No. 19-17

In the
Supreme Court of the United States

ALEXANDER C. BAKER,

Petitioner

v.

CLARA VESELIZA BAKER,

Respondent

On Petition for Writ of Certiorari to the
California Court of Appeal, Second District, Division Two

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICUS CURIAE

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MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER

The National Coalition For Men ("NCFM"), by and through counsel of record J. Steven Svoboda, Esq., Supreme Court Bar. No. 249750, respectfully moves under Supreme Court Rule 37(b) for leave to file a brief as *amicus curiae* in support of Petitioner Alexander C. Baker.

A. Notice and consent request

Respondent Clara Veseliza Baker and the Office of the California Attorney General were timely notified of proposed amicus' intent to file this amicus brief, and their consent was sought. Neither party consented to the amicus filing.

B. NCFM has advocated against the unconstitutionally vague and ever-expanding definition of DVPA abuse since 2014

This case presents issues of constitutional importance to proposed amicus NCFM, a 501(c)(3) nonprofit civil rights organization and legal services provider that, since 1977, has been dedicated to ending harmful discrimination against men, boys, their families, and the women who love them.

NCFM took a stance against the definition of "abuse" found in California's Domestic Violence Prevention Act ("DVPA") in 2014, filing an *amicus* letter to the California Supreme Court in the matter of *Burquet v. Brumbaugh*, 223 Cal.App.4th 1140, 167 (2014). At that time, we urged the California Supreme Court to grant review to consider whether the DVPA abuse definition was unconstitutionally vague.

Burquet followed *In re Marriage of Nadkarni*, 173 Cal.App.4th 197, 93 Cal.Rptr.3d 723 (2009), by interpreting the DVPA statutory language "disturbing the peace" to mean any conduct that "destroys the mental or emotional calm" of the other person. We contend essentially that this constituted judicial legislation, violating separation of powers while creat-

ing an expansive statutory interpretation that was void for vagueness.

Factually, while *Nadkarni* involved a man who had a prior history of violence, *Burquet* was a case that, like the present *Baker* case, involved no allegations of physical violence at all. Rather, the DV restraining order in *Burquet* was upheld only on a finding of emotional upset claimed by the adverse party.

NCFM was troubled by *Burquet* on due process grounds, for it was clear at that time that a restraining order issued only on a finding of emotional upset would not afford the average person an opportunity to understand what conduct was prohibited under the law. We warned of the ever-broadening reach of the DVPA. However, the California Supreme Court declined to take up the case.

C. This case is an excellent vehicle

The *Baker v. Baker* case is an excellent vehicle for the Supreme Court of the United States to now consider a vagueness challenge to the DVPA abuse definition, because in this case, the behavior found to be abusive had been Constitutionally protected activity, which should have been deemed to fall within First Amendment protections of free speech and the right to petition.

Since 2014, several Opinions by this Court have been handed down which should directly impact its decision on granting certiorari. *Johnson v. United States,* 576 U.S. 135 S. Ct. 2551, 2556, 192 L.Ed.2d 569 (2015) ("*Johnson*") stuck the residual clause from a criminal statute as void for vagueness. *Ses-*

sions v. Dimaya, 584 U. S. 138 S. Ct. 1204, 1215, 200 L.Ed.2d 549, (2018) ("*Dimaya*") struck a vague residual clause in a civil case, finding that when a civil statute imparts serious consequences, it must be analyzed in a vagueness challenge with a level of scrutiny generally reserved for criminal statutes. Both *Johnson* and *Dimaya* are referenced heavily in Mr. Baker's pending Petition, and are not the focus of the proposed amicus brief.

On June 24, 2019, the very day Mr. Baker filed his Petition, this Court issued its Opinion in *U.S. v. Davis*, 139 S.CT. 2319 ("*Davis*"). In *Davis*, this Court again struck down a statute under the vagueness doctrine, and offered a detailed discussion of the canon of constitutional avoidance and the rule of lenity.

Davis is in harmony with *Johnson* and *Dimaya*, and emphasizes that, to pass constitutional muster, a law must be sufficiently clear that a person of ordinary intelligence can understand what conduct is prohibited. *Davis* is directly on point to the present Baker matter, and is a chief focus of our proposed amicus brief.

This case presents an excellent opportunity for this Court to continue to develop the law with regard to the clarity required in statutory language, that causes a restrained person suffer stigmatizing consequences, and to lose the fundamental right to bear arms.

D. Conclusion

By appearing as an *amicus curiae*, NCFM can assist the Court in developing due process law nationwide with regard to the constitutional limits on defining non-violent domestic abuse. In light of the foregoing, the Court should grant leave for NCFM to file the attached Amicus brief.

