No.

IN THE

SUPREME COURT OF THE UNITED STATES

Pierre GENEVIER (Pro se) — PETITIONER

vs.

The Superior Court of Los Angeles County,

Respondent

Los Angeles County,

Real party of interest.

ON PETITION FOR A WRIT OF CERTIORARI TO

Supreme Court of California

PETITION FOR WRIT OF CERTIORARI

Pierre GENEVIER

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Petitioner (pro per) and plaintiff

QUESTION (S) PRESENTED

1)_ Whether the Appeals Court **summary** denial (App. A) of the petition for a **peremptory** writ of mandate to compel the Superior Court to issue a new order striking LA County's demurrer to FAC **(a) violates** the California Constitution **[Cal Cont. art. VI & 14]** and US Constitution [right to a due process, principle of equal justice] and **(b) is in conflict** with this Court's conclusion in ***Burn v. Ohio 360 US 252 (1959)***?

2)_Whether CCP 471.5 **disallows** the filing of a demurrer on a '***CCP 471.5 type of amended complaint***' (as in this case)? (Or whether the word 'answer' in CCP 471.5 means 'answer' or 'respond'?).

3)_ Whether CCP 1008 forecloses the Court from ruling on a demurrer to a '*CCP 471.5 type of amended complaint*' (as in this case) as opposed to a '*CCP 472 type of amended complaint*'? (The answer to this question confirms the answer to the previous question and the validity of CCP 471.5's wording.).

LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

[] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

[All the documents of the underlying negligence case against the LA County (BC 364 736) were scanned and can be found on Superior Court's website, if necessary. And an Excerpt of record containing the pertinent pleadings was filed at the Appeals Court.

This petition for certiorari is on the internet at:

http://pgenevier.110mb.com/npdf/petsupcovslac-strike3-12-10.pdf;

Appendix A. The order of the 2nd district Appeal Court dated 12/11/09 it at:

http://pgenevier.110mb.com/npdf/caorderB220781-12-11-09.pdf

Appendix B. The order of the LA Superior Court dated 12/2/09 is at:

http://pgenevier.110mb.com/npdf/scorderbc364736-12-2-09.pdf

Appendix C. The **o**rder of the California Supreme Court dated 2/3/10 http://pgenevier.110mb.com/npdf/supcaorderS178869-2-3-10.pdf]

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] **For cases from state courts:**
The opinion of the highest state court to review the merits appears at **Appendix C** to the petition and is **the California Supreme Court's order** dismissing summarily plaintiff's petition for review, case no **S178 869**.
[ ] reported at ; or, [ ] has been designated for publication but is not yet reported; or,
[x] **is unpublished.**

The opinion of the Appeals' Court appears at **Appendix A** to the petition and is **the petition for writ of mandate dismissal order** of the Appeals Court for the Second Appellate district, Division One, Case No. B220 781
[ ] reported at ; or, [ ] has been designated for publication but is not yet reported; or,
[x] **is unpublished.**

JURISDICTION

[X] For cases from state courts:

The date on which the highest state court decided my case was **2-3-10.** A copy

of that summary decision appears at **Appendix C**.

[ ] A timely petition for rehearing was thereafter denied on the following date: (there is no rehearing on petition for review denial), and a copy of the order denying rehearing appears at Appendix . [ ] An extension of time to file the petition for a writ of certiorari was granted to and including (date) on (date)in Application No. A .

The jurisdiction of this Court is invoked under 28 U.S.C.§1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

14th Amendment, Right to a due process.

California Constitution Article VI and section 14:

The Legislature shall provide for the prompt publication of such opinions of the Supreme Court and courts of appeal as the Supreme Court deems appropriate, and those opinions shall be available for publication by any person. **Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated.**

California Civil Code 471.5. (a) If the complaint is amended, a copy of the amendments shall be filed, or the court may, in its discretion, require the complaint as amended to be filed, and a copy of the amendments or amended complaint must be served upon the defendants affected thereby. **The defendant shall answer the amendments**, or the complaint as amended, within 30 days after service thereof, or such other time as the court may direct, and **judgment by default may be entered upon failure to answer**, as in other cases. For the purposes of this subdivision, "complaint" includes a cross-complaint, and "defendant" includes a person against whom a cross-complaint is filed.

(b) If the answer is amended, the adverse party has 10 days after service thereof, or such other time as the court may direct, in which to demur to the amended answer.

California Civil Code 586. (a) In the following cases the same proceedings shall be had, and **judgment shall be rendered in the same manner**, **as if the defendant had failed to answer:**

(1) **If the complaint has been amended**, and the defendant fails to answer it, as amended, **or demur thereto**, or file a notice of motion to strike, **of the character specified in Section 585**, within 30 days after service thereof or within the time allowed by the court.

