No. 19-7990

ORIGINAL

In The

SUPREME COURT OF THE UNITED STATES

GABRIEL L. ROMAN
Petitioner,

vs.

SARA H. KIM, MD and ARMEN A. KASSABIAN, MD
Respondents,

On Petition for Certiorari to the Supreme Court of California

PETITION FOR A WRIT OF CERTIORARI

Gabriel L. Roman
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QUESTIONS PRESENTED FOR REVIEW

1) Whether the California Vexatious Litigant Statute is Unconstitutional

List of Parties

1) GABRIEL L. ROMAN, Plaintiff and Petitioner;

2) SARA H. KIM, MD, Defendant and Respondent;

3) ARMEN A. KASSABIAN, MD, Defendant and Respondent;

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The order of the Supreme Court of California filed on December 11, 2019, denying the Petition for Review under Case S258846, is reprinted, respectively, in the Appendix A.

The order of the Court of Appeal of The State of California Second Appellate filed on October 8, 2019, denying the Petition for Rehearing, under Case B276067 is reprinted, respectively, in the Appendix B.

The memorandum order of the Court of Appeal of The State of California Second Appellate filed on September 23, 2019, affirming the trial court decisions, under Case B276067 is reprinted, respectively, in the Appendix C.

The Pre-filing order- Vexatious Litigant of the Los Angeles Superior Court filled on June 28, 2016 entered against Gabriel L. Roman under Case EC058421, is reprinted, respectively, in the Appendix D.

The Order deeming Gabriel L. Roman a Vexatious Litigant of the Los Angeles Superior Court filled on February 23, 2016 under Case EC058421, is reprinted, respectively, in the Appendix E.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a). The date on which the California Supreme Court denied the petition for review was December 11, 2019. A copy of that decision appears at Appendix no. A.

CONSTITUTIONAL PROVISIONS, STATUTES AND POLICIES AT ISSUE

First Amendment to the United States Constitution

Congress shall make no law [...] abridging the freedom of speech, [...] and [the right] to petition the Government for a redress of grievances;

Fifth Amendment To The United States Constitution

No person shall [...] be deprived of life, liberty, or property, without due process of law;

Seventh Amendment To The United States Constitution

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law;

Eight Amendment To The United States Constitution

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

Fourteenth Amendment To The United States Constitution

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 Code of Civil Procedure section 391 et. seq.

As used in this title, the following terms have the following meanings:

(a) "Litigation" means any civil action or proceeding, commenced, maintained or pending in any state or federal court.

(b) "Vexatious litigant" means a person who does any of the following:

(1) In the immediately preceding seven-year 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 or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing.

(2) After a litigation has been finally determined against the person, repeatedly relitigates or attempts to relitigate, in propria persona, either (i) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or (ii) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined.

(3) In any litigation while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay.

(4) Has previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding based upon the same or substantially similar facts, transaction, or occurrence.

(c) "Security" means an undertaking to assure payment, to the party for whose benefit the undertaking is required to be furnished, of the party's reasonable expenses, including attorney's fees and not limited to taxable costs, incurred in or in connection with a litigation instituted, caused to be instituted, or maintained or caused to be maintained by a vexatious litigant.

(d) "Plaintiff" means the person who commences, institutes or maintains a litigation or causes it to be commenced, instituted or maintained, including an attorney at law acting in propria persona.

(e) "Defendant" means a person (including corporation, association, partnership and firm or governmental entity) against whom a litigation is brought or maintained or sought to be brought or maintained.

California Code of Civil Procedure section 391.1

In any litigation pending in any court of this state, at any time until final judgment is entered, a defendant may move the court, upon notice and hearing, for an order requiring the plaintiff to furnish security or for an order dismissing the litigation pursuant to subdivision (b) of Section 391.3 . The motion for an order requiring the plaintiff to furnish security shall be based upon the ground, and supported by a showing, that the plaintiff is a vexatious litigant and that there is not a reasonable probability that he or she will prevail in the litigation against the moving defendant.

California Code of Civil Procedure section 391.7

(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. Disobedience of the order by a vexatious litigant may be punished as a contempt of court.

(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. The presiding justice or presiding judge may condition the filing of the litigation upon the furnishing of security for the benefit of the defendants as provided in Section 391.3 .

(c) The clerk may not file any litigation presented by a vexatious litigant subject to a prefiling order unless the vexatious litigant first obtains an order from the presiding justice or presiding judge permitting the filing. If the clerk mistakenly files the litigation without the order, any party may file with the clerk and serve, or the presiding justice or presiding judge may direct the clerk to file and serve, on the plaintiff and other parties a notice stating that the plaintiff is a vexatious litigant subject to a prefiling order as set forth in subdivision (a). The filing of the notice shall automatically stay the litigation. The litigation shall be automatically dismissed unless the plaintiff within 10 days of the filing of that notice obtains an order from the presiding justice or presiding judge permitting the filing of the litigation as set forth in subdivision (b). If the presiding justice or presiding judge issues an order permitting the filing, the stay of the litigation shall remain in effect, and the defendants need not plead, until 10 days after the defendants are served with a copy of the order.

(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.

(e) The presiding justice or presiding judge of a court may designate a justice or judge of the same court to act on his or her behalf in exercising the authority and responsibilities provided under subdivisions (a) to (c), inclusive.

(f) The clerk of the court shall provide the Judicial Council a copy of any prefiling orders issued pursuant to subdivision (a). The Judicial Council shall maintain a record of vexatious litigants subject to those prefiling orders and shall annually disseminate a list of those persons to the clerks of the courts of this state.