Respectfully submitted,
this 31st day of July, 2019,

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BRIEF OF AMICUS CURIAE
NATIONAL COALITTION FOR MEN
IN SUPPORT OF PETITIONER

RULE 29.6 STATEMENT

National Coalition For Men ("NCFM") is a 501(c)(3) non-profit civil rights organization and legal services provider. No corporation or other entity owns any part of NCFM.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE

This prospective *amicus curiae,* the National Coalition For Men ("NCFM") is the oldest and largest organization of its type. A 501(c)(3) organization founded in 1977, for over 40 years NCFM has been dedicated to raising awareness about how sex discrimination adversely affects women and men.

NCFM recently received nation-wide press coverage in the litigation *National Coalition For Men v. Selective Service System*, 2019 WL 861135, Civil Action H-16-3362, in the United States District Court, S.D. Texas, Houston Division, with a 02/22/2019 summary judgment that the Military Selective Service Act's male-only draft is unconstitutional.

NCFM members, board members, and its attorneys are, and for years have been very concerned about overreaching consequences of the severable residual clause definition of "abuse" found in the Domestic Violence Prevention Act at California Family Code §6203(a)(4), as interpreted by cases such as *In re Marriage of Nadkarni*, 173 Cal.App.4th 197, 93 Cal.Rptr.3d 723 (2009) ("*Nadkarni*") and *Burquet v. Brumbaugh,* 223 Cal.App.4th 1140, 167 Cal.Rptr.3d 664 (2014) ("*Burquet*").

For the reasons that follow, NCFM supports Petitioner and Appellant Alexander Baker's Petition for a Writ of Certiorari following the California Supreme Court's denial of his petition for review of the appellate opinion in the instant case, *Baker v. Baker*.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari, filed on June 24, 2019, the same date as *United States v. Davis, 139 S. Ct. 2319 (2019)* ("*Davis*") should be granted because it will give this Court an opportunity to continue its refinement of the law concerning challenges to state statutes under doctrines such as vagueness, overbreadth, and separation of powers, and to further develop the applicability of *Davis'* analysis of the canon of constitutional avoidance and the rule of lenity.

Vagueness, overbreadth, and separation of powers are areas of the law that have evolved significantly since NCFM wrote an April 25, 2014 letter to the California Supreme Court regarding the Domestic Violence Prevention Act's residual clause expanding the definition of abuse - Family Code 6203(a)(4) - and discussing the leading California opinion - *Nadkarni* - during the *Burquet* appeal.

NCFM contends that there has subsequently been a "sea change" nationally in governing law that is becoming apparent more and more, day by day at present, which NCFM could have used in 2014 to apply the void for vagueness and separation of powers doctrines more forcefully had the authorities been developed to their current state at that time.

This "sea change" centers on the declining need to urge that a statute is void for vagueness only if there are no possible instances of conduct clearly falling within the statute's prohibitions. This abandonment of the "any constitutional application" doctrine arose from this Court's opinion in *Johnson v. United States,* 135 S. Ct. 2551 (2015) ("*Johnson*"); and was

clarified further in the civil matter *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) ("*Dimaya*").

Two very recent Opinions, including one of this Court, *Davis,* and one from the United States Court of Appeals, Fourth Circuit, *Manning v. Caldwell for City of Roanoke* (2019 WL 3139408) (2019) ("*Manning"*), developed these changes further after the instant Petition was filed. In harmony with *Johnson* and *Dimaya,* both *Davis* and *Manning* find that a statute is impermissibly vague if a person of ordinary intelligence cannot understand what conduct is prohibited.

All circumstances weigh heavily in favor of granting certitorari here, where the present case challenges an unconstitutionally vague California statute defining "abuse" with the words, "To engage in any behavior that has been or could be enjoined pursuant to Section 6320" and its related case law which interprets a prohibition on "disturbing the peace" of a party as "destroying the mental or emotional calm" of the person.

This case is a proper vehicle for this Court to consider federal Constitutional matters of pressing national importance in which a State has enacted a definition of abuse that is overbroad as to protected speech and the right to petition. It arises from the divorce of two non-violent musicians whose family included two children affected by the divorce, who never threatened imminent bodily harm. As such, it can focus on Constitutional protections without the risk that either actual criminal violence, or "true threats" of violence could undermine the case of Alexander Baker, or lead to a U.S. Supreme Court opinion that appears to leave physical violence, or true threats of such violence unpunished.

