No.

In the

Supreme Court of the United States

John Hsu, *Petitioner*,

v.

City of Berkeley, *Respondent*.

On Petition for a Writ of Certiorari to the
California Court of Appeal, First Appellate District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether California's vexatious litigant statute, in key provisions, utilizes the categorical approach, requiring guesswork and inviting arbitrary enforcement, and should be declared void for vagueness.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

Trial court: Alameda County Superior Court
Docket No.: RS18924493
Case caption: Hsu v. City of Berkeley
Date of entry of judgment: April 8, 2019

Court of Appeal, First Appellate District
Docket No.: A156947
Case caption: Hsu v. City of Berkeley
Date of entry of judgment: May 1, 2019

California Supreme Court
Docket No.: S256112
Case caption: Hsu v. City of Berkeley
Date of entry of order denying discretionary review: July 10, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULE

UNITED STATES CONSTITUTION

OTHER AUTHORITIES

OPINIONS BELOW

The Order of the California Court of Appeal, First Appellate District, dismissing petitioner's appeal, in App. A, 1a-2a, is not published. The Court of Appeal's Order denying rehearing, in App. B, 3a-4a, is also not published. The California Supreme Court's order denying discretionary review, in App. C, 5a, is reported at 2019 Cal. LEXIS 5026.

JURISDICTION

The Order of California Supreme Court denying discretionary review was entered on July 10, 2019. This Court has jurisdiction under 28 U.S.C. § 1257(a). The Petition is timely under Supreme Court rule 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides the following:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state

> deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California's "vexatious litigant statute" (Cal. Code Civ. Proc. §§ 391-391.8), in its entirety, is reproduced in App. D, 6a-13a. The key provisions relevant here are:

§ 391(b), under "Definitions," provides that:

> "Vexatious litigant" means a person who does any of the following: (1) In the immediately preceding seven-years period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person . . ..

§ 391.7, on "prefiling order," provides that:

> **(a)** In addition to any other relief provided in this title, the court may, on its own motion or the motion of any party, enter a prefiling order which prohibits a vexatious litigant from filing any new litigation in the courts of this state in propria persona without first obtaining leave of the presiding justice

> or presiding judge of the court where the litigation is proposed to be filed. . . ..
>
> **(b)** The presiding justice or presiding judge shall permit the filing of that litigation only if it appears that the litigation has merit and has not been filed for the purposes of harassment or delay. . . ..

STATEMENT OF THE CASE

A law which is so vague that it fails to give ordinary people fair notice violates constitutional due process. When the Legislature has failed to enact a law that is clear, the judges are forced to devolve into guesswork and intuition to fill in the gaps, leading to arbitrary enforcement. As such, the vague law also violates the separation of powers doctrine under our Constitution. *Johnson v. United States*, 135 S.Ct. 2551, 2556-2560 (2015); *Sessions v. Dimaya*, 138 S.Ct. 1204, 1209-1210, 1216, 1223, 1227-1228 (2018); *United States v. Davis*, 139 S.Ct. 2319, 2323, 2325, 2336 (2019). California's "vexatious litigant statute" is such a law.

1. California's "vexatious litigant statute" is problematic in using the categorical approach.

While this Court has held that "the genuineness of a grievance does not turn on whether it succeeds," *BE & K Const. Co. v. NLRB*, 536 U.S. 516, 532-533

(2002), California's "vexatious litigant statute" uses a *numerical quota*—having received five final adverse determinations in five years—to *define* pro se plaintiff as "vexatious litigant." Cal. Code Civ. Proc. § 391(b)(1)(i). However, the *quota*, by its nature, is just a number, revealing *nothing* about the *genuineness* of the grievance. Yet, the "vexatious litigant" label, on its face, by it nature, is a character-trait determination, which creates fear and anger, induces contempt, hatred, and public ridicule.

