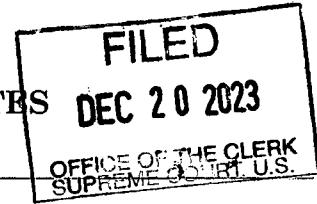


No. 23-6349

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES



DERRICK MARTIN KING, *Petitioner*

vs.

CTTT ENTERPRISES LLC dba BUDGET CAR MART, *Respondent*

*On Petition for Writ of Certiorari to the Ohio Ninth District Court of Appeals*

**PETITION FOR WRIT OF CERTIORARI**

DERRICK MARTIN KING  
1445 Crestview Avenue  
Akron, Ohio 44320-4049

*Pro se Petitioner*

## **QUESTIONS PRESENTED FOR REVIEW**

Whether the Supreme Court of Ohio's administrative orders necessitated by the COVID-19 pandemic regarding the use of remote depositions violates a civil litigant's constitutional right to access to the courts and due process of law under the First and Fourteenth Amendments.

**LIST OF PARTIES**

Petitioner **DERRICK MARTIN KING** (hereinafter "Mr. King") is an individual adult person who purchased a motor vehicle. Mr. King resides in Akron, Ohio.

Respondent **CTTT ENTERPRISES LLC dba BUDGET CAR MART** (hereinafter "BCM") is an Ohio limited liability company with a principal place of business in Springfield Township, Ohio and Norton, Ohio. CTTT Enterprises LLC operates two (2) used car dealerships under the fictitious name Budget Car Mart.

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**PETITION FOR A WRIT OF CERTIORARI**

Petitioner DERRICK MARTIN KING, appearing pro se, respectfully petitions this Court for a writ of certiorari to review the judgment of the Ohio Ninth District Court of Appeals.

**OPINION BELOW**

The decision of the Ohio Ninth District Court of Appeals (attached herein and marked as APPENDIX A) which affirmed the decision of the Summit County (Ohio) Court of Common Pleas is reported at 2023-Ohio-2756, 2023 Ohio App. LEXIS 2720, 2023 WL 5093868 (Aug. 9, 2023).

The decision of the Ohio Supreme Court declining jurisdiction (attached herein and marked as APPENDIX B) is unpublished and reported in table form at 2023-Ohio-3670, 171 Ohio St.3d 1456, 218 N.E.3d 974 (Oct. 10, 2023).

**STATEMENT OF JURISDICTION**

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257(a) as he timely filed this petition for writ of certiorari within ninety (90) days of the Ohio Supreme Court's decision which declined jurisdiction.

**CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

U.S. Const. amend. I (1791) states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

U.S. Const. amend. XIV § 1 (1868) states that:

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.

Ohio Const. art. I § 16 (1912) states that:

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

### **STATEMENT OF THE CASE**

#### A. Global Pandemics and their Effects on the Courts.

##### 1. *The influenza pandemic of 1918.*

The 1918 influenza, more commonly known as the "Spanish flu," spread from 1918-1919 and infecting nearly 500 million people worldwide. U.S. Centers for Disease Control, *The 1918 Flu Pandemic: Why It Matters 100 Years Later* (May 14, 2018), available online at <https://blogs.cdc.gov/publichealthmatters/2018/05/1918-flu/> (last accessed Dec. 14, 2023). The situation was very dire. As the U.S. Centers for Disease Control noted:

An estimated 195,000 Americans died during October alone. In the fall of 1918, the United States experienced a severe shortage of professional nurses during the flu pandemic because large numbers of them were deployed to military camps in the United States and abroad. A black-and-white advertisement for the Chicago School of Nursing. This shortage was made worse by the failure to use trained African American nurses. The Chicago chapter of the American Red Cross issued an urgent call for volunteers to help nurse the ill. Philadelphia was hit hard by the pandemic with more than 500 corpses awaiting burial, some for more than a week. Many parts of the U.S. had been drained of

physicians and nurses due to calls for military service, so there was a shortage of medical personnel to meet the civilian demand for health care during the 1918 flu pandemic. In Massachusetts, for example, Governor McCall asked every able-bodied person across the state with medical training to offer their aid in fighting the outbreak.

