

United States Court
Eastern District of California

Pro Se, Patrick Michael Hamer and Donna
Lee Hamer and Does 6-10,
Plaintiffs,
vs.

Case No. CIV S-08-2269-MCE-
EFB-PS

EDC and Does 6-10 in individual and
official capacity: D.A. Vern Pierson in
individual and official capacity:
D.D.A. Dick JonesFS in individual and
official capacity: Worth Dikemen in
individual and official capacity:
B.O.S.(Dist.2) Helen Bauman in
individual and official capacity: Brenda
Bailey in individual and official
capacity: B.O.S (Dist 2) Ray Nutting in
individual and official capacity [per
Fed. R. Proc. 25d]: Sheriff JEFF NEVES
in individual and official capacity:
Under Sheriff FRED KOLLAR in individual
and official capacity: AND Deputy DAN
JOHNSON in individual and official
capacity: Assemblyman Ted Gaines in
individual and official capacity: Steve
Davey in individual and official
capacity:: Judge James Wagoner in
individual and official capacity: Bob
Anderson and David Randall Private
State Actors and Individual Capacity:
California Attorney General Edmond G.
Brown Jr Official Capacity
Defendants

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTIONS BY PLAINTIFFS
PATRICK AND DONNA HAMER TO
VACATE SEPTEMBER 2, 2009
HEARING AND MOTION IN
OPPOSITION TO DEFENDANT
GAINES AND DAVEY MOTION TO
DISMISS PURSUANT TO
RULE12(B)

JURY TRIAL DEMANDED

1. Defendants motions to dismiss second amended complaint does not
comply with Rule 10(b)Fed.R.Civ.P. "A party must state its
claims or defenses in numbered paragraphs, each limited as far
as practicable to a single set of circumstances" and is dated
before plaintiffs filed the complaint

2. Plaintiffs Patrick and Donna Hamer Provide Notice to All
Defendants that the Plaintiffs move the court to vacate the
September 2, 2009 hearing "motion to dismiss second amended
complaint without further leave to amend, and require defendants

1 to answer the complaint on the following points of authorities
2 and law in this motion that make defendants arguments
3 irrelevant.

4 3. Plaintiffs objected twice to two court orders denying a request
5 from plaintiffs to amend the original first amended complaint,
6 and have objected to the recent court order dated 6/9/2009, and
7 was denied Fed.R.Civ.P. 15(a)(2) making it appear that
8 plaintiffs have been granted reasonable opportunity to amend,
9 which is in reality untrue, because the record shows that even
10 though plaintiffs request was denied, the courts dismissed the
11 same complaint with "leave to amend" in a manner of laches
12 benefiting defense at the expense of justice for the Plaintiffs.

13
14 **OPPOSITION ARGUMENTS TO DEFENSE "PRELIMINARY STATEMENT AND ISSUES**
15 **TO BE DECIDED."**

16
17 4. The entirety of the complaint does not comply with Rule 10(b)
18 Fed.R.Civ.P.. There are no "numbered paragraphs" and there are
19 multiple sets of "circumstances" in the un-numbered pleading,
20 and these are not Pro Se litigants but qualified lawyers
21 attempting to kill a case, that has overwhelming evidence of
22 **MERIT**, by alleging similar deficiencies, against plaintiffs and
23 we object to any favoritism shown fellow government official
24 defendants.

25 5. Local rule 7-130 "General Format of Documents" is the basis for
26 modeling the format of pleadings and Plaintiffs belief upon good
27 faith is that they have complied with local rules referred from
28 the "Pro Se Package - A Simple Guide to Filing a Civil Action."

6. Furthermore, these counselors are offering testimony as
witnesses and are perjuring their motions with untruths about
the complaint that they cannot prove, which has been previously

1 objected to and un noticed by this court. We believe these acts
2 are attempts to confuse the court, and if left unnoticed is
3 evidence of bias and willful injustice, and this fact is also
4 evidence of frivolous defense attempts, showing that they know
5 they cannot prevail against the merits because they offer no
6 legitimate arguments in "law or fact" on the Merits. "A
7 complaint is frivolous only if it contains "inarguable legal
8 conclusion[s]" or "fanciful factual allegations."⁵

9 "The Supreme Court has held that a claim "is frivolous where
10 it lacks an arguable basis either in law or in fact." Neitzke
11 v. Williams, 490 U.S. 319, 325, 109 S.Ct. 1827, 1831 (1989).
12 A complaint is frivolous only if it contains 'inarguable
13 legal conclusion[s]' or 'fanciful factual obligations.' "
14 McKeever v. Block, 932 F.2d 795, 798 (9th Cir.1991), (quoting
15 Neitzke, 109 S.Ct. at 1833). See also Hernandez v. Denton,
16 929 F.2d 1374, 1376 (9th Cir.), cert. granted, 112 S.Ct. 369
17 (1991).¹

18 7. In viewing McKeever, it is obvious that McKeever may have used a
19 charcoal pen and toilet paper to plead non legal terms, and
20 thus, satisfied the Ninth Circuit appellate Courts ruling that
21 this pleading stated a claim.⁵ Any argument against McKeever, a
22 citation provided by the honorable Magistrate Brennen, would be
23 tantamount to high browed elitist's or even acts committed by
24 overt racists who in the past, and presently, ignore the rights
25 of those they perceive to be weak and unworthy of justice.

26 8. These frivolous motions, which contain obvious baseless
27 inarguable statements as if counsel is a sworn in witness. We
28 will motion to strike these, and request sanctions to stop these
false statements by counsel acting as witnesses attempting to
deceive the court by making up false allegations in motions.

9. These false allegations are hampering efforts of pro se
plaintiffs to make a living by requiring wasted time allotted
for work to earn money paying bills. These frivolous defenses
are evidence of their own hypocrisy to attack the pleadings of

1 Pro Se Plaintiffs, harmed substantially by their "evil wicked
2 mean and nasty" defendant's acts.

3 **OPPOSITION TO FED.R.CIV.P 8(A)(2) ARGUMENT FOR MOTION TO DISMISS**

4 **"GROUND 4."**

5
6
7 10. Page 4 line 7-9 on defendants motion to dismiss is erroneous,
8 "colorful," "frivolous," and not true as stated by defendants,
9 as plaintiffs did comply with the "...Court's order..." by pleading
10 "Short and Plain Statement of the Claims showing that the
11 pleader is entitled to relief." The court order specified
12 further describing expectations to comply with Fed.R.Civ.P. 8(a)
13 (2).

14 11. The June 9th Court Order states on Page 2 line 8-26 necessity
15 to meet the "plausibility standard" in *Ascroft v. Iqbal*.
16 Plaintiff's claim now has attempted without benefit of a
17 "statement of the complaint's deficiencies,"⁵ but an intuitive
18 idea of pleading "facial plausibility" because

19 "[a] claim has facial plausibility when the plaintiff pleads
20 factual content that allows the court to draw the reasonable
21 inference that the defendant is liable for the misconduct
22 alleged."; "...rule 8 does not require "detailed factual
23 allegations," but it demands more than an unadorned, the-
24 defendant unlawfully- harmed-me accusation. [emphasis added]
25 ...nor does a complaint suffice if it tenders "naked
26 assertion[s]" devoid of "further factual enhancement." To
27 survive a motion to dismiss, a complaint must contain
28 sufficient factual matter, accepted as true, to "state a
claim to relief that is plausible on its face." *Ashcroft v.*
*Iqbal*²,. *Hydrick v. Hunter*, (9th Cir.2006).³

12. Plaintiffs allegation claims are sufficient to satisfy "a
short and plain statement of the claim' that will give the
defendant fair notice of what the plaintiff's claim is and the
grounds upon which it rests." *Id.*, at 47 (footnote omitted).⁴

13. In addition, the complaint complies to a "Short and Plain
Statement of the Claims showing that the pleader is entitled to

