

No. S182629

SUPREME COURT

**IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA**

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**JOSEPH L. SHALANT,**

*Plaintiff and Appellant,*

vs.

**THOMAS V. GIRARDI, et al.,**

*Defendants and Respondents.*

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SUPREME COURT  
**FILED**

SEP 20 2010

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Deputy

After a Decision by the Court of Appeal,  
Second Appellate District, Division One  
Court of Appeal No. B211932 (c/w B214302)  
Los Angeles Superior Court No. BC 363843 (c/w BC 366214)  
Hon. Teresa Sanchez-Gordon

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**OPENING BRIEF ON THE MERITS**

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Martin N. Buchanan (SBN 124193)  
Niddrie, Fish & Buchanan LLP  
750 B Street, Suite 3300  
San Diego, CA 92101  
Telephone: (619) 238-2426  
Facsimile: (619) 238-6036  
(Attorneys for Respondent  
Thomas V. Girardi)

Rebecca R. Weinreich (SBN 155684)  
Lewis Brisbois Bisgaard & Smith LLP  
221 N. Figueroa Street, Suite 1200  
Los Angeles, CA 90012  
Telephone: (213) 250-1800  
Facsimile: (213) 481-0621  
(Attorneys for Respondent  
National Union Fire Insurance  
Company of Pittsburgh, PA)

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## ISSUE PRESENTED

Does Code of Civil Procedure section 391.7 require a vexatious litigant to obtain permission of the presiding judge to proceed in propria persona when he or she becomes self-represented during a pending action or proceeding?

## INTRODUCTION

This Court has granted review to resolve a conflict over the proper interpretation of Code of Civil Procedure<sup>1</sup> section 391.7, which authorizes a court to enter an order requiring a vexatious litigant to obtain permission of the presiding judge before “filing any new litigation ... in propria persona.” (§ 391.7, subd. (a).) In *Forrest v. Department of Corrections* (2007) 150 Cal.App.4th 183, Division Two of the Second Appellate District held that section 391.7 requires permission not only for the initial filing of a pro per lawsuit, but also whenever a vexatious litigant becomes self-represented and attempts to proceed in pro per at any stage of a pending case. (*Id.* at pp. 195-197.) In this case, however, Division One of the same court rejected the holding of *Forrest* and ruled that section 391.7 applies only to the initiation of a new lawsuit in pro per. (Ex. A to Pet. for Review, pp. 7-13.)

For three reasons, *Forrest* was correctly decided. First, the vexatious litigant statute expressly defines “litigation” to include any “pending” civil action or “proceeding.” (§ 391, subd. (a).) The legal definition of a “proceeding” itself includes any procedural step in a pending action. (See, e.g., Black’s Law Dict. (9<sup>th</sup> ed. 2009) p. 1324.) Thus, a vexatious litigant who becomes self-represented while an action is pending and seeks to continue the litigation is prosecuting “new litigation ... in propria persona”

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<sup>1</sup>All statutory references are to the Code of Civil Procedure.

and must obtain permission of the presiding judge to proceed with the lawsuit. (§ 391.7, subd. (a).)

Second, *Forrest's* interpretation of the statute best effectuates the basic purposes of the law—to reduce the costs of defending against frivolous claims by vexatious litigants, relieve the burden on the court system, and free judicial resources to devote to legitimate cases. All of these statutory goals would be served by requiring vexatious litigants who become self-represented while an action is pending to make the minimal showing required for permission to proceed in pro per—“that the litigation has merit and has not been filed for the purposes of harassment and delay.” (§ 391.7, subd. (b).)

Third, a contrary interpretation would give vexatious litigants an easy way to circumvent the statute simply by finding an attorney willing to lend his or her name to the initial complaint (or the notice of appeal in the case of a new appeal) and then bow out of the case. California appellate courts have consistently and correctly construed the vexatious litigant statute broadly to prevent exactly this type of evasion by litigants with a demonstrated history of abusing the judicial system. The Court of Appeal erred by ruling that the statute must instead be construed narrowly to avoid unfounded constitutional concerns that have been rejected by state and federal courts alike. For all these reasons, the judgment of the Court of Appeal should be reversed.

### **STATEMENT OF CASE AND FACTS**

In 2002, the Honorable J. Stephen Czuleger of Los Angeles County Superior Court declared attorney Joseph L. Shalant to be a vexatious litigant within the meaning of Code of Civil Procedure section 391. (9 CT 1923-



1924.) Pursuant to section 391.7, Judge Czuleger issued an order using the standard Judicial Council form MC-700. The order stated that Shalant “is prohibited from filing any new litigation in propria persona in the courts of California without approval of the presiding judge of the court in which the action is to be filed.” (9 CT 1899.)

On May 18, 2005, the Review Department of the State Bar Court placed Shalant on inactive status. (9 CT 1952.) The Review Department found that Shalant had collected an illegal fee and had committed an act of moral turpitude by threatening to withdraw from a case if his client did not pay the illegal fee. (9 CT 1936-1942.) The Review Department also found that Shalant had been the subject of four prior disciplinary proceedings (*id.* at pp. 1942-1943), and that “[m]ost of his prior misconduct was fee-related.” (*Id.* at p. 1949.) The Review Department stated: “[W]e find that respondent’s involvement with the disciplinary system has spanned every decade over nearly thirty years, beginning in early 1976, and that his past disciplinary proceedings involved 9 separate matters where at least 13 clients were adversely affected, of whom at least 5 were minor children.” (*Id.* at pp. 1948-1949.)

On December 14, 2005, this Court denied Shalant’s petition for review and disbarred him from the practice of law. (8 CT 1927.)

On December 22, 2006, Shalant filed this lawsuit against respondents Thomas V. Girardi and National Union. Shalant alleged that he was still owed part of his 50 percent share of a \$1.5 million contingency fee for a case in which he and Girardi had both represented a client named Jose Castro. Shalant admitted that Girardi had already paid him \$745,000 of the fee, but claimed that Girardi still owed him about \$28,000. The complaint against Girardi and National Union was filed on Shalant’s behalf

by attorney L'Tanya M. Butler. (1 CT 17-28.)

