No. 21-537

In The Supreme Court of the United States

J 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,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* LANDMARK LEGAL FOUNDATION, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, ATLANTIC LEGAL FOUNDATION, YOUNG AMERICA'S FOUNDATION, AND HISPANIC LEADERSHIP FUND IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amicus Curiae Landmark Legal Foundation ("Landmark") is a national public-interest law firm committed to preserving the principles of limited government, separation of powers, federalism, originalist construction of the Constitution and individual rights. Landmark has a unique perspective on this case because of its status as a nonprofit corporation that has director and officer ("D&O") liability insurance and solicits charitable contributions in California.

Amicus Curiae National Federation of Independent Business Small Business Legal Center ("NFIB SBLC") is a nonprofit, public-interest law firm, established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. NFIB is the nation's leading small business association, representing members in Washington D.C., and all fifty state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. To fulfill its role as

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[1] The parties consented to the filing of this brief. Counsel for *Amici Curiae* provided notices to counsel for parties of its intent to file this brief on October 28, 2021, more than ten days before the due date. All parties consented by October 30, 2021. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

the voice for small business, the NFIB SBLC frequently files amicus briefs in cases that affect small businesses.

Established in 1977, *Amicus Curiae* Atlantic Legal Foundation ("Atlantic") is a national, nonprofit, nonpartisan, public-interest law firm whose mission is to advance the rule of law and civil justice by advocating for individual liberty, free enterprise, property rights, limited and efficient government, sound science in judicial and regulatory proceedings, and school choice. With the benefit of guidance from the distinguished legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, the Foundation pursues its mission by participating as *amicus curiae* in carefully selected appeals before the Supreme Court, federal courts of appeals, and state supreme courts. Atlantic has a unique perspective on this case because of its status as a nonprofit corporation that has D&O liability insurance and solicits charitable contributions in California. *See* atlanticlegal.org.

Amicus Curiae Young America's Foundation is a nonprofit organization dedicated to advancing the ideas of individual freedom, traditional values, a strong national defense, and free enterprise amongst young people. As part of its tax exempt mission, Young America's Foundation preserves and protects the Ronald Reagan Ranch and operates the Reagan Ranch Center, both located in California. Young America's Foundation has an interest in this case because it

retains employees, maintains D&O liability insurance, and solicits charitable contributions in California.

Amicus Curiae Hispanic Leadership Fund ("HLF") is a not-for-profit 501(c)(4) social-welfare organization. HLF is dedicated to strengthening working families by promoting common-sense public policy solutions promoting liberty, opportunity, and prosperity, with a particular interest in issues affecting the Hispanic community. HLF has previously participated in federal cases in challenges to state laws that unconstitutionally restrict nonprofit organizations' speech and expression. *See*, *e.g.*, *Hispanic Leadership Fund v. Walsh*, 2013 WL 5423855 (N.D.N.Y. 2013).

Amici urge this Court to grant the petition for certiorari.

INTRODUCTION AND SUMMARY OF ARGUMENT

California's extremely broad Unfair Competition Law and False Advertising Law act as "catch-all" statutory schemes for not only unlawful conduct, but unfair conduct as well. Vague, overly broad statutes force individuals and businesses to navigate in the blind, depriving them of the opportunity to know what conduct is prohibited. The assessment of future risks to businesses and nonprofit organizations is made much more difficult. These laws create the kind of uncertainty that makes D&O insurance a critical need for many small businesses and nonprofit corporations.

And yet, the California Attorney General has the unilateral power to deprive an insured the benefit of its D&O coverage by simply alleging violation of ill-defined statutes under Cal. Ins. Code § 533.5(b). With a mere allegation, California creates an insurmountable litigation advantage in cases with a large majority of small businesses and nonprofit organizations. Small businesses and nonprofits, including *amici*, cannot afford to engage in extensive and expensive litigation. NFIB reports that its average California member company has less than $500,000 in annual revenues and fewer than 30 days of operating cash reserves. And the vast majority of nonprofit organizations are similarly strapped for resources. Without access to D&O insurance for which these companies have paid premiums, many are doomed to shuttering their doors in the face of a UCL allegation.

Cal. Ins. Code § 533.5(b) therefore renders many, if not most, small companies and nonprofits incapable of obtaining legal representation in UCL cases. This threatens to create a two-tier system of justice in California, where only large, wealthy firms are capable of going to trial. Smaller businesses and nonprofits will be forced to buckle and settle, incapable of exercising their due process right to retain counsel as civil litigants.

