No. 19-6736

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATE

Ralph Colombo

Petitioner

v.

Kinkle, Rodiger & Spriggs et al.,

Respondents

On Petition for a Writ of Certiorari to

California Court of Appeal, Fourth Appellate District, Division Three

PETITION FOR WRIT OF CERTIORARI

Ralph Colombo
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Petitioner In Pro Per

QUESTION PRESENTED

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

LIST OF PARTIES

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follow:

Petitioner:

Ralph Colombo

Respondents:

Kinkle, Rodiger & Spriggs
Andrew J. Pyka

RELATED CASES

Trial Court: Orange County Superior Court

Case No.	Caption	Judgment
30-2015-00792001	Colombo v. Kinkle, Rogier & Sprigg et al.	6/5/2015
30-2016-00869183	Colombo v. Kinkle, Rogier & Sprigg et al.	12/4/2017

Court of Appeal: Fourth Appellate District, Division Three

Case No.	Caption	Date of Entry of Judgment
G052272	Colombo v. Superior Court	1/14/2016
G055823	Colombo v. Kinkle, Rogier & Sprigg et al.	5/16/2019

California Supreme Court

S256490	Colombo v. Kinkle, Rogier & Sprigg et al.	8/21/2019

(Denial of discretionary review and depublication request)

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PETITION FOR WRIT OF CERTIORARI

Petitioner Ralph Colombo respectfully petition for a writ of certiorari to review the judgment below in the Court of Appeal, Fourth Appellate District Division Three.

OPINIONS BELOW

The published opinion of the California Court of Appeal, Fourth Appellate District, Division Three, in App. A, 1a-15a, is reported at *Colombo v. Kinkle, Rodiger & Spriggs*, 35 Cal.App.4th 407 (2019). The Court of Appeal's Orders denying rehearing, in App. B, 16a and App. C, 17a, are unpublished. The California Supreme Court's Order denying discretionary review and depublication request, in App. D, 18a, is reported at 2019 Cal. LEXIS 6308.

JURISDICTION

The Order of the California Supreme Court denying discretionary review was entered on August 21, 2019. This Court has jurisdiction under 28 U.S.C. § 1257(a). This 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 within its jurisdiction the equal protection of the laws.

California's "vexatious litigant statute," Cal. Code Civ. Proc. §§ 391-391.8, in its entirely, is reproduced in App. D, 25a-29a. The key provisions relevant here are:

Code of Civil Procedure section 391, subdivision (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 . . .. (Hereafter abbreviated as "§ 391(b)(1)(i).")

Code of Civil Procedure section 391.7, on "prefiling order," provides the following:

(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.

"Finally determined" under § 391(b) has been interpreted as follows: "When, as here, all avenues for direct review have been exhausted, the judgment is final for all purposes." *First Western Dev. Corp. v. Superior Court*, 212 Cal.App.3d 860, 864 (1989).

California Code of Civil Procedure section 340.6, on "Attorneys; wrongful professional act or omission; tolling of period," in relevant part, provides the following:

> (a) An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. . . .. Except for a claim for which the plaintiff is required to establish his or her factual innocence, in no event shall the time for commencement of legal action exceed four years except that the period shall be tolled during the time that any of the following exists:
>
> > (2) The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongfully act or omission occurred.

Code of Civil Procedure section 360.5, on "Waiver of statute of limitations; effective period; renewal" [Thomson Reuters], in relevant part, provides the following:

> No waiver shall bar a defense to any action that the action was not commenced within the time limited by this title unless the waiver is in writing and signed by the person obligated. No waiver executed prior to the expiration of the time limited for the commencement of the action by this title shall be effective for period exceeding four years from the date of expiration of the time limited for

commencement of the action by this title and no waiver executed four years from the date thereof, but any such waiver may be renewed for a further period of not exceeding four years from the expiration of the immediately preceding waiver.

Such waivers may be made successively.

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, resulting in 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.

The doctrine of *stare decisis* cannot apply where the precedent does not "promote[] the evenhanded, predictable, and consistent development of legal principles." *Johnson v. United States*, 135 S.Ct. 2551, 2562-2563 (2015).

