No. _____

IN THE

Supreme Court of the United States

VIDALA AARONOFF,

Petitioner,

v.

CURTIS OLSON.

Respondent.

On Petition for Writ of Certiorari to
The Court of Appeal of the State of California
Second Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Due Process Clause requires a court to construe a *pro se* litigant's filings liberally in order to enable the litigant to participate as fully as possible in proceedings in which they possess an interest?
2. Whether the Equal Protection Causes allows a state court to grant a wealthy litigant's request for attorney's fees against an indigent litigant in connection with a petition for a civil harassment restraining order without considering the indigent litigant's ability to pay?

RELATED PROCEEDINGS

This case arises out of the following proceedings:

- *Aaronoff v. Olson*, No. 17SMRO00308 (L.A. Cnty. Super. Ct. Nov. 19, 2018).
- *Olson v. Aaronoff*, No. 17SMRO00368 (L.A. Cnty. Super. Ct. Nov. 19, 2018).
- *Aaronoff v. Olson*, No. B295388 (Cal. Ct. App. Jan. 24, 2023), *rehearing denied*, Feb. 23, 2023, *petition for review denied*, No. S278941 (Cal. Apr. 26, 2023).

The following proceedings are directly related to this case, within the meaning of Rule 14.1(b)(iii):

- *Olson v. Aaronoff*, No. 19STCV46503 (L.A. Cnty. Super. Ct. filed Dec. 23, 2019).
- *Olson v. Aaronoff*, No. B315237 (Cal Ct. App. Feb. 24, 2023), petition for review denied, May 31, 2023.
- *Aaronoff v. Olson*, No. 2:21-cv-09747-SB-PD (C.D. Calif dismissed Feb. 2, 2023).
- *Doe v. Olson*, No. 23-55219 (9th Cir.) (docketed Mar. 9, 2023).

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JURISDICTION

The judgment of the California Court of Appeal, Second Appellate District, was entered on January 24, 2023. A petition for review in the California Supreme Court was timely filed on March 6, 2023, which was denied on April 26, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the 14th Amendment, which contains the Due Process and Equal Protection Clauses provides:

> 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.

The California civil harassment restraining order statute is codified at Cal. Code Civ. Proc. § 527.6. Relevant provisions are reproduced at P. App. 145a.

INTRODUCTION

For an American living in poverty, few, if any, aspects of life are spared the impacts of this social and economic condition. Problems that might be considered small annoyances by most people, can all-too-easily lead to significant consequences for someone with fewer resources. Poverty increases the likelihood that others will seek to take advantage of a person, on the expectation a poor person is less likely to, for example, leave a job at which they are experiencing sexual harassment or assert their legal rights against an underhanded debt collector. For this reason, it is particularly important to ensure that people experiencing poverty are not further disadvantaged in the courts and face as few barriers as possible when it comes to asserting and protecting their rights in the civil justice system.

Unfortunately, we still fall far short of this objective. With insufficient legal aid funding and *pro bono* resources available to provide poor Americans with the same quality legal counsel to which wealthier Americans are accustomed, putative litigants often have to choose between not availing themselves of our courts, obtaining less capable and less experienced counsel, or self-representation.

As explained further below, this case is about two particular ways that a state court system—here, California—fails indigent litigants[1] in a manner that falls short of the requirements of the 14th Amendment's Due Process and Equal Protection Clauses: (1) by applying procedural rules to self-represented litigants in a manner that prevents the litigant from making her case fully; and (2) by allowing attorney's fees to be awarded against an indigent litigant without considering her ability to pay.

STATEMENT OF THE CASE

Petitioner Vidala Aaronoff is a disabled scholar and former teacher of indigenous sacred dance. As a result of car accidents in 2016 and 2018, she has been unable to work. She resides in a rent-controlled apartment that respondent converted into a condominium and relies on public assistance for support. Respondent Curtis Olson, in contrast, is an extremely wealthy real-estate developer and investor.

