

Docket No. 05-16637

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

KIM BERRY,
Plaintiff/Appellant, pro se

v.

THE STATE OF CALIFORNIA, et al,
Defendants/Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA,
NO. CV S-04-2580 LKK KJM PS

DISMISSAL FOR LACK OF JURISDICTION

FINDINGS AND RECOMMENDATIONS BY HONORABLE KIMBERLY MUELLER
ADOPTED IN FULL BY HONORABLE LAWRENCE K. KARLTON

BRIEF OF APPELLANT

Kim Andrew Berry, PRO SE
6465 Aspen Gardens Way
Citrus Heights, California 95621
(916) 213-0492
kberry@surewest.net

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STATEMENT OF JURISDICTION

This action alleges that a California state statute violates the First, Fifth, and/or Fourteenth Amendments (Petition Clause) of the U.S. Constitution. [ER 1:1] Accordingly, the district court had jurisdiction pursuant to *28 U.S.C. § 1331*. A dismissal disposing of all claims was entered on July 22, 2005, [ER 18] and a timely notice of appeal was filed on August 15, 2005. [ER 19] This Court has appellate jurisdiction pursuant to *28 U.S.C. § 1291*.

STATEMENT OF THE ISSUES

1) Whether the district court erred in denying jurisdiction under *Rooker-Feldman* when relief sought was solely injunctive and declaratory relief, prospectively challenging the constitutionality of a state statute, and was not affecting the prior \$13,000 state court sanction judgment.

2) Whether, in view of the prospective relief sought, the district court erred by dismissing on any basis.

3) Whether *Local Rule 72-302(c)(21)*, which denies only pro se litigants a hearing before the district judge who signs the dismissal order, violates the Equal Protection Clause embedded in the Fifth Amendment.¹

¹ This question is apparently first impression. FRAP 44 notice filed on October 21, 2005

STATEMENT OF THE CASE

A. Case Summary

The state trial court sanctioned Berry \$13,000 for appealing from its order, with no finding that his appeal was frivolous or otherwise subject to sanctions under well-established rules and precedent. After the state action was final, Berry filed this federal complaint to establish his rights regarding sanctions against future appeals, under a state statute that he alleges violates the petition clause of the U.S. Constitution.

He now appeals from the district court's dismissal of his action under *Rooker-Feldman*.

Since Berry was denied a hearing before the district judge who signed the dismissal order – solely because he was not represented by an attorney – he brings a second question of whether that local rule violates equal protection of a fundamental right.

B. Procedural History

Berry appealed from a \$5400 *Family Code* § 271 sanction by state superior court. He then filed a second appeal after the judge sanctioned him \$4000 – without prejudice, for all costs and fees that may result from the first appeal – regardless of merit – unless Berry agreed to drop the first appeal. The appeals were consolidated into *Berry I* [ER 1:5]

Neither the state appellate court nor superior court found Berry's appeals to be frivolous or bad faith pursuant to California's landmark *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, which for 20 years has defined the standard for punishing appeals. [ER 1:6] Nonetheless, on remand on

August 28, 2003, the superior court sanctioned Berry over \$13,000 under Family Code § 271 for all attorney's fees incurred within that consolidated appeal. [ER 1:6]

Berry then brought a de novo appeal *Berry II* posing the first impression question:

Whether, on remand from appeals that were neither deemed frivolous nor otherwise subject to sanctions under CRC 27(e), CCP 907, or *In re Marriage of Flaherty* by the appellate court, family court may order a Family Code section 271 sanction for appellate fees.

On July 30, 2004 the opinion issued: "The order is affirmed. Each party shall bear its own costs on appeal." [ER 1:7] That opinion established an apparent first impression holding, albeit unpublished, but certainly one that could again be applied to Berry and other appellants:

"Family Code section 271 provides an independent basis for an award of attorney's fees and costs on appeal where a party's conduct 'frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys.' ... Family Code section 271 'applies a different and less stringent standard than ... Flaherty.'" (C045271 Opinion, page 8) [ER 1:7]

On October 13, 2004, the California Supreme Court denied review, finally disposing of that case. [ER 1:7]

On December 6, 2004, Berry filed this federal complaint to establish his right to appeal, prospectively, from future state court orders, with a Prayer for Relief [ER 1:12]:

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

3) For an order enjoining the California State Judiciary from sanctioning appeals under Family code Section 271;

The State filed a motion to dismiss and the arguments were fully briefed [ER 8,9,11].

