

19-443  
No. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE  
UNITED STATES

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CHARLES G. KINNEY,  
*Plaintiff-Appellant,*

v.

PHILIP S. GUTIERREZ,  
U.S. District Court,  
*Defendant-Appellee,*

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On Petition For Writ Of Certiorari To The  
Ninth Circuit Court of Appeals (19-15565)

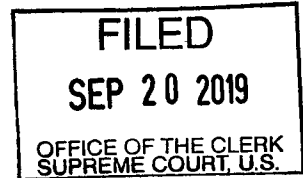
US District Court No. 3:19-mc-80021-JD  
Northern District of California,  
San Francisco (*Bivens* claim)

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PETITION AND APPENDIX FOR A  
WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

A *Bivens* case allows a private individual to seek damages from an individual federal officer for unconstitutional conduct (e.g. 8<sup>th</sup> Amendment). *Ziglar v. Abbasi*, 137 S.Ct. 1843 (2017).

This petition involves an excessive fine and a cruel and unusual punishment on Kinney due to improper applications of vexatious litigant laws.

For 10+ years, Kinney was repeatedly labeled a vexatious litigant (VL) even though he did not meet the VL tests. These VL orders were done to punish Kinney and preclude him from access to the courts. Here, these VL orders also resulted in obstructions of justice (e.g. by concealing ADA, CWA, and title 11 violations). 18 USC Sec. 1519.

When Kinney filed civil rights actions in federal court (e.g. for unconstitutional *state* VL orders), Judge P.S. Gutierrez issued a *federal* VL order against Kinney, and imposed excessive fines and a cruel and unusual punishment (e.g. a pre-filing review that was actually applied to all his cases).

Judicial immunity was waived since this Judge punished Kinney as a prosecutor, rather than act as a neutral arbitrator of a dispute. *Sup. Ct. of Virg. v. Consumers Union*, 466 U.S. 719 (1980).

Kinney filed a *Bivens* claim and complaint. The USDC dismissed his complaint, and the Ninth Circuit dismissed his appeal, by using the **same** VL orders to eliminate Kinney's *Bivens* claim.

## **PARTIES TO THE PROCEEDINGS**

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

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and Cruel And Unusual Punishment, Has

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And That Severely Impairs Meaningful Review  
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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Charles Kinney requests that a “writ of certiorari” issue to review the “final” judgment by the Ninth Circuit on June 26, 2019 that *refused* to allow Kinney’s appeal “to proceed” based on its **own** pre-filing review [App. A; Ninth Circuit No. 19-15565, Dk #3] pursuant to an overbroad and unconstitutional vexatious litigant (VL) pre-filing order issued by the Ninth Circuit in No. 17-80256.

Kinney appealed the dismissal of his case from an **earlier** pre-filing review by the USDC, and paid the \$505 filing fee (which has never been refunded to Kinney). Kinney’s *Bivens* case was **only** against defendant Judge Gutierrez because of the unconstitutional (and overbroad) 2016 VL order issued by Gutierrez. Kinney’s *Bivens* case against defendant Gutierrez did not violate the 2016 VL order which protected discharged-debtor Clark and listed unsecured creditors attorneys Marcus.

The dismissal of Kinney’s *Bivens* claim was issued on Feb. 26, 2019 by USDC Judge James Donato after his **own** pre-filing review of the complaint in which he used a 2018 VL pre-filing order by Judge Chen that was based on Judge Gutierrez’s 2016 VL order [App. B; USDC 3:19-mc-80021, Dk #4].

The **same** unconstitutional VL pre-filing orders that **created** a *Bivens* claim were used to **dismiss** Kinney’s *Bivens* case against Judge Gutierrez. That is cruel and unusual punishment because it abolishes the *Bivens* claim procedure for Kinney and it violates his 8<sup>th</sup> Amendment rights.

A *Bivens* claim arises when an individual federal officer (i.e. USDC Judge Gutierrez) violates one's constitutional rights (when ignoring the law as to who is a VL) by imposing excessive fines on Kinney (e.g. \$6,000 in sanctions) and imposing a cruel and unusual punishment. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 389-410 (1971); Ziglar v. Abbasi, 137 S.Ct. 1843, 1855-1859 (2017).

A cruel and unusual punishment results from the VL pre-filing review of all cases (**irrespective** of whether the cases are against 2010 Chapter 7 discharged-debtor Michele Clark and her listed, unsecured-creditor attorneys David Marcus) since Kinney is being precluded from all federal courts.

These VL pre-filing orders have *concealed* judicial acts that obstructed justice when judges willfully ignored 11 USC Sec. 524(a)(1) for illegal attorney fee awards to debtor Clark; ignored ongoing ADA violations by the City of Los Angeles and high-level employee Cooper; and ignored Clean Water Act (CWA) violations in Laguna Beach.

