No. 25-718

In The Supreme Court of the United States

SYLVIA PRIDE,

Petitioner

v.

BOONE COUNTY PROSECUTOR'S OFFICE,
ROGER JOHNSON, and TRACY SKAGGS,

Respondents

On Petition For Writ Of Certiorari To The Missouri Court of Appeals (Western District)

PETITION FOR WRIT OF CERTIORARI

Sylvia Pride

PO Box 248
Sturgeon MO, 65284

(573) 687-2014

spride@emailsplash.com

Question Presented for Review

When a state appellate court ignores the undisputed facts of an appeal and expressly decides an appeal on different, even opposite facts, does the resulting decision violate the due process rights of a litigant? Is a state created right of appeal a property interest protected by the due process clauses of the fifth and fourteenth amendments to the United States Constitution, and is that right satisfied when appellate courts decide appeals based upon fictional scenarios which are contrary to the undisputed facts of the appeal presented?

The Missouri Court of Appeals has an unfortunate history of occasionally deciding "special" cases by fabricating or changing material facts to obtain desired results, and Missouri appellate law creates a loophole insulating such decisions from reversal or review by the Missouri Supreme Court. The opinion in this case was decided on facts which are *opposite* to the undisputed facts of record. The opinion expressly relies upon these fictional statements of fact that have no basis in reality. The decision of the Court of appeals prevented a lawsuit from proceeding against a public official who committed

a felony to avoid complying with Missouri's open records laws, and the opinion was written by a judge who has connections to the public official who benefited from the decision. Petitioner seeks a finding that the practice of deciding appeals based upon fictional scenarios rather than the facts of record violates the due process clauses of the Fifth and Fourteenth amendments to the US Constitution by depriving litigants of a protected property interest.

Parties to the Underlying Proceeding

Petitioner Sylvia Pride seeks review of the judgment in Western District of Missouri Court of Appeals Case No. WD86900. The Appellant in that proceeding is Sylvia Pride. The Respondents are Boone County Prosecutor's Office, Roger Johnson, and Tracy Skaggs.

Related Proceedings

Pride v. Boone County Prosecutor, No. 23BA-CV02815
Circuit Court Boone County, Missouri
(This is the underlying lawsuit. Judgment was entered on February 1, 2024.)

Sylvia Pride, App v. Boone Prosecutor, Res, No. SC101057
Supreme Court of Missouri
(Application for transfer. Application was denied on May 27, 2025.)

SXR Sylvia Pride v. Western District, No. SC101079
Supreme Court of Missouri
(Petition for writ of mandamus. Petition was denied on May 27, 2025.)

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Opinions and Orders

The opinion decision of the Missouri Court of Appeals Western District has been published and is reported at 711 S.W.3d 476.

On April 1, 2025 the Court of Appeals Western District denied the motion for rehearing. (Included as Appendix E at page A22.)

On May 27, 2025 the Missouri Supreme Court denied Petitioner's applications for discretionary transfer and review. (Included as Appendix C at page A18 and as Appendix D at page A20.)

The decision sought to be reviewed is an appeal from a judgment of dismissal entered in Boone County Circuit Case No. 23BA-CV02815 on February 1, 2024. (Included as Appendix B at page A16.)

Basis for Jurisdiction

Petitioner seeks review of a decision of the Western District of Missouri Court of Appeals in *Pride v. Boone Cnty. Prosecutor's Off.*, 711 S.W.3d 476 (Mo. Ct. App. 2025). The decision and opinion were entered on March 4, 2025. The motion for rehearing was denied on April 1, 2025. Petitioner filed an application for transfer to the Missouri Supreme Court which was denied on May 27, 2025. Therefore, Petitioner's petition for writ of certiorari is timely under Supreme Court Rule 13.1. This Court has jurisdiction under 28 U.S.C. § 1257(a).

Petitioner seeks a finding that the decision of the Court of Appeals violates her due process rights under the fifth and fourteenth amendments to the US Constitution because the decision of the Court of Appeals denied her right to appeal the actual judgment entered against her, thereby depriving her of a property interest protected by the due process clauses of the fifth and fourteenth amendments to the constitution. This Court has jurisdiction because this case involves a question of federal constitutional law.

