No. _____

In the
Supreme Court of the United States

MITCHELL J. STEIN,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeal for the State of California

PETITION FOR WRIT OF CERTIORARI

RICHARD C. KLUGH
LAW OFFICES OF
RICHARD C. KLUGH
Ingraham Building
25 S.E. Second Ave.
Suite 1100
Miami, FL 33131
(305) 536-1191
rklugh@klughlaw.com

Counsel for Petitioner

QUESTION PRESENTED

As this Court has cautioned, "harmless-error rules can work very unfair and mischievous results," including when "legally forbidden" tactics substantially impact a proceeding. *Chapman v. California*, 386 U.S. 18, 22 (1967). In criminal cases, the Court has identified categories of structural error which are not susceptible to a harmless-error inquiry, *see, e.g., Sullivan v. Louisiana*, 508 U.S. 275, 281-282 (1993); *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991); *Batson v. Kentucky*, 476 U.S. 79, 106 (1986); *Davis v. Alaska*, 415 U.S. 308, 318 (1974); *Estes v. State of Tex.*, 381 U.S. 532, 542–43 (1965), while as to other errors the Court has placed the burden to prove harmlessness on the beneficiary of the error. *Chapman*, 386 U.S. at 24.

Not unlike in criminal cases, specific injury resulting from certain fundamental errors in civil proceedings may be difficult to identify or may not yet have occurred. This is the case where, as here, summary adjudication is awarded in plaintiff's favor on a cause of action for declaratory relief which is, as acknowledged below, legally forbidden. The Court's silence on structural error in the civil context has caused a deep split among state and federal courts.

The question presented is:

When a fundamental structural error results in an invalid judgment against a civil litigant in violation of the Due Process Clause, is the error *per se* prejudicial, as held by seven state courts of last resort and two circuits, or must the litigant prove prejudice, as held by five state high courts and two circuits?

PARTIES TO THE PROCEEDING

There are no parties interested in the proceeding other than those named in the caption of the case.

The Law Offices of Kramer and Kaslow, d.b.a. K2 Law, Mass Litigation Alliance, and Consolidated Litigation Group; Philip Allen Kramer; Christopher Van Son, d.b.a. the Law Offices of Christopher J. Van Son and Consolidated Litigation Group; Mesa Law Group Corp.; Paul Petersen; Attorneys Processing Center, LLC, d.b.a. Attorney Processing Center and Processing Center; Data Management, LLC; Gary DiGirolamo; Bill Merrill Stephenson; Mitigation Professionals, LLC, d.b.a. K2 Law; Glen Reneau; Pate, Marier and Associates, Inc; James Eric Pate; Ryan William Marier; Home Retention Division; Michael Anthony Tapia, d.b.a. Customer Solutions Group and Home Retention Division; Lewis Marketing Corp.; and Thomas Phanco were defendants below and are no longer interested in the proceeding.

Mitchell J. Stein & Associates, Inc. was named as a defendant below but was dissolved three years before the commencement of the action.

TABLE OF CONTENTS

QUESTION PRESENTED i
PARTIES TO THE PROCEEDING ii
TABLE OF AUTHORITIES vi
PETITION FOR WRIT OF CERTIORARI 1
OPINIONS BELOW 3
JURISDICTION 3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3
STATEMENT OF THE CASE 4
A. Factual Background And Trial Court Proceedings 4
B. The Decision of the Court of Appeal for the State of California 8
REASONS FOR GRANTING THE PETITION 9
I. There Is A Profound Conflict Over The Question Presented. 11
A. Five high state courts and courts in three circuits hold that the structural-error doctrine has no place in the civil context. . 11
B. Seven state high courts and two circuits hold that structural errors defy harmless-error analysis in civil cases 15
II. This Case Is An Ideal Vehicle To Resolve The Question Presented. 19
III. The Importance Of Resolving The Conflict 23
CONCLUSION 26

TABLE OF APPENDICES

Appendix A

Opinion, Court of Appeal for the State of California, *The People vs. Stein*, No. B275955 (May 15,2018).....App-1

Appendix B

Order, Supreme Court of California Denying Petition for Review, *The People vs. Stein*, No. S249516 (Aug. 8, 2018).....App-16

Appendix C

Order, Court of Appeal for the State of California Denying Petition for Rehearing, *The People vs. Stein*, No. B275955 (June 4, 2018).....App-17

Appendix D

Final Judgment against Mitchell Stein, Los Angeles Superior Court, *The People vs. The Law Offices of Kramer and Kaslow, et al.*, No. LC094571 (May 9, 2016)....App-18

Appendix E

Order, Los Angeles Superior Court Granting Plaintiff's Motion for Summary Adjudication,*The People vs. The Law Offices of Kramer and Kaslow, et al.*, No. LC094571 (Feb. 5, 2016).....App-30

Appendix F

Trancript of Status Conference, Los Angeles Superior Court, *The People vs. The Law Offices of Kramer and Kaslow, et al.*, No. LC094571(Apr. 13, 2015).....App-40

Appendix G

Constitutional and Statutory Provisions Involved……..……..App-61

U.S. Const. amend. XIV, § 1……..……..App-61
Cal. Const., art. VI, § 13……..App-61
Cal. Code Civ. Proc., § 475 ……App-61-62

TABLE OF AUTHORITIES

Cases

Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury,
686 F.3d 965 (9th Cir. 2012)..... 11, 14

Arizona v. Fulminante,
499 U.S. 279 (1991)..... i, 11, 18

Aulisio v. Bancroft (2014)
230 Cal. App. 4th 1516 16

Avichail ex rel. T.A. v. St. John's Mercy Health Sys.,
686 F.3d 548 (8th Cir. 2012)..... 11, 18

