HSU v. CALIFORNIA STATE PERSONNEL BD.

S225332

Supreme Court of California

March 26, 2015

Reporter
2015 CA S. Ct. Briefs LEXIS 785

JOHN HSU, Petitioner and Appellant, v. CALIFORNIA STATE PERSONNEL BOARD, CALIFORNIA DEPARTMENT OF TOXIC SUBSTANCES CONTROL, et al., Respondents.

Type: Petition for Appeal

Prior History: After a Decision By the Court of Appeal, Fourth Appellate District, Division One, Case No. D067187. Following Appeal from Order and Judgment of San Diego Superior Court. Case No. 37-2011-00099531-CU-WM-CTL. Hon. David J. Danielsen, Presiding Judge; Hon. Timothy B. Taylor, Judge.

Counsel

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

Title

Petition for Review

Text

ISSUES PRESENTED

1. Whether *McColm* [1] 's broadened definition for ″litigation,″ treating an appeal as a separate ″litigation″ within the meaning of the vexatious litigant statute, is inconsistent with: (1) the Code of Civil Procedure section 1049, (2) the California finality rule, (3) the legislative intent in 1990, (4) the California Supreme Court's interpretation of the term ″new litigation″ (Code Civ. Proa, § 391.7), and (5) the vexatious litigant statutory scheme considered as a whole.

2. What is the showing that is required for an appeal to proceed-e.g., ″the simple showing [2] of an arguable issues will suffice,″ or, it depends on the legal acumen [3] of the judge who does the viewing.
[*2]

RELATED PETITION

S222726, *John v. Superior Court*, where the California Supreme Court has granted review for the issue: ″Must a defendant who has been declared a vexatious litigant and is subject to a prefiling order (Code Civ. Proa, § 391.7, subd. (a)) obtain leave of the presiding judge or justice before filing an appeal from an adverse judgment?″

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[1] McColm v. Westwood Park Assn. (1998) 62 Cal.App.4th 1211, 1216, 1219 (″*McColm*″).

[2] In re R.H. (2009) 170 Cal.App.4th 678, 701, 702, 705 (″*In re R.H.*″).

[3] People v. Sumner (1968) 262 Cal.App.2d 409, 415.

If, in the instant petition, the Court concludes that *McColm*'s, broadened definition for ″litigation″ is error, and therefore leave of court is *not* required to *appeal*, the Court's holding in the instant petition will also be dispositive of the related petition in **S222726**.

LEGAL DISCUSSION BELOW

I.

Why *McColm*'s Broadened Definition for ″Litigation″ Is Error.

A. *McColm*'s broadened definition for ″litigation″

In McColm v. Westwood Park Assn. (1998) 62 Cal.App.4th 1211, the court came up with a broadened definition for ″litigation,″ allegedly used ″[throughout the vexatious litigant statute″ **[*3]** (*Id. at p. 1216).* By such a construction, the court concluded that ″ ' ″Litigation″ means any civil action or proceeding, commenced, maintained or pending in any state or federal court.' (§ 391, subd. (a).) Manifestly, 'any civil action or proceeding' includes any appeal or writ proceeding.″ (*Ibid*.) ″ 'Litigation' for purposes of vexatious litigant requirements encompasses civil trials and special proceedings, but it is broader than that. It includes proceedings initiated in the Courts of Appeal by notice of appeal or by writ petitions other than habeas corpus or other criminal matters.″ (*Id. at p. 1219.)*

Yes, the vexatious litigant statute has defined ″litigation″ as a ″civil action or proceedings″ (Code Civ. Proc, § 391, subd. (a)). Yet, in the meantime, all the statutes dealing with the same subject matter must be construed together so as ″to give force and effect to all of their provisions.″ (*State Dept. of Public Health v. Superior Court (2015) 60 Cal.4th 940, 955.)*

B. California has only two classes of judicial remedies: ″actions,″ and ″special proceedings.″

In California, only two classes of judicial remedies **[*4]** exist: 1. Actions, and 2. Special proceedings. (Code Civ. Proc, § 21.) ″An action is an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or prosecution of a right, the redress or prevention of a wrong, or the punishment of a public offense.″ (Code Civ. Proc, § 22.) ″Every other remedy is a special proceeding.″ (Code Civ. Proc, § 23.)