Petitioner and respondent have a fraught history. While he originally hired her to assist with the condominium redevelopment project, their relationship took a sharp turn after she rejected his advances. In 2015, his sexual assault, stalking and harassment of

[1] References in this petition to poor or indigent litigants should be understood as referring to civil litigants unless context indicate otherwise.

petition led her to seek protection via a civil harassment restraining order, a form of civil protection order available in California for victims of harassment. *See* Cal. Code Civ. Proc. § 527.6, P.App. 145a. A three year no-contact order was granted by consent of the parties. By 2017, however, petitioner once again started to fear for her safety as a result of renewed harassment and stalking, which, even though it involved third-persons, petitioner had reason to believe was being carried out on behalf of respondent. In response, petitioner sought a new civil harassment restraining order, which respondent opposed. Respondent also retaliated by seeking a civil harassment restraining order of his own against petitioner, based on the manner in which service of process occurred.

The two petitions were consolidated and a trial was held in the Los Angeles County Superior Court. Following the trial, the court concluded that neither party had proven its case and declined to grant either petition. With respect to petitioner's case, the court found that she had not carried her burden of proving by clear and convincing evidence that the harassment she experienced was attributable to respondent. P.App. 138a. Such failure should, in significant part, be attributed to the inadequate performance of her counsel who, among other things, based his trial strategy on the wrong standard of proof and failed to call witnesses with relevant knowledge.

Petitioner, now unrepresented by counsel, moved for reconsideration and a new trial on various grounds. She became concerned, however, when respondent, in opposing the motions, asserted that the evidence showed no connection between himself and one of the people believed to have been harassing petitioner on his behalf—a former professional baseball player named Lenny Dykstra. This is because petitioner and her

former counsel distinctly remembered respondent, under questioning, describing Mr. Dykstra as a "golf buddy," and recalling the two spending time golfing together in Mexico. When petitioner was finally able to obtain a copy of the trial transcript, she was shocked to discover that it had been altered, and that respondent's answers connecting him to Dykstra had been replaced with answers denying any connection.

Respondent applied for an award of attorney's fees, pursuant to the fee-shifting provision of the civil harassment restraining order statue, in response to which petitioner made a similar application. The court decided that each party was considered a "prevailing party" in the case brought by the other, and therefore entitled to an award of attorney's fees. P.App. 60a. However, due in significant part to the difference in rates charged by respondent's high-powered lawyer and petitioner's more modest solo practitioner, the court ended up requiring petitioner to pay respondent approximately $80,000, after setting off their respective awards. P.App. 63a, 88a.

As part of its fee award, the trial court also considered petitioner's ability to pay the post-set-off amount. Although petitioner was indigent and disabled, and had been granted *in forma pauperis* status, respondent falsely contended that petitioner actually owned the rental condominium unit in which she a tenant.[2] The court accepted respondent's evidence and, as a result, concluded (wrongly) that petitioner had the means to pay the approximately $80,000 award against her. P.App. 84a.

[2] In reality, it is actually *respondent* who, in fact, owns a 99.98% interest in the very condominium that he claimed was owned by petitioner.

Petitioner appealed the judgment against her (Appeal B295388), while both parties appealed the award of attorney's fees to the other (Appeals B298224 and B298532). Petitioner, still unrepresented, appealed the trial court's denial of her civil harassment restraining order petition, the award of attorney fees to respondent, and raised a claim of ineffective assistance of counsel.[3]

In its opinion, the Court of Appeal for the Second District first struck petitioner's opening brief in the above-listed appeals for failing to comply with the California Rules of Court. P.App. 19a-22a. With respect to the altered trial transcript, the court of appeals described petitioner's inclusion as part of her discussion of the trial transcript of an accurate version of respondent's testimony concerning his relationship with Mr. Dykstra as "[m]ost troubling." P.App. 21a. The court then found that petitioner had forfeited her arguments about the altered documents, explaining that she had argued on appeal that such documents constituted a fraud on the court, and yet fraud had not been among the grounds she raised below in seeking a new trial. P.App. 21a-22a. And, finally, the court held that there was no obligation on the trial court to assess a party's ability to pay when awarding attorney's fees. P.App. 27a.

Respondent sought review in the California Supreme Court, which was denied on April 26, 2023. P.App. 1a.

[3] Additional appeals of enforcement-related orders, not at issue in this Petition, also followed.

The actions of the Court of Appeal are inconsistent with the requirements of the Due Process and Equal Protection Clauses of the 14th Amendment. As explained further below:

- The Court of Appeal acted contrary to the requirements of the Due Process Clause by failing to consider the actual substance of *pro se* petitioner's arguments before declaring them to have been waived; and
- The Court of Appeal acted inconsistently with the Equal Protection Clause by failing to require consideration of a litigant's ability to pay before an award of attorney's fees issues against them.

