No. 22-657

IN THE SUPREME COURT OF THE UNITED STATES

In re Roger Towers, et al.

ON PETITION FOR WRIT OF MANDAMUS
TO THE
NINTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF MANDAMUS

Roger Towers
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QUESTIONS

In context of the refusal of Congress to create additional Article III Judgeships:

1. Does the distribution of Article III judgeships pursuant to 28 U.S.C. §§44 (circuit judges) &133 (district judges) satisfy the Due Process Clause of the Fifth Amendment and/or Article III?

2. Should the Magistrates Act be invalidated due to a false presumption of "total control" of the referral process?

3. Should the judgments in these related cases be set aside due to: a) an unlawful exercise of jurisdiction; b) denial of due process; or, c) in the interests of justice?

PARTIES TO THE PROCEEDINGS

Petitioners are Roger Towers and Kate Towers.

Defendant Respondents include: County of San Joaquin, Grupe Commercial Company, Kristen Heggee, Raymond Hoo, Kevin Huber, Jack Kautz, Zayante Merrill, J. Mark Myles, Amy-Skewes Cox, and Kerry Sullivan. The U.S. Solicitor General is also a Respondent.

CORPORATE DISCLOSURE STATEMENT

Petitioners do not own more than 10% of any publicly held corporation.

PROCEEDINGS AT ISSUE

Declaratory Relief- Towers v. County of San Joaquin
Ninth Circuit Case No. 18-16712,
Date of Judgment: August 24, 2020.
CAED Case No. 2:17-cv-02597-JAM-KJN.
Date of Judgment: August 29, 2018.

Complaint for Damages- Towers, et al v. Myles,et al.
Ninth Circuit Case No. 19-16684
Date of Judgment: May 26, 2021
CAED Case No. 2:18-cv-02996-JAM-KJN.
Date of Judgment: August 2, 2019

Related Case (on habeas):
Towers v. Hamasaki,
U.S. Supreme Court No. 22-385,
docketed 10/25/2022 (pending rehearing motion).

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JURISDICTION

Jurisdiction of this Court is pursuant 28 U.S.C. §1651.

SOLICITOR GENERAL SERVICE

In this matter, 28 U.S.C. 2403(a) may apply; service has been made on the U.S. Solicitor General; and the Ninth Circuit did not previously certify any question.

STATEMENT OF CASE

1. Introduction.

The consequences of Congress's failure to follow the recommendations of the Judicial Conference have resulted in a national catastrophe. Based on statistics maintained by the AOUSC- the probability of a civil plaintiff reaching trial is approaching zero. (Sections 5, below.) Nowhere has the disregard for the needs of the Judiciary been felt more severely than in the Eastern District of California (CAED).

In a June 2018 plea, Eastern District of California (CAED) district judges described their decades-long judicial crisis; and admitted to being "wholly unable to handle civil matters" and "catastrophic consequences" if more judgeships were not immediately authorized (A1, *infra*). For pro se litigants, the catastrophe arrived in 1999 when Local Rule 302(c)(21) was adopted (A38). Pursuant to this Rule, automatic referral of pro se litigation is pre-text for case disposal. (See Sections 2 & 6, below.)

Here, the uncontested fact is that we are being arbitrarily deprived of all economic use of our Property. Effectively, the County has stolen our Property and given it to illegal mining operations as a noxious use easement. The facts and law have not mattered- not in the California Courts, not in the CAED and not in the Ninth Circuit. (Sec. 2) Our business and health have been destroyed. (Sec. 3) Under the circumstances, these judgments must be set aside. (Sec.7) Without more Article III Judgeships, however, we have no assurance of fair judicial process. We ask the Court to take corrective action so that the independence of the Judiciary; and the rule of law, may be restored.

2. The facts and law are irrelevant when the only thing that matters is case disposal.[1]

a) Declaratory Relief – Uncontested facts establish that San Joaquin County stole our land and retaliated when we filed a federal complaint.

The Complaint for Declaratory Relief sought declarations on two issues.[2] First, it sought a declaration that San Joaquin County's *2035 General Plan* "Open Space/Resource Conservation" ("OS/RC") land use designation was void because it denied all reasonable economic use of our Property; and, because it was arbitrarily, irrationally, and discriminatorily drawn. I also sought a declaration that issuance of a restraining order was invalid for violation of the First Amendment. [3]

The arbitrary judicial began before County's response. In declaratory relief, I served the Complaint and a motion for partial summary judgment on the restraining order issue at the same time. The Magistrate, *sua sponte*, dismissed and vacated the motion because "defendant's time to respond to the complaint has not yet elapsed". (A43, *extra*) Rule 56(b) provides that "a party may file a

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[1] Records on appeal in the Ninth Circuit are denominated: ER, SER, and FER. Superscript is used for the Complaint for Damages (i.e. – ER[2]).

[2] Case #18-16712, Complaint at ER29, ECF10. Prayers for Relief at ER37.

[3] In California a "general plan" is the "constitution" for land use and development. All local government land use actions must be consistent with the general plan. See *DeVita v. County of Napa*, 9 Cal.4th 763, 772-73 (Cal. 1995) - describing general relationships of general plan to other land use actions; *Orange Citizens for Parks & Recreation v. Superior Court of Orange Cnty.*, 2 Cal.5th 141, 159 (Cal. 2016) - general plan open space policies preclude other development.

motion for summary judgment at any time until 30 days after the close of all discovery.[4] The Magistrate based his authority on Local Rule 302(c)(21) defining the duties to be performed by a Magistrate in Sacramento.[5]

I moved to annul the order and asked the Court to re-schedule as soon as possible. (Memo, ER93:19) The motion was denied because the facts or law had not changed (ER5).

On January 30, 2018, Defendant County of San Joaquin (COUNTY) filed a Rule12 (b)(6) motion. (ER99) The motion to dismiss the restraining order issue relies on Younger abstention doctrine because the "same claims regarding the restraining order are already pending in the California Court of Appeal for the Third Appellate District." (ER105) I re-filed/re-served the motion for partial summary judgment and the volumes of paper evidence (ER274).