STATEMENT OF THE CASE

A. Facts Giving Rise To This Case

The Petitioner, Gabriel L. Roman was diagnosed with prostate cancer on February 1, 2011. Part of his cancer treatment procedure was the need to implant some small gold seeds ("fiducials") into his prostate in order to undergo Cyberknife targeted high dosage of radiation for his prostate cancer. The gold fiducials were necessary as they would be visible on the X-ray machine to assist the targeted radiation to be delivered to just that area mapped by the fiducials.

The fiducials implant procedure was performed at the urologist medical office of Armen A. Kassabian, MD on March 7, 2011. Unbeknownst to Roman during that time exact period of time Dr. Kassabian was binging on alcohol, methamphetamines, cocaine, vicodin and zanax, and his medical license was

suspended because of that, but he was placed on Probation by the California medical Board. Dr. Sara H. Kim, the radiation oncologist who was supposed to do the radiation treatment after the fiducials implant, was also there. Fiducials implant was not part of her knowledge and expertise. After Dr. Kassabian confessed to Dr. Kim that he had never before performed this fiducials implant procedure, Dr. Kim took it upon herself to guide Dr. Kassabian as to where to implant the fiducials. Dr. Kassabian forgot to administer any type of anesthesia to Roman. This resulted in excruciating pain and suffering for Roman, and he was moaning in pain the entire time. On March 18, 2011 Roman learned for the first time that the fiducials were implanted in the wrong place creating real and palpable damage and injury. When Roman asked Dr. Kim on March 21, 2011 who committed medical malpractice Dr. Kim abandoned him as her patient.

B. Procedural History

The original complaint was filed on May 31, 2012 by Roman, against defendants Armen A. Kassabian, MD ("Dr. Kassabian"), Sara H. Kim, MD ("Dr. Kim"), Glendale Adventist Medical Center ("GAMC") and does 1 through 50, alleging Medical Malpractice –Negligence, Medical Malpractice via Agency – Negligence and Lack of Informed Consent. A First Amended Complaint was subsequently filed on September 24, 2012.

All three defendants filed motions for summary judgment and Dr. Kim also filed two motions to declare Roman a vexatious litigant. The trial court granted Dr. Kim's motion to declare Roman a vexatious litigant and dismissed the action against her when Roman failed to post a $10,000 bond. The trial court also granted summary judgment for Dr. Kassabian and GAMC, and dismissed the actions as to those defendants as well. Roman appealed all dismissals.

C. The Appellate Court Proceedings

The First Appeal

On June 27, 2015 the court of appeal reversed the finding that Roman was a vexatious litigant, and remanded the case back as to Dr. Kim in full.

As to GAMC, the court affirmed the granting of the Summary Judgment, finding that Dr. Kim was not GAMC's agent and that Roman failed properly to address in its appellant opening brief the statute of limitation as to GAMC.

As to Dr. Kassabian, the court of appeal affirmed in part the granting of the summary judgment as to the lack of informed consent cause of action but reversed the grant of the summary judgment as to medical malpractice negligence, finding that it is within the knowledge of a layperson that Roman experienced excruciating

pain and suffering when the surgical implant procedure was performed upon him without anesthesia.

The Case is Remanded Back to the Trial Court

The remittitur was issued on October 2, 2015. Upon remittitur and upon the peremptory challenge to Judge Goldstein, the case was re-assigned to Judge William D. Stewart.

On remand, in November of 2015, Dr. Kim filed another motion to deem Roman a vexatious litigant and Dr. Kassabian filed a joinder to it. Roman opposed the motion. On February 19, 2016, the trial court granted the motion and deemed Roman a vexatious litigant and also entered a pre-filing order against him on June 28, 2016, but it did not order Roman to post security since it did not find there was no probability that Roman would succeed on his case against the defendants. A copy of order deeming Roman a vexatious litigant entered on February 23, 2016 appears at Appendix no. E. A copy of the pre-filing order filed on June 28, 2016 appears at Appendix no. D.

On June 14, 2016 Dr. Kim filed a Motion for Summary Judgment as to the Second Amended Complaint. Roman opposed that motion. The summary judgment was granted on 08/26/2016 and an order of dismissal was entered on 09/15/2016 as to Dr. Kim.

The Second Appeal

Roman filed two timely appeals. One appeal challenged the vexatious litigant order and the pre-filing order and the other one challenged the dismissal of Dr. Kim after the granting of the summary judgment.

On January 30, 2017, the Court of Appeal issued an order allowing both appeals to go through and consolidated both appeals.

Oral argument before the Court of Appeal was held on August 27, 2019. Luminita Roman addressed the Court of Appeal on behalf of Roman as a reasonable accommodation to his disability.

The Non-Published Opinion was issued on September 23, 2019 affirming in full the granting of the summary judgment for Dr. Kim and the order deeming Roman a vexatious litigant and the pre-filing order entered against him. A copy of the Non-Published Opinion filed on September 23, 2019 appears at Appendix no. C Appellant filed a petition for rehearing on October 7, 2019. That petition was denied on October 8, 2019. A copy of that denial order appears at Appendix no. B.

Petition to the California Supreme Court

On October 28, 2019 Roman petitioned the Supreme Court of California to review the case. That petition was summarily denied by the Supreme Court of California on December 11, 2019. A copy of that summary denial appears at Appendix no. A.

REASONS WHY CERTIORARI SHOULD BE GRANTED
I.