1 relief" per Federal Rules of Civil Procedure 8(a)(2) affixed
2 with affidavits from a Senator, exhibit A1 inter alia, that
3 names Gaines and Davey as having Ratified a deceitful written
4 instrument that deprived plaintiffs of a federal right to
5 redress by state and federal constitution alleged in the
6 complaint denied by "ad hoc" non legislative acts, while the
7 motion to dismiss admits that there was some sort of
8 interactions, "participation, between defendants and plaintiff.
9 And it is the job of the Jury, beyond the Fact Finder, to
10 distinguish what the interaction was. "a reasonable finder of
11 fact could find that the Defendants acted maliciously, wantonly,
12 or oppressively. Therefore, the Defendants are not entitled to
13 summary judgment on the issue of punitive damages with respect
14 to any claim."⁸

15 14. In *McKeever*, your honor quotes, "sufficient allegations to
16 put defendants fairly on notice of the claims against them."⁵
17 *McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

18 15. So in that regard, defendants who accuse plaintiffs of
19 "failed to comply with court order directing them to..." see
20 motion to dismiss pg 6 line 10. The Defendants also failed to
21 comply with the order to allow plaintiff to comply with rule 8
22 by ignoring the authorities provided by your honor. Your Honor
23 stated, " ("Rule 8(a) is the starting point of a simplified
24 pleading system, which was adopted to focus litigation on the
25 merits of a claim") and Rule 10. The paragraph continues in
26 *Swierkiewicz* ,See *Conley, supra*, at 48 (**"The Federal Rules**
27 **reject the approach that pleading is a game of skill in which**
28 **one misstep by counsel may be decisive to the outcome and accept**
the principle that the purpose of pleading is to facilitate a
proper decision on the merits").⁶ [emphasis added].

16. So as defense counsel continues to beat this dead horse with
1 frivolous motions, when plaintiffs reduced a 132 page complaint
2 to the crippling 25 page order limit, which was heartily
3 objected to by plaintiffs.
4

17. Plaintiffs filed a motion to amended the complaint dated
5 March 3, 2008 and stated that they could amend the original
6 complaint within 30 to 40 pages. Limiting the complaint to 25
7 pages overtly prejudices plaintiff complaint, barring the First
8 Amendment Right to redress any grievances that exceed 25 pages,
9 "crippling" items not alleged, causing unjustly and against the
10 plaintiffs will, a waiver of missing allegations, forcibly,
11 under duress, not alleged, by court order, and barred by ad hoc
12 rulings that are "perceived" by plaintiffs to be controversial
13 in law.
14

18. A plaintiff move the court to take judicial notice that
15 limiting pleadings to 25 pages was not a defense motion; but is
16 arguably an ad hoc judicial decision unfairly assisting defense
17 by helping hobble plaintiff's complaint further, and "crippling"
18 plaintiff's ability to properly plead. This fact has obviously
19 been detected by defendants who intend to capitalize on this
20 biased decision, which is unfair, as Defendants did not request
21 this in a motion!
22

19. Previously, a request to amend the complaint to "30 or 40
23 pages" was denied by your Honor. In the 9th circuit, in
24 discussing "...burden..." Fed.R.Civ.P 8(a), McKeever, states, "With
25 respect to pro se litigants this burden is relaxed."⁵ without
26 benefit to Rule 15(a)(2) "...when justice so requires" a pleading
27 may be amended by leave of the court. To use the old adage,
28 "what are we? Chopped liver?"

20. In addition, the court denies plaintiffs, Pat Hamer an "honor
graduate" trained in html server applications, a right allowed

1 at judicial discretion in local rules 5-133(2) to e-file
2 documents. This was particularly offensive, due to plaintiff's
3 rural location in dangerous snow conditions which make driving
4 dangerous, and expensive, due to distance, and plaintiffs have
5 crashed their vehicle, a 4wd truck driving at very low speeds on
6 black ice, rolling it close to the edge of a canyon, in the
7 prior year, without violating vehicle codes.

8 21. Plaintiff Pat Hamer was recovering from surgery, and the
9 unreasonable denial to allow plaintiffs to e-file endangered
10 Pat's wife who was forced to endanger herself against her will,
11 as plaintiff Pat Hamer could do nothing without fear of arrest
12 or sanction, seemingly ongoing punitive acts for redressing
13 grievances done overtly this was upsetting and plaintiffs
14 believe that no purpose other than to discourage plaintiffs in
15 this instant action was justified. As Pro Se inexperienced at
16 these matters, it is hard to study law and meet deadlines early!

17 22. Yet this courts decision can be argued unnecessarily
18 dangerous to plaintiffs safety, a "state created danger," by
19 court order requiring trips in snow conditions when a much safer
20 expedient avenue for filing is available to even Pro Se
21 litigants, with exception to Plaintiffs, who have been treated
22 different from Pro Se plaintiffs allowed to file electronically.

23 23. Defendants are hammering plaintiffs warning them that they
24 are not following "procedures" and will move for rule 11
25 sanctions, in numbers letters sent to plaintiffs, "warning"
26 them. Yet plaintiffs have a constitutional right to "redress
27 grievances" but courts have "constitutional right" to punish
28 plaintiffs redressing grievances who could not afford to
purchase a law degree? If necessary, plaintiffs will challenge
that hogwash punitive act to deter justice!

1 24. Plaintiff Pat Hamer can no longer operate his business due to
2 pleading requirements and works 10 to 12 hours per day studying
3 law and pleading in an attempt to comply! This is absurd
4 redress, and this court needs to prevent the cultivation of
5 corruption with current precedence, provided by your Honor and
6 Plaintiff's and even Defense counsel, that forces these
7 defendants to answer this complaint. Yet in treating the redress
8 attempt of plaintiffs Pat and Donna Hamer, there is a
9 controversial pattern developing that is "wide spread" from the
10 county to the state to the federal offices where citizens are
11 required to redress grievances, of what appears [emphasis added]
12 to be selective discrimination against plaintiffs. It appears
13 that the courts and agencies are overtly assisting defendants
14 and accused officials, commonly known as "cronyism." Officials
15 are either abusing discretion or outright deceitfully
16 obstructing justice in this particular case.

17 25. Officials are barred by the constitution, from treating
18 plaintiffs as scum of the earth, non deserving citizens, similar
19 to those found liable at Atascadero for mistreating S.V.P
20 inmates. Yet this court ignores plaintiff's allegations of a
21 "pattern" of unlawful CONSTITUTIONAL DEPRIVATIONS of citizens
22 rights. Yet in the same breath allow them to be continually
23 threatened with murder. It is overtly unconscionable to a
24 simple human being to realize the focus of this court is to
25 "notice a pattern of Practice" of not meeting procedural
26 standards, that may further harm plaintiffs with sanctions, that
27 they cannot afford. Mental torture is occurring by these acts
28 to plaintiffs, and we will not concede to any form of extortion
or duress or oppression!

26. Plaintiffs move the court to take Judicial Notice that it can
be construed as plaintiffs have obviously have touched a nerve

1 among corrupt officials who are using every trick to silence
2 plaintiffs, and hide allegations, and that is why plaintiffs are
3 in Federal Court, but only to witness more examples of favoring
4 fellow government officials over the rights of crime victims
5 suffering retaliation for free speech, inter alia.

6 27. Some defendants have simply sought to be "big shots" similar
7 to commonly known cronyism acts of "fixing tickets," so to
8 speak, except to the extreme level of cover up attempts of
9 federal RICO and Conspiracy allegations overtly meritorious,
10 with proof of predicate acts and other criminal acts as alleged
11 in the causes of actions.

12 28. Plaintiffs are looking forward to a decision from the
13 appellate courts if necessary. Are these behaviors allowed in
14 the United States? Reading Ninth Circuit appellate cases, I
15 don't think so! I say! Let Freedom Ring!

16 www.preventmurder.org!

17 29. It is Judicially Noticeable that Bob Berger discovered these
18 acts, but defendants choose to ignore this discovery and harm
19 plaintiffs maliciously and deliberately, see exhibit A2. Yet
20 all defendants hid this discovery and revealed their malicious
21 intent which the courts need to grant punitive and exemplary
22 damages to plaintiffs due to this incontrovertible evidence.

23 30. Plaintiffs have alleged a retaliation, inter alia, claim
24 against defendants, including Gaines and Davey who conspired
25 with El Dorado County officials to ratify a deceitful instrument
26 in writing transferred through interstate wires.