C. When does an action ″commence,″ for how long is an action ″pending,″ and what is the relationship between an ″action″ and an ″appeal″?

″An action is commenced, within the meaning of this Title, when the complaint is filed.″ (Code Civ. Proc, § 350.) ″A civil action is commenced by filing a complaint with the court.″ (Code Civ. Proc, § 411.10.) ″An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied.″ (Code Civ. Proc, § 1049.) As a result, as the California Supreme Court has observed: ″filing an appeal 'is not a separate proceeding and has no independent existence' [citation]; it is merely the continuation of an action.″ (*Coleman v. Gulf Ins. Group (1986) 41 Cal.3d 782, 794* **[*5]** (″*Coleman*″).)

D. Because an ″appeal″ does not commence a new ″action″ or ″litigation,″ leave of court is not required to appeal.

The Code of Civil Procedure sections 21-23, 350, 411.10, and 1049, read together with *Coleman*, show that an *appeal* is only part of *spendingnot commence* a ″new litigation.″ Thus, until the vexatious litigant is properly amended [4], the ″prefiling order″ provision of the vexatious litigant statute does *not* apply to the filing of an *appeal*.

See also further discussion below, and Appellant's Opening Brief at pages 15-20.

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[4] For example, by:

. Defining ″litigation,″ under section 391, subdivision (a), as an action or writ proceeding commenced under a court's original jurisdiction;

. Replacing the term ″new litigation″ under section 391.7 by: ″an action or writ proceeding filed under a court's original jurisdiction; or an appeal or writ petition, other than a petition for review, arising from the judicial proceedings below.″

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[*6]

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

The Code of Civil Procedure section 391, subdivision (b) provides, in part, the following:

″Vexatious litigant″ means a person who does any of the following:

(1) In the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person . . .

As to what ″finally determined″ means, the court in *First Western Dev. Corp. v. Superior Court (1989) 212 Cal.App.3d 860, 864* (″*First Western*″) has explained [5] that: ″When, as here, all avenues for direct review have been exhausted, the judgment is final for all purposes.″

F. The legislative [*7] history in 1990 does not show that the Legislature has intended to treat an ″appeal″ as a new ″litigation.″

A review of the legislative history at the time the ″prefiling order″ provision was enacted in 1990 also does not show that the Legislature has intended to create an exception to the Code of Civil Procedure section 1049, to overrule *Coleman* or *First Western*, or to treat an *appeal* as a separate and independent new *action*.

In *Shalant v. Girardi (2011) 51 Cal.4th 1164, 1175, fn. 7,* California Supreme Court has examined the legislative history behind section 391.7's enactment:

> Senate Bill No. 2675 (1989-1990 Reg. Sess.), by which section 391.7 was enacted (and the vexatious litigant statutes strengthened in other respects), was proposed by the California Attorney General's Office, which in a letter to the chairman of the Senate Committee on the Judiciary in preparation for a committee hearing, explained that the office ″spends substantial amounts of time defending unmeritorious *lawsuits* brought by vexatious litigants.″ (Deputy Atty. Gen. Jeffrey J. Fuller, letter to Sen. Bill Lockyer re Sen. Bill No. 2675 (1989-1990 Reg. Sess.) Apr. 11, 1990, p. **[*8]** 1, italics added.) The proposed law would address this problem by, among other measures, ″[p]roviding for judicial review of subsequent *actions* brought by a vexatious litigant prior to filing.″ (*Id*. at p. 2, italics added.) The committee analysis for the ensuring hearing, in explaining the need for legislation, relayed the Attorney General's concern with the resources spent defending ″unmeritorious *lawsuits* brought by vexatious litigants″ and his view that the law should be strengthened to ″prevent the waste of public funds required for the defense of frivolous *suits*.″ (Sen. Com. on Judiciary, Analysis of Sen Bill No. 2675 (1989-1990 Reg. Sess.) Apr. 17, 1990, pp. 2-3, italics added.) A later bill summary and a local cost estimate prepared by the Department of Finance stated the bill would ″make it more difficult to file frivolous *suits and actions*″ by, among other things, ″prohibiting] court clerks from filling any *suit* by a vexatious litigant unless the presiding judge issues an order permitting such filing.″ (Dept. of Finance, Analysis of Sen. Bill No. 2675 (1989-1990 Reg. Sess.) May 8, 1990, p. 1, italics added; Dept. of Finance, Local Cost Estimate for **[*9]** Sen. Bill No. 2675 (1989-1990 Reg. Sess.) May 8, 1990, p. 1, italics added.) Finally, in urging the Governor to sign the legislation, the bill's author explained it would ″provide for judicial review of subsequent *actions* filed by persons who have been adjudicated vexatious litigants.″ (Sen. Milton Marks, letter to Governor George Deukmejian re Sen Bill No. 2675 (1989-1990 Reg. Sess.) Sept. 11, 1990, par. 3, italics added.)

