Case No. 14-56140

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CALIFORNIA COALITION FOR FAMILIES AND CHILDREN, PBC, a Delaware public benefit corporation, COLBERN C. STUART, III

Plaintiffs-Appellants

v.

SAN DIEGO COUNTY BAR ASSOCIATION, et al.

Defendants-Appellees

Appeal From The United States District Court
For The Southern District of California
Case No. 03-cv-1944 CAB (JLB)
The Honorable Cathy Ann Bencivengo

APPELLANTS' JOINT OPENING BRIEF

Colbern C. Stuart III, J.D.
President, California Coalition for Families and Children, PBC
4891 Pacific Highway Ste. 102
San Diego, CA 92110
Telephone: 858-504-0171
Cole.Stuart@Lexevia.com

Plaintiff-Appellant In Pro Se

Dean Browning Webb, Esq.
Law Offices of Dean Browning Webb
515 E 39th St.
Vancouver, WA 98663-2240
Telephone: 503-629-2176
RICOman1968@aol.com
Counsel for Plaintiff-Appellant California Coalition for Families and Children, PBC

CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

TREATISES

CONSTITUTIONAL PROVISIONS

PUBLICATIONS

CORPORATE DISCLOSURE STATEMENT

CALIFORNIA COALITION FOR FAMILIES AND CHILDREN, PBC

Appellant California Coalition for Families and Children, PBC is a Delaware public benefit corporation with no parent corporations. No publicly held company owns 10% or more of its stock.

I. JURISDICTION

This appeal arises from an action for damages and prospective relief under the Racketeer Influenced and Corrupt Organizations Act of 1970 ("RICO"), 18 U.S.C. §§ 1961-1964; The Civil Rights Act of 1871, 42 U.S.C. § 1983, 1985, and 1986; the Lanham Act, 15 U.S.C. § 1125(a); the Declaratory Judgment Act, 28 U.S.C. § 2201; and supplemental California state law claims. Subject matter jurisdiction is pursuant to 28 U.S.C. §§ 1331 (federal question), 1337(a) (regulation of commerce), 1343(a)(3) (civil rights), 1367(a) (supplemental), and 2201 (declaratory judgment).

This Court has jurisdiction over the July 9, 2014 Judgment in a Civil Case (ER 4) as a final decision of a district court. 28 U.S.C. § 1291; *Bradshaw v. Zoological Soc. of San Diego*, 662 F.2d 1301, 1304 (9th Cir. 1981). This Court also has jurisdiction over interlocutory orders preceding final judgment, including the December 23, 2013 order dismissing the original complaint with leave to amend (ER 41) (*Lacey v. Maricopa Cnty.*, 693 F.3d 896, 928 (9th Cir. 2012)), the July 9, 2014 denial of Appellants' Motion for Preliminary Injunction (ER 11), and the September 16, 2013 order denying leave to file a witness harassment restraining order (ER 67) pursuant to 28 U.S.C. § 1292(a). *Privitera v. California Bd. of Med. Quality Assur.*, 926 F.2d 890, 892 (9th Cir. 1991).

Appellants timely filed a Notice of Appeal on July 14, 2014. ER 1.

II. ISSUES PRESENTED

1. Can a district court dismiss a complaint with prejudice *sua sponte* for failure to comply with Rule 8(a)(2), without analyzing grounds for dismissal under Rule 12 or 41(b)? If so, did Appellants' First Amended Complaint violate Rule 8(a)(2) if it contained cognizable claims, but also "verbiage, argument, and rhetoric"?

2. Can a district court dismiss a non-State entity asserting the affirmative defense of Eleventh Amendment immunity without receiving facts determinative of the entity's relationship with the State?

3. Does this Court's decision in *Ashelman v. Pope* extend absolute judicial immunity to family court judicial officers "in their judicial capacity as officers of the court, running the family court system"? Is *Ashelman's* "extension" of *Stump v. Sparkman* and "pro-immunity" policy an illegal incursion into congressional authority under Article I, sec. 1, cl. 2 of the United States Constitution?

4. Was Appellant Stuart entitled to leave to seek a witness harassment restraining order to prevent defendants from threatening witnesses with illegal arrest?

5. Did the district court's admonishment of California Coalition's local counsel while he was attempting to enter an appearance, unfounded threats of Rule 11 sanctions, and courtroom hostility deprive Appellants of an impartial tribunal?

6. Should "counter-sanctions" under Rule 11 be awarded to Appellants after Appellee San Diego County Superior Court brought, and lost, *two* motions for Rule 11 sanctions, and *lost every issue* in the *two* underlying motions to dismiss on which the *two* Rule 11 motions were based?

III. THE CASE

Appellant California Coalition for Families and Children, PBC is a public benefit corporation supporting the interests of families and children in domestic disputes and child custody. Colbern Stuart is California Coalition's President.[1] California Coalition sues its competitors—public and private legal and social service providers—including the San Diego County Bar Association and divorce lawyers affiliated with its family law subsection, San Diego County Superior Court, Family Division judicial officers and administrators, divorce industry "forensic psychologists," and others who comprise and support the California divorce industry or, as they call themselves, the "Family Law Community." ER 121.

California Coalition alleges these divorce industry professionals, acting in conspiracy and enterprise, engaged in a pattern of racketeering activity under color of law, consisting of fraud, extortion, and violence, including assaulting Stuart at a 2010 meeting of San Diego divorce lawyers which California Coalition was attending to develop its business and advance reform. California Coalition alleges public and private entity defendants have coordinated their substantial power and wealth to stifle and retaliate for California Coalition's competition and free speech in order to protect their commercial markets and illegal enterprises. The action seeks legal and equitable remedies under RICO, the Civil Rights Act, the Lanham Act, and the Declaratory Judgment Act for past and ongoing damage and deprivation to California Coalition and its association members, and Stuart's business and person.

The action is present on appeal after the district court dismissed Appellants' First Amended Complaint ("FAC") with prejudice for a failure to comply with Rule 8(a)(2).

[1] "California Coalition" shall refer to both appellants except when Stuart is referenced separately.

IV. FACTS

This action arises from an extended series of conflicts between California Coalition and the San Diego "Family Law Community" in the course of California Coalition's business development and reform activity, including: (1) An April, 2010 confrontation between California Coalition and defendants San Diego County Bar Association ("SDCBA") and its security staff, San Diego County Superior Court, Family Division judges, family law "forensic psychologists," San Diego County Sheriff's deputies, and divorce attorneys, occurring at a meeting of the San Diego County "Family Law Community" at SDCBA's meeting facility (the "Stuart Assault," ER 137); (2) SDCBA's subsequent collaboration with the San Diego City Attorney's Office to persecute Stuart for misdemeanors relating to his protected speech, business development, and reform activity (the "Malicious Prosecution," ER 177); (3) a pattern of fraud and extortion of San Diego families by "Family Law Community" forensic psychologist Dr. Stephen Doyne ("Doyne Terrorism," ER 265); (4) obstruction of justice by Defendant Commission on Judicial Performance of California Coalition's attempts to redress these and other claims with state and federal authorities ("Commission Obstruction of Justice," ER 331); (5) San Diego Superior Court's general counsel Kristine Nesthus's coordination of police to threaten criminal prosecution of California Coalition's members and witnesses after this action was filed, ("Nesthus Obstruction of Justice," ER 208), and (6) the concerted and successful effort to disbar Stuart, an intellectual property litigator licensed for 15 years in all state and federal courts in California, Nevada, and Arizona, because of his commercial activities, activism, and related representations ("Malicious Prosecution Within State Bar," ER 192-193, 198-199).

A. Original Complaint

This action was filed in August, 2013, three months after Stuart was released from fifteen months of illegal imprisonment in county jail because of his representation, participation, and advancement of the interests of parents and

children. FAC Count 3 (ER 178-207). The original Complaint alleged about 36 claims against about 50 defendants under complex racketeering and civil rights conspiracy statutes supported by substantial factual detail. Doc. No. 1.

California Coalition anticipated the filing would provoke defendants to escalate their pattern of harassment of California Coalition, and filed the Complaint as a verified pleading to enable it to serve as an evidentiary foundation in support of an immediate motion for a witness harassment restraining order consistent with 18 U.S.C. § 1514(b). ER 358. The district court denied Stuart's motion, instead sealing the Complaint. ER 67-69. California Coalition's fears were accurate—even after sealing, defendants continued to threaten Appellants' witnesses, process servers, and counsel. See FAC Count 4, "Nesthus Obstruction of Justice" (ER 208); Doc. Nos. 114, 129 (**sealed** oppositions to local counsel Mr. Eric Ching's motions to withdraw), 115 (letter to district judge from fearful California Coalition witness).

B. Superior Court and Commission Motions To Dismiss

Upon service, two groups of defendants moved to dismiss: The San Diego County Superior Court and its employees (Doc. No. 16) and the Commission on Judicial Performance and its employees (Doc. No. 22). Because the Complaint was drafted by Stuart in *pro se* during his illegal imprisonment and three months after his release—while expiration of limitations periods were approaching[2]—Stuart acknowledged the sensibility of amending, and attempted to negotiate stipulations to withdraw motions to dismiss. See October 28, 2013 Meet and Confer letter ("M&C"), Doc. No. 21-1, Ex. "A." Superior Court defendants refused, instead filing a motion for Rule 11 sanctions. Doc. No. 21-1, Ex. "B"; Doc. No. 23. Other defendants—all who so requested—received extensions of time to respond. Doc.

[2] All Defendants assert statutes of limitation defenses. Doc. No.131.

Nos. 40, 47, 64, 75, 84. Remaining defendants failed to seek stipulation, instead filing voluminous motions. Doc. Nos. 48, 49, 50, 51, 52, 53, 54, 62, 65, 67, 73, 74.[3]

Forced to oppose, Stuart argued (1) Superior Court defendants brought the wrong Rule 12 motion to dismiss rather than clarify, (2) the Complaint gave adequate notice under Rule 8, yet could be amended to cure alleged defects, and (3) no defendant could establish immunity on the face of the Complaint.[4] Doc. No. 57.

C. December 19 and 23 Orders

At hearing on December 19, 2013 the district court dismissed the entire Complaint. ER 60. The court dismissed California Coalition's claims because counsel Dean Webb was not yet admitted *pro hac vice*.[5] With California Coalition dismissed, the court reasoned the entire Complaint must be rewritten to "disentangle" Stuart's claims from California Coalition's claims. ER 55.

The court dismissed all civil rights claims *with* prejudice as barred by a two year statute of limitations, stating "there's no way to fix that." ER 57. Stuart reminded the court of tolling and estoppel issues raised in the briefing, and the court revised its ruling, instructing: "if you think you can make a legitimate, nonfrivolous argument . . . try it." ER 61-62. The court's written order instructed to "set forth specific allegations in his amended complaint to support" tolling and estoppel. ER 48.

The court instructed Stuart to amend to clarify the civil rights claims by pleading "plausible facts"[6] against each defendant: "[I]dentify the factual allegations

---

[3] These motions were later "deemed withdrawn." ER 16.

[4] Superior Court and Commission defendants moved on sixteen other grounds irrelevant here.

[5] Mr. Webb was admitted three weeks later in January, 2014 (Doc. No. 94).

[6] Appellants understood the court's multiple references to "plausible facts" (ER 60, 65) to mean "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

that support each alleged violation." ER 46. The court granted leave to amend "with the following exceptions" (*i.e.*, dismissals *with* prejudice) for Superior Court defendants having judicial immunity, and the Commission on Judicial Performance and is employees in "official capacity" having Eleventh Amendment immunity. ER 48. Though at hearing the court identified many claims it believed barred by immunity (ER 59), the written order did not identify any claim falling into these categories.

The December 23 written order instructed to add detail on amendment: (1) "Heed the statute of limitations" for Title 42 claims, (2) "To the extent Stuart contends that equitable tolling should apply, he must set forth specific allegations in his amended complaint to support such a theory" and (3) "appropriately and coherently identif[y] causes of action and the specific defendants he alleges liable for his asserted damages without unnecessary verbiage, argument, and rhetoric." ER 48-49. The court did not identify pleadings consisting of "unnecessary verbiage, argument, and rhetoric."

The court threatened sanctions if Stuart did not drop judicial defendants and plead more detail to in anticipation of immunity affirmative defenses: "I'm denying their motion for sanctions, but if you come back and give me this laundry list of defendants again and do not give me justifiable reasons as to why they should be defendants in this case and don't take in consideration their rights to judicial immunity and just name them to harass them, I will consider sanctions against you sir." ER 59-60. The court instructed that the amended complaint "better damn well not be more than 30 pages long, sir." ER 61.

The court denied the San Diego County Superior Court's motion for sanctions and Stuart's claim for counter-sanctions, and "deemed withdrawn" ten other pending motions to dismiss. ER 16, 45, 49.