27 31. Plaintiffs legally contacted Defendants Gaines, who on radio
28 Station KFBK solicited aid to Plaintiffs and directed them to
call their office in "Roseville" while the public was listening
to their empty promise, transcripts are available commonly known
as a "fact."

1 32. Plaintiffs had a constitutional right alleged in the
2 complaint both State and Federal to talk to representatives, who
3 by law cannot bar a constituent from calling them to "consult
4 with their representatives, petition government for the redress
5 of grievances and assemble freely to consult for the common
6 good"⁷ inter alia. However, plaintiffs, who were already being
7 attacked by Gaines and Davey's El Dorado County colleagues for
8 criticizing them, managed to recruit Gaines and Davey into an
9 ongoing conspiracy. Gaines and Davey ignored true facts and
10 used the interstate wires, to further assist in interfering with
11 plaintiffs constitutional rights, federally established
12 statutes, state laws, county ordinances interfering with
13 interstate commerce, and conspiracy to deprive rights § 1983.

14 33. It is Judicially noticeable without discretion, that Senator
15 Dave Cox, who called Plaintiff at his home did not participate
16 in furthering the conspiracy as did Gaines and Davey, and it is
17 overt evidence that the very Honorable Dave Cox, is not being
18 sued, because he did not retaliate against plaintiffs and chill
19 his rights and did not

20 "make a deliberate choice to follow a course of action . . .
21 made from among various alternatives by the official or
22 officials responsible for establishing final policy with
23 respect to the subject matter in question.' " Oviatt , 954
24 F.2d at 1477 (quoting Pembaur v. City of Cincinnati, 475 U.S.
25 469, 483-84 (1986) (plurality opinion)).¹⁴

26 34. Gaines and Davey by State and Federal Constitution cannot
27 retaliate unlawfully against an individual and hide behind
28 legislative immunity in their individual capacities without a
vote on public "policy issues,"^{16 15} when they refuse to allow
Plaintiffs the rights to contact them, a non legislative act.
Gaines and Davey clearly do not have powers to arrest or force
criminals to behave, but they cannot refuse a call, and
retaliate against constituents for speech, especially after
gaining public confidence, openly agreeing to assist abused

1 constituents; while openly inviting plaintiffs to "call their
2 office" only to send armed troops to intimidate plaintiffs,
3 "chilling" a "person of ordinary firmness."⁸

4 35. These acts by Gaines and Davey aided in the act of concealing
5 defendants desire to allow plaintiffs business property to be un-
6 marketable, by willful policy to not enforce court orders and
7 ordinances and state and federal statutes, with intent to
8 obstruct justice in an ongoing investigation by the Grand Jury
9 case GJ07-007, and in open civil cases where Plaintiffs
10 prevailed.

11 36. It is judicially noticeable that plaintiffs are crime victims
12 complaining of a "Monell" liability issue of a "policy to
13 deprive rights," and plaintiffs have evidence of El Dorado
14 County Superior court orders, without reference to any summons
15 or docket number before the judge in his judicial capacity.
16 This order was without due process threatening to arrest
17 Plaintiffs for lawful conduct see exhibit Q. The Grand Jury
18 complaint was hid from public scrutiny regarding the Grand Jury
19 Case GJ07-007. The CHP and a small army of sheriffs converging
20 on plaintiffs home just to intimidate them, whereas, witnesses
21 were present preventing possible further illegal action that may
22 have been intended, due to the number of officers. This show of
23 force is not even provided when shoot outs with sheriffs occur
24 in El Dorado County resulting in multiple murders and injury to
25 deputies! [see the shooting of Art Meiz] Yet Defendant Gaines
26 and Davey state on page 7 line 20-23 "are still squarely within
27 the legislative purview" and page 7 line 8-11, "arising within
28 the scope of their official positions" when sending resources,
not to prevent murder, but to intimidate witnesses and critics
out of retaliation.

1 37. Apparently they are suggesting that they had a legislative
2 vote at the capitol building amidst budget stalemates and
3 "affected local or state policy" in order to silence crime
4 victims Pat and Donna Hamer inter alia, that interfere with
5 corrupt acts of their colleagues, and they have a "burden" to
6 prove this, and they have not met that burden.

7 38. Yet they provide no precedent or fact of or denial, only an
8 admission that what they did was "squarely within the
9 legislative purview, citing Bogan v. Scott Harris, which clearly
10 states, "Bogan's actions were legislative because they were
11 integral steps in the legislative process," and "It reflected a
12 discretionary, policymaking decision implicating the city's
13 budgetary priorities and its services to constituents," and
14 "Bogan's actions were legislative because they were integral
15 steps in the legislative process."

16 39. Defendants Gaines have not met this burden, and in Kaahumanu,
17 Ninth Circuit controlling precedent requires, ". "The burden of
18 proof in establishing absolute immunity is on the individual
19 asserting it." Trevino v. Gates, 23 F.3d 1480, 1482 (9th Cir.
20 1994).

21 40. Furthermore, in Bogan, it states,
22 "The rule is well settled, that where the law requires
23 absolutely a ministerial act to be done by a public officer,
24 and he neglects or refuses to do such act, he may be
25 compelled to respond in damages to the extent of the injury
26 arising from his conduct."

27 41. Plaintiffs have alleged a first amendment right and state
28 constitutional right to free speech, alleging that this was a
"substantial motivating factor," again see defendants precedent,
Bogan. They can also prove multiple acts of denials of "due

1 process under the 14th amendment and constitutional property
2 infringements.

3 42. Plaintiffs relied upon that they as human beings, had rights
4 under the crime victim bill of rights, but were devastated when
5 El Dorado County purposefully formulated a policy outlined in
6 exhibits, A1, and reinforced by 2 years overt incidences, and
7 even exhibit Q obstruction of justice, and other obstruction of
8 justice acts overlooked without any hearings, or investigations.

9 43. This policy ratified the acts of a bailed accused criminal to
10 stalk plaintiffs un-relentlessly, place their house under siege
11 for 2 years, and 3 years of cyberstalking with overt writings,
12 of "I want to kill my neighbors," and pictures of his gun
13 titled, "dead on." Yet even this Federal Court will not give
14 plaintiffs an injunction to prevent ongoing constitutional
15 violations and this is overtly ordered to force plaintiffs in a
16 "state created danger."

17 44. Plaintiffs listed in the complaint the "facts" necessary to
18 show particularized evidence of policy, "simply concisely and
19 directly"⁹ leaving out other facts, where plaintiffs had to
20 sneak in the back door of their residence and park their cars in
21 neighbor lots for 2 years

22 45. Or tarp their front perimeter to obstruct the aim of their
23 neighbor who would take pot shots at their property with
24 firewood, bb's, rocks, and shoot their pets, brand new
25 automobiles, sabotage the sale of their business property,
26 assault and threaten to murder them when they were visible and
27 threaten friends and other crime victims in retaliation for
28 "calling the sheriffs on them when Randall was caught shooting
Pats new pickup truck. Yet official policy was to ignore
plaintiffs, unless the coroner was to be called, they could not
ignore that call!

1 46. You got to be kidding that for two years, victims of this
2 oppression and duress, have no redress to stop this overt
3 retaliation for critical speech as a punishment in the United
4 States of America.

5 47. It is impossible to comprehend this malicious policy to be
6 lawful when precedent controls this court to show that policy to
7 punish citizens free speech by retaliating, is not a protected
8 right of officials, outside of legislative duties.

9 48. It is upon good faith believe that the duty and
10 responsibility of this court is to notice it's own precedence
11 due to the absence of any controlling precedent from defendants
12 to vacate this hearing to dismiss and compel defendants to
13 answer this complaint.

14 49. This court must for the sake of justice, permit Plaintiffs to
15 eliminate compound sentences, and correct some deficiencies per
16 a statement to show deficiencies from your honor as pleaded
17 under the precedence of the Ninth Circuit courts of appeals.

18 50. Some of these facts are alleged as incidents that show
19 through "particularized evidence" ¹⁰ in conjunction with
20 exhibits.

21 51. The evidence shows and it is alleged, the main focus of
22 remedial agencies plaintiffs have filed complaints with has been
23 to use subterfuge and obstruction of justice to prevent these
24 incidences to go on public record, a cover-up if you will, of
25 what happened to plaintiffs.