As the numbers of sick rose, the Red Cross put out desperate calls for trained nurses as well as untrained volunteers to help at emergency centers. In October of 1918, Congress approved a \$1 million budget for the U. S. Public Health Service to recruit 1,000 medical doctors and more than 700 registered nurses.

At one point in Chicago, physicians were reporting a staggering number of new cases, reaching as high as 1,200 people each day. This in turn intensified the shortage of doctors and nurses. Additionally, hospitals in some areas were so overloaded with flu patients that schools, private homes and other buildings had to be converted into makeshift hospitals, some of which were staffed by medical students.

*Id.* As a result of the pandemic, this Court postponed scheduled arguments, and denied entry into the courthouse to all persons but lawyers.<sup>1</sup> See Mark Walsh, *Outbreaks of Disease Have Shuttered the Supreme Court Going Back More Than 2 Centuries*, ABA Journal (Mar. 19, 2020), available online at <https://www.abajournal.com/web/article/outbreaks-have-shuttered-the-supreme-court-going-back-more-than-two-centuries> (last accessed Dec. 12, 2023); Claire Cushman, *Epidemics and the Supreme Court*, Supreme Court Historical Society (Jan.

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<sup>1</sup> In 2001, this Court was affected by another public health crisis, when anthrax-laden mail was sent to several government departments. See R. Hobday & J. Cason, *The Open-Air Treatment of Pandemic Influenza*, American Public Journal of Health (Oct. 2009), available online at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4504358/pdf/AJPH.2008.134627.pdf> (last accessed Dec. 12, 2023). However, the justices were able to move to a nearby courthouse used by the D.C. Circuit Court to avoid contamination. *Id.*

7, 2021), available online at <https://supremecourthistory.org/scotus-scoops/epidemics-and-the-supreme-court/> (last accessed Dec. 12, 2023).

2. *The severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) outbreak of 2019-2020.*

In December 2019, the severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) (hereinafter “COVID-19”) appeared in Wuhan, China. Denis Chow, *Where Did the Coronavirus Come From? Past Outbreaks Provide Hints*, NBC News (Feb. 28, 2020), available online at <https://www.nbcnews.com/science/science-news/where-did-new-coronavirus-come-past-outbreaks-provide-hints-n1144521> (last accessed Dec. 14, 2023). It was marked by mild to severe symptoms that include fever, cough, shortness of breath, chills, muscle pain, headache, sore throat, loss of taste or smell, congestion, runny nose, nausea, vomiting, and diarrhea. National Found. for Infectious Diseases, *2019 Novel Coronavirus (COVID-19) Outbreak*, available online at [www.nfid.org/infectious-diseases/19036/](http://www.nfid.org/infectious-diseases/19036/) (last accessed Jan. 29, 2021). People also could be asymptomatic yet test positive for the virus. U.S. Centers for Disease Control and Prevention, *Clinical Care Guidance*, available online at [www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html](http://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html) (last updated Feb. 16, 2021). As a result of its silent spread, affected individuals may experience the full magnitude of the virus or nothing at all. Id. This causes the kind of fear that causes people to hoard toilet paper, flour, and hand-sanitizer. See Carol Mathews, *Hoarding and the COVID-19 Pandemic*, Psychology Today (Oct. 30, 2020), available online at [www.psychologytoday.com/us/blog/overcome-anxiety/202010/hoarding-and-the-](http://www.psychologytoday.com/us/blog/overcome-anxiety/202010/hoarding-and-the-)

covid-19-pandemic (last accessed Dec. 14, 2023); Emma Balter, *From Toilet Paper to Roller Skates, These Were the Great Shortages of 2020*, Houston Chronical (Dec. 30, 2020), available online at <https://www.houstonchronicle.com/life/article/shopping-shortages-2020-covid-pandemic-15836207.php> (last accessed Dec. 14, 2023). At its core, the fear stokes panic; the virus has a highly contagious nature and sometimes a deadly outcome. U.S. Centers for Disease Control and Prevention, *COVID-19: Frequently Asked Questions*, available online at <https://www.cdc.gov/coronavirus/2019-ncov/faq.html> (last updated May 7, 2021).

