

SB

226

# LEGAL SERVICES

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## MEMORANDUM

April 11, 2008

**SUBJECT:** Requiring leave of the court to file complaint for vexatious defendant (SB 226, Work Order 25-LS0825\C)

**TO:** Representative Jay Ramras  
Chair of the House Judiciary Committee  
Attn: Jane Pierson

**FROM:** Dennis C. Bailey *DCB*  
Legislative Counsel

You have asked whether the issues I identified in my earlier (April 11, 2008) memorandum relating to your amendment also apply to the underlying bill, SB 226. The amendment requires a plaintiff to obtain leave of the court before a public interest litigant may file a complaint. The underlying bill requires a vexatious litigant to obtain prefiling order before the vexatious litigant may commence an action. The short answer is yes, the concerns in my memo apply to both.

Both the amendment and the bill require the court to make a preliminary determination that the claims of the public interest litigant have merit and are not filed solely for the purpose of harassment or delay. A determination of success on the merits by the court before litigation has begun could be challenged as a constitutional due process infringement.

Both the bill and the amendment require a prefiling order. This requirement potentially creates a jurisdiction problem. Normally a civil action is commenced by the filing of a complaint under Civil Rule 3 and jurisdiction over the parties is obtained by service of the complaint and summons on the defendant. (AS 09.05.010) The prefiling order might be considered an order without jurisdiction.

Focusing on the larger perspective, in my judgment, both the bill and the amendment may be subject to a constitutional challenge based on an argument that it interferes with the right of access to the courts. The Alaska Supreme Court has outlined the right of access to the courts as follows:

The right of access to the courts is an important interest requiring enhanced scrutiny; however, that right is impaired only by state action that actually limits or blocks access to the courts. n.33 The damages caps at issue here do not actually limit access to the courts; rather, they simply

Representative Jay Ramras  
April 11, 2008  
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limit a plaintiff's recovery in civil court.

Footnotes

n. 33 See *Patrick v. Lynden Transport, Inc.*, 765 P.2d 1375, 1379 (Alaska 1988) (holding that statute requiring security bond for nonresident plaintiffs in civil court "restricts access to Alaska courts" and violates equal protection); *Wilson v. Municipality of Anchorage*, 669 P.2d 569, 572 (Alaska 1983) (holding that statute blocking recovery against government tortfeasors did not infringe right of access to courts because plaintiffs could still recover against private tortfeasors); *Bush v. Reid*, 516 P.2d 1215, 1220-21 (Alaska 1973) (holding that statute directly barring parolees' access to civil courts infringed right of access to courts).

*Evans v. State*, 56 P.3d 1046, 1052 (Alaska 2002).

Further, the Alaska Supreme Court, in *Patrick v. Lynden Transp.*, 765 P.2d 1375, 1379 (Alaska 1988), held that AS 09.60.060, which requires that nonresident or foreign plaintiffs must post security for costs and attorneys fees, unconstitutionally denies access to the courts. The court concluded that "statutory infringement upon that right is deserving of close scrutiny. The purposes served by the statute and the legislature's chosen means for effectuating those purposes must be examined."

Commenting on the *Patrick v. Lynden Transp.* case, the Alaska Supreme Court emphasized that "the 'effect of the statute [was] to discriminate between those nonresidents who can afford to post a bond for costs and attorney fees and those nonresidents who cannot, as well as to discriminate between nonresidents and residents generally.' We concluded that the statute violated equal protection because it unreasonably restricted access to the courts." *In re K.A.H.*, 967 P.2d 91, 94 (Alaska 1998).

The posting of cost bond required by both the draft bill and the amendment have many parallels with the cost bond statute rejected by the *Patrick v. Lynden Transp.* case and may be challenged on similar grounds.

It is, of course, impossible to predict the actual outcome of a litigation challenging the prefiling requirements proposed in the bill.

If I may be of further assistance, please advise.

DCB:med  
08-273.med



## HOUSE JUDICIARY COMMITTEE

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### MEMORANDUM

Date: April 10, 2008

To: Representative John Coghill  
Chair House Rules Committee

From: Representative Jay Ramras  
Chair House Judiciary Committee

Re: Referral File for SB266 – Vexatious Litigants

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Attached please find the following documents:

- Sponsor Statement
- SB266 (25-LS0825\C)
- LAW 0 Fiscal Note
- Back up
- HJUD Committee Report

# Alaska State Legislature



Senator Hollis French

## Sponsor Statement

### Senate Bill 226 - Vexatious Litigants

SB 226 creates a process in statute for courts to manage the problem of lawsuits brought by individuals who are "vexatious litigants."

A vexatious litigant is defined as a person who, among other things, repeatedly litigates the same claims or previous adverse decisions against the same parties, files multiple frivolous lawsuits, repeatedly files pleadings or motions that are frivolous or in bad faith, or repeatedly engages in tactics that are without merit or intended to cause unnecessary delay.

This bill allows the court to impose reasonable restrictions on vexatious litigants' access to the court. Under SB 226 a court can require conditions, such as the posting of security or prefiling review of a complaint by a presiding judge, before an action filed by a vexatious litigant can proceed. Several states have passed similar legislation to control the problem of vexatious litigation. The provisions in this bill are based on California's Code of Civil Procedure.

Vexatious litigation needlessly burdens the resources of the court system, and creates unnecessary expense for individuals who are the target of this litigation in the public and private sectors. It is certainly important to recognize and protect the individual's right to litigate claims in our court system. SB 226 will only affect those few cases that are clearly without merit. This bill will provide means for screening out extreme examples of meritless cases before they are filed. Please join me in supporting SB 226.

# FISCAL NOTE

**STATE OF ALASKA**  
**2008 LEGISLATIVE SESSION**

Fiscal Note Number: **SB226-LAW-CIV-01-17-08**  
 Bill Version: **SB226**  
 () Publish Date: \_\_\_\_\_

Identifier (file name): \_\_\_\_\_ Dept. Affected: **LAW**  
 Title: **An Act relating to vexatious litigants** RDU: **CIVIL**  
 Component: **Torts & Workers Compensation**  
 Sponsor: **Judiciary** Component Number: \_\_\_\_\_  
 Requester: **Senate Judiciary**

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below

	Appropriation Required	Information						
		FY 2009	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014
<b>OPERATING EXPENDITURES</b>								
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Travel								
Contractual								
Supplies								
Equipment								
Land & Structures								
Grants & Claims								
Miscellaneous								
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>								
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<b>CHANGE IN REVENUES ( )</b>								
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**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts								
1003 GF Match								
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts								
1037 GF/Mental Health								
Other Interagency Receipts								
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2008) cost: 0.0

**POSITIONS**

Full-time								
Part-time								
Temporary								

**ANALYSIS:** (Attach a separate page if necessary)

The bill would amend current statute, the Alaska Rules of Civil Procedure and the Constitution of the State of Alaska in order to allow the Alaska Court System to more appropriately manage the problem of vexatious litigation. The bill would enable the court system to prohibit, under certain circumstances, the commencement of an action by a vexatious litigant who is subject to a pre-filing order or who fails to provide court ordered security, prohibit the issuance of a summons upon the filing of a complaint if the complaint is filed by a vexatious litigant or if a complaint has been mistakenly filed and is considered invalid; establish that a party to an action mistakenly accepted for filing by the clerk of court need not file an answer or other responsive pleading under certain circumstances; and permit the clerk of court to dismiss a mistakenly filed case. Enactment of the bill is not anticipated to fiscally impact the Department of Law.

Prepared by: Robert Meiners, Administrative Services Manager  
 Division: Administrative Services Division  
 Approved by: Talis Colberg, Attorney General  
Department of Law

Phone 907-465-5427  
 Date/Time 1/18/08 4:23 AM  
 Date 1/18/2008

American Law Reports ALR6th  
The ALR databases are made current by the weekly addition of relevant new cases.

(This annotation has not been released for publication in ALR and is subject to revision or withdrawal).

## Validity, Construction, and Application of State Vexatious Litigant Statutes

Robin Miller, J.D.

A state vexatious litigant statute permits restrictions on access to the courts by a litigant judicially determined to be vexatious, at least when the litigant is proceeding pro se. The purpose of such a statute is to prevent abuse of the judicial system by those persons who persistently and habitually file lawsuits without reasonable grounds, or who otherwise engage in frivolous conduct in the courts. These statutes have been consistently upheld by the courts. For example, in Wolfe v. George, 385 F. Supp. 2d 1004 (N.D. Cal. 2005), the court held that: (1) the California vexatious litigant statute does not violate litigants' rights to petition for redress of grievances, procedural due process, equal protection, or protection from double jeopardy; (2) the statute is not unconstitutionally vague or overbroad; (3) the statute does not impose an excessive fine or constitute an ex post facto law or a bill of attainder; and (4) the statute does not violate the Supremacy Clause of the U.S. Constitution. This annotation collects and analyzes the federal and state cases discussing the validity, construction, and application of state vexatious litigant statutes.

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This annotation collects and analyzes the federal and state cases discussing the validity, construction, and application of a state vexatious litigant statute. Such a statute permits restrictions on access to the courts by a litigant judicially determined to be vexatious, at least when the litigant is proceeding pro se.

Some opinions discussed in this annotation may be restricted by court rule as to publication and citation in briefs; readers are cautioned to check each case for restrictions. A number of jurisdictions may have rules, regulations, constitutional provisions, or legislative enactments directly bearing upon this subject. These provisions are discussed herein only to the extent and in the form that they are reflected in the court opinions that fall within the scope of this annotation. The reader is consequently advised to consult the appropriate statutory or regulatory compilations to ascertain the current status of all statutes discussed herein.

## § 2. Summary and comment

The purpose of a vexatious litigant statute is to prevent abuse of the judicial system by those persons who persistently and habitually file lawsuits without reasonable grounds, or who otherwise engage in frivolous conduct in the courts. Such conduct clogs the court dockets, results in increased costs, and is a waste of judicial resources that are supported by the taxpayers.<sup>[FN1]</sup>

California enacted the nation's first vexatious litigant statute<sup>[FN2]</sup> in 1963 after suggestions by both the state bar and the state judiciary.<sup>[FN3]</sup> This statute was significantly broadened in 1990.<sup>[FN4]</sup>

The next state to act, Hawaii, did not do so until 1993,<sup>[FN5]</sup> enacting a statute modeled on California's.<sup>[FN6]</sup> Other states followed: Ohio in 1996,<sup>[FN7]</sup> Texas in 1997,<sup>[FN8]</sup> and Florida in 2000.<sup>[FN9]</sup> The latter two are also based on (but are not identical to) California's statute, while Ohio's is dissimilar.