(b) For the purposes of this section, **"respond" means to answer, to demur, or to move to strike.**

STATEMENT OF THE CASE

A The Facts

The petition for a **peremptory** writ of mandate to compel the Superior Court to issue a new order striking LA County's demurrer to FAC in case **BC 364 736** whose issues and summary denials are reviewed here refers to a negligence complaint for damages against the Los Angeles County filed **on 1-12-07**. The LA County initially demurred to the complaint more than 20 days late, but the Superior Court refused to enter default and sustained the County's demurer **with leave to amend and required a small change in the complaint [**to present a statute imposing 'direct' liability on the County for negligence (not CC 1714)**]**. Petitioner filed his first amended complaint (FAC) that complied with the Court order and did **not** change any facts and/or the **sole** cause of action for negligence based (mainly) on violations of regulation articles (MPP) and various statutes imposing a duty on the County. The County did **not** strike the FAC or filed an answer, and instead it filed a (almost identical) demurrer to the FAC (adding 2 new grounds for dismissal), which is not allowed according **to CCP 417.5** and **CCP 1008**.

While petitioner pursued his first request to enter default in front of the US Supreme Court (no 07-6445), he requested a stay of the demurer to FAC hearing until the US Supreme Court rules on the first request to compel the entry of default, and the stay was granted. **On October 29 2007**, the US Supreme Court denied the request to compel the entry of default and the stay

ended, but the LA County did **not** re-noticed its demurer at the earliest available date as required by California Rule of Court Rule 3.1320 d [stating that the demurer must be heard within 35 days of its filing **or on the first available Court date**] from 10-29-07 to 5-30-08. **On 5-30-08** petitioner requested a second stay of proceeding to allow the pro bono lawyer appointed by the CA9 in the related case (08-55492) to review this case also and the stay was granted, but the pro bono lawyer overlooked a conflict of interest and later revoked himself. **On 2-25-09** after the Court ordered a status conference, petitioner applied again ex parte for the entry of default for failure to answer on time to the FAC, but it was denied, and so was the petition for writ of mandate **summarily** by the Appeals Court and 2 Supreme Courts (SC no 09-6525). So **on 11-5-09**, petitioner filed a motion to strike the demurrer to FAC (and a renewed motion to enter default with the Court's permission), the County opposed and petitioner replied. The Court denied the motion to strike because the McAllister case states that the word '*answer*' in CCP 471.5 presumably means '*respond*' (in the Rutter Group guide) and the renewed motion to enter default because the motion to strike was denied, and continued the hearing on the demurrer on 12-2-09 (see App. B). Petitioner then filed the petition for a **peremptory** writ of mandate to compel the Superior Court to issue a new order striking LA County's demurrer to FAC and explained, in addition to the legal justification for a strike, that a summary denial would violate both the California and US constitutions and

be in conflict with the US Supreme Court conclusion *in Burns v. Ohio*, but both the Appeals Courts (App. A) and the California Supreme Court (App. C) ignored this argument and rendered summary decisions **which give this Court jurisdiction** and the responsibility to correct their grave errors.

B Procedural History.

The complaint for damages ($2 840 000) due to professional negligence against the Los Angeles County (**BC 364 736**) followed two earlier complaints: **(a) One initial complaint for misrepresentation** (BC 310 113) filed on 2-4-04 at the Superior Court that was removed and later dismissed with prejudice for the claim against the LA County DPSS because of the immunity for misrepresentation **under GC 818.8 (**US Supreme Court case no 05-7408) although there exists a legal authority stating that this immunity does not apply in the social services area as in this case (and good sense supports this conclusion); **And (b) a second complaint** (05-7517) filed at the Federal Court **on 10-19-05** for **(1)** deprivation of civil rights, **(2)** conspiracy to interfere with civil rights, **(3)** common law conspiracy against several civil servants in their individual capacities [and LA County for (1) only], and for **(4) negligence** against defendants United States of America and **Los Angeles County** that was dismissed without prejudice for the negligence claim against the County on 12-28-06, after more than a year of analysis of defendant's demurrer. Petitioner did re-file the negligence complaint (BC 364 736) on 1-12-07 at the Superior Court as explained above in A.

REASONS FOR GRANTING THE PETITION

A Introduction.

This petition for writ of certiorari should be granted because **it raises two important issues of law** and because the decisions below conflict with the US Supreme Court conclusion *in Burns v. Ohio* [Rule 10 (c)], lead to a gross miscarriage of justice and are unduly harsh in their impact (SCP. 277).

1) The '**unconstitutionality**' of summary denials of petitions for peremptory writs of mandate issue and its importance.

The first issue of law is the '**unconstitutionality**' of summary denials of petitions for a peremptory writ of mandate'. The California Constitution guarantees a **motivated** decision by Appeals Courts and the Supreme Court for decisions that '*determine a cause*' [Cal Cont. art. VI & 14], and the California Supreme Court confirmed in *Funeral Dir. Assn. v. Bd. Of Funeral Dirs. (1943) 22 C. 2d. 104*, that this provision of the constitution applied to the granting or denying of a **peremptory** writ of mandate that is a '***determination of cause***', but obviously Appeals Courts do not apply this rule with the blessing of the California Supreme Court – in this case the Appeals Court denied summarily (for the **third time)** petitioner's properly noticed and timely petition for a **peremptory** writ of mandate that presents all the essential elements and record necessary to grant the petition although petitioner reminded them that a summary denial would violate both the California and **US Constitution** and **be in conflict with the US Supreme**