Provisions of Law Involved in this Case

Missouri Revised Statute § 512.020 grants the right of appeal to parties aggrieved by judgments entered in civil cases and is included as Appendix G at page A25.

The relevant provisions of the fifth and fourteenth amendments to the United States Constitution are included as Appendix F at page A24.

Statement of Facts

Petitioner seeks transfer for review of an opinion decision issued by the Missouri Court of Appeals. The opinion expressly relies upon a fictional set of facts to affirm the judgment. The opinion goes so far as to admit that it relies upon these facts and openly states that if the facts were different (and cites facts identical to the undisputed facts of record as a hypothetical example) then the result would be different. This is not an isolated case, rather it is one sample of a disturbing practice which has been repeatedly utilized by Missouri appellate courts for the purpose of achieving desired appellate outcomes without creating undesirable precedent. Because the facts of this case are simple, concise, and completely undisputed by the parties, and the appellate decision expressly relies upon fiction which is *opposite* to those facts, this case is a textbook model for reviewing the constitutionality of Missouri's practice of deciding "special" cases by creating fictional scenarios to reach desired outcomes.

The appeal originated from a judgment of dismissal entered in a lawsuit for violations of Missouri's open

records act. (Also known as Missouri's "Sunshine Law".)[1] The Sunshine Law allows members of the public to request public records from public governmental bodies, and requires those public governmental bodies to respond to requests within 3 business days. In response to such a request, a public governmental body must provide the records or an explanation for delay or denial of the request. The Sunshine Law creates a cause of action against public governmental bodies that violate the law by failing to properly respond or provide the records within the time required by law, and allows for fines of up to $5,000.00 per violation if violations are knowing or purposeful. Under Missouri law a violation is "knowing" if the violators violate the law with awareness that their conduct violates the law, and a purposeful violation occurs when violators act with intent to violate the law or engage in a "conscious design, intent, or plan" to do so. *Spradlin v. City of Fulton*, 982 S.W.2d 255, 262 (Mo. 1998). The Sunshine Law requires all public government bodies to keep a Sunshine Law compliance policy[2], and specifies that this policy may be used in

1 Missouri's open records act is commonly known as the Sunshine Law, and is contained in Chapter 610 of the Missouri Revised Statutes.

2 Missouri Revised Statute § 610.028.2 requires that "[e]ach public governmental body shall provide a reasonable written policy in compliance with sections 610.010 to 610.030, open to

litigation to indemnify employees and members of public governmental bodies for violations of the Sunshine Law if such violations result from reliance upon the policy. Missouri law also mandates that this policy be an open record available to the public.

On July 17, 2023 Petitioner filed a lawsuit against Respondents Boone County Prosecutor's Office (hereinafter referred to as BCPO), Roger Johnson (the elected prosecutor of Boone County Missouri), and Tracy Skaggs (office manager and custodian of records for BCPO).

The petition[3] alleged as follows:

> Plaintiff made a request for records to BCPO on May 5, 2023.[4] The request was for BCPO's Sunshine Law Compliance Policy "as referred to in RSMo 610.028.2 *as it was on May 3, 2023*".

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public inspection, regarding the release of information on any meeting, record or vote and any member or employee of the public governmental body who complies with the written policy is not guilty of a violation of the provisions of sections 610.010 to 610.030 or subject to civil liability for any act arising out of his adherence to the written policy of the agency."

3 This petition is short, clear and concise. A copy of the petition is included as Appendix H at page A27.

4 As alleged in the petition, Petitioner had previously made a request for records on May 3, 2023. The purpose of the May 5, 2023 records request was to determine whether Skaggs had complied with BCPO policy when she provided an improper response to the May 3 request.

(Emphasis added.) Respondents received the request but did not intend to comply with the law by providing Petitioner with a copy of the policy that had been in effect on May 3, 2023. Instead, Respondents engaged in a conspiracy to create a new policy and backdate it so that it would appear as if it was the policy that had been in effect on May 3, 2023 as requested by Petitioner.