The California statute establishes four tests for vexatiousness; a litigant's satisfying any one is a sufficient basis for a determination that the litigant is vexatious:

- In the immediately preceding seven-year period, the person has commenced, prosecuted, or maintained in propria persona at least five litigations, other than in a small claims court, that have been (1) finally determined adversely to the person or (2) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing.

- After a litigation has been finally determined against the person, he or she repeatedly relitigates or attempts to relitigate, in propria persona, either (1) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or (2) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined.

- In any litigation while acting in propria persona, the person repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay.

- The person has previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding based upon the same or substantially similar facts, transaction, or occurrence.

Statutes enacted in Florida, Hawaii, and Texas embrace some or all of the California statute's criteria for a vexatious litigant, occasionally with modifications. The Ohio statute, taking a different approach, applies to a litigant who has habitually, persistently, and without reasonable grounds engaged in "vexatious conduct," which the statute defines as conduct that either: (1) obviously serves merely to harass or maliciously injure another party to the civil action; (2) is imposed solely for delay; or (3) is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law.

After a litigant has been determined by the court to be vexatious, all the statutes permit two separate remedies: a requirement that the litigant post security for the opposing party's costs in order to continue the litigation, and a prefiling order requiring the litigant to receive advance judicial permission before commencing new pro se litigation.<sup>[FN10]</sup>

Courts asked to consider the constitutionality of a state vexatious litigant statute have consistently upheld the statute (§ 4). Some courts have ruled that such a statute does not apply to criminal or habeas corpus proceedings (§ 5).

Courts have been asked to address various procedural issues in connection with a motion to have a person declared a vexatious litigant under the state vexatious litigant statute. Thus, courts have held, under the circumstances, that such a motion was (§ 6), or was not (§ 7), made in a manner permitted under the statute; that the motion was (§ 8), or was not (§ 9), made by a party permitted under the statute to assert such a motion; that the statute required prior notice and a hearing (§ 10), but did not require the court to issue formal findings (§ 11), before a party could be declared a vexatious litigant; and that the motion was (§ 12), or was not (§ 13), timely under the statute.

In cases resolving substantive issues concerning the propriety of an order declaring a party to be a vexatious litigant, courts have had to address certain threshold issues. Thus, courts have held, at least under the circumstances, that a vexatious litigant was (§ 14), or was not (§ 15), required to be a natural person; that a vexatious litigant was (§ 18), or was not (§ 19), required to be proceeding pro se; and that, where a vexatious litigant was required to be a "plaintiff," a party's status as a plaintiff was (§ 16), or was not (§ 17), supportable.

In cases applying the various definitions of vexatious litigant found in state vexatious litigant statutes, courts have held, under the circumstances, that a showing that there was no reasonable probability that a litigant would prevail in the litigation was (§ 20), or was not (§ 21), a prerequisite for a determination that the litigant was vexatious; that a determination that a party was a vexatious litigant was (§ 22), or was not (§ 23), supportable under a provision in a state vexatious litigant statute defining a vexatious litigant as one who had engaged in persistent vexatious conduct; that a determination that a party was a vexatious litigant was (§ 24), or was not (§ 25), supportable under a provision in a state vexatious litigant statute defining a vexatious litigant as one who had been designated as a vexatious litigant in prior litigation; that a determination that a party was a vexatious litigant was (§ 26), or was not (§ 27), supportable under a provision in a state vexatious litigant statute defining a vexatious litigant as one who had engaged in repeated dilatory or frivolous conduct; that a determination that a party was a vexatious litigant was (§ 28), or was not (§ 29), supportable under a provision in a state vexatious litigant statute defining a vexatious litigant as one who had repeatedly litigated, or attempted to litigate, the same issues; that a determination that a party was a vexatious litigant was (§ 30), or was not (§ 31), supportable under a provision in a state vexatious litigant statute defining a vexatious litigant as one who had commenced a specified number of prior unsuccessful litigations; and that a determination that a party was a vexatious litigant was supportable under an unspecified provision in a state vexatious litigant statute (§ 32).

In other cases involving substantive issues in connection with a motion to have a person declared a vexatious litigant under the state vexatious litigant statute, courts have ruled, at least under the circumstances, that neither the fact that a prior court declined to declare the person to be a vexatious litigant under the statute (§ 33), nor the fact that a prior court had sanctioned the person for the allegedly objectionable conduct (§ 34), precluded the court from granting the motion.

In cases addressing the propriety of the issuance, under the state vexatious litigant statute, of a prefiling order requiring a vexatious litigant to obtain advance judicial permission to commence specified litigation, courts have held, under the circumstances, that the proper party made the motion seeking the issuance of the prefiling order (§ 35); that the motion seeking the issuance of the prefiling order, or the court's order granting the motion, was timely filed (§ 36); that it was (§ 37), or was not (§ 38), permissible for the order to extend to litigation in which the vexatious litigant was represented by counsel rather than proceeding pro se; and that it was impermissible for the order to extend to litigation commenced in certain courts (§ 39).

In cases addressing the propriety of the issuance, under the state vexatious litigant statute, of a court order

requiring a vexatious litigant to post security in order to proceed with specified litigation, courts have held, under the circumstances, that a court was not required to hold a hearing (§ 41), or to make formal findings (§ 40), prior to issuing such an order; that a motion seeking such an order was untimely (§ 42); that the amount of security required was (§ 43), or was not (§ 44), supportable; that the court had (§ 45), or did not have (§ 46), discretion in issuing such an order; that the court properly disposed of unused security (§ 47); that the court improperly specified the form of the security (§ 48); that a finding that a vexatious litigant lacked a reasonable probability of success with respect to certain litigation, so as to support an order for security, was (§ 49), or was not (§ 50), supportable; that it was proper for the order to protect a specified party (§ 51); and that a litigant's receiving judicial permission to proceed with certain litigation did not preclude a court from ordering the litigant to provide security in order to proceed with the litigation (§ 52).

In cases involving the application, rather than the propriety, under the circumstances, of a prefiling order issued against a vexatious litigant under the state vexatious litigant statute, courts have held, under the circumstances, that the litigant sought leave to proceed from the wrong court (§ 53); that the order applied to specific litigation (§ 54); and that the litigant did not submit a sufficient application for leave to proceed (§ 55).

In cases involving the application of an order, under the state vexatious litigant statute, requiring a vexatious litigant to post security in order to proceed with certain litigation, courts have held, under the circumstances, that the order did (§ 56), or did not (§ 57), apply to the litigant's current litigation.

Finally, in several miscellaneous cases arising under state vexatious litigant statutes, courts have held, under the circumstances, that dismissal of the action was an appropriate sanction for a vexatious litigant's failure to comply with the statute or an order issued under the statute (§ 58); that a stay imposed upon the filing of a vexatious litigant motion was (§ 59), or was not (§ 60), preclusive of certain action by the court; that a vexatious litigant's appeal was untimely even taking into account the time expended in complying with a prefiling order (§ 61); and that a pleading filed following a court's denial of a vexatious litigant motion was (§ 62), or was not (§ 63), timely.

### § 3. Practice pointers

A proceeding under a state vexatious litigant statute is just one tool available to rein in litigants who abuse the judicial system. A court may have inherent power to restrict a vexatious litigant's access to the courts, [FN11] or the party harassed by the litigant may be able to secure an anti-suit injunction.[FN12] Furthermore, a court may have either inherent [FN13] or express statutory[FN14] authority to require a party who pursues vexatious litigation, or the party's attorney, to pay the opposing party's attorney's fees.

A court order declaring a party to be a vexatious litigant is usually considered an interlocutory order that cannot be appealed until final judgment is rendered in the action.[FN15]

The state vexatious litigant statutes enacted to date do not provide a mechanism for that designation, once bestowed, to be removed, and only one court appears to have considered the question of whether a mechanism should be provided.[FN16] According to the California state vexatious litigants web site, a person's name can be removed from the state list of vexatious litigants only if the court that issued the original vexatious litigant order vacates that order.[FN17]

Where a state-law claim is asserted in a federal court sitting in a state that has enacted a vexatious litigant statute, it appears that a party's status as a vexatious litigant will be determined under federal law, rather than under the state statute.[FN18] unless the federal court has adopted a local rule embracing the standards articulated in the state statute [FN19]

## II. GENERAL PRINCIPLES

### § 4. View that statute is constitutional

Rejecting the indicated federal or state constitutional challenges, the courts in the following cases held that the state's vexatious litigant statute is constitutional.

**Legal Encyclopedias**

Am. Jur. 2d, Constitutional Law § 620

Am. Jur. 2d, Costs § 81

Am. Jur. 2d, Equity § 27

Am. Jur. 2d, Injunctions § § 39, 78, 191, 204

C.J.S., Actions § 73

C.J.S., Costs § 63

C.J.S., Equity § 38

C.J.S., Injunctions § 99

**Trial Strategy**

Cause of Action Under 28 USC 1927 to Recover Excess Costs, Expenses, and Attorneys' Fees for Unreasonable and Vexatious Multiplication of Proceedings, 19 Causes of Action 447

**Additional References**

Appellees' Brief [Leonard v. Abbott], 2004 WL 1873171

Appellant's Reply Brief [Leonard v. Abbott], 2004 WL 1292173

Appellant's First Amended Brief [Leonard v. Abbott], 2004 WL 828168

California state vexatious litigants website, [http:// www.courtinfo.ca.gov/courtadmin/aoc/vexatious.htm](http://www.courtinfo.ca.gov/courtadmin/aoc/vexatious.htm)

Ohio state vexatious litigants website, [http://www.sconet.state.oh.us/Clerk\\_of\\_Court/vexatious/](http://www.sconet.state.oh.us/Clerk_of_Court/vexatious/)

**Section 2. Footnotes:**

[FN1] See Mayer v. Bristow, 91 Ohio St. 3d 3, 2000-Ohio-109, 740 N.E.2d 656 (2000).

[FN2] See Cal. Civ. Proc. Code § § 391 et seq. (effective Sept. 20, 1963).