In March 2020, the novel coronavirus (“COVID-19”) made its impact on the entire planet. More than 40 million Americans have been infected with the COVID-19 virus and more than 653,000 have died from issues related to COVID-19. Centers for Disease Control and Prevention. *COVID data tracker*, available online at <https://covid.cdc.gov/covid-data-tracker/#datatracker-home> (last accessed May 4, 2023).

Since March 2020, no institution has been immune to the COVID-19 pandemic, including the courts. Jury trials in every state have been halted for months. Michael Shammas & Michael Pressman, *Memorandum: The Permissibility & Constitutionality of Jury Trial by Videoconference*. Civil Jury Project (Júl. 30, 2020), available online at <https://civiljuryproject.law.nyu.edu/memorandum-the-permissibility-constitutionality-of-jury-trial-byvideoconference/> (last accessed Dec. 12, 2023). Texas was the first state to fully attempt to hold both a bench trial and a civil jury trial on a video conferencing platform. On April 22, 2020, a one-day bench

trial was held in Harris County, Texas by Judge Beau Miller, which was then live streamed on the court's website. Daniel Siegal, *Texas Court Pioneers Trial by Zoom in Attorney Fee Dispute*, Law360 (Apr. 22, 2020), available online at [www.law360.com/articles/1265459/texas-court-pioneers-trial-by-zoom-in-atty-fee-dispute](http://www.law360.com/articles/1265459/texas-court-pioneers-trial-by-zoom-in-atty-fee-dispute) (last accessed Dec. 12, 2023). Over the course of the day-long trial, which involved an attorney fee dispute case, more than 2,000 virtual attendees watched the live stream. *Id.* However, less than a month later, the state was far less successful in their attempts to conduct a civil jury trial using remote video software. See K. Buehler, *Texas Court Holds First Jury Trial Via Zoom in Insurance Feud*, Law360 (May 18, 2020), available online at <https://www.law360.com/articles/1274097/texas-court-holds-first-jury-trial-via-zoom-in-insurance-feud> (last accessed Dec. 11, 2023). The potential challenges faced by Harris County quickly became apparent, when, during jury selection, the presiding judge had to instruct jurors not to Google information, use their phones, or allow family members into the room. *Id.*

B. The Courts Impose Changes Due to the Pandemic.

1. *State of Ohio's response to the pandemic.*

On March 27, 2020, the Supreme Court of Ohio issued its first administrative order regarding the COVID-19 pandemic. *In re Tolling of Time Requirements Imposed by Rules Promulgated by the Supreme Court and Use of Technology*, 158 Ohio St.3d 1447, 2020-Ohio-1166, 141 N.E.2d 974. These emergency orders were only intended to be in effect for a short period of time. The Supreme Court of Ohio later issued a *nunc pro tunc* order stating that "Any oath or an affirmation required by a rule of the Court may be administered remotely by use of audio- or video-communication

technology, provided the technology shall allow the person administering the oath or affirmation to positively identify the person taking the oath or making the affirmation." *In re Remote Administration of Oaths and Affirmations*, 159 Ohio St.3d 1402, 2020-Ohio-3155, 146 N.E.2d 578; *In re Use of Technology and Remote Administration of Oaths and Affirmations*, 159 Ohio St.3d 1461, 2020-Ohio-3861, 150 N.E.3d 107.

2. *Other state and federal courts.*

With regards to the federal courts, the Administrative Office of the U.S. Courts published a collection of all of the COVID-19 court orders that were issued in response to the pandemic. Administrative Office of the U.S. Courts, Court Orders and Updates During COVID-19 Pandemic, available online at <https://www.uscourts.gov/about-federal-courts/court-website-links/court-orders-and-updates-during-covid19-pandemic> (last accessed Dec. 12, 2023).

C. Mr. King's Civil Lawsuit against BCM.

1. *Mr. King's purchase of used car and subsequent mechanical problems associated with the vehicle.*

On April 28, 2021, Mr. King walked into one of the BCM used car dealerships with the intent of purchasing a vehicle for his personal use. Mr. King subsequently purchased a white 2010 Chevy Malibu LT for \$4,635.02. The written agreement indicated that the subject vehicle was being sold "as-is" with no warranties and the odometer displayed 138,867 miles at the time of sale.