For Kinney's *Bivens* complaint [USDC No. 19-mc-80021, Dk #1], the USDC and Ninth Circuit ignored requests for prospective injunctive relief to prevent continuing violations of federal law by "rogue" judicial officers in state or federal courts, including by Judge Gutierrez. Green v. Mansour, 474 U.S. 64, 68 (1985); Will v. Michigan Dept. of State Police, 491 U.S. 58, 71 and fn. 10 (1989); Ex Parte Young, 209 U.S. 123, 159-160 (1908).

A *Bivens* claim is very similar to a civil rights claim under 42 U.S.C. Sec. 1983. Kentucky v. Graham, 473 U.S. 159, 165-167 (1985). Both of them impose personal liability on a government official if that official, acting under color of law, causes the deprivation of a federal right.

There is no judicial immunity issue in this *Bivens* case because Judge Gutierrez intentionally and willfully decided to act as a “prosecutor” of Kinney, rather than act as a “neutral arbitrator” of a valid legal dispute. Supreme Court of Virginia v. Consumers Union of United States, Inc., 466 U.S. 719, 726-737 and fn. 15 (1980); Forrester v. White, 484 U.S. 219, 226-229 (1988); Pulliam v. Allen, 466 U.S. 522, 529-542 (1984); Burns v. Reed, 500 U.S. 478, 494 (1991).

The VL order by Judge Gutierrez (which violated Kinney’s 8<sup>th</sup> Amendment rights) was issued May 13, 2016 [USDC No. 2:15-cv-08910, Dk #70].

Kinney filed a *Bivens* claim based on that 2016 VL order and submitted a complaint on Jan. 20, 2019.

The USDC dismissal order for Kinney’s *Bivens* complaint was issued Feb. 26, 2019 [USDC No. 19-mc-80021-JD, Dk #4].

The Ninth Circuit dismissal order was issued June 26, 2019 after Kinney paid the \$505 appeal fee [Ninth Circuit No. 19-15565, Dk #3] and was based on a based on a Jan. 19, 2018 VL order from the Ninth Circuit [No. 17-80256, Dk #4] which also violated Kinney’s 8<sup>th</sup> Amendment rights.

These VL orders have been the subject of previous petitions by Kinney (e.g. #18-516, 18-517, and 18-160), but this is the first *Bivens* case petition.

These VL pre-filing review orders and subsequent dismissal of Kinney's *Bivens* case are forms of compelled speech (aka "compelled silence") about judicial misconduct and constitutional violations by state and federal judicial officers, *but are also* an intentional concealment of ongoing ADA, CWA and title 11 violations (i.e. obstructions of justice). NIFLA v. Becerra, 138 S.Ct. 2361 (2018); Janus v. AFSCME, 138 S.Ct. 2448 (2018); Fleck v. Wetch, 139 S.Ct. 590 (2018); 18 U.S.C. Sec. 1519.

The federal judicial officers that have engaged in cruel and unusual punishment of Kinney (and in intentional obstructions of justice as to ongoing ADA, CWA and title 11 violations) include but are not limited to USDC Judges Gutierrez, Chen and Chhabria; and Ninth Circuit Judges Bea, Bybee, Canby, Clifton, Farris, Fernandez, Friedland, Goodwin, Gould, Kozinski (now resigned), Levy, McKeown, Murguia, Nguyen, Owens, Paez, Silverman, N.R. Smith, Thomas (i.e. the current Chief Justice), Wallace and Watford.

*In re Thomas* doesn't apply

The only reason given by the Ninth Circuit for its refusal to allow Kinney's appeal "to proceed" was that Kinney's appeal was "so insubstantial" that he could not proceed with it.

The only case cited by the Ninth Circuit was *In re Thomas* [App. A, 1]. However, the case In re

Thomas, 508 F.3d 1225 (9<sup>th</sup> Cir. 2007), does **not** apply to attorney's fee orders deemed *void* pursuant to 11 U.S.C. Sec. 524(a)(1), or to unconstitutional and overbroad VL pre-filing orders issued by state or federal judicial officers.

#### Substantial Financial Impacts

The financial impact is not "insubstantial". The adverse economic impacts upon Kinney of the ongoing constitutional violations *exceed* \$500,000 [e.g. due to 5+ VL pre-filing orders and 13+ *void* attorney's fee awards for *discharged* pre-petition and post-petition debts that were shifted onto Kinney by 2010 Chapter 7 *no asset* discharged-debtor Michele Clark **and** her listed, unsecured creditor attorneys David Marcus etc (with help by contract attorney Eric Chomsky as a co-planner of the fee motions and an accessory-after-the-fact)].