[FN3] See Taliaferro v. Hoogs, 236 Cal. App. 2d 521, 46 Cal. Rptr. 147 (1st Dist. 1965); McColm v. Westwood Park Ass'n, 62 Cal. App. 4th 1211, 73 Cal. Rptr. 2d 288 (1st Dist. 1998).

[FN4] See Camerado Ins. Agency, Inc. v. Superior Court, 12 Cal. App. 4th 838, 16 Cal. Rptr. 2d 42 (3d Dist. 1993).

[FN5] See Haw. Rev. Stat. § § 634J-1 et seq.

[FN6] See Standard Management, Inc. v. Kekona, 98 Haw. 95, 43 P.3d 232 (Ct. App. 2001).

[FN7] See Ohio Rev. Code Ann. § 2323.52 (effective March 18, 1997).

[FN8] See Tex. Civ. Prac. & Rem. Code Ann. § § 11.001 et seq. (effective Sept. 1, 1997).

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(Publication page references are not available for this document.)

[FN9] See Fla. Stat. Ann. § 68.093 (effective Oct. 1, 2000).

[FN10] See, e.g., Holcomb v. U.S. Bank Nat. Ass'n, 129 Cal. App. 4th 1494, 29 Cal. Rptr. 3d 578 (4th Dist. 2005) (§ 54); Bravo v. Ismaj, 99 Cal. App. 4th 211, 120 Cal. Rptr. 2d 879 (4th Dist. 2002) (§ 10).

### Section 3. Footnotes:

[FN11] See, e.g., Melnitzky v. Apple Bank for Savings, 19 A.D.3d 252, 797 N.Y.S.2d 470 (1st Dep't 2005); Jordan v. State ex rel. Dept. of Motor Vehicles and Public Safety, 110 P.3d 30 (Nev. 2005); May v. Barthet, 886 So. 2d 324 (Fla. Dist. Ct. App. 4th Dist. 2004).

[FN12] See, e.g., Weaver v. School Bd. Of Leon County, 896 So. 2d 929, 197 Ed. Law Rep. 457 (Fla. Dist. Ct. App. 1st Dist. 2005); Howell v. Texas Workers' Compensation Com'n, 143 S.W.3d 416 (Tex. App. Austin 2004), review denied, (2 pets.) (Apr. 1, 2005).

[FN13] See, e.g., LaMontagne Builders, Inc. v. Bowman Brook Purchase Group, 150 N.H. 270, 837 A.2d 301 (2003); Barnes v. Oklahoma Farm Bureau Mut. Ins. Co., 2000 OK 55, 11 P.3d 162 (Okla. 2000), as corrected, (July 25, 2000) and as corrected, (Aug. 9, 2000) and as corrected, (Jan. 16, 2001).

[FN14] See, e.g., Gibson v. Decatur Federal Sav. & Loan Ass'n, 235 Ga. App. 160, 508 S.E.2d 788 (1998); Lewis v. Powers, 1997 WL 335563 (Ohio Ct. App. 2d Dist. Montgomery County 1997); Township of Lower Merion v. QED, Inc., 762 A.2d 779 (Pa. Commw. Ct. 2000).

[FN15] See, e.g., Stern v. American States Ins. Co., 2003 WL 1611291 (Cal. App. 2d Dist. 2003), unpublished/noncitable, (Mar. 28, 2003); Phillips v. Phillips, 2004 WL 2903519 (Tex. App. Houston 1st Dist. 2004).

[FN16] See PBA, LLC v. KPOD, Ltd., 112 Cal. App. 4th 965, 5 Cal. Rptr. 3d 532 (2d Dist. 2003), review denied, (Jan. 22, 2004) (§ 26), in which the court stated that "[d]espite the apparent unfairness of permanently branding a person as a vexatious litigant, it is unclear how the vexatious litigant determination can be erased in appropriate cases. The statutory scheme ... does not itself provide a procedural mechanism for dissolving an order declaring a person a vexatious litigant."

[FN17] See <http://www.courtinfo.ca.gov/courtadmin/aoc/vexfaq.htm>.

[FN18] See Fox v. Pope, R.I.C.O. Bus. Disp. Guide (CC11) ¶ 16010, 2001 WL 167913 (N.D. Tex. 2001) (unreported opinion); Benoza v. Target Personnel Services, 1997 WL 446232 (N.D. Cal. 1997) (unreported opinion). See also Carlock v. RMP Financial, 2003 WL 24207625 (S.D. Cal. 2003) (unreported opinion; without deciding the "Erie question" of whether federal or state law controlled, the court found that the party was not a vexatious litigant under either standard).

[FN19] See Sanders v. CleanNet of Southern California, Inc., 135 Fed. Appx. 936 (9th Cir. 2005) (this case may be of limited or no precedential value due to court rule); Weissman v. Quail Lodge, Inc., 179 F.3d 1194 (9th Cir. 1999).

### Section 4. Footnotes:

[FN20] In Cent. Ohio Transit Auth. v. Timson, 132 Ohio App. 3d 41, 724 N.E.2d 458 (10th Dist. Franklin County 1998) (abrogated by, Mayer v. Bristow, 91 Ohio St. 3d 3, 2000-Ohio-109, 740 N.E.2d 656 (2000)), the court held that, while most of the state vexatious litigator statute was constitutional, Ohio Rev. Code Ann. § 2323.52(G), precluding any appeal from a court's denial of a vexatious litigator's application for leave to proceed with a case, violated Ohio Const. art. I, § 16, providing that all courts shall be open, and every person, for an injury to his or her land, goods, person, or reputation, shall have remedy by due course of law.

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Briefs and Other Related Documents

Wolfe v. George N.D. Cal., 2005.

United States District Court, N.D. California,  
Burton H. WOLFE, Plaintiff,

v.

Ronald M. GEORGE, et al., Defendants.

No. C 00-1047 SBA.

Nos. 264, 276, 285.

Aug. 22, 2005.

**Background:** Civil rights action was brought against state of California, California's Judicial Council, various California trial and appellate judges, and court services analyst employed by the California Judicial Council, seeking declaration that California's Vexatious Litigant Statute was unconstitutional. The District Court dismissed action for lack of subject matter jurisdiction, and plaintiff appealed. The Court of Appeals, 392 F.3d 358, affirmed in part, reversed in part, and remanded. On remand, parties moved and cross moved for judgment on the pleadings.

**Holdings:** The District Court, Armstrong, J., held that:

- (1) statute did not violate First Amendment right to petition for redress of grievances;
- (2) statute was not unconstitutionally vague or overbroad;
- (3) statute did not violate procedural due process rights of frequent litigants;
- (4) equal protection rights were not violated;
- (5) double jeopardy rights were not violated;
- (6) security requirement was not impermissible excessive fine;
- (7) no ex post facto law or bill of attainder was involved;
- (8) no Supremacy Clause violation was involved; and
- (9) litigant lacked standing to raise third party claims.

Judgment for state.

West Headnotes

11 Action 13 13 Action131 Grounds and Conditions Precedent13k9 k. Unnecessary or Vexatious Actions.Most Cited CasesConstitutional Law 92 9192 Constitutional Law92V Personal, Civil and Political Rights92k91 k. Right of Assembly and Petition. MostCited Cases

California Vexatious Litigant Statute, barring frivolous lawsuits, did not violate First Amendment right to petition for redress of grievances; suits based on intentional falsehoods, or knowingly frivolous claims, were not protected by First Amendment. U.S.C.A. Const. Amend. 1; West's Ann. Cal. C.C.P. § 391 et seq.

12 Action 13 13 Action131 Grounds and Conditions Precedent13k9 k. Unnecessary or Vexatious Actions.Most Cited CasesConstitutional Law 92 82(6.1)92 Constitutional Law92V Personal, Civil and Political Rights92k82 Constitutional Guaranties in General92k82(6) Particular Rights, Limitations, and

Applications

92k82(6.1) k. In General. Most CitedCases

California Vexatious Litigant Statute was not unconstitutionally vague, despite claims that pro se litigants would not understand technical legal terms, and that judges were given excessive discretion to determine that litigation was vexatious or lacked merit. U.S.C.A. Const. Amend. 1; West's Ann. Cal. C.C.P. § 391 et seq.

13 Action 13

13 Action

13I Grounds and Conditions Precedent

13k9 k. Unnecessary or Vexatious Actions.

Most Cited Cases

**Constitutional Law 92 ↪ 82(6.1)**

92 Constitutional Law

92V Personal, Civil and Political Rights

92k82 Constitutional Guaranties in General

92k82(6) Particular Rights, Limitations, and Applications

92k82(6.1) k. In General. Most Cited

Cases

California Vexatious Litigant statute was not unconstitutionally overbroad; there was compelling government interest in supporting uncluttered operation of court, and there were safeguards against suppression of justifiable litigation. U.S.C.A. Const.Amend 1; West's Ann.Cal.C.C.P. § 391 et seq.

**[4] Action 13 ↪ 9**

13 Action

13I Grounds and Conditions Precedent

13k9 k. Unnecessary or Vexatious Actions.

Most Cited Cases

**Constitutional Law 92 ↪ 305(2)**

92 Constitutional Law

92XII Due Process of Law

92k304 Civil Remedies and Proceedings

92k305 Actions

92k305(2) k. Access to Courts; Rights to Hearing and Determination. Most Cited Cases

California Vexatious Litigant Statute did not violate procedural due process rights of frequent litigants; there were no restrictions placed on right to sue until after notice and hearing, and claims that suits filed after entry of order limiting suit were frivolous would be resolved on case by case basis. U.S.C.A. Const.Amend 14; West's Ann.Cal.C.C.P. § 391 et seq.

**[5] Action 13 ↪ 9**

13 Action

13I Grounds and Conditions Precedent

13k9 k. Unnecessary or Vexatious Actions.

Most Cited Cases

**Constitutional Law 92 ↪ 248(1)**

92 Constitutional Law

92XI Equal Protection of Laws

92k243 Creation or Discharge of Liability

92k248 Costs or Fees

92k248(1) k. In General. Most Cited

Cases

**Constitutional Law 92 ↪ 249(1)**

92 Constitutional Law

92XI Equal Protection of Laws

92k249 Civil Remedies and Proceedings

92k249(1) k. In General. Most Cited Cases

**Costs 102 ↪ 106**

102 Costs

102VI Security for Costs; Proceedings in Forma Pauperis

102k106 k. Statutory Provisions. Most Cited

Cases

Equal protection rights of frequent litigants were not violated by California Vexatious Litigant Statute, requiring them to have complaints screened by court before filing and to post security; financial barrier applied only to activities not protected by constitution. U.S.C.A. Const.Amend 14; West's Ann.Cal.C.C.P. § 391 et seq.

