HSU v. CALIFORNIA DEP'T OF TOXIC SUBSTANCES CONTROL

S226143

Supreme Court of California

April 30, 2015

Reporter
2015 CA S. Ct. Briefs LEXIS 975

JOHN HSU, Plaintiff and Respondents, v. CALIFORNIA DEPARTMENT OF TOXIC SUBSTANCES CONTROL, et al., Defendants and Respondents.

Type: Petition for Appeal

Prior History: After a Decision By the Court of Appeal, Fourth Appellate District, Division One, Case No. D067632. Following Appeal from Order and Judgment of San Diego Superior Court Case No. 37-2011-00099531-CU-WM-CTL. Hon. David J. Danielsen, Presiding Judge; Hon. Timothy B. Taylor, Judge.

Counsel

[*1] JOHN HSU, Petitioner in Pro per, Berkeley, CA.

Title

Petition for Review

Text

ISSUES PRESENTED

1. Whether taking a lack of success as a measure [1] of ″vexatiousness,″ without considering whether the litigation is reasonably based, to restrict a litigant's right of access to the courts, serves a legitimate, rational, or compelling governmental interest.
[*2]

2. California Constitution, article III, section 1, provides that: ″The State of California is an inseparable part of the United States of America, and the United States Constitution is the supreme law of the land.″ Under the United States Constitution, the First Amendment provides for ″freedom of speech, or of the press; or the right of the people peacefully to assemble, and to petition the government for a redress of grievances.″ Out of regard for the constitutional underpinnings of the right to court access, federal courts have concluded that pre-filing orders restricting access to the court must be narrowly tailored to closely fit the specific vice encountered. The question is: Under the same constitutional umbrella, whether California's

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[1] E.g., as measured by the five-adverse-final-determinations-in-seven-years *quota* under the Code of Civil Procedure section 391, subdivision (b)(1)(i): ″Vexatious litigant″ means a person who 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 finally determined adversely to the person.

The statute makes no distinction as to: whether the litigation is reasonably based; whether the final determination is a determination on the merits; whether amendment of the pleadings should have been permitted; or whether the final determination is the result of the hearing officer's failure to conduct a fair hearing.

vexatious litigant statute, allowing [2] for regular issuance of pre-filings orders restricting the filing of *any* future litigations, is over broad, and is in violation of the Equal Protection Clause under the Fourteenth Amendment of the United States Constitution.

[*3]

3. California' vexatious litigant statute, relying on the uncertain ″it appears″ criterion (Code Civ. Proc., § 391.7, subd. (b) [3]) to limit the litigant's constitutional right to petition, has led to widespread [4] dismissal of meritorious claims. The question is: So as to allow for the detection of arbitrary rule, and to enable an adequate appellate review, when a court denies a litigant's right to petition under California's vexatious litigant statute, whether the court should be required to state, in writing, the court's legal basis and reasoning, establishing a rational nexus between the evidence relied upon and the court's conclusion.

[*4]

4. In light of the above, whether California's vexatious litigant statute is unconstitutional vague or over broad on its face, and unduly oppressive and unconstitutional as applied.

LEGAL PRINCIPLES

> Correct reading of a statute demands awareness of the underlying presuppositions. In construing the Federal Constitution, the Judicial Department of the National Government has the final say. Because equal protection pledges the protection of equal laws, the punishment must fit the crime.

I.

THE GENUINENESS OF A GRIEVANCE DOES NOT TURN ON WHETHER IT SUCCEEDS.

As the United States Supreme Court has noted in *BE & K Const. Co. v. NLRB (2002) 536 U.S. 516, 532-533,* ″the genuineness of a grievance does not turn on whether it succeeds. Indeed, this is reflected by our prior cases which have protected petitioning whenever it is genuine, not simply when it triumphs. Nor does the text of the First Amendment speak in terms of successful petitioning-it speaks simply of the right of the people to petition the Government for a redress of grievances.

″Second, even unsuccessful but reasonably based suits advance some First Amendment interests. Like **[*5]** successful suits, unsuccessful suits allow the public airing of disputed facts, and raise matters of public concern. They also promote the evolution of the law by supporting the development of legal theories that may not gain acceptance the first time around. Moreover, the ability to lawfully prosecute even unsuccessful suits adds legitimacy to the court system as a designated alternative to force.

″Finally, while baseless suits can be seen as analogous to false statements, that analogy does not directly extend to suits that are unsuccessful but reasonably based. For even if a suit could be seen as a kind of provocative statement, the fact that

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[2] Code of Civil Procedure section 391.7, subdivision (a), provides that a court may enter a prefiling order prohibiting 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.

