NO. 22-_____

In the Supreme Court of the United States

LINDA MATARESE, PERSONAL REPRESENTATIVE OF THE ESTATE OF HILDA DULD BAUMAN,

Petitioner,

v.

VIRGINIA HOSPITAL CENTER ARLINGTON HEALTH SYSTEM, d/b/a VIRGINIA HOSPITAL CENTER ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Supreme Court of Virginia in affirming the Arlington County Circuit court violate Petitioner's Fourteenth Amendment due process rights by failing to follow its own rules of civil procedure by granting a motion to strike and dismissing a case with prejudice before Plaintiff resting its case-in-chief?

2. Was the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 *et seq.,* violated by the Arlington County Circuit Court of Virginia because of that Court's failure to provide a disabled litigant with reasonable accommodation?

3. Does the holding in *Haines v. Kerner*, 404 U.S. 519 (1972), apply to civil *pro se* litigants at the appellate level?

PARTIES TO THE PROCEEDINGS

Petitioner and Plaintiff-Appellant Below

- Linda Matarese

Ms. Matarese is the Personal Representative of the Estate of Hilda Duld Bauman, daughter of the decedent, and plaintiff on behalf of both the Estate of Hilda Duld Bauman and in her personal capacity as a survivor in a Commonwealth of Virginia wrongful death and medical battery suit.

Respondents and Defendants-Appellees Below

- Virginia Hospital Center Arlington Heath System, d/b/a Virginia Hospital Center
- Virginia Hospital Center Physician Group, LLC d/b/a VHC Physician Group
- Aysha Farooqi, M.D.
- Loren Friedman, M.D.
- Peter Ouellette, M.D.
- Thomas Strait, M.D.

The Respondents are medical providers and healthcare facilities of the decedent in her final days and defendants in the Commonwealth of Virginia wrongful death and medical battery suit.

LIST OF PROCEEDINGS

Virigina Supreme Court

Record No. 211110

Linda Matarese, in her Capacity as Administratrix of the Estate of Hilda Duld Bauman, Deceased, et al., *Appellants,* v. Virginia Hospital Center Arlington Health System, d/b/a Virginia Hospital Center, et al., *Appellees*

Date of Final Order: June 29, 2022

Date of Rehearing Denial: October 4, 2022

Arlington County Circuit Court

Case No. CL-19000375-00

Linda Matarese, Personal Representative (Administrator) of the Estate of Hilda Duld Bauman, Deceased, *Plaintiff,* v. Virginia Hospital Center Arlington Health System, d/b/a Virginia Hospital Center, et al., *Defendants*

Date of Final Order: July 15, 2021

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PETITION FOR WRIT OF CERTIORARI

Linda Matarese, in her capacity as Administratrix for the Estate of Hilda Duld Bauman as well as in her individual capacity as the survivor in a Commonwealth of Virginia wrongful death and medical battery suit, respectfully petitions this Court for a writ of certiorari to review the ruling by the Supreme Court of Virginia that there was no reversible error of the trial court's decision to grant a motion to strike the entirety of plaintiff's case prior to Petitioner/Plaintiff resting her case-in-chief, at a jury trial, depriving her of basic due process; whether accommodations for persons with disabilities are required under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 *et seq.*, applies to proceedings held in state court; and whether the holding in *Haines v. Kerner*, 404 U.S. 519 (1972), applies to *pro se* litigants at the appellate level.

OPINIONS BELOW

The opinion of the Supreme Court of Virginia, decided on June 29, 2022, is unreported. App.1a. The original opinion of the Arlington County Circuit Court, Arlington, Virginia, from July 15, 2021, is unreported. App.7a.

JURISDICTION

The original judgment from the Supreme Court of Virginia was entered on June 29, 2022. (App.1a). A timely petition for rehearing was filed on July 13, 2022. The petition for rehearing was denied on October 4, 2022. (App.43a). This writ has been timely filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend XIV, sec. 1
Due Process Clause

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

Va. Const. Article I. Bill of Rights

Section 11. Due process of law; obligation of contracts; taking or damaging of private property; prohibited discrimination; jury trial in civil cases

> That no person shall be deprived of his life, liberty, or property without due process of law;
>
> . . .
>
> . . . That in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred. . . .

Americans with Disabilities Act of 1990

42 U.S.C. § 12102

As used in this chapter:

(1) Disability

The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment (as described in paragraph (3)).

(2) Major Life Activities

(A) In General

For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks,

seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

(B) Major Bodily Functions

For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

(3) Regarded as Having Such an Impairment

For purposes of paragraph (1)(C):

(A) An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

(B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

(4) Rules of Construction Regarding the Definition of Disability

The definition of "disability" in paragraph (1) shall be construed in accordance with the following:

(A) The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.

(B) The term "substantial limits" shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.

(C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

(D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

42 U.S.C. § 12131

As used in this subchapter:

(1) Public Entity

The term "public entity" means—

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 24102(4) of title 49).

(2) Qualified Individual With a Disability

The term "qualified individual with a disability" means an individual with a disability who, with

> or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12132

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity or be subjected to discrimination by any such entity.

Va. Sup. Ct. R. 1:11

> If the court sustains a motion to strike the evidence of either party in a civil case being tried before a jury, or the evidence of the Commonwealth in a criminal case being so tried, then the court should enter summary judgment or partial summary judgment in conformity with its ruling on the motion to strike.

STATEMENT OF THE CASE

The life of someone like Petitioner who has been diagnosed as having multiple chemical sensitivity (hereafter "MCS"), called by some in the medical community idiopathic environmental intolerance (hereafter "IEI"),[1] comes with, at times, overwhelming challenges. Environments that would otherwise be safe for people without IEI can be a physical minefield for an IEI sufferer. Their only defense is to control their surrounding environments to a high degree to avoid significant physical pain or other debilitating symptoms. Because of this, Petitioner's zone of safe, the conditions under which she will not suffer physically, has shrunk over time to no bigger than her apartment.[2] Additionally, IEI suffers must endure constant prejudice and questioning of the validity of their pain simply because others cannot understand, and/or have failed to research, it for themselves.