**[6] Double Jeopardy 135H ↪ 22**

135H Double Jeopardy

135HII Proceedings, Offenses, Punishments, and Persons Involved or Affected

135Hk22 k. Particular Proceedings. Most Cited

Cases

California Vexatious Litigant Statute, imposing restrictions on persons engaged in frivolous litigation, did not violate double jeopardy clause; no criminal sanctions were involved. U.S.C.A. Const.Amend 5; West's Ann.Cal.C.C.P. § 391 et seq.

**[7] Fines 174 ↪ 1.3**

174 Fines

174k1.3 k. Excessive Fines. Most Cited Cases

California Vexatious Litigant Statute, imposing security requirement on litigant found to have engaged in vexatious litigation, did not violate Eighth Amendment prohibition on excessive fines; Eighth Amendment was implicated in criminal and civil forfeiture proceedings, not involved in present case. U.S.C.A. Const.Amend 8; West's Ann.Cal.C.C.P. §

391 et seq.

[8] Action 13 ↪ 9

13 Action

131 Grounds and Conditions Precedent

13k9 k. Unnecessary or Vexatious Actions.

Most Cited Cases

Constitutional Law 92 ↪ 199

92 Constitutional Law

92VII Retrospective and Ex Post Facto Laws

92k198 Retroactive Operation of Ex Post Facto

Laws

92k199 k. In General. Most Cited Cases

California Vexatious Litigant Statute, imposing security requirements when persons with history of vexatious litigation bring suit, was not ex post facto law violating Constitution; ex post facto clause applied only to criminal cases. U.S.C.A. Const. Art. 1, § 9, cl. 3, 10, cl. 1; West's Ann.Cal.C.C.P. § 391 et seq.

[9] Action 13 ↪ 9

13 Action

131 Grounds and Conditions Precedent

13k9 k. Unnecessary or Vexatious Actions.

Most Cited Cases

Constitutional Law 92 ↪ 82.5

92 Constitutional Law

92V Personal, Civil and Political Rights

92k82.5 k. Bills of Attainder, Prohibition

Against. Most Cited Cases

California Vexatious Litigant Statute, imposing restrictions on litigants with history of vexatious filings, was not unconstitutional bill of attainder; statute had valid and non punitive purpose of protecting courts and other litigants against abuses of judicial process, rather than purpose of inflicting legislative punishment on frequent litigators. U.S.C.A. Const. Art. 1, § 9, cl. 3, 10, cl. 1.

[10] Action 13 ↪ 9

13 Action

131 Grounds and Conditions Precedent

13k9 k. Unnecessary or Vexatious Actions.

Most Cited Cases

States 360 ↪ 18.15

360 States

360I Political Status and Relations

360I(B) Federal Supremacy; Preemption

360k18.15 k. Particular Cases, Preemption or Supersession. Most Cited Cases

Absence of any conflicting federal statute precluded claim that California Vexatious Litigant Statute, imposing restrictions on persons engaging in frivolous litigation, violated Supremacy Clause. U.S.C.A. Const. Art. 6, cl. 2; West's Ann.Cal.C.C.P. § 391 et seq.

[11] Constitutional Law 92 ↪ 42.1(1)

92 Constitutional Law

92II Construction, Operation, and Enforcement of Constitutional Provisions

92k41 Persons Entitled to Raise Constitutional Questions

92k42.1 Particular Statutes or Actions Attacked

92k42.1(1) k. In General. Most Cited Cases

Litigant lacked standing to raise claims, on behalf of all persons pursuing pro se claims, that California Vexatious Litigant Statute was unconstitutional; litigant was seeking to represent too broad a class, as statute applied only to those with record of frivolous litigation. U.S.C.A. Const. Art. 3, § 2, cl. 1; West's Ann.Cal.C.C.P. § 391 et seq.

Burton H. Wolfe, San Francisco, CA, pro se.

David M. Verhey, Sacramento, CA, Tom Blake, CA State Attorney General's Office, Thomas A. Blake, Jonathan U. Lee, City Attorney's Office, San Francisco, CA, for Defendants.

#### ORDER

ARMSTRONG, District Judge.

This matter comes before the Court on Plaintiff's Motion for Judgment on the Pleadings [Docket No. 264] and Defendants' Cross-Motion for Judgment on the Pleadings [Docket No. 276]. Having read and considered the arguments presented by the parties in the papers submitted to the Court, and having heard the argument of Plaintiff and Defendants' counsel at the June 28, 2005 hearing, the Court hereby DENIES Plaintiff's Motion for Judgment on the Pleadings and GRANTS Defendants' Cross-Motion for Judgment on the Pleadings.

BACKGROUND

#### A. Procedural Background.

On March 27, 2000, Plaintiff Burton Wolfe ("Plaintiff"), filed a Complaint, in propria persona, under 42 U.S.C. § 1983, challenging the constitutionality of California's\*1007 Vexatious Litigant Statute. He named as defendants: (1) Justice Gary Strankman, Chief Justice Ronald George, Deborah Silva, the Judicial Council of California, and State of California (collectively known as the "State Defendants"); and (2) Judge Alfred Chiantelli, Judge David Garcia, and Judge Ronald Quidachay (collectively known as the "Judge Defendants").

On March 29, 2002, this Court dismissed Plaintiff's Complaint under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction pursuant to the *Rooker-Feldman* doctrine after finding that Plaintiff's action appeared to be a de facto appeal of prior state court decisions. See *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16, 44 S.Ct. 149, 68 L.Ed. 362 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482-86, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983). The Court also dismissed the State Defendants and the Judge Defendants from the lawsuit. Plaintiff subsequently appealed.

On December 14, 2004, the Ninth Circuit held that this Court erred by dismissing the suit under *Rooker-Feldman*. See *Wolfe v. Strankman*, 392 F.3d 358, 364 (9th Cir. 2004). Specifically, the Ninth Circuit found that Plaintiff's references to his involvement in prior state court actions went to show that Plaintiff had standing, and were not de facto appeals from the decisions in those prior actions. *Id.* However, the Ninth Circuit affirmed the dismissal of the State of California and the Judicial Council of California on the grounds that they are not "persons" subject to suit under § 1983. *Id.* at 361. The court further affirmed the dismissal of the Judge Defendants, Justice Strankman, and Chief Justice George in his judicial capacity. *Id.* Finally, the court reversed the dismissal of Chief Justice George, in his administrative capacity, and Ms. Silva, and remanded to this Court for further proceedings. *Id.*

On February 8, 2005, Plaintiff filed a First Amended Complaint, in propria persona, on behalf of himself and on behalf of all persons appearing in the courts of California without representation, for Declaratory and Prospective Injunctive Relief. In the First

Amended Complaint, Plaintiff alleges that California's Vexatious Litigant Statute, California Code of Civil Procedure § § 391 et seq., is unconstitutional. On February 23, 2005, Plaintiff filed a Motion for Judgment on the Pleadings or, in the alternative, for Declaratory Judgment. On May 6, 2005, Defendants filed a Cross-Motion for Judgment on the Pleadings.

#### B. Statutory Background.

California's Vexatious Litigant Statute (the "statute") is codified at California Code of Civil Procedure § § 391 et seq. The statute defines a vexatious litigant as a person who:

- (1) In the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in small claims court that have been (i) finally determined adversely to the person or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing.
- (2) After a litigation has been finally determined against the person, repeatedly relitigates or attempts to relitigate, in propria persona, either (i) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or (ii) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined.
- (3) In any litigation while acting in propria persona, repeatedly files unmeritorious\*1008 motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay.
- (4) Has previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding based upon the same or substantially similar facts, transaction, or occurrence.

Cal. Code of Civ. Proc. § 391(b)(1)-(4) Pursuant to the statute, a defendant may move the court to require the pro se plaintiff to provide security if the defendant can make a showing that the plaintiff is a vexatious litigant and that there is not a reasonable probability that the plaintiff will prevail in the litigation against the moving party. See Cal. Code of Civ. Proc. § 391.1. Upon making the requisite findings, the court may then order the plaintiff to provide a security <sup>fund</sup> that compensates for the reasonable costs and attorney fees of defending the

suit. Cal.Code Civ. Proc. § § 391.1, 391.3. If the plaintiff fails to post the security, the action may be dismissed. Cal.Code Civ. Proc. § 391.4.

FN1 A "security" is defined in the statute as an "undertaking to assure payment, to the party for whose benefit the undertaking is required to be furnished, of the party's reasonable expenses, including attorney's fees and not limited to taxable costs, incurred in or in connection with a litigation instituted, caused to be instituted, or maintained or caused to be maintained by a vexatious litigant." Cal.Code Civ. Proc. § 391(c).

Once a plaintiff has been declared a "vexatious litigant" within the meaning of the statute, the court may also enter an order prohibiting that plaintiff from filing new state court litigation absent leave of the presiding judge where the litigation is proposed to be filed. Cal.Code Civ. Proc. § 391.7. This order is referred to as a "prefiling" order. Cal.Code Civ. Proc. § 391.7. After the prefiling order is issued, the presiding judge shall permit the filing of further litigation if it appears that the litigation has merit and has not been filed for the purposes of harassment or delay. Cal.Code of Civ. Proc. § 391.7(b).

## LEGAL STANDARD

### A. Motion for Judgment on the Pleadings.

Under Federal Rule of Civil Procedure 12(c), any party may move for judgment on the pleadings at any time after the pleadings are closed but within such time as not to delay the trial. Fed.R.Civ.P. 12(c). "For the purposes of the motion, the allegations of the non-moving party must be accepted as true, while the allegations of the moving party which have been denied are assumed to be false." Hal Roach Studios, Inc. v. Richard Feiner and Co., Inc., 896 F.2d 1542, 1550 (9th Cir.1990). Judgment on the pleadings is proper when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law. *Id.* When brought by the defendant, a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) is a "means to challenge the sufficiency of the complaint after an answer has been filed." New Nor, Inc. v. Lavasoft, 356 F.Supp.2d 1090, 1115

(C.D.Cal.2004). A motion for judgment on the pleadings is therefore similar to a motion to dismiss. *Id.* When the district court must go beyond the pleadings to resolve an issue on a motion for judgment on the pleadings, the proceeding is properly treated as a motion for summary judgment. Fed.R.Civ.P. 12(c); Bonilla v. Oakland Scavenger Co., 697 F.2d 1297, 1301 (9th Cir.1982).