Bandimere v. Sec. & Exch. Comm'n,
844 F.3d 1168 (10th Cir. 2016)..... 19

Batson v. Kentucky,
476 U.S. 79 (1986)..... i, 11, 18

Bd. of Regents of State Colleges v. Roth,
408 U.S. 564 (1972)..... 1

Boddie v. Connecticut,
401 U.S. 371 (1971)..... 25

Campbell v. Campbell,
49 Va. App. 498 (2007)..... 16

Chapman v. California,
386 U.S. 18 (1967)..... i, 2, 23, 24

Childers v. Edwards (1996)
48 Cal.App.4th 1544 21

Davis v. Alaska,
415 U.S. 308 (1974) ..... i, 1
Estes v. State of Tex.,
381 U.S. 532 (1965) i
F.P. v. Monier (2017)
3 Cal. 5th 1099 ..... 11, 17, 24
Fahy v. State of Conn.,
375 U.S. 85 (1963) 2
Garris v. Governing Bd. of S.C. Reinsurance Facility,
333 S.C. 432 (1998) 16
Girot v. Keith,
212 Ill. 2d 372 (2004) 18
Graham v. Apfel,
129 F.3d 1420 (11th Cir. 1997) 11, 14
Hanif v. Astrue, No. C11-513-RSL-BAT,
2011 WL 6140867
(W.D. Wash. Nov. 18, 2011) 19
Hebert v. Los Angeles Raiders, Ltd. (1991)
23 Cal.App.4th 414 10
Horn v. Hilltown Twp.,
461 Pa. 745 (1975) 15
I.A. v. H.H.,
710 So.2d 162 (Fla. Dist. Ct. App. 1998) 16
In Matter of Motors Liquidation Co.,
829 F.3d 135 (2d Cir. 2016) 18

In re Adoption of B.J.M.,
42 Kan. App. 2d 77 (2009) 17
In re Adoption of L.B.M.,
639 Pa. 428 (2017) 16
In re D.I.B.,
988 S.W.2d 753 (Tex.1999) 14, 24
In re Det. of Reyes,
184 Wash. 2d 340 (2015) 12
In re Glerisbeth C.,
162 Conn. App. 273 (2015) 13
In re S.A.G.,
403 S.W.3d 907 (Tex. App. 2013) 11, 14, 24
Integrated Dynamic Solutions, Inc. v. VitaVet Labs, Inc. (2016)
6 Cal.App.5th 1178 22
Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.,
796 F.3d 111 (D.C. Cir. 2015) 19
Johnson v. Schonlaw,
2018 CO 73 ..... 10, 13, 24
Jones v. Sisters of Providence in Washington,
93 Wash. App. 727 (1999) 10, 12, 13
Kotteakos v. United States,
328 U.S. 750 (1946) 24
LaManna v. Proformance Ins. Co.,
364 N.J. Super. 473 (App. Div. 2003) 17

Laura A. New-man, LLC v. Roberts,
2016 CO 9 (2016) 13
M.L. v. Fed. Way Sch. Dist.,
394 F.3d 634 (9th Cir. 2005)..... 14
Maldonado-Velasquez v. Moniz,
274 F. Supp. 3d 11 (D. Mass. 2017) 15
Matter of Boomgarden,
780 F.2d 657 (7th Cir. 1985)..... 18
McMillan v. Castro,
405 F.3d 405 (6th Cir. 2005)..... 11, 18
Muller v. Coastside County Water Dist. (1961)
191 Cal.App.2d 511..... 24
Nahshal v. Fremont Ins. Co., No. 336234, 2018 WL 3074049
(Mich. Ct. App. June 21, 2018)..... 18
Norton v. Town of Islip,
239 F. Supp. 2d 264 (E.D.N.Y. 2003) 19
People ex rel. R.D.,
2012 COA 35 13
People v. Hinkley (1987)
193 Cal.App.3d 383..... 4
Perkins v. Fed. Fruit & Produce Co.,
945 F. Supp. 2d 1225 (D. Colo. 2013)..... 19
Perkins v. Komarnyckyj,
172 Ariz. 115 (1992)..... 16

Pierce v. Pierce,
2001 OK 97 (2001) 11, 15
Plaut v. Spendthrift Farm, Inc.,
514 U.S. 211 (1995)..... 19
Republic Nat. Bank of Dallas v. Crippen,
224 F.2d 565 (5th Cir. 1955)..... 15, 18
Rose v. Clark,
478 U.S. 570 (1986)..... 1
Ryan v. Palmateer,
338 Or. 278 (2005) 12
San Jose Ranch Co. v. San Jose Land & Water Co. (1899)
126 Cal. 322 ..... 12, 24
Sanchez v. State,
272 Or. App. 226 (2015)..... 12
Shinseki v. Sanders,
556 U.S. 396 (2009)..... 2
Smith v. Pattishall,
127 Fla. 474 (1937) 16
Soule v. Gen. Motors Corp. (1994)
8 Cal. 4th 548..... 11, 16
State ex rel. Gregan v. Koczur,
287 Conn. 145 (2008) 13
Stone v. F.D.I.C.,
179 F.3d 1368 (Fed. Cir. 1999)..... 18

Sullivan v. Louisiana,
508 U.S. 275 (1993) ..... i, 17
United States v. Ford,
683 F.3d 761 (7th Cir. 2012) 20
Waller v. Georgia,
467 U.S. 39 (1984) 1, 20
Wantuch v. Davis (1995)
32 Cal.App.4th 786 22
Wiseman v. Armstrong,
295 Conn. 94 (2010) 13
Woodsum v. Colvin, No. C16-5219-RAJ,
2016 WL 7486714
(W.D. Wash. Dec. 30, 2016) 19
Wright v. Bernstein,
23 N.J. 284 (1957) 17

Statutes

28 U.S. Code, § 1257(a) 3
38 U.S. Code, § 7261(b)(2) 2
8 U.S.C. § 1226 15
Bus. & Prof. Code § 17200 6
Bus. & Prof. Code § 17500 6
Cal. BPC, § 6180.14 ..... 4, 5
Cal. BPC, § 6190 ..... 4, 5
Cal. Code Civ. Proc., § 475 ..... 3, 9, 12
Cal. Code. Civ. Proc., § 1021.5 21
Okla. Stat. Ann. tit. 20, § 3001.1 ..... 10, 15

Constitutional Provisions

U.S. Const., § 2, art. 2, cl. 2..... 19
U.S Const. amend. V 1
U.S. Const. amend. XIV 1, 3

PETITION FOR WRIT OF CERTIORARI

This Court held long ago that "[p]rocedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). "'Liberty' and 'property' … are among the '(g)reat (constitutional) concepts . . . purposely left to gather meaning from experience." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 571 (1972) (citation omitted). A defendant's Fourteenth Amendment right "is a principle basic to our society" even if it does not "involve the stigma and hardships of a criminal conviction." *Mathews*, 424 U.S. at 333 (citation omitted).