Since Kinney's damages exceed \$500,000, this is **not** an "insubstantial" *financial* issue; and it does **not** meet the *In re Thomas* criteria.

#### The Unconstitutional VL Orders

For the last 10 years, there have been numerous unconstitutional (and overbroad) VL pre-filing orders against Kinney. The VL orders started in 2008 (in state court) and the most recent was in 2018. The most egregious VL orders include:

##### 1. The 2008 VL Order is Stayed

In Aug. 2008, Kinney and his business partner Kim Kempton "won" an appeal against the City of Los Angeles ("City") with respect to obstructions placed in the public right-of-way "sidewalk area".

Kempton and Kinney v. City of Los Angeles, 165 Cal.App.4<sup>th</sup> 1344 (Cal. 2008).

This meant the City could no longer ignore its own 2006 nuisance citation against high-level City employee Carolyn Cooper for her obstructing fences in the public right-of-way (next-door to Kinney's Los Angeles house), and the City would be exposed to liability in an ADA class action case (filed about the same time as Kinney's case).

That published opinion also called into question the directly-inconsistent rulings by Los Angeles County Superior Court (LASC) Judge Elizabeth Grimes, one in favor of Clark and one in favor of Cooper, based on her blatantly-erroneous reading of the *Evans* case. Evans v. Fraught, 231 Cal.App.2d 698, 705 (Cal. 1965).

The *Evans* case held that Clark's *secret* easement to her next-door-neighbor Cooper in 1991 (for an encroaching fence) meant seller Clark did not give buyers Kinney and Kempton "clean" title in 2005. It was an abuse of discretion for Judge Grimes to hold Clark and Cooper prevailed over Kinney.

LASC Judge Grimes was being elevated to the Cal. Court of Appeal, and her directly-inconsistent rulings "did not help" her win/loss record.

Because of that Aug. 2008 opinion, City employee Carolyn Cooper, the City of Los Angeles, LASC Judge Elizabeth Grimes (through her developer husband who had frequent contact with the City), LASC Judge Luis Lavin, COA Presiding Justice

Roger Boren and others conspired to retaliate against Kinney (and against Kempton).

Thus, in Oct. 2008, Judge Lavin issued a tentative VL ruling against Kinney based on 4 cases that did not meet the Cal. Code of Civil Procedure (CCP) Sec. 391 criteria [as explained by John v. Superior Court, 63 Cal.4<sup>th</sup> 91 (Cal. 2016)].

The 4 cases cited by Judge Lavin to justify his VL ruling included 2 cases (Payne and Luc) in which Kinney was the attorney for defendants; 1 case (Van Scoy) that was more than 7 years old; and 1 case (Overton) that was not yet final [and in which Kinney prevailed over other defendants]. Thus, Judge Lavin did not cite to evidence of 5 *in pro se* losses by Kinney in 7 years. CCP Sec. 391(b)(1). On Nov. 19, 2008, Judge Lavin signed the VL pre-filing order. Kinney appealed.

As part of that retaliation, Court of Appeal (COA) Presiding Justice Boren unilaterally dismissed Kinney's appeal by using Judge Lavin's 2008 VL order (contrary to Cal. Constitution, Art. 6, Sec. 3, which requires a "3-judge court" to make rulings).

Justice Boren ignored CCP Sec. 916(a) created an ***automatic stay*** of Judge Lavin's VL order (i.e. an injunction; see CCP Sec. 525) when Kinney filed his appeal. Paramount Pictures Corp. v. Davis, 228 Cal.App.2d 827, 837-838 (Cal. 1964). That stay is still in effect today because Kinney's appeal was filed but was never allowed to reach a conclusion.

As part of that retaliation, in 2012, LASC Judge Lavin issued a VL order against Kempton and required her to post an unreasonable \$185,000 in security, contrary to CCP Sec. 391(c).

As part of that retaliation, in 2016, COA Presiding Justice Roger Boren required Kinney to post an unreasonable \$175,000 in security for an appeal, contrary to CCP Sec. 391(c). He also switched the Division assigned to hear the subsequent appeal of the LA case, contrary to the COA Local Rules.

As part of that retaliation, in 2009, Cooper (i.e. the sore loser) reported Kinney to the State Bar. Cooper had never been a client of Kinney, and had been cited by the City in 2006 for nuisance due to her obstructing fence in the public right-of-way on Cedar Lodge Terrace (CLT), which still remains.