Court's conclusion *in Burns v. Ohio* [and again only one judge is listed in the Appeals Court's decision although 3 judges are required]**. This is a fundamental issue** of course because there is no justice without a motivated decision [See CFPP **section 51.17 [b]**: *When an opinion addresses an issues of first impression without discussing precedent from other jurisdiction or the policy implications of its rule, the decision* ***is not entitled to deference*** *[McHugh v. Santa Monica…]***'**] and because the principle of equal justice under law is a key to the fairness of the justice system**.**

Moreover, the Appeals Courts and Supreme Court do **not** have the right and/or authority to change the Constitution, and the Supreme Court fairly clearly specified that the grant or denial of a peremptory writ should be motivated according to the Cal. Constitution, so the summary denial is an abuse of power in addition to penalize the victims who ask for justice. The grant of certiorari is therefore justified **according to Rule 10 (c).**

2) The meaning of the word '*answer*' in CCP 471.5 is also an important (procedural) issue.

The second issue of law is a procedural issue**:** whether CCP 471.5 disallows the filing of demurer on a CCP 471.5 type of amended complaints, or more simply put whether the word '*answer*' in CCP 471.5 means '*answer*' or '*respond*'. **It is also a important issue of law** because even though this statute is more than 120 years old and the civil code knows the difference between '*answer*' and '*respond*' (see above CCP 586), there is an **obvious and public** controversy in **the legal community** since two leading publishers of

California Civil Procedure guides present contradictory information on the issue as seen below. The controversy is unjustified though because the existing legal authority that address the issue of the meaning of CCP 471.5 **(***McGary v. Pedrorena***)** shows that its wording is coherent with other statutes like CCP 1008 that forecloses the Court from ruling on a demurer to a 'CCP 471.5 type of amended complaints'. It was the role and duty of the Appeals Court and California Supreme Court to clarify the law, and not to let incorrect information be spread, but they failed to do so, so the US Supreme Court that oversees the justice of 50 states is now the last resort to settle the question for everyone's benefits. The refusal to properly apply a statute presents substantial due process questions which can justify the grant of certiorari also [see SCP 272].

3) The decisions below lead to a gross miscarriage of justice, and are unduly harsh in their impact.

Finally, petitioner's case is meritorious because: **(1)** two Courts have already concluded that the demurrer's objections were not sufficient to dismiss the complaint [the LA County had already presented the same objections to the District Court that had not found them sufficient to dismiss with prejudice the case after one year of analysis]; **(2)** in the previous related case against the California DSS (BC 340712, B191039) both the Superior Court and the Appeals Court found that G815.6 made the DSS liable for violations of the same MPP articles and criminal statutes, so this very similar complaint about violations of the same

MPP regulation articles is valid also; and **(3)** if the Court were to rule on the demurrer to FAC asking to review the timeliness of the complaint as seen in part C 3), it would have - in all honesty - to review first (on his own motion) the timelines of the demurrer that was more than 20 days late, and enter default against the County (!).

Finally **(4)** as the court knows already, the rulings on the previous related cases ignored existing legal authorities to reach unfair conclusions [the LA County incorrectly obtained the immunity for misrepresentation under G818.8 in the first lawsuit although this immunity does not apply in the social service area (see Michael J. V. Los Angeles County, Department of Adoption (app. 2 Dist 1988) 247 Cal. Rptr.) see SC no 05-7408; and the DSS incorrectly obtained the judicial immunity despite the fact that G815.6 imposes a direct liability on the state independently from any immunity its employees may enjoy (see Bradford v. State of California (1975) 36 CA 3d 16, 19, 111 Cr 852.) see SC no 07-7122].

It is also obvious that petitioner suffered a very grave prejudice as the result of the LA County's negligence [since he was sent more than 16 times in the street in 2002-03, he could not resettle and later even became very sick over a 8 years period], so in this context of a meritorious case, the Appeals Court and Supreme Court summary decisions lead to a gross miscarriage of justice and are unduly harsh in their impact, which can justify the grant of certiorari also [see SCP p. 277].

B The Appeals Court violated the California Constitution and the US Constitution when it denied summarily the petition for a peremptory writ of mandate.

1_The violation of the California Constitution.

California Constitution article 6 section 14 states that the '***decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated*'**, **and t**he California Supreme Court has already agreed that the grant or denial of a petition for a peremptory writ of mandate was **a '<u>determination of a cause</u>**' which required a written and motivated decision in *Funeral Dir.*, so petitioner is/was entitled to a written and motivated decision.

[see *Funeral Dir. Assn. v. Bd. Of Funeral Dirs. (1943) 22 C. 2d. 104, 'The Supreme Court's initial action in issuing or declining to issue a prerogative writ on* ***an ex parte application*** *does not constitute such 'determination of a cause'* (Cal. Const. Art. VI sect. 14) as to require a written decision. *<u>It is only after an alternative writ has been issued that the matter becomes 'a cause</u>,' the determination of which, i.e.,* ***the granting or denying of a peremptory writ***, *<u>requires a written decision'</u>*.]

