No.

In the

Supreme Court of the United States

Kenner,

Plaintiff-Petitioners,

v.

Kelly et al,

Defendant-Respondents.

On Petition for a Writ of Mandamus to the United States Supreme Court for a Lawsuit Originating in the United States District Court for the Southern District of California,

No. 10-cv-02105; Honorable Judge Dana Sabraw

In re Kenner

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pro se

I. QUESTION PRESENTED

1. *Do the district and appeals courts have the authority to dismiss our lawsuit against IRS defendants solely because our complaint is not based upon a violation of the preferred United States' remedy statute?*

Or …

Do the district and appeals courts have the authority to direct us to use the preferred United States' remedy statute for our lawsuit against IRS defendants?

II. PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Brian and Kathleen Kenner are plaintiffs in this RICO lawsuit and petitioners for this *writ of mandamus*.

Defendant -Respondents

Defendants *Erin Kelly*, an individual (IRS Revenue Officer, Emp. #: 33-05034), *Carol Rose*, an individual (IRS Offer In Compromise Specialist, Emp.#: 33-08058), *Mary K. Pittner*, an individual (Supervisory Revenue Officer, ID: 1000151076), *Patricia Blizzard*, an individual (Supervisory Revenue Officer, ID: 1000150698), *Crawford*, an individual (IRS Area Director), and *Charlotte A. Becerra*, an individual (Revenue Officer, ID: 1000621757) are citizens of and reside in the State of California. Defendant *Alito*, an individual (IRS Director), is presently a citizen of and resides in the State of Georgia. Defendant *J. Plasky*, an individual (IRS Process Examiner, Emp. #: 0202115) is a citizen of and resides in the State of Tennessee. Defendant *Mindy S. Meigs*, an individual (IRS Attorney, ID: 409366) is a citizen of and resides in the State of California. Defendant *Silvia L. Shaughnessy*, an individual (IRS Attorney, ID: 408761) is a citizen of and resides in the State of California. All have been sued in their individual capacity as RICO persons operating or managing a RICO enterprise.

Defendant *Barbara Dunn*, an individual (an attorney), is a citizen of and resides in the State of California. Defendant *Lacey, Dunn, & Do* is A Professional Corporation with its place of business in La Crescenta, California. Defendants Dunn, Lacey, Dunn & Do, and the IRS defendants have been sued for conspiracy to a violation of RICO.

Other respondents:

Federal district court Judge Dana Sabraw, Ninth Circuit Justice Tallman, Ninth Circuit Justice M. Smith, and Ninth Circuit Justice Hurwitz are respondents to the *writ of mandamus*.

Supreme Court Rule 29.6 Statement:

No corporations are involved in this proceeding.

III. BASIS FOR JURISDICTION

A. Basis for Supreme Court jurisdiction

The Ninth Circuit affirmed the district court dismissal of the lawsuit on June 20, 2013. The Ninth Circuit's dismissal memorandum is attached to this petition as Appendix A. We timely filed a petition to rehear the appeal on June 28, 2013. The Ninth Circuit has neither granted our request nor mandated that their decision is final. The status of the dispute is thus uncertain.

Petitioners seek a *writ of mandamus* as authorized by 28 U.S.C.S. § 1651(a). The exercise of power under this section to issue all writs necessary or appropriate in aid of jurisdiction is in

the nature of appellate jurisdiction where directed to the inferior court, and extends to the potential jurisdiction of an appellate court where an appeal is not yet pending but may later be perfected. *F.T.C. v. Dean Foods Co.*, U.S.Ill.1966, 86 S.Ct. 1738, 384 U.S. 597, 16 L.Ed.2d 802 (28 U.S.C.A. § 1651, 10).

B. Basis for appellate and federal jurisdiction

1. The statutory basis of subject matter jurisdiction of the district court

The United States District Court for the Southern District of California (the "District Court") had subject matter jurisdiction over this action against Erin Kelly, Jennifer Plasky, Carol Rose, Mary Kay Pittner, C. David Crawford, Patricia Blizzard, Charlotte Becerra, Silvia Shaughnessy, David Alito, and Mindy Meigs, (collectively "IRS Defendants") and, Barbara Dunn ("DUNN"), and Lacey Dunn and Do, PC ("LD&D") pursuant to *15 U.S.C. § 1121,* and *28 U.S.C. § 1331* and *28 U.S.C. § 1332*.