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[1] This syndrome has multiple symptoms that are precipitated by a variety of chemical substances when exposed to very low levels which do not affect the population at large. Mitsuyasu Wantanabe, Hideki Tonori, and Yoshiharu Aizawa, *Multiple Chemical Sensitivity and Idiopathic Environmental Intolerance (Part One)*, ENVIRON. HEALTH PREV. MED., Vol. 7, 264-72 (Jan. 2003). Symptoms may include a rapid heart rate, chest pain, sweating, shortness of breath, fatigue, flushing, dizziness, nausea, choking, trembling, numbness, coughing, hoarseness, and difficulty concentrating. *Id*. Common triggers for IEI include, but are not limited to, food, carpet and furniture odors, painting materials, perfumes, scented lotions, scented soaps, cleaning supplies, mobile telephone devices, and exhaust fumes. *Id*.

[2] *Matarese v. Archstone Pentagon City*, 795 F.Supp.2d 402 (E.D. Va.2011).

A. MCS/IEI Is a Condition *Recognized in the Medical Community as a Legitimate Illness* But Is Often Met With Incredulity and Even Scorn By the General Public as It Is Not Widely Understood, or in Many Cases Even Heard of.

Petitioner's journey with MCS/IEI has included countless medical tests and doctor visits before a medical determination was reached; this is not a "made-up" condition. Petitioner's MCS has merited her a disabled person as defined under both federal statutes and the laws of the Commonwealth of Virginia. Her disability is well-documented in her personal medical record, through the application of disability services in public transportation, and has been subject to litigation in an unrelated federal housing case.[3] Petitioner's MCS diagnosis significantly impacts her daily life to the degree that renders her disabled as defined by the Americans with Disabilities Act of 1990.[4]

Petitioner filed a wrongful death suit on behalf of her mother and herself as the survivor, but when it finally reached a jury trial for her mother's death, her MCS—likely as a reaction to the physical

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[3] *Matarese v. Archstone Comm. LLC*, 468 Fed.Appx. 283 (4th Cir. 2012)(*appeal of Matarese v. Archstone Pentagon City*, 795 Fed.Supp.2d 402 (E.D. Va. 2011)).

[4] *See* 42 U.S.C. § 12102. The court in *Matarese v. Archstone Pentagon City* found that "[d]ue to the reactions she experiences, Ms. Matarese has become extremely afraid of exposure to chemicals. Ms. Matarese has not spent a night away from her home in approximately 15 years and only leaves the apartment when necessary, such as to visit the doctors or to buy groceries." *Matarese*, 795 Fed.Supp.2d at 415.

environment of the court and four, straight days out of her home—reared its ugly head during an in-person jury trial causing her to seek options to end her physical pain, only to have her case erroneously dismissed by a trial judge. This is Petitioner's story: a 76-year-old, disabled woman who has been failed by the judiciary and the inadequate application of the laws established to protect her.

1. The Case Below Was Neither Frivolous, Nor Trivial, But Dealt with Fundamental Issues of Life and Death.[5]

In her capacity as Administratrix of the Estate of Hilda Duld Bauman as well as her individual capacity as the sole survivor of Ms. Bauman, Petitioner Linda Matarese filed a complaint for wrongful death and medical battery against the Respondents on February 5, 2019. Ms. Bauman, the decedent, was Petitioner's mother and died in the care of Respondents on February 9, 2014.

Ms. Bauman suffered a stroke at the end of January in 2014. The Petitioner was her mother's attorney-in-fact. Respondents refused to provide Ms. Bauman with life prolonging therapy over the persistent, strenuous, repetitive objections of the Petitioner. Instead, Respondents limited their treatment to end of life, palliative care of Ms. Bauman, inconsistent

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[5] The topic of end-of-life care is a hot bed of ethical and legal debate on both sides of the issue. "Lurking . . . is a concession that autonomy interests lie on both sides of the [end-of-life care] debate-the right to choose on the one hand; the right to be free from non-consensual homicide on the other." Neil M. Gorsuch, *The Right to Assisted Suicide and Euthanasia*, 23 HARV. LAW. J. & PUB. POL'Y 678 (1999-2000).

with the observations of Petitioner who spent countless hours with her mother and sat vigil over her mother the last weeks of her life. Respondents overrode the objections of the Petitioner and refused to prolong the life of Ms. Bauman, instead allowed her to languish and die.

Petitioner presented evidence at trial that showed her mother's death was hastened when Respondents withheld hydration therapy in the form of IV fluids from Ms. Bauman without the consent of Petitioner and when Respondents administered Ativan without consent. App.64a. Neither Ms. Bauman, nor Petitioner gave express or implied consent to the course of care administered by Respondents while Ms. Bauman was in their facility from January 27, 2014, until her death on February 9, 2014.

The trial began on July 12, 2021, before a jury in the Arlington County Circuit Court in Arlington, Virginia, but was abruptly cut short on Day Four when the judge granted Defendant's oral motion to strike prior to Plaintiff resting her case-in-chief contrary to Virginia Rules of Civil Procedure because Petitioner, a disabled person, had to leave the courthouse in extreme pain related to her disability.

B. The Petitioner's Belief that She Could Leave the Courtroom Was Reasonable Based on the Court's Clear and Unambiguous Jury Instructions that the Jury Was Not to Attribute Any Weight to the Absence of a Party During Trial.

At the onset of the trial, Judge Judith L. Wheat of the Arlington County Circuit Court informed the parties, their counsel, and the jury that the parties

were free to come and go as they pleased during the proceeding and did not require the court's permission to do so. App.38a. At the request of defense counsel, a jury instruction was given stating that "[t]he parties in this case may come and in and out of the trial and [the jury is to] put no significance on that." App.12a. Petitioner's trial attorney inquired as to how this jury instruction applied to Petitioner and was told by Judge Wheat that "[i]f Mrs. Matarese needs to leave, she should just get up and leave. So, if she needs to go out, she should just go out." App.13a.

C. Petitioner Was Recognized as Legally Disabled According to Objective Criteria in Multiple Other Forums.

On the morning of July 15, 2021, Day Four of the trial, the jury heard from one of Petitioner's expert witnesses via videotaped deposition about the violations of standard of care Ms. Bauman endured during her final days of life in the hands of Respondents, over the repeated objection of Petitioner, ultimately resulting in Ms. Bauman's death. The witness confirmed that what ignited the suit—the withholding of IV hydration and the administration of Ativan by Respondents—contributed to the death of Ms. Bauman. At the conclusion of the video testimony, the trial court heard some evidentiary oral arguments from counsel and sequestered the jury before proceeding, addressing the parties about the sequence of remaining witnesses. Shortly before 11:00 am, the court adjourned for a brief recess during which Petitioner experienced an unexpected medical episode and severe pain related to her disability which began in the courtroom. App.30a.