Section 533.5(b) also creates a chilling effect for individuals wishing to serve on a nonprofit organization's board of directors. It is for this reason that D&O insurance protection is critical to the health of nonprofit organizations. Giving prosecutors authority to

deprive an organization of its D&O coverage unfairly deprives coverage for officers and directors. The law is not only unfair, but it spells disaster for effective nonprofit board oversight.

ARGUMENT

I. California's statutory scheme unfairly burdens small business and nonprofit organizations and discourages potential board members from serving.

Under California's Unfair Competition Law ("UCL"), any unlawful, unfair or fraudulent business act or practice is deemed to be unfair competition. Cal. Bus. & Prof. Code § 17200. "In other words, a practice is prohibited as 'unfair' or 'deceptive' even if not 'unlawful' and vice versa." *State Farm Fire & Cas. Co. v. Superior Court*, 45 Cal. App. 4th 1093, 1102 (1996) (citation omitted). All three prongs have a broad scope. "Virtually any law – federal, state or local – can serve as a predicate for a section 17200 action." *Id*. at 1102-03 (citation omitted). The "unfair" prong "is intentionally broad, thus allowing courts maximum discretion to prohibit new schemes to defraud." *Id.* at 1103 (citation omitted). *But see Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 184-87 (1999) (rejecting the use of vague unfairness standards in UCL cases brought by competitors). The "fraud" prong is unlike common law fraud or deception. Instead, a violation "can be shown even if no one was actually deceived, relied upon the fraudulent practice, or sustained any

damage." *State Farm*, 45 Cal. App. 4th, at 1105 (citation omitted). The statute imposes strict liability so there is no need to show that the defendant intended harm. *People ex rel. Van de Kamp v. Cappuccio, Inc.*, 204 Cal. App. 3d 750, 760-61 (1988).

California's False Advertising Law ("FAL") has a broad scope as well. It has an expansive reach as to covered persons, intent, types of statements, and methods of dissemination. It applies to statements made "with intent directly or indirectly" that induce the public "to enter into any obligation" relating to the disposal of property or performance of service made or disseminated before the public "which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading." Cal. Bus. & Prof. Code § 17500. The statute goes beyond regulating falsehoods to the less stringent standard of "misleading" statements.

The UCL, one of the many "Little FTC Acts" enacted by the states, has "led to abusive litigation and unpredictable liability for California businesses." Alexander N. Cross, *Federalizing Unfair Business Practice Claims Under California's Unfair Competition Law*, 1 U. Chi. Legal F. 489, 490 (2013). Although California courts have tried to rein in vague standards of unfairness, "uncertainty over the UCL's reach remains." *Id.* This is not surprising since "[t]he term 'unfair' is an elusive concept, often dependent upon the eye of the beholder," as noted in a federal FTC case. *E. I. Du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 137 (2d Cir. 1984). It is also true that "[v]ague laws invite arbitrary power." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223 (2018) (Gorsuch, J., concurring).

It is understandable that businesses like Petitioners sought D&O liability coverage protection while doing business in California. "[T]he purpose of insurance is to protect insureds against unknown risks." *Appalachian Ins. Co. v. Liberty Mut. Ins. Co.*, 676 F.2d 56, 63 (3d Cir. 1982). The broad and vague outlines of California's consumer protection statutes create unknown risks for corporations that make business liability insurance necessary.

Upon this shaky foundation, California added more power to the government with the passage of Cal. Ins. Code § 533.5(b). The Attorney General made statements in support of legislation "to address a problem the Attorney General had encountered (only) in UCL and FAL actions and to address a specific problem that public entities were experiencing when they brought unfair competition or false advertising actions, whether civil or criminal, against individuals and businesses." *Mt. Hawley Ins. Co. v. Lopez*, 215 Cal. App. 4th 1385, 1402 (2013). When defendants were covered by a business insurance policy, these cases became "impossible to settle." *Id.* at 1403. Section 533.5(b) prohibits insurance policies from providing any duty to defend claims arising under the UCL or FAL brought by "the Attorney General, any district attorney, any city prosecutor, or any county counsel." *Id.* at 1411. This is a very powerful tool to be used in the government's discretion. The statute applies to take away a corporation's insurance protection upon the filing of the claim, not after any impartial hearing. Furthermore, the statute puts a wide range of business

organizations at risk of lawsuits from even local government entities.

