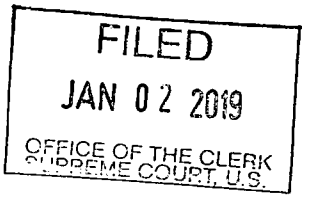
18-907

No. ____

IN THE
SUPREME COURT OF THE
UNITED STATES



CHARLES G. KINNEY,
Petitioner,

v.

THREE ARCH BAY COMMUNITY
SERVICES DISTRICT; et al.,
Respondents,

On Petition For Writ Of
Certiorari To The
Ninth Circuit Court of Appeals
#17-55899 (Oct. 4, 2018 denial of
petition for rehearing) [2 of 3]

U.S. District Court, Central
District of Calif. (Santa Ana)
#8:16-cv-00796-RGK-JC

PETITION AND APPENDIX FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Vexatious litigant ("VL") laws are being used by the courts to "punish" Kinney to the detriment of the environment. Punishment occurs even though Kinney is an attorney who was not a party, *pro se* plaintiff who ultimately prevailed, defendant, or listed bankruptcy creditor. Those categories are excluded from all VL laws. In state courts, the VL law results in a one-size-fits-all penalty (e.g. state-wide pre-filing orders for someone who is in the wrong place at the wrong time). In federal courts, VL orders are "narrowly tailored" but they are not so applied to Kinney, especially if a VL decision was already made in state court (and that violates the separation of powers doctrine). In Cal., one single case can result in a VL decision if a plaintiff loses against five defendants but wins against the sixth since each defendant requires a separate appeal which counts as 5 losses. The VL laws let one Judge or Justice decide the merits of a complaint or appeal without evidence, contrary to First Amendment rights and the Cal. Constitution which requires a 3 justice panel. Here, VL laws are being used to compel Kinney's "silence" as to ongoing nuisances and violations of the CWA. ADA, and discharge injunction. This violates Kinney's property owner rights, and there has been collaboration among judges to punish Kinney (e.g. Justices Boren and O'Leary). On 12/28/17, 8 of Kinney's pending appeals were dismissed by Circuit Judges Silverman, Bybee and Wallace.

On 5/23/18, 3 more appeals including this CWA case were dismissed by Circuit Judges Silverman, Bea and Watford. *When will this Court stop the ongoing violations of federal law?*

PARTIES TO THE PROCEEDINGS

The parties to this proceeding are those appearing in the caption to this petition.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Charles Kinney requests that a writ of certiorari issue to review the "final" Oct. 4, 2018 decision denying a rehearing for its May 23, 2018 dismissal of Kinney's pending appeal in Ninth Circuit **#17-55899 (2 of 3)** [Dk #46 and #44-1, respectively].

The issues include ongoing pollution which continues to cause nuisances and trespass on Kinney's Laguna Beach property, and which continues to violate the Clean Water Act ("CWA"), whenever there is a medium to heavy rain day, or when fire hydrants, pools, or water tanks are flushed from above.

None of the polluters obtained a National Pollutant Discharge Elimination Permit ("NDPES") via the CWA, so some but not all the CWA rules apply to the polluters since there is no "standard, limitation, or order'" in an applicable NPDES permit because "no" such permit was ever issued to any of the 3 polluters.

The ocean pollution started in 1992; and it has never been stopped. The pollution was first seen during winter-time construction of houses in the Three Arch Bay subdivision. The contractors did not use enough sediment controls, so mud and muddy water were sent down the hill, across the property that Kinney would later purchase in 2001, and into the ocean.

To address this pollution, the public entity Three Arch Bay Community Services District ("TABCSD") created a 1999 drainage contract with several neighbors on the private street Virginia Way and the City of Laguna Beach ("City"). That 1999 contract required the installation of a larger pipe. That contract had a hold-harmless clause for TABCSD, but

it did not include all properties in the runoff path of the pollution [e.g. South Coast Highway ("SCH"); Mike Boone's property west of SCH], so the proposed pipe could not be installed on the omitted properties. Because of that, the 1999 drainage contract was not a solution to the muddy runoff from land in the Three Arch Bay subdivision managed by TABCSD.

TABCSD was formed in 1957 under Cal. Government Code Secs. 61000 etc because the upscale, gated Three Arch Bay subdivision was in Orange County at that time, not in a city. TABCSD's powers included the right but apparently not the obligation to install storm water management devices (e.g. straw wattles) to control erosion on private properties and on the common areas of that 29 acre subdivision.

In May 2001, Kinney bought his Laguna Beach property from one of the neighbors that had signed the 1999 contract, but that contract was not assigned to him during the purchase. However, Kinney's property was directly in the path of the polluted runoff as it came off the Three Arch Bay subdivision, so his parcel had to be included if a new pipe was to be installed. In addition, two property owners to the west of Kinney's property across the private street Virginia Way (i.e. Chaldu and Viviani) had built (or their predecessors-in-title had built) tall retaining walls that created a new sediment basin in the private street that redirected and collected the polluted runoff, but did not have a large enough drain pipe at the bottom of the basin to accommodate the runoff. That sediment basin and undersized drain caused the polluted runoff to form a huge pond, flood Virginia Way and the properties of other neighbors including Kinney's property, leave behind mud, and send pollutants to the ocean from that point source.

In 2001, the City got "cold feet" and said it would not honor any obligations in the 1999 contract. TABCSD really wanted to keep the hold-harmless clause, so it sued the City in Orange County Superior Court in Nov. 2001 to determine everyone's rights and duties.

The state court instructed TABCSD to sue all parties to the 1999 contract but, for some reason, TABCSD also sued several people who were not parties to that 1999 drainage contract including Kinney, neighbor Lueder, and Lueder's live-in boyfriend.

