Supreme Court, U.S.
FILED
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19-7766

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Guillermo Garcia
_____ — PETITIONER
(Your Name)

vs.

B.A. Lacey et al.
_____ — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

California Court of Appeal, Fifth Appellate District

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Guillermo Garcia
(Your Name)

CDCR # V31771, CIM-II-Facility A-1-113L, P. O. Box 3100
(Address)

Chino, CA 91708
(City, State, Zip Code)

(Phone Number)

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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 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 follows:

Petitioner: Guillermo Garcia

Respondents: B. A. Lacey; M. Baldwin; J. Tennison; D. Wattle; C. Koening; H. Lackner; P. Quin; F. X. Chavez; J. Kavanaugh

RELATED CASES

Trial Court: Tuolumne County Superior Court

Case No.: CV57059 Garcia v. Lacey et al. Still pending

Court of Appeal: Fifth Appellate District

Case No.	Caption	Date of Entry of Judgment
F066681	Garcia v. Lacey et al.	11/12/2014 (Garcia prevails: 231 Cal.App.4th 402.)
F073831	Garcia v. Lacey et al.	9/1/2016
F074756	Garcia v. Lacey et al.	9/11/2019
F078786	Garcia v, Lacey et al. (Split out of F074756 on 2/8/2019)	4/30/2019
F079041	Garcia v. Lacey et al.	

California Supreme Court

S256347	Garcia v. Lacey et al.	8/14/2019 (from F078786)
S258678	Garcia v. Lacey et al.	(from F074756)

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The unpublished opinion of the California Court of Appeal, Fifth Appellate District, in App. A, 1a-22a, is reported at 2019 Cal. App. Unpub. LEXIS 3046 and 2019 WL 1923679. The Court of Appeal's Order denying rehearing, in App. B, 23a, is unpublished. The California Supreme Court's Order denying discretionary review, in App. C, 24a, is reported at 2019 Cal. LEXIS 6159.

JURISDICTION

The Order of the California Supreme Court denying discretionary review was entered on August 14, 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).

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).

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.*

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. 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 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 Code Civ. Proc., § 472), so as to dismiss the case. Yet, on appeal, the Court of Appeal, Fourth Appellate District, Division One, *affirmed*!

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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 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*.

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." *See*: *ante*, p. 5, 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.

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. 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, dockets on October 10, 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, Fifth Appellate District, has ruled under the "vexatious litigant statute."

CDCR's Mission, Values, and Regulation

California Department of Corrections and Rehabilitation ("CDCR") has the *Mission* to "enhance public safety through safe and secure incarceration of offenders, effective parole supervision, and rehabilitative strategies to successfully reintegrate offenders into our communities."

CDCR's *Values* include the following:

- **Integrity:** We conduct ourselves professionally through fair, honest, and ethical behavior. We have the courage to do what is right, even in the face of adversity.
- **Accountability:** We accept responsibility for our actions and decisions as well as their consequences.
- **Respect:** We respect each other's differences and treat others with courtesy, dignity, and consideration.

(http://cdcr.ca.gov/About_CDCR/vision-mission.values.html)

To effectuate CDCR's policies and mission, after balancing risks and advantages, CDCR has promulgated regulations. The regulations are not just *guidelines*, but have the force of law. Under such law, CDCR employees have ministerial *duties* to perform, and actions *not* to engage in.

15 Cal. Code Regs. § 3287(a)(2), for example, has provided the following:

> "Cell and property inspections are necessary in order to detect and control serious contraband and to maintain institution security.

> Such inspections will not be used as a punitive measure nor to harass an inmate. Every reasonable precaution will be taken to avoid damage to personal property and to leave the inmate's quarters and property in good order upon completion of the inspection."

As CDCR employees do not have the authority to depart from CDCR regulations, to conduct themselves in accordance with what CDCR regulations provides is merely CDCR employees' *ministerial* duty. **F074756**, Appellant's Opening Brief ("AOB") at pp. 13-14.

Grievances

Defendants Wattle and Lacey started harassing inmate Guillermo Garcia on August 10, 2010, by paging him to go to the office several times a day. They asked Garcia for a copy of the grievance Garcia had submitted, a CDCR 602 appeal, against Lacey for cell search. At the meetings, Wattle and Lacey made several threats to move Garcia out of his building.

Later they entered Garcia's cell multiple times from August 2011 to November 6, 2011, took away Garcia's eye glasses, and confiscated and damaged some of Garcia's properties including his typewriter. Lacey and Wattle did this several times, until they had damaged Garcia's typewriter. The typewriter was never replaced. Their apparent purpose was to prevent Garcia from filing further grievances.

