

No. 18-8105

IN THE SUPREME COURT OF THE UNITED STATES

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Alicja Herriott,  
Petitioner,  
v.  
Paul Herriott,  
Respondent

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On Petition for Writ of Certiorari To The  
California Court of Appeal, Second Appellate District

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF  
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## **CORPORATE DISCLOSURE STATEMENT**

Respondent Paul Herriott is not a corporation.

## **QUESTION PRESENTED**

1. May a State set pre-filing requirements for litigants determined to be vexatious?
2. Is California Code of Civil Procedure sections 391, et seq. a constitutional exercise of the State of California's power to control abuse of its Court system?

## **RULE 29.1(C) STATEMENT**

This Petition calls into question the constitutionality of California Code of Civil Procedure sections 391, et seq., such that 28 U.S.C. §2403(b) may apply.

## **1. INTRODUCTORY STATEMENT OF THE CASE.**

Petitioner Alicja Herriott's Petition for Writ of Certiorari is an exemplar of why vexatious litigant statutes exist. It contains a convoluted eleven page recitation of prior litigation. The proceedings relevant to the Petition for Writ of Certiorari are the following:

On May 1, 2012, in Los Angeles Superior Court Case *In Re the Marriage of Paul Herriott and Alicja Herriott*, Case No. BD 415 787, Petitioner was found to be a vexatious litigant as defined in California Code of Civil Procedure section 391(b) (hereinafter, the "Vexatious Litigant Statute).<sup>1</sup> The order made specific findings regarding Petitioner's litigious conduct which gave rise to her being determined to be a vexatious litigant. The order required Petitioner to obtain Court permission before filing any new litigation. That order is final and not the subject of the instant petition.

On October 11, 2017, Petitioner filed a complaint without obtaining Court permission.<sup>2</sup> At that time, she was on the vexatious litigant list maintained by the Administrative Office of the Courts.<sup>3</sup>

On February 23, 2018, Respondent filed a motion to strike the complaint for failure to comply with the Vexatious Litigant Statute, to be heard April 19, 2018.<sup>4</sup>

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<sup>1</sup> Respondent's Appendix, p. 1, Exhibit 1.

<sup>2</sup> Respondent's Appendix, p. 6, Exhibit 2.

<sup>3</sup> Respondent's Appendix, p. 35, Exhibit 3.

<sup>4</sup> Respondent's Appendix, p. 38, Exhibit 4.

Petitioner filed no opposition to the motion.<sup>5</sup>

At the hearing on April 19, 2018, the Court ordered that the case would be dismissed if Petitioner did not obtain “an order from the Presiding Judge of this Court permitting the filing of the litigation within ten (10) days of the filing of this notice.”<sup>6</sup>

On April 19, 2018, Respondent served Petitioner with notice of ruling.<sup>7</sup>

Petitioner failed to seek an order from the Court allowing filing of the litigation within the ten day period, so the case was dismissed.<sup>8</sup> Even though Petitioner failed to seek permission to file her complaint in the trial court, and even though Petitioner already was found to be a vexatious litigant five years before, Petitioner seeks from this Court an order finding that the Vexatious Litigant Statute is unconstitutionally vague, overbroad, and violative of due process and equal protection under the law. In so arguing, Petitioner ignores the Federal case directly on point, in which these same constitutional issues were decided contrary to her arguments, the case of *Wolfe v. George*, 486 F.3d 1120 (9<sup>th</sup> Cir. 2006). As such, Petitioner misstates the law applicable to this writ petition.

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<sup>5</sup> Respondent’s Appendix, p. 38, Exhibit 4.

<sup>6</sup> Respondent’s Appendix, p. 61, Exhibit 5, at 6:12-18.

<sup>7</sup> Respondent’s Appendix, p. 64, Exhibit 6.

<sup>8</sup> Respondent’s Appendix, p. 68, Exhibit 7.

**2. SUMMARY OF ARGUMENT.**

The State of California enacted California Code of Civil Procedure sections 390, et seq. to curb problems created by vexatious, pro se litigants, who were inundating the Court system with frivolous litigation which was bogging down the Court system. Both California and federal decisions that have considered the question have found the statute to be constitutional.