The uncontested Statement of Undisputed Facts (ER115-117) establishes that on October 11, 2016 we filed a Complaint for Damages in the CAED (the "2016 Case") (SUF#1). The Complaint named numerous County officials including the County Counsel and two of his deputies (SUF#2). Two weeks later, on October 24, the County Counsel's Office obtained a TRO. The application for the TRO was based on false affidavits that I was yelling and saying things never stated at the September 29, 2016 Planning Commission meeting (SUF#3-5). The TRO prohibited indirect contact with defendants in the 2016 Case – in effect, prohibiting service of process. The TRO also included prior restraints on my ability to obtain public records or appear at public hearings

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[4] Motion and memo in opposition, ER92. Rule 56, A25.

[5] L.R. 302(c)(21), A39; re: jurisdiction, Order at A43, f.n. 1.

concerning the potential development of our property and unlawful mining in the vicinity of our Property. (TRO, ER057, ¶9) I never threatened to do anything to anyone (SUF#6). After hearing, a three-year restraining order issued from San Joaquin County Superior Court (SUF#7).

Summary judgment, FRCP Rule 56 (A29), is implemented by the CAED through Local Rule 260 (A36). COUNTY failed to dispute my SUF; did not admit facts as required by Local Rule 260 (b); and, refused to specify what facts or issues could be discovered as required by Local Rule 260 (b) and FRCP Rule 56 (d). The dispositive facts were before the court, but County's attorney Derek Cole declared under penalty of perjury of *California law*: "A high likelihood exists that the County will obtain evidence during discovery that will controvert the facts presented ..." (ER169)

Applying Younger abstention, the Magistrate claimed that "false affidavits and testimony" and "flagrant constitutional violations against plaintiff...are unpersuasive" (F&R, A65 *extra*). My citations/quotations didn't matter (ER184-190). For example, I quoted: "Bad faith prosecution or harassment make abstention inappropriate even where these [threshold] requirements are met. *Younger,* 401 U.S. at 47-49, 91 S.Ct. at 752-53." *World Famous Drinking Emp. v. City of Tempe,* 820 F.2d 1079, 1082 (9th Cir. 1987) (ER188:16); and, *Dombrowski v. Pfister,* 380 U.S. 479, 489–90, (1965).

My opposition detailed that Younger abstention, as an affirmative defense, must be pleaded in the answer. (ER190 citing A*SARCO, LLC v. Union Pac. R. Co.*, 765 F.3d 999, 1004 (9th Cir. 2014)).

Issue and claim preclusion are also affirmative defenses. *Rivet v. Regions Bank*, 522 U.S. 470, 476

(1998). Nevertheless, in response to my claims in substantive due process for deprivation of reasonable economic use and arbitrary line drawing in 2016;[6] County's Rule 12(b)(6) motion (ER105) contends:

> Towers is precluded from bringing claims concerning the OS/RC designation of his property because the San Joaquin Superior Court and Third District Court of Appeal already ruled on the issues he wishes to relitigate in this forum. It is undisputed the claims raised here are the same as have been conclusively—after several years of litigation—determined by California courts.

Inter alia, this motion is frivolous because, as quoted by County Defendant: "The doctrine of claim preclusion bars litigation of claims raised, or claims that could have been raised in the prior litigation. *Robi v. Five Platters, Inc.*, 838 F. 2d 318, 322 (9th Cir. 1988)." (ER104:8). That which was "determined by California courts" was filed in December 2009- the "2009 Case".[7] The claim in declaratory relief concerns the *2035 General Plan* adopted in December 2016. The uncontested fact is that the *2035 Plan* replaces the *2010 General Plan*. These Plans "are based on different policies, land use diagrams (maps) and background information." (FACT 2, ER29)

Defendant's fraudulent narrative of the 2009 Case relies on a limitations period it had expressly

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[6] See prayers "a" and "b" (ER37) and allegations at ¶¶9-11 (ER31) differentiating reasonable economic use from arbitrary line drawing.

[7] Defendant's request for judicial notice includes the Second Amended Petition Complaint in San Joaquin County Superior Court Case #39-2009-00231065 with file stamp of 10/13/2010.

waived (ER²297). I opposed County's request for judicial notice with thorough briefing (ER178-182), including a quotation from *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001):

> On a Rule 12(b)(6) motion to dismiss, when a court takes judicial notice of another court's opinion, it may do so "not for the truth of the facts recited therein, but for the existence of the opinion,...

Despite prior rulings properly applied for represented litigants,[8] the Magistrate cut and pasted from the CAL-3DCA Opinion for findings of fact and conclusions of law - including a *strawman* based on a waived limitations period defense (F&R, ER9:15-19). Instead of recognizing the pleadings and prayers in substantive due process, the Magistrate falsely claimed: "the complaint here involves substantially the same evidence as in Towers II [the 2009 Case]-allegedly fabricated maps." (ER20:1) The allegation is that the "OS/RC designation line, adopted in 2016, has been arbitrarily drawn". (ER31, ₱11.) The Magistrate's false representation attempts to fill missing evidence for an issue preclusion argument.[9] On March 13, 2018 Magistrate Newman effected termination by supplementing the F&R with a stay order.[10]

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[8] Prior rulings on judicial notice were later detailed in my motion for disqualification. Method/time of research, Memo ER²108:20 and confirmed in prior declation, ER²118.

[9] Applying California law, the issue to be precluded must be identical. *San Remo Hotel, L.P. V. City County of San Francisco*, 545 U.S. 323, 336 n.14 (2005).

[10] No authority exists for this common CAED practice. *Reynaga v. Cammisa*, 971 F.2d 414, 416 (9th Cir. 1992). (Decl., ₱9)

My 20 pages of objections detailed the numerous errors.[11] I made clear that "the claim lies in substantive due process, not procedural due process." (ER210:6) I detailed substantive due process legal theory;[12] and, the equal protection claim (ER217:16). I subsequently requested judicial notice of the dispositive facts (ER228), including FACT 3:

> The only allowed private use of [our] Property is mining; [our] Property cannot be commercially excavated for mining; and San Joaquin County has previously recognized this fact.

