



1           4. This action seeks to enjoin the State of California, its agents, and its  
2 officers, from sanctioning appeals and other separate actions under California Family  
3 Code Section 271<sup>1</sup> on the grounds that sanctions under that statute chills access to the  
4 courts pursuant to the petition clause of the First Amendment and related authorities.

5                   "[N]o state law is above the Constitution ...if they conflict  
6 with the Fourteenth Amendment federal courts have a duty to  
7 prescribe appropriate remedies." Milliken v. Bradley, 418  
8 U.S. 717 (1974)

9           5. The appellate briefs, petition for review, and Flaherty all raised the  
10 unconstitutional chilling effect<sup>2</sup> of Section 271 sanctions against appeals during the  
11 State of California's jurisdiction.<sup>3</sup>

- 12       • **Flaherty at 651**: "[A]ny definition [of a frivolous appeal] must be read so as to  
13 avoid a serious chilling effect on the assertion of litigants' rights on appeal. . .  
14 Vague definitions of what constitutes a frivolous appeal raise the danger that  
15 attorneys will be deterred from asserting valid claims out of a fear that they will  
16 incur court sanctions. This in turn will deprive their clients of their day in court."
- 17       • **S127052 Petition for Review p.10**: "If Review is denied, then petitioner will  
18 incur a miscarriage of justice and future litigants will be chilled by the threat of  
19 sanctions – or blind-sighted by arbitrary appellate sanctions outside of Rules and  
20 published authorities."

---

21 <sup>1</sup> **California Family Code Section 271 (a)** Notwithstanding any other provision of this  
22 code, the court may base an award of attorney's fees and costs on the extent to which the  
23 conduct of each party or attorney furthers or frustrates the policy of the law to promote  
24 settlement of litigation and, where possible, to reduce the cost of litigation by  
25 encouraging cooperation between the parties and attorneys. An award of attorney's fees  
and costs pursuant to this section is in the nature of a sanction.

<sup>2</sup> **Chill**: "The relinquishment of legitimate First Amendment rights by individuals, fearful  
of the possible or threatened application of laws or sanctions and subsequent prosecution,  
whether or not successful, indirectly resulting from the exercise of those legitimate  
rights." (Barrons Law Dictionary, emphasis added)

<sup>3</sup> Plaintiff never waived his claim that the statute is unconstitutional pursuant to Federal  
Rules of Civil Procedure, Rule 24(e) [28 U.S.C. § 2403]



1 orders pursuant to state statutes that deprive citizens of their liberty and property  
2 comply with the U.S. Constitution.

3 14. Defendant California State Judiciary is a real party, since Judge Mize  
4 initially suggested that appellate fee sanctions be sought under section 271, and the  
5 Third Appellate District remanded for a "reconsideration of actual appellate expenses"  
6 which Judge Borack construed as a directive to order sanctions. "[W]e directed the  
7 trial court to make that award, on Wife's motion, once the appeal was final." (C045271  
8 p.6).

### 10 **STANDING**

11 15. Plaintiff has standing under Article III of the Constitution to maintain this  
12 suit, cf. *Northeastern Florida Contractors v. Jacksonville*, 508 U.S. 656, 663 (1993):

13 a) Plaintiff has suffered an "injury in fact" as the superior and appellate courts of  
14 California have sanctioned him over \$13,000 for bringing two appeals, neither of  
15 which was deemed to be frivolous or bad faith.

16 b) Plaintiff's injury is a direct result of the statute at issue.

17 c) The threat of further sanctions under Family Code Section 271 has chilled  
18 plaintiff's ability to defend himself in pending family court matters. There is a  
19 substantial likelihood that the relief sought from this court, if granted, would  
20 remedy this harm.

1 **FACTUAL BACKGROUND**

2 16. On January 28, 2002, the California Superior Court sanctioned plaintiff  
3 \$5,400 under Family Code § 271 for filing a separate civil action (01AS04738,  
4 Sacramento) after the divorce was final, alleging "abuse of process."<sup>4</sup> That civil action  
5 was not deemed frivolous nor subject to sanctions by the court that presided over it.

6 17. On February 28, 2002, plaintiff filed a timely notice of appeal from the  
7 January 28th order, pursuant to Code of Civil Procedure § 904.1 (A)(12) "From an  
8 order directing payment of monetary sanctions by a party or an attorney for a party if  
9 the amount exceeds five thousand dollars (\$5,000)." [Appeal #1 C040538].