The government's ability to deny defendants' use of D&O liability insurance gives it power over them. It creates pressure on defendants to seek settlement to avoid litigation costs. In this case, after the California attorney general sued Petitioners, their insurance company paid $2 million under the D&O liability policy to assist in their defense. Pet'r's Br. 2. The state "ultimately served more than 1,000 written discovery demands and took nearly 40 depositions." *Id.*

Amicus Curiae NFIB's members do not have the resources to conduct extensive litigation like this. "[T]he typical NFIB member employs 10 people and reports gross sales of about $500,000 a year." *Who NFIB Represents*, NFIB, https://www.nfib.com/about-nfib/what-is-nfib/who-nfib-represents/ (last visited Nov. 8, 2021). NFIB member businesses are comparable in size with small businesses nationally. According to a 2016 U.S. Census survey, the median annual revenue for a small business is less than $400,000 and 39% show less than $250,000. Steven King, *Most Small Businesses Still Have Less Than $400,000 in Annual Revenue*, Small Bus. Labs, June 18, 2019, https://www.smallbizlabs.com/2019/06/most-small-businesses-still-have-less-than-400000-in-annual-revenue.html (last visited Nov. 8, 2021). Roughly a quarter had more than $1 million. *Id.*

Small businesses do not have the cash reserves to weather extended litigation. "The median small

business holds an average daily cash balance of $12,100, with wide variation across and within industries." Diana Farrell & Chris Wheat, *Cash is King: Flows, Balances, and Buffer Days: Evidence from 600,000 Small Businesses*, 12 (2016), https://www.jpmorganchase.com/content/dam/jpmc/jpmorgan-chase-and-co/institute/pdf/jpmc-institute-small-business-report.pdf (last visited Nov. 10, 2021). The median number of cash buffer days for small businesses is twenty-seven days. *Id.* at 14. Cash buffer days are "the number of days of cash outflows a business could pay out of its cash balance were its inflows to stop." *Id.*

A report prepared for the Small Business Administration on the impact of litigation on small business determined that legal costs for small businesses ranged from $3,000 to $150,000, with one-third reporting less than $10,000. Klemm Analysis Grp., *Impact of Litigation on Small Business*, 12 (2005), https://www.sba.gov/sites/default/files/files/rs265tot.pdf (last visited Nov. 8, 2021). Due to their small reserves, money spent on litigation "caused a huge burden to the small business owners." *Id.* at 13. One of the conclusions of survey participants who had been involved in litigation was "[i]nsurance is mandatory." *Id*. at 16. Even low D&O insurance coverage may be a problem for business, "potentially hindering their ability to attract talented directors and stifling the good kind of corporate risk-taking." Chris Bryant, *When Lawyers Charge $1,800 an Hour, Who Pays?*, Bloomberg, https://www.bloomberg.com/opinion/articles/2021-06-21/

when-lawyers-charge-1-800-an-hour-who-pays-d-o-insurance-fees-soar (last visited Nov. 9, 2021).

The potential loss of D&O liability insurance has a damaging effect not just on businesses but on nonprofit organizations (including the *amici*) as well. Nonprofits do not have the same balance sheet protection to afford litigation. "The personal finances of directors and officers are on the line if a nonprofit is sued and it lacks sufficient insurance to cover any damages. . . ." Chad Hemenway, *As an Increasing Target for Claims, Nonprofits Seek More D&O Coverage*, Nat'l Underwriter Prop. & Cas. Ins., Feb. 2, 2012, https://www.propertycasualty360.com/2012/02/02/as-an-increasing-target-for-claims-nonprofits-seek-more-do-coverage/ (last visited Nov. 10, 2021). There has also been an increase in lawsuits against charities brought by attorneys general. *Id.*

In California, commercial fundraisers for charitable organizations have been successfully sued under the FAL. *People v. Orange Cty. Charitable Servs.*, 73 Cal. App. 4th 1054 (1999). The court held that "the false advertising laws of Business and Professions Code section 17500 et seq., prohibiting untrue or misleading statements, undoubtedly apply to representations made by fundraisers with the intent of obtaining charitable solicitations." *Id.* at 1075. Furthermore, both the UCL and the FAL apply to broad categories of organizations. Cal. Bus. & Prof. Code §§ 17201, 17500.

California's statutory scheme creates an unnecessary chilling effect for individuals who might

otherwise serve on a board of directors in violation of the First Amendment. The UCL and FAL's vague applicability coupled with Section 533.5(b)'s potential for arbitrary application indiscriminately threaten a board member's property interests and improperly threaten their constitutional right to free association. *See generally Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373 (2021). In *Americans for Prosperity Foundation*, the California legislature created an atmosphere ripe with potential for harassment and retribution against financial supporters of nonprofit organizations. Here, California acts directly, depriving nonprofits, their officers, and their directors the opportunity to defend themselves against state deprivation of their property. It is hard to overstate the potential for mischief by overzealous prosecutors.

