No. ________

IN THE

Supreme Court of the United States

AARON RAISER,
Petitioner,
v.

TRI-CITY MEDICAL CENTER,
GE HEALTHCARE INC,
WILLIAM A MEADE JR
WILLIAM A MEADE JR MD PC,
JOENELL ESTABILLO
Respondents.

Petition for Writ of Certiorari from the California Supreme Court

Petition for Writ of Certiorari

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Questions Presented for Review

1. Whether California Code of Civil Procedure (CCP) §391 violates the U.S. Constitution because CCP §391 bears on a fundamental right of access to the courts and contains an irrebuttable presumption affecting that right?

2. Whether CCP §391 violates the U.S. Constitution because CCP §391 relates to a fundamental right of access to the courts and because CCP §391 is not <u>narrowly tailored</u> to serve a compelling state interest?

3. Whether the state of California can punish a citizen of another state/jurisdiction under CCP §391 for conduct of the citizen in another state/jurisdiction where that conduct is perfectly legal and appropriate in the other state/jurisdiction?

4. Whether CCP §391 impermissibly imposes its law on citizens of other states/jurisdictions in violation of federalism?

5. Whether CCP §391 is unconstitutional on void for vagueness notice grounds?

6. Whether a court can be allowed to declare a case groundless or without merit on purely factual grounds relying ONLY on expert witnesses of one party without giving the other party a chance to examine or cross examine those witnesses?

7. Whether due process of law was denied Petitioner when the court of appeals decided an appeal where the court of appeals had no jurisdiction to consider that appeal?

Parties to the Proceedings

All parties appear in the case caption.

Corporate Disclosure Statement:

Petitioner is not filing for or on behalf of a Corporation.

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On July 12, 2017 the California Supreme Court entered an Order Denying Petitioner's Petition For Review. (Appendix A).

On May 15, 2017 the California Court of Appeal denied the Petition for Rehearing. (Appendix E)

On April 19, 2017 the California Court of Appeal entered an Opinion upholding the constitutionality of CCP 391 and dismissal of the underlying action. (Appendix B).

On August 18, 2015 the Superior Court of California, San Diego County entered an Order Dismissing Petitioner's case. (Appendix C).

On June 4, 2015 the Superior Court of California, San Diego County entered an Order Imposing Bond of Petitioner of over $500,000 in order for Petitioner's case to proceed. (Appendix D).

Appendix (Volume 1)

Supporting Court Documents

Appendix J[1]

J1 – Petitioner's Opposition (excerpts) to 391's Constitutionality – trial court.

J2 – Declaration of Petitioner Re: ER Expert Witness

J3 – Declaration of Petitioner's Expert Witness

Appendix K – Petition For Review in California Supreme Court (excerpts)

[1] The trial court filed each of these with 1 file stamp and they are thus kept together here and Appendix J thus contains 3 separate court documents.

Constitutional Provisions, Statutes

U.S. Constitution, Bill of Rights – 1st Amendment

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

U.S. Constitution, Bill of Rights – 14th Amendment

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Cal. Code Civ. Proc. §391

As used in this title, the following terms have the following meanings:
(a) "Litigation" means any civil action or proceeding, commenced, maintained or pending in any state or federal court.
(b) "Vexatious litigant" means a person who does any of the following:
(1) In the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing.
(2) After a litigation has been finally determined against the person, repeatedly relitigates or attempts to relitigate, in propria persona, either (i) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or (ii) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined.
(3) In any litigation while acting in propria

persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay.

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

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

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

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

Cal. Code Civ. Proc. §391.1

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

Cal. Code Civ. Proc. §391.2

At the hearing upon the motion the court shall consider any evidence, written or oral, by witnesses or affidavit, as may be material to the ground of the motion. Except for an order dismissing the litigation pursuant to subdivision (b) of Section 391.3, no determination made by the court in determining or ruling upon the motion shall be or be deemed to be a determination of any issue in the litigation or of the merits thereof.

Cal. Code Civ. Proc. §391.3

(a) Except as provided in subdivision (b), if, after hearing the evidence upon the motion, the court determines that the plaintiff is a vexatious litigant and that there is no reasonable probability that the plaintiff will prevail in the litigation against the moving defendant, the court shall order the plaintiff to furnish, for the benefit of the moving defendant, security in such amount and within such time as the court shall fix.
(b) If, after hearing evidence on the motion, the court determines that the litigation has no merit and has been filed for the purposes of harassment or delay, the court shall order the litigation dismissed. This subdivision shall only apply to litigation filed in a court of this state by a vexatious litigant subject to a prefiling order pursuant to Section 391.7 who was represented by counsel at the time the litigation was filed and who became in propria persona after the withdrawal of his or her attorney.
(c) A defendant may make a motion for relief in the alternative under either subdivision (a) or (b) and shall combine all grounds for relief in one motion.

Cal. Code Civ. Proc. §391.4

When security that has been ordered furnished is not furnished as ordered, the litigation shall be dismissed as to the defendant for whose benefit it was ordered furnished.

Cal. Code Civ. Proc. §391.6

Except as provided in subdivision (b) of Section 391.3, when a motion pursuant to Section 391.1 is filed prior to trial the litigation is stayed, and the moving defendant need not plead, until 10 days after the motion shall have been denied, or if granted, until 10 days after the required security has been furnished and the moving defendant given written notice thereof. When a motion pursuant to Section 391.1 is made at any time thereafter, the litigation shall be stayed for such period after the denial of the motion or the furnishing of the required security as the court shall determine.

Cal. Code Civ. Proc. §391.7

(a) In addition to any other relief provided in this title, the court may, on its own motion or the motion of any party, enter a prefiling order

which prohibits a vexatious litigant from filing any new litigation in the courts of this state in propria persona without first obtaining leave of the presiding justice or presiding judge of the court where the litigation is proposed to be filed. Disobedience of the order by a vexatious litigant may be punished as a contempt of court.
(b) The presiding justice or presiding judge shall permit the filing of that litigation only if it appears that the litigation has merit and has not been filed for the purposes of harassment or delay. The presiding justice or presiding judge may condition the filing of the litigation upon the furnishing of security for the benefit of the defendants as provided in Section 391.3.
(c) The clerk may not file any litigation presented by a vexatious litigant subject to a prefiling order unless the vexatious litigant first obtains an order from the presiding justice or presiding judge permitting the filing. If the clerk mistakenly files the litigation without the order, any party may file with the clerk and serve, or the presiding justice or presiding judge may direct the clerk to file and serve, on the plaintiff and other parties a notice stating that the plaintiff is a vexatious litigant subject to a prefiling order as set forth in subdivision (a). The filing of the notice shall automatically stay the litigation. The litigation shall be automatically dismissed unless the plaintiff

within 10 days of the filing of that notice obtains an order from the presiding justice or presiding judge permitting the filing of the litigation as set forth in subdivision (b). If the presiding justice or presiding judge issues an order permitting the filing, the stay of the litigation shall remain in effect, and the defendants need not plead, until 10 days after the defendants are served with a copy of the order.