The Superior Court and the real party of interest [LA County] had already '*shown cause*' why they thought the petition should be denied when they opposed and denied the motion to strike, so there was no need for the Appeals Court to issue an order to show cause <u>and the petition is/was a petition for a **peremptory** writ of mandate</u> [In Palma v. US Industrial Fastners, Inc. 36 Cal. 3d 171, the court wrote: '*the respondent may choose to act in conformity with the prayer, in which case the petition becomes moot; otherwise, the respondent or the real party in interest may file a written return setting forth* ***the factual and***

legal basis *which justify the respondent's refusal to do so. …**The matter is then 'cause'** to be decided in writing with reasons stated, as required by Cal. Const. Art. 6 Sect. 14.*', so the filing of opposing papers and explanation why the motion to strike should be denied is key to justify the need for a motivated decision].

Moreover, the case fitted (fits) '*those limited situation where the '**accelerated Palma procedure'** is appropriate*' since the parties had been given **the required 10 days due notice** that a peremptory writ was requested; the court had opposing papers in file that adequately addressed the issues [as seen below. The County's opposition to the motion to strike squarely opposes the issues presented here since it presents the following sections: '*no authority prohibits defendant from filing of a demurrer to a FAC*', and '*CCP 1008 does not apply to defendant's demurrer'*, (not too many arguments can be presented in opposition (and those that qualify are not valid)], but they did not dispute the facts (the Court could have asked for more if necessary); the court had the necessary record to rule on the petition also as seen below, and, as seen in part E, the petition presented the essential elements for a writ [undisputed facts and well settled principle of law; CCP 471.5 does state failure to '*answer*', not failure to '*respond*' and for good reasons. CCP knows the difference, see above (p. 7) CCP 586 differentiating 'respond' and 'answer'. CCP 1008 is also often used statute….].

In Palma 36 Cal. 3d 171, The Court wrote: '*Although this procedure (first instance peremptory writ) was once considered appropriate only **when unusual***

circumstance required immediate action *…, in recent years Courts of Appeals have increasingly resorted to issuance of a peremptory writ in the first instance when it appears the petition and* ***opposing papers on file adequately address the issues raised by the petition, that no factual dispute exists****, and* ***that the additional briefing that would follow the issuance of an alternate writ is unnecessary*** *to disposition of the petition*'. Here the circumstance required **immediate action** since the demurrer must be stricken before it is heard (especially when default could follow **and there is $20 000 penalty for every month until the dispute is resolved**), and there is an urgency to resolve the case when the petitioner has suffered for 8 years already because of the wrongdoings described in the complaint. It was obvious that '***additional briefing was unnecessary*** *to disposition of the petition'* because the issue is fairly simple and no case other than the ones mentioned here address the issue of the meaning of CCP 471.5 or of '*answer*' in CCP 471.5.

The Appeals Court knew that additional briefing was unnecessary since it did not even wait for the 10 days of the notice to see if the County or the Court would oppose the petition and rendered its decision in 4 days - probably because it did not want to have the request for a writ unopposed (the opposition to the petition is an important element in the granting of a writ). Here the Superior Court and LA County are public agencies and they surely want to have this issue of the meaning of '*answer*' in CCP 471.5 clarified (even if they argued for a denial of the motion to strike); again the initial demurrer was 20 days late and default could have been entered in 2007, so refusing to interpret this CCP 471.5 is

close **to an obvious robbery of $2 840 000**, if the Appeals Court thought '*answer*' means '*answer*'; and if not, writing a short order explaining why '*answer*' means '*respond*' in this context does not take long **and it is everyone's interest** [that is how the law improves by trying cases and addressing (new) specific issues when they come along, even if (or especially when) they come after 120 years!].

In the context of a petition to compel the Superior Court to apply the law, a request for a peremptory writ is nothing else than an 'appeal' of the Superior Court's decision for which an appellant is entitled to a written and motivated decision (so it makes sense that such a petition be entitled to written and motivated decision). If the Appeals Court renders a summary decision on this petition for a peremptory writ, and the demurrer is sustained and the case is dismissed, petitioner would be entitled to a written and motivated decision <u>on this same issue in appeal</u> [as ***in People V. Medina (1972) 6 Cal 3d 484*****,** because the summary denial is not res juridicata], so the purpose of the summary decision in this particular case context (where the urgency is obvious) is just to delay the review of the issue (of the meaning of CCP 471.5,) to hurt and harass petitioner (by forcing him to file more pleadings although he is very poor), and is a violation of the due process.

[As the a parenthesis, in section 51.17 [c], CFPP states also: '*A Court of Appeal opinion is required to identify the justices participating in the decision, including the author of the majority opinion and any concurring or dissenting opinion. If the opinion is by the Court, <u>it must identify the **three** participating justices</u> [Cal Rules of courts Rules 8.256 (a) (2)]*'; and in this case the decision identifies only one participating justice, there are 4 justices in division one, so it is not difficult to find at least 3 who are available. **].**

Again Cal Rules of Courts Rules 8.486 allows the Court to **summarily** deny a petition for which the required record or explanation (…) was not presented, but this rule does not apply here because petitioner did present the excerpts of record [containing the necessary documents to evaluate the petition: the complaint and amended complaint; the demurrer and demurrer to FAC; the Court order on the initial demurrer; the motion to strike, the opposition and reply to this motion, and the Court order on the motion to strike (App. B)]. The Appeals Court had all the elements to issue the peremptory writ and the necessary record, so the appeals court abused its discretion and its summary decision (App. A) violates the California Constitution and US Constitution and the principle of equal justice under law as seen below.