[3] ″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 purpose of harassment or delay. ...″ (Code Civ. Proc., § 391.7, subd. (b).)

[4] See, for example, Court of Appeal, Case No. D067187, March 5, 2015 Appellant's Appendix (″AA″), vol. 1, pp. 123-136, or this Court, Case No. S217129, April 25, 2014 Reply to SPB's Answer to Petition for Review *[seven out of eight* superior court presiding judges did not allow a meritorious petition to proceed]; and vol. 2, pp. 361-374, October 18, 2014 Petition for Writ of Certiorari, No. 14-464, 2014 U.S. S. Ct. Briefs LEXIS 3706 [superior court and court of appeal abandoned the traditional *standards of review]*. See also Court of Appeal, Case No. D067187, March 5, 2015 Appellant's Opening Brief, D067187_AOB_Hsu, at pages 2-3 & 22-24, or August 1, 2014 Petition for Writ of Certiorari, No. 14-140, 2014 U.S. S. Ct. Briefs LEXIS 2797 [court of appeal dismissed the appeal by: (1) creating numerous exceptions to the statutes and regulation; (2) attributing respondents' misstated facts to petitioner; and (3) claiming collateral estoppel bar where the criteria for applying the doctrine had *not* been met].

it loses does not mean it is false. At most it means the plaintiff did not meet its burden of proving its truth. That does not mean the defendant has proved-or could prove-the contrary." *(Ibid.*, internal citations and quotation marks omitted.)

II.

THE FIRST AMENDMENT RIGHT TO PETITION IS ONE OF THE MOST PRECIOUS OF THE LIBERTIES SAFEGUARDED BY THE BILL OF RIGHTS. OUT OF REGARD FOR THE CONSTITUTIONAL UNDERPINNINGS OF THE RIGHT TO PETITION, PRE-FILING ORDERS MUST BE NARROWLY TAILORED TO CLOSELY FIT THE SPECIFIC VICE ENCOUNTERED, AND SHOULD RARELY BE FILED.

As also explained by the United States Supreme Court in *BE & K Const. Co. v. NLRB (2002) 536 U.S. 516, 524-525:* "The First Amendment provides, in relevant part, that 'Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.' We have recognized this right to petition as one of 'the most precious of the liberties safeguarded by the Bill of Rights,' *United Mine Workers v. Illinois Bar Ass'n, 389 U.S. 217, 222 (1967),* and have explained that the right is implied by 'the very idea of a government, republican in form,' *United States v. Cruikshank, 92 U.S. 542, 552* . . . (1876)."

"Out of regard for the constitutional underpinnings of the right to court access, pre-filing orders should rarely be filed . . . . When district courts seek to impose pre-filing restrictions, they must: . . . (3) make substantive findings of frivolousness or harassment; and (4) tailor the order narrowly so as to closely fit the specific vice encountered." (*Ringgold-Lockhart v. County of Los Angeles v. County of Los Angeles (9th Cir. 2014) 761 F.3d 1057, 1062* **[*7]** (internal citations and quotation marks omitted).)

Similarly, California Supreme Court has concluded that: "any definition [for "frivolousness"] must be read so as to avoid a serious chilling effect on the assertion of litigants' rights on appeal. Counsel and their clients have a right to present issues that are arguably correct, even though it is extremely unlikely that they will win on appeal." (*In re Marriage of Flaherty (1982) 31 Cal.3d 637, 650.)*

A. Courts Should Consider Whether Other, Less Restrictive Options, Are Adequate to Protect the Court and Parties. A Pre-filing Order Restricting the Filing of *All* Future Litigations Is Over-broad.

Before issuing a pre-filing order, "courts should consider whether other, less restrictive options, are adequate to protect the court and the parties. (*Molski v. Evergreen Dynasty Corp. (9th Cir. 2007) 500 F.3d 1047, 1061.)* The Code of Civil Procedure section 128.7, subdivision (d), as well as the similarly worded Federal Rules of Civil Procedure, rule 11(c)(4) (discussed in *Ringgold-Lockhart v. County of Los Angeles (9th Cir. 2014) 761 F.3d 1057, 1065),* has provided the courts **[*8]** with a means to address frivolous or abusive filings.

Code of Civil Procedure section 128.7, subdivision (b), provides that when presenting papers to the court, the party are certifying that, to the best of the attorney or unrepresented party's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, the papers are "not being presented primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation" (subd. (b)(1)), and "[t]he claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law" (subd. (b)(2)). Subdivision (d), requires that: "[a] sanction imposed for violation of subdivision (b) shall be limited to what is sufficient to deter repetition of this conduct or comparable conduct by others similarly situated." Subdivision (d) then provides a list of sanctions of varying severity that courts may, in their discretion, impose: "directives of a nonmonetary nature, an order to pay a penalty into court, or if imposed on motion and warranted **[*9]** for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney's fees and other expenses incurred as a direct result of the violation."

