

No. \_\_\_\_\_

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**In the**  
**Supreme Court of the United States**

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WALL STREET APARTMENTS, LLC AND  
ALAA ELKHARWILY, M.D.,

*Petitioners,*

v.

ALL STAR PROPERTY MANAGEMENT, LLC, ET AL.,

*Respondents.*

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**On Petition for a Writ of Certiorari to the  
Supreme Court of Washington and the  
Court of Appeals of Washington, Division III**

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**PETITION FOR A WRIT OF CERTIORARI**

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Richard T. Wylie  
*Counsel of Record*  
222 South Ninth Street  
Suite 1600  
Minneapolis, MN 55402  
(612) 337-9581  
[rickwlaw@aol.com](mailto:rickwlaw@aol.com)

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APRIL 8, 2023

*Counsel for Petitioners*

SUPREME COURT PRESS



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## **QUESTIONS PRESENTED**

Appellants seek review of a judgment of the Supreme Court of the State of Washington denying Appellants' petition of review of the Washington Court of Appeals' denial of Appellants' right to due process, including the right to a hearing, to decisions based on the records, and to a statement of the reasons of its decisions. These violations occurred when the Court of Appeals did not review Appellants' assigned errors in the trial court's decisions after the Court of Appeals had lost its records of the trial court's decisions, amended findings, and the established facts of the case prior to the issue of its opinion; and when the Court of Appeals rested its decision on external records that were not supposed to be part of the record of the trial court hearing nor presented to the parties at any stage prior to the issue of the Court of Appeals' Opinion; and when the Court of Appeals misfiled and did not file nor correct its records of Appellants' motions and filings in the court of appeal prior to the Supreme Court's denial of Appellants' petition for review and when it did not state a reason for its decisions.

1. Whether the Court of Appeals violated the constitutional rights of Appellants to due process and equal protection of the law when it denied Appellants their right to a meaningful hearing by the Court of Appeals itself; and denied Appellants a decision by that Court of Appeals solely resting on the basis of the record, and precluded any further review of its violations on the basis of the record.
2. Whether the state Supreme Court violated Appellants' constitutional rights to due process, equal

protection of the law, and access to the court when it denied the Appellants the right to a hearing before disposition of Appellants' claims of the court of Appeals' own violations of Appellants' constitutional rights, which were only revealed after the Court of Appeals issued its opinion; especially that the Appellate Rules of Procedure do not allow rehearing after denial of the petition for review.

3. Whether repetitive violations of the constitutional rights of more than one single litigant of a special racial group by the same state appellate court necessitate "scrutiny" of the State Court proceedings.

## **PARTIES TO THE PROCEEDINGS**

### **Petitioners and Plaintiffs-Appellants below**

- Wall Street Apartments, LLC
- Alaa Elkharwily, MD.

### **Respondents and Defendants-Appellees below**

- All Star Property Management, LLC
- Gieve Parker, individually and on behalf of her marital community
- John Does and Jane Does I through X

## **CORPORATE DISCLOSURE STATEMENT**

No public company owns a 10% or greater ownership stake in Wall Street Apartments, LLC, or any parent company or subsidiary.

## **LIST OF PROCEEDINGS**

Supreme Court of Washington

No. 101073-7

Wall Street Apartments, LLC, et al., *Appellants*, v.  
All Star Property Management, LLC, et al., *Appellees*

Date of Final Order: November 9, 2022

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Court of Appeals for the State of Washington

No. 37512-9-III

Wall Street Apartments, LLC, A Washington Limited  
Liability Company; and Alaa Elkharwily, M.D.,  
*Appellants*, v. All Star Property Management, LLC, a  
Washington limited liability company; Gieve Parker,  
individually and on behalf of her marital community,  
*Respondents*, John Does and Jane Does I through X,  
*Defendants*

Date of Final Opinion: April 19, 2022

Date of Denial of Reconsideration and Amended  
Opinion: June 7, 2022

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Superior Court, County of Spokane, Washington

No. 15-2-04021-3

Wall Street Apartments, LLC, a Washington Limited  
Liability Company; and Alaa Elkharwily, M.D.,  
*Plaintiffs*, v. All Star Property Management, LLC, a  
Washington Limited Liability Company; Gieve  
Parker, Individually and on Behalf of Her Marital  
Community, and John Does and Jane Does I  
Through X, *Defendants*.

Date of Final Decision: February 13, 2020

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## OPINIONS BELOW

Petitioner seeks review of the opinion of the Washington Court of Appeals, Division III, dated April 19, 2022 (App.3a), and the subsequent order denying review by the Supreme Court of Washington dated November 9, 2022 (App.1a). These opinions were not designated for publication.



## JURISDICTION

The opinion of the Washington Court of Appeals was entered on April 19, 2022. (App.3a) The amended opinion of the Court of Appeals was entered on June 7, 2022. (App.21a) Appellants timely filed a petition for review in the Washington Supreme Court, which was denied on November 9, 2022. The Clerk of this Court extended the time for filing a petition for a writ of certiorari until April 8, 2023. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).



## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### U.S. Const., amend. XIV § 1

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.

### **Supreme Court Rule 10(c)**

The questions presented in this case involves an important issue of federal law, and represent important constitutional issue that should be settled by this Court.



### **STATEMENT OF THE CASE**

#### **A. Summary of the Facts of the Case at the Trial Court**

In the summer of 2012 the parties entered into a management agreement under which Defendant All Star Property Management would manage 6 units of the 36 units in the Wall Street's building. Ex. P1. The agreement required Defendants to use "due diligence in the management of the premises . . ." *Id.* at ¶ 1, 7, 9.

Central to this case is the removal of the fire alarm system in the evening of 27th of September, 2012. After a bench trial, the trial court found that after Gieve Parker, co-owner of All Star, sent a text message "I quit" on September 27, 2012, at 10:25 am, there was no evidence that Defendants, "assumed responsibility for the fire alarm or expected or knew it was taken down." CP 1097-1115 at ¶ 28.

The trial court found that on September 26, 2012, that it was not clear if there was any plan to start demolition of the lobby wall that day so as to make the lobby more open. Most of the wall, trims and door were taken down on September 26, 2012. The remaining part of the wall, and the fire alarm box and panel on which they were hung, were not taken down, disconnected nor removed until the evening of September 27. On September 27, at 10:25 a.m., Parker sent a text a message “I quit” over a dispute over the phone with Plaintiffs. CP. 1382-1407. A lot of tenants left the building after the taking down of the wall and fire system. Parker, All Star’s co-owner, testified under oath at a Labor and Industry Board hearing that she had no personal knowledge nor involvement in the removal of the fire alarm system. She testified she filed a lien on the property for a little over \$1,500. She conceded she had “all the keys” to the building, including “the boiler room” which contained the fire system control unit. RP 426-427. She conceded her claims she made against Elkharwily two weeks after the removal of the fire alarm system for harassment was dismissed with prejudice. RP 230: 21:23.

Plaintiffs filed a suit for multiple claims and damages close to \$250,000 under breach of contract, breach of covenant of good faith, consumer protection act among other claims. Defendants counterclaimed for little over \$ 1,300. On summary judgment, the breach of contract and covenant of good faith survived. The other claims including the claim under the Consumer Protection Act for failure to provide the prerequisite prelien notices required by RCW 18.27.114 were dismissed for “lack of supporting proof.” The

parties went to mandatory arbitration, in which Plaintiffs prevailed and were awarded over \$ 7,000 in damages. During arbitration, Parker for the first time testified about an email she alleged was sent to her from a Mr. Kimbrel, whom she claimed worked for Fire West Company. The email expressly shows he was called to disconnect the fire boxes and he was on the phone with Parker on the day he disconnected the fire system. Parker maintained that her call to Mr. Kimbrel was before she quit.

Plaintiffs moved for trial de novo, deposed Parker and requested her to produce the alleged email. During deposition, Parker, a corporate officer, testified that a lot of her testimony at the L and I hearing was “wrong.” RP 421:1. At trial, Parker’s oral testimony detailed her corporation’s knowledge and the take upon the removal of the fire alarm system after her “quit” message. Parker asserted she was still the “property manager,” even after she had sent the text she quit. RP 407:1-3. She testified that the phone call she previously testified her made to Kimbrel before she quit was in fact made only after she had quit and after most of the wall, the trim, and door went down but before the rest of the wall with the fire system attached came down, RP 418:2-4, 417:5-7. She testified she kept telling Dr. Elkharwily to call the number on the fire box after she herself admittedly removed the fire system: the fire box and panel. RP 419:12-17.

Q. Okay. So if we look at the—when you were telling Dr. Elkharwily—when you were telling Elkharwily that the fire panel was not your problem, “You should call the box, the number on the box,” and so forth. you had moved them out by then?

### A. Yes.

Following a bench trial, the trial court returned a decision in favor of Defendants for a little over \$1,300 and awarded attorney fees including post arbitration fees because Plaintiff failed to improve his position at trial. Though Plaintiffs prevailed in arbitration, the court also awarded pre arbitration fees and sanctions for bringing a “frivolous” action. In post-trial motions, Defendants did not dispute or deny in a required response that the purported Kimbrel email was fake and fabricated by Defendants.<sup>1</sup> CP 1139-1183. p 42:1-3. She also conceded, among other concessions, that she admittedly was prohibited by Dr. Elkharwily from making the purchases that constituted her counterclaim of the \$1,300.

On July 24, 2020, the trial court issued its order granting in part post-trial motions and it amended its findings in response to Plaintiff’s post-trial motions. CP 1382-1407. Plaintiff properly and timely appealed the denial of his post-trial motions. The trial court’s order on post-trial motions and amended findings were promptly furnished to the court of appeals upon its direction. Order filed October 20, 2021.