The federal constitutional questions in these proceedings were implicit in the arguments that petitioner, a self-represented litigant, made below. With respect to Question 1, petitioner raised the issue of the altered trial transcript in the trial court, P.App. 286a, 296a-298a, the court of appeals, P.App. 240a-243a, and in her petition for review to the Supreme Court of California. P.App. 177a-179a. And, with respect to Question 2, petitioner raised the issue of an indigent litigant's inability to pay in the trial court, P.App. 277a-278a, the court of appeals, P.App. 203a-204a, and in her petition for review to the Supreme Court of California. P.App. 172a-175a.

Even if the federal constitutional issues identified in this petition were not explicitly raised in the state trial and appellate courts, this is because the claimed violations arose out of the failure of the state appellate courts to correct the errors made by the trial court or out of new failures on the part of the Court of Appeal to decide issues in a manner consistent with the federal constitution.

This Court nevertheless has jurisdiction to review the constitutionality of the state court judgements, *see Smith v. Phillips*, 455 U.S. 209, 221 (1982), because the

underlying issues were properly raised in state court and the Court is "not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Financial Services*, 500 U.S. 90, 99 (1991); *see also Singleton v. Wulff,* 428 U.S. 106, 121 (1976) (whether to resolve issues not raised below is within the discretion of an appellate court).

REASONS FOR GRANTING THE WRIT

I. THE CALIFORNIA COURT OF APPEAL FAILED TO PROTECT PETITIONER'S RIGHTS UNDER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE 14TH AMENDMENT

Under the Due Process Clause of the 14th Amendment, a state may not "deprive any person of life, liberty, or property, without due process of law. . . ". U.S. CONST. amdt. XIV, § 1. Here, California courts deprived petitioner of both her interest in obtaining protection from respondent by means of a civil harassment restraining order[4] and money (through the award of attorney's fees against her) without the procedural protections required by the Due Process Clause.

The requirements of due process depend on the nature of the interest at stake and the weight of that interest balanced against opposing government interests. *Goldberg v. Kelly*, 397 U.S. 254, 262-63 (1970). "'Due process,'" the Court has explained, "unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961).

[4] "Among the historic liberties so protected [by the Due Process Clause] was a right to . . . obtain judicial relief for[] unjustified intrusions on personal security." *Ingraham v. Wright*, 430 U.S. 651, 673 (1977).

In *Mathews v. Eldridge*, the Court articulated a three-part test to determine what process is required under the Due Process Clause, 424 U.S. 319, 335 (1976):

> Identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Id.

Among the most well-known requirements of due process, required when a proposed deprivation is intended to be final, are notice, *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), and the opportunity to be heard, *id.* at 313, before an impartial tribunal. *Goldberg*, 397 U.S. at 271.

Similarly, the Equal Protection Clause provides that a state may not "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amdt. XIV, § 1. Any time a person is harmed as a result of the government creating different classes of people, facially or *de facto*, whether such classification violates the Equal Protection Clause depends on the "relation between the classification adopted and the object to be attained." *Romer v. Evans*, 517 U.S. 620, 632 (1996). The applicable test, however, depends on the nature of the classification and of the affected rights. *See id*.

Classifications that do not burden a fundamental right or target a suspect class are subject to rational-basis review and will be upheld, as long as it bears a rational relation

to some legitimate end. *Id.* at 631. In contrast, where a classification does burden a fundamental right or target a suspect class, it is subject to strict scrutiny and will be struck down unless it is narrowly tailored and necessary to fulfill a compelling governmental interest. *San Antonio Indep. Sch. Dist. V. Rodriguez*, 411 U.S. 1, 16-17 (1973).

1. The court of appeals applied procedural requirements to petitioner, a *pro se* litigant, in an overly strict and formal manner, depriving her of the ability to fully make her case, in a manner inconsistent with the requirements of the Due Process Clause.

a. The court's actions

Despite petitioner's receipt of a no-contact order against respondent in 2015, respondent increasingly relied on associates to continue his campaign of threats and harassment against petitioner. These associates included former professional baseball player Lenny Dykstra, who (i) used a false name to sublet a room from petitioner, (ii) attempted to pressure petitioner to commit criminal acts and drop her lawsuit against respondent, (iii) appeared to stalk petitioner, and (iv) likely stole documents from petitioner concerning her lawsuit. As a result of these and other actions by respondent's associates, petitioner was forced into hiding for her safety. At the time, however, petitioner was not aware of Mr. Dykstra's relationship to respondent.

