

018
No.18-8105

**IN THE SUPREME COURT OF THE UNITED
STATES**

ALICJA HERRIOTT

Petitioner

V.

PAUL B. HERRIOTT

Respondent

On Petition For Writ Of Certiorari To The
Supreme Court Of The State Of California

**REPLY BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

ALICJA HERRIOTT

Petitioner

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INTRODUCTION

In *Be & K Constr. Co. v. NLRB* (2002) 536 U.S. 516, 53, this Court held, that “*The First Amendment* provides, in relevant part, that “Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.” We have recognized this right to petition as one of “the most precious of the liberties safeguarded by the Bill of Rights,”

STANDARD FOR REVIEW

Respondent standards for review is the rationale of the state interest enacted in California Vexatious Litigant Statue addressed in *Wolfe v. George, supra*, 486 F.3d at 1125; *Rodriguez v. Cook*, 169 F.3d 1176, 1180 (9th Cir. 1999). Where Petitioner to this Court seeks review of lack of constitutionality of the law in question under *First Amendment* petition clause, the *Fifth Amendment* due process clause, and the *Fourteenth Amendment* equal protection clause, that the State must not structure laws to preserves state interest over US citizen right to petition the Government for a redress of grievances. *Be & K Constr. Co. v. NLRB* (2002) 536 U.S. 516, 53.

BACKGROUND FACTS OF THE CASE

This case originates from the prior litigation.¹ Petitioner in her petition presents highly relevant background issues of the case that Petitioner and Respondent are opposite parties in both litigations.

Respondent is the party who files lawsuit against Petitioner for divorce and he is the party who makes request to proclaim Petitioner as vexatious litigant. Respondent uses Vexatious Litigant Statue as a tactic to stop Petitioner from prevailing on the already pending two appeals², as all the eleven pages in the Petition introduces this Court to the vexatious litigant issue in the prior litigation.

In this case, a subject of the petition to this Court, Respondent uses the same tactic to prevail, and he files a motion to dismiss the case under CCP391.7 that Petitioner is a Vexatious Litigant.

Because under *Code of Civ. Proc. Sec. 340* the statue of limitation to file complaint for personal injury is running out Petitioner has no other choice than file the case in pro per before she retains a legal representation. Thereafter, Petitioner's attorney negotiates a proper settlement that Respondent's Insurance Company already takes responsibility for the

¹BD415-787. Divorce case filed to Los Angels Superior Court by Petitioner and Respondent to this Court in year 2004. There is no prior litigations against filed by either party.

² Petitioner prevails on two appeals Case No: B233061 and B234240, but the third case on appeal No B243517 is dismissed by Court denying prefilling order under CCP391.7

accident. Nonetheless, the third party on behalf Respondent files request to dismiss the case under *CCP391.7*.

As Respondents states in his brief that the Vexatious Litigant Statute requires a finding by the Court “that the plaintiff is a vexatious litigant and there is no reasonable probability, that the plaintiff will prevail in the litigation against the moving defendant” before requiring from plaintiff to furnish security *Cal. Code Civ. Proc. §391.3(a)*.

However, if Respondent takes responsibility for the accident and his Insurance Company makes a settlement offer. Would the Court consider the case meritorious? If not, would Defendant seek security by asking Petitioner to furnish security payment from Petitioner? On April 19,2018 Court only asks Petitioner’s attorney to retain permission to file new litigation by vexatious litigant within 10 days. As the case gets more complicated, Petitioner’s attorney Mr. Antonio Castillo III is fired minutes after the hearing on April 19,2018. He is not allowed to enter to the office of the Barnes Law Firm and forbidden to contact Petitioner. The proper complaint is filed to The State Bar that the Barnes Law Firm doesn’t notify Petitioner on the court decision or files “ Request to File New Litigation by Vexatious Litigant” as it is ordered.³

³ The case against Mr. Antonio Castillo III is dropped and it is redirected against The Barnes Law Firm at 633 West Fifth Street, Suite 1750, Los Angeles, CA90071, represented by managing attorney Mr. John Sheehan, California bar license number: 133607. California State Bar Case No 18-O-14004, No 18-O-17784

Respondent's general statement, that "Petitioner's litigious conduct which gave rise to her being determined to be a vexatious litigant", or "In Re the Marriage of Paul Herriott and Alicja Herriott, Case No BD415-787, Petitioner was found to be a vexatious litigant as defined in *California Code of Civil Procedure section 391(b)*." are misleading. Nonetheless, the statements, without intent, are in support of the Petitioner's claim that the very broad Vexatious Litigant Statue is vague and ambiguous.