Review Is Warranted Because The United States Court of Appeals For The Ninth Circuit And Other California Courts of Appeal Have Decided An Important Question of Federal Law That Has Not Been, But Should Be, Settled By This Court.

On September 23, 2019, the Court of Appeal of The State of California Second Appellate District held in its memorandum order that the California Vexatious Litigant Statute (hereafter "VLS") is constitutional by a cursory enumeration of some other cases deeming it constitutional. However, the generality quoted by that panel is of little utility, as it fails to show ***why*** the VLS is Constitutional.

Roman has attacked the VLS on many grounds showing that the VLS violate the supremacy clause and is unconstitutional under the First, Fifth, Seventh, Eighth, and Fourteenth Amendments. In turn, the appellate Court held that "[d]espite repeated challenges on these grounds, the vexatious litigant statutes have consistently been upheld as constitutional. *Fink v. Shemtov* (2010) 180 Cal.App.4th 1160, 1170-1171; *In re R.H.* (2009) 170 Cal.App.4th 678, disapproved on other grounds in *John v. Superior Court* (2016) 63 Cal.4th 91; *Wolfe v. George* (9th Cir. 2007) 486 F.3d 1120; *Wolfgram v. Wells Fargo Bank* (1997) 53 Cal.App.4th 43; *Muller v. Tanner* (1969) 2 Cal.App.3d 445; *Taliaferro v. Hoogs* (1965) 236 Cal.App.2d 521.)."

There is a distinction between VLS being constitutional and being capriciously upheld as constitutional, by string citations without analysis.

A cursory review of the cases relied upon by the appellate Court, shows that the decisions in those cases were unsound and peppered with grave errors, as (1) the VLS is patterned after section 834 of the Corporations Code from the derivative suits with severe consequences, as *individual's rights* that are secured by the US Constitution are now affected and infringed upon; (2) there is no requirement under the VLS of a finding that the prior suits were baseless or sham pleadings as required by this Court in numerous cases in order for the suits to lose their First Amendment protection; (3) the wrong standard of scrutiny was used by the Ninth

Circuit Court in *Wolfe v. George*, (9th Cir. 2007) 486 F.3d 1120, such as the ***reasonable test*** instead of the ***strict scrutiny*** or the ***intermediate test*** because First Amendment rights are involved; (4) the reasons behind implementing the VLS such as *"keeps vexatious litigants from clogging courts"* and *"curbing those for whom litigation has become a game"*, cannot justify the violation of the First Amendment right of that litigant acting in his individual capacity to petition the government for redress of grievances and fails to rise to a level of a *compelling, not able to be refuted, governmental interest*, and (5) the VLS is overreaching and not narrowly tailored, since there are no alternatives left to a vexatious litigant, let alone ample alternatives, "as the pre-clearance requirement imposes a substantial burden on the free-access guarantee." Review of the memorandum order is necessary and appropriate since the memorandum order when it comes to the unconstitutionality of the VLS and the cases quoted in that order conflict with more than one relevant decision of this Court regarding which suits lose the protection of the First Amendment and which don't and the fact that there is no such requirement for a suit to be successful in order not to lose its First Amendment Protection (See *BE&K Constr. Co. v. NLRB*, 536 U.S. 516 (2002) at 531, 532 and 533), which the California Vexatious Litigant Statute says that it does.

Furthermore, the United States court of appeals for the 9th circuit in *Wolfe v. George*, 486 F. 3d 1120 – (9th Circuit 2007) has entered a decision in conflict with the decision in *Ringgold-Lockhart v. County of Los Angeles,* 761 F. 3d 1057(9th Circuit 2014.) from the same 9th Circuit United States Court of Appeals on the same important matter, as to the standard of review that needs to be applied as to the constitutionality of the California Vexatious Litigant Statute.

A. THE CALIFORNIA VEXATIOUS LITIGANT STATUTE IS UNCONSTITUTIONAL

Article six paragraph 2 of the U.S. Constitution, states:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

See also Marbury v. Madison, 5 U.S. 137 (1803). This is one of the leading cases in the history of United States of America and has been challenged some two hundred times and never overturned. The opinion of the court was given by Honorable John Marshall Chief Justice of the Supreme Court. His opinion **said for a secondary law to come in conflict with the Supreme law was illogical. For certainly the supreme law will prevail over all other law. And our**

forefathers have intended that the supreme law would be the basis of all law. And for any law to come in conflict would be null and void of law. It would bear no power to enforce. It would bear no obligation to obey. It would purport to settle as it would never existed for unconstitutionality would date to the enactment of such a law not for the date so branded in the open court of law. No Courts are bound to uphold it. And no citizens are bound to obey it. It operates as a mere nullity or a fiction of law which means it doesn't exist in law.

This argument is so effective that it nullifies the California Vexatious Litigant Law. The California legislature had no power to pass a law that is unconstitutional.

The California vexatious Litigant Law conflicts with the **First Amendment** to the US Constitution(**Congress shall make no law....abridging the freedom of speech... and [the right] to petition the government for a redress of grievances);** it conflicts with the **Fifth Amendment** to the US Constitution (**No person shall be... deprived of life, liberty, or property, without due process of law**) it conflicts with the **Seventh Amendment** to the US Constitution (**In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law);** it conflicts with the Eight Amendment to the US Constitution:(**Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.)** and also conflicts with the **Fourteenth Amendment** to the US Constitution (**Section 1. ...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.).**

The California vexatious Litigant law was enacted at the request of the California Bar Association which sought to continue its monopoly over the practice of law in the State of California and for its lawyers to be unopposed by people who are representing themselves in *propia persona* in courts. This law prohibits pro per litigants from filing any new lawsuits in the state of California without leave of Court if a court finds that a pro per had five cases finally determined against him other than small claims actions in the last seven years, or that he filed repeatedly unmeritorious motions while acting in pro per. (C.C.P. §391(b)(1) and (3), see also C.C.P. §391.7.)