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<sup>1</sup> The email is an exhibit to a declaration of Appellant Elkharwily included at App.64a.

**B. Summary of the Facts of the Case at the Court of Appeals**

**1. The Court of Appeals Acknowledged Its Failure to Review or Consider the Trial Court’s Amended Findings, Which Became the Established Facts of the Case When Reviewing the Assigned Errors of the Trial Court Decisions, and Acknowledged Its Non-Review of the Assigned Errors of the Trial Court Decisions on Post-Trial Motions. The Court of Appeals Acknowledged the Loss of Said Records Within Its Court**

In its Opinion filed April 19, 2022, the Court of Appeals asserted that the trial court’s post-trial orders and amended findings were not part of the record, and did not consider the amended findings or the decision on the post-trial motions in its review of this case. Opinion, at 8 n 2 (App.9a). That Court stated:

Neither the trial court’s order granting the appellants’ motion in part nor the amended findings of fact and conclusions of law are included in the record on review.

**2. Discovery of External Disingenuous Record That Was Not, Nor Supposed to be, Part of the Record at the Trial Court, Which Infected the Court of Appeal, and Upon Which the Court of Appeal Relied in Its Review in Lieu of the True and Genuine Records of the Trial Court Hearing**

While filing of their motion for reconsideration on May 9, 2022, Appellants discovered a disingenuous document transmitted as CP 1327-1329 to the court of appeal which was not filed by them, nor served upon them, nor was it supposed to be part of the trial court records nor hearing and which appeared to have been filed on April 3rd, 2020, as “Declaration Affidavit of Alaa Elkharwily,” Docket Document 192.

Upon said discovery, Appellants filed multiple motions on May 29, 2022, prior to issuance of the Court of Appeals’ order on reconsideration (June 7, 2022), to:

1. supplement the genuine and true records of the trial court (“SN 187”), which was replaced by the disingenuous records, under RAP 9.10; and to
2. recall/withdraw the opinion and correct the record so as to purge the disingenuous records from the appellate court records.

Appellants’ motion to supplement the records with the true and genuine records to the court of appeal was uncontested.<sup>2</sup>

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<sup>2</sup> Defendants did not dispute nor deny the filing of the disingenuous records that infected the court of appeal.

**3. The Court of Appeals Acknowledged the Transmittal of the Lost Records and Availability for Review Before Issue of the Opinion But Failed to Review the Assigned Errors. The Court of Appeals Also Failed to State Any Reason for Its Non-Review of the Assigned Errors in the Post-Trial Motions, and Failed to State Any Reason Why the Trial Court Decisions Should Still be Affirmed in the Light of Its Amended Findings and the Established Facts of the Case. The Court Denied Appellants' Request for a Hearing, in Violation of Their Right to Due Process**

On June 7, 2022 the court of appeals denied Appellants' motion for reconsideration (without considering the true and correct and genuine records which were filed by Plaintiff and considered by the trial court, and it relied on the incorrect disingenuous external records)

The court of appeals panel amended its opinion by order filed June 7, 2022, acknowledging the lost records of the amended findings and the post-trial order were transmitted from the trial court as "CP 1382-1407".

The trial court denied Wall Street's motions for reconsideration, a new trial, and relief from judgment, but granted in part the motion for amended findings of fact and conclusions of law. *See* CP 1382-1407.

However, the court did not review the assigned errors of the order, nor did it indicate nor state it reviewed the amended findings of the trial court

which are the established facts of the case. App.10a-11a. Opinion filed April 19, at page 9 where the court of appeals did not list the assigned errors of said order nor state that it reviewed the established facts of the case when reviewing the assigned trial court decisions. Also, see order amending opinion filed June 7, 2022. App.21a-22a.

**4. The Clerk of the Court of Appeal Rulings Denying Plaintiffs Motions to Correct the Records, Without Any Statement of Any Reason Why; and Its Untimely Notice of Doing So, Thus Depriving the Panel of the Court of Appeals from Reconsidering Its Decisions on the Basis of the Correct and True and Complete Records of the Trial Court Hearing**

After notifying the parties of the decision denying Appellants' motion to reconsider on June 7, 2022, the clerk served for the first time its order, apparently entered on May 26, 2022, denying Plaintiffs' Motion to supplement the correct and genuine records.<sup>3</sup> The Clerk also denied the motion to recall/withdraw the opinion and to purge the disingenuous record from its records. Plaintiff was deprived from timely and meaningful notice of the Clerk's ruling which service is required at the time of the ruling entry. Plaintiff was prejudiced by losing the ability to have filed

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<sup>3</sup> Prior to the Supreme Court's disposition of Appellants' Petitions and motions; the Clerk of the court of appeals refused to provide any copy of said ruling. App.56a. the ruling entered on May 26, 2022 has been omitted from the records after the Supreme Court made its decision. The Clerk filed the ruling it filed on June 7 instead.

motion to modify the clerk's ruling prior to issue of the court of appeal's order on Plaintiffs' motion to reconsider. Moreover, the clerk denied Appellants' motions without stating a reason as required by RAP 17.6(a),<sup>4</sup> thus depriving Appellants of a basis for appealing its decisions.

