No. 23-1342

IN THE

Supreme Court of the United States

DAVID W. FOLEY, JR., AND JENNIFER T. FOLEY,
Petitioners,

v.

ORANGE COUNTY, ASIMA AZAM, TIM BOLDIG, FRED BRUMMER, RICHARD CROTTY, FRANK DETOMA, MILDRED FERNANDEZ, MITCH GORDON, TARA GOULD, CAROL HOSSFIELD, TERESA JACOBS, RODERICK LOVE, ROCCO RELVINI, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, TIFFANY RUSSELL, BILL SEGAL, PHIL SMITH, AND LINDA STEWART,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

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August 23, 2024

QUESTION PRESENTED

Whether the Due Process Clauses of the Fifth and Fourteenth Amendments require federal and state courts to answer the question of state law that the claimant alleges is dispositive of their claim.

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ARGUMENT

I. A new Eleventh Circuit order begs an answer to the due process question presented.

The Eleventh Circuit has issued a new collateral order in this case which makes the question presented doubly cert-worthy. Like the order on review, it too deliberately evades the issue of state law dispositive of the petitioners' federal claim.

July 24, 2024, a month after the petition was filed, the Eleventh Circuit, in appeal 23-12740, affirmed the collateral decision of the District Court to designate the Foleys as vexatious litigants.

A simple comparison of the new appellate order and the Foleys' corresponding principal appellate brief demonstrates that the Eleventh Circuit has clearly answered the question presented in the negative – the Eleventh Circuit has now three times ignored the Foleys' substantive defense of their wildlife property rights in Article IV, Section 9, Florida Constitution, and on this last occasion has refused to even acknowledge that the Foleys raise Article IV, Section 9, to support their good faith defense of the action under review.

This new collateral order is reproduced on pages SA-1 thru SA-5 of the appendix to this supplemental brief.

It makes no reference whatsoever to the provision of Florida law dispositive of the Foleys' good faith defense of this action – Article IV, Section 9, Florida Constitution.

The Foleys' corresponding principal appellate brief is reproduced on pages SA-6 thru SA-66 of the appendix to this supplemental brief.

It clearly asserts Article IV, Section 9, Florida Constitution, as the ground for the Foleys' good faith

defense of their federal action, *see* appendix to this supplemental brief pages SA-22 thru 26, 28, 29, 45, 46, 49, 52, 53, 57, and 61.

The correspondence between order and pleading that is required by due process, as urged in the Foleys' petition, is also absent from this new Eleventh Circuit order.

This *oversight* by the Eleventh Circuit is not accidental. It represents the pattern of this case. The Eleventh Circuit, like the district court, the state court, and the local administrative proceeding, has again replaced the hard work of due process (i.e., recognizing and resolving the dispositive issue of state law) with the shortcut that the Foleys' petition labels *stealth abstention.*

II. Due process requires what psychologists prescribe for both the persistent litigant and the impatient court.

This oversight in the Eleventh Circuit's new vexatious litigant order opens the door to another way of demonstrating how the question presented is doubly cert-worthy: "due process of law" requires precisely what psychologists say busy courts require to distinguish the persistent from the vexatious litigant – an answer to the claimant's legal question as soon as possible.

In their article *Vexatious Litigants*, [1] British psychologists Paul Mullen and Grant Lester share a perspective on the vexatious, or *querulous*, litigant that does not appear in the efficiency-driven, cost-benefit analyses found in law journals, [2] legislative impact

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[1] Paul E. Mullen, M.B.B.S., D.Sc., and Grant Lester M.B.B.S., M.M.E.D. (2006). *Vexatious Litigants and Unusually Persistent Complainants and Petitioners: From Querulous Paranoia to Querulous Behaviour*, Behavioral Sciences and the Law 24: 333–349.

[2] Neveils, Deborah L. (2000). *Florida's Vexatious Litigant Law: An End to the Pro Se Litigant's Courtroom Capers?*, Nova Law Review:

statements,[3] bar workgroup reports,[4] or Florida Supreme Court administrative orders.[5]

Mullen and Lester suggest a very simple and effective solution to the *querulous* claimant – the Court should answer the claimant's legal question as soon as possible.

This solution to the *querulous* claimant is precisely what due process promises any claimant, *querulous* or not.

In other words, an affirmative answer to the question presented is a two-birds-with-one-stone solution. That makes the question presented in this toucan case doubly cert-worthy.

Below, to assist the Court in its conference, the Foleys quote select portions of the Mullen and Lester article that thoughtfully explore the differences between various types of persistent litigants and conclude that persistent litigants and judicial efficiency require the same thing – an answer to the legal question the claimant presents, at the earliest possible opportunity.

> Querulous (from the Latin for plaintive murmuring) is used in this article to describe a pattern of behaviour involving the unusually persistent pursuit of a personal grievance in a manner seriously

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Vol. 25: Iss. 1, Article 10.

[3] Florida Senate Staff Analysis and Economic Impact Statement, Judiciary Committee, *Vexatious Litigants* (November 3, 1999). https://flsenate.gov/Session/Bill/2000/154/Analyses/20000154SJU_SB0154.ju.pdf.

[4] Florida Bar Workgroup on Sanctions for Vexatious and Sham Litigation – Final Report (June, 2022), https://www-media.floridabar.org/uploads/2022/08/Report-of-the-Workgroup-on-Sanctions-for-Vexatious-and-Sham-Litigation-1.pdf.

[5] Florida Supreme Court Administrative Order No. AOSC21-62, (December, 2021). https://supremecourt.flcourts.gov/content/download/813326/file/AOSC21-62.pdf.

damaging to the individual's economic, social, and personal interests, and disruptive to the functioning of the courts and/or other agencies attempting to resolve the claims. (Page 334).

...

Querulous behaviour has to be separated from the over-enthusiastic, and even disruptive, pursuit of justice that remains within normal limits, or is legitimized by the social agenda being pursued.

Individuals can invest inordinate amounts of time in the pursuit of claims because of the inherent complexity and manifest importance of the complaint. These we would not regard as querulous. There are difficult people who pursue claims filled with a sense of being victimized and distrustful of all except their own construction of the case, but who will ultimately settle for the best deal they can extract. This is difficult but not querulous behaviour. Querulousness in our opinion involves not just persistence but a totally disproportionate investment of time and resources in grievances that grow steadily from the mundane to the grandiose, and whose settlement requires not just apology, reparation, and/or compensation but retribution and personal vindication.

Querulous behaviour is almost always associated with claims of wide social significance for the quest for personal justice. Distinguishing those individuals from social reformers who are using the complaints procedures or the civil courts to pursue their campaigns is therefore of importance.

Social reformers are pursuing issues of concern to groups of their fellow citizens and they use personal experience, if they use it at all, to inform their

campaigns. The socially relevant and the personally relevant may, on occasion, be elided, but never in a manner in which the idiosyncratic overwhelms the wider public interest. Social campaigners typically work with and through others. Their objectives are circumscribed and obviously related to the core issues driving the campaign. In most cases they will work for negotiated resolutions even if these involve a degree of compromise and face saving for authorities.

Querulous behaviour, in contrast, involves claiming wide social significance for idiosyncratic concerns. There is a conflation of the personal with the supposed public import to leave the personal dominant. Those showing querulous behaviour usually have problems working with others, typically dismissing a series of lawyers, advocates, and/or claims professionals, who, not infrequently, find themselves the subject of subsequent complaints. Querulous behaviour often revolves around stated objectives that are difficult to relate to any of the claimed core issues of social relevance, and despite, or possibly because of, the diffuse nature of the demands, negotiation and compromise have no place in their quest for justice.

The clear theoretical dichotomy between social campaigning and querulous behaviour is not always so obvious in practice. Those whose behaviour is querulous can occasionally gather around them small groups of like minded supporters, a process now assisted by the internet. They can join social campaigns where their energies compensate for a time for their personalization of issues. In some social movements such personalization may even be encouraged, though usually the querulous by

constant self-reference eventually alienate themselves from the group. Those who have shown querulous behaviour in the past may take on a role of lay advocate and use others to advance their own view of justice. Such individuals are recognized as a major problem for agencies of accountability. On occasion, campaigns emerge around issues that have immense personal import for all those involved, and in these situations the risks of querulous behaviour suborning aspects of the group's function may be considerable. If there are doubts then the benefit of these doubts should go to the assumption of legitimate campaigning, not to the presence of querulous behaviour.

Whistle blowers, who usually claim to be exposing nefarious and corrupt practices in their place of work, are a particularly difficult group in which to separate altruistic from querulous behaviour. There is no doubt that errors occur. In 1977 in Finland a television salesman contacted the police and tax authorities, claiming that the company he worked for, along with a major television manufacturer, were involved in large scale tax evasion and black market sales. When greeted with disbelief he attempted to publicize his revelations, eventually being detained and committed for compulsory treatment with a diagnosis of querulous paranoia. Subsequently his allegations were fully substantiated (Stalstrom, 1980 [*Querulous paranoia: Diagnosis and dissent.* Australian and New Zealand Journal of Psychiatry, *14,* 145-150.]). Whistle blowers tend to be somewhat isolated individuals, who are forced to pursue a lonely road, often at great cost to themselves. The accusations often turn on an interpretation of events that may seem questionable, or even implausible, to those without their inside

knowledge. This group also tend to gather further grievances and make supplementary accusations, as with the querulous, but here often because they have in fact become the object of conspiracies and orchestrated litanies of lies, central among which is usually the claim that they are motivated by personal resentment at some failure of promotion or job loss. Whistle blowers may even share some of the personality traits of the querulous in terms of obsessiveness and righteous self-assurance. *It is only by examining carefully the behaviour in relation to the claim and applying the criteria used for social reformers that there is any chance of making a distinction* [*Emphasis* added]. It has been our experience that one can identify a group who, though mistaken, are pursuing a coherent campaign related to an understandable and objectively important set of issues. What remains are those in whom, unless frankly mentally ill on other criteria, it is difficult to distinguish the misguided and over-involved from the querulous. (Pages 340-342).

...

If we accept that individuals drawn into complaints resolution or litigation have varying propensities to become querulous, then efforts should be made to avoid any potential provocations or encouragement to such behaviour. Some initial attempt should be made at the outset to clarify the limitations of complaint and claim resolution systems. (Page 346).

...

To evaluate ... the querulous ... a careful history is needed, a dispassionate examination of the documents, and an active attempt to engage with their ideas and claims. (Page 345).

...

> The objective is to assist in resolving what can be resolved with repeated and clear emphasis on which aspects of the claim are outside of the organization's jurisdiction and powers. When what can be done has been done the case needs to be sympathetically but firmly closed, albeit ideally with the opportunity for the claimant, who if querulous will remain dissatisfied, to come back occasionally to discuss outstanding issues. (Page 347).
>
> ...
>
> Managing the querulous is about helping them construct face saving exits. (Page 342).

In sum, according to Mullen and Lester, though the due process question presented is relevant to all "individuals drawn into complaints resolution or litigation," its answer is critical to busy courts attempting to distinguish the *querulous* litigant from the genuine whistleblower, social reformer, or institutional litigator (e.g., Pacific Legal Foundation, Institute for Justice, law school clinics, ACLU). According to Mullen and Lester, courts can only distinguish the vexatious from the persistent by answering, as quickly as possible, the question of law the litigant alleges is dispositive of their claim: the vexatious will persist even after that question is answered; the persistent will not. Consequently, the question presented has cert-worthy import beyond its application to due process; it confronts the Court's concern for the *querulous* bogey that Dickens said may be the Court's own creation.

> This is the Court ... which so exhausts finances, patience, courage, hope; so overthrows the brain and breaks the heart; that ... [it] has its worn-out lunatic in every madhouse.[6]

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[6] Dickens, Charles. *Bleak House*. Bradbury & Evans, 1853, page 2.