One would wonder how many cases and how many motions attorneys are losing during their careers and nobody is holding them accountable, yet the California Bar Association wants pro pers to be held accountable for the same thing.

A different standard applies to attorneys than to *pro pers* and a divergence from the equal protection under the law clause under the US Constitution. This law discriminates against non-licensed attorneys in furtherance of the monopoly of the California State Bar over the practice of law, and basically is highjacking the Justice system for their own benefit in violation of RICO law.

This law also provides for a judge to sit on a civil case and decide if the case has merit, in direct violation of the Seventh Amendment to the US Constitution which provides for a jury to rule upon the case if the controversy is over $20.00. See *Moran v. Murtaugh Miller Meyer & Nelson, LLP* (2007) 40 Cal. 4th 780. , *See also*, C.C.P. §§ 391.1, 391.2 and 391.3. Therefore, the California vexatious Litigant law is Unconstitutional.

First, the holding against the pro per litigant and the punishment of the pro per litigant due to the fact that he had five cases finally determined against him in the last seven years by either dismissing the current litigation because of that fact or by entering a prefiling order against him or her or both, comes in direct conflict with the First Amendment to the US Constitution as it curtails that pro per litigant's freedom of speech and its right to petition the government for redress of grievance. Since ***the filing*** of the prior actions within the past seven years fall strictly within a person's freedom of speech and his right to petition the government for redress of grievance, there can be no law enacted to curtail such freedom of speech and no penalty could be exacted against that individual for exercising his rights without being in conflict with the First Amendment to the US Constitution. Therefore, the California Vexatious Litigant law is Unconstitutional.

Second, the holding against a pro per litigant and the punishment of the *pro per* litigant due to the fact that the pro per litigant has filed motions seeking redress from the Court or has opposed motions filed by the defendant in a pending case by either dismissing the current litigation because of that fact or by entering a prefiling order against him/her or both, comes in direct conflict with the Fourteenth Amendment to the US Constitution as it curtails that pro per litigant's right of due process. "The essential requirements of due process ... are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement." See *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985).

Third, this law also provides for a judge to then request a bond which usually is in the nature of tens of thousands of dollars if not hundreds of thousands of dollars at the request of the defendant should the Court decide in violation of the seventh amendment to the US constitution that the case has no merit, which violates the Eight amendment to the US Constitution which ***prohibits excessive bail and excessive fines***.

Lastly, this law then provides for a prefiling order to be entered against the vexatious litigant who would need to seek leave of the Presiding judge wherever filing any new litigation in the State of California. This conflicts with the Fifth and Fourteenth Amendment to the US Constitution's equal protection clause and right of due process under the law, as it treats a "vexatious litigant" differently than any other citizen, and denies him or her full access to the courts.

> "As explained in *Luckett v. Panos* (2008) 161 Cal.App.4th 77, 90 [73 Cal.Rptr.3d 745], footnote omitted (*Luckett*), "a *prefiling order* against a vexatious litigant meets the definition of an injunction." The court in *Luckett* stated: "[T]here is no question that the prefiling order contemplated by section 391.7, subdivision (a) *is* an injunction. It is, literally, an order requiring [a party] to refrain from doing a particular act — filing any new litigation without certain permission. It is punishable by contempt. And it is sufficiently definite to be punishable by contempt." (*Luckett, supra,* 161 Cal.App.4th at p. 85; see *City of Santa Cruz v. Patel* (2007) 155 Cal.App.4th 234, 242 [65 Cal.Rptr.3d 824]."

See In Re *Marriage of Rifkin &Carty* (2015) 234 Cal.App.4th 1339.

Considering that an injunction *is* a separate action that allows a party to file a lawsuit against another party without adequate notice and without the benefit of discovery, and without a jury trial, C.C.P. Section 391.7, amounts to a denial of the right of due process and equal protection under the US Constitution and under the California Constitution.

This Court noted the importance of the jury right in its 1968 ruling of *Duncan v. Louisiana,* 391 U.S. 145:

> "Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitution strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right trial by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."

1. The Enactment of the California Vexatious Litigant Statute

The California vexatious Litigant law was enacted on July 13, 1963, at the request of the California Bar Association.

Taliaferro v. Hoogs, 236 Cal. App. 2d 521 - Cal: Court of Appeal 1965,at 526, unveils the history behind the California VLS:

> "The vexatious litigant statute was enacted at the suggestion of the State Bar. [...] The statute is patterned after section 834 of the Corporations Code. The Corporations Code provisions for hearing and determination by the court of the amount of security required are similar to sections 391.1-391.3 of the Code of Civil Procedure."
>
> "The constitutionality of section 834 of the Corporations Code was challenged in *Beyerbach v. Juno Oil Co.*, 42 Cal.2d 11 [265 P.2d 1], on grounds of the equal protection clause of the federal Constitution (Amend. XIV, 1) The Supreme Court, in ruling the statute constitutional, relied on *Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 [69 S.Ct. 1221, 93 L.Ed. 1528]*
>
> In Cohen, at page 550, the court noted that a state has plenary power over shareholder litigation as the corporation is *a creature* of the state." (Emphasis Added.)