The background facts of this litigation show that any In Pro Per litigant, defendant or petitioner, without knowledge of wrongdoing can loose its right to petition, as Respondent expresses indirectly his view on In Pro Per litigant: "Petitioner's petition for writ of certiorari is merely her latest abuse of the judicial system," not as her right to petition.

STATEMENT OF THE CASE

Respondent finds California Vexatious Litigant Statue to be constitutional under *Wolfgram v. Wells Fargo Bank, 53 Cal.App.4th 43 (1997); Wolfe v. George, 486 F.3d 1120 (9th Cir. 2006)* Nonetheless, Respondent does not provide a supportable rationale for such ambiguous

Vexatious Litigant Statute subjecting defendant in the family law case to the prefilling order requirement of Vexatious Litigant or represented by an attorney Petitioner in this case.

Supreme Court Rule 15.2, which requires the Respondent's brief in opposition to address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if Certiorari were granted. Instead, Respondent inadequately misstates facts and issues of Petitioner in the prior litigation and subjecting represented by attorney Petitioner to prefilling order of Vexatious Litigant in this case.

This case follows from the both parties divorce case. It is crucial for this Court to review application of the prefilling order of vexatious litigant to Petitioner in the prior case, that its perpetration against in pro per defendant is not isolated incident in this case only.

Petitioner to this Court stands by the statements that proclaiming defendant in family law case as vexatious and subjecting represented by attorney petitioner to the prefilling order of vexatious litigant is in violation of her rights protected under the *First Amendment* petition clause, the *Fifth Amendment* due process clause, and the *Fourteenth Amendment* equal protection clause. The Statute of Vexatious Litigant is unconstitutionally vague, overbroad, and violates of due process and equal protection under the law as we see in this case.

ARGUMENT

1. Is Vexatious Litigant Statue Clear Who Is The Vexatious Litigant?

The Statute, aimed at limiting misuse of the court system, allow courts to declare plaintiffs vexatious litigants if they have initiated five unsuccessful or unresolved lawsuits within the past seven years. *Cal. Civ. Proc. § 391.7* ("Statute"). Pursuing *Cal. Civ. Proc. § 391(b) (1)* a vexatious litigant as a

person who does any of the following: In the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations...(i) finally determined adversely to the person or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing. (2) After a litigation has been finally determined against the person, repeatedly relitigates or attempts to relitigate, in propria persona.

The statue differs in each section who is vexatious: under VL CCP391.7 In Pro Per Plaintiffs are subjected to the law, but under CCP391 (b)(1) any person acting in Pro Per might be proclaimed vexatious.

The statue is wide open to discretionary decisions of the Court if petitioner or defendant acting in in propria persona might be vexatious. As we see in this case, Petitioner to this court is Defendant acting in pro per in

the family law filed by Respondent divorce case when court proclaims her as vexatious litigant under *CCP391 (b)(2)*.

Even though, Petitioner responds to the motions or seeks review of the lower court decisions in higher courts, after May 1,2012⁴ Court find the fillings frivolous or solely intended to cause unnecessary delay. Petitioner and Respondent in the divorce case acting in pro per in her own defense has no idea that filings of the responding papers, permitted by the family law motions, or seeking review of the bias court orders in the court of appeal or higher courts might be punishable under *CCP391*.

The definition of Vexatious Litigant under *CCP391* is so poorly phrased that it does not put Alicja on notice of what action is permissible and what is outlawed. In *NAACP v. Button*, 371 U.S. 415, 432-33 (1963); is decided that Vexatious Litigant Statue is applied to the person who acts in pro per in California courts. It is not clear if Vexatious Litigant is a person who is represented by an attorney? In *Camerado Ins. Agency, Inc. v. Superior Court (Stolz)* (1993) No. C014311. Third Dist. Jan 25, 1993. "We presume the Legislature was aware of the judicial construction of section 391, subdivision (b)(1), as extending to vexatious litigants represented by counsel, when the Legislature amended the vexatious litigant statute in 1990. Moreover, we may presume the Legislature adopted that judicial construction by reenacting subdivision (b)(1) with nonsubstantive changes. (See, e.g.,

⁴Case No BD415-787, May 1,2012 Court Order proclaiming Defendant/Petitioner to this court as Vexatious Litigant

Brailsford v. Blue (1962) 57 Cal. 2d 335, 339 [19 Cal. Rptr. 485, 369 P.2d 13];
Ladd v. Board of Trustees (1972) 23 Cal. App. 3d 984, 990 [100 Cal. Rptr. 571

Petitioner files the complaint in pro per, but she retains attorney and complaint is amended and refilled before April 19, 2018 court hearing.