III. None dispute that this case is a clean vehicle for a clear answer to the simple question presented.

The respondents do not contest any statement of fact or any application of law presented in the Foleys' petition. They ignore the petition and file no brief in opposition.

Rule 15(2) allows the Court, at its discretion, to consider this lack of response a blanket waiver to the petition's argument for the question presented. It states, in relevant part:

> Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition. Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition.

Ignoring the Foleys was a successful strategy for the respondents in state and federal court. By ignoring Article IV, Section 9, Florida Constitution, and omitting any mention of it in their state and federal arguments, the respondents encouraged state and federal court likewise to ignore that provision of state law that is dispositive of the Foleys' federal claim.

The question presented implies that the respondents' strategy mislead these courts to deny the guarantee of "due process of law" in the Fifth and Fourteenth Amendments.

The Foleys request that the Court consider the respondents' waiver as evidence that they are prepared to defend their advocacy of *stealth abstention* and to go directly to the merits of the question presented.

CONCLUSION

The petition should be granted and merits briefs should be ordered.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX CONTENTS

[DO NOT PUBLISH]

In the United States Court of Appeals For the Eleventh Circuit

No. 23-12740

Non-Argument Calendar

DAVID WASH FOLEY, JR., JENNIFER T. FOLEY,
Plaintiffs-Appellants,

versus

ORANGE COUNTY, ASIMA M. AZAM, TIM BOLDIG, FRED BRUMMER, RICHARD CROTTY, individually and together, in their personal capacities, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida
D.C. Docket No. 6:22-cv-00456-RBD-EJK

Before JORDAN, LAGOA, and BRASHER, Circuit Judges.

PER CURIAM:

David Foley Jr., and his wife, Jennifer Foley, filed a *pro se* complaint against Orange County, Florida, and nineteen individual defendants, raising the same federal and state law claims against the same defendants as they have alleged in several prior federal and state lawsuits arising from the same set of facts as those presented here. The Foleys now appeal the district court's decision to designate them vexatious litigants and restrict their ability to file future lawsuits. Because the record supports the district court's findings that the Foleys are vexatious litigants, and because the district court has not entirely prevented the Foleys from accessing federal court, we affirm.

I.

Although this lawsuit was filed in 2022, the underlying dispute began in 2007, when a neighbor complained to Orange County about the Foleys breeding toucans in an aviary built on residential property. In an administrative proceeding, the County determined that the Foleys' aviary was against County code because it required permits that the Foleys never secured. That proceeding gave rise to the Foleys' first state court litigation (*Foley I*), in which they contested both the County's substantive determination that they were violating County code by building an aviary without a permit as well as the procedures used by the County in making that determination. The state courts rejected both arguments, meaning the Foleys could either get a permit or destroy the aviary. The Foleys tried to obtain a permit, but their request was denied. They appealed their way through Florida's state courts (*Foley II*), but the denial was upheld at every stage. The Foleys were ultimately forced to destroy the aviary and make other accommodations for the toucans.

The Foleys then turned to federal court, filing their first *pro se* federal lawsuit against Orange County and nineteen county officials involved in the code-enforcement and permitting processes. *See Foley v. Orange County*, Docs. 1, 162, 6:12-cv-00269 (M.D. Fla.) (*Foley III*). The Foleys alleged violations of their substantive due process and equal protection rights under the Fourteenth Amendment, their First Amendment commercial free speech rights, and their Fourth Amendment rights to be free from unreasonable searches and seizures. The district court ruled against the Foleys on all those claims. We affirmed, specifically concluding that the Foleys' claims were so frivolous that, under *Bell v. Hood*, 327 U.S. 678 (1946), federal courts lacked subject-matter jurisdiction to

adjudicate them. *Foley v. Orange Cnty.*, 638 F. App'x 941, 942 (11th Cir. 2016).

The Foleys tried their luck again in state court, *Foley IV*, suing the same twenty defendants from *Foley III*. The Foleys alleged violations of various state laws as well as procedural due process and Takings Clause violations. The Foleys dropped their Takings Clause claim voluntarily, and the state trial court ruled against the Foleys on all remaining claims. In response, the Foleys filed six motions for rehearing in the state trial court, three appeals to the intermediate state appellate court, seven motions for rehearing in the intermediate appellate court, one appeal to the Florida Supreme Court, two petitions for a writ of mandamus, and one petition for a writ of prohibition. Every request for relief was denied.

The Foleys then came back to federal court and filed this lawsuit, *Foley V*. Suing the same twenty defendants from *Foley III* and *Foley IV*, the Foleys alleged procedural due process and Takings Clause violations. The defendants moved to dismiss the claims on *res judicata* grounds; the district court granted the motion; we affirmed. *See Foley v. Orange Cnty.*, 2024 WL 49134 (11th Cir. Jan. 4, 2024).

After the district court's dismissal of the complaint in this case, and while the appeal of that dismissal was pending in this court, the defendants asked the district court to declare the Foleys vexatious litigants and to impose various pre-filing restrictions on them. The district court granted that request, finding that the Fo- leys' legal claims are meritless, that the Foleys have been harassing the defendants, and that the Foleys' litigation tactics have been burdensome on—and at times even insulting to—the courts. *See* D.E. with" the Foleys, that "restricting their filing privileges is the only way to deter them from continuing this nonmeritorious obsessive litigation." *Id.* at 3 (internal quotation marks and citation omitted).

Accordingly, the district court declared the Foleys vexatious litigants and ordered that "[a]ny new pleading filed by these Plaintiffs . . . will be assigned to and reviewed by the judges assigned to this case," in accordance with the Middle District of Florida, Orlando Division's vexatious litigant procedures. *Id.* at 4. Pursuant to those procedures, any new complaint filed by the Foleys will be allowed so long as it provides federal subject matter jurisdiction, is not duplicative or harassing, and is not otherwise frivolous. *See In re Vexatious Litigants in the Orlando Division*, 6:23-mc-00003 (M.D. Fla. Jan. 18, 2023).

II.

We review the district court's decision to restrict the Foleys' filing privileges for abuse of discretion. *Miller v. Donald*, 541 F.3d 1091, 1095-96 (11th Cir. 2008); *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1096 (11th Cir. 2004).

III.

The All Writs Act provides that the "Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." *Klay*, 376 F.3d at 1099 (quoting 28 U.S.C. § 1651(a)). This power includes the authority "to enjoin litigants who are abusing the court system by harassing their opponents." *Harrelson v. United States*, 613 F.2d 114, 116 (5th Cir. 1980).

We have recognized that "[c]onsiderable discretion necessarily is reposed in the district court." *Procup v. Strickland*, 792 F.2d 1069, 1074 (11th Cir. 1986) (en banc). The only restriction on injunctions designed to protect against vexatious litigation is that a litigant cannot be "completely foreclosed from any access to the

court." *Id.*; *see also Martin-Trigona v. Shaw*, 986 F.2d 1384, 1387 (11th Cir. 1993). We have upheld an injunction requiring the pre-filing screening of claims against a vexatious litigant. *See Martin-Trigona*, 986 F.2d at 1387-88; *Cofield v. Ala. Pub. Serv. Comm'n*, 936 F.2d 512, 518 (11th Cir. 1991).

Here, the record supports the district court's determination that the Foleys are vexatious litigants. They have instituted multiple proceedings in state and federal court, pursuing the same claims, against the same defendants, based on the same facts, for more than a decade. They have lost on every claim at every step of the way. Yet, as the district court concluded, absent some deterrence, the Foleys are committed to reasserting these claims.

The pre-filing restrictions adopted by the district court are appropriate under the circumstances and under our precedents. Those restrictions do not foreclose the Foleys' access to the court system and impose only a minimally restrictive screening process for weeding out frivolous, duplicative, or harassing claims. Such screening processes are a permissible restriction on vexatious litigants. *See Cofield*, 936 F.2d at 518. Because the district court reasonably exercised its considerable discretion in designating the Foleys vexatious litigants and conditioning their future filings, and because that injunction does not completely foreclose the Foleys' access to the courts, we affirm. *See Procup*, 792 F.2d at 1074.

AFFIRMED.

No. 23-12740-J

In the United States Court of Appeals for the Eleventh Circuit

DAVID W. FOLEY, JR., AND JENNIFER T. FOLEY,
Plaintiffs-Appellants,

v.

ORANGE COUNTY, a political subdivision of Florida, and ASIMA AZAM, TIM BOLDIG, FRED BRUMMER, RICHARD CROTTY, FRANK DETOMA, MILDRED FERNANDEZ, MITCH GORDON, TARA GOULD, CAROL HOSSFIELD, TERESA JACOBS, RODERICK LOVE, ROCCO RELVINI, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, TIFFANY RUSSELL, BILL SEGAL, PHIL SMITH, AND LINDA STEWART, individually and together, in their personal capacities,

Defendants-Appellees.

APPELLANTS' PRINCIPAL BRIEF

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO
NO: 6:22-CV-00456-RBD-EJK

David Foley and
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No. 23-12740-J Foley, *et ux v.* Orange County, *et al*
Certificate of Interested Persons and
Corporate Disclosure Statement

Plaintiff-Appellants David and Jennifer Foley (the Foleys) certify that the following is a complete list of interested persons as required by FRAP 26.1, and 11th Cir. R. 26.1-1:

1. Angell, Derek, Attorney for Defendants/Appellees Asima Azam, Fred Brummer, Richard Crotty, Frank Detoma, Mildred Fernandez, Teresa Jacobs, Roderick Love, Scott Richman, Joe Roberts, Marcus Robinson, Tiffany Russell, Bill Segal, and Linda Stewart
2. Azam, Asima, Defendant/Appellee
3. Bernbaum, Lee, Attorney for Defendant/Appellee Orange County
4. Boldig, Tim, Defendant/Appellee
5. Brummer, Fred, Defendant/Appellee
6. Connor, Jessica C., Attorney for Defendants/Appellees Tim Boldig, Mitch Gordon, Tara Gould, Carol Hossfield, Rocco Relvini, and Phil Smith
7. Crotty, Richard, Defendant/Appellee
8. Dalton, Roy B., Jr., United States District Judge
9. Dean, Ringers, Morgan & Lawton, P.A., law firm representing Defendants/Appellees Tim Boldig, Mitch Gordon, Tara Gould, Carol Hossfield, Rocco Relvini, and Phil Smith
10. DeToma, Frank, Defendant/Appellee
11. Fernandez, Mildred, Defendant/Appellee
12. Foley, David, Jr., Plaintiff/Appellant
13. Foley, Jennifer, Plaintiff/Appellant
14. Gordon, Mitch, Defendant/Appellee
15. Gould, Tara, Defendant/Appellee
16. Harrop, Ronald L., Attorney for Defendants/Appellees Asima Azam, Fred Brummer, Richard Crotty, Frank Detoma, Mildred Fernandez, Teresa

Jacobs, Roderick Love, Scott Richman, Joe Roberts, Marcus Robinson, Tiffany Russell, Bill Segal, and Linda Stewart

17. Hossfield, Carol, Defendant/Appellee
18. Jacobs, Teresa, Defendant/Appellee
19. Kidd, Embry J., United States Magistrate Judge
20. Love, Roderick, Defendant/Appellee
21. O'Connor, Hatfel & Angell, PLLC, law firm representing Defendants/Appellees Asima Azam, Fred Brummer, Richard Crotty, Frank Detoma, Mildred Fernandez, Teresa Jacobs, Roderick Love, Scott Richman, Joe Roberts, Marcus Robinson, Tiffany Russell, Bill Segal, and Linda Stewart
22. Orange County, Defendant/Appellee
23. Relvini, Rocco, Defendant/Appellee
24. Richman, Scott, Defendant/Appellee
25. Roberts, Joe, Defendant/Appellee
26. Robinson, Marcus, Defendant/Appellee
27. Russell, Tiffany, Defendant/Appellee
28. Segal, Bill, Defendant/Appellee
29. Smith, Phil, Defendant/Appellee
30. Stewart, Linda, Defendant/Appellee

Statement Regarding Oral Argument

The Eleventh Circuit has not adopted vexatious litigant guidelines like those its District Courts have adopted from the Second Circuit decision in Safir v. United States Lines, Inc., 792 F.2d 19, 24 (2nd Cir. 1986).