Under the statute, once the "vexatious litigant" label attaches, the plaintiff is also automatically eligible to receive a "prefiling order" of the broadest reach—prohibiting him or her from the filing of *any* new litigation in the courts of California in pro per without leave of the presiding justice or presiding judge. Cal. Code Civ. Proc. § 391.7(a). In sharp contrast, the federal judicial department is of the opinion that "[o]ut of regard for the constitutional underpinnings of the right to court access, pre-filing orders should rarely be filed," and if filed, the pre-filing order must be tailored "narrowly so as to closely fit the specific vice encountered." *Ringgold-Lockhart v. County of Los Angeles*, 761 F.3d 1057, 1062 (9th Cir. 2014). That is, under the federal Constitution, California's one-size-fits-all "prefiling order" is impermissibly over-broad.

Once the "prefiling order" is issued, the "vexatious litigant statute" requires the presiding justice or presiding judge to determine whether "it appears"

that any new litigation proposed by the litigant has merit and has not been filed for the purposes of harassment or delay. Cal. Code Civ. Proc. § 391.7(b). But, "it appears," by its nature, is vague and uncertain. "It appears" appeals to the presiding officer's intuition, and calls on the judge's feelings, experience, and estimation. With no further guidance from the Legislature, however, the presiding judge has to guess what "it appears" means. Has the Legislature delegated its policy-making authority to the judge? What if different judges hold different views? How are ordinary people potentially affected by the statute supposed to know, and be expected to meet, the requirements of the unascertainable standards? The result is widespread dismissal of meritorious claims.

2. Use of the categorical approach requires guesswork and invites arbitrary enforcement.

Yes, guesswork and arbitrary enforcement occurred, for example, in the trial court case underlying Case No. 14-140 in this Court. As reported there, seven out of eight presiding judges, from Sacramento, San Francisco, Los Angeles, to San Diego, did not allow a particular meritorious claim to proceed. In the one trial court (San Diego) where the presiding judge did allow the proposed new litigation to proceed, the subsequently assigned judge was upset to find that a "vexatious litigant,"

previously so *adjudicated*[1], had appeared in the courtroom. In the judge's view, "equity" has to run against ""vexatious litigants." Thus, the judge would not apply the pertinent statute of limitations, refused to apply the proper standard of review (for ruling on demurrer), and engaged in judicial legislation (taking "vexatious litigants" as having no right to amend their complaints once of course under Cal. Code Civ. Proc. § 472), so as to dismiss the case. Yet, guess what? On appeal, the Court of Appeal, Fourth Appellate District, Division One, *affirmed.*

In the trial court case underlying Case No. 14-464 in this Court, first the judge applied and misapplied the *numerical quota*, so as to declare the plaintiff a "vexatious litigant." *Ante*, n. 1. Then came to the same judge were two petitions for review of administrative decisions which had arrived at *contrary* decisions based on the same fact. Rather than applying the doctrines of collateral estoppel and judicial estoppel to reconcile the two administrative decisions, the judge affirmed both, thus himself issuing two *contrary* Judgments. Yet, the judge refused to "re-plow the ground." The judge further stayed the proceedings for close to four years while

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[1]In that "adjudication" at Alameda County Superior Court (Case No. RG08428582), the judge treated each trial court action, each appeal at the court of appeal, and each petition to the California Supreme Court for review, as a separate and independent "litigation," toward meeting the *quota*, thus making pro per plaintiffs particularly easy to qualify as "vexatious litigant."

memory fades and witnesses disappear, et cetera, et cetera, to plaintiff's prejudice, thus setting plaintiff up for failure. Yet, under the "vexatious litigant statute," the then administrative presiding justice ("APJ") of the Court of Appeal, First Appellate District, summarily disallowed *each* one of plaintiff's appeals or statutory writ petitions to proceed.