Girardi filed a cross-complaint against Shalant. Girardi alleged that Shalant had concealed his inactive State Bar status and his pending disbarment and had made deliberate misrepresentations regarding his State Bar status to Girardi and to the client when they entered into the fee-sharing agreement. Accordingly, Girardi sought a return of the \$745,000 fee already paid to Shalant, with any recovery to be assigned to the client Jose Castro. (1 CT 46-55; 2 CT 353-365.)

On May 4, 2007, four months after Shalant's complaint was filed, attorney James T. Biesty substituted into the case as counsel for Shalant in place of attorney L'Tanya Butler. (3 CT 472.) Eight months later, on December 19, 2007, Shalant substituted into the case as counsel for himself in place of attorney James T. Biesty. (5 CT 1102.) One month later, on January 18, 2008, attorney Biesty substituted back into the case as counsel for Shalant. (5 CT 1106.) Two months later, on March 26, 2008, attorney Butler substituted back into the case as counsel for Shalant in place of attorney Biesty. (6 CT 1295.)

Within two months of substituting back into the case, attorney Butler sought to substitute out again "[d]ue to an irremediable breakdown in the attorney/client relationship." (8 CT 1715.) Shalant refused to consent to the substitution. (*Ibid.*) On June 26, 2008, attorney Butler filed an ex parte application to be relieved as counsel for Shalant, along with a supporting declaration stating that she was "prepared to present to the Court, in camera, a series of e-mail communications between myself and Mr. Shalant which demonstrate the complete and total breakdown of the attorney/client relationship." (8 CT 1714-1716.) Shalant opposed the application. (8 CT 1720-1721.) On July 15, 2008, the Honorable Teresa Sanchez-Gordon held

a hearing on the matter and granted attorney Butler's application to be relieved. (8 CT 1727.) As a result, Shalant was again self-represented.

On July 14, 2008, counsel for National Union sent Shalant a letter notifying him that, as a vexatious litigant, he was required either to retain counsel to represent him or obtain permission of the presiding judge to proceed in pro per, pursuant to section 391.7 and *Forrest, supra*, 150 Cal.App.4th 183. (10 CT 2229.)

On July 29, 2008, Girardi filed a notice that Shalant had been declared a vexatious litigant and was the subject of a section 391.7 order. (9 CT 1897-1899.) The notice stated: "Plaintiff Shalant has violated the Prefiling Order in representing himself in this litigation because 'the requirements of prefiling order, under section 391.7, remain in effect throughout the life of a lawsuit and permit dismissal at any point when a vexatious litigant proceeds without counsel or [sic] without the permission of the presiding judge.'" (9 CT 1898, quoting *Forrest, supra*, 150 Cal.App.4th at p. 197.)

On July 30, 2008, National Union filed a motion to dismiss the action pursuant to section 391.7. (9 CT 1912-1956.) On August 13, 2008, Girardi also filed a motion to dismiss Shalant's complaint pursuant to section 391.7. (9 CT 2039-2044.)

On August 4, 2008, Shalant submitted an "ex parte, in camera" request to the presiding judge for permission to proceed in pro per pursuant to section 391.7. The presiding judge assigned the matter to the Honorable Lee Smalley Edmon. On August 12, 2008, Judge Edmon denied Shalant's ex parte application without prejudice for failure to give notice to opposing counsel. (11 CT 2321-2324, 2334.)

On August 14, 2008, the parties appeared before Judge Sanchez-Gordon for a settlement conference. At the hearing, Shalant stated that he was “not questioning” he had to seek permission from the presiding judge to proceed in pro per. (11 CT 2323:17-18.) Shalant acknowledged that he was required to obtain permission under *Forrest*. (11 CT 2325:6 [“I recognize that’s what the law is ...”].) He also told the court that “if ... I’m not given permission to proceed in pro per, I will retain counsel.” (11 CT 2325:17-18.) Shalant stated: “I’m assuming I can retain counsel easily within 30 days. I’ve spoken to various attorneys on this matter.” (11 CT 2326:3-5.)

Judge Sanchez-Gordon gave Shalant another 30 days (until September 14, 2008) to obtain permission from the presiding judge to proceed in pro per. (10 CT 2047; 11 CT 2322-2327.) She told Shalant: “If you don’t obtain permission from the presiding judge in 30 days, I’m going to dismiss this case.” (11 CT 2323:6-8.) Judge Sanchez-Gordon continued the hearing on the pending motions to dismiss until September 18, 2008. (11 CT 2327.)

Shalant was present at the August 14 hearing, but refused to waive notice of the new hearing date. (11 CT 2327-2328.) On August 15, 2008, Girardi served written notice of the September 18 hearing date on Shalant. (11 CT 2330-2331.)

On August 18, 2008, Shalant submitted another written request for permission to proceed in pro per to Judge Edmon. (11 CT 2334-2345.) Judge Edmon scheduled a hearing on the matter for October 1, 2008. (11 CT 2396.) Shalant never notified Judge Sanchez-Gordon that the hearing had been scheduled for October 1 and did not request an extension of the September 14 deadline to obtain permission to proceed in pro per. (See 11

CT 2347-2349.)

Shalant did not comply with the September 14 deadline and failed to appear at the September 18 hearing on the motions to dismiss for failure to comply with section 391.7. (11 CT 2492.) Accordingly, Judge Sanchez-Gordon granted both defendants' motions to dismiss and dismissed the action in its entirety for failure to comply with section 391.7. (10 CT 2198-2202; 11 CT 2492-2496.)