D. First Amended Complaint

On January 9, 2014 Appellants filed a First Amended Complaint ("FAC") in seven sections including Section III. Background: ER 121-135 (14 pages); Section IV. Common Allegations: ER 135-143 (8 pages); Section V. Charging Allegations: Civil Rights (supporting 11 civil rights and 11 racketeering Counts): ER 143-283 (140 pages, or about 6 pages/count); Lanham Act: ER 284-292 (8 pages); Section VI. Racketeering: ER 292-349 (Racketeering Counts 1-11, 57 pages, 5 pages/count); Section VII. Prospective Relief Counts 1 and 2: ER 349-355 (6 pages).

The FAC contained the following revisions to comply with the court's instructions:

1. Reduction Amendments

To reduce "unnecessary verbiage, argument, and rhetoric" Appellants deleted a table of cases defining "Family Federal Rights" (Complaint, Doc. No. 1 "Compl." ¶76), details of California Coalition's business and reform (Compl. ¶¶78-80), footnotes citing legal authority (Compl. pp.173-175), reduced the Section 1514(b) allegations (¶¶386-391), and streamlined style.

2. Expanding Amendments

The district court's remaining instructions required protraction of pleadings. The court instructed to separate claims by defendant and theory, *add* "non frivolous argument," (ER 62) particularize "just how many separate state and federal claims," and "to connect his factual allegations to the numerous causes of action identified." ER 46, 55.

The FAC complies by dissecting original Counts into distinct claims against individual or common groups of defendants, adding facts relating to the specific claim. For example Count 1 alleges one Section 1983 claim per defendant based on the Stuart Assault (Claim 1.1 "Off Duty Officers", Claim 1.2 "Sheriffs' Deputies", etc.). Count 2 breaks down state claims by theory alleged against the "Stuart Assault

Coordinator" group of defendants on the same facts as Count 1. This dissection compelled expanding Counts 1 and 2 by 35 pages.

To comply with instruction to identify "violations" of rights, the FAC describes each state and federal constitutional right (ER 144-146), details the substantive due process "violations" in Count 12 (ER 279), and trespass under color of law "violations" in Count 13 (ER 282), adding ten pages.

Other counts are broken down by theory or central defendant: FAC Count 6 (supervisory theory claims, ER 232) expanded to thirteen pages, Count 7 (municipal theory claims, ER 245) to seven pages, Count 9 (42 U.S.C. § 1985 claims, ER 254) to ten pages, and Count 11 ("Doyne Terrorism", ER 265) to fourteen pages. Each claim incorporates general allegations and adds fact subsets organized around the subject of the claim—a defendant or group of defendants (e.g., Count 1), or cognizable theory (e.g., Count 5).

3. Standardized Pleading of "Short, Plain" Claims

The court instructed to clarify "who was suing who for what." ER 61. The FAC complies by adding a short introductory caption and first paragraph to every claim, identifying the statute asserted, party asserting, and defendants to each claim. *See e.g*. FAC ¶¶153, 168, etc. The body of each claim incorporates earlier passages tagged with acronyms to avoid repetition, requiring minimal additional facts specific to the defendant/s or theory of the claim. *See, e.g*, FAC Claim 3.1 (ER 201) incorporating "PROSECUTORIAL MISCONDUCT, FALSE IMPRISONMENTS, and MALICIOUS PROSECUTION." Each claim concludes with a list of rights or privileges violated and a short paragraph reciting *verbatim* the language of the statute asserted. *See, e.g*., FAC Claim 1.2, ¶175 (ER 147). A similar standardized "short, plain" statement is contained in every claim. This is the core "statement" required by Rule 8(a)(2).

The claims could be further particularized, and certain defendants moving *for the first time* in the Omnibus so insisted. See Doc. Nos. 131, 137, 149-2, 150, 152, and California Coalition's Opposition to Omnibus, Doc. No. 161, pp. 107-121, 147-150, 152-169. Because the court admonished harshly against length, Appellants refrained from sub-dividing certain civil rights counts to maximum particularity, pleading only to the statutory language of Section 1983, 1985, and 1986. See Count 10 (ER 264). This level of particularity tracks the language of Sections 1983, this Court's Model Jury Instruction 9.2, and the form[7] provided by the Southern District for Civil Rights Act cases—incontrovertibly satisfying Rule 8(a)(2).

Appellants repeatedly expressed a willingness to further particularize counts, but a reluctance to increase length. See Sec. VI.B.5 *infra*. Further particularity, if desirable, may be accomplished through Rule 12, ordinary case management, or discovery. *Id*.

4. Anticipatory Pleading

a. Judicial Immunity

The court initially dismissed judicial defendants with prejudice as immune for the "the way the family court operates," but offered Appellants could amend to "state a cause of action that clearly outlines to the court they acted in a capacity that wasn't their judicial capacity." ER 59. The FAC complies by adding facts establishing judicial officers acted in the absence of jurisdiction, or performed non-judicial acts. FAC ¶¶294-296, 493, 651, 706, 731, 738, 899, etc. The FAC necessarily pleads facts describing judicial functions which are immune from civil rights liability, but relevant to RICO criminality, tolling and estoppel, and prospective relief—none of which are subject to immunity. See *Pulliam v. Allen,* 466 U.S. 522 (1984); *United States v. Angelilli*, 660 F.2d 23, 30–35 (2d Cir.1981); *Vierria v. California Highway*

[7] Motion to Take Judicial Notice ("MTJN") Ex 7.

Patrol, 644 F.Supp.2d 1219 (2009). To highlight claims *not* based on immune acts, the FAC bolds "**non-immune.**" See FAC ¶¶350, 478, etc.

b. Eleventh Amendment

Commission Defendants attacked accusing insufficient detail supporting *ultra vires* (non-immune) allegations. Doc. No. 22-1. The FAC responds by extracting Commission Defendants from original Counts 1 and 2, and placing them into their own Count 5, adding detail supporting six distinct legal theories (Claims 5.1-5.6) compelling addition of about 13 pages. ER 217-231.

c. Plausibility, Particularity

In addition to the court's admonition to plead "plausible facts" (ER 46), defendants which filed and served motions "deemed withdrawn" asserted many plausibility and particularity attacks under *Twombly* and Rule 9(b). See Doc. Nos. 48, 49, 50, 51, 52, 53, 54, 62, 67, 73. In response California Coalition added detail throughout the FAC and broke fraud and false advertising counts into distinct claims directed at each defendant, adding about twenty pages. See Count 11—"Doyne Terrorism" (ER 265-278), Count 15—False Advertising (ER 284), and Racketeering Count 1—Mail Fraud (ER 316).

d. Statute of Limitations

To counter the court's disposition to dismiss civil rights claims as barred by a two-year statute (ER 57) and comply with command to add "nonfrivilous argument" (ER 62), California Coalition added new Counts 3 and 4 and "nonfrivilous argument" throughout the FAC to support a "continuing conspiracy," delaying accrual. *See, e.g.,* FAC ¶¶466, 830, 1018, 1026, 1110, 1113 ("undue influence," "duress," "fraudulent concealment," "obstruct, deter, and impede," and "thwart" allegations).

Counts 3 and 4 are detailed to "argue" the continuing conspiracy between the "Stuart Assault Coordinators" and the City Attorney's Office in a retaliatory

prosecution for "harassing judges" (Count 3, ER 177), the several "False Imprisonments" (ER 183-198), and the post-filing "Nesthus Obstruction of Justice" (Count 4, ER 208), extending accrual dates into September, 2013. The counts plead "plausible facts" to satisfy *Twombly*.

5. Supplemental Malicious Prosecution and Obstruction of Justice Counts 3 and 4

Because the "continuing conspiracy" facts also support supplemental claims against the conspiring entities causing obstruction and duress, the FAC adds new parties (City Attorney Defendants and Nesthus Defendants) and claims (3.1-3.6 and 4.1-4.5) on the facts as permitted under Rules 18(a), 20(a)(2)(A) and (B).

The FAC adds a supplemental Count 4 totaling nine pages—The "Nesthus Obstruction of Justice"—based on events occurring after the August 20, 2013 complaint's filing. The Count alleges these facts as a continuation of the pattern of harassment alleged in the Complaint, delaying accrual. As above, the civil rights claims in Counts 3 and 4 are expressly limited to "**non-immune**" acts. FAC ¶ 350, etc. The same facts also support predicate crime and enterprise allegations under racketeering counts 1-15 to which immunity is not a defense. The supplemental claims and parties are properly joined under Fed.R. Civ.P. 20(a)(2). Counts 3 and 4 add about 40 pages.

6. Amendments Not Made

The district court instructed the FAC "better damn well not be more than 30 pages long, sir" (ER 61). California Coalition could not comply with this instruction because the court's other instructions required lengthening pleadings. Further, Mr. Webb achieved admission *pro hac vice* in January with the filing of the FAC, curing California Coalition's representation issue, and alleviating the need to "disentangle" (ER 55) individual and corporate claims. The court acknowledged "now that there's counsel, that in and of itself is appropriate." ER 24.

E. Omnibus Motion to Dismiss

Defendants coordinated vigorous attack in a single "Omnibus Motion to Dismiss" (Doc. No. 131), eighteen separate "joinder" motions, and fifteen replies, totaling around 250 pages of attack on dozens of issues. Doc. Nos. 134-152, 162-181, 183-188. See ER 106-07 for list of issues. Appellants jointly opposed. Doc. Nos. 161, 163, 164, 166, 183. Defendants Administrative Office of the Courts and San Diego County Superior Court filed a *second* motion for Rule 11 sanctions. Doc. No. 160.

F. Dismissal With Prejudice

The court took the matter off hearing calendar and on July 9, 2014 dismissed with prejudice on a single ground not noticed in the Omnibus—failure to comply with Rule 8(a)(2). ER 4. The short order indicates the court found *none* of defendants' noticed grounds persuasive (ER 10). The court instead undertook independent analysis under Rule 8(a)(2) *only*, dismissing with prejudice on the following three grounds: The FAC (1) "is even longer than the original and remains unmanageable, argumentative, confusing, and frequently incomprehensible" (ER 10), (2) contains claims "so implausible as to be offensive" (ER 8), and (3) contains "unique acronyms, defined terms, and terms with no discernable meaning." ER 8.

The Omnibus was the first round attacking the complaint for all defendants except the Commission and Superior Court defendants.[8] Yet the court refused California Coalition's multiple requests for leave to amend, reasoning "Due to plaintiffs' inability—or unwillingness—to file a complaint that complies with Rule

[8] Stuart granted original extensions to respond on condition that defendants treat the FAC as an original complaint. *See, e.g.*, Doc. No. 40. Stipulating defendants—including lead Omnibus drafter SDCBA—reneged this promise in the Omnibus. See Doc. No. 131-1 (unfaithful references to "repeated," "prior amendment," and "pattern of violation.")

8, the court finds that granting further leave to amend would unduly prejudice defendants." ER 11; Sec. VI.B.5, *infra*.

The court denied Appellants' pending Motion for Preliminary Injunction (Doc. No. 109), denied Superior Court and AOC's motion for Rule 11 sanctions, and declined to cite California Coalition for contempt for filing the FAC. ER 11-12.

V. SUMMARY OF ARGUMENT

The Honorable Gladys Kessler, Senior Judge, United States District Court for the District of Columbia, in the preface to her 1,683-page Final Opinion in the fifteen-year-long *United States v. Philip Morris* tobacco industry RICO litigation determining that tobacco product producers, scientific research firms, public relations firms, and their outside lawyers engaged in a fifty-year-long racketeering enterprise to conceal the lethal effects of smoking wrote:

> Courts must decide every case that walks in the courthouse door, even when it presents the kind of jurisprudential, public policy, evidentiary, and case management problems inherent in this litigation.

Regarding the "role of lawyers in this fifty year fraud scheme," Judge Kessler concluded:

> What a sad and disquieting chapter in the history of an honorable and often courageous profession.

United States v. Philip Morris, 449 F.Supp. 2d 1, 29 (2006).

The $50 billion annual divorce industry is a ravenous parasite on California families and children. It has leveraged its enormous wealth to achieve a monopoly on domestic dispute resolution, captured related public and private legal institutions, perverted their legal function to the industry's advantage, and entrenched the marketplace to exclude competitors such as California Coalition offering legal, efficient, and far healthier alternatives to the divorce industry's debaucherous sham.

To engage the obscene ill-gotten wealth and power of this orgiastic public-private enterprise, California Coalition marshals racketeering and civil rights conspiracy laws which notoriously require complex pleading, and pose unusual case

management challenges in the district court. The complaints at issue are lengthy and detailed—*as they must be*. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

The district court dismissed the FAC *sua sponte* on insufficient grounds not noticed in the Omnibus; defendants failed to mount *even a single* persuasive attack in their mountains of paper. The district court construed Rule 8(a)(2) contrary to the unambiguous language of the rule, criticizing length, "argument," "verbosity" supportive detail, and multi-theory claims—none of which may be prohibited by law.