Approximately one month following the purchase of the subject vehicle, Mr. King began to notice a loud noise emanating from the vehicle whenever he applied

the brakes. On June 1, 2021, Mr. King took the subject vehicle for a vehicle inspection. The inspection revealed that the vehicle needed to have the brake pads and rotors (both front and rear axles) replaced. King was essentially without a reliable vehicle for several weeks and drove the vehicle very minimally until he was able to have the vehicle repaired. The total cost of the replacement of the brakes was \$1,281.01 and a subsequent replacement air conditioner compressor was \$320.25.

2. *Mr. King initiates a complaint against BCM.*

On July 13, 2021, Mr. King filed a civil complaint in the Summit County Court of Common Pleas naming BCM as the sole defendant. The complaint alleged the following causes of action (1) violation of the Ohio Consumer Sales Practices Act; (2) breach of express warranty condition; (3) breach of implied warranties of merchantability and fitness; (4) fraud and misrepresentation; (5) unconscionability; and (6) breach of covenants of good faith and fair dealing. On November 8, 2021, Mr. King filed an amended complaint alleging three causes of action: (1) violation of the Ohio Consumer Sales Practices Act; (2) fraud, misrepresentation/negligent misrepresentation; and (3) breach of express or implied contract/breach of covenants of good faith. BCM filed a timely answer to the initial complaint and the amended complaint.

During the discovery process, lead counsel for BCM submitted a request for admission which asked Mr. King to admit or deny “[t]hat you have falsely claimed to be disabled to obtain benefits from either the state, federal, or local government agencies.” There was no reasonable basis for that request for admission. Lead counsel for BCM also attempted to inquire about a felony conviction that was over ten (10)

years old in violation of the Ohio Rules of Evidence. Finally, lead counsel for BCM noticed Mr. King to appear at an oral deposition and when Mr. King appeared at the deposition the court reporter was not physically present in violation of the Ohio Rules of Civil Procedure that was applicable at the time of the deposition.<sup>2</sup>

3. *The trial court granted summary judgment in favor of BCM.*

On April 20, 2020, the trial court issued a final judgment denying Mr. King's motion for summary judgment and granting BCM's motion for summary judgment.

*King v. Budget Car Mart LLC, 2022 WL 20651436 (Ohio Com.P. Apr. 20, 2022)*  
(Appendix C). The trial court's reasoning is as follows:

When the evidence is viewed in the light most favorable to Plaintiff, reasonable minds can only reach one conclusion, which is adverse to Plaintiff. There is no genuine issue of material fact remaining to be litigated regarding whether Defendant violated the CSPA, engaged in an unfair or deceptive act or practice, engaged in fraud, concealment or negligent misrepresentation, and breached an express or implied contract or the covenants of good faith and fair dealing. Plaintiff is entitled to judgment as a matter of law. A review of the record reveals Plaintiff was aware of the "as-is" condition of the vehicle when he purchased it. He test drove the vehicle in a small circle around the parking lot before deciding to buy it. The brakes and air conditioner were working. Statements by the salesperson that the eleven year old car with 138,867 miles on it was recently acquired from Fred Martin was a true statement. The salesperson's statement that the car was in "excellent" or "perfect" condition are mere expressions of opinion. The service records do not reveal any issues with the brakes or air conditioner which Defendant could have concealed from Plaintiff. Plaintiff benefitted from his purchase of the car as he continued driving the vehicle. It is not an unfair or deceptive act or practice for a used car dealer to be unable to foresee brake issues that may arise with a vehicle

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<sup>2</sup> Mr. King filed a motion to disqualify counsel for BCM, which the trial court denied. *King v. Budget Car Mart LLC, 2022 WL 20651439 (Ohio Com.P. Apr. 4, 2022)*.

thirty days after it is purchased, or a fan belt and air conditioner problem one hundred and twenty days later. The written documents constitute the final written agreement of the parties and precludes Plaintiff's contract claims. Plaintiff has not articulated what contract term, whether express or implied, Defendant is alleged to have breached, or is not performing in good faith.