Five and ½ months after the Magistrate filed his F&R, District Judge John L. Mendez adopted the magistrate's F&R in full without analysis or comment on my request for judicial notice. (A68, *extra.*) I appealed and filed the AOB. A separate, but related Complaint for Damages (ER²28) was filed to avoid a limitation period argument associated with the prior bad acts.

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[11] Improper use of judicial notice (ER218-219); dismissal based on an affirmative defense (ER221-222); abstention (ER222-223); collateral estoppel (ER224-225); and facts deduced by the magistrate were clearly irrelevant and otherwise wrong. (ER226-227).

[12] The analysis follows *Eide v. Sarasota Cty.*, 908 F.2d 716, 721-22 (11th Cir. 1990). See: "3.1 The 'Due Process Taking' Claim" at ER213:18; and, "3.2 The 'Arbitrary and Capricious Due Process' Claim" at ER215:18.

b) Complaint for Damages- I discovered a scheme to rid the court of pro se litigation and moved for disqualification, but the district judge refused to hear it.

The Complaint for Damages identifies four Causes of Action including retaliation and obstruction of justice. (Table of Allegations, ER²28)

As a related case, Magistrate Newman re-assigned the Complaint for Damages to himself and Judge Mendez (A75); and again claimed jurisdiction pursuant to L.R. 302(c)(21). (A76, f.n.1) After researching how these judges had applied the law in other cases; I then understood the scheme to rid the court of pro se litigants. My motion for disqualification detailed five points.[13] Among other things, isolating a single isolated sentence from *Schneider v. Cal. Dept. of Corrections*, 151 F.3d 1194, 1197 n. l (9th Cir. 1998); these judges tell pro se litigants: "the court may not consider a memorandum in opposition to a defendant's motion to dismiss to determine the propriety of a Rule 12(b)(6) motion." I also detailed how the law of judicial notice was being applied differently as between pro se and represented litigants.

By Minute Order (Dkt text, ER²304), the Magistrate claimed the motion was improperly noticed and ordered response. We immediately moved the District Judge to reconsider this Order pursuant Local Rule 303(c) and FRCP 72(a) (ER²138). The motion was ignored. (Dkt ER²304)

Our brief in opposition to the motion to dismiss explicitly detailed County's fraud (ER²147) and was

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[13] Motion, ER²99. Memo, ER²101. Methods and time of research, Memo ER²108:20 and confirmed in Declaration. ER²118.

otherwise supported by our request for judicial notice of facts of corruption in the CAL-3DCA (ER²159).

> FACT 1: The California Court of Appeal, Third Appellate District, intentionally delayed review and determination of Case # C073598 [the 2009 Case] for three and ½ years past the statutory obligation to hear and decide. (ER²161)
> FACT 2: In considering Case #C073598, the California Court of Appeal, Third Appellate District, refused to consider TOWERS' claims in substantive due process. (ER²162)

We detailed the frivolity associated with Defendants' motion to dismiss by reminding the Court of the actual claims identified in the Complaint. The opposition was not based on these claims. (ER²146) We objected to judicial notice of the documents supporting Defendant's fraudulent argument including "Exhibit 5" missing every other page (ER²156:7).

The F&R again quotes the CAL-3DCA for the strawman (A79) and ignored our uncontested request for judicial notice of true facts. The Magistrate judicially noticed Defendant's irrelevant and fraudulent documents (A77, f.n. 2); ordered dismissal of the disqualification motion; stayed motion practice and discovery; and concluded his F&R by threatening us with sanctions. (A95).

Our Objections included twelve pages of fact and law. (ER²281-295). We reminded Judge Mendez that a motion for recusal had been filed; and, that a motion for reconsideration of the Magistrate's Order was pending. (ER²284:10) We detailed: the abuses in judicial notice including the failure to acknowledge the facts established by our uncontested request for judicial notice (ER²286); the failure to convert the

motion to dismiss into one for summary judgement (ER²286); fraud on the court (ER²287-290); and, the frivolity involved in Defendant's claim/issue preclusion argument (ER²291) - *including the fact that none of our claims had actually been litigated in the 2009 Case* (ER²293). We also requested judicial notice of two documents proving fraud on the Court, i.e. – a true and correct copy of "Ex. 5" and County's demurrer expressly waiving the limitations period defense being relied upon. (ER²297)

District Judge Mendez's two-page Order dismissing our Complaint again represented that he had considered the Objections. (A97) In dismissing our claims Judge Mendez did not address the Objections or facts, but simply adopted the findings and recommendations. (A98)

c) Ninth Circuit review was arbitrary.

Declaratory Relief - Assuming, *arguendo*, that the Ninth Circuit was endowed with subject matter jurisdiction; its rulings were completely arbitrary. The Opinion was based in procedural due process, not substantive due process claim. (A71, *extra.*) Our motion for reconsideration detailed the points in the course of 14 pages within eight distinct headings. (ECF37) These are three examples.

Example 1 -The AOB quoted *Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001): "[W]hen a court takes judicial notice of another court's opinion, it may do so 'not for the truth of the facts recited therein, ...'" Citing *Lee* at 689, the panel claimed: "The district court did not abuse its discretion in taking judicial notice of court filings and other matters of public record." The panel based its Opinion on the CAL-3DCA *strawman*- not the substantive due process claim before the court.

Example 2:

> The district court properly dismissed plaintiff's claims pertaining to restraining orders as barred under the Younger abstention doctrine because federal courts are required to abstain from interfering with pending state court proceedings. *ReadyLink Healthcare, Inc. v. State Comp. Ins. Fund*, 754 F.3d 754, 758-59 (9th Cir. 2014)

I responded by identifying that the *Readylink* citation refers to "threshold" requirements. "If these 'threshold elements' are met, we then consider whether the federal action would have the practical effect of enjoining the state proceedings and whether an exception to *Younger* applies. *See Gilbertson,* 381 F.3d at 978, 983–84" *Readylink*, 759."