26 52. An overt motive is alleged in the complaint on page 6
27 paragraph 24.

28 53. Now as Plaintiff's in Federal Court, we face technical
obstruction as pro se litigants, while defendants counsels, are
not discourage from pleading false statements, and though
objected to previously by plaintiffs, subterfuge alleging

1 imaginary gravamen of plaintiffs case to gain dismissals that
2 have been successful, thought not in merit, are not discouraged.

3 54. In defense of your Honor, we plaintiffs have not lost faith
4 in you---yet, and acknowledge that our original pleadings were
5 very confusing, and were in the form of a story that needs to be
6 told, and perhaps that long story due to Pro Se obvious lack of
7 knowledge in pleading, may have prejudiced us to the point we
8 could not lawfully move the court for proper orders in our
9 favor.

10 55. Hopefully, now, it is evident that you see we control and
11 move the court by law and precedent that you must adhere to or
12 face remand of Pro Se litigants, "pleadings of pro se civil
13 rights plaintiff to be construed liberally, affording plaintiff
14 benefit of any doubt)."⁵

15 56. These complaints of this process should be viewed with
16 empathy within context of course. We mean no animosity to the
17 courts, and view these defendants as a few bad apples.
18 Unfortunately, the defendants share a political party
19 affiliation and being that this is a scandalous case to the
20 Republican Party, they are motivated to either impeach corrupt
21 officials from within, which they are not. Evidence shows that
22 they are overtly and surreptitiously abusing the victims in a
23 cover-up.

24 57. Please consider this in the light of this litigation.
25 Defendant Helen Bauman was caught red handed, see exhibit A2,
26 admissions are under way to authenticate these exhibits. Helen
27 Bauman was seeking office in the Sacramento Assembly District,
28 and 1 week after her interview in the Sacramento Republican
Committee, she was discovered by a member to use deceitful
instruments in writing without conscience or remorse to deprive
plaintiffs of rights of redress, and it contuse to worked to

1 deprive plaintiffs rights without the necessity of injunction to
2 stop it!

3 58. In fact, Helen Bauman was arrested endangering the lives of
4 citizens according to news reports, and attempting to flee the
5 scene. If this court does justice and allows these facts
6 admitted as to the defendants who are named by her as
7 conspirators, they too, may face the political consequences of
8 their self destructive political behavior. These are facts that
9 explain the determination of counsel to make a defense against
10 plaintiffs with allegations that are non existing, as if they
11 never heard of the affects of "ad hoc" decisions by legislators
12 that are "not legislative acts."

13 59. Dismissal on their alleged grounds is not proper and there is
14 no controlling precedent to dismiss plaintiffs complaint with
15 prejudice.

16 60. Plaintiffs Move the court to vacate September 2, 2009 hearing
17 and compel Defendants to answer the complaint.

18 **OPPOSITION ARGUMENT TO RULE 12(b) FED.R.CIV.P MOTION TO DISMISS**
19 **"GROUND 3"**
20

21 61. Controlling precedence in Hydrick v. Hunter, is an on point
22 example of classic abuses of civil rights suffered by victims
23 and plaintiffs. Atascadero officials in charge of SVP's
24 [sexually violent predators] complained of numerous civil rights
25 violations, and claimed that officials severely mistreated them.
26 Due to the nature of their incarceration, it is common
27 knowledge, that sympathy towards SVP's may be very limited, yet
28 the 9th circuit prevented further violations and stopped corrupt
acts of officials.

1 62. It is Judicially noticeable that the following examples from
2 Hydrick, show that defendants treated crime victim citizens, Pat
3 and Donna Hamer the plaintiffs with the same evil disdain as did
4 officials at Atascadero mistreated SVP's. I imagine their
5 rationale would be that SVP's acted inhumane perhaps and they
6 deserved abuse. Yet what is the rationale to treat Plaintiffs
7 the same as SVP's?

8 63. In Hydrick v. Hunter a 2006 Ninth circuit precedent, it
9 states voluminously in Plaintiffs favor:

10 See Resnick v. Hayes, [213 F.3d 443](#), 447 (9th Cir. 2000). The
11 "complaint should not be dismissed [under Rule 12(b)(6)]
12 unless it appears beyond doubt that the plaintiff can prove
13 no set of facts in support of the claim that would entitle
14 the plaintiff to relief." Thompson v. Davis, [295 F.3d 890](#),
15 895 (9th Cir. 2002).³

16 But the point of the Rule 12(b)(6) motion is not to evaluate
17 the veracity of Plaintiffs' allegations, or to speculate as
18 to Defendants' justifications for their actions. Rather,
19 unless it is "beyond doubt" that the plaintiff cannot prove
20 facts that would entitle him to relief, the Rule 12(b)(6)
21 motion must be denied. See Navarro v. Block, [250 F.3d 729](#)
22 (9th Cir. 2001). The standard is no different for a civil
23 rights claim than for any other claim.

24 64. In Mckeever:

25 "Ordinarily, where a pro se litigant submits a letter
26 expressing disapproval of an adverse magistrate's ruling on a
27 non-dispositive matter within the allotted time period, we
28 would deem the letter, however inartful, a motion for
reconsideration so long as it reasonably apprised the
district court that the magistrate's ruling was being
contested."

65. Even with Mckeever, with controversy as an inmate, putting
into question the existence of a "clean hands theory", unlike
the Plaintiffs, and perhaps not even high school equivalent
level pleading, Mckeever states, "I Edward McKeever Jr. had a
great big bellie laugh, and then looked for the signature, to
see if Pee Wee Herman had sign it,"

66. The appellate courts recognized that this accused
incarcerated criminal was a human being and their just

1 reversal's thwarted an attempt by the lower courts to weaken the
2 U.S. constitution adding abusive power to it by refusing to
3 assist in covering-up wrong doing by officials. They did not
4 allow the lower Ninth Circuit courts to resort to cronyism
5 helping their colleagues cover acts based upon complaints of
6 "unworthy civilians" whom like us, are seemed to be viewed as
7 pond scum, even [SVP's] without a "rational basis" by these so
8 called Legislators, who have abandoned the fundamental principle
9 of representatives to simply allow communication to constituents
10 without retaliation to protected redress or speech! The court
11 in McKeever, based the reversals of dismissal upon the "merits"
12 of his complaint.

13 67. Yet we innocent citizen crime victim plaintiffs come here pro
14 se due to economic exigency with clean hands. Would we be so
15 lucky in this long standing pattern of practice of extorting
16 protected liberty from us plaintiffs because we cannot pay for
17 adequate legal expenses? This is a disgusting revelation to
18 crime victim citizens about the hidden inner workings of the
19 United States, that as laymen, we recognize that most citizens
20 are unaware of these procedures!

21 68. If left unchecked, continued biased rulings will cause
22 plaintiffs to suffer more civil rights violations, creating fear
23 for their government. Has it come to this in the United States
24 that citizens such as us have to seek political asylum in a
25 country, perhaps overtly undemocratic but at least not
26 hypocritical to the rest of the world usurping our image as a
27 light upon a hill to the rest of the world by covering up
28 corruption? Utter poppy cock!

69. It is obvious; we are not welcome in El Dorado County, or
perhaps the United States, and we can take a hint!

1 70. In defendants motion to dismiss they mislead your Honor by
2 asserting, that the complaint "pursues the same convoluted civil
3 rights complaint as the original complaint" page 4 lines 13-14.