At trial, petitioner's attorney attempted to question respondent about his relationship with Mr. Dykstra. Asked whether he knew Mr. Dykstra, respondent began to explain that Mr. Dykstra was a "golf buddy" of his when respondent's counsel objected

on the grounds of relevance. The court immediately sustained the objection, ending the entire line of questioning.

In his opposition to petitioner's motions for reconsideration and a new trial, respondent stated that "there is nothing connecting Olson to Dykstra" and that during the trial "Olson denied knowing Dykstra." This greatly worried petitioner who distinctly remembered that Olson had testified differently at trial, making her concerned about possible alterations to the transcript. Petitioner therefore requested a copy from the court prior to the hearing on her motions for a new trial and for reconsideration. Court staff, however, withheld the transcript from petitioner, while the court declined her request for a continuance until she could obtain a copy.

When petitioner finally obtained a copy of the transcript, she discovered that line of questioning where respondent's described Mr. Dykstra as a "golf buddy" had been removed, as had opposing counsel's objection and the court's ruling. Instead, the altered transcript shows petitioner's counsel asking respondent "Are you friends with Mr. Dykstra?", "Do you maintain any sort of relationship with him?", and "Did you ever maintain any sort of relationship with Mr. Dykstra?" According to the altered transcript, respondent supposedly answered "no" to each question before counsel abruptly ended the line of questioning.

The trial court appeared to ignore the evidence of this relationship in finding that petitioner had not proven her case against respondent by clear and convincing evidence. The central shortcoming identified in the court's ruling with respect to petitioner's case was petitioner's alleged inability to connect harassment by third parties to respondent—

the precise issue addressed by the alterations to the trial transcript. P.App. 138a. Had the court considered respondent's acknowledgment that Mr. Dykstra was his "golf buddy," it very well may have concluded that this additional evidence meant petitioner had met her evidentiary burden and was therefore entitled to the restraining order that she was seeking.[5]

The Court of Appeal rejected petitioner's contention that she was a victim of a "fraud on the court" as a result of the altered transcript, and found that she had forfeited the issue by not previously raising the specific issue of fraud with the trial court in her motion for a new trial. P.App. 21a. The court, however, was wrong to find that the issue was forfeited, as petitioner was not "chang[ing her] position and adopt[ing] a new and different theory on appeal." P.App. 21a-22a (quoting *Cable Connection Inc. v. DIRECTV, Inc.*, 44 Cal.4th 1334, 1350 n. 12 (2008)). Contrary to the court's finding, petitioner had in fact raised the issue of fraud in connection with the altered transcript in her post-trial briefing, including through the submission of a declaration from petitioner's former attorney Benjamin Kanani as to the actual, unaltered exchange. P.App. 296a-297a.

The gravamen of petitioner's complaint was not the existence of fraud, but the existence of an altered trial transcript.[6] Yet, the Court of Appeal did no more than

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[5] The alterations to the transcript also meant that record for appeal lacked not only respondent's acknowledgment of his relationship with Mr. Dykstra, but the trial court's ruling preventing petitioner's counsel from inquiring further about the relationship between the two men, as well, thereby impairing petitioner's ability to raise this issue on appeal.

[6] Describing the issue as fraud was petitioner's attempt to find a legal "magic word" that would entitle her to relief, reflecting an understanding of the law common among laypeople without legal training. This can be seen from petitioner's frequent invocation of *U.S. v. Throckmorton* and its well-known, if often

compare her description of the issue before that court as one of "fraud on the court" with her description of the grounds for seeking a new trial, including "newly discovered evidence, abuse of discretion and misapplication of law by the trial court," before erroneously concluding that petitioner was raising a new issue for the first time on appeal. P.App. 21a.