The canon of *constitutional avoidance* has no application where interpretation of the statute cannot provide a *fair alternative. United States v. Davis*, 139 S.Ct. 2319, 2332-2333 (2019).

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

While the United States Supreme 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" utilizes a *numerical quota*–having received five final adverse determinations in seven year–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, and arouses 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. 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.*

Before a "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. 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 personal experience, feelings, 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. Using the categorical approach has required guesswork .and invited 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 meritorious claim–the *same* proposed "new litigation"–to proceed. In the sole 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

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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* under § 391(b)(1)(i), thus making pro per plaintiffs *particularly easy* to qualify as "vexatious litigant."

What the superior court applied there was the *McColm* court's *broadened* definition for "*litigation*" allegedly used "throughout" the vexatious litigant statute, *McColm v. Westwood Park Assn.*, 62 Cal.App.4th 1211, 1215-1219 (1998) (disapproved in part by *John v. Superior Court*, 63 Cal.4th 91, 99, n. 2; 369 P.3d 238, 243 (2016)), even though *McColm*'s "*broadened*" definition had, in effect, already been *overruled* by the California Legislature's

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, on appeal, the California 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. Nonetheless, the judge refused to "re-plow the ground." The judge further stayed the proceedings for close to four years while 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.

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statutory amendment to § 391.7 in 2002. That amendment added a new subdivision (d), App. D. 28a, containing a new and specific definition for "litigation" for use in § 391.7 *only*, thus the statutory definitions for "litigation" under § 391(a) and § 391.7 could *no longer* be said to mean the *same*.

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 a Writ of Certiorari, pp. 17-18, App. V, 193a-196a.

But *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*, the United States Supreme 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 did not even correctly identify the issue presented on appeal. Petitioner thus petitioned for rehearing. Yet, a summary denial was still the result. Petition for a Writ of Certiorari, Case No. 19- 469, *Hsu v. City of Berkeley*, pp. 7-

8, App. B, 3a-4a, filed on October 1, 2019.

In sum, the wide array of dire consequences resulting from the application of California's "vexatious litigant statute" has been astonishing. Indeed, as the United States Supreme 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."

3. How California Court of Appeal, Third Appellate District, Division Three, has ruled under the "vexatious litigant statute."

The Court of Appeal's May 16, 2019 Opinion, App. A, 1a-15a, opened with a very strong opening statement, which was also the Court's holding. The Opinion, however, was based on: (1) mistaken notions of the law; (2) misleading statements of the fact; (3) appealing to ridicule–a fallacy in logical reasoning; and (4) failing to confront or resolve the serious constitutional challenges to California vexatious litigant statute.

The first question is whether Petitioner Colombo's action at the trial court below was time-barred.

Stipulation waiving statute-of-limitations

In March 2012, under Code of Civil Procedure section 340.6(a)(2), *ante* at p. 3, Colombo timely "filed a malpractice action against defendants (*Colombo v. Kinkle, Rodiger & Spriggs et al.* (Super. Ct. Orange County . . . case number 30-2012-00557051))," App. A, 4a-5a. "After the case had proceeded for more than two years," App. A, 5a, line 4, "Colombo seeks to defer or avoid litigation against [Defendants] at this time regarding his claims, rights, causes of action,

counter-claims, cross-claims, and defenses as identified in the matter entitled Ralph Colombo v. Kindle, Rodiger & Spriggs, et al. (Orange County Superior Court Case No. 30-2012-00557051)." App. F, 24a, ¶ 1. Pursuant to California Code of Civil Procedure section 360.5 governing "waiver of statute of limitations," *ante* at pp. 3-4, App. F, 26a, ¶ 8, the parties entered into a "Tolling Agreement" to dismiss, without prejudice, App. F, 25a, ¶ 4, Colombo's legal malpractice action filed in 2012, superior court Case No. 30-2012-00557051, to allow Colombo's refiling of the same claims later, if necessary, App. F, 25a-26a, ¶ 6, as long as the "Tolling Agreement" is still in effect. App. F, 24a-25a, ¶ 3.