Ordinarily litigants in this circuit have a right to hearing before the district judge who would grant the motion to dismiss, pursuant to Local Rule 72-302(c)(3). However, *Local Rule 72-302(c)(21)* denies pro se litigants that same right. Accordingly the matter was heard by a magistrate judge on February 24, 2005. On May 4, 2005 the magistrate judge issued a Findings and Recommendations for Dismissal [ER 14, transcript TR] for lack of subject matter jurisdiction under *Rooker-Feldman*.

On May 15, 2005 Berry filed a timely *Objections To Magistrate Judge's Findings and Recommendations for Dismissal*, [ER 16] arguing that the findings were silent on the pivotal fact that the complaint sought only prospective relief, and raising the striking analogies with the instant case and this Court's *Wolfe v. Strankman* 392 F.3d 358 (9th Cir.2004) opinion.

The State did not file a reply to the objection.

On July 22, 2005, after conducting a de novo review of the findings, the district judge adopted the findings and recommendations in full without further comment. [ER 18]

On August 15, 2005 Berry filed a timely notice of appeal. [ER 19]

C. Statement of Facts Relevant to Dismissal

1) In review of a motion for dismissal, evidence is viewed in the light most favorable to the nonmoving party. *Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1257 (9th Cir. 2001).

2) Berry seeks only prospective relief from future sanction orders, as evidenced by:

- The complaint's standing ("The threat of further sanctions..." para 15.c). [ER 1:4]
- Future-tense cause of action: "Plaintiff will be chilled from appealing from unjust and improper family law orders." (para 58) [ER 1:11]
- No retrospective relief in the Prayer (para 62-66) [ER 1:12]

3) There is no state court sanction judgment from which the complaint could possibly be seeking relief: The sanction order in Berry II was final October 2004 when the California Supreme Court denied review. (para 32) [ER 1:7]

4) California Family Code section 271 authorizes trial courts to sanction parties for bringing good faith, nonfrivolous appeals from their own orders – provided they deem that the appeals had "frustrated settlement" pursuant to the statute. (The State concedes this fact at p.5 line 5 of their Reply to Opposition to Motion to Dismiss. [ER 12:5])

5) This instant action does not challenge a state court judgment, but rather the constitutionality of a state statute. The State concedes this fact on p.5 line 10 of their Reply to Opposition to Motion to Dismiss: ("Plaintiff urges this court to consider once again whether Section 271 violates the Petition Clause of the First Amendment.") [ER 12:5]

6) California Attorney General Bill Lockyer has a duty to the People of California "to see that the laws of the state are uniformly and adequately enforced." (*California Constitution, Article V, Section 13*). This includes enforcement of the Constitutional law of the State's *Petition Clause at Article I, Section 3(a)*.

SUMMARY OF ARGUMENT

Because Berry's complaint seeks only injunctive and declaratory relief, wholly prospectively, from future sanctions under a State statute, for bringing nonfrivolous appeals from state superior court orders, the district court erred in dismissing under *Rooker-Feldman* doctrine. This Court has already spoken in *Wolfe v. Strankman* 392 F.3d 358 (9th Cir.2004),² that *Rooker-Feldman* does not bar prospective federal relief from future enforcement of a State statute that punishes a citizen for engaging in a constitutionally protected activity.

Preclusion also does not span from a state's past enforcement of a statute to the barring of a prospective challenge against further enforcement of that statute via a federal complaint.

Berry also alleges that the Local Rule allowing only pro se complaints to be dismissed without a hearing before the district judge who will grant the dismissal violates equal protection. Because access to the court is a fundamental right, this dual standard cannot withstand a strict scrutiny analysis.

² *Wolfe* opinion by Judge William A. Fletcher, who is "a recognized authority on *Rooker-Feldman*" according to Judge Alex Kozinski. [Kozinski Strikes Back](#) - The Recorder - September 23, 2005 - www.callaw.com

STANDARD OF APPELLATE REVIEW

The Ninth Circuit reviews the district court's dismissal for lack of subject matter jurisdiction under *Rooker-Feldman* de novo. *Noel v. Hall*, 341 F.3d 1148, 1154 (9th Cir.2003). "We may affirm the district court's dismissal on any ground supported by the record," *Wolfe v. Strankman*, 392 F.3d 358, 361 (9th Cir. 2004).