The dismissal follows improvident grant of Superior Court's initial Rule 12(b)(6) motion, which attacked length, complexity, and "clarification" issues not enabled through Rule 12(b)(6). Rather than deny the motion on Superior Court's unwise *insistence* on dismissal with prejudice, the court dismissed with leave to amend, instructing California Coalition to plead "plausible facts" and "nonfrivolous argument," imposed illegal restrictions on pleading, and repeatedly threatened Rule 11 sanctions—*at a first hearing*. California Coalition complied pleading "plausible facts," "nonfrivilous argument," and particularizing as instructed, unavoidably protracting pleadings.

Both complaints satisfy the sole purpose of Rule 8—to provide notice of the legal theories and facts asserted. The court and defendants cannot deny they had notice—they mounted *hundreds* of pages of pointed attack in both pleading rounds.

The district court applied a startling scope of judicial immunity to claims against defendants "in their judicial capacity as officers of the court, running the family court system." (ER 38), citing *Ashelman v. Pope,* 793 F.2d 1072, 1075 (9th Cir. 1986). ER 53. *Ashelman's* scope of immunity is starkly inconsistent with *decades* of controlling Supreme Court authority repeatedly admonishing that the "freewheeling" policy analysis contained in *Ashelaman* is error. *See, e.g.*, *Rehberg v. Paulk*, 132 S.Ct. 1497 (2012). Moreover, on *any* construction of judicial

immunity, the affirmative defense cannot be derived from the face of the FAC which pleads around immunities and "admits" no defense.

The district court granted the Commission on Judicial Performance Eleventh Amendment immunity without analyzing the Commission's relationship with the State of California, improperly relying on a single district court decision, *Ricotta v. California*, 4 F. Supp. 2d 961 (S.D. Cal. 1998), that did not adjudicate the critical issue.

The court repeatedly backed its courtroom colloquy with vivid threats of Rule 11 sanctions, including improperly threatening California Coalition's local counsel with sanctions as he was attempting to appear in the case. This threat so startled local counsel that he immediately withdrew his engagement, depriving California Coalition of highly-competent representation.

The district court erroneously denied California Coalition's two motions for preliminary injunction without hearing or analysis, including (1) a motion for preliminary injunction regarding domestic violence restraining orders, and (2) a motion for preliminary injunction to protect Appellants' witnesses from obstruction of justice by the San Diego County Superior Court's general counsel, Kristine Nesthus, who directed San Diego County Sheriff's Department and state Highway Patrol detectives to threaten California Coalition's members, process servers, and counsel.

Finally, in light of California Coalition's defeat of San Diego Superior Court's *two* "cut-n-paste" Rule 11 motions based on the exact grounds of their *two* unsuccessful motions to dismiss, the district court's denial of counter-sanctions to California Coalition was error.

VI. ARGUMENT

A. Standards of Review

Compliance with Rule 8 is "essentially a question of law." *In re Dominguez*, 51 F.3d 1502, 1508 (9th Cir. 1995). Review of a district court's interpretation of a statute is *de novo*. *United States v. McFall*, 558 F.3d 951, 956 (9th Cir. 2009). Review of an involuntary dismissal under Rule 41(b) is for abuse of discretion, but to dismiss for a failure to comply with Rule 8, a court "must necessarily consider the legal question of whether the district court correctly dismissed without prejudice the original complaint on Rule 8 grounds." *Hearns v. San Bernardino Police Dep't*, 530 F.3d 1124, 1129 (9th Cir. 2008). "A district court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996); *Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.*, 654 F.3d 989, 994 (9th Cir. 2011). A dismissal for failure to state a claim is reviewed *de novo*. *Abagnin v. AMVAC Chemical Corp.*, 545 F.3d 733, 737 (9th Cir. 2008). Exercise of discretion in denying leave to amend is reviewed "strictly." *Klamath-Lake Pharm. v. Klamath Med. Serv. Bureau*, 701 F.2d 1276, 1292 (9th Cir.).

Eleventh Amendment immunity is reviewed *de novo*. *Doe v. Lawrence Livermore Nat'l Lab.*, 131 F.3d 836, 838 (9th Cir. 1997). Judicial immunity is a question of law reviewed *de novo*. *Miller v. Davis*, 521 F.3d 1142, 1145 (9th Cir. 2008). Review of a refusal to grant preliminary injunction is for abuse of discretion. *Wright v. Rushen*, 642 F.2d 1129, 1132 (9th Cir. 1981). Review of a refusal to grant Rule 11 sanctions is for abuse of discretion. *Retail Flooring Dealers of Am., Inc. v. Beaulieu of Am., LLC*, 339 F.3d 1146, 1150 (9th Cir. 2003).

B. The District Court's July Dismissal with Prejudice Was Error

1. A District Court Cannot Dismiss *Sua Sponte* with Prejudice For Curable Rule 8 Issues

Though the Omnibus sought dismissal with prejudice as a sanction under Rule 41(b), the district court bypassed Omnibus analysis, instead analyzing and dismissing under Rule 8(a)(2) alone. ER 10-11. The court rejected the noticed grounds in the Omnibus after California Coalition moved to strike (ER 70-104) that analysis because it was based on an evidentiary declaration of Stephen Lucas, lead counsel on the Omnibus (Doc. Nos. 131-1, 7-13; 161, 47; 162; 164. Mr. Lucas proffered *percipient* testimony and *expert opinion* in support of a pleading motion, offering to testify that because he and his "attorney staff" could not "understand" the FAC, it violated Rule 8(a)(2). Doc. No. 131-2, p. 2:6-9; ER 70-104.

California Coalition was entitled to cross examine Mr. Lucas to obtain admissions refuting his opinion, and filed an emergency motion for leave to take early discovery and call him to testify at hearing. Doc. No. 164. The court denied the motion, finding a lack of good cause, but conceded it would ignore "material inappropriate at this stage for consideration." ER 14. California Coalition thereafter filed objections identifying "inappropriate" material as most of the Lucas declaration and entire Rule 41(b) analysis of the Omnibus, and moved to strike the same. Doc. Nos. 166, 166-1. The court declined to rule on California Coalition's motion, but the July order nowhere references Omnibus analysis, indicating the court simply ignored it. ER 10.

With the Omnibus decapitated, the court embarked on analysis under Rule 8(a)(2) alone, inserting issues not raised by the Omnibus. ER 8-9; Sec. IV.F, *supra*. In dismissing on new issues and only under Rule 8(a)(2), the court failed to provide notice and opportunity. See *Zinermon v. Burch*, 494 U.S. 113, 126 (1990). Due process requires notice of a court's intent to dismiss an action, the grounds on which

the court intends to dismiss, and opportunity to oppose the dismissal.[9] *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 465-68 (2000); *Lee v. City of Los Angeles*, 250 F.3d 668 (9th Cir. 2001).

Further, dismissal under Rule 8(a)(2) alone—without analyzing under an enabling rule such as 41(b)—is error. Rule 8(a)(2) not self-enabling—it is a *standard* for pleading a claim. See *FNB Bank v. Park Nat. Corp., CIV.A.* 13-0064-WS-C, 2013 WL 1748796 (S.D. Ala. Apr. 23, 2013); Wright § Miller, 5 *Federal Practice & Procedure* § 1203 "Relationship Between Rule 8 and Other Federal Rules" (3d ed.). A district court may dismiss a case with prejudice only on the same grounds as parties are authorized to move. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 49 (1991); *Oliva v. Sullivan*, 958 F.2d 272 (9th Cir. 1992). Because a party cannot move under Rule 8 alone, the district court's dismissal under Rule 8 alone is error.

Finally, any *sua sponte* dismissal with prejudice is error unless "the plaintiffs cannot possibly win relief." *Wong v. Bell*, 642 F.2d 359, 361-362 (9th Cir.1981). The court made no finding that California Coalition "cannot possibly win relief," and could never reach such conclusion because the court attacked pleading formalities curable by amendment. See § VI.B.6, *infra*.

2. Rule 41(b) Sanction Would Be Error

Should this Court overlook the due process deprivation to analyze dismissal as a sanction, it will find insufficient basis. A court dismissing under Rule 41(b) must make specific findings that "plaintiff fails to comply with these rules or a court order" and regarding "the public's interest in expeditious resolution of litigation; the court's need to manage its docket; the risk of prejudice to the defendants; the public policy favoring disposition of cases on their merits; and the availability of less drastic sanctions." *Thompson v. Housing Auth. of Los Angeles*, 782 F.2d 829, 831

[9] At hearing the district judge acknowledged *sua sponte* dismissal would be inappropriate. ER 27.

(9th Cir. 1986). ER 100-121. Terminating sanctions are proper only "where at least four [of the five] factors support dismissal." *Hernandez v. City of El Monte*, 138 F.3d 393, 399 (9th Cir. 1998).

California Coalition established below that (1) the FAC complied with Rule 8 and all relevant orders, (2) defendants suffer no prejudice by having to read the complaint, (3) public policy favors adjudication of the merits of this dispute, which is directed to remedy fraudulent and extortionate practices of public officials and legal services to California families state-wide, and (4) less "harsh" alternatives such as targeted particularization amendments (MTJN Ex. 3) are available and appropriate at this early stage. ER 100-121. The court's July order (ER 6) ignored this analysis, failing to "make explicit findings concerning each factor" necessary to dismiss with prejudice. *Yourish v. Calif. Amplif.*, 191 F.3d 983 (9th Cir.1999). Ignoring appellant's authority and argument was error; due process guarantees opportunity to be *heard*, not *ignored*. *Zinermon v. Burch*, 494 U.S. 113, 126 (1990).

a. The District Court Construed Rule 8(a)(2) Contrary to the Unambiguous Rule and Rules 8(d) and (e)

The district court construed Rule 8(a)(2) to render restrictions it does not give; prohibitions against "prolixity," argument, length, and "manageability." It lifted concepts from dicta in pre-*Twombly* decisions of this Court analyzing complaints so disorganized they presented not even a single claim, concluding the FAC was defective because it *contained* "verbiage, argument, and rhetoric" (ER 49), "prolix, replete with redundancy," "verbose," (ER 10, 52), and "surplusage and argumentative text" (ER 11, 47). The court ignored Appellants' analysis of cases distinguishing length and prolixity from intelligibility, and that such defects may be cured by amendment. Doc. No. 161, p. 44-46. *See, e.g.*, *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 623 (9th Cir. 1988); *Westways World Travel v. AMR Corp.*, 182 F. Supp.2d 952, 957 (C.D. Calif. 2001).

The district court's construction is inconsistent with the unambiguous face of the Rule. "We give the Federal Rules of Civil Procedure their plain meaning. . . . When we find the terms ... unambiguous, judicial inquiry is complete," *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 123 (1989); *In re Ioane*, 227 B.R. 181, 183 (B.A.P. 9th Cir. 1998). Rule 8(a)(2) unambiguously requires merely that a pleading *contain* "a short, plain statement of the claim." It is a threshold, not a ceiling; *it prohibits nothing.* Extra-textual restrictions are also inconsistent with the "liberal notice pleading of Rule 8(a)" and Rules 8(d) ("No technical form is required.") and (e) ("Pleadings must be construed to do justice") which together "reject the approach that pleading is a game of skill . . . and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Swierkiewicz* at 514 (2002); *see also Hearns v. San Bernardino Police Dep't,* 530 F.3d 1124, 1132 (9th Cir. 2008).

Rule 8 is not a stringent threshold. It does not require a claim to plead a *prima facia* case, recite elements, track a jury instruction, or be persuasive. *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 514 (2002); *Thomas v. Kaven*, 765 F.3d 1183, 1197 (10th Cir. 2014). Claims may be pled in combination, in the alternative, and on inconsistent theories; "the pleading is sufficient if any one of them is sufficient." Rule 8(d)(2). "[I]n the context of a multiparty, multiclaim complaint each claim should be stated as succinctly and plainly as possible even though the entire pleading may prove to be long and complicated by virtue of the number of parties and claims." Wright & Miller, 5 *Federal Practice & Procedure,* § 1217 (3rd ed.). Rule 8 is a lower threshold than even the State of California's liberal Code of Civil Procedure, which evaluates complaints *as a whole*, and requires complaints to be "certain." Cal.C. Civ.P. § 430.10(f).