Important to the adoption of any such guidelines is a consideration of the issues presented by the primary question raised in this appeal: Is a post-dismissal Writ ever "necessary or appropriate" to broadly enjoin "any pleading to open a new case," or as an initial sanction in a civil case, or when the claim is not "devoid of arguable legal or factual support"?

If the Court considers this appeal an opportunity to refine Procup v. Strickland, 792 F.2d 1069 (11th Cir. 1986) and to expressly adopt guidelines like those in Safir or Cromer v. Kraft Foods, 390 F.3d 812, 818 (4th Cir. 2004), or the initial monetary sanction policy of Farguson v. MBank Houston, 808 F.2d 358 (5th Cir. 1986), the Foleys would like to take part in its deliberations, and request oral argument for that purpose.

For these reasons, pursuant FRAP 34(a)(2), and 11th Cir. R. 34-3(c), the Foleys request that oral argument be heard, and state 1) their appeal is not frivolous; 2) the dispositive issue has been authoritatively determined; and, 3) direct examination on oral argument will ensure the Court has the relevant facts, and will aid the Court in resolving the legal issues presented.

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Jurisdictional Statement

Before the pre-filing injunction at issue in the instant appeal was briefed and decided by the District Court, this Court had assumed jurisdiction of this case in pending appeal #22-13864-JJ.

Consequently, the District Court erred when it assumed jurisdiction to make new findings regarding "qualified immunity" to support its Writ while that defense is at issue in the Foleys' pending appeal #22-13864-JJ.

Furthermore, the District Court exceeded its jurisdiction under Title 28 U.S. Code Section 1651 when it issued an overbroad injunction that was not necessary or appropriate as an initial sanction in a civil case presenting a claim that was not devoid of merit.

This Court has appellate jurisdiction, pursuant Title 28 U.S. Code Section 1291, to review (1) the final order of the District Court entered July 26, 2023, designating the Foleys vexatious litigants; and, (2) the order of the District Court entered August 25, 2023, denying rehearing of the order entered July 26, 2023.

This appeal is timely filed per the requirements of Rule 4(a)(1)(A), Federal Rules of Appellate Procedure; the Foleys' original notice of appeal was filed August 23, 2023, Docket 167.

Statement of the Issues

Pursuant the All Writs Act, Title 28 U.S. Code Section 1651, the District Court has designated the Foleys vexatious litigants and subjected all the Foleys' future pleadings to pre-filing restrictions. This appeal asks:

1. Is the District Court without jurisdiction under the Act to make new findings regarding "qualified immunity" to support its Writ while that defense is at issue in the Foleys' pending appeal #22-13864-JJ?

2. Is it an unreasonable or incorrect application of the Act to designate and enjoin the Foleys as vexatious litigants when they proceed on the objective good faith view that their federal due process and takings claims did not ripen or accrue until state court ruled that Florida no longer protects the Foleys' interests in the state-licensed sale of their toucans?

3. Is it a misapplication of the "necessary or appropriate" standard of the Act to broadly subject "any pleading to open a new case in this Division" to pre-filing review rather than narrowly tailor that restriction to pro se pleadings involving the same parties and the issues previously adjudicated?

4. Is it a misapplication of the "necessary or appropriate" standard of the Act to order pre-filing review as an initial sanction, rather than monetary sanctions, absent proof of an inability or a failure to pay monetary sanctions?

Statement of the Case

I. The facts relevant to the issues submitted for review

The issue on review is the District Court's decision to designate the Foleys as vexatious litigants and subject "any pleading to open a new case in this Division" to pre-filing review. To facilitate this Court's analysis of the District Court's decision the Foleys outline below the sequence of the proceedings since 2007, the jurisdictional limits of each tribunal, the distinct facts before each tribunal, and the relevant rulings of each tribunal.

A. Two County administrative proceedings deprive the Foleys of their state-licensed right to sell toucans

1. For just over a year, from roughly the date of the citizen accusation that the Foleys were 'raising birds to sell', February 23, 2007 (Docket 1, allegation 53), until the final BCC order, February 29, 2008 (Docket 1, allegation 81; Docket 33-15), the Foleys defended their bird business against the defendants' actions in two county administrative proceedings.

2. The first proceeding concluded with an order of the Orange County Code Enforcement Board (CEB) (Docket 1, allegations 60 thru 62; Docket 33-13, pages 2, 3). In this proceeding the Foleys were prosecuted for building a 'structure' without a building permit (Docket 1, allegation 58). In this proceeding the Foleys were not prosecuted for 'raising birds to sell,' aviculture, or for building an aviary (Docket 1, allegations 57, 59).

1. The second proceeding concluded with an order of the Orange County Board of County Commissioners (BCC) (Docket 1, allegation 81; Docket 33-15). In this second proceeding the Foleys were prosecuted and punished for

'raising birds to sell' (Docket 1, allegations 55, 68 thru 70, 73, 76, 78 thru 81). The Foleys' allegations on this point are supported by collateral findings made in *Foley v. Azam*, 257 So.3d 1134, 1136 (Fla. 5th Dist. 2018):[1]

> "The Foleys were commercial toucan farmers who attempted to run their business out of their home in Orange County ... Following a public hearing, the Board of Zoning Adjustment ('BZA') found that the Foleys were in violation of the Code and the Board of County Commissioners ('BCC') affirmed that decision."

B. Foley I: Two state-court review proceedings lack jurisdiction to remedy the deprivation.

2. For the next two years and seven months, from the date of the final BCC order, February 29, 2008, until the final order of Florida's Fifth District Court of Appeal, October 8, 2010 (Docket 1, allegation 86), the Foleys pursued two state-court review proceedings, Foley I. One reviewed the CEB order, while the other reviewed the BCC order. Though neither proceeding reversed or quashed the administrative orders reviewed, the jurisdictional limits, factual limits, and ultimate rulings of these proceedings are the basis for the Foleys' allegations that the injury to their bird business that resulted from defendants' violation of Article IV, Section 9, Florida Constitution,[2] could not be remedied in these state review proceedings (Docket 1, allegations 64 thru 67 and 84 thru 86).

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[1] *Foley v. Azam* was not the state court review of the BCC order. It was the Foleys' successful reversal of the Ninth Circuit's decision in Foley III to grant the defendants' limitations defense.

[2] Article IV, Section 9. There shall be a fish and wildlife conservation commission ... The commission shall exercise the regulatory and executive powers of the state with respect to wild animal life ...

3. On appeal of the CEB order, in *Foley v. Orange Cnty.*, CVA1 07-37 (Fla. 9th Cir. 2009), the Foleys successfully established that the defendants prosecuted them before the CEB only for "erecting structures on their property without the proper building or use permits" (Docket 34-1, page 1), and did not prosecute them before the CEB for any violation of Orange County's regulation of 'raising birds to sell,' aviculture, or aviary (Docket 1, allegations 59, 60, 62, 64 thru 67). The Foleys' right to 'raising birds to sell,' and the due process guaranteed that right, were not at issue, and so were beyond the jurisdiction of the court on appellate review of the CEB order.

4. On certiorari review of the BCC order, in *Foley v. Orange Cnty.*, 08-CA-5227-O (Fla. 9th Cir. 2009), the Foleys successfully established that the reviewing court lacked jurisdiction to consider whether Article IV, Section 9, Florida Constitution prohibited the defendants' interference with the Foleys' bird business (Docket 1, allegations 84 thru 86). Again, the Foleys' right to 'raising birds to sell,' and the due process guaranteed that right, could not be made an issue and could not be decided on certiorari of the BCC order; any injury to the Foleys' bird business that flowed from the defendants' violation of Article IV, Section 9, Florida Constitution, could only be remedied in an original action. The order denying certiorari, Docket 34-3, page 3, confirms the Foleys' allegations by holding:

> "Petitioners' assertion that sections of the Orange County Zoning Code are unconstitutional is one which can only be made in a separate legal action, not on certiorari review. See *Miami-Dade County v. Omnipoint Holdings, Inc.*, 863 So.2d 195 (Fla. 2003)."

C. *Foley II: First federal suit is dismissed without prejudice.*

5. For approximately four years and five months – from the date the Foleys filed suit in the District Court, February 21, 2012, in Foley et ux v. Orange County et al, 6:12-cv-269 (M.D. Fla.), until the District Court on remand dismissed the Foleys' case without prejudice for lack of subject matter jurisdiction, July 27, 2016 (Docket 34-8), as directed by the Eleventh Circuit in Foley v. Orange County, 638 Fed.Appx. 941 (11th Cir. 2016) – the Foleys pursued their first original action against the defendants, Foley II. Though this action was dismissed, every judge involved found merit in the Foleys' state-law claims, found those claims were not frivolous or barred by Foley I, and encouraged the Foleys to pursue the claims in state court and to return to federal court if necessary.

6. In Foley II (Docket 34-6, pages 4, 5) the District Court construed the Foleys' second amended complaint to assert a state-law claim for declaratory relief, and federal claims in substantive due process, equal protection, compelled speech, commercial speech, and search and seizure.

7. In Foley II (Id., page 15), District Judge Roy B. Dalton, Jr. – the same judge who now designates the Foleys vexatious – granted the Foleys state-law claim and at the end of eleven pages of analysis (Id., pages 7 thru 17) ruled that the Foleys' bird business was placed beyond the defendants' regulatory authority by Article IV, Section 9, Florida Constitution:

> "Orange County cannot use its land use ordinances to regulate the [Foleys'] possession or sale of captive wildlife ... Those [ordinances] specifically target activities that fall within the exclusive authority of the [Fish and Wildlife Commission]."

8. In Foley II (Id., page 2, †2), Judge Dalton concluded that Foley I did not provide a remedy for defendants' violation of Article IV, Section 9, Florida Constitution, and did not bar Foley II:

> "This claim is not subject to res judicata or estopped by Plaintiffs' state court actions, which were in nature of an administrative review of an executive action. Indeed, in those proceedings, the state court notified Plaintiffs of the need to file an independent civil action to challenge the constitutionality of the land use ordinances."

9. In Foley II (Docket 34-5, page 14), Judge Dalton saw merit in a potential takings claim:

> "The application of an invalid land use regulation may form the basis of a regulatory takings claim. Thus, it is possible that the Foleys could state a regulatory takings claim against Orange County."

10. In Foley II (Id. †8), Judge Dalton encouraged the Foleys to pursue that takings claim in state court before returning to federal court:

> "[F]or a takings claim to be ripe, a plaintiff must demonstrate that he unsuccessfully pursued the available state procedures to obtain just compensation before bringing his federal claim."

11. In Foley II, during oral argument before the Eleventh Circuit:

a. Judge Tjoflat told the Foleys their claims were not frivolous, "Your claims are not frivolous claims," (Docket 54-1, page 183, lines 4, 5);

b. Judge Tjoflat encouraged the Foleys to start over in state court,

> "[D]ismissal without prejudice doesn't hurt you at all ... There's no injury at all; you're back at square one with a remedy in the state court," (Docket 54-1, page 184, lines 1 thru 7);

c. Judge Tjoflat encouraged the Foleys to return to federal court, if state court got it wrong,

> "[T]he federal court ... gets an answer to the question out of the state courts ... Then, if they're wrong, we have a constitutional argument in this court," (Docket 54-1, page 183, lines 21 thru 25);

d. Orange County attorney William Turner conceded to Judge Anderson that Foley II was not barred by Foley I,

> ANDERSON: But you do not contend that they are barred by res judicata.
>
> TURNER: No your honor I do not contend that."
>
> (Docket 54-1, page 172, lines 25 thru 28);

e. Judges Tjoflat and Anderson in their colloquy with County attorney William Turner explored the possibility of abstention as a means to affirm Judge Dalton's dismissal of the federal claims and to also vacate – without prejudice to the Foleys – Judge Dalton's favorable pendant state-law declaration regarding Article IV, Section 9, Florida Constitution:

> ANDERSON: Well you mean that the district court should have declined to take pendent jurisdiction.
>
> TURNER: Yes your honor.
>
> TJOFLAT: It's an old Pullman doctrine issue. I have a problem of whether there is a non-frivolous constitutional claim in this case. I have serious question whether the district court should

have, if there is no non-frivolous Federal claim the court had no jurisdiction on these other issues.