(d) For purposes of this section, "litigation" includes any petition, application, or motion other than a discovery motion, in a proceeding under the Family Code or Probate Code, for any order.

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

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

California Rules of Court 8.104 - Time to appeal

(a) Normal time
(1) Unless a statute, rule 8.108, or rule 8.702 provides otherwise, a notice of appeal must be filed on or before the earliest of:
(A) 60 days after the superior court clerk serves on the party filing the notice of appeal a document entitled "Notice of Entry" of judgment or a filed-endorsed copy of the judgment, showing the date either was served;
(B) 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled "Notice of Entry" of judgment or a filed-endorsed copy of the judgment, accompanied by proof of service; or
(C) 180 days after entry of judgment.

(2) Service under (1)(A) and (B) may be by any method permitted by the Code of Civil Procedure, including electronic service when permitted under Code of Civil Procedure section 1010.6 and rules 2.250–2.261.

(3) If the parties stipulated in the trial court under Code of Civil Procedure section 1019.5 to waive notice of the court order being appealed, the time to appeal under (1)(C) applies unless the court or a party serves notice of entry of

judgment or a filed-endorsed copy of the judgment to start the time period under (1)(A) or (B)

b) No extension of time; late notice of appeal

Except as provided in rule 8.66, no court may extend the time to file a notice of appeal. If a notice of appeal is filed late, the reviewing court must dismiss the appeal.

(c) What constitutes entry
For purposes of this rule:
(1) The entry date of a judgment is the date the judgment is filed under Code of Civil Procedure section 668.5, or the date it is entered in the judgment book.

(2) The entry date of an appealable order that is entered in the minutes is the date it is entered in the permanent minutes. But if the minute order directs that a written order be prepared, the entry date is the date the signed order is filed; a written order prepared under rule 3.1312 or similar local rule is not such an order prepared by direction of a minute order.

(3) The entry date of an appealable order that is

not entered in the minutes is the date the signed order is filed.

(4) The entry date of a decree of distribution in a probate proceeding is the date it is entered at length in the judgment book or other permanent court record.

(d) Premature notice of appeal

(1) A notice of appeal filed after judgment is rendered but before it is entered is valid and is treated as filed immediately after entry of judgment.

(2) The reviewing court may treat a notice of appeal filed after the superior court has

announced its intended ruling, but before it has rendered judgment, as filed immediately after entry of judgment.

(e) Appealable order

As used in (a) and (d), "judgment" includes an appealable order if the appeal is from an appealable order

CRC 8.66. Extending time because of public emergency

(a) Emergency extensions of time

If made necessary by the occurrence or danger of an earthquake, fire, or other public emergency, or by the destruction of or danger to a building housing a reviewing court, the Chair of the Judicial Council, notwithstanding any other rule in this title, may:

(1) Extend by no more than 14 additional days the time to do any act required or permitted under these rules; or

(2) Authorize specified courts to extend by no more than 30 additional days the time to do any act required or permitted under these rules.

(b) Applicability of order

(1) An order under (a) must specify whether it applies throughout the state, only to specified courts, or only to courts or attorneys in specified geographic areas, or applies in some other manner.

(2) An order of the Chair of the Judicial Council under (a)(2) must specify the length of the authorized extension.

(c) Additional extensions

If made necessary by the nature or extent of the public emergency, the Chair of the Judicial Council may extend or renew an order issued under (a) for an additional period of:

(1) No more than 14 days for an order under (a)(1); or

(2) No more than 30 days for an order under (a)(2).

JURISDICTIONAL STATEMENT

The date of the California Supreme Court Order denying Review is July 12, 2017 (Appendix A). Petitioner's appeal in the California Court of Appeals (4^{th} Dist.) was decided April 19, 2017 (Appendix B) and was timely appealed to the California Supreme Court. A petition for rehearing in the California Court of Appeals (4^{th} Dist.) was timely filed and denied May 15, 2017 (Appendix E).

28 U. S. C. § 2403(b) may apply and the attorney general of the state of California was served with 3 copies of this Petition. See Proof of Service.

This Court has jurisdiction of this matter pursuant to 28 U.S. Code § 1257.

STATEMENT OF THE CASE

I. Statement of the Case
A. Nature of the Underlying Case

Petitioner was involved in civil litigation in the Superior Court of San Diego, California in December 2014. [2]

While this Petition focuses on the constitutionality of CCP §391 the brief facts of the underlying case are Petitioner went to the Emergency Room (ER) of Defendant's hospital, was lied to in order to get Petitioner to undergo a CT scan he didn't need; there was an absence of a proper informed consent such explaining as the cancer risks (which are about 1 cancer per 1500 CT scans) and never informed Petitioner about alternatives to the CT scan such as a flu swab test; Petitioner was also overexposed to radiation from a malfunctioning CT scanner.

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[2] The court of appeal Opinion (Appendix B) doesn't summarize the facts to accurately reflect the facts of the complaint or Declarations in the case below, however, for purposes of this Petition it is close enough. This Petition focuses on the constitutionality of CCP 391 as did the underlying appeal.

See *Declaration of Aaron Raiser for May 22, 2015 Hearing* found at Exhibit B of Appendix J3.

Petitioner also learned that in America 1 in 3 CT scans, like Petitioner, are not even necessary, and only 17% of patients get any type of informed consent about cancer risks, AND per the FDA, 1 in 2000 people getting CT scans eventually die as a result of the CT scan due to cancer; in American, there are 72 million CT scans performed per year. See Plaintiff's 391 Opposition (Appendix J1) at 26. Doing the math, about 10,000 people die per year from a CT scan which they never needed to start with and never told about the cancer risks.

A typical CT scan performed without an informed consent is rarely actionable on negligence grounds given the cancer does not occx`ur until years later. Petitioner's case however involved fraud, and under *Potter v. Firestone Tire & Rubber Co.* 6 Cal.4th 965 (1993) can recover for fear of cancer as fraud is involved in the exposure of someone to a cancer causing agent such as a CT scan, among other claims in the case.

Thus, in addition to the unconstitutionality of CCP 391 the underlying case has great important beyond Petitioner for America in general.

B. Key Procedural Matters

Defendants filed a motion under California Code of Civil Procedure (CCP) §391 (391) to hold Petitioner a vexatious litigant. Under 391 anyone losing 5 "litigations" in the prior 7 years – anywhere in the United States, even if the 5 cases were meritorious – is automatically a vexatious litigant and subject to severe restrictions and a differential set of rules of civil procedure.