Since Kinney has expertise in engineering and law, within a few months he had determined many of the flaws in the 1999 contract. For example, all property owners in the path of the polluted runoff on the way to the ocean were not included, so a new drain pipe could not go on those properties. The drain in the sediment-collecting basin on Virginia Way was too small by a factor of 6, and the creators of that basin, Viviani and Chaldu, refused to put in an overflow to bypass the small drain. There were questions as to whether TABCSD could require storm water facilities to be installed on private properties in the Three Arch Bay subdivision, and who owned which parts of the private street Virginia Way (e.g. since the City believed it was a "public" street in May 2001 but it changed its mind after Kinney did some research at the Orange County Recorder's Office). There were options as to where to install a new drain pipe and one option went north on Virginia Way and then west on 11th St. (aka Sunset) to SCH, but property owner Sherrie Overton had just built an illegal fence across the private street 11th St (aka Sunset) contrary to the access rights given to each Tract 849 subdivision lot owner (e.g. Kinney, Overton, Chaldu and Viviani).

One of the main causes of the ocean pollution was determined to be loose fill generated by the private entity Three Arch Bay Association, a homeowners association ("TABA"), when it graded a new road at the upper portion of the street Vista Del Sol in about 1947 (i.e. 10 years before TABCSD was formed). During the grading, TABA dumped so much loose soil into the ravine above Kinney's property that it easily covered 6+ foot tall trees and bushes (e.g. as shown by aerial photos). That loose soil has never been stabilized by TABCSD, TABA, or property owner(s) who owns the lot(s). The loose soil continues to erode during medium to heavy rain events, and whenever large amounts of water are dumped onto that loose soil (e.g. from water tanks or pools), even though construction is no longer occurring in that area.

Another main cause of the ocean pollution is that TABCSD stipulated in 2006 that it "remains legally responsible" for all storm water drainage and facilities, but that was a lie and cover-up for TABA's 1947 loose soil problem. Each property owner is responsible to manage his property under Cal. Civil Code Sec. 1714, so TABA was responsible for the improper grading in 1947, but the property owner who now has the loose soil is responsible for that.

Even though TABCSD argues it "remains legally responsible", TABCSD continues to extort private property owners to pay money for building storm water facilities on their lands in exchange for TABCSD's architectural "approval" for new proposed residential development (e.g. see Naddor application).

TABCSD has built storm water facilities without the necessary permits and was "caught" in 2012 by the Calif. Coastal Commission for a concrete sediment

basin built in 2010 without permits in the ravine above Kinney's property (e.g. see Brock application).

Kinney's Laguna Beach property is not in the Three Arch Bay subdivision, but it abuts a section of that subdivision at a place called the Virginia ravine (aka "System 6") with 6.7 acres of watershed on drainage maps prepared for TABCSD and/or TABA. Kinney's lot is in the Tract 849 subdivision with 653 lots.

Even though Kinney was sued as a "defendant" in TABCSD's 2001 state court lawsuit, and even though the 1999 contract was adjudged to be "void", there has never been a "one final judgment" for Kinney.

In 2011, Kinney protested that he had never been dismissed and no "one final judgment" had ever been entered as to him, so he filed an appeal as a "defendant" in Feb. 2012. In response to that appeal, the Cal. Court of Appeal, Fourth Appellate District, Division Three ("COA4") has continued to refuse to assign an appellate number to that appeal and/or allow that appeal to proceed, even though written evidence exists that COA4 had notice of Kinney's 2012 appeal (see Calif. Supreme Court #S227955 and S228081 aka SCOTUS #15-7297; and Ninth Circuit #17-55081 aka SCOTUS #18-518).

As early as 2005, Kinney's rights were being ignored in Laguna Beach when he attempted to have a Cal. Code of Civil Procedure Sec. ("CCP") 1060 decision as to the private streets that abutted his property (i.e. Virginia Way) and/or that were near his property including a private street (i.e. 11th St. aka Sunset) that had been enclosed with a fence built by Sherrie Overton. Overton was represented by an attorney from a LA law-firm that included David Marcus, Esq.

That law-firm is the same one that would appear in 2007 for seller Michele Clark in cases filed in Los Angeles regarding Kinney's Los Angeles property which was purchased in 2005 from seller Clark (who filed a Chapter 7 "no asset" bankruptcy in 2010).

In Laguna Beach, Kinney's right to use all of the private streets arose from language on the recorded map for the Tract 849 subdivision with 653 lots (since Kinney bought lot #653 in 2001). Kinney's right to a CCP 1060 determination was denied by the COA4 and to this day is still being denied; see *Kinney v. Overton*, 153 Cal.App.4th 482 (Cal. 2007).

By Dec. 2011, Cal. Court of Appeal, Second Appellate District ("COA2"), Adm. Pres. Justice Roger Boren had issued *In re Kinney*, 201 Cal.App.4th 951 (Cal. 2011) in which Justice Boren blatantly misstated the facts as to what was occurring in Laguna Beach with respect to Kinney. As of Dec. 2011, the punishment of Kinney as a VL was in "full enforcement" mode.

In Dec. 2011, Kinney was given permission to file a lawsuit regarding the Dec. 2010 flooding of his Laguna Beach property and the private street which abuts his house, Virginia Way. The Orange County state court dismissed Kinney's nuisance complaint based on Kinney's disputed vexatious litigant status and mis-interpretation of law as to a continuing nuisance; the Cal. Supreme Court denied review.

In 2016, Kinney filed a CWA complaint as a citizen as authorized under 33 U.S.C. Sec. 1251 etc against TABCSD and two property owners to the west of Kinney's property, Viviani and Chaldu, who had jointly created their own sediment collection basin with an undersized drain in the street. That basin

collected and redirected sediment-laden runoff water toward the ocean. Since no polluter had a NPDES permit, each polluter was violating the CWA.

Under the US District Court rules, Kinney's CWA complaint should have been assigned to the "Southern Division" in Santa Ana (#8) since all defendants were in that division and all pollution was occurring in that division. Local Rule 83-1.1; General Order #16-05 (formerly #14-03). However, because of Kinney's VL status, the case was assigned to USDC Judge Klausner in the "Western Division" in Los Angeles (#2), who shared the same Magistrate Judge with USDC Judge Gutierrez (e.g. to keep track of Kinney's attempts to succeed at any litigation).

Judge Guteirrez issued the May 13, 2016 VL order against Kinney to cover-up ongoing violations of 11 U.S.C. Sec. 524(a) by 2010 Chapter 7 "no asset" discharged-debtor Clark's attorney Marcus, a listed unsecured creditor, and by state courts who kept issuing "void" attorney fee orders against Kinney.