TURNER: Yes your honor.

TJOFLAT: And I can't find one.

(Docket 54-1, page 176, lines 1 thru 13)

TJOFLAT: Because if there is no non–frivolous federal claim he should have dismissed the case without prejudice. That would have allowed the Foley's to do the very thing that the Certiorari judge said they ought to do.

TURNER: Yes your honor.

(Docket 54-1, page 176, line 25 thru page 177, line 4)

ANDERSON: So what you'd like us to do is vacate the District Courts judgment and hold that he should not have exercised pendent jurisdiction over the state law claims.

TURNER: Well I don't want to have my cake and eat it too. I'd like your... I'd like the court to just reverse all together but that would be somewhat inconsistent with, I think the true argument.

TJOFLAT: Well if it's reversed on the merits then that's the end of the day for the Foley's. If it's not reversed on the merits but on jurisdictional grounds it puts them back where they were in the first place.

TURNER: Correct. Correct.

TJOFLAT: But with a remedy.

(Docket 54-1, page 177, line 17 thru page 178, line 7)

12. In Foley II (Docket 34-7, pages 4, 5), the Eleventh Circuit ultimately used the Supreme Court's decision in Bell v. Hood, 327 U.S. 678, 682-683 (1946), to do what it had discussed at oral argument – to effectively affirm the District Court's dismissal of the federal claims but to also vacate, without prejudice to the Foleys, the District Court's favorable pendent state-law declaration regarding Article IV, Section 9, Florida Constitution:

> "Where a District Court's jurisdiction is based on a federal question, "a suit may sometimes be dismissed . . . where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction *or where such a claim is wholly insubstantial and frivolous*." *Bell*, 327 U.S. at 682–83, 66 S.Ct. at 776 (emphasis added). "Under the latter *Bell* exception, subject matter jurisdiction is lacking only 'if the claim has no plausible foundation, or if the court concludes that a prior Supreme Court decision clearly forecloses the claim.'" *Blue Cross & Blue Shield of Ala. v. Sanders*, 138 F.3d 1347, 1352 (11th Cir. 1998) (quoting *Barnett v. Bailey*, 956 F.2d 1036, 1041 (11th Cir. 1992))."

13. In Foley II, the Eleventh Circuit used the word "frivolous" from Bell to do only one thing that had not already been done by Judge Dalton' prior dismissal of the Foleys' federal claims – to vacate without prejudice Judge Dalton's favorable pendant state-law declaration. The word 'frivolous' was not used as a condemnation of the legal or factual basis for the Foleys' state-law claim, or to brand the Foleys as 'vexatious.'

14. In Foley II, the Eleventh Circuit (Docket 34-7, page 10, †4) specifically endorsed Judge Dalton's conclusion that, "it would be theoretically possible for the Foleys to bring a regulatory takings claim under 42 U.S.C. §1983."

15. Foley II was ultimately dismissed without prejudice (Docket 34-8), allowing the Foleys to proceed in state court, just as Judges Dalton, Tjoflat and Anderson had suggested they do.

D. Foley III: The only Florida suit for post-deprivation relief rules that the Foleys' state-licensed right to sell toucans is no longer a property right that Florida protects.

16. For the next four and a half years, from the date the Foleys filed suit in Orange County's Ninth Judicial Circuit, August 25, 2016 (Docket 34-10, allegation 2-c) until the Fifth District Court of Appeal denied rehearing, March 3, 2022 (Docket 1, allegation 10-d-5), the Foleys pursued their first original action against the defendants in state court. Though this action was dismissed, the Foleys' complaint alleges (Docket 1, allegations 10-f and 100) that this dismissal is the basis for, and ripened, their new federal claims.

17. Foley III was the Foleys' first opportunity in state court to do what they could not do in Foley I; it was the Foleys' first opportunity in state court (1) to challenge the defendants' violation of Article IV, Section 9, Florida Constitution; and (2) to seek a post-deprivation remedy.

18. The two relevant orders in Foley III (Docket 34-11 and 34-13), did not dismiss the suit as unreasonable, frivolous, or barred by a prior proceeding.

19. Foley III (Docket 34-11), found the employees3 and officials4 immune from suit and dismissed the Foleys' suit against them per Section 768.28(9)(a), Florida Statutes, without reaching the merits of the claims.

20. Foley III (Docket 34-11), did not grant the employees or officials qualified immunity from the violation of any constitutional right.

a. Docket 34-11 nowhere uses the phrase "qualified immunity."

b. Docket 34-11 nowhere makes the factual inquiry necessary to establish the 'discretionary authority' predicate of qualified immunity.

c. Docket 34-11 nowhere discusses any federal constitutional right.

d. Docket 34-11 nowhere determines whether the constitutional right – nowhere discussed – is clearly established.

21. Foley III (Docket 34-13), dismissed the suit against Orange County upon finding, as the County urged, that the Foleys' had no injury-in-fact.

a. The state court (Docket 34-13, page 3) ruled that the Foleys claimed no property right recognized by Florida law:

> "[T]he only 'right' that Plaintiffs claim is Mr. Foley's state-issued permit, which is not a

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3 The employees are: Tim Boldig, Mitch Gordon, Tara Gould, Carol Hossfield, Rocco Relvini, and Phil Smith.

4 The officials are: Asima Azam, Fred Brummer, Richard Crotty, Frank Detoma, Mildred Fernandez, Teresa Jacobs, Roderick Love, Scott Richman, Joe Roberts, Marcus Robinson, Tiffany Russell, Bill Segal, and Linda Stewart.

property right. Hernandez v. Dept, of State, Div. of Licensing, 629 So.2d 205, 206 (Fla. 3d DCA 1993)."

b. Orange County urged state court to rule that the Foleys claimed no property right recognized by Florida law:

> "The only 'right' the Foleys arguably ever had was a 'right' granted to Mr. Foley alone by a state-issued permit or license, not a property right. Florida law is clear that permits and licenses do not create property rights. See Hernandez v. Dept, of State, Division of Licensing, 629 So.2d 205, 206 (Fla. 3rd DCA 1993)." Docket 44-1, page 7.
>
> "The Foleys claimed in 2007 that Orange County could not regulate away, at the county level, a license they had obtained from the state." *Id.*, page 2.
>
> "Moreover, the Foleys were deprived at most of their rights under a permit, which does not constitute a property right. See Hernandez, 629 So.2d at 206. Thus, the Foleys were not deprived of life, liberty or property." *Id.*, page 10.
>
> "The [Foleys'] theory [is] that Mr. Foley had obtained a license from the State to own and sell particular birds at a particular address and that Orange County could not by dint of its land use regulations stand in the way of a license Mr. Foley had otherwise received from the State of Florida." Docket 44-7, page 7, lines 11 thru 16.

22. Foley III did not rule on the procedural due process claim the Foleys make in the present federal suit.

a. The Magistrate, infra page 18, paragraph 40-b, found that the Foleys made "the same federal due process claim" in Foley II and III.

b. In Foley II, the Foleys' first federal suit, the Foleys made only a substantive due process claim, see Docket 34-6, pages 17 thru 23.

c. In Foley III, the Foleys' only state suit, state court ruled on only a substantive due process claim (emphasis added):

> "Plaintiffs also seek money damages for an alleged violation of 42 U.S.C. §1983 for violation of their due process. This allegation must be similarly dismissed with prejudice for failure to state a cause of action because they do not allege and cannot prove that they were deprived of life, liberty or property (i.e., *substantive* due process) under the facts of this case." Docket 34-13, p. 3, †4.

d. In Foley III, Orange County told state court the Foleys' due process claim was a claim in substantive due process:

> "The Foleys bring only substantive due process claims,"
>
> Docket 44-1, page 9.
>
> "In order to address [the Foleys'] claims, the Court should first review the law applicable to substantive due process claims," Docket 44-1, page 10.
>
> "Land use regulations like those at issue in this case are state-created rights that are not protected by substantive due process," Id.

e. In Foley III, the officials – to substantiate their defense in *res judicata* – told state court the Foleys' due process claim was the same due process claim made in Foleys II, i.e., a *substantive* due process claim:

> "[C]ount seven contains an alleged due process violation under 42 U.S.C. § 1983. This precise claim was deemed frivolous by the Eleventh Circuit. *See Foley v. Orange Cnty.*, 638 Fed. Appx. 941, 944 (11th Cir. 2016). It is also barred by res judicata since the question has been litigated to finality in the federal forum. This was discussed in the initial motion to dismiss as well," Docket 44-3, page 5.
>
> "[R]es judicata bars the federal claim(s)," Docket 44-3, page 6.
>
> "[W]e have res judicata as to the Federal claims. I noted that they have cited Section 1983. That's a Federal claim obviously. And the Federal courts have dismissed all Federal claims with prejudice. So I think that goes without saying that that one has already been resolved." Docket 44-6, page 15, lines 16 thru 21.
>
> "[W]hat perhaps is most procedurally concerning is that in their last count, which is a due process theory, is that the (sic) reallege Chapter 42 USC 1983, a civil rights federal statute, which federal courts -- the 11th Circuit no less -- said is frivolous. And yet they slide section 1983 back into this lawsuit. That's res judicata, make no mistake about it." Docket 44-8, page 14, line 25 thru page 15, line 7.

f. In Foley III, the employees – like the officials – told state court the Foleys' due process claim was the same

due process claim made in federal court in Foleys II, i.e., a *substantive* due process claim:

> "[T]he due process claim in Count Seven has already been found to be frivolous by the Eleventh Circuit Court of Appeals. Therefore, it is barred by res judicata," Docket 44-2, page 9.
>
> "[T]he district court concluded ... that the Foleys failed to show due process violations ... *Foley v. Orange County*, 2013 WL 4110414, *9-14 (M.D. Fla. Aug. 13, 2013)," Docket 44-2, page 3.
>
> "It appears that only one federal claim is asserted against the Employees. Namely, Count Seven is a purported due process claim in which Plaintiff claims that all 'Defendants' violated his federal constitutional rights. (Amended Complaint, pg. 22). This claim, and any other federal claim, asserted by Plaintiff are barred by res judicata," Docket 44-2, page 6.
>
> "The Federal courts, every one of them, all the way to the top, have said that the Federal claims against the employees, both sets, are not only not properly based under the facts or the law but they're frivolous," Docket 44-6, page 19, lines 20 thru 25.
>
> "The res judicata clearly applies to the Federal claims. They've already been tried all the way to the conclusion," Docket 44-6, page 20, lines 10 thru 12.
>
> "I would concur, again, with everything that Mr. Angell said regarding res judicata for the federal claim in Count 7," Docket 44-8, page 18, lines 15 thru 17.

23. Foley III did not impose sanctions:

a. Foley III issued two non-final, non-appealable orders per Section 57.105, Florida Statutes: (1) Docket 73, pages 17 thru 19, issued May 13, 2021; (2) Docket 73, pages 20 thru 28, issued January 28, 2022.

b. These orders determined entitlement to fees as a sanction, but did not determine the fees, and so did not impose payment as a sanction.

II. The relevant procedural history

24. October 11, 2022, in Docket 70, the District Court dismissed the Foleys' suit as barred by res judicata.

25. October 19, 2022, in Docket 73, the employees filed their motion to sanction the Foleys pursuant Rule 11.

26. November 9, 2022, in Docket 84, the Foleys filed a notice of appeal from the Court's October 11th order, Docket 70. Appeal #22-13864-JJ.