Whether subject matter jurisdiction exists does not depend on resolution of a factual dispute, but rather on the allegations in the complaint. We assume Berry's allegations to be true and draw all reasonable inferences in his favor. See Fed. R. Civ. P. 12(b)(1); *Saridakis v. United Airlines*, 166 F.3d 1272, 1274 n.1 (9th Cir. 1999). We construe the complaint liberally because it was drafted by a pro se plaintiff. *Eldridge v. Block*, 832 F.2d 1132, 1137 (9th Cir. 1987).

A discretionary review of *Local Rule 72-302(c)(21)* would be an original proceeding.

ARGUMENT

A. THE DISTRICT COURT ERRED IN DENYING JURISDICTION UNDER THE ROOKER-FELDMAN DOCTRINE

1) The district court overlooked the prospective nature of the complaint

The State opened their Motion to Dismiss by fundamentally misrepresenting Berry's complaint as an attempt to "*revers[e] a decision of the Court of Appeal for the Third Appellate District.*" [ER 9:1] The State then proceeded with a valid argument from their false premise.

Berry argued in vain for the district court to see the true nature of his complaint. The term "prospective" appears five times in his *Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss*, [ER 11], twice at oral argument [ER TR 3:3 and 5:10]³ and eight times in *Objections to Magistrate Judge's Findings and Recommendations for Dismissal*. [ER 16]

Nonetheless, the court's *Findings and Recommendations for Dismissal* [ER 14] is silent on the prospective nature, and all of the *Rooker-Feldman* authorities it relied upon are inapposite to prospective claims.

³ At the hearing [ER TR p.5] Berry quoted *Wooley v. Maynard*, 430 U.S. 705,711 (1977), where the Court held that suits seeking wholly prospective, injunctive and declaratory relief "is in no way designed to annul the result of the state's trial" but rather to preclude only further prosecution under the statute."

2) The prospective nature of this case is pivotal to whether Rooker-Feldman denies jurisdiction

Because *prospective* relief does not and *cannot* undo a *prior* state court judgment – and because such relief does not attempt to set aside the prior judgment – this Court’s holding in *Noel* is dispositive: *Rooker-Feldman* does not deprive the district court of original jurisdiction to resolve a Federal question, pursuant to 28 U.S.C. § 1331:

The *Rooker-Feldman* doctrine asks: is the federal plaintiff seeking to set aside a state judgment, or does he present some *independent claim*, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party? If the former, then the district court lacks jurisdiction; if the latter, *then there is jurisdiction* and state law determines whether the defendant prevails under principles of preclusion. *Noel v. Hall*, 341 F.3d 1148, 1163 (9th Cir. 2003). (emphasis added).

The “independent claim” at bar is whether, in future appeals, the State should be enjoined from punishing good faith, nonfrivolous appeals with huge sanction orders by the judge whose order was appealed from.

3) The dismissal is contrary to this Court's recent reversal of a Rooker-Feldman abstention in a case strikingly analogous to the instant action

On December 14, 2004 this Ninth Circuit issued *Wolfe v. Strankman* 392 F.3d 358 (9th Cir.2004) which is highly analogous to the case at bar.⁴ There plaintiff Wolfe sought a declaration that California's vexatious litigant statute is unconstitutional and sought injunctive relief barring enforcement of that statute, prospectively.

This Court began its *Rooker-Feldman* analysis by examining the same *Noel v. Hall*, 341 F.3d 1148, 1154 (9th Cir. 2003) that Berry relied upon in his *Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss* [ER 11:4] This Court held that *Rooker-Feldman* could not bar Wolfe's action because no vexatious litigant action was currently pending in the state court. Hence, this federal Court should not deny Berry of jurisdiction in the instant action, because there is no sanction action against him pending in state court.

⁴ Berry learned of this Court's new case law after the February 24, 2005 oral argument, and presented it to the District Judge in *Objections to Magistrate Judge's Findings and Recommendations for Dismissal* [ER 16:2] for de novo review. But Judge Karlton's July 22nd order is silent on *Wolfe*, adopting the Findings and Recommendations in full.