The Southern District of California was the proper venue because a substantial part of the events or omissions giving rise to the claim occurred in, and a substantial part of property that is the subject of the action is situated within that district (*28 U.S.C. § 1391(b)(2)*).

2. The basis for claiming that the judgment or order appealed from is final or otherwise appealable, and the statutory basis of jurisdiction of this Court

The District Court has entered final judgment on all claims for relief in the underlying action on May 27, 2011 (10-cv-02105-Doc. 64 & 65). The District Court's judgment is final under *Federal Rule of Civil Procedure 54* and this Court has jurisdiction pursuant to *28 U.S.C § 1291*.

3. The date of entry of the judgment or order appealed from; the date of filing of the notice of appeal or petition for review; and the statute or rule under which it is claimed the appeal is timely

Final judgment for this action was entered on May 27, 2011 (10-cv-02105-Doc. 64 & 65). The Notice of Appeal for this decision was timely filed with the District Court on June 21, 2011 (10-cv-02105: Dot. 66) pursuant to *28 U.S.C § 2107(a)* and *Federal Rule of Appellate Procedure 4(a)(1)*.

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VII. SUMMARY OF ARGUMENT

This is an petition for a *writ of mandamus* (28 U.S.C.S. § 1651(a)) to the Supreme Court of the United States to either enable or compel Judge Dana Sabraw[1] in federal lawsuit *Kenner v. Kelly et al* (no. 10-cv-02105, hereafter referred to as "RICO Lawsuit #1") to proceed with this lawsuit as justice now demands: *trial*. This petition is proper because, as the facts presented herein establish, we are being deliberately and systematically denied due process to pursue our chosen legal remedy against federal defendants, where, as a matter of federal law, it is our legal right to do so.

The pre-trial debate is over. As the facts and law set forth in this brief will show, the Kenner RICO complaint has been thoroughly challenged and proven sufficiently alleged. The dispute is not proceeding to trial, however. The Ninth Circuit has instead affirmed the district court's dismissal on the sole grounds that we must, but did not, plead the preferred United States remedy against IRS defendants. The decision is in error because it is in clear conflict with prior Supreme Court decisions. 26 U.S.C. § 7433, the United States preferred remedy, has enabled federal employees to act as if they are above the law. If the appeals court decision

[1] Judge Sabraw was recently assigned the RICO lawsuit and temporarily assigned the Kenner lawsuit challenging the constitutionality of certain 26 USC § 7433 provisions. He has not interfered with the constitutional rights of Kenner.

in our lawsuit is allowed to stand, they certainly will be[2].

Exhausting our remaining remedies, we timely filed a petition for rehearing at the Ninth Circuit citing, inter alia, *Caterpillar Inc. v. Williams*[3]. The *Caterpillar Inc.* citation was also included in our various Ninth Circuit appeal briefs to directly dispute the district court's earlier conclusion. The Court of Appeals has neither granted our request for rehearing nor mandated that their decision is final. In truth, the lower federal courts have persistently refused to adjudicate this and related lawsuits[4]. Initially, the District Court threatened us with sanctions or loss of rights should we pursue the RICO lawsuit against IRS personnel. Later, another San Diego

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[2] Total personal immunity for a "pattern of racketeering" when the United States benefits.

[3] "[C]ourts should not undertake to infer in one cause of action when a complaint clearly states a claim under a different cause of action. `[T]he party who brings a suit is master to decide what law he will rely upon.'" *id*. (quoting *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 n. 7, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987))." *O'Guinn v. Lovelock Corr. Ctr.*, 502 F.3d 1056 at 1060 (Ninth Cir. 2007).

[4] Where a district court persistently and without reason refuses to adjudicate a case properly before it, the court of appeals may issue a writ of mandamus in order that it may exercise the jurisdiction of review given by law. Otherwise, the appellate jurisdiction could be defeated and the purpose of the statute authorizing the writ thwarted by unauthorized action of the district court obstructing the appeal. *Will v. Calvert Fire Ins. Co.*,437 U.S. 655 (1978).

