No. 13-17170

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RON PIERCE, et al.,
Plaintiffs-Appellants,
v.
CALIFORNIA CHIEF JUSTICE CANTIL-SAKAUYE, et al.,
Defendants-Appellees.

Appeal from U.S. District Court for the Northern District of California
Civil Case No. C 13-01295 JSW (Honorable Jeffrey S. White)

PLAINTIFFS-APPELLANTS' OPENING BRIEF

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INTRODUCTION

The class members here are parents, both mothers and fathers, who have been declared "vexatious" under the California Vexatious Litigant Statute. These parents were declared "vexatious" during litigation in their on-going and protracted custody disputes. After being declared "vexatious" on motions by the attorney for the other parent/ex-spouse, the "vexatious parent" then is subject to a "prefiling order" pursuant to §391.7 of the Vexatious Litigant Statute.[1] (VLS). Before the "vexatious" parent is allowed to file any new pleadings while acting in "propria persona," the parent must first obtain "permission" from the presiding judge.[2] If there is "merit" to the custody motion or the appeal of a custody order, the presiding judge will then grant the self-represented parent "permission" to file motions or appeal. On the other hand, those "vexatious parents" who can either hire an attorney

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1 VLS §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.

2 VLS §391.7(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.

or are fortunate enough to find a pro-bono attorney, are shielded from the reach of the VLS. (***Shalant v. Girardi*** (2011) 51 Cal. 4th 1164).[3]

In any event, before a vexatious parent is granted the right to file or finds an attorney, the parent is denied "full and immediate" access to the only forum the state of California provides for the resolution of its "custody dispute.[4] Unlike "vexatious parents," a represented parent has immediate and full access to family law courts, the state-monopolized forum for resolving their "fundamental relationships"[5] (their custody disputes). " In the

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[3] The California Supreme Court in ***Shalant*** ruled, supra, at 1167: "We agree with the Court of Appeal. By its unambiguous terms, section 391.7, subdivision (a) authorizes only a ―prefiling‖ order prohibiting a vexatious litigant from ―filing‖ new litigation without prior permission, and only when the litigant is *unrepresented* by counsel. Subdivision (c) of the section provides that the court clerk shall not ―file‖ any such litigation without an order from the presiding judge permitting the ―filing,‖ and if the court clerk mistakenly ―files‖ the litigation without such an order, the litigation is to be dismissed."

[4] ***Boddie v. Connecticut*** (1971) 401 U.S. 371, 376-37: Thus, this Court has seldom been asked to view access to the courts as an element of due process. The legitimacy of the State's monopoly over techniques of final dispute settlement, even where some are denied access to its use, stands unimpaired where recognized, effective alternatives for the adjustment of differences remain. But the successful invocation of this governmental power by plaintiffs has often created serious problems for defendants' rights. For at that point, the judicial proceeding becomes the *only effective means* of resolving the dispute at hand, and denial of a defendant's ***full access*** to that process raises grave problems for its legitimacy. (emphasis added).

[5] ***Boddie,*** supra, at 382-383: We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be

instant case, one self-represented parent, Adil Hiramenk, was denied permission by the "presiding judge" to appeal a family law judge's order that enjoined him from having any contact with his minor children, until "midnight" on August 24, 2062, that is, for 50 years. (Complaint, ¶57, ER-15, pg 7/7-8). While the Court of Appeals in ***Shalant v. Girardi*** found that the VLS has been "narrowly drawn" by courts to survive "constitutional challenges" and to avoid impinging on "the right to access to courts,"[6] neither the Supreme Court nor the Court of Appeals in ***Shalant*** considered a "constitutional challenge" brought by a "vexatious" parent in a custody case.

In essence, the California courts and Ninth Circuit in ***Wolfe v. George***, 486 F.3d 1120 (9th Cir. 2007) have upheld constitutional challenges to the VLS that were brought by "civil litigants." But these courts have never ruled

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placed beyond the reach of any individual, for, as we have already noted, in the case before us, this right is the ***exclusive precondition*** to the ***adjustment of a fundamental human relationship***. The requirement that these appellants resort to the judicial process is entirely a ***state-created*** matter. Thus, we hold only that a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, preempt the right to dissolve this legal relationship without affording all citizens ***access to the means it has prescribed*** for doing so. (emphasis added)

[6] ***Shalant v. Girardi*** (2010) 183 Cal. App. 4th 545, 566: But taken as a normative claim--that section 391.7 *should be* interpreted broadly--the statement is incorrect, because the Court of Appeal has repeatedly upheld the vexatious litigant statutes (including section 391.7) against constitutional challenges on the ground that the statutes are ***narrowly drawn*** and thus do not impermissibly invade the right of access to the courts. (emphasis added).

on a "constitutional challenge" brought by vexatious parents embroiled in custody disputes in family law proceedings. There are two significant and material distinctions between civil litigants and parents in custody disputes. First, these Class Members/parents, unlike your garden-variety "vexatious civil litigant," are enmeshed in litigation touching on their fundamental parental rights. (***Santosky v. Kramer*** (1982) 455 U.S. 745; ***Stanley v. Illinois*** (1972) 405 U.S. 645). Second, these Class Members, like the married couple seeking a divorce in ***Boddie v. Connecticut***, can only resolve their custody cases (their "fundamental relationship") in the "state-created" forum that is a family law court.[7]

In their complaint, the Class Members were quite emphatic in calling attention to these fundamental distinctions between civil litigants and parents in custody disputes. However, no sooner had they filed their civil rights suit

[7] In ***In re Bittaker*** (1996) 55 Cal. App. 4th 1004, the Court of Appeals did not "address" an inmate's "constitutional challenge" to the VLS. Instead, the court ruled that "*[A] petition for writ of habeas corpus is not a civil action or proceeding within the meaning of the vexatious litigant statute*." (*supra*, at 1012). The inmate argued that applying the VLS to a habeas corpus proceeding violated Cal. Const. Art. I, §11, which provides that habeas corpus could not be suspended "unless required by public safety or in cases of rebellion or invasion." Petitioner argues that application of the vexatious litigant statute to habeas corpus proceedings is prohibited by the California Constitution, which provides, "Habeas corpus may not be suspended unless required by public safety in cases of rebellion or invasion." (Cal. Const., art. I, § 11.) Because we hold that on its face section 391 does not apply to habeas corpus proceedings, it is unnecessary and would be inappropriate for us to address the constitutional challenge.

with its Due Process and Equal Protections challenges to the VLS, than the Attorney General filed a motion to dismiss on April 15, 2013. (ER-15). The Attorney General, in the Defendant's Motion to Dismiss Plaintiffs' Complaint for Injunctive and Declaratory Relief, argued that the Ninth Circuit in ***Wolfe v. George*** rejected the same constitutional challenges that the Class Members "*made here*." (ER 14, pg. 8/19; ER-172). The Attorney General did not address the issue of whether custody disputes implicate fundamental parental rights.[8] Nor did the Attorney General dispute that "state-created" family law courts are the "only forum" the parents have to resolve their custody disputes. Instead, the Attorney General merely asserted that the *"[P]laintiffs' equal protection claims are foreclosed by Wolfe*." (ER 14 pg. 9/2-3, ER pg. 173). By ignoring any violation of fundamental custody rights, the Attorney General then paved the way to assert that "rational basis review," which the Ninth Circuit applied in ***Wolfe***, was "*the standard that is likewise appropriate in this case*." (*ER 15 pg. 8/15-18, ER pg. 179).

The district court judge also concluded that "dismissal" of the suit was in order, ruling that ***Wolfe*** foreclosed "*their Equal Protection, Due Process, and First Amendment rights are "**foreclosed by George**.*" (**See, August 13,*

[8] In the same way, the Attorney General did not address the issue of whether the VLS created a suspect classes, such as represented parents as opposed to unrepresented vexatious parents.

2013 Order Granting in Part, and Denying, in Part, Motion to Dismiss, and Denying As Moot Motion for Preliminary Injunction, ER 6, pg. 8/24-28; ER 55). However, the district judge took a different approach in arriving at his ruling. He did not quibble over the issue of whether rational basis review or a heightened scrutiny was called for. Instead, he cited ***West v Atkins***[9] for the proposition that a claim under section 1983 will not stand unless, "*1) a right secured by the Constitution or laws of the United was violated and (2) that the alleged violation was committed by a person acting under the color of state law.*" (ER 6, pg. 8/15-22; ER 55). In his unique and novel approach, Judge Jeffrey S. White ruled that the parent's section 1983 civil rights suit failed because "*none of the Plaintiffs has had their parental rights fully, finally, and irrevocably terminated.*" (ER 6, pg. 10/24-25; ER 57). In relying on ***Wolfe v. George***, the district court implicitly adopted that court's rational review analysis.