10 18. On April 29, 2002, the Superior Court sanctioned plaintiff under § 271  
11 another \$4000, without prejudice, for all costs and fees that may result from that  
12 appeal - unless plaintiff agreed to drop the appeal from that judge's own ruling.

13 19. At the April 29, 2002 hearing, plaintiff objected that this subsequent  
14 sanction for appealing was "chilling [his] appeal."

15 20. Plaintiff offered a draft of his appellate brief and stated he would drop the  
16 appeal if the court explained the lack of merit, yet the court declined to explain the  
17 lack of merit. (RT 12 line 12).

18 21. Perhaps mindful of the Constitutional ramifications, the court stated,  
19 "There's no intention on this court to indicate that he should not appeal, because  
20 everyone has the right to appeal. Defense positions or objections turn out to be law in  
21 the future. So we don't know what's going to happen." (RT 27 line 12).

22 22. On June 7, 2002, Plaintiff filed a timely notice of appeal from the April  
23 29th "sanction for appealing" order. [Appeal #2 C041377].

24  
25 <sup>4</sup> Plaintiff alleged that wife's attorneys committed perjury in the ex parte residence  
exclusion that removed him from his house, abusing a restraining order to change status  
quo and for material gain rather than for "protection."

1           23. The Third District Appellate Court consolidated the two appeals and  
2 rendered the disposition:

3                   “The \$5,400 sanctions award (C040538) is affirmed. The  
4                   \$4,000 sanctions award (C041377) is reversed with directions  
5                   to the trial court to reconsider the actual amount of appellate  
6                   expenses.”

- 7           • The disposition did not explicitly remand for sanctions.
- 8           • The appellate court did not give notice of its intent to order sanctions against the  
9           appeals pursuant to California Rules of Court Rule 27(e).
- 10          • The appellate court did not dispute that the first appeal raised issues of first  
11          impression, and the second appeal resulted in reversal.
- 12          • No court found these appeals to be frivolous nor brought for improper motive  
13          pursuant to In re Marriage of Flaherty<sup>5</sup> (1982) 31 Cal.3d 637, 650.

14           24. Nonetheless, on remand on August 28, 2003, the court sanctioned plaintiff  
15 over \$13,000 under Family Code § 271 for all attorney’s fees incurred within these  
16 appeals - including \$5000 against C041377, which resulted in reversal.

17           25. Judge Borack,<sup>6</sup> who ordered the \$13,000 sanction, admitted that she had not  
18 reviewed the record prior to the OSC hearing; had not previously presided over this  
19 matter; and conceded that the sanction was a construal of the C041377 disposition.

---

20 <sup>5</sup> [T]o avoid a *serious chilling effect* on the assertion of litigants' rights on appeal.  
21 Counsel and their clients have a right to present issues that are arguably correct, even if it  
22 is extremely unlikely that they will win on appeal. An appeal that is simply without merit  
23 is not by definition frivolous and *should not incur sanctions*. In re Marriage of Flaherty  
24 (1982) 31 Cal.3d 637, 650 (emphasis added)

25 <sup>6</sup> Ironically, Judge Borack is the sister of State Senator Sheila Kuehl, a feminist activist  
responsible for much of the legislation that has turned restraining orders and false  
allegations into “divorce tactics.” Under Kuehl’s legislation plaintiff was denied joint  
custody of his children because the judge said that the mere presence of a restraining  
order gives rise to the presumption against joint custody.



1  
2 33. A sanction is "a punitive or coercive measure or action that results from  
3 failure to comply with a law, rule, or order." (Merriam-Webster's Dictionary of Law)

4 34. California Family Code Section 271 is a sanction for the conduct of  
5 "frustrating settlement."

6 35. By their nature, legitimate appeals frustrate matters that have been settled  
7 by a lower court.

8 36. Bringing legitimate appeals is both authorized by California statutes and a  
9 Constitutional Right under the Petition Clause of the First Amendment.

10 37. Section 271 empowers judges to sanction litigants in excess of \$10,000 for  
11 bringing legitimate, good faith, nonfrivolous appeals from their rulings.

12 38. Sanctions or the threat of sanctions in excess of \$10,000 chill legitimate  
13 appeals.