4) Consistent with Wolfe, the Federal Court should construe Berry's prior sanctions as a basis for standing

Just as at bar, Wolfe had previously been penalized under the state statute that he now challenged prospectively. This Court found that "since there was no vexatious litigant order entered against Wolfe at the time he filed in district court, there was no state court judgment from which he could have been seeking relief." *Wolfe ibid.* Instead, this Court construed the prior cases as a demonstration of standing – "tending to show that he will act in this way again and that the statute will be enforced against him again."⁵

Analogously at bar there is no state court sanction judgment from which Berry could be seeking relief: The sanction order in *Berry II* was final October 2004 when the California Supreme Court denied review.

The doctrine [of stare decisis] carries such persuasive force that [the Court has] always required a departure from precedent to be supported by some special justification.
Dickerson v. United States, 530 U.S. 428, 443 (2000).

Accordingly, under the doctrine of stare decisis, the district court should have either followed this Court's *Wolfe v. Strankman* precedent and construed the prior state case as a basis for standing - or have provided its justification for not doing so.

⁵ See *Thomas v. Anchorage Equal Rights Commission*, 220 F.3d 1134, 1139-40 (9th Cir. 2000) (en banc) (holding that the history of enforcement of a statute is relevant to standing and ripeness inquiry).

5) Subsequent to the hearing in district court, the U.S. Supreme Court clarified that Rooker-Feldman is confined to cases where a district court is asked to overturn a state court judgment

In *Exxon Mobil Corp. et al. v. Saudi Basic Industries Corp.* 125 U.S. 1517 (2005) – argued February 24, 2005, decided March 30, 2005 – the Supreme Court explained:

The *Rooker-Feldman* doctrine, we hold today, is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and *inviting district court review and rejection of those judgments*. (Emphasis added)

Because prospective relief does not and cannot undo a prior state court judgment, *Rooker-Feldman* does not deprive this court of jurisdiction. The instant prospective challenge of the constitutionality of a state statute is independent from the *Berry II* appeal from a prior sanction in state court.

Accordingly, abstention would be a miscarriage of justice.

B. THERE IS NO ALTERNATE BASIS UNDER WHICH THIS ACTION MUST BE DISMISSED

The district court cited only *Rooker-Feldman* as grounds for dismissal. However, “[i]f support exists in the record, the dismissal may be affirmed on any proper ground, even if the district court did not reach the issue or relied on alternative grounds.” *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295 (9th Cir. 1998).

Therefore Berry is obliged to refute each issue raised by the State.

1) There is no basis to dismiss for lack of standing

Berry sufficiently alleges at paragraph 15 of his complaint [ER 1:4] the three prongs of standing under Article III of the Constitution to maintain this suit. *cf.* *Northeastern Florida Contractors v. Jacksonville*, 508 U.S. 656, 663 (1993).

2) There is no basis to dismiss under Younger abstention because nothing is pending in state court

The final jurisdictional hurdle is *Younger abstention*. As this Court recently explained in *Gilbertson v. Albright*, 381 F.3d 965 (9th Cir. 2004) (en banc), *Younger abstention* only applies when there are “parallel state proceedings.” At bar the state proceeding terminated on October 14, 2004, fully two months before Berry filed this instant federal action.

The Supreme Court affirms that prospective federal action seeking injunctive and declaratory relief from future enforcement of a state statute is not barred by *Younger*:

Appellee Maynard was subsequently found guilty in state court of violating the misdemeanor statute on three separate charges and upon refusing to pay the fines imposed was sentenced to, and served, 15 days in jail. Appellees then brought this action in Federal District Court pursuant to 42 U.S.C. 1983, seeking injunctive and declaratory relief against enforcement of the New Hampshire statutes . . . The Maynards seek only to be free from prosecutions for future violations of the same statutes. *Younger* does not bar federal jurisdiction." *Wooley v. Maynard*, 430 U.S. 705,711 (1977)

“[T]he federal courts’ obligation to adjudicate claims within their jurisdiction [is] ‘virtually unflagging.’” *New Orleans Pub. Serv., Inc. v. New Orleans*, 491 U.S. 350, 358, (1989). As such, abstention “is the exception and not the rule.” *Marks v. Stinson*, 19 F.3d 873, 881 (3d Cir. 1994).

Accordingly, the State’s motion for dismissal for lack of jurisdiction under either *Rooker-Feldman* or *Younger abstention* must fail.