Respondents were also aware that the existence and contents of such a policy had the potential to effect their liability in another ongoing lawsuit for violations of the Sunshine Law that occurred in May of 2022. *After* receiving the May 5, 2023 request for records, Respondents created a new policy which would appear as if it had been created and signed by Johnson in May of 2022. The policy was signed by Johnson and dated "May 2022". However, Johnson was not the Boone County Prosecutor in May of 2022, and he did not work in the prosecutor's office during that time period. Respondent Skaggs then emailed the newly created forgery to Petitioner as if it was the policy that had been in effect on May 3, 2023 as requested. Respondents conspired to create and

provide the forgery to Petitioner "for the purpose of depriving [Petitioner] of her right to receive a copy of BCPO's Sunshine Law Compliance Policy as it was on May 3, 2023 and/or know whether such a policy existed on May 3, 2023." Count 1 of the petition alleged Respondents violated the Sunshine Law by failing to properly respond to Petitioner's May 5, 2023 request, and that their failure to do so was a knowing and purposeful violation of the Sunshine Law. Count 1 requested that fines be assessed against Respondents for violating the Sunshine Law.

Count 2 of the petition alleges that Petitioner sent a second record request to Skaggs via email on May 12, 2023. The request stated that Petitioner was attempting to determine on what day of May 2022 the policy had been created since it was relevant to ongoing litigation. In reference to the previously provided document, the request stated "[i]f that policy was not in effect on May 14, 2022, please send me a copy of the policy as it was on May 14, 2022." The petition alleges that Skaggs was required to respond to this request because she was aware that the previously provided policy

was a recent forgery and had not been in effect on May 14, 2022. The petition alleges that Skaggs was aware that she was legally required to respond to this request within 3 business days, but failed to do so because she was aware that she and Johnson had committed criminal forgery and she was attempting "to avoid making further statements and admissions that could be used as evidence" regarding their criminal misconduct.

Petitioner was later able to contact Skaggs by telephone, and during that call Skaggs continued in her attempts to deceive Petitioner into believing that the forged policy had been created in May of 2022. At that time Skaggs also alleged that no policy had existed previous to the creation of the document which purported to have been created in May of 2022.

Count 2 alleged that Skaggs' failure to properly respond to the May 12, 2023 request was a knowing and purposeful violation of the Missouri Sunshine Law. Count 2 requested that fines be assessed against Respondents for violating the Sunshine Law.

Respondents filed a motion to dismiss the petition. The motion to dismiss argued that the petition failed to state a claim for violations of the Sunshine Law. The circuit court held a hearing on the motion to dismiss, and during that hearing Respondents' attorney admitted for the first time that the policy document provided to Petitioner had not existed at the time of Petitioner's May 5, 2023 request, and was created in response to Petitioner's request.[5] [6] The Circuit Court granted the motion to dismiss and entered a judgment of dismissal. Petitioner filed appeal as Missouri Court of Appeals Western District Case No. WD86900.

On March 4, 2025 the Court of Appeals affirmed the judgment of dismissal. In Missouri, appellate courts treat all facts alleged in a petition as true when deciding whether a petition states a claim. The opinion openly declares that it follows this rule, but the reality is far different. The opinion of the Court of Appeals invents

5 A transcript of this hearing is included in the record on appeal.

6 This admission was inevitable. It was apparent that the document had been misdated due to the fact that Roger Johnson was not the Boone County Prosecutor in May of 2022. During May of 2022 Johnson was employed by a private law firm and was campaigning for the position of Boone County Prosecutor. Johnson was appointed to the position of Boone County Prosecutor on August 3, 2022 after previous Boone County Prosecutor Daniel Knight was found dead in his home of an alleged suicide.

material facts which are *opposite* to the undisputed facts of record, and expressly relies upon those made-up "facts" to support its finding that the petition failed to state a claim. The opinion of the Court of Appeals states that "Pride's well-pleaded facts show that the Prosecutor's Office timely disclosed its Sunshine Law compliance policy *as it existed at the time of her requests* and that policy *was the only existing document responsive to her requests*. That is all the Sunshine Law required here. Pride may have wanted a version in effect on a specific date, but *she did not allege that such document existed and was withheld from her.*" (Emphasis added.) The opinion of the Court of Appeals rejects the facts pled in the petition by stating that the document which was provided to Petitioner existed at the time of her requests when the petition clearly pleads that the forgery was created by Respondents *after* they received Petitioner's request, and that Respondents did so to avoid providing Petitioner with a copy of the actual policy that had been in effect on May 3, 2023, or notifying Petitioner that no such record existed.[7] The