On October 6, 2008, attorney Biesty substituted back into the case and filed an ex parte application to restore Shalant's case to civil active status and reinstate his request to proceed in pro per. (11 CT 2380-2404.) In a supporting declaration, Shalant stated: "[P]rior to 8-28-08, a very smart (UCLA Law Review), gutsy lawyer, Roger Jon Diamond, had agreed to represent me if I were not permitted by Dept 1 to proceed pro per, and if we were to finalize arrangements... I had, however, decided to wait until after Dept 1 ruled before committing to Mr. Diamond as my counsel." (11 CT 2397.) Judge Sanchez-Gordon denied Shalant's ex parte application on October 6, 2008. (11 CT 2444.) The court entered a final judgment on October 20, 2008. (11 CT 2452.)

Represented by a new attorney, Brian A. Yapko, Shalant appealed from the dismissal of his complaint. (11 CT 2456.) In his appeal, Shalant did not argue that *Forrest* was wrongly decided, nor did he dispute that section 391.7 required him to obtain permission to proceed in pro per. Shalant's opening brief requested that the dismissal order be reversed and "remanded to Department 1 for the determination which should have occurred on October 1, 2008" (i.e., whether the presiding judge would grant him permission to proceed in pro per) and that he be given "a reasonable time to retain counsel" if the presiding judge denied his request to proceed

in pro per. (Appellant’s Opening Brief, p. 24.)

On April 5, 2010, in a published opinion, the Second Appellate District, Division One reversed the dismissal order. The court rejected the holding of *Forrest* and ruled that section 391.7’s requirement of permission from the presiding judge applies only to the *initiation* of a new lawsuit in pro per. The court found that no permission is required if the vexatious litigant is represented by counsel when the lawsuit is first filed, but later becomes self-represented while the lawsuit is pending. (Ex. A to Pet. for Review, pp. 7-13.) In reaching this conclusion, the court found no “ambiguity in the language of either the statute or the prefiling order entered against Shalant” and thus saw “no need to resort to extrinsic interpretive aids such as public policy considerations.” (*Id.* at p. 10.)<sup>2</sup>

## ARGUMENT

### **I. A VEXATIOUS LITIGANT MUST OBTAIN THE PERMISSION OF THE PRESIDING JUDGE TO PROCEED IN PRO PER WHENEVER HE OR SHE BECOMES SELF-REPRESENTED AT ANY STAGE OF THE LITIGATION.**

#### **A. The History of the Vexatious Litigant Statute.**

California enacted the nation’s first vexatious litigant statute in 1963 “to address problems ‘created by the persistent and obsessive litigant, who has constantly pending a number of groundless actions.’ [Citation.]” (*In re R.H.* (2009) 170 Cal.App.4th 678, 688.) Vexatious litigants impose an

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<sup>2</sup>In a consolidated appeal, the Court of Appeal also reversed a judgment in favor of Castro in a related action against Shalant. This Court denied Castro’s petition for review when it granted the petition by Girardi and National Union.

unreasonable burden on the courts by their repetitive lawsuits, which often involve frivolous claims against judges and other court officers who make adverse decisions against them. (*Wolfgram v. Wells Fargo Bank* (1997) 53 Cal.App.4th 43, 48; *First Western Development Corp. v. Superior Court* (1989) 212 Cal.App.3d 860, 867-868.) “Their abuse of the court system not only wastes court time and resources, but also prejudices other parties waiting their turn before the courts.” (*In re Bittaker* (1997) 55 Cal.App.4th 1004, 1008; accord *In re Natural Gas Anti-Trust Cases* (2006) 137 Cal.App.4th 387, 393-394; see also Annot., *Validity, Construction and Application of State Vexatious Litigant Statutes* (2009) 45 A.L.R.6th 493, 514 § 2 [describing purposes of vexatious litigant statutes].)

As originally enacted in 1963, section 391, subdivision (b) defined a “vexatious litigant” as someone who had (1) commenced, prosecuted, or maintained at least five unsuccessful civil actions or proceedings in propria persona within the preceding seven years, or (2) repeatedly relitigated or attempted to relitigate in propria persona the same claim against the same defendant or defendants after a final adverse determination. Sections 391.1 through 391.6 established procedures by which a defendant may move to designate a plaintiff as a vexatious litigant and require him or her to post security upon a showing that there is no reasonable probability he or she will prevail in the action. The plaintiff’s failure to post the security results in the dismissal of the action. (§ 391.4.)

“Since its enactment of the vexatious litigant law, the Legislature has expanded its reach. [Citation.] Most notably, in 1990, the Legislature both broadened the definitions of terms used in the law (§ 391) as well as created an additional tool, known as a prefiling order (§ 391.7), by which courts may counter vexatious litigants’ misuse of our justice system ....”

(*In re R.H.*, *supra*, 170 Cal.App.4th at p. 688; see also *Camerado Ins. Agency, Inc. v. Superior Court* (1993) 12 Cal.App.4th 838, 843 [explaining that the intent of 1990 amendments was “to broaden the reach of the vexatious litigant statute” and describing “expansive nature of the amendments”].)

Section 391.7, subdivision (a) provides that “the court may, on its own motion or the motion of any party, enter a prefiling order which prohibits a vexatious litigant from filing any new litigation in the courts of this state in propria persona without first obtaining leave of the presiding judge of the court where the litigation is proposed to be filed.” Subdivision (b) further provides that “[t]he presiding judge shall permit the filing of that litigation only if it appears that the litigation has merit and has not been filed for the purposes of harassment and delay.” The statute defines “litigation” to mean “any civil action or proceeding, commenced, maintained or pending in any state or federal court.” (§ 391, subd. (a).)