Appendix C at C-3, 2021 WL 20651436 at \*3.

4. *The state appellate court affirmed the trial court's judgment, and the state's highest court declined jurisdiction*

Mr. King filed a timely notice of appeal to the Summit County Court of Appeals (Ninth Appellate District). The assignments of error presented to the Summit County Court of Appeals were the following: (1) the trial court erred in granting [Appellee's] motion to strike the documents obtained from the BBB of Akron and the Ohio Attorney General; (2) the trial court erred in denying [Appellant's] motion to strike the filing of the January 12, 2022 deposition transcript; (3) the trial court erred in denying [Appellant's] motion to disqualify Lawrence Raymond Bach as counsel for [Appellee]; (4) The trial court erred in denying [Appellant's] motion for a protective order; and (5) the trial court erred in granting summary judgment in favor of [Appellee] and denying the motion for entry of a summary judgment in [Appellant's] favor.

On August 9, 2023, the court of appeals affirmed the decision in a unanimous decision. *King v. Budget Car Mart, LLC*, 2023-Ohio-2756, 2023 Ohio App. LEXIS 2720, 2023 WL 5093868 (Ohio App. 9 Dist. Aug. 9, 2023). With respect to the first assignment of error (granting BCM's motion to strike evidence), the court of appeals found that the fact that BCM did not object to Mr. King's discovery of the documents

did not mean that it waived its right to object to Mr. King's subsequent attempt to introduce those documents as evidence. *King, supra*, at ¶ 15. In overruling Mr. King's second assignment of error (denial of Mr. King's motion to strike the deposition transcript), the court of appeals cited the COVID-19 administrative orders issued by the Ohio Supreme Court in support of its decision. *King, supra*, at ¶ 21. In overruling Mr. King's third assignment of error (denial of the motion to disqualify BCM's counsel), the court of appeals found that:

The trial court, in its ruling denying Mr. King's motion, noted that both Mr. King and BCM's counsel had inserted unnecessary commentary into the litigation. The trial court also directed all parties to conduct themselves with civility and to refrain from further unnecessary commentary. Mr. King has not demonstrated that the trial court's ruling was unreasonable under the circumstances.

*King, supra*, at ¶ 26. The court of appeals did not issue an opinion on Mr. King's fourth assignment of error (denial of his motion for a protective order), finding that the opinion on the fifth assignment error (denial of his motion for summary judgment) rendered it to be moot. *King, supra*, at ¶ 44.

In overruling the denial of Mr. King's motion for summary judgment, the court of appeals made the following findings:

On appeal, Mr. King has made a very general argument that there remains a genuine dispute of fact precluding summary judgment, while also asserting that he is entitled to summary judgment. The only claim that Mr. King expressly discusses is his claim related to fraud/misrepresentation. Thus, Mr. King has not demonstrated on appeal that the trial court erred in granting summary judgment to BCM as to his Ohio Consumer Sales Practices Act or contract-related claim.

*King, supra*, at ¶ 37. In assessing Mr. King's fraud/misrepresentation allegations, the court of appeals made the following findings:

BCM presented Mr. King's deposition, accompanying exhibits, and an affidavit along with exhibits in support of its motion for summary judgment. In his deposition, Mr. King acknowledged that he did not expect the brakes to be new on a car that was over 10 years old with over 130,000 miles on it. Mr. King also agreed that repairing and checking the brakes is a common part of vehicle maintenance. He also indicated that, to his knowledge, there was nothing wrong with the brakes at the time the car was sold to him by BCM and agreed that, at no point, did the brakes ever fail to stop the vehicle. Mr. King testified that when he test drove the vehicle there were no issues that he noticed and that "everything that [he] saw worked." The car also stopped and started and was in operating order at the time of purchase. Further, despite the problems with the brakes and air conditioning that required repairs, Mr. King was able to drive the vehicle to the deposition and acknowledged that it was capable of getting him there safely.