Petitioner was shown to have a perfect record, however, in California state courts, having filed and settled 2 cases in the prior 7 years. Petitioner has never been a vexatious litigant in the California court system **or so much had been shown to have even lost any court cases there.**

Petitioner, however, was shown to have lost 2 meritorious federal court cases in the prior 7 years. That would not have put Petitioner on the vexatious litigant list, however, 391 creatively defines an appeal as "new" litigation, even though an appeal simply transfers jurisdiction from an existing court case to the court of appeals.

Petitioner had lost 6 federal appeals in the prior 7 years – all meritorious – and was thus held vexatious under California law. Oddly, federal courts don't consider appeals new litigation, and losing an appeal in federal court does not automatically mean someone is vexatious, so because California redefined another jurisdictions rules to fit their own purpose Petitioner was held a vexatious litigant. That however was only the start of Petitioner's injustice.

Under 391.6 the trial court stayed the proceedings when Defendants motioned to declare Petitioner a vexatious litigant. See Appendix F – Superior Court Order. Under California law, a trial court need not credit the allegations of a plaintiff's complaint as true but may exercise its discretion in evaluating the evidence presented on a motion to require security under 391. *Moran v. Murtaugh* 126 Cal App 4th 323 (2005). A trial court can consider evidence presented by the parties as to the merits of the case. See CCP §391.2. However, given the proceedings are stayed, Petitioner was unable to perform any discovery and could not cross examine any witnesses of the Defendant and obtain the evidence needed to show the merits of his case.

So what 391 degenerates into is for all practical purpose is a motion for summary judgment (1) with no discovery (2) no chance to depose or cross examine any witness/expert of the Defendant and (3) insufficient time for Petitioner to procure and prepare his own experts to oppose Defendants' experts. Under federal rules, at least, if a party moves for summary judgment without discovery the non-moving party can under Fed. R. Civ. Proc. 56 ask a court for a chance to do discovery in order to be able to properly oppose the motion. No such provision exists under CCP §391.

Obviously, under such procedural rules, no pro se litigant litigating a case under 391 who needs expert witnesses can ever prevail. Apparently, this is the first time any pro per in California has needed expert witnesses under 391, and 391 simply doesn't work under such conditions.

A few examples of how harmful this was to Petitioner's due process of law rights can be seen from the court of appeal opinion (Appendix B) which noted:

> ... Raiser's claimed injury is based on his unfounded fear of developing cancer from having undergone the CT scan; it does not stem from a "knowledge, corroborated by reliable medical or scientific opinion."(Id. at p. 997.)

Opinion (Appendix B) at 34-35.

However, no discovery was allowed. Petitioner was expected to procure an expert to testify (corroborating reliable medical or scientific opinion) as to the risk of getting cancer. Yet no discovery was allowed into the calibration history of the CT scanner, reported and known problems with GE's CT scanner's – which are known to overexpose patients to excessive radiation. Petitioner's expert was a professor of radiology at USC. She was HIGHLY qualified to testify as to the operation and radiation exposure of patients during CT scans, yet she was not given a chance to procure the very information at discovery she would need to opine on Petitioner's cancer risks. Further, Petitioner was given insufficient time to procure other expert witnesses to testify as to cancer risks and other expert issues – all due to 391.

A good example is that under the controlling case law *Potter v. Firestone Tire & Rubber Co.* 6 Cal.4th 965 Plaintiff can recover for medical monitoring costs for the negligence based claims. Yet, Petitioner was denied access to the very discovery he needed for his expert to determine the radiation exposure of Petitioner and his need for medical monitoring.

Another example of the problems 391 caused is seen in Petitioner's Declaration in trial court concerning his ER expert who at the last minute refused to answer hypothetical questions based on Petitioner's Declaration. See Appendix J2 (outlining the many problems 391 caused Petitioner with his ER expert). Were it not for 391 and its shortened deadlines Petitioner simply would have gone out and procured another expert, and had plenty of time to prepare for trial. It also shows the unfairness to Petitioner being expected to get an expert to give a favorable opinion in his case where no discovery has been done such as deposing the doctors, medical staff and examining records related to the CT scanner. All that information would have been helpful if not mission critical for Petitioner's ER expert to form a proper opinion.

While this Petition is not drafted to prove the merits of the case, a mentioning of some underlying facts is pertinent to show the injury to Petitioner's due process of law rights. A better treatise on all of the many problems 391 caused can be seen in Part IV of Petitioner's Opening Brief in the court of appeals, found at Appendix G herewith.

The main relief sought would be that if CCP §391 is unconstitutional, Petitioner's case should be remanded back to trial court and allow it to proceed like any other case under the California Rules of Civil Procedure, and allow Petitioner discovery, a chance to depose/cross examine the Defendants' experts, and allow Petitioner ample time – like any other litigant – to procure and prepare his expert witnesses in order to show the merits of his case.

C.

All federal questions herein were raised in the first instance in the Superior Court of California for the county of San Diego in Petitioner's opposition to requiring him to post bond under 391 (See Appendix J1). The superior court did not address Petitioner's challenges because it believed it was bound by prior California court of appeal opinions which never addressed the same or similar arguments or facts as Petitioner.

Petitioner then appealed and raised the same federal question arguments in the Court of Appeal (4th Dist.) of California and the Opening Brief (excerpts) is found at Appendix G. The court of appeals did a poor job addressing Petitioner's constitutional / federal question arguments and upheld 391 as constitutional.

Petitioner then filed a Petition for Rehearing as required under California court rules in the court of appeal, and then filed a Petition for Review with the California Supreme Court (Appendix K) raising the same federal questions, which review was denied (Appendix A).

Federal Question Foundation Chart [3]

Issue	Trial Ct Appx. J1	Ct. App. Appx. G	Sup. Ct. Appx. K
1	6-7, 13-14 [4]	4-10	23,24-27
2	6-11	4-5, 10-13	21-24,28
3	11-12	13-15	31-33

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[3] This table outlines where in the Trial Court (Trial Ct.), Court of Appeals (Ct. App.) and Cal. Supreme Court (Sup. Ct.) the Issues were raised below.

[4] Petitioner argued the concept of irrebuttable presumptions – that a court cannot make presumptions with respect to "important interests" (fundamental rights) and cited to applicable case law on irrebuttable presumption - Stanley v. Illinois 405 U.S. 645 and previously in the same document at 6-7 showed access to the courts is a fundamental right, and thus presumptions could not be allowed.

4	11-12, 3-6	13-15	31-33
5	14-21, 21-25	15-17	28-31
6	3-6	18-47	15-22
7	Raised for first time on appeal by court of appeals	Raised for first time on appeal by court of appeals	33-52

Argument - Reasons for Granting the Writ

"It is one of the misfortunes of the law that ideas become [crystallized] in phrases and thereafter for a long time cease to provoke further analysis." *Hyde v. U.S.* (1912) 225 U.S. 347, 384-91 (Justice Oliver Wendell Holmes).

Having survived very weak challenges by pro se litigants since its enactment in 1965, most all courts addressing 391's constitutionality simply say it has survived constitutional challenge but never addresses the *ratio decidendi* of the very few court of appeal cases to actually address the constitutionality of 391. In other words 391 has ceased to "provoke further analysis".