It was a grave error when California adopted the VLS tailored from the derivative suits considering the severe consequences, as *individual's rights* that are secured by the US Constitution are now affected. Unlike in derivative suits, where the power of the state over fiduciary litigation is plenary, a regular civil suit where the plaintiff is an individual acting in his natural individual capacity as flesh and blood human being, in *propria persona*, does not fall under this category. The *Cohen* Court took the time to distinguish the fact that a stakeholder who sues in a derivative suit "*He sues, not for himself alone, but as representative of a class comprising all who are similarly situated*", and his role is *a fiduciary one*, not in an *individual* capacity. See *Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 [69 S.Ct. 1221, 93 L.Ed. 1528]*. (1949).

By adopting the California vexatious Litigant Statute tailored from section 834 of the Corporations Code, the State of California transformed those individual rights into privileges which it had no authority to do.

An amendment was made to the California Vexatious Litigant Statute in 1990, and, as shown in a Committee Report, the 1990 amendment's primary purpose was "to reduce the state's costs of defending frivolous suit[s] filed against the state." S. 1989-90-SB2675, 2d Legis. Sess. 2 (Cal. 1990). "According to the sponsor [State Senator Marks], the Attorney General's office spends substantial amounts of time defending unmeritorious lawsuits brought by vexatious litigants . . . . The sponsor contends existing California law should be strengthened to prevent the waste of public funds required for the defense of frivolous suits." The *purpose* of

the amendment is self-serving and is against what the *public servants* are allowed to do. The *public servants* abused their position of power in order to insulate themselves from suit from *the people.*

The First Amendment bars a prosecution (such as under CCP Section 391 et. seq.) where the proceeding is motivated by the improper purpose of interfering with the Appellant's constitutionally protected rights. *Bantam Books v Sullivan*, 372 U.S. 58 (1963); *Dombrowski v. Phister*, 380 U.S. 479 (1975)." The First Amendment also bars prior restraint, which the pre-filing order injunction is.

This amendment codified at C.C.P. Section 391.7, prohibits pro per litigants from filing any new lawsuits in the state of California without leave of Court if a court finds that that pro per had five cases finally determined against that pro per litigant other than small claims actions in the last seven years, or that it filed repeatedly unmeritorious motions while acting in pro per. (C.C.P. §391(b)(1) and (3), see also C.C.P. §391.7.)

2. California Vexatious Litigant Statute Violates the First Amendment to the U.S. Constitution

The holding against the pro per litigant and the punishment of the pro per litigant due to the fact that he had five cases finally determined against him in the last seven years by either dismissing the current litigation because of that fact or by entering a prefiling order against him / her or both, **comes in direct conflict with the First Amendment to the US Constitution** ***as it curtails*** that pro per's freedom of speech and ***its right to petition the government for redress of grievance*** and ***it amounts to prior restraint,*** it does not serve ***a compelling governmental interest*** and ***is not narrowly tailored*** . Therefore, the California Vexatious Litigant law is Unconstitutional as it violates the First Amendment to the U.S. Constitution.

a. There is No Pre-requisite That the Prior Five Cases Lost be Sham or Frivolous Under The California Vexatious Litigant Statute, Which deems this Statute Violative of the First Amendment to the US Constitution

Since ***the filing*** of the prior actions within the past seven years fall strictly within a person's freedom of speech and its right to petition the government for redress of grievance, there can be no law enacted to curtail such freedom of speech without being in conflict with the First Amendment to the US Constitution.

It is true that this right is not absolute as not all suits have the protection of the First Amendment, involving sham or baseless ones. But the California Vexatious Litigant Statute does not discriminate between meritorious suits or suits

that have some basis in law and the baseless or sham pleadings. Instead, it turns on whether the litigation was ultimately successful or not. See *Wolfgram v. Wells Fargo Bank*, 53 Cal. App. 4th 43. But according to this court in *BE&K Constr. Co. v. NLRB*, 536 U.S. 516 (2002) at 531, 532 and 533, there is no such requirement for a suit to be successful in order not to lose its First Amendment Protection.

The issue of which suits lose protection under the First Amendment was discussed at length by this Court in *BE&K Constr. Co. v. NLRB*, 536 U.S. 516 (2002) at 531, 532 and 533:

> "We said in *Bill Johnson's* that the Board could enjoin baseless retaliatory suits because they fell outside of the First Amendment and thus were analogous to "false statements." 461 U. S., at 743. [...] But whether this class of suits falls outside the scope of the First Amendment's Petition Clause at the least presents a difficult constitutional question, given the following considerations.
> First, even though all the lawsuits in this class are unsuccessful, the class nevertheless includes a substantial proportion of all suits involving genuine grievances because the genuineness of a grievance does not turn on whether it succeeds. Indeed, this is reflected by our prior cases which have protected petitioning whenever it is genuine, not simply when it triumphs. See, *e. g., Professional Real Estate Investors,* 508 U. S., at 58-61 (protecting suits from antitrust liability whenever they are objectively or subjectively genuine); *Pennington,* 381 U. S., at 670 (shielding from antitrust immunity any "concerted effort to influence public officials"). Nor does the text of the First Amendment speak in terms of successful petitioning—it speaks simply of "the right of the people . . . to petition the Government for a redress of grievances."
> Second, even unsuccessful but reasonably based suits advance some First Amendment interests. Like successful suits, unsuccessful suits allow the "`public airing of disputed facts,' " *Bill Johnson's, supra,* at 743 (quoting *Balmer*, Sham Litigation and the Antitrust Law, 29 Buffalo L. Rev. 39, 60 (1980)), and raise matters of public concern. They also promote the evolution of the law by supporting the development of legal theories that may not gain acceptance the first time around. Moreover, the ability to lawfully prosecute even unsuccessful suits adds legitimacy to the court system as a designated alternative to force. See Andrews, A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right, 60 Ohio St. L. J. 557, 656 (1999) (noting the potential for avoiding violence by the filing of unsuccessful claims).
> Finally, while baseless suits can be seen as analogous to false statements, that analogy does not directly extend to suits that are