Instead, *Baker v. Baker* arises from the application of a vague statutory definition of "abuse", which should trigger this Court's interest in three current, and recently developing areas of First Amendment free speech and/or right to petition litigation:

First, *Baker* arises from and allows study of "controlling" behavior, which is not a term used in the challenged statute, but was added by case law, and which was expanded to apparently include electronic messages and "litigation tactics" in this *Baker* case;

Second, *Baker* arises from and allows study of "abuse" by interstate electronic communication, such as internet posting, text messaging and e-mail. The issues falling in this purview include choice of law, conflict of law, comity regarding sister state judgments, forum shopping, and long arm jurisdictional analysis, and simply grasping and learning the results, to use positive law in order to comply with the published law. These multiple issues leave persons "of common intelligence unable to learn whether basic Federal First Amendment "freedom of speech" law, or particular, but inconsistent State laws govern, where the State "abuse" laws are in conflict with the well know adjudications of the boundaries of First Amendment protected speech. For example, California has identified threatening behavior and threats as abuse. In contrast, under Federal Constitutional law, a threat may be proscribed by law so long as it is a "true threat" per *United States v. Maxton* 940 F.2d 103, 105, 106 (4th Cir.1991). A "true threat" of imminent bodily harm is a threat which "on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate, and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execu-

tion." *United States v. Kelner* 534 F.2d 1020, 1027 (2nd Cir.1976); and

Third, *Baker* arises from and allows study of the right to petition the government for a redress of grievances without risking duplicative punishments, including those in the original forum in which the petition was filed, and, in this case, in subsequently filed restraining order litigation asserting that prior litigation under a different case number was "abuse".

The *Baker* petition arises from pressing national issues, which are especially urgent in California. Persons who may be sued in DVPA litigation in California are subject to the inherent vagueness of the interpretation of what "has been or could be enjoined" as including "disturbing the peace" defined as conduct that "destroys the mental or emotional calm" of the person seeking protection. The vagueness of the abuse definition creates a system that inherently will continue to be overbroad into First Amendment protections of speech and petitioning the government, and will produce an unending list of behaviors that "have been or could be enjoined" that cannot be reconciled with the general knowledge persons of common intelligence have been taught about their federal constitutional rights.

California's DVPA's residual clause is in derogation of federal constitutional rights and, due to federal supremacy, should be studied and held void for vagueness, overbreadth, and violation of separation of powers after this petition is granted.

ARGUMENT

I. THE COURT SHOULD GRANT THE PETITION BECAUSE THIS MATTER WILL ALLOW EXTENSIVE FURTHER DEVELOPMENT OF RECENTLY PUBLISHED DOCTRINES FROM *U.S. v. DAVIS* .

A. *U. S. v. Davis* raises new issues that strongly favor the granting of Alexander Baker's Petition for a Writ of Certiorari filed the same date.

Part III. D. of *U.S. v. Davis*, 139 S.CT. 2319, (2019) ("*Davis*") set out the majority's holdings that neither the canon of constitutional avoidance nor the rule of lenity should be employed to read a criminal statute expansively.

This Petition for Writ of Certiorari should be granted because it provides a compelling vehicle for examination of these holdings of *Davis* in the civil context of family law domestic violence restraining order litigation. In this regard, *Baker v. Baker* can be an ideal civil follow up to *Davis,* as *Sessions v. Dimaya, 138 S. Ct. 1204 (2018)* ("*Dimaya*") was a civil law follow up to *Johnson v. United States*, 576 U.S. 135 S. Ct. 2551, (2015) ("*Johnson*").

The applicability of the void for vagueness doctrine, the First Amendment overbreadth doctrine, and the separation of powers doctrine are all keenly made central to the *Baker v. Baker* petition. This can provide the five-justice majority from *Davis* and the *Davis* matter's dissenting justices a timely and nationally significant opportunity to develop these doctrines in the background of state family law domestic violence prevention statutes, and federal

statutory schemes such as the Violence Against Women Act, while further involving detailed opportunities to discuss the canon of constitutional avoidance and the rule of lenity which were subjects of differing opinions in *Davis*.

As to the canon of constitutional avoidance, *Davis* explained:

> With all this statutory evidence now arrayed against it. . . the government insists, it is our duty to adopt any "fairly possible" reading of a statute to save it from being held unconstitutional. Brief for United States 45.[fn omitted]
>
> We doubt, however, the canon could play a proper role in this case even if the government's reading were "possible." True, when presented with two "fair alternatives," this Court has sometimes adopted the narrower construction of a criminal statute to avoid having to hold it unconstitutional if it were construed more broadly. *United States v. Rumely*, 345 U.S. 41, 45, 47, 73 S.Ct. 543, 97 L.Ed. 770 (1953); see, *e.g., Skilling v. United States*, 561 U.S. 358, 405–406, and n. 40, 130 S.Ct. 2896, 177 L.Ed.2d 619 (2010); *United States v. Lanier*, 520 U.S. 259, 265–267, and n. 6, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997). But no one before us has identified a case in which this Court has invoked the canon to *expand* the reach of a criminal statute in order to save it.
>
> …

> Employing the avoidance canon to expand a criminal statute's scope would risk offending the very same due process and separation-of-powers principles on which the vagueness doctrine itself rests. See *supra*, at 2325 – 2326. Everyone agrees that Mr. Davis and Mr. Glover did many things that Congress had declared to be crimes…But does § 924(c)(3)(B) require them to suffer additional punishment, on top of everything else? Even if you think it's *possible* to read the statute to impose such additional punishment, it's *impossible* to say that Congress surely intended that result, or that the law gave Mr. Davis and Mr. Glover fair warning that § 924(c)'s mandatory penalties would apply to their conduct. Respect for due process and the separation of powers suggests a court may not, in order to save Congress the trouble of having to write a new law, construe a criminal statute to penalize conduct it does not clearly proscribe.

