

No. 23-6338

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IN THE  
SUPREME COURT OF THE UNITED STATES

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MARC FISHMAN,  
*Petitioner,*

v.

NEW YORK  
*Respondent.*

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On Petition for a Writ of Certiorari to  
the Court of Appeals of New York

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**BRIEF AMICUS CURIAE OF DISABILITY RIGHTS  
NEW YORK IN SUPPORT OF PETITIONER**

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## INTEREST OF THE AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Disability Rights New York (“DRNY”) respectfully submits this brief *amicus curiae* in support of Petitioner Marc Fishman.<sup>1</sup>

As the designated Protection & Advocacy System for the State of New York, DRNY has a compelling interest in legal matters that adversely impact on the constitutional rights of New York residents with disabilities. DRNY is interested in this matter due to the nature of the conduct committed by staff in court systems of the State of New York, including the failure to provide reasonable accommodations to petitioner at consequential court proceedings, the extraordinary impact of such failure on petitioner as a person with disabilities, and the potential for these court systems to violate the constitutional rights of other individuals with disabilities if such practices continue.

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<sup>1</sup> Pursuant to this Court’s Rule 37.2, counsel of record for all listed parties received notice at least 10 days prior to the due date of the Amicus Curiae’s intention to file this brief.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

## SUMMARY OF ARGUMENT

The Petition presented by Marc Fishman seeks review of the New York Court of Appeal's judgement in denying petitioner's application regarding an order of protection against him made pursuant to New York Criminal Procedure Law § 530.12 ("CPL § 530.12"). On its face, and as applied to Petitioner, Marc Fishman, CPL § 530.12 is unconstitutional. This statute does not provide the minimum due process guarantees required under the Fourteenth Amendment. Nor has the New York State court system remedied the facial violations of CPL § 530.12 when applying the statute to Petitioner. As an individual with a disability, the manner in which CPL § 530.12 has been applied to Petitioner highlights the historical nature of court discrimination against people with disabilities. The lack of any pre-deprivation hearing or post-deprivation remedy to appeal or modify an order of protection created under this law grievously harms an individual's rights to due to process and their ability to protect their own personal and property interests.

## ARGUMENT

### **I. CPL § 530.12 is unconstitutional on its face and as applied to Petitioner as it fails to provide sufficient due process protections to those affected by its orders of protection.**

Mr. Fishman has lost the ability to be meaningfully involved in his children's lives and education for years and has no ability to modify or appeal this order because of the way that §530.12 has been applied against him. CPL § 530.12, which regulates the creation of temporary and final orders of protection, violates the Constitution by failing to provide sufficient protections as required under the Due Process Clause of the Fourteenth Amendment.

CPL § 530.12 permits New York State courts to issue a temporary order of protection when any crime or violation between household members is related to a pending criminal action. N.Y. C.P.L. § 530.12 (1). These can be issued with a warrant for arrest, an order to commit a defendant to custody, and as a condition for bail, but under the statute orders can also be issued *ex parte* and prior to any hearing. N.Y. C.P.L. § 530.12 (3, 4). The statute places New York courts in a position to wield extraordinary power over the affected person's access not only to their residence and the property therein, but also to their child visitation rights. N.Y. C.P.L. § 530.12 (1-8). The grounds for temporary withholding of these fundamental rights need not be explicitly violent or abusive in nature.



Moreover, temporary orders of protection are issued prior to conviction or any evidentiary showing of criminal responsibility. *Id.* While New York courts *can* conduct evidentiary hearings on the scope or appropriateness of a temporary order of protection when requested to do so via writ of mandamus, the statute sets forth no procedure by which an individual can dispute the issuance of such order or move for alteration of its content. *Matter of Crawford v. Ally*, 150 N.Y.S.3d 712 (2021); see also *People v. Simmons*, N.Y.S.3d 715 (N.Y.Crim.Ct. 2023); *People v. Riley*, 181 N.Y.S.3d 873 (N.Y.Crim.Ct. 2023). A court is also not *required* to provide a *Crawford* hearing on request.