27. November 16, 2022, in Docket 91, the Foleys responded to the employees' October 19th motion, Docket 73.

28. December 6, 2022, in Docket 100, the defendants filed a joint motion to declare the Foleys vexatious litigants.

29. January 3, 2023, in Docket 107, the Foleys responded to the defendants' joint December 6th motion, Docket 100.

30. May 12, 2023, in Docket 151, Magistrate Judge Embry J. Kidd filed his Report and Recommendation regarding (1) the employees' October 19th Rule 11 motion for sanctions, Docket 73, and (2) the defendants' December 6th joint motion to declare the Foleys vexatious litigants, Docket 100.

31. June 26, 2023, in Docket 154, the Foleys filed their objection to the Magistrate's Report and Recommendation, Docket 151.

32. July 26, 2023, in Docket 162, the District Court "adopted, confirmed, and made a part of [its] order in its entirety" the Magistrate's May 12th Report and Recommendation, Docket 151.

33. August 18, 2023, in Docket 165, the Foleys requested rehearing of the District Court's July 26th order, Docket 162.

34. August 23, 2023, in Docket 167, the Foleys filed a notice of appeal from the Court's July 26th order, Docket 162. Appeal # 23-12740-J.

35. August 25, 2023, in Docket 169, the District Court denied the Foleys' August 18th request for rehearing, Docket 165.

36. September 5, 2023, in Docket 172, the Foleys filed an amended notice of appeal from the Court's July 26th order, Docket 162, and the Court's August 25th order, Docket 169. Appeal # 23-12740-J.

III. The rulings presented for review

37. January 18, 2023, District Judge, Roy B. Dalton, Jr., of the Middle District of Florida, Orlando Division (District Court), issued standing order In Re: Vexatious Litigants in the Orlando Division, 6:23-mc-03-RBD (M.D. Fla. January 18, 2023), Appendix Vol. I, tab B. This five-page order was issued two weeks after the Foleys filed their response to the defendants' joint motion to designate the Foleys vexatious, and it is cited on page 4, in paragraph 4-a, of the decretal closing of the order under review, Docket 162. The order does the following: (1) It summarizes in four sentences the limited guidance provided by this Court in Procup v. Strickland, 792 F.2d 1069, 1073 (11th Cir. 1986), Brewer v. United States, 614 F.App'x 426, 427 (11th Cir. 2015), Martin-Trigona v. Shaw, 986 F.2d 1384, 1386-87 (11th Cir. 1993), and United States v. Devlin, 2022 WL 3921583, at *3 (11th Cir. August 31, 2022); (2) It establishes general

guidelines for judicial decrees enjoining vexatious litigants; and (3) It outlines the procedures to be followed by the Clerk upon receipt of a new filing by a vexatious litigant.

38. May 12, 2023, Magistrate Embry J. Kidd, issued his Report and Recommendation, Docket 151, on the employees' Rule 11 motion, Docket 73, and the defendants joint motion to designate the Foleys vexatious, Docket 100. The Foleys challenge the Report and Recommendation to the extent it is adopted in its entirety by the District Court, and base their challenge on the following findings and rulings:

a. Docket 151, page 3.

> "Notably, this is the fourth case in a series of cases brought in state and federal court by Plaintiffs. The issues underlying this case originated sixteen years ago, in 2007, after Plaintiffs were found in violation of county code for maintaining a commercial aviary. ([Doc. 1])"

b. Docket 151, page 3.

> "Plaintiffs filed another complaint in the Ninth Judicial Circuit Court against Defendants alleging the same federal due process claim raised in the first federal lawsuit. (Doc. 34-9.)"

c. Docket 151, page 3.

> "The Ninth Judicial Circuit determined that the Employee Defendants and the Official Defendants were protected by qualified immunity and dismissed all claims against them with prejudice. (Docs. 34-11.)"

d. Docket 151, page 3.

> "The Ninth Judicial Circuit granted the Motions for Sanctions filed by the Employee and Official

Defendants against Plaintiffs for filing frivolous claims. (Doc. 73 at 17-28.)"

e. Docket 151, page 3.

"Plaintiffs initiated the instant lawsuit against Defendants on March 3, 2022, for the same incidents alleged in the prior lawsuits. (Doc. 1.)"

f. Docket 151, page 7.

"[T]his Court and the State courts had already ruled against Plaintiffs on the claims that they originally asserted. In fact, Plaintiffs' claims in both state and federal court clearly relate to the nearly identical allegations concerning their code enforcement violations. (Docs. 1, 34-10.)"

g. Docket 151, page 7.

"Because Plaintiffs' claims arise from the same 'nucleus of operative facts' as in both previous lawsuits, res judicata applies. (See Doc. 70.)"

h. Docket 151, page 8.

"Plaintiffs had direct notice through the previous decisions of the Ninth Judicial Circuit, the Fifth District Court of Appeal, this Court, and the Eleventh Circuit that their claims against Defendants were frivolous. This is further supported by the sanctions ordered against them by the Ninth Judicial Circuit. (Doc. 73 at 17–28.) Despite these repeated adverse findings, Plaintiffs nevertheless pursued the instant lawsuit in this Court."

i. Docket 151, page 9.

"[E]ven if Plaintiffs could pay a monetary sanction, there is little indication it would deter them from their 'near obsession' with this matter

... Indeed, the Ninth Judicial Circuit previously ordered monetary sanctions against Plaintiffs, to no avail. (See Doc. 73 at 17-28.)"

j. Docket 151, page 10.

"Plaintiffs have a sixteen-year history of non-meritorious litigation, involving multiple frivolous filings, that has placed a significant burden on the defendants and the courts. Because monetary sanctions have been ineffective in deterring Plaintiffs from their obsessive litigation, the undersigned recommends that the Court declare Plaintiffs vexatious litigants whose future filings should be restricted by the Court."

39. July 26, 2023, the District Court issued its final order, Docket 162. In this order the District Court did the following: (1) It denied as moot the employees' Rule 11 motion, Docket 73; (2) It granted in part and denied in part the defendants' joint motion to declare the Foleys vexatious, Docket 100; (3) It adopted, confirmed, and made a part of its order in its entirety the Report and Recommendation of the Magistrate, Docket 151; (4) It denied as moot the Foleys' request for oral argument, Docket 156; and (5) It overruled the Foleys' objection to the Report and Recommendation, Docket 154. The Foleys challenge the District Court's decision to declare the Foleys vexatious, and in particular, challenge the following findings and rulings.

a. Docket 162, page 3.

"The Undersigned's long history with Plaintiffs suggests that restricting their filing privileges is the only way to deter them from continuing this nonmeritorious 'obsessive litigation,' as Judge Kidd aptly put it. (Doc. 151, p. 10.)"

b. Docket 162, page 3.

"The R&R (Doc. 151) is ADOPTED, CONFIRMED, and made a part of this Order in its entirety."

c. Docket 162, pages 3, 4.

"Plaintiffs are DESIGNATED vexatious litigants. Plaintiffs David W. Foley, Jr. and Jennifer T. Foley are hereby restricted from filing any pleading to open a new case in this Division. Any new pleading filed by these Plaintiffs in this Division will be assigned to and reviewed by the judges assigned to this case. See In re Vexatious Litigants in Orlando Div., No. 6:23-mc-3 (M.D. Fla. Jan. 18, 2023) (Doc. 1)."

40. August 25, 2023, the District Court issued its order, Docket 169, denying the Foleys' motion for reconsideration of its order of July 26, 2023, Docket 162. The Foleys challenge the following finding and ruling.

a. Docket 169, page 3.

"Nor is there any reason to reconsider the adoption Order more broadly, as Judge Kidd's thorough R&R properly considered the factors for determining whether to declare Plaintiffs vexatious and their objection did nothing to alter that analysis."

IV. Standard of Review

A. Subject Matter Jurisdiction

"The district court's subject matter jurisdiction is a question of law that we review de novo even when it is raised for the first time on appeal," United States v. Iguaran, 821 F.3d 1335, 1336 (11th Cir. 2016).

B. All Writs Pre-filing Injunction

In Klay v. United Healthgroup, Inc., 376 F.3d 1092, 1096-1097 (11th Cir. 2004) (Tjoflat, Birch, Goodwin) this Court laid out the standard of review for a final decision to grant a pre-filing injunction as follows:

> In reviewing the district court's decision to grant an injunction, including an injunction under the All Writs Act, we apply an abuse-of-discretion standard. See Winkler v. Eli Lilly & Co., 101 F.3d 1196, 1203 (7th Cir.1996). "A district court abuses its discretion if it applies an incorrect legal standard, follows improper procedures in making the determination, or makes findings of fact that are clearly erroneous." Martin v. Automobili Lamborghini Exclusive, Inc., 307 F.3d 1332, 1336 (11th Cir. 2002). A district court may also abuse its discretion by applying the law in an unreasonable or incorrect manner. See Woodard v. Fanboy, L.L.C., 298 F.3d 1261, 1268 n. 14 (11th Cir.2002) (holding that, "in [the] preliminary injunction context, a district court abuses its discretion where the decision rests upon a 'misapplication of the law to the facts'" (quoting Marco v. Accent Publishing Co., 969 F.2d 1547, 1548 (3d Cir.1992))); [footnote omitted] see, e.g., McMahan v. Toto, 256 F.3d 1120, 1128 (11th Cir. 2001) ("The abuse of discretion standard of review recognizes that for the matter in question there is a range of choice for the district court and so long as its decision does not amount to a clear error of judgment we will not reverse...."). Finally, an abuse of discretion occurs if the district court imposes some harm, disadvantage, or restriction upon someone that is unnecessarily broad or does not result in any offsetting gain to anyone else or

society at large. See, e.g., Keener v. Convergys Corp., 342 F.3d 1264, 1270-71 (11th Cir. 2003) (holding that, because an injunction lacked "a reasonable scope" when the court made it apply nationwide rather than solely within the state of Georgia, it "should be modified to preclude [the appellee] from enforcing [a particular agreement] in Georgia only.... [T]he breadth of the injunction, without such limitation ... constitutes an abuse of discretion...."); Piazza v. Ebsco Indus., 273 F.3d 1341, 1352 (11th Cir. 2001) (holding that where the defendants "identified potential prejudice arising from certification of the [plaintiff's] claim under Rule 23(b)(3) ... [and the plaintiff] has identified no basis for preferring certification of this claim under Rule 23(b)(3) to certification under Rule 23(b)(1), it was an abuse of discretion to certify the [plaintiff's] claim under Rule 23(b)(3).").

In making these assessments, we review the district court's factual determinations for clear error, see Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts, Inc., 299 F.3d 1242, 1246 (11th Cir. 2002) (holding, in the preliminary injunction context, "[w]e review the district court's findings of fact under the clearly erroneous standard"), and its purely legal determinations de novo. See Major League Baseball v. Crist, 331 F.3d 1177, 1183 (11th Cir. 2003) (holding that, when reviewing a district court's decision to grant or deny an injunction, "[u]nderlying questions of law ... are reviewed de novo").

Summary of the Argument

The All Writs Act, Title 28 U.S. Code Section 1651 (a), states:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

The Act did not confer jurisdiction upon the District Court to make new findings regarding "qualified immunity" to support its Writ while that defense is at issue in the Foleys' pending appeal #22-13864-JJ.

The District Court's pre-filing injunction is an abuse of the discretion granted by the Act because it penalizes the Foleys' objective good faith argument that their federal due process and takings claims did not ripen or accrue until state court ruled that Florida no longer protects the Foleys' interests in the state-licensed sale of toucans.

The District Court misapplied the "in aid of" and "necessary or appropriate" standards of the Act when it failed, and refused, to narrowly tailor its pre-filing injunction to enjoin only pro se pleadings involving the same parties and the issues previously adjudicated.