### \*1009 B. Declaratory Judgment.

28 U.S.C. § 2201 provides that "[i]n a case of actual controversy within its jurisdiction ... any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." 28 U.S.C. § 2201.

Declaratory judgment is appropriate where, as here, an injunction is not available because there are no pending state court proceedings. Steffel v. Thompson, 415 U.S. 452, 463, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974) ("When no state prosecution is pending and the only question is whether declaratory relief is appropriate, the congressional scheme that makes the federal courts the primary guardians of constitutional rights, and the express congressional authorization of declaratory relief, afforded because it is a less harsh and abrasive remedy than the injunction, become the factors of primary significance.")

## ANALYSIS

### A. Plaintiff's and Defendants' Cross-Motions for Judgment on the Pleadings.

In his Motion for Judgment on the Pleadings, Plaintiff seeks a declaratory judgment from this Court that California's Vexatious Litigant Statute, California Code Civil Procedure § § 391 et seq., is unconstitutional. <sup>FN2</sup> Plaintiff asserts the following bases for a finding that the Vexatious Litigant Statute is unconstitutional: (1) it violates the First Amendment; (2) it is overbroad; (3) it is vague; (4) it violates the due process clause of the Fifth and Fourteenth Amendments <sup>FN3</sup>; (5) it violates the equal protection clause of the Fourteenth Amendment; (6) it violates the double jeopardy clause of the Fifth Amendment; (7) it violates the excessive fines clause

of the Eighth Amendment; (8) it is an impermissible ex post facto law or bill of attainder; and (9) it generally conflicts with federal law and violates 42 U.S.C. § 1983. Defendants, on the other hand, move for judgment on the pleadings on the basis that the Vexatious Litigant Statute is not unconstitutional on any of the aforementioned grounds. Additionally, Defendants assert that Plaintiff lacks standing to assert third-party rights.<sup>FN3</sup>

<sup>FN2</sup> Plaintiff actually contends that the statute is unconstitutional "on its face" and "as applied." However, Plaintiff has not produced any admissible evidence demonstrating that the statute is unconstitutional as "applied" to himself or others. Instead, he relies on vague references to certain "facts" that are clearly outside of his own personal knowledge and "documents" that have not been produced to the Court. See, e.g., Pl's Mot. at 19. Plaintiff has therefore failed on his burden of proof with respect to his "as applied" constitutional challenge and, accordingly, only his facial challenge is discussed below.

<sup>FN3</sup> Since Plaintiff is challenging a state statute, his due process cause of action is most appropriately characterized as claim brought under the Fourteenth Amendment, not the Fifth Amendment. Thus, hereafter, discussion of Plaintiff's due process claim will refer exclusively to the Fourteenth Amendment. It should be noted, however, that the due process analysis is the same under both the Fourteenth and Fifth Amendment. See Rodriguez v. Cook, 10<sup>th</sup> F.3d 1176, 1179 n. 4 (9th Cir. 1990).

<sup>FN4</sup> Although it is not clear from the parties' briefing, both parties conceded at the June 28, 2005 hearing that, pursuant to the Ninth Circuit's ruling in Wolfe, Plaintiff's personal standing has been established and is no longer challenged by Defendants. See Wolfe, 392 F.3d at 364 ("We construe Wolfe's references to the prior judicial actions ... as ... part of his demonstration that he is sufficiently threatened with actual harm from the future operation of the Vexatious Litigant Statute that he has standing to bring the present suit.").

\*1010 1. Constitutionality under the First

Amendment.

a. First Amendment Right to Petition for Grievances.

[1] With respect to Plaintiff's First Amendment claim, the Court must first determine whether the Vexatious Litigant Statute actually encroaches upon a right guaranteed by the First Amendment.

The United States Supreme Court has long recognized that the right to petition for a redress or grievance is a liberty safeguarded by the Bill of Rights and is intimately connected both in origin and in purpose with the other First Amendment rights of free speech and free press. United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217, 222, 88 S.Ct. 353, 19 L.Ed.2d 426 (1967).<sup>FN5</sup> However, the Supreme Court has also consistently held that "baseless litigation is *not* immunized by the First Amendment right to petition." Bill Johnson's Restaurants, Inc v. NLRB, 461 U.S. 731, 743, 103 S.Ct. 2161, 76 L.Ed.2d 277 (1983) ("[S]ince sham litigation by definition does not involve a bona fide grievance, it does not come within the first amendment right to petition."). In fact, as the Supreme Court stated in Bill Johnson's Restaurants, "The first amendment interests involved in private litigation-compensation for violated rights and interest, the psychological benefits of vindication, public airing of disputed facts-are not advanced when the litigation is based on intentional falsehoods or on knowingly frivolous claims." *Id*

<sup>FN5</sup> The First Amendment is "incorporated" against the states by virtue of the Fourteenth Amendment. Hague v. CIO, 307 U.S. 496, 512-13, 59 S.Ct. 954, 83 L.Ed. 1423 (1939).

Applying the Bill Johnson's Restaurants holding to the Vexatious Litigant Statute, the Court finds that the Vexatious Litigant Statute does not violate the First Amendment. By its very terms, the statute is only implicated once the state court has concluded that there is "no reasonable probability that [the plaintiff] will prevail in the litigation against the moving defendant." Cal Code Civ Proc. § 391.3. Further, even when a plaintiff has been declared a vexatious litigant, the statute does not preclude a plaintiff from filing subsequent lawsuits, so long as those lawsuits have merit. See Cal Code Civ Proc. § 391.7; see Wolfgram v. Wells Fargo Bank, 53

Cal App 4th 43, 60, 61, Cal Rptr 2d 694 (1987) ("When a vexatious litigant knocks on the courthouse door with a colorable claim, he may enter.") Thus, to the extent that Plaintiff's argument is premised on his belief that the Vexatious Litigant Statute encroaches upon a First Amendment right because it is a prohibitive ban on meritorious litigation, his argument is fatally flawed. The Vexatious Litigant Statute is not, as Plaintiff contends, an absolute ban on the right to petition for grievances.

## 2. Vagueness.

[2] Plaintiff has also not proven that the Statute is unconstitutionally vague. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). To survive a vagueness challenge, the statute must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. *Id.* This is particularly important when sensitive areas of First Amendment freedoms are involved; in such cases, the statute must have sufficiently clear terms such that citizens are not led to "steer far wider of the unlawful zone ... than if the boundaries of the forbidden areas were clearly marked." *Id.* \*1011 The statute must also provide explicit standards for those who apply it so that arbitrary and discriminatory enforcement is prevented. *Id.*

In support of his vagueness challenge, Plaintiff contends that the statute fails to provide warning of what conduct is proscribed because it does not define the terms "finally determined adversely," "unmeritorious pleadings," "unnecessary discovery," or "other tactics that are frivolous." Having considered Plaintiff's arguments, the Court finds that there is absolutely no merit to the contention that words such as "final," "adverse," "unmeritorious," "unnecessary," "tactics," or "frivolous" are incomprehensible to a person of ordinary intelligence. Second, while it may be true that a complete stranger to litigation may not readily understand the correct meaning of the terms "discovery" and "pleadings," Plaintiff's contention that an "ordinary person" would not understand these terms is completely undermined by the fact that the "ordinary person" in this context is a person who either: (1) has engaged in litigation on at least five prior occasions within seven years; (2) is actively involved in current litigation; or (3) has recently

been involved in litigation and is reinitiating that litigation. See Cal Code Civ. Proc. § 391(b). Thus, the argument that such a person is not able to comprehend fairly basic concepts of litigation is tenuous, at best, and defies credibility. The Vexatious Litigant Statute simply has no applicability to a person who is a complete stranger to litigation.

Moreover, even assuming, *arguendo*, that "sensitive areas of First Amendment freedoms" are involved, the Court does not find that there is any lack of clarity in the statute that would lead citizens to "steer far wider of the unlawful zone" than necessary. The activity "prohibited" by the statute is unmistakably clear: it is the pursuit of litigation that lacks merit and is instituted solely for the sake of harassment and delay. Indeed, the definition of the term "vexatious litigant" alone contains a considerable amount of detail. See Cal Code Civ. Proc. § 391. Since this is not "a vague, general ... ordinance, but a statute written specifically for the [court] context, where the prohibited disturbances are easily measured by their impact" the Court finds that the statute gives "fair notice to those to whom it is directed." See Grayned, 408 U.S. at 112, 92 S.Ct. 2294.

Additionally, since the statute provides for actual notice and a hearing before it is even triggered, there is arguably nothing to "steer clear of" at all, as even a person who unjustifiably pursues frivolous litigation is free to continue his activities until his opponent asks the court to intervene. Cal Code Civ. Proc. § 391.1. Significantly, even then, the person cannot be declared a "vexatious litigant" until after the court has conducted a hearing and given the plaintiff the opportunity to be heard. *Id.*

Plaintiff's alternative argument, that the alleged "vagueness" of the statute enables judges to interpret the statute in an arbitrary and discriminatory manner, is also unpersuasive. Undisputedly, even outside of the Vexatious Litigant context, judges are regularly called upon to determine what constitutes a "final adverse determination," an "unmeritorious pleading," "frivolous tactics," or "unnecessary discovery." See, e.g., Cal Code Civ. Proc. 128.5 ("Every trial court may order a party, the party's attorney, or both to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay."); see also Cal. Rule of Court 27(e) (permitting Court of Appeal to "impose sanctions, including the award or denial of costs, on a party or an attorney for (a) \*1012 taking a frivolous

appeal or appealing solely to cause delay; (b) including in the record any matter not reasonably material to the appeal's determination; or (c) committing any other unreasonable violation of these rules." The fact that a judge performs this function is one of the most fundamental underpinnings of the judicial system. See, e.g., Ellis v. Rosket Corp., 143 Cal.App.3d 642, 648, 192 Cal.Rptr. 57 (1983) ("A trial court is empowered to exercise its supervisory power in such a manner as to provide for the orderly conduct of the court's business and to 'guard against inept procedures and unnecessary indulgences which would tend to hinder, hamper or delay the conduct and dispatch of its proceedings.'"). Thus, Plaintiff's argument that "a judge can [not] come up with applicable definitions for such terms" is wholly without merit. The case law makes clear that California state court judges are, in fact, consistently and fairly construing the statute. See, e.g., Childs v. PaineWebber Inc., 29 Cal.App.4th 982, 992, 35 Cal.Rptr.2d 93 (1994).