Before entering a broad, all-inclusive pre-filing order applicable to the filing of *all* new litigations, the court "assuredly should have considered" whether imposing lesser sanctions would be an adequate deterrent. (*Ringgold-Lockhart v. County of Los Angeles (9th Cir. 2014) 761 F.3d 1057, 1065;Cromer v. Kraft Foods North America, Incorp. (4th Cir. 2004) 390 F.3d*

812, 818-819 [″The prefiling injunction . . . enjoins Cromer from making *'any and all* filings' . . . without first obtaining permission form the magistrate judge who issued the injunction. This injunction is not 'narrowly tailored to fit the particular circumstances of the case.' ″]) Where the pre-filing restriction extends to ″any action,″ the pre-filing order is ″expansive″ and ″over broad,″ and its breadth, not justified. *(Ringgold-Lockhart v. County of Los Angeles (9th Cir. 2014) 761 F.3d 1057, 1066.)*

B. To Make a Finding of ″Frivolousness,″ the Number of Complaints Filed must [*10] Be Inordinate, and the Claims must Be Patently Without Merit.

″To determine whether the litigation is frivolous, district courts must look at both the number and content of the filings as indicia of the frivolousness of the litigant's claims. While we have not established a numerical definition for frivolousness, we have said that even if a litigant's petition is frivolous, the court must make a finding that the number of complaints were inordinate. Litigiousness alone is not enough, either: The plaintiff's claims must not only be numerous, but also be patently without merit.

″As an alternative to frivolousness, the district court may make an alternative finding that the litigant's filings show a pattern of harassment. However, courts must be careful not to conclude that particular types of actions filed repetitiously are harassing, and must instead discern whether the filing of several similar types of actions constitutes an intent to harass the defendant or the court.″ (*Ringgold-Lockhart (9th Cir. 2014) 761 F.3d 1057, 1064* (internal citations and quotation marks omitted).)

C. Courts Cannot Properly Say Whether a Suit Is ″Meritorious″ from the Pleadings Alone [*11] .

″[C]ourts cannot properly say whether a suit is 'meritorious' from the pleadings alone. A lawsuit need not be meritorious to proceed past the motion-to-dismiss stage; to the contrary, 'a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those [ultimate] facts is improbable, and that recovery is very remote and unlikely.' *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007)* (internal quotation marks omitted). And even as to the propriety of a [Federal Rules of Civil Procedure] Rule 12(b)(6) dismissal, whether a case merits dismissal for failure to state a claim is often determinable only after briefing and argument; it is often not a decision accurately to be made at a pre-filing stage.″ (*Ringgold-Lockhart v. County of Los Angeles (9th Cir. 2014) 761 F.3d 1057, 1066.)*

D. At the *Pleading* Stage, Leave to Amend Should Be Permitted Where Amendment of the Pleadings Could Cure the Perceived Defects.

″To determine whether the trial court properly decided that there was no arguable basis in law [for the litigation to proceed], the court of appeals must examine the types of relief and causes of action **[*12]** the [litigant] pleaded in his petition to determine whether, as a matter of law, the petition stated a cause of action that would authorize relief. [Citations.] In reviewing a dismissal of a suit filed by [the litigant], the appellate court is bound to take as true the allegations in the [litigant's] original petition. [Citations.] The court should consider whether the suit was dismissed with prejudice, and, if it was, it should determine whether the [litigant]'s error could be remedied through more specific pleading; if it could, dismissal with prejudice was improper. [Citation.]″ (*In re Douglas (2010) 333 S.W.3d 273, 293-294;* similarly, *Schifando v. City of Los Angeles (2003) 31 Cal.4th 1074, 1081* [demurrer]; *Fire Ins. Exch. v. Superior Court (Altman) (2004) 116 Cal.App.4th 446, 452* [judgment on the pleadings].)

When the court is concerned about a party's possible mental state of scienter, or the mental state to deceive, manipulate, or defraud *(Reese v. Malone (9th Cir. 2014) 747 F.3d 557, 568),* the United States Supreme Court has held that a court must also consider plausible opposing inferences **[*13]** before dismissing the case. *(Tellabs, Inc. v. Makor Issues & Rights, Ltc. (2007) 551 U.S. 308, 322-324.)* For this purpose, the Court prescribed a ″workable construction″ geared to the governing statute's *twin* goals: to *curb* frivolous litigation, while *preserving* the plaintiffs ability to recover on meritorious claims.