2) The violation of the US Constitution.

The violation of the California Constitution results in a violation of the Fourteenth Amendment (right to a due process) of the US Constitution, as in *Burn v. Ohio 360 US 252 (1959)* in which the US Supreme Court had also deducted the violation of the due process (principle of Equal Justice under law) from the violation of the Ohio Constitution in a similar context:

[see page 252 '*Since a person who is not indigent may have the Ohio Supreme Court consider his application for leave to appeal from a felony conviction,* ***denial of the same right*** *to this indigent petitioner solely because he was unable to pay the filing fee* ***violated the Fourteenth Amendment***', later '*The imposition by the State of financial barriers restricting the availability of appellate review for indigent criminal defendants* ***has no place in our heritage of Equal Justice Under Law***']

Here it is the same, since some petitioners obtain motivated decisions conformed to the Constitution on petitions for a peremptory writ, the denial of the same right to a pro se refugee who has a valid claim and a petition for a peremptory writ presenting all the essential elements necessary to issue a writ, ***violates the Fourteenth Amendment***', and such a practice '***has no place in our heritage of Equal Justice Under Law***'. The violation of the California Constitution results in **the violation of the US Constitution's Fourteenth Amendment** as in Burns, and the Appeals Court's summary decision is (knowingly) in conflict with the US Supreme Court's conclusion *in Burns v. Ohio* which justifies the grant of certiorari according to Rule 10 (c).

C CCP 471.5 does not allow the filing of a demurrer on a CCP 471.5 type of amended complaint.

1) The Matthew Bender's citation, and the case *McGary v. Pedrorena (1881) 58 C. 91* differentiating amended complaints.

CFPP no 21.19 (2) states: '*Answer to Amended Complaint. The defendant or cross defendant* ***is required to answer the amendments****, or the complaint …as amended, within 30 days after service, …, and judgments by default may be entered on failure to answer as (CCP 471.5 (a)). CCP 471.5 refers only to the filing of* ***an answer*** *to the amended complaint and* ***does not authorize the filing of a demurrer****. This is also true of its predecessor statute, former code 432.'.*

Again this makes sense because the filing of a demurrer to a FAC that complies with the Court's order sustaining the first demurrer with leave to amend and that does not change and/or add any facts and/or causes of action is nothing else than a dishonest effort to avoid the filing of an immediate petition for writ of mandate at the Appeals Court **to review the '*leave to***

amend' issue, and to have the judge reconsider its initial decision without following the requirements of CCP 1008.

The Code of Civil Procedure described two '*different types of amended complaints*' (CCP 471.5 and CCP 472) – this has been clarified by the California Supreme Court very early on *in* ***McGary v. Pedrorena (1881) 58 C. 91*** stating '*in order to give force and effect to both of these sections of the code (471.5 formerly 432 and 472), we must hold that sect. 472 applies to amendments made before answer filed and before trial of an issue of law upon a demurrer, and that sect. 432 (471.5) applies to amendments made after an answer is filed, or after the trial of an issue of law upon a demurrer to a complaint*.' There is therefore no doubt that an amended complaint that complies with the court order and that does not change and/or add any facts and/or causes of action – as in this case [see explanation below in C 3)] - is a '*CCP 471.5 type of amended complaint'* for which the filing of a new demurrer is **not** allowed [and for which the default provision of CCP 471.5 for failing to answer applies also]. While CCP 586 a) 1 and CCP 472 refer to CCP 472 type of amended complaints in which facts and/or causes of action were changed and/or added, creating new possible issues of law that the judge has not seen and addressed ['***before answer filed and before trial of an issue of law upon a demurrer***']. Since CCP 472 does not address the default issue (as CCP 471.5 does), the law had to have CCP 586 a) 1 for the '*CCP 472 type of amended complaints*' allowing the filing of a demurrer.

CCP 586 is linked and cross referenced **only** to **CCP 472** (type of amended complaints), **not** to CCP 471.5 (type of amended complaints) [again CCP 586 used to be named **CCP 872** to show the relation with CCP 472, most certainly], so it does not apply here and does not prevent the striking of the demurrer (or entry of default). If CCP 586 were not only linked (or did not only refer) to CCP 472 (type of amended complaints), then CCP 471.5 would **not** have to specify that '***default may be entered for failure to answer*'**,** it would simply not address the issue as CCP 472.

The difference between CCP 471.5 and 472 that, for some, may seem a too fine intellectual issue (and/or may seem to have lost its importance or necessity over the years), **is in fact still very important** because it prevents the type of dishonest behavior mentioned here - the dishonest effort to avoid the filing of an immediate petition for writ of mandate at the appeal court to review the '*leave to amend issue*', and to have the judge reconsider its initial decision without following the requirements of CCP 1008. It also forces the parties to focus on the Court order, the plaintiff must comply or risk a motion to strike (that can be transformed in a motion to dismiss if granted), and the defendant must answer (or strike the AC if it does not comply) or face a default. CCP 471.5 addresses the straight forward cases and most probably the majority of cases.