Lacey and Wattle also retaliated against Garcia by filing false write-ups against Garcia, so as to justify their actions or omissions.

On October 22, 2011, Defendant Lacey falsely accused Garcia of disobeying orders, and issued to Garcia a CDCR 115, a charging document. Defendant J. Kavanaugh then "found" Garcia guilty and ordered Garcia to be placed in solitary confinement in a cold cell for 20 days. **F074756**, AOB at p. 3.

Despite such escalating harassment, CDCR denied all of Garcia's grievances.

Causes of Action Garcia alleged at the Superior Court

On May 31, 2016, Garcia filed his Third Amended Complaint and a Request for Judicial Notice in Support. The *First* Cause of Action alleged violation of plaintiff's constitutional rights by all of the Defendants. The *Second* Cause of Action alleged Intentional Infliction of Emotional Distress by Lacey and Wattle. The *Third* Cause of Action alleged Negligent Infliction of Emotional Distress by all Defendants. The *Fourth* Cause of Action alleged Continuous Maintenance of a Harassing and Hostile Incarceration Environment by all Defendants. The *Fifth* Cause of Action alleged Negligence (see: Judicial Council of California Civil Jury Instructions, "CACI," No. 400 et seq.) against all Defendants. **F074756**, AOB at p. 4.

Appeal

On November 16, 2016, Garcia timely appealed from the Toulumne County Superior Court's Order sustaining Defendants' demurrer without leave to amend. In his Appellant's Opening Brief ("AOB") filed on September 26, 2017 in **F074756**, Garcia pointed out the prejudicial errors in the trial court's rulings:

(1) When reviewing the Plaintiff's Government Claim and Complaint, the Superior Court had failed to consider the exhibits attached to these documents. AOB at pp. 8-11. Besides, the Defendants were aware of what they themselves had done anyway, and therefore were not short on notice. *Khoury v. Maly's of California, Inc.*, 14 Cal.App.4th 612, 616 (1993); AOB at pp. 5, 18-19.

(2) Plaintiff did properly allege causes of action warranting relief. AOB at pp. 11-16, citing *Sandin v. Conner*, 515 U.S. 472, 484 (1995), *Fletcher v. Western National Life Ins. Co.*, 10 Cal.App.3d 376, 394-409 (1970) ["Emotional distress" includes any "highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, or worry"–as quoted by CACI No. 1604]. and *Ramos v. County of Madera*, 4 Cal.3d 685, 692; 484 P.2d 93, 98 (1971) ["Unless the Legislature has clearly provided for immunity, the important societal goal of compensating injured parties for damages caused by willful or negligent acts must prevail"].

(3) Contrary to what Defendants asserted, because the Defendants were *not* making CDCR's basic policy decisions, Defendants are *not* immune under Government Code section 820.2. *Johnson v. State of California*, 69 Cal.2d 782, 794-795, n. 8; 447 P.2d 352, 361 (1968); *Caldwell v. Montoya*, 10 Cal.4th 972, 981; 897 P.2d 1320, 1325-1326 (1995); *Barner v. Leeds*, 24 Cal.4th 676, 684-685; 13 P.3d 704, 709-710 (2000); *Scott v. County of Los Angeles*, 27 Cal.App.4th 125, 141-142 (1994). AOB at pp. 16-18.

(4) The trial court erred further by taking Defendants' misstated version of Plaintiff's allegations as true when ruling on Defendants' demurrer, and by failing to apply the proper standard of review. AOB at pp. 6-7, 9-10, 18-20.

As of now, Defendants still have not filed their Reply Brief.

In response to the AOB, *rather than* filing a *Reply Brief*, Defendants filed a Motion to declare Garcia a "vexatious litigant" under the "vexatious litigant statute" 's *quota* (§ 391(b)(1)(i)), on December 29, 2017. Taking full advantage of Garcia' lack of funds, Defendants further demanded that Garcia furnish *security* for the Defendants' "*protection*." Noting Defendants' improper reliance on *McColm* and material departure from federal authorities including *BE & K* (2002), *supra*, etc., Garcia filed his Opposition. To this Opposition, Defendants did not file a Reply. On May 11, 2018, the Court of Appeal *requested* that Respondents file a Reply to Garcia's Opposition. Defendants's Reply finally reached the Court of Appeal on August 7, 2018, yet the Reply was *unable* to refute Garcia's showing.

F078786 split out of F074756.