In criminal cases, this Court has identified categories of constitutional error which are "of the first magnitude and no amount of showing of want of prejudice would cure it." *Davis v. Alaska*, 415 U.S. 308, 318 (1974). Injury which may one day flow from an invalid adjudication is temporarily intangible. Prejudice must thus be presumed when "evidence [is not yet] available of specific injury" from fundamental error. *Waller v. Georgia*, 467 U.S. 39, 50 n. 9 (1984).

Though this Court has repeatedly held that not all constitutional violations demand automatic reversal, such error can be harmless only if it does not substantially affect "an otherwise valid conviction." *Rose v. Clark*, 478 U.S. 570, 576 (1986). It follows that automatic reversal of a civil judgment found to be *in*valid is the only "remedy … appropriate to the violation." *Waller*, 467 U.S. at 50. As set forth below,

"[t]he question … whether there is a reasonable possibility that the [error] complained of might have contributed to the [judgment]," *Fahy v. State of Conn.*, 375 U.S. 85, 86–87 (1963), can only be answered in the affirmative here. At a minimum, where the error complained of is a fundamental structural defect within the judgment, the burden should be placed "on someone other than the person prejudiced by [the error] … to show that it was harmless." *Chapman v. California*, 386 U.S. 18, 24 (1967).

The lower courts are deeply divided over whether a structural-error approach has a place in the civil context. This Court's rationale behind the structural-error approach is not nullified by the difference in hardship between a criminal conviction and a civil judgment. Indeed, in *Shinseki v. Sanders*, 556 U.S. 396 (2009) (holding that Federal Circuit's harmless-error framework conflicts with § 7261(b)(2)'s requirement that the Veterans Court take "due account of the rule of prejudicial error"), Justice Souter, with whom Justices Ginsburg and Stevens joined, noted in a dissenting opinion that shifting the burden to "the party getting the benefit of the error to show its harmlessness, depending on the statutory setting or specific sort of mistake made" is a "workable" concept "even in civil … appeals." *Id.*, at 415-16. The time is ripe for this Court to resolve the stark conflict among state and federal courts and make clear that even in the civil context, no court should consider the harmless-error doctrine an aberrant hindrance to its judicial discretion and duty to "save the good … while avoiding the bad." *Chapman*, 386 U.S. at 23. The petition should be granted.

OPINIONS BELOW

The opinion of the Court of Appeal for the State of California is unreported at 2018 WL 2214715 and is reproduced at App-1-15. The unpublished order of the Supreme Court of California denying petition for review is reproduced at App-16. The unpublished order of the Court of Appeal for the State of California denying petition for rehearing is reproduced at App-17. The final judgment against Mitchell Stein issued by the Los Angeles Superior Court is reproduced at App-18-29. The Superior Court's order granting plaintiff's motion for summary adjudication is reproduced at App-30-39. At a status conference held on April 13, 2015, plaintiff discussed with the trial court avenues of dismissing this case while "avoiding uncertainty" on the question as to which party prevailed. The transcript of the status conference is reproduced at App-40-60.

JURISDICTION

The California Court of Appeal issued its opinion on May 15, 2018. Petitioner timely filed a petition for rehearing, which the court denied on June 4, 2018. Petitioner timely filed a petition for review in the Supreme Court of the State of California, which was denied on August 8, 2018. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the U.S. Constitution, § 1; Article VI, § 13 of the California Constituton; and California Code of Civil Procedure, § 475, are reproduced at App-61-62.

STATEMENT OF THE CASE

A. Factual Background And Trial Court Proceedings

1. In the midst of the 2010 foreclosure crisis, the law practice of Petitioner Mitchell Stein was the first to lead an investigation into improper lending practices and to file suit in 2009 against Bank of America on behalf of hundreds of homeowners in an action styled *Ronald v. Bank of America*, LASC Case No. BC409444, alleging the very misconduct later prosecuted by the state and federal governments, resulting in the second largest civil settlement in U.S. history – the National Mortgage Settlement of 2012. According to the trial court, the consumers' lawsuits were facially and substantially meritorious. 2CT285[1] (trial court, *Ronald* action: "[*Ronald*] plaintiffs … are presumably going to get a judgment for billions of dollars against Bank of America…. The issues presented [in *Ronald*] are part of a larger socioeconomic problem that confront our society in California and all of the other states in this union…."); 4CT939 (trial court below: "I'm sure that the cases [against the lenders led by Stein] have a great deal of merit.").

2. On August 17, 2011, without first inquring whether the remaining partners of the firm would assume responsibility for the firm's clients as required by Cal. BPC §§ 6190 and 6180.14, and though plaintiff's claims did not concern the question of

[1] "CT" refers to the Clerk's Transcript, the number before CT refers to the volume, and the number after CT references the page number.

lawyer competency, which "[Cal. BPC] section 6190 proceedings are designed to reach," *People v. Hinkley* (1987) 193 Cal.App.3d 383, the California Attorney General, on behalf of the People of the State of California ("AG"), and the California State Bar raided Stein's law offices without notice to the firm or its clients, seized all client files and froze all firm and private bank accounts after the filing of this action. Stein's law firm at the time, Mitchell J. Stein & Associates LLP, was not named as a defendant; rather, plaintiff incorrectly named "Mitchell J. Stein & Associates, Inc." as a defendant, which had been dissolved in November 2008 – almost three years before plaintiff brought its action. 9CT1964.

After the raid, nearly 200 of Stein's clients submitted letters and declarations to the trial court under oath objecting to this action. However, the trial court entered a preliminary injunction, erroneously finding that it had authority to do so "without expressly balancing the actual harms … [because] the plaintiff [is] a government entity…." 4CT873-74.