Federal Court conspired with DOJ personnel to engage in lawless acts to defeat a related lawsuit of this dispute, while taking other abusive steps to deny our automatic rights to appeal—see section entitled "Procedural History" to follow.

The first Kenner RICO lawsuit was filed October 8, 2010. Nearly three years have elapsed and there has been no just resolution to the pre-trial process for this or any of the lawsuits of this dispute. The magnitude of this delay, because it is intentional and entirely unjustifiable, is an abuse of process, prejudicial to us, and a judicial usurpation of power[5]. Accordingly, we respectfully request that the Supreme Court consider and grant our petition for a *writ of mandamus*.

VIII. PROCEDURAL HISTORY

RICO Lawsuit #1 is the first of 5 lawsuits filed in federal or state court for this dispute. All lawsuits have been dismissed. All but one of the dismissals have been appealed:

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[5] The peremptory writ of mandamus has traditionally been used in the federal courts only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. While the courts have never confined themselves to an arbitrary and technical definition of "jurisdiction," it is clear that only exceptional circumstances amounting to a judicial "usurpation of power" will justify the invocation of this extraordinary remedy. *Will v. United States*, 389 U.S. 90 (1967).

A. The RICO lawsuits

1. RICO Lawsuit #1

On October 8, 2010, we filed RICO Lawsuit #1 (10-cv-2105) in the Southern District of California against 10 IRS employees in their individual capacities. The lawsuit was dismissed and subsequently appealed. RICO Lawsuit #1's appeal decision is the subject of this *writ of mandamus* petition.

On June 20, 2013, the Ninth Circuit affirmed the district court's dismissal (Appendix A – Ninth Circuit Decision Memorandum). We petitioned to have the Ninth Circuit rehear our appeal (June 28, 2013), requesting that the court take care to address the citations and findings set forth in the rehearing petition. The Ninth Circuit has neither granted our rehearing nor issued a mandate rendering the decision final.

2. The 2nd RICO Lawsuit

On July 7, 2011, a 2nd RICO lawsuit was filed (11-cv-1538) to preserve Kenner rights not protected by the 1st RICO lawsuit. New claims were added to the original allegations: a 26 USC § 7432 real property claim and several constitutional claims. *Fireman's Fund*, a corporation, was added as a new defendant.

The 2nd RICO lawsuit was initially assigned to Judge Dana Sabraw. Judge Sabraw transferred the 2nd RICO lawsuit to the courtroom of Judge Battaglia. Judge Battaglia has now recused

himself of both RICO lawsuits. The lawsuits have thus returned to the Sabraw Court.

3. Federal judges Barry Moskowitz and Anthony Battaglia participated in a conspiracy to unlawfully defeat RICO Lawsuit #1

Both district courts dismissed RICO Lawsuit #1 for failure to state the United States' preferred remedy[6]. On November 18, 2010, Judge Barry Moskowitz *sua sponte* dismissed RICO Lawsuit #1 for want of Jurisdiction. Judge Moskowitz threatened[7] us to modify our complaint into one based on 26 U.S.C. § 7433 causes of action or face complete dismissal of our claims. Judge Moskowitz's specific *dismissal with leave* was for failure to state a 26 U.S.C. § 7433 claim based on the fact that federal defendants are immune from RICO allegations because of sovereign immunity. For our first amended complaint, we again pleaded RICO. In response, Judge Moskowitz neither denied defendants motions to dismiss nor dismissed the RICO lawsuit.

On March 7, 2011, Judge Anthony Battaglia was confirmed to the federal bench. One week later, Judge Battaglia replaced Judge Moskowitz on the

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[6] Not a statutory requirement but an unspoken policy. 26 USC § 7433 (the preferred remedy) achieves de-facto total personal immunity for IRS employees when a pattern of racketeering is undertaken for the benefit of the United States.

[7] A violation of the Bane Act: *Cal. Civ. Code § 52.1.*

1st RICO lawsuit. On May 27, 2011, Judge Battaglia dismissed RICO Lawsuit #1 on the grounds that he lacked subject matter jurisdiction based on sovereign immunity. Judge Battaglia found that our RICO complaint was not frivolous. In his dismissal, Judge Battaglia nevertheless threatened[8] the possibility of future sanctions should we further pursue our RICO claims against federal defendants.