4 71. Appellate courts have already attempted to protect Pro Se
5 litigants, in Karim-Panahi, Rule 8(a) was grounds for dismissal
6 but remanded, they noted that Karim-Panahi in his amended
7 complaint,

8 "asserting essentially the same claims", or "but the court
9 did not identify any particular deficiencies in the
10 complaint," "Fed.R.Civ.P. 12(b)(6). The district court did
11 not advise Karim-Panahi of the deficiencies in the amended
12 complaint," or In civil rights cases where the plaintiff
13 appears pro se, the court must construe the pleadings
14 liberally and must afford plaintiff the benefit of any
15 doubt," or "A pro se litigant must be given leave to amend
16 his or her complaint unless it is 'absolutely clear that the
17 deficiencies of the complaint could not be cured by
18 amendment,'" or Moreover, before dismissing a pro se civil
19 rights complaint for failure to state a claim, the district
20 court must give the plaintiff a statement of the complaint's
21 deficiencies," or "Without the benefit of a statement of
22 deficiencies, the pro se litigant will likely repeat previous
23 errors." Noll, 809 F.2d at 1448," or "Although Karim-Panahi's
24 amended complaint consists in large part of a rambling and
25 vituperative narrative plagued with errors in grammar and
26 spelling, it does appear to allege..." [emphasis added] or "the
27 court must do more than simply advise the pro se plaintiff
28 that his complaint needs to be shorter and more concise," or
The amended complaint contains legal conclusions but no
specification of any facts to support the claim of
conspiracy. The district court should have advised Karim-
Panahi of this deficiency." [emphasis added] From McKeever⁵

29 72. Apparently, 9th circuit court of appeals precedence shows
30 empathy to the rights of litigants who cannot afford counsel in
31 appellate court decisions that have controlling authorities to
32 meet justice requirements, therefore defendants fail to meet the
33 burden of proof.¹¹

34 73. Plaintiffs came close to the 25 pages but to do justice need
35 an extra 5 to 12 pages. We do admit however, at the time of that
36 motion, plaintiffs were not able to comprehend the theories of

1 notice v. heightened pleading requirements and were still
2 confused.

3 74. At this present time, we plaintiffs, believe that we have not
4 been adequately provided a "statement of the complaint's
5 deficiencies," as we are well able to read the federal
6 procedures, but lack any example. We acknowledge that your
7 Honor, at that time was perhaps wise in this denial for leave to
8 amend, but we believe that 25 page limitation without a motion
9 from counsel is an "unintended" error of negligent or bias
10 decision. Your order states, "...intended to support, rather than
11 handicap...".

12 75. This court should not be bridled further by frivolous
13 motions ignoring authorities provided by your honor. Whereas, if
14 we focus on the motion to dismiss strong points, we don't see
15 any strong points, only trickster lawyers, who have no problem
16 lying to a judge, attacking technicalities and ignoring the
17 merits, i.e., "The Federal Rules reject the approach that
18 pleading is a game of skill in which one misstep by counsel may
19 be decisive to the outcome..."⁶ Lying amongst conspirators, is
20 common knowledge, "part of the game of deception."

21 76. Common sense and points of authorities demand that your Honor
22 recognizes the merits of the case based upon allegations of
23 "retaliation," "deliberate indifference," "willful, malicious,
24 reckless disregard, callous wanton disregard," "abuse under the
25 color of authority," "Monell Liability" due to defendants
26 "unlawful policy" and their "deliberate choice to follow that
27 course of action made from among various alternatives,"
28 discriminated against plaintiffs, a "class-of-one", in similarly
situated circumstances by treating them different for no
rational basis, inter alia [defendants need to read the
complaint]. "The person is a "class-of-one" when [s]he alleges

1 that the government is subjecting only he[r] to differing and
2 unique treatment compared to others similarly situated. Enquist
3 v. Oregon.¹² Though Enquist because she is an employee of the
4 government is not entitled to class of one theory, and the Ninth
5 Circuit recognizes this as precedent!:

6 "The appellate panel admitted that the Supreme Court has
7 recognized "class-of-one" equal protection actions in *Village*
8 *of Willowbrook v. Olech*, which permitted a village resident
9 to sue a municipality under a "class-of-one" theory." Under
10 the "class of one theory" recognized by the Court in *Village*
11 *of Willowbrook v. Olech*, a plaintiff can bring an Equal
12 Protection claim where "she has been intentionally treated
13 differently from others similarly situated and. there is no
14 rational basis for the difference in treatment." 528 U.S.
15 562, 564 (2000). In other words, one person can bring a claim
16 under the Equal Protection Clause if that person has been
17 treated in an "irrational and wholly arbitrary" way by state
18 actors, even if that person cannot demonstrate that he or she
19 is part of a group which as a whole has been treated
20 differently. *Id.* at 565.

21 77. Gaines and Davey cannot escape liability because of their
22 "deliberate choice to follow that course of action made from
23 various alternatives," inter alia.. This has made a harsh
24 realization with Hydrick woefully to Gaines and Davey lack of
25 merit, along with El Dorado County defendant's et al, whom
26 treated plaintiffs on point with this case in abuses with the
27 same disdain as officials wrongfully, treated sexually violent
28 predators. They fit the mold in civil rights violations and
will be held liable according to these cases. THIS IS THAT THAT
THE CONSTITUTION PROHIBITS, EVEN THE 11TH AMENDMENT, AND THEY DID
THE EVIL DEED IN GOOD OLE KING GEORGE III FASHION!

29 "A person `subjects' another to the deprivation of a
30 constitutional right, within the meaning of [§] 1983, if
31 [that person] does an affirmative act, participates in
32 another's affirmative acts, or omits to perform an act which
33 [that person] is legally required to do that causes the
34 deprivation of which complaint is made." *Johnson v. Duffy*,
35 588 F.2d 740, 743 (9th Cir. 1978). Indeed, the "requisite
36 causal connection can be established not only by some kind of
37 direct personal participation in the deprivation, but also by
38 setting in motion a series of acts by others which the actor₂₁

1 knows or reasonably should know would cause others to inflict
2 the constitutional injury." Id. at 743-744.³

3 In limited circumstances, a person can also be subject to §
4 1983 liability for the acts of others. Although there is no
5 pure respondeat superior liability under § 1983, a supervisor
6 is liable for the constitutional violations of subordinates
7 "if the supervisor participated in or directed the
8 violations, or knew of the violations and failed to act
9 [EMPHASIS ADDED] to prevent them." Taylor v. List, **880 F.2d**
10 **1040**, 1045 (9th Cir. 1989).

11 [7] Plaintiffs proceed on both of these theories: (a) that
12 Defendants created policies and procedures that violated
13 Plaintiffs' constitutional rights; and (b) that Defendants
14 were willfully blind to constitutional violations committed
15 by their subordinates. Because Defendants were directors and
16 policy makers for Atascadero State Hospital, we believe
17 Plaintiffs have sufficiently alleged that the constitutional
18 violations they suffered were "set in motion" by Defendants'
19 policy decisions or, at the very least, that Defendants knew
20 of these abuses and demonstrated a deliberate indifference to
21 the SVPs' plight.

22 Taking the statements in the complaint in the light most
23 favorable to the Plaintiffs, Plaintiffs may be able to state
24 a claim against all of the named Defendants, each of whom
25 played an instrumental role in policy-making and enforcement.
26 Similarly, punishment in retaliation for exercising one's
27 right to access the courts may constitute a First Amendment
28 violation. Rizzo v. Dawson, **778 F.2d 527**, 531-32 (9th Cir.
1985). We have held that the prohibition against retaliatory
punishment is " `clearly established law' in the Ninth
Circuit, for qualified immunity purposes." Pratt v. Rowland,
65 F.3d 802, 806 & n.4 (9th Cir. 1995). Given the facts
alleged,10 10 We note that Plaintiffs' original pro se
complaint contains particularly persuasive narratives on this
issue.

we believe Plaintiffs may be able to prove that they have
been punished in retaliation for the exercise of their First
and Fourteenth Amendment rights to file grievances about the
conditions of their confinement. Accordingly, their claims
should not be dismissed at the Rule 12(b)(6) stage.

78. Yet take judicial notice without discretion, that on the
motion to dismiss page 5 line 18-25, and page 6 line 1-6,
defendants quote none of the elements that are in our complaint

1 and mentioned above, as if non existent, yet willfully misleads
2 the court.

3 79. Take judicial notice without discretion, that defense even
4 admits that the complaint has "actual facts as to what specific
5 actions were taken by defendants Gaines and Davey and how those
6 particular actions actually caused the plaintiffs to be deprived
7 of specific rights under the color of law" page 6 line 3-5
8 motion to dismiss.

9 80. They admit that "they are on notice" and that plaintiffs are
10 entitled to relief.

11 81. However, these admissions are made under their misconception
12 of Bogan and "legislative immunity."

13 82. It is required that each allegation we alleged fits the
14 elements that are also instructed to Jurors in the 9th circuit
15 "civil jury instructions" § "(9) civil rights claims," to state
16 a claim!