There is no evidence in the record that BCM knew the vehicle needed any major repairs at the time of the sale; in fact, Mr. King did not notice any issues with the vehicle until approximately 30 days later and those issues involved the brakes, a system that Mr. King himself acknowledged commonly required maintenance.

BCM also set forth evidence that it purchased the vehicle it sold to Mr. King from Fred Martin Motor Company, and it did not receive any service records or inspection records from Fred Martin Motor Company. Mr. King did not present any evidence which contradicts that fact; instead, Mr. King has conjectured that BCM had the documents due to its affiliation with Fred Martin Superstore. Moreover, Mr. King has not detailed how the service records relate to any of the problems that he later experienced. Thus, Mr. King has not shown that he was damaged by any failure to disclose records, assuming that BCM possessed any. Overall, Mr. King has not shown on appeal that the trial court erred in granting summary judgment to BCM on his fraud claim and in denying his motion for summary judgment.

*King, supra*, at ¶¶ 40-42.

Mr. King filed a timely appeal to the Supreme Court of Ohio arguing that (1) a trial court cannot reasonably rely on COVID-19 administrative orders from [the Supreme Court of Ohio] regarding the use of remotely administered oaths for depositions when the deposition took place AFTER the Ohio Governor's previously

imposed state of emergency was rescinded; and (2) that trial attorneys who engage in name calling or other unprofessional conduct against a pro se party in a civil case must be disqualified from further participation in the case. BCM filed a response in opposition, and on October 10, 2023 the Supreme Court of Ohio declined jurisdiction in the case. *King v. Budget Car Mart LLC*, 171 Ohio St.3d 1456, 2023-Ohio-3670, 218 N.E.3d 974 (Table) (Ohio Oct. 10, 2023).

Mr. King timely filed this petition for writ of certiorari pursuant to 28 U.S.C. § 1257(a) as it was filed within ninety (90) days following the Supreme Court of Ohio's decision declining review of the case.

#### **REASONS FOR GRANTING THE WRIT**

THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI BECAUSE IT HAS REPEATEDLY HELD THAT PARTIES HAVE A CONSTITUTIONAL RIGHT OF ACCESS TO THE COURTS. THAT RIGHT OF ACCESS TO THE COURTS IS APPLICABLE EVEN DURING THE COVID-19 PANDEMIC.

A. Under the First, Fifth, and Fourteenth Amendments to the U.S. Constitution, the Right of the People to Petition their Government for a Redress of Grievances is Recognized.

The First Amendment states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, **and to petition the government for a redress of grievances.**” U.S. Const. amend. I (emphasis added). In addition, there is the constitutional right to due process under

the law recognized by the Constitution.<sup>3</sup> The State of Ohio also has implemented a constitutional right of access to the courts and to due process of law into its constitution. Ohio Const. art I § 16 (1912).

This Court has held that “[t]he right of access to the courts is indeed but one aspect of the right of petition.” *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 612, 92 S. Ct. 609, 30 L. Ed.2d 642 (1972), *citing Johnson v. Avery*, 393 U.S. 483, 485, 89 S. Ct. 747, 748, 21 L. Ed.2d 718; *Ex parte Hull*, 312 U.S. 546, 549, 61 S. Ct. 640, 641, 85 L. Ed. 1034.

B. Impact of the COVID-19 Pandemic on the Courts.

As other courts have recognized, “[t]he President of the United States has declared a national emergency due to the spread of the COVID-19 virus, and the Centers for Disease Control have noted that the best way to prevent illness is to minimize person-to-person contact.” *Sinceno v. Riverside Church in City of New York*, 2020 U.S. Dist. LEXIS 47895, 2020 WL 1302053, at \*1 (S.D.N.Y. Mar. 18, 2020). As one court has recognized:

Attorneys and litigants all over the country are adapting to a new way of practicing law, including conducting depositions and deposition preparation remotely. *See De Lench v. Archie*, 2020 U.S. Dist. LEXIS 58049, 2020 WL 1644226, at \*2 (D. Mass., Apr. 2, 2020) (“reminding the parties that the April 5, 2021 trial date remains firm” [and] “[i]n light of

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<sup>3</sup> The Due Process is contained in the Fifth Amendment (“No person shall . . . be deprived of life, liberty, or property, without due process of law”) and Section 1 of the Fourteenth Amendment (“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”). *See* U.S. Const. amend I; U.S. Const. amend. XIV § 1.

the current coronavirus pandemic, [ ] encourag[ing] the parties to avail themselves of video technology for meetings, depositions, and other communication and interactions arising in the discovery process").