The first material question in this appeal, then, is whether the district court erred in failing to apply heightened scrutiny review in determining whether the Class Members' due process right to access was violated by the use of VLS in custody disputes. While the Class Members asserted it was "clear error" under FRCP 59(e) not to apply a heightened scrutiny approach,

[9] ***West v. Atkins***, 487 U.S. 42, 48.

the district court judge denied their motion. In his October 4, 2010 Order Denying Motion to Amend Judgment Under FRCP 59(e), the judge stated that he "*found that rational basis review applied, relying on Wolfe v. George, 486 F3d 1120, 1226 (9th Cir. 2006).*" (ER 2, pg. 3/14-18; ER 6). The district court further found that "[*T]he VLS applies to all pro se litigants*."[10] (ER 2, pg. 3/16-17; ER 6).

In his view, apparently, the district court judge believes that there is no legal distinction between civil litigants and parents caught up in custody disputes. In ***Wolfe v. George***, the Ninth Circuit, in choosing between either a rational basis or heightened scrutiny standard of review, first asked whether or not Burton H. Wolfe's suit implicated fundamental rights or involved a "suspect class." Only after finding that Mr. Wolfe's suit did not "*raise to the same constitutional level as a divorce*" as in ***Boddie v. Connecticut***, did the Ninth Circuit apply a rational basis review. (***Wolfe***, supra, at 1126). That brings up the underlying question here. Did the district court judge decide the issue of the appropriate level of review? It seems the district court failed to ask whether a parent's right to access the state-monopolized family law

[10] In their complaint, Plaintiffs provided pleadings that showed that trial court judges have applied the VLS not only against "represented" litigant, but against their attorneys as occurred when Judge Beth Labson Freeman imposed a "prefiling order" against Ms. Michele Fotinons and her attorney, Patricia Barry. In this dismissal motion, Judge Jeffrey White simply ignores these inconvenient facts.

court "*rises to the same constitutional level as divorce*"? This is the crux of this appeal.

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. §1331 because Appellant/Plaintiffs have brought claims arising under federal law. The Ninth Circuit Court of Appeals has jurisdiction under 28 U.S.C. §1291. The district court's dismissal of the suit on August 13, 2013 and its denial of Appellants' Motion to Amend Judgment under FRCP §59(e) is an appealable final decision. The district court issued its ruling and order denying relief from judgment on October 4, 2013. Appellants timely filed a Notice of Appeal on Oct 23, 2010. *See* FED. R. APP. P. 4(A)(iv).

STATEMENT OF ISSUES PRESENTED FOR EVIEW

1. Whether the application of the VLS to parents embroiled in custody disputes infringes on their right to access to the only forum the state provides for resolution of their custody cases?

2. Whether the application of the VLS in the context of custody disputes violates the Equal Protection Clause by targeting parents who are litigating their custody dispute in propria persona while shielding parents who are represented?

3. Whether the application of the VLS in the context of custody disputes violates the Equal Protection Clause by creating a suspect class of parents who are not shielded from the reach of the VLS because they cannot afford to hire an attorney and are thus "unrepresented"?

4. Whether the application of the VLS in the context of custody disputes violates the Privileges and Immunities Clause of the 14th Amendment by bestowing on a represented parent the right to bring a "vexatious litigant" motion against the "unrepresented parent"?

5. Whether the application of the VLS in the context of custody disputes violates the Due Process Clause by denying access and hampering a parent's opportunity to resolve, regain, or restore their fundamental custody rights?

6. Whether the application of a "prefiling order" under VLS violates a parent's 1st Amendment right to petition (appeal a custody/visitation order) by substituting their right to appellate review with written opinions by three judges for the "merit determination" of a lone presiding judge without any stated reasons other than the recitation of boiler-plate language that the appeal "has no merit"?

7. Whether the application of a "prefiling order" under VLS violates a parent's 1st Amendment right to petition at the trial level by making the presiding judge's permission to file custody motions an essential precondition to their right to "adjust their fundamental custody relationship"?

8. Whether the denial of "permission" to file custody motions by use of the mandatory "judicial council form" (MC-702), which permits a presiding judge to merely check the "denied box," violates a parent's due process rights by failing to provide any legal or factual basis (an appeal record) on which to challenge the order on appeal?

PERTINENT LEGAL PROVISIONS

Cal. Const. Art. I, §7(b): "(b) A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. Privileges or immunities granted by the Legislature may be altered or revoked."

Cal. Const. Art. I, §3(a): The people have the right to instruct their representatives, petition government for redress of grievances[11], and assemble freely to consult for the common good.

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[11] ***City of Long Beach v. Bozek*** (1982) 31 Cal. 3rd 528, fn 4: The legislative history of California Constitution article I, section 3, reveals an intent to make the California provision at least as broad as the First Amendment right of petition. Article I, section 10 of the California Constitution, originally enacted in 1849, stated: "The people shall have the right to freely assemble together to consult for the common good, to instruct their representatives, and to petition the Legislature for redress of grievances." (Italics added.) On November 5, 1974, the voters of this state adopted the following amended and renumbered provision: "The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good." (Italics added.) (Cal. Const., art. I, § 3.) The amendment was clearly intended to broaden the right of petition to

U.S. Const. Amend. XIV, §1: "[N]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United State; 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."

STATEMENT OF THE CASE

The Appellants, who are parents in on-going custody disputes, brought this class action against Chief Justice Cantil-Sakauye and Steven Jahr of the Judicial Council hoping to overturn California's VLS as it applies to family law litigants, particularly parents locked into protracted custody battles. The Appellants challenge the constitutionality of the VLS as it is applied in the context of family law custody proceedings. The Appellants assert that the VLS on its face and as applied infringes on their fundamental custody rights.[12]

The Appellants understand California's need to manage its docket, preserve scare judicial resources, and to curb meritless cases. The Appellants

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make it extend to petitions to all branches of government, not merely to the Legislature.

[12] ***Santosky v. Kramer*** (1982) 455 U.S. 745; ***Stanley v. Illinois*** (1972) 405 U.S.645, 651; "A parent's interest in the companionship, care, custody and management of his or her children rises to a constitutionally secured right, given the centrality of family life as the focus of personal meaning and responsibility.")

do not doubt that the state has rational and very urgent reasons to curtail a *civil* litigant's access to the judicial process when such a litigant is filing frivolous or vexatious claims.[13] They concede that state courts have found that civil litigants' right to petition grievances under the 1st Amendment does not entitle them to "clog the court system and impair everyone else's right to seek justice."[14] However, at the same time, the Appellants know from their own unfortunate experiences as *family law litigants*, and as "parents," that the state's "*unclogging its court docket*" rationale for curtailing, restricting, or denying them access to family law courts is not rationale and certainly not compelling.[15]

Unlike civil litigants, the Appellants here are parents in custody disputes, at least half of whom had no choice in being dragged into family law court once "dissolution" pleadings were filed against them. The parents have absolutely no choice in where to resolve their custody disputes. Most

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[13] "The constant suer for himself becomes a serious problem to others than the defendant he dogs. By clogging court calendars, he causes real detriment to those who have legitimate controversies to be determined and to the taxpayers who must provide the courts." (***Taliaferro v. Hoogs*** (1965) 237 Cal. App. 2d 73, 74.)

[14] ***Wolfgram v. Wells Fargo Bank*** (1993) 53 Cal. App. 4th 43, 56.

[15] ***Lammers v. Superior Court*** (2000) 83 Cal.App.4th 1309, 1325: "[W]hen an enactment broadly and directly impinges upon the fundamental constitutional rights of a substantial portion of those individuals to whom it applies, it can be upheld only if, considering its general and normal application, its compelling justifications outweigh its impingement upon constitutional rights and cannot be accomplished by less intrusive means."

cannot afford to hire attorneys to avoid acting "in propria persona" and becoming a target for a "vexatious litigant" motion. The family law courts are the "only forum" that the state of California has provided for the parents here to resolve their custody dispute.[16] Yet the state Legislature treats civil litigants the same as family law litigants for purposes of the VLS. While the imposition of the VLS affects civil litigants right to petition under the First Amendment, family law litigants suffer a double blow. Not only are their procedural due process rights to petition affected, but their substantive due process rights related to custody are undermined. Similarly, California's justification for imposing the VLS on parents in custody disputes is doubly unjustified.[17]

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[16] *See, ***Boddie v. Connecticut*** (1971) 401 U.S. 371, 376-377: "Thus, although they assert here due process rights as would-be plaintiffs, we think appellants' plight, because resort to the state courts is the only avenue to dissolution of their marriages, is akin to that of defendants faced with exclusion from the only forum effectively empowered to settle their disputes. Resort to the judicial process by these plaintiffs is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court."

[17] ***Elkins v. Sup. Ct.*** (2007) 41 Cal. 4th 1337, 1353: In other words, court congestion and 'the press of business' will not justify depriving parties of fundamental rights and a full and fair opportunity to present all competent and material evidence relevant to the matter to be adjudicated."; ***Boddie v. Connecticut*** (1971) 401 U.S. 371:"We are thus left to evaluate the State's asserted interest in its fee and cost requirements as a mechanism of resource allocation or cost recoupment. Such a justification was offered and rejected in *Griffin v. Illinois*, 351 U. S. 12 (1956)."