3. The clients were told by the Bar to "find a new attorney." 3CT500. Having been deprived of their client files, retainer payments and representation of their choice, the clients' suits against the lenders were eventually dismissed. In 2012, 309 of Stein's former clients – individually and on behalf of others similarly situated – filed suit against the AG and State Bar, alleging $1 billion in damages as a direct result of this action ("third-party action"). The district court stayed the third-party action pending the outcome of this case, because, "if Stein prevails in state court, that victory will directly impact [third parties]." *Stein v.*

Harris (N.D. Cal., Aug. 3, 2012, No. C 12-00985 CRB) 2012 WL 3202959, at *8. 10CT2213.

4. In this action, Stein was joined with 19 other lawyer and non-lawyer defendants. The AG and State Bar alleged a marketing and fee-sharing scheme in violation of Cal. BPC §§ 17200 and 17500, asserting that misleading statements and promises were made to consumers in connection with their home loans and litigation against lenders, and that attorneys unlawfully shared fees with non-attorneys. App-3. Stein presented testimonial and other evidence below that certain of the co-defendants were using his name and likeness in a scheme Stein neither authorized nor was involved in. A State Bar investigator testified under oath months after the raid that he had not traced a single penny from the alleged scheme to Stein and was "not done with the investigation yet." 6CT1236. One client later explained under oath that her statements had been misconstrued by plaintiff and the State Bar to wrongfully implicate Stein. 3CT581 ("I made it perfectly clear"). No admissible and convincing evidence ever proved that Stein was involved in the scheme; rather, in relying on hearsay statements by codefendants and counsel for Bank in America in the *Ronald* action, the trial court conjectured that it "simply [did] not believ[e]" Stein was uninvolved and reasoned that there "may" be evidence that has "not [yet been] identified." 4CT851—74.

The AG eventually settled with all other defendants. When Stein refused to settle but wished to proceed on the merits, the AG discussed with the trial court at an April 13, 2015 status conference in Stein's

absence how it could dismiss the action without the court "call[ing] Stein the prevailing party." App-54-58 (Stein "has rejected … our best and final settlement offer"). As the AG openly conceded, "[t]he problem … with dismissing without prejudice is first [the third-party] action against the People in bringing this law enforcement action." App-56. The court gave *sua sponte* leave to amend the complaint to add a stand-alone cause of action for declartory relief as the prevailing party so that the AG could move for summary adjudication ("MSA") on that cause of action before dismissing its original causes against Stein. The strategy was implemented to "avoid uncertainty" as to the impact of the AG's voluntary dismissal on the third-party action, by plaintiff's admission. App-8-9; App-54-58.

Stein sought additional time to file an opposition or his own summary judgment motion. The trial court denied Stein's request for extension, granted his alternative request to deem his motion an objection, granted the AG's MSA, entered final judgment in favor of the AG on the prevailing-party cause of action, and dismissed the original suit.

In support of the MSA, the trial court relied in large part on an unrelated indictment against Stein in *US v. Stein*, which was filed four months after the initiation of this action. The indictment revolved around three purchase orders the government alleged never happened and were made up by Stein in connection with a company named Signalife, nna Heart Tronics, Inc. Stein was convicted in 2013 based,

in part, on material evidence later shown to be false,[2] and was sentenced to 17 years imprisonment. Based on these factors, the AG argued Stein was unavailable and "judgmentproof," and that voluntary dismissal would be "solely in the interest of the court's [and] the state's resources." App-6-8. Stein's conviction, reduced sentence following remand, and forfeiture order are now under review in the Eleventh Circuit, Case No. 18-13762.

B. The Decision of the Court of Appeal for the State of California

Though the appellate court conceded that "a stand alone cause of action for declaratory relief as a 'prevailing party'" is not legally permitted, App-13, the court affirmed on the basis that Stein "has not shown any injustice or prejudice to him arising from the

---

[2] Specifically, Stein demonstrated that two key government witnesses falsely testified that they "never received any backup" and no "independent information" on the purchase orders though they had received a down-payment on one of the purchase orders from a real customer, whom the government never called at Stein's trial. The Eleventh Circuit held that these lies do not warrant a new trial because the evidence was among two million files produced to Stein and because the false testimony was not the "centerpiece" of closing argument. *United States v. Stein*, 846 F.3d at 1143, 1150 & n. 13 ("[i]n the absence of government suppression of the evidence, … there can be no *Giglio* violation"). The United States argued in response to Paul D. Clement and Jeffrey L. Fisher's certiorari petition on behalf of Stein that this Court should defer consideration of Stein's petition until after re-sentencing set for July 2018. *Stein v. United States of America*, 2017 WL 5158038 (U.S.), ** 23, 24. Stein will present his false-evidence claims – supported by new evidence presented after remand – in a renewed petition if his current appeal before the Eleventh Circuit is unsuccessful.

grant of summary adjudication[,] … [n]or could he." App-13-14 (citing Cal. Const., art. VI, § 13; Code Civ. Proc., § 475). The court referenced Stein's alternative structural-error argument following its order for supplemental briefing on the issue of prejudice to find that Stein "fail[ed] to satisfy his affirmative duty on appeal of demonstrating prejudice." App-14-15.

The court reasoned at oral argument, held on May 9, 2018, that so long as no "cost [is] assessed against [Stein]" underthe erroneous prevailing-party judgment, Stein is precluded from"say[ing] the mere existence of that cost is prejudicial."[3]

The court declined to address the remaining claims, including prejudice to third-party litigants. It dismissed the appeal from the TRO and preliminary injunction for lack of jurisdiction without opining on why it rejected Stein's claim that the orders fell within the "significant exception to [the mootness] rule." *Hebert v. Los Angeles Raiders*, Ltd. (1991) 23 Cal.App.4th 414.

The court denied Stein's petition for rehearing, in which Stein argued that, *inter alia*, each of the appellate court's proposed avenues of showing prejudice or injustice in this case (App-14 n. 7) conflicts with uniformity and due process principles and is plainly illogical.

REASONS FOR GRANTING THE PETITION

Courts below have widely acknowledged the conflict of authority implicated here and have repeatedly noted a lack of guidance on the issue.