Written notices that are required to be incorporated into these orders of protection state that they “can only be modified or terminated by the court,” and provide individuals subject to such orders with no identified method by which they can petition the court for the termination or modification of the order. N.Y. C.P.L. § 530.12 (6). Additionally, the statute sets forth limited notice and service requirements. N.Y. C.P.L. § 530.12 (8). These factors collectively place virtually unlimited power in the hands of petitioners and state actors seeking such orders and the court systems who issue such orders.

The “right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.” *Mathews v. Eldridge*, 96 S. Ct. 893, 902, (1976) (quoting *Joint Anti-Fascist Comm. v. McGrath*, 71

S.Ct. 624, 646 (1951) (Frankfurter, J., concurring)). The Court has established minimum due process requirements for a deprivation due to state proceedings, which generally require at least a post-deprivation remedy, if not also a pre-deprivation remedy.<sup>2</sup> Under CPL § 530.12, no specific pre-deprivation *or* post-deprivation process exists for these orders of protection. CPL §530.12 does not meet this minimum standard and instead grants judges a range of power over an individual's fundamental personal and property interests with insufficient methods of due process to address that deprivation.

CPL § 530.12 also violates the minimum due process protections as applied to Petitioner. Mr. Fishman was never provided with a copy of the order of protection against him nor any opportunity to be heard regarding the order.<sup>3</sup> Mr. Fishman was not even aware of the order of protection against him until he attempted to participate in his child's education meeting and was barred from it. He has also been barred from any visitation with his children due to the order. Mr. Fishman attempted to modify the order of protection but was denied that ability by the *sua sponte* anti-filing injunction made against him by the

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<sup>2</sup> *Hudson v. Palmer*, 104 S. Ct. 3194, 3203 (1984); *Mathews v. Eldridge*, 96 S. Ct. at 900.

<sup>3</sup> Petitioner notes that despite claim that a hearing was held on the order of protection, Clerk of that court confirmed that no proceeding was held on that date. Furthermore, Mr. Fishman has been told that he is unable to appeal this order because it is a temporary order of protection, but the form used is that of a final order of protection. Pet'r's Br. 2-3; Pet'r's App. 14-20.

court.<sup>4</sup> Mr. Fishman's appeal was also rejected and he was informed that he had no statutory right to appeal the order.<sup>5</sup> The order of protection was reissued April 28, 2023, but again Mr. Fishman was not provided with a hearing or any ability to speak on his behalf regarding the deprivation of his parental rights.<sup>6</sup>

As noted above, one of the focuses in determining if there are sufficient due process protections for a deprivation of property is if there is a pre- or post-deprivation remedy.<sup>7</sup> Here, the Petitioner has received neither. In *People v. Koertge*, the court felt there was sufficient protections regarding due process because they are "issued in coordination with the bail hearing" and so the defendant is present and presumably able to present evidence then. *People v. Koertge*, 701 N.Y.S.2d 588, 594 (Dist. Ct. 1998). However, CPL §530.12's language does not require orders of protection to be issued at a bail hearing. Even if it did, Mr. Fishman did not receive a hearing prior to the issuance of this order. *Koertge* also notes that temporary orders of protection are "automatically limited by the speedy trial limitations," but that does not apply to CPL §530.12. *Id.* Even if the orders of protection were limited by these requirements, the orders against Mr. Fishman's have long since exceeded those limitations.

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<sup>4</sup> Pet'r's Br. 2

<sup>5</sup> Pet'r's Br. 3-4; Pet'r's App. 4

<sup>6</sup> Pet'r's Br. 4

<sup>7</sup> *Hudson*, 104 S. Ct. at 3203; *Mathews*, 96 S. Ct. at 900.