As part of the same 1990 bill that enacted section 391.7, the Legislature also added two new categories of “vexatious litigant” in section 391, subdivision (b). The first includes anyone who “[i]n any litigation while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay.” (§ 391, subd. (b)(3).) The second includes anyone who “[h]as previously been declared to be a vexatious litigant by any state or federal court of record.” (§ 391, subd. (b)(4).) The Legislature also modified the definition of “plaintiff” to clarify that it includes “an attorney at law acting

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in propria persona.” (§ 391, subd. (d).)<sup>3</sup>

“[A]ppellate courts have taken an expansive approach to the vexatious litigant law in much the same way as the Legislature.” (*In re R.H.*, *supra*, 170 Cal.App.4th at p. 691, citing *Forrest*, *supra*, 150 Cal.App.4th at pp. 195-196; *In re Natural Gas Anti-Trust Cases*, *supra*, 137 Cal.App.4th at p. 396; *Bravo v. Ismaj* (2002) 99 Cal.App.4th 211, 222; *Camerado*, *supra*, 12 Cal.App.4th at pp. 840-845.) The courts have rejected an overly literal interpretation where a broader reading is necessary to achieve the purposes of the law. For example, “[a]lthough the language of the statute refers to a person who is representing himself in propria persona, it has also been applied to a person represented by counsel where counsel acts as a mere puppet or conduit for the client’s abusive litigation tactics.” (*In re Natural Gas Anti-Trust Cases*, *supra*, 137 Cal.App.4th at p. 394, citing *In re Shieh* (1993) 17 Cal.App.4th 1154, 1166-1167.)

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<sup>3</sup>In 2002, the Legislature amended section 391.7 by adding the following provision: “For purposes of this section, ‘litigation’ includes any petition, application, or motion other than a discovery motion, in a proceeding under the Family Code or Probate Code, for any order.” (§ 391.7, subd. (d).) The purpose of this change was “to make clear that the provisions of [section 391.7] and related sections can be applied in Family Code and Probate Code matters.... It is arguably simply a clarification of existing law, which allows the law regarding vexatious litigants to be applied in ‘any civil action or proceeding commenced, maintained, or pending in any state or federal court.’ (Code of Civil Procedure section 391).” (Assem. Com. On Judiciary, Rep. on Assem. Bill No. 1938 (2001-2002 Reg. Sess.) Feb. 14, 2002, p. 4, at <<http://www.leginfo.ca.gov/>>; see also *In re R.H.*, *supra*, 170 Cal.App.4th at p. 700 [“the legislative history underlying this 2002 amendment to section 391.7 reveals the Legislature merely sought to draw attention to the availability of the vexatious litigant determination as a remedy for relatives who were legal guardians and were subjected to repeated[] and unfounded attempts by parents to challenge a legal guardian’s decision making or even their continuing status as legal guardian”].)

## **B. Principles of Statutory Construction.**

“When construing a statute, a court’s goal is ‘to ascertain the intent of the enacting legislative body so that we may adopt the construction that best effectuates the purpose of the law.’ [Citations.] Generally, the court first examines the statute’s words, giving them their ordinary and usual meaning and viewing them in their statutory context, because the statutory language is usually the most reliable indicator of legislative intent. [Citations.]” (*Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal. 4<sup>th</sup> 554, 567.)

“When the statutory language is ambiguous, a court may consider the consequences of each possible construction and will reasonably infer that the enacting legislative body intended an interpretation producing practical and workable results rather than one producing mischief or absurdity.” (*Gattuso, supra*, 42 Cal.4th at p. 567.) “It is a fundamental tenet of statutory construction that we must give the statute a *reasonable* construction conforming to legislative intent.” (*City of Santa Monica v. Gonzalez* (2008) 43 Cal.4th 905, 919.)

## **C. The Language of the Vexatious Litigant Statute Applies to Pending Actions and Proceedings.**

As noted, section 391.7, subdivision (a) authorizes the court to issue an order prohibiting a vexatious litigant from filing “any new litigation ... in propria persona” without first obtaining leave of the presiding judge. In the context of this statutory scheme, the word “new” refers to litigation occurring *after* entry of the prefilings order, not an early procedural stage in the lawsuit. (*Forrest, supra*, 150 Cal.App.4th at p. 196.) The Court of Appeal below did not dispute this interpretation of the word “new.” (Ex. A to Pet. For Review, p. 10.) Accordingly, this Court must examine the rest

of the statute to determine whether it applies to vexatious litigants who are subject to a pre-filing order and become self-represented while a lawsuit is already pending.

For several reasons, the language of the statute requires a vexatious litigant to obtain permission to proceed in pro per even if he or she was initially represented by counsel when the lawsuit was filed. First, the vexatious litigant statute broadly defines the word “litigation” to mean “any civil action or proceeding, commenced, *maintained or pending*” in any court. (§ 391, subd. (a), emphasis added.) Thus, the statute by its terms “encompasses lawsuits beyond the initial filing to include those that are maintained or pending.” (*Forrest, supra*, 150 Cal.App.4th at p. 197; see also *Fink v. Shemtov* (2010) 180 Cal.App.4th 1160, 1170 [“The term ‘litigation’ is broadly defined in section 391 ....”].) By defining “litigation” to include actions or proceedings that are “maintained or pending” in court, the Legislature expressed its intent not to confine the statute solely to newly-filed lawsuits. Thus, “the terms of the pre-filing order–representation by counsel or permission to file–pertain throughout the life of the lawsuit.” (*Forrest, supra*, 150 Cal.App.4th at p. 197.)

Second, the statutory definition of “litigation” includes “any action or proceeding ....” (§ 391, subd. (a), emphasis added.) The word “proceeding” itself has a distinct legal meaning that refers to *any* procedural step within a larger action or special proceeding. (*Lister v. Superior Court* (1979) 98 Cal.App.3d 64, 70, citing *Rooney v. Vermont Investment Corp.* (1973) 10 Cal.3d 351, 367.) ““Anything done from the commencement to the termination is a proceeding.”” (*Stonesifer v. Kilburn* (1892) 94 Cal. 33, 43, citation omitted; see also Black’s Law Dict. (9<sup>th</sup> ed. 2009) p. 1324 [defining “proceeding” as “[t]he regular and orderly

progression of a lawsuit, including all acts and events between the commencement and the entry of judgment” or as “[a]n act or step that is part of a larger action”].) For example, the term “proceeding” includes the settlement of a bill of exceptions (*Lukes v. Logan* (1884) 66 Cal. 33), a pretrial demand for exchange of expert witnesses (*Zellerino v. Brown* (1992) 235 Cal.App.3d 1097, 1104-1106), a motion to dismiss for lack of prosecution (*Larkin v. Superior Court* (1916) 171 Cal. 719, 724), a motion to dismiss for failure to answer interrogatories (*Aldrich v. San Fernando Valley Lumber Co.* (1985) 170 Cal.App.3d 725, 742), and the taking of a deposition in a pending action (*Burns v. Superior Court* (1903) 140 Cal. 1, 5-6).