3) This claim is not barred by res judicata

A. Each appealable sanction order is an independent money judgment, independent of res judicata of prior sanction appeals

California law⁶ provides that, even within the same case, litigants have a right to appeal from each sanction as if they were independent money judgments:

[An appeal may be taken in a civil proceeding from] an order directing payment of monetary sanctions by a party or an attorney for a party if the amount exceeds five thousand dollars (\$5,000). *California Code of Civil Procedure 904.1.(a)(12)*

As independent money judgments⁷ with distinct bases, the reviewing court does not apply res judicata as to factors raised and argued in prior appeals from sanctions, even within the same underlying case.⁸

Deductively, there is no res judicata or preclusion from the sanction judgment final in October 2004 and this prospective challenge to future sanctions under the same statute.

⁶ State court judgments are accorded the same preclusive effect in federal courts as they are given in the courts of that state. See *28 U.S.C.S 1738*.

⁷ cf "an award of sanctions under Code of Civil Procedure section 128.5 ... is essentially a judgment for money damages" *Banks v. Manos* (1991) 232 Cal.App.3d 123, 129

⁸ If an appellate court intends that an opinion span to future causes of action, it can accomplish this by publishing the opinion.

B. Res judicata does not span from a prior sanction order to the future sanction orders anticipated by this prospective action

“*Res judicata* is not a bar to claims that arise after the initial complaint is filed. These rights may be asserted in a supplemental pleading, but if such a pleading is not filed a plaintiff is not foreclosed from asserting the rights in a subsequent action [Citation]. The general rule that a judgment is conclusive as to matters that could have been litigated ‘does not apply to new rights acquired pending the action which might have been, but which were not, required to be litigated [Citation].’” *Allied Fire Protection v. Diede Construction, Inc.* (2005) 127 Cal.App.4th 150, 155.

Accordingly, *res judicata* does not apply to subsequent federal actions seeking only prospective relief from claims which may accrue at some future date.

4) This claim is not barred by the Eleventh Amendment

The *ex parte Young* doctrine provides that the Eleventh Amendment does not bar suits for prospective injunctive relief brought against state officers "in their official capacities, to enjoin an alleged ongoing violation of federal law." *Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041, 1045 (9th Cir. 2000).

Furthermore, under settled Eleventh Amendment doctrine, citizens may seek prospective relief in federal courts in suits for injunctive relief brought against state officials *Ex parte Young*, 209 U.S. 123 (1908).

Accordingly, the instant complaint names defendant *Bill Lockyer in his official capacity as Attorney General of the State of California* and seeks only prospective declaratory and injunctive relief. Thus this action is not barred by the Eleventh Amendment.⁹

⁹ In the interests of justice, since the district court was silent on the Eleventh Amendment and thus Berry was afforded no opportunity to amend prior to dismissal, Berry asks that this Court either construe the complaint as against "Chief Justice George in his administrative capacity of the California State Judiciary," or alternately drop the California State Judiciary as a defendant, if the Attorney General sufficiently binds the State to the relief sought.

C. LOCAL RULE 72-302(c)(21) VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FIFTH AMENDMENT

This claim is being raised for the first time on appeal.¹⁰

Equal protection claims are considered under a two-step analysis.

First, an appellant must show that the statute in question “results in members of a certain group being treated differently from other persons based on membership in that group.” *United States v. Lopez-Flores*, 63 F.3d 1468, 1472 (9th Cir. 1995). “In the second step, a court assesses the legitimacy of a discriminatory statute under the appropriate level of scrutiny.” *Sagana v. Tenorio*, 384 F.3d 731, 740 (9th Cir. 2004).

1) The Rule results in pro se litigants being treated differently within Sacramento District Court

The Rule mandates different treatment for the group of litigants who represent themselves and do not have a law degree. We are effectively “moved to the back of the bus” and denied a hearing before the district judge

¹⁰ “Federal appellate courts generally do not consider issues first raised on appeal. . . . [but] will review an issue for the first time on appeal under certain circumstances, such as when the issue is a legal one, not necessitating additional development of the record, . . . or when review will prevent ‘manifest injustice.’” *Animal Protection Inst. of Am. v. Hodel*, 860 F.2d 920, 927 (9th Cir. 1988) (citations omitted)

Berry did not raise the issue in district court because it was not ripe until he was harmed by the rule. cf *Portman v. County of Santa Clara*, 995 F.2d 898 (9th Cir. 1993) (“Portman fails to point to even a single client who has received substandard representation as a result of this statute. . .”). A manifest injustice will occur if summary judgment on the merits is subsequently ordered with no opportunity for a hearing before the district judge who signs the order.

who signs our dispositive orders. We are denied the one chance to look him in the eye and be assured that he “got” our point – for example – that we were seeking only prospective relief:

LOCAL RULE 72-302

(c) Duties to Be Performed in Civil Matters by a Magistrate Judge Pursuant to 28 U.S.C. § 636(a), (b)(1)(A), (b)(1)(B), (b)(3), or Other Law.