7 The opinion of the Court of Appeals does admit that Missouri law requires a response if a requested record does not exist. "Typically, where there are no documents responsive to a public records request, the Sunshine Law requires the governmental body to inform the requester accordingly." *Pride v. Boone Cnty. Prosecutor's Off.*, 711 S.W.3d 476, 483 (Mo. Ct. App. 2025).

opinion also misstates the facts by concluding that the petition did not sufficiently plead that an existing document was withheld from Petitioner. The petition pled that Petitioner requested a copy of the policy that all public governmental bodies are required by law to keep. There is a presumption that the prosecutor's office had a policy as required by law.[8] The petition expressly pled that "[Petitioner] had a right to receive a copy of [Respondent] BCPO's Sunshine Law Compliance Policy as it was on May 3, 2023." Because it is impossible to copy a document that does not exist, the petition clearly infers that there was an original document which could be copied. The petition then goes on to plead that Respondents engaged in a scheme to deceive Petitioner and to avoid providing Petitioner "*the genuine Sunshine Law Compliance Policy that existed and was in effect on*

8 "There is a presumption that public officials have rightfully and lawfully discharged their official duties until the contrary appears." *Dittmeier v. Missouri Real Estate Commission,* 316 S.W.2d 1, 5 (Mo. 1958).

May 3, 2023."[9] The petition does reasonably infer,[10] and even expressly pleads, that Respondents withheld an existing document from Petitioner. The decision of the Court of Appeals rejects the facts pled in the petition and instead relies upon substitute facts of its own creation. A purposeful violation of the Sunshine Law is committed by engaging in an intentional scheme or plan to violate the Sunshine Law. If the document had been created *prior to,* and *already existed* at the time of Petitioner's request, it could not have been created as part of a scheme to avoid properly responding to Petitioner's request. Therefore, if the policy was created and misdated *prior* to Petitioner's request it could not have been a purposeful violation of the Sunshine Law. Conversely, if Respondents received Petitioner's request

9 The petition does alternatively plead that Respondents may have forged the document and provided it to Petitioner to avoid notifying Petitioner that such a policy did not exist on May 3, 2023. "A pleader may make two or more statements of a cause of action alternatively or hypothetically in one count, and if any one of the statements of the claim is sufficient, the pleading is not made insufficient by reason of the insufficiency of one or more of the alternative statements. Rule 55.10;" *Showalter V. Westoak Realty and Inv*, 741 S.W.2d 681, 683 (Mo. Ct. App. 1988). "If the petition sets forth any set of facts that, if proven, would entitle the plaintiffs to relief, then the petition states a claim." *Phelps v. City of Kansas City*, 371 S.W.3d 909, 912 (Mo. Ct. App. 2012).

10 "In reviewing a motion to dismiss for failure to state a claim, [Missouri appellate courts accept] as true all facts properly pleaded and all reasonable inferences therefrom. " *Madden v. C K Barbecue Carryout, Inc.*, 758 S.W.2d 59, 61 (Mo. 1988).

and *then* forged the document as part of a scheme to avoid properly responding to Petitioner's request (as alleged in Petitioner's petition), it would have constituted a purposeful violation of the law and subjected Respondents to penalties for their actions. As such, the factual errors in the opinion of the Missouri Court of Appeals were custom tailored to achieve a finding that the petition had failed to state a claim for purposeful violations of the Sunshine Law.

Despite the fact that the petition pled that the forged policy *did not exist on May 14, 2022*, and therefore Skaggs was required to respond to the May 12, 2023 request for records within 3 days, the decision of the Court of Appeals held that Respondents were not required to respond to the May 12, 2023 request because the policy *did exist on May 14, 2022*. Respondent's opinion openly acknowledges that Skaggs would have been required to respond if the policy had not been in effect on May 14, 2022, but infers that the policy was in effect on May 14, 2022 and therefore Skaggs was not obligated to respond within 3 days. In reference to that request the opinion states *"[i]t would then follow that if the document previously provided was not in effect on May 14, 2022, and the Prosecutor's Office did not have a*