On June 21, 2011, Judge Battaglia's dismissal was appealed (Ninth Circuit appeal 11-56062). Twenty months after final appeal arguments were filed (December 11, 2012 until June, 2013), the Ninth Circuit decided the case. The court's decision moved forward the Battaglia and initial Moskowitz district court conclusion that our lawsuit was inadequate, because we did not file a 26 U.S.C. § 7433 claim.

The Ninth Circuit found no fault with the sufficiency of the RICO allegations.

B. A civil rights lawsuit was filed by Kenner that was based, in part, upon the California Bane Act (Cal. Civ. Code § 52.1). National Bank Capital One and Federal Judges Anthony Battaglia and Ted Moskowitz are additional parties to this suit having been drawn into the controversy

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[8] A violation of the Bane Act: *Cal. Civ. Code § 52.1*

1. A third lawsuit was filed in order to: *one*, stem federal employee lawlessness taken to defeat the RICO lawsuits, and *two*, protect threatened Kenner assets

A California state lawsuit was filed (37-2011-00070473-CU-CR-EC) with claims based, in part, upon on the Bane Act (*Cal. Civ. Code § 52.1*[9]). This lawsuit was removed to San Diego federal court by IRS defendants and numbered 11-cv-2520. This lawsuit is hereafter referred to as the "Bane Act Lawsuit". IRS Defendants, Federal judges Anthony Battaglia and Ted Moskowitz, and Capital One are parties to this lawsuit.

On July 25, 2011, IRS Defendants, or colleagues on their behalf, illegally threatened confiscation of *all* our property and assets. Our RICO Lawsuit #1 appeal opening brief was due shortly thereafter. Because of claims set forth in the earlier federal lawsuits, IRS employees were without legal authority to engage in collection activity against us. Consequently, we filed the Bane Act lawsuit and sought the protection of: (1) the Sabraw Court with a TRO request; (2) the Battaglia Court with a TRO request; (3) the Battaglia Court with a request for notice of *lis*

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[9] When a "person or persons, whether or not acting under color of law, interferes by threats, intimidation, or coercion, or attempts to interfere by threats, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States […]", they violate the Bane Act (*Cal. Civ. Code § 52.1*).

pendens; (4) the Ninth Circuit Court of Appeals with a TRO request, and then finally (5) a supplemental TRO request at the Ninth Circuit. The *lis pendens* was granted. Though a TRO was not granted, IRS employees did abandon their threatened collection action against us.

Defendant Capital One also abandoned their noticed initial foreclosure sale of the Kenner property scheduled for August 1, 2011, as a consequence of notice of our application for *lis pendens*. However, on September 26, 2011, 3 days before our appeal in the RICO lawsuit was due, Capital One mailed us a "3 day notice", demanding that we vacate the property. In the notice, Capital One declared that they had taken ownership of the property just days before. We alleged in the Bane Act Lawsuit that Capital One obtained ownership of the property wrongfully and in collaboration with IRS Defendants to disrupt RICO Lawsuit #1's appeal (no.11-56062). Almost a year later, and because of the Bane Act Lawsuit appeal[10], Capital One rescinded the sale of the property, stating in their *notice of rescission* filed with the County of San Diego that they *should not have proceeded*.

2. Further deceit and abuse of process by new RICO lawsuit conspirator Capital One

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[10] Judge Benitez attempted to trick us into failing to timely file our appeal on Bane Act Lawsuit. Once it was apparent that we would successfully obtain our right of appeal, and thus get the lawsuit alleging claims against Capital One into appeal, Capital One and its agents rescinded the "sale" of the Kenner property.

resulted in yet another state lawsuit against them

On December 18, 2011, Capital One deceptively served two nearly identical (two word difference) unlawful detainer lawsuits upon us ("37-2011-362**48**" and "37-2011-362**69**"). By state law, we had five days to answer or otherwise act on the lawsuit(s). Two days after service of process however, Capital One noticed us in writing that *the unlawful detainer lawsuit* had been dismissed. Unaware at that time that *two* identical lawsuits had been filed, but also unaware at that time that "the unlawful detainer lawsuit" had been dismissed, we timely filed an answer to one lawsuit. We eventually discovered the second lawsuit and attempted to answer it, but by then, Capital One had dismissed it. The multiple unlawful detainer lawsuits were a scheme designed to obtain a default judgment against us on the property.