Example 3:

Having been denied the opportunity to seek sanctions at the District Court because of the Magistrate's unlawful order precluding further motions; we did not seek sanctions for fraudulent argument until County repeated its fraudulent presentation in the Respondent's Brief. Our Reply Brief (pp. 7-11, ECF27) detailed the fraud and requested judicial notice of state court documents proving the fraud. The Panel refused to address the fraud stating: "We do not consider matters not specifically and distinctly raised and argued in the opening brief, or arguments and allegations raised for the first time on appeal. See *Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009)." (A-101) *Padgett* refers to the ordinary case. *We cannot argue fraud upon the Circuit Court before it happened.*

Complaint for Damages- Before filing the AOB, we requested recusal of the CAED judges (ECF6) and were summarily denied: "No motions for reconsideration, clarification, or modification of this denial shall be filed or entertained." (A99, *extra.*)

The AOB (ECF16) requested summary disposition based on five points:

a) Local Rule 302(c)(21) violates Article III.
b) District Judge failed to conduct de novo review.
c) A magistrate is without authority to dismiss a motion for disqualification.
d) District Judge refuses to consider motions.
e) Bias requires recusal pursuant to 28 U.S.C. §455.

The panel dismissed the arguments without discussion (A100) and denied our motion for rehearing. (A102)

3. "To picture the future, imagine a boot stamping on a human face—forever." Orwell, 1984.

Through ongoing fraud, the County of San Joaquin has deprived us of all reasonable economic use of our Property for the past twenty-three years. In the process of stealing our Property, Defendants have destroyed our property development business and taken the resources necessary to retain counsel. (Decl. ¶6) When we complained, the County Counsel retaliated with the restraining order resulting in jail, criminal prosecution, and a six-year effort (so far) to restore my good name. (See Cert. Petition re: denial of habeas, #22-385 (pending motion for rehearing).)

The destruction of our means of income and malicious prosecution results in a severe, ongoing toll on our health. In October 2019, following the

Ninth Circuit's denial of our motion for disqualification, I was in the middle preparing the AOB for the declaratory relief action when one side of my face was suddenly paralyzed. I can no longer smile and have other difficulties with vision and breathing. More recently, stress induced heart arrhythmia has become routine. (Decl., ¶7.) The litigation process has been harder on my wife, Kate.

By 2014, we were in serious financial difficulty and Kate began working at the local library to help pay the bills. In 2016, she developed psoriasis with open sores all over her body. A year after I suffered the Bells Palsy attack, in November 2020, Kate suffered a catastrophic neurological failure. As of Sept. 29, 2022, Kate is under doctor's orders not to return to work while we seek answers from specialists in the fields of neurology and neuropsychology. Kate's accrued vacation and sick leave will be exhausted by February 2023. (Decl., ¶8) This is our Orwellian nightmare. Defendants, and the courts below, would have it be our future.

4. The Judicial Conference and the lower courts have become tools by which Congress replaces Article III judges.

Three months after the CAED June 2018 plea for more judgeships failed, Magistrate Dennis Cota was added to the roster of CAED magistrates. (Ex. 190) In March 2020, as part of the Biennial Survey, Chief District Judge Mueller recognized that "[e]ven if more magistrate judges were appointed, there is not an additional category of work that could be assigned or referred to magistrate judges that is appropriately taken, ..."

On April 16, 2020 the Ninth Circuit Judicial Council declared a CAED judicial "emergency" and ordered an extension of the Speedy Trial Act. See *In re Approval of Judicial Emergency Declared in E. Dist. of Cal.*, 956 F.3d 1175, 1178 (9th Cir. 2020). (Ex.93)

On May 15, 2020 CAED District Judge Dale Drozd issued standing orders assigning new cases to "NONE". His order recounts the exodus of CAED judges and refusal of Senior status (A8, *infra*).

In June 2020, the Honorable Brian Miller appeared before the Senate Judicial Committee on behalf of the Judicial Conference. His presentation identified some of the "profound" "effects of increasing caseloads without a corresponding increase in judges". He explained: "The problem cannot be addressed just by adding magistrate judges, or hoping senior and visiting judges will lessen the workload. (Ex.117)[14] On November 1, 2020 Magistrate Helena Barch-Kuchta was added to the CAED roster. (Bio, Ex. 187)

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[14]www.judiciary.senate.gov/imo/media/doc/Miller%20Testimony2.pdf

CAED Chief District Judge Kimberly Mueller, in her February 2021 written presentation to a House Judiciary sub-committee, likened the refusal of Congress to create additional judgeships to the punishment of Sisyphus - condemned to push the boulder up-hill forever. (Ex.139) She made further observations about former Chief District Judge O'Neil to the effect he was fortunate to have survived to retirement. (Ex.146)

In March 2021, the Judicial Conference recommended 4 additional judgeships for the CAED and 2 additional judgeships for the Ninth Circuit. (Ex.92) In letters dated March 23, 2021 addressed to the respective judiciary committee members of Congress, the Conference advised (Ex.62):

> The severity of conditions in the Western district of Texas, the Eastern District of California, the Central District of California, the Southern District of Indiana, and the Districts of New Jersey and Delaware require immediate action.

Although some of the districts with the greatest needs have changed, this is the exact same wording as used by the Judicial Conference in 2013. The CAED, Western District of Texas and District of Delaware have the distinction of making both lists. At some point, people understand there is no reasonable expectation of relief. From 2009-2014, CAED weighted filings averaged 1,057. Despite the fastest growing population in California (Ex.135) and an increase in filings nationally (f.n. 17); weighted filings in the CAED decreased to 730 in 2019 (Ex.19). (Decl.¶10) After decades in the Sisyphus syndrome; judges are exhausted *and blamed.* This Court can, and must resurrect, its independence.