In extreme but not uncommon situations, some Appellants here have been denied access to family law courts after their parental rights have been severely curtailed by family law judges. (*See, Complaint, ¶47, ¶61). In one case, a family law judge imposed a 50 year restraining order on a father. (ER-15, pg. 7/5-10; ER 182). In the restraining order, the father was denied all contact with his ex-spouse as well as his three minor children until "midnight" on August 24 in the year 2062. In another case, a father has been denied access to the family law courts to challenge an order terminating his parental right, though the father asserts the termination order was obtained by fraud. (*See, Complaint, ¶29, ER 10, pg. 28; ER 131). In short, the imposition of the VLS on these parents in custody disputes has caused and continues to cause irreparable harm. Some of these parents have not seen their children of period of up to three years and others only for token visits.(*See Complaint, ¶13).

There is no amount of money that can compensated Appellants for the years lost as parents. The wisdom of threatening to sever a child in two was demonstrated by King Solomon. These cases, on the other hand, which severed the parent-child relationship, can be characterized by the absence of wisdom, an abundance of vitriol, and a systemic failure of the family law courts in the state of California.

STATEMENT OF FACTS

The Class Members are parents involved in on-going custody disputes whose access to family law courts, the only forum that California provides for the resolution of their custody, has been limited, restricted, if not completely denied by application of the VLS.

STATUTORY AND REGULATORY FRAMEWORK

The Vexatious Litigant Statute, since its enactment in 1963 (Stats. 1963, ch. 1471, §1, p. 3038), has expanded its reach both by amendments from the California Legislature and by "broad readings" of the VLS by various appellate courts. As applied in its current form, a "moving defendant" in a civil case can move the court for an order requiring the "plaintiff" to furnish security. (§391.1). [18] The statute contemplates a hearing with the right to call witness and provide evidence. (§391.2). In 1990, the Legislature broadened the scope of the VLS by adding §391.7 (Stats. 1990, ch. 621, §§ 1-3), which provided that once a litigant was found "vexatious," the court, "*on it own motion or the motion of any party*," is authorized to impose "*prefiling orders*" on self-represented vexatious litigants trying to file "new litigation." (Stats. 1990, ch. 621, § 3, pp. 3072-

[18] ***CCP §391.1***: "….The motion must 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 will prevail in the litigation against the moving defendant."

3073). Before being allowed to file "new litigation," the vexatious litigant, acting "*in propria persona*," first has to get the "permission" of the court. (§391.7(a)). The 1990 amendment also expanded the definition of "plaintiffs" under the VLS to include "*an attorney at law acting in propria persona*."

In 1998, the first significant judicial expansion of the VLS occurred in the case of ***McColm v. Westwood Park Assn***. (1998) 62 Cal. App. 4th 1211. In ***McColm***, the Court of Appeals for the First District expanded the type of litigation that could be counted as "vexatious" under §391.1(a-d) to include writs, appeals, and petitions, supra 1219-1220:

> "Litigation" for purposes of vexatious litigant requirements encompasses civil trials and special proceedings, but it is broader than that. It includes proceedings initiated in the Courts of Appeal by notice of appeal or by writ petitions other than habeas corpus or other criminal matters.

As a result, self-represented vexatious litigants at the trial level as well as in appellate courts must obtain the "presiding judge's" permission before being allowed to file.[19] Another significant expansion of the reach of the VLS occurred in the case of ***Camerado Insurance Agency, Inc. v. Superior***

[19] The Judicial Council has created MC-701, a form that allows "vexatious litigants" to request permission to file new litigation.(*See, http://www.courts.ca.gov/documents/mc701.pdf). The court of appeals have their own forms.

Court (1993) 12 Cal. App. 4th 838. In its broad reading of the VLS, the Court of Appeals for the Fourth District in ***Camerado*** viewed the 1990 amendments to the VLS as proof of legislative intent to expand the reach of the VLS.[20] In abrogating the distinction in the VLS between represented and self-represented litigants, the ***Camerado*** court ruled that "representation" did not shield a previously declared litigant from the security requirement of §391.3. (*supra*, at 845).

The trial courts' reliance on the VLS to resolve custody disputes was most clearly encouraged and promoted in a decision by Judge Jane Cardoza. In ***In re R.H.***, almost two years after Chief Justice George's decision in ***Elkins v. Sup. Ct.***, Judge Jane Cardoza cites the legislative history of the Vexatious Litigant Statute as a basis for using that statute as a "tool" for gagging parents who try to regain custody of their children, (***In re R. H.,***170 Cal. App. 678, 700 (2009)):

> (Bill History of Assem. Bill 1938, (2000-2001 Reg. Sess.), (enacted as Stats. 2002. ch.1118.) "Under existing law, parties to family law and probate law proceedings, as well as the court, may already use the vexatious litigant statutes if they so desire. [¶] The intent of this bill,

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20 *Camerado*, supra, at 8 43-844 **:** A review of the 1990 amendments demonstrates the Legislature's intent to broaden the reach of the vexatious litigant statute….Nothing in these amendments suggests a legislative intent to overturn the decision in Muller v. Tanner, supra, 2 Cal.App.3d 438, or otherwise limit the reach of the vexatious litigant statute. The expansive nature of the amendments suggests just the opposite.

> according to the author and the proponents, is to point the way to the vexatious litigant statutes to the parties engaged in these proceedings and to the court, as a tool to discourage repeated motions by parents to regain custody of their children when there are no changed circumstances to justify a different result." (Sen. Com. on Judiciary Analysis of Assem. Bill No. 1938 (2001-2002 Reg. Sess.)

Implicit in her characterization of parent's attempt to "regain custody" is the belief that such attempts are frivolous, that the trial judge made the right decision the first time, that custody cases are static and immutable, and that custody matters don't involve fundamental rights. (*See, ***Santosky v. Kramer*** (1982) 455 U.S. 745). The use of the VLS in this way is predicated on a circular argument, that is, that any "change of circumstance" argument is wrong and that access to the courts to make that argument would be pointless. Therefore, denial of access to a parent trying to show "changed circumstances" is needed. In this class action, there are members who have had their parental rights terminated and then the trial courts have relied on the appellate court's "denial of permission" to appeal (the termination order) as proof that a request for emergency visitation is "final" and that there has been no "change of circumstances." (*See, ER 10, pg. 31, 32: ER 134, 135. In short, the VLS is not used as "*a tool to discourage repeated motions by parents to regain custody*," but as a way to curtail a custody dispute by locking one parent out of court.

More than two years before Judge Cardoza decree, Chief Justice George ruled that "*trials by declarations*" in family law proceedings violated the "*hearsay rules*." (***Elkins v. Sup. Ct.*** (2007) 41 Cal. 4th 1337, 1356). In ***Elkins***, Jeffrey Elkins was denied the right to testify, cross examine witness, or present evidence because he failed to comply with a local rule requiring declarations as to the nature of the oral testimony. Although Jeffrey Elkins argued that the local rule as applied was inconsistent with the guarantee of due process, Chief Justice George deferred to the doctrine of "judicial restraint" and avoided answering the "constitutional questions."[21] Instead, he based his decision on the hearsay violation. In reversing the trial court, Chief Justice George noted that family law litigants deprived of their "day in court," as was Jeffrey Elkins, would express their "*shock, outrage, and anger*." (*Id*., 1367). Chief Justice George also pointed out, supra, 1345:

> Although we are sympathetic to the need of trial courts to process the heavy case load of dissolution matters in a timely manner, a fair and full adjudication on the merits is at least as important in family law trials as in other civil matters, in light of the importance of the issues presented such as ***the custody and well-being of children*** and the

[21] ***Elkins***, *supra* 1357: The conclusion we reach also permits us to avoid the difficult question whether the local rule and order violate petitioner's right to due process of law, "[m]indful [as we are] of the prudential rule of judicial restraint that counsels against rendering a decision on constitutional grounds if a statutory basis for resolution exists." (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1190.) [8] This rule directs that "if reasonably possible, statutory provisions should be interpreted in a manner that avoids serious constitutional questions." (*Id*. at p. 1197.)

> disposition of a family's entire net worth. Although respondent court evidently sought to improve the administration of justice by adopting and enforcing its rule and order, in doing so it improperly deviated from state law. (emphasis added)

In riffing on due process of law, Chief Justice George pointed out the "common theme" of cases that have invalidated fast-track rules, *supra* 1353:

> A common theme in the appellate decisions invalidating local rules, and one that also appears in the present case, is that a local court has advanced the goals of efficiency and conservation of judicial resources by adopting procedures that deviated from those established by statute, thereby impairing the countervailing interests of litigants as well as the interest of the public in being afforded access to justice, resolution of a controversy on the merits, and a fair proceeding.