The Court's prescription reads in part as follows:

First, courts must, as with any motion to dismiss for failure to plead a claim on which relief can be granted, accept all factual allegations in the complaint as true.

Second, courts must consider the complaint in its entirety.

Third, in determining whether the pleaded facts give rise to a ″strong″ inference of scienter, the court must take into account plausible opposing inferences. The strength of an inference cannot be decided in a vacuum. The inquiry is inherently *comparative*. To determine whether the plaintiff has alleged facts that give rise to the requisite ″strong inference″ of scienter, a court must consider plausible, nonculpable explanations for the defendant's conduct, as well as inferences favoring the plaintiff.

E. For *Screening* of an Appeal at the [*14] Pre-filing Stage, Preparation of the Appellate Record must Be Allowed. A Summary Denial of the Application Is Error If the Application Is Not So Patently Frivolous as to Require Dismissal Without Full Briefing on the Merits or Oral Argument.

In *Coppedge v. United States (1962) 369 U.S. 438 (1962)* (″*Coppedge*″), the United States Supreme Court has decided what *showing* is required, and what *documents* should be allowed to be presented, in a prisoner's application for leave to appeal in forma pauperis under *28 U.S.C. § 1915.* Because what is considered was procedural *due process*, the same reasoning should apply here:

The *showing* required is that the petitioner has proceeded in good faith. *(Coppedge* at p. 444.) ″Good faith″ is demonstrated when the petitioner seeks appellate review of an issue that is not frivolous. (*Id., at 445.)*

In addition, the petitioner is entitled to receive, or present, a *record* of sufficient completeness to enable him to attempt to make a showing that he was acting in good faith. If, with such aid, the appellant then presents *any* issue that is *not clearly frivolous* **[*15]** , leave to proceed must be allowed. (*Id., at 446.)*

If from the *face* of the papers filed, it appears that the applicant will present issues for review that are not clearly frivolous, the court should *grant* leave to appeal, and proceed to consider the appeal on the merits in the *same* manner that it considers appeals filed by non-indigent petitioners who are able to pay for the court fees and costs. (*Ibid*.)

A court's summary denial of the application is error if the application is not so patently frivolous as to require dismissal without *full briefing* on the merits or *oral argument*. (*Id., at 447-448, 452-453.)*

F. Judicial Review must Be Sufficiently Robust to Reveal and Remedy Any Evident Deprivation of Constitutional Rights.

In *In re Lawrence (2008) 44 Cal.4th 1181, 1211,* California Supreme Court has held that: ″judicial review must be sufficiently robust to reveal and remedy any evident deprivation of constitutional rights.″ Because due process interest mandates a meaningful review, it is important that both the evidence relied upon, and the ″reasoning establishing a rational nexus″ to the decision, **[*16]** be stated. (*In re Shaputis (2011) 53 Cal.4th 192, 209-210* (maj. opn.), 223 (conc. opn. of Liu, J.)

III.

STATUTORY CONSTRUCTION REQUIRES AWARENESS OF THE UNDERLYING PRESUMPTIONS.

In general, ″[w]hen we interpret a statute, '[o]ur fundamental task . . . is to determine the Legislature's intent so as to effectuate the law's purpose. We first examine the statutory language, giving it a plain and commonsense meaning. We do not examine that language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment. If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences that the Legislature did not intend. If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy.' ″ (*Sierra Club v. Superior Court (2013) 57 Cal.4th 157, 165-166.)*

In addition, correctly reading a statute requires awareness of the underlying presumptions.

A. Correctly [*17] Reading a Statute Demands Awareness of Certain Presuppositions.

At the United States Supreme Court recently cautioned in *Bond v. United States (2014) 134 S.Ct. 2077, 2088;189 L.Ed.2d 1, 12:* ″Part of a fair reading of statutory text is recognizing that 'Congress legislates against the backdrop' of certain unexpressed presumptions. *EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991).* As Justice Frankfurter put it in his famous essay on statutory interpretation, correctly reading a statute 'demands awareness of certain presuppositions.' Some Reflections on the Reading of Statutes, 47 Colum.L.Rev. 527, 537 (1947). . . . The notion that some things 'go without saying' applies to legislation just as it does to everyday life.″

A general presupposition is that all judges follow the statutes and constitutions. The question is then: what if any of the presuppositions turns out to be not true?

B. Rules of Statutory Constructions Are Not Rules of Law but Merely Axioms of Experience. They Do Not Solve the Special Difficulties in Construing a Particular Statute.