In this CWA case, the case number starts with "8:16" but a Judge Klausner case in LA should start with "2:16". It is assumed this was done to conceal where the Laguna Beach CWA case was really assigned.

In the 2016 CWA case, Kinney had Viviani and Chaldu timely served, but TABCSD refused several times to allow Kinney's process server into the gated Three Arch Bay subdivision to get to TABCSD's only office location at 5 Bay Drive, Laguna Beach. After several tries, the process server left the summons and complaint with security guards at the gate, and a copy of the summons and complaint were mailed to TABCSD which completed substituted service.

However, TABCSD ignored that substituted service had occurred (i.e. leave with a person "apparently in charge" – the security guard who was refusing entry to the process server; and mail the summons etc to TABCSD). After that service, TABCSD failed to file an answer or other responsive pleading, or to move to quash the summons from the first service. Bein v. Brechtel-Jochim Group, Inc., 6 Cal.App.4th 1387, 1392-1395 and fn. 7 (Cal. 1992); Fed.R.Civ.P. ("FRCP") Rules 4, 5 and 12. By failing to object, TABSD waived all issues including the timeliness of that service.

Kinney filed a request to take TABCSD's default, but the clerk refused to do her ministerial duty to enter a default. FRCP Rule 55. Instead, the clerk referred Kinney's request to Judge Klausner, who refused to enter the default. That forced Kinney to re-serve TABCSD in 2017, but TABCSD argued the second service in 2017 was late **without** any mention of its failure to contest the first service or explain why the first process server was denied entry on several occasions by TAB's own security guards when timely attempts to serve were made. Thus, TABCSD waived timely service in 2016 due to the improper acts of its agents - the security guards. Gwaduri v. Immigration and Naturalization Service, 362 F.3d 1144, 1145-1146 (9th Cir. 2004); Panaras v. Liquid Carbonic Indus. Corp., 94 F.3d 338, 340 (7th Cir. 1996); Henderson v. United States, 517 U.S. 654, 658-659 (1996).

On June 15, 2017, USDC Judge Kalusner ignored the unjustified refusal of TABCSD (who had hired the security guards) to allow Kinney's process server to enter the gated community to serve TABCSD, and TABCSD's failure to timely contest the first service which waived time limits for service and conceded the

first service was proper. As a result, TABCSD was dismissed on June 15, 2017 [App. D, 14].

On May 22, 2107, USDC Judge Klausner dismissed Viviani and Chaldu, but without explaining how their jointly-operated sediment basin was not regulated by the CWA since every "person" who pollutes the ocean from a point source violates the CWA if they do not have a NPDES permit, and without explaining how Kinney's 60 day notice did not give them "sufficient information" to satisfy the CWA notice requirement, given their extensive knowledge of the pollution over the last 2+ decades and how to fix it [App. C, 6].

Here, all polluters were well aware of the pollution problem since it been occurring for so long, and well aware of how to "correct the problem" [App. C, 6].

All polluters knew that when the mud and sediment pollution got to SCH, that pollution was going to be deposited into the ocean by a series of drain pipes going under SCH without any treatment whatsoever, and thus that pollution would violate the CWA.

No polluter had a NPDES permit (e.g. which ***might*** allow some amount of mud or sediment pollution via a "standard, limitation, or order"). Since no NPDES permit exists, the CWA ***completely bans*** all mud and sediment pollution in any amount in the runoff by anyone (e.g. a homeowner) from any point source (e.g. a basin). Envtl. Prot. Info. Ctr. v. Pac. Lumber Co., 301 F.Supp.2d 1102, 1113 (N.D. Cal. 2004).

USDC Judge Klausner never explained why Kinney's "state-action complaint" in 2012, the other documents sent by Kinney from 2012-2015, and the notices to EPA and the State in 2015, all combined with the 2+

decades of extensive knowledge of the problem by Chaldus and Viviaini do not satisfy the CWA 60 day "notice" requirement [App. C, 6]. Judge Klausner ignores Kinney's notice was not only the 2012 "state-action complaint" but also other documents in that state case as well as separate 2015 notices to the EPA and the State. The rules do not limit the notices or require the words "intent to sue". 40 C.F.R. 135.

The "adequacy of information" in Kinney's pre-filing notices depends on numerous factors which require an analysis of the "nature of the purported violations, the prior regulatory history of the site, and the actions or inactions of the particular defendants" (aka a summary judgment analysis where facts alleged by Kinney are deemed to be true). Paolino v. JF Realty, LLC, 710 F.3d 31, 35-42 (1st Cir. 2013); Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 484 U.S. 49, 56-60 (1987). Judge Klausner did not do this.

USDC Judge Klausner does not address the separate role of each polluter. It is undisputed that TABCSD helps create the mud and sediment in the runoff. However, once Chaldu and Viviani collect, channel and redirect the muddy runoff, that ***now*** becomes "their" pollution too. Northwest Envtl. Def. Ctr. v. Brown, 640 F.3d 1063, 1070-1071 (9th Cir. 2011); U.S. v. Milner, 583 F.3d 1171, 1193-1196 (9th Cir. 2009); Comm. to Save Mokelumne River v. East Bay Muni. Util. Dist., 13 F.3d 305, 308-309 (9th Cir. 1993); Tri-Realty Co. v. Ursinus Coll., 124 F.Supp.3d 418, 462 (E.D. Pa. 2015); American Canoe Ass'n. v. Murphy Farms, Inc., 412 F.3d 536, 537-540 (4th Cir. 2005); Residents Against Indus. Landfill Expansion (RAILE) v. Diversified Systems, Inc., 804 F.Supp. 1036, 1038-1039 (E.D. Tenn. 1992).

Contrary to Judge Klauser's reasoning, if Chaldu and Viviani opened up the channel toward the ocean, they would no longer "collect, channel and redirect" the pollution, so it wouldn't be "**their**" pollution anymore. [App. C, 6]. ***If that occurred,*** TABCSD would still be liable for the pollution originating from up on the hill. All pollution would now pass over Virginia Way without causing flooding, but Chaldu and Viviani would no longer be liable since they would no longer collect, channel and redirect the pollution, ***so it wouldn't be "their" pollution*** under the CWA.