5. Replacing district court judges with magistrates results in destruction of the Seventh Amendment.

In 1976 and 1979, Congress expanded the role of the magistrate "to the end that the judge could have more time to preside at the trial of cases" *Peretz v. United States*, 501 U.S. 923, 942 n.1 (1991); and thereby "improve access to the courts for all groups." *Roell v. Withrow*, 538 U.S. 580, 588 (2003). The irony is palpable. Notwithstanding the Civil Justice Reform Act of 1990 intending to "ensure just, speedy, and inexpensive resolutions of civil disputes" (28 U.S.C. §471), civil trials are being made to disappear.

Based on her experience, the Hon. Diane J. Humetewa, United States District Court Judge, District of Arizona attributes the "disappearing trial" phenomenon to local court rules and "the large volume of cases requir[ing] judges to encourage parties to resolve their disputes and motions without oral argument and short of trial." [15]

Steadily declining since 1990, the 2020 civil trial rate for the nation fell from 4.34% to .50%.[16] Stated differently, a civil plaintiff in 1990 was 8.7 times more likely to reach trial than in 2020. Given the historical attempts to fix the civil justice system, the 1990 4.34% civil trial rate is certainly below that which should be expected. Even if the 1990 civil trial rate is used as a benchmark, there should have been

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[15] "The Need for New Lower Court Judgeships, 30 Years in the Making" – Testimony, U.S. House of Representatives Subcommittee on Courts, Comm. on the Judiciary, Ex. 119.

[16] AOUSC Table 4.10 "Civil Cases Terminated by Action Taken", Ex,7 or www.uscourts.gov/sites/default/files/data_tables/jff_4.10_0930.2021.pdf

11,757 civil trials in 2020. Instead, there were 1,365 civil trials. Based on the 1990 trial rate, 10,392 civil cases that should have gone to trial in 2020, never made it. This is occurring year-after-year. See "Trials Killed", Table I.

TABLE I

DISAPPEARING TRIALS

Yr.	Civil Cases Ended	Civil Trials	Trial Rate %	Trials expect'd	Trials Killed
90	213,429	9,263	4.34	9,263	(0)
95	229,325	7,443	3.25	9,953	2,510
00	259,234	4,404	1.70	11,251	6,847
05	270,973	3,899	1.44	11,760	7,861
10	309,361	3,309	1.07	13,426	10,117
15	274,362	2,968	1.08	11,907	8,939
19	311,520	2,228	0.72	13,520	11,292
20	270,902	1,365	0.50	11,757	10,392

Source: AOUSC Table 4.10, Ex.7 Oct. 2022

www.uscourts.gov/sites/default/files/data_tables/jff_4.10_0930.2021.pdf

Over the past three decades, Congress has continued to bury the Judiciary in litigation for which it has no capacity to oversee. Since 1990, the population of the United States increased by 33%, but filings increased by 61%.[17] At the same time, the number of authorized judgeships increased by only 4%. The failure to keep pace is exacerbated by the Senator's ever more abusive use of "blue slips". For example, in 2004 and 2005, the average vacancy was 3.7%. In 2017-2019, the average vacancy was 17.6%.[18]

Distributional disparities are another problem. Based on the 2013 Judicial Conference Recommendations; in 2014, the AOUSC Director informed Congress "that five district courts are struggling with extraordinarily high and sustained workloads, and was urged to establish, as soon as possible, new judgeships in the District of Arizona, Eastern District of California, District of Delaware, Eastern District of Texas, and Western District of Texas." (Ex.53) The 2014-2019 six-year average caseload for these districts were (Ex. 15 – 19):

Arizona -	687	TX-WD -	740	Delaware -	785
CAED -	801	TX-ED -	818		

For caseloads from courts at the other end of the spectrum, see TABLE 2, next page.[19]

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[17] National Judicial Caseload Profiles, Ex.8-12. Filings from 1992 and 1993 averaged 264,825. These were earliest numbers available online. Filings from 2019 and 2021 averaged 426,259. Filings from 2020 were 562,342 and disregarded as anomalous. (426,259/264,825 = 1.61)

[18] National Judicial Caseload Profiles, Ex.8-12.

[19] Other courts with a low judgeship caseload average include Maine (248, 3 judgeships) and Rhode Island (263, 3 judgeships). Another way to view the inequity is to look at

TABLE 2							
U.S. Dist. Courts - Low Caseloads							
	2016	2017	2018	2019	2020	2021	avg
D.C.	234	219	269	293	291	299	268
Judgeship	15	15	15	15	15	15	
Penn. - E	312	319	300	317	306	311	311
Judgeship	22	22	22	22	22	22	
Ken. - E	315	342	331	361	327	280	326
Judgeship	5.5	5.5	5.5	5.5	5.5	5.5	
Mich. - E	356	345	331	324	278	266	317
Judgeship	15	15	15	15	15	15	
Okla. - W	280	282	291	284	291	307	289
Judgeship	6	6	6	6	6	6	
Wyoming	205	197	169	178	187	169	184
Judgeship	3	3	3	3	3	3	

The failure of Congress to heed the advice of the Judicial Conference has a domino effect. In 2017, the Judicial Conference recommended additional judgeships in seven of the Ninth Circuit's 13 district courts. (Ex.59) Based on a 4-year average, 2017-2020, the appeal rate within the Ninth Circuit is 21% higher than the rest of the nation. For the CAED, the appeal rate is 45% higher than the national average (.094 x 1.45 = .1363 or 13.63%). See Table 3, next page.

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total caseloads. Based on the 6-year averages shown above, the CAED has an average annual caseload of 4,806 (6 judgeships x 801). The average CAED weighted filings is higher than D.C. (4,020) and Michigan -E (4,750) with fifteen judgeships each. See AOUSC Caseload Profiles, Ex.20-25.