(*Wolfgram v. Wells Fargo Bank*, 53 Cal.App.4th 43 (1997); *Wolfe v. George*, 486 F.3d 1120 (9<sup>th</sup> Cir. 2006).) Petitioner's petition for writ of certiorari is merely her latest abuse of the judicial system, as she never sought relief from the state court to file her complaint, either before filing it, or after hearing. As such, her petition should be denied.

**3. PETITIONER FAILED TO SEEK RELIEF IN THE STATE COURT.**

As noted above, Petitioner never sought leave of trial court to allow her to file her complaint under the Vexatious Litigant Statute. The Vexatious Litigant Statute specifically provides that where, as here, the Court has found a plaintiff to be a vexatious litigant, and required the plaintiff to seek a pre-filing order, "the litigation shall be automatically dismissed unless the plaintiff within ten days of the filing of that notice obtains an order from the presiding justice or presiding judge permitting the filing of the litigation."

(Cal. Code Civ. Proc. §391.7(c).) The Court "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.” (California Code of Civil Procedure section 391.7(b).)

In the present case, Petitioner never sought an order from the California Superior Court allowing her to file the Complaint under the Vexatious Litigant Statute, either before filing the Complaint, or after the April 19, 2018 hearing. Therefore, she has no basis for a meritorious appeal. Petitioner’s entire writ petition is premised on her argument that she was denied her day in Court; however, she never sought her day in Court by showing that her complaint had merit and was not filed for purposes of harassment or delay. Petitioner lacks any injury not caused by her own conduct. Her petition is completely hypothetical. As such, this Court should deny her petition.

#### **4. STANDARD FOR REVIEW**

The standard for review regarding the constitutionality of the Vexatious Litigant Statute is whether the statute bears a rational relationship to a valid state interest. (*Wolfe v. George, supra*, 486 F.3d at 1125; *Rodriguez v. Cook*, 169 F.3d 1176, 1180 (9<sup>th</sup> Cir. 1999.)

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## **5. THE VEXATIOUS LITIGANT STATUTE IS CONSTITUTIONAL**

### **a. THE VEXATIOUS LITIGANT STATUTE SERVES A VALID STATE PURPOSE.**

As explained by the California Court of Appeal in *Wolfgram v. Wells Fargo Bank*, 53 Cal.App.4<sup>th</sup> 43, 48 (1997), the Vexatious Litigant Statute was enacted because of the problems caused by “persistent and obsessive” pro per litigants, with constantly pending groundless actions placing an unreasonable burden on the Courts. This, in turn, “prevents the speedy consideration of deserving and proper litigation.” (*Id.* at 48.) As noted in the case of *Wolfe v. George, supra*, 486 F.3d at 1125, fn 12: “We recognize that ‘there is strong precedent establishing the inherent power of federal courts to regulate the activities of abusive litigants by imposing carefully tailored restrictions under the appropriate circumstances.’ ” [Citations omitted.]

Similarly,

California's vexatious litigation statute is  
“rationally related to a legitimate state purpose.”

First, vexatious litigants tie up a great deal of a court's time, denying that time to litigants with substantial cases. Second, the state has an interest in protecting defendants from harassment by

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frivolous litigation, just as it has an interest in protecting people from stalking.

(*Wolfe v. George, supra* at 1126.)

**b. THE VEXATIOUS LITIGANT STATUTE IS NOT VAGUE REGARDING TO WHOM IT APPLIES**

California Code of Civil Procedure section 391(b) defines a vexatious litigant as 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.

The statute gives “fair notice to those who might violate the statute.”

(*Wolfe v. George, supra*, 486 F.3d at 1125.) As explained by the *Wolfe v. George* Court:

Like California, we impose prefiling requirements on vexatious appellate litigants in light of decisions upholding their legitimacy. Congress has also imposed somewhat similar procedures on prisoners who file in forma pauperis appeals, civil actions, and second or successive petitions for writs of habeas corpus. In *Rodriguez v. Cook* we held that 28 U.S.C. § 1915(g), the analogous federal statute for vexatious prisoner litigants, was subject only to rational basis review, not strict scrutiny, and rejected constitutional challenges similar to Wolfe's.