Despite how the Agreement or its terms are labeled or mislabeled, "*tolling*" or not, the Agreement is in the nature of a *contract* or a *stipulation* to *waive statute of limitations* under Cal. Code Civil Proc. § 360.5, App. F, 26a, ¶ 8, *intended* to permit re-filing of Colombo's legal malpractice claims, App. F, 25a-26a, ¶ 6, *unhindered* by the statute of limitations under section 340.6, as long as the contract is still in force. App. F, 24a-25a, ¶ 3. The Agreement will expire 30 days after the Court of Appeal issued its Remittitur on appeal from Orange County Superior Court Case No. 30-2013-00654987, *Colombo v. Nellie Gail Ranch Owners Association.* App. F, 24a-25a, ¶ 3. Colombo will then have 30 days after expiration of the "Tolling Agreement" to refile Colombo's legal malpractice claims. App. F, 25a-26a, ¶ 6.

In the appeal from the *Nellie* case, the Court of Appeal, in Case No. **G050879**, did not issue its Remittitur until February 17, 2017. So, the mutually agreed-upon *waiver* of statute of limitations continued until 30 days later, or March 19, 2017.

Colombo's attempt to re-file his legal malpractice action

Pursuant to the terms of the "Tolling Agreement" under California Code of Civil Procedure section 360.5 on "waiver of statute of limitations," entered into on October 31, 2014, App. F, 24a, 28a, Colombo has the right to renew his legal malpractice action. On February 17, 2015, however, the superior court qualified Colombo as a "vexatious litigant" and issued him a "prefiling order[2]." App. A, 5a. As a result, Colombo had to seek leave from the presiding judge of the superior court to re-file his legal malpractice claims. Accordingly, Colombo promptly sought such permission. Very *unexpectedly*, on June 5, 2015, on the date[3] Colombo's Request for Permission to File New Litigation was *filed*, Presiding Judge Glenda Sanders immediately DENIED Colombo's Application. Colombo then submitted[4] a Motion for Reconsideration, but

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[2] The Court of Appeal characterized the "prefiling order" provision as "allow[ing] a court to 'prohibit[] a vexatious litigant from filing any new [complaint or motion] . . .,' " citing Cal. Code Civ. Proc. 391.7, subds. (a), (d). App. A, 5a, 10a. Replacing the word "litigation" by "complaint or motion" is, however, not entirely proper. The subdivision (d) referenced here is a 2002 statutory amendment adding the then new subdivision (d): "For purposes of this section, 'litigation' includes any petition, application, or motion other than a discovery motion, in a proceeding under the Family Code or Probate Code, for any order."

Note that Colombo's litigation is neither a Family Law or a Probate case. The Court of Appeal's "complaint or motion" has, therefore, altered or overstretched the statutory definition.

A major consequence of this 2002 Amendment is that the term "litigation" as defined in Cal. Code Civ. Proc. § 391(a) and in § 391.7, App. E, 19a, 22a, can *no longer* be deemed to mean the *same*. As a result, *McColm*'s *broadened* definition for "litigation," allegedly used "throughout" the vexatious litigant statute, is *no longer* true, as noted in footnote 1, *ante*, at pp. 6-7.

[3] Cf.: App. A, 6a, line 4, states: "On February 24, 2015, in accordance with the prefiling order, Colombo *submitted* a Request to File New Litigation . . .." Then, App. A, 12a, line 17, quoting Colombo, stated: "the Request for prefiling order, *filed* February 24, 2015." The superior court's Register of Actions, line 2, however, stated: "Request and Order to file new litigation by vexatious litigant *filed* by Colombo, Ralph on 6/05/2015." (*Italics* added.)

[4] App. A, 6a, 3rd ¶, states that Colombo *filed* "a motion for reconsideration in the trial court on June 18," but the superior court's Register of Action shows *no* such entry. The superior court only

Judge Sanders did not respond. Then, Colombo had to file an appeal. On July 10, 2019, the superior court filed[5] Colombo's Notice of Appeal. Orange County Superior Court Case No. 30-2015-00792001, Register of Actions, lines 2, 3, 4, 6, 7.