“[W]hen a word used in a statute has a well-established *legal* meaning, it will be given that meaning in construing the statute.” (*Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 19.) By defining the term “litigation” to include “any ... *proceeding*, commenced, maintained, or pending” in court (§ 391, subd. (a), emphasis added), the Legislature manifested an intent to apply the statute to any “procedural step that is part of the larger action or special proceeding.” (*Lister, supra*, 98 Cal.App.3d at p. 70.) Accordingly, a vexatious litigant who becomes self-represented while the action is already pending cannot take any further procedural steps in the action without first obtaining permission from the presiding judge to proceed in *pro per*.

Third, this construction comports with the ordinary meaning of the term “litigation.” “Litigation” refers to “[t]he process of carrying on a lawsuit.” (Black’s Law Dict. (9<sup>th</sup> ed. 2009) p. 1017.) When a vexatious litigant becomes self-represented and seeks to “carry[] on a lawsuit” on his or her own (*ibid.*), he or she is engaged in “new litigation ... in *propria*

persona.” (§ 391.7, subd. (a).) Thus, section 391.7 should be construed to require permission of the presiding judge whenever a vexatious litigant seeks to represent himself or herself at *any* stage of a pending lawsuit.

Finally, when the Legislature enacted section 391.7 in 1990, it also expanded the definition of a vexatious litigant to include any pro per litigant who engages in frivolous or dilatory conduct *during* the course of a pending action. (§ 391, subd. (a)(3) [defining “vexatious litigant” to include someone who “[i]n any litigation while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay”].) As the court concluded in *Forrest*: “It would be anomalous for the statute to permit the entry of a prefiling order based on a litigant’s bad faith acts throughout a lawsuit but then limit application of the order to the filing of a new lawsuit and have no application during its pendency.” (*Forrest, supra*, 150 Cal.App.4th at p. 197.)

The Court of Appeal below erred in its analysis of the statutory language. The court acknowledged that the statutory definition of “litigation” contained in section 391, subdivision (a) refers to “various types of civil actions or proceedings *at various stages of progress* and in various courts.” (Ex. A to Pet. For Review, p. 11, emphasis added.) However, the court concluded that the word “litigation” as used in section 391.7, subdivision (a) “refers only to a subset of the larger category of actions that are included within the statutory definition—it there refers only to actions that the plaintiff proposes to file but has not yet filed.” (*Id.* at p. 12.)

This reasoning is faulty. Section 391 explicitly states that the definitions contained therein apply to *all* of Title 3A governing vexatious litigants. (§ 391 [“As used in this title, the following terms have the following meanings ....”].) Section 391.7 is part of Title 3A. Thus, the definition of “litigation” set forth in section 391, subdivision (a) applies to that term as used in section 391.7, subdivision (a). “If the Legislature has provided an express definition of a term, that definition ordinarily is binding on the courts.” (*Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1063; see also *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 826 [“If the Legislature has provided an express definition, we must take it as we find it.”].) Furthermore, “it is generally presumed that when a word is used in a particular sense in one part of a statute, it is intended to have the same meaning if it appears in another part of the same statute.” (*People v. Dillon* (1983) 34 Cal.3d 441, 468.)

In ruling that the definition of “litigation” in section 391.7 is more restrictive than the statutory definition of section 391, the Court of Appeal pointed out that section 391.7 is expressly limited to “litigation *in the courts of this state* ....” (§ 391.7, subd. (a), emphasis added), whereas section 391, subdivision (a) defines “litigation” more broadly to include actions or proceedings “in any state or federal court.” (Ex. A to Pet. for Review, pp. 11-12.) However, this does not logically demonstrate that the Legislature *also* restricted the statutory definition of “litigation” to exclude pending actions and proceedings. By its terms, section 391.7 applies to *any* “litigation” that is: (i) “new,” i.e., occurring after entry of the prefiling order (*Forrest, supra*, 150 Cal.App.4th at p. 196); (ii) filed “in any court of this state”; and (iii) prosecuted “in propria persona.” (§ 391.7, subd. (a).) None of these limitations excludes *pending* actions or proceedings, which are part of the statutory definition of “litigation.” (§ 391, subd. (a).)

The Court of Appeal apparently relied on the language of section 391.7, subdivision (a) stating that the vexatious litigant must seek permission from “the presiding judge of the court *where the litigation is proposed to be filed.*” (§ 391.7, subd. (a), emphasis added.) However, this phrase merely identifies which presiding judge must give permission; it does not purport to limit the *type* of litigation for which a vexatious litigant must seek permission. Furthermore, the word “file” can mean either the delivery of a document to the court clerk in a pending case or the commencement of a whole new lawsuit. (Black’s Law Dict. (9<sup>th</sup> ed. 2009) p. 704.) Because the statute defines “litigation” to include “pending” actions, as well as proceedings within a larger action (§ 391, subd. (a)), and because a pro per can *become* a “vexatious litigant” by engaging in frivolous or dilatory tactics during the litigation of a pending case (§ 391, subd. (b)(3)), it follows that a vexatious litigant can “propose to file” new litigation in pro per even in a case that is already pending. Thus, the phrase “where the litigation is proposed to be filed” does not modify or restrict the governing statutory definition of “litigation” set forth in section 391, subdivision (a).<sup>4</sup>

For all these reasons, the language of the vexatious litigant statute supports the *Forrest* court’s conclusion that “the requirements of a prefiling

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<sup>4</sup>This same reasoning also applies to the language of the prefiling order entered against Shalant, which prohibited him from “filing any new litigation in propria persona in the courts of California without approval of the presiding judge of the court in which the action is to be filed.” (9 CT 1899.) Construed in harmony with the statute authorizing these types of orders, this standard Judicial Council form can only be understood to use the term “litigation” as it is expressly defined in the vexatious litigant statute. (Cf. *In re Alyssa H.* (1994) 22 Cal.App.4th 1249, 1253-1254 [Judicial Council presumed to be aware of preexisting legal definition of phrase].)

order, under section 391.7, remain in effect throughout the life of a lawsuit and permit dismissal at any point when a vexatious litigant proceeds without counsel [and] without the permission of the presiding judge.” (*Forrest, supra*, 150 Cal.App.4th at p. 197.)