The district court's construction of Rule 8(a)(2) contrary to its unambiguous face and other Rules was error.

b. The District Court's Expansion of Rule 8 Violates the Rules Enabling Act and the United States Constitution

The district court's expansive construction of Rule 8 also deprives California Coalition's fundamental rights of due process, petition, and expression. A district court—by rule, policy, or command—is restrained as any government from restricting rights of speech, petition, due process, and jury trial. *Hanna v. Plumer*, 380 U.S. 460, 464-65 (1965). The Rules Enabling Act *commands*: "Such rules shall not abridge, enlarge or modify any substantive right." 28 U.S.C.A. § 2072(b). A district judge's authority is similarly restricted. "All said about the rules of a district "court" must of course apply a fortiori to the rules of an individual judge." 1988 Commentary to 28 U.S.C.A. § 2071 (West).

"Substantive rights" include petition, expression, due process, and jury trial. *United States v. Wunsch*, 84 F.3d 1110, 1119 (9th Cir.1996). "The right of access to the courts . . . is founded in the Due Process Clause." *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974). Access is also a privilege under Article IV of the United States Constitution. *Chambers v. Baltimore & O. R.R.*, 207 U.S. 142, 148 (1907) (". . . one of the highest and most essential privileges of citizenship."). The right to seek redress is guaranteed by the First Amendment. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972).

A complaint is the first of many petitioning events in litigation. *Kearney v. Foley & Lardner, LLP*, 590 F.3d 638, 648 (9th Cir. 2009). A complaint *against* government is the quintessential "petition." *White v. Lee*, 227 F.3d 1214, 1227 (9th Cir. 2000). Even "chilling" petition is illegal. *Id*. at 1224. A complaint is a legitimate vehicle for alerting law enforcement, policymakers, interested third parties, and the public to lawlessness of public officials. *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 606 (1976). Where prosecutors and judges are accused of criminal behavior the public interest in petition and expression is at its apex. *Morrison v. Olson*, 487 U.S. 654, 727-728 (1988). "It is as much [a citizen's] duty

to criticize as it is the official's duty to administer." *New York Times Co. v. Sullivan*, 376 U.S. 254, 282-83 (1964). A complaint is a legitimate method of identification of illegal behavior under settled law, but also to "clearly establish" what *should* be illegal. *See, e.g., Neitzke v. Williams*, 490 U.S. 319, 328 (1989) ("Close questions of federal law . . . have on a number of occasions arisen on motions to dismiss."). Litigation is a unique forum for truth-seeking; "those involved in judicial proceedings should be 'given every encouragement to make a full disclosure of all pertinent information within their knowledge.'" *Briscoe v. LaHue*, 460 U.S. 325, 335 (1983).

Restrictions to protect adjudicative process must survive high scrutiny. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1074 (1991); *Burlington N. R.R. v. Woods*, 480 U.S. 1 (1987); *Bus. Guides, Inc. v. Chromatic Commc'ns Enterprises, Inc.*, 498 U.S. 533, 558 (1991). Even disruptive advocacy is protected. *Standing Comm. on Discipline of U.S. Dist. Court for Cent. Dist. of California v. Yagman*, 55 F.3d 1430, 1436-37 (9th Cir. 1995).

A complaint enables due process functions throughout the litigation such as defining the nature and scope of discovery, narrowing issues, discovering a defendant's knowledge of facts, position, and admissions under Rules 8(b) and (c). It frames Rule 12(c) or 56 motions, and sets foundation for relevance and issues at trial and on appeal. Here, Stuart filed the original Complaint as a verified pleading and evidentiary foundation for an immediate Rule 65 motion for a Section 1514(b) witness harassment restraining order. ER 358. Burdening the *content of testimony* is rarely legal. *Lane v. Franks*, 134 S. Ct. 2369, 2379 (2014).

The district court's construction imposed impermissibly vague and overbroad restrictions against "verbiage," "rhetoric," "argument," and "manageable." *Wunsch* at 1119. A pleader's error in comprehending such concepts risks pain of dismissal with prejudice—a deprivation of a Fifth Amendment right to remedy and due

process, Seventh Amendment right to jury trial—Rule 11 sanctions—a deprivation of property—and in the district court's contemplation even a citation for *contempt*—a deprivation of liberty. ER 12.

c. Defendants and The District Court Demonstrate They Understood Most Claims, Satisfying Rule 8

Rule 8's sole function is to give notice, and is satisfied if defendants demonstrate ability to defend. See *Morgan v. Kobrin Sec., Inc.,* 649 F. Supp. 1023, 1027 (N.D. Ill. 1986) ("Given Kobrin's well-briefed Rule 12(b)(6) motion, it is clear he is fully apprised of the charges against him."). Defendants' mountains of motions and the district court's own admissions at hearings demonstrate the FAC "contains" many claims complying with Rule 8. The district judge even asserted *defenses* to claims, *dismissing some claims outright*: See ER:

- 42, 44 "plaintiffs assert approximately 36 causes of action";
- 46 "plaintiffs assert about 75 'claims' in their first 15 counts";
- 57 "you have a claim against Mr. Doyne";
- 57 "those causes of action are barred as to every defendant;
- 24-25 "blending of causes of action within claims";
- 58 "the causes of action that arise out of the April 15, 2010 incident";
- 27 "There are certainly 1983 claims against entities that you can't have a 1983 claim against.";
- 8 "well over fifty defendants (including judges, attorneys, doctors, social workers, and law-enforcement officers) of conspiring to commit racketeering activity . . .";

Defendants too recognized claims sufficient to mount *hundreds* of pages of attack specifically identifying *dozens* claims (Doc. Nos. 131-153, 167-181, 184-187). Any assertion of complete incomprehensibility cannot co-exist with such behavior, demonstrating receipt of notice sufficient to satisfy Rule 8.

*d. Post-*Twombly *Pleading Under Rule 8(a)(2) Requires Detail*

The district court's reliance on *McHenry*, *Nevijel*, and *Schmitd* (ER 10, 47) is further error as these cases are diminished after *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). Judge Posner recently observed:

> Since a plaintiff must now show plausibility, complaints are likely to be longer—and legitimately so—than before *Twombly* and *Iqbal*. . . . [A] complaint may be long not because the draftsman is incompetent or is seeking to obfuscate . . . but because it contains a large number of distinct charges.

Kadamovas v. Stevens, 706 F.3d 843, 844-45 (7th Cir. 2013).[10]

The district court cited a single post-*Twombly* case—*Cafasso, United States ex rel. v. Gen. Dynamics C4 Sys., Inc*., 637 F.3d 1047 (9th Cir. 2011). ER 11, 47. *Cafasso's* dispositive issue was not Rule 8, but whether breach of contract was cognizable as a "false claim" under 31 U.S.C. § 3729. *Id*. at 1054-59; MTJN Ex. 5. After three amendments and two years of "acrimonious discovery," plaintiff admitted she could allege only breach of contract—not False Claims Act fraud. The district court found plaintiff abandoned her "claim" (Rule 8) as to a "false claim" (Section 3279) and dismissed with leave. Plaintiff responded with a wildly-disorganized 733 page third amended complaint that still failed to assert fraud, whereupon the district court dismissed. This Court affirmed finding the complaint stated *not a single claim* in 733 disorganized pages. *Id*. at 1057-60.

---

[10] *See also, Mendiondo v. Centinela Hosp. Med. Ctr*., 521 F.3d 1097, 1104 (9th Cir. 2008); *Anthony v. Chosen One Props*., No. CIV. 2:09-2272 WBS KMJ, 2009 WL 4282027, at *7 (E.D. Cal. Nov. 25, 2009); *Elan Microelectronics Corp. v. Apple, Inc*., No. C 09-01531 RS, 2009 WL 2972374, at *2 (N.D. Cal. September 14, 2009); *Johnson v. Van Boening*, 2009 WL 1765768 (W.D. Wash. June 18, 2009); *Wiggins v. Cosmopolitan Casino of Las Vegas*, 2:11-CV-01815-ECR, 2012 WL 3561979 (D. Nev. Aug. 15, 2012); *BBL, Inc. v. City of Angola*, 2013 WL 2383659 (N.D. Ind. May 29, 2013) ("Prolixity is a bane of the legal profession but a poor ground for rejecting potentially meritorious claims.").

Cafasso's bizarre facts are not present: The FAC is a first pleading to most defendants, necessarily lengthy to assert plausible conspiracies involving many defendants, and logically organized into counts and claims broken down by defendants and theories as *specifically directed* by the district court. Sec. IV.C. *supra*. Even if not a "model of clarity," the FAC is not "incomprehensible"; the district court's characterization of the FAC as only "frequently incomprehensible" (ER 10) is contested, but a concession sufficient to reverse. The district court's heavy reliance on pre-*Twombly* authority and *Cafasso* was error.

e. Acronyms and Defined Terms Do Not Foul Rule 8

"[U]nique acronyms, defined terms, and terms with no discernable meaning" (ER 8) are common during complex pleading. MTJN Exs. 1-4. The district court cited *United States ex rel. Garst v. Lockheed-Martin Corp.*, 328 F.3d 374 (7th Cir. 2003) which criticized acronyms only in dicta, focusing instead on *four* failed attempts to plead a single claim. *Id*. at 377, 379 ("A concise statement of the claim illustrated by 400 concrete examples of fraud would be one thing…").

f. Peonage Predicates Are Properly Pled

The district court—alone—found "offensive" the FAC's assertion of peonage RICO predicates and allegations against Jahr and Levin. ER 7-8. Both attacks were asserted improperly *sua sponte*. See Sec. VI.B.1 *supra*. If given notice and opportunity, California Coalition would reference *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 479 (1985) and *United States v. Philip Morris*, 566 F.3d 1095, 1106 (D.C. Cir. 2009) which recognize non-accusing predicates establish "continuity," "pattern," "enterprise," and conspiracy, and "Defendants' participation in the enterprise." *Id*. The peonage predicates follow this practice—they do not "accuse well over fifty defendants (including judges, attorneys, doctors, social workers, and law-enforcement) of conspiring to commit" the predicates. ER 8. No defendant attacked the peonage predicates because no defendant was directly accused.

The court's *sua sponte* attack that Jahr and Levin are mentioned in a few paragraphs (ER 7) is accurate but no foul. RICO enables plaintiffs to plead a sweeping dragnet against any entity associated organized crime, including "operators" such as Mr. Jahr, and "participants" such as Ms. Levin. *See, e.g.*, *Salinas v. United States*, 522 U.S. 52 (1997); *Pinkerton v. United States*, 328 U.S. 640 (1946); *Smith v. Berg*, 247 F.3d 532 (3rd Cir. 2001); *United States v. Fernandez*, 388 F.3d 1199 (9th Cir. 2004).

These *sua sponte* attacks are improper plausibility challenges which must be analyzed under the multi-stage analysis established in *Ashcroft v. Iqbal*, 556 U.S. 662, 664 (2009) and *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 970 (9th Cir. 2009).[11]

g. Defendants Proved No Prejudice

To achieve dismissal as a sanction defendants must show prejudice. *Thompson*, *supra*. Prejudice is "serious impairment of investigation or defense." *Couch On Ins.*, § 193:50 (3rd ed. 2014). The district court found prejudice because (1) defendants must read the complex complaint, and (2) "plaintiffs' noncompliance harms litigants in other matters pending before the court." ER 10-11, 61. The district court asserted *it* was prejudiced because "federal judges have better things to do." ER 11.

These assertions are not "prejudice." Defendants' evidence of "prejudice" was Mr. Lucas' proposed expert testimony, which the district court should have stricken. See ER 70-104; Doc. No. 164. The "burden" of reading a complex complaint can *never* be a "serious impairment" to parties and counsel as skilled as those present. The court's concern for "harm" to litigants in other cases is not

[11] California Coalition would defend plausibility by referencing California's practice of indefinitely imprisoning support debtors by contempt under *Moss v. Superior Court (Ortiz),* 17 Cal. 4th 396, 401 (1998) as unconstitutional, making family support enforcement an act of peonage under title 18 U.S.C. § 1581 *et. seq*.

"prejudice" in this case—the only parties who may assert prejudice here are parties to this action. Moreover, "balancing" between litigants in other cases is inappropriate as *each* is entitled to a district court's attention as a matter of *right*. *Los Angeles Cnty. Bar Ass'n v. Eu*, 979 F.2d 697, 701 (9th Cir. 1992) (delays in civil proceeding a due process violation); *Satterlee v. Kritzman*, 626 F.2d 682, 683 (9th Cir. 1980) (delayed *habeas*). The honesty of a legal and social services directed to unsophisticated families and children in the crisis of a domestic dispute is *at least* as important as any other matter on the district court's busy docket. Challenging though this case will be, the district court must equally manage "every case that walks in the courthouse door." *Philip Morris* at 29.

h. Legitimate "Manageability" Concerns Are Not Grounds for Dismissal

"Manageability" is not relevant to Rule 8. "Rule 8(a)(2) speaks of a short and plain statement of each claim, not a short and plain pleading." Wright and Miller, "Statement of the Claim—"Short and Plain", 5 *Federal Practice and Procedure*, § 1217 (3d ed.). Including the present case, "RICO cases may be pesky but courts should not erect artificial barriers—metaphysical or otherwise—as means of keeping RICO cases of the federal dockets." *Allwaste, Inc. v. Hecht*, 65 F.3d 1523, 1529 (9th Cir. 1995); *Westways World Travel v. AMR Corp.*, 182 F. Supp. 2d 952, 957 (C.D. Cal. 2001) (it is "burdensome" for a district court to "prune" a complaint containing a cognizable claim at the pleading stage.).