On February 8, 2019, the Court of Appeal split the vexatious litigant motion portion of **F074756** into a new case, **F078786**. On February 26, 2019, the Court of Appeal issued an Order in the nature of a "Tentative Ruling" reciting Defendants' allegations, and stated that all parties "may" submit further briefing. On March 21, 2019, the Court of Appeal filed Garcia's "Constitutional Challenges to California's Vexatious Litigant Statute," and on April 11, 2019, Garcia's "Supplemental Brief."

Garcia's "*Constitutional Challenges*" cited, among other authorities, *BE & K* (2002), *Coppedge* (1962), *Ringgold-Lockhart* (9th Cir. 2014), *Johnson* (2015), *Dimaya* (2018), and *Marbury v. Madison*, 5 U.S. 137, 180 (1803), ending with: "[t]he Proper

Standard of Review, Summarized," just before the "Conclusion."

Garcia's "*Supplemental Brief*" explained why the Defendants' vexatious litigant motion should be denied:

(1) The constitutional right to petition is "fundamental to our scheme of ordered liberty," with "dee[p] root[s] in [our] history and tradition." *Timbs v. Indiana*, 139 S.Ct. 682, 686-687 (2019).

(2) The litigations Garcia initiated are not of the "*groundless*" type the Legislature was concerned about.

(3) *McColm*'s broadened definition for "litigation" has, in effect, already been *overruled* by California Legislature's statutory amendment in 2002. *Ante*, p. 5, n. 1.

(4) Where, as here, Defendants have not produced the full case records for the "litigations" Defendants had asked the Court of Appeal to rely on, it is often *impossible* for the court to discern the merit of those cases.

(5) The "vexatious litigant statute" 's "prefiling order" provision is *not* narrowly tailored. In addition, what does "*it appears*" mean? How can a litigant be expected to meet the standard that is not unknown to him? Such imposition on the litigant is more than what *due process* can tolerate.

To these two briefs, Defendants did *not* file any response.

Yet, on April 30, 2019, the Court of Appeal issued its decision in **F078786**, in Defendants' favor.

Problems with the Court of Appeal's decision in F078786

1. In dismissing Garcia's Third Amended Complaint, the superior court erred in failing to consider the Exhibits Garcia attached to Garcia's Government Claim and Complaint, and erred in failing to apply the proper standard of review. Here, the Court of Appeal did the same. App. A, 14a-18a.

This is the Court of Appeal's *error in fact* and *in law*.

2. Defendants harassed Garcia for months, took away his eye glasses, damaged his typewriter, and unjustly placed Garcia in solitary confinement for 20 days. Defendants' purpose was to cause Garcia severe emotional distress, and indeed caused Garcia severe emotional distress. In the Fifth Appellate District's view, however, the emotional distress was not "so severe as to exceed all bounds of that usually tolerated by a civilized community." App. A, 19a. The Court of Appeal does not mention, however, that the Defendants' ultimate goal was to deprive Garcia of Garcia's constitutional right to petition. So, the *question* is: Is deprivation of Garcia's "clearly established," protected, constitutional right to petition, *Pearson v. Callahan*, 555 U.S. 223, 232 (2009), taking away Garcia's last chance for protection, with serious "chilling effect," *O'Brien v. Welty*, 818 F.3d 920, 932 (9th Cir. 2016), a threat or punishment, *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000), that, to the "civilized community," is "severe," or not?

The Court of Appeal opined that all that Garcia needed to do was to "harden himself." App. A, 20a. As a result, Garcia not only should not receive any compensation for the damage to his properties, but must now pay Defendants $8,500 for the Defendants' "protection." App. A, 21a-22a.

In the process, however, the Court of Appeal is also dispensing with CDCR's "Mission," "Values," and regulation (15 Cal. Code Regs., § 3287(a)(2)), App. A, 13a-14a, and simultaneously *encouraging* Defendants to do even *further* wrongs. Apparently the Court of Appeal has here mistaken its own predilections for public policy deserving recognition at law, *Green v. Ralee Engineering Co.*, 19 Cal.4th 66, 71-72; 960 P.2d 1046, 1049 (1998), but the Court of Appeal does not have the authority to do so–under the constitutional *separation of powers*.

This is, again, the Court of Appeal's *error in law*.

3. Even though Defendants have *not* been able to refute Garcia's "Constitutional Challenges to California's Vexatious Litigant Statute," the Court of Appeal eagerly embraced: (1) the Statute's *quota* under § 391(b)(1)(i); (2) *McColm*'s broadened definition for "litigation"; and (3) *McColm*'s progeny over the years, as the basis to declare Garcia a "vexatious litigant," App. A, 5a-14a, even though *McColm*'s broadened definition for "litigation" has, in effect, already been *overruled* by statutory amendment in 2002. *Ante*, p. 5, n. 1. In doing so, the Court of Appeal has misapplied the *doctrine* of *stare decisis*.