As Justice Frankfurter further explained in *United States v. Universal C. I. T. Credit Corp. (1952) 344 U.S. 218, 221-222:* **[*18]** ″Generalities about statutory construction help us little. They are not rules of law but merely axioms of experience. *Boston Sand Co. v. United States, 278 U.S. 41, 48.* They do not solve the special difficulties in construing a particular statute. The variables render every problem of statutory construction unique. See *United States v. Jin Fuey Moy, 241 U.S. 394, 402.* For that reason we may utilize, in construing a statute not unambiguous, all the light relevantly shed upon the words and the clause and the statute that express the purpose of Congress.″

C. So That the Code of Civil Procedure Section 391.7 may Pass Constitutional Muster, the Fifth Appellate Court Had to Conclude That ″The Simple Showing of an Arguable Issue Will Suffice for Permission to File.″

California Constitution provides that a court of appeal shall conduct itself as a three-judge court, and decisions of the courts of appeal ″that determine causes shall be in writing with reasons stated.″ (Cal. Const., art. VI, §§ 3 & 14.) When the prefiling order provision (Code Civ. Proc., § 391.7) of the vexatious litigant statutes was challenged for being in violation of the California **[*19]** Constitution, article VI, sections 3 and 14, the court of appeal in *In re R.H. (2009) 170 Cal.App.4th 678* thus had to conclude as follows:

> ″Section 391.7, subdivision (b) provides in part '[t]he presiding judge shall permit the filing of [new litigation in the courts of this state by a vexatious litigant in propria persona] only if it appears that the litigation has merit and has not been filed for the purposes of harassment or delay.' Thus, by section 391.7's own terms, the presiding justice in determining whether to permit the appeal to proceed does not pass on its merits. The presiding justice merely determines if there is an issue to review on appeal.″ (*In re R.H.* at p. 701.)
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> ″No doubt, any impairment of the right to petition must be narrowly drawn. *(Wolfgram [v. Wells Fargo Bank* (1997)] *53 Cal.App.4th [43,] 55-57.)*″ (*In re R.H.* at p. 702.)
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> ″[T]he simple showing of an arguable issue will suffice for permission to file.″ (*Id.* at p. 705.)

D. *McColm*'s Broadened Definition for ″Litigation,″ Treating Each Appeal or Writ Petition as a New Litigation Within the Meaning of the Vexatious Litigant Statute, Is Inconsistent [*20] with Both the Code of Civil Procedure Section 1049 and the Vexatious Litigant Statute Considered as a Whole.

This issue has been discussed in the related [5] Petition for Review, Case No. S225332, *Hsu v. California Department of Toxic Substances Control*. The sub-topics, slightly revised, are the following:

1. California has only two classes of judicial remedies:

″actions,″ and ″special proceedings.″

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[5] In the other related Petition, Case No. S222726, *John v. Superior Court* (reviewed granted February 11, 2015), the respondent appears to have made a similar argument.

2. ″An action is deemed to be pending from the time of its commencement until its final determination upon appeal.″ (Code Civ. Proc., § 1049.)

3. The California finality rule: What constitutes ″finally determined″ within the meaning of the vexatious litigant statute?

4. The legislative history in 1990 does not show that the Legislature has intended to treat an ″appeal″ as a new ″litigation.″

5. The California Supreme Court also does not consider a petition for review as a ″new litigation″ within the meaning of the vexatious litigant statute.

6. *McColm's* broadened definition for ″litigation″ has further led to absurd results.

7. Because an ″appeal″ does not commence a new ″action″ or ″litigation,″ leave of court is *not* required to **[*21]** appeal.

E. Legislative Silence, by Itself, Cannot Elevate That Silence to Implied Legislation.

″Legislative silence after a court has construed a statute gives rise at most to an arguable inference of acquiescence or passive approval, the weakness of which have been exposed elsewhere. But something more than mere silence should be required before that acquiescence is elevated into a species of implied legislation. . . .″ *(Cianci v. Superior Court (1985) 40 Cal.3d 903, 923.)*

IV.

NEITHER THE DOCTRINE OF STARE DECISIS NOR THE DOCTRINE OF THE LAW OF THE CASE PRECLUDES RECONSIDERATION OF A POORLY REASONED OPINION OR AN UNJUST DECISION.

″We respect the principle of stare decisis, but reconsideration of a poorly reasoned opinion is nevertheless appropriate.″ *(Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn. (2013) 55 Cal.4th 1168, 1180.)* **[*22]** ″[A]s Mr. Justice Frankfurter wrote for the Court, '[Stare] *decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.' [Citations.] . . . Although the doctrine does indeed serve important values, it nevertheless should not shield court-created error from correction.″ (*Cianci v. Superior Court (1985) 40 Cal.3d 903, 923-924.)*

″[T]he doctrine of the law of the case . . . is merely a rule of procedure and does not go to the power of the Court. It will not be adhered to where its application will result in an unjust decision.″ *(Clemente v. State of California (1985) 40 Cal.3d 202, 211;* accord, *Morohoshi v. Pacific Home (2004) 34 Cal.4th 482, 491-492* [″e.g., where there has been a manifest misapplication of existing principles resulting in substantial injustice.″])

V.

