No. 21-537

In the Supreme Court of the United States

ADIR INTERNATIONAL, LLC, DBA CURACAO, FKA LA CURACAO, A DELAWARE LIMITED LIABILITY COMPANY; RON AZARKMAN, AN INDIVIDUAL, PETITIONERS

v.

STARR INDEMNITY AND LIABILITY COMPANY, A TEXAS CORPORATION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

No other State—and to our knowledge, no common law jurisdiction—has ever enacted a law prohibiting parties with entirely lawful litigation insurance from using it to defend themselves when sued by the State. Without a finding of probable cause or even reasonable suspicion—*i.e.*, based solely on unproven *allegations*—§ 533.5 strips both companies and individual officers and directors of the benefit of such coverage, whenever the State's lawyers elect to bring claims under either of two broad umbrella statutes. The purpose and effect of this extraordinary law are to "stack[] the deck" in the State's favor (App. 9a) and compel defendants to settle. As petitioners' *amici* demonstrate, the law wreaks particular havoc on small and mid-sized businesses, and deters good people from serving on corporate boards, in the world's fifth largest economy—where the costs of litigation can be ruinous even when the claims are baseless.

Starr does not deny any of this. It offers *not one* legitimate rationale for the statute. Rather, it doubles down on the Ninth Circuit's unfounded legal assumption that, because petitioners could "afford competent counsel" in the State's lawsuit, their defense was not "impaired" in any way that implicates their "narrow" due process rights. Opp. 6-7. Starr brushes off closely analogous precedents on the ground that they arose under the Sixth (rather than Fifth) Amendment or did not speak specifically to *this* statute.

Mostly, Starr presses the Alice-in-Wonderlandish notion that this case is a poor vehicle to review this law because Adir succeeded in scraping together the funds to hire not-incompetent counsel. *Just wait*, Starr assures us, some future party who cannot afford

counsel in the State's underlying lawsuit will somehow manage to litigate the statute's constitutionality all the way up to this Court. Opp. 15. Earth to Starr: Any party that cannot afford counsel will be forced to settle—just as the legislature intended. Any party that can hire counsel with other funds will, by Starr's lights, not be injured. The right vehicle is never.

The problem is Starr's understanding of prejudice. This is not a "vehicle" issue; it goes to the substance of due process. In Sixth Amendment cases, this Court has consistently recognized that "the restraint [of funds] itself suffices to completely deny this constitutional right." *Luis* v. *United States*, 578 U.S. 5, 20 (2016) (plurality). As the Court put it in *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 148 (2006), depriving parties of their chosen counsel is unconstitutional "regardless of the quality of the representation [they] received." Yes, these were criminal cases. But whether the same rule governs *civil* cases is plainly a certworthy question.

When restrictions on a party's right to use lawful resources to hire counsel are merely the incidental effect of regulations that serve some legitimate public purpose, that party might need to show case-specific prejudice. But when the restriction is direct—and the State's admitted purpose here is to coerce settlement—we submit that prejudice can be presumed. Indeed, in *every* case where a party is prevented from using insurance coverage that it purchased, it suffers indisputable prejudice to its ability to litigate. It does not matter whether its counsel was competent; preventing a party from using resources set aside for litigation, in the form of insurance, simply to increase the State's settlement leverage, is prejudice in the constitutional sense. That is why this law is *facially* invalid.

Once this becomes clear, little remains of Starr's opposition. Starr pretends the State is regulating insurance, but it is regulating its litigation opponents. Indeed, Starr knows there is nothing wrong with D&O insurance; the company sells it every day. Starr concedes that the original meaning of due process "bars the government from actively preventing a party from obtaining counsel" (Opp. 12), which is exactly what the statute does. Starr says its insurance contract with petitioners was void, but that circular argument depends entirely on the statute's constitutionality. Starr mischaracterizes our attack on the State's discretion to plead a UCL violation as a "selective enforcement" challenge. Opp. 19-20. Starr's preservation arguments are makeweights: Adir pressed, and the Ninth Circuit addressed, the due process question presented. And "percolation" will not produce a better opportunity to consider this law's constitutionality. Opp. 22.

Indeed, under Starr's theory, there will *never* be a realistic opportunity for this Court to decide the question presented: Defendants who lack the wherewithal to fight will have no choice but to settle, and those able to hire "competent counsel" cannot state a claim. All the while, California keeps "stacking the deck" in its favor. This Court should intervene.