On appeal, on July 20, 2015, the Court of Appeal below acknowledged receipt of Colombo's Notice of Appeal. On September 29, 2015, the Presiding Justice of the Court DENIED and DISMISSED Colombo's appeal. On October 13, 2015, Colombo then petitioned for rehearing. On October 27, 2015, the Presiding Justice REVERSED, allowing Colombo's appeal to proceed, necessarily because Colombo's appeal has merit. Code Civ. Proc. § 391.7(b). On November 10, 2015, however, again *unexpectedly*, "The court [of appeal] is considering (1) treating[6] the permission to file an appeal as permission to file a petition for writ of mandate,"

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stamped Colombo's motion as "RECEIVED."

[5]The Court of Appeal stated: "on July 10, Colombo filed a notice of appeal of the order denying the first request. He *neglected* to file a prefiling request to this court . . .." (Emphasis added.) App. A, 6a, 5th ¶. The fact is, however, that when a notice of appeal is filed *at the superior court*, a request for permission to appeal is *not* required. In addition, a "notice of appeal" is not, itself, a "new litigation" within the meaning of CCP § 391.7. Filing of a notice of appeal is only a step preliminary to the filing of the brief on the merits, which is the Appellant's Opening Brief. Normally, an appellant would have about 70 days to have the record and the Appellant's Opening Brief prepared. Taking this 70 days away from the "vexatious litigant" would be a *drastic* measure and be manifestly *unfair*.

[6]App. A, 6a-7a states: "In a subsequent order, we noted we were considering treating the appeal as a writ petition, and ordered the clerk to service notice on defendants, which was the first time defendants learned of Colombo's attempt to file a new action against them."

The "*first time*" assertion is, however, *unlikely* to be true, because when Colombo's Notice of Appeal was filed on July 10, 2015 at the superior court, the superior court clerk had the *duty* to "promptly send a notification of the filing of the notice of appeal to the attorney of record for each party, to any unrepresented party, and to the reviewing court clerk." Cal. Rules of Court, rule 8.100(e)(1).

Indeed, the superior court's Docket for Case No. 30-2015-00792001 at line 11 shows that "NOTIFICATION OF FILING NOTICE OF APPEAL" was filed on 07/10/2015, the *same* day the superior court filed Colombo's Notice of Appeal.

App. A, 6a-7a, ordering further that "Preparation of the record on appeal is STAYED pending further order of this court." Case No. **G052272**, Docket (Register of Actions).

This Order is very *unexpected* because an *appeal* would require the Court of Appeal to issue a decision "in writing with reasons stated." Cal. Const., art. VI, §§ 3 & 14. In contrast, a *writ petition* may be summarily denied, with no reason stated, and is final upon filing, with no opportunity for rehearing. California Rules of Court, rules 8.490(b)(1)(A) & (c), 8.268(a)(2).

On November 12, 2015, the superior court filed **G052272**'s three-page "Order." Then, twenty days later on December 22, 2015, again very *unexpectedly*, after the superior court had already lost jurisdiction, Judge Sanders issued her Order, App. G, 29a-30a, responding to Colombo's Motion for Reconsideration, which Colombo had *submitted* more than *half-a-year earlier* on June 18, 2015 when the superior court still had jurisdiction. 30-2015-00792001, Register of Actions, lines 17, 18. App. A, 7a ["While proceedings in this court [**G052272**] were ongoing, Judge Sanders issued an order denying Colombo's motion for reconsideration"].

On January 14, 2016, after the Christmas and New Year recesses, the Court of Appeal DENIED Colombo's "*petition* for a writ of mandate," without stating a reason, and summarily DISMISSED Colombo's *appeal*. **G052272**, Docket and Disposition, January 14, 2016 entries. App. A. 7a, 1st ¶; 2a, lines 2-3 ["This court denied extraordinary relief. Undaunted, ..."].

This is another *astonishing result*, because even if Colombo had not adequately pled his *writ petition*, this does *not* necessarily mean that Colombo's *appeal* is lacking in *merit*.

How Judge Sanders has prejudicially erred

1. Judge Sanders' December 22, 2015 Order, App. G, 29a-30a, first pointed out that Colombo's motion for reconsideration is, technically, not a proper motion to file. App. G, 30a. Yet, from Colombo's motion, it should be clear to Judge Sanders that Colombo had found prejudicial errors in Judge Sanders' decision. Because Cal. Code of Civil Procedure has the purpose "to promote justice," Cal. Code Civ. Proc. § 4, and because California's public policy favors "trial or other disposition of an action on the merits" over dismissal on procedural ground, Cal. Code Civ. Proc. § 583.130, in the interest of justice, it would be more appropriate for the Honorable Judge Sanders to treat Colombo's motion as either a "Request for Correction of the Court's Errors in Fact or in Law," or a "Reply to the Court's December 22, 2015 Order."