TABLE 3			
CIVIL APPEAL RATE 2017-2020			
	Cases Term. by Dist. Cts.	Appeals Filed	Appeal Rate
NATIONAL	1,149,368	108,379	**9.4%**
NINTH CIRC.	187,165	21,257	**11.4%**
CA-E	18,014	2,452	**13.6%**
Source: AOUSC TABLEs "C" and "B-3A			

The 2017 Judicial Conference recommendations included five new Ninth Circuit judgeships to address its "emergency". (Ex.93) It got worse over the next year. The Ninth Circuit was staffed with just twenty-four (71%) of the recommended thirty-four judgeships. (Ex. 50) In 2015-2016, a time when vacancies were minimal; from filing of the notice of appeal to disposition was 14-15 months. In 2018, 5 of the 29 judgeships were vacant. Notwithstanding the vacancy, the average time of disposition was reduced to 11.7 months. Still suffering from significant vacancies in 2019, the time to disposition was reduced again in 2019 to 10.8 months. (Ex. 50) Beyond the arbitrary treatment of these cases as documented in Section 2.c, above, the implications are staggering.

Please do not blame the messenger. I know these are hard truths. Without intervention, however, the American Experiment is over.

6. Local Rule 302(c)(21) is void law.

Local rules are "laws of the United States." *United States v. Hvass*, 355 U.S. 570, 575 (1958). Local rules "must be consistent with—but not duplicate—federal statutes and rules..." F.R.C.P. Rule 83. CAED Local Rule 302(c)(21) purports to bestow upon the magistrate authority to determine "all actions in which all the plaintiffs or defendants are proceeding in propria persona, including dispositive and non-dispositive motions and matters." (A39) No such authority exists. Absent consent of the parties, the only action a magistrate can take on a *dispositive motion* is to report and recommend. Rule 72(b), A33; 28 U.S.C.§636(b)(1), A21; *""The authority — and the responsibility — to make an informed, final determination . . . remains with the judge." Mathews v. Weber, 423 U.S., at 271." United States v. Raddatz,* 447 U.S. 667, 682 (1980).

We have a personal right to an Article III adjudicator. *Wellness Int'l Network, Ltd. v. Sharif,* 575 U.S. 665, 675 (2015). When the magistrate dismissed our motions for summary judgment and disqualification, our rights in Article III were taken.

L.R. 302(c)(21), as otherwise demonstrated by the refusal of the district court to address the claims contained within the Complaints; follow rules of procedure; be bound by precedent; or hear the motion for recusal (detailed in Section 2); is pretext for case disposal in violation of the Due Process Clause of the Fifth Amendment.

"When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests." *Zablocki*

v. Redhail, 434 U.S. 374, 388 (1978). See *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975)- 5th and 14th Amendment analysis is the same; *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) - "concepts of equal protection and due process... are not mutually exclusive." "[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution" *INS v. Chadha*, 462 U.S. 919, 944 (1983).

7. A Rule 60(b) motion cannot be fairly heard so this Court must vacate judgments.

"Rule 60(b), ... reflects and confirms the courts' own inherent and discretionary power, 'firmly established in English practice long before the foundation of our Republic,' to set aside a judgment whose enforcement would work inequity. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944)." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 235 (1995). Because adjudication in the lower courts has demonstrated that they are unwilling "to hold the balance nice, clear and true" *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 825 (1986); our only option for a (substantive) Rule 60(b) motion is limited to this Court.

Rule 60(b) sets forth six bases of relief from a final judgment, including: "(4) where the judgement is void" and "(6) any other reason that justifies relief". (A32) See *Klapprott v. United States*, 335 U.S. 601, 614-15 (1949). "A void judgment is a legal nullity... a void judgment is one so affected by a fundamental infirmity that the infirmity may be raised even after the judgment becomes final. *United Student Aid Funds v. Espinosa*, 559 U.S. 260, 270 (2010). See *Hazel-Atlas Co.*, at 244-48.

a) For want of jurisdiction, judgement is a nullity.

"Because the magistrate judge acted without jurisdiction, the judgement is a nullity, and because the district court had no jurisdiction to enter judgment, this Court has no jurisdiction to hear the appeal." *Aldrich v. Bowen*, 130 F.3d 1364, 1365 (9th Cir. 1997). "Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. [citations]" *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 94 (1998). This rule is "inflexible and without exception". *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). "A void judgment is a legal nullity..." *United Student Aid Funds v. Espinosa*, 559 U.S. 260, 270 (2010). **"[D]efects in subject-matter jurisdiction require correction..."** *U.S. v. Cotton*, 535 U.S. 625, 630 (2002). **(emph. added)** See also *Peretz v. United States*, 501 U.S. 923, 954 (1991) citing exceptions where error is not plain.

b) For want of due process, judgment is a nullity.

As detailed, the facts and law have not mattered. The core requirement of due process, a fair and unbiased decision-making process, was missing. *In re Murchison*, 349 U.S. 133, 136 (1955). Judges who are required to push the boulder uphill forever can never provide a fair hearing. *Lavoie*, 825.

8. Distributional disparities in the allocation of judgeships defined by 28 U.S.C. §§44 & 133 result in denial of 5th Amendment rights in due process and equal protection.

There is no rational basis for the allocation of judgeships. Judicial Conference recommendations have been ignored and the consequences of inaction have been catastrophic. The Judiciary Act, 28 U.S.C. §§44 (circuit judges) &133 (district judges) defining the distribution of these judgeships must be declared unconstitutional. (Section 6 due process/ equal protection argument incorporated here.)

9. The Magistrates Act is void - Total control of the referral process is a fallacy destroying the structural integrity of Article III.

"The standard for determining whether there is an improper interference with or delegation of the independent power of a branch is whether the alteration prevents or substantially impairs performance by the branch of its essential role in the constitutional system. *Nixon v. Administrator of General Services,*433 U.S. 425, 443 ... (1977)." *Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc.*, 725 F.2d 537, 544 (9th Cir. 1984, en banc) (*Pacemaker II*). *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850 (1986).