4. In fact, the Court of Appeal has embraced all terms of the "vexatious litigant statute." App. A, 5a-14a. In doing so, the Court of Appeal had to *avoid* the United States Constitution and laws of the United States, yet *failing* to offer any statutory interpretation which was a "*fair alternative*," *United States v. Davis*, 139 S.Ct. 2319, 2332 (2019). But when, in effect, *overruling* the pertinent United States Supreme Court precedents, the Court of Appeal did not have the jurisdiction to do so. U.S. Const., art. VI, cl. 2.

Petition for Rehearing

On May 17, 2019, the Court of Appeal filed Garcia's Petition for Rehearing. Garcia's Petition noted the following:

(1) Judicial review must be sufficiently *robust* to reveal and remedy any evident deprivation of constitutional rights. *In re Lawrence*, 44 Cal.4th 1181, 1211; 190 P.3d 535, 553 (2008).

(2) The doctrine of *stare decisis* does not preclude "reconsideration of a poorly reasoned opinion." *Riverisland Cold Storage v. Fresno-Madera Protection Credit Assn.*, 55 Cal.4th 1169, 1180; 291 P.3d 316, 322-323 (2013). The doctrine "should not shield court-created error from correction." *Cianci v. Superior Court*, 40 Cal.3d 903, 923-924; 710 P.2d 375, 387 (1985).

(3) *Pre se* complaints must be *liberally* construed. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). The Court of Appeal, however, did the contrary. App. A, 14a-21a.

(4) The Court of Appeal's reliance on *McColm* and its *progeny*, App. A, 5a-8a, 10a-12a, is *misplaced.*

(5) The Court of Appeal's reliance on California case laws which are *inconsistent* with United States Supreme Court precedents, because "[w]e find these [California] precedents to be persuasive," App. A, 11a-12a, is also misplaced.

Outcome

On May 28, 2019, the Fifth Appellate District summarily denied rehearing in **F078786**, and issued Remittitur against Garcia on August 15, 2019, the day after the

California Supreme Court denied discretionary review.

In **F074756**, for Garcia's failure to furnish the security the Court of Appeal required in **F078786**, the Court of Appeal issued an Order *dismissing* **F074756** on September 11, 2019.

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; 2019 WL 4594701 (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.

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 Fifth Appellate District below, Appellant Guillermo Garcia had previously raised a question of first impression successfully (in Case No. **F066681**, arising from the same trial court action below as here), leading to the Court of Appeal's publication of the opinion, *Garcia v. Lacey*, 231 Cal.App.4th 402 (2014). In 2019, however, the Court of Appeal went out of its way to declare Garcia a "vexatious litigant" by:

(1) *Omitting* key facts and *failing* to apply the proper standard of review;

(2) *Relying* on *McColm*'s broadened definition for "litigation" already overruled by the 2002 statutory amendment, *ante*, p. 5, n. 1, in violation of separation of powers;

(3) *Disregarding* pertinent United States Supreme Court precedents; and

(4) *Misapplying* both the doctrine of *stare decisis* and the canon of *constitutional avoidance*. *Ante*, at pp. 8-16.

In fact, on the basis of the same "vexatious litigations" the Fifth Appellate District considered, App. A, 9a, a federal district court concluded, on September 23, 2019, that: "Defendant [Chavez] fails to demonstrate that Plaintiff [Garcia] qualifies as a vexatious litigant even under the more lenient California standard. As stated, of the eight cases cited by Defendant, one was voluntarily dismissed, one was dismissed as abandoned by Plaintiff, and one was dismissed for failure to pay the filing fee and prosecute the action. There is an insufficient basis to find that these dismissal constitute an adverse determination to Plaintiff." *Garcia v. Baldwin*, 2019 U.S. Dist. LEXIS 162484, *9, n. 3 (E.D.Cal. 2019).

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

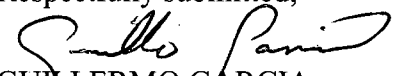
invites arbitrary enforcement, *or* the *over-broad* one-size-fits-all prefiling order. As such, no viable alternative exists for the canon of constitutional avoidance to apply.

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

The petition for a writ of certiorari should be granted.

Respectfully submitted,



GUILLERMO GARCIA
Petitioner in pro se
CDCR # V31771
CIM-II-Facility A-1-113L
P. O. Box 3100
Chino, CA 91708

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