1. Petitioner, a 76-Year-Old Woman, Experienced a Major Medical Emergency Episode on Day Four of the Jury Trial Stemming from Her Disability.

It was evident to all present that Mrs. Matarese was in obvious physical duress. App.35a. She was shaking, wincing in pain, crying, unable to sit, stand, or walk. Petitioner could not transport herself through the courthouse and was physically carried by several courthouse deputies and, eventually, placed in a wheelchair. App.36a.

D. Petitioner Had Genuine and Justified Concerns About Being Transported to the Hospital She Believed Killed Her Mother.

In a truly horrific case of irony, Petitioner, who could not transport herself through the courthouse, was physically carried by six deputies and, eventually placed in a wheelchair, App.36a, was given no option except transportation to the very medical facility that was the specific defendant opposite her pending trial. App.79a. No alternative facility was ever offered or made available. *Id*. Mrs. Matarese declined to be transported to what she believed was the scene of the crime.

It took the assistance of six courthouse deputies and her husband to get Mrs. Matarese into her car.[6] Her husband her home. App.33-34a. There, in an environment she strictly controls to avoid any MCS

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6 Petitioner's trial counsel proffered to the court that "at least six deputies . . . can get on the stand and confirm that she was in obvious physical distress[.] The one deputy could barely get her into the wheelchair." App.36a.

triggers, prior to attempting to locate an alternative hospital or urgent care facility, Petitioner attempted to treat her condition with on-hand medications, which she knew to alleviate symptoms associated with her well-documented preexisting condition, so she could return as quickly as possible.

E. When Faced With the Medical Emergency of an Elderly, Disabled Litigant in Her Courtroom, the Trial Judge Lacked Patience and Understanding and Failed to Control Her Frustration With Petitioner While Presiding over a Hearing on an Oral Motion to Strike Made By Defense Counsel.

Upon reconvening after Mrs. Matarese left the courthouse seriously ill during the morning recess, Judge Wheat, clearly frustrated, engaged counsel as to what should happen next. Defendant's counsel remarked: "[T]hey can't prove their case without her testimony. We're in the middle of trial. [*sic*] I think the answer is a motion to strike, a directed verdict that the case be over." App.37a. Petitioner's counsel staunchly objected reiterating that Petitioner had an unexpected medical emergency. App.33-39a. The trial court opined that if it was a medical emergency, Petitioner would have sought treatment at the emergency room. *Id*. Petitioner's trial attorney further objected by stating that: "She may end up in the emergency room, Your Honor. [But] certainly not wanting to be put into an ambulance and being separated from her husband for a 76-year-old lady who has been married is not, I think, an unusual request." App.31a.

After hearing arguments on defendants' motion to strike, the trial judge stated,

> I am not happy[,] and I am not going to make a decision that impacts people while I am having steam coming out of my ears. I don't think that is fair to anyone, so put your facts on the record. Everyone put the position on the record that you want me to consider. I'm going to take a break. I'm going to take a walk around the block, and then I will come back[,] and I will decide how to handle this.

App.36a.

After a brief recess, the trial court orally held that the motion to strike would be held in abeyance and iterated the trial schedule for the remainder of the day which included the reading of the depositions of two plaintiff witnesses and an expert witness of a defendant, which parties agreed to take out of turn, hoping that more information would be available on the health of Mrs. Matarese later. App.36-38a.

F. The Trial Judge Ignored Petitioner's Legitimate Reason to Not Seek Treatment at Respondents' Facility and Improperly Relied on Her Non-Expert Lay Opinion on a Medical Matter Resulting in Gross Misunderstanding of Genuine Disability.

After a lunch recess on Day Four of the trial, counsel for Petitioner informed the court that Petitioner remained in the same amount of pain as when she left the courthouse in the morning, but she was hopeful to return the following day. App.19a. He renewed his objection to the motion to strike all of Plaintiff's case. *Id*. Defense counsel argued that the parties "still don't have any information as to the medical reasons as to why she left" to which the judge replied "Well, that's

my concern. She's not going to seek medical treatment[;] I have nothing to evaluate." App.18a. Defense counsel argued that there was no guarantee as to whether or when Petitioner would feel well enough to return and plaintiff's counsel reminded all present that "Mrs. Matarese's sensitivity has been adjudicated by a federal court as a legitimate handicap, so it is not something made up." App.15a. The following occurred on the record:

> COURT: But how am I going to get any information[?] She's not going to a doctor. You're asking me to accept the word of her husband that what she has experienced in the past is what is happening now. I'll [*sic*] have nothing to make that determination. And if she comes back tomorrow afternoon, I can't get – your case-in-chief finished tomorrow afternoon, so then it's continued into next week . . . .And she's not taking any action seriously that there is an actual medical emergency that precludes her from being here . . . .
>
> [PETITIONER'S COUNSEL]: I was starting to say the Archstone case decided by Judge Lee adjudicated a legitimate handicap –
>
> COURT: Which is what? Tell me what it is.
>
> [PETITIONER'S COUNSEL]: It's some sort of sensitivity, chemical sensitivity to cleaning or paint fumes – of course unknown, but it's referenced in [the federal] case. It's a published case, so it's readily available online. . . . But when she's in a different environment for an extended period, it can be

> triggered.
>
> [DEFENSE COUNSEL]: Your Honor –
>
> COURT: Yes.
>
> [DEFENSE COUNSEL]:-there's no evidence that she had a reaction to this allegedly – and I don't know –
>
> COURT: Motion to strike is granted. . . . Case is dismissed against all defendants with prejudice.

App.18-19a.

The jury was released, and the court clerk generated an order. On the order, Petitioner's counsel handwrote the following objection:

> The Plaintiff, age 76, Linda Matarese, was confronted with an unexpected health care emergency during the fourth day of their jury trial. She has a sensitivity to chemicals, such as paint fumes and cleaners, when outside of her normal environment for an extended period. The emergency was unexpected and unpredicted, and was the subject of adjudication by the U.S.D.C. for the E.D. of Va. in a civil action filed by plaintiff against Archstone properties. The plaintiff's husband, who was attending to his wife at home when this case was dismissed, stated that she was in pain and discomfort, but would be able to appear tomorrow afternoon. The husband was available to testify. No attempt has been made for an accommodation of a legitimate handicap.