Judge Klausner is correct in stating that, to decide subject-matter jurisdiction, a summary judgment analysis must take place. However, Judge Klausner did not follow the process for a summary judgment analysis (e.g. by accepting a version of the facts by Chaldus' attorney, Mr. Beggs, as true rather than accepting Kinney's version of the facts). [App. C, 6]

Contrary to rulings by USDC Judge Klausner [App. C, 6, and D, 14], disputed material facts exist which is relevant to the court's decisions as to: (1) the sufficiency of the first service on TABCSD; (2) the waiver by TABCSD of objections to timeliness of the first service due to acts by security guards refusing entry to the first process server on several occasions; and (3) the alleged insufficiency of Kinney's pre-filing notice to TAB, Chaldu, Viviani and government entities including what was sent to whom and when via Kinney's notices (since there can be more than just 1 document for a 60 day notice), what did each of the documents actually say (rather than relying on what Chaldu's attorney claims they said), what was the history of the site, and what inactions occurred in the past. There is no requirement that the 60 day notice under the CWA be given in only 1 document,

and there is no requirement to use any particular words in any of the notices (e.g. "intent to sue").

Furthermore, additional disputed issues include: (1) what did TABCSD know about the several attempts to serve it in 2016 including the several attempts within the applicable time limit to serve; (2) why did TABCSD ignore the first completed service to its own peril; (3) did the sediment basin that was jointly built and operated by Chaldu and Viviani mean they were subject to the CWA provisions even though they were homeowners; (4) how detailed did Kinney's pre-filing notice in 2012 have to be when each polluter knew about the pollution and how to stop it from 1992 onward; (5) what did Kinney's pre-filing notices have to contain when no polluter had a NPDES permit and all polluters knew about the ongoing pollution and how to stop it; and (6) could Kinney send pre-filing notices to the EPA and the State in 2015 since no time limit for such action exists in the CWA [but all notices have to be sent 60 days before filing suit].

There is no exception to give private property owners a "free pass" to pollute the ocean, and the cost to correct and the intent to pollute are not relevant in the CWA action. Here, if the polluters are already on notice of the CWA violations and the polluters do not have any NPDES permits, Kinney's 60 day notice of intent to sue can be rather brief and can omit many specific details such as the dates of the ongoing violations (e.g. since there is no "standard, limit or order" to be found in a NPDES permit because no such permits exist).

In the Ninth Circuit appeal of the CWA case, Kinney filed an Opening Brief on 12/28/17 [Dk #4]. TABCSD filed an Answering Brief on 1/23/18 [Dk #10]. Chadlu

filed an Answering Brief on 1/25/18 [Dk #15]. Viviani filed an Answering Brief on 2/1/18 or 2/6/18 [Dk #26 or #28]. Kinney filed a Reply Brief on 4/30/18 [Dk #41] and he had requested oral argument.

Within 23 days, the Ninth Circuit dismissed Kinney's appeal without allowing oral argument [Dk #44 on 5/23/18; App. B, 3]. In its cursory dismissal, the Ninth Circuit gave 4 reasons: (1) Kinney's 60 day notice was not sufficient {without explaining why}; (2) Kinney's first service on TABCSD was untimely {without explaining the consequences of the refusals by TABCSD's security guards to allow access to the first process server on several occasions including attempts within the time limit to serve}; (3) any leave to amend by Kinney would be futile {without explaining why it would be futile}; and (4) the assignment of the CWA case to the wrong division was rejected without explanation {even though it violated the Local Rules as to assignments of cases}.

On Oct. 4, 2018, the Ninth Circuit denied Kinney's petitions for rehearings [App. A, 1].

These decisions were done to compel Kinney's "silence" as to ongoing violations of state and federal laws by these polluters; to down-play the May 2016 VL order by USDC Judge Gutierrez; and to cover-up the "gaming" of the assignment system in the Central District of California as done to this CWA case.

The justification for compelling Kinney's "silence" was that Kinney had been deemed to be a "vexatious litigant" in state court and then in federal court, so Kinney was not entitled to pursue any cases in US District Court or the Ninth Circuit.

However, with a cursory examination of the facts, it can be shown that Kinney is not a VL (e.g. because he did not meet the tests in VL laws); and that Kinney has been subjected to systematic retaliation for being in the wrong place at the wrong time (e.g. when Los Angeles County Superior Court ["LASC"] Judge Elizabeth Grimes wanted to be "elevated" to a Justice in the Cal. Court of Appeal, Second Appellate District, but had made 2 directly inconsistent rulings in 1 case, but refused to correct the inconsistency). LASC Judge Luis Lavin used the *Van Scoy* selenium pollution CWA case in which Kinney was only the attorney, and the *Payne v. Schmidt* case in which Kinney was the attorney for defendant Schmidt to get the necessary 5 losses out of 7 to support his VL order in Oct. 2008 via CCP Secs. 391 et seq.

On May 23, 2018, three of Kinney's ongoing appeals were simultaneously dismissed in the Ninth Circuit:

(A) 17-16988 {Dk #7} [appeal regarding 2016 state appellate court order to post an exorbitant $175,000 in security to proceed with an appeal of a "void" attorney's fee award against *non-party/creditor* Kinney in a 2007 fraud case against *seller/debtor* Clark as to Clark's Los Angeles property now owned by Kinney, and which ignores the prohibitions in both 11 U.S.C. Sec. 524(a)(1) and (2)];

(B) **17-55899** {Dk #44} [appeal regarding ongoing CWA violations for polluted muddy runoff by persons without NPDES permits that flows onto and across Kinney's Laguna Beach property, causing a nuisance, and then into the ocean; and which ignored the default of the main polluter, about which the state courts have penalized Kinney as a "defendant" in a 2001 case filed by one of the polluters]; **and**

(C) 17-56356 {Dk #31} [appeal as to a 2015 order for attorney's fees in favor of *seller/debtor* Clark and against *buyer/creditor* Kinney because of two directly-inconsistent rulings by LASC Judge Grimes and which were affirmed by Cal. Court of Appeal Second Appellate District, Division One, Justices who **still refuse** to correct their inconsistencies as to a lack of merchantable title from Clark versus a secret unrecorded easement from Clark to her next-door neighbor Carolyn Cooper for an encroaching fence (and who **still allow** Cooper's other fence to remain on the public right-of-way which is an ongoing ADA violation), and which cites the 2016 VL order issued by USDC Judge P.S. Gutierrez against *listed-creditor* Kinney, but ignores the prohibitions in 11 U.S.C. Sec. 524(a)(1) and (2)] {docket numbers in brackets}.