II. The Court should grant the petition to protect Defendants' right to fund their legal defense in civil litigation.

This case involves the scope of the right to counsel in a civil action. This is distinct from the right to counsel in criminal matters, which is guaranteed by the Sixth Amendment in federal cases and made applicable to the states in *Gideon v. Wainwright*, 372 U.S. 335, 341-45 (1963). *Gideon* established the indigent criminal defendant's right to state-appointed counsel, which has no civil counterpart. The civil right to counsel is thus not as broad as the criminal right to counsel. *Id.* Yet, according to the Court in *Powell v. Alabama*, 287

U.S. 45, 67-71 (1932), they both derive in part from the Due Process Clause.

The right at issue in this case is the right of civil litigants to be heard by counsel of their choosing with their own untainted funds, such as those obtained through a liability insurance policy. Without this right, the state can stack the deck against defendants in litigation and pressure them to settle by limiting their resources to retain counsel of their choosing.

In *Powell*, defendants were appointed counsel who had almost no time to prepare for their state criminal trials. *Id.* at 52. The Court explained that notice and an opportunity to be heard at a hearing are "basic elements" of the right to due process of law. *Id*. at 68. The right to be heard includes the right to be heard by counsel. *Id*. at 68-69. "[T]he right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice." *Id*. at 53. The Court made clear that this due process right to retain counsel applied to both civil and criminal cases. *Id.* at 69. "If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." *Id*.

Since *Powell*, the caselaw shedding light on the right to civil counsel is "scarce" (and that fact alone supports review) but "the right of a civil litigant to be represented by retained counsel, if desired, is now

clearly recognized." *Anderson v. Sheppard*, 856 F.2d 741, 747 (6th Cir. 1988) (citations omitted). For example, in *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1117 (5th Cir. 1980), a trial court's blanket order to counsel to refrain from speaking with witnesses during recesses applied even to counsel's own client. The Fifth Circuit found this an infringement of the constitutional right to retain counsel. *Id*. at 1118. In *Mosley v. St. Louis Sw. Ry.*, 634 F.2d 942, 946 (5th Cir. 1981), an EEOC specialist conferred directly with a claimant over settlement terms even though the claimant had retained counsel and furthermore denied the claimant's request to speak with his counsel. The Fifth Circuit found that this denial of advice and assistance of retained counsel violated due process. *Id.* In *Anderson*, the Sixth Circuit held that the trial court's denial of an extension of time to obtain new counsel after plaintiff's counsel withdrew was an effective denial of plaintiff's right to counsel. *Anderson v. Sheppard*, 856 F.2d 741, 748-49 (6th Cir. 1988).

In the matter at hand, the Ninth Circuit determined that these cases show that the due process right to retain counsel in civil cases has a "narrow scope." *Adir Int'l, Ltd. Liab. Co. v. Starr Indem. & Liab. Co.*, 994 F.3d 1032, 1039-40 (9th Cir. 2021). It "appears to apply only in extreme scenarios where the government substantially interferes with a party's ability to communicate with his or her lawyer or actively prevents a party who is willing and able to obtain counsel from doing so." *Id*. Accordingly, the Ninth Circuit declined to "enlarge the limited due process right to retain counsel

to include a constitutional right to use insurance proceeds to pay for legal fees." *Id.* at 1040. California Insurance Code § 533.5(b), according to the court of appeals, "does not actively prevent Adir from obtaining counsel or communicating with its lawyers." *Id.* at 1041.

The Ninth Circuit furthermore rejected application of Sixth Amendment cases where courts found the state's restraint of untainted funds necessary for defendants to hire counsel of their choice violated the right to counsel. *Id*. (citing *United States v. Stein*, 541 F.3d 130 (2d Cir. 2008) and *Luis v. United States*, 136 S. Ct. 1083 (2016)). According to the court of appeals, the Sixth Amendment right to counsel is analogous to the civil litigant's right, but not equivalent, because the potential loss of liberty in a criminal trial warrants greater protection. *Id*.

The Ninth Circuit's focus on what sets the criminal defendant's rights apart from the civil litigant's led it to improperly narrow the scope of the civil litigant's right to retain counsel. *Id.* First, it is true that the consequences are more serious to the criminal defendant than to the civil litigant, thereby warranting greater protection. But that protection in the context of the right to be heard is found most prominently in the right of criminal defendants to appointed counsel under *Gideon*. Petitioners do not seek a civil *Gideon*; they want to be able to fund their own counsel without restriction from the state. Just because one's rights are more expansive does not mean the other's rights should be disregarded. There is still a due process right

to counsel and serious consequences at stake for the Petitioners that warrants protection from state impingement. It is somewhat cavalier to suggest that Petitioners did have competent counsel below, so there was no great harm to them. Petitioners are left with the difficult task of proving an alternate history where they had greater financial resources available to fund their defense and a better outcome below.