2) The *McAllister v. County of Monterrey* case and the Matthew Bender and Rutter guides confusion and contradictory conclusion on this issue.

The Superior Court justified its order denying the motion to strike with the case ***McAllister*** *v. County of Monterrey (2007) 147 Cal. App. 4th 253, 281…*' (app. B), the case used by defendant in its opposition, but this case does not specifically address the issue of meaning of CCP 471.5 or of the word '*answer*' in CCP 471.5; it only refers to a Rutter Group Guide statement saying that the word '*answer*' means '*respond*' in CCP 471.5 without presenting any legal authority or legal argument justifying this assertion.

Moreover, the case McAllister leaves serious doubt about the veracity of this statement, since the court wrote '*Notwithstanding McAllister's insistence that 'answer' does not mean 'demurrer,' a contrary interpretation* ***would*** *not be unreasonable. (Cf. Weil & Brown , Cal. Practice guide: Civil Procedure Before Trial, supra 7:34 p. 7-16 [word 'answer' in 471.5* ***presumably*** *means 'respond' and thus include the possibility for another demurrer]*'; but again it was **not** addressing this specific issue of the meaning of '*amended complaint*' in CCP 471.5, CCP 472, and in CCP 586, or of the meaning of '*answer*' in CCP 471.5, it was simply saying that, for some, the word '*answer*' can easily be (mis) interpreted to mean '*respond*' without saying if it is **rightly** or **wrongly** interpreted to mean '*respond*' in the Rutter Group Guide **since the court used the words '*presumably*' and 'would' which do not imply certainty**.

Petitioner does **not** question the fact that the Rutter Group's practice guide and even the Matthew Bender's guides **are confused** on this issue of the meaning of '*amended complaint*' in CCP 471.5, CCP 472, and in CCP 586; and that they present contradictory information on this issue since the CFPP (Matthew Bender's guides) states that CCP 471.5 does **not** allow the filing of a demurrer, while the Rutter Group's guide states that CCP 471.5 **does** allow the filing of a demurrer, **but first** these guides are **not the California Courts, so their sayings** (unsupported by valid legal authorities) **do not have force of law**; and **second,** the reason for their confusion is that **they both overlook** (or ignore) the clarification of the California Supreme Court in ***McGary v. Pedrorena (1881) 58 C. 91*** without which they cannot explain why CCP 471.5 uses the words '*failure to **answer** may lead to a default*', and why CCP 472 does not address the default issue [and instead is cross-referenced with CCP 586 (which again used to be named **CCP 872** to show the relation with CCP 472, most certainly)].

So they are vague on the issue, but the Mattew Bender's guides have at least the intellectual honesty to write that CCP 471.5 does **not** allow the filing of a demurrer, while the Rutter Group is **not at all** intellectually rigorous on this issue since it cites McAllister as a confirmation of its statement that a demurrer is allowed although, as seen above, the McAllister case does **not** directly address this issue, and leaves an obvious doubt about the veracity of the Rutter Group's allegation on this matter. The statutes

(CCP 471.5, 472) wording and legal authorities on this matter [***McGary v. Pedrorena (1881) 58 C. 91***] are clear, leave no doubt about the objective of the law, and are coherent with other statutes like CCP 1008 as seen in part D.

3) The logic behind CCP 471.5 and CCP 472, and the FAC and demurer to FAC contents.

The Court surely understands that **there is no honest reason** to allow the filing of a demurrer on this **471.5's type** of amended complaint because: **1) If the amended complaint** corrects the complaint fault exactly as the judge requested it, then **for the judge** the amended complaint **is free of objection appearing at the face of the complaint**, and there is no need to ask the judge to rule again on the technical validity of the complaint, and an answer should be filed. **2) If the amended complaint** does not comply with the judge's order, then the defendant can move to strike (dismiss) the amended complaint for failure to comply with the court order sustaining the demurrer with leave to amend [motion that can be transformed into a motion to dismiss if granted as in *Kronsberg v. Milton J. Wershow Co. (1965) 238 Cal. App. 2 d 170, 173*].

And **3) If the amended complaint** corrects (or not) the complaint's fault as requested by the judge and at the same time adds and/or changes allegations, and/or causes of action,, then it is not anymore a CCP 471.5's type of amended complaint, **it is CCP 472's type of amended complaint** because the addition and/or change of facts, and/or causes of action,, creates new possible issues of law that have not been addressed by the judge or

answered (the amendments are then amendments before trial of the created possible issues of law), so of course a new demurrer can be filed on this type of amended complaint; the Court will note also that the addition and/or change of facts, and/or causes of action,, creates new circumstances, and CCP 1008 does not apply anymore; **but this is not the case here, petitioner did not change and/or add any facts and/or cause of action.**

Here the amended complaint is almost identical to the initial complaint (exactly same facts, same cause of action,) and it complies with the Court order (again the defendant did not strike it) since the amendment requested was to present a statute imposing liability on the County other than CC 1714 (which petitioner had presented in conjunction with GC 815.2 imposing a vicarious liability). Petitioner had mentioned also **GC 815.6** in his complaint, **so the amendment was only the slight modification of the 3 paragraphs on the existence of the duty** - the demurrer to FAC did not even address this amendment.