The Court then commented: ″examination of the legislative history behind section 391.7's enactment. . . shows a clear focus on precluding vexatious litigants from filing in propria persona unmeritorious new 'actions' or 'lawsuits.' Nowhere in this history is there any suggestion the new section [Code Civ. Proc, § 391.7] would bar vexatious litigants from filing motions

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[5] Accord, Childs v. PaineWebber Incorp. (1994) 29 Cal.App.4th 982, 993;Holcomb v. U.S. Bank National Assn. (2005) 129 Cal.App.4th 1494, 1502.

or other papers *in pending* litigation. The additional remedy provided by section 391.7 was, instead, 'directed at precluding the *initiation* of a meritless lawsuit and the costs associated with defending such litigation.' (Citation.)" (*Shalant v. Girardi (2011) 51 Cal.4th 1164, 1175.)*

G. The California Supreme Court also does not consider a petition for review [*10] as a "new litigation" within the meaning of the vexatious litigant statute.

At the California Supreme Court, "a prefiling order is not required from you to file a petition for review in this court. Although a prefiling order is required for any new litigation in a court, a petition for review is not considered new litigation by this court. (Code of Civil Procedure section 391.7(a).)" (Letter dated November 30, 2011 from the Honorable Frederick K. Ohlrich, Court Administrator and Clerk of the Supreme Court, signed by J. L. Casados, Supervising Deputy Clerk.) The Court only takes a litigation filed under the Court's original jurisdiction as a "new litigation." (Appellant's Appendix, vol. 2, pp. 359-360.)

McColm's broadened definition for "litigation," treating each appeal or writ petition from the proceedings below as a "new litigation," is thus inconsistent also with the California Supreme Court's interpretation of the term "new litigation."

H. *McColm*'s broadened definition for "litigation" has also led to absurd results.

The vexatious litigant statute has set a "five adverse final determinations in seven years" quota under the Code of Civil Procedure section 391, **[*11]** subdivision (b)(l)(i), as noted above. And "finally determined" has been construed as having reach a final determination by exhausting all avenues for direct review, in accordance with the California finality rule.

According to *McColm* (1998), however, each intermediary appeal or writ petition, such as the statutory writ petition regarding disqualification of a judge (Code Civ. Proc, § 170.3, subd. (d)), or regarding the denial of a request for public record under the California Public Record Act (Gov. Code, § 6259, subd. (c)), also counts as a "litigation," as the term "litigation" is used "[t]hroughout the vexatious litigant statute" *(McColm* at p. 1216). Then, the pursuit of all avenues for direct review from *one* litigation turns the single litigation into several. Such a reading could readily qualify a self-represented litigant as vexatious. In this manner, *McColm* has set for pro per litigants a rate of success which even well-trained attorneys cannot be expected to meet.

In addition, an intermediary appeal or writ petition necessarily re-litigates the same issue already adjudicated at the superior court below. By the way *McColm* reckons, then, a pro per **[*12]** litigant who appeals or files a writ petition in an action already commenced may readily qualify as vexatious under the Code of Civil Procedure section 391, subdivisions (b)(2) and (b)(3) also. *McColm* has made no showing that this is indeed the Legislature's intent.