For those 3 appeals, Kinney's petitions for rehearings were all denied on Oct. 4, 2018 {Dk #9, #46 and #33}.

On Dec. 28, 2017, eight of Kinney's ongoing Ninth Circuit appeals of similar issues were *simultaneously* dismissed {docket numbers in brackets}: 16-16689 {Dk #19-1}; 16-17255 {Dk #7-1}; 16-55343 and 16-55347 consolidated {Dk #43-1}; 16-56162 {Dk #34-1}; 16-56733 {Dk #27-1}; 16-56735 {Dk #35-1}; 16-56750 {Dk #8-1}; and 17-55081 {Dk #9-1}. Likewise, all of Kinney's petitions for rehearings were denied on the same day, April 19, 2018. As a result, Kinney filed petitions with this Court ("USSC"); and those petitions were filed as #18-509, 18-504, 18-510, 18-515, 18-508, 18-516, 18-517, and 18-518, respectively.

Recently, this Court clarified that "professional speech" is just as broadly protected as "free speech" **and** when a group *compels speech* or *silence* it violates one's First Amendment rights. The decisions ***compel silence*** so

that property owner Kinney cannot pursue claims to redress violations of his federal constitution and civil rights by Judges and others who were acting as *prosecutors* under color of authority, rather than acting as *neutral arbitrators* of disputes. Janus v. American Federation of State, County and Municipal Employees, Council 31, 585 U.S. __ (2018); National Institute of Family and Life Advocates v. Becerra, 585 U.S. __ (2018); Supreme Court of Virginia v. Consumers Union, 446 U.S. 719, 736 and n. 15 (1980); Hafer v. Melo, 502 U.S. 21, 25-31 (1991); Devereaux v. Abbey, 263 F.3d 1070, 1074 (9th Cir. 2001); Canatella v. State of California, 304 F.3d 843, 847-854, n. 6 and 14 (9th Cir. 2002); Bauer v. Texas, 341 F.3d 352, 356-360 (5th Cir. 2003).

The difference between ***compelled speech*** and ***compelled silence*** has *no constitutional significance* when applying the First Amendment's guarantee of "freedom of speech" to all citizens which includes the decision(s) by Kinney of both what to say and what not to say. Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781, 796-797 (1988).

NIFLA clarified regulations of "professional speech", and gives that the *same broad protection* as given to "free speech" under the 1st and 14th Amendments.

Professional speech can occur by an attorney or *pro se* litigant when there is a challenge to improper acts by state court Judges or Justices, by bankruptcy debtors or their attorneys, and (like here) by federal judges.

Professional torts may be regulated [i.e. government may define boundaries of legal malpractice claims], but any regulation of non-advertising, non-

solicitation "speech" is subject to a "strict scrutiny standard" of review under *Janus* and *NIFLA*.

All content-based laws (which would include the unconstitutionally-vague "vexatious litigant" laws) are presumptively unconstitutional and can only be upheld if the government proves the laws are narrowly tailored to serve a compelling state interest (which was never shown by relevant facts, or proven by law, to apply to Kinney) under *Janus* and *NIFLA*. Professional speech by an attorney or *pro se* litigant can ***also be penalized*** under an unconstitutionally-vague vexatious litigant ("VL")" law that is being improperly applied by Judges or Justices.

Given how Calif. counts losses under the VL law and given that Calif. requires an appeal within 60 days whenever a defendant is dismissed, a plaintiff can become labeled as a vexatious litigant in one case with 6 defendants, but still "win" the case. Fink v. Shemtov, 180 Cal.App.4th 1160, 1170 (Cal. 2010).

The VL **judicial** penalty *is in addition to* the State Bar's penalty of suspension or disbarment.

These US Supreme Court opinions also apply to the "vexatious litigant" laws which are being utilized by state and federal courts: (A) to silence "professional speech"; **and** (B) to enforce their will by the threat that attorneys or *pro se* litigants will be prohibited [e.g. because one Judge or Justice can deny permission to file a case or appeal].

It only takes 1 federal or state Judge to decide to improperly label a *pro se* litigant or attorney as a "vexatious litigant", and then other courts seem to intentionally or blindly follow that first ruling.

Kinney was first labeled as "vexatious" on Nov. 19, 2008 by LASC Judge Luis Lavin even though Kinney was no longer a party in that case from Nov. 7, 2008 onward (as shown in the docket) and about which Kinney was never allowed to appeal due to unilateral decisions of Cal. Court of Appeal Admin. Pres. Justice Roger Boren from 2009 onward. As part of the VL decision by Judge Lavin, he counted cases against Kinney in which Kinney was only the attorney and sometimes only the attorney for a defendant.

Kinney was then labeled as "vexatious" on Dec. 8, 2011 by COA Justice Roger Boren even though Kinney was never a party or appellant in that matter [In re Kinney, 201 Cal.App.4th 951 (Cal. 2011)]. Without any supporting evidence, COA Justice Boren labeled the appellant, Kinney's client Kempton, as a "puppet" of Kinney ***even though*** the tribunal hearing officer of the Cal. State Bar, "Judge" Pat McElroy, found no such evidence in her subsequent non-judicial-court disbarment proceedings in 2013.

In 2017, Kinney was again labeled as "vexatious" by COA2 Justices Francis Rothschild, Victoria Cheney, and Jeffrey Johnson even though Kinney was specifically "listed" as a bankruptcy "creditor" by debtor Michele Clark in her July 28, 2010 Chapter 7 bankruptcy petition, which they ignored [Kinney v. Clark, 12 Cal.App.5th 724 (Cal. 2017)].