[3] Recording, at 21:25-22:18.

Dissenting and inconsistent opinions reflect a sharp disagreement even among the judiciary within several states and circuits. Justices of the Colorado high court, for example, recently grappled with the question in *Johnson v. Schonlaw*, 2018 CO 73. The dissent admonished that the majority's "rule of automatic affirmance … renders a longstanding rule of civil procedure virtually meaningless," suggesting that the unauthorized participation of an alternate in civil jury deliberations was a type of trial error giving rise to a "rebuttable presumption of prejudice." *Id*., at ¶¶ 20-33 (Gabriel, J., dissenting). Because prejudice flowing from this category of error is impossible to assess (*id*.), the Washington appellate court reached the opposite conclusion in *Jones v. Sisters of Providence in Washington*, 93 Wash. App. 727, 733 (1999). While five state courts of last resort have rejected a structural approach, the doctrine is, indeed, intrinsic in Oklahoma's statutory bedrock. Okla. Stat. Ann. tit. 20, § 3001.1. By way of example, Oklahoma courts presume prejudice from the mere appearance of judge partiality, while courts in Texas hold that the violation of the right to an impartial decisionmaker is only presumptively prejudicial in criminal cases but ispresumtively harmless in the civil context. *See, e.g*., *Pierce v. Pierce,* 2001 OK 97, ¶ 19-20 (2001); compare, *In re S.A.G*., 403 S.W.3d 907, 917, 918 (Tex. App. 2013).

A lack of consensus is also recognized among federal circuits. For example, while this Court's silence on the question caused the Ninth and Eleventh Circuits to hesitate in taking a structural approach, *Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury*, 686 F.3d 965, 988-89, n. 15 (9th Cir. 2012);

Graham v. Apfel, 129 F.3d 1420, 1423 (11th Cir. 1997), the Sixth and Eight Circuits readily interprete the Court's structural analyses in criminal cases to extend to civil cases when appropriate. *See, e.g.*, *McMillan v. Castro*, 405 F.3d 405, 410 (6th Cir. 2005) (relying on*Arizona v. Fulminante*, 499 U.S. 279, 309 (1991)); *Avichail ex rel. T.A. v. St. John's Mercy Health Sys.*, 686 F.3d 548, 552 (8th Cir. 2012) (applying *Batson v. Kentucky*, 476 U.S. 79, 106 (1986) in civil context).

Despite the California Supreme Court's recognition of the doctrine's applicability in *Soule v. Gen. Motors Corp.* (1994) 8 Cal. 4th 548, 579, the decision below demonstrates that the "strong presumption *against*" finding structural error in civil cases, *F.P. v. Monier* (2017) 3 Cal. 5th 1099, 1107-14 (emphasis in original), can be applied irrationally and yield absurd results. The appellate court's philosophy here that its duty to reverse a structurally defective judgment is restricted by the harmless-error rule is the antithesis of century-old California Supreme Court precedent that "unless some very restricted meaning can be given to the amendment to [Code of Civil Procedure] section 475, it is plainly unconstitutional and void," *San Jose Ranch Co. v. San Jose Land & Water Co.* (1899) 126 Cal. 322, 325.

I. THERE IS A PROFOUND CONFLICT OVER THE QUESTION PRESENTED.

A. Five high state courts and courts in three circuits hold that the structural-error doctrine has no place in the civil context.

In the **Supreme Court of Washington**, "the doctrine of structural error is strictly limited to crim-

inal trials" based upon the rationale that this Court has only applied the doctrine to "*criminal trial* [and] *punishment*." *In re Det. of Reyes*, 184 Wash. 2d 340, 346-48 (2015) (en banc) (affirming despite violation of the public trial right) (citations omitted). The Washington appellate court held in *Jones v. Sisters of Providence in Washington*, 93 Wash. App. 727, 733 (1999), however, that an alternate juror's participation in civil deliberations are presumptively prejudicial "unless it affirmatively appears that there was not and could not have been any prejudice." The **Oregon high court** noted that even in criminal cases, the doctrine is generally "not ... a useful analytical tool for Oregon courts." *Ryan v. Palmateer*, 338 Or. 278, 295-97 (2005) (en banc). The Oregon appellate court declined to resolve the question in *Sanchez v. State*, 272 Or. App. 226, 240–41 (2015) (finding that civil post-conviction claim that "show-cause precondition on … ability to call live witnesses" "was not structural because it did not affect the entire conduct of the hearing"). Though the **Supreme Court of Colorado** held it tends to "closely track[]" criminal law in civil cases even if "civil harmless error review did not undergo the twists and turns taken by criminal harmless error doctrine," *Laura A. Newman, LLC v. Roberts*, 2016 CO 9, ¶ 24 (2016), this was recently disproven in *Johnson v. Schonlaw*, 2018 CO 73,¶¶ 10-11, 17, 20-33 (declining to presume prejudice from unauthorized participation of an alternate in civil jury deliberations though dissent noted prejudice was impossible to prove). Thus, despite the acknowledged difficulty in establishing prejudice from such error, the *Johnson* court reached the opposite conclusion the Washington court reached in *Jones,*

supra, 93 Wash. App. at 733. *See also People ex rel. R.D.*, 2012 COA 35, ¶ 30 (noting that "neither the Colorado Supreme Court nor the United States Supreme Court has recognized the concept of structural error in civil cases.").

The **highest court of Connecticut** similarly noted that structural error is not subject to a "per se reversible error" doctrine because "[t]here is no rule or practice that requires an appellate court to apply a particular standard of review in civil cases, even when reviewing for structural error." *Wiseman v. Armstrong*, 295 Conn. 94, 109–10 (2010) (finding appellant failed to prove prejudice from erroneous failure to poll jury). Connecticut appellate courts nevertheless apply a "harmless beyond a reasonable doubt" standard to procedural due process and other constitutional violations, shifting the burden to the beneficiary of the error. *In re Glerisbeth C.*, 162 Conn. App. 273, 280 (2015); *State ex rel. Gregan v. Koczur*, 287 Conn. 145, 156 (2008).