17 83. This pleading may seem exhaustive, and because I am Pro Se,
18 counsel is willing to exploit this weakness through bad faith,
19 however, Plaintiff's sought legal local remedy, and obeyed all
20 laws in redress, yet their defendants violated laws,
21 constitutional statutes, and acted deliberately callous and
22 malicious, allowing them to be threatened, along with other
23 community members, with "murder" and even assaulted, and
24 property vandalism, where plaintiffs, even though had a court
25 order to protect them, defendants, in writing, forming a policy,
26 instructed them to "avoid" their attacker who they allowed to
27 violate a court order for 3 years in an attempt to keep the
28 plaintiffs and other crime victims silent. There are 3 years of
incidences that suggest a policy, and not a single incident of
"failure to arrest" as alleged as a cause of action.

1 84. Then why are the defendants, offering this court an
2 irrelevant defense on allegations not made?

3 85. These are facts necessary to plead in compliance with court
4 order, page 2 line 14-18.

5 "To survive a motion to dismiss, a complaint must contain
6 sufficient factual matter, accepted as true, to 'state a
7 claim to relief that is plausible on its face.' A claim has
8 facial plausibility when the plaintiff pleads factual content
that allows the court to draw the reasonable inference that
the defendant is liable for the misconduct alleged. Also see
Hydrick v. Hunter, (9th Cir.2006).³

9 86. For instance, Exhibit A1 is provided and alleged as a
10 "deceitful" "written instrument," page 18 para. 104, inter alia,
11 with statutes showing that it is criminal in nature at cause of
12 action headings for counts 1-5.

13 87. In *Leatherman*, it stated, "We review here a decision granting
14 a motion to dismiss, and therefore must accept as true all the
15 factual allegations in the complaint. See *United States v.*
16 *Gaubert*, 499 U. S. ----, ---- (1991)."

17 88. So in my second amended complaint I have taken each
18 allegation and pleaded it in proper elements that are provided
19 to 9th circuit juries according to the this Courts "Jury
20 instructions" verbatim, and if I did not have evidence of
21 proving that element it did not make it into this complaint.
22 Whereas, to relief...' "

23 89. ... "In sum, a complaint that alleges that a defendant caused a
24 plaintiff's injury, without explaining how, [emphasis added]
25 does not meet the requirements of Rule 8(a) and therefore cannot
26 survive a Rule 12(b)(6) motion.²

27 90. See that the page 6 lines 4-5 motion to dismiss alleges that
28 they acknowledge plaintiff's "explaining how" "...how those
particular actions..."

91. In plaintiffs second amended complaint, we allege Gaines and
Davey Conspired to deprive rights of plaintiffs, Page 18 lines

1 102 through 103. In compliance with 9th Circuit Jury
2 instructions § 9.1 for elements pleading 1983 conspiracy, "All
3 Defendants in this count violated a duty of care [emphasis
4 added] and acted under the color of law. All Defendants
5 deprived Plaintiffs of their Constitutional right..."

6 92. Then we show that defendants Gaines and Davey were direct
7 participants, through various contacts with plaintiffs or
8 defendants through media, interstate wires, and exhibits A1
9 official correspondence from a senator with his seal affixed to
10 it, making it a legislative act of providing evidence in a civil
11 complaint investigation. It is also alleged in Para. 3 of the 2nd
12 amended Complaint that, "Court Take Notice that Defendants did
13 not seek to clear up these matters...made a deliberate choice to
14 follow that course of illegal action made from among various
15 legal alternatives to help Plaintiffs." This process establishes
16 the "plausibility standard... for more than a sheer possibility
17 that a defendant has acted unlawfully [emphasis added].¹³" First
18 of all Plaintiffs are crime victims contacting their legislature
19 representatives who's "legislative act" according the State
20 Constitution Article 1 § 3(a) is not to abridge this statute
21 that "the people have the right to instruct their
22 representatives..." and § 3(b)(1)"...access to writings of public
23 officials and agencies shall be open to public scrutiny" inter
24 alia.

25 93. Plaintiffs Move the Court to take Judicial Notice without
26 discretion that Defendants admit in their motion to dismiss that
27 that they were denying plaintiffs request for "access to
28 writings...", and refusing "instruction," and they admit, that
plaintiffs overt non threatening "public scrutiny" caused them
to "perceive a threat" for violating a delusional made up law

1 against "REPEATEDLY CONTACTING REPRESENTATIVES" THEIR PRIMA
2 FACIE DEFENSE!!!

3 94. Gaines and Davey call the CHP dignitary threat assessment
4 unit. This unit acquired no warrant and acted outside of police
5 business, as "big shots" doing political favors in a personal
6 manner to intimidate plaintiffs and was supported by El Dorado
7 County sheriffs acting as thug enforcers for no legitimate
8 purpose, or "rationale basis" under the color of authority.

9 95. This defense is utterly absurd and ridiculous! A Threat unit
10 with armed thugs under the color of authority converged on
11 Plaintiffs residence, in a manner not provided to murder victims
12 in this county only day's apart. What law enforcement policy
13 allowed the threat unit to orchestrate a fleet of cars and
14 officers to converge on the plaintiffs? That question is a
15 burden that needs to be brought by defendants.

16 96. They raided their humble abode home, invaded their privacy,
17 embarrassing private citizens and disturbed their guest, and
18 neighbors inter alia, creating a bad stigma in the public eye
19 against Pat and Donna, just to tell plaintiff the unimaginable
20 in the United States government, that "you can no longer contact
21 your representatives, or risk these consequences."

22 97. This is an example of [a] gravamen alleged in the complaint,
23 hidden from your honor by defense subterfuge, because they lack
24 the respect to give you substance, hoping you are sympathetic to
25 wicked corrupt legislators who act overtly with reckless
26 disregard.

27 98. So for Gaines and Davey they are named in the summons as
28 being sued in official and individual capacities. It is alleged
that they ratified a conspiracy, not in Respondeat superior
capacity as some defendants are asserting, rather they actually
contacted plaintiffs, offered assistance to plaintiffs on the

1 public airways and interstate wires, and it is alleged and prima
2 facie evidence shows that defendant Gaines and Davey contacted
3 their fellow Republican colleagues in El Dorado County
4 government offices per Exhibit A1 naming Gaines and Davey as
5 persons who would ratify the deceitful letter, a "reasonable
6 inference that the defendant is liable for the misconduct
7 alleged. For instance, in alleging count 2 section 1983
8 conspiracy, see *Mary Sanders Lee v. City of Los Angeles* ¹⁴

9 99. Dismissal on these alleged grounds is not proper and there is
10 no controlling precedent to dismiss plaintiff's complaint with
11 prejudice.

12 100. Plaintiffs Move the court to vacate September, 2 hearing and
13 compel Defendants to answer the complaint.

14 **OPPOSITION ARGUMENT TO "LEGISLATIVE IMMUNITY BARS ALL OF**
15 **PLAINTIFFS' CLAIMS AGAINST THE MOVING PARTIES"**
16 **"GROUND 1-2"**

17 101. See page 6 lines 20-21 "All of the allegations contained in
18 the Complaint of acts or omissions against defendants Gaines and
19 Davey are within the scope of their legislative immunity" and
20 page 7 motion to dismiss, line 16-23 "*...even if these allegations*
21 *were true*, legislative immunity would still bar Plaintiffs'
22 claims since all of the acts complained of were alleged to have
23 been done in the course and scope of Gaines and Davey's work for
24 the Legislature." See their moot allegations page 7 18-23:

25 "Coordination with local government officials, deciding
26 whether or not to respond to "grievances" from a constituent,
27 and requesting the threat assessment unit of the CHP to
28 investigate a constituent who repeatedly contacted the
representative's office and is perceived to be a security
threat are still squarely within the legislative purview and
the motivation of the legislator and his staff in taking
these alleged actions is immaterial to the immunity."

102. Plaintiffs move the court to take Judicial Notice without
discretion; that Plaintiffs have not alleged or complained that

1 the defendants, "deciding whether or not to respond to
2 "grievances" from a constituent" caused them damages.