From 2008 onward, all "vexatious litigant" rulings against Kinney have been decided: (i) **without** using a "strict scrutiny standard" of review [e.g. since no review was ever allowed]; (ii) **without** fact finding by Judges or Justices via oral testimony in open court under oath and with cross-examination; (iii) **without** balancing the public benefits of Kinney's litigation

versus the public harm of Kinney's litigation, if any; and (iv) **without** allowing Kinney any appeal or review rights to contest those adverse rulings [e.g. so there was no "standard" of review whatsoever].

The *Janus* and *NIFLA* decisions clearly apply to the Cal. State Bar, but also apply to the state and federal courts that have ***compelled speech*** and/or ***silence*** against a litigant by the application or misapplication of unconstitutionally vague "vexatious litigant" laws.

Here, the Ninth Circuit's rulings are now attempting to ***compel silence*** as to Kinney's First Amendment and federal civil rights in the federal courts.

The courts have intentionally mis-labeled Kinney's attempts under the First Amendment and 42 U.S.C. Sec. 1983 to seek redress of grievances (e.g. as *defacto* appeals; as precluded by *Rooker-Feldman* or other similar doctrines like collateral estoppel or res judicata; **and/or** as meritless or frivolous claims).

Many courts summarily or *sua sponte* dismissed Kinney's claims or appeals; and many tried to silence Kinney by not allowing him a right to file cases (e.g. counter-claims) or appeals.

Some courts refuse to rule on Kinney's counter-claims (e.g. Judge Gutierrez). Levin Metals v. Parr-Richm. Term., 799 F.2d 1312, 1315-16 (9th Cir. 1986).

The **courts** have been denying Kinney's attempts to have reviews of rulings based on: (1) his vexatious litigant status; (2) ignoring the improper enforcement of unenforceable pre-petition contracts; and/or (3) ignoring violations of bankruptcy law (e.g. by LASC Judge Barbara Scheper). The rulings are violations

of Kinney's First Amendment rights to "professional speech" and his federal civil rights due to the imposition of ***compelled silence*** contrary to the *Janus*, *NIFLA*, *Riley,* and *Consumer Union* decisions.

The dismissals of Kinney's cases and pending appeals were abuses of discretion because only the district courts and Ninth Circuit can adjudicate civil rights complaints under 42 U.S.C. Sec. 1983 and for ongoing violations of the CWA.

Kinney's federal civil rights are different than his state rights. Therefore, retaliation is not subject to *Rooker-Feldman* doctrine or preclusionary rules, and is not a *defacto* appeal of state decisions, especially when the lower court decisions (e.g. dismissals) were made *sua sponte* or summarily without a trial.

Since 2008, Kinney has been repeatedly and unjustly denied his right to appeal in the courts because Kinney has been falsely labeled as a vexatious litigant [e.g. after directly-inconsistent decisions from 2008 to 2010 by the state courts]. When Kinney went to federal court with civil rights claims, *Rooker-Feldman* was used to dismiss his cases **even though** Kinney was precluded from proceeding with state court appeals and **even though** courts were acting as *prosecutors* of Kinney (e.g. by refusing to rule).

This same Ninth Circuit panel knows that, if Kinney hires an attorney to pursue his cases or appeals, they will label that attorney as Kinney's "puppet" (without any proof or evidentiary hearing as the judiciary has done before in state court), and sanction that attorney (as has been done before in state courts). This means Kinney cannot obtain the services of an attorney because no attorney wants to take that risk.

Recently, one of the reasons "why" the judiciary is penalizing Kinney was discovered by attorney Cyrus Sanai (i.e. the last attorney hired by Kinney in the state courts). In March 2018, that attorney filed a complaint in the U.S. District Court, Central District of California (Los Angeles), Case No. 2:18-cv-02136-RGK (Judge Klausner) in which the history of these improper judicial actions was described in detail.

According to that complaint, a scheme was created in the Los Angeles County Superior Court ("LASC") by attorneys who acted as judges' "Court Counsel" (and who previously represented LA County Sheriff Lee Baca, now in prison). They were to identify and silence certain attorneys and litigants who had been deemed "difficult" by the judges. One was deemed to be "difficult" if the judges were embarrassed by successful challenges for disqualification, and/or by frequent reversals of their trial court's decisions.

As part of the scheme, the method used to keep honest judges silent (about "difficult" litigants and attorneys) was to threaten them with "bad" judicial assignments (e.g. assign them to traffic court) in the vast Los Angeles County Superior Court system.

As part of the scheme, some state lower court judges were promoted to the state appellate court (e.g. Judge Grimes, Judge Lavin) after their "win/loss" records were improved by not having their rulings reversed.

As part of the scheme, the "difficult" attorneys and litigants would be unable to succeed in getting adverse decisions overturned. In addition, sometimes fake charges would be created to impose punitive measures on them. Furthermore, sometimes charges

would be brought by the Calif. State Bar to subject the "difficult" attorneys to disciplinary charges.

As part of the scheme, the Court Counsel and those judges have expanded the unconstitutionally-vague vexatious litigant law to include attorneys [In re Kinney, 201 Cal.App.4th 951 (Cal. 2011) in an appeal in which Kinney was not a party or appellant] **and** represented litigants [Kinney v. Clark, 12 Cal.App.5th 724 (Cal. 2017)] ***without*** Calif. Legislative approval or authority. Note *Kinney v. Clark* also identifies violations of bankruptcy law by debtor Michele Clark, by her own listed-creditor attorney David Marcus; by her own attorney Eric Chomsky; by LASC Judge Barbara Scheper; **and** by Cal. Justices Frances Rothschild, Victoria Chaney and Jeffrey Johnson.

From 2008 onward, special retaliation and vexatious litigant rules have applied to Kinney regardless of whether Kinney was an *in pro se* litigant, just an attorney for a client, a defendant **or** a non-party.

The Ninth Circuit has: (1) denied Kinney his rights to appeal or seek redress of grievances [e.g. for the pending appeals involving violations of the Clean Water Act in the ocean by Laguna Beach; and violations of the ADA due to obstructed public rights-of-way in Los Angeles]; (2) denied Kinney his inherent right to "honest services" from all state and federal judges [e.g. since Judge Klausner has now imposed a VL order on Kinney]; **and** (3) interfered with Kinney's ongoing interstate commerce under color of official right [e.g. since Kinney owns property outside of Cal.; has suppliers of products outside of Cal.; and has ongoing businesses outside of Cal., all of which have been jeopardized by these rulings].