> unsuccessful but reasonably based. For even if a suit could be seen as a kind of provable statement, the fact that it loses does not mean it is false. At most it means the plaintiff did not meet its burden of proving its truth. That does not mean the defendant has proved—or could prove—the contrary."

As shown above, the US Supreme Court has decided that only sham and baseless suits do not get the First Amendment protection, and all the other ones do.

Because the California VLS does not require that the five losing cases be sham or baseless (See *Wolfgram v. Wells Fargo Bank*, 53 Cal. App. 4th 43), it gives a deadly blow to the statute as it comes in direct conflict with the First Amendment, as only baseless suits lose the First Amendment protection. For this reason alone, the California VLS is unconstitutional.

b. Because First Amendment Issues Are At Hand This Warrants a Strict Scrutiny or Intermediate Scrutiny Test to be Applied to the California Vexatious Litigant Statute

The *Wolfe v. George*, 486 F. 3d 1120 - Court of Appeals, 9th Circuit 2007, applied a **reasonable basis test** while weighing in on the constitutionality of the California vexatious Litigant Statute. That was an error, considering that fundamental constitutional rights are at stake, and therefore, the **strict scrutiny test** supposed to be used instead, or the **intermediate scrutiny test** in the least.

The *Wolfe* court held that "California's vexatious litigation statute is "rationally related to a legitimate state purpose". "First, vexatious litigants tie up a great deal of a court's time, denying that time to litigants with substantial cases. Second, the state has an interest in protecting defendants from harassment by frivolous litigation, just as it has an interest in protecting people from stalking."

The *Wolfe* court only proves that the California VLS is *irrational*. It targets the litigants in pro per for clogging up the courts and fails to look at all the litigants that have attorneys. How many lawsuits filed by litigants represented by attorneys also fail and clog the court system?! The VLS is further irrational, as it fails to look at the lawsuits filed by the pro pers whether or not they are in fact frivolous. Once again, the VLS does not require such. Only that a lawsuit is not won in the end, not that it is frivolous. This Court in fact held in *BE&K Constr. Co. v. NLRB*, 536 U.S. 516 (2002) at 531, 532 and 533, that a lawsuit cannot be enjoined if is not found to be baseless or a sham, and absent of that requirement is fully protected by the First Amendment.

The reasons behind the implementing of the California Vexatious Litigant Statute, such as "*keeps vexatious litigants from clogging courts*" and "*curbing those*

for whom litigation has become a game", cannot justify the violation of the First Amendment right of that litigant acting in his individual capacity to petition the government for redress of grievances, under **strict scrutiny** test or **intermediate scrutiny** tests.

To pass strict scrutiny, the legislature must have passed the law to further a "compelling governmental interest," and must have narrowly tailored the law to achieve that interest. There is absolutely no compelling governmental interest when it comes to the California Vexatious Litigant Statute.

> "The prefiling order component of the vexatious litigant statue is a necessary method of curbing those for whom litigation has become a game.... To the extent it keeps vexatious litigants from clogging courts, it is closer to `licensing or permit systems which are administered pursuant to narrowly drawn, reasonable and definite standards' which represent `government's only practical means of managing competing uses of public facilities[.]' (*Wolfgram v. Wells Fargo Bank*, 53 Cal. App. 4th 43 at 60.)

A government's "*practical means of managing competing uses of public facilities*" pales in comparison with the violation of the First Amendment right to sue, and in no way rises to a level of a *compelling, not able to be refuted, governmental interest.*

Strict scrutiny will often be invoked in ***an equal protection*** claim, as in this case. For a court to apply strict scrutiny, the legislature must have passed a law that infringes upon a fundamental right, which the California vexatious litigant statute clearly does.

At the least, the intermediate scrutiny should have been applied as Courts have also held that intermediate scrutiny is the appropriate standard for certain First Amendment issues.

In *US West, Inc. v. United States*, 48 F.3d 1092 (9th Cir. 1994) (hereafter "US West"), was held that in order to pass the first prong (important government interest prong) of intermediate scrutiny for a First Amendment issue, the government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."

Here, once again, the California Vexatious Litigant Statute does not rise to an important government interest prong, and the alleged harm caused by the vexatious litigants is merely conjectural and speculative, and thus the first prong cannot be met under the intermediate scrutiny to justify the curtailing of the right

to sue, a First Amendment issue.

The *US West* court also held that for the government to pass the second prong (means test) of intermediate scrutiny for a First Amendment issue, the regulation must leave open "ample alternative channels of communication."

Here, there are no alternatives left to a vexatious litigant, let alone ample alternatives. Once one is deemed a vexatious litigant he forever bares that stigma, and he is left at the whims of a judge if he is wronged and wants to address the wrong that was done to him, "as the pre-clearance requirement imposes a substantial burden on the free-access guarantee.