*Grano v. Sodexo Management, Inc.*, 335 F.R.D. 411, 415 (2020).

Under Fed.R.Civ.P. 30(b), courts are authorized to order that depositions "be taken by telephone other remote means." *See Usov v. Lazar*, 2015 WL 5052497, at \*1 (S.D.N.Y. Aug. 25, 2015); *Graham v. Ocwen Loan Servicing, LLC*, 2016 U.S. Dist. LEXIS 186459, 2016 WL 7443288, at \*1 (S.D. Fla. July 1, 2016) ("[C]ourts enjoy wide discretion to control and place appropriate limits on discovery, which includes authorizing depositions to be taken by remote means"). When exercising its discretion, this Court "must 'balance claims of prejudice and those of hardship and conduct a careful weighing of the relevant facts.'" *Usov, supra*, 2015 WL 5052497, at \*1, quoting *RP Family, Inc. v. Commonwealth Land Title Ins. Co.*, 2011 U.S. Dist. LEXIS 137334, 2011 WL 6020154, at \*3 (E.D.N.Y. Nov. 30, 2011).

C. The Trial Court's Reliance on the Ohio Supreme Court's Administrative Orders Unconstitutionally Denied Mr. King of his First Amendment Right to Access to the Courts and his Fourteenth Amendment Right to Due Process Under the Law.

The Ohio Rules of Civil Procedure govern civil procedure and operates in a similar fashion as the Federal Rules of Civil Procedure. Rule 30 sets forth the rules applicable to oral depositions. Previously, Section (B)(6) of Rule 30 stated that "[t]he parties may stipulate or the court may upon motion order that a deposition be taken by telephone or other remote means." Former Ohio R. Civ. P. 30(B)(6) (repealed July

1, 2023).<sup>4</sup> See also Fed. R. Civ. P. 30(B)(4) (“parties may stipulate or the court may upon motion order that a deposition be taken by telephone or other remote means.”)

In this case, Mr. King’s oral deposition took place AFTER the COVID-19 emergency order of Ohio Governor Richard M. DeWine was rescinded. Thus, the trial court violated Mr. King’s First Amendment constitutional right of access to the courts and Mr. King’s constitutional right to due process under the law.

D. Courts have Held that Despite the COVID-19 Restrictions, the Constitutional Protections Afforded to Litigants are Still Applicable

Despite the serious implications associated with the COVID-19 pandemic, a litigant’s constitutional rights must be protected at all costs. An example of this is a criminal defendant’s constitutional right to a public trial or a news organization’s First Amendment right to open court proceedings. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980) (plurality) (describing how the First Amendment protects forms of communication “necessary for a democracy to survive” including public access to courtrooms); *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002) (“Democracies die behind closed doors.”); *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596, 605-06, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982) (explaining the long history of openness to the extent that the Court had previously been unable to find an historical example of a

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<sup>4</sup> On July 1, 2023, Section (B)(6) was amended to include a provision that the court may upon motion order that the deposition be taken by telephone or with one or more participants attending remotely. Ohio R. Civ. P. 30(B)(6).

closed trial and the importance of public scrutiny in “the functioning of the judicial process and the government as a whole,” including permitting “the public to participate in and serve as a check upon the judicial process--an essential component in our structure of self-government”).