As part of that retaliation, Cooper continued to provide false information to the State Bar (e.g. that there were no sidewalks in Silverlake). After the ADA class action was settled in 2017, a new sidewalk appeared in front of Cooper's house on Fernwood Ave. (but her fence on CLT remained).

As part of that retaliation, in 2012 and 2014, the State Bar punished Kinney by concealing the ongoing ADA violations by Cooper and the City; the ongoing CWA violations in Laguna Beach; and the ongoing title 11 violations by debtor Clark (all of which are obstructions of justice by state employees under 18 U.S.C. Sec. 1519). The Cal. Supreme Court refused to review the State Bar rulings against Kinney, so it obstructed justice.

## 2. The 2011 VL Order is Void

On Dec. 8, 2011, COA Presiding Justice (P.J.) Boren authored *In re Kinney* which was a VL order against attorney Kinney. This was contrary to CCP Sec. 391.7 which didn't allow a "presiding justice" to make a VL order against anyone until Jan. 1, 2012; and contrary to CCP Sec. 391 which does not include attorneys who are representing clients. In re Kinney, 201 Cal.App.4th 951 (Cal. 2011); Weissman v. Quail Lodge, Inc., 179 F.3d 1194, 1197 (9th Cir. 1999); Legal Services Corp. v. Velazquez, 531 U.S. 533, 542-548 (2001).

This was part of the 2008 conspiracy to retaliate against Kinney for the "win" against the City (as to removing obstructions in public rights-of-way) and Cooper (for her obstructing fences).

P.J. Boren didn't have subject matter jurisdiction to make an attorney a VL, so this was a "void" order. John v. Superior Court, 63 Cal.4th 91 (Cal. 2016); 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).

P.J. Boren's VL order was internationally done to obstruct justice (e.g. to conceal ADA violations near Kinney's Los Angeles house being caused by high-level City-employee Cooper; and to conceal CWA violations near Kinney's Laguna Beach house). Both are mentioned in *In re Kinney*, but Boren falsified the facts. The third scenario in *In re Kinney* was about Kinney's client Toste, but

CCP Sec. 391 and *John v. Superior Court* do not allow a VL order against an attorney with a client.

3. The 2016 VL Order Violates the 8<sup>th</sup> Amdmt  
On May 13, 2016, USDC Judge Gutierrez issued a VL pre-filing order which was limited to Chapter 7 discharged-debtor Clark and listed unsecured creditor attorneys Marcus etc. That VL order also imposed excessive fines on Kinney, and cruel and unusual punishment, because Gutierrez never examined the real facts (but instead used Boren's falsification of the facts from *In re Kinney*).

*That 2016 VL pre-filing order created a Bivens cause of action against Judge Gutierrez which is the subject of this SCOTUS petition.*

That VL order ignored that Clark was no longer obligated to her attorneys Marcus for pre- or post-petition attorney fees, so Marcus could not get awarded any fees from Clark, and then shift those fees onto Kinney on behalf of Clark. Cal Civil Code Sec. 1717; CCP Sec. 1033.5(a)(10); Trope v. Katz, 11 Cal.4<sup>th</sup> 274, 279-289 (Cal. 1995); PLCM Group, Inc. v. Drexler, 22 Cal.4<sup>th</sup> 1084, 1092-1094 (Cal. 2000); Reynolds Metals Co. v. Alperson, 25 Cal.3d 124, 127-129 (Cal. 1979); Cen-Pen Corp. v. Hanson, 58 F.3d 89, 92-94 (4<sup>th</sup> Cir. 1995); Johnson v. Home State Bank, 501 U.S. 78, 84 (1991); 11 U.S.C. Sec. 524(a)(2),

By asking for fees, Clark and her attorneys were falsely stating that Clark was *still personally liable* under pre-petition contracts including her 2007 hourly-fee retainer with Marcus, and her

2005 real estate sale contract with buyers Kinney and Kempton [contrary to 11 USC 524(a)(2)]. In re McLean, 794 F.3d 1313, 1321-1325 (11<sup>th</sup> Cir. 2015); In re Marino, 577 B.R. 772, 782-784 (9<sup>th</sup> Cir. 2017); In re Castellino Villas, A.K.F. LLC, 836 F.3d 1028, 1033-1037 (9<sup>th</sup> Cir. 2016).

Since debtor Clark is not obligated to Marcus for fees, they cannot shift any attorney fees onto creditor Kinney. Hensley v. Eckerhart, 461 U.S. 424, 433-434 (1982) ["Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority."].