Although Chief Justice George points out the need for "access to justice" and mentions that his decision provides "*guidance to trial courts*,"[22] Judge Jane Cardoza, more than two years later, would recommend that family law judges use of the VLS as a "tool" to "discourage" access to those parents trying to "regain custody." Unfortunately, the members of this class have found that family law judges are predisposed to follow the recommendations of Judge Cardoza rather than those of Chief Justice George or the Elkins

[22] ***Elkins***, *supra* 1346: In addition to providing guidance to the trial courts, our discussion highlights the unusual burdens and restrictions that have been imposed upon family law litigants at the local level in response to increasing case loads and limited judicial resources. We observe that this problem may merit consideration as a statewide policy matter, and suggest to the Judicial Council that it establish a task force for that purpose.

Task Force.

In ***Elkins***, Chief Justice George referred to statewide surveys showing a loss of "faith and confidence" in the family law courts. (*supra*, 1368). That is on-going sentiment shared by the member of this class. He also pointed out that theses surveys revealed that "*80% of the cases (family law) have at least one unrepresented party by the time of disposition.*" (*supra*, 1368). In view of the failure of the family law courts to "*earn the public trust,*" Chief Justice George directed that a task force be set up by the Judicial Council. (*supra*, 1369, fn 20):

> We recommend to the Judicial Council that it establish a task force, including representatives of the family law bench and bar and the Judicial Council Advisory Committee on Families and the Courts, to study and propose measures to assist trial courts in achieving efficiency and fairness in marital dissolution proceedings and to ***ensure access to justice for litigants***, ***many of whom are self-represented***. Such a task force might wish to consider proposals for adoption of new rules of court establishing statewide rules of practice and procedure for fair and expeditious proceedings in family law, from the initiation of an action to postjudgment motions. ***Special care might be taken to accommodate self-represented litigants.*** Proposed rules could be written in a manner easy for laypersons to follow, be economical to comply with, and ensure that a litigant be afforded a satisfactory opportunity to present his or her case to the court. (Emphasis added)

As noted above, for Judge Cardoza and family law judges of her ilk, the "*special care taken to accommodate self-represented family law litigants"* is to declare them "*vexatious litigants*" and curtail or deny them access.

Although Judge Cardoza's ruling was issued two years after the state Supreme Court's decision in ***Elkins***, she neither explained how her ruling squared with the rationale of ***Elkins*** or how the use of the VLS in custody disputes "*ensured access for litigants, many of whom are self-represented*."

The Elkins Task Force has done nothing to quash the pitched battle between Chief Justice George's cry for more access and Judge Cardoza's rebel yell for less access. Judge Laurie D. Zelon, the Chairperson of the Elkins Task Force, after a lengthy and "comprehensive review" of family law courts, issued her final recommendations, which are cited here:[23]

> ***Our task force's recommendations fall under five broad categories:***
>
> ***I. Efficient and Effective Procedures to Help Ensure Justice, Fairness, Due Process, and Safety***
>
> ***II. More Effective Child Custody Procedures for a Better Court Experience for Families and Children***
>
> ***III. Ensuring Meaningful Access to Justice for All Litigants***
>
> ***IV. Enhancing the Status of, and Respect for, Family Law Litigants and the Family Law Process Through Judicial Leadership***
>
> ***V. Laying the Foundation for Future Innovation***

On April 23, 2010, the Judicial Council adopted the recommendations.[24] While Judge Zelon's final recommendations repeated the lofty goals and gilded promises of Chief Justice George, she fails to recognize the battle

[23] http://www.courts.ca.gov/documents/20100423itemj.pdf
[24] http://www.californiaprobono.org/news/article.310603-Judicial_Council_Accepts_Elkins_Task_Force_Report

being waged by Judge Cardoza for use of the VLS by "family law judges" and by Chief Justice George for greater access for "family law litigants." She does not address the subject of the Vexatious Litigant Statute and the Task Force offered no opinion as to whether the VLS has a role in family courts. By the time the final recommendations were being submitted on April 23, 2010, family law judges throughout California were following the lead of Judge Cardoza and using the VLS to unclog their crowded family court dockets, to curtail access, and to end custody disputes by labeling one of the parents "vexatious." In the final recommendations, Judge Zelon seemed oblivious to the fact that parents acting "in propria persona" in custody disputes could become targets for "vexatious litigant" actions under §391.1. While she did allude to "*potential difficulties*" for self-represented parents, she seems to have been totally outflanked by the interests Judge Cardoza was promoting. (*See fn 7, pg. 79, Final Recom):,

> Cases in which one side has counsel and the other does not can pose a variety of potential difficulties for the unrepresented litigant, the attorney, and the judicial officer. Representation may be available in more of these cases if courts were to make early needs-based attorney fee awards.

Judge Zelon states that the "*Legislature has recognized the difficulties with self-representation in some cases*" and drafted the Sargent Shriver Civil Counsel Act (AB 590 [Feuer]; Stats. 2009, ch. 457), which became law and

"*was funded, commencing October 1, 2011, for several pilot projects that will provide representation to low-income parties on critical legal issues affecting basic human needs*." [25] Judge Zelon conceded in her final recommendations that most family law litigants would remain unrepresented even if the Act were passed.[26] In short, the "potential problems" consist of the very real problem that "unrepresented" parents have been and remain targets of "vexatious litigant" (for "acting in propria persona") actions by the opposing party (parent) or by the "presiding judges" "on their own motions" under §391.7

The constitutionality of the VLS has been upheld. The constitutional challenges to the VLS, however, have always been brought by civil litigants, not family law litigants/parents who assert that the VLS, on its face or as applied, violated their fundamental custody rights. (***Stanley v. Illinois*** (1972) 405 U.S. 645). In ***Shalant v. Girardi***, (2010), 183 Cal. App. 545, the Court of Appeals cautioned against "broad interpretations" of the VLS, supra, 557:

> Given the important **constitutional concerns** that section 391.7 implicates, we conclude that the statute should not be broadly interpreted. Rather, it should be applied strictly according to its terms. (emphasis added).

The Court of Appeals noted that it is "*incorrect*" to "*broadly interpret*" the

[25] *See pg. 1: http://www.courts.ca.gov/documents/AB-590.pdf
[26] *See pg. 79: http://www.courts.ca.gov/documents/20100423itemj.pdf

VLS because the VLS has been upheld on the grounds that they have been "*narrowly drawn and thus do not impermissively invade the right the right of access to the courts*."[27] (***Shalant***, *supra*, 556-557). The Supreme Court adopted the "plain reading" (strict construction) approach to the VLS, cautioned courts to "*observe the limits set by statutory scheme*" of the VLS, and noted that the distinction by the Legislature between "represented" and "in propria persona" litigants "*was not absurd*." (***Shalant v. Girardi*** (2011) 51 Cal. 4th 1164, 1176). Further, the Supreme Court lifted a passage from the appellate decision that scolded courts for acts of judicial legislation, supra at 1177:

> As the appellate court below remarked: "We sympathize with the plight of already overburdened trial courts that are forced to contend with the abusive conduct of vexatious litigants. But in their efforts to deal with the problem of vexatious litigants, courts must observe the

[27] ***Shalant***, supra at 556: "Taken as a purely descriptive claim, the statement is probably true--section 391.7 does appear to have been interpreted broadly. (See *Forrest*, *supra*, 150 Cal.App.4th at pp. 195-196 & fn. 4 [collecting cases].) But taken as a normative claim--that section 391.7 *should be* interpreted broadly--the statement is incorrect, because the Court of Appeal has repeatedly upheld the vexatious litigant statutes (including section 391.7) against constitutional challenges on the ground that the statutes are *narrowly drawn* and thus do not impermissibly invade the right of access to the courts. (See *Wolfgram v. Wells Fargo Bank* (1997) 53 Cal.App.4th 43, 55-57, 60; *Luckett v. Panos* (2008) 161 Cal.App.4th 77, 81; *In re R.H.* (2009) 170 Cal.App.4th 678, 702; *Kobayashi v. Superior Court* (2009) 175 Cal.App.4th 536, 541.) Given the important constitutional concerns that **[183 Cal.App.4th 557]** section 391.7 implicates, we conclude that the statute should not be broadly interpreted. Rather, it should be applied strictly according to its terms."

> limits set by the applicable statutory scheme. If those limits are too confining, then it is the function of the Legislature, not the courts, to expand them."

Judicial officers are presumed to follow the law, but that is not always evident to the members of this class. (Evid. Code §§601, 604). The case here is rift with family law judge and appellate judges who construe the VLS both broadly and inconsistently with the holding in ***Shalant v. Girardi***.

While the Elkins Task Force, under Category IV, seeks to "*ensure the status and respect of family law litigants through judicial leadership,*" it's unclear how a judge's order that "declares" a family law litigant "vexatious" in a custody dispute would achieve that goal. In fact, it's clear that litigants who've been declared "vexatious" are judicially profiled and vilified and have less access to courts than criminal defendants (murders, rapists, child molesters) and less visitation rights if they had, in fact, committed "murder." For instance, in ***Kobayashi v. Superior Court*** (2009) 176 Cal. App. 4th, 535, a decision rendered after ***Elkins*** and during the "public comment" phase of the Elkins Task Force, Judge Sills opined that "*much vexatious litigation is the product of the vexatious litigant's propensity for dishonesty*…" (supra, 541). In ***Luckett v. Panos***, (2008) 161 Cal. App. 4th 77, Judge Sills asserted that vexatious litigants have a "*habit of suing people as a way of life*" and they "*watch too much day time television full of judge shows.*" (*supra*, at

94). He characterized "vexatious litigants" as unemployed deadbeats who sue "*in forma pauperis status*" and "use their "*typewriters as weapons, filing lawsuits at virtually no costs to themselves…*" (*supra*, at 94). He conjectured that "vexatious litigants" very likely had "mental disorders," (*supra*, 91):

> To be sure, of course, many vexatious litigants probably do suffer from some sort of mental disorder, a fact that trial court staff around the state would appear to have first hand knowledge.