To accomplish this, what the APJ did was to set up a "procedure." *First*, the Court of Appeal will *not accept* application for permission to appeal until after the Notice of Appeal is filed at the trial court. *Second*, preparation of the record is *suspended*. *Third*, the Applicant's showing is *limited* to "three pages or less" (with no record to refer to). *Fourth*, "if he [the APJ] denies your application, your attempted appeal in this matter will be automatically *terminated*." Case No. 14-464, Petition for Writ of Certiorari, pp. 17-18, App.V, pp. 193a-196a. *None* of these restrictions is what the statute has provided. What is happening is impermissible judicial legislation. Cal. Code Civ. Proc. § 1858.

In direct contrast to the First Appellate District's "procedure," when reviewing a prisoner's application for leave to appeal, so as to comply with *due* process, this Court requires that a record of sufficient completeness be made available. If with the aid of the record and a counsel, the appellant presents any issue that is not clearly frivolous, leave to proceed must be allowed. The Court then proceeds to consider the appeal on the merits in the *same* manner that it

considers appeals filed by non-indigent petitioners who are able to pay. A court's summary denial of the application is error if the application is not so patently frivolous as to require dismissal without *full briefing* on the merits or oral argument. *Coppedge v. United States*, 369 U.S. 438, 444-448, 452-453 (1962).

In 2019, after petitioner pointed out the serious flaws in the First Appellate District's "procedure," the District still applied the same "procedure."

In fact, in 2019, the APJ's Order dismissing the appeal, App. A, 1a-2a, did not even correctly identify the issue presented on appeal. Petitioner thus petitioned for rehearing. Yet, a summary denial was still the outcome. App. B, 3a-4a.

Indeed, as this Court has observed in *Sessions v. Dimaya*, 138 S.Ct. 1204, 1232, 1234 (2018) (concurring opn. of Justice Gorsuch): "Choice, pure and raw, is" made. "A government of laws and not of man can never tolerate that arbitrary power."

REASONS FOR GRANTING THE PETITION

"Vague laws invite arbitrary power." Vague laws, in violation of constitutional due process, fail to provide ordinary people fair warning and leave the people in the dark about what the law demands. Vague law also undermines the constitutional separation of powers by allowing prosecutors and courts to make it up. *Sessions v. Dimaya*, 138 S.Ct. 1204, 1223-1224, 1227 (2018). "In our constitutional order, a vague law is no law at all." When Congress or the Legislature passes a vague law, the role of courts under our Constitution is not to fashion a new, clearer law to take its place, but to treat the law as a nullity and invite Congress or the Legislature to try again. *United States v. Davis*, 139 S.Ct. 2319, 2323, 2336 (2019). California's "vexatious litigant statute" is such a law.

I. A numerical quota has displaced consideration of the genuineness of a grievance.

California's "vexatious litigant statute" uses the categorical approach and vague languages, leaving the underlying reasoning far from being clear. For example, how did the numerical *quota* under Cal. Rule of Civil Proc. § 391(b)(1)(i) come about? Has statistics shown that this *quota* is associated with absolutely no margin of error? Why should application of the quota *displace* a proper determination of the genuineness of the grievances?

Is this rule by law, or rule by number?

A United States District Court has consistently disapproved the use of the *quota*: "[T]he mere fact that a plaintiff has had numerous suits dismissed against him is an insufficient ground upon which to make a finding of vexatiousness." *Howard v. Gradtillo*, 2011 U.S. Dist. LEXIS 121088 (E.D.Cal. 2011). "When issuing a vexatious litigant order[,] 'care is demanded in order to protect access to the courts, which serves as the final safeguard for constitutional rights.' [*De Long v. Hennessey*, 912 F.2d 1144] at 1149 [(9th Cir. 1990)]. Thus, it was proper for the Magistrate Judge to consider the more substantive analysis required by *De Long* instead of blithely following Section 391." *Quillar v. Zepeda*, 2012 U.S. Dist. LEXIS 26392 (E.D.Cal. 2012). "[A] procedural dismissal such as this 'does not demonstrate a malicious or vexatious intent' on the part of the plaintiff and should not count toward determining vexatiousness." *Smith v. Sergent*, 2016 U.S. Dist. LEXIS 130685 (E.D.Cal. 2016), *affirmed* by *Smith v. Sergent*, 2016 U.S. Dist. LEXIS 161285 (E.D.Cal. 2016).