2. The December 22, 2015 Order next stated: "The Tolling Agreement was presented and considered in the original pre-filing request." App. G, 30a. "Was considered," however, does not necessarily mean "considered thoroughly enough."

3. The December 22, 2015 Order next noted: "The court also notes that the Tolling Agreement was entered into on October 31, 2014–over two years *after* the statute of limitations period expired." App. G, 30a. In making this statement, however, Judge Sanders has failed to recognize that this Agreement, in the nature of a *stipulation* or a *contract,* "is intended to satisfy California Code of Civil Procedure, Section 360.5," App. F, 26 a, ¶ 8, and Section 360.5 is about "waiver of statute of limitations" [Thomson Reuters, California Civil Practice Statutes and Rules Annotated] and "waivers" [Deering's California Codes Annotated; LEXIS]. Further, "A *contract* must be so interpreted as to give effect to the mutual intention of the parties as it exists at the time of contracting, so far as the same is ascertainable and lawful," Cal. Civ. Code § 1636, and

the *intention* is to allow Colombo to "defer or avoid litigation against Pyke at this time," App. F, 24a, ¶ 1, and to re-file the claims later, if necessary, App. F, 25a-26a, ¶ 6, at any time when the Agreement, or the *waiver of statute of limitations* under Cal. Code Civ. Proc. § 360.5, is still in effect, thus *unhindered* by the statute of limitations under § 340.6. The Agreement is *not* a *stipulation* to *bar* Colombo from re-filing his claims, App. F, 25a-26a, ¶ 6.

4. The December 22, 2015 Order next made reference to *Forman v. Chicago Title Ins. Co.*, 32 Cal.App.4th 998, 1006 (1995). App. G, 30a. App. A, 7a. *Forman* is, however, inapposite. The *Forman* case is about *equitable tolling* of a statute of limitations during the time period the insurer is investigating the insured's claim, rather than about *waiver* of statute of limitations under Cal. Code Civ. Proc. § 360.5.

5. The December 22, 2015 Order last stated: "Also, the attorneys did not waive any statute of limitations defense. (Tolling Agreement. ¶ 7.)" App. G, 30a. The "did not waive" is not true, as noted above and in the "Tolling Agreement" at ¶ 8. App. F, 26 a. ¶ 7 of the "Tolling Agreement" states that "Noting in this Agreement shall prevent Pyka from asserting . . .." App. F, 26a. Yes, "Pyka," App. A, 24a, may choose to "assert" whatever they want, but their statute of limitations defense is *not available* when the *waiver* of statute of limitations under the Cal. Code Civ. Proc. § 360.5 is in force. App. F, 24a, ¶ 3, 26a, ¶ 8.

Legal consequence of Judge Sanders and Judge Marks' Orders and the Court of Appeal's reliance on them

1. The December 22, 2015 Order was issued when Judge Sanders no longer had jurisdiction, so the Order is void.

Indeed, "[a] void judgment is, in legal effect, no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars any one." *Bennett v. Wilson*, 122 Cal. 509, 513-514; 55 P. 390, 391 (1898). This, the Court of Appeal, Fourth Appellate District, Division Three below has itself acknowledged on September 18, 2019 in *Sharon v. Porter*, 2019 Cal.App. LEXIS 1006, *10; 2019 WL 5088594 (2019).

2. The Order is also erroneous and prejudicial in failing to recognize the *waiver of statute of limitations* provision and the purpose under the "Tolling Agreement."

3. The Application for permission to file a new litigation is "merely incidental to, and an adjunct of, the proposed filing of . . . a complaint–with that complaint constituting the prospective action or proceeding." Where the Application is denied, "no complaint was ever filed and, therefore, no action or proceeding was ever commenced." *Garcia v. Lacey*, 231 Cal.App.4th 402, 412 & fn. 10 (2014), citing Cal. Code Civ. Proc. § 350 ["An action is commenced, within the meaning of this Title, when the complaint is filed"].