policy in effect on that date (or no longer retained that document), then they would have had to respond to Pride's May 12 request with that information because the contingency in the request would have been triggered." Petitioner's petition expressly pleads that Respondents were required to respond to the request *because the policy that had been provided was not in effect on May 14, 2022*. By holding that Respondents did not have to respond to the request because the previously provided policy was in effect on May 14, 2022, the opinion of the Court of Appeals cites facts which are *exactly opposite* to the facts alleged in the petition, while acknowledging that the result would be different if the decision was based on facts which are identical to the undisputed facts of the case. Further, it is not reasonable to believe that this error was the result of an oversight because Petitioner's Point 3 on appeal expressly argued that *Skaggs was required to respond to the request because she was aware that the document did not exist on May 14, 2022.*[11] The opinion holds that Skaggs *would have been required to respond if the policy did not exist on May 14, 2022*. In essence, the Court of Appeals accepted the *legal arguments* set forth in Point 3 of Petitioner's appeal and even included them in the opinion while

11 The appellate brief is included as Appendix I at page A41.

merely substituting *opposite facts* to reach a contrary result.

Petitioner filed a motion for rehearing which pointed out these factual errors, and requested that the opinion be corrected. The Court of Appeals denied that motion on April 1, 2025 without explanation.

The opinion was written by the Honorable Judge Karen King Mitchell who sits on the Western District of Missouri Court of Appeals. Out of the 45 counties within the jurisdiction of the Western District, Judge Mitchell resides in Boone County where Respondents are also located, and Judge Mitchell previously held the position of Chief Deputy Missouri Attorney General where Respondent Roger Johnson worked alongside her as an Assistant Missouri Attorney General representing the state of Missouri in criminal appeals. (Petitioner was unaware of any potential conflict until after her appeal was decided and the motion for rehearing was denied.)

Petitioner filed an application for transfer to the Supreme Court of Missouri.[12] In that application, Petitioner argued that "[b]y substituting fiction in place of the facts in the record, and deciding the appeal based

12 Missouri Supreme Court docket no. SC101057.

on such fiction, the Court of Appeals [had] infringed on [Petitioner's] right to appeal the actual judgment of the Circuit Court."[13] Petitioner also filed a motion for review by extraordinary writ.[14] In support of that motion Petitioner argued that the Court of Appeals had substantially "deprived" Petitioner of her "right to appeal", and reduced the right of appeal granted by Missouri state law to "nothing more than a procedural formality." Petitioner argued that the actions of the Court of Appeals constituted "a defacto denial of [Petitioner's] right to appeal". The application for transfer and the application for review by extraordinary writ proceeding were summarily denied without explanation on May 27, 2025.

This was a predictable outcome since the Missouri Supreme Court will not grant transfer for review of factual errors in an appellate opinion, and Missouri law does not allow for appellate review of errors made by Missouri Appellate Courts. Because the Supreme Court of Missouri lacks jurisdiction to review the specific

13 Because the Missouri Supreme Court lacked jurisdiction to reach the constitutional issues raised in this petition, any deficiency in raising the constitutional issue before the Missouri Supreme Court is irrelevant. "There is a familiar maxim in the law—the law does not require vain or useless acts." *Yang v. Robert Half Int'l, Inc.*, 79 F.4th 949, 960 (8th Cir. 2023).

14 Missouri Supreme Court docket no. SC101079.

issues raised in this petition, the Western District of Missouri Court of Appeals was the highest state court in which a decision could be had.

This Court has Jurisdiction to Review the Federal Issues Raised

Failure to raise a federal constitutional question prior to the decision of a state appellate court does not deprive this court of jurisdiction where the federal issue is the result of an unexpected action by the state court itself, and where the issue could not have been raised prior to the decision complained of. *Great N. Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 367, 53 S. Ct. 145, 149, 77 L. Ed. 360 (1932). Because it was not immediately obvious that the factual errors were not the result of oversight, Petitioner utilized the process provided by Missouri Supreme Court Rule 84.17 to have the factual errors corrected.[15] The motion for rehearing clearly detailed the factual errors and referenced specific parts of the appellate record to prove that the decision was

15 Missouri Supreme Court Rule 84.17(a)(1) allows a party to file a motion for rehearing "to call attention to material matters of law or fact overlooked or misinterpreted by the court, as shown by its opinion".