This is readily evident when comparing Petitioner's Opening Brief (Appendix G) - raising never before argued constitutional challenges to 391 - with the actual appellate Opinion (Appendix B). The court of appeals successfully ducked and dodged every (winning) argument Petitioner made. California appears content to prop up 391 for another 50 years even though all can readily see it is unconstitutional.

This however is not only unfair to Petitioner, but to the many who follow. Courts literally – at least on occasion - have human life and destiny in its hands <u>and fair access to the courts is imperative</u>, along with proper legal analysis.

In Petitioner's case for example, Petitioner faces a significant risk of getting cancer and is seeking cancer screening costs in one cause of action due to not having money for healthcare. Yet look at what 391 has done. It has delayed Petitioner's cancer screening by several years. It could be that Petitioner does have cancer and early cancer screening might save Petitioner's life. Yet all due to 391 and its groundless and unfair basis – at least in Petitioner's case – for declaring him a vexatious litigant Petitioner's cancer screening has been delayed some 4 years which in the end might end up killing him. While Petitioner is hopeful that is not the case, it highlights why 391 must be fixed and if access to the courts is to be denied or restricted there must be a compelling reason and a more narrowly tailored approach to handling wayward pro pers.

CCP §391 states in pertinent part:

> (b) "Vexatious litigant" means a person who does any of the following:
> (1) In the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations *** finally determined adversely to the person ***.

See CCP §391.

The Legislative Intent of 391 is set forth in *Wolfgram v. Wells Fargo* 53 Cal. App. 4th 43 (1997):

> "A problem [was] created by the persistent and obsessive litigant, appearing in pro. per., who has constantly pending a number of groundless actions *** "The need for the adoption of this legislation is that there is

> an unreasonable burden placed upon the courts by groundless litigation, which, in turn, prevents the speedy consideration of deserving and proper litigation;

See *Wolfgram v. Wells Fargo* 53 Cal. App. 4th at 48.

As originally drafted 391 required that the 5 cases lost to have been brought in **California state courts**. Other jurisdictions were irrelevant. 391 was amended in 1990 to include litigation in all jurisdictions. See 1990 Cal. Stat. 621, § 1-3; See also Amendment Notes to CCP §391 (emphasis added) ("1990 Amendment: In addition to making technical changes, (1) substituted "state or federal court of record" for "court of this state" in subd (a); ***")

The following arguments and issues show an important reason for granting this writ and shows important rights of federal law are being denied and unconstitutionally impeded by California's CCP §391. It clearly shows interference with - and in Petitioner's case - a denial of the right to petition government under the 1st Amendment of the U.S. Constitution, and clearly shows an interference with and in Petitioner's case a denial of due process of law under the 14th Amendment of the U.S. Constitution.

I. Access to Court is a Fundamental Right

Chief Justice Marshall in *Marbury v. Madison* (1803) 15 U.S. (1 Cranch) 137 first described the ability to obtain civil redress as the "very essence of civil liberty." Id. at 163.

California courts in *Baltayan v. Estate of Getemyan* (2001) 90 Cal. App. 4th 1427 acknowledged the fundamental right of access of the courts. See Id. at 1440 ("The Supreme Court first reserved the issue whether the legislature even had the power to abrogate this fundamental right of access to the courts."); *Id.* at 1442 ("In ruling indigents are entitled to waiver of security for costs, both England and California are saying one party's economic interest in receiving its costs of litigation should it win cannot be used to deny an indigent party his fundamental right of access to the courts.")

With respect to the U.S. Supreme court, it is beyond dispute that the right of access to the courts is a fundamental right protected by the Constitution. The U.S. Supreme Court has found several constitutional bases for this right. See, e.g., *Chambers v. Baltimore & O.R.R.* 207 U.S. 142, 148 (1907) (right of access is a privilege and immunity secured under article IV of the

Constitution and the Fourteenth Amendment*);* *Pennsylvania v. Finley* 481 U.S. 551, 557 (1987) (the Equal Protection Clause), *California Motor Transport Co. v. Trucking Unlimited* 404 U.S. 508, 510 (1972) (right of access is one aspect of First Amendment right of petition); *Wolff v. McDonnell* (1974) 418 U.S. 539, 579 (right of access is founded in the Due Process Clause).

Accordingly, interference with or deprivation of the right of access to the courts is actionable under Sec. 1983. See *Harrison v. Springdale Water*, 780 F.2d 1422, 1428; *Ryland v. Shapiro* 708 F.2d 967, 972 (5th Cir.1983); *Graham v. National Collegiate Athletic Ass'n* 804 F.2d 953, 959 (6th Cir.1986). It should also be redressable here on appeal.

The right of access in its most formal manifestation protects a person's right to physically access the court system. Without more, however, such an important right would ring hollow in the halls of justice. See *Chambers*, 207 U.S. at 148 ("In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship...."). Access to courts does not only protect one's right to physically enter the courthouse halls, but also insures that the access to courts will be "adequate, effective and meaningful." *Bounds v. Smith*, 430 U.S. 817 (1977).

II. 391 Contains An Irrebuttable Presumption

391 contains the provision that it is conclusively established that any litigant appearing in pro per who loses 5 litigations in 7 years is a vexatious litigant. See CCP §391(b)(1) (""Vexatious litigant" means a person who ...[i]n the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations *** finally determined adversely to the person ***.") .

III. Issue #1 - 391 Is Unconstitutional Given It Bears On a Fundamental Right and Contains an Irrebuttable Presumption

Petitioner cited to *Stanley v. Illinois* (1972) 405 U.S. 645 in the courts below to show that irrebuttable presumptions are not allowed with respect to burdening a fundamental right.

> Likewise, in regard to §391 et seq, California cannot merely presume that, in itself, a pro se litigant losing five actions in

> seven years (under §391(b)(1)) deserves punishment — without a showing of some kind of actual blameworthiness. "Procedure by presumption is always cheaper and easier than individualized determination. But when . . . the procedure forecloses the determinative issues . . . it needlessly risks running roughshod over . . . important interests. It therefore cannot stand." (Stanley at 656-657).

See Opening Brief (Excerpts) (Appendix G) at pp. 4-7

However worded, the "important interests" referred to in *Stanley* were fundamental rights:

> The rights to conceive and to raise one's children have been deemed "essential," Meyer v. Nebraska, 262 U. S. 390, 262 U. S. 399 (1923), "basic civil rights of man," Skinner v. Oklahoma, 316 U. S. 535, 316 U. S. 541 (1942), and "[r]ights far more precious . . . than property rights," May v. Anderson, 345 U. S. 528, 345 U. S. 533 (1953).

Stanley, 405 U.S. at 651.