THE PUNISHMENT MUST FIT THE CRIME.

Under the Fourteenth Amendment of the United States Constitution, ″equal protection is a pledge **[*23]** of the protection of equal laws.″ *Yick Wo v. Hopkins (1886) 118 U.S. 356, 369.* Accordingly,

> ″[A]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory . . . to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceeding . . . and shall be subject to like punishment, pains, penalties . . . and exactions of every kind, and to nor other.″ (*Ibid.*)
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> ″When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. . . . And the law is the definition and limitation of power. . . . [T]he government . . . 'may be a government of laws and not of man.' For the idea that one

> man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails . . .." (*Id., 369-370.)*

In **[*24]** *TransAmerican Natural Gas Corp. v. Powell (1991) 811 S.W.2d 913,* the Supreme Court of Texas ruled as follows: "just sanctions must not be excessive. The punishment should fit the crime. A sanction imposed . . . should be no more severe than necessary to satisfy its legitimate purposes. It follows that the court must consider the availability of less stringent sanctions and whether such lesser sanctions would fully promote compliance." (*Id., at 917.)* "In all but the most egregious circumstances, other lesser sanctions should be tried first before imposing the ultimate sanction of the 'death penalty' (dismissal of pleadings). Cases should be won or lost on their merits . . .." (*Id., at 920;* conc. opn. of J. Gonzalez.)

In *Yates v. United States (2015) 135 S.Ct. 1074, 1088;191 L.Ed.2d 64, 82-83,* the United States Supreme Court has also ruled that: " 'it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.' "

PROCEDURAL HISTORY

> At the court of appeal below, Petitioner/Appellant John Hsu made one preliminary, **[*25]** and four supplemental, showings of why the appeal has merit. To the requests for permission to appeal in support of a *single* appeal, the court of appeal assigned three case numbers (D066899, D067187, D067632), resulting in the filing of two petitions for review (S225332 and the instant petition) from the *same* appeal.

To request permission to appeal, both the superior court and court of appeal below informed Hsu in 2012 that the authority followed was *In re R.H. (2009) 170 Cal.App.4th 678* ["the simple showing of an arguable issue will suffice for permission to file"]. Pursuant to this standard, the court of appeal granted permission for Hsu's first appeal (Case No. D061979) to proceed, but on May 27, 2014, issued its remittitur against Hsu.

On June 13, 2014 to the superior court, Hsu submitted his post-remittitur motion to strike or tax costs. On September 12, 2014, the superior court ruled against Hsu.

On October 26, 2014, pursuant to *In re R.H. (2009) 170 Cal.App.4th 678, 701, 702 and 705,* Hsu requested permission to appeal, stating his "arguable issues": (1) the prior "vexatious litigant" designation was error, and why; (2) the presiding **[*26]** department and department 72 of the superior court were in disagreement as to whether filing of a motion to strike or tax cost requires leave of court; (3) department 72 had failed to consider *statutory exceptions* to Respondent California Department of Toxic Substances Control's right to recover cost; and (4) the court of appeal's opinion from the prior appeal (Case No. D061979) was inconsistent with itself. At the same time, Hsu also requested permission to file appellant's opening brief and appellant's appendix, but noted that he did not yet have enough time to prepare the opening brief and the appendix.

To Hsu's surprise, on November 14, 2014, the court of appeal denied Hsu's request "as he has not shown that his appeal has merit and is not being pursued for purposes of harassment or delay. (See Code Civ. Proc., § 391.7, subd. (b).)" (Case No. D066899.)

Sensing that the court of appeal needed more information, Hsu then made a more extensive showing on December 17, 2014, attaching more supporting documents, and explaining in greater detail "[w]hy the appeal has merit," and also why the court's opinion from the prior appeal (Case No. D0671979) was error as a matter of law. **[*27]** Referencing *Coppedge v. United States* (1962) 369 439, 444-448, Hsu again requested permission to file appellant's opening brief and appellant's appendix.

On January 16, 2015, the court of appeal asked for more information. (Case No. D067187.) Meanwhile, Hsu's preparation of the appellant's opening brief and appellant's appendix continued. On February 2, 2015 and February 18, 2015, Hsu made his further showings. The February 18, 2015 submission included the just-completed appellant's opening brief and appellant's appendix. The opening brief also explained why leave of court was actually *not* required to appeal. The February 18, 2015 mailing was delivered to the court of appeal on February 20, 2015 at 8:13 a.m.