That VL order also imposed \$6,000 in sanctions [i.e. an excessive fine given 11 USC 524(a)(1)] and a cruel and unusual punishment [e.g. the "global" pre-filing order which is being applied to Kinney's subsequent CWA cases and to his *Bivens* claim against Gutierrez]. That VL order is not narrowly tailored and, even if it is, it is not being applied narrowly by the USDC and Ninth Circuit (e.g. since a VL review has been applied to CWA cases and to this *Bivens* case). De Long v. Hennessey, 912 F.2d 1144, 1146-1149 (9<sup>th</sup> Cir. 1990).

Because of the excessive fine and globally-applied pre-filing review from that 2016 VL order, this violates Kinney's 8<sup>th</sup> Amendment rights and subjects defendant Gutierrez to liability under a *Bivens* cause of action. Here, it was an abuse of discretion to use VL orders to deny Kinney the right to proceed with his *Bivens* case.

#### 4. The 2017 VL Order Violates 524(a)(1)

In 2017, COA Justices Chaney, Rothschild and Johnson issued *Kinney v. Clark* which imposed a VL order on Kinney and any attorney that he may hire [e.g. a cruel and unusual punishment given the *limited* scope of CCP Sec. 391], and imposed monetary sanctions on Kinney and his attorney William Rubendall (e.g. excessive fines). Kinney v. Clark, 12 Cal.App.5th 724 (Cal. 2017).

In *Kinney v. Clark*, COA Justices described that LASC Judge Barbara Scheper awarded attorney fees to debtor Clark in July 2012. This was before Clark's discharge in Aug. 2012, but after Clark filed a Chapter 7 "no asset" bankruptcy petition in July 2010. In that 2+ year timeframe, only the bankruptcy trustee could have filed a motion for attorney's fees (i.e. not Clark's attorneys Marcus etc). Thus, the July 2012 attorney fee order by Judge Scheper was a violation of bankruptcy law, and "void *ab initio*". Bostanian v. Liberty Savings Bank, 52 Cal.App.4th 1075, 1078-1087 (Cal. 1997); In re Hamilton, 540 F.3d 367, 370-376 (6th Cir. 2008). The motion for the order violated 11 U.S.C. Sec. 524(a)(2) because it is a *myth* that Clark is still personally liable to her attorneys Marcus.

LASC Judge Scheper's July 2012 attorney fee order in favor of Clark was also automatically void under 11 U.S.C. Sec. 524(a)(1) because debtor Clark was no longer personally liable to her attorneys Marcus.

5. The 2018 VL Order Violates the 8th Amdmt  
In 2018, USDC Judge Edward M. Chen imposed a VL order based on Gutierrez's 2016 VL order that:  
(A) ignores Clark is no longer personally liable to

her own attorneys Marcus; (B) ignores Clark is no longer obligated under the 2005 real estate sale contract with buyer Kinney; and (C) ignores state and federal court judges continue to penalize Kinney by awarding attorney fees orders in favor of Clark [who is violating 11 USC Sec. 524(a)(2) by filing those attorney fee motions], and for attorney fee orders which are automatically “void” under 11 USC Sec. 524(a)(1). State Univ. of New York v. Fox, 492 U.S. 469, 482-486 (1989); In re McLean, 794 F.3d 1313, 1321-1325 (11<sup>th</sup> Cir. 2015); In re Marino, 577 B.R. 772, 782-784 (9<sup>th</sup> Cir. 2017).

In addition to not following bankruptcy law [e.g. 11 USC Sec. 524(a)], the *federal* VL orders ignore constitutionally-vague *state* VL law, and repeat bogus and incorrect “facts” allegedly supporting these VL orders (e.g. from *In re Kinney*). That means these judges are intentionally obstructing the “proper administration” of federal ADA, CWA and title 11 laws. Johnson v. United States, 135 S.Ct. 2551, 2557-2563 (2015); 18 USC Sec. 1519.

As expected, this also has had a chilling effect on Kinney’s free speech. Citizens United v. Federal Election Commission, 558 U.S. 310, 331 (2010).

If the actual “facts” are reviewed (e.g. many of which are shown by the dockets such as Kinney’s status as only the attorney), it is clear that none of Kinney’s cases were frivolous or lacked merit. Pennzoil v. Texaco, Inc., 481 U.S. 1, 8-17 (1987); Smith v. Robbins, 528 U.S. 259, 269-276 (2000).

For over 10 years, a group of people (some of whom were judges) decided to retaliate against Kinney both at the state and federal court levels. In that process, various state and federal laws were violated. This gives rise to retaliation claims against members of that group as well as claims under the Hobbs Act and other laws (as well as *Bivens* claims against federal officers). Hooten v. H Jenne III, 786 F.2d 692 (5<sup>th</sup> Cir. 1986); United States v. Hooten, 693 F.2d 857, 858 (9<sup>th</sup> Cir. 1982); Sloman v. Tadlock, 21 F.3d 1462, 1470 (9<sup>th</sup> Cir. 1994); Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310, 1313-1320 (9<sup>th</sup> Cir. 1989); Lacey v. Maricopa County, 693 F.3d 896, 916 (9<sup>th</sup> Cir. 2012).