The district court abused discretion in failing to consider "less harsh" means to resolve issues. *Thompson,* 782 F.2d at 831. "District judges could do more to require that complaints be cut down to size." *Kadamovas* at 846 (7th Cir. 2013). Less harsh remedies include Rule 12(e) or (f) (*Kennedy v. Full Tilt Poker*, 2010 WL 1710006 (C.D. Cal. Apr. 26, 2010)), a RICO case statement (MTJN Ex. 6), or a "particularized statement" (MTJN Ex. 3). The court's acronym concerns (ER 10) are resolved by a "definition sheet" such as the *two* the court prepared. ER 8, n. 3;

ER 42, n. 2. This district judge maintains a chambers rule—not imposed here (See M&C)—requiring conference before dispositive motions. See "Civil Case Procedures for Hon. Cathy Ann Bencivengo," "Ex Parte Motions" and "Noticed Motions" item E.[12]

Leave to amend is particularly appropriate because Stuart pleads *in pro se*. *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 623-24 (9th Cir. 1988). The district court recognized Stuart's experience in intellectual property litigation (ER 31-33), but overlooked that Stuart drafted the complaint inside San Diego County jails. FAC ¶453; Doc. Nos. 114, 129, 155-1 (**sealed**).

The district court's manageability concerns are real, yet dismissal with prejudice was error.

i. California Coalition Requested to Amend

The district court's conclusion that California Coalition was "unwilling" to amend (ER 4, 11) ignores repeated expressions of willingness and ability to amend. See Doc Nos. 21-1 (M&C); 161 pp. 15:7-11; 18:2-6; 21:14-16, 22:13-15, 71:27-28, 82:27-28, 97:4-5, 111:5-7, 127:22-23, 131:22-23, 134:25-135:1, 158:10, and 164:4-6. The court's impression of "unwillingness" (ER 11) follows California Coalition's contention that the FAC complies with Rule 8, which California Coalition makes as a matter of *right*. California Coalition has always been willing to comply with law.

3. Conclusion: Length and Content of FAC Comply with All Rules and Valid Orders and Are Relevant to Defeat Attack

The specificity pled under court order (ER 64-65) and to refute attacks by defendants accusing implausibility (section IV.C.6-7, *supra*) was apparently effective—the July *sua sponte* dismissal indicates the court was unpersuaded by *any*

[12] Available at https://www.casd.uscourts.gov/Rules/Lists/Rules/Attachments/50/Bencivengo%20Chambers%20Rules%20for%20Civil%20Cases.pdf.

defendants' attack. What the court characterized as "surplussage" was not—given notice and opportunity California Coalition could identify how the detail was supportive under *Twombly*. Whether verbose, argumentative, or otherwise, the FAC was responsive to court order and highly effective at repelling vigorous attack.

C. The Superior Court's Initial Rule 12(b)(6) Motion Asserted Clarification Issues Not Enabling Dismissal

The errors in dismissing the FAC were precipitated by improvident grant of Superior Court's initial 12(b)(6) motion. Rule 12(b)(6) is appropriate where a complaint lacks a cognizable legal theory or pleads "insufficient facts under a cognizable legal claim." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). Rule 12(b)(6) is not exacting; "a complaint need not pin plaintiff's claim for relief to a precise legal theory." *Skinner v. Switzer*, 131 S. Ct. 1289, 1296 (2011). "A complaint should not be dismissed if it states a claim under any theory, even if the plaintiff erroneously relies on a different legal theory. . ." *Westways World Travel v. AMR Corp.*, 182 F. Supp.2d 952 (C.D. Calif. 2001). Even "disjointed" claims are tolerable. *Loubser v. Thacker*, 440 F.3d 439, 443 (7th Cir. 2006).

The district court granted dismissal without a showing of either 12(b)(6) threshold, instead diverting to the erroneous "prolixity" analysis detailed in Sec. VI.B.2, *supra*. The Complaint averred numerous cognizable theories and abundant facts in support. Doc. No. 57. Defendants' first wave of attacks list *dozens* of cognizable claims. See Doc. Nos. 16, 22, 23, 48, 49, 50, 51, 52, 53, 54, 62, 67, 73. Though contested, even if the complaint "fails to clearly identify each separate claim for relief" (ER 51) and was "confusing, redundant, conclusory," (ER 52), the findings were insufficient to grant a Rule 12(b)(6) motion.

The district court's adoption of Superior Court's conflation of Rule 12(b)(6) and less harsh Rules effectively lowered the threshold for the December dismissal, catapulting the Omnibus to assert a "failure" to comply with the improvident order, precipitating the July dismissal. Insisting on dismissal rather than clarification,

defendants brought the wrong initial motion, and the court's dismissal—even with leave—was error.

D. Defendants Did Not Prove Factual Foundations for Judicial or Eleventh Amendment Immunity

A party asserting an affirmative defense must "affirmatively state" the defense. Fed.R. Civ.P. 8(c)(1). A party may bring a Rule 12(b)(6) motion based on an affirmative defense in unusual circumstances—where the face of the Complaint "admits" the defense. *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980). The defense must be apparent from the complaint "with certitude. *Gray v. Evercore Restructuring L.L.C.*, 544 F3d 320, 324 (1st Cir. 2008).

Analyzed below, the original complaint "admitted" no immunity, and neither motion made an "affirmative" showing.

1. Commission Defendants Failed to Establish Sovereignty

An entity asserting statehood must show a judgment against it will bind the State, and that a money judgment would be drawn from the State's treasury. *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 52 (1994); *Shaw v. State of California Dept. of Alcoholic Beverage Control*, 788 F.2d 600, 603 (9th Cir.1986); *Greater Los Angeles Council on Deafness, Inc. v. Zolin*, 812 F.2d 1103 (9th Cir. 1987). Sovereignty analysis is factual. *Zolin* at 1110 ("We must look behind the pleadings . . ."). Defendants bear the burden of proof. *ITSI T.V. Prods., Inc. v. Agric. Associations*, 3 F.3d 1289, 1291 (9th Cir. 1993); *Wolfe v. Strankman*, 392 F.3d 358, 364 (9th Cir. 2004).

a. The Commission Advanced No Proof of a Relationship with the State

Commission defendants merely cited cases which did not perform the factual analysis. Doc. No. 22-1, pp.3-6. The district court adopted one such case: *Ricotta v. California*, 4 F. Supp. 2d 961, 976 (S.D. Cal. 1998), and a state immunity under Article VI, § 18(h) of the California Constitution.

Ricotta did not analyze under *Shaw* or *Pennhurst* because the *Ricotta* plaintiff *conceded* he "erroneously sued the state . . . ." and the complaint "admitted" it sought relief drawing from state funds. *Ricotta* at 976. *Ricotta* cannot preclude litigation of facts here because issues conceded by Mr. Ricotta have no preclusive effect absent parity here, which the Commission cannot assert. See *White v. City of Pasadena*, 671 F.3d 918, 926-27 (9th Cir. 2012).

On the relevant analysis, the Complaint did not "admit" the Commission as a State "with certitude," but asserted the opposite—as an "entity" "beneath state-level" Compl. ¶¶ 18, 172. Such *factual* allegations are presumed true. *Ashcroft v. Iqbal,* 556 U.S. 662, 664 (2009). Moreover, the Commission could never establish itself as a sovereign. California Coalition detailed below that the Commission is *mandated* to govern itself and its budget independently from the State. Doc. No. 57. It is so independent it has been described as "a bureaucracy out of control." See *Recorder v. Comm'n on Judicial Performance*, 72 Cal. App. 4th 258, 263 (1999). Commission members are not employees of the State or Commission, but private lawyers, citizens, and county judges. Cal.Const. Art. 6 § 8(a).

Both the Supreme Court and this Court have counseled caution in extending immunity to non-state entities exercising a "slice of state power." *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U. S. 391, 400-401 (1979); *Alden v. Maine*, 527 U.S. 706, 713 (1999); *N. Ins. Co. of New York v. Chatham Cnty., Ga*., 547 U.S. 189, 194 (2006); *Del Campo v. Kennedy*, 517 F.3d 1070, 1075 (9th Cir. 2008). The December, 2013 order extending Eleventh Amendment immunity without factual analysis of the Commission's relationship with the State of California was error.

b. California Constitutional Immunity Does Not Protect the Commission; Employees are Not Immune For Ultra Vires Acts

California Constitution Article VI, § 18(h) protects only Commission employees—not the Commission—for acts undertaken "in the course of their official duties." Further, the California Constitution cannot immunize a state actor against federal law claims. *Kimes v. Stone*, 84 F.3d 1121, 1126 (9th Cir. 1996). California Coalition established below that the Complaint pled criminal frolics and deprivation of state and federal rights against Battson and Simi which could *never* be pursuant to "official duties." Doc. No. 57, pp. 11-13, 26-28, 31; Cal. Const. art. I § 26; *Vierria v. California Highway Patrol*, 644 F. Supp. 2d 1219, 1240 (E.D. Cal. 2009). The district court's extension of immunity to the Commission and its employees in "official capacity" (ER 48) was inconsistent with the "course of official duties" scope, and error.

2. The District Court Extended Judicial Immunity under *Ashelman v. Pope* Contrary to Controlling Supreme Court Authority

The district court granted Superior Court officials immunity under *Ashelman v. Pope,* 793 F.2d 1072 (9th Cir. 1986) for "judicial acts within the jurisdiction of their courts." ER 48. The order did not identify any claim within that scope, but warned Stuart to "be wary of the immunities in pleading" the FAC (ER 48) and that if Stuart "didn't take into consideration their rights to judicial immunity" the court would consider sanctions. ER 59-60.

The Supreme Court has repeatedly emphasized that an official claiming an affirmative defense of immunity bears the burden to prove that 1871 common law immunized the function accused. *See, e.g.*, *Malley v. Briggs*, 475 U.S. 335, 339-340 (1986) ("Our initial inquiry is whether an official claiming immunity under § 1983 can point to a common-law counterpart to the privilege he asserts."); *Burns v. Reed*, 500 U.S. 478, 498 (1991) ("Where we have found that a tradition of absolute immunity did not exist as of 1871, we have refused to grant such immunity under §

1983."). The Court "has for that reason been quite sparing in recognizing absolute immunity for state actors." *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993).

a. Defendants Failed to Proffer, and the District Court Failed to Conduct, an Historical Analysis of Function at Common Law

The "function" analysis considers *only* historical fact. *Malley* at 342 ("We emphasize that our role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice, and that we are guided in interpreting Congress' intent by the common-law tradition."); *Tower v. Glover*, 467 U.S. 914, 920 (1984) ("Section 1983 immunities are 'predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law . . . .'"); *Jensen v. Lane Cnty.*, 222 F.3d 570, 577 (9th Cir. 2000) (no "firmly-rooted tradition" of immunity for psychiatrist employed by prison).

The Supreme Court undertook this historical analysis most recently in *Rehberg v. Paulk*, 132 S.Ct. 1497, 1503-07 (2012). Similar historical analyses are apparent in *Monroe v. Pape*, 365 U.S. 167, 172-85 (1961); *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 703 (1978); *Pierson v. Ray*, 386 U.S. 547, 559-62 (1967) (Douglas, J., dissenting); *Owen v. City of Independence, Mo.*, 445 U.S. 622, 642 (1980); *Hoffman v. Harris*, 511 U.S. 1060 (1994) (Thomas, J., dissenting); and *Kalina v. Fletcher*, 522 U.S. 118, 132 (1997) (Scalia, J., concurring). Granting an immunity absent historical analysis is error. *Scheuer v. Rhodes*, 416 U.S. 232, 249-50 (1974) ("These cases, in their present posture, present no occasion for a definitive exploration of the scope of immunity . . . .").