Had the court looked behind petitioner's characterization of the issue to the actual substance, it would have realized that petitioner was not raising this issue for the first time on appeal. By failing to grant that basic consideration, the court neglected to provide petitioner with the leeway traditionally and appropriately due to *pro se* litigants, so as to prevent the inadvertent forfeiture of important rights simply because of petitioner's lack of legal training.[7]

Moreover, even if petitioner had neglected to raise the issue in the trial court, such neglect would nevertheless have been excusable, as she was unable to obtain a copy of the altered transcript from the clerk of court prior to the hearing on her motion for a new trial.

b. The due process violation

A "fair trial in a fair tribunal is a basic requirement of due process." *In re: Murchison*, 349 U.S. 133, 136 (1955). "[W]henever necessary to the protection of the

misunderstood, dicta that "fraud vitiates every thing." 98 U.S. 61, 66 (1878) (quoting J.C. Wells, A treatise on the doctrines of res adjudicata and stare decisis § 499 (1878)).

[7] For this same reason, the court was wrong to strike petitioner's entire opening brief, *see* P.App. 19a-22a, when it could have simply struck or disregarded the extraneous material that petitioner included.

parties, [due process of law] must give them an opportunity to be heard respecting the justice of the judgment sought." *Hagar v. Reclamation Dist.*, 111 U.S. 701, 708 (1884).

In this case, petitioner—by virtue of her status as a *pro* se litigant—was wrongly denied a fair hearing on her petition for a civil harassment restraining order against respondent. This is due to the appellate court's refusal to consider petitioner's evidence that the transcript of respondent being cross-examined had been altered in a manner that likely would have affected the trial court's consideration of an issue that it considered dispositive, namely whether the individuals alleged to be harassing petitioner were acting on behalf of respondent. If an accurate transcript, showing the relationship between respondent and Mr. Dykstra, had been before the court, it very well may have concluded that Mr. Dykstra's actions toward petitioner were likely taken on behalf of respondent.

By focusing only on the different words that petitioner used to describe the issue before the trial and appellate courts, the Court of Appeal improperly chose formalism over justice, allowing the court to avoid addressing petitioner's evidence that the transcript of respondent's testimony concerning Lenny Dykstra had been altered in a way that masked respondent's admission about his relationship with Dykstra.[8]

Applying the three-part *Mathews* test to the appellate court's action, the Court should be able to conclude the Due Process Clause required the Court of Appeals to look

[8] The Supreme Court of California, by turning down petitioner's petition for review, P.App. 1a, likewise did nothing to correct the errors of the trial court and the court of appeals.

beyond the differences in the descriptions that petitioner used to characterize the evidence of the trial transcript having been altered and compare the actual substance of the arguments that petitioner presented to each court, and then determine whether the trial court erred in not considering petitioner's allegations.

Petitioner's Interest: Petitioner has multiple, overlapping interests at stake. Substantively, she has an interest in obtaining protection from respondent via a civil harassment restraining order. Instrumentally, however, she also has interests in meaningful access to the courts, receipt of a fair hearing, the opportunity to present her case, fair consideration thereof, and treatment by the courts that makes the outcome a function of the strength of her case, rather than of her self-representation and lack of legal training. These instrumental interests may be summed up as an interest in the opportunity to avail herself of California's judicial system just as fully as a wealthier, represented litigant could and, in particular, the meaningful (and equal) opportunity to appeal alleged errors by the trial court.

Risk of Erroneous Deprivation and Value of Additional Procedures: The procedure employed by the Court of Appeal in deciding whether petitioner had presented the issue to the trial court first was simply to compare the characterizations of the problem alleged by petitioner in each court, find that petitioner characterized the issue differently and, thus, hold that the issue was forfeited. This procedure creates a significant risk of wrongly depriving a *pro se* litigant of the meaningful opportunity to appeal an alleged error by the trial court. This is because *pro se* litigants are unlikely to understand at the trial stage how the manner in which an issue is raised may impact an appeal, or to

understand at the appellate stage that there are consequences for the way an issue is presented, in the same way that a trained attorney, with an ethical obligation of competence, would. An unrepresented litigant is also unlikely to have the knowledge and skill to present an issue at the trial level in a manner appropriate to that stage, while also setting up an issue for appeal, if necessary.

The value of additional procedures—namely, to look beyond how a *pro se* litigant may characterize or categorize an issue in order to compare the actual substance that was put to the trial court with the substance of the issue raised on appeal would essentially negate the risks of erroneous deprivation identified above.