As such, *McColm*'s, construction, placing a substantial, undue burden on pro per litigants, is in violation of the *equal protection* clause under the Fourteenth Amendment of the United States Constitution.

II.

So That the "Prefiling Order" Provision of the Vexatious Litigant Statute May Pass Constitutional Muster, the Court in *In re R.H.* Had to Conclude That the Simple Showing of an Arguable Issue Will Suffice for Permission to File.

Equal protection "is a pledge of the protection of equal laws." All persons within the jurisdiction of the United States shall be subject to like punishment, pains, penalties, and exactions of every kind, and to no other. (*Yick Wo v. Hopkins (1886) 118 U.S. 356, 369-370.)*

Due process "requires, as a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through **[*13]** the judicial process must be given a meaningful opportunity to be heard." (*Boddie v. Connecticut (1971) 401 U.S. 371, 375.*

California Constitution provides that a court of appeal shall conduct itself as a three-judge court, and decisions of the courts of appeal "that determine causes shall be in writing with reasons stated." (Cal. Const., art. VI, §§ 3 & 14.)

When the prefiling order provision (Code Civ. Proc, § 391.7) of the vexatious litigant statutes was challenged for being in violation of the California Constitution, article VI, sections 3 and 14, the court of appeal in *In re R.H. (2009) 170 Cal.App.4th 678* thus had to conclude as follows:

> ″Section 391.7, subdivision (b) provides in part '[t]he presiding judge shall permit the filing of [new litigation in the courts of this state by a vexatious litigant in propria persona] only if it appears that the litigation has merit and has not been filed for the purposes of harassment or delay.' Thus, by section 391.7's own terms, the presiding justice in determining whether to permit the appeal to proceed does not pass on its merits. The presiding justice merely determines if there is an **[*14]** issue to review on appeal.″ (*In re R.H.* at p. 701.)
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> ″No doubt, any impairment of the right to petition must be narrowly drawn. (*Wolfgram* [*v. Wells Fargo Bank* (1997)] *53 Cal.App.4th [43,] 55-57.)*″ (*In re R.H.* at p. 702.)
>
> ″[T]he simple showing of an arguable issue will suffice for permission to file.″ (*Id.* at p. 705.)

At the court of appeal below, the *arguable issues* presented include the following:

. There is a disagreement between the assigned judge and the presiding judge: Whether the filing of a motion to strike or tax costs on appeal constitutes the filing of a ″new litigation″ (Code Civ. Proc, § 391.7) within the meaning of the vexatious litigant statute, requiring prior permission of the presiding judge (see: *Shalant v. Girardi (2011)51 Cal.4th 1164, 1173-1175);*

. Whether *McColm*'s broadened definition for ″litigation″ is error as a matter of law;

. Where a case has not even ″commenced″ (Code Civ. Proc, §§ 350 & 411.10), whether the ruling of the court, nevertheless, has issue preclusion effect *(Garcia v. Lacey (2014) 231 Cal.App.4th 402, 411-412);*

. Where a party's cost **[*15]** claim conflicts with the evidence, or is not supported by the evidence, whether the party is, nevertheless, entitled to the costs claimed *(Jones v. Dumbrichob (1998) 63 Cal.App.4th 1258, 1265-1267);*

. Where a respondent has ″prevailed″ by misleading the courts as to facts, and by urging the court not to follow the law, whether the respondent's actions are, nevertheless, ″reasonably necessary″ for the conduct of the litigation (Code Civ. Proc, § 1033.5, subd. (c)), entitling the respondent to recover costs as a matter of right;

. To the extent an appellate opinion is based on mistaken views of the facts and the law, whether the appellate opinion should, nevertheless, be given law-of-the-case effect *(Clemente v. State of California (1985) 40 Cal.3d 482, 491-492).*

Pursuant to the criterion set forth in *In re R.H.*, then, the appeal should be allowed to proceed.

PROCEDURAL HISTORY

After the Court of Appeal issued its remittitur from the prior appeal (D061979), respondent California Department of Toxic Substances (″DTSC″) served its memorandum of costs on appeal. DTSC, however, refused to produce any evidence in support. Petitioner **[*16]** John Hsu, therefore, had to file a motion to strike or tax costs.