We sued Capital One and others for these new unlawful and abusive acts in a yet another state lawsuit (no. 37-2012-65080). This lawsuit was improperly denied as *res judicata*, based on the claims set forth in the earlier and still pending (at appeal) Bane Act Lawsuit. However, the Bane Act Lawsuit had been dismissed on jurisdictional grounds and thus could not be *res judicata* for the claims of state lawsuit 37-2012-65080. Moreover, the events of the Capital One unlawful detainer scheme described above occurred after the Bane Act Lawsuit's district court dismissal and thus, for this additional

reason, cannot be *res judicata*. Lawsuit 37-2012-65080 was not appealed because the court in that lawsuit sanctioned us to deter the appeal and to keep this dispute out of state court.

3. Federal judge Roger Benitez and DOJ employee Kaycee Sullivan became potential conspirators to the controversy for unlawful acts carried out to defeat the Bane Act Lawsuit

On January 13, 2012, DOJ attorneys were granted permission to substitute the United States[11] for IRS Defendants (11-cv-2520: Doc 28) in the Bane Act Lawsuit. This was accomplished by assuming implied FTCA (28 U.S.C. Chapter 171) claims in the lawsuit. There are however, *at least*[12] two problems with this Benitez Court act. Problem number one: we did not plead FTCA causes of action in the Bane Act Lawsuit, and we are "master[s] to decide what law [we] will rely upon" *Caterpillar Inc. v. Williams*. We alleged the California Bane Act, Abuse of Process, and other remedies for various intentional unlawful acts in

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[11] The United States had not waived its sovereign immunity. This substitution scheme would have effectively ended the lawsuit against IRS Defendants if the Bane Act Lawsuit appeal could be denied.

[12]A third reason is that the IRS Defendants themselves argued (using 28 USC § 2680 (c) – Exceptions) that the United States should not have been substituted for IRS Defendants. In bad faith, they did this once the Bane Act Lawsuit was dismissed for the United States' sovereign immunity after the substitution.

the lawsuit. Problem number two: as a matter of law, the FTCA may not be used as a remedy for intentional violations of the law, and explicitly, for a violation of *Abuse of Process*[13]. This move by the Benitez Court could easily be challenged in court or later undone at appeal. However, the DOJ and Judge Benitez would together undertake further dishonest acts to protect the wrongful substitution scheme from appeal.

On the same day the substitution act was granted by Judge Benitez, Judicial Defendants, IRS Defendants, and Capital One Defendants were dismissed from the lawsuit (11-cv-2520: Doc 29) using a court minute order (minute order header stating: "WARNING: CASE CLOSED on 01/13/2012")[14]. The United States had requested substitution of the United States for IRS Defendants without proper notice to plaintiffs. DOJ attorneys dishonestly declared, in collaboration with Judge Benitez's substitution and minute order dismissal scheme, that they had timely served us. They had not. We provided evidence to support our allegations of DOJ perjury to the Benitez Court. Our allegations were unfairly rejected. The DOJ had, in fact, noticed us of their request for substitution 12 days after they served the notice on

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[13] 28 USC § 2680 (h) – *Exceptions*.

[14] Minute order dismissals are ambiguous when compared to entry of final judgment using *Federal Rule of Civil Procedure 58*.

the court[15], and 4 days after the Bane Act Lawsuit had been dismissed.

We timely filed our first appeal for the Bane Act Lawsuit on February 10, 2012 (12-55287). Four days later, on February, 14, 2012, the United States filed a motion to dismiss the United States within the Benitez Court (11-cv-2520). In response, we moved to have the Benitez Court enter final judgment (*Federal Rule of Civil Procedure 58*). This proper request was denied. Judge Benitez apparently hoped that we, as *pro se* litigants, would not understand that a court minute order can be considered entry of final judgment for the purposes of appeal.