Government's Interest: The government's interests are not insubstantial. As the California Supreme Court has found, these interests include fairness to the trial court and opposing party, as well as encouraging litigants to raise issues as trial, so that they may be corrected. *See People v. Saunders*, 5 Cal. 4th 580, 590 (1993).

Balancing these issues demonstrates that the value to petitioner's interests, and the value of reducing the risk of erroneous deprivation of those interests, that additional procedures would create significantly outweighs any harm to the government's interests (or those of other litigants). They would not create any burden for courts of appeals—evaluating the substance of issues is what appellate courts do. Nor would they be unfair to trial courts because they do not affect the basic rules of waiver and forfeiture, thereby maintaining the incentive for litigants to raise issues at the trial court level and allow the court to correct its own mistakes.

The difference is only in the consideration given to inartful *pro se* filings and in affording unrepresented litigants the same sort of consideration we would all want if we found ourselves tasked with operating within a highly specialized field such a law, but without the training that everyone else has received. *Cf. Erickson v. Pardus,* 551 U.S. 89, 94 (2007) ("A document filed *pro se* is 'to be liberally construed'") (citing *Estelle v. Gamble,* 429 US 97, 106 (1976)).

2. The court of appeals held that attorney's fees may be awarded in connection with a petition for anti-harassment protective order without considering an indigent litigant's ability to pay, in a manner inconsistent with the Equal Protection Clause

a. The court's actions

Under the California statute authorizing civil harassment restraining orders, "[t]he prevailing party in an action … may be awarded court costs and attorney's fees, if any," Cal. Code Civ. Proc. § 527.6(s), P.App. 150a, and following the trial court's judgment, both parties moved for an award of fees. Because the parties had filed cross-petitions, both of which were denied, the court decided to treat each party as a "prevailing party" within the meaning of § 527.6(s) with respect to the petition brought by the other party and, therefore, entitled to its attorney's fees.

Petitioner had been represented through trial by a less expensive, less experienced solo practitioner, while respondent was represented by Mr. Eric Kennedy of the prominent Los Angeles law firm, Buchalter, named a "Top Litigator" by the Los Angeles Business Journal. As a consequence of this disparity between counsel, the court found that respondent was due approximately $119,000 in attorney's fees from petitioner,

while petitioner was due approximately $40,000 from respondent. Petitioner, an indigent person, thus owed approximately $79,000 to respondent, already an extraordinarily wealthy person, after the two awards were set off against each other. P.App. 63a, 88a.

The court, seeking to do "substantial justice," also considered petitioner's ability to pay the award of attorney's fees. The court concluded that petitioner possessed the ability to pay based on real estate documents submitted by respondent that petitioner argued had been falsified. On appeal, petitioner argued that the court had abused its discretion by failing to properly consider her ability to pay, including through its reliance on the falsified documents purporting to show that she owned the condominium unit in which she resided. P.App. 203a-204a.

The Court of Appeal declined to address the documents issue, which it considered no more than a question of credibility. P.App. 22a. It also held that the court had not abused its discretion, as § 527.6(s), the fee-shifting provision at issue, did not require a judge to consider litigants' ability to pay before awarding attorney's fees. P.App. 27a.

b. The equal protection violation

This Court has yet to find that the poor or indigent are a suspect class. It has often held, however, that access to the courts is a fundamental right, whether generally,[9] or, at

[9] The Court has repeatedly recognized the existence of a constitutional right of access to the courts, grounded variously in the Article IV Privileges and Immunities Clause, First Amendment Petition Clause, Fifth Amendment Due Process Clause, and the Fourteenth Amendment Equal Protection and Due Process Clauses. *Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002) (*citing Chambers v. Baltimore & Ohio R. Co.*, 207 U. S. 142, 148 (1907); *Blake v. McClung*, 172 U. S. 239, 249 (1898); *Slaughter-House Cases*, 16 Wall. 36, 79 (1873), *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U. S. 731, 741 (1983); *California Motor Transport Co. v. Trucking Unlimited*, 404 U. S. 508, 513 (1972), *Murray v. Giarratano*, 492 U. S. 1, 11, n. 6

a minimum, when another fundamental right is at stake. *See, e.g.*, *M.L.B. v. S.L.J.*, 519 U.S. 102, 113 (1996) ("Crucial to our decision in *Boddie* was the fundamental interest at stake.").