The District Court misapplied the "necessary or appropriate" standard of the Act when it ordered a pre-filing injunction rather than a monetary sanction in the absence of any finding of an inability or a failure to pay a monetary sanction.

Argument

I. The District Court erroneously assumed jurisdiction to make findings regarding "qualified immunity" while that defense is at issue in the Foleys' pending appeal.

"The notice of appeal blocks the district court from taking any action affecting the questions presented by the appeal," Trustees of Chicago Truck Dr. v. Central Transp., 935 F.2d 114, 120 (7th Cir. 1991), cited with favor in

Weaver v. Florida Power & Light Co., 172 F.3d 771, 773 (11th Cir. 1999).

As stated in the Jurisdictional Statement, page 19 and supported on pages 35 thru 40, in paragraphs 24, 26, 30 thru 36, this Court already had jurisdiction of the Foleys' case in appeal #22-13864-JJ, when the District Court issued the orders challenged in this appeal. Appeal #22-13864-JJ, challenges the District Court's dismissal of the Foleys' complaint with prejudice as barred by *res judicata*. This Court, however, in that appeal is not limited to the question of *res judicata*; it "may affirm the judgment of the district court on any ground supported by the record, regardless of whether that ground was relied upon or even considered by the district court," Kernel Recs. Oy v. Mosley, 694 F.3d 1294, 1309 (11th Cir. 2012). Consequently, per Weaver, the District Court lacked jurisdiction to make new factual or legal determinations in the collateral order challenged here that would affect "any ground" for affirmance of its earlier dismissal.

The District Court's earlier dismissal challenged in appeal #22-13864-JJ makes only one significant finding of fact. That finding appears in the following two sentences of Docket 70, page 4:

> "Plaintiffs freely admit that the underlying "incidents" of the state case and this case are the same. (Doc. 1, ¶ 10(b).) As both cases involve causes of action that arise out of the same nucleus of operative facts, all four elements of res judicata are met, and this case is due to be dismissed."

Consequently, per Weaver, when the Foleys filed their notice of appeal in appeal #22-13864-JJ, the District Court lost jurisdiction to make any finding that might affect that appeal beyond this finding of "the same nucleus of operative facts."

The District Court order challenged in the instant appeal, however, to support its injunction, improperly makes the following additional finding that affects appeal #22-13864-JJ, see Docket 151, page 3:

> "The Ninth Judicial Circuit determined that the Employee Defendants and the Official Defendants were protected by qualified immunity and dismissed all claims against them with prejudice. (Docs. 34-11.)"

This new finding regarding an alleged prior state-court grant of "qualified immunity" is not merely "collateral"[5] to the dismissal challenged in appeal #22-13864-JJ. It is – or would be were it not improper and erroneous – dispositive of the "discretionary authority" predicate of the qualified immunity defense. That is because a defendant cannot even claim qualified immunity without first proving they acted within the bounds of their state-defined "discretionary authority when the allegedly wrongful acts occurred," Zeigler v. Jackson, 716 F.2d 847, 849 (11th Cir. 1983). So, the District Court's finding, or allegation, that "qualified immunity" was previously granted is by implication also an allegation that the defendants have already proven their "discretionary authority" under state law.

But that is the most hotly contested factual question in this case – *Did state court ever require the defendants to prove whether their actions were placed beyond their "discretionary authority" by Article IV, Section 9, and Article VIII, Section 1(j),*[6] *Florida Constitution?* See:

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[5] "A matter is collateral if the matter itself is not relevant in the litigation to establish a fact of consequence," US v. Ndiaye, 434 F.3d 1270, 1282 (11th Cir. 2006) (internal quotations omitted)

[6] Article VIII, Section 1(j). Violation of ordinances. Persons violating county ordinances shall be prosecuted and punished as provided by

Docket 91, page 2; Docket 81, page 8 lines 7 thru 11, page 9 lines 17 thru 22, page 11 line 21 thru page 12 line 12, page 16 lines 18 thru 21, page 19 lines 22 thru 24, page 20 line 10 thru page 23 line 19, page 35 line 21 thru page 36 line 6, page 41 line 17 thru page 42 line 9, page 44 line 19 thru page 51 line 15; Docket 73, pages 4, 5, 10, 11; Docket 59, pages 10 thru 15; Docket 58, pages 10 thru 15; Docket 36, pages 8, 11 thru 17; and, Docket 35, pages 7, 11 thru 16.

And the District Court's untimely and unelaborated answer to this question is not only procedurally barred – it is clearly erroneous, and it threatens to estop the Foleys claim that Florida's constitution denied the defendants the "discretionary authority" essential to "qualified immunity." As stated *supra* page 30 paragraph 20 including subparagraphs, Foley III, Docket 34-11, says absolutely nothing about discretionary authority, qualified immunity, any federal constitutional right, or Articles IV, Section 9, and VIII, Section 1(j), Florida Constitution. This silence is fatal to the District Court's conclusion. "[A]pplication of collateral estoppel must be premised on a clear determination of the issues litigated in the [prior] proceeding," French v. Jinright & Ryan, PC, 735 F.2d 433, 436 (11th Cir. 1984). "[A] federal court will not confer preclusive effect on a state court order where it is unclear what the state court actually decided," New Port Largo v. Monroe County, 95 F.3d 1084 †6 (11th Cir. 1996).

But more importantly, the question of "qualified immunity" and the related question of "discretionary authority" are already before this Court in appeal #22-13864-JJ as an alternative basis for affirmance. See Docket of appeal #22-13864-JJ: Docket 22, pages 44 thru 47; Docket 33, pages 20, 21, 33, 39 thru 41, 57 thru 64, 70; Docket 36, pages 20, 21, 33, 41 thru 43, 59 thru 67, 73;

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law.

Docket 37, pages 14, 16 thru 18; Docket 49, pages 20, 21, 33, 39 thru 41, 54 thru 62, 68; and, Docket 55, pages 18, 23, 24, 37 thru 41.

The District Court's finding regarding "qualified immunity" occurred after the Foleys had filed their notice of appeal. Consequently, it was a prohibited, prejudicial "action affecting the questions presented by the appeal," that "defeats the point of the appeal and creates a risk of inconsistent handling of the case by two tribunals," Bradford-Scott Data v. Physician Computer Network, 128 F.3d 504, 505 (7th Cir. 1997).

To ensure that this Court is free to make its own determination regarding qualified immunity, and that the Foleys are not collaterally estopped in appeal #22-13864-JJ from urging that the defendants acted without "discretionary authority," the District Court's improper finding of an alleged prior state-court grant of "qualified immunity" should be stricken from the District Court order and the Magistrate's Report.

II. The District Court erroneously denied the Foleys' good faith defense to the pre-filing injunction.

"The key to unlocking a court's inherent power is a finding of bad faith," Barnes v. Dalton, 158 F.3d 1212, 1214 (11th Cir. 1998). Conversely, good faith is a complete defense that denies a court that key. Good faith exists even when a claim is dismissed as *res judicata*, if the claim is "not so devoid of arguable legal or factual support as to be frivolous," Jones v. Texas Tech University, 656 F.2d 1137, 1146 (5th Cir. September 25, 1981).[7]

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[7] Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir.1981) adopted as binding precedent all decisions of the Fifth Circuit rendered prior to close of business September 30, 1981.

The District Court in this case, after dismissing the Foleys' claims as *res judicata*, justified unlocking its inherent power by concluding that the Foleys have re-litigated the same "nucleus of operative fact" for sixteen years with no expectation of ever prevailing, *supra* pages 37 thru 39, paragraphs 38a, 38-e, 38-f, 38-g, 38-h, 38-j. The District Court's conclusion that the Foleys proceed in bad faith is unreasonable and incorrect. Though the Foleys expect to reverse this conclusion in appeal #22-13864-JJ, they need here only argue that the District Court's finding of bad faith is erroneous because the Foleys' claim presents a substantial question that is not "devoid of arguable legal or factual support."

Here the District Court overlooks, or misapprehends, allegations 10-f and 100 of the Foleys' complaint, Docket 1, and the referenced allegations and record evidence supporting these allegations.

Allegation 10-f states, in part:

> The pre-deprivation procedural due process claim presented by this complaint ... *accrues today* with the denial of any post-deprivation remedy by the Fifth District Court of Appeal.
>
> (*Emphasis* added.)

Allegation 100 states:

> Orange County, and the defendants identified in paragraphs 15 through 33 supra, have subjected the Foleys, or caused the Foleys to be subjected, to a *denial by the state of Florida* of an adequate post-deprivation hearing on the application of Article IV, Section 9, and Article VIII, Section 1(j), Florida Constitution, to the defendants' unlawful injunction of the Foleys' right to sell birds, as stated in paragraphs 4, 11-f including

subparagraphs, 84 through 88 including subparagraphs, 89-e, and 94-e.

(*Emphasis* added.)

A new "*denial by the state of Florida*" is alleged here, one that "*accrues today*." Allegation 100 is not a new theory of recovery on the same "nucleus of operative fact." Allegations 10-f and 100 set up a new "nucleus of operative fact" for a new claim that did not ripen or accrue until March 3, 2022, per McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994) . Allegations 10-f and 100 give the Foleys' complaint an objective good faith basis that makes the District Court's finding of bad faith clearly erroneous.

A. The Foleys' due process claim accrued March 3, 2022.

March 3, 2022, at 2:50 PM, the Foleys filed the present suit in federal court. Earlier that same day, as alleged in the complaint, Docket 1, allegation 10-d-5, Florida's Fifth District Court of Appeal, in appeal 5D21-0233, on rehearing, Docket 33-12, affirmed without opinion, Docket 33-10, the final order of Orange County's Ninth Judicial Circuit Court, Docket 34-13, in Foley III, the Foleys' state court case 2016-CA-007634-O.

This final, appellate-affirmed order of the Ninth Circuit radically changed Florida property law (facts: *supra* pages 30 and 31, paragraph 21, including subparagraphs). Orange County's Ninth Circuit – to justify denying the Foleys a basis for *any* remedy – magically declared the Foleys' right to sell toucans to be non-property after the fact (discussion: *infra* pages 51 thru 55.) That change is what gives rise to the Foleys' new federal due process claim. That change in Florida property law – urged by the defendants – is a new fact. It is a fact that could not have been alleged as the basis for any claim litigated prior to March 3, 2022. As a result, the Foleys' federal claim is a

fundamentally different claim from any previously adjudicated; their new federal claim includes the new state court order announcing new state law as a new fact in a new "nucleus of operative fact."

Consequently, the District Court's determination of bad faith is unreasonable per Jones because the Foleys' claim is not "devoid of arguable legal or factual support." It is a good faith attempt to litigate a new fact – a change in Florida property law – not an attempt to litigate a fact the Foleys could have litigated in a prior proceeding.

More pointedly, as a matter of law, the District Court's determination of bad faith misapprehends a critical difference between the claim in *substantive* due process the District Court found in Foley II and III *supra* pages 31 thru 34, paragraph 22 including subparagraphs, and the Foleys' new claim in *procedural* due process. That difference – ripeness and accrual – is set out in McKinney v. Pate, 20 F.3d 1550, 1557 (11th Cir. 1994) :

> "A violation of a substantive due process right ... is complete when it occurs ... By contrast, a procedural due process violation is not complete unless and until the State fails to provide due process ... [O]nly when the state refuses to provide a process sufficient to remedy the procedural deprivation does a constitutional violation actionable under section 1983 arise."

Consequently, to make any *procedural* due process claim McKinney required the Foleys to do something that was not required of their earlier *substantive* due process claim – to establish the new fact of the state's refusal to recognize any protected interest in the state-licensed sale of toucans. Allegations 10-f and 100 do this.

In sum, as a matter of fact and law, the Foleys allegation – that their claim did not accrue until March 3,

2022 – is not "devoid of arguable legal or factual support" but has an objective good faith basis.