On February 28, 2012, 18 days after our first notice of appeal, the United States filed a motion to dismiss the appeal (12-55287: Doc 6) at the Ninth Circuit. We opposed the United States' motion and attached a declaration stating that we had neither served the United States nor obtained a waiver of sovereign immunity from the United States[16] (plaintiffs have the burden of proof to establish that the United States has waived it sovereign immunity). The Ninth Circuit nevertheless granted the United States' motion, finding that it did not have jurisdiction over the appeal (12-55287: Doc 9).

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[15] Notice to the Court on January 5, 2012 and notice to Kenner on January 17, 2012.

[16] The United States did waive its immunity for the acts underlying the RICO lawsuit claims. We had not sued the United States in the RICO lawsuit however.

In truth, because of the minute order and the content of Kenner declaration, the district court did not, and could not, have jurisdiction of the Bane Act Lawsuit against the United States once our Notice of Appeal was timely filed.

On March 27, 2012, the Benitez Court granted the United States' motion to dismiss using a second minute order. Judge Benitez would later opine in the dismissal order that he did not have personal jurisdiction of the United States or subject matter jurisdiction of the lawsuit against the United States[17]. The new minute order plainly stated "APPEAL" in its header (instead of "WARNING: CASE CLOSED …" as the first minute order had done). We appealed once again (12-55758). We suspected that if we did not timely appeal the lawsuit's dismissal, the word "APPEAL" would be declared sufficient notice to us that the lawsuit had been dismissed so as to justify a jurisdictional denial of a subsequent appeal. This time the Ninth Circuit *sua sponte* dismissed the appeal using the same justification as on the first appeal dismissal (12-55758: Doc 2). We *again* moved the Benitez Court to enter final judgment. It did. We appealed a third time. This time our appeal efforts were not denied (Appeal 12-56358 docketed July 23, 2012).

The Bane Act Lawsuit Notice of Appeal was timely filed 3 times. The Ninth Circuit fairly had

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[17] The Benitez District Court therefore, paradoxically, overruled the prior Ninth Circuit decision.

jurisdiction of the lawsuit all three times. The entire district court dismissal con was an effort to trick us into missing the jurisdictional appeal timeline in aid of the unlawful FTCA substitution scheme.

Within the district court dismissal of the United States, Judge Benitez ruled that IRS DOJ attorney Kaycee Sullivan had "likely" not engaged in perjury when she, as we allege, intentionally misrepresented to the court, under oath, that she had timely served us on the notice of substitution. Judge Benitez has no authority to find fact since he was without jurisdiction[18]. His decision abetted defendant attorney Kaycee Sullivan's perjury.

Finally, without subject matter or personal jurisdiction, Judge Benitez attached, to his United State's dismissal order, an ORDER TO SHOW CAUSE ("OSC"), compelling us to explain to the court why Judge Benitez should not formally deny us access to the courts without the court's permission. We did not respond to the Benitez OSC, and revealingly, he did not issue the order.

4. Capital One and the Trustee for Capital One attempted to reverse their involvement in the RICO conspiracy with federal employees, by rescinding their "purchase" of the Kenner property, once it became apparent that we would not fall for

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[18] No jurisdiction means Judge Benitez is also liable for harm inflicted for another violation of the California Bane Act.

the Benitez Court's dismissal minute order ruse.

Capital One used the trustee facilitated sale of our property as "proof" that they had properly purchased it. Capital One had no doubt assumed that Judge Benitez would prevent our Bane Act Lawsuit from reaching appeal, thereby protecting Capital One's dishonest acquisition of the property. Capital One's "purchase" of the Kenner property was rescinded on May 25, 2012, sheepishly stating on the recorded "NOTICE OF RECISION OF SALE" that "the foreclosure sale that occurred on [left blank] should not have proceeded".

At appeal for the Bane Act Lawsuit, Capital One argued that our complaint against them should be dismissed because they had properly purchased the Kenner property, as evidenced by the trustee's notice of sale filed with the San Diego County recorder. However, Capital One filed their *notice of rescission* for the sale of the Kenner property with the county of San Diego before they made their arguments at the Ninth Circuit. Deceptively, we were not noticed that the *rescission of sale* had been recorded. Capital One's opposition brief before the Ninth Circuit was therefore an act of perjury.