Davis, *supra* at 2332-2333

The Court's reasoning in *Davis* can be applicable here in a civil context, as the challenged DVPA statute does not give fair warning that penalties - such as the loss of the right to bear arms or to visit one's children - would apply, for example to Alexander Baker's conduct of pursuing civil litigation, and of posting discovery documents on an internet blog.

As to the rule of lenity, *Davis* continues:

> Employing the canon as the government wishes would also sit uneasily with the

> rule of lenity's teaching that ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor. That rule is "perhaps not much less old than" the task of statutory "construction itself." *United States v. Wiltberger,* 18 U.S. (5 Wheat.) 76, 95, 5 L.Ed. 37 (1820) (Marshall, C.J.). And much like the vagueness doctrine, it is founded on "the tenderness of the law for the rights of individuals" to fair notice of the law "and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department." *Ibid.*; see *Lanier*, 520 U.S. at 265–266, and n. 5, 117 S.Ct. 1219. Applying constitutional avoidance to narrow a criminal statute, as this Court has historically done, accords with the rule of lenity. By contrast, using the avoidance canon instead to adopt a more expansive reading of a criminal statute would place these traditionally sympathetic doctrines at war with one another. [fn omitted]

Davis, *supra*, at 2332-2333

California's ever-widening interpretations of domestic "disturbing the peace" and of "destroying the emotional calm" run exactly contrary to the Court's clear Constitutional message in *Davis,* which speaks of restricting use of constitutional avoidance, consistent with lenity, only to narrow, rather than widen the constitutional scope of a statute drawn into question as void for vagueness.

Granting this petition will allow this Court to develop and clarify evolving law, particularly as, in contrast, the dissenting opinion in *Davis* urged that*:*

"It is a serious mistake. . . to follow *Johnson* and *Dimaya* off the constitutional cliff in this case." *Davis*, *supra*, at 2338. The dissent continued: "To begin with, that theory seems to come out of nowhere. The Court's novel cabining of the constitutional avoidance canon is not reflected in this Court's precedents. On the contrary, it contradicts several precedents…" *Davis*, *supra*, at 2352-2353, KAVANAUGH, J, Dissenting.

Baker v. Baker appropriately provides an ideally contrasting context, by arising from a civil family law violence prevention statute that has penalties imposing highly detrimental consequences upon the restrained party, as called for by discussion in *Dimaya, supra,* at 1212-1213 (applying the most exacting vagueness standard to a civil statute authorizing a respondent's removal from the United States). (See also *Dimaya*, *supra* at 1225–31, Gorsuch, J., concurring in part and concurring in the judgment, noting that "today's civil laws regularly impose penalties far more severe than those found in many criminal statutes").

Laws that nominally impose only civil consequences warrant a "relatively strict test" for vagueness if the law is "quasi-criminal" and has a stigmatizing effect. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, at 498–500, 102 S. Ct. 1186, 71 L.Ed.2d 362 (1982). California's DVPA qualifies in this regard.

A party restrained by a Domestic Violence Prevention Act restraining order automatically loses the constitutional right to bear arms. See 18 U.S.C. § 922(g)(8), which prohibits anyone subject to a state restraining order from possessing firearms. That loss comes, from a due process perspective, without the

benefit of a criminal trial, without the benefit of a burden of proof of either proof beyond a reasonable doubt, or clear and convincing evidence, but rather after hearings with minimal notice requirements, to which California case law has required only proof made by a preponderance of evidence. *Cooper v. Bettinger* 242 Cal.App.4th 77, 90, 194 Cal. Rptr. 3d 772, fn. 14; (2015); *Gdowski v. Gdowski* 175 Cal.App.4th 128, 137, 95 Cal.Rptr.3d 799, (2009).

The "abuse" that may be enjoined under sections 6203 and 6320 is much broader than that which, by contrast, is defined as civil harassment (Cf. California's Code of Civil Procedure, § 527.6, subd. (b)) for which an order may enjoin civil harassment only on proof by clear and convincing evidence. (Code Civ. Proc., § 527.6, subd. (d).) This stringent standard of proof does not apply to an order after hearing restraining abuse under the DVPA. (See § 6340, subd. (a).)

It is California's express policy to construe applications for restraining orders broadly. See, e.g. *Nakamura v. Parker,* 156 Cal.App.4th 327, at p. 334, 67 Cal.Rptr.3d 286, 289, (2007) ("The DVPA "confer[s] a discretion designed to be exercised liberally, at least more liberally than a trial court's discretion to restrain civil harassment generally"). The present construction, allowing and directing trial courts to deem more and more behaviors to constitute domestic "abuse" so as to be sure of preventing domestic violence, clearly seems to violate constitutional due process mandates in the realms of the void for vagueness doctrine, the separation of powers doctrine, and the First Amendment overbreadth doctrines consistent with in the majority opinion in *Davis*.