Federal judges who issued VL orders that violated Kinney's 8<sup>th</sup> Amendment rights are subject to *Bivens* claims. Federal judges are now trying to eliminate Kinney's *Bivens* case by using VL orders that gave rise to the original *Bivens* claims.

In this SCOTUS petition, the 2016 VL Order issued by Gutierrez violates the 8<sup>th</sup> Amendment because it has an excessive fine and includes a cruel and unusual punishment imposed on Kinney (e.g. with respect to his rights as a listed creditor in Clark's 2010 Chapter 7 *no asset* bankruptcy case). That creates a *Bivens* claim.

USDC and Ninth Circuit want to use the same VL orders to *eliminate* Kinney's right to pursue a *Bivens* case (which arose from these VL orders).

## OPINIONS BELOW

The decision(s) sought to be reviewed are the:

1. June 26, 2019 “final” decision by the Ninth Circuit denying Kinney’s timely request for permission to appeal the prior dismissal based on its **own** 2018 VL pre-filing review order and citing the *In re Thomas* case (with its “*so insubstantial*” rationale) which has been routinely used to dismiss Kinney’s appeals [Ninth Circuit No. 19-15565, Dk #3, Appendix A, page 1]<sup>1</sup>.

2. Feb. 26, 2019 dismissal order by USDC Judge Donato based on his **own** pre-filing review of Kinney’s *Bivens* complaint against the only defendant, Judge Gutierrez, by using a 2018 VL order [USDC No. 19-80021, Dk #4; App. B, 3].

#### **JURISDICTION**

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

Here, the US District Court improperly dismissed Kinney’s *Bivens* complaint [App. B, 3].

Next, the Ninth Circuit improperly denied Kinney a right to continue with his appeal [App. A, 1].

As noted in prior SCOTUS petitions, the state and federal courts have not followed **and** are still not following bankruptcy or state law with respect to Kinney [e.g. as to 11 USC Sec. 524(a) for Clark’s

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<sup>1</sup> Citation method is Appendix (“App.”), exhibit letter, and sequential page number.

bankruptcy; as to attorneys Marcus' hourly-fee 2007 retainer with client Clark with a charging lien; as to Cooper's obstructing fences in LA public rights-of-way; and as to CWA violations in Laguna Beach]; see SCOTUS #18-1096, 18-1095, 18-906, 18-908, 18-517, 18-516, 18-160, 17-219, 16-252, 16-606 and 16-1182. Bosse v. Oklahoma, 580 U.S. \_\_\_, 137 S.Ct. 1, 196 L.Ed.2d 1 (2016).

Judge Gutierrez made rulings while acting as a "prosecutor" of Kinney which violated Kinney's federal constitutional rights [e.g. 8th Amendment] and federal civil rights under color of authority or official right [e.g. 42 U.S.C. Sec. 1983], so judicial and/or sovereign immunities were limited or eliminated [e.g. for *prospective* injunctive relief]. 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).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Court has jurisdiction to address violations of state or federal law by the state or federal courts.

Federal courts have exclusive and original jurisdiction under 28 U.S.C. Sec. 1331, 1343, 1441, 1443 and 1452 (and 42 U.S.C. Sec. 1983 etc), to consider:

(1) violations of federal *constitutional* rights [e.g. 8th Amendment rights];

- (2) violations of other federal laws [e.g. violations of the Commerce Clause; the “honest services” law; the Hobbs Act; and 11 U.S.C. Sec. 524(a)];
- (3) obstructions of justice as to violations of ADA, CWA and title 11 laws [e.g. 18 USC Sec. 1519];
- (4) bankruptcy fraud [e.g. 18 U.S.C. Secs. 152 and 157]; and
- (5) *Bivens* claims.

## STATEMENT OF THE CASE

This petition involves federal courts who denied Kinney’s attempts to pursue a *Bivens* case against a federal judicial officer who had issued an order that violated Kinney’s 8<sup>th</sup> Amendment rights.

## SUMMARY OF LOWER COURT PROCEEDINGS

On May 13, 2016, Judge P.S. Gutierrez issued an order against Kinney with: (1) sanctions [e.g. an excessive fine of \$6,000]; and (2) a pre-filing VL order that has been applied globally in practice [e.g. to Kinney’s CWA citizen lawsuits] and which has resulted in dismissals [e.g. by *sua sponte* dismissals of cases or “so insubstantial” appeal dismissals] of ***all of Kinney’s federal cases and appeals from 2016 onward*** before discovery could start and/or oral arguments could occur (e.g. a cruel and unusual punishment).