4. As a result, Judge Sanders cannot be deemed to have ruled on the merits of the litigation not yet filed, in an adversary[7] adjudication system, where the defendants had not received notice, did not submit any brief, and did not appear.

5. Colombo, therefore, acted entirely properly in making his *second* request to file his legal malpractice litigation at the superior court. In 2016 in the *second* round at the superior court, Presiding Judge Charles Margines allowed Colombo's litigation to proceed. App. A, 7a,

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[7] The Court of Appeal's opinion characterized the "hearing" Judge Sanders conducted as "*one fair adversary hearing.*" (*Italics* original.) App. A, 10a, line 6. But, it is *not*, as explained.

last ¶. Yet, the subsequently assigned Judge Linda S. Marks, *at the Defendants' urging*, "determined that Colombo's claims for legal malpractice and breach of fiduciary duty were time- barred under [Cal. Code Civ. Proc.] section 340.6." App. A, 8a, 3rd ¶. That is, here, like Judge Sanders, Judge Marks has also prejudicially erred in failing to consider the Tolling Agreement's "*waiver of statute of limitations*" component under Cal. Code Civ. Proc. § 360.5. App. F, 26a, ¶ 8.

6. In sum, while the Parties had entered into the "Tolling Agreement" for the purpose of *allowing* Colombo to re-file his legal malpractice claims at a later time, App. F, 24a-26a, ¶¶ 1-6, Defendants here tried to accomplish the *opposite*. A *reasonable person* aware of the facts would therefore understand that the Defendants, by their conduct, should be *estopped* to rely on statute of limitations under § 340.6, where Colombo's dismissal of his 2012 action without prejudice, App. F, 25a, ¶ 4, and his "delay" in commencing his renewed action in 2015 or 2016, were based on the Defendants' assurance that Colombo's refiling of the same claims would be allowed to go forward.

Under such circumstances, the Defendants, the law firm and its lawyers, App. F, 24a, 28a, cannot (1) justly or equitably *lull* their adversary, Colombo, who is not a lawyer, into a *false* sense of security and (2) thereby cause Colombo to subject his claim to bar of statute of limitations, and (3) then be permitted to plead the very delay caused by the Defendants' conduct as a *defense* to Colombo's renewed malpractice action when brought. *Santa Clara County v, Vargas*, 71 Cal.App.3d 510, 524 (1977), citing and quoting *Estate of Pieper*, 224 Cal.App.2d 670, 690-691 (1964).

Defendants' assertions and disclaims in the "Agreement" at App. F, 26a-27a, ¶¶ 7, 9-13, were merely self-serving, apparently only intended to injure Colombo. But, the "Maxim of Jurisprudence" is that: "No one can take advantage of his own wrong." Cal. Civ. Code § 3517.

7. Judge Marks erred further in not allowing the "new causes of action [Colombo] added in the first amended complaint" on the ground that "they were not included in [Colombo's] request for a prefiling order." App. A, 8a, 3rd ¶. But the California law on point is that the plaintiff's right to amend once of course, Cal. Code Civ. Proc. § 472, does not limit the type of amendment that can be made. *Gross v. Department of Transportation*, 180 Cal.App.3d 1102, 1105 (1986) ["Section 472 does not limit what types of amendments may be made of course and without leave of court"]. California Supreme Court has already held that once a new action has been allowed to proceed under the vexatious litigant statute's prefiling order provision, Cal. Code Civ. Proc. § 391.7, leave to file "motions or other papers in propria persona" is *not* required.[8] *Shalant v. Girardi*, 51 Cal.4th 1164, 1173-1175; 253 P.3d 266, 272-273 (2011).

8. The Court of Appeal below, then, erred in taking the same view as Judge Marks did. App. A, 8a, 13a. **G055823**, Docket, 01/30/2016 entry.

9. The Court of Appeal thus improperly (1) characterized Colombo's litigation as "groundless," "abuse," and "lacks merit or is designed to harass or cause delay," App. A, 13a-14a, and (2) stated that: "this vexatious litigant refuses to stop biting." App. A. 2a, lines 8-9.