14 39. Statutes that chill the legitimate exercise of First Amendment rights are  
15 unconstitutional.

16 40. Therefore it is unconstitutional to sanction appeals under the Family Code  
17 Section 271 standard of "frustrating settlement."

18  
19 **B) Sanctioning appeals under the standards of California's**  
20 **Family Code Section 271 violates the Petition Clause of**  
21 **the First Amendment by chilling the right of access to the**  
22 **court, and is therefore unconstitutional.**

23 41. The right of petition originates from chapter 61 of Magna Carta (1215).

24 42. Although the Constitution's text does not expressly provide a right of  
25 "access to the courts," U.S. Supreme Court decisions have grounded it in the First  
Amendment's Petition Clause, see, e.g., California Motor Transp. Co. v. Trucking  
Unlimited, 404 U.S. 508, 513 (1972).

1           43. A law that impinges upon a fundamental right explicitly or implicitly  
2 secured by the Constitution is presumptively unconstitutional. Mobile v. Bolden, 446  
3 U.S. 55, 76 (1980). Even indirect restraints intended to cure some evil cannot be  
4 sustained:

5                   "[The right to petition for redress of grievances] is among the  
6 most precious of the liberties safeguarded by the Bill of  
7 Rights... The First Amendment would, however, be a hollow  
8 promise if it left government free to destroy or erode its  
9 guarantees by indirect restraints so long as no law is passed  
10 that prohibits free speech, press, petition, or assembly as such.  
11 We have therefore repeatedly held that laws which actually  
12 affect the exercise of these vital rights cannot be sustained  
13 merely because they were enacted for the purpose of dealing  
14 with some evil within the State's legislative competence..."  
15 Mine Workers v. Illinois Bar Assn., 389 U.S. 217 (1967)

16           44. There is no Federal appellate sanction comparable to the California Family  
17 Code Section 271 sanction.

18           45. California Code of Civil Procedure 1034(b) directs the California Judicial  
19 Council to "establish by rule allowable costs on appeal and the procedure for claiming  
20 those costs." These are California Rules of Court Rule 27 and Rule 870.2.

21           46. Of these two rules, only Rule 27(e) pertains to sanctions.

22           47. An appellate sanction under Family Code Section 271 is a lower standard  
23 for sanctions than the prevailing standards of both In re Marriage of Flaherty (1982) 31  
24 Cal.3d 637, and California Rules of Court Rule 27(e).

25           48. A statute authorizing a judge to sanction a legitimate appeal from his own  
ruling, based on whether he deemed that appeal "necessary," chills legitimate and  
protected litigation, and is thus unconstitutional under the petition clause of the First  
Amendment.

1                   **C) Sanctions against appeals under California's Family Code**  
2                   **Section 271 are unconstitutionally vague and arbitrary.**

3                   49. Family Code Section 271 is unconstitutionally vague. Unlike sanctions for  
4 frivolous appeals, in which the state provides clear prongs under Flaherty, the state  
5 provides no similar guidelines for when a legitimate appeal might be deemed  
6 "unnecessary" or a "frustration of settlement."

7                   “[First Amendment] freedoms are delicate and vulnerable, as  
8 well as supremely precious in our society. The threat of  
9 sanctions may deter their exercise almost as potently as the  
10 actual application of sanctions. Cf. Smith v. California, 361  
11 U.S. 147, 151-154; Speiser v. Randall, 357 U.S. 513, 526.  
12 Because First Amendment freedoms need breathing space to  
13 survive, government may regulate in the area only with  
14 narrow specificity. Cantwell v. Connecticut, 310 U.S. 296,  
15 311.” N. A. A. C. P. v. Button, 371 U.S. 415, 433 (1963)

16                   50. Family Code Section 271 is unconstitutionally arbitrary: While every  
17 appeal is arguably a "frustration of a settled matter," not every family law appeal is  
18 sanctioned on remand under that standard. The State provides no narrow specificity for  
19 what makes an appeal "necessary" or "unnecessary" pursuant to that statute:

20                   It is a basic principle of due process that an enactment is void  
21 for vagueness if its prohibitions are not clearly defined.  
22 Vague laws offend several important values. First, because  
23 we assume that man is free to steer between lawful and  
24 unlawful conduct, we insist that laws give the person of  
25 ordinary intelligence a reasonable opportunity to know what  
is prohibited, so that he may act accordingly. Vague laws may  
trap the innocent by not providing fair warning. Second, if  
arbitrary and discriminatory enforcement is to be prevented,  
laws must provide explicit standards for those who apply  
them. 4 A vague law impermissibly delegates basic policy  
matters to ... judges ... for resolution on an ad hoc and  
subjective basis, with the attendant dangers of ***arbitrary and  
discriminatory application***. Third, but related, where a vague  
statute "abut[s] upon sensitive areas of basic First  
Amendment freedoms," it "operates to inhibit the exercise of  
[those] freedoms." Uncertain meanings inevitably lead  
citizens to "'steer far wider of the unlawful zone' . . . than if  
the boundaries of the forbidden areas were clearly marked."  
GRAYNED v. CITY OF ROCKFORD, 408 U.S. 104, 108  
(1972) (emphasis added)

1  
2 **FIRST CAUSE OF ACTION FOR**  
3 **DECLARATORY RELIEF AGAINST ALL DEFENDANTS**

4 51. Plaintiff incorporates by reference and realleges each and every allegation  
5 in the above Paragraphs.

6 52. Sanctioning appeals under the standard of California's Family Code Section  
7 271 chills legitimate litigation and is therefore unconstitutional under the Petition  
8 Clause of the First Amendment.

9 53. An actual and justiciable controversy exists between the parties concerning  
10 the constitutionality of Family Code Section 271.

11 54. Plaintiff is informed and believes, and therefore alleges that defendants  
12 dispute that sanctioning appeals under Family Code Section 271 violates the U.S.  
13 Constitution.

14 55. A judicial determination of rights and responsibilities arising from this  
15 actual controversy is necessary and appropriate at this time.

16 56. WHEREFORE, Plaintiff prays for judgment as hereinafter set forth.

17  
18 **SECOND CAUSE OF ACTION FOR**  
19 **INJUNCTIVE RELIEF AGAINST ALL DEFENDANTS**

20 57. Plaintiff incorporates by reference and realleges each and every allegation  
21 in the above Paragraphs.

22 58. Plaintiff contends that Defendants' enforcement of Family Code Section  
23 271 to sanction legitimate appeals will, unless enjoined by this Court, cause great and  
24 irreparable injury to Plaintiff, and those similarly situated, in that Plaintiff will be  
25 chilled from appealing from unjust and improper family law orders for fear that the

1 judge who made the order will deem his appeals unnecessary litigation and sanction  
2 him in excess of \$10,000.

3 59. Furthermore, unless defendants are enjoined from enforcing Family Code  
4 Section 271, the Judiciary will be authorized to arbitrarily order sanctions against  
5 appeals, perhaps disproportionately against PRO SE litigants, since any appeal can be  
6 construed a "frustration of a settled matter."

7 60. Without an injunction restraining enforcement of Family Code Section 271,  
8 Defendants will maintain and enforce sanctions against appeals that, regardless of  
9 merit or outcome, they deem "unnecessary."

10 61. WHEREFORE, Plaintiff prays for judgment as hereinafter set forth.

11 **PRAYER**

12 62. WHEREFORE, Plaintiff prays for relief and judgment as follows:

13 63. For a declaration that - either on its face or as applied - it is  
14 unconstitutional to sanction appeals under California Family Code Section 271;

15 64. For an order enjoining the California State Judiciary from sanctioning  
16 appeals under Family code Section 271;

17 65. To allow Plaintiff to recover his costs, expert witness fees, and attorney  
18 fees as may be allowed by law; and

19 66. To provide such other and further relief as the Court may deem proper.

20 December 4, 2004

21  
22  
23 

---

Kim Berry - PRO SE  
24 6465 Aspen Gardens Way  
25 Citrus Heights, CA 95621  
916 213-0492

1  
2 **VERIFICATION**

3 I, Kim Andrew Berry, declare:

4 I have read the foregoing Verified Complaint for Declaratory and Injunctive Relief  
5 and, except for matters stated on information and belief, the facts stated therein are  
6 true on my own knowledge, and as to those matters stated on information and belief, I  
7 believe them to be true. I declare under penalty of perjury under the laws of the United  
8 States that the foregoing is true and correct and that this verification was executed this  
9 \_\_\_\_\_ day of December, 2004, at Sacramento, California.

10  
11 \_\_\_\_\_  
12 Kim Berry - PRO SE  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25