3 103. Plaintiffs move the court to take Judicial Notice without
4 discretion, that "deciding whether or not to respond to
5 "grievances" is not a valid reason to "perceive" plaintiffs are
6 a "security threat." See page 7 line 18-21.

7 104. Yet this "legislative counsel" has the callous impudence to
8 trash the California and State Constitution, which governs a
9 "legislative act." "Whether an act is legislative turns on
10 the nature of the act itself, rather than on the motive or
11 intent of the official performing it. *Id.*, at 370, 377." Citing
12 defendants authority (*Bogan v. Scott-Harris*)¹⁵ where they are
13 calling an 11 year old case "recent."

14 105. However, a more recent case in the 9th circuit referring to
15 *Bogan*, identifies and explains what legislative immunity is. In
16 a very recent case ***Kaahumanu v. County of Maui*** (2003), the ninth
17 circuit ruled that, "7. Thus, the immunity attaches only to
18 actions taken "in the sphere of legitimate legislative
19 activity." *Id.* at 376. In *Bogan v. Scott-Harris*, 523 U.S. 44, 49
20 (1998)."

21 106. Plaintiffs refer to *Bogan* also to show that *Bogan* did not
22 hide the fact that *Bogan* was an issue of "voting on an
23 ordinance." They reversed a decision, based upon legislative
24 acts that allegedly harmed an individual; the district court
25 erred in finding for the plaintiffs because in *Bogon*, "The
26 ordinance reflected a discretionary, policymaking decision
27 implicating the budgetary priorities of the city and the
28 services the city provides to its constituents."

107. Defendants have not shown how their defense of legislative
acts give rise to legislative immunity, a burden required.

108. However, Kaahumanu note that it is overwhelmingly obvious
that Gaines and Davey reflecting their mental state, as being
malicious and callous, inter alia, have abrogated their immunity
in order to skew justice to be "big shots to their cronies in El
Dorado County, contrary to Senator Dave Cox and Rob Olmstead who
walk a higher road, and did not over react and escalate a "state
created danger" to send officers to plaintiffs home who are well
equipped to kill the plaintiff's if discretion so dictates.

109. Senator Cox, and Olmstead walk far from the sewers that
Gaines and Davey gravitate to in this display of corruption.

110. In Kaahumanu, similarly, and one point, a those defendants
moved to dismiss on "12(b) and legislative immunity in
individual capacity."¹⁶

111. The 9th circuit court of appeals defined concisely what are
not legislative acts and even referred to Bogan which was
similar in that a reversal was had on an "individual" action
against a person, but in Bogan it was ruled to affect policy.
Whereas in Kaahumanu, this similar seemingly legislative act of
VOTING, did not affect policy, and here are the citations and
authorities from that wonderful case:

[2] We have recognized that "not all governmental acts by . .
. a local legislature[] are necessarily legislative in
nature." Cinevision Corp. v. City of Burbank, 745 F.2d 560,
580 (9th Cir. 1984). "Whether an act is legislative turns on
the nature of the act, rather than on the motive or intent of
the official performing it." Bogan, 523 U.S. at 54. The
question before us, then, is whether the actions of the
Council members, when "stripped of all considerations of
intent and motive," were legislative rather than
administrative or executive. Id. at 55.

"The Supreme Court 'has generally been quite sparing in its
recognition of claims to absolute official immunity.' "
Chateaubriand v. Gaspard, 97 F.3d 1218, 1220 (9th Cir. 1996)
(quoting Forrester v. White, 484 U.S. 219, 224 (1988)). "The
burden of proof in establishing absolute immunity is on the
individual asserting it." Trevino v. Gates, 23 F.3d 1480,
1482 (9th Cir. 1994).

1 [3] We determine whether an action is legislative by
2 considering four factors: (1) "whether the act involves ad
3 hoc decision making, or the formulation of policy"; (2)
4 "whether the act applies to a few individuals, or to the
5 public at large"; (3) "whether the act is formally
6 legislative in character"; and (4) "whether it bears all the
7 hallmarks of traditional legislation." *Bechard v. Rappold*,
8 287 F.3d 827, 829 (9th Cir. 2002) (quoting *San Pedro Hotel*,
9 259 F.3d at 476, and *Bogan*, 523 U.S. at 55) (internal
10 quotation marks omitted). We consider each factor in turn,
11 but recognize that they are not mutually exclusive. *fn4

12 (1) Ad hoc decision making: The defendants argue that a
13 decision to grant or deny a conditional use permit is an act
14 of public policy rather than an ad hoc decision because it
15 involves the exercise of considerable discretion. They argue
16 that because a CUP authorizes a use that would otherwise be
17 prohibited under the existing comprehensive zoning ordinance,
18 a CUP therefore temporarily modifies and supersedes the
19 policies contained in that ordinance. The plaintiffs respond
20 that such decisions are made on a case-by-case basis, and
21 that as a practical matter, the consequences of each
22 individual permit do not alter the underlying legislative
23 policy.

24 [4] The district court rightly concluded that the Council's
25 decision was ad hoc. **The decision was taken based on the**
26 **circumstances of the particular case and did not effectuate**
27 **policy or create a binding rule of conduct.** [emphasis added]
28 Typically, a zoning ordinance establishes a rule of general
29 application, but here the ordinance would have affected only
30 a single permit and a single parcel of land. As the district
court noted, "regardless of whether the County Council voted
to deny or grant Plaintiffs' CUP, those seeking to conduct
businesses similar to Plaintiffs' wedding operation would be
required to obtain their own CUP in accordance with the
provisions of the Maui County Code." Enactment of the
ordinance would not have created a new category of expressly
permitted or special uses and therefore did not modify or
supersede the policies contained in the existing
comprehensive zoning ordinance.

112. Kaahumanu state that, "The defendants rely on *Kuzinich v.*
County of Santa Clara, 689 F.2d 1345 (9th Cir. 1982) to no
avail."

113. Plaintiffs similarly state that *Gaines* and *Davey* rely on
Bogan to no avail.

114. Plaintiffs move the court to take Judicial Notice that *Gaines*
and *Davey* did not allege any defense that suggests that "any

1 act that (1)"involves...the formulation of policy"; (2) "whether
2 the act applies to...the public at large"; (3) "whether the act is
3 formally legislative in character"; and (4) "whether it bears
4 all the hallmarks of traditional legislation.

5 115. nor, did they "create a binding rule of conduct" mentioned in
6 Kaahumanu.

7 116. Gaines and Davey's decisions were "ad hoc" personal vendetta
8 "case by case" decisions to act unlawfully that do not fall
9 under the 11th amendment, and they must be held liable in their
10 individual capacity for damages against plaintiffs and exemplary
11 and punitive damages for willful callous disregard as alleged.

12 117. In the civil jury instructions for civil rights violations,
13 Jurors will be instructed in § 9 introductory comment, "The
14 Eleventh Amendment, however, "does not bar suits seeking damages
15 against state officials in their personal capacity." *Hydrick v.*
16 *Hunter*, 466 F.3d 676, 688 (9th Cir.2006)."

17 118. Defendants in a delusional allegation states "Here,
18 plaintiffs sue defendants Gaines and Davey as "Defendant
19 Assemblyman Ted Gaines and Defendant Assembly Aide Steve Davey"
20 and state that Gaines and Davey "were acting in their official
21 capacity...(See Amended Complaint p. 19, lines 2-5) There is no
22 allegation describing an act of either defendant in his
23 individual capacity."

24 119. Yet in paragraph 111 you can make out clearly the phrase
25 "individual capacity." Regardless it is presumed individual any
26 ways...

27 120. ...Moving on with *Hydrick v. Hunter*, a new precedent:

28 [4] The second amended complaint states that Defendants acted
in and are being sued in their individual and official
capacities. This creates a presumption that Plaintiffs are
seeking monetary damages against defendants in their personal
capacity. See *Romano v. Bible*, 169 F.3d 1182, 1186 (9th Cir.
1999) (stating a strong presumption in favor of a personal
capacity suit where an official capacity suit for damages
would be barred). Accordingly, the Eleventh Amendment does 31

not bar Plaintiffs' claim for damages against Defendants in their individual capacities.

121. Defendants quote a group of statutes and codes on page 5 lines 18-23 in a manner that, for lack of other words, reflects the ill willed attempt at covering up their meritless defenses.