Then, apparently not wishing to define the group too narrowly, Judge Sills stated that it was "*perfectly imaginable*" that "vexatious litigants" could also be like Professor Moriarty, the criminal mastermind of Conan Doyle's fiction, and the arch-enemy of Sherlock Holmes.[28] (*supra* 91-92). While Judge Sills did not decide if Mr. Luckett suffered from a "mental disorder" or was a "criminal mastermind," he did rule that he should not be allowed to file any more actions for "*no less than four years*" and only after he's shown "*remorse*" for being a "vexatious litigant." *(supra*, 92, 96).

The family law litigants in this class action can take little consolation in the fact that Mr. Luckett was a "civil litigant" as opposed to a "family law litigant." The ruling of Judge Sills in ***Luckett v. Panos*** is binding precedent,

[28] ***Luckett***, supra 92: "And it is perfectly imaginable that a very sane, if wrongfully-minded person -- Conan Doyle's fictional Moriarty comes to mind -- who would be perfectly willing to pursue a course of vexatious litigation in the course of some ulterior purpose."

applicable to both civil and family law litigants. In view of the ***Luckett*** holding, the class members recognize that their branding as a "vexatious litigant" works on various levels. First, their right to access can be curtailed or even denied for "*no less than four years*." Second, the "*branding*" is an implicit psychological evaluation, either they suffer "*mental disorders*" or are "*criminal masterminds*." Third, it is not the family law judge that must "*earn the publics' trust*" as Chief Justice George stated in ***Elkins***, but the family law "vexatious" parents who must show "*remorse.*" The Elkins Task Force recommendation that family law litigants should be shown "respect" is replaced with a requirement that they must show "remorse." In this sense, the "branding" is not merely a judicial ruling but a psychological evaluation that the members have some untreatable illness. In ***Luckett***, Judge Sills points out that Mr. Luckett's supporting declarations show that he has not "*mended his ways*," (*supra*, 92):

> All Luckett's declaration shows is that, instead of devoting his life to something productive, he has spent the last 16 years suing people. That fact only *confirms* the very trait of character on which the determination of vexatious litigant was first based.

None of the class members here are prepared to concede that their battle to "regain custody" of their children is "*something unproductive*" or the product of some defective "*trait of character*." Chief Justice George, in

Elkins, realized that the problems with the family law courts are systemic. Instead of trying to "*earn the public's respect,*" family law judges find it a better use of their scarce judicial resources to brand parents as "vexatious" as a way of ending custody disputes and a quick fix to managing their dockets.

Finally, after being labeled vexatious, the class members here have found that there are no clear procedures, no written standards, and no practical way to erase the branding. While the Judicial Council has recently added §391.8 to the VLS[29], this seems more a response to the "constitutional concern" first raised by John E. Wolfgram in ***Wolfgram v. Wells Fargo Bank*** (1993) 53 Cal. App. 4th 43 that the "vexatious litigant" declaration functioned as a "permanent branding." It also prompts the question as to whether a party that files a §391.8 request is entitled to an evidentiary hearing. In this way, the Court of Appeals for the Second Appellate District was "troubled" by this "permanent" branding issue. (***PBA, LLC v. KPOD***, Ltd. (2003) 112 Cal. App. 4th 965)). The ***PBA*** court stated, supra 976:

> While there is much to recommend this reasoning, the conclusion section 391.7 is to be a permanent, irrevocable restriction is troubling.

[29] Section 391.8 (a). A vexatious litigant subject to a prefiling order under Section 391.7 may file an application to vacate the prefiling order and remove his or her name from the Judicial Council's list of vexatious litigants subject to prefiling orders….

> Although section 391.7 does not *absolutely* exclude the "pro per" litigant from the courts, we believe fundamental fairness requires the "vexatious litigant" brand be erasable in *appropriate circumstances*.

The ***PBC*** court ruled that a "prefiling order" under CCP §391.7 is not an "***absolute exclusion***." This ruling was predicated upon the language in ***Wolfgram***, which stated that when a vexatious litigant "*knocks on the courtroom door with a colorable claim, he may enter*."[30] In ***Luckett***, Judge Sills stated that the branding was tantamount to an injunction under Code of Civil Procedures §553, which could be lifted with a showing of "changed circumstances." (*supra*, 93). In ***Luckett***, as noted above, Judge Sills invented factors, such as his "remorse" factor, which courts could consider before erasing the vexatious litigant branding. While the VLS does not spell out the "*appropriate circumstances*" for erasure, the class members here are faced with the judge-created "factors" of "*remorse*" and "*no less than four year*" banishment from filing. Judge Sills' factors, while harsh and severe even for civil litigants, are nothing short of tyrannical and inquisitional in the context of custody cases.

The battle line here is between family law judges who want to unclog

[30] Plaintiffs notes, having been repeatedly denied the right to file anything, that the issue of what is a "colorable" claim as applied in custody case is unconstitutionally vague because there is no clear standard (***Grayned v. City of Rockford***, 408 U.S. 104, 108-109 (1972) quoted in ***Village of Hoffman Estates v. The Flipside***, 455 U.S. 489, 498 (1982).

their dockets of "difficult cases" and parents who expect and deserve a well-informed judiciary who know the law, the Family Code, Title Five Rules, and the facts of a particular case. The class members are not treated with "respect." Instead, the family law judges and lawyers for ex-spouses have taken up the club of the VLS and used it to beat down the self-represented and often indigent parent. In essence, any attempt to "resolve" the custody dispute has been scuttled.

STANDARD OF REVIEW

The issue of the constitutionality of a state statute is reviewed de novo. (*See, ***Berry v. Department of Social Services***, 447 F. 3d. 643, 648 (9th Cir. 2006); ***United States v. Harding***, 971 F. 2d 410, 412 (9th Cir.1992). The district court's rulings that the California Vexatious Litigant Statute does not violate either the Equal Protection or the Due Process Clauses of the United States Constitution concern questions of law, which are reviewed de novo. (***United States v. Sahhar***, 56 F.3d 1026, 1028 (9th Cir. 1995)). A district court's determinations on mixed questions of law and fact that implicate constitutional rights are also reviewed *de novo*. (***Cogswell v. City of Seattle***, F.3d 809, 813 (9th Cir.2003); ***Berger v. City of Seattle***, 569 F.3d 1029, 1035 (9th Cir. 2009)). Where the key "issues aris[e] under the First Amendment," the court will conduct an independent review of the

facts. (***Rosenbaum v. City & County of San Francisco***, 484 F.3d 1142, 1152 (9th Cir.2007).

ARGUMENT

I. Strict Scrutiny Review Is Required Here In Family Law Proceedings Implicating Fundamental Custody Rights.

A. District Court Ruling.

As noted in the **Introduction**, both the Attorney General and district court judge have argued that ***Wolfe v. George*** "*forecloses*" all of the Appellants' constitution claims. In the April 15, 2013 Motion to Dismiss Plaintiffs' Complaint, the Deputy Attorney General pointed out that the "*Ninth Circuit applied rational basis review, the standard that is likewise appropriate here*. *Wollfe,* 486 F.3d at 1126." (ER 14, pg. 8/17-18; ER 172). The Deputy Attorney said nary a word regarding the distinctions between civil litigants and custody cases. Instead, the Deputy Attorney General dispatched the Appellants' claims by repeating the rational basis analysis the Ninth Circuit conducted in ***Wolfe***. (pg. 8-11). The Attorney General never conducted an initial determination of the proper "level of scrutiny" to be used. The Attorney General never asked whether the parent's right to access the family law courts "*rose to the same level as divorce*." (***Wolfe***, supra, 1126).

The district court judge also asserted that ***Wolfe*** "foreclosed" the Appellants' claims in his August 13, 2013 Granting In Part and Denying In Part the Motion to Dismiss (ER-6). In his order, the judge seemed to rely solely on ***Wolfe*** without making a preliminary determination of the "level of scrutiny" to be applied. For instance, he states (ER-6, pg. 8/26-28, ER 55):

> The Court concludes that these claims are foreclosed by George, even though the Ninth Circuit evaluated the VLS in the context of civil cases, rather than in the context of custody disputes.