As a result, for any case before Judge Gutierrez, Kinney has not been allowed to obtain testimony under oath to show the quoted “facts” used in the prior VL orders (e.g. in *In re Kinney*) are false.

On May 7 and 12, 2018, Kinney submitted *Bivens* claims against Gutierrez, that were acknowledged as received in June and denied in Aug. 2018.

On Jan. 20, 2019, Kinney submitted his *Bivens* complaint against Judge Gutierrez because of the 2016 VL order that contained excessive sanctions and a cruel and unusual punishment (e.g. an overbroad pre-filing order).

On Feb. 26, 2019, an order was issued by USDC Judge Donato that refused Kinney the right to file (i.e. dismissed) the *Bivens* complaint based on a 2018 VL pre-filing order issued by Judge Chen that had been created because of Judge Gutierrez' 2016 VL pre-filing order [App. B, 3].

On March 14, 2019, Kinney filed a notice of appeal as to USDC Judge Donato's decision and paid the \$505 filing fee.

On June 26, 2019, the Ninth Circuit denied Kinney's request for permission to proceed with his appeal by using a "*so insubstantial*" rationale (that various Ninth Circuit Judges have used many times previously as to Kinney's appeals); and it did not refund the filing fee of \$505 that Kinney had paid [App. A, 1]

This SCOTUS petition addresses the: (1) excessive fines and cruel and unusual punishment caused by the 2016 VL pre-filing order and the subsequent orders that were created based on that 2016 VL order [e.g. by USDC Judge Chen]; (2) ongoing retaliation against Kinney [e.g. *forcing*

*his silence* by precluding him from all federal courts through the use of summary dismissals or “so insubstantial” appeal rationale]; (3) ongoing bankruptcy law violations to the detriment of Kinney as a listed-creditor in Clark’s 2010 Chapter 7 *no asset* bankruptcy; (4) “taking” of his property [e.g. over \$500,000 to date] without just compensation for an allegedly-public use under the VL laws to protect the public from vexatious litigants [i.e. even though Kinney is not actually a VL under any of the VL tests]; and (5) damaging of his existing interstate commerce businesses [e.g. due to liens on his properties for attorney fee awards to discharged-debtor Clark for fees she allegedly owes to her listed unsecured creditors attorneys David Marcus etc in violation of 11 U.S.C. Sec. 524(a)(2), even though all of the attorney fee awards in favor of Clark and her attorneys after July 2010 are automatically void under 11 U.S.C. Sec. 524(a)(1)].

## STATEMENT OF FACTS

In 2015, Kinney filed a federal case to challenge the ongoing bankruptcy law violations by Michele Clark and her attorneys David Marcus etc. 11 U.S.C. Sec. 524(a)(2); 18 U.S.C. Secs. 152 and 157.

In response, Judge Gutierrez issued a May 13, 2016 VL pre-filing review order along with an excessive fine (e.g. a sanction) and a cruel and unusual punishment (e.g. a restriction on Kinney as to filing future cases) even though that Judge never examined the blatantly *false* information in the prior VL orders (e.g. as stated in *In re Kinney*).

In 2018, Kinney filed a *Bivens* claim against Judge Gutierrez because the 2016 VL order included excessive fines and a cruel and unusual punishment, but was based on *false* information.

Essentially, Kinney has been made a “criminal” without ever having a trial or hearing, with testimony under oath and cross-examination of all concerned, about the actual facts.

In Jan. 2019, Kinney submitted a proposed *Bivens* complaint which was not allowed to proceed by USDC Judge Donato based on Judge Chen’s 2018 VL order which had the same *falsified* facts as found in *In re Kinney* [App. B, 3]

In March 2019, Kinney appealed to the Ninth Circuit. In June 2019, the Ninth Circuit refused to allow that appeal to proceed based on the Ninth Circuit’s 2018 VL order which had the same *falsified* facts as found in *In re Kinney* [App. A, 1]

#### **REASONS FOR GRANTING THE WRIT OF CERTIORARI**

**Certiorari Should Be Granted Because A Federal Judicial Officer, By Issuing An Unconstitutional Vexatious Litigant Order With Excessive Fines and Cruel And Unusual Punishment, Has Violated Kinney’s Eighth Amendment Rights; And That Severely Impairs Meaningful Review of Important Questions of Federal Law, And Severely Impairs Rights Guaranteed Under The Amendments to the US Constitution;**

**And Is In Conflict With Decisions Of This Court And Other United States Court Of Appeals.**

By issuing the 2016 VL pre-filing order against Kinney without ever confirming the actual facts (e.g. which are contrary to the *fabrication* of the facts and history of past cases by COA P.J. Boren in *In re Kinney*), defendant Judge Gutierrez has violated the Eighth Amendment rights of Kinney to be free of excessive fines and free of cruel and unusual punishments. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 389-410 (1971); Ziglar v. Abbasi, 137 S.Ct. 1843, 1855-1859 (2017).