App.9a.

A notice of appeal was timely filed on September 21, 2021. Petitioner's appellate counsel filed a Petition for Appeal. App.72a. Petitioner chose to proceed on her appeal *pro se* and filed an Amended Petition for Appeal on December 14, 2022, with the Supreme Court of Virginia, App.55a, and an Amended and Restated Petition for Appeal on May 14, 2022. App.55a. Both were accepted as timely filed by the appellate court rendering her Motion for Leave filed on June 7, 2022, as moot. At issue on appeal was the court's dismissal of the case with prejudice, the court's denial of Petitioner counsel's oral motion for mistrial, the trial court's abuse of discretion, and the court's ruling which was the harshest penalty depriving Petitioner of her due process rights. *Id.* Petitioner reasserted that the trial court abused their discretion by granting the motion to strike all of her evidence prior to the completion of her case-in-chief depriving her of her due process rights. *Id.*

The Supreme Court of Virginia held on June 29, 2022, that it was "there is no reversible error on judgment complained of." App.1a. A motion for rehearing was filed by Petitioner, *pro se*, on July 13, 2022, which was denied on October 4, 2022. App.43a. There was no written opinion on the merits of the appeal by the Supreme Court of Virginia. This writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

I. THE TRIAL COURT VIOLATED VIRGINIA'S RULES OF CIVIL PROCEDURE, DEPRIVING PETITIONER OF HER CONSTITUTIONAL RIGHT TO DUE PROCESS BY ERRONEOUSLY GRANTING THE ORAL MOTION TO STRIKE THE ENTIRETY OF PETITIONER'S CASE *PRIOR TO* COMPLETION OF HER CASE-IN-CHIEF.

In Virginia, a motion to strike is a litigant's tool that can be directed at a particular item of evidence, the testimony of a particular witness, or used to strike out all evidence of a party, thereby removing the question of fact from the jury. *See Virginia Electric Company v. Mitchell*, 159 Va. 855 (1932). According to Virginia Rules of Civil Procedure Section 1:11 if "a court sustains a motion to strike the evidence of either party in a civil case tried before a jury . . . then the court should enter summary judgment or partial summary judgment in conformance with its ruling on the motion to strike."

In the case at bar, the trial court sustained defendant's oral motion to strike the entirety of Petitioner's evidence prior to the conclusion of her case-in-chief and proceeded to dismiss Petitioner's suit with prejudice. App.16a. The ruling of the trial court was an abuse of discretion and deprived Petitioner of her constitutional right to due process, taking the questions of fact away from the trier of fact: the jury. The right to a trial by jury is a fundamental right so deeply rooted in our legal system that appears is

guaranteed by the Constitutions of the United States, and the Commonwealth of Virginia.[7]

A. The Standard for a Motion to Strike in Virginia Is Analogous to That of a Demurrer and Should Only Be Granted in the Most Extreme Circumstances After Taking the Evidence Presented in a Light Most Favorable to Plaintiff.

Virginia's motion to strike rule replaced the abolished demurrer to the evidence and should be granted where it plainly appears that the trial court would be compelled to set aside any verdict found for plaintiff as being without evidence to support the verdict. *Davis v. Rodgers*, 139 Va. 618, 622-23 (1924).[8] The procedure and practice of a demurrer of evidence versus a motion to strike are different, though functionally remain the same. *Tahboub v. Thiagarajah*, 298 Va. 366, 371 (2020). A demurrer to evidence, now a motion to strike, is made at the conclusion of the plaintiff's case-in-chief and tests whether the evidence

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[7] The right to a trial by jury is guaranteed in federal courts by the Constitution in civil cases by the Seventh Amendment. U.S. CONST. amend. 67. The Virginia constitution calls the right to a jury "sacred". Article I, section 11. Va. Const. Art. 1 § 11. The Virginia Rules of Civil Procedure treats the right to a jury trial as a matter of right, unless waived. Va. Sup. Ct. § 8.01-336(A).

[8] *See also Meade v. Saunders*, 151 Va. 636, 641 (1928); *Barksdale v. Southern RR Co.*, 152 Va. 604, 614 (1929); *Green v. Smith*, 153 Va. 675, 679 (1930); *Durham v. Nat'l Pool Equip.*, 205 Va. 441 (1964); *Sweely Holdings, LLC v. SunTrust Bank*, 296 Va. 367, 382 n. 12 (2018).

presented is sufficient to prove the cause of action. *Id*. at 487.[9]

"A motion to strike out all evidence of the adverse party is very far reaching." *Green v. Smith*, 153 Va. 675, 679 (1930). "Like a ruling on a motion for summary judgment or on demurrer, a court must consider all facts in a light most favorable to the non-moving party." *Tahboub*, 298 Va. at 371. "All inferences which a jury might fairly draw from plaintiff's evidence must be drawn in [her] favor; and where there are several inferences which may be drawn from the evidence, though they may differ in degree of probability, the court must adopt those most favorable to the party whose evidence it is sought to have struck out, unless they be strained, forced, or contrary to reason." *Green*, 153 Va. at 680.[10] The standard outlined in *Green* has been the standard applied in Virginia state courts since 1930.

A motion to strike all of plaintiff's evidence must be made at the conclusion of plaintiff's case-in-chief. *Artrip v. E.E. Berry Equip. Co*., 240 Va. 354, 357 (1990) (emphasis added). The court's ruling must be based on the presumption that the jury will believe all evidence presented to it. *Tahboub*, 298 Va. at 371. "[W]hen the purpose of the motion is to take the issues from the jury it should be granted only in a clear case." *Virginia Electric Co.*, 159 Va. at 855 (1932).

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9 *Citing* Martin T. Burks, PLEADING AND PRACTICE IN ACTIONS AT COMMON LAW, § 275 (Martin Parks 1913).

10 Relying on *Dove Co. v. New River Coal Co.*, 150 Va, 796 (1928); *Limbaugh v. Commonwealth*, 149 Va. 383, 393 (1927); *Goshen Furnace Corp. v. Tolley's Adm'r*, 134 Va. 404 (1922).

B. In an Abuse of Discretion, the Trial Court Dismissed Petitioner's Complaint With Prejudice After Granting an Oral Motion to Strike Made at Trial Prior to Petitioner Resting Her Case-in-Chief.