In his October 4, 2013 order Denying Plaintiffs' Motion to Amend Judgment Under FRCP 59(e), however, the judge back peddles, stating he relied on ***M.L.B v. S.L.J***, 519 U.S. 102 (1996) in determining the "*level of scrutiny*." He states that the Supreme Court's distinction in ***M.L.B. v. S.L.J*** between "*loss of custody and termination of parental rights*" was what "*supported his conclusion that a rational basis review applied.* (*Id*, at 10:1-25)." (ER-2, pg. 3/23-24; ER 6). The judge also cited to ***In re R.H***, 170 Cal. App. 4th 670, 702-705 (2009) as authority for the proposition that a strict scrutiny standard of review was not applicable in custody cases.

B. District Court's Use of Rational Basis Review Predicated on Erroneous View of Fundamental Rights.

1. District Court's Ruling that Fundamental Rights Are To Be Protected Only If Fully, Finally and Irrevocably Terminated Is Error.

Initially, in his August 13, 2013 order Dismissing the Complaint (ER-6), the district judge asserted that the Appellants' section 1983 suit failed under the two-pronged standard of ***West v. Atkins*** because they had failed to show that a violation of their constitutional rights. (ER-6, pg. 8/21-22; ER-55). "*Rather, Defendants argue that Plaintiffs have not alleged facts that show they violated Plaintiffs' constitutional rights.*"). Relying on the distinction between a "*loss of custody and the termination of parental*

rights" cited in ***M.L.B. v. S.L.J***, the district judge ruled that Appellants failed to show a constitutional violation under the first prong of ***West v. Atkins*** because "*none of the Plaintiffs has had their parental rights fully, finally, and irrevocably terminated*." (ER-6, pg. 10/24-25; ER 57).

To suggest that there can only be a violation of constitutional rights if the violation is absolute and irrevocable, is simply fantastic. Appellants are unaware of any state or federal decision supporting such a standard for adjudicating constitutional violations. Further, the district court's reasoning is inconsistent with cases holding the deprivation of a fundamental right for even a short period of time constitutes irreparable harm. (*See, ***Gutierrez v. Municipal Court***, 838 F. 2d 1031, 1035 (9th Cir. 1988); ***Cunningham v. Adams,*** 808 F.2d 815, 822 (11th Cir. 1987); "*When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary*." *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2nd Cir. 1984) quoting 11 C. Wright & A. Miller, Federal Practice & Procedure, 2948, at 440 (1973)); *Deerfield Medical Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981).

2. The Distinction Between Loss of Custody and Termination of Parental Rights Was Not A Factor Announced in *M.L.B. v. S.L.J* for Determining the Level of Scrutiny.

In his October 4, 2013 order Denying the Motion to Amend Judgment Under FRCP 59(e), the district court judge corrects and qualifies his early ruling by stating that the Supreme Court's distinction in ***M.L.B. v. S.L.J.*** supports his conclusion "*that a rational basis review applied*." (ER 2, pg. 3/22-25; ER 6). However, the Supreme Court relied on no such "distinction" in selecting or determining the proper level of scrutiny. To read ***M.LB. v. S.L.J***. to mean that the proper level of scrutiny is determined by the degree or magnitude of a constitutional violation is unreasonable and contrary to numerous decisions of the Supreme Court. Heightened scrutiny is triggered when a constitutional right is implicated, impinged or infringed upon, not when it is "*fully, finally, or irrevocably terminated*." (ER 6, pg. 10/24-25; ER 57). The 14th Amendment, like its 5th Amendment counterpart, provides not only "*fair process*" but "*provides heightened protection against government interference with certain fundamental rights and liberty interests*." (***Washington v. Glucksberg***, 521 U.S. 702, 719-720; ***Reno v. Flores***, 507 U.S. 292, 301-302 (1993).

The district court's "*full, final, and irrevocably terminated*" approach to protecting rights or implementing heightened scrutiny would decimate fundamental rights and gut any notion of fair process. The district court's ruling that the Appellants are not entitled to a heightened level of scrutiny

because their fundamental parental rights were merely infringed upon but not *terminated* does violence to Supreme Court decisions. (*See, ***Stanley v. Illinois; Sankosky v. Kramer***). In ***Troxel v. Granville***, 530 U.S. 57 (2000), the Supreme Court reiterated the long-standing policy that "*the oldest fundamental liberty interests recognized by this Court*," is "*the interest of parents in the care, custody and control of their children.*" The Supreme Court held that the Due Process Clause of 14th Amendment "includes the right of parents to *'control the education of their own'*." (supra, 65, quoting, ***Meyer v. Nebraska*** (1923) 262 U.S. 390, 3900). The ***Granville*** court further reaffirmed its holding in ***Pierce v. Society of Sisters***, (1925) 268 U.S. 510, which held that a parent's protected liberty interest "includes the right to *'direct the upbringing and education of children under their control'*.

In reaching its holding, the district court read much into its purported distinction in ***M.L.B. v. S.L.J***, such as a factor for determining the proper level of scrutiny. In construing the holding of ***M.L.B. v. S.L.J***, the district court stated in its August 13, 2013 Motion to Dismiss, (ER 6, 10/18-25; ER 57):

> In reaching that conclusion, the Supreme Court noted that because of the finality involved, parental termination orders present a unique type of deprivation and, thus, differ from "mine run civil actions, *even from other domestic relations matters such as divorce, paternity, and child support*. Id. at 127 (emphasis added); see also id at 121 ("In contracts to loss of irretrievabl[y] destructi[ve] of the most

> fundamental family relationship." (quoting *Santosky v. Kramer*, 455 U.S. 745, 753 (1982)). As they confirmed at the hearing, none of the Plaintiffs has had their parental rights fully, finally, and irrevocably terminated.

In deconstructing this paragraph, it seems the district court views the Supreme Court's statement regarding the extent of a deprivation as a "distinction." In the ***M.L.B. v. S.L.J*** court's comparison of "*parental termination orders*" with "*other domestic matters such as divorce, paternity, and child support,*" the district court finds a distinction. This distinction then becomes a factor for determining the appropriate level of scrutiny.

However, it's clear that in contrasting various "domestic matters" the Supreme Court in ***M.L.B. v. S.L.J*** was speaking to the degree of deprivation. The Supreme Court was merely pointing out that "*termination decrees*" are "*the most severe form of state action*…" (*supra*, 128). To read this passage as a distinction or factor for determining the level of scrutiny is just wrong. If the distinction indicated that heightened scrutiny was meant to be used for only the most severe cases of deprivation, such as "termination orders," then contrasting "termination orders" with "divorce" would be nonsensical. Not only did the Supreme Court use heightened scrutiny in ***M.L.B. v. S.L.J*** (a termination of parental right case) but they did so in the divorce issue arising in ***Boddie***. (*See also, heightened scrutiny in paternity case, ***Weber v. Aetna***

Casualty & Surety Co., 406 U.S. 164 (1972); ***Yoder v. Wisconsin*** 406 U.S. 205 (1972))

3. The District Court's Reliance on *In re R.H.* to Deny Strict Scrutiny Is Misplaced.

The ***In re R.H***. case was a juvenile dependency proceeding rendered two years before the state Supreme Court ruling in ***Shalant v. Girardi*** which rejected "broad readings" of the VLS. In ***In re R.H***., Judge Jane Cardoza concedes that she "broadly" construes the definition of "vexatious litigation" under the VLS to include "juvenile proceeding."[31] In expanding the reach of the VLS to juvenile dependency cases and declaring the father "vexatious," she even relied on a decision, ***Forrest v. Department of Corporations*** (2007) 150 Cal.App.4th 183, which the state Supreme Court "disapproved" in ***Shalant*** for its "broad reading." (*supra*, at 1172, fn 3).

It's doubtful, after ***Shalant v. Girardi***, if ***In re R.H***. remains reliable authority for the view that the VLS can be applied to parents in juvenile dependency proceedings. Even if the case remains viable, Judge Cardoza

[31] ***In re R.H***., supra, at 693: "With these authorities in mind and given that the vexatious litigant law has been both broadly written and interpreted, we conclude R.H. meets the definition of a vexatious litigant under section 391, subdivision (b)(1)."

stated that the reach of ***In re R.H***. was limited to the facts of that case.[32] In that regard, for the district court to rely on ***In re R.H.*** for the general proposition that the VLS can be applied against parents without raising "constitutional concerns" regarding access and due process is equally suspect. (*See, fn 27).

Furthermore, Judge Cardoza rejected R.H.'s (the father) assertion that he was entitled to strict scrutiny review.[33](*supra*, at 704). Judge Cardoza noted that R.H. cited ***M.L.B. v. S.L.J*** for "the proposition" that "*cases involving parental rights are entitled to greater protection than other litigants as a matter of due process*." (*supra*, at 704). Judge Cardoza stated:

> In an abundance of caution, we nonetheless have reviewed R.H.'s specific claim that he is entitled to greater due process protection than other vexatious litigants, namely strict scrutiny of the prefiling order, on a theory that his rights as a parent are at stake. We are not persuaded because R.H. is not a parent whose rights have been terminated and therefore our prefiling order is not subject to strict scrutiny.