(*Wolfe v. George, supra*, 486 F.3d at 1125 (internal footnotes omitted).)

**c. THE VEXATIOUS LITIGANT STATUTE IS NOT OVERLY BROAD.**

The Vexatious Litigant Statute is not overly broad. There is no constitutional right to file frivolous litigation. (*Wolfe v. George, supra* at 1125.) Contrary to Petitioner's argument, the statute does not prevent her, or other litigants found to be vexatious, from filing lawsuits, it merely requires them to show that the claims are potentially meritorious. (Cal. Code Civ. Proc. §391.7(b).) It does not apply to defendants who have been previously determined to be vexatious from appealing adverse decisions.

(*John v. Superior Court*, 63 Cal. 4<sup>th</sup> 91 (2016).) As such, it is tailored to deal with the state's concern.

**d. THE VEXATIOUS LITIGANT STATUTE DOES NOT VIOLATE THE RIGHT TO PETITION.**

“Just as false statements are not immunized by the First Amendment right to freedom of speech, see *Herbert v. Lando*, 441 U. S. 153, 171 (1979); *Gertz v. Robert Welch, Inc.*, 418 U. S. 323, 340 (1974), baseless litigation is not immunized by the First Amendment right to petition.” (*Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743 (1983).) As noted above, the Vexatious Litigant Statute does not prevent vexatious litigants from petitioning the government, it only requires them to show that they have a potentially meritorious claim. (Cal. Code Civ. Proc. §391.7(b); *Wolfe v. George, supra* at 1125.)

**e. THE VEXATIOUS LITIGANT STATUTE DOES NOT VIOLATE DUE PROCESS.**

Petitioner argues that her due process rights are violated because she is required to furnish security, creating a financial barrier to access to the Courts. However, the Vexatious Litigant Statute requires a finding by the Court “that the plaintiff is a vexatious litigant and there is no reasonable probability that the plaintiff will prevail in the litigation against the moving defendant” before requiring that the plaintiff furnish security. (Cal. Code Civ. Proc. §391.3(a).) The fact that there is a financial barrier to frivolous or

vexatious litigation does not deprive the litigant of due process. (*Wolfe v. George, supra* at 1125-1126.)

**f. THE VEXATIOUS LITIGANT STATUTE DOES NOT VIOLATE EQUAL PROTECTION.**

As explained by the Court in *Wolfe v. George, supra* at 1126: “A state can rationally distinguish litigants who sue and lose often, sue the same people for the same thing after they have lost, and so on, from other litigants.” The Court pointed out that the pre-filing order does little more than require a determination of whether the complaint states a claim before imposing the burdens of litigation on a defendant, and that a defendant could move to dismiss on this basis anyway. (*Id.* at 1126-1127.) Therefore, the Court found that the Vexatious Litigant Statute was not a substantial or irrational bar to access. (*Id.*)

**g. THE VEXATIOUS LITIGANT STATUTE DOES NOT VIOLATE THE EIGHTH AMENDMENT.**

Petitioner also claims that the Vexatious Litigant Statute violates the Eighth Amendment to the Constitution. The Eighth Amendment provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” The provision does not apply to the Vexatious Litigant Statute because, even when it does impose the need to furnish security, security is not a fine or punishment. (*Wolfe v. George, supra* at 1127, citing *Browning-Ferris Indus. of Vermont v. Kelco Disposal, Inc.*, 492

U.S. 257, 265, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989).) As such, it does not violate the Eighth Amendment.

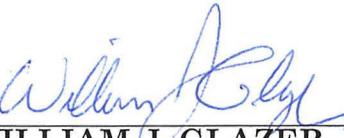
**6. CONCLUSION.**

For all of the above stated reasons, the Court should deny the petition for writ of certiorari. Petitioner failed to comply with the Vexatious Litigant Statute, causing dismissal of her complaint. The statute is constitutional. As such, there was no basis for a meritorious appeal and no basis for this petition for writ of certiorari.

Dated: March 25, 2019

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