Granting this petition would thus provide an ideal opportunity for the U.S. Supreme Court to revisit whether and in what circumstances the expansive-versus-narrow principles set out in *Davis* might be affirmed, or might by contrast, be deemed to go too far, and to "follow *Johnson* and *Dimaya* off the constitutional cliff." These are statutory particulars, and statutory interpretation controversies that require no evidentiary particulars. The purely statutory challenge makes this *Baker* petition an ideal petition to grant.

B. Davis' holdings on constitutional avoidance and lenity correspond to vagueness and overbreadth flaws in California's DVPA "abuse" jurisprudence

NCFM briefed the matters of broad-versus-narrow interpretation of the pertinent statutes - Cal. Fam. Code §§ 6203(a)(4) and 6320 - in 2014, (before *Johnson* initiated the previously referenced 'sea change") when submitting a 4/25/14 letter to the California Supreme Court during the process of the appellant's Petition for Review of the opinion in *Burquet v. Brumbaugh,* 223 Cal.App.4th 1140, 167 Cal.Rptr.3d 664 (2014) ("*Burquet*"), review of which was denied on 4/31/14.

NCFM's prior letter brief for *Burquet* concerned the then recent, broad, expansive statutory interpretation, particularly the interpretation set out below from *Nadkarni*, contrasted with a narrow, criminal law definition set out in *In re Bushman*, 1 Cal.3d 767, 773, 83 Cal. Rptr. 375, 463 P.2d 727 (1970).

NCFM's 2014 letter described the Statewide importance of due process implications of the evolving expansive definitions of "abuse" under California's

DVPA. NCFM was writing in the context of the *Burquet* appeal, in which the parties were urging the courts to choose between the then recent, broad *Narkarni* definition of "disturbing the peace" set out as "destroying the mental or emotional calm" of the other party, and a narrow interpretation urged by the appellant, based on the criminal law definition of "disturbing the peace" set out statutorily at California's Penal Code § 415 and in *Bushman*, *supra,* i.e. the "disruption of public order by acts that are themselves violent or that tend to incite violence."

By following *Nadkarni,* the opinion in *Burquet* continued California's expansion of the definition of "disturbing the peace" to include any action upsetting to the subjective emotional calm of a partner or ex-partner, regardless of whether the action occurs only once, regardless if the action is itself otherwise legal and acceptable, and regardless of any showing of a threat, or likelihood of repetition or need to prevent future harm. In *Burquet*, the court based the injunction on the plaintiff's claimed emotional state—to "assure the peace and tranquility of the petitioner." *Burquet, supra,* at 1143.

Occasional emotional upset however, is a component of most, if not all intimate relationships. California jurisprudence appeared to justify a restraining order merely upon an application to the court claiming emotional upset, with no guidance to the restrained person as to what conduct is or is not abuse.

Nadkarni, supra, is often cited in defining "disturbance" of a person's peace in the context of domestic violence abuse. However, in *Nadkarni*, defendant had a history of physical abuse; he had spent twenty days in jail for beating his wife. The court found his actions - a course of conduct accessing,

reading, and publishing his former wife's emails - were disturbing in the dictionary sense of destroying her emotional and mental calm. This is a contrast to *Burquet* and various subsequent cases, and to Petitioner Alexander Baker's current petition, in which there was no history of violence between the parties.

Basing an injunction on a claimed emotional state of an applicant, such as an expression of fear, is much different than identifying conduct for the potentially restrained party that is ascertainably permissible, versus not permissible. California's vague definition of abuse as something that "has been or could be enjoined", and its expansive body of case law protecting that vague definition by avoiding constitutional challenge, is contrary for Federal Constitutional law as most recently set out in *Davis*. These considerations should lead the court to grant this petition.

II. GRANTING THIS PETITION WOULD ALLOW THE COURT TO ASSESS THE DEVELOPMENT OF LAWS DEEMING "ABUSE" TO INCLUDE "CONTROLLING BEHAVIOR."

A. "Controlling behavior" is a newly developing type of alleged abuse.

California case law has added "controlling behavior" to the definition of abuse, notably in the opinion in *Rodriguez v. Menjivar* 243 Cal.App.4th 816, at 821-822, 196 Cal. Rptr. 3d 816 at 821-822 (2015); and cases, including unpublished cases, that follow it. The concept of controlling behavior is developing nationwide, and considered significant. See, e.g., Evan Stark, Coercive Control: How Men Entrap Women in Personal Life (Interpersonal Violence)

(2009). California Continuing Legal Education courses refer students to this book, and it is one of many publications illustrating the development of "controlling behavior" as a focus of development of social studies and law.