Superior Court Defendants proffered, and the district court undertook, no historical analysis of the functions accused in the complaint—merely citing *Ashelman's* broad holding. Doc. No. 16-1, 19; ER 48. This fails to "affirmatively state" the defense that was exclusively their burden. Fed.R. Civ.P. 8(c); *Butler v.*

Elle, 281 F.3d 1014, 1021 (9th Cir. 2002). The district court's extending immunity on this record was error.

b. Ashelman *Stands In Error Under Controlling Supreme Court Authority*

The district court's reliance on *Ashelman* was error because *Ashelman* stands in error. *Ashelman* held: "Judges and those performing judge-like functions are absolutely immune from damage liability for acts performed in their official capacities" and "[a]s long as the judge's ultimate acts are judicial actions taken within the court's subject matter jurisdiction, immunity applies." *Ashelman* at 1075, 1078. *Ashelman* reached this holding on analysis originating in the Fifth Circuit, which invented a "four factor" test, and a "pro-immunity" policy that the four factors "are to be construed generously in favor of the judge and in light of the policies underlying judicial immunity . . . to ensure independent and disinterested judicial and prosecutorial decisionmaking." *Id*. at 1076 (citing *McAlester v. Brown*, 469 F.2d 1280 (5th Cir.1972); *Adams v. McIlhany*, 764 F.2d 294 (5th Cir. 1985); and *Dykes v. Hosemann*, 776 F.2d 942 (11th Cir. 1985)). Since *Stump v. Sparkman*, 435 U.S. 349 (1978), *McAlester's* analysis—and every case adopting it—is error.

In *McAlester* the Fifth Circuit extended immunity to a judge for jailing the father of a prisoner who brought clothing for his son to the judge's chambers. *McAlester* at 1281. After release Mr. Brown sued Judge McAlester under Section 1983. *Id*. The Fifth Circuit analyzed *Bradley v. Fisher*, 80 U.S. 335 (1871), *Pierson v. Ray,* 386 U.S. 547 (1967), and Texas law[13] empowering contempt citations, "discerning" a "four part" immunity test: "(1) the precise act complained of, use of the contempt power, is a normal judicial function; (2) the events involved occurred in the judge's chambers; (3) the controversy centered around a case then pending

[13] *Taylor v. Goodrich*, 25 Tex. Civ. App. 109, 110 (1897) did not analyze common law, but a Texas contempt statute.

before the judge; and (4) the confrontation arose directly and immediately out of a visit to the judge in his official capacity." *McAlester* at 1282. Applying its new test, the Fifth Circuit determined the contempt citation was authorized by statute, occurred in chambers, related to a pending case, and therefore immune. *Id*. at 1283.

Six years later Justice White in *Sparkman* considered *McAlester's* four factor test as well as "the relevant cases" from other circuits, including this Court's decision in *Gregory v. Thompson,* 500 F.2d 59 (9th Cir. 1974). *Sparkman* at 361. He "cast aside"[14] *McAlester's* four factors,[15] distilling a "cogent two-part test"[16] to determine whether an accused act is "judicial in nature": (1) "the nature of the act itself, i.e., whether it is a function normally performed by a judge," and (2) "the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity." *Id*. at 362.

Sparkman thus "cast aside considerable debris"[17] including *McAlester's* "precise act" factor, and *McAlester's* focus on *location* of the act being in "chambers" relating to a "pending case," or during a "visit" to a judge. *Id*. In rejecting *McAlester's* test Justice White favorably cited this Court's decision in *Gregory,* which held that physically evicting a litigant *from chambers* is not "of a judicial nature." *Sparkman* at 370, n. 10. He also analyzed *Lynch v. Johnson*, 420 F.2d 818 (6th Cir. 1970), holding that a county judge "forcibly removing" plaintiff from "fiscal court" was not immune. *Id*. at 820. Clearly Justice White cited *Gregory* and *Lynch* to *refute McAlester's* emphasis on "precise act", and to emphasize that

---

[14] *Harper v. Merckle*, 638 F.2d 848, 857 (5th Cir. 1981) (judge conducting contempt proceedings against family support debtor pursuant to irregular procedure not immune).

[15] "Among the factors relied on…" *Sparkman* at 361.

[16] *Harper* at 857.

[17] *Id*.

even if a judge acts "in chambers," or relating to a "confrontation" or "pending" case, the "precise act" may not be "judicial in nature." After *Sparkman*, *McAlester's* four-factor "discernment" from *Bradley* and *Pierson* was a dead end.

Seven years after *Sparkman,* the Fifth Circuit in *Adams* refused to recognize *Sparkman* as controlling authority—resurrecting and *expanding McAlester's* four-factor test. *Adams* at 297.[18] As if the Supreme Court were a sister circuit, the Fifth Circuit cited *Sparkman*, then turned its back on it. *Id*. ("The four factors generally relied upon *by this circuit* . . . .") (emphasis added). *Adams* proceeded to analyze under *McAlester* rather than *Sparkman*, erroneously relying on the "official capacity" and "precise act" "debris" "cast aside" by Justice White. *Adams* at 197.

Adams also proselytized a *wildly* "freewheeling" pro-immunity "policy," citing to *McAlester*, *Bradley,* and *Pierson*. See *McAlester* at 1282-83. These cases support *nothing close* to a "pro-immunity" policy. Indeed the Supreme Court has consistently observed the *opposite* policy: "This Court has . . . been quite sparing in recognizing absolute immunity for state actors." *Buckley* at 269. See also *Forrester v. White*, 484 U.S. 219, 224 (1988); *Burns v. Reed*, 500 U.S. 478, 491 (1991); *Kalina v. Fletcher*, 522 U.S. 118, 132 (1997).[19]

---

[18] *Adams* and *Dykes* cite the denial of certiorari in *Harper* (*Merckle v. Harper*, 454 U.S. 816 (1981)), as indicia of vitality of *McAlester's* "four part" test. This deduction is error. Though *Harper* cites *McAlester* and *Sparkman* as "two guiding lights", *Harper* reached result on *Sparkman's* (controlling) "two-factor" authority. *Harper's result* was thus correct, but by means of faulty analysis that resurrected *McAlester's* test to equal to *Sparkman's*, making denial of certiorari on *result* proper. See *Sec. & Exch. Comm'n v. Chenery Corp*., 318 U.S. 80, 88 (1943). *Dykes* misread *Harper* as "focused" *only* on *McAlester's* test, thereby (improperly) perpetuating *McAlester* at *Sparkmans'* expense. *Dykes*, 776 F.2d 942, 946 (11th Cir. 1985). *McAlester's* "light" guides only error.

[19] *Dykes* dissenting Judge Hatchett expressed outrage his majority's adoption of the Fifth Circuit's immunity "policy": "As the majority concedes, no precedent, Supreme Court or otherwise, requires such a broad definition and application of the judicial immunity doctrine. [N]o policy considerations justify such a result . . ."

Adams conducted no analysis of common law to determine if the contempt function was immune in 1871, examining only Judge Mcllhany's statutory jurisdiction, concluding it was authorized by statute, and therefore immune. *Adams* at 295-97. This analysis is inconsistent with *Sparkman*, which considers statutory authorization relevant to the second jurisdictional factor, but insufficient to determine the first "judicial act" factor. *Sparkman* at 362.

The Fifth, Ninth, and Eleventh Circuits' failure to align with *Sparkman* is the cascade of error[20] condemned by the Supreme Court in *Rehberg* and *decades* of prior controlling authority. *See, e.g., Malley* (decided March 5, 1986, four months before *Ashelman*), *Tower* (1984), *Owen* (1980), *Sparkman* (1978), *Imbler* (1976), and *Pierson* (1967), *supra*.

c. Ashelman's *"Expansion" of Immunity is an Illegal Incursion into Congressional Authority*

This Court in *Ashelman* conceded it was "expand[ing]" the scope of immunity in *Sparkman,* apparently failing to recognize that no United States *court* can "expand" *Sparkman*. *Ashelman* at 1075. *Pierson* and *Sparkman's* controversial[21]

Dykes at 954.

[20] *Dykes* at 945 (immunity to protect from "apprehension of personal consequence."); *Adams v. McIlhany*, 764 F.2d 294 (5th Cir. 1985); *Holloway v. Walker*, 765 F.2d 517, 522 (5th Cir. 1985) ("freewheeling" policy to immunize judge conspiring to plunder a corporation); and *Lerwill v. Joslin*, 712 F.2d 435 (10th Cir. 1983). *Ashelman* at 1075-77. *Lerwill* was diminished by this Court in *Fletcher v. Kalina* because it "predates *Malley*, *Burns* and *Buckley*." *Fletcher v. Kalina*, 93 F.3d 653, 656, n. 3 (9th Cir. 1996). *Ashelman* relied on *Richardson v. Koshiba*, 693 F.2d 911, 913 (9th Cir.1982), which invented a "balancing" test "of the need to protect the rights of citizens by providing a damage remedy for constitutional violations with the need to protect officials in the vigorous exercise of their discretionary authority." *Richardson* at 915. *Richardson* relied on *Sellars v. Procunier*, 641 F.2d 1295, 1298 (9th Cir. 1981) stating "[i]t is no longer the case, however, that immunity at common law in 1871 is the *sine qua non* for according public officials immunity under § 1983." Since *Pierson*, the correct statement of law is *exactly the opposite*.

[21] *Pierson* at 558-567 (Douglas, J. dissenting); *Scheuer v. Rhodes*, 416 U.S.

"construction" of the Civil Rights Act have been apologetically qualified as the outer perimeter of Article III judicial power. See *Pulliam v. Allen*, 466 U.S. 522, 543 (1984) ("[I]t is for Congress, not this Court, to determine to what extent to abrogate the judiciary's common-law immunity."); *Wood v. Strickland*, 420 U.S. 308, 321 (1975) ("Absent legislative guidance, we now rely on those same sources"); *Butz v. Economou*, 438 U.S. 478, 489 (1978). *Ashelman's* "expansion" of *Sparkman* illegally *legislated* a narrower version of Section 1983. "Just as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied, it cannot limit a cause of action that Congress has created . . ." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S.Ct. 1377, 1388 (2014) (internal citation omitted).

Section 1983's facial clarity and the intent of Congress to hold judges accountable is incontrovertible. *Monroe* at 172-85. *Ashelman's* disobedient "expansion" of *Sparkman* to cavort with the Fifth and Eleventh Circuits in perpetuating the indulgent analysis of *Adams* is a startling—indeed *shameful*[22]—incursion into Article I sec. 2 cl. 1 congressional authority, rightfully condemned by the Supreme Court in *Rehberg*, and for generations prior.

d. The District Court Illegally "Expanded" Ashelman *Even Further*

The district court described a startlingly broad scope of immunity for defendants acting "in their judicial capacity as officers of the court, running the family court system" ER 58-59. Though the December 23 written order is narrower,

---

232 (1974) ("[T]he legislative history indicates that there is no absolute immunity"); *Pulliam* at 540 (1984) ("every Member of Congress who spoke to the issue assumed that judges would be liable under § 1983").

[22] "[I]f it states a rule undesirable in its consequences, Congress can change it. We add only to the instability and uncertainty of the law if we revise the meaning of [the Civil Rights Act] to meet the exigencies of each case coming before us." *Monroe* at 185.

the repeated commands at hearing, backed with vivid threats of sanction, had resounding prophylactic impact upon California Coalition in drafting the FAC. Out of fear, California Coalition pruned claims and drafted the FAC expressly to exclude "**non-immune**" acts. Sec. IV.C.4, supra.

The narrower scope articulated in the written order could not have been in the district judge's mind when at hearing on February 26, 2014 the court again articulated a startling scope of immunity to include "most, if not all, of the defendants" in the FAC. ER 27. This scope would apply to allegations against judicial officials that cannot be immune under *any* construction of the doctrine, including the "Stuart Assault" (Count 1); administrative behaviors of "running the family court system" alleged in the "Doyne Terrorism" (Count 11); supervisory claims (Counts 6, 7); "take-down" notices as in the "Nesthus Obstruction of Justice" (Count 4); and all racketeering activity.

None of these functions can be immune, and the district court's utterances otherwise—backed by vitriol—were egregious errors.

3. Judicial Defendants Are Not Immune For Non-Judicial Acts "Setting in Motion" Constitutional Injury; *Ashelman's* Abrogation of *Rankin* and *Beard* Was Error

The district court's citation to *Ashelman* also jeopardized California Coalition's conspiracy allegations directed at SDCBA, divorce lawyers, judicial officers, and City Attorney prosecutors "setting in motion" constitutional injury.[23] *Ashelman* hastily reversed its panel and two prior decisions including *Rankin v. Howard*, 633 F.2d 844 (9th Cir. 1980), which held: "[A] judge's private, prior

[23] See FAC ¶¶145 (Stuart Assault Coordinators); ¶368 Count 3 (SDCBA/Federal and City Attorney Defendants); ¶495 (Groch and City Attorney Defendants); ¶509 (Nesthus and Superior Court Judges); ¶553 (Battson/Simi and Schall/Wohlfeil); ¶639 (Supervising Defendants); Counts 9, 10; ¶808 (Doyne and Wohlfeil/Schall); Count 12, ¶913 (Superior Court and Alliance); and all RICO Counts.

agreement to decide in favor of one party is not a judicial act." *Rankin* at 847. In remanding, *Rankin* instructed to receive *facts* going to "the possibility that Judge Zeller lost his immunity by participating in a conspiracy to violate Rankin's civil rights through a nonjudicial agreement." *Id.* at 850. The Supreme Court denied Judge Zellar's petition for certiorari on this Court's denial of immunity, indicating *Rankin* was—and remains in spite of *Ashelman's* abrogation—good law. *Zeller v. Rankin*, 451 U.S. 939 (1981). *Beard v. Udall,* 648 F.2d 1264 (9th Cir. 1981) dutifully followed *Rankin*: "[I]f there was a prior, private agreement . . . then Judge Greer would not enjoy immunity . . . ." *Id.* at 1270. *Ashelman's* panel faithfully applied *Beard* and *Rankin*, finding no immunity against allegations that judge and prosecutor conspired to deny Ashelman's rights. *Ashelman v. Pope*, 769 F.2d 1360, 1361 (9th Cir. 1985) reh'g granted, opinion withdrawn, 778 F.2d 539 (9th Cir. 1985) and on reh'g, 793 F.2d 1072 (9th Cir. 1986).