The beginning of the end of Article III was *Mathews v. Weber*, 423 U.S. 261(1976). *Weber* recognized "an avalanche of additional work for the district courts which could be performed only by multiplying the number of judges or giving judges additional assistance." *Id.*, 268. The issue was whether Social Security benefit cases, consisting of a closed administrative record, could be referred to a magistrate for purposes of preparing a

recommendation. The government's petition "expressly declined" to make a constitutional argument. *Id.*, 265. Nevertheless, the fact that a district judge makes the final decision was used to frame the question (*Id.*, 263) and qualify the decision. *Id.*, 269-271. *Weber* insisted Article III was not violated because "[t]he magistrate may do no more than propose a recommendation, and ... [t]he district judge is free to follow it or wholly to ignore it, ... The authority — and the responsibility — to make an informed, final determination, we emphasize, remains with the judge. *Id.*, 270-71. (See also *Gomez v. United States*, 490 U.S. 858, 864 (1989) discussing *Mathews* and history of the Magistrates Act.) Failing to acknowledge a distinction between public rights and private rights, within months of *Weber*, Congress reasoned that "ultimate review" by the district judge would "pass muster". *Raddatz,* 681 n.8.

In context of private rights, the mere laying of Article III hands is not enough. *Exec. Benefits Ins. Agency v. Arkison*, 573 U.S. 25, 32-33 (2014) discussing *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). "The Constitution assigns that job—resolution of 'the mundane as well as the glamorous, matters of common law and statute as well as constitutional law, issues of fact as well as issues of law' - to the Judiciary." *Stern v. Marshall*, 564 U.S. 462, 484-85 (2011) quoting *Northern Pipeline*, at 87 n.39. For these reasons, reference is predicated on *"total control"* and *"de novo"* review of the F&R. *Raddatz*, 447 U.S. 667, 681-682 (1980) (concerning a suppression motion referred to a magistrate as an additional duty pursuant to 28 U.S.C. 636(b)); *Thomas v. Arn*, 474 U.S. 140, 153 (1985). In practice, these predicates are missing.

"Total control" of the referral process has always been fallacy. "If it were possible for district judges to supervise all civil cases to the extent the majority contemplates, there would be no need for magistrates. *Pacemaker II,* 552 (dissent, J. Schroder describing three fallacies of the Magistrates Act).[20] In *Raddatz,* Justice Blackmun's deciding opinion assumed a district judge is "waiting in the wings, fully able to correct errors... " *Id.,* 686.

Six years after *Raddatz,* Justice Blackmun joined the dissent to question whether *Raddatz* (and *Schor*) remained good law. "The critical question for Article III purposes is whether meaningful judicial review... can be accomplished." *Peretz v. United States,* 501 U.S. 923, 951-52 (1991).[21] The issue in *Peretz* was whether felony *voir dire* is one of the additional duties that could be assigned to a magistrate with consent of the parties. The dissent opined that control of the process was not possible. The majority relied on the waiver of the "personal right" to an Article III adjudicator. *Id.,* 934. "Consent" was the crucial difference in the outcome between *Peretz* and *Gomez, supra* (same issue). *Gomez* avoided the Article III question by claiming that Congress never intended that felony *voir dire* could be an "additional duty". *Id.,* 872 n.25. *Peretz* reasoned that, with the parties' consent, federal judges had the "leeway to experiment". *Id.,* 932. ***We did not consent.***

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[20] The question in *Pacemaker II* was the "constitutionality of the section of the Federal Magistrate Act of 1979 which allows magistrates to conduct civil trials with the consent of all parties. 28 U.S.C. § 636(c). The Opinion, written by then Judge Anthony Kennedy,

[21] *Peretz* heavily relied on two factors: 1) waiver; and 2) the "total control and jurisdiction" language from *Raddatz. Peretz,* 936-37.

Beyond our personal right, the structural integrity of Article III has been destroyed. *Peretz*, at 937, and most recently *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 655, 679 (2015), rely on *Raddatz's* "total control" fallacy to assert that there was "no danger" to the structural integrity of Article III. *Id.*, 937. *Raddatz, Peretz, Schor, and Wellness* were based on a false assumption and the result is clear, see Table I, above.

To the extent that this Court is inclined to look at the "practical effect" of the Magistrates Act, *Wellness* at 678-679 citing *Schor* at 851; the Court's most recent decisions are inconsistent with historical context. Justice Brennan's dissent in *Schor* (joined by J. Marshall) at 859, identified three narrow exceptions to the otherwise absolute mandate of Article III adjudication: "territorial courts...; courts-martial...; and courts that adjudicate certain disputes concerning public rights... I would limit the judicial authority of non-Article III federal tribunals to these few, long-established exceptions and would countenance no further erosion of Article III's mandate." *Id.*, 859. See, Chief Justice Robert's dissent in *Wellness*, at 688: "The majority's acquiescence in the erosion of our constitutional power sets a precedent that I fear we will regret." The Chief Justice, citing "The Federalist No. 48", reminded the Court that the Framers "warned that the Legislature would inevitably seek to draw greater power into its 'impetuous vortex,'." *Id.*, 705.

Nowhere is the vortex stronger than in the Senate's "blue slip" process. [22] At the expense of the

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[22] Senatorial courtesy: as defined by Webster: Ex.159; Memorandum, Solicitor General, 1942, relevant authorities and precedents Ex.160. Blue-slips: defined by the Senate's

Judiciary and the Nation, our Senators have degraded the ability of the Judiciary to function for their personal political benefit. This is the "aggrandizement" of one branch at the expense of another which violates the separation of powers. *Schor,* 850.

If the Senators want to put judicial nominees through the ring of fire, that is their right. They cannot, however, violate the Constitution as part of the process. *Marbury v. Madison,* 5 U.S. 137, 178 (1803). Here, California's two senators (both Democrats), as part of Senate policy, blocked the ability of the (Republican) President to fill two vacancies in the CAED for years. Meanwhile, the CAED judges were begging for help. (June 2018 letter, A1.) Judge Drozd, left with no choice, began assigning cases to "NONE". (Order, A5)

Peretz, at 942, identified that *this* "theme pervades the Act's legislative history."

> If district judges are willing to experiment with the assignment to magistrates of other functions in aid of the business of the courts, *there will be increased time available to judges for the careful and unhurried performance of their vital and traditional adjudicatory duties*, and a consequent benefit to both efficiency and the quality of justice in the Federal courts." H.R. Rep. No. 94-1609, p. 12 (1976)... [*italics* original]

These words are false.