The **Texas Supreme Court** cautioned that even though"it may be true that some kinds of errors … will *never* be harmless… and … some other kinds of errors will rarely be harmless," "appellate courts should *not* automatically foreclose the application of the harmless error test to certain categories of error." *In re D.I.B.*, 988 S.W.2d 753, 758 (Tex.1999) (emphasis added) (finding that appellant failed to show prejudice from trial court's erroneous failure to explain that adjudication in juvenile proceeding may be used in future criminal proceeding). A Texas appellate court thereafter noted that the structural error doctrine applies only in criminal cases. *In re S.A.G.*, 403 S.W.3d

907, 917, 918 (Tex. App. 2013) (holding that, unlike in criminal cases, violation of right to impartial judge is not structural error).

The **Ninth Circuit** found in *Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury*, 686 F.3d 965, 988-89, n. 15 (9th Cir. 2012) that because "[t]he Supreme Court has never held that an error in the *civil* context is structural," failures to mitigate the use of classified information and give constitutionally adequate notice are subject to harmless-error analysis. Years earlier, the Ninth Circuit found structural error "where members of an evaluation board expressly mandated by Congress were not included" in *M.L. v. Fed. Way Sch. Dist*., 394 F.3d 634, 647–48 (9th Cir. 2005), but *see id*., at 651-52 (Clifton, J., dissenting). In the **Eleventh Circuit**, "there must be a showing of prejudice" to "prevail on due process violation[from deprivation of right to counsel] at administrative hearing[s]," *Graham v. Apfel*, 129 F.3d 1420, 1423 (11th Cir. 1997), thus declining to follow the Fifth Circuit's reasoning in *Republic Nat. Bank of Dallas v. Crippen*, 224 F.2d 565, 566 (5th Cir. 1955) (holding that denial of constitutional right, such as right to be heard, "is never harmless error"). A **Massachusetts district court** recently held that the misallocation of the burden of proof at a § 1226 bond hearing cannot be structural because the doctrine is "strictly limited" to criminal cases. *Maldonado-Velasquez v. Moniz*, 274 F. Supp. 3d 11, 14 (D. Mass. 2017).

B. Seven state high courts and two circuits hold that structural errors defy harmless-error analysis in civil cases.

In contrast to the foregoing positions and the decision below, the structural-error doctrine is embedded within **Oklahoma**'s harmless error statue, *see* Okla. Stat. Ann. tit. 20, § 3001.1 ("a substantial violation of a constitutional or statutory right" requires judgment to be set aside or new trial to be granted in criminal or civil cases). A structural approach is thus routinely applied in Oklahoma courts. *See, e.g., Pierce v. Pierce,* 2001 OK 97, ¶ 19-20 (2001) (holding that mere "appearance of judge partiality arising from counsel's campaign contributions" violated due process and that such constitutional errors "are *not* treated, as a matter of law, as harmless error") (emphasis in original). The **highest court of Pennsylvania** takes a similar approach.*Horn v. Hilltown Twp.*, 461 Pa. 745, 748 (1975) (finding a "denial of due process absent proof of harm" whenever error is merely "*susceptible* to prejudice" in matter concerning fairness of tribunal) (emphasis added); *In re Adoption of L.B.M.*, 639 Pa. 428, 445–46 (2017) (finding that denial of right to counsel, though statutory, is *per se* prejudicial, because "[w]hether the right … is conferred by constitution or statute, [it] must be protected"). The **Arizona high court** reached the same conclusion in *Perkins v. Komarnyckyj*, 172 Ariz. 115, 119 (1992) (En Banc) (holding that "nature of the erro[neous jury instruction] renders it impossible to prove the extent of any prejudice"). The **Florida high court** instructed that appellate courts have an independent *duty* to

correct precisely the type of error at issue even if not raised on appeal. *Smith v. Pattishall*, 127 Fla. 474, 483 (1937); *see I.A. v. H.H.*, 710 So.2d 162, 165 (Fla. Dist. Ct. App. 1998) ("where the trial court has granted relief that is not authorized by law, or pursuant to a cause of action that either does not exist or is not available to the plaintiff[,]" it is the reviewing court's "duty to notice and correct [such] jurisdictional defects or fundamental errors even when they have not been identified by the parties").

The **South Carolina Supreme Court** and **Virginia appellate courts** read *Fulminante,* 499 U.S. at 310 to mean that if the "structure of the [civil] proceeding [is] so inherently flawed[,] it is not subject to harmless error analysis." *Garris v. Governing Bd. of S.C. Reinsurance Facility*, 333 S.C. 432, 447–48 (1998) (involving right to impartial adjudicator); *Campbell v. Campbell*, 49 Va. App. 498, 505 n. 4 (2007) (concerning right to cross-examination). A structural approach was acknowledged by the **California Supreme Court** in *Soule v. Gen. Motors Corp*. (1994) 8 Cal. 4th 548, 579. In *Aulisio v. Bancroft* (2014) 230 Cal. App. 4th 1516, 1527 the California appellate court found "structural error" in connection with the court's erroneous ruling that defendant's representation of his trust *in pro per* would constitute the unauthorized practice of law. More recently, the high court declined to find structural error in *F.P. v. Monier* (2017) 3 Cal. 5th 1099, holding that the right to an appointment of damages can be forfeited, extensively explaining why a "strong presumption exists *against* finding that an error falls within the structural category." *Id*., at 1104, 1107-14 (emphasis in original). The case below

demonstrates that some courts give too much credence to this strong presumption.

Similarly to the holding in *F.P. v. Monier, supra,* the **New Jersey appellate court** in *LaManna v. Proformance Ins. Co.*, 364 N.J. Super. 473, 480 (App. Div. 2003) found that a "belated objection" waived the right to a civil verdict rendered by at least five-sixths of the jury members. *But see id.*, at 482–83 (dissent holding that error should be reversible "even in the absence of prejudice, when a fundamental right … in a constitutional manner is put at risk"). The court thus did not follow the **New Jersey Supreme Court's** clear instruction that error is *per se* prejudicial where "error was harmful to the appellants' right to a jury trial and all the fundamental incidents thereof." *Wright v. Bernstein*, 23 N.J. 284, 296 (1957).