**D. The Purposes of the Statute Would Best be Served by Applying it to Pending Actions.**

In addition to being supported by the statutory language, the interpretation adopted in *Forrest* “best effectuates the purpose of the law.” (*Gattuso, supra*, 42 Cal. 4<sup>th</sup> at p. 567.) The 1990 bill enacting section 391.7 was sponsored by the Attorney General and introduced by Senator Milton Marks. (*McColm v. Westwood Park Assn.* (1998) 62 Cal.App.4th 1211, 1216, fn. 3.) “According to a Committee Report, the 1990 amendment’s primary purpose was ‘to reduce the state’s costs of defending frivolous suit[s] filed against the state.’” (Lee W. Rawls, *The California Vexatious Litigant Statute: A Viable Judicial Tool to Deny The Clever Obstructionists Access?* (1998) 72 S. Cal. L. Rev. 275, 286, citation omitted.) “According to the sponsor [], the Attorney General’s office spends substantial amounts of time defending unmeritorious lawsuits brought by vexatious litigants.... The sponsor contends existing California law should be strengthened to prevent the waste of public funds required for the defense of frivolous suits.” (*Id.* at p. 286, fn. 71, citation omitted.)

This legislative purpose would best be served by construing section 391.7 to apply *whenever* a vexatious litigant seeks to litigate a case in pro per, even if he or she does not become self-represented until after the initial filing of the lawsuit. As this Court has acknowledged in another context, “[c]ontinuing an action one discovers to be baseless harms the defendant and burdens the court system just as much as initiating an action known to be baseless from the outset.” (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 969



[attorney may be held liable for malicious prosecution for continuing to prosecute lawsuit after learning it is not supported by probable cause].) Where a vexatious litigant cannot find *any* attorney to continue prosecuting a pending case—and his or her prior attorney or attorneys have all been relieved or withdrawn—it is very likely because the vexatious litigant’s case is yet another frivolous action that stands no chance of success. (See *Wolfgram, supra*, 53 Cal.App.4th at p. 57 [litigant’s history of losing lawsuits “while acting in propria persona ... support[s] the reasonable inference that the suer has been using the court system inappropriately and will continue to do so”].) In these circumstances, requiring the vexatious litigant to demonstrate “that the litigation has merit and has not been filed for the purposes of harassment or delay” (§ 391.7, subd. (b)) serves the Legislature’s primary goal of reducing the cost of defending against frivolous lawsuits.

This interpretation also promotes the Legislature’s secondary goals of relieving the burden on the court system and freeing judicial resources to devote to other *non-frivolous* cases. (See *In re Natural Gas Anti-Trust Cases, supra*, 137 Cal.App.4th at pp. 393-394; *In re Bittaker, supra*, 55 Cal.App.4th at p. 1008; *Wolfgram, supra*, 53 Cal.App.4th at p. 48.) “[V]exatious litigants tie up a great deal of a court’s time, denying that time to litigants with substantial cases.” (*Wolfe v. George* (9<sup>th</sup> Cir. 2007) 486 F.3d 1120, 1126.) A vexatious litigant with a past history of abusing the judicial process should not be permitted to waste even more judicial resources by litigating yet another case in pro per without at least making the minimal showing that his or her case has merit and is not being pursued for improper purposes. (§ 391.7, subd. (b).) Even if the vexatious litigant becomes self-represented *after* the lawsuit is filed, it serves the goals of the statute to give courts the tools to dispose of frivolous claims by pro per

vexatious litigants quickly and efficiently so that they do not continue to clog the system and force other litigants to wait in line to be heard.

**E. A Contrary Interpretation Would Allow Vexatious Litigants to Circumvent the Statute.**

The Court of Appeal's contrary interpretation of section 391.7 would create a significant loophole in the law that vexatious litigants could easily exploit. If the law only required the presiding judge's permission for the initial filing of a lawsuit in pro per, a vexatious litigant could easily evade the statute simply by finding a lawyer who is willing to put his or her name on the complaint and later substitute out of the case. Vexatious litigants could defeat the purpose of the law by using attorneys "as mere puppets" just to file the initial complaint. (See, e.g., *In re Shieh, supra*, 17 Cal.App.4th at p. 1167 [finding that vexatious litigant used his attorneys "as mere puppets" rather than "as neutral assessors of his claims, bound by ethical considerations not to pursue unmeritorious or frivolous matters on behalf of a prospective client"].) Furthermore, once the attorney substituted out of the case, the vexatious litigant would be free to add frivolous new claims against the defendant by filing an amended complaint, including claims already adjudicated in prior proceedings.

A vexatious litigant could also use this same evasive tactic to circumvent the requirement of obtaining permission to pursue an appeal in pro per. (See *McColm, supra*, 62 Cal.App.4th at p. 1217 [holding that section 391.7 requires permission of administrative presiding justice for a vexatious litigant to appeal in pro per].) So long as the vexatious litigant could find some lawyer to "initiate" the appeal simply by putting his or her name on the notice of appeal, the litigant could later substitute in for the lawyer and pursue the appeal in pro per without permission of the administrative presiding justice. Moreover, if the vexatious litigant were

represented by counsel in the trial court, he or she could easily accomplish this result simply by insisting that trial counsel file a notice of appeal on his or her behalf.