Studies have shown that with less proximity to a criminal defendant, the less empathy jurors will feel when evaluating the charges against the accused. Nina J. Nina Ginsberg, et al., *Criminal Court Reopening and Public Health in the COVID-19 Era: National Association of Criminal Defense Lawyers Statement of Principles and Report*, at 10 (June 2, 2020), available online at <https://nacdl.org/getattachment/56802001-1bb9-4edd-814d-c8d5c41346f3/criminal-court-reopening-and-public-health-inthe-covid-19-era.pdf> (last accessed Dec. 14, 2023). Current courtroom policies such as the accused wearing a mask or barriers placed between the accused and the courtroom have the potential to further dehumanize criminal defendants to jurors hearing their case, and may influence their sentencing negatively. *Id.* at 10. Moreover, the software programs used to conduct these remote trials have been shown to decrease the retention of information and attention spans of those utilizing them. *Id.* This may inhibit a fair trial because jurors will pay less attention to the evidence presented and resulting verdicts may not be as informed as they would have been traditionally at an in-person jury trial. *Id.*

Courts have weighed a criminal defendant’s Sixth Amendment right to confront witnesses against the necessities created by the COVID-19 pandemic. In *State v. Stefanko*, 2022-Ohio-2569, 193 N.E.3d 632 (Ohio App. 9 Dist. Jul. 27, 2022),

the defendant objected to the testimony of her then-husband (who was separately convicted separately of aggravated murder and was serving a life sentence) via videoconferencing. The court of appeals reversed Stefanko's conviction for aggravated murder.

The Second Circuit held that “[c]losed-circuit television should not be considered a commonplace substitute for in-court testimony by a witness. There may well be intangible elements of the ordeal of testifying in a courtroom that are reduced or even eliminated by remote testimony.” *United States v. Gigante*, 166 F.3d 75, 81 (2d Cir. 1999). See also *United States v. Carter*, 907 F.2d 1199, 1206 (9<sup>th</sup> Cir. 2018) (court makes it clear that a defendant's right to physically confront an adverse witness (whether child or adult) cannot be compromised by permitting the witness to testify by video (whether one-way or two-way) unless [Maryland v. Craig, 497 U.S. 836, 850, 110 S. Ct 3157, 111 L. Ed.2d 666 (1990)]’s standard is satisfied. And that standard is a stringent one; the use of a remote video procedure must be reserved for rare cases in which it is “necessary.”); *United States v. Casher*, 2020 U.S. Dist. LEXIS 106293, 2020 WL 3271767 (D. Mont. Jun. 17, 2020) (court denied motion to quash subpoena of witness requiring in-person testimony). But see *United States v. Benson*, 79 F. App’x 813, 821 (6th Cir. 2003) (district court’s decision to allow an 85-year-old witness to testify by video upheld);<sup>5</sup> *United States v. Rosenau*, 870 F. Supp.

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<sup>5</sup> The district court found that the elderly witness was too ill to travel, had extensive health problems, and was still recovering from a major surgery. *United States v. Benson*, supra, 79 F. Appx at 821.

2d 1109 (W.D. Wash. 2012) (court allowed a witness to testify remotely from Canada as the witness was unable to enter the United States due to a court order; moreover, the defendant could not travel to Canada for the witness's deposition as Canada refused to allow the defendant to enter the country)

The courts also struggled with the issue of a criminal defendant's Sixth Amendment right to a speedy trial. The president of the National Association of Criminal Defense Lawyers commented on the recent federal orders suspending court proceedings as "completely new territory" to navigate with Sixth Amendment issues. Jordan S. Rubin, *Coronavirus Containment Collides With U.S. Constitutional Rights*, Bloomberg Law (March 31, 2020), available online at <https://news.bloomberglaw.com/uslaw-week/coronavirus-containment-collides-with-u-s-constitutional-rights> (last accessed Dec. 14, 2023).

### CONCLUSION

This Court should grant certiorari because important constitutional rights of litigants are not suspended because of a global pandemic. While some changes to normal operations were necessary, those changes must be balanced with the negative impact imposed on litigants. Once the pandemic ended, normal court operations should have resumed.

Petitioner prays this Court grant certiorari to review the decision of the Ohio Ninth District Court of Appeals.

Dated: Dec 20 2023

Respectfully Submitted,

  
DERRICK MARTIN KING  
1445 Crestview Avenue

Akron, Ohio 44320-4049

*Pro se Petitioner*

# APPENDIX A

*King v. Budget Car Mart LLC*

Ohio 9<sup>th</sup> District Court of Appeals (Summit County)

Case No. CA-30293

August 9, 2023 Opinion affirming decision of trial court