Assembled e*n banc*, this Court changed its mind. Yet the twenty-eight years since *Ashelman's en banc* decision have shown that *Rankin*, *Beard*, and the *Ashelman* panel were closer to correct than the *en banc* decision. *See*, *e.g*, *Johnson v. Duffy*, 588 F.2d 740, 743–44 (9th Cir.1978); *Starr v. Baca*, 652 F.3d 1202, 1218 (9th Cir. 2011); *Wallace v. Powell*, 3:09-CV-286, 2014 WL 70092 (M.D. Pa. Jan. 9, 2014); *Sanchez v. Pereira–Castillo*, 590 F.3d 31, 51 (1st Cir.2009); *Morris v. Dearborne*, 181 F.3d 657, 672 (5th Cir.1999); *Sales v. Grant*, 158 F.3d 768, 776 (4th Cir.1998); *Waddell v. Forney*, 108 F.3d 889, 894 (8th Cir.1997); *Conner v. Reinhard*, 847 F.2d 384, 396–97 (7th Cir.1988).

Most recently, in the infamous "Kids for Cash" case Judge Richard Caputo of the Middle District of Pennsylvania found juvenile court judges Mark Ciavarella and Michael Conahan "indecently, cavalierly, baselessly, and willfully" entered into extra-judicial conspiracies which "set in motion" deprivations of juvenile litigants' due process. See *Wallace v. Powell,* 2009 WL 4051974 (M.D. Pa. Nov. 20, 2009).

Judge Caputo found that while Judge Ciavarella was immune from money damages based on the thousands of deprivations occurring inside of his courtroom, he was not immune from claims he conspired to build a detention center into which he illegally sentenced juveniles, or his "placement" and probation policies "which set in motion and furthered the conspiracy that resulted in the deprivation." *Wallace v. Powell*, 2014 WL 70092, at *9-11; Doc. No. 163.

Consistent with *Rankin*, Judge Caputo found such behavior to be a *perversion* of justice—the "antithesis of the 'principled and fearless decision-making' that judicial immunity exists to protect." *Rankin* at 847. Such behavior is not entitled to immunity, but *punishment*. *Id.*; *Imbler v. Pachtman,* 424 U.S. 409, 429 (1976). Our Supreme Court has for generations been, and today remains postured in accord. See *Rehberg*, *supra* at 1507, n. 1 ("[W]e do not suggest that absolute immunity extends to all activity that a witness conducts outside of the grand jury room.").

a. Ashelman's *Retreat from* Rankin's *Denial of Immunity to Conspiracy was Error*

Ashelman retreated from defense of *Rankin* under criticism from the Fifth Circuit in *Holloway v. Walker,* 765 F.2d 517 (5th Cir. 1985). *Ashelman* at 1076-77. The criticism and retreat were errors. *Holloway* criticized *Rankin* because it saw a divergence between *Rankin* and its prior decision in *Sparks v. Duval Cnty. Ranch Co.*, 604 F.2d 976 (5th Cir. 1979). *Holloway*, 765 F.2d at 522. *Holloway* reasoned that because *Sparks* involved a claim to immunity by a judge acting in conspiracy with private parties, and was affirmed by the Supreme Court, *Rankin* must be error. *Holloway* at 522.

This Court in *Ashelman* bowed to *Holloway's* criticism of *Rankin*, yet simultaneously recognized that the "precedential value" of *Sparks* "is debatable" because the Supreme Court did not grant certiorari on the issue of immunity of the judge, but on whether private parties enjoyed a "derivative immunity" from a judge *previously determined* to be immune. *Ashelman* at 1077, n. 2. *Rankin* also analyzed

this issue, but resolved it correctly—*against* immunity for the "setting in motion" conspiracy. *Rankin* at 848, n. 9.

Ashelman and *Holloway* both erred in conflating the concepts of "malice" and "corrupt" from *Bradley*—merely *mens rea*, not yet a crime—with the inchoate crime of conspiracy, which is not merely *mens rea*, but an *independent crime* by virtue of agreement to commit a (second) crime. *United States v. Iribe*, 564 F.3d 1155, 1160 (9th Cir. 2009). *Ashelman* and *Holloway* construed *Bradley* to support their conflation of *mens rea* with inchoate crime, concluding: "Intent should play no role in the immunity analysis"—thus extending immunity not just to the simple case of "adding" an allegation of *mens rea* to an accused judicial act, but also to the *independent crime* of conspiracy "setting in motion" a deprivation.[24] *Ashelman* at 1078. Neither *Bradley* nor its ancestry[25] support this conflation—*none* make reference to a common law immunity for inchoate conspiracy. That simple observation is dispositive of this issue: Common law *did not immunize conspiracies*.

This Court in *Ashelman* was correct in doubting *Holloway's* attack on *Rankin*—but erred in resolving those doubts in favor of *Holloway*. *Rankin* and *Sparks* are not in conflict, *Bradley's* immunity does not encompass the inchoate act of conspiracy, and *Ashelman's* retreat from *Rankin* was error.

The district court's utterances reading *Ashelman* as immunizing independent parties, judicial defendants, or prosecutors in conspiracy "setting in motion" deprivation was error.

---

[24] *Mireless v. Waco*, 502 U.S. 9, 14 (1991) (Stevens, J., dissenting) demonstrates a similar distinction ("petitioner issued two commands…").

[25] *Randall v. Brigham*, 74 U.S. 523 (1868) and cases cited therein.

b. Ashelman's *"Ultimate Act" Factor Was Rejected in* Sparkman

Ashelman's "ultimate act" factor originated through *McAlester's* "discernment" of the four factor test—there described as "precise act"—later rejected in *Sparkman*. Sec. VI.D.2, *supra*. Justice White in *Sparkman* rejected "precise act" for good reason—it cannot be derived from *Pierson*, which expressly limited its finding of immunity for Judge Spencer to the judicial act *proven* by the plaintiff "Freedom Riders" at trial: The core judicial function "to adjudge petitioners guilty when their cases came before his court." *Pierson* at 554. The Supreme Court was not presented with a "setting in motion" or conspiracy issue because at trial the plaintiff "Freedom Riders" did not *prove* a conspiracy:

> We find no difficulty in agreeing with the Court of Appeals that Judge Spencer is immune from liability for damages for his role in these convictions. The record is barren of any proof or specific allegation that Judge Spencer played any role in these arrests and convictions other than to adjudge petitioners guilty when their cases came before his court.[8]

Footnote 8 limits the holding to *exclude* conspiracy:

> Petitioners attempted to suggest a 'conspiracy' between Judge Spencer and the police officers by questioning him about his reasons for finding petitioners guilty in these cases and by showing that he had found other 'Freedom Riders' guilty under similar circumstances in previous cases. The *proof* of conspiracy never went beyond this suggestion . . . .

Pierson at 554 (emphasis added). The question excluded was whether Judge Spencer would have been immune against *proof* that he conspired with Jackson police to harass the "sit in" civil rights activists travelling through Mississippi in the 1960s to protest southern segregation. If the Freedom Riders would have presented more than a "suggestion" (*Id.*) of a conspiracy, plainly Chief Justice Warren believed

that separate analysis of the conspiracy was appropriate. *Id*. That statement of law is as good today as it was in 1967 and 1872, or for that matter, 1791 and 1776.

In addition, in rejecting the "precise act" element of *McAlester's* "four-part" test, Justice White in *Sparkman* noted that Ms. Sparkman's conspiracy allegations were not presented because the district court had decided (probably incorrectly) that the conspiring defendants were not "state actors," and neither party contested that holding. *Id*. at 364, n. 13.

Finally, unlike *Rankin* and *Harper*, which withstood petition for certiorari, neither *Ashelman, Holloway*, nor *Adams* have survived review.

4. Family Law Judges Will Not Identify an Immunity at Common Law

Judicial official defendants from divorce tribunals did not, and will not identify a common law analog to any modern divorce court function because at 1871 common law, *no civil judicial tribunal could exercise jurisdiction over divorce.* "It is elementary that in the early history of jurisprudence in England the common law courts exercised no jurisdiction over divorce cases, jurisdiction in such matters resting entirely with the ecclesiastical courts of the realm." *Peterson v. Peterson*, 24 Haw. 239, 246 (1918). Post-revolutionary American States radically severed divorce and custody from civil courts by mandate of the church/state wall. U.S. Const. Amend. 1; *McGowan v. State of Md*., 366 U.S. 420, 443 (1961). *Every* function relating to divorce was relinquished to the church side of the wall. *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 227 (1963) ("the church . . . and church law usually governs such matters as baptism, marriage, divorce and separation, at least for its members and sometimes for the entire body politic."). Civil courts did not—and *could not*—determine "grounds" for divorce because the issue required inquiry into religious ideology. *Watson v. Jones*, 80 U.S. 679, 703 (1871); *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575, 1576-77 (1st Cir.

1989) ("civil courts cannot adjudicate disputes turning on . . . religious doctrine . . .").

Until about 1897, the civil "process" of divorce was limited to property division—performed by state legislatures in a "rubber stamp" process similar to passing a bill into law. G. Howard, *A History of Matrimonial Institutions* 77 (1904). California's "Family Courts" are a creation of the 1970s. L. Friedman, *Rights of Passage: Divorce Law in Historical Perspective* 63 OR. L. REV. 649, 667 (1984). The psychologist-as-judge "custody evaluator" function was unknown to a divorce courtroom until the mid-1990s "as the supply of psychologists continued to increase and stricter third-party payer regimens were imposed for mental health treatment (Gould, 2006)." Robert F. Kelly, Sarah H. Ramsey, *Child Custody Evaluations: The Need for Systems-Level Outcome Assessments*, 47 FAM. CT. REV. 286, 291 (2009).

On the church side of the wall, religious tribunals enjoyed no sovereign immunity for divorce ritual because unlike the church/state entity in England, American churches are *purely voluntary* associations. *Jones v. Wolf*, 443 U.S. 595 (1979). The "immunity" of a religious association is derived from the members' rights of association and exercise. *Paul v. Watchtower Bible & Tract Soc. of New York, Inc.*, 819 F.2d 875, 883 (9th Cir. 1987). Church tribunals have always remained liable for *civil* wrongs as if they were private associations. *Id*.

The twentieth century expansion of sovereignty into territory previously the sphere of the church cannot annex First Amendment liberties; a civil court is a sovereign, prohibited to acquire or possess a "right" of expression or exercise. The First and Fourteenth Amendments restrain "only such action as may fairly be said to be that of the States." *United States v. Morrison*, 529 U.S. 598, 621 (2000). "[T]he censorial power is in the people over the Government, and not in the Government over the people." *New York Times Co. v. Sullivan*, 376 U.S. 254, 282-83 (1964).

California could no more immunize divorce tribunals from civil rights abuse than it could deputize a priest to perform an exorcism. Whatever "immunity" churches enjoyed, it was derivative of liberty—not sovereignty—a non-transferable currency upon family court's twentieth century annex of church function.

5. Modern Family Court Jurisdiction is Inferior; *If* It Has Immunity It is *Extremely* Narrow

The district court's December 23 order describes family courts as having limited jurisdiction, ascribing a narrow scope of immunity to acts "within the jurisdiction of their courts," citing *Ashelman*. ER 48. Yet *Ashelamn* is wildly more ambitious than this proposition. The district court instead appears to be acknowledging *Bradley*: "[W]ith reference to judges of limited and inferior authority it had been held that they were protected only when they acted within their jurisdiction." *Bradley* at 352.

Dubious in any incarnation, family "jurisdiction" is incontrovertibly "inferior" because it is specific: "a proceeding for dissolution of marriage, for nullity of marriage, or for legal separation of the parties." Cal. Fam.C. § 2010. See also *King v. State Educ. Dep't*, 182 F.3d 162 (2d Cir.1999). Family courts adjudicate equity subordinate to courts of law. *Greenwood v. Greenwood*, 112 Cal. App. 691, 696 (1931).