The grievous nature in which §530.12 was applied to Petitioner is heightened in light of his status as an individual with disabilities and in the repeated issues he encountered when requesting accommodations for the related proceedings. Any burden on due process created by §530.12 is felt more severely by people with disabilities, who face unique barriers to court access that individuals without disability generally do not. *Infra*, sec. II. Mr. Fishman has had to navigate the order of protection against him and §530.12's insufficient due process protections, while also navigating the court system and its procedures as an individual with disabilities that affect his cognition and hearing.<sup>8</sup>

Both the language of CPL §530.12 and the manner in which it has been applied to Mr. Fishman are unconstitutional for lack of due process protections.

## **II. The continued use of CPL §530.12 allows for the historical perpetuation of court discrimination against people with disabilities.**

Individuals with disabilities are uniquely and disproportionately harmed by CPL § 530.12's lack of due process due to the history of discriminatory treatment of people with disabilities by our court systems.<sup>9</sup> This court has previously noted a "pervasive

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<sup>8</sup> Pet'r's Br. 11.

<sup>9</sup> Americans with Disabilities Act, Findings and Purpose, 42 U.S.C.A. § 12101 [finding that "the continuing existence of unfair and unnecessary discrimination and prejudice denies

unequal treatment of persons with disabilities in the administration of state services and programs, including systematic deprivations of fundamental rights.” *Tennessee v. Lane*, 124 S. Ct. 1978, 1980 (2004). Especially notable here due to Mr. Fishman’s experiences is the history and continued tendencies of court systems to discriminate against parents with disabilities.<sup>10</sup> Mr. Fishman’s circumstances exemplify the discriminatory impact of §530.12 on individuals with disabilities.

Manifestations of many disabilities, including traumatic brain injury, developmental and intellectual disabilities, and significant mental health disabilities, result in an inability to comprehend, process, retain and act on information provided.<sup>11</sup>

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people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous. . .].

<sup>10</sup> A study by the Nat’l Council on Disability found rates in which child custody is removed from a parent with a disability to be between 70-80% for those with psychiatric disabilities, 40-80% for parents with an intellectual disability, and 13% of parents with physical disabilities reporting discriminatory treatment in custody cases. Nat’l Council on Disability, *Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children* 43 (2012), [http://www.ncd.gov/sites/default/files/Documents/NCD\\_Parenting\\_508\\_0.pdf](http://www.ncd.gov/sites/default/files/Documents/NCD_Parenting_508_0.pdf)

<sup>11</sup> Tom N. Tombaugh et al., *The effects of mild and severe traumatic brain injury on speed of information processing as measured by the computerized tests of information processing (CTIP)*, 22 Archives of Clinical Neuropsychology 25 (Jan. 2007) (“Overall, the results are consistent with the position that slowness of information processing occurs with TBI and increases with the severity of the injury”); Wen Jia Chai et al., *Working Memory From the Psychological and Neurosciences*

These abilities are integral in navigating the legal system and parsing legal documents such as the orders of protection at issue here. Failure to comply with the terms of these orders will likely result in a finding that the order has been violated and may result in jail detention and subsequent criminal conviction. N.Y. C.P.L. § 530.12 (10).

CPL § 530.12 does not direct that orders be explained to the person who it is issued against or be provided in a language or format they can understand. Because of this, a person with a disability that affects their comprehension, reading, or memory is subjected to penalties for *willfully* violating an order of protection even if they have only confirmed they received the order. (see *People v. Inserra*, 4 N.Y.3d 30, 823 N.E.2d 437 (2004) [in which the court found the defendant had sufficient knowledge of the details of an order of protection against him for the charge of criminal contempt because his signature was on the order.]).