Second, due process rights, like other individual rights, often involve the expenditure of funds to be exercised. Scrutiny for a compelling reason is often warranted when these expenditures are prohibited, restricted or taxed because they are impingements on the underlying right. *See*, *e.g.*, *Buckley v. Valeo*, 424 U.S. 1 (1976) (freedom of speech); *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575 (1983) (freedom of the press); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (due process right to privacy). In this case, restricting defendants' use of their D&O liability insurance in consumer protection suits because such cases would otherwise be impossible to settle is not a compelling reason. Returning to Justice Sutherland's formulation in *Powell* shows how the insurance restriction is an impingement on the underlying right to retain counsel. If refusal "to hear a party by counsel, employed by and appearing for him" is a denial of due process, would not a refusal to allow a party to pay for counsel with insurance proceeds be one as well? *Powell*, 287 U.S. at 69. They both have the same effect.

Thus, the court of appeals was wrong to view the Sixth Amendment cases, *Stein* and *Luis*, that involved the use of untainted funds to retain counsel, as an invalid analogy to Petitioners' situation. In *Luis*, this Court held that "the pretrial restraint of legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment. The nature and importance of the constitutional right taken together with the nature of the assets lead us to this conclusion." *Luis*, 136 S. Ct. at 1088. The analogy to the case here is apt. In fact, this Court has elsewhere viewed the pretrial restraint of assets in a civil case critically, describing it as a "nuclear weapon." *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 332 (1999).

In *Powell*, the Court noted how the civil and criminal rights had a common root in the Due Process Clause. *Powell*, 287 U.S. at 67-71. It also explained why one was specifically made part of the Bill of Rights. *Id.* at 60-65. The Sixth Amendment was ratified to reject the harsh practice under the English common law to deny counsel in cases of treason or felony. *Id*. But this does not denigrate the right for civil litigants.

> Because English practice had recognized the right to retain civil counsel, there was no need to reaffirm the prerogative. Therefore, the sixth amendment's rejection of the English criminal practice does not represent the denial of a right to retain counsel in civil litigation. The existence of such a right has, indeed,

> been generally assumed in the American legal system.

Note, *The Right to Counsel in Civil Litigation*, 66 Colum. L. Rev. 1322, 1327 (1966) (footnote omitted). This suggests why the caselaw regarding the right to retain civil counsel is so "scarce," as the Sixth Circuit noted in *Anderson*. California is interfering with a basic element of due process law. The right has roots in the English common law and has been firmly ensconced in the United States. Petitioners must thus cite Sixth Amendment cases for guidance because Cal. Ins. Code § 533.5(b) is an anomalous impingement on the due process right to retain counsel. Petitioners' situation is a compelling signal that this Court's guidance is necessary.

Finally, although the Ninth Circuit believed that affirming the importance of funding to the right to retain counsel would "enlarge" the right, in truth, it would merely clarify it. Several issues were left unresolved in *Gideon* that required the Court to return repeatedly to the Sixth Amendment right to counsel: when the right to counsel arises (*Brewer v. Williams*, 430 U.S. 387 (1977)); whether some offenses are so minor that the government need not provide counsel (*Argersinger v. Hamlin*, 407 U.S. 25 (1972)); and how effective must defense counsel be (*Strickland v. Washington*, 466 U.S. 668 (1984)). *See* Donald Dripps, *Right-to-Counsel Clause*, in *The Heritage Guide to the Constitution* (David F. Forte & Matthew Spalding, eds., 2d ed. 2014). It is appropriate for the Court to do

so here as well, given the scarcity of caselaw and the importance of the due process right at risk.

Similar to *Gideon*, there are multiple instances where this Court has ensured that civil litigants' access to the courts was not denied because of indigency. "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (holding that the denial of a trial transcript to an indigent criminal defendant for his appeal violates the Fourteenth Amendment's Due Process and Equal Protection Clauses). In *Boddie v. Connecticut*, 401 U.S. 371, 382-83 (1971), the Court held that, under the Fourteenth Amendment's Due Process Clause, a state may not deny indigents seeking a divorce due to their failure to afford the court fees. It is hard to square why the indigent should not be denied access to the courthouse door but it is acceptable to limit other litigants' access to D&O funds so that they are forced to settle and can never get there.

The Court should grant the petition to protect the Due Process Clause for civil litigants as it has done repeatedly for criminal defendants and the indigent.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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