A statute should not be construed in a manner that creates an opportunity for subterfuge, evasion, or circumvention. (*Freedland v. Greco* (1955) 45 Cal.2d 462, 467-468.) This is particularly important for a law that is targeted against vexatious litigants who already have a history of abusing the judicial system. The whole purpose of section 391.7 is to provide “a necessary method of curbing those for whom litigation has become a game.” (*Wolfgram, supra*, 53 Cal.App.4th at p. 60.) Thus, the Court should reject any interpretation of the statute that would give these “clever obstructionists” an easy way to game the system. (*Rawles, supra*, 72 S. Cal. L. Rev. at 275, fn. d1 [referring to vexatious litigants as “clever obstructionists”].)

California courts have consistently held that vexatious litigants should not be permitted to evade the requirements of the statute simply by finding some lawyer who is willing to lend his or her name to the action. In *Muller v. Tanner* (1969) 2 Cal.App.3d 438, for example, the court found that a plaintiff acting in propria persona was a vexatious litigant and ordered him to furnish security pursuant to section 391.3. (*Id.* at p. 441.) Rather than comply, the plaintiff found an attorney to file a whole new action alleging the same cause of action as the prior complaint. (*Ibid.*) The trial court struck the new action and the Court of Appeal affirmed: “To permit the plaintiff to evade the foregoing consequences by filing a second suit on the same cause of action would be to encourage the vexatious litigation which the statute was designed to prevent.... The fact that plaintiff secured an attorney to lend his name to the subsequently filed complaint

avails him naught.” (*Id.* at pp. 443-444.)

In *Camerado, supra*, 12 Cal.App.4th 838, the court held that the vexatious litigant statute authorized an order requiring the plaintiff to furnish security even though the plaintiff was represented by counsel in the current litigation. The court stated: “The legislative purpose would be frustrated by a construction of the statute which would permit a vexatious litigant to avoid the protection afforded potential targets simply by obtaining counsel.” (*Id.* at p. 842.)

In *In re Shieh, supra*, 17 Cal.App.4th 1154, the Court of Appeal declared attorney Shieh to be a vexatious litigant and issued a prefiling order pursuant to section 391.7. Even though the literal language of the statute only allows the prefiling order to apply to litigation filed “in propria persona” (§ 391.7, subd. (a)), the court made the prefiling order applicable to any future litigation filed by Shieh “whether in propria persona or through an attorney ....” (*In re Shieh, supra*, 17 Cal.App.4th at pp. 1167-1168.) The court reasoned that the attorneys who had purported to represent Shieh in the past were acting as “mere puppets” rather than “neutral assessors of his claims” and thus “a prefiling order limited to Shieh’s in propria persona activities would be wholly ineffective as a means of curbing his out-of-control behavior.” (*Id.* at p. 1167; see also *Wolfgram, supra*, 53 Cal.App.4th at p. 58 [“The vexatious litigant can be barred from court, even if he uses a ‘strawman’ attorney”].)

In *Say & Say, Inc. v. Ebershoff* (1993) 20 Cal.App.4th 1759, the same court declared Shieh’s corporation Say & Say, Inc. to be a vexatious litigant and issued a prefiling order for the corporation. Even though “section 391, subdivision (b) defines a vexatious litigant as a person who has in the past appeared in propria persona in litigation” (*id.* at p. 1766),

and corporations generally cannot appear in propria persona (*id.* at pp. 1766-1767), the court found that Say & Say, Inc. was subject to the vexatious litigant law because Shieh had used the corporation as a means to “circumvent” the statute. (*Id.* at pp. 1769-1670 & fn. 11.)

As these cases demonstrate, vexatious litigants with a history of manipulating the judicial system will take full advantage of any potential loophole in the statute. Unfortunately, there are also lawyers who will cooperate with them in doing so. In each of the foregoing cases, the courts chose a broad construction to accomplish the purposes of the statute, rather than a narrow and literal construction that would have permitted evasion. When interpreting a statute, courts “may reject a literal construction that is contrary to the legislative intent apparent in the statute or that would lead to absurd results.” (*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 27.) Accordingly, even if this Court were to find that the literal language of the statute only applies to the initiation of new lawsuits, it should not adopt such a literal interpretation because it would facilitate evasion and frustrate the purposes of the Legislature. To achieve the purposes of the law and prevent circumvention, section 391.7 should be construed to apply whenever a vexatious litigant who is subject to a pre-filing order seeks to represent himself or herself at any stage of the litigation.

**F. The Court of Appeal Erred in Ruling that Section 391.7 Must Be Strictly Construed.**

The Court of Appeal below disagreed with the *Forrest* court’s reliance on the statement that “[s]ection 391.7 has been broadly interpreted.” (*Forrest, supra*, 150 Cal.App.4th at p. 195.) Although the Court of Appeal agreed that this statement was true “as a purely descriptive claim,” it found that “taken as a normative claim—that section 391.7 *should*

be interpreted broadly—the statement is incorrect, because the Court of Appeal has repeatedly upheld the vexatious litigant statutes (including section 391.7) against constitutional challenges on the ground that the statutes are *narrowly drawn* and thus do not impermissibly invade the right of access to the courts.” (Ex. A to Pet. for Review, pp. 12-13, citing *Wolfgram*, *supra*, 53 Cal.App.4th at pp. 55-57, 60; *Luckett v. Panos* (2008) 161 Cal.App.4th 77, 81; *In re R.H.*, *supra*, 170 Cal.App.4th at p. 702; *Kobayashi v. Superior Court* (2009) 175 Cal.App.4th 536, 541.) The Court of Appeal stated: “Given the important constitutional concerns that section 391.7 implicates, we conclude that the statute should not be broadly interpreted. Rather, it should be applied strictly according to its terms.” (*Id.* at p. 13.)