The absence of meaningful due process protections in C.P.L. § 530.12 subjects people with certain disabilities to a disproportionate potential that an order of protection will be issued against them with no guarantee of pre- or post-deprivation remedy. Many disabilities, including several significant mental illnesses, are marked by behavior that can be viewed

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*Perspectives: A Review*, 9 Front. Psychol. (2018); Thang M. Le et al., *Alterations in visual cortical activation and connectivity with prefrontal cortex during working memory updating in major depressive disorder*, 14 NeuroImage: Clinical 43 (2017).

as aggressive or threatening if an individual is not given a method of remedy in which to explain to the court system how their disability may affect their behavior.<sup>12</sup> Traumatic brain injuries, commonly referred to as “TBI,” can affect the communication of the person affected, including their ability to control the volume of their voice.<sup>13</sup> Tourette Syndrome vocal tics can result in the uncontrolled utterance of words and phrases, which could include words or phrases that seem threatening or aggressive.<sup>14</sup> The insufficient due process rights of CPL § 530.12 leave these individuals with no guaranteed way in which to ensure a court properly considers their symptoms when considering whether an individual’s behavior qualifies the need for an order of protection against them.

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<sup>12</sup> W W McKinlay et al., *The short-term outcome of severe blunt head injury as reported by relatives of the injured person*, 44 J. Neurology, Neurosurgery, and Psychiatry 527 (1981); Marie E. Rueve & Randon S. Welton, *Violence and mental illness*, 5 Psychiatry Edgemont 34 (2008); A Fresán et al., *Stigma and perceived aggression towards schizophrenia in female students of medicine and psychology*, 5 Salud Mental 41 (2018).

<sup>13</sup> Angela Morgan, *Dysarthria in children and adults with TBI*, in *Social and Communication Disorders Following Traumatic Brain Injury* 218 (Skye McDonald et al. eds., 2<sup>nd</sup> ed. 2014) [“Estimates of the incidence of dysarthria following severe TBI vary widely but probably affect around one-third of adults. . .”]; Marc Fagelson & David M. Baguley, *Hyperacusis and Disorders of Sound Intolerance: Clinical and Research Perspectives*, 149-166 (2018).

<sup>14</sup> American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 81 (5th ed. 2013); Tourette Association of America, <https://tourette.org/about-tourette/overview/what-is-tourette/> (last visited Jan. 16, 2024).

The lack of pre-deprivation or post-deprivation remedy for these orders of protection, leads to individuals with disabilities being unaware of or lacking an understanding of the order made against them which in turn leads to the individual unknowingly acting in a way that violates it.<sup>15</sup> This lack of notice and ability to respond to the deprivation disproportionately impacts individuals with disabilities. For example, where an order is issued barring a wheelchair user from their wheelchair accessible home, that person would not only be required to find a new place of residence, but also to immediately engage in the challenging endeavor of finding a new, *accessible* residence. Without the requirement of a procedure by which people with disabilities can challenge the order of protection or its breadth, immediate and significant harm is inevitable. As noted above, prompt evidentiary hearings related to the issuance of orders of protection pursuant to *Crawford* are not required by the courts. Also, *Crawford* petitions require that either the individual or counsel promptly file a petition to request the hearing. For individuals with disabilities, additional accessibility barriers like this which require the legal services of someone with sufficient knowledge of the processes to navigate such a petition or require the individual with disability to parse pro se the requirements for filing such an order operate to only further the inaccessibility issues an individual

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<sup>15</sup> The school specifically noted that they denied Mr. Fishman from participating in his children's meeting as it would involve making "virtual contact" with his wife—thus violating the order of protection. Pet'r's App. 19.



with disabilities may already be experiencing in engaging with the legal system.

For all of the above-cited reasons, DRNY asserts that New York's process for issuance and service of orders of protection does not align with the constitutional protections and minimum due process requirements afforded to individuals under the Constitution and poses an exacerbated risk of harm to individuals with disabilities like Petitioner.

## CONCLUSION

For all of the above-cited reasons stated above, DRNY respectfully asserts that Petitioner's Writ of Certiorari should be granted.

DATED: January 19, 2024.

Respectfully submitted,

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