### **5. Plaintiffs' Objections and Claims of Violations of His Constitutional Rights and Motions to Modify the Court of Appeals' Clerk's Rulings**

Plaintiffs objected and raised their claims of violating their constitutional rights to due process. Appellants also filed two motions to modify the two Clerk's rulings and actions on July 7, 2022.

On June 27, 2022, Appellants also filed three motions:

- a) "Motion to recall" the amended opinion filed June 7, 2022. Motions at 9-19; and
- b) "Motion to reconsider" the amended opinion filed June 7, 2022. Motions at 7-8 and 9-19.
- c) "Motion for a permission to enter trial court decision on post-trial motions." Motions at page 4-7;

On June 29, 2022, the clerk issued an order denying the three motions. The clerk cited RAP

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<sup>4</sup> RAP 17.6(a) states that "Motion Decided by Commissioner or Clerk. A commissioner or clerk decides a motion by a written ruling which includes a statement of the reason for the decision. The commissioner or clerk will file the ruling and serve a copy on the movant and all persons entitled to notice of the original motion."

12.4(h) in denying the motion to reconsider, but did not state any reason for denying the other two motions. The clerk's order stated:

... the Motion for Reconsideration of Order (June 7, 2022) is denied. RAP 12.4(h). Please be advised your deadline to file a Petition for Review with the Supreme Court is July 7, 2022.

On July 7, 2022, Plaintiffs filed two motions to modify the Clerk's two rulings made on June 29, 2022, and later on the same day was compelled to file the petition for review while notifying the Supreme Court that there are still multiple pending motions to modify on which the court of appeal had not rendered decisions yet.

**6. The Court of Appeals “Closing” the Case Without Authority Nor Notice to the Parties, Nor Hearing; and the Clerk’s Preclusion of Review of Its Rulings By the Court of Appeals Panel Through Motion to Modify By Forwarding Plaintiff’s Motions to Modify to the Washington Supreme Court Before the Court of Appeals First Decides These Motions; and the Supreme Court Informing the Court of Appeals of Its Decision Declining to Take Any Action on Any Forwarded Motion to Modify Because the Court of Appeal Has to First Review Said Rulings**

In the Supreme Court Clerk's letter ruling filed July 11, 2022, the Clerk stated:

The Court of Appeals has forwarded the

“PETITION FOR REVIEW OF APPELLANTS” filed there on July 7, 2022, in the referenced matter. The matter has been assigned the Supreme Court cause number indicated above. The Court of Appeals also forwarded to this Court the “PLAINTIFFS /APPELLANTS’ MOTION TO MODIFY CLERK’S ORDER FILED JUNE 7, 2022.

On July 11, the Clerk of the Washington Supreme Court also noted that “It appears as though the Court of Appeals forwarded to this Court the motion to modify the clerk’s order along with the petition for review because the case there is now closed.” The Clerk further noted, As the Supreme Court cannot act on the motion to modify, the motion will be placed in the file without further action.”

The Court of appeals did not notify Appellant that the case was closed nor could it close the case. Because motions to modify have to be decided first by the court of appeals, as a matter of right, as required by the rule and decided by the Supreme Court,<sup>5</sup> and

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<sup>5</sup> In Washington appellate courts, unelected court clerks or commissioners handle most of the motion practice. Some motions are minor and mostly procedural, but other motions touch on the scope of the appeal or its merits. Because commissioners and Clerks have the power to shape the course of an appeal, the Washington Rules of Appellate Procedure allow parties to internally appeal any commissioner or clerk’s decision to a panel of elected judges, via what is called a “motion to modify” under RAP 17.7. The clerk decisions are called “rulings,” to distinguish them from full appellate opinions or orders. Wash. R. App. P. 17.6(a).

(“[I]f a losing party does not like the Commissioner’s [or the Clerk’s] ruling, one is not forced to accept it. Upon making a motion to modify pursuant to RAP 17.7, petitioner is entitled to and receives, as a matter of right, a de novo review of the

because justice will be better served by presenting all issues on appeal before the Supreme Court, and because the court of appeals retains jurisdiction to decide motions to modify until the Supreme Court has accepted review or issues its mandate, neither of which occurred, RAP 12.7(a).<sup>6</sup> Appellants moved to stay all proceedings in the Supreme Court until complete resolution of all pending motions to modify and to remand the forwarded motions to modify.

On July 25, 2022, Appellants filed their motion to modify the clerk of the court of appeal's rulings and its action. The Clerk forwarded the motions to modify to the Supreme Court as well.

On August 8, 2022, Appellants filed their fourth motion to modify the decision of the clerk of the court of appeals forwarding the motions to modify to the Supreme Court and refusal to forward the motions to the panel of the court of appeal to decide the motions. Appellants also filed in the same document their motion to disqualify the court of appeals.