The acts by this panel violate 18 U.S.C. Secs. 1346 and/or 1951, and give rise to new civil rights and/or RICO claims (e.g. since they acted as prosecutors of Kinney). See United States v. Inzunza, 638 F.3d 1006 (9th Cir. 2009); United States v. Frega, 179 F.3d 793 (9th Cir. 1999); United States v. Carbo, 572 F.3d 112 (3rd Cir. 2009); United States v. Stephenson, 895 F.2d 867 (2nd Cir. 1990); United States v. Burkhart, 682 F.2d 589 (6th Cir. 1982); United States v. Frazier, 560 F.2d 884 (8th Cir. 1977); In re Justices of Supreme Court of Puerto Rico, 695 F.2d 17, 24 (1st Cir. 1982); Supreme Court of Virginia v. Consumers Union, 446 U.S. 719, 736 and n. 15 (1980).

As for Commerce Clause violations, when Kinney was an attorney in Calif., he was granted *pro hac vice* status in Colorado for cases about his mineral interests which is an ongoing interstate enterprise. Keith v. Kinney, 961 P.2d 516 (Colo. App. 1997); Kinney v. Keith, 128 P.3d 297 (Colo. App. 2005); Keith v. Kinney, 140 P.3d 141 (Colo. App. 2006)].

Before dismissing Kinney's 3 pending appeals **and** before issuing a global pre-filing review order on Jan. 19, 2018 [#17-80256], the Ninth Circuit ***knew the entire history*** of the ongoing punishment and retaliation against Kinney because almost all these issues were briefed by Kinney in the Ninth Circuit's reciprocal disbarment matter [#15-80090] and at the hearing before the Ninth Circuit Appellate Commissioner for which Kinney has the oral proceedings transcribed on paper and that were provided that to the Ninth Circuit (e.g. except for the issues that arose after about 2016).

OPINIONS BELOW

On May 23, 2018, a three judge panel of the Ninth Circuit issued simultaneous dismissals of 3 pending appeals by Kinney, including the one being addressed in this petition. [Appendix A, 1[1]].

On Oct. 4, 2018, the same three judge panel of the Ninth Circuit issued simultaneous denials of the petitions for rehearing on each appeal [App. B, pg. 3].

The rulings violated Kinney's "federal" constitutional rights (e.g. First Amendment) and civil rights under color of authority or official right (e.g. 42 U.S.C. Sec. 1983), so all immunity was eliminated. Fitzpatrick v. Bitzer, 427 U.S. 445, 448 (1976); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 102-106, 123 n. 34 (1984); Patrick v. Burget, 486 U.S. 94, 101-104 (1988); Pennsylvania v. Union Gas Co., 491 U.S. 1, 57 (1989); F.T.C. v. Ticor Title Ins. Co., 504 U.S. 621, 631-638 (1992).

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code ("U.S.C."), Secs. 1254(1), 1257(a), and/or 2101(c).

This Ninth Circuit panel has violated Kinney's First Amendment rights by ***compelling silence*** and by acting as ***prosecutors*** of Kinney under color of official right which resulted in losses to Kinney's interstate commerce businesses and/or loss of "honest services" from the state and/or federal judiciary. American Railway Express Co. v. Levee, 263 U.S. 19, 20-21 (1923); Cohen v. California, 403 U.S. 15, 17-18

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[1] Citation method is Appendix ("App."), exhibit letter, and sequential page number.

(1971); Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 159-161 (1954).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Court has jurisdiction to address violations of state and/or federal law by the state judicial courts (e.g. Cal. Court of Appeal and Supreme Court), by the federal district courts, and/or by the Ninth Circuit.

The federal courts have exclusive and original jurisdiction under 28 U.S.C. Sec. 1331, 1441 and/or 1443 and under 42 U.S.C. Sec. 1983 etc to consider violations of federal constitutional rights (e.g. First Amendment rights) and other federal statutes (e.g. violations of the Commerce Clause, "honest services" law, the Hobbs Act, and bankruptcy law).

The federal courts have exclusive and original jurisdiction under 28 U.S.C. Sec. 1331, 1441 and/or 1443 to consider violations of federal civil rights, and CWA violations under 33 U.S.C. Secs. 1251 et seq.

STATEMENT OF THE CASE

This petition involves the same Ninth Circuit panel who summarily dismissing 3 of Kinney's ongoing appeals and denying petitions for review to ***compel silence*** and to punish him for attempting to enforce his federal rights (e.g. under the CWA).

The petition also involves **compelling silence** as to ongoing CWA violations and ongoing nuisances.

SUMMARY OF LOWER COURT PROCEEDINGS

USDC Judge Klausner dismissed Kinney's CWA case against 3 polluters who did not have NPDES permits as described herein [App. C, 6; App.D, 14].

On May 23, 2018, the Ninth Circuit dismissed 3 pending appeals including the CWA appeal in this petition. [App. B, 3]. Kinney filed petitions for rehearings in the dismissed appeals, including the appeal here. On Oct. 4, 2018, this same panel of the Ninth Circuit denied those petitions [App. A, 1].

This petition is being filed to address the ongoing prosecution of Kinney by ***compelling silence*** and other means, and the ongoing federal law violations to the detriment of Kinney (e.g. to his interstate commerce businesses; to his property rights).

STATEMENT OF FACTS

Refer to the facts discussed above in this petition.

On May 23, 2018, Kinney had pending appeals in the Ninth Circuit including but not limited to 3 pending appeals all of which were simultaneously dismissed by the same Ninth Circuit panel, including the appeal in this petition [App. B, 3].

On Oct. 4, 2018, the Ninth Circuit simultaneously denied Kinney's petitions for rehearing in all 3 appeals including the appeal here [App. A, 1]

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Certiorari Should Be Granted Because The Courts are Compelling Silence About Ongoing Violations of Federal Law Which Violates

Kinney's First Amendment Rights; And The Method and Application of Alleged Due Process by the Ninth Circuit Severely Impairs Meaningful Review of Important Questions of Federal Law, And Severely Impairs Rights Guaranteed Under The First, Fourth, Fifth And Fourteenth Amendments; And Is In Conflict With Decisions Of This Court And Other United States Court Of Appeals.