On the same day, the court of appeal issued its order in Case No. D067187: ″Plaintiff and appellant John Hsu's request to file new litigation by vexatious litigant is denied. The appeal is therefore dismissed″-even though the notice of appeal had not yet been filed. At the same time, the court also calendared April 21, 2015 as the date to issue its remittitur. The court of appeal then *returned*, to Hsu, Hsu's February 2, 2015 and February 18, 2015 submissions. The **[*28]** court's docket did not acknowledged receipt of the two submissions.

As the time for filing a notice of appeal had not yet expired, Hsu still had time to make another showing. On February 26, 2015, Hsu thus submitted a ten-page summary of the authorities regarding: ″The showing required for an appeal to proceed.″ On February 27, 2015, Hsu served his notice of appeal and appellant's designation of records on appeal, and mailed the originals with filing fees to the superior court.

On March 5, 2015, Hsu served his petition for rehearing in Case No. D067187 (D067187_RP_Hsu), together with updated versions of his appellant's opening brief (D067187_AOB_Hsu) and appellant's appendix (in two volumes) in support. The appellant's appendix, at volume 2, pages 355-395, listed, chronologically, the prior showings made from October 26, 2014 to February 27, 2015, as explained above. On March 23, 2015, the court of appeal summarily denied the petition for rehearing. The court of appeal's docket (for Case No. D067187), again, did not acknowledge receipt of either the appellant's opening brief or the appellant's appendix.

On March 23, 2015, the court of appeal also rejected Hsu's February 26, 2015 request **[*29]** for permission to appeal: ″John Hsu's March 5, 2015 request for permission to appeal is DENIED. (Code of Civ. Proc., § 391.7, subd. (b).) The appeal filed with the Superior Court on March 2, 2015, is DISMISSED.″ (Case No. D067632.) On March 26, 2015, the court of appeal returned Hsu's filing fee to Hsu.

On March 26, 2015, Hsu timely submitted his Petition for Review (Case No. S225332) from Case No. D067187. On April 9, 2015, Hsu requested this Court to take judicial notice of his March 5, 2015 appellant's opening brief in Case No. D067187.

On April 6, 2015, Hsu petitioned the court of appeal for rehearing in Case No. D067632. (D067632_RP_Hsu.) The petition for rehearing discussed, more extensively, the pertinent legal principles, including more recent federal authorities, on statutory construction, and on limits to the government's power to restrain exercise of the constitutional right to petition (as explained above, *supra*, at pp. 3-19). On April 14, 2015, the court of appeal issued its decision: ″The petition for rehearing is DENIED. The superior court ruled on the motion to tax costs on the merits rather than taking the motion off calendar or summarily denying it based on **[*30]** appellant's failure to obtain a pre-filing order.″

This April 14, 2015 order is particular revealing. From the order, ″it appears″ that the court of appeal's *reasoning* is as follows: Because the superior court has already ruled on the motion on the merits (-major premise), then, by the plain meaning of the Code of Civil Procedure section 391.7, subdivision (b) (-minor premise), ″it appears″ that the appeal does not ″have merit,″ and has ″been filed for the purposes of harassment or delay″ (-primary conclusion). Thus, the appeal must be dismissed (secondary conclusion). As a result, no ″arguable issue″ needs to be entertained.

The instant Petition for Review, submitted within ten days after the court of appeal's March 23, 2015 order in Case No. D067632 had became final, is timely.

WHY REVIEW SHOULD BE GRANTED

The highly divergent constructions of the ″it appears″ standard under the vexatious litigant statute, by the courts across the State, beg the conclusion that the statute is indeed unconstitutionally ″vague for vagueness,″ ″impermissibly delegat[ing] basic policy matters to . . . judges . . . for resolution on an *ad hoc* and subjective basis, with the attendant **[*31]** dangers of arbitrary and discriminatory applications.″ *(Grayned v. City of Rockford (1972) 408 U.S. 104, 108-109.)*

Review should therefore be granted for the Court to:

(1) Resolve the conflicts among the courts of appeal, such as between the Fifth Appellate District in *In re R.H. (2009) 170 Cal.App.4th 678* and the Fourth Appellate District, Division One, regarding the showing required for an appeal to proceed; or,

(2) Conclude that leave of court is *not* required to appeal *(supra*, pp. 15-16, and the related Petition for Review, Case No. 225332, *Hsu v. Cal. Dept. of Toxic Substances Control*, at pp. 2-8);

(3) Explain what presuppositions must have underlain the vexatious litigant statute, and must be taken into account when construing the statute;

(4) Specify the proper standards of review to apply at the pre-filing stage (e.g., *supra*, pp. 3-19);

(5) Require court decisions to state their legal basis and reasoning establishing a rational basis between the evidence and the conclusion;

(6) Provide further guidance as appropriate; and

(7) Secure uniformity of decisions. (Cal. Rules of Court, rule 8.500(b)(1).)