ARGUMENT

I. This Court should grant review and confirm that where the government directly interferes with a party's civil right to choose its counsel, prejudice may be presumed.

Starr's primary basis for opposing certiorari is that due process is not violated unless § 533.5 "impaired [petitioners'] ability to retain counsel"—*i.e.*, unless

they show prejudice. Opp. 6, 8, 9, 11, 15 (cleaned up). Starr thus conveniently says the Court should await a case where the challenger could not "afford competent counsel absent coverage" or the State "actively thwarted" its efforts to retain counsel. Opp. 8, 17-18 (citations omitted). Nonsense.

First, Starr simply assumes that the Ninth Circuit was correct in requiring petitioners to show prejudice. App. 15a & n.5; Opp. 5-6, 15. But this Court's precedents and the Second Circuit's decision in *United States* v. *Stein*, 541 F.3d 130 (2d Cir. 2008), hold that interfering with a defendant's right to use lawful funds to pay its counsel is *itself* unconstitutional—such violations are *presumed* to cause harm.

In *Luis*, for example, the plurality explained that "the restraint [of untainted funds] *itself suffices* to completely deny this constitutional right." 578 U.S. at 20 (emphasis added); see *id.* at 35 (Thomas, J., concurring). In support, it cited *Gonzalez-Lopez*, which held: "Where the right to be assisted by counsel of one's choice is wrongly denied, * * * it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation. Deprivation of the right is 'complete' when the defendant is erroneously prevented from being represented by the lawyer he wants, *regardless of the quality of the representation he received*." 548 U.S. at 148 (emphasis added); see *Luis*, 578 U.S. at 11 (plurality); *id.* at 25 (Thomas, J., concurring) (*Gonzalez-Lopez* establishes "[t]he right to select counsel of one's choice" as "'the root meaning' of the Sixth Amendment right to counsel"). Here, as there, analyzing how petitioners were prejudiced is an unnecessary "speculative inquiry into what might have occurred in an alternate universe." *Gonzalez-Lopez*, 548 U.S. at 150.

Contrary to Starr's suggestion, the Second Circuit has *not* held that due process requires a showing that "the defendants either were unable to retain the counsel of their choosing" or were "forced to limit their defenses." Opp. 10 (cleaned up). Rather, *Stein* followed *Gonzalez-Lopez*, holding that "the right to defend oneself using whatever assets one has or might reasonably and lawfully obtain" is "violated because the deprivation of counsel was erroneous. *No additional showing of prejudice is required*." 541 F.3d at 156-157 (emphasis added) (quoting *Gonzalez-Lopez*, 548 U.S. at 146). Under *Stein*, "[a] defendant who is deprived of counsel of choice (without justification) need not show how his or her defense was impacted; such errors are structural and are not subject to harmless-error review." *Id*. at 157.

Starr correctly notes that these are Sixth Amendment decisions. Opp. 10, 14. But there is no reason to interpret the Fifth Amendment right to civil counsel more narrowly. *Luis* reaffirmed that the "right to assistance of counsel is a fundamental constituent of due process" that includes "the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire." 578 U.S. at 18-19 (plurality); *id*. at 34 (Thomas, J., concurring). Insofar as the Court has not expressly decided whether prejudice may be presumed when the government directly interferes with the *civil* right to counsel, that supports *granting* review, not denying it. The issue is plainly certworthy, and this case provides an excellent opportunity to fill out the meaning of that right.

Second, it is especially unjustified to demand proof of prejudice where the government directly attacks its opponents' funding for counsel. Section 533.5's evisceration of Adir's means of paying counsel is not

merely an incidental effect of a generally applicable statute; it is the statute's express purpose. By analogy, States may regulate the practice of law, but they could not limit litigation opponents to paying only $50/hour for counsel, just to gain an advantage in court. Section 533.5 cuts off legitimate funds precisely to give California a leg up in cases that might prove "impossible to settle" with insurance-funded counsel. *Mt. Hawley Ins. Co.* v. *Lopez*, 215 Cal. App. 4th 1385, 1402-1403 (Cal. Ct. App. 2013). This statutory context provides more obvious grounds for presuming prejudice than existed in past cases. Cf. *Luis*, 578 U.S. at 11, 18-23 (plurality); *Gonzalez-Lopez*, 548 U.S. at 146-152. Indeed, it shows that, even assuming due process bars States only from "actively thwart[ing]" defendants' efforts to retain counsel (Opp. 8), that standard is satisfied here.