based upon factual inaccuracies.[16] It was not apparent that the erroneous factual findings were intentional until the motion for rehearing was denied. After the motion for rehearing was denied, Missouri law barred Petitioner from filing any further motion regarding the issue.[17]

Petitioner argued that she had been deprived of her right to appeal in her application for transfer to the Missouri Supreme Court, but Petitioner's requests for discretionary transfer and review were doomed by Missouri law. Although the Missouri Supreme Court may grant discretionary transfer of appeals, Missouri Supreme Court Rules 83.02 and 83.04 set out the only reasons why transfer will be granted, and factual errors in an appellate opinion are not one of those reasons. Further, *Missouri law strictly prohibits any attempt to appeal an appellate decision*. Even if transfer of an appeal is granted, the Missouri Supreme Court cannot review error committed by the Missouri Court of Appeals, and if an appellant attempts to obtain such review after transfer, the Missouri Supreme Court will

16 The motion for rehearing is included as Appendix J at page A72.

17 Pursuant to Missouri Supreme Court Rule 84.17(d) a party may not file any further motion for rehearing after a motion for rehearing is denied.

dismiss the appeal without reaching the alleged error. *City of Harrisonville v. Missouri Dep't of Nat. Res.,* 681 S.W.3d 177, 182 (Mo. 2023).[18]

Together, these rules and practices have created a loophole which allows Missouri appellate courts to fabricate facts without concern for reversal, and this technicality leaves appellants at a dead-end after their appeals are extinguished without proper review. If the opinion of the Court of Appeals had correctly admitted that the document did not exist at the time of Petitioner's requests, and that Respondents had engaged in a scheme to create the document to avoid providing Petitioner with a proper response, the decision would have deviated from state precedent by finding that Respondents actions did not constitute a purposeful violation of Missouri's Sunshine Law. Such a decision

18 In *City of Harrisonville v. Missouri Dep't of Nat. Res.,* 681 S.W.3d 177 the Missouri Supreme Court dismissed an appeal after transfer because the appellant attempted to raise claims of appellate court error. The court stated that the claim of error was "based on a non-cognizable claim that the court of appeals erred. The right to appeal is 'purely statutory,' and § 512.020 generally authorizes an appeal by any party aggrieved by any judgment of any *trial court* in any civil cause.' (Emphasis added). There is no appeal from a court of appeals decision, and the court of appeals opinion is vacated when this Court transfers an appeal. As Rule 84.04(d) makes clear, this Court reviews claims of 'trial court' error, not appellate court error." - *Id.* at 182 (Mo. 2023). (Internal citations omitted.)

would have allowed Petitioner a meaningful opportunity to have the appeal transferred to the Missouri Supreme Court for review. Instead, by creating fictional facts to support their decision, the Court of Appeals not only deprived Petitioner of her right to appeal the actual judgment entered against her, but also deprived her of the possibility of having the decision reviewed by the Missouri Supreme Court on transfer.

The Missouri Supreme Court's refusal to hear matters of appellate court error is not a matter of willful obstruction. Rather, *the Supreme Court of Missouri completely lacks jurisdiction to hear such an appeal.* Missouri law holds that the right to appeal is purely statutory, and appellate courts (including the Supreme Court of Missouri) lack jurisdiction to hear appeals that are not authorized by statute. *Pachmayr v. Harper*, 390 S.W.3d 222, 224 (Mo. Ct. App. 2013) (Holding that where appeal is not authorized by statute, an appellate court lacks jurisdiction.) Because Missouri law only authorizes appeals from decisions of "trial courts",[19] the Supreme Court of Missouri lacks appellate jurisdiction to review decisions of lower appellate courts. Although the Missouri Supreme Court has power to grant transfer

19 See Missouri Revised Statute § 512.020.

after a decision of the Missouri Court of Appeals, its ability to review error is limited to errors committed by the trial court. As such, *the Missouri Supreme Court will never have the opportunity to reach the federal constitutional issues raised in this petition.*