In the case at bar, the trial court granted the defendants' motion to strike before the conclusion of Petitioner's case-in-chief. On Day Four of a scheduled six-day jury trial, Petitioner experienced an onset of MCS, which required her to leave the hearing unexpectedly, with the assistance of six deputies and a wheelchair. App.39a. The court instructed the jury at the beginning of the trial that the parties could come and go as they pleased, including Petitioner. App.12a. There was no instruction to parties that they had to obtain the trial court's permission to be absent from the courtroom during trial or what would constitute a valid excuse for an absence.

This trial involved the wrongful death of Petitioner's mother. There was extensive discovery involving many experts, witnesses, reviews of voluminous medical files, and years of pretrial litigation. This trial was of the utmost importance to the Petitioner. Prior to the onset of her intractable pain related to her disability, Petitioner did not miss one minute of the trial, or any pretrial proceeding, including her own ten-hour deposition. She would not have exempted herself from the hearing absent a severe circumstance beyond her control.

Petitioner took Judge Wheat at her word that parties were able to come and go as they pleased as was instructed to the jury and agreed upon by all parties

at the onset of the trial.[11] Petitioner's reliance on those jury instructions was reasonable. Further, since the plaintiff had not rested her case-in-chief, her trial counsel would never have been able to advise her that a motion to strike could be made and the legal implications thereof. Petitioner was entitled to the same application of the jury instructions as Respondents, who were free to come and go at their leisure. Considering these circumstances, not only is Judge Wheat's ruling unconstitutional, but shocks the conscious.

C. The Supreme Court of Virginia Failed Petitioner by Refusing to Hold Its Trial Court to the Well-Established Constitutional Standard of Due Process in Front of a Fair and Neutral Tribunal.

The Fourteenth Amendment requires federal and state trials to be conducted in accordance with due process of law. *Dutton v. Evans*, 400 U.S. 74, 97 (1970). "Asserted denial [of due process] is to be tested by an appraisal of the totality of facts in a given case. That which may in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial." *Gideon v. Wainwright*, 372 U.S. 335, 339 (1963) (*quoting Betts v. Brady*, 316 U.S. 455, 462 (1942)). It is by this standard that the Court should test federal and state rules of evidence. *Dutton*, 400 U.S. at 97.

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[11] *See* App.12a.

1. Deeply Rooted in the Right to Due Process Is the Right to Have a Fair and Neutral Tribunal.

Due process further requires that the judiciary be a neutral body before whom conflicts are resolved. *See generally Marshall v. Jerrico*, 446 U.S. 238 (1980). The concept of neutrality of the judiciary is embedded in the Constitution's Due Process Clause as a guarantee that "life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law." *Id.* at 242. (*quoting Mathews v. Eldridge*, 424 U.S. 319, 344 (1976)). "At the same time, it preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done,'" *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring), "by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." *Id.* The requirement of neutrality has been jealously guarded by this Court. *Id.* Throughout this litigation, Mrs. Matarese was repeatedly subjected to disparaging attacks and insinuations. The judge's order striking Petitioner's evidence was overreaching, untimely, and contrary to Virginia state law, a failure of judicial neutrality, and deprived Matarese of her "day in court."

2. The Trial Judge Dismissed Petitioner's Case With Prejudice, Not on the Merits of the Case, But in a Heated Moment That Lacked Judicial Temperament.

Here, the motion was untimely made by defense counsel because the plaintiff had not rested her case-in-chief and was not present in the courtroom. The order was untimely ruled upon for the same reason. We can only speculate as to why the trial judge took material facts away from the jury, but it was not because there was an absence of material facts in dispute. Through examination of the record, it is clear the trial judge gave too much weight to judicial considerations and not enough weight to the constitutional due process rights of Petitioner and, in a moment of frustration, unfairly stripped Petitioner of her chance to litigate the wrongful death of her mother. *See* App. 31-36a.

It is the duty of the appellate court to oversee the actions of the courts below so that they comport with all rules of judiciary conduct and applicable state laws.

This trial judge admitted to being frustrated and having "steam coming out of [her] ears." App.33a. She self-admittedly needed to "take a walk around the block" prior to ruling on the defendant's oral motion to strike the plaintiff's case. *Id*. It was in this mental space that Judge Wheat dismissed Petitioner's case with prejudice, not on the merits of the case, but in a moment that lacked judicial temperament. The appellate court further failed Petitioner by not righting the wrongs committed by the trial judge and deciding her

appeal on the merits of the claim. This matter should be remanded so that Mrs. Matarese has her day in court.

II. THE VIRGINIA STATE COURT DEPRIVED PETITIONER, A DISABLED PERSON, OF HER DUE PROCESS RIGHTS BY FAILING TO PROVIDE REASONABLE ACCOMMODATIONS UNDER THE AMERICANS WITH DISABILITIES ACT OF 1990.

The Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12131 *et seq*., prohibits discrimination against persons with disabilities in three major areas; employment (Title I); public services, programs, and activities (Title II)[12]; and public accommodations (Title III). "Congress enacted Title II [of the ADA] against a backdrop of pervasive unequal treatment [of persons with disabilities] in the administration of state services and programs, including systematic deprivations of fundamental rights." *Tennessee v. Lane*, 541 U.S. 509, 524 (2004). The ADA defines a disability as: "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment (as described in paragraph (3))." 42 U.S.C. § 12102(1). An individual meets the requirement of "being regarded as having such an impairment" if the individual establishes that "[she] has been subjected to an action prohibited under this [Act] because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." 42 U.S.C. § 12102(3).

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12 A public entity is defined as "[a]ny State or local government." 42 U.S.C. § 12131(1)(A).

The ADA demands that "reasonable" measures are taken to ensure the inclusion of disabled persons in our society. *See* 42 U.S.C. § 12101. Reasonable measures are ones that are ones that are feasible on their face—namely, that the institution could accommodate ordinarily or without trouble. *Tennessee*, 541 U.S. at 524-25. Further, "[t]he definition of disability in this [Act] shall be construed in favor of broad coverage of individuals under this [Act], to the maximum extent permitted by the terms of this chapter." 42 U.S.C. § 12102(4)(A). The ADA permits disabled persons to participate in the full pantheon of rights and privileges non-disabled persons have access to every day—as such, it is broadly construed to protect disadvantaged individuals. *Tennessee*, 541 U.S. at 524-25.