Attorneys are subjected to the ethical laws and to discipline from the State Bar of California; therefore, they are not obligated to obtain prefilling order of Vexatious Litigant. It is not clear, why Petitioner's attorney is subjected to the prefilling order of vexatious litigant? The rationale of the decision is for the court to decide if the case is meritorious; instead, to take more time of the court for Presiding Judge to decide if the case has merits pursuing *California Code of Civil Procedure section 391.7(b)*?

If Court of Appeal, in *Camerado Ins. Agency, Inc. v. Superior Court (Stolz)* (1993) No. C014311. Third Dist. Jan 25, 1993, presumes only, that the Legislature was aware of newly adopted of the judicial construction of *section 391, subdivision (b)(1)*". The attorney who represents Vexatious Litigant has ethical responsibility which violation is punishable by the State Bar is subjected to the prefilling order of his client, than who should to seek the prefilling order and makes the request for the prefilling order: the attorney or his client? If the rule is not clear for the court, so it is not clear for the litigant, either. Therefore, court order asking Petitioner's attorney to obtain prefilling order of vexatious litigant is not enforceable order.

This very unambiguous definition who is a Vexatious litigant in

California Courts and who is subjected to the refilling order is widely open to arbitrary and unreasonable application of this law; therefore, it doesn't withstand the test of the constitutional certainty of the law.

2. A Vague Definition Of The Meritorious-Meritless Litigations

Respondent states that "the Vexatious Litigant Statute does not prevent vexatious litigants from petitioning the government, it only requires them to show that they have a potentially meritorious claim. (*Cal. Code Civ. Proc. §391.7(b); Wolfe v. George, supra at 1125.*)" This vague and mysterious rule requires form In Pro per litigant to know and to show something few lawyers can do in the court. There is no clear definition of meritorious litigation. The Vexatious Litigant Statue doesn't define frivolous lawsuits clearly. Judge William W. Schwarzer stated, the total amount of behavior that would be sanctionable [as frivolous] . . . is not determinable by ordinary quantitative measure. *T. E. Willging, The Rule, 11 Sanctioning Process 67 N.130 (Federal Judicial Ctr.1988)*. Also, the meritorious lawsuits can't be determent by the ordinary measures either. The decision which case deserves to be praised is left to the discretion of the court not for in pro per litigant to decide. If vexatious litigant makes mistake and petition to court thinking that his or hers case is meritorious, she or he is facing punishment under CCP391.7. As we see in this instance, after May 1,2012 any fillings of

Defendant in the family law case to Superior Court, Court of Appeal, or US Supreme Court are perceived as frivolous lawsuits punishable by monetary sanctions,⁵ and Petitioner's requests for prefilling order to file Notice on Appeal, petition to CA Supreme Court are denied.

Focusing on the issue of vagueness, the Supreme Court in *Baggett v. Bullitt*, 377 U.S. 360 (1964), struck down the 1931 and 1955 provisions of a Washington state law that mandated loyalty oaths for state employees, thereby interfering with their *First Amendment* rights of association. Although states had the right to "take proper measures safeguarding the public service from disloyal conduct", the measures they take "must allow public servants to know what is and is not disloyal." Because there is no clear definition of what is meritorious claim and what is not, in pro per Litigant has no ability to know if her motions or petition to court are meritorious claims.

Pursuing Vexatious Litigation Statue under CCP391 to the only meritorious litigations right to be heard, *Fifth Amendment* would protect only meritorious litigations by due process clause.

The scope of the statue is too broad in several respects, it is in fact unworkable that the court doesn't allow a new action to be initiated unless the court deems the action 'meritorious.

⁵ Case No BD415-787, on May 1,2012 Petitioner is sanctioned with \$1,200 payable to Respondent, \$12,500 for petition to US Supreme Court payable to Respondent, May 5,2014 Minute Order. Appendix "G" to Petition for Writ of Certiorari

3. Prefilling Order Of Vexatious Litigant Obligation And Sanctions

Respondent states “The Court pointed out that the pre-filing order does little more than require a determination of whether the complaint states a claim before imposing the burdens of litigation on a defendant, and that a defendant could move to dismiss on this basis anyway. (*Id. at 1126-1127.*)”

Does the statement proof Petitioner’s claim, that prefilling order of Vexatious Litigant is in violation of the *Fifth Amendment* due process clause, and the *Fourteenth Amendment* equal protection clause”? The right of any person to petition and to be heard in the court without prior assertion made by presiding judge is infringed by the prefilling order of vexatious litigant.

In this instance, Superior Court proclaims Petitioner as Vexatious Litigant, and thereafter the pending appeal⁶ is dismissed and the prefilling orders of vexatious litigant to petition to higher courts are denied. Sanctions of prefilling order of Vexatious Litigant requirement prevents Defendant from filling any motions in own defense in the family law case and dismisses the civil case for personal injury. The cases are never heard on its merits and Petitioner can’t have “a day in the court” to present her claim for the injury, damages and lost of income. Vexatious Litigant Statue with prefilling order requirement is a substantial and irrational bar to access to court.