Plaintiff's position is also based entirely on the faulty premise that "in a CCP 391 proceeding a First Amendment right is at stake." Again, by definition, a "CCP 391 proceeding" involves only litigation where the plaintiff cannot demonstrate that he has any reasonable likelihood of prevailing. Such frivolous litigation is not protected by the First Amendment.

Finally, Plaintiff's concern that litigants are often required to post securities of varying amounts, or subjected to pre-filing orders with varying standards, does not compel the conclusion that judges are enforcing the statute in an arbitrary or discriminatory manner. If anything, it suggests that state court judges are appropriately deciding each matter on a case-by-case basis, after giving careful consideration to the particular facts of the situation. This supports a finding of constitutionality. Grayned, 408 U.S. at 119, 92 S.Ct. 2294 ("[the] decision is made, as it should be, on an individualized basis, given the particular fact situation."). Accordingly, the Court finds that the Vexatious Litigant Statute is not unconstitutionally vague.

### 3. Overbreadth.

[3] Plaintiff's argument that the Vexatious Litigant Statute is unconstitutionally overbroad is also flawed. Although "[a] clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct," there is simply

no basis to conclude that the Vexatious Litigant Statute "sweeps within its prohibitions" constitutionally protected activities. Grayned, 408 U.S. at 115, 92 S.Ct. 2294.

First, as set forth above, the Vexatious Litigant Statute is not a prohibitive ban on the general right to petition for *bona fide* grievances. In fact, the Vexatious Litigant Statute does not prohibit the filing of meritorious litigation or special proceedings, such as the filing of a habeas corpus petition. See, e.g., In re Bitaker, 55 Cal.App.4th 1004, 1011-12, 64 Cal.Rptr.2d 679 (1997) (holding that a petition for writ of habeas corpus is not a civil action or proceedings within the meaning of the Vexatious Litigant Statute). Second, the purpose of the Vexatious Litigant Statute is undeniably significant and legitimate. Specifically, the purpose of the statute is to protect courts from "the unreasonable burden placed upon [them] by groundless litigation [which] prevents the speedy consideration of proper litigation and [consumes] tremendous time and effort." First Western Dev. Corp. v. Superior Court, 212 Cal.App.3d 860, 870, 261 Cal.Rptr. 116 (1989). The Vexatious Litigant also protects the general public, as well, because "[t]he constant suer ... becomes \*1013 a serious problem to others than the defendant he dogs ... [b]y 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." Tahaferro v. Hoogs, 237 Cal.App.2d 73, 74, 46 Cal.Rptr. 643 (1965).

Although Plaintiff does not dispute that the inherent purpose of the Vexatious Litigant Statute is important and legitimate, he argues that the statute must be overturned because there are "many [other] ways of dealing with nuisance litigants that are less drastic than imposing affordable monetary barriers or blacklisting them." However, this argument is entirely insufficient to support an overbreadth challenge to the constitutionality of a statute that (1) serves a substantial and legitimate purpose, and (2) is not aimed at, and does not encompass, constitutionally protected speech or activities. See Virginia v. Hicks, 539 U.S. 113, 118, 123 S.Ct. 2191, 156 L.Ed.2d 148 (2003) ("[T]here comes a point at which ... [one] cannot justify prohibiting ... enforcement of ... a law that reflects 'legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct.'"). Since the Vexatious Litigant Statute is specifically aimed at controlling constitutionally unprotected conduct, the "legitimate state interest" standard mandates that the Court uphold its validity.

Even assuming that the statute *does* affect constitutionally protected speech, however, Plaintiff has not shown that the statute is unconstitutionally "overbroad." A statute affecting constitutionally protected speech is not overbroad if it is narrowly tailored and does not prohibit substantially more protected speech or conduct than necessary. Ironically, here, the very purpose of the notice and hearing requirement of the statute, as well as the "prefiling order" process set forth in the statute, is to *ensure* that constitutionally protected activities (*i.e.* the filing of meritorious claims) are *not* prohibited in any way. Thus, like the ordinance scrutinized and ultimately upheld by the Supreme Court in *Grayned*, the Vexatious Litigant Statute is constitutional because it is narrowly tailored to further the compelling interest in having a legal system that is not needlessly disrupted by baseless and frivolous litigation. *Grayned*, 408 U.S. at 121, 92 S.Ct. 2294 ("Far from having an impermissibly broad prophylactic ordinance, ... [the statute] punishes only conduct which disrupts or is about to disrupt normal ... activities."); *see also Cox v. State of Louisiana*, 379 U.S. 559, 562, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965) ("Since we are committed to a government of laws and not of men, it is of the utmost importance that the administration of justice be absolutely fair and orderly. This Court has recognized that the unhindered and untrammelled functioning of our courts is part of the very foundation of our constitutional democracy."). As such, Plaintiff's overbreadth challenge fails.

#### 4. Constitutionality under the Fourteenth Amendment.

##### a. Procedural Due Process.

[4] Next, Plaintiff argues that the Vexatious Litigant Statute violates the fundamental precepts of due process of fair treatment, fair play, decency, and justice guaranteed by the Fourteenth Amendment. It should be noted that this same argument was previously considered by the California Court of Appeals in *Wolffgram* and ultimately rejected. *See Wolffgram*, 53 Cal. App. 4th at 60, 61 Cal Rptr. 2d 694.

The Supreme Court has established that due process "requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to \*1014 settle their claims of right and duty through the judicial process must be given a

meaningful opportunity to be heard." *Boddie v. Connecticut*, 401 U.S. 371, 377, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971). Here, the Vexatious Litigant Statute fulfills the requirements set forth in *Boddie* because (1) the state's interest in controlling the unfettered abuse of the legal system overrides a litigant's personal interest in filing frivolous pleadings, and (2) the statute provides a litigant with an ample and meaningful opportunity to be heard. In fact, it is beyond dispute that the Vexatious Litigant Statute explicitly provides for notice and opportunity to be heard before the plaintiff is subjected to any adverse effects of the statute. Moreover, even when a prefiling order has been entered, there is never a "blanket" prohibition on further filings; a plaintiff deemed to be a vexatious litigant may always file a new action so long as the presiding judge determines that the litigation has merit and has not been filed for the purpose of harassment or delay. *Cal.Code Civ. Proc. § 391.7(b)*. Such determinations are appropriately made on a case-by-case basis. *Id.* If the plaintiff believes that he has been wrongly denied of the opportunity to pursue meritorious litigation, relief by way of mandamus is immediately available to challenge the presiding judge's abuse of discretion. *Cal.Code Civ. Proc. § 1085*.

##### b. Substantive Due Process and the Equal Protection Clause of the Fourteenth Amendment.

[5] Plaintiff also argues that the Vexatious Litigant Statute violates the due process and equal protection clauses of the Fourteenth Amendment because it unfairly discriminates against pro se litigants in that it (1) imposes a financial barrier to the pro se litigant's "right to sue," and (2) creates a disparity between how pro se litigants and represented parties are treated by the courts. These arguments, however, are insufficient to invalidate the statute under the Fourteenth Amendment.

First, the fact that the vexatious litigant *may* be required to pay a "security" does not violate the Fourteenth Amendment since this so-called "financial barrier" only serves to bar frivolous litigation, which is not protected by the Constitution. *See California Code of Civil Procedure § 391.3* (stating that the Court may only order the payment of a security once the court has determined, "after hearing the evidence upon the motion, ... that the plaintiff is a vexatious litigant and that *there is no reasonable probability that the plaintiff will prevail in the litigation against the moving defendant*") (emphasis added); *see also Cal.Code Civ. Proc. § 391(c)* (the amount of the

security is limited to the opposing party's "reasonable expenses ... incurred in or in connection with a litigation instituted, caused to be instituted, or maintained or caused to be maintained by a vexatious litigant.") (emphasis added).

Relying primarily on the Supreme Court's holding in *Boddie*, and the District of Columbia Court of Appeals's holding in *In re Green*, 669 F.2d 779, 785 (D.C.Cir.1981), Plaintiff essentially seeks to have this Court hold that the imposition of any cost associated with civil litigation is unconstitutional.<sup>FN6</sup> This is not, however, what the Fourteenth Amendment requires, and Plaintiff's reliance on *Boddie* and *Green* is utterly misplaced. In fact, in *Green*, the \*1015 District of Columbia Court of Appeals expressly acknowledged that the "right of access to the courts ... is neither absolute or unconditional." *In re Green*, 669 F.2d at 785. Further, in *United States v. Kras*, 409 U.S. 434, 446, 93 S.Ct. 631, 34 L.Ed.2d 626 (1973), the Supreme Court declined to follow this particular holding in *Boddie* after noting that *Boddie's* holding was limited to cases involving a state's regulation of a fundamental right, such as marriage. *Id.* at 446, 93 S.Ct. 631 ("We are ... of the opinion that the [bankruptcy] filing fee requirement does not deny [the litigant of] the equal protection of the laws."). Thus, under *Kras*, in cases where a fundamental right is not implicated, a statute will be upheld if there is a rational justification for it. *Id.*; see also *Ortvein v. Schwab*, 410 U.S. 656, 656, 93 S.Ct. 1172, 35 L.Ed.2d 572 (1973) (upholding validity of appellate filing fee applied to indigents seeking to appeal an adverse welfare decision).

<sup>FN6</sup> Plaintiff also relies on *Roberts v. LaPaille*, 389 U.S. 40, 42, 88 S.Ct. 194, 19 L.Ed.2d 41 (1967) and *Bounds v. Smith*, 430 U.S. 817, 825, 97 S.Ct. 1491, 52 L.Ed.2d 72. However, these cases involve a prisoner's right of access to the courts, which is not applicable in this context. The Vexatious Litigant Statute does not apply to criminal proceedings, see *Cal.Code of Civ. Proc.* 391(a), or to petitions for writ of habeas corpus, see *In re Bittaker*, 55 Cal.App.4th at 1011-12, 64 Cal.Rptr.2d 679.