This Court's rule which requires litigants to raise and preserve constitutional issues is very much a common sense rule, and this rule has not been applied when its application would defeat its purpose. The Court should not overlook the reality that the procedure used by Missouri appellate courts to deprive litigants of their right to appeal is well calculated to obstruct any attempt to have the practice reviewed by a higher court. *Further, because of Missouri's appellate rules, it will never be possible to timely raise these federal issues in a Missouri court.*

Because Missouri law precluded Petitioner from obtaining a review of her constitutional claims by a state court, this Court should grant review of the unconstitutional practice utilized by the Missouri Court of Appeals despite the fact that these federal issues were not fully briefed and decided by Missouri Courts. This

Court has previously granted certiorari when review of federal issues in state courts was thwarted by state procedure. See *Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 457, 78 S. Ct. 1163, 1169, 2 L. Ed. 2d 1488 (1958). (Holding that state court's failure to reach federal issue does not preclude review by this court where application of state procedure unfairly deprived litigant of the right to have the issues decided by the state court.)

Because the Missouri Supreme Court lacked jurisdiction to consider the constitutional issues for which Petitioner seeks certiorari, the Missouri Court of Appeals was the state court of last resort and this Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

Reasons for Granting the Writ

The procedure utilized by the Missouri Court of Appeals deprives litigants of a property right without due process of law.

The due process clauses of the fifth and fourteenth amendments to the United States constitution prohibit states from depriving individuals of life, liberty, or property, without due process of law.

This Court has previously found that state created procedures for adjudication of rights are protected property interests and a state may not deprive individuals of these rights without due process of law. In *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 430, 102 S. Ct. 1148, 1155, 71 L. Ed. 2D 265 (1982) the Court stated that a property interest "is an individual entitlement grounded in state law, which cannot be removed except 'for cause.' Once that characteristic is found, the types of interests protected as 'property' are varied and, as often as not, intangible, relating 'to the whole domain of social and economic fact." (Internal citations omitted.) Missouri Law grants the right of

appeal to any party aggrieved by a final judgment in a civil cause.[20] It is undisputed that Petitioner appealed such a judgment. Therefore, Petitioner's right to appeal the judgment entered against her constitutes a protected property interest.

Where a state created property right exists, the state may not deprive individuals of that right without conducting "minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated." *Wolff v. McDonnell,* 418 U.S. 539, 557, 94 S. Ct. 2963, 2975, 41 L. Ed. 2D 935 (1974). In *Evitts v. Lucey,* 469 U.S. 387, 400, 105 S. Ct. 830, 838, 83 L. Ed. 2D 821 (1985) this Court held that a state created right to appeal was subject to due process protection. The Court stated that "when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution, and, in particular, in accord with the Due Process Clause." Because Missouri state law creates a right of appeal, litigants may not be deprived of that right without due process.

20 Missouri Revised Statute § 512.020 included as Appendix G at page A25.

This Court has previously found that a state judicial procedure may violate the due process clause if it "'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or 'transgresses any recognized principle of fundamental fairness in operation.'" *Dist. Attorney's Off. for Third Jud. Dist. v. Osborne,* 557 U.S. 52, 69, 129 S. Ct. 2308, 2320, 174 L. Ed. 2D 38 (2009). "The touchstone of due process is protection of the individual against arbitrary action of government". *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S. Ct. 2963, 2976, 41 L. Ed. 2D 935 (1974).

It is a well settled principle that courts must reach decisions based upon evidence before the court. It is not the role of the judiciary to create facts or invent evidence. It is an undisputed fundamental element of due process that courts decide cases based upon evidence presented, and appellate courts decide cases based upon the record on appeal. Democratic courts base their decisions upon the evidence, rather than basing the "evidence" upon the decision. A court that invents or modifies facts to support its judgment rather than

basing the judgment upon the facts of record is the epitome of a proverbial kangaroo court. It is axiomatic that such a procedure offends traditional and fundamental principles of justice, and transgresses recognized principles of fundamental fairness in operation. When a judge fabricates evidence to support a decision, he necessarily steps into the roles of witness, advocate, and arbiter. Such a process stomps on other rights such as the right to a neutral tribunal, the right to present evidence, the right to see and confront evidence presented by the opposing party, the right to cross examine witnesses, and the right to a decision based on evidence presented. If courts do not reach decisions based upon the facts and evidence presented, all other due process rights become worthless. In *Hovey v. Elliott* this Court held that the right to notice was useless if a defendant was denied the right to be heard.