The issue of what "controlling" behavior can be abusive has never been defined in a way that gives people "of common intelligence" fair notice of what the law demands of them. This makes California case law interpreting statutorily defined abuse (defined as "behavior that has been or could be enjoined pursuant to section 6320) as including "controlling behavior" overly expansive, impermissibly vague, and unconstitutional. Vague laws contravene the "first essential of due process of law" that statutes must give people "of common intelligence" fair notice of what the law demands of them. *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926); *Collins v. Kentucky*, 234 U.S. 634, 638, 34 S.Ct. 924, 58 L.Ed. 1510 (1914).

Baker v. Baker is an ideal vehicle for the U.S. Supreme Court to address all aspects of this nationally important developing area because of the emphasis the court of appeal and trial court placed on Alexander Baker's alleged "controlling behavior", which controlling behavior included use of finances, transmission of emails aiming to have the couple reconcile, and filing court papers in defense of the DV hearing itself.

III. GRANTING THIS PETITION WOULD ALLOW THE COURT TO ASSESS THE DEVELOPMENT OF LAWS DEEMING "ABUSE" TO INCLUDE INTERSTATE ELECTRONIC WRITTEN COMMUNICATION

A. Electronic communications are newly developing types of alleged abuse that rarely present "true threats" of imminent bodily harm.

The *Baker v. Baker* petition for writ of certiorari is nationally important, and should be granted for the further reasons that it involves non-violent internet activities between residents of different states. Mr. Baker's former spouse, Clara, became a Kansas resident, and her physical distance from her California resident ex husband makes the difference between unprotected "true threats" of imminent bodily harm, and other threats that have been held protected by the First Amendment to the United States Constitution stand out starkly.

The multi-state aspects of *Baker v. Baker* also bring out the nationally important issues of choice of law, conflict of law, and long arm jurisdiction. One case regarding electronic activity in Georgia was recently adjudicated by a California Court of Appeal. In *Hogue v. Hogue* 16 Cal.App.5th 833, 224 Cal.Rptr.3d 651 (2017) ("*Hogue*"), an estranged wife alleged that her husband had pretended to shoot himself in the mouth with his shotgun during a video message to her on social media. *Hogue* made a holding applying California's challenged and vague definition of "abuse" to internet conduct by the defendant while he was in Georgia, holding:

> . . . As in *Schlussel v. Schlussel* (1983) 141 Cal.App.3d 194, 190 Cal.Rptr. 95, where a defendant placed harassing phone calls to a California resident, the existence of statutory protection from the conduct at issue (there, a criminal statute) was sufficient . . . because it was not any different "than shooting a gun into the state" . . . The act. . . is indisputably conduct that would disturb plaintiff's peace of mind within the meaning of the act and be the basis for granting a restraining order.

Hogue, supra, at 224.

Baker v. Baker is an ideal forum for consideration of the nationally important choice of law issues and conflict of law issues, as it can address both conflicts in State law definitions of abuse and evidentiary burdens of proof of abuse, and the Federal Question of the extent of the free speech protections afforded by the First Amendment to the U.S. Constitution.

For the court's reference, the definition of "abuse" in Georgia, Ga. Code Ann., § 19-13-1 did not include filming or transmitting a video, but rather referenced criminal acts, identifying:

> (1) Any felony; or
>
> (2) Commission of offenses of battery, simple battery, simple assault, assault, stalking, criminal damage to property, unlawful restraint, or criminal trespass.
>
> The term "family violence" shall not be deemed to include reasonable discipline administered by a parent to a child in the

> form of corporal punishment, restraint, or detention.

For comparison, the definition of "abuse" in Kansas, where petitioner Alexander Baker's former spouse Clara now resides, Kansas Statute Annotated 60-3102 reads, in pertinent part:

> (a) "Abuse" means the occurrence of one or more of the following acts between intimate partners or household members:
>
> (1) Intentionally attempting to cause bodily injury, or intentionally or recklessly causing bodily injury.
>
> (2) Intentionally placing, by physical threat, another in fear of imminent bodily injury.
>
> (3) Engaging in any sexual contact or attempted sexual contact with another person without consent or when such person is incapable of giving consent…

In contrast, California's challenged definition of abuse also includes the challenged "residual clause." California Family Code § 6203 definitions of abuse read:

> (a) For purposes of this act, "abuse" means any of the following:
>
> (1) To intentionally or recklessly cause or attempt to cause bodily injury.
>
> (2) Sexual assault.

> (3) To place a person in reasonable apprehension of imminent serious bodily injury to that person or to another.
>
> (4) To engage in any behavior that has been or could be enjoined pursuant to Section 6320.
>
> (b) Abuse is not limited to the actual infliction of physical injury or assault.

Cal. Fam. Code § 6203, emphasis added to residual clause.