Plaintiff's alternative argument that the Vexatious Litigant Statute unfairly disadvantages pro se litigants is also fundamentally flawed. While Plaintiff may subjectively believe that the statute is a "weapon" hurled against unsuspecting persons who

are "unskilled at law," it has long been recognized that the Vexatious Litigant Statute was enacted for the purpose of protecting defendants from overly litigious, vexing, and harassing plaintiffs and protecting the courts from having to expend countless hours dealing with meritless litigation. This is clear not only from the history of the statute but also from the very terms of the statute itself. See, e.g., *First Western Dev. Corp. v. Superior Court*, 212 Cal.App.3d 860, 870, 261 Cal.Rptr. 116 (1989) ("The vexatious litigant statutes were enacted to require a person found a vexatious litigant to put up security for the reasonable expenses of a defendant who becomes the target of one of these obsessive and persistent litigants whose conduct can cause serious financial results to the unfortunate object of his attack.")

Additionally, the Vexatious Litigant Statute does not, as Plaintiff contends, subject pro se litigants to undue burdens that are not equally borne by attorneys and represented parties. Indeed, the Vexatious Litigant Statute is not unique; the California Code of Civil Procedure contains other similar measures intended to control the filing of frivolous litigation. See, e.g., *Cal.Code Civ. Proc.* § 128.5 (providing for the imposition of sanctions against an attorney or party who litigates in bad faith); *Cal.Code of Civ. Proc.* § 907 (allowing a Court of Appeals to impose costs on an attorney or party who pursues a frivolous appeal); *Cal.Code Civ. Proc.* § 128.7 (providing for the imposition of sanctions against an attorney who submits papers to the court for the sole purpose of harassing the opposing party or causing delay).

Attorneys are also subject to *California Business and Professions Code* § 6068, which provides, *inter alia*, that an attorney must: (1) support the Constitution and laws of the United States and California, (2) maintain the respect due to the courts of justice and judicial officers, (3) counsel or maintain only actions, proceedings, or defenses that appear to him or her legal or just; (4) employ means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law; and (5) not encourage either the commencement or the continuance of an action or proceeding for a corrupt motive of passion or interest. *Cal. B & P Code* § 6068. Additionally, an attorney's conduct is regulated by the State Bar of California and California's Rules of Professional Responsibility. See *Cal. B & P Code* § 6068.7 (providing that a court must notify the \*1016 State Bar when sanctions in excess of \$1,000 are imposed)

Although Plaintiff attempts to distinguish the Vexatious Litigant Statute by noting that lawyers are not subject to a rule that "disciplines" them for "losing five lawsuits in seven years," Plaintiff conveniently overlooks the fact that a pro se litigant's prior litigation record *only* becomes relevant when that litigant attempts to pursue a *sixth* litigation that has no reasonable probability of success. This distinction is significant and Plaintiff's failure to even acknowledge it makes his argument unpersuasive.

Further, in evaluating Plaintiff's argument, the Ninth Circuit's analysis in *Rodriguez* is instructive. In *Rodriguez*, the Ninth Circuit considered a Fifth Amendment challenge to 28 U.S.C. § 1915(g) (commonly referred to as the "three-strike rule").<sup>FN7</sup> *Rodriguez*, 169 F.3d at 1179. In upholding the three-strike rule, the Ninth Circuit noted that "requiring prisoners to make the same financial decisions as non-prisoners before filing a cause of action does not violate equal protection." *Id.* The court also stated that "[a]lthough prisoners are entitled to meaningful access to the courts, courts are not obliged to be a playground where prisoners with nothing better to do continuously file frivolous claims. Only after demonstrating an inability to function within the judicial system is an indigent inmate asked to pay for access to the courts." *Id.* at 1180. Accordingly, the Ninth Circuit concluded that § 1915(g) permissibly "precludes prisoners with a history of abusing the legal system from continuing to abuse it while enjoying IFP status." *Id.* Thus, under the holding of *Rodriguez*, neither the security provision of the Vexatious Litigant Statute nor its analogous "six-strike rule" can be considered unconstitutional.

<sup>FN7</sup> The three-strike rule provides that "[i]n no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding ... [in forma pauperis] if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury." 28 U.S.C. § 1915(g).

Accordingly, the Court hereby finds that the Vexatious Litigant Statute does not violate the due process or equal protection clause of the Fourteenth Amendment.

### 5. Double Jeopardy Clause of the Fifth Amendment.

[6] Plaintiff also argues that the Vexatious Litigant Statute violates the double jeopardy clause of the Fifth Amendment. While the double jeopardy clause may be enforced against the states due to its incorporation into the due process clause of the Fourteenth Amendment, *see Benton v. Maryland*, 395 U.S. 784, 794, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969), the double jeopardy clause simply does not apply to the Vexatious Litigant Statute.

Specifically, the double jeopardy clause serves to prohibit multiple punishments for *criminal* conduct. *See Abbate v. United States*, 359 U.S. 187, 198-99, 79 S.Ct. 666, 3 L.Ed.2d 729 (1959) ("The basis of the Fifth Amendment protection against double jeopardy is that a person shall not be harassed by successive trials; that an accused shall not have to marshal the resources and energies necessary for his defense more than once for the same alleged *criminal acts*.") (emphasis added). Although the cases upon which Plaintiff relies—namely *United States v. Halper*, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989) and \*1017 *United States v. \$405,089.23 U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994)—discuss the fact that a civil fine may be considered "punitive," significantly, both cases involved a predicate *criminal* offense. *See Halper*, 490 U.S. at 437, 109 S.Ct. 1892 (defendant initially charged under criminal false claims act statute); *see also \$405,089.23 U.S. Currency*, 33 F.3d at 1213 (defendants initially charged with conspiracy and money laundering arising out of large-scale methamphetamine manufacturing operation). Further, the holding in *Halper* was later abrogated by the Supreme Court in *Hudson v. United States*, 522 U.S. 93, 98-09, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997) (holding that the double jeopardy clause "protects only against the imposition of multiple criminal punishments for the same offense"). Thus, the fact that Plaintiff subjectively feels that the Vexatious Litigant Statute operates as a "punishment" is irrelevant. The relevant inquiry under the Fifth Amendment is whether the statute serves as a second punishment for a *criminal* offense, which it clearly does not. Indeed, in order to reach this conclusion, the Court would have to first accept the utterly preposterous premise that the pursuit of frivolous litigation is criminal conduct. Accordingly, the Court finds that Plaintiff has failed to state a claim under the double jeopardy clause of

the Fifth Amendment.

#### 6. Excessive Fines Clause of the Eighth Amendment.

[2] Plaintiff's argument that the Vexatious Litigant Statute violates the excessive fines clause of the Eighth Amendment is equally without merit. Plaintiff's specific contention is that the Vexatious Litigant Statute violates the excessive fines clause of the Eighth Amendment because it punishes, as well as deters, use of the courts. However, like Plaintiff's double jeopardy clause allegation, Plaintiff's excessive fines clause claim relies entirely upon the assumption that the Vexatious Litigant Statute is somehow related to criminal conduct. This assumption is unjustified under the applicable case law.

The Eighth Amendment reads in its entirety: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Const. Amend. VIII. The Supreme Court has long understood the Eighth Amendment to apply primarily, and perhaps exclusively, to criminal prosecutions and punishments. Browning-Ferris Indus. of Vermont, Inc v Kelco Disposal, Inc, 492 U.S. 257, 262, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989); see, e.g., Fong Yue Ting v United States, 149 U.S. 698, 730, 13 S.Ct. 1016, 37 L.Ed. 905 (1893) (stating that Eighth Amendment is inapplicable to deportation because deportation is not punishment for a crime). "Bail, fines, and punishment traditionally have been associated with the criminal process, and by subjecting the three to parallel limitations the text of the Amendment suggests an intention to limit the power of those entrusted with the criminal-law function of government." Browning-Ferris, 492 U.S. at 263, 109 S.Ct. 2909 (quoting Ingraham v Wright, 430 U.S. 511, 664-568, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977)).

Although the Supreme Court has held that the Eighth Amendment excessive fines clause extends to civil forfeiture proceedings, see Alexander v United States, 509 U.S. 544, 559-59, 113 S.Ct. 2765, 125 L.Ed.2d 441 (1993), Plaintiff's attempt to equate the "security" provision of the Vexatious Litigant Statute with a "civil forfeiture" is wholly without merit. Notably, there are significant differences between a "civil forfeiture" and a "security" which Plaintiff overlooks. First, a civil forfeiture proceeding necessarily relates to prior criminal conduct. See, e.g., United States v Premises Known as RR# J, 14

F.3d 864, 869 (3d Cir.1994) ("The Government bears the initial burden of proof in attaching property for trial in civil forfeiture \*1018 cases and to do so it must establish some connection between the alleged criminal activity and the ... property the Government seeks to forfeit."); see also United States v Certain Real Property and Premises, 954 F.2d 29, 33 (2nd Cir.1992) (stating that 21 U.S.C. § 881(a)(7) provides for the forfeiture of real property which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of a violation of the narcotics laws) Second, in a civil forfeiture proceeding, the Government is the entity who retains the money or property. In contrast, under the Vexatious Litigant Statute, the "security" is provided for the exclusive benefit of the opposing party. See Cal.Code Civ. Proc. § 391(c) (defining a security as "an undertaking to assure payment, to the party for whose benefit the undertaking is required to be furnished, of the party's reasonable expenses.") (emphasis added). These distinctions are important, as they are critical features that bring a civil forfeiture within the ambit of the Eighth Amendment. See Browning-Ferris, 492 U.S. at 265, 109 S.Ct. 2909 ("[W]e think it significant that at the time of the drafting and ratification of the Amendment, the word "fine" was understood to mean a payment to a sovereign as punishment for some offense.").

Accordingly, there is no basis upon which this Court can conclude that the Vexatious Litigant Statute violates the excessive fines clause of the Eighth Amendment.

#### 7. The Ex Post Facto Clause and the Bill of Attainder Clause.

[8][9] Plaintiff's argument that the Vexatious Litigant Statute is an ex post facto law prohibited by the Article 1, Section 10 of the United States Constitution is also baseless. The Supreme Court has expressly held that the ex post facto clause is aimed at laws that "retroactively alter the definition of crimes or increase the punishment for criminal acts." California Dept of Corrections v Morales, 514 U.S. 499, 504, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995) (emphasis added). For example, the ex post facto clause "is violated if a change in the law creates 'a sufficient risk of increasing the measure of punishment attached to the covered crime.'" Humes v Thompson, 336 F.3d 848, 855 (9th Cir.2003) (quoting California Dept of Corr v Morales, 514 U.S. 499, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995)). Since the Vexatious Litigant Statute does not involve

penal legislation, the ex post facto clause is simply inapplicable to this case.<sup>FN8</sup>

<sup>FN8</sup> Further, as Defendants correctly note, Plaintiff's reliance on Landgraf v. USI Film Products, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994), and Ralis v. RFE/RL, inc. 770 F.2d 1121 (D.C.Cir.1985), is misplaced. Both Landgraf and Ralis concern "retroactive" statutory enactments. Landgraf, 511 U.S. at 266-67, 114 S.Ct. 1483; Ralis, 770 F.2d at 1123-24. That is not an issue here.