This reasoning is flawed. The cases cited by the Court of Appeal merely observed that section 391.7 is narrowly drawn *in substance*, because it allows vexatious litigants to continue to prosecute lawsuits either with counsel or with the permission of the presiding judge upon a showing that the lawsuit “has merit and has not been filed for the purposes of harassment or delay.” (§ 391.7, subd. (b).) In other words, “[w]hen the vexatious litigant knocks on the courthouse door with a colorable claim, he may enter.” (*Wolfgram*, 53 Cal.App.4th at p. 60.) Contrary to the Court of Appeal’s holding, none of these cases held that the *language* of section 391.7 must be construed narrowly for the statute to withstand constitutional scrutiny. Because the statute already avoids any constitutional infirmity by *allowing* vexatious litigants to prosecute meritorious lawsuits (§ 391.7, subd. (b)), a narrow construction of the statutory language is not necessary to render it constitutional. “[B]aseless litigation is not immunized by the First Amendment right to petition.” (*Wolfgram*, 53 Cal.App.4th at pp. 57-58, quoting *Bill Johnson’s Restaurants, Inc. v. NLRB* (1983) 461 U.S. 731,

743; see also *Wolfe v. George* (9<sup>th</sup> Cir. 2007) 486 F.3d 1120, 1125; *Kobayashi, supra*, 175 Cal.App.4th at p. 541; *In re R.H., supra*, 170 Cal.App.4th at pp. 702-703; *Luckett, supra*, 161 Cal.App.4th at p. 81.)<sup>5</sup>

As demonstrated above, “appellate courts have taken an expansive approach to the vexatious litigant law in much the same way as the Legislature.” (*In re R.H., supra*, 170 Cal.App.4th at p. 691, citing *Forrest, supra*, 150 Cal.App.4th at pp. 195-196; *In re Natural Gas Anti-Trust Cases, supra*, 137 Cal.App.4th at p. 396; *Bravo, supra*, 99 Cal.App.4th at p. 222; *Camerado, supra*, 12 Cal.App.4th at pp. 840-845.) A broad interpretation is necessary to achieve the Legislature’s purposes and prevent evasion of the statute. Moreover, there is nothing even arguably unconstitutional about applying the statute to a vexatious litigant who becomes self-represented while the action is pending. As long as the vexatious litigant can demonstrate that the lawsuit has merit and was not filed for an improper purpose, he or she will be permitted to proceed in pro per. (§ 391.7, subd. (b).) Although it is true that statutes should be construed to avoid constitutional infirmity, there is no conceivable

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<sup>5</sup>In addition to rejecting claims based on the right to petition, state and federal courts have rejected attacks against California’s vexatious litigant statute based on virtually every other imaginable constitutional theory. (*Moran v. Murtaugh Miller Meyer & Nelson, LLP* (2007) 40 Cal.4th 780, 786 [right to jury trial, alleged discrimination against vexatious litigants of “modest means,” due process]; *In re R.H., supra*, 170 Cal.App.4th at pp. 700-705 [right to counsel, due process, other California constitutional claims]; *Wolfgram, supra*, 53 Cal.App.4th at pp. 59-61 [prior restraint, due process]; *In re Whitaker* (1992) 6 Cal.App.4th 54, 56; *Wolfe v. George, supra*, 486 F.3d at pp. 1125-1126 [vagueness, due process, equal protection, double jeopardy, ex post facto, Eighth Amendment, bill of attainder, Supremacy Clause].) None of these cases suggested that the constitutional validity of the vexatious litigant statute is dependent on a narrow construction of the statutory language.

constitutional impediment to this construction. Accordingly, the Court of Appeal erred in adopting a narrow construction of the statute due to the “important constitutional concerns” allegedly implicated. (Ex. A to Pet. for Review, p. 13.)

### **CONCLUSION**

For all the foregoing reasons, the judgment of the Court of Appeal should be reversed.

Dated: Sept. 17, 2010

**NIDDRIE, FISH & BUCHANAN LLP**  
Martin N. Buchanan  
(Attorneys for Respondent  
Thomas V. Girardi)

**LEWIS BRISBOIS BISGAARD &  
SMITH LLP**  
Rebecca R. Weinreich  
(Attorneys for Respondent  
National Union Fire Insurance  
Company of Pittsburgh PA)

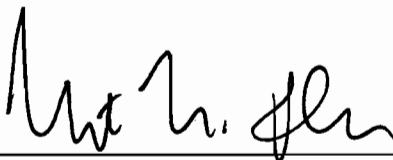


## CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.520(c) of the California Rules of Court, I certify that the foregoing Opening Brief on the Merits was produced on a computer in 13-point type. The word count, including footnotes, as calculated by the word processing program used to generate the brief is 7,621 words.

Dated: Sept. 17, 2010

NIDDRIE, FISH & BUCHANAN, LLP

By:   
\_\_\_\_\_  
Martin N. Buchanan  
(Attorney for Respondent  
Thomas V. Girardi)

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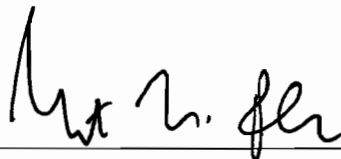
I, Martin N. Buchanan, am employed in the County of San Diego, California. I am over the age of 18 years and not a party to the within action. My business address is 750 B Street, Suite 3300, San Diego, California 92101. On Sept. 17, 2010, I served the foregoing **OPENING BRIEF ON THE MERITS** by mailing a copy by first class mail in separate envelopes addressed as follows:

Brian A. Yapko  
Law Offices of Brian A. Yapko  
3470 Wilshire Blvd., Suite 1026  
Los Angeles, CA 90010  
(Attorney for Appellant  
Joseph L. Shalant)

Clerk of Court  
California Court of Appeal  
Second Appellate District, Div. One  
300 S. Spring Street, Second Floor,  
N. Tower  
Los Angeles, CA 90013-1213

Hon. Teresa Sanchez Gordon  
Los Angeles Superior Court  
Department 74  
111 North Hill Street  
Los Angeles, CA 90012

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on Sept. 17, 2010, at San Diego, California.



Martin N. Buchanan