B. Issues of nationwide importance arise from the differences in state laws defining domestic abuse

The other forty-nine States, and various territories subject to the U.S. Federal Government, and to the holdings of *Johnson*, *Dimaya,* and *Davis* have enacted laws defining domestic violence. None of them define domestic violence by a residual clause defining "abuse" as any behavior that "has been or could be enjoined" under California Family Code § 6320. California is unique in this regard. Its language has never been followed by any other legislature.

Many of the other States define abuse as conviction of a crime, which brings Constitutional protection to persons restrained, by providing that their behavior be judged against the elements of the listed crimes, and examined by a jury, under a "beyond a reasonable doubt standard. California's statute is in stark contrast, inviting a Family Law judge to decide on an ad hoc basis, using a preponderance of evidence standard, to consider whether behavior "could be" enjoined.

In one of the territories subject to the U.S. Supreme court's holdings (the territory of Guam), a definition of "Family Violence" aka "abuse" has been held void for vagueness after the 2015 publication of *Johnson*. See *People v. Shimizu* 2017 Guam 11 (2017) ("*Shimizu*").

The conflict between *Shimizu*, *supra*, and all California cases, including *Baker v. Baker*, and *Molinaro v. Molinaro,* 33 Cal. App. 5th 824, 832, 245 Cal.Rptr.3d 402 (2019) (petition for review filed May 7, 2019, review denied June 20, 2019) that have upheld California Family Code section 6203(a)(4) against void for vagueness challenges provides a compelling reason for this petition for certiorari to be granted.

The statutes of the other forty-nine states defining abuse in entirely different ways are highly pertinent. They have created an incontrovertible record of legislation to evaluate in the context of the instant challenge to the constitutionality of the DVPA residual clause definition of abuse.

Like laboratory experiments, the other forty-nine states' and territories' legislative language and even their appellate results can be referenced by any state legislature to enact a more constitutional definition of non-physically violent abuse, should the California legislature be compelled to do so by any U.S. Supreme Court opinion holding Family Code section 6203(a)(4) void for vagueness.

For the Court's convenience, citations to the definitions of abuse in the other states may be found in the Appendix following this brief. (App.1a-2a, *infra*)

IV. PROTECTION OF THE RIGHT TO PETITION FOR REDRESS OF GRIEVANCE STRONGLY FAVORS GRANTING THE *BAKER v. BAKER* PETITION

A. Because Petitioner suffered duplicative harm in his DVPA case which punished his prior, separate litigation, his Petition for a Writ of Certiorari should be granted to address the matter of vague statutes adding duplicative penalties identified in *U.S. v. Davis*

Davis, *supra*, published the same day that Alexander Baker filed his Petition for a Writ of Certiorari, wrote:

> . . . Everyone agrees that Mr. Davis and Mr. Glover did many things that Congress had declared to be crimes. . . But does § 924(c)(3)(B) require them to suffer additional punishment, on top of everything else? . . . Respect for due process and the separation of powers suggests a court may not, in order to save Congress the trouble of having to write a new law, construe a criminal statute to penalize conduct it does not clearly proscribe.

Davis, *supra,* at 2332-2333.

Alexander Baker suffered additional harm beyond what could have been anticipated. His earlier litigation, including litigation in which he prevailed, was punished under California's DVPA because, essentially, Mr. Baker's prior litigation using other case numbers had disturbed his wife's mental and emotional calm.

This unpredictable punishment (causing, e.g. loss of the right to bear arms, and a temporary restraining order restraining parent-child contact) in a later DVPA proceeding (notably not a malicious prosecution lawsuit based on a prior judgment on the merits) illustrates the federal questions raised by the *ad hoc* interpretations of California Family Code section 6203(a)(4).

This duplicative punishment in subsequent lawsuits aspect of the petition an issue of national importance, as the First Amendment's rights to petition the government for a redress of grievances are significantly impaired by the void and overbroad statute, section 6203(a)(4) and the cases interpreting it.

V. GRANTING THIS PETITION WOULD ALLOW THE U.S. SUPREME COURT TO ASSESS THE WILDLY UNTEACHABLE BODY OF CALIFORNIA "ABUSE" LAW

Cataloguing and teaching the contours of what constitutes or does not constitute "abuse" under California's Family Code § 6203(a)(4) is near impossible. And the adjudications of what constitutes abuse keep expanding.

For example, California's vague ad hoc interpretations of what constitutes "abuse" now includes *Herriott v. Herriott*, 33 Cal.App.5th 212, 244 Cal.Rptr.3d 755 (2019) ("*Herriot*"), in which the alleged "abuse" included both a former husband Paul's behavior "slamming" his ex wife's iron gate, and evidence that generally he "doesn't talk about [Alicja] so kindly" and yells things to Alicja such as, "Why don't you move out? Go back to Poland." *Herriot, supra* at 221.