Third, the implications of Starr's view that States may "prohibit[] one source of funding to retain civil counsel," provided it avoids "disturbing the other[s]" (Opp. 9), are breathtaking. States could then bar defendants from using any one source of funds—including contributed funds, contingency fee arrangements, or any other legitimate means of financing litigation—provided they left "other sources" untouched. But deliberately targeting the "right to use one's financial resources for an attorney" violates the right to counsel regardless of potential "other sources" of funds. See *Luis*, 578 U.S. at 27 (Thomas, J., concurring).

Fourth, Starr ignores how most companies operate. The "[National Federation of Independent Business] reports that its average California member company has less than $500,000 in annual revenues and fewer than 30 days of operating cash reserves." Landmark Br. 4. It is cold comfort to such companies that § 533.5

theoretically preserves "other" funding. Most would burn through their reserves in weeks, leaving them in debt or bankrupt—which is precisely why insurance is the preferred means of managing onerous litigation costs. Businesses and executives deserve clarity on whether the State may choke off that critical means of protecting themselves.

II. Starr's remaining grounds for opposing certiorari lack merit.

Fundamental Fairness. Starr never mentions the Ninth Circuit's acknowledgement that "California has stacked the deck against defendants." App. 9a. But Starr cannot dispute the basic rule of this Court's fundamental fairness precedents—that States may not enact laws that upset "the balance of forces between the accused and his accuser." *Wardius* v. *Oregon*, 412 U.S. 470, 474-476 (1973).

Starr's claim that § 533.5 does not "place any special burdens in litigation, as a facial matter" (Opp. 18) is baffling—the statute strips defendants of resources from the *moment* California sues, while the State fights on, backed by taxpayer funding. As in *Wardius*, that *ex ante* rule systematically advantages California without regard to any defendant's culpability. And as in *Wardius*, the rule violates due process.

Original Public Meaning. Contrary to Starr's assertion (Opp. 12), the "original public meaning" of due process does not support denying certiorari. The idea that the "Sixth Amendment's explicit guarantee of counsel" renders decisions such as *Luis* inapplicable in civil cases (App. 14a-15a) gets the history exactly backwards.

The Sixth Amendment explicitly mentions the criminal right to counsel not because it was *broader* than its civil common-law cousin, but because it was *narrower*. Criminal defendants not accused of treason were "prohibit[ed] representation in felony cases." *Luis,* 578 U.S. at 25 (Thomas, J., concurring). In civil cases, by contrast, parties had "the right to hire counsel of choice." *Ibid.* As the Judiciary Act of 1789 provided, "in all the Courts of the United States, the parties may plead and manage their own causes personally or by the assistance of [] counsel." 1 Stat. 73, 92 (1789).

This Court has expanded the criminal right to counsel (e.g., *Gideon* v. *Wainwright*, 372 U.S. 335 (1963)), but it has never curtailed the historic scope of the civil right. That "the right to counsel" "protects the prerequisite right to use one's financial resources for an attorney" (*Luis*, 578 U.S. at 27 (Thomas, J., concurring)) logically applies to civil *and* criminal cases. And Starr cannot explain why, if "[a] criminal defendant's untainted assets are protected from Government interference before trial and judgment" (*id.* at 32), civil defendants may be relegated to a *worse* position.

The Framers would not have countenanced the idea that, without showing wrongdoing, States could cut off a defendant's access to untainted funds when they are on the other side of the *v.* As they understood, absent "the right to use lawfully owned property to pay for an attorney," "the right to hire counsel of choice * * * would be meaningless." *Id.* at 25.

Contract Coverage and Forfeiture Cases. Starr wrongly declares that "Petitioners' policy never included coverage of claims within Section 533.5's

terms, and Petitioners never paid [Starr] for such coverage," because the policy was "void." Opp. 3, 16. This was standard litigation insurance, as Starr well knew. Before the Attorney General's letter arrived, Starr expended $2 million under the contract. Now it prefers to renege. But if § 533.5 is unconstitutional, then it is not an "applicable law[]" (App. 74a), and Adir's coverage remains valid.