On the same day, August 8, 2022, Appellants sought modification of decision of the clerk of the Supreme Court placing the forwarded motions in file

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Commissioner's ruling by a three-judge panel."). *Wolfe v. Wolfe*, 99 Wash. 2d 531, 534-35, 663 P.2d 469, 471 (1983) at 535, 663 P.2d at 471

<sup>6</sup> 12.7(a) states that "The Court of Appeals loses the power to change or modify its decision (1) upon issuance of a mandate in accordance with rule 12.5, except when the mandate is recalled as provided in rule 12.9, (2) upon acceptance by the Supreme Court of review of the decision of the Court of Appeals, or (3) upon issuance of a certificate of finality as provided in rules 12.5(e) and rule 16.15.(e) ."

and not remanding said motions or directing the court of appeal to decide those motions before forwarding.

## **7. Appellants’ Discovery of the Omitted and Misfiled Records of His Filings Occurred After They Had Filed Their Motion to Stay and Remand**

Appellants discovered the omission and misfiling of their motions, replies and supplemental on the docket of the court of appeal after having had filed their motion to stay and remand on August 8, 2022. Appellants discovered that only one out of the two motions to modify filed on July 7, 2022, appears on the docket of the court of appeals after they had filed their motion to stay and remand. *See App.53a.* Because it appears as “other filing” on the docket it is not clear which motion, was docketed in the court of appeal and forwarded to the Supreme Court, and which one was not.

On or about August 9, 2022, Appellants communicated with the clerk’s office in the court of appeals, which stated it already had forwarded those motions including the last motion to modify its decision forwarding the motions to the Supreme Court, despite the Supreme Court ruling it would not take any action on any motion to modify, and that the court of appeal should rule on them first. The Clerk also stated it forwarded the fourth motion to modify and motion to disqualify filed on August 8, 2022. The clerk also informed Appellant that the court of appeals would not disqualify itself and made it clear that the court of appeals will not make any ruling on any of Appellants’ motions to modify. That was before any

judge of the court of appeal had even looked at or considered any of said motions.

Despite the Clerk's assertions that the motions were forwarded, the docket of the court of appeals did not show the filing of Appellants fourth motion to modify and motion to disqualify until 10 days after August 8, the day of the filing. *See* the screen shot taken on August 15, 2022, depicting the absence in the record of Appellants' motion to modify and disqualify which Appellants filed August 8, 2022.<sup>7</sup> Compare with the screen shot taken on August 17 showing said filing for the first time on the docket. *See* both screen shots attached as App.65-68a.

On August 16, 2022, Appellants filed a supplement to their motion to disqualify the court of appeals accompanied by declarations of Mr. and Mrs. Elkhawly documenting the Clerk's statements made on the speaker phone.

On August 17, 2022, a screen shot of the docket of the court of appeals shows that the two filings that Appellants made on August 8, 2022, appear for the first time on the docket including Appellants' filing of "motion to modify and disqualify" and "Appellants' reply in support of their uncontested motion to modify."

The docket of the Supreme Court does not show but one motion filed on August 8, 2022. More likely it is Appellants' motion to stay and remand in that court which was filed August 8. The docket of the Supreme Court does not show any other forwarded

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<sup>7</sup> The docket screen shot shows only one filing received by the court of appeal on August 8 which was "Appellants' reply in support of his uncontested motion to modify."

motion by the court of appeals on August 9 or after or any other motion until August 24. The Clerk, on August 9, stated she already forwarded the motion to disqualify filed on August 8, 2022. The docket shows the Clerk did not.

Moreover, the Supplement that Appellants filed to their motion to disqualify on August 16, 2022, did not show on the docket of the Supreme Court.

And, despite the court of appeal's reluctance to identify any of Appellants' motions, replies, or responses, and despite identifying all filings as "other filings", the court of appeals misidentified Appellants' reply in support of their motion to disqualify as "objection to attorney fees." More, despite filing it on August 23, 2022, the docket shows it was filed August 24, 2022, instead.

And, only two filings made on August 23 show on the docket out of the three filings Appellants filed. The clerk of the court of appeals refused to clarify whether any two filings were merged together or one is missing from the record. App.55a. Further, Appellants discovered that only one out of the two motions to modify filed on July 7, 2022, appears on the docket of the court of appeals after they had filed their motion to stay and remand.

## **8. The Clerk of the Court of Appeals Declined to Correct the Court of Appeal's Records**

Upon discovery, Appellants immediately communicated by email letters with the clerk of the Supreme Court on August 25, 2022, and the clerk of the court of appeals on August 26, 2022. App.54a. Appellants

also filed a motion to extend time to file a reply in support of his motion to stay proceedings and remand the forwarded motions in the Supreme Court so as to allow the clerk of the court of appeal time to correct records in order to enable the Appellant to refer correctly to the records in his motions and to correct references to his petitions for review.