Like the district court, Judge Cardoza interpreted ***M.L.B. v. S.L.J*** to mean that R.H. had no right to "*greater protection*" or heightened scrutiny unless his parental rights were "terminated." Apparently, Judge Cardoza thought the "point" of the Supreme Court's ruling in ***M.L.B. v. S.L.J*** was that due

[32] ***In re R.H***., supra, at 707: "Our holding is specifically limited to the circumstances which R.H. presents. We are not dealing with just any parent who appeals or seeks writ relief from a dependency court decision."
[33] In re R.H., supra, at 704:

process protections turned on the ***distinction*** between "judicial proceedings forever terminating parental rights" and "other custody proceedings."[34] As noted above, this reading of ***M.L.B. v. S.L.J*** does not square with over 75 years of jurisprudence related to fundamental parental rights.

C. Child Custody Cases Are Inherently Different From Civil Cases.

Neither the Attorney General nor the district court address the factual and legal distinctions between custody cases and civil actions. First, a parent's right to the "care, custody, and control of the upbringing and education" of his/her children is a long-established fundamental right. Such parental rights cannot be vindicated if access the state-monopolized family law courts is restricted, limited, or denied by the VLS. (***Santosky***, ***Stanley***, ***Granville***, etc.). On the other hand, the Ninth Circuit in ***Wolfe*** concluded that the VLS did not "deprive" Burton H. Wolfe "*of an opportunity to vindicate a fundamental right in court.*" (***Wolfe***, supra, at 1126).

Second, the very nature of a custody case is different from a civil case in myriad ways. A civil litigant subject to the VLS files and prosecutes his complaint "in propria persona" and is designated the "plaintiff." On the

[34] ***In re R.H***., supra, at 704: "R.H. overlooks the point of the Supreme Court's pronouncements, namely access to judicial proceedings forever terminating parental rights cannot turn on ability to pay or be examined for rationality. (*M.L.B. v. S.L.J., supra,* 591 U.S. at pp. 123-124.) In so doing, the Supreme Court distinguished a parental rights termination proceeding from other custody determinations."

other hand, in a custody cases, half of the parents are dragged into court. They are then targeted under the VLS by the represented parent because they cannot afford representation. In the instant case, most of the parents did not file for dissolution of the marriage. Nevertheless, the represented parent could "move" the court under §391.1 of the VLS to have the unrepresented parent declared "vexatious." A third significant difference between custody cases and civil suits is that a parent has no alternative but to resolve the custody dispute in the state-monopolized family law courts.

A fourth difference is that civil litigants supposedly "sue often and lose often." A custody case, on the other hand, is a single action that can last until a minor child reaches the age of maturity. When a civil litigant is declared vexatious, the nature of his civil suit doesn't change. But if a parent caught up in a custody dispute is declared vexatious, he's subject to an insidious legal fiction brought about by the "prefiling order" of the VLS. Every new "pleading" in the ongoing custody dispute becomes "new litigation" for which the parent must get permission to file. In this case, some parents have been locked out of the family law court without being granted permission to file any pleadings.

The fifth difference is that the VLS may be "rationally related" to the purpose of curtailing "frequent pro se" vexatious civil litigants. However,

this rational breaks down for "vexatious parents." In ***Wolfe***, the Ninth Circuit noted that the state has an interest in curtailing vexatious litigants who "tie up a great deal of the court's time" while "denying that time to others." The Ninth Circuit also noted that the state has an interest in curtailing "*frivolous litigations, just as it has an interest in protecting people from stalking*." (*supra*, 1126). The "prefiling orders" supposed weeds out the frivolous litigation.

But subjecting one parent to a "prefiling order" isn't going to curtail or resolve the custody dispute. It may have the effect of ending the dispute by muzzling one parent. It also creates an incentive to use the VLS as a tactic by the represented parent to deny due process. To allow one parent to game the VLS for some tactical advantage is not in the "best-interest" of the child or anyone else's. Likewise, it's hard to imagine how any custody dispute could be characterized as "frivolous" or how a parent could be mentioned in the same breath as a "stalker." A prefiling order in the context of a custody dispute is just as likely to have a chilling effect on the filing of meritorious motions. In fact, the threat of a "vexatious litigant" motion by a deep-pocketed and represented parent may cause the unrepresented parent to avoid filing meritorious motions for fear of a getting hit with §391.1 motion.

Finally, in the context of custody cases, visitations orders cannot be

said to be "adversely determined" against a parent. Rather, they are issued in the "best-interest" of the child. In that respect, the definitions of the VLS fit an adversarial civil suit but seem a poor match for a custody dispute where the "best-interest" of a child is the "purpose" of the litigation.

D. Heightened Level of Scrutiny Is Required Given The Infringement of Fundamental Parental Rights.

1. Denial of Fundamental Rights, *Boddie* And Its *Progeny*.

In ***Boddie v. Connecticut***, 401 U.S. 371 (1971), the Supreme Court ruled that the state's filing fee required to divorce functioned to deny a indigent married couple access to the only forum provided by the state to "*adjust a fundamental relationship*." (*supra*, at 383). In his concurring opinion, Justice Douglas stated, (*supra* at 385):

> The Court today puts "flesh" upon the Due Process Clause by concluding that marriage and its dissolution are so important that an unhappy couple who are indigent should have access to the divorce courts free of charge.

The Supreme Court concluded that the denial of access violated their fundamental right to be heard in violation of the Due Process Clause.[35]

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[35] ***Boddie***, supra at 380-381: Drawing upon the principles established by the cases just canvassed, we conclude that the State's refusal to admit these appellants to its courts, the sole means in Connecticut for obtaining a divorce, must be regarded as the equivalent of denying them an opportunity to be heard upon their claimed right to a dissolution of their marriages, and,

In ***M.LB v. S.L.J***., 519 U.S. 102 (1996), another fee requirement case, the U.S. Supreme Court expanded on ***Boddie***. The Supreme Court concluded, (*supra*, at 107):

> Just as a State may not block an indigent petty offender's access to an appeal afforded others, see *Mayer* v. *Chicago*, 404 U. S. 189, 195-196, so Mississippi may not deny M. L. B., because of her poverty, appellate review of the sufficiency of the evidence on which the trial court based its parental termination decree.

In reaching its ruling, the Supreme Court in ***M.LB v. S.L.J*** noted that "*fee requirements*" are ordinarily only examined for "rationality," with two exceptions. The first exception relates to filing fees that infringe upon fundamental rights such as the right to divorce. (***Boddie***). The second exception occurs when filing fees relate to the political processes as voters or candidates. (*supra*, at 124, fn 14, quoting ***Harper v. Virginia Bd of Elections***, 383 U.S. 663 (1966)). In ***M.L.B. v. S.L.B***., the Supreme Court created a third exception related to termination cases.[36] Using a heightened scrutiny review, the Supreme Court held that the state's asserted need for revenues (filing fees) to offset costs was rejected as a bar to the parent's right to access and to defend against the state's termination proceeding.

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in the absence of a sufficient countervailing justification for the State's action, a denial of due process.

[36] ***M.L.B. v. S.L.J***, supra, at 124 : In accord with the substance and sense of our decisions in *Lassiter* and *Santosky*, see *supra*, at 117-120, we place decrees forever terminating parental rights in the category of cases in which the State may not "bolt the door to equal justice,"…"

2. *Wolfe v. George*, Selecting the Appropriate Level of Scrutiny.[37]

In ***Wolfe v. George***, Barton H. Wolfe urged the Ninth Circuit to review its constitutional challenges to the VLS with heightened scrutiny rather than rational basis review In selecting the proper level of scrutiny for review of the California VLS, the Ninth Circuit considered such cases as ***Boddie v. Connecticut***, **United States v. Kras**,[38] *and* **Ortwein v. Schwab**.[39] The Ninth Circuit then stated *"…we review the California statute for a rational basis. (fn 25) The California cases show that a rational basis exists*." In footnote 25, the Ninth Circuit noted, (*supra*, at 1126):

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[37] *See, ***Clark v. Jeter***, 486 U.S. 456, 461 (1988): In considering whether state legislation violates the Equal Protection Clause of the Fourteenth Amendment, U.S.Const., Amdt. 14, § 1, we apply different levels of scrutiny to different types of classifications. At a minimum, a statutory classification must be rationally related to a legitimate governmental purpose. *San Antonio Independent School Dist. v. Rodriguez*, 411 U. S. 1, 411 U. S. 17 (1973); *cf. Lyng v. Automobile Workers*, 485 U. S. 360, 485 U. S. 370 (1988). Classifications based on race or national origin, *e.g., Loving v. Virginia*, 388 U. S. 1, 388 U. S. 11 (1967), and classifications affecting fundamental rights, *e.g., Harper v. Virginia Bd. of Elections*, 383 U. S. 663, 383 U. S. 672 (1966), are given the most exacting scrutiny. Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy. *See, e.g., Mississippi University for Women v. Hogan*, 458 U. S. 718, 458 U. S. 723-724, and n. 9 (1982); *Mills v. Habluetzel*, 456 U. S. 91, 456 U. S. 99 (1982); *Craig v. Boren*, 429 U. S. 190, 429 U. S. 197 (1976); *Mathews v. Lucas*, 427 U. S. 495, 427 U. S. 505-506 (1976).