The instant Petition **[*32]** for Review has also called attention to the apparent split between the federal authorities and California regarding the scope of the governments' authority to impose pre-filing orders against so-called vexatious litigants, in limiting their United States Constitutional right to petition. California Constitution, article III, section 1 has acknowledged that ″the United States Constitution is the supreme court law of the land.″ In addition, it is the Judicial Department (U.S. Const., art. III, § 1) of the National Government that has the final say in construing the National Constitution. *(Cohens v. Virginia (1821) 19 U.S. 264, 381.)* Furthermore, ″a law repugnant to the constitution is void.″ *(Marbury v. Madison (1803) 5 U.S. 137, 180.)Yet*, on the one hand, the United States Supreme Court has ruled that under the First Amendment to the United States Constitution, ″the genuineness of a grievance does not turn on whether it succeeds″ *(BE* 6 *K Const. Co. v. NLRB (2002) 536 U.S. 516, 532-533);* and, on the other hand, California's vexatious litigant statute equates lack of success with ″vexatiousness″ (Cal. Code Civ. Proc., § 391, **[*33]** subd. (b)(1)(i)), without considering whether the litigations in questions are reasonably based. The federal court has also ruled that pre-filing orders must be narrowly tailored to closely fit the specific vice encountered, and should rarely be filed *(Ringgold-Lockhart v. County of Los Angeles v. County of Los Angeles (9th Cir. 2014) 761 F.3d 1057, 1062, 1066);* yet, California's vexatious litigant statute generally allows for the issuance of the broad pre-filing order ″prohibit[ing] a vexatious litigant from filing any new litigation . . . without first obtaining leave of the presiding justice or presiding judge . . ..″ (Code Civ. Proc., § 391.7, subd. (a)).

Review should therefore be granted for this Court to settle the important questions of law (Cal. Rules of Court, rule 8.500(b)(1)):

(1) Whether these provisions in California's vexatious litigant statute are rationally based, and serve a legitimate, rational, or compelling governmental interest; and

(2) Whether the statutory provisions as stated, arising from the California Legislature's policy determinations, are the vexatious litigant statute's fundamental, central constitutional defects, unconstitutional **[*34]** on their face, and impossible for this Court to reform.

Review should also be granted because the Court of Appeal's decision below ″on the merits″ lacked concurrence of sufficient qualified justices. (Cal. Rules of Court, rule 8.500(b)(3).) Without mentioning any contrary showing, the Court of Appeal simply took the superior court's order and judgment as proper and valid, while, in effect, aborting the Constitutional right to petition, and the statutory right to appeal (Code Civ. Proc., § 100).

The Court may also grant review for the purpose of transferring the matter to the Court of Appeal for such proceedings as the Supreme Court may order. (Cal. Rules of Court, rule 8.500(b)(4).)

CONCLUSION

For the reasons stated in the foregoing, review should be granted.

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rules 8.504(d)(1))

The text of this petition consists of 6,294 words as counted by the Corel WordPerfect version 9 word-processing program used to generate the petition.

Dated: April 30, 2015

/s/ John Hsu

JOHN HSU

PROOF OF SERVICE

1. At the time of service, I was over 18 years of age and not a party to this action.

2. My business **[*35]** address is 2138 University Avenue, Berkeley, California.

3. On April 30, 2015,1 mailed a copy of the foregoing document entitled:

PETITION FOR REVIEW

by depositing in sealed envelopes with the U.S. Postal Service, with the postage fully paid, addressed separately as follows:

Christopher Thomas, Department of Human Resources, 1515 ″S″ Street, North Building, Suite 400, Sacramento, CA 95811

Chian He, State Personnel Board, 801 Capitol Mall, Sacramento, CA 95814

Attorney General, 1300 ″I″ Street, 11th FL, Sacramento, CA 95814

Clerk, San Diego Superior Court, 220 W. Broadway, Room 3001, San Diego, CA 92101

Clerk, Court of Appeal, Fourth Appellate District, Division One, 750 ″B″ Street, Suite 300, San Diego, CA 92101

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: April 30, 2015

/s/ Eliyah Arnon
Eliyah Arnon

[SEE ATTACHMENT IN ORIGINAL]

[SEE ATTACHMENT IN ORIGINAL]