The ADA is applicable to the states directly through the statutory text, and through abrogated immunity under the Eleventh Amendment. *Id*. *See also United States v. Georgia*, 561 U.S. 151 (2006). Title II of the ADA mandates that the plaintiff need only "establish the fact that a municipality has failed to provide a reasonable accommodation for a person eligible to receive one."[13] As such, municipal entities, courts, and state governments are required to proactively protect disabled persons' rights. *Id*.

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13 Franklin Ferguson Jr., *Preserving Prometheus' Precious Gift: Title II of the Americans with Disabilities Act*, 18 NAT'L BLACK L.J. 100 (2005).

A. The Virginia State Court Required Petitioner to Provide Proof of Emergency Medical Treatment or Medical Evidence of a Disability Contrary to the ADA.

The ADA states that "[s]ubject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. At issue is whether the striking of all of Petitioner's evidence in her state court civil action, granting summary judgment, and dismissing her claims with prejudice because of a medical emergency stemming from her disability excluded her from participation in the judiciary in violation of the ADA and deprived her due process rights. The answer is clearly yes.

A state must ensure that all individuals have a "meaningful opportunity to be heard in its courts." *Tennessee*, 541 U.S. at 532 (*citing Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)). Rulings in *Tennessee v. Lane*, *Boddie v. Connecticut*, *Griffin v. Illinois*, 351 U.S. 12 (1956), and *Gideon v. Wainwright*, *supra.*, "make it clear that considerations of cost and convenience alone cannot justify a State's failure to provide individuals with a meaningful right of access to the courts." *Id.*

1. The Trial Judge Erroneously Made Her Ruling Based on the One, Isolated Event on Day Four of Trial Rather Than Broadly as Required by the ADA.

Here, Petitioner's counsel made it be known several times that she was, in fact, a disabled person. He stated, "Your Honor, one fact that I . . . think is important [is] Mrs. Matarese's sensitivity has been adjudicated by a federal court as a legitimate handicap, so it is not something that is made up." App.15a. "[T]he Archstone case decided by Judge Lee adjudicated a legitimate handicap." *Id*. "It's some sort of sensitivity, chemical sensitivity to cleaning or paint fumes – of course unknown, but it is referenced in the case. It's a published case so that it's readily accessible online. . . . But when she's in a different environment for an extended period of time, it can be triggered" *Id*.

Despite that, the judge presiding over this instant case focused on whether Petitioner was seeking medical attention to treat her disability rather than its long-established existence as documented throughout her medical record and federal court cases. App.15a. On numerous occasions on the Fourth Day of trial, Judge Wheat emphasized her misplaced need for medical records, stating "She's not going to seek medical treatment, I have nothing to evaluate" and "[S]he's not taking any action seriously to show this court that there is an actual medical emergency that precludes her from being here." App.15a. The court insisted that Petitioner's counsel provide evidence of her need for medical attention, despite the formal recognition of Petitioner's disability by a readily available federal court decision. *Id*. The court's statement that "[Peti-

tioner]'s not taking any action seriously to show this court that there is an actual medical emergency that precludes her being here" directly contravenes its duty to accept the truth of Petitioner's disability. App.15a.

The court's emphasis on the need for medical documentation belies the point of the ADA. Namely, the court demanded that either Petitioner go to the emergency room of the hospital she was suing or forfeit her right to have the case heard. The ADA has no such medical requirements, and the court's misplaced focus severely prejudiced Petitioner and violated her due process rights under the ADA. The court ignored, despite repeated emphasis from Petitioner's counsel, that Petitioner already had a documented disability —Petitioner had litigated that very point before the 4th Circuit. *See* n. 8, *supra*.

2. The Disabled are Not Required to Seek New Treatments for Ongoing Conditions as a Condition of Legal Protection to Maintain Their Protections Under the Law.

There is nothing in Title II requiring a disabled person to seek emergency treatment in order to receive a reasonable accommodation under the Act. For Mrs. Matarese, seeking any medical treatment would have prolonged her illness, exposing her to another unfamiliar and uncontrolled environment. The best course of action, which she took, was to go to the safest environment she knew, her home, and take medicine she already knew worked.

The ADA is broadly construed, to protect the maximum number of disabled persons. *See* 42 U.S.C. § 12102(4)(A). It was the state court's duty to ensure

the ADA was complied with once it knew that a person with a disability was appearing before the trial court, and that she was experiencing a medical emergency related to her disability. Petitioner was failed by the judiciary at both the trial and appellate levels. The trial judge clearly acted out of frustration and not in accordance with the federal and civil procedure laws before her, discriminating against Petitioner. The appellate court failed to remedy the injustice by sustaining the lower court's ruling instead of remanding for a new trial.

B. The Petitioner Was Denied Any Number of Reasonable Accommodations by the Court Including, Schedule Changes, Video or Telephonic Appearances—Yet, None Were Considered.

Title II of the ADA states "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. A qualified individual is one that "with or without reasonable modifications to rules, policies, or practices . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." *Id*. The Code of Federal Regulations, in Title 28, Judicial Administration, states that "no qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity." *See* 28 C.F.R. § 35.130.

Here, Petitioner was denied the reasonable modification proposed by her counsel to the court after her medical emergency. The trial was scheduled for six days: from July 12 to July 19. On the fourth day of the trial, July 15, 2021, Petitioner's counsel reported to the court that Petitioner could return Monday, or Friday afternoon if it was a matter of having the case dismissed. *Id.* In response, the court summarily granted the motion to strike and dismissed Petitioner's case with prejudice, rather than make a reasonable modification of the trial schedule for Petitioner, or some similar accommodation, as is required by the ADA. App.21-22a.

The Virginia Rules expressly provide for the ability for a disabled witness to testify remotely in Virginia Rule 1:27.[14] In our post-pandemic era, some jurisdictions still conduct all or most evidentiary hearings remotely. Yet no remote appearance option was offered to Mrs. Matarese even with their ready availability and regular use fresh in our collective memories.