⁶ B243517. Petitioner appeals January 25,2012 court order terminating permanent spousal support without change of financial situation on both parties.

Additional sanctions for being Vexatious Litigant are ambiguous to the rule when the financial sanctions are applicable. Under *Eighth Amendment to the Constitution*, monetary sanctions against custodial parent are excessive fines imposed after court terminates permanent spousal support and she is left with no income. On May 1, 2012 Petitioner is sanctioned with \$1200 and \$12,500 for filing Petition to the US Supreme Court on May 5, 2014.

It is no accident that Petitioner is proclaimed as vexatious litigant four months after her permanent spousal support is terminated. This decision brings unpredictable consequences for Petitioner that she lost her only income without ability to seek review of January 25, 2012 court order. Court of Appeal dismisses petitioner's appeal of January 25, 2012 court order after she files Opening Brief, nine months into proceedings on appeal ⁷

In *Thornhill v. Alabama* 310 U.S. 88, 60 S. Ct. 736 (1940) Court finds the *State Code § 3448 (1923)* invalid on its face. That The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. If Pro Se litigant is restrained by prefilling order of vexatious litigant, punished financially for petitioning to the higher courts, and barred from seeking redress of grievances this law must be invalid on its face.

⁷ Case No. B243517. Petition for Writ of Certiorari, Page 8. Appendix "O", "P"

4. The Vexatious Litigant Statute And Its Applicability In Certain Appeals

Petitioner's request for prefilling order under CCP391.7 to file "Notice on appeal" in this case is denied⁸

In the background cases, at first, the prefilling order of vexatious litigant is granted but it is denied after 9 months into proceedings on Appeal Case NoB243517.⁹ On the appeal B255032¹⁰ prefilling order is not requested, later time is requested and denied, the case is dismissed and reinstated and prefilling order is denied and accepted again. Thereafter, all the requests for prefilling order to file "Notice on Appeal" are denied. In *John v. Superior Court*, 63 Cal. 4th 91 (Cal. 2016), the California Supreme Court confronted the issue of whether the vexatious litigant Statute applies to defendants appealing a judgment against them. The Statute provides an important mechanism for curbing an unrepresented plaintiff's ability to file vexatious lawsuits. However, if the Statute would apply when vexatious litigants appeal a case they did not initiate, the Supreme Court would essentially be punishing those vexatious litigants for their past actions rather than evaluating the appeal on its merits.

⁸ Appendix "B" to Petition for Writ of Certiorari

⁹ Appendix "O", to Petition for Writ of Certiorari Page 8-9

¹⁰ Appendix: K, L, M, N, to Petition of Certiorari Page 10-12

Why Petitioner's request for prefilling order to file Notice on Appeal is denied by the Court of Appeal, rather than assessing the merits of the appeal?

Even though, CA Supreme Court ruled that the vexatious litigant filing requirements doesn't apply to the defendants because they don't initiate the litigation, it is not clear why defendant in the family law case is subjected to prefilling order to file Notice on Appeal in the few instances and she is not subjected to this law in other cases on appeal in the same family law litigation?

SUMMARY

This case originates from the prior litigation in the family law case involving both parties in the present case submitted to this Court.

Petitioner argues that creating a barrier for represented by attorney or in pro per Petitioner violates her equal rights to petition protected by due process clause under US Constitution.

The scope of the statute is too broad in several respects; it is in fact unworkable when the Court doesn't allow a new action to be initiated unless the Court deems the action "meritorious". Respondent's perceives Petitioner's petition for writ of certiorari as abuse of the judicial system, instead as her right to petition. Indeed, Respondents' statement only supports Petitioner's claim that Vexatious Litigant Statute is

unconstitutional.

Respondent's Brief is broad and vague as the Statue itself, and he fails to show constitutionality of the law in question. The law which deprives Petitioner to this Court privileges and rights protected by: *the First Amendment* petition clause, *the Fifth Amendment* due process clause, and *the Fourteenth Amendment* equal protection clause must be unconstitutional.

CONCLUSION

This Court need to take a closer look about how the term 'vexatious' is being used in the California courts and whether that is consistent with the Privilege and Immunities Clause, the First Amendment petition clause, the Fifth Amendment due process clause, and the Fourteenth Amendment equal protection clause for every person in the California courts.

For the foregoing reasons, Petitioner respectfully requests Supreme Court to grant Petition for Writ Of Certiorari.

Date: April 2,2019

Respectfully submitted,



Alicja Herriott
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