Plaintiff has also not demonstrated that the Vexatious Litigant Statute is an unconstitutional "bill of attainder." A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." Nixon v. Adm'r of Gen. Servs. 433 U.S. 425, 468, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977). As stated by the Supreme Court in Nixon, "Just as Article III confines the Judiciary to the task of adjudicating concrete 'cases or controversies,' so too the Bill of Attainder Clause was found to 'reflect ... the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons.'" *Id.* (quoting \*1019 United States v. Brown, 381 U.S. 437, 445, 85 S.Ct. 1707, 14 L.Ed.2d 484 (1965)). Given that the inherent concern of the bill of attainder clause is the separation of powers doctrine, Plaintiff's attempt to define the Vexatious Litigant Statute as a "bill of attainder" is decidedly strained. However, even assuming, *arguendo*, that the Vexatious Litigant Statute falls within the ambit of the bill of attainder clause, Plaintiff still fails to demonstrate that it meets the criteria set forth by the Supreme Court in Selective Service System v. Minnesota Pub. Inter-Research Group, 468 U.S. 841, 847, 104 S.Ct. 3348, 82 L.Ed.2d 632 (1984).

In Selective Service System, the Supreme Court noted that, to constitute a bill of attainder, the statute must (1) specify the affected persons, and (2) inflict punishment (3) without a judicial trial. *Id.* Three inquiries determine whether a statute inflicts punishment on the specified individual or group (1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, viewed in terms of the type and severity of burdens imposed, reasonably can be said

to further nonpunitive legislative purposes; and (3) whether the legislative record evinces a congressional intent to punish. *Id.* at 852, 104 S.Ct. 3348. Although Plaintiff vigorously argues that the Vexatious Litigant Statute is a "sadistic" statute that was enacted for the sole purpose of punishing pro se litigants, there is simply no credible support for this conclusion outside of Plaintiff's own speculative theories. As noted previously, it has been consistently recognized that the purpose of the statute was to protect courts and defendants from "the unreasonable burden placed upon [them] by groundless litigation." First Western Dev. Corp. v. Superior Court, 212 Cal.App.3d 860, 870, 261 Cal.Rptr. 116 (1989). Since this purpose is decidedly legitimate and non-punitive, Plaintiff has not demonstrated that the Vexatious Litigant Statute is a "bill of attainder."

#### 8. Supremacy Clause.

Last, Plaintiff argues that the Vexatious Litigant Statute conflicts with numerous federal laws thereby violating the Supremacy Clause of the United States Constitution. Specifically, he contends that the Vexatious Litigant Statute "conflicts with the right under Title 28 U.S.C. § 1654 to litigate in pro per and the right provided under Title 28 U.S.C. § 1915 ... to conduct a case without prepayment of fees or imposition of 'security.'" Additionally, Plaintiff argues that the statute violates 42 U.S.C. § 1983.<sup>FN9</sup> All of these arguments lack merit.

<sup>FN9</sup> Plaintiff also argues that the Vexatious Litigant Statute improperly "enables a state court to prohibit and punish a pro se litigant for failing to prevail in five litigations in a federal court under federal standards." However, he fails to articulate how this violates the Supremacy Clause.

[10] First, there is no inherent conflict with 28 U.S.C. § 1654, which provides that "parties may plead and conduct their own cases personally" according to the rules of such courts. *Id.* Nor is there a conflict with 28 U.S.C. § 1915, which explicitly provides that a federal court may dismiss a case filed *in forma pauperis* if the court determines that the action or appeal is frivolous, malicious, or fails to state a claim on which relief may be granted. 28 U.S.C. § 1915(e). As to Plaintiff's § 1983 claim, as previously explained, *supra*, this is premised on his flawed assumption that a person has an absolute right

to file litigation, regardless of its merits. There is no such right under the Constitution. See *Bill Johnson's Restaurants, Inc.*, 461 U.S. at 743, 103 S.Ct. 2161 ("[B]aseless litigation is not immunized by the First Amendment right to petition."). Accordingly, \*1020 Plaintiff has failed to state a claim under the Supremacy Clause.

### 9. Third Party Standing.

[11] Although the Court has concluded that the Vexatious Litigant Statute is constitutional and that Defendants are entitled to judgment as a matter of law on the merits of Plaintiff's Complaint, the Court will briefly address Defendant's objection to Plaintiff's purported third-party standing.

As previously noted, *supra*, Plaintiff seeks declaratory judgment in this action on behalf of himself and on behalf of "all persons appearing or trying to appear in the Courts of California without benefit of representation by counsel." First Amended Complaint ("FAC") at 123-25. Defendants have conceded that Plaintiff has standing to pursue this action on behalf of himself. See *Wolfe*, 392 F.3d at 364 (finding that Plaintiff's prior state court actions are sufficient to establish that Plaintiff is threatened with actual harm from the future operation of the Vexatious Litigant Statute and therefore sufficient to establish standing). However, Defendants argue that Plaintiff does not have standing to assert constitutional rights on behalf of other persons.

"Article III of the Constitution limits the 'judicial power' of the United States to the resolution of 'cases' and 'controversies.'" *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 471, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982) (citations omitted). Generally, there are three requirements for Article III standing: (1) injury in fact, which means an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) a causal relationship between the injury and the challenged conduct, which means that the injury fairly can be traced to the challenged action of the defendants, and has not resulted from the independent action of some third party not before the court; and (3) a likelihood that the injury will be redressed by a favorable decision, which means that the prospect of obtaining relief from the injury as a result of a favorable ruling is not too speculative. *Lujan v. Defenders of Wildlife*, 504

U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). The party invoking federal jurisdiction bears the burden of establishing each of these elements. *Id.*

Courts typically employ a presumption against third-party standing. *Singleton v. Wulff*, 428 U.S. 106, 113-14, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976). However, the presumption may be rebutted in circumstances where: (1) the litigant has suffered an injury in fact and has a close relation to the third party; and (2) where there is some hindrance to the third-party's ability to protect his or her own interests. See *Powers v. Ohio*, 499 U.S. 400, 411, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). Plaintiff argues that he meets both of these exceptions due to the unique nature and circumstances of this case.<sup>EN10</sup> The Court \*1021 does not find Plaintiff's argument persuasive. First, Plaintiff's contention that "all persons appearing or trying to appear in the Courts of California without benefit of representation by counsel" are subjected to the Vexatious Litigant Statute results from a gross misreading of the Statute. As this Court has observed, *supra*, the terms of the Statute make it clear that it applies to only a limited class of persons; specifically, it applies only to those persons who have demonstrated a clear inability to pursue meritorious litigation or who have utterly failed to adroitly navigate the California court system. Accordingly, the class of persons that Plaintiff seeks to represent is unnecessarily overbroad and, therefore, Plaintiff has not demonstrated that he has a close relationship with such parties. Second, Plaintiff has not effectively demonstrated that there is any hindrance to the third parties' abilities to protect their own interests. To the contrary, as Defendants correctly note, a person determined to be a "vexatious litigant" can always challenge such determination through the appropriate appellate process. In fact, it appears that Plaintiff's belief that third parties are hindered in pursuing such litigation is premised solely on Plaintiff's subjective belief that other persons are not capable of "proceeding with the level of ability and competence that they now have with Wolfe effectively representing them." Pl's Supp Reply to Def's Mot. at 12-8-10. This argument has no basis in law or fact. Further, because the Court has concluded that Plaintiff has not raised a cognizable claim under the First Amendment, the Supreme Court's holding in *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973) does not support Plaintiff's position. See *id.* (finding that the restriction on third-party standing is relaxed when the plaintiff is asserting a First Amendment claim). Accordingly, the Court sustains Defendants' objection to Plaintiff's assertion of standing on behalf

of "all persons appearing or trying to appear in the Courts of California without benefit of representation by counsel."

FN10. Plaintiff has also filed a Request for Judicial Notice [Docket No. 285] asking the Court to take judicial notice of the following documents: (1) a June 30, 1999 copy of the Vexatious Litigant List, (-) an incomplete excerpt from a December 15, 2004 article of the *Daily Journal* regarding Plaintiff; (3) a copy of the Prefiling Order form used by the California courts; and (4) an April 29, 2005 copy of the Vexatious Litigant List. Plaintiff does not clearly explain why he wants the Court to take judicial notice of these documents. However, it appears to the Court that some of these documents are tangentially related to Plaintiff's third-party standing argument. Accordingly, Plaintiff's Request for Judicial Notice is GRANTED IN PART AND DENIED IN PART. The Court hereby takes judicial notice of the June 30, 1999 copy of the Vexatious Litigant List, the December 15, 2004 *Daily Journal* article, and the April 29, 2005 copy of the Vexatious Litigant List for the limited purpose of determining whether Plaintiff has third-party standing.

#### CONCLUSION

IT IS HEREBY ORDERED THAT Plaintiff's Motion for Judgment on the Pleadings [Docket No. 264] is DENIED and Defendants' Cross-Motion for Judgment on the Pleadings [Docket No. 276] is GRANTED.

IT IS FURTHER ORDERED THAT Plaintiff's Request for Judicial Notice [Docket No. 285] is GRANTED IN PART AND DENIED IN PART.

IT IS SO ORDERED.

#### JUDGMENT

In accordance with the Court's Order denying Plaintiff's Motion for Judgment on the Pleadings and granting Defendants' Cross-Motion for Judgment on the Pleadings,

IT IS HEREBY ORDERED THAT final judgment is entered in favor of Defendants on all of Plaintiff's

causes of action. All matters calendared in this action are VACATED. The Clerk shall close the file and terminate any pending matters.

IT IS SO ORDERED.

N.D.Cal.,2005.  
Wolfe v. George  
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• [4 00CV01047](#) (Docket) (Mar. 27, 2000)

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