In *Weinberger v. Salfi* (1975) 422 U.S. 749 the Court referred to Stanley's right as a "protected right", and explained that was the reason the statute and its presumption scheme in the Stanley case were invalid:

> The Court today distinguishes Stanley v. Illinois, 405 U. S. 645 (1972), and Cleveland Board of Education v. LaFleur, 414 U. S. 632 (1974), two cases which struck down conclusive presumptions, because both dealt with protected rights, while this case deals with "a noncontractual claim to receive funds from the public treasury [which] enjoys no constitutionally protected status."

Weinberger, 422 U.S. at 803.

It goes without saying that access to the courts is an important and protected interest. Non-protected interests such as areas of law for economics or social welfare allow irrebuttable presumption if they are survive a rational basis test.

> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are

> imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution ***

Weinberger, 422 U.S. at 769.

In *Michael H. v. Gerald D.* (1989) 491 U.S. 110 a California Supreme Court case was reviewed by the U.S. Supreme Court. That case dealt with a California statute which conclusively established that a child born to a married woman was fathered by her husband. In upholding the constitutionality of that law the U.S. Supreme Court noted:

> Michael has failed to meet his burden of proving that his claimed "liberty" interest is one so deeply imbedded within society's traditions as to be a fundamental right.

Michael H. v. Gerald D. 491 U.S. at 111.

Because 391 involves a fundamental right and the rights involved turn on an irrebuttable presumption, 391 must be found unconstitutional.

To finish this issue, Plaintiff cites to *Stanley*:

> This Court has not, however, embraced the general proposition that a wrong may be done if it can be undone. Cf. Sniadach v. Family Finance Corp., 395 U. S. 337 (1969). Surely, in the case before us, if there is delay between the doing and the undoing, petitioner suffers from the deprivation of his children, and the children suffer from uncertainty and dislocation.

Stanley, 405 U.S. at 647.

Simply because at some future point in time Plaintiff might get removed from the vexatious litigant list and come up with the money for cancer screening, as the plaintiff in Stanley might regain custody of his children, Plaintiff has been injured in his access to the courts and a remedy he otherwise deserves or at least deserve a fair chance in court to show. Further, simply because Plaintiff might some day be able to litigate his case in state court, as the plaintiff in Stanley, Plaintiff shall have suffered due to 391 incorrect presumption over a 2 year delay in litigating this case in trial court. As the Supreme Court pointed out, delays - when it comes to fundamental rights - are not tolerable.

IV. Issue #2 - 391 Is Unconstitutional Given It Is Not Narrowly Tailored, And It Fails Strict Scrutiny Analysis For The Fundamental Right of Access To The Courts

Synthesizing the rule of law with respect to fundamental rights and irrebuttable presumptions and the present section on fundamental rights and laws being narrowly tailored the outcome is clear: Laws bearing on fundamental rights must be narrowly tailored and irrebuttable presumptions are NOT narrowly tailored.

A. Laws Burdening Fundamental Rights Invoke Strict Scrutiny Analysis and Must Be Narrowly Tailored

If legislation involves a fundamental right or affects a suspect classification, the statute is closely scrutinized, and will be (1) closely scrutinized and upheld only if it is (2) necessary for furtherance of a compelling state interest and (3) narrowly tailored.

> The United States Supreme Court has long recognized the existence and special place of implied fundamental rights under the United States Constitution. *** "The Fourteenth Amendment 'forbids the

> government to infringe ... "fundamental" liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.'"

See *Washington v. Glucksberg,* 521 U.S. 702, 721 (1997).

B. Assuming a Pro Se Litigant Who Loses 5 Cases In 7 Years To Be Vexatious Is Not Narrowly Tailored

It should not be in dispute that 391 burdens or infringes on access to the courts of the pro per litigant who happens to lose 5 cases in 7 years. It should not be in dispute that access to the court system is a fundamental right, and that as a result, any laws burdening that right should be subject to strict scrutiny. It should not be in dispute then that 391 should be reviewed under a strict scrutiny analysis.

Assuming that a person who loses 5 cases in 7 years is vexatious is NOT narrowly tailored. The narrowly tailored approach is to hold someone as a vexatious litigant when they file vexatious litigation. Few concepts could be simpler.

C. The 1990 Amendment Pulling In Other Jurisdictions is Not Narrowly Tailored

The other aspect of the narrowly tailored analysis is that given that the objective of 391 is to curb baseless litigation in California, the 1 frivolous or harassing case must be filed in California state courts. If not, it is not narrowly tailored given its objective is to prevent vexatious litigation in California state courts.

Related to this is the fact that 391 only requires losing 5 cases in 7 years in any jurisdiction. Other states look to the merits of the litigation prior to declaring it vexatious. Thus, 391 is not narrowly tailored as it must impose its laws on other jurisdictions and then punish a litigant in those jurisdictions for what is perfectly proper in that jurisdiction.

Further, California cannot guarantee the substantive and procedural aspects of why and how any person from another jurisdiction came to be a "vexatious" litigant.

D. California's Take On 391 Being Narrowly Tailored

The Opinion (Appendix B) at 20-21 states – with respect to 391 and the argument that it is not narrowly tailored states "there is no direct 'penalty'".

There are various problems with that approach.

First, nowhere in the history of this Court's Fundamental Rights - Strict Scrutiny Jurisprudence has it ever been held that a law need not be narrowly tailored if there is no "penalty".

Second, the contention that there is no penalty involved with 391 was based on *Wolfgram v. Wells Fargo* 53 Cal. App. 4th 48 (1997) which case DID NOT involve expert witnesses. Petitioner's case does, and Petitioner showed penalty. See for example the Opening Brief (Excerpts) (Appendix G) at pp. 18 – 46.

It is not in dispute access to the courts is a fundamental right. It was never shown anywhere below to be narrowly tailored, and it is obvious it is not. A close examination of the only court in California to come even close to analyzing whether 391 was narrowly tailored was *Wolfgram v. Wells Fargo* 53 Cal. App. 4th 48 (1997) and while the appellant in that case appears to have raised the narrowly tailored argument, the court simply ignored that argument because "there is no direct 'penalty'" See *Wolfgram v. Wells Fargo* 53 Cal. App. 4th at 57 (1997). Again, appellant Wolfgram did not need expert witnesses so his case was similar to a motion to dismiss under Fed. R. Civ. Proc. 12(b)(6). Petitioner needed expert witness and his case turned out to be similar to a motion for summary judgment with (1) no discovery (2) no chance to cross examine Defendants experts (3) wholly insufficient time for Petitioner to procure and prepare experts in his case and (4) no chance to ask the court to perform discovery needed to oppose the motion.

Fourth, the Opinion ignores this Court's case law of *Washington v. Glucksberg*:

> The United States Supreme Court has long recognized the existence and special place of implied fundamental rights under the United States Constitution. *** "The Fourteenth Amendment 'forbids the government to infringe ... "fundamental" liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."'