C. A fifth lawsuit was filed challenging de-facto personal immunity federal employees enjoy for intentional violation of the law when the United States is the beneficiary

We filed federal lawsuit 12-cv-1011 ("Constitutional Challenge to IRC§7433"),

challenging the constitutionality of statutes and other common law enabling federal employees, including federal judges, to intentionally break the law when it is in the best interest of the United States to do so. We included, by reference, the earlier lawsuits as the basis and standing for the claims of this lawsuit.

The lawsuit was initially assigned to Judge Battaglia's court. In response to United States' motion to dismiss, we suggested that it is a conflict of interest for Judge Battaglia to maintain control of this lawsuit. Judge Battaglia subsequently disqualified himself from the three Kenner cases he then controlled. The two RICO lawsuits and the Constitutional Challenge to IRC§7433 lawsuit were transferred to the courtroom of Federal Judge Dana Sabraw. Days later, the Constitutional Challenge to IRC§7433 lawsuit was mysteriously transferred to the courtroom of federal Judge Michael Anello. The Constitutional Challenge to IRC§7433 lawsuit was then dismissed on bogus grounds—for, among other reasons, that we had not established a case or controversy. The Constitutional Challenge to IRC§7433 lawsuit was dismissed without an opportunity to amend. The dismissal has been appealed and a decision is pending.

Judge Anello was once a partner in the law firm representing parties to *this* RICO lawsuit. Barbara Dunn and law firm Lacy, Dunn, and Do, PC. Barbara Dunn became a RICO conspirator when she conspired with IRS employees to defraud Kenner of settlement from an earlier lawsuit. Both these parties are represented by Charles Grebing.

Charles Grebing and Michael Anello were partners in the law firm WINGERT, GREBING, ANELLO & BRUBAKER.

IX. ARGUMENT

A. Writ of Mandamus

> 'The common-law writ of mandamus against a lower court is codified at 28 U.S.C.S. § 1651(a): "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." This is a "drastic and extraordinary" remedy "reserved for really extraordinary causes." *Ex parte Fahey*, 332 U. S. 258, 259-260 (1947). "The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine [the court against which mandamus is sought] to a lawful exercise of its prescribed jurisdiction." *Roche v. Evaporated Milk Assn.*, 319 U. S. 21, 26 (1943). Although courts have not "confined themselves to an arbitrary and technical definition of `jurisdiction,'" *Will v. United States*, 389 U. S. 90, 95 (1967), "only exceptional circumstances amounting to a judicial `usurpation of power,'" *ibid.*, or a "clear abuse of discretion," *Bankers Life &*

Casualty Co. v. Holland, 346 U. S. 379, 383 (1953), "will justify the invocation of this extraordinary remedy," *Will*, 389 U.S., at 95.'

As the writ is one of "the most potent weapons in the judicial arsenal," id., at 107, three conditions must be satisfied before it may issue. *Kerr v. United States Dist. Court for Northern Dist.* of Cal., 426 U. S. 394, 403 (1976). First, "**the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires**," ibid.—a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process, *Fahey*, supra, at 260. Second, **the petitioner must satisfy "`the burden of showing that [his] right to issuance of the writ is "clear and indisputable."'"** *Kerr*, supra, at 403 (quoting *Bankers Life & Casualty Co.*, supra, at 384). Third, even if the first two prerequisites have been met, **the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances**. *Kerr*, supra, at 403 (citing *Schlagenhauf v. Holder*, 379 U.S. 104, 112, n. 8 (1964)). These hurdles, however demanding, are not insuperable. This Court has issued the writ to restrain a lower court when its actions would

> threaten the separation of powers by "embarrass[ing] the executive arm of the Government," *Ex parte Peru*, 318 U. S. 578, 588 (1943), or result in the "intrusion by the federal judiciary on a delicate area of federal-state relations," *Will*, supra, at 95 (citing *Maryland v. Soper* (No. 1), 270 U.S. 9 (1926)). (Emphasis Added)
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> *Cheney v. United States Dist. Court,* 542 U.S. 367, 380 (2004)

B. The Ninth Circuit's Kenner RICO appeal decision is wrong as a matter of law— petitioners' right to issuance of the writ is thus clear and indisputable

1. The Ninth Circuit's RICO decision conflicts with prior Supreme Court Decisions

For dismissal of RICO Lawsuit #1, the Ninth Circuit concluded:

> "In No. 11-56062, the district court properly dismissed the Kenners' RICO claims against the Internal Revenue Service ("IRS") defendants for failure to state a claim because the Kenners' allegations against the IRS defendants constitute violations of the Internal Revenue Code ("IRC") in connection with tax collection activities, and the sole remedy for such claims is under 26 U.S.C. § 7433. See 26 U.S.C. § 7433 (providing that a civil action against the United States under § 7433 "shall be

> the exclusive remedy for recovering damages" resulting from IRS employees' negligent, reckless, or intentional disregard of any IRC provision or treasury regulation in connection with any collection of federal tax)." Appendix A, pg. 2, ¶1

In this conclusion, the Ninth Circuit has concluded that we had not sufficiently stated a claim because our RICO lawsuit was not based on 26 U.S.C. § 7433 claims. The Ninth Circuit is in error. Our claims sufficiently *constitute* a violation RICO. This decision therefore conflicts with both binding Supreme Court and Ninth Circuit precedent deciding that plaintiffs are masters of their claim:

> "[C]ourts should not undertake to infer in one cause of action when a complaint clearly states a claim under a different cause of action. `[T]he party who brings a suit is master to decide what law he will rely upon.'" Id. (quoting *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 n. 7, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987))." *O'Guinn v. Lovelock Corr. Ctr.*, 502 F.3d 1056 at 1060 (Ninth Cir. 2007)

Binding precedent and "the doctrine of *stare decisis* is of fundamental importance to the rule of law." *Welch v. Texas Dept. of Highways and Public Transportation*, 483 U. S. 468, 494 (1987).

2. The Ninth Circuit's RICO decision also conflicts with own prior decisions

In prior appeals, the Ninth Circuit has concluded that:

- RICO may be appropriate for use against IRS employees providing the elements of RICO are properly pled (*Major v. United States IRS*, No. 05-36118 , Ninth Cir., 201 Fed. Appx. 564; 2006 U.S. App. LEXIS 23840; 98 A.F.T.R.2d (RIA) 6654, September 11, 2006, and *Miller v. Yokohama Tire Corp.*, 358 F.3d 616, 620 (Ninth Cir. 2004) (holding that RICO has 4 elements—no mention of 26 U.S.C. § 7433))
- 26 U.S.C. § 7433 may not be applied to violations of RICO (*Shwarz v. US,* 234 F.3d 428 at 434 (Ninth Cir. 2000))

C. The Ninth Circuit Court of Appeals will not or cannot rule in this lawsuit—petitioners have no other adequate means to attain relief

> "The writ of mandamus is subject to the legal and equitable discretion of the court, and it ought not to be issued in cases of doubtful right. But it is the only adequate mode of relief, where an inferior tribunal refuses to act upon a subject brought properly before it." *Life & Fire Ins. Co. v. Heirs of Wilson*, 33 U.S. 291, 303 (1834).

The Ninth Circuit is our court of last resort before the Supreme Court. Without a final decision

or rehearing by the Ninth Circuit, the RICO lawsuit remains unjustly in an undecided or otherwise indeterminate state.

D. Under the circumstances of this dispute, a mandate is proper

In accordance with the requirements of *Cheney* or the rules of this court (Supreme Court Rule 20.1), this petition for a writ of mandamus is proper. Furthermore, under the circumstances of the Ninth Circuit's decision, it is essential that the Supreme Court consider and grant this petition for a *writ of mandamus*.

The Ninth Circuit has concluded that 26 U.S.C. § 7433 is our sole remedy for IRS Defendants' *pattern of racketeering* (an element of RICO). Because of the exclusivity provisions of §7433, IRS employees enjoy total personal immunity when the United States benefits from lawless acts taken. By lumping our properly pleaded RICO claim under the protection of §7433, IRS Defendants can now enjoy total personal immunity for systemic lawlessness when the United States beneficiary.

X. CONCLUSION & REASONS TO GRANT THE PETITION

It is clear to petitioners what happened leading up to, and during the pretrial activity for, RICO Lawsuit #1. Because of §7433, IRS employees purposely set policy for intentional violations of law to benefit the United States. Punitive or deterring damages for intentional violations of the