The demurrer to FAC **was also almost identical to the first one** since the **2 notices** stated that **the demurrer is made on the grounds** that: (1) the complaint fails to state facts sufficient to constitute the cause of action, and (2) the complaint is uncertain. And the 2 memoranda of points and authorities stated that **(1)** the complaint is barred by principle of res juridicata; and **(2)** the allegations subsequent to the previous lawsuit filing in 2-2004 do not constitute negligence. The new paragraphs in the 2nd demurrer

are: **(a) the complaint** is not timely filed [which would not have been welcomed in the first demurer that was filed more than 20 days late (!)]; and **(b) the plaintiff** has not sufficiently pled compliance with applicable claims statute. Both of which could have been presented earlier since petitioner did not change his allegation of claims filing in paragraph 53 of the initial complaint! So the demurrer to FAC also violated without any doubt **CCP 1008** forbidding the filing of a motion to reconsider if the moving party cannot present new or different facts, circumstances or law while explaining why they were not presented in the earlier motion, in addition to be unauthorized by CCP 471.5.

D LA County's demurrer to FAC violates CCP 1008 in this particular context.

1) The case *Bennett v. Suncloud*.

The case *Bennett v. Suncloud 56 Cal. App. 4th 91; 65 Cal. Reptr. D 80 (June 1997)* in which CCP 1008 prevented the Court from reconsidering a previous ruling on **a demurrer** stating that the complaint was timely (see *Bennett* on page 96), leaves no doubt about the fact that CCP 1008 also applies to demurrer to FAC unlike the defendant's lawyer pretended. The Court in Bennett wrote:

'*Appellant contends that in sustaining the demurer to the entire third amended complaint,* ***Judge Haber disregarded section 1008 of CCP which essentially forbids trial courts from reconsidering orders previously rendered in the***

action *… A motion made in accordance with section 1008 must include reference to new or different facts… On the other hand, when judge Finkel overruled the demurrer to the first, second third, seventh and ninth cause of faction (for breach of express warranty…),* ***Judge Haber was foreclosed from rendering a new determination on the viability of those claims*** *unless new facts, or circumstances were brought to his attention…*'.

So CCP 1008 prevents Judge Recana from ruling on the demurrer to FAC because again there is no new (and/or changed) facts and/or causes of action in the FAC, and the County does not present any special new circumstance justifying reconsideration, it only repeats mainly the initial demurrer arguments as seen above or presents issues of law that could have been presented earlier. The California Supreme Court has confirmed the importance of CCP 1008 and clarified its use in *Le Francois v. Goel 35 Cal. 4th 1094 (2005)* and here the Superior Court did not allow the filing of a new demurer, so there is no doubt that the demurrer is in violation of CCP 1008.

In her opposition, Mrs. Ellyatt writes that CCP 1008 '*does not apply to defendant demurrer* ***because the matters set out in the original complaint were no longer before the cour****t*', this argument has been contradicted by several courts as seen in *Gray v. Hall 203 Cal. 306 (1928)* that cites *Redington v. Cornwell, 90 Cal. 49, 60,61*:

The court wrote: '*some earlier authorities would seem to indicate that an amended complaint supersedes the original complaint for all purposes.*

The case Redington…, however, correctly interprets these decisions and declares: 'It has been said in a number of cases that an amended complaint supersedes the original; but I think a careful examination of those cases will show that it was only to the extent of the amendment. Beyond this, whatever may have been said is mere dictum. But in none of the cases has it been said that the original is not part of the judgment roll; nor has it been decided that an original complaint is superseded for the purpose of showing when the action was commenced, and ***whether or not a new difference causes of action was introduced by amendment****. For the purpose of determining these questions and perhaps others that may arise, which often become material on appeal,* ***the amended complaint can by no possibility supersedes the original****…*'.

As seen in *McGary v. Pedrorena (1881) 58 C. 91 and Bennett above***, it is the nature of the amendments that determines if CCP 1008 applies**, so the original complaint is important to see that no new cause of action and/or facts were added and that the facts were not changed, only the amendments requested by the court on the (mis) use of CC 1714 were made.

2) The defendant had the possibility to file a petition for writ of mandate.

If Mrs. Ellyatt thought that the 2 initial objections and the new objections were sufficient to sustain the demurrer without leave to amend, **she should have immediately filed a petition for writ of mandate at the Appeals Court to question** the judge's decision to **grant leave to amend** to save '*a needless and expensive trial*' as it is proper to do.

[Please see *North American Chemical Co. v. Superior Court 59 cal. App. 4th 764,* explaining that *'****review by mandamus*** *is appropriate when the Court sustains a demurer and when the mandamus proceeding* ***prevents a needless and expensive trial and reversal****',* or see *Big Valley Band of Pomo Indians v. Superior Court (2005) 133 CA 4th 1185, 1189-1190…****(writ review was appropriate to determine defendant was immune from suit)****,* or finally see *Cryolife, Ind. V. Superior Court*

*(2003) 110 CA 4th 1145, 1151-1152…(**writ review was appropriate when petition raised two significant issues of first impression**)*…].