In *Ringgold-Lockhart v. County of Los Angeles*, 761 F. 3d 1057 - Court of Appeals, 9th Circuit 2014, the court found that:

> "Restricting access to the courts is however a serious matter. "[T]he right of access to the courts is a fundamental right protected by the Constitution." Delew v. Wagner,143 F.3d 1219, 1222 (9th Cir. 1998). The First Amendment "right of the people . . . to petition the Government for a redress of grievances," which secures the right to access the courts, has been termed "one of the most precious of the liberties safeguarded by the Bill of Rights." BE &K Const. Co. v. NLRB, 536 U.S. 516, 524–25 (2002) (internal quotation marks omitted, alteration in original); see also *Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002)(noting that the Supreme Court has located the court access right in the Privileges and Immunities clause, the First Amendment petition clause, the Fifth Amendment due process clause, and the Fourteenth Amendment equal protection clause).
>
> Profligate use of pre-filing orders could infringe this important right, *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1057 (9th Cir. 2007) (per curiam), as the pre-clearance requirement imposes a substantial burden on the free-access guarantee. "Among all other citizens, [the vexatious litigant] is to be restricted in his right of access to the courts. . . . We cannot predict what harm might come to him as a result, and he should not be forced to predict it either. What he does know is that a Sword of Damocles hangs over his hopes for federal access for the foreseeable future." Moy v. United States, 906 F.2d 467, 470 (9th Cir. 1990).
>
> Out of regard for the constitutional underpinnings of the right to court access "pre-filing orders should rarely be filed".

See Ringgold-Lockhart v. County of Los Angeles, 761 F. 3d 1057(9th Circuit 2014.)

The *Ringgold* comes in direct contradiction with *Wolfe v. George*, 486 F.3d 1120(9th Circuit 2007.), which rejected the constitutional challenge to the California Vexatious Litigant law. It also shows a big discrepancy as to the scrutiny standard that needs to be applied while looking at the constitutional violations that this law unveils. Since there is a great discrepancy of opinion amongst the 9th Circuit Court of Appeal as to the unconstitutionality of the restricting access to the courts, namely the entry of pre-filing orders against *pro pers*, the US Supreme Court must now decide the unconstitutionality of the California Vexatious Litigant Law, and of any other law that restricts access to the courts.

In *BE&K Construction Co. v. National Labor Relations Board*, 536 U.S. 516 (2002), this court, though not ruling on First Amendment grounds, nevertheless noted that it had long viewed the right to sue in court as a form of petition.

> "We have recognized this right to petition as one of the most precious of the liberties safeguarded by the Bill of Rights," Justice Sandra Day O'Connor wrote for the Court, "and have explained that the right is implied by the very idea of a government, republican in form." *BE&K Constr. Co. v. NLRB*, 536 U.S. 516 (2002) at 525.

The *First Amendment to the U.S. Constitution* states:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

According to Dictionary.com, "abridging" means "curtail". "Curtail means to reduce in extent or quantity; impose a restriction on "*civil liberties were further curtailed.*"

The main argument made by the courts quoted in the appellate court's opinion, is that a vexatious litigant plaintiff does not completely lose its rights to sue. Instead he/she needs to seek a pre-filing order and if the presiding judge believes the case has merit it may allow for the litigation to be filed. However, the pre-filing order is in fact curtailing/abridging the right to sue, as it imposes a restriction upon the ability to sue, which the First Amendment states that it cannot do. In order for the First Amendment to be violated one does not need to demonstrate that a plaintiff who was deemed a vexatious litigant will never be able to sue under any circumstance, what suffice is to show that a restriction has been placed upon that individual, which the California VLS , C.C.P. Section 391.7 does.

c. The California Vexatious Litigant Statute is Not Narrowly Tailored

This case is the poster child for evidencing the fact that the California

Vexatious Litigant Statute is not ***narrowly tailored*** to achieve its alleged purpose such as *managing competing uses of public facilities.*

In a CCP Section 391.1 motion for security two prongs must be met to deem a pro per plaintiff a vexatious litigant: (1) five cases to be finally determined adversely to the pro per plaintiff within the proceeding seven years ***and*** (2) there is no reasonable probability that Plaintiff will succeed at trial against the moving defendant in the current litigation. Here, the trial court found that Roman is likely to succeed at trial against the moving defendants, and denied defendants' request for security. Yet, it still deemed Roman a vexatious litigant and entered a pre-filing order against him at the request of the defendants. That was an error, as the motion should have been denied outright since one of the two prongs was not met. Roman raised this issue on appeal. The court of appeals deemed this issue moot and affirmed the pre-filing order entered against Roman in full, contrary to *Wolfgram v. Wells Fargo Bank*, 53 Cal. App. 4th 43 at 57 and 58 which held that "***that showing"*** ["Merely losing five suits in seven years"] ***"is insufficient to support a motion to declare someone a vexatious litigant, it must be coupled with proof that the suer has come into court again, with a suit with no reasonable probability of success. (§ 391.1.)".***

Oddly, the trial judge then went ahead and declared that the pre-filing order does not apply to the current litigation. To note, the case is still ongoing and Roman will proceed with a jury trial against one of the moving defendants, Dr. Kassabian.

When it comes to this issue of whether or not a court could deem a pro per plaintiff a vexatious litigant and enter a pre-filing order against him absent the finding that the current litigation has merit, the California Court of Appeals are split and the law is not settled.