(3) All pretrial motions pursuant to the Supplemental Rules for Certain Admiralty and Maritime Cases, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss for failure to state a claim upon which relief can be granted, and to dismiss an action involuntarily;

(21) In Sacramento, all cases in which all the plaintiffs or defendants are proceeding in propria persona, also referred to as pro se, including dispositive and nondispositive motions and matters. Cases initially assigned to a Magistrate Judge under this paragraph shall be referred back to the assigned District Judge a party appearing in propria persona is later represented by an attorney appearing in accordance with Rule 83-180.

Pro se complaints are distinguished by the clerk upon filing, where “PS” is appended to the case numbers to clearly mark the inferior status of these cases. They may as well be stamped TBD - “to be dismissed.”¹¹

The docket for this appeal states:

Lower court information:

District: 0972-2 : CV-04-02580-KJM

presiding judge: Lawrence K. Karlton, Senior Judge

¹¹ cf, When Michael Newdow first brought his pledge case PRO SE, it was summarily recommended for dismissal by Magistrate Judge Peter A. Nowinski, then District Judge Schwartz adopted the recommendation for dismissal in full. (CIV S-00-0495 at www.restorethepledge.com) The dismissal was overturned by this Court and it proceeded to the Supreme Ct.

But, while Judge Karlton signed the order, he did not preside over the hearing. Would it be due process to have oral arguments before a different appellate panel than the one presiding over the decision?

2) This Rule infringes upon a fundamental right and therefore should be reviewed under the “strict scrutiny” standard

The Rule infringes upon the fundamental right of due process and equal access to the courts, which are, “objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty.” *Sagana v. Tenorio*, 384 F.3d 731, 742 (9th Cir. 2004) “If the rule ... impinges upon a fundamental right, the court will examine it by applying a strict scrutiny standard.” *Lupert v. Cal. St. Bar*, 761 F.2d 1325, 1327-28 (9th Cir. 1985).

The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)) If due process for attorneys entails being heard by the district judge, then depriving non-attorneys that same opportunity to be heard is a denial of equal protection and due process.

3) Under the strict scrutiny standard, the Rule violates equal protection

Where certain "fundamental rights" are involved, the Court has held that regulation limiting these rights may be justified only by a "compelling state interest," *Kramer v. Union Free School District*, 395 U.S. 621, 627

(1969), and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.

There is no “compelling interest” for the federal district court to provide pro se litigants a lower standard of justice than it renders to parties represented by attorneys. We are charged the same filing fee.

If the district court docket does not allow time to preside over all hearings, then cases could be drawn at random for hearing by a magistrate judge, without regard for the class of the parties.

The current practice intentionally discriminates against pro se litigants: “*An intent to discriminate is not a legitimate state interest.*” *Ranschburg v. Toan*, 709 F.2d 1207,1211 (8th Cir. 1983).

CONCLUSION

For the reasons stated above, Berry asks this Court to REVERSE the district court's dismissal for lack of jurisdiction and REMAND for consideration of the merits.

Respectfully submitted:

November 16, 2005

Kim Berry – PRO SE

CERTIFICATE OF COMPLIANCE

I certify that: The attached brief is not subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages.

November 16, 2005

Date

Signature of Pro Se litigant

KIM ANDREW BERRY
6465 Aspen Gardens Way
Citrus Heights, CA 95621
Tel: (916) 213-0492
PRO SE

NINTH CIRCUIT COURT OF APPEALS

DECLARATION OF SERVICE BY MAIL

I am a resident of Sacramento County, California. I am over the age of eighteen (18) and not a party to the above-entitled action. My home address is 6465 Aspen Gardens Way, Citrus Heights, California.

On this date, November 19, 2005, I served the parties named below with true copies of:

BRIEF OF APPELLANT EXCERPTS OF RECORD

By placing the documents in the United States mail, addressed to:

Susan Roche Oie Office of the Attorney General P.O. Box 944255 Sacramento, CA, 94244-2550
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 19th day of November 2005, at Sacramento, California.

SIGN _____

Marites Berry