But, Mrs. Ellyatt could not file a new demurrer on a CCP 471.5 type of FAC, so her demurrer violating CCP 1008 should be stricken.

E The essential elements for a writ and arguments' conclusion.

1) The essential elements of a writ.

CFPP section 358.31 states that **the essential elements** of a writ are **(1) the existence of duty** on the respondent and **(2) the demonstration of the right to a writ by clear, certain and positive evidence [**'*The petition for writ of mandate must demonstrate the right to a writ **by clear, certain and positive evidence.** California Federation of Teachers v. Oxnard Elementary Sch. (1969) 272 Cal. App. 2d. 514, 545,* see CFPP 358 .31 (1)]. So the petition presents the essential elements for the issuance of a **peremptory** writ of mandate **because (1)** the Superior Court '*is under legal duty to apply **the proper law** and it may be directed to perform that duty by writ of mandate'* [see CFPP 358.32], and it has/had a duty to apply the provision of CCP 471.5 forbidding a demurrer and the provision of CCP 1008 foreclosing the Court from addressing the issues of the demurer to FAC.

And because (2) the fact that the FAC complies with the Court order sustaining the demurrer with leave to amend is obvious **and undisputed** (no motion to strike was filed and the change requested was minor and is easily

verifiable), as well as the fact that the FAC presents **no** new facts and/or causes of action and/or does not change the initial facts and sole cause**. The principles of law** explained above [definition and wording of CCP 471.5, 472, see ***McGary v. Pedrorena (1881) 58 C. 91 and Bennett above,*** CCP 1008] **are well settled (120 years), and coherent with other statutes (CCP 1008,)**; and the deficiencies presented above appear at the face of the demurer to FAC [CCP 437 (a)], **so the striking of the demurer is legitimate** and warranted according to CCP 430.40 and to the case Buck v. Morrossis (1952) 114 Cal. App. 2d 461, 464 -465 P.2d 27- (demurrer). And the demonstration of the right to a writ by clear, certain and positive evidence is established.

CCP 1086 also states: '*the writ must be issued* ***in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law***', and here it is/was obvious that petitioner had no other plain, speedy and adequate remedy to have the Superior Court apply these well settle principles of law (CCP 471.5, 1008,), and that **the Appeals Court had to address the issues before the demurrer was heard** otherwise petitioner would (or at least could) suffer an irreparable injury (including the loss of the possibility to have a default entered, in the case context), so petitioner's request for a **peremptory writ** of **mandate was justified and** legitimate. And as seen above the parties had been give due notice and the court had all the necessary documents on file including opposing papers.

2) Arguments' conclusion.

To conclude this argument, the Appeals Court's summary decision violates the California and US Constitution and it is (knowingly) in conflict with the conclusion of this Court in *Burn v. Ohio 360 US 252 (1959).* In addition to that, it is obvious that it is in everyone's interest to clarify the meaning of '*answer*' in CCP 471.5 and that petitioner would be entitled to a motivated decision in an eventual appeal anyway (if the case were dismissed), so the Appeals Court had no honest reason to render a summary decision, and its purpose appears clearly to be to delay the resolution of the case to hurt and harass petitioner by forcing him to file more pleadings **which is in violation of the due process right also**. In the particular context the case (mentioned above p. 13-14), the summary decisions also lead to a gross miscarriage and are unduly harsh in their impact which are also grounds to **grant certiorari [**see Rule 10 (c) and SCP p. 277]. This petition is filed concurrently with the petition for rehearing in case 09-08222, and the two cases are related as explained in the petition for rehearing, additional remarks on the importance of issues are also given in this other petition.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Date: March , 2010

Pierre Genevier

No.

IN THE

SUPREME COURT OF THE UNITED STATES

Pierre GENEVIER (Pro se) — PETITIONER

vs.

The Superior Court of Los Angeles County --- Respondent

Los Angeles County, ---Real party of interest.

PROOF OF SERVICE

I, Pierre Genevier, do swear or declare that on this date, March , 2009, as required by Supreme Court Rule 29, I have served the enclosed **MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS** and **PETITION FOR A WRIT OF CERTIORARI** on each party to the above proceeding or that party's counsel, and on every other person required to be served, by hand delivering or faxing or emailing or mailing the above documents.

The names and addresses of those served are as follows:

Mr. Frederick Bennett, Attorney for Los Angeles Superior Court (respondent), and **Judge Red Recana,** Superior Court, 111 North Hill street, RM 546, Los Angeles CA 90012 (By hand delivery).

Mr. Maranga and Mrs. Ellyatt, Attorney for the Los Angeles County (real party of interest), at 5850 Canoga Avenue, suite 600, Woodland Hills, CA 91367, Fax : (818) 380 0028.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March , 2010

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Los Angeles County, ---Real party of interest.

"As required by Supreme Court Rule 33.1(h), I certify that the document contains __6884 __ words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).
"I declare under penalty of perjury that the foregoing is true and correct.

"Executed on _March _____, 2010.

_____

Pierre Genevier