Further, the Foleys squarely defended allegations 10-f and 100 to the District Court: see Docket 154, pages 22 thru 24; Docket 83, pages 9 thru 11; Docket 60, pages 2, 3, 8, 15; Docket 59, pages 2, 3, 5, 6, 16; and, Docket 58, pages 2, 3, 5, 6, 17, 18.

So, it was an abuse of discretion for the District Court to deny the Foleys' good faith defense in Docket 154, pages 22 thru 24, without a substantive finding as to the accrual date stated in allegation 10-f for the procedural due process claim stated in allegation 100.

B. Allegations 10-f and 100 challenge the March 3rd change in Florida property law.

The record demonstrates that Orange County's Ninth Circuit in Docket 34-13, page 3 (quoted *supra* page 30, paragraph 21-a), adopted Orange County's argument in Docs. 44-1 and 44-7 (quoted *supra* page 31, paragraph 21-b), that Florida no longer recognizes the sale of toucans licensed by the Florida Fish and Wildlife Conservation Commission as a property right due any protection from the County's erroneous interference.

This is a radical change to the Florida property law applicable to captive exotic wildlife. And Orange County – in privity with the individual defendants[8] – convinced the Ninth Circuit to adopt this change. It is the defendants' seditious advocacy for the abrogation of historically recognized property rights that the Foleys challenge in allegation 100 when they allege:

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[8] "The individual defendants are or were in privity with Orange County." Docket 38, p. 8, "Defendant, Orange County, Florida's Dispositive Motion to Dismiss the Complaint with Prejudice."

> Orange County, and the defendants... *caused the Foleys to be subjected*, to a denial by the state of Florida of an adequate post-deprivation hearing on the application of Article IV, Section 9, and Article VIII, Section 1(j), Florida Constitution, to the defendants' unlawful injunction of the Foleys' right to sell birds...
>
> (*Emphasis* added.)

During the sixty years preceding the Ninth Circuit's decision, the use of wildlife held in captivity was assumed to be a protected property interest, Barrow v. Holland, 125 So.2d 749, 751 (Fla. 1960):

> "Once such animals *ferae naturae* have been legitimately reduced to private control ... they become private property. When this occurs the owner thereof can not be deprived of the use thereof, except in accord with all of the elements of due process which protect one's ownership of private property generally."

Thirty-one years later State v. Butler, 587 So.2d 1391, 1393 (3rd Dist. 1991), further held that the Florida Fish and Wildlife Conservation Commission (FWC) defines all property interests in captive wildlife:

> "Within the scope of its constitutional and statutory authority, the Commission defines the conditions under which state wildlife may be possessed as lawful private property."

Twenty years ago, Florida's only four-term Attorney General, Bob "tobacco buster" Butterworth, in Op. Att'y Gen. Fla. 2002-23, said that Article IV, Section 9, Florida Constitution, placed *all property interests in captive exotic birds* beyond County regulatory interference:

> "[A] County is prohibited by Article IV, section 9,

> Florida Constitution, and the statutes and administrative rules promulgated thereunder, from enjoining the possession, breeding or sale of non-indigenous exotic birds."

And finally, just ten years ago, Judge Dalton of the Middle District of Florida – the very judge who now (paradoxically) designates the Foleys vexatious – in Foley et ux v. Orange County et al, 6:12-cv-269 (M.D. Fla. August 13, 2013) (Docket 34-6, pages 7-17), after a comprehensive review of 72 years of Florida judicial decisions construing Article IV, Section 9, Florida Constitution, held that the Foleys were given a property interest in the sale of their toucans by FWC, and that this interest was placed beyond County interference by Article IV, Section 9, Florida Constitution:

> "In Whitehead [v. Rogers, 223 So. 2d 330 (Fla. 1968)], the Florida Supreme Court held that a statute prohibiting shooting on Sunday was void to the extent it prohibited an activity that was specifically authorized by the Game Commission. *Id.* at 330–31. Like the hunter in Whitehead, who was issued a permit by the Game Commission that authorized him to hunt on Sunday, [the Foleys] were issued a permit by the commission authorizing them to possess and sell class III birds from their residence. *See id.* Thus, like the statute in Whitehead, Orange County's ordinances are void to the extent such ordinances prohibit Plaintiffs from possessing and selling class III birds from their residence. *See id.*"

Now, however, per the appellate affirmed decision of Orange County's Ninth Circuit Court, Florida no longer recognizes the sale of toucans licensed by FWC as a property right due any protection from the defendants' interference.

This Circuit in Winkler v. County of DeKalb, 648 F.2d 411, 414 (5th Cir. June 19, 1981)[9] recognized that such an abrupt reversal of Florida's "longstanding pattern of practice" by Orange County's Ninth Circuit "after the fact" provides the Foleys with good reason to claim in allegation 100 that the defendants have "caused the Foleys to be subjected" to Florida's violation of Amendment Fourteen:

> "[T]he state may not magically declare an interest to be 'non property' after the fact for Fourteenth Amendment purposes if, for example, a longstanding pattern of practice has established an individual's entitlement to a particular government benefit."

Winkler and Zaccari are firmly grounded; the Supreme Court likewise said in Hughes v. Washington, 389 U.S. 290, 296-297 (1967):

> "[A] State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all."

In sum, as a matter of law, the Foleys' claim – that they suffered a taking without due process when the defendants caused them to be subjected to Florida's after-the-fact abrogation of their property rights – is not "devoid of arguable legal or factual support," but has an objective basis.

Further, the Foleys squarely presented their position on this point to the District Court: *see* Docket 154, page 24;

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[9] Precedent per Bonner, *see* †7 *supra*. *See also* Barnes v. Zaccari, 669 F.3d 1295, 1307 (11th Cir. 2012), quoting Winkler.

Docket 90, pages 14, 15; Docket 83, page 2, †1 and associated text, page 22 "Conclusion"; Docket 81, page 36, lines 12 thru 17, page 36, line 24 thru page 37, line 9, page 38, line 13 thru page 39, line 4, page 43, lines 5 thru 7; Docket 60, pages 5, 6.

So, it was an abuse of discretion for the District Court to deny the Foleys' good faith defense without a substantive finding as to whether the state action challenged in allegations 10-f and 100, presented a substantial Fourteenth Amendment question, reasonably arguable, and not frivolous.

C. *The March 3rd change in Florida property law gave rise to the Foleys' new claim based upon a "legitimate claim of entitlement" to procedural safeguards.*

The Foleys' new due process claim asks whether Amendment Fourteen procedurally safeguards the Foleys' licensed sale of toucans despite Florida's decision to no longer do so – *Does the Foleys' interest in the licensed sale of toucans "rise[] to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause"?*[10] This due process question seeks to establish this interest as a federally protected "legitimate claim of entitlement" after state court "by the simple device of asserting retroactively that the property it has taken never existed at all,"[11] "magically declare[d that] interest to be 'non property' after

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[10] Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 9 (1978): "Although the underlying substantive interest is created by 'an independent source such as state law,' federal constitutional law determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause."

[11] Hughes at 296-297, quoted *supra* p. 36.

the fact,"[12] despite the historic recognition of that interest by Florida[13] and federal court.[14]

Supreme Court precedent gives the Foleys an objective good faith basis for claiming that their interest in the licensed sale of toucans is a federally protected "legitimate claim of entitlement." "[P]roperty interests subject to procedural due process protection ... denote[] a broad range of interests that are secured by existing rules or understandings," Perry v. Sindermann, 408 U.S. 593, 601 (1972), such as statutes, Goss v. Lopez, 419 U.S. 565, 572-73, (1975); regulations, County of Monroe, Florida v. U.S. Dep't of Labor, 690 F.2d 1359 (11th Cir.1982); or mutually explicit understandings, Sindermann at 602-603. "The hallmark of property ... is an individual entitlement grounded in state law, which cannot be removed except 'for cause.'" Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 (1982). "Once a state creates a substantive interest in a government benefit, 'federal constitutional law determines whether that interest rises to the level of a legitimate claim of entitlement protected by the Due Process Clause.' Memphis Light, Gas & Water Div., 436 U.S. 1, 9 (1978)," Barnes v. Zaccari, 669 F.3d 1295, 1303 (11th Cir. 2012).

The Foleys can also argue in objective good faith that, per Zimmerman, David Foley in his FWC license has "an individual entitlement" to sell toucans because under Florida law that license cannot be revoked except 'for cause': (1) Article IV, Section 9, Florida Constitution grants FWC exclusive executive and regulatory authority over "wild animal life," Docket 54-1, page 98; (2) Section 379.303, Florida Statutes, requires FWC to establish rules

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[12] Winkler at 414, quoted *supra* p. 36.

[13] Barrow at 751, quoted *supra* p. 34; Butler at 1393, quoted *supra* p. 34; Op. Att'y Gen. Fla. 2002-23, quoted *supra* p. 35.

[14] Foley et ux, quoted *supra* p. 35.

governing permits, *Id.*, page 125 (3) Section 379.3761, Florida Statutes, makes a permit necessary to sell wildlife, and makes violation of FWC permit requirements punishable per §379.4015, Florida Statutes, *Id.*, page 126; (4) Section 379.4015(5), Florida Statutes, grants state court jurisdiction to suspend or revoke an FWC license for specified offenses; (5) Rule 68-1.008 (5)(c)(3)(f) Florida Administrative Code, makes the due process requirements of §120.60, Florida Statutes, applicable to issuance, denial, suspension, or revocation of FWC captive wildlife permits, "FWC action to grant or deny permits or licenses or to suspend or revoke such permits or licenses is subject to adjudication under Sections 120.57, 120.569 and 120.60, F.S"; and, (6) Griffis v. FWC, 57 So.3d 929 (Fla. 1st Dist. 2011) held that "[w]here [FWC] is granted the right and power to revoke a license for certain named reasons, causes, or crimes, set out in the statutes, a license may not be revoked for any other or different cause or causes not clearly within the provisions of the statutes."

Finally, Supreme Court precedent gives the Foleys an objective good faith basis for urging that licenses, like David Foley's FWC license to sell toucans, create a "legitimate claim of entitlement" to the privileges they grant, and to the procedures necessary to safeguard them from erroneous deprivation: Barry v. Barchi, 443 U.S. 55 (1979) (horse trainer's license); Bell v. Burson, 402 U.S. 535 (1971) (driver's license); Dent v. West Virginia, 129 U.S. 114 (1889) (physician's license); Goldsmith v. U.S. Bd. of Tax Appeals, 270 U.S. 117 (1926) (accounting license); In re Ruffalo, 390 U.S. 544 (1968) (license to practice law); Schware v. Bd, of Bar Examiners, 353 U.S. 232 (1957) (license to practice law); Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963) (admission to the bar).

So, as a matter of fact and law, the Foleys' good faith defense is not "devoid of arguable legal or factual support," but has an objective basis.

The Foleys squarely presented their position on this point to the District Court: *see* Docket 107, pages 5; Docket 90, pages 9 thru 11; Docket 83, page 4, ††2 and 3, and associated text, page 10, †11 and associated text; Docket 81, page 36, lines 4 thru 11, page 37, lines 10 thru 14, page 44, lines 13 thru 15; Docket 60, page 4, citing Board of Regents of State Colleges v. Roth, 408 US 564, 577 (1972).

Consequently, it was an abuse of discretion for the District Court to deny the Foleys' good faith defense without a substantive finding as to whether the Foleys' presented a reasonable, arguable, non-frivolous "claim of entitlement" to the procedural safeguards that Florida decided it would no longer provide.

This Court should reverse the injunction on the basis of the Foleys' good faith defense.