See *Washington v. Glucksberg,* 521 U.S. 702, 721 (1997).

California ignores the mandate that 391 be narrowly tailored, instead focusing on the lack of injury claim. Once declared vexatious the vexatious litigant must, for example, when filing a new case seek permission from the presiding judge. In other words, a process is provided for the vexatious litigant to gain access to the court. Yet *Washington v. Glucksberg* states that "no matter what process is provided" it must be narrowly tailored.

California is saying because they have a process to gain access to the courts it doesn't matter if it is narrowly tailored or not. Yet this Court says "no matter what process is provided" it must be narrowly tailored.

While subtle, and never before raised, Petitioner has a winning challenge.

Fifth, the Opinion at 23 does not accurately state the law as to 391 claiming:

> Instead, [the relevant authorities] inform us that the suer has repeatedly lost many meritless (albeit colorable) suits while acting in propria persona, which, when combined with the fact that he has filed another (sixth) suit which has been found

> to lack merit, support the reasonable inference that the suer has been using the court' system inappropriately and will continue to do so." (Id. at p. 57.)

Opinion (Appendix B) at 22.

To California whether or not the 5 cases had merit or not is not pertinent because the pro per has come into court with a 6th case which was found to lack merit. That reasoning is flawed yet subtle.

In Woflgram's circumstances he came into court with a 6th case that lacked merit – was frivolous – independent of the prior 5. In Petitioner's reasoning as long as someone has filed 1 case that is frivolous they can be put on the vexatious litigant.

Here is the difference in the 2 cases. Wolfgram did not need expert witnesses, Petitioner did. Needing expert witnesses, Petitioner's case was found to be "frivolous" because he had no chance to do discovery, no chance to cross examine witnesses and insufficient time to find and prepare expert witnesses. For starters. The trial judge also struck Petitioner's Declaration for the reasonable probability of success hearing. See Opinion at 30. [5]

That doomed Petitioner's case. Under California law, a trial court need not credit the allegations of a plaintiff's complaint as true but may exercise its discretion in evaluating the evidence presented on a motion to require security under 391. *Moran v. Murtaugh* 126 Cal App 4th 323 (2005). A trial court can consider evidence presented by the parties as the merits of the case. See CCP §391.2.

Yet when the trial judge struck Petitioner's Declaration, that left NO FACTS – NOTHING before the trial judge regarding Petitioner's case. It is similar to a motion for summary judgment in federal court where the non-moving party does not present a declaration/affidavit to factually support their opposition. They are doomed.

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[5] The Opinion claims Petitioner challenged the merits of the underlying lawsuit. That is false and can be readily seen from the Opening Brief (Appendix G) at 1-3. Petitioner's entire appeal and briefing was limited to the constitutionality of 391.

On that alone, Petitioner's case was found to be "frivolous" yet were it not for 391 Petitioner's case could have proceeded like any other case to trial and had Defendants filed a motion for summary judgment under state law, Petitioner would have had the chance to perform discovery and to submit those facts in support of his opposition, could have deposed Defendants expert witnesses, and Petitioner would have had ample time to procure and prepare his experts and their Declarations etc.

Were it not for 391 the trial court would never have been in a position to exercise its discretion to strike Petitioner's Declaration – and end the case prematurely.

This is so obvious. Were it not for 391 and its draconian rules a pro per is subject to Petitioner could have prevailed – or had a solid chance to win. Yet all because Petitioner was subject to these odd rules under 391 his case was deemed "frivolous".

A closer look at the Opinion shows it almost entirely ignores is that the trial judge struck Petitioner's Declaration for the reasonable probability of success hearing and the reasons why. See Opinion at p. 30. [6]

While the reasons why are not at issue on this appeal, mainly because the matter was never briefed, what matters here is that 391 thrusts a pro se litigant into a novel set of procedures where their case is doomed if they need expert witnesses. A reasonably detailed coverage of the full scope of the procedural problems and injustice 391 procedurally caused if found in the Opening Brief (Appendix G) at 18-46.

To summarize this aspect of argument: California claims 391 is no big deal because a person is not vexatious until they file the 6th lawsuit that is frivolous, yet California ignores that a person coming into court with a 6th lawsuit where expert witnesses are involved that their case is doomed due to the draconian set of procedural rules that pro per litigant is subject to under 391.

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[6] The Opinion claims Petitioner challenged the merits of the underlying lawsuit. That is false and can be readily seen from the Opening Brief (Appendix G) at 1-3. Petitioner's entire appeal and briefing was limited to the constitutionality of 391.

Other observations from the Opinion:

> The Wolfgram court continued, "The fact that the statute does not include a requirement that the five losing suits be frivolous does not render it unconstitutional," explaining that such a "showing is insufficient to support a motion to declare someone a vexatious litigant[;] it must be coupled with proof that the suer has come into court again, with a suit with no reasonable probability of success. [Citation.] That fact, coupled with the abysmal history of failure, is sufficient to establish 'vexatiousness' in the ultimate sense, litigation lacking 'reasonableness or probable cause or excuse.' " (Id. at p. 58.)

Opinion (Appendix B) at 23-24.

While the flaws in that argument are shown above, Petitioner points out that a person in California is put on the vexatious litigant list for losing 5 cases (meritorious or not) in 7 years. There is no requirement of filing a 6th lawsuit that is frivolous as the Opinion claims. Filing the 6th lawsuit that lacks merit simply means the plaintiff must post bond. Even if the 6th lawsuit did have merit and could proceed normally, the plaintiff in that case would still be placed on the vexatious litigant list for having lost 5 cases in the past 7 years. See CCP §391(b)(1) defining a vexatious litigant as a per per losing 5 litigations in 7 years and then see CCP §391.7:

> (a) In addition to any other relief provided in this title, the court may, on its own motion or the motion of any party, <u>enter a prefiling order which prohibits a vexatious litigant from filing any new litigation in the courts of this state in propria persona without first obtaining leave of the presiding justice or presiding judge of the court</u> where the litigation is proposed to be filed. Disobedience of the order by a vexatious litigant may be punished as a contempt of court.

A pro per then can face jail time in California by being held in contempt of court where they have never so much as ever even lost a court case in California – like Petitioner's set of circumstances.

More troubling, all of Petitioner's litigation in federal court as shown at briefing in the court of appeals – losing 2 federal cases and 6 federal appeals – was not considered wrongful, illegal, or amiss in the slightest by those courts.

Petitioner can go to jail for filing a court case in California where he has not even lost a California state court case and has not so much as ever committed a wrong in any court outside California!

Even more frustrating is that the ONLY reason Petitioner was held to be a vexatious litigant was the 6 lost appeals.[7] Yet, federal courts don't consider an appeal new litigation. California redefines the rules of another jurisdiction and impose its definitions on that jurisdiction and conduct of that citizen in that jurisdiction in order to pull off its unjust feat. This is simply absurd. How can this stand in America?