[38] ***United States v. Kras***, 409 U.S. 434, (1973)

[39] ***Ortwein v. Schwab***, 410 U.S. 656 (1973).

> *See Kras*, 409 U.S. at 448, 93 S.Ct. 631 (reviewing filing fee requirement for rational basis when there was no fundamental right to discharge one's debts in bankruptcy).

Likewise, in footnote 29, the Ninth Circuit noted:

> *See Ortwein*, 410 U.S. at 660, 93 S.Ct. 1172 (holding that because poverty is not a suspect classification subject to heightened review, "[t]he applicable standard is that of rational justification") (citing *Kras*).

On the other hand, the Ninth Circuit noted that the Supreme Court in ***Boddie*** rejected a rational basis analysis because "divorce" involved a fundamental right, (*supra*, at 383):[40]

> A] State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-empt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so.").

In ***Boddie***, the Supreme Court used a heightened review given the "*basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship*." (*supra*, at 376).

[40] ***Boddie***, supra at 379: Our cases further establish that a statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question.

After reviewing these decisions, the Ninth Circuit then stated "*…we review the California statute for a rational basis. (fn 25) The California cases show that a rational basis exists*."

3. *Wolfe v. George*, Applying the Selected Level of Review.

a. Due Process Clause

In ***Wolfe v. George***, the Ninth Circuit noted that Burton H. Wolfe had filed civil suits "*regarding San Francisco tax cab companies*." In rejecting Mr. Wolfe's argument that the VLS denies him due process by denying him access, the Ninth's Circuit ruled that his right to bring a civil suit, unlike this child custody case, did not "*rise to the same constitutional level as divorce*." Rather, the Ninth Circuit concluded that Mr. Wolfe's suit did not implicate fundamental rights and was, in that way, in keeping with the "rational basis review" used in ***Ortwein*** and ***Kras***.

In ***Kras***, the Supreme Court found Robert Kras' right to file for bankruptcy was distinguishable from the married couple' case in ***Boddie*** in two ways. First, there was no "protected interest" in filing for bankruptcy. (***Kras***, *supra*, 445: "*We see no fundamental interest that is gained or lost depending on the availability of a discharge in bankruptcy).* Second, bankruptcy was not the "*only method available*" for Mr. Kras to "*adjust his legal relationship with his creditors*." (*supra*, 445). The state did not have a "monopoly" over Mr. Kras' problem managing his debt. The Ninth Circuit

went on to examine if there was a "rational" relationship between with California's interest in controlling scarce judicial resources and curbing "frivolous" litigant. In the context of civil suit, it found there was a "rational basis."[41]

b. Equal Protection Clause

With respect to Mr. Wolfe's assertion that the VLS created a suspect class, which triggered strict scrutiny, the Ninth Circuit ruled that "*[T]he California statute does not violate equal protection. Frequent pro se litigants are not a suspect class meriting strict scrutiny*." (*supra*, at 1126). Applying a rational basis review, the Ninth Circuit next examined the state's "rational" and concluded that "*[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*. (emphasis added).

E. District Court's Deference To *Wolfe's* Rational Basis Review Without Examining Facts Related to Custody Disputes Was Reversible Error.

1. The VLS Violates Parent's Substantive Due Process Rights.

The district court ruled that ***Wolfe v. George***' rational basis review "precludes" the Appellants' suit. In ***Wolfe v. George***, before selecting the

[41] ***Wolfe***, *supra*, at 1126: 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 frivolous litigation, just as it has an interest in protecting people from stalking.

proper level of scrutiny, the Ninth Circuit asked whether Mr. Burton's suit "*rises to the same constitutional level as divorce*." The ***Wolfe*** court considered the two ***Boddie*** factors (fundamental interest and state control/monopoly). Here, on the other hand, the district court fails to even frame the legal issue, which is:

> "Does a parent's access to a family law court in a custody dispute rise to the same constitutional level as divorce"?

In this case, the Attorney General avoided any discussion as to whether a custody dispute involves a protected interest, a fundamental right. There was no discussion as to the distinctions between civil and custody cases. For its part, the district court ruled, on its misreading of ***M.L.B. v. S.L.B***, that fundamental parental rights are not implicated unless "fully, finally, and irrevocably terminated." In view of holding in cases such ***Santosky v. Kramer***, ***Stanley v. Illinois***, and ***Granville***, it's certain Appellants' suit implicates fundamental rights. Likewise, the Appellants' custody cases, like the couple seeking to divorce in ***Boddie***, is bound to the state-created and "monopolistic" family law courts, the "only forum" California provides for the resolution of custody disputes. In short, the district court erred in not using a heightened scrutiny review because the VLS has not been narrowly

drawn and "*impermissibly invades the right of access to the courts*" by these "vexatious" parents. (***Shalant***, *supra*, 183 Cal. App. 4th 545, 556)

2. No Compelling Interest Justifying Due Process Violations In Custody Cases.

Under a heightened review, California's stated interest in applying the VLS to manage judicial resources or curtail "frivolous litigation" is not compelling in the context of fundamental parental rights. It does not pass constitutional muster. In ***Boddie***, the Supreme Court rejected these stated "interest" and suggested that the statute could have been more narrowly drawn. (*See, ***Lammers***, ***Elkins***, fn 15, fn 17.). It pointed out that there were other methods, other "available alternatives" the state could use to achieve its objectives, *supra*, 381:

> The arguments for this kind of fee and cost requirement are that the State's interest in the prevention of ***frivolous*** litigation is substantial, its use of court fees and process costs to allocate scarce resources is rational, and its balance between the defendant's right to notice and the plaintiff's right to access is reasonable.
>
> In our opinion, none of these considerations is sufficient to override the interest of these plaintiff appellants in having access to the ***only avenue open*** for dissolving their allegedly untenable marriages. (emphasis added).

The district court did not explain how custody pleadings are "frivolous" or become so after a parent is declared "vexatious." Further, the district court did not meet its burden of showing "other alternatives," such as restricting the reach of the VLS so that custody disputes are not subject to the VLS.

3. The VLS Violates Equal Protection In Custody Cases.

In the context of custody cases, the VLS creates suspect classifications based on the ability to obtain "representation." Those parents who can afford to hire a lawyer or have found a pro bono attorney are shielded and "immune" from the VLS and have full and immediate access to the courts. Furthermore, represented parents have the privilege of filing "vexatious litigant" motions against the parent acting "in propria persona." On the other hand, unrepresented parents are subject to §391.1 motions and are denied immediate and full access once declared "vexatious."

These classifications in the context of custody cases are neither rational nor compelling. Unlike civil litigants, parents in custody disputes are not "frequent pro se litigants" who sue "often." (***Wolfe***, supra, at 1126). There is no rational or compelling distinction in a custody dispute between one parent who is represented and another who is not. Neither parent has any choice in the forum. Similarly, to declare a parent "vexatious" in a custody dispute, the other parent would have to show that there is "*no reasonably probability that he/she will prevail in the litigation.*" (CCP §§ 391.1, 391.2). In the context of a custody dispute, to argue that a parent has no probability of prevailing is nonsensical, if not absurd. A "vexatious parent" is an absurd classification in a custody dispute. The absurdity is more evident when one

considers Family Code §3040 that creates the "public policy" of "frequent and continuous" contact for both parents.

In ***Wolfe***, the Ninth Circuit was not presented with a case involving "parents" with protected interests in the "care and custody" of their children. Unlike Barton H. Wolfe, the Appellants' suit implicates implicate "constitutional concerns," that is, their fundamental custody rights. In that regard, in ***Santosky v. Kramer***, Justice Blackmun quoted from the legislative history of the Indian Relief Act for the proposition that the "*removal of a child from the parents is a penalty as great [a], if not greater, than a criminal penalty…*" Unlike the civil litigant in ***Wolfe v. George***, the Appellants here are a "*suspect class*" and heightened scrutiny review was required. For the district court to defer to the holding of ***Wolfe v. George*** without considering the facts and legal issues involved in the custody case was clear and reversible error.

CONCLUSION

For the foregoing reasons, the Court of Appeals should reverse the district court's dismissal order and direct that court to consider their constitutional challenges with a heightened scrutiny standard of review.

Respectfully submitted,

s/Archibald Cunningham

_____

Archibald Cunningham
Attorney for Appellants

STATEMENT OF RELATED CASE

Pursuant to Ninth Circuit Rule 28-2.6, Appellants certify that there are no related appeals pending in this court that arise out of the same district court case as the present appeal.

Dated: November 5, 2013

s/ Archibald Cunningham
Archibald Cunningham,
Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 5th, 2013.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Archibald Cunningham

_____

Archibald Cunningham
Attorney for Appellants

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28-4, 29-2(c)(2) and (3), 32-2 or 32-4[1] for Case Number 13-17170

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