The Petitioner was directly excluded from participation in the activities of a public entity—namely, the court case in which she was the plaintiff. The request made on the Petitioner's behalf would have delayed the trial, at most, by a day and a half. Further, the court had previously scheduled additional testimony that afternoon. Petitioner's request was a reasonable modification in the face of a medical emergency

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[14] The statute provides that "The court may grant permission for the testimony of any witness using audiovisual means. . . . The court may consider, among other factors, the age of the witness, and whether the witness has any disabilities or special needs that would affect the taking of testimony." Va. Sup. Ct. R. 1:27(b)(1).

caused by her disability. The court's refusal to consider it constituted a violation of ADA Title II.

C. Reasonable Accommodations Were Inexplicably Denied, Especially Given Petitioner's Documented Disability and That She Was Assisted Out of the Courthouse by Six Bailiffs.

The ADA demands the institution consider instituting reasonable modifications—one that would not be out of the ordinary and is feasible on its face. *See U.S. Airways Inc. v. Barnett*, 535 U.S. 391 (2007).

A motion for a mistrial is one that is granted by the court under cases of necessity.[15] It is feasible that this court might have granted it. Courts have upheld mistrials when a "high degree of necessity" was present. Here, there was a high degree of necessity: the Petitioner's right to proceed with her case was in jeopardy because of her disability and sudden outset of incredible pain. The ADA requires that disabled persons be given a special status to enable them to fully participate in society. As the court stated in *U.S. Airways*, "preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal." *U.S. Airways Inc*, 535 U.S. at 397.

Petitioner's counsel requested a mistrial, a solution that would have terminated the proceedings and permitted Petitioner's claims to be preserved; this would have freed up the jury, one of the judge's major concerns. App.37a. Instead, the court actively chose to strike Petitioner's evidence and dismiss the case

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15 *Renico v. Lett*, 559 U.S. 766 (2010) (citing *Illinois v. Somerville*, 410 U.S. 458 (1973)).

with prejudice. In doing so, the court severely punished Petitioner for being a disabled person—dismissing the case with prejudice was the harshest outcome possible. This extinguished Petitioner's right to litigate a case regarding the death of her mother merely because she is a disabled person.

Additionally, on the morning of Day Four of the trial, the trial judge outlined a schedule of keeping the trial moving efficiently through the afternoon while more information was obtained about Petitioner's health. App.38a. The parties had already agreed to allow defendant experts traveling across the country to testify in person to take the stand, out of order, and one was ready to go. *Id*. Further, the testimony of Petitioner's husband could have been obtained or counsel could have presented Petitioner's deposition in her absence. The court could have simply adjourned for the night and evaluated the situation the following morning, allowing this disabled, 76-year-old woman time to rest and heal.

This is a direct violation of the spirit and the letter of the ADA as she was directly "excluded from participation in or be denied the benefits of the services . . . of a public entity" because of her disability. 48 U.S.C. § 12132. Instead of making reasonable modifications, as demanded under the Americans with Disabilities Act, the court flat out refused to accommodate Petitioner and instead actively extinguished her rights.

D. The Continuing Failure of Arlington County's Circuit Court to Designate an ADA Coordinator Appears to Violate the Settlement Agreement Between the Commonwealth of Virginia with the U.S. Department of Justice.

When Virginia Courts failed to provide an interpreter for a deaf litigant a lawsuit under ADA Title II commenced.[16] A Settlement Agreement and Release of Claims was reached between the United States of America and Entities of the Commonwealth of Virginia.[17] On March 25, 2019, the Virginia Supreme Court Chief Justice Donald Lemons sent all circuit and district court chief judges in Virginia a memorandum ordering each judicial circuit to designate at least one person to serve as an ADA Coordinator for all courts in each judicial circuit. The designated ADA Coordinator answers ADA questions and responds to requests for reasonable accommodations.

The DOJ has created extensive regulations to ensure that Title II of the ADA is complied with in the broadest ways possible to maximize access to services. 28 C.F.R. § 35.101, *et seq*. Accordingly, public entities that employ fifty or more people must designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under ADA Title II, including any investigation of any complaint alleging the entity's noncompliance or alleging any actions that are prohibited. 28 C.F.R. § 35.107.

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16 United States District Court for the Eastern District of Virginia in Civil Action No. 3:12cv59-JAG (*United States v. Commonwealth of Va., et al.*).

17 https://archive.ada.gov/entities_commonwealth_va_sa.html.

At the time of the Petitioner's trial, the Arlington County Circuit Court had no designated ADA Coordinator, who would have responded to a request to accommodate Mrs. Matarese's disability. The Arlington County Courthouse inexplicably remains without an ADA Coordinator though the rest of the Commonwealth complies with the federal regulations.[18]

Arlington County's Circuit Court's failure to designate an ADA Coordinator violates federal regulations meant to protect citizens like Petitioner. Judge Wheat's failure to accommodate Petitioner was contrary to the training she received as required by the settlement agreement. The Supreme Court of Virginia's unwillingness to issue an opinion on the merits of the appeal of Petitioner continues the known history of this state to unfairly discriminate against disabled litigants.

E. Judge Wheat's Order Clearly Discriminates Against Petitioner in Violation of the ADA.

The public policy animating the ADA is "to diminish or to eliminate the stereotypical thought processes, the thoughtless actions, and the hostile reactions that far too often bar those with disabilities from participating fully in the Nation's life." *U.S. Airways Inc.*, 535 U.S. at 401. Title II specifically seeks to protect a disabled person's right to access public institutions, including the judicial system. As expressed in *U.S. Airways*, the goal is target biases, either conscious or unconscious, such as the one Petitioner encountered.

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[18] A complete list of Commonwealth of Virginia ADA Coordinators can be found at https://www.vacourts.gov/courts/ada/ada_field_coordinators.pdf.

Id. Judge Wheat expressly stated that she was "finding it very difficult to believe [Petitioner was suffering from her disability] at this point," even though Petitioner had been so visibly in pain, six separate deputies attempted to help her before she was ultimately wheeled out of the courthouse in a wheelchair. App. 31-35a. Justice Kennedy, in his concurrence to *Board of Trustees of Univ. of Alabama v. Garrett* stated that "[p]rejudice, we are beginning to understand, rises not from malice or hostile animus alone. It may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." 531 U.S. 356, 374-75 (2001).