Out of abundant caution, Hsu first submitted his moving papers to the presiding judge of the San Diego Superior Court for approval. The presiding judge determined that prior approval was *not* required, and thus forwarded the moving papers to the Honorable Timothy Taylor in Department 72. A deputy clerk in Department 72 then filed the motion.

When ruling on the motion, however, the Honorable Judge Taylor faulted Hsu for *failing* to obtain the presiding judge's prior approval, as a ground to deny the motion. In addition, the Honorable Judge Taylor refused to consider any statutory exception (Code Civ. Proc, § 1033.5, subd. (c)) to DTSC's right to recover cost.

To the Court of Appeal, Fourth Appellate District, Division One, on October 26, 2014, Hsu then submitted a request for permission to appeal, using Judicial Council Form MC-701. On November 14, 2014, the presiding justice denied the

request ″as [Hsu] has not shown that his appeal has merit and is not being pursued for purposes of harassment or delay. (See Code Civ. Proc, § 391.7, subd. (b).)″

Sensing that the court needed to see more information, Hsu **[*17]** submitted another request on December 17, 2014, which the court filed on December 23, 2014. Till the end of January 2015, however, the court still had not made a ruling, so Hsu supplied more information on February 2, 2015, and then on February 18, 2015. Hsu's February 18, 2015 package was delivered to the court at 8:13 a.m. on February 20, 2015. On the same day, the presiding justice issued her decision: ″Plaintiff and appellant John Hsu's request to file new litigation by vexatious litigant is denied. The appeal is therefore dismissed.″ The docket for this case (D067187) does not show that the court has filed the documents Hsu submitted on February 2, 2015 and February 18, 2015.

On March 5, 2015, by express mail for next day delivery by 10:30 a.m., Hsu submitted a petition for rehearing, together with appellant's opening brief and appellant's appendix, so that the court could have sufficient information to review. The package was delivered and signed for at 9:09 a.m. on March 6, 2015. On that day, still within 15 days from February 20, 2015, Hsu also e-submitted the electronic versions of his petition for rehearing (D067187_RF_Hsu) and opening brief (D067187_AOB_Hsu).

Yet, the **[*18]** court did not file Hsu's petition for rehearing until March 11, 2015, and the case's docket does not show receipt of either the appellant's opening brief or the appellant's appendix (in two volumes).

No decision on the petition for rehearing was issued within 30 days from February 20, 2015 (Cal. Rules of Court, rule 8.268(c)), but the court did issue an order summarily denying the petition for rehearing on March 23, 2015.

The filing of the instant petition for review, within 40 days from February 20, 2015, is timely. (Cal Rules of Court, rule 8.500(e)(1).)

WHY REVIEW SHOULD BE GRANTED

In *Ringgold-Lockhart v. County of Los Angeles (9th Cir. 2014) 761 F.3d 1057,* the Ninth Circuit considered ″the limits of a federal court's authority to impose pre-filing restrictions against so-called vexatious litigations.″ The court noted that the First Amendment right to petition had been termed ″one of the most precious of the liberties safeguarded by the Bill of Rights.″ ″Out of regard for the constitutional underpinnings of the right to court access, 'pre-filing orders should rarely be filed.' ″ When a court seeks to impose pre-filing restrictions, the court must ″tailor **[*19]** the order narrowly so as 'to closely fit the specific vice encountered.' ″ In considering whether other remedies are adequate to curb the perceived vice, the court noted that the Federal Rules of Civil Procedure had provided the courts with a means to address frivolous or abusive filings. Rule 11(c)(4) requires, in particular, that ″[a] sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct.″

The provision in California Code of Civil Procedure section 128.7, subdivision (d), is very similar to the provision in Rule 11(c)(4). The *question* is then: under the *same* First Amendment constitutional umbrella, whether California state courts have been too quick to issue a pre-filing order limiting the filing of ″*any* new litigation.″ (Code Civ. Proa, § 391.7.)

McColm's, broadened definition for ″litigation,″ taking each appeal or further writ petition as a ″new litigation,″ then made the situation worse, readily and seriously handicapping self-represented litigants' right of access to the courts.