The Clerk of the Court of Appeals refused to identify any of the misfiled and records, and refused any attempt to correct the record of its docket. The clerk did not file its response letter nor did it make it part of the record either<sup>8</sup> As far as the record of the docket is concerned, the clerk's communication letter did not exist prior to the Supreme Court decisions were made *See App.54a.*

Defendants conceded that the records should be corrected and the references to the records should be accurate under RAP 10.3(a)(6), if Appellants were to be afforded any meaningful hearings.

On August 30, 2022, Appellants filed a motion to modify the Supreme Court Clerk's ruling that the Supreme Court Justices will rule on the petition on the same day they rule on Appellants' motions to extend time to file a reply in support of their motion to stay and remand to allow correcting the records of the court of appeal before consideration of any of Appellants' petition or motion to satisfy the Constitutional rights to due process.

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<sup>8</sup> The Supreme Court Clerk made its communication with Appellants regarding the same issue part of the record prior to the Supreme Court denial of the petition.

**C. The Washington Supreme Court Denying Petitioners' Petition to Review the Court of Appeals' Violations of Appellants Constitutional Rights and Decisions; and Denied Appellants' Motions to Allow Correction of the Records and to Allow Due Process**

On November 9, 2022, The Washington Supreme Court ordered:

That the petition for review is denied. That the “Appellants’ Motion to Stay Proceedings; and Remand the Forwarded Motions, Responses and Replies”, the “Appellants’ Motion for Extension to File Reply in Support of Motion to Stay Proceedings; and Remand the Forwarded Motions, Response and Replies” and the “Appellants’ Motion to Modify Clerk’s Rulings filed August 8, 2022, and August 30, 2022” are also denied.

The Supreme Court thus disposed of Appellants’ claims of the court of appeals’ violations of their constitutional rights and disposed of Appellants’ motions requesting to allow an opportunity to hear Appellants’ claims on due process.



## REASONS FOR GRANTING THE PETITION

As shown throughout the petition, the petition for cert should be granted because:

**I. This Case Represents Exceptionally Unique Constitutional Matters at the Level of the State Appellate Court Which Necessitate' Review By This Court of the Appellate Court Proceedings**

To lose selective records in the Court of Appeals, fundamentally essential for its review and which were electronically transmitted among the other records of the case is exceptionally unique. Not addressing the loss of said records and denying any corrective process in order to redress or correct the records is also unique. What is more unique, an almost identical loss of selective essential records by the same court of appeal at almost the same time in another different case involving a litigant of the same racial group as Appellants in this case (non white). Appellants were deprived of their constitutional rights in a manner almost identical to another litigant in the same court, at almost the same time. Filed in the Appendix hereto is a Decision in the Washington Court of Appeals, Division III, dated June 2, 2022, in the matter entitled "In re C.S.", Case No. 38056-4-III. The appellant apparently suffered from identical selective electronic loss of the court of appeals' records fundamental to the review process after having been electronically transmitted with the rest of the records of the case (CP 696-712). Appellants in the Simon's case were identically denied the right to due process through denying their rights to hearing and to decision

solely based on the records; and their rights to equal protection of the law as Appellants are biracial; and to their right to access to the court. Furthermore, identical to this case, footnote 1 of the Opinion of the same court of appeal (at page 1) states the loss of its records which became not part of the Appellate review nor consideration:

[fn1] The Simons appear to have filed a similar motion in August 2018. *See Clerk's Papers (CP) at 3584; 1 Report of Proceedings (Apr. 12, 2019)* at 31. This motion does not appear to be included in the appellate record.

This decision came just five days from the court of appeals' decision on Appellants' motion for reconsideration dated June 7, 2022. The Supreme Court also denied their petition for review on the same day of November 9, 2022. The Appellate court took judicial notice of said case prior to rendering its decisions of disposing Appellants' claims of constitutional violations on November 9, 2022. Appellants in the Simon case was due and have filed their petition for Cert April 10, 2023.

Respectfully, this Court may take a judicial notice of said case,

**II. The Appellate Court Decisions Below are in Violation of Appellants' Fundamental Constitutional Rights Established By This Court**

**III. The Questions Presented are of Crucial Constitutional Importance and Warrant Review**

1. A distinction needs to be established by this court between the State highest court's role established under the state constitution, in providing a process of discretionary review of the underlying case, and of its mandatory role, under the US constitution, in deciding its own violations of the constitutional rights, especially when discovered after issue of the Appellate Court Opinion. See argument of the law below.
2. The Court should clarify that denial of access to the state appellate court and denial of an opportunity to be heard are the same, and unconstitutional in the manners that Appellants suffered by the state appellate court. See argument of the law below.
3. This Court should decide whether the State's appellate court should be subject to the necessity of the "rigid scrutiny" when legal restrictions are imposed on more than one Appellant of a specific racial group. See argument of law below.