> "But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak, if he has anything to say, why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be, in effect, to deny that he is entitled to notice at all, and the sham and deceptive proceeding had

> better be omitted altogether. It would be like saying to a party, 'Appear and you shall be heard;' and, when he has appeared, saying, 'Your appearance shall not be recognized, and you shall not be heard.'"
> *Hovey v. Elliott,* 167 U.S. 409, 415, 17 S. Ct. 841, 843, 42 L. Ed. 215 (1897).

In the same way, foundational due process rights such as the right to present evidence, the right to see and confront evidence presented by the opposing party, and the right to cross examine witnesses are all worthless if a litigant has no right to a decision based upon the evidence presented. For this reason, the right to have a case decided upon the evidence of record is one of the most important and foundational rights of due process, and a denial of this right erodes the most essential principles of American constitutional justice.

Further, decisions that are not rooted in evidence before a court are arbitrary, and have the effect of substantially depriving appellants of their right to appeal. By creating fictional scenarios and basing their decisions upon these fictional scenarios, Missouri appellate courts effectively deprive litigants of their right to appeal the actual judgments entered against them. If appellate courts are

free to ignore the facts of record when deciding an appeal, the right to appeal is reduced to nothing more than a procedural formality. "The 'due process of law' which the Fourteenth Amendment exacts from the States is a conception of fundamental justice. It is not satisfied by merely formal procedural correctness" *Foster v. People of State of Ill.,* 332 U.S. 134, 136, 67 S. Ct. 1716, 1717–18, 91 L. Ed. 1955 (1947) (Internal citations omitted.) By deciding Petitioner's appeal while disregarding the facts underlying Petitioner's case, the Missouri Court of Appeals has deprived Petitioner of her right to appeal the judgment entered against her. The Court of Appeals has allowed Petitioner to enjoy the *procedure* of an appeal while ignoring Petitioner's *right to appeal the actual judgment entered against her*. The opinion of the Court of Appeals is nothing more than an eloquent work of fiction. In substance, the actions of the Court of Appeals constitute a de facto denial of Petitioner's right to appeal.

This is not a new or novel issue. Petitioner is aware of multiple appeals that have suffered the same unfortunate fate. In each case, the Court of Appeals has refused to correct the "errors" on rehearing. The

consequences of these fiction-based opinions is devastating in both civil and criminal appeals, and such decisions have the potential to create unsolvable problems for litigants who utilize the appellate process in Missouri. These opinions constitute res judicata in future proceedings despite the fact that parties have no right to be heard before an appellate court arbitrarily fabricates "evidence" effecting their rights. In cases of remand or partial remand, fictional findings become binding on the lower court, and must be given the same weight and respect in future proceedings as if they were supported by evidence entered in accordance with constitutional safeguards. Parties have no further opportunity to have these decisions reviewed and are forced to suffer the consequences of arbitrary and irrational appellate decisions. Denials of other due process rights such as the right to confront witnesses or present evidence appear innocent in comparison to this abhorrent practice. The fact that this scenario does not affect the majority of appeals is no reason to overlook its effect on the rights of litigants impacted by it. If this Court does not prohibit the practice, litigants will continue to suffer in silence as a result of

unconstitutional procedures which deny them a meaningful appellate review.

This Case is a Perfect Candidate for Review

Although this case is not unique, Petitioner is not aware of any decision where an appellate court openly admitted that the decision would have been opposite if the facts had been as they actually were. Because the opinion of the Court of Appeals openly admits that it is based upon facts that are easily dis-proven by the record on appeal, and because the opinion also admits that the outcome would have been different if it relied upon facts which are identical to the facts shown by the record on appeal, there are no complicated issues of state law to be decided by this Court. Because review in a dismissal for failure to state a claim is limited to the facts in the petition, there is no dispute as to the facts of record in this case. As such, the controversy is limited to the narrow issue of whether the procedure utilized by the Missouri Court of Appeals violates the due process clauses of the fifth and fourteenth amendments to the United States Constitution.

Wherefore, Petitioner respectfully requests that this Court grant certiorari to review the decision entered against Petitioner by the Western District of Missouri Court of Appeals.