The **Kansas appellate court** cited *Sullivan v. Louisiana*, 508 U.S. 275, 282 (1993) in finding that prejudice from the denial of incarcerated father's right to be present at the hearing on stepfather's adoption petition was difficult to assess and thus presumptively prejudicial. *In re Adoption of B.J.M.*, 42 Kan. App. 2d 77, 87 (2009). The **Illinois Supreme Court** found that the denial of the right to an administrative procedure before "an unbiased decisionmaker … can never be found harmless." *Girot v. Keith*, 212 Ill. 2d 372, 379–80 (2004). A **Michigan appellate court**recently "recognize[d] that there are a limited set of civil actions" to which the doctrine would apply, but it held that such actions must "have criminal-like aspects." *Nahshal v. Fremont Ins. Co.*, No. 336234, 2018 WL 3074049, at *7 n. 1 (Mich. Ct. App. June 21, 2018).

The **Sixth** and **Eight Circuits** do not hesitate to read this Court's precedent to apply in the civil context. *McMillan v. Castro*, 405 F.3d 405, 410 (6th Cir. 2005) (interpreting *Fulminante*, 499 U.S. at 309 as judicial bias exception to harmless-error rule in civil context); *Avichail ex rel. T.A. v. St. John's Mercy Health Sys.*, 686 F.3d 548, 552 (8th Cir. 2012) (relying on *Batson*, 476 U.S. at 106 to apply test for purposeful racial discrimination in jury selection). In the **Seventh** and **Fifth Circuits**, the denial of the constitutional right to be heard is "the denial of due process which is never harmless error." *Matter of Boomgarden*, 780 F.2d 657, 661 (7th Cir. 1985); *Republic Nat. Bank of Dallas,* 224 F.2d at 566. In the **Federal Circuit**, "when a procedural due process violation has occurred because of exparte communications, such a violation is not subject to the harmless error test." *Stone v. F.D.I.C.*, 179 F.3d 1368, 1377 (Fed. Cir. 1999). The **Second Circuit** in *In Matter of Motors Liquidation Co.*, 829 F.3d 135, 161–63 (2d Cir. 2016) (reversing in disagreeing with bankruptcy court's finding that inadequate notice of sale order was not prejudicial) acknowledged the circuit split but declined to decide the question. The **Tenth** and **D.C. Circuits** follow this Court's recognition of the separation of powers as a "structural safeguard" in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995) to deem a violation of the Appointments Clause a defect defying harmless-error analysis. *Bandimere v. Sec. & Exch. Comm'n*, 844 F.3d 1168, 1181 n. 31 (10th Cir. 2016); *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 123 (D.C. Cir. 2015). **Washington district courts** have reversed in finding structural

error in civil proceedings, *Woodsum v. Colvin*, No. C16-5219-RAJ, 2016 WL 7486714, at *5 (W.D. Wash. Dec. 30, 2016) (reversing because failure to apply proper DAA analysis is *per se* prejudicial and such a fundamental-error claim cannot be waived); *Hanif v. Astrue*, No. C11-513-RSL-BAT, 2011 WL 6140867 *3 (W.D. Wash. Nov. 18, 2011) (same). The **Colorado district court** in *Perkins v. Fed. Fruit & Produce Co.*, 945 F. Supp. 2d 1225, 1241 (D. Colo. 2013) (finding that no judicial absence occurred during jury deliberations) acknowledged its application in civil cases, and a **New York district court** recognized that "the harmless error doctrine may [not] be used as a shield against procedural due process claims challenging the state's deprivation of property rights." *Norton v. Town of Islip*, 239 F. Supp. 2d 264, 271 (E.D.N.Y.), aff'd, 77 F. App'x 56 (2d Cir. 2003).

II. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE THE QUESTION PRESENTED.

Review is especially appropriate here for several reasons. The violation at issue permits a narrow classification of error which can never be harmless in the civil context without the risk of defying the purpose of the harmless-error rule. Requiring automatic reversal of a structurally invalid judgment could never be a "remedy [not] appropriate to the violation," *Waller*, 467 U.S. at 50, nor would the remedy unduly prejudice "innocent third parties, … whose access to [the court] system [would be] impaired by additional litigation." *United States v. Ford*, 683 F.3d 761, 769 (7th Cir. 2012). To the contrary, failure to reverse would injure the identified third-party

litigants and increase and complicate their litigation needs.

The record is suitable to resolving the question. The AG and trial court *conceded* that the purpose of its prevailing-party stratagem was to "avoid uncertainty" on the impact of its voluntary dismissal on the related third-party action against it. App-9; App-54-58.[4] The record contains unrebutted admissions by a State Bar investigator that he lacked any evidentiary proof that Stein was involved in the scheme alleged by plaintiff, further unmasking plaintiff's ulterior motive behind paving its lawless escapeway. 6CT1236-38. The clients' vehement objections to the AG's action, even after they had been put on notice of the AG's claims, are the People's true voices. *See also* App-57 (counsel for AG conceding AG was hesitant in proceeding on the merits because "Stein has continually contested the factual underpinnings of the case….").

The trial court gave plaintiff *sua sponte* permission in Stein's absence to amend its complaint to add the unlawful cause of action after Stein expressed his intent to proceed on the merits, then denied Stein's motion for additional time to oppose plaintiff's unprecedented MSA or bring his own dispositive motion. App-7-9. The trial court thus committed multiple due process violations.

The appellate court does not dispute that "a stand alone cause of action for declaratory relief as a

---

[4] The transcript of the April 13, 2015 status conference was appended as Exhibit R in support of the AG's motion for summary adjudication.

'prevailing party'" is legally forbidden and, indeed, cannot logically exist. App-13. *See, e.g., Childers v. Edwards* (1996) 48 Cal.App.4th 1544, 1550 (to be determined the "prevailing party," plaintiff must have prevailed on a specific "cause of action itself"). To add insult to injury, the AG is precluded from seeking costs under the prevailing-party statute in an enforcement action. Cal. Code. Civ. Proc. § 1021.5.