Starr invokes the same faulty reasoning in dismissing the Court's forfeiture cases, stating only that the statute does not "facially conflict with" them. Opp. 16. But as Starr acknowledges, those decisions hold "that the State may only impose '[p]retrial restraints on forfeitable property' in a defendant's possession when the government proves at a hearing that the defendant committed the offense triggering forfeiture and that the property has the requisite connection to the crime." Opp. 15. Here again, Starr cannot explain why civil defendants may be treated worse.

Preservation. Starr's suggestion that this case is "a poor vehicle" because certain "arguments" were not preserved is baseless. Opp. 21, 23. The petition presents one theory—due process—that was *both* "pressed" and "passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992). "Once a federal claim is properly presented, a party can make any argument in support of that claim." *Yee* v. *City of Escondito*, 503 U.S. 519, 534 (1992). Each fundamental

fairness case we cited (Pet. 26-28) addresses due process.[1] At most, therefore, we have offered an additional "argument to support what has been [Adir's] consistent claim: that [California] did not accord [it] the rights it was obliged to provide by the [Fourteenth] Amendment." *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). That is not a "vehicle" problem—only the case's natural evolution.

Waiting for Some Other Challenge. Starr's assertion that this case is not a proper facial challenge depends entirely on its merits argument that civil litigants with "other sources of funds" are not "burdened" by § 533.5. Opp. 15, 22-23. But that dubious legal position lies at the heart of the question presented. *Supra* at 2-6 (explaining why prejudice should be presumed). If there is any doubt about the answer, that is a reason to grant, not deny, certiorari. If due process protects the right to secure counsel with all legitimate funding sources, § 533.5 is unconstitutional *every* time it is applied—the strictest standard applicable to facial challenges. *United States* v. *Salerno*, 481 U.S. 739, 745 (1987).

Starr does not dispute the statute's sweeping impact. The UCL reaches every "unlawful" business act or practice. As the Attorney General stated when he wrote Starr, that "includes *any* activity that is forbidden by *any* law." App. 163a (emphasis added). Over 1,000 decisions annually discuss the statute, which governs the world's fifth-largest economy. Pet. 32. What is Starr's answer? That the statute governs

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[1] The same is true of amici's *Ex Parte Young* argument. NCLA Br. 8-18 (citing *Ex Parte Young*, 209 U.S. 123, 144-145 (1908)).

only "one category of civil cases." Opp. 1. That is like saying the Olympics Games capture only "one category of games": sports.

While ignoring the statute's far-reaching effects (Landmark Br. 3-5, 8-11; NCLA Br. 7-18), Starr advocates letting things "percolat[e]" and awaiting an "as-applied challenge." Opp. 22. The Court would wait in vain. California stands alone in prohibiting defendants from using insurance funds to resist the government's claims. That precludes any square circuit split, and it is not unusual for this Court to grant certiorari to review the constitutionality of unique state laws. Pet. 36 (collecting cases).

To boot, the California Supreme Court exercises only discretionary review; and defendants who cannot afford competent counsel would be ill-equipped to undertake a David-versus-Goliath constitutional battle up through three levels of state courts and then through certiorari and merits litigation in this Court. NCLA Br. 7-18. Nor should they have to. The Court needs no further factual development to assess § 533.5's constitutionality; and the statute, which mounts a frontal attack on the right to choose one's counsel, is unconstitutional in every application.

In a particularly desperate argument, Starr suggests that an *Ex Parte Young* suit against the Attorney General would be a better vehicle to consider the statute's constitutionality. Opp. 20-21. But *Ex Parte Young* does not shield Starr from defending the unconstitutional statute that it invokes to renege on its contract. Adir has been injured *by Starr*; and for Adir to obtain full relief, *Starr* must be a party. Adir is free to take the shortest path from point A to point B—suing Starr for breach.

Starr's appeal to wait for an "as-applied challenge" by a defendant who "cannot afford competent counsel" (Opp. 22-23) should thus be seen for what it is: a fabricated attempt to insulate this statute from review. California's outrageous law threatens countless businesses and individuals. Review is warranted simply because of the "nature and importance of the constitutional right." *Luis*, 578 U.S. at 10 (plurality). There is no valid reason to delay.

CONCLUSION

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

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