122. Borrowing wording from Hydrick, Plaintiffs attempt to enforce pendent state law claims in federal court. Plaintiffs refer, in their allegations and count's for claims for relief, to provisions in the California Constitution that parallel the applicable provision in the United States Constitution.

Plaintiffs concede that they could not prevail on a § 1983 claim based on a violation of state law, because § 1983, by its own terms, protects only violations of federal law. See *Ybarra v. Bastian*, 647 F.2d 891, 892 (9th Cir. 1981). Instead, they cite California law only where it is legitimate to do so, e.g., where there is a state-created liberty or property interest at stake. See, e.g., *Paul v. Davis*, 424 U.S. 693, 710-12 (1976).

Accordingly, Plaintiffs' claims are not barred on this ground."

123. Take Judicial Notice to spare a separate motion in limine that defense is using subterfuge to falsely paint with misinformation a gravamen of "Plaintiffs' allegations against Gaines and Davey include numerous unspecified acts of "conspiracy" to violate plaintiffs' constitutional rights and for their refusal to force county officials to arrest plaintiffs' neighbor or enforce a restraining order and for illegal search and seizure" page 4, line 17-20. This is another lie, because according to court records, the "neighbor" was arrested 4 times, noting docket numbers. It was Vern Pearson who reversed the arrests under Gary Lacy fulfilling his alleged "campaign promise" to the perpetrator.

124. It is alleged that Gaines and Davey violated section 1983 and conspired with other defendants all named in exhibit A1

1 provided as evidence by a State Senator through his office, the
2 Honorable Senator Dave Cox.

3 125. Dismissal on these alleged grounds is not proper and there
4 is no controlling precedent to dismiss plaintiffs complaint with
5 prejudice.

6 126. Plaintiffs Move the court to vacate September, 2 hearing and
7 compel Defendants to answer the complaint.

8 127. Plaintiffs argue that Pink v. Modoc Indian Health Project
9 proves the futility of Plaintiffs claim, however aside from not
10 proving immunity defense in Pat and Donna's instant action,
11 Pink's dismissal was affirmed by the Appellate court, "In sum,
12 we find that the district court did not err in its dismissal of
13 Pink's claims for lack of subject matter jurisdiction."

14 128. Defendants in an effort to compare plaintiffs with
15 disgruntled individuals who wanted to sue the United States for
16 abuses several hundred years ago, where all the parties have
17 been dead for one or two hundred years, cite a case, Cato v. the
18 U.S.A.. Cato, inter alia, had claims that did not cause the 9th
19 circuit court to "conceive of possibilities for stating
20 acognizable claim." Of course witnesses had been dead for
21 perhaps several hundred years, defendants counsel sees
22 Plaintiffs in this light, and as a good joke at the next lawyer
23 - judge golf tourney, would expect your honor to slap your knee
24 and email the Legislative counsel, "good one! Tee he he."!

25 129. It is absolutely absurd that a "legislative counsel" asserts
26 on page 10 lines 23 and 24, "Under 28 U.S.C. §1915, even pro se
27 complaints must contain at least some minimum level of factual
28 support." In using Neitzke v. Williams to state the previous
quote, it is obvious that counsel could care less about
defending his clients, assuredly, because they lack no
cognizable defense and immunity does not bar them for non

1 legislative acts. First they misspell the name, not a big deal,
2 I am guilty of that, but on page 6 lines 3, they contradict that
3 allegation and admit in the motion to dismiss that , "a paucity
4 of actual facts as to what specific actions were taken by
5 defendants Gaines and Davey," are alleged by plaintiffs. I
6 believe "paucity" and "minimum" are synonymous.

7 130. Defendants have no clue about civil rights or this case or
8 the involvement by their defendants and are resorting to boiler
9 plate templates to defend Gaines and Davey. 28 U.S.C. 1915 has
10 to do with In Forma Pauperis plaintiffs, and that we have not
11 claimed or should be identified as also. Perhaps they are
12 defending Gaines and Davey against another plaintiff and have
13 paper work mixed up?

14 131. Perhaps, citing 28 U.S.C 1915(e)(2)(B)(i)-(ii) is a childish
15 immature dig at plaintiffs, who have undergone "malicious"
16 "callous" "frivolous" treatment that is arbitrary and
17 capricious, reflecting the callous disregard for crime victims.

18 **DEFENDANTS SHOULD NOT BE GRANTED DISMISSAL**

19 132. Plaintiffs have alleged facts showing how their speech caused
20 Gaines and Davey to "chill" and deter speech barring redress and
21 lawful contact between representatives and plaintiff
22 constituents inter alia.

23 133. Plaintiffs have shown that Gaines and Davey under color of
24 authority fabricated a story resorting to extreme measures to
25 bar speech and chill rights through cronyism by enlisting CHP
26 under the pretense of color under the authorities, and other
27 forces to block their free movement and embarrass neighbors and
28 guests.

134. Plaintiffs have provided exhibit A1, and have stated facts
that must be taken as true to show that Gaines and Davey

1 initiated contact to help plaintiffs grievances, originating on
2 a recorded radio broadcast, but Conspired with other officials
3 under color to deprive them of 1st, 4th and 14th amendments
4 depriving them of "clearly established rights" inter alia.

5 135. Plaintiffs have shown how defendants complain about
6 procedural technicalities, their only valid defense, yet they do
7 not adhere to procedural requirements themselves.

8 136. Plaintiffs have shown that Senator Dave Cox, faced with the
9 same plaintiffs grievances, followed **THE CORRECT EXAMPLE OF**
10 **LEGISLATURES** acting lawfully following another choice of
11 redress, contrary to Gaines and Davey who acted deliberately,
12 and maliciously, with wanton disregard knowingly turning a blind
13 eye to their requirements in the representative constituent
14 capacity.

15 137. Plaintiffs have shown that Gaines and Davey have not offered
16 the requisite proof that they acted in a "legislative capacity."

17 138. However, Plaintiffs have provided "on point" authority
18 proving that plaintiffs allegations against Gaines and Davey,
19 were not alleging official capacity acts, but acts done in their
20 individual capacity as stated in the complaint.

21 CONCLUSION

22 139. Following and proving the grounds stated in the opposition to
23 "motion to dismiss without leave to amend" Plaintiffs move the
24 court to vacate the September 2 hearing, and compel the
25 defendants Gaines and Davey to answer the complaint and face a
26 Jury Trial for their willful Malicious unconscionable acts.
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1 Dated August 6, 2009

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4 Respectfully Submitted

5 Plaintiffs Pro Se

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7 Patrick M. Hamer

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9 _____
10 Donna L. Hamer
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16 ¹ Cecil T. Kinkade, Plaintiff-appellant, v. C. Goldsmith et. al. United States
17 Court of Appeals, Ninth Circuit. - 959 F.2d 240

18 ² *Ashcroft v. Iqbal*, ___U.S. ___, 129 S.Ct. 1937, 1949 (May 18, 2009) (quoting *Bell*
19 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 556, 557 (2007)).

20 ³ *Hydrick v. Hunter*, 466 F.3d 676, 688 (9th Cir.2006).

21 ⁴ *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S.
22 163,168[] (1993).

23 ⁵ *McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

24 ⁶ "*Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002)

25 ⁷ California Constitution.

26 ⁸ *Rayford v. Omura* 400 fed supp 2nd series page 1223 district ct. of Hawaii (2005)

27 ⁹ Quote from June 9th court order.

28 ¹⁰ *Blue v. Koren*, 72 F.3d 1075 (2d Cir. 1995)

¹¹ *Trevino v. Gates*, 23 F.3d 1480, 1482 (9th Cir. 1994).

¹² *Engquist v. Oregon Dep't of Agriculture* (07-474) Oral argument: April 21, 2008

¹³ June 9th Court order.

¹⁴ *Mary Sanders Lee v. City of Los Angeles* ORDER OPINION 250 F.3d 668 (9th Cir.
2001)

¹⁵ *Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998)

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Pleading Summary Jury Trial

Demanded -

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2 ¹⁶ Kaahumanu v. County of Maui , 315 F.3d 1215 (9th Cir. 2003).
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