As to the ability to show prejudice, at least three crucial circumstances make this case particularly compelling: (i) substantial injury can still occur; (ii) prejudice was identified but consistently rejected; (iii) prejudice is thus difficult to identify.

Stein repeatedly argued that the identified third parties have been and will be injured by the court's erroneous rulings, and that depriving him of a full and fair merits determination violates due process. Further, forcing a party to defend an unlawful cause of action, the implementation of which was *encouraged* by the trial court, can only be inherently prejudicial. App-57-58. The courts below repeatedly rejected Stein's evidence on the merits based on plaintiff's absurd argument that "the only conceivable relevance [Stein's] evidence may have had would have been to a finding of liability under [original complaint], which the People did not seek." *See, e.g.*, Respondent's Brief below ("RB"), at 44-45. In light of these facts, the appellate court's finding that, e.g., Stein "does not attempt to show that … it was reasonably probably (sic) defendant would have obtained a favorable merits determination" on appeal, App-14 n. 7, is misguided, and highlights that

intervention by this Court is desperately needed to resolve the question presented.

Each of the underlying uncontroverted facts is wholly immaterial to a prevailing-party determination. App-30-39. The trial court heavily relied on Stein's "judgment-proof" status in finding that further litigation would waste judicial and state resources, however, if the law permitted such shortcuts, any plaintiff which obtained an asset freeze order without notice could obtain summary judgment based on the notion that the defendant is now judgment-proof. *See also* RB, at 41-42 (arguing that further litigation would be "solely for theater"); *but see Wantuch v. Davis* (1995) 32 Cal.App.4th 786, 792 ("[a] prisoner may not be deprived … of meaningful access to the civil courts … [in an] action threatening his or her personal or property interests"); and *see* App-31-33 (arguing that that plaintiff prevailed because it obtained a TRO and preliminary injunction and settled with all other defendants); *but see Integrated Dynamic Solutions, Inc. v. VitaVet Labs, Inc.* (2016) 6 Cal.App.5th 1178, 1186 ("[t]he granting or denial of a [TRO or] preliminary injunction does not amount to an adjudication of the ultimate rights in controversy").

Among the "uncontroverted facts" the trial court found is that "Mitchell J. Stein & Associates, Inc. has been dissolved and has not answered the People's Second Amended Complaint." App-31, 19. However, as the AG's exhibit to its statement of uncontroverted facts reveals, Mitchell J. Stein & Associates, Inc. had been dissolved almost three years *before* the AG brought this action, 9CT1964, which renders the court's orders – effectively depriving hundreds of

clients of the representation they bargained for – even more egregious, because the court never had jurisdiction over Stein's LLP.

Further, Stein's reputation remains blemished. Stein could not pay for counsel of his choice at his criminal trial. The funds in Stein's law firm and private accounts were transferred to the Department of Justice under an unrelated forfeiture order currently on appeal in the Eleventh Circuit.[5]

Finally, the appellate court's reference to Stein's alternative structural-error argument as a basis for its conclusion that prejudice *could not* be shown, App-14-15, demonstrates that a rigid interpretation of the harmless-error rule interferes with the reviewing courts' duty, as identified by the Court in *Chapman,* to separate the good from the bad.

The question presented is outcome-determinative. Stein and third-party litigants are either entitled to a full and fair merits determination or a proper voluntary dismissal of the action.

III. THE IMPORTANCE OF RESOLVING THE CONFLICT

Though the California Supreme Court admonished over a century ago that unless courts give "some very restricted meaning" to California's harmless-error provision, "it is plainly unconstitutional and void," *San Jose Ranch Co,* 126 Cal. at 325, courts regularly fail to restrict the meaning of the rule and counteractively restrict instead their duty to "save the

[5]*See, United States v. Stein*, S.D. Fla. Case No. 11-cr-80205-KAM; docket entries 471-1, at 4; 478.

good … while avoiding the bad." *Chapman*, 386 U.S. at 23.

A mere lack of comparable precedent, *F.P. v. Monier*, 3 Cal. 5th at 1112, can lead to an irrational finding of harmlessness. This Court cautioned that harmless-error rules should not be "governed in any rigid sense of stare decisis by what has been done in similar situations." *Kotteakos v. United States*, 328 U.S. 750, 762 (1946). Several courts still routinely determine whether error was harmless before deciding whether it could be placed into a category which precludes the analysis in the first place. *See*, *e.g*, *F.P. v. Monier*, 3 Cal. 5th at 1104, 1107-14; *In re D.I.B.*, 988 S.W.2d at 758; *Johnson*, 2018 CO 73,¶¶ 10-11, 17; *In re S.A.G.*, 403 S.W.3d at 917-18.

Unlawful causes of action are "so clearly erroneous as to merit no further attention" in ruling on a motion to dismiss. *Muller v. Coastside County Water Dist.* (1961) 191 Cal.App.2d 511, 513. This Court's guidance is needed to close the gap in standards between affirming a dismissal and refusing to reverse based on the identical "clear[] erro[r]" (*id.*). The reviewing court here utilized California's harmless-error provision to cure the fiction of a judicial determination that a party prevailed on a nonexistent cause of action. Failure to rationally remedy such clear violations creates an imbalance of harms between, on one hand, the party impacted by the error who is presumed not to be prejudiced absent a showing of harm and, on the other hand, unidentified litigants who are presumed to be prejudiced under the harmless-error rationale that they enjoy a right to utilize the court systems.

The question presented arises with considerable frequency. More than seventeen lower appellate courts have weighed in on the issue, at least six of which have noted this Court's silence on the matter. The decisions below reflect an alarming inconsistency in treating certain fundamental errors. Laying blame on the party affected by a legally forbidden litigation tactic intrudes upon the proper functioning of our system of justice. As the Court aptly noted, "[p]erhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to … definitively settle their differences in an orderly, predictable manner." *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971). The entrenched conflict can only be resolved by this Court.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

RICHARD C. KLUGH
LAW OFFICES OF
RICHARD C. KLUGH
Ingraham Building
25 S.E. Second Ave.
Suite 1100
Miami, FL 33131
(305) 536-1191
rklugh@klughlaw.com

Counsel for Petitioner

November 6, 2018