**IV. When a Corrective Process Is Provided By the State But Error, in Relation to the Federal Question of Constitutional Violation, Creeps Into the Record, This Court Has the Responsibility to Review the State Proceedings**

Washington provides appellate review of decisions of its trial courts and courts of appeals, ultimately through discretionary review by its supreme court. However, here, at the court of appeals and supreme court levels, Appellant were denied constitutional rights as shown herein, by the appellate courts themselves, essentially by denying the Appellants the right to hearings

As this Court in *Hawk v. Olson*, 326 U.S. 271 (1945) held, when the state does not provide corrective judicial process, the federal courts will entertain habeas corpus to redress the violation of the federal constitutional right. *White v. Ragen*, 324 U.S. 760. When the corrective process is provided by the state but error, in relation to the federal question of constitutional violation, creeps into the record, we have the responsibility to review the state proceedings. The record establishes that the appellate courts deprived Appellants the access and opportunity to be heard, and this Court should therefore review the state Appellate court proceedings.

**V. This Case Is the Ideal Vehicle to Address the Questions Presented**

**VI. This Case Is of Utmost Public Interest Not Only Will Acceptance of Review Promote Confidence in Our Judicial System But Will Exponentially Promote the Public Confidence and Trust in the Supreme Court of the United States Itself as well; (Chief Justice Roberts and Justice Sotomayor Publicly Expressed and as the Rest of Justices Also Wish to Accomplish)**

## **VII Law Defining Violations of the Appellants' Constitutional Rights By the Appellate Court and in Support of the Reasons to Grant the Review**

### **A. Due process**

#### **1. The Right to Hearing**

“The right to be heard, before property is taken or privileges, withdrawn which have been previously awarded, is of the essence of due process of law. It is unnecessary to recite the decisions in which this principle has been repeatedly recognized. It is enough to say it has never been questioned in this court.” *Garfield v. Goldsby*, 211 U.S. 262 (1908). The fundamental requisite of due process of law is the opportunity to be heard. *Louisville Nashville R.R. Co. v. Schmidt*, 177 U.S. 230, 236; *Simon v. Craft*, 182 U.S. 427, 436. The Fourteenth Amendment’s Due Process Clause has been interpreted as preventing the states from denying potential litigants use of established adjudicatory procedures, when such an action would be “the equivalent of denying them an opportunity to be heard upon their claimed right[s].” *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971). In *Boddie*, the Court established that, at least where interests of basic importance are involved, “absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.” 401 U.S., at 377.

“The “hearing” is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by

that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The “hearing” is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given.” *Morgan v. United States*, 298 U.S. 468 (1936).

If appellate review is to be meaningful, it must fulfill its basic historic function of correcting error in the trial court proceedings.

Here, the Court of Appeals did not afford the appellants a hearing when it did not review Appellants’ assigned errors in the trial court’s decisions after the Court of Appeals had lost its records of the trial court’s decisions, amended findings, and the established facts of the case prior to the issue of its opinion; and when the Court of Appeals rested its decision on external records that were not supposed to be part of the record of the trial court hearing nor presented to the parties at any stage prior to the issue of the Court of Appeals’ Opinion; and when the Court of Appeals misfiled and did not file nor correct its records of Appellants’ filings nor the missing records of its own rulings prior to the Supreme Court’s denial of Appellants’ petition for review.

The court of appeal also did not afford Appellants a hearing on its own violations of Appellants’ constitutional rights when it issued and disclosed in its opinion the loss of its records on review and its lack of review of the trial court decisions and the established facts of the case. The Supreme Court did not afford Appellants a hearing on the court of appeals’

violation of their constitutional rights before it denied Appellants' petition.

The state supreme court did not distinguish its role established under the state constitution, to provide a process of discretionary review of violations of the constitutional rights of appellants as part of its review of the original case, and of its mandatory role, under the constitution of the United State, in disposition of Appellants' claims of the appellate court's violations of their constitutional rights, especially when discovered after issue of the Appellate Court Opinion. It is therefore essential that this court make the distinction clear to the state highest courts.

## **2. The Right to Decision Based on the Record**

In *Goldberg v. Kelly*, 397 U.S. 254 (1970), the Court established that the decision maker's decision "must rest solely on the legal rules and evidence adduced at the hearing," *id.*, at 271. It is for that reason due process requires that the decision-maker "demonstrate compliance with this elementary requirement" by "stat[ing] the reasons for his determination and indicat[ing] the evidence he relied on." *Id.*

Decisions, to be consistent with constitutional protections, cannot be based on information of which the parties were not apprised of and which they had no opportunity to controvert. In addition to amounting to a denial of a hearing it is an independent denial of the constitutional right to due process. It is well settled by this Court that in a tribunal making a decision after a hearing, "nothing can be considered as evidence that was not introduced at a hearing of which the parties had notice or at which they were

present. *United States v. Abilene So. Ry. Co.*, 265 U.S. 274, 44 S.Ct. 565, 68 L.Ed. 1016. The fact that there may be substantial and properly introduced evidence which supports the tribunal decision is immaterial. (*Cf., Ohio Bell Tel. Co. v. Public Utilities Com.*, 301 U.S. 292 [57 S.Ct. 724, 81 L.Ed. 1093].). The right of a hearing before a tribunal would be meaningless if the tribunal were permitted to base its determination upon information received without the knowledge of the parties.