Compounding the problem is the vagueness of the statutory term ″it appears.″ (Code Civ. Proc, § 391.7, subdivision (b) [6].) What **[*20]** does ″it appears″ mean? Some courts appear to have construed ″it appears″ as the Legislature's express delegation of unfettered discretion. As applied, then, the ″it appears″ standard has led the courts to create numerous exceptions to the statutes, or even abandon the traditional standards of review. See, e.g., Petition for Writ of Certiorari, Nos. 14-140 and 14-464. *(2014 U.S. S. Ct. Briefs LEXIS 2797 and 3706.)*

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[6] Section 391.7, subdivision (b) provides as follows: ″The presiding justice or presiding judge shall permit the filing of that [new] litigation only if it appears that the litigation has merit and has not been filed for the purposes of harassment or delay.″

The result is a severe punishment: a meritorious litigation is not allowed to move forward. This is directly contradictory to the legislative intent.

Review should therefore be granted to allow the Court to:

. Harmonize California's with the federal courts' view on the importance or value of the First Amendment right **[*21]** to petition, or the people's right of access to the courts;

. Look into the apparent Constitutional infirmity of the vexatious litigant statute's ″five adverse final determinations in seven years″ quota for determination of ″vexatiousness,″ in light of the United States Supreme Court's opinion in *BE & K Construction Co v. NLRB (2002) 536 U.S. 516, 532-533* that ″the genuineness of a grievance does not turn on whether it succeeds″;

. Caution that pre-filing orders must rarely be filed, and that pre-filing orders need not be of the one-size-fit-all type;

. Explain what a court may, or may not, properly assess at the *pre-filing* stage (see, e.g., *In re R.H. (2009) 170 Cal.App.4th 678, 701, 702, 705;Ringgold-Lockhart v. County of Los Angeles (9th Cir. 2014) 761 F.3d 1057, 1066* [″courts cannot properly say whether a suit is 'meritorious' from the pleadings alone. . . . it is often not a decision accurately to be made at a pre-filing stage″]);

. Specify the proper *standards of review* to apply when a court *screens* proposed litigations (see, e.g., *Coppedge v. United States (1962) 369 U.S. 438, 444-448;* **[*22]** *Tellabs, Inc. v. Makor Issues & Rights, Ltc. (2007) 551 U.S. 308, 322-324);*

. Resolve the current appellate splits and provide suitable guidance [7] to the courts below, so that the state courts across California State may reach consistent, just and proper decisions;

. Strengthen the public's perception of the integrity of the judicial system;

. Suggest the specific languages for the Legislature to use when the Legislature next amends, or repeals and then re-enacts, the vexatious litigant statute;

. Work out, together with the executive and legislative branches of the state government, innovative and viable means of support, such as those already being developed in other jurisdictions [8], to provide self-represented litigants, poor or not so poor, with meaningful access to the courts;
[*23]

. Declare California's vexatious litigant statute constitutionally infirm and void, if the Court finds the statute impossible to reform under constitutional scrutiny. Note that most states do not have a vexatious litigant statute, and have been doing just fine.

CONCLUSION

In light of the above and the role of this Court as institutional overseer over the courts, review should be granted so as to secure uniformity of decision and to settle the important questions of law. Review may also be granted for the purpose of transferring the matter to the court of appeal below, directing the court to allow the appeal to proceed, and to issue a written opinion with reasons stated. (Cal. Const., art. VI, §§ 3 & 14.) (Cal. Rules of Court, rule 8.500(b)(1), (3) and (4).)

CERTIFICATE OF WORD COUNT

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

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[7] See, e.g., Appellant's Opening Brief, p. 25, fn. 23, and Appellant's Appendix, vol. 2, pp. 380-389.

[8] See, e.g., 2014 and 2015 ″State of the Judiciary,″ by the Honorable Jonathan Lippman, Chief Judge of the State of New York.

The text of this petition consists of 4,026 words as counted by the Corel WordPerfect version 9 word-processing program used to generate the petition.

Dated: March 26, 2015

/s/ [Signature]

JOHN HSU

[SEE ATTACHMENTS IN ORIGINAL]

[SEE ATTACHMENTS IN ORIGINAL]