Federal circuits' views are similar. "Litigiousness alone is not enough." "The plaintiff's claims must not only be numerous, but also be patently without merit." *Ringgold-Lockhart v. County of Los Angeles, supra*, at 761 F.3d, p. 1064. "[L]egitimate claims should receive a full and fair hearing no matter how litigious the plaintiff may be."

In re Oliver, 682 F.2d 433, 446 (3d Cir. 1982).

II. The "it appears" standard leans on the judge's intuition and imagination, and has led to the widespread dismissal of meritorious claims.

Lacking sufficient guidance, the statute also requires guesswork and invites arbitrary enforcement, which, unfortunately, many California state courts have eagerly embraced. "It appears" calls on what the judge sees intuitively, and forces the judge to imagine what horrific things the plaintiff might have done to legally qualify as a "vexatious litigant." Gifis' Law Dictionary (7th ed. 2016), at page 589, defines "VEXATIOUS LITIGATION" as "civil action shown to have been instituted maliciously and without probable cause," citing [*Paramount Pictures, Inc. v. Blumenthal*,] 11 N.Y.S. 2d 768, 772 [(1939)]. So, why should any judge in his or her good senses allow such a person to enter the courtroom door?

Surely, as noted under "Statement of the Case," a judge leaned on his intuition to conclude that "equity" should run against "vexatious litigants." *Ante*, p. 6. On this "*equitable*" ground, then, the judge refused to apply the proper standards of review. Another judge, an APJ, has, over the years, elaborately devised a "procedure," with the result that the court could get rid of the cases presented by "vexatious" plaintiffs as

soon as possible. *Ante*, p. 7.

Yet, knowingly pursuing a purpose other than faithful discharge of judicial duties is bad faith and is judicial misconduct. *Spruance v. Commission on Judicial Qualifications*, 532 P.2d 1209, 1221 (1975). In the process, the judge also shields the truly outrageous defendants from the liability for their serious wrongs. So, is justice reached, or is this rule by will, fierce and raw?

In the cases reported in 14-140 and 14-464, the petitioner, the plaintiff, is a well-trained, conscientious, capable, dedicated and productive civil servant, having been invited to prepare a scientific review article. The government, however, portrayed the plaintiff as wholly incompetent, and then used the "vexatious litigant statute" to turn petitioner into a sure loser. The government's action leading to this result is particularly inappropriate, if not offensive, oppressive, or worse.

III. No fair alternative interpretation of the statute exists for constitutional avoidance to apply.

Application of the canon of constitutional avoidance requires the available of fair alternatives. *United States v. Davis, supra*, at p. 2332. The canon is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which would raise serious constitutional doubts. "The canon is thus a means of

giving effect to congressional intent, not of subverting it." *Clark v. Suartz Martinez*, 543 U.S. 371, 381-382 (2005).

In the case of California's "vexatious litigant statute," however, courts cannot interpret away *either* the categorical statutory definition for "vexatious litigant," *or* the vague and uncertain "it appears" which requires guesswork and invites arbitrary enforcement, *or* the over-broad one-size-fits-all prefiling order. As such, no viable alternative exists for the constitutional avoidance canon to apply.

Declaring these statutory provisions in California's "vexatious litigant statute" unconstitutional is, therefore, a necessity. Meanwhile, California will *not* be at a loss because California may still simply adhere to the well-reasoned precedents of the United States Supreme Court as to what due process and separation of powers require. After all, "only this Court or a constitutional amendment can alter our holdings." *Knick v. Township of Scott*, 139 S.Ct. 2162, 2177-2178 (2019). Indeed, the United States "Constitution, and laws of the United States . . . shall be the supreme law of the land." U.S. Const., art. VI, cl. 2.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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