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[8] In *Shalant,* supra, in its opinion at Notes 2 and 4 state:

"[2] We have no occasion here to decide whether, or under what circumstances, the filing of an amended complaint constitutes the filing of new litigation within the meaning of section 391.7."

"[4] Nor does our plain language reading of section 391.7 conflict with the definition of "litigation" in section 391, subdivision (a), as including an action "maintained or pending" in a state or federal court."

10. The Court of Appeal's reliance on the superior court judges' Orders, App. A, 6a, 8a, lines 12-14, 7a, 2nd & 3rd ¶¶, 10a ["*one fair adversary hearing*"], 11a, 1st ¶, and the Court of Appeal's ridicule of Colombo, App. A, 2a, 6a, 7a, 11a-14a, and claims of collateral estoppel and res judicata bar, App. A, 2a, 8a-14a, are, therefore, all misplaced and not justified.

REASONS FOR GRANTING THE WRIT

"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 § 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 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. 2016). "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. 2016). "[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); accord, *Garcia v. Baldwin*, 2019 U.S. Dist. LEXIS 162484 (E.D.Cal. September 23, 2019).

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 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 qualify *legally* 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*, 256 A.D. 756;] 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 above under "Statement of the Case" and in Case No. 14-140, a judge leaned on his intuition to conclude that "equity" should run against "vexatious litigants." 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. Case No. 14-464; also reported in Case No. 19-469, docketed on October 10, 2019.

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*, 13 Cal.3d 778, 796; 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-educated, capable, conscientious, dedicated and productive civil servant, having been invited to prepare a review article for inclusion as a chapter in a scientific monograph. The government, however, in continuing retaliation for petitioner's complaint of his employer's engagement in scientific misconduct, 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.

At the California Court of Appeal, the Fourth Appellate District, Division Three below, as explained above, the Court's decision rested on misleading statement of the fact, mistaken notions of the law, and deployment of fallacies in logical reasoning, such as appeal to ridicule and failure to complete the proof. As far as the *constitutionality* of California's "vexatious litigant statute" is concerned, the Court:

(1) Does not question whether the "vexatious litigant" *as defined* by the "vexatious litigant statute" indeed or necessarily reflects *vexatious* conduct;

(2) Accepts as entirely proper the vexatious litigant statute's targeting *pro se* plaintiffs for severe punishment, despite the great disparity in bargaining power between litigants represented by attorneys, and litigants who cannot financially afford the services of attorneys;

(3) Treats a presiding judge's "*it appears*" determination under the "prefiling order" provision of the vexatious litigant statute, Cal. Code Civ. Proc. § 391.7(b), as a "final and conclusive" determination on the merits. App. A, 14a, 3rd ¶;

(4) Takes it for granted that once a *pro se* plaintiff has been declared a "vexatious litigant" under the vexatious litigant statute, a *prefiling order* of the broadest reach, Cal. Code Civ. Proc. § 391.7(a), should attach. App. A, 5a, 3rd ¶ ["Pursuant to a motion made by Nellie Gail, . . ., the superior court determined Colombo was a vexatious litigant. Accordingly, it entered a prefiling order pursuant to Code of Civil Procedure section 391.7"].

(5) Engages in judicial legislation, in violation of constitutional separation of powers, by "preclud[ing] a litigant from filing successive requests," App. A, 2a, 2nd ¶, and by disallowing new causes of action to be added after permission has been granted for the new litigation to proceed, App. A, 8a, 3rd ¶. But the "prefiling order" provision of the "vexatious litigant statute," Cal. Code Civ. Proc. § 391.7, contains no such restrictions.

(6) Simply "DENIED" Colombo's Petition for Rehearing, App. B, 16a, when Colombo called the Court's attention to: (*i*) the serious constitutional challenges to California's "vexatious litigant statute" and (*ii*) this Court's published opinions on point, including *Johnson v. United States*, 135 S.Ct. 2551 (2015) and *Sessions v. Dimaya*, 138 S.Ct. 1204 (2018).

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

Application of the canon of constitutional avoidance requires the availability 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" based on a numerical quota, 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 canon of constitutional avoidance to apply.

Declaring these key 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, 39 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

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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Respectfully submitted,

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