This Judge has *compelled silence* upon Kinney in direct violation of the *Janus*, *NIFLA* and *Riley* decisions **and** in direct violation of bankruptcy law given Kinney's *undisputed* status as a "listed" creditor. 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 Judge has acted as a *prosecutor* of Kinney, **not** as a *neutral arbitrator* of disputes, when he denied his rights. That also violated Kinney's federal constitutional and civil rights, his rights to the "honest services", and the Hobbs Act. 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 (9<sup>th</sup> Cir. 2001); Canatella v. State of California, 304 F.3d 843, 847-854, n. 6 and 14 (9<sup>th</sup> Cir. 2002); Bauer v. Texas, 341 F.3d 352, 356-360 (5<sup>th</sup> Cir. 2003); In re Justices of Supreme Court of Puerto Rico, 695 F.2d 17, 24 (1<sup>st</sup> Cir. 1982); United States v. Murphy, 768 F.2d 1518, 1523-1539 (7<sup>th</sup> Cir. 1985); Zarcone v. Perry, 572 F.2d 52, 54-57 (2<sup>nd</sup> Cir. 1978).

This Judge was retaliating against Kinney (as was done by *In re Kinney* and *Kinney v. Clark* rulings). That has caused irreparable injury, and injury to his property, interstate businesses, cases, appeals, and past clients. 42 U.S.C. Sec. 1983; Hernandez v. Sessions, 872 F.3d 976, 994 (9<sup>th</sup> Cir. 2017).

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

Kinney has the right "to petition the Government for a redress of grievances". That includes his right to file a *Bivens* case and a right to a review by appeal (which is being consistently denied to Kinney without just cause in both state and federal courts). 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 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 14th Amendment’s right to due process of law is the opportunity to be heard. Grannis v. Ordean, 234 U.S. 385, 394 (1914). As to all of the VL orders (e.g. from 2008 onward), Kinney has never had the right to be heard and to have the right to question his accusers (e.g. Lavin, Boren, Gutierrez and Chen) *under oath*.

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 court is not required to provide a right to appellate review, procedures which adversely affect access to the appellate

review process, which the court has chosen to provide, requires close judicial scrutiny. Griffin v. Illinois, 351 U.S. 12 (1956). This applies to both the state courts and federal 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 the federal and state courts apply, restrict or summarily deny the right of access to the courts and force silence on “difficult” attorneys and on *pro se* litigants.

As to the acts of this Judge, 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).

This Judge has ignored that post-2010 award orders were all “void” [e.g. 11 U.S.C. 524(a)(1)]; and “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).

This Judge has *ignored* Kinney’s right to be free from retaliation, and the *obligation* of the federal court to examine the actual facts and then

determine the issues by applying the correct law. In re Isaacs, 895 F.3d 904, 910-911 (6<sup>th</sup> Cir. 2018); In re McLean, 794 F.3d 1313, 1321-1325 (11<sup>th</sup> Cir. 2015); Bulloch v. United States, 763 F.2d 1115, 1121-1122 (10<sup>th</sup> Cir. 1994); McCarthy v. Madigan, 503 U.S. 140, 146 (1992); Colorado River Water Conservation District v. United States, 424 U.S. 800, 817-818 (1976).

The *Bosse* decision requires the courts to follow the law, but no court has done that for the last 10+ years as to Kinney (e.g. because Kinney was vilified by LASC Judge Lavin in 2008 and by COA P.J. Boren in 2011, and then every other judge simply joined in the abuse of Kinney without examining the actual facts and without using the applicable law). Bosse v. Oklahoma, 580 U.S. \_\_\_, 137 S.Ct. 1 (2016); Orner v. Shalala, 30 F.3d 1307, 1309-1310 (10<sup>th</sup> Cir. 1994).

As a result, Kinney now has a valid *Bivens* claim and case against USDC Judge P.S. Gutierrez due to the violation of Kinney's 8<sup>th</sup> Amendment rights.

## CONCLUSION

This petition should be granted, and Kinney should be allowed to proceed with his *Bivens* case.

Dated: 9/18/19      By: \_\_\_/s/\_\_\_\_\_  
Charles Kinney, in pro se