Judiciary Committee, Ex. 158. Blue-slip – Origins and Development, Yale Law & Policy Review, Fall 2018, Ex.168. Blue-slip - in practice: "Explaining the Senate's Blue Slip Process" Nov. 2017 (Sen. D. Feinstein) (Ex.165); "Senate Blue Slips" Oct. 2017, Sen. M. Lee (Ex.183).

This Court must now acknowledge that the Magistrates Act has failed. Congress has buried the Judiciary in an avalanche; and now, the Judiciary is gasping for breath. So that this catastrophe may never be repeated, the Court cannot be timid. Legislation increasing the workload of the courts requires a concomitant allocation of financial resources to fund the Judiciary. An unfunded mandate imposed on the Judiciary violates both Article III's guarantee of an independent Judiciary and fair process- process otherwise guaranteed by the Due Process Clause.

10. CONCLUSION

For the reasons identified, we ask the Court to:

a) direct the Ninth Circuit to vacate these judgments and direct entry of Defendants' default with monetary sanctions in accordance with the separately filed motion;
b) declare CAED Local Rule 302(c)(21) void;
c) declare the Magistrates Act void;
d) declare 28 U.S.C. §44 and §133 void;
e) declare the Senate's blue-slip practice unlawful to the extent that said practice violates a litigant's right to equal access to an Article III judge.

Written by,

ROGER T — *12/24/2022*

Roger Towers — Date

Joined by,

K. Tow — *12/24/2022*

Kate Towers — Date

DECLARATION OF ROGER TOWERS

I, Roger Towers, declare as follows:

1. I am one of the Petitioners in these cases now before the Court and make this declaration based on personal knowledge, education, professional experience, and extensive review of data maintained by the Administrative Office of the United States Courts (AOUSC).

2. Education – I possess a Bachelor of Science degree in Landscape Architecture and have completed substantial post-graduate work in land use planning and public administration. My post-graduate work includes completion of coursework in quantitative statistical analysis – the application of mathematical procedures to data. The calculations presented here are based on data obtained from the AOUSC and involve only basic computational skills.

3. Professional Experience – I have spent more than forty years involved in land use development and real estate investment – including ten years working for public planning agencies and private land use planning/engineering firms. I have processed many hundreds of land use development applications in California. I am licensed by the State of California as a general contractor and as a real estate broker.

4. My wife (Kate) earned her Bachelor of Science degree, with honors, in business administration. We began investing in real estate in about 1994. The "Property" that is the subject of this litigation is approximately 20 acres of land and consists of three parcels. We agreed to buy the Property on or about February 2000 with the intention of improving it for rural residential use. After making improvements to

the Property; we marketed the Property and agreed to sell one of the lots. A condition of the agreement was that we obtain a "Site Approval" for the construction of homes. The San Joaquin County Community Development Department (CDD) approved our application for the construction of four homes in 2002. However, nearby mining operations appealed the staff action. The Site Approval was denied after exhaustion of the appeals process.

5. In 2009, I discovered CDD had been intentionally misrepresenting land use designations and other basic planning information on or in the immediate vicinity of our Property at public hearings since 1996. The fraudulent representations have resulted in the approval of open pit mining in the immediate vicinity of our Property and the denial of our various development applications. We filed a complex land use action against the County and the CDD Director in 2009, i.e. – the "2009 Case". As a result of the discovery process, the background facts of fraud and malfeasance were irrefutably documented.[23]

6. As a result of the extended litigation, our property development business incorporated as "House and Land" in 2004, has been destroyed. The expense of litigation has drained our business of needed acquisition capital and caused losses for the business in most years since 2007. If not for borrowing money from family, House and Land would have had to close for insufficient cash flow. Without borrowing more money, we are unable to meet monthly expenses.

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[23] See 2009 Case AOB Table of Contents, FER350. The Statements of Fact are true and I retain possession of the documents supporting the statements.

7. The stress related to litigation with the County and the destruction of the means by which we have made our living has taken a very significant toll on our health. In 2016, I developed heart arrhythmia with associated chest pains. I now suffer from high blood pressure for which I began taking medication in 2021. In 2019, while working on the appeal brief for the Complaint for Damages (19-16684), half of my face was suddenly paralyzed. The condition was subsequently diagnosed as Bells Palsy- a condition with unclear causation.[24] I cannot smile. I have difficulty breathing because one of my nares is now substantially smaller. I remain at risk of losing my left eye because my eyelid will not fully close when I am stressed.

8. Kate began working at the local library on or about 2012 to help pay the bills. In 2020, Kate suffered a catastrophic neurological failure. She lost her short-term memory.[25] Kate has never fully recovered. We continue to seek treatment from neurologists and neuropsychologists and are presently facing difficulties with insurance coverage. On doctor's orders, she is on a leave of absence from the library. Kate's sick leave is exhausted. She has about 200 hours of vacation time remaining.

9. Utilizing "CASETEXT", on December 1, 2022; I searched for the order "all pleading, discovery; and motion practice in this action are STAYED pending resolution of the findings and recommendations". The search returned 125 results since 2017.

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[24] Roger's hospital bill, Ex.191.

[25] Kate's hospital bill, Ex. 192.

10. The CAED average weighted caseload from 2009 to 2014 was 1057.[26] By 2019 the caseload dropped to 730. (Ex.19) Between 2010 and 2020, the population in the CAED grew by about 11%. Nationally, court filings have increased by 8% in the same period. (See f.n. 17 rejecting 2020 filings as anomalous and relying on a 2019 and 2021 filings average.) The preliminary recommendations of the Judicial Conference (2021) discusses unique circumstances in the CAED such as declining immigration and prisoner cases. (Ex. 87)

11. The Exhibits supporting this Petition have been obtained from reputable online sources; and are true and correct copies of what they appear to be.

I certify under penalty of perjury that the foregoing is true and correct.

Roger Towers 12/24/2022

Roger Towers Date

[26] www.uscourts.gov/sites/default/files/statistics_import_dir/district-fcms-profiles-september-2014.pdf