Equal protection cases finding that civil litigants cannot be denied access to the courts for financial reason generally fit into two lines. The cases following *Griffin v. Illinois*, 351 U.S. 12 (1956) "stand for the proposition that a State cannot arbitrarily cut off appeal rights for indigents while leaving open avenues of appeal for more affluent persons," *Ross v. Moffitt*, 417 U. S. 600, 607 (1974), while cases such as *Little v. Streater*, 452 U.S. 1 (1981) and *M.L.B* have rejected financial barriers to accessing to the courts for family law-related purposes.[10] In contrast, *United States* v. *Kras,* 409 U. S. 434 (1973), held that no right to meaningful access to courts exists for a bankruptcy case, and *Ortwein v. Schwab*, 410 U.S. 656 (1973) (per curiam), found the same with respect to government benefits.

In *Ortwein*, the Court also stated that barriers to access to the courts will be subject to rational review, unless the reason why access is sought implicates a fundamental right. 410 U.S. at 660. *Ortwein*, *Kras* and their progeny thus appear to

(1989) (plurality opinion); *Walters v. National Assn. of Radiation Survivors*, 473 U. S. 305, 335 (1985), , *Pennsylvania v. Finley,* 481 U. S. 551, 557 (1987), *Wolff v. McDonnell*, 418 U. S. 539, 576 (1974); *Boddie v. Connecticut*, 401 U. S. 371, 380-381 (1971)); *see also Tennessee v. Lane*, 541 U.S. 509, 533-34 (2004) (Section 5 of the Fourteenth Amendment). A right that is explicitly or implicitly guaranteed by the Constitution is a fundamental right. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1973).

[10] Even without always doing so explicitly, the equal protection decisions of this Court with respect to civil litigants have subjected classifications that burden economic and social welfare litigation to rational basis review, while those that implicate family issues have been treated to strict scrutiny, consistent with the traditional distinction in 14th Amendment jurisprudence.

require two fundamental rights in order to make a valid claim that the lack of meaningful access to the courts violates the Equal Protection Clause: the fundamental right of access to the courts, *plus* the interest underlying the particular reason why access is sought now.

Regardless of which line of cases has the better argument, the right to petition for a civil harassment restraining order should be understood to implicate a second fundamental right, distinct from the right to access the courts: the right to personal security.

In California, a victim of harassment may petition the courts for a civil harassment restraining order, enjoining the harasser from "harassing, intimidating, molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, abusing, telephoning, … destroying personal property, contacting, … or coming within a specified distance of, or disturbing the peace of, the petitioner." Cal. Code Civ. Proc. § 527.6(b)(6)(A), P.App. 145a. Harassment is defined to include "unlawful violence, a credible threat of violence, or a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose." *Id.*, § (b)(3). In other words, a civil harassment restraining order should be understood a mechanism for an individual to keep themselves safe from violence or the threat thereof.

This right was of great concern to the Founders and is the animating force behind the 4th Amendment, which begins by referencing "the right of the people to be secure in their persons…" U.S. CONST. amdt. IV. This interest also finds expression in the 2nd

Amendment and its animating concern with self-defense. *See McDonald v. Chicago*, 561 U.S. 742, 767 (2010) ("[I]ndividual self-defense is 'the central component of the Second Amendment right'") (quoting *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008)). A civil harassment protection order is no less a means of self-defense than carrying a handgun.

What that means is that a classification on the basis of wealth that burdens meaningful access to the courts for the purpose of obtaining a civil harassment restraining order should be subject to strict scrutiny and found to be unconstitutional unless it is narrowly tailored and necessary to fulfill a compelling governmental interest.

Here, it is the award of attorney's fees to any prevailing party without regard for the losing party's ability to pay that creates this *de facto* classification.[11] For an indigent individual, it is impossible to petition for a civil harassment restraining order without the threat of a ruinous judgment simply because the court declines to grant your petition. This fee-shifting provision thus operates much like the threat of sanctions, except without any requirements such as bad faith or a finding of improper purpose.