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[7] Opinion (Appendix B) lists 13 cases / appeals which the Opinion claims the opposing party said supports its motion. Nowhere was there any finding by the court of appeals that any of those cases in fact did support any finding Petitioner should be vexatious. Importantly, none of those cases were shown or even alleged to be frivolous.

V. Issue #4, 5 - 391 Is Unconstitutional By Imposing Its Law On Citizens of Other Jurisdictions and Punishes Citizens of Other States for Perfectly Lawful Conduct in Those Jurisdictions

The concept of a state punishing a person for acts committed outside that state was dealt with in *Robinson v. California,* 370 U.S. 660 (1962):

> We hold that a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment.

See *Robinson v. California* (1962) 370 U.S. 660, 667. [8]

This provides additional grounds for invalidating 391, at least with respect to the 1990 amendment expanding its reach beyond the jurisdiction of California state courts. 391 is

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[8] Petitioner has to admit that it was very difficult to find supporting case law which appears to be the result of no state ever attempting to impose its laws on citizens of other states and punishing them for conduct that is perfectly legal and legitimate in the other state.

punitive in nature and it punishes otherwise legal conduct committed outside the jurisdiction of the California state court system. In the present matter, Plaintiff is being punished not for any wrongful conduct in the California state courts. Plaintiff is being punished in California for his lawful and legitimate conduct in other jurisdictions.

Under *Robinson*, if a state can't punish a person for illegal acts committed in another state, 391 cannot punish a citizen for legal acts committed in another state or jurisdiction.

Losing 5 cases in another jurisdiction such as Nevada for example is not considered "vexatious". In Nevada:

> The court may find that a person is a vexatious litigant if the person files a petition, objection, motion or other pleading which is without merit or intended to harass or annoy the personal representative or a trustee. In determining whether the person is a vexatious litigant, the court may take into consideration whether the person has previously filed pleadings in a proceeding that were without merit or intended to harass or annoy a fiduciary.

See NV Rev Stat § 155.165 (2013).

In other words, California can't redefine other jurisdictions' laws and then impose its laws on those in that jurisdiction and then punish the citizen of that jurisdiction for doing what is perfectly ok in that jurisdiction.

Perhaps the better way of looking at it is federalism. We are a nation composed of 50 states. One state can't redefine what an appeal is in another jurisdiction and claim it is new litigation and then punish someone of another jurisdiction for having taken a legitimate appeal in that jurisdiction when they happen to lose that appeal.

VI. - Issue #5 - 391 Is Facially Unconstitutional On Notice Grounds

A. 391 (1990 version) Unconstitutional on Notice Grounds

Related to the 1990 amendment is a lack of notice to the potential offender of 391. Due process of law means (1) notice and (2) opportunity to be heard. "[T] he rudiments of fair play include notice, an opportunity to respond, and a hearing." *In re Marriage of*

Flaherty 31 Cal. 3d 637, 654 (1982). See also *Kolender v. Lawson*, 461 U. S. 352 (1983) (requiring reasonable notice of a statutes meaning).

The typical lack of notice challenge is based on a statute being so vague it does not give sufficient notice. The notice doctrine rests on the due process clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution.

391 takes an odd twist on this one. It fails to give notice and punishes conduct by a person in another jurisdiction or state. Moreover, it punishes that citizen for conduct that is wholly lawful in that state.

<u>There is simply no valid mechanism by which the state of California can give citizens of other states notice of its laws concerning 391 and that the citizen's wholly lawful conduct in that state shall be punished in California at some future time.</u>

<u>This appears to present a very novel issue here in America where a state imposes its legislation on another state and its citizen.</u>

B. Insufficient Notice To Out-Of-State Residents That An Appeal In Their State Is New Litigation

391 holds that an appeal is actually a new litigation. See *McColm v. Westwood Park Assn.,* 62 Cal.App.4th 1211, 1220 (1998). There is no conceivable way a rational person in say Nevada could be put on notice that their taking an appeal from a valid court case they should have won to start with is going to be a "new litigation". In support, most other jurisdictions in our nation holds that an appeal is simply another "stage" of the same court case and that on appeal the court of appeal takes "jurisdiction" over that case during the appeal.

C. Insufficient Notice To In-State Residents That An Appeal Is New Litigation

While a citizen is expected to be aware of the laws of their own states, no reasonable citizen of this state can read 391 and conclude that their filing an appeal from a perfectly valid court case can be punished if they lose.

> As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can

> understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.

See *Kolender v. Lawson*, 461 U. S. 352, 357–358.

While 391 is not penal per se, it is penal in nature and punishes / sanctions conduct.

No reasonable person can read 391 and be put on notice that an "appeal" is new litigation. CCP 391(a) simply defines litigation as "'Litigation' means any civil action or proceeding, commenced, maintained or pending in any state or federal court.".

Most people simply believe that an appeal transfers jurisdiction of an existing "civil action" to the court of appeals. The average / reasonable person is not put on notice that it is considered "new" litigation.

In order to figure out an appeal is "new" litigation one must search the case law. "Litigation" for purposes of vexatious litigant requirements encompasses civil trials and special proceedings, and also includes proceedings initiated in the Courts of Appeal by notice of appeal or by writ petitions other than habeas corpus or other criminal matters. See

McColm v. Westwood Park Assn. 62 Cal App 4th 1211 (1998, Cal App 1st Dist).

Thus, 391 is void for vagueness on notice grounds.

VII - Issue #6. A civil court case must allow an opportunity for cross examination of witnesses prior to making a determination on the factual merits of the case.

Appendix F shows the trial court order staying the proceedings under 391.6. A trial court can consider evidence presented by the parties on the merits of the case. See CCP §391.2.

However, no opportunity for discovery is permitted prior to the merits of the case being determined, and importantly, no opportunity for discovery of any expert witnesses presented by the Defendants.

Yet, due process of law requires an opportunity in civil actions to cross examine witnesses.

> All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine

> witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense.

See *ICC v. Louisville & Nashville R. Co.*, 227 U.S. 88, 93 (1913)

Because Petitioner was denied a chance to cross examine the Defendants' experts prior to a decision on the merits of the case Petitioner's due process of law rights were denied under the 14th Amendment along with his right to petition under the 1st Amendment.

IX. - Issue #7 – Court of Appeals Lacked Jurisdiction to Rule on the Merits of the Underlying Case

Petitioner was designated a "vexatious litigant" under 391 and required to furnish bond to proceed on June 4, 2015. See *Order* at Appendix D. Under California law Petitioner is permitted to take an immediate interlocutory appeal so Petitioner filed a 1st Notice of Appeal (Appendix H). The court of appeals however improperly construed the interlocutory appeal and its briefing as covering the merits of the case and the 2nd notice of appeal covering the merits of the case was never processed by the court of appeal.