Herriot also included allegations of Paul's appar-

ent vicarious liability for actions by his employee Ruben, who allegedly painted the steps outside of Alicja's apartment "without first notifying her", and leaving the painted steps "unmarked," causing Alicja to slip and fall and "permanently injure" herself. *Herriot, supra,* at 218. This construction of the DVPA transforms non-threatening speech, or negligent application of deck paint into activity that causes a loss of the constitutional right to bear arms.

Another recent, unpublished case litigated whether a trial court had extended the definition of "abuse" to include the act of moving out of the marital home with one's children without notice to the other parent. Teaching such points to attorneys attending continuing education classes, or advising clients as to the risks that a secretive, surprise move out could be deemed abusive is fraught with difficulties, due to the vagueness of California's definition of abuse.

Rights, including rights to travel freely within a State, or to flee abuse without, for example, loss of Constitutional rights (Second Amendment) were not considered in the unpublished opinion, but aggregated, such opinions exemplify the vagueness of the California definition of abuse, a nationally important matter that impacts numerous federal questions, not just free speech and the right to bear arms.

CONCLUSION

Based on the forgoing, NCFM respectfully requests that the Court grant the petition for a writ of certiorari of the above referenced *Baker v. Baker* case to provide the opportunity to determine whether California's severable residual clause definition of domestic "abuse" at Family Code § 6203(a)(4) is overbroad and void for vagueness under the procedural rules announced by the U.S. Supreme Court in *Johnson, Dimaya*, and *Davis*; whether *Nadkarni*, *Burquet* and cases following them should be overruled as violating separation of powers; and generally, whether the DVPA's severable residual clause definition of "abuse" is unconstitutional in violation of the U.S. Constitution's 14th and First Amendments, and the federal supremacy clause.

Respectfully submitted,
this 31st day of July, 2019,

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APPENDIX

Citations to abuse definitions throughout the U.S.

ALABAMA:	Ala. Code 1975 § 30-5-2
ALASKA:	AS § 18.66.990
ARIZONA:	12 Section 13–3601
ARKANSAS:	AR Code Annotated § 9–15–201(e)(1)(A
COLORADO:	C.R.S.A. § 13-14-101
CONNECTICUT:	C.G.S.A. § 46b-15 states:
DELAWARE:	10 Del. C. § 1041
DIST. OF COL.	D. C. Code §§ 16-1001 et seq.
FLORIDA:	§ 741.28(2), FL Statutes
GEORGIA:	Ga. Code Ann., § 19-13-1
HAWAI'I:	Hawai'i Revised Statutes § 586–1 (1993)
IDAHO:	I.C. § 39–6303(1)
ILLINOIS:	750 ILCS 60/103 ST CH 40 ¶ 2311-3)
INDIANA:	IC 34-6-2-34.5
IOWA:	I.C.A. § 236.2
KANSAS:	K.S.A. 60-3102
KENTUCKY:	KRS § 403.720
LOUISIANA:	LSA-R.S. 46:2132 § 2132.
MAINE:	19-A M.R.S.A. § 4002
MARYLAND:	Maryland Code Family Law § 4-501
MASSACHUSSETTS:	M.G.L.A. 209A § 1

MICHIGAN:	M.C.L.A. 600.2950
MINNESOTA:	M.S.A. § 518B.01
MISSISSIPPI:	Miss. Code Ann. § 93-21-3
MISSOURI:	V.A.M.S. 455.010
MONTANA:	MCA 40-15-102
NEBRASKA:	§ 42–903(1)
NEVADA:	N.R.S. 33.018
NEW HAMPSHIRE:	N.H. Rev. Stat. § 173-B:1
NEW JERSEY:	N.J.S.A. 2C:25-19
NEW MEXICO:	N. M. S. A. 1978, § 40-13-2
NEW YORK:	Family Court Act § 812(1)
NORTH CAROLINA:	N.C.G.S.A. § 50B-1
NORTH DAKOTA:	§ 14-07.1-01
OHIO:	R.C. 3113.31(A)(1)
OKLAHOMA:	22 Okl.St.Ann. § 60.1
OREGON:	O.R.S. § 107.705
PENNSYLVANIA:	23 Pa.C.S.A. § 6102(a)
RHODE ISLAND:	Gen. Laws 1956, § 15-15-1
SOUTH CAROLINA:	§ 20-4-20
SOUTH DAKOTA:	SDCL § 25-10-1
TENNESSEE:	T. C. A. § 36-3-601
TEXAS:	V.T.C.A. Fam. Code § 71.004
UTAH:	U.C.A. 1953 § 78B-7-102
VERMONT:	15 V.S.A. § 1101
VIRGINIA:	Va. Code Ann. § 16.1-228
WASHINGTON:	West's RCWA 26.50.010
WEST VIRGINIA:	W. Va. Code, § 48-27-202
WISCONSIN:	W.S.A. 813.12
WYOMING:	W.S.1977 § 35-21-102