Moreover, when there is a significant disparity between the parties' resources, the absence of a requirement to consider ability to pay (as per the Court of Appeal) provides a wealthy litigant with the opportunity gain significant leverage over a poor one by

[11] A classification can exist even if the parties are formally afforded the same treatment. This is because treating unlike cases alike is no less a cause of differential treatment than treating alike cases differently. *Cf. Griffin v. Illinois*, 351 U.S. 12, 23 (Frankfurter, J. concurring) (quoting Anatole France that "[t]he law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.") (citation omitted).

hiring the most expensive attorneys and running up the bills. Such gamesmanship would raise the stakes for an indigent litigant significantly, knowing that she faces an impossibly judgment against her if she loses the case, while a wealthy litigant may hardly notice. Under the circumstances, a rational indigent petitioner would likely be forced to agree to a consent order that falls short of what she originally sought and to which she may be entitled, or, indeed, to withdraw the petition entirely. A rational indigent respondent would similar face extreme pressure to accept the other party's demands and not oppose the entry of an order against him, based only on the parties' relative finances, not the merits of their cases.

If access to the courts is conditioned on accepting the risk of financial ruin, it can hardly be considered meaningful access. As this Court stated in *Douglas v. California*, "For there can be no equal justice where the kind of [judicial proceeding] a [person] enjoys 'depends on the amount of money he has.'" 372 U.S. 35, 355 (1963) (quoting *Griffin*, 351 U.S. at 19.).

Applying strict scrutiny, this *de facto* classification fails as it is neither necessary nor narrowly tailored to the achievement of the government's objective.

Fee-shifting statutes are generally understood to have two purposes: to incentivize lawyers to help bring meritorious cases and to disincentivize the filing of cases without merit. The Court of Appeal, in ruling that there was no requirement to consider ability to pay, relied only on the fact that nothing in the text required it; the court identified no other reason or purpose that the elimination of that requirement was supposed to serve. P.App. 27a.

The classification at issue is a consequence of the difference between a fee-shifting statute where an indigent litigant's ability to pay is taken into consideration and one where it is not. It can hardly be said that removing consideration of a litigant's ability to pay will contribute to the bringing of more strong cases and fewer weak ones. Indeed, as explained, it is likely to lead to fewer cases of all kind because it creates significantly stronger consequences for overestimating the strength of one's case or defense. These broad effects also mean that the classification cannot be considered narrowly tailored.

II. THE COURT SHOULD GRANT CERTIORARI TO ADDRESS IMPORTANT ISSUES AT THE INTERSECTION OF CONSTITUTIONAL LAW, POVERTY, AND INEQUALITY

American society has two great, intersecting dividing lines: race and poverty. For most, if not all, of our country's history, race has been out chief preoccupation, for better or worse. In recent years, however, this Court has been leading this country in a different direction, declaring that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race," *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 748 (2007), thereby signaling the start of a new colorblind era.

The question is, as the space available for racial justice shrinks, will the Court decide that the Constitution no longer plays a role in "form[ing] a more perfect Union, establish[ing] Justice, [and] insur[ing] domestic Tranquility," U.S. CONST. pmbl., or will it turn its eyes in the direction of poverty and inequality, revisiting those precedents that may have outlived whatever usefulness they once had, and taking a new look at those

approaches to constitutional law that, instead of "promot[ing] the general Welfare," *id.*, may be causing harm to those of our fellow citizens with the fewest resources?[12]

This petition presents two such opportunities to begin answering the many "important question[s]of federal law that [have] not been, but should be, settled by this Court." SUP. CT. R. 10(c).

The first question speaks to the experience and perspective of a *pro* se litigant. For *pro se* litigants, rules of procedure can be a minefield. And without training as a lawyer, it is far too easy for a self-represented litigant to miss or misunderstand the meaning or consequences of an action.

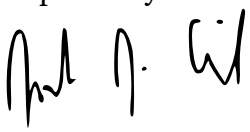
And the problem underlying the second question is the cause of very serious and real issues. For many low-income Californians, such as petitioner, the Court of Appeal's ruling effectively closes the courtroom door to you when it comes to seeking protection against a wealthy individual through a civil harassment protection order, at least if you are unwilling to risk your entire financial future on prevailing over someone with far more resources to spend. We should not require that of people, nor should the Constitution permit it.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

[12] *See generally*, *e.g.*, Stephen Loffredo, *Poverty, Democracy, and Constitutional Law*, 141 U. PA. L. REV. 1277 (1993).

Respectfully submitted,



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