The Appellate court violated Appellants' right to decisions made on the records when the Court of Appeals rested its decision on external records that were not supposed to be part of the record of the trial court hearing, nor presented to the parties at any stage prior to the issuance of the Court of Appeals' Opinion; and when the Court of Appeals misfiled and did not file or correct its records of Appellants' filings prior to the Supreme Court's denial of Appellants' petition for review.

The state Supreme Court also based its denial of Appellants' petition on said records that were not part of the trial court records and when it disallowed the correction of the appellate court records prior to rendering its decisions.

### **3. The Right to Statement of the Reason**

As stated above, a decision maker must state the reasons for its determination and indicate the evidence relied upon. This is to ensure that the decision I based solely on the legal rules and evidence adduced at the hearing. *Goldberg v. Kelly*, 397 U.S. at 271.

Here, the Court of Appeals clerk repeatedly forwarded Appellants' motions in that court to the Washington even though the Court of Appeals retained jurisdiction to decide them. The court of appeals also did not state any reason for its denial to address its own violations of Appellants' due process. Again, The Supreme Court did not distinguish and honor its roles under the federal law, when it disposed of Appellants' claims of the appellate court's violation of appellants' constitutional rights without any statement of reasons. It is therefore crucial that this court establish the distinction

### **B. Equal Protection of the Law**

In *Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 179 (Douglas, J., concurring), it was said:

When we deny even the most degraded person the rudiments of a fair trial, we endanger the liberties of everyone. We set a pattern of conduct that is dangerously expansive and is adaptable to the needs of any majority bent on suppressing opposition or dissension. "It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law.

This Court has also held:

Distinctions between citizens solely because of their ancestry are by their very nature

odious to a free people [\*291] whose institutions are founded upon the doctrine of equality.

[All] legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.

The Court has never questioned the validity of those pronouncements. Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.

*Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 290-91 (1978) (citations omitted.)

For this reason, “strict scrutiny” of the state proceedings in this case is called for. This is especially true, given that the violations were imposed on multiple litigants of specific racial group, the Appellant Elkharwily in this case and the Simon case, by the same appellate court almost at the same time through the same actions.

### **C. Denial of Access to the Court**

The state appellate courts prematurely and unnecessarily closed the case in the court of appeals, forwarded Appellants’ motions to modify without notice, a hearing nor statement of any reasons<sup>9</sup>. The

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<sup>9</sup> In the Washington appellate courts, unelected court clerks or commissioners handle most of the motion practice. Some motions are minor and mostly procedural, but other motions touch on the scope of the appeal or its merits. Because commissioners

Supreme Court denied Appellants' petition and claims terminated the review before the court of appeal rendered any decision on said motions.

The Supreme Court disposed of Appellants' claims of its violations of their constitutional rights. The Washington Appellate rules do not allow to file for rehearing or motion for reconsideration of a Supreme Court order denying a petition for review nor an order refusing to modify a ruling by the commissioner or clerk. RAP 12.4. A state may not constitutionally block access to its courts where access is required to vitiate a right. *Boddie*, 401 U.S. at 377-81, 91 S. Ct. at 785-87 (divorce may only be obtained through court action.)

The right to access to the courts is also violated whenever the control of litigation is involved. *Doe v. Puget Sound Blood Center*, 117 Wn.2d 772, 782, 819 P.2d 370 (1991). Also, "it is now fundamental that, once established . . . avenues [of appellate review] must be kept free of unreasoned distinctions that can only impede open and equal access to the courts."

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and Clerks have the power to shape the course of an appeal, the Washington Rules of Appellate Procedure allow parties to internally appeal any commissioner or clerk's decision to a panel of elected judges, via what is called a "motion to modify" under RAP 17.7. The clerk decisions are called "rulings," to distinguish them from full appellate opinions or orders. WASH. R. APP. P. 17.6(a).

("[I]f a losing party does not like the Commissioner's [or the Clerk's] ruling, one is not forced to accept it. Upon making a motion to modify pursuant to RAP 17.7, petitioner is entitled to and receives, as a matter of right, a *de novo* review of the Commissioner's ruling by a three-judge panel."). *Wolfe v. Wolfe*, 99 Wash. 2d 531, 534-35, 663 P.2d 469, 471 (1983) at 535, 663 P.2d at 471

*Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966). This Court has not yet been faced with the denial of access to the courts and denial of an opportunity to be heard in the manners that Appellants suffered. This case is thus an ideal vehicle to decide such crucially important and unique issues.



## CONCLUSION

For all the foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

Richard T. Wylie  
*Counsel of Record*  
222 South Ninth Street  
Suite 1600  
Minneapolis, MN 55402  
(612) 337-9581  
[rickwlaw@aol.com](mailto:rickwlaw@aol.com)

*Counsel for Petitioners*

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