While judicial defendants bear the formidable burden of demonstrating their modern functions even *existed* at common law, in no case will they achieve a scope of immunity greater than an 1871 inferior court; for judicial acts within their jurisdiction not done "maliciously or corruptly." *Bradley* at 351-52. *See also Id*. at 357 (Davis, J; Clifford, J, dissenting); *Sparkman* at 356, n. 7.

6. Like *Ashelman, Pierson* Was an Illegal Incursion into Congressional Authority

For the same reason that *Ashelman's* "extension" of *Sparkman* was an illegal encroachment on exclusive congressional authority, the Supreme Court in *Pierson*

overstepped the limits of Article III jurisdiction. Section 1983 is not a subject for statutory interpretation; clearer language and recorded intent has likely never emerged from Congress. See *Monroe* at 185-191; *Pulliam* at 540 ("[E]very Member of Congress who spoke to the issue assumed that judges would be liable under § 1983"); *Scheuer v. Rhodes*, 416 U.S. 232, 243 (1974) ("[T]he legislative history indicates that there is no absolute immunity"); *Pierson* at 559. (Douglas, J., dissenting). Given that Chief Justice Warren's construction benefited primarily those deciding the issue—*judges*—*Pierson's* anomalous methodology is disturbing. *Without doubt*, the 42nd Congress would agree. *Id*.

Recognizing the weight of contrary authority, California Coalition respectfully submits the following issue of first impression to any United States court: *Pierson* stands in error for exceeding the judicial power vested in United States courts under Article III of the United States Constitution, and should be reversed. "[I]f it states a rule undesirable in its consequences, Congress can change it." *Monroe* at 185.

Conclusion: "If We Desire Respect For the Law, then We Must First Make the Law Respectable."[26]

The public to whom our profession has pledged a fiduciary oath, and perhaps our "honorable and often courageous" profession itself, is entitled to an accurate statement of a doctrine so central to the integrity of state and federal courts as absolute immunity. The statement standing in this circuit for 28 years was inaccurate the day it published—a disturbing fact considering it has deprived *hundreds of thousands* of state and federal[27] court litigants remedy for deprivation of due process and the liberties it preserves.

---

[26] Louis D. Brandeis, *Other People's Money* (1933).

[27] *Butz v. Economou*, 438 U.S. 478, 499 (1978) (". . . just one federal immunity doctrine . . .").

The district court's reliance on and expansion of *Ashelman* was understandable, yet like *Ashelman*, egregious error.

E. The District Court's Hostility, Threats, Insults, and *Expressed* Bias Was a Deprivation of Impartial Tribunal

The transcripts capture one facet[28] of the district judge's hostility toward Appellants. ER 61 ("better damn well not be more than 30 pages long, sir"); ER 59 ("laundry list of defendants"); ER 59-60 ("I will consider sanctions against you sir"); ER 64-65 ("have at it"); ER 26-27 ("not for me to do your homework, unfortunately"); ER 27 ("I've had a moments where I was thinking about just *sua sponte* dismissing it."); ER 23-24 ("that is your signature and you are attesting to it?"); ER 38 ("you're really pushing your luck"); ER 28 ("you really want to do that?"); ER 55 ("claims that smack of class representation"), and repetitive rattling of Rule 11 sanctions. The hostility penetrated the July order—the district judge revealed she was contemplating a *sua sponte* contempt citation against Appellants' filing the FAC. ER 12. While the court did not consummate its threats, their echoes foreseeably chilled advocacy. Sec. V.C.4.a *supra*.

The record better reflects the district judge's hostility toward California Coalition's local counsel, Mr. Adam Bram (identified as "Graham"), as he attempted to appear. ER 38-39. *Immediately* after the recorded confrontation, Mr. Bram terminated his representation, refusing *any* further contact.

California Coalition respectfully submits the district judge's hostility, *sua sponte* advocacy, and *express* bias (ER 27—"unfortunately . . . ") rose to a deprivation of due process and impartial tribunal. *Marshall v. Jericho*, 446 U.S. 238, 242 (1980); *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009).

[28] These utterances were accompanied by emphasizing intonation and facial expressions incapable of citation.

Interference with attorney-client relationship is a California tort. See *Skelly v. Richman*, 10 Cal. App. 3d 844 (1970).

The deprivation cannot be remedied by appellate relief alone. However, Appellants request that in the event of remand, California Coalition be relieved of obligation to appear by local counsel under Southern District Local Rule 83.3 (c)(5), and such other and further relief as this Court deems just and proper.

F. California Coalition Was Entitled File Motion for Witness Harassment Restraining Order

California Coalition anticipated defendants' pattern of harassment would escalate upon filing this action, and drafted the Complaint as a verified pleading and foundation for immediate Rule 65 motion for a witness harassment restraining order consistent with 18 U.S.C. § 1514(b). ER 358-377. These fears were accurate. Mere *hours* after the Complaint appeared on PACER, Superior Court general counsel Kristine Nesthus instigated Sheriff's Deputies and state Highway Patrol detectives to track down and threaten California Coalition witnesses and affiliates. ER 208-216. California Coalition immediately filed ex parte application for leave to seek restraining orders. ER 358-377.

The court denied leave, instead sealing the complaint, explaining the sealing "mooted" the restraining order. ER 68. Sealing did not "moot" defendants' harassment; agents of the Superior Court continued to threaten Appellants' witnesses, counsel, and process servers, causing them to remain fearful of associating with California Coalition. Doc. No. 4; Sec. IV.B.

Denial of Appellants' motions was abuse of discretion. California Coalition's witnesses, counsel, and affiliates *remain* intimidated, fearful, obstructed from remedy, and deprived of petition, expression, and association, causing ongoing irreparable injury. California Coalition requests this Court remand and instruct the district court grant leave to file, or simply grant, a restraining order consistent with that requested in Doc. No. 4, ER 351-52.

G. Superior Court Defendants' *Two* Failed Sanctions Motions Entitles California Coalition to Counter-Sanctions

Superior Court's first Rule 11 motion (Doc. No. 23) "cut-n-pasted" the motion to dismiss brought by all judicial defendants (Doc. No. 16), yet only the Superior Court moved for sanctions. Thus, the Rule 11 argued grounds for parties which did not join the motion. See Doc. No. 56. Opposing required hours of tedious unraveling of the Superior Court's grounds from nonmoving parties. Doc. No. 56, 56-1. Moreover, Superior Court's motion on the same grounds as the motion to dismiss was an improper "hardball" tactic. *Gaiardo v. Ethyl Corp.*, 835 F.2d 479 (3rd Cir. 1987).

California Coalition's M&C (Doc. No. 21-1) proposed *stipulation* for the disposition reached in the first round—leave to amend and time to cure representation and capacity issues. Yet Superior Court insisted on *only* dismissal with prejudice. Doc. No. 16. The court granted leave and denied Superior Court's sanctions motion, meaning Superior Court lost *both* the "hardball" Rule 11 motion *and* the underlying motion to dismiss. Both of Superior Court's motions were thus frivolous. ER 48.

Superior Court's second motion for sanctions (Doc. No. 160) —also a "cut-n-paste" of its joinder (Doc. No. 140) and thus a "hardball" tactic (*Gaiardo*, supra)—fared even worse. Superior Court effectively lost the Omnibus, "joinder," and Rule 11—*for a second time*. ER 12.

Given Superior Court's record of obstruction for *years* before and even after this action, "hardball" and frivolous motion practice, and refusing stipulation, Appellants submit the district court abused discretion in denying counter-sanctions. Superior Court knows far higher professional standards, and rightly punishes litigants for unfaithful litigation conduct. California Coalition respectfully requests this Court to do no less, and remand with instructions to determine an appropriate sanction against the Superior Court.

H. Incorporation/Preservation of Motion for Preliminary Injunction

The district court's summary denial (ER 11) of California Coalitions' motion for preliminary injunction (Doc. No. 109) was abuse of discretion. *Zinermon v. Burch*, 494 U.S. 113 (1990). Appellants respectfully request leave of Circuit Rule 28-1(b) to preserve and incorporate that motion for adjudication here.

VII. CONCLUSION

"Courts must decide every case that walks in the courthouse door, even when it presents the kind of jurisprudential, public policy, evidentiary, and case management problems inherent in this litigation." *Philip Morris* at 29. "Although RICO cases may be pesky, courts should not erect artificial barriers—metaphysical or otherwise—as a means of keeping RICO cases off the federal dockets" *Sun Sav. & Loan Ass'n v. Dierdorff*, 825 F.2d 187, 194 (9th Cir. 1987).

California Coalition and the families who have yet to achieve a sustained voice in the courts of the United States are grateful for this Court's generous attention to an over-length brief. Defendants and the district court have demonstrated the FAC provides notice to enable *aggressive* attack. Legitimate manageability concerns are addressed through ordinary case management. California Coalition is acutely aware this action poses challenges for the district court, yet has proven a record of proactive attention to litigation efficiency which will continue upon remand.

"The methods may have changed; the means may have become more subtle; but the wrong to be remedied still exists." *Pierson* at 563 (Douglas, J, dissenting).

Appellants request oral argument, and pray for relief as follows:

1. Reverse the July 9, 2014 dismissal with prejudice and remand with instructions that defendants shall file answers within 40 days;

2. Reverse the December 19 and 23 orders dismissing claims against judicial defendants as immune under *Ashelman v. Pope,* as *Ashelman* and *Pierson v. Ray* are unconstitutional exercises of powers reserved to Congress; or, in the alternative, remand with instructions to proceed under *Rehberg v. Paulk*, *Rankin v. Howard*, and consistent with the "setting in motion" analysis of *Johnson v. Duffy, Starr v. Baca,* and *Wallace v. Powell;*

3. Reverse the December 23 order dismissing claims against Commission defendants and remand with instructions to proceed by receiving evidence of the Commission's relationship with the State of California;

4. Reverse the September 16, 2013 order (ER 67) finding Appellants' motion for witness harassment restraining order "moot," and grant, or remand with instructions to grant, a witness harassment restraining order;

5. Remand to the district court with instructions that California Coalition be relieved of any obligation to obtain local counsel;

6. Reverse the December 23, 2013 and July, 2014 denials of counter-sanctions to Appellants, and remand with instructions that the district court award reasonable costs and fees to Appellants for time expended in opposing both Rule 11 motions (Doc. No. 39-2);

7. Grant Appellants leave of Circuit Rule 28-1(b) to incorporate briefing, or permit additional briefing regarding the preserved Motion for Preliminary Injunction (Doc. No. 109);

8. Award costs and fees on appeal to Appellants pursuant to 42 U.S.C. § 1988, and 18 U.S.C. 1964(c); and

9. Such other and further relief as this Court deems just and proper.

Dated: December 5, 2014

By: s/ Colbern C. Stuart III
Colbern C. Stuart, III
President, California Coalition for
Families and Children, PBC,
in Pro Se

Dated: December 5, 2014

By: s/ Dean Browning Webb
Dean Browning Webb, Esq.
Law Offices of Dean Browning Webb
Counsel for Plaintiff-Appellant
California Coalition for
Families and Children, PBC

CERTIFICATE OF COMPLIANCE

The undersigned certifies under Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 32-1 and 28-4, that the attached opening brief is proportionally spaced, has a type face of 14 points or more and, pursuant to the word-count feature of the word processing program used to prepare this brief, contains 15,987 words, exclusive of the matters that may be omitted under Rule 32(a)(7)(B)(iii).

On September 15, 2014, Appellants filed a Notice of Joint Brief pursuant to Ninth Circuit Rule 28-4 (Dkt. No. 10-1) extending type volume limitation to 15,500 words. On October 22, 2014, Appellants filed a Motion to File Overlength Brief requesting permission to file this brief extending type volume limitation to 20,364 words. Dkt.# 11-1. On November 14, 2014, this Court granted in part Appellants' Motion to File Overlength Brief, extending type volume limitation to 16,000 words.

Pursuant to Ninth Circuit Rule 28-2.6, Appellants confirm that they are not aware of any related cases pending in this Court.

Dated: December 5, 2014

By: s/ Colbern C. Stuart III
Colbern C. Stuart, III
President, California Coalition for
Families and Children, PBC,
in Pro Se

Dated: December 5, 2014

By: s/ Dean Browning Webb
Dean Browning Webb, Esq.
Law Offices of Dean Browning Webb
Counsel for Plaintiff-Appellant
California Coalition for
Families and Children, PBC

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 5, 2014 per Federal Rules of Appellate Procedure Ninth Circuit Rule 25-5(g).

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. Any other counsel of record will be served by facsimile transmission and/or first class mail this 5th day of December, 2014.

By: s/ Colbern C. Stuart III
Colbern C. Stuart, III
President, California Coalition
For Families and Children, PBC,
in Pro Se