III. The District Court erroneously refused to narrow its pre-filing injunction.

The District Court's order, quoted *supra* page 39, paragraph 39-b, designates the Foleys "vexatious litigants" and states that the Foleys are "restricted" from "filing any pleading to open a new case in this Division." The Foleys asked the District Court, on the authority of Klay v. United Healthgroup, Inc., 376 F.3d 1092, 1096 (11th Cir. 2004) (Tjoflat), to narrow its injunction to the issues and persons involved in the case, Docket 165, pages 3 thru 5. The District Court ignored the request, Docket 169.

This Court in Klay, quoted *supra* page 41, provided the Foleys with a basis for challenging the breadth of the District Court's pre-filing injunction. Building on Klay Judge Tjoflat in Miller v. Donald, 541 F.3d 1091 (11th Cir. 2008), vacated a similarly overbroad prohibition of "any

and all filings" without leave of court, and suggested on remand that "a narrower injunction could target ... filings arising from the facts or transaction already raised and litigated in other cases."

On the basis of Klay and Miller the Foleys ask this Court, if it does not reverse, to vacate the injunction as overbroad and remand with instructions to narrowly tailor the injunction to enjoin only *pro se* pleadings involving the same parties and the issues previously adjudicated.

IV. The District Court erroneously found the adequacy of alternative sanctions irrelevant.

The District Court took no express position on alternate sanctions, but instead adopted "in its entirety" the Magistrate's position quoted supra page 19, paragraph 40-i. Properly understood, the Magistrate's position was that the viability of alternate sanctions is irrelevant.

The Foleys boldly characterize the Magistrate's position this way for three reasons. First, the Magistrate did not actually determine the viability of alternate sanctions. Instead, the Magistrate merely speculated that given the Foleys' "sixteen-year history of non-meritorious litigation," whether the Foleys were rich or poor, monetary sanctions would not deter their "'near obsession' with this matter." Second, whether or not the Magistrate's psychological diagnosis of the Foleys is correct, no precedent of this Court required the Magistrate to seriously consider alternative sanctions. And third, as evidenced by its standing order, Appendix Vol. I, tab B, the District Court reads this Court's precedent as recognizing no restraint upon its discretion in the "in aid of" or "necessary or appropriate" clauses of the All Writs Act. So, the Magistrate's unrestrained speculation opens the door to boldly press for a precedent of restraint as a basis for reversal or remand.

A. The Foleys' litigation is not a non-meritorious obsession.

Whether the Foleys' story is the story of an "obsession" is irrelevant; what matters is whether their claim is "devoid of arguable ... support."

Above in Section II, pages 35 thru 36, the Foleys walk through their good-faith defense of their new federal claim. Whether or not that claim succeeds in the Foleys' pending appeal #22-13864-JJ, this good-faith defense is one demonstration that the Foleys' sixteen year ordeal is not a non-meritorious obsession. The other is the actual sixteen-year ordeal. That history – recounted here on pages 21 thru 35 – demonstrates that each proceeding reasonably lead to the next: (1) In the local administrative proceedings the defendants, in violation of Article IV, Section 9, and Article VIII, Section 1(j), Florida Constitution, enjoined the Foleys' sale of toucans (Docket 1, allegation 83 including subparagraphs); (2) The defendants' violation of those provisions of state law lead necessarily to state court review in Foley I, but that review lacked jurisdiction to remedy the defendants' trespass of the state constitution for the reasons stated *supra* pages 22 thru 23, paragraphs 2 thru 4; (3) Federal court in Foley II resolved the defendants' violation of Article IV, Section 9, in the Foleys' favor, but ultimately vacated that victory for lack of a substantial federal question, and encouraged the Foleys to seek relief in state court, as stated *supra* pages 24 thru 29, paragraphs 5 thru 15; (4) State court in Foley III dismissed the Foleys' suit against the employees and officials because they were immune from suit per Section 768.28(9)(a), Florida Statutes, as stated *supra* page 30, paragraph 19, and state court dismissed the Foleys' suit against Orange County by magically declaring that Florida no longer recognized the Foleys' licensed sale of toucans as a protected property right, as stated *supra* pages 30 thru 31,

paragraph 21 including subparagraphs; and, (5) Then, the Foleys returned to federal court confident that Winkler, Zaccari, McKinney, and Zimmerman, grounded their claim that the defendants were liable under the "causes to be subjected" clause of Title 42 U.S. Code Section 1983 for the post-deprivation remedy denied by the state court's radical, after-the-fact abrogation of the Foley's property rights in the state-licensed sale of toucans, as urged *supra* pages 47 thru 58.

Absent a showing that the Foleys' "obsession" is "devoid of arguable legal or factual support" – a showing that Winkler, Zaccari, McKinney, and Zimmerman do not apply – the District Court's psychological assessment of the Foleys was an unreasonable basis for rejecting alternative sanctions that would less encumber the Foleys' access to court.

B. The Foleys have never been sanctioned.

The Magistrate recommended the District Court enjoin the Foleys rather than impose monetary sanctions because state court "previously ordered monetary sanctions against [the Foleys], to no avail," Docket 151, page 9. But the Magistrate is wrong – the Foleys have never been sanctioned (*supra* page 34, paragraph 23 including subparagraphs).

In the Ninth Circuit, the employees and officials avoided the merits of the Foleys' suit on a defense of sovereign (absolute)[15] immunity per Section 768.28(9)(a), Florida Statutes, Docket 34-11. The Ninth Circuit

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[15] Florida courts use the phrases "sovereign immunity" and "absolute immunity" interchangeably: Avallone v. Bd. of County Com'rs Citrus Cty., 493 So.2d 1002 (Fla. 1986), Department of Transp. v. Neilson, 419 So.2d 1071 (Fla. 1982), Everton v. Willard, 468 So.2d 936 (Fla. 1985), Reddish v. Smith, 468 So.2d 929 (Fla. 1985).

subsequently issued two non-final, non-appealable orders per Section 57.105, Florida Statutes – the first for the employees on May 12, 2021, Docket 73, pages 17 thru 19, the second for the officials on January 28, 2022, Docket 73, pages 20 thru 28. Those orders separately grant the employees and officials *entitlement* to fees for their successful immunity defense in Section 768.28(9)(a), Florida Statutes. Neither order calculates a fee, or awards the defendants, or requires the Foleys to pay, a fee. More importantly, both orders defy the Florida precedent set by the Third District Court of Appeal.[16] It ruled that sanctions are not available per Section 57.105, Florida Statutes, to a government defendant who has avoided the merits of a suit on a defense of immunity, *See* Phillips v. Garcia, 147 So.3d 569, 571, 572 (Fla. 3rd Dist. 2014) and Cullen v. Marsh, 34 So.3d 235, 243 (Fla. 3rd Dist. 2010). Consequently, the Foleys can – without ignoring the sanctions *threatened* by the Ninth Circuit's entitlement order – claim in good faith that they have never been sanctioned, and that it is unlikely they will ever be sanctioned per Section 57.105, Florida Statutes. Before the Foleys can be sanctioned, the defendants will have to secure a final, appealable order that calculates and awards fees in the Ninth Circuit, and then convince Florida's new Sixth District Court of Appeal to declare conflict with the Third District, and then successfully defend that conflict in the Florida Supreme Court. That day is likely a long way off as there is no evidence in the record that the defendants sought an order from the Ninth Circuit awarding fees before the District Court declared the Foleys vexatious, July 26, 2023.

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[16] "[I]n the event the only case on point on a district level is from a district other than the one in which the trial court is located, the trial court [is] required to follow that decision," Pardo v. State, 596 So.2d 665, 667 (Fla. 1992)

The District Court's conclusion that the Foleys have been previously sanctioned "to no avail," is clearly erroneous as a matter of fact and law. Absent a finding of a final order for monetary sanctions, and a finding of a failure to pay those sanctions, the District Court lacked a reasonable basis for rejecting the alternative of monetary sanctions as a lesser encumbrance upon the Foleys' access to court.

C. The All Writs Act requires the least restrictive sanction.

As demonstrated in the preceding two subsections, the District Court, on the Magistrate's Recommendation, only speculated upon the efficacy of alternative monetary sanctions without making any serious factual inquiry.

This would be clear legal error in the Fifth Circuit and would guarantee the Foleys a reversal. For that reason the Foleys made the following recommendation to the District Court, Docket 165, page 6:

> The Fifth Circuit has a policy, recommended here, of ordering monetary sanctions first, and then justifying an injunction, if frivolous/vexatious action recurs, on proof of failure to pay the original monetary sanction: e.g., Nix v. Major League Baseball, 62 F.4th 920 (5th Cir. 2023); Whitfield v. Texas Children Memorial Hermann Hospital, No. 19-20292 (5th Cir. Oct. 27, 2020); Matter of Carroll, 850 F.3d 811 (5th Cir. 2017); Farguson v. MBank Houston, NA, 808 F.2d 358 (5th Cir. 1986); Day v. Allstate Ins. Co., 788 F.2d 1110 (5th Cir. 1986) ("[W]here monetary sanctions are ineffective in deterring vexatious filings, enjoining such filings [will] be considered."). In other words, if the Foleys have done anything deserving sanction, they recommend the Court (1) vacate its order

> branding and enjoining them as vexatious, (2) order an appropriate monetary sanction, and then (3) enjoin the Foleys as vexatious if the Foleys press a new frivolous action before paying the monetary sanction.

This Court's *en banc* decision in Procup v. Strickland, 792 F.2d 1069 (11th Cir. 1986), could not consider whether other sanctions would be appropriate because Procup was a prisoner proceeding *in forma pauperis* – no other sanctions were possible. So, Procup does not prevent a three-judge panel of this Circuit from adopting Fifth Circuit policy for a civil suit.

And though in footnote 4 of Oliver v. Ameris Bank, No. 21-13005 (September 21, 2023, 11th Cir. 2023) (Rosenbaum, Jill Pryor, and Edmondson), this Court quite recently and expressly declined to apply the five-point framework that the District Court borrowed in this case from Safir v. United States Lines, Inc., 792 F.2d 19, 24 (2nd Cir. 1986), it nevertheless made a finding with respect to Safir's fifth element – the adequacy of alternative sanctions. In Oliver this Court found the litigant had been unresponsive to alternative sanctions "in the past."

This inquiry as to the adequacy of alternative sanctions is not merely a policy of the Fifth District – as a matter of its plain language, or the judicial "negative-implication canon" (Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 10, pages 107 thru 111 (2012)), Title 28 U.S. Code Section 1651 requires consideration of the adequacy of alternative sanctions. The All Writs Act authorizes the court to issue only those writs "necessary or appropriate." It requires a measured assessment, and effectively prohibits writs in excess of what is "necessary or appropriate." Consequently, no court can justify issuance of a writ without first establishing the inadequacy of alternatives. As a practical

matter, no court can do so without proof such alternatives would be ineffective.

The District Court found no proof that the Foleys were indigent or had failed to pay a monetary sanction. Consequently, the District Court abused its discretion by imposing pre-filing restrictions without first imposing a monetary sanction.

On the wisdom of the Fifth District's reading of the All Writs Act, the Foleys ask this Court, if it does not reverse the injunction on the Foleys' good faith defense, to vacate the injunction and remand to the District Court with instructions to impose an appropriate monetary sanction.

Conclusion

The Foleys respectfully request the Court: **Reverse** the district court's pre-filing injunction designating the Foleys' vexatious litigants; or if not, **Strike** the district court's improper finding of a prior state-court grant of "qualified immunity," **Vacate** the district court's pre-filing injunction designating the Foleys' vexatious litigants, and **Remand** either with instructions that alternate sanctions be imposed, or with instructions that the injunction be narrowed to *pro se* pleadings involving the same parties and the issues previously adjudicated.

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Certificate of Service

THE FOLEYS CERTIFY that on November 1, 2023, a copy of this brief was filed with the Clerk of Court using the Court's CM/ECF system, which will send by e-mail a notice of Docket activity to: Lee Bernbaum, lee.bernbaum@ocfl.net; Derek Angell, dangell@ohalaw.com; and, Jessica C. Conner, jessica.conner@drml-law.com.

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