A prefiling order under section 391.7 is separately appealable. CCP §904.1(a)(6), as an injunction (*Luckett v. Panos* (2008) 161 Cal.App.4th 77, 90) or the collateral order doctrine. *Lester v. Lennane* (2000) 84 Cal.App.4th 536, 561; *Marsh v. Mountain Zephyr, Inc.* (1996) 43 Cal.App.4th 289, 297-298.)

Petitioner filed the notice of appeal for that interlocutory matter on July 6, 2015. See Appendix I (limited to the Order of Petitioner being declared a vexatious litigant). After Petitioner failed to pay the bond under 391 the case was dismissed on August 18, 2015. See **Appendix C** (Order Announcing and Dismissing Case in response to Defendants' ex parte motion for dismissal). Petitioner thereafter filed a 2nd notice of appeal (Appendix H) covering all other issues – including the merits of the case. See Appendix H.

Thus, a record on appeal was prepared solely for briefing on whether Petitioner should be declared a vexatious litigant and whether 391 is constitutional for the 1st notice of appeal and related briefing. The merits of the case – which had not even been dismissed at that point – was left to the second notice of appeal which was later filed.

However, pulling the rug out from under Petitioner's appeal, the court of appeals – without any advanced notice – ruled on the merits of the underlying case also. See Opinion (Appendix B) at 2, FN 2 ("We treated this appeal as an appeal from the order, and denied as moot Raiser's subsequent 'motion to correct docket text.'") [9]

What matters here is that California Rules of Court (CRC) 8.104(d) only allows a notice of appeal to be treated prematurely filed if there was an existing announcement of dismissal or order of dismissal not yet entered in the court docket:

(d) Premature notice of appeal

(1) A notice of appeal filed after judgment is rendered but before it is entered is valid and is treated as filed immediately after entry of judgment.

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[9] The 2nd notice of appeal had become lost and a request to file new litigation (the appeal) required under 391 was mislabeled as the 2nd notice of appeal.

(2) The reviewing court may treat a notice of appeal filed after the superior court has announced its intended ruling, but before it has rendered judgment, as filed immediately after entry of judgment.

See *California Rules of Court* (CRC) 8.104(d).

CRC 8.104(b) states: "Except as provided in rule 8.66, no court may extend the time to file a notice of appeal. If a notice of appeal is filed late, the reviewing court must dismiss the appeal."

CRC 8.66 however only allows for an extension of time to file the notice of appeal in case of public emergency such as an major earthquake which might prevent people from filing documents. See CRC 8.66. No such emergency is mentioned by the court of appeal or took place.

Thus, the court of appeals had no authority to act on the merits of the case as there was NO notice of appeal at issue at briefing in the court of appeals below.

Thus, on July 6, 2015 there was no judgment announced or entered dismissing the underlying case and there was ONLY an order of Appendix

D requiring Petitioner to post bond. Dismissal of the action (the "judgment") did not take place until August 18, 2015 as evidenced by Appendix C. At any rate nowhere is there found any judgment in the underlying case until at earliest August 18, 2015 so the 1st Notice of appeal can not be treated as being premature as to the dismissal of the entire case. The 2nd notice of appeal finally arrived at the court of appeals as evidenced by the date stamp on Appendix H on February 28, 2017 which was after briefing of the 1st notice of appeal was completed, and only weeks prior to oral argument.

Because due process of law and the fundamental right to access of courts requires a court to have jurisdiction to rule on a matter, and because the court of appeal lacked jurisdiction to rule on the merits of the underlying case, reversible error was committed and taking this writ is proper to correct that error.

In the alternative, if the court of appeal had discretion to construe the 1st notice of appeal as covering the merits of the case, that discretion was abused given the 1st notice of appeal was limited to the matter of the order declaring Petitioner a vexatious litigant on its face. Further, given there was a 2nd notice of appeal filed which was to cover the merits of the case, that discretion would be abused also, especially where there was no record prepared for 2nd notice of appeal. The 1st notice of appeal and the record for that appeal did not even contain any order or judgment showing the case had ever been dismissed and the Opinion of Appendix B nowhere provides evidence that the case was ever dismissed! In California the decision of the trial court on the reasonable probability of success hearing is not appealable until dismissal of the case.

Further, given the 2nd notice of appeal was in possession of the court of appeals weeks prior to oral argument where no briefing was permitted on the issues of the 2nd notice of appeal, that would further evidence an injustice.

Also Petitioner pointed out in his opening Brief (Appendix G):

> This appeal (NOA filed 8-6-15 in this court) only deals with the CCP §391 ("391") prefiling order and related constitutional issues.
>
> The notice appeal dealing with the merits of the case and its dismissal was filed the trial court on October 15, 2015 and then was lost or destroyed. The trial court ordered that

notice of appeal to be filed dated October 15, 2015 nunc pro tunc after hearing on 06/09/2016. See Trial Court ROA #253. The document claiming to be a notice of appeal filed 10-23-15 is actually a request to appeal, or a request to file "new" litigation and is NOT a notice of appeal.

See Appellant's Opening Brief (Appendix G) at 1-3.

Thus, a clear injustice occurred and discretion – assuming the court of appeals had it – was abused in construing the 1st notice of appeal to cover the merits of the case when a 2nd notice of appeal – timely and properly filed – was supposed to cover the merits of the case.

Here the state courts added insult to injury in first declaring Petitioner a vexatious litigant on baseless grounds, then thrusting Petitioner into a highly unfair set of procedural rules causing Petitioner to lose a highly meritorious case, and then where Petitioner at least could have prevailed on appeal on the merits of the case the state court ruled on the merits of the case where it had no jurisdiction to do so.

An easy way to see how meritorious Petitioner's appeal would have been on the merits of the case can be seen from Appendix D – Order imposing bond at p. 8 ("Consequently, there is insufficient evidence showing a substantial probability Plaintiff Aaron Raiser will prevail on his claims."). However, 391 requires only a "reasonable" probability of success. See CCP §391.3:

> (a) Except as provided in subdivision (b), if, after hearing the evidence upon the motion, the court determines that the plaintiff is a vexatious litigant and that there is no reasonable probability that the plaintiff will prevail in the litigation against the moving defendant, the court shall order the plaintiff to furnish, for the benefit of the moving defendant, security in such amount and within such time as the court shall fix.

Thus, Petitioner easily could have prevailed on appeal and continued with the case.

Because due process of law under the 14th Amendment was offended and the right to petition under the 1st Amendment was also offended by the California state court ruling on the merits of the case where that was not even briefed or at issue and where there was no jurisdiction to rule on the merits of the case, this writ should be allowed.

X. CONCLUSION & RELIEF SOUGHT

Each issue raised in this Petition has merit. Taking this petition would address important constitutional issues on the fundamental right of access to the courts and ensure that due process of law is ensured to all Americans, including pro se litigants, who have happened to have had a lot in life where they need to use the court system more than others. It would help ensure liberty and justice for all.

December 4, 2017

____

Aaron Raiser