This Ninth Circuit panel (and the district courts and state courts) are ***compelling silence*** on Kinney in violation of the *Janus, NIFLA* and *Riley* decisions. [App. A, 1; App. B, 3] Janus v. American Federation of State, County and Municipal Employees, Council 31, 585 U.S. __ (2018); National Institute of Family and Life Advocates v. Becerra, 585 U.S. ___ (2018); Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781, 796-797 (1988).

This panel also acted as *prosecutors* of Kinney, not neutral arbitrators of disputes, when they dismissed his appeal(s) and denied his petition(s) for rehearings; and violated Kinney's federal constitutional and civil rights, the "honest services" law, and the Hobbs Act. [App. A, 1; App. B, 3] Supreme Court of Virginia v. Consumers Union, 446 U.S. 719, 736 and n. 15 (1980); Hafer v. Melo, 502 U.S. 21, 25-31 (1991); Devereaux v. Abbey, 263 F.3d 1070, 1074 (9th Cir. 2001); Canatella v. State of California, 304 F.3d 843, 847-854, n. 6 and 14 (9th Cir. 2002); Bauer v. Texas, 341 F.3d 352, 356-360 (5th Cir. 2003); In re Justices of Supreme Court of Puerto Rico, 695 F.2d 17, 24 (1st Cir. 1982); United States v. Murphy, 768 F.2d 1518, 1523-1539 (7th Cir. 1985); Zarcone v. Perry, 572 F.2d 52, 54-57 (2nd Cir. 1978).

This panel's acts were discriminatory retaliation (e.g. see *In re Kinney,* and *Kinney v. Clark*) to the detriment of Kinney, his cases, his appeals, his interstate businesses, and/or his property. 42 U.S.C. Secs. 1983 and 1985. USDC Judge Klausner has now imposed a VL order on Kinney even though no authority exists for that in a CWA case.

This panel's acts were done to restrict Kinney's First Amendment rights (e.g. as to his appeals), to restrict his fair access to the courts, **and** to retaliate against him. Hooten v. H Jenne III, 786 F.2d 692 (5th Cir. 1986); United States v. Hooten, 693 F.2d 857, 858 (9th Cir. 1982); Sloman v. Tadlock, 21 F.3d 1462, 1470 (9th Cir. 1994); Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310, 1313-1320 (9th Cir. 1989); Lacey v. Maricopa County, 693 F.3d 896, 916 (9th Cir. 2012).

Kinney has the right "to petition the Government for a redress of grievances" including a right to a review by appeal (which is being routinely denied to Kinney in both the state and federal courts); and that First Amendment Right is "one of the most precious of the liberties safeguarded by the Bill of Rights". BE & K Constr. Co. v. NLRB, 536 U.S. 516, 524 (2002) [quoting United Mine Workers v. Illinois Bar Assn., 389 U.S. 217, 222 (1967)].

A standard of strict scrutiny should be applied to procedural barriers made by rule or statute, as applied in appellate courts, which chill or penalize the exercise of First Amendment rights, and act to limit direct review by a higher court. "The consideration of asserted constitutional rights may not be thwarted by simple recitation that there has not been observance of a procedural rule with which there has been compliance in both substance and

form, in every real sense." NAACP v. Alabama ex rel. Flowers, 377 U.S. 288, 297 (1964).

Fundamental to the Fourteenth Amendment's right to due process of law is the opportunity to be heard. Grannis v. Ordean, 234 U.S. 385, 394 (1914).

When a person is deprived of his rights in a manner contrary to the basic tenets of due process, the slate must be wiped clean in order to restore the petitioner to a position he would have occupied if due process had been accorded to him in the first place. Peralta v. Heights Med. Ctr., Inc., 485 U.S. 80, 86-87 (1988).

Although a particular state is not required to provide a right to appellate review, procedures which adversely affect access to the appellate review process, which the state has chosen to provide, requires close judicial scrutiny. Griffin v. Illinois, 351 U.S. 12 (1956). This should apply to all courts.

An appeal cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the federal Equal Protection Clause. Smith v. Bennett, 365 U.S. 708 (1961).

Certiorari should be granted to provide guidance on the method and manner in which both the federal and state courts apply, restrict or summarily deny the right of access to the courts, and to compel silence on "difficult" attorneys and *pro se* litigants.

As to the acts of this panel of the Ninth Circuit, an appearance of impropriety, whether such impropriety is actually present or proven, weakens our system of justice. "A fair trial in a fair tribunal is a basic

requirement of due process. In re Murchison, 349 U.S. 133, 136 (1955).

While claims of bias generally are resolved by common law, statute, or professional standards of the bench and bar, the Due Process Clause of the Fourteenth Amendment "establishes a constitutional floor." Bracy v. Gramley, 520 U.S. 899, 904 (1997).

This panel has ignored that "void" orders cannot support subsequent decisions. Sinochem Intl. Co. v. Malaysia Intl. Ship Corp., 549 U.S. 422, 430 (2007); Plaza Hollister Ltd. Ptsp v. Cty of San Benito, 72 Cal.App.4th 1, 13-22 (Cal. 1999); Airlines Reporting Corp. v. Renda, 177 Cal.App.4th 14, 19-23 (Cal. 2009).

Besides **compelling silence** on Kinney, this panel has ignored: (1) ongoing nuisances and CWA violations in Laguna Beach; (2) adverse impacts on Kinney's property rights; (3) adverse impacts on Kinney's interstate commerce businesses; and (4) Kinney's right to be free from retaliation, all subject to review by federal courts that have the obligation to determine the issues and follow the law. McCarthy v. Madigan, 503 U.S. 140, 146 (1992); Colorado River Water Conservation District v. United States, 424 U.S. 800, 817-818 (1976); Bosse v. Oklahoma, 580 U.S. __, 137 S.Ct. 1, 196 L.Ed.2d 1 (2016); Navarro v. Encino Motorcars, LLC, 845 F.3d 925, 926-928 (9th Cir. 2017).

CONCLUSION

This petition should be granted.

Dated: 1/2/19 By:___/s/_____
Charles Kinney, in pro per