Wofgram v.Wells Fargo Bank, 53 Cal. App. 4th 43 at 57 and 58 held that the finding that the current litigation has no merit concurrent with the fact that a pro per plaintiff lost prior five litigations ***is a must*** in order to deem a plaintiff a vexatious litigant:

> "We agree with Wolfgram that the authorities canvassed teach that any impairment of the right to petition, including any penalty exacted after the fact, must be narrowly drawn. *But here there is no direct "penalty" exacted as a result of Wolfgram's five losing suits.* Instead, they inform us that the suer has repeatedly lost many meritless (albeit colorable) suits while acting in propria persona, which, *when combined with* the fact that he has filed another (sixth) suit which has been found to lack merit, support the reasonable inference that the suer has been using the court system inappropriately and will continue to do so.

> "The fact that the statute does not include a requirement that the five *losing* suits be frivolous does not render it unconstitutional. Wolfgram states that "Merely losing five suits in seven years is not `flagrant abuse' of the system," in other words, that the inference drawn by the statute is unreasonable. But he overlooks the fact that ***that showing is insufficient to support a motion to declare someone a vexatious litigant, it must be coupled with proof that the suer has come into court again, with a suit with no reasonable probability of success. (§ 391.1.)***"

In Re Marriage of Rifkin &Carty (2015) 234 Cal.App.4th 1339 held:

> "The requirement that a court find a litigant has no reasonable probability of prevailing in the litigation applies where the court orders the litigant to furnish security in an action. (§§ 391, 391.3, subd. (a); *Golin, supra,* 190 Cal.App.4th at p. 640.) Section 391.7, on the other hand, does not require the court to find there is no reasonable probability the plaintiff will prevail in the litigation before making a prefiling order. Indeed, such a finding would not be feasible, since the prefiling order acts prospectively to prohibit a party from filing new litigation, and a court would not be able to predict whether any future pleadings filed by a party would have merit."

In Re Marriage of Rifkin &Carty (2015) 234 Cal.App.4th 1339 was in fact in error when it found that a pre-filing order could be entered against a plaintiff even if a motion for security was denied. The reason this is in error, is because CCP Section 391.7 refers to a person who was already deemed a vexatious litigant not a "party" as described in *In Re Rifkin.* This is in addition to, not absent, the finding that a pro per plaintiff is a vexatious litigant in the first instance. Since in order to deem a plaintiff a vexatious litigant a defendant must file a motion for security and prevail on that motion, See *Wolfgram v. Wells Fargo Bank*, 53 Cal. App. 4th 43 at 57 and 58, absent a showing that a plaintiff who lost prior five litigations and filed yet another meritless action and only in combination to that fact would deem it a vexatious litigant, a plaintiff cannot be deemed a vexatious litigant as it would be unconstitutional, and the statute will not be narrowly tailored.

Since the court of appeal in this case embraced the *In Re Marriage of Rifkin &Carty* reasoning it begs the finding in *Wolfgram* that in this situation the deeming of Roman a vexatious litigant solely based upon the prior five losing cases amounts to violation of the First Amendment to the US Constitution as ***there is*** a direct penalty exacted against Roman after the fact just for losing those five cases absent of the finding they were frivolous or baseless, and without the finding that the current litigation lacks merit.

As it stands, and as it was interpreted by the California Court of Appeal in this case, *In Re Marriage of Rifkin &Carty* (2015) 234 Cal.App.4th 1339 is in direct conflict with *Wofgram v.Wells Fargo Bank*, 53 Cal. App. 4th 43 at 57 and 58. However, the California Supreme Court denied Roman's petition for review and therefore, refused to address this issue, and allowed the California courts to interpret the statute as they please without clear and defined guidance, and in turn has validated the fact that the California Vexatious Litigant Statute is wide sweeping and ***not*** narrowly tailored.

As outlined above, The California vexatious litigant law has converted the rights of the people of the State of California into privileges. Those rights under the Bill of Rights from the US Constitution are the people's Rights which shall not be infringed upon. All infringement is forbidden. The California vexatious Litigant law is infringing upon the rights of the people of the State of California. The vexatious litigant law is stealing their rights. Petitioner claims infringement, Petitioner claims encroachment, Petitioner claims impingement, Petitioner claims usurpation, Petitioner claims they are stealing the people of the state of California's rights.

The Constitution is in writing. It is a legal document. That was ratified by all of the members in a congress. There was an offer. Government offered to govern. There was a consideration. The citizens considered how they're going to be governed. And Government promised that they would govern by constitution. And there was an agreement the citizens agreed that if Government promised that they would be governed by the constitution they would agree to allow the constitution into force. When the government signed that contract, it was an iron clad contract, and enforceable pursuant to the statute of frauds. All the Plaintiff is asking is that they enforce the contract. If we have something here that we believe that's the way it is they should honor that. They should honor it in favor of the citizen, the clearly intended beneficiary.

CONCLUSION

Based on the foregoing, Petitioner respectfully submits that this Petition for Writ of Certiorari should be granted.

Dated: March 9, 2020

Respectfully Submitted,

By:***/s/ Gabriel L. Roman***

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CERTIFICATE OF WORD COUNT

I certify that the text of this brief, as counted by Microsoft Word, consists of 8,953 words (including footnotes but excluding the tables of contents and authorities, the list of parties, this certificate, the index of appendixes, the appendixes A through F and the attached proof of service).

March 9, 2020

By: */s/ Gabriel L. Roman*
Gabriel L. Roman, Petitioner In Pro Per

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