Petitioner cannot control her disability—Petitioner was in physical duress through no fault of her own. The court's implicit bias is clear. The court ruled hastily, and without considering reasonable modifications, in violation of the ADA. The court focused on the hardship to the defendants, their experts, and the jury. App.12a and App.29a. The ADA demands that courts make special allotments for disabled persons, even that if that means showing a preference to one individual. In *U.S. Airways*, the Court held "that preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal." *U.S. Airways*, 535 U.S. at 597. Instead, the court illustrated clear bias against Petitioner, immediately granting the opposing party's motion to strike and dismissing the case with prejudice. App.12a.

III. PROCEDURAL DUE PROCESS RIGHTS OF *PRO SE* CIVIL LITIGANTS ARE INCONSISTENTLY APPLIED AMONG THE STATES, RESULTING IN LARGE SWATHS OF THE CITIZENS WITHOUT ACCESS TO COURTS, ESPECIALLY AT THE APPELLATE LEVEL.

Although this Court has not directly confronted the question of whether a civil *pro se* litigant should be assisted throughout litigation, including appeals, the Court has ruled that civil litigants are constitutionally entitled to basic due process. However, procedural treatment of *pro se* civil litigants at the trial level is, at best, inconsistent, and no standard of treatment exists at the appellate level. Since civil *pro se* litigants often are unable to comply with procedural rules, in practice, exceptions are routinely carved out to accommodate them.

A. *Pro se* Litigants Deserve the Minimum Due Process Rights to Which All Other Litigants Are Entitled, the Most Significant Right Being the Opportunity to Be Heard.[19]

As the Court noted in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) not "every litigant [is entitled] to a hearing on the merits in every case." *Id.* at 437. The Court has maintained that the "very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Wolf v. McDonnell*, 418 U.S. 539, 560

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[19] *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982) (quoting *Armstrong. v. Manzo*, 380 U.S. 545, 552 (1965)); *Little v. Streater*, 452 U.S. 1, 5-6 (1981); *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 789 (2005).

(1974).[20] Due process is not "unrelated to time, place, and circumstances," but rather is "flexible and calls for procedural protections as the particular situation demands." *Logan*, 455 U.S. at 437.

To this end, the Court's balancing test requires a two-step analysis to determine how much judicial process is due: an identification of a protected interest and a determination of what type of process is due.[21]

Under step one of this analysis, civil litigants have a protected interest in having a meaningful opportunity to be heard which is distinct from the protected interests that underly the litigant's cause of action. Since civil litigants have a statutory right to proceed *pro se* under 28 U.S.C. § 1654, courts should consistently hold that a meaningful opportunity to be heard is in and of itself a protected interest.[22]

Once a protected interest is identified, the second step, a three-factor test, is required to determine how much process is due. "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 U.S. 319, 335 (1976). Government interests

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[20] Quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

[21] *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

[22] *See United States v. Kras*, 409 U.S. 434 (1973); *Logan, supra.*; *Boddie v. Connecticut*, 401 U.S. 371 (1971).

include the conservation of judicial resources,[23] preserving the impartial role of the judge in an adversarial system,[24] and reduction of frivolous *pro se* litigation.[25]

B. Applying the Two-Step Analysis to Due Process in Civil Cases, a *Pro Se* Litigant Is Entitled to a Liberal Construction of Their Pleadings.[26]

In *Haines v. Kerner*, 404 U.S. 519 (1972), this Court held that refusal to construe a *pro se* pleading flexibly is tantamount to depriving them of the meaningful opportunity to be heard. The very point of the *Haines* approach is to determine if, when a *pro se* civil plaintiff has not said the "magic words," or has even said the wrong words, a cause of action still exists.[27]

The actual burden on the adversarial system through the application of *Haines* is slight. The standard that a complaint should be dismissed only for a failure to state a claim upon which relief can be granted, absent jurisdictional or venue issues, was originally formulated in the context of litigants rep-

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[23] *See* Helen B. Kim, *Legal Education for the Pro se Litigant: A Step Towards a Meaningful Right to Be Heard*, 96 YALE L.J. 1641, 1646 (1987).

[24] *Ake v. Oklahoma*, 470 U.S. 68, 79 (1985).

[25] *See, e.g.*, Wayne T. Westling and Patricia Rasmussen, 16 LOY. U. CHI. L.J. 273, 291 (1985).

[26] *Haines v. Kerner*, 404 U.S. 519 (1972).

[27] *See Hughes v. Rowe*, 449 U.S. 5, 22-23 (1980) (Rehnquist W., dissenting).

resented by counsel.[28] *Haines* admittedly requires "less stringent standards" for review of *pro se* claims than of pleadings drafted by lawyers, but the ultimate result is a less stringent interpretation of a very lax standard. For the same reason that the government should be interested in having impartial justice for civil *pro se* litigants it should also be interested in having a civil *pro se* claim be adjudicated on its merits.

If, at the trial level, a civil *pro se* litigant's pleading is to be liberally construed, it stands to reason that at the appellate level, the standard remains the same.

C. *Pro Se* Petitioner Preserved the Due Process Issue on Appeal Through Her Arguments in Her Petition to Virginia's Highest Court.

While the Petitioner in her *pro se* appeal never said due process explicitly, she made a due process argument and, raised the issue again in her petition for rehearing. Specifically, Assignment of Error 1 in Petitioner's *pro se* Amended and Restated Petition for Appeal states that the "trial court erred and created a reversible error when it granted [Respondent's] motion to strike prior to [Petitioner] resting her case-in-chief . . . and the trial court failed to view the evidence in a light most favorable to [Petitioner]." App.55a. Petitioner went on to argue in her *pro se* brief that "summary judgment is a 'drastic remedy' that withdraws genuine issues of material fact from the fact finder, usually a jury." App.42a. Further, in her Petition for Rehearing, she avers that the trial

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[28] *See, e.g.*, Fed. R. Civ. P. Rule 12

court order "is a violation of procedural due process." App.55a.

The reason that summary judgment is such a drastic remedy, as Petitioner correctly asserted, is because of due process. Due process is so fundamental to our jurisprudence that stating the dismissal of Petitioner's case with prejudice "violated due process" in those exact words was not necessary. The concept was exhaustively argued and apparent on the face of the pleading. Therefore, applying the holding from *Haines* to the case at bar, the federal constitutional question was preserved, and this Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONCLUSION

Petitioner respectfully requests that this writ of certiorari be granted so that the matter may be remanded back to state court for a trial consistent with Petitioner's constitutional right to due process and that provides reasonable accommodations pursuant to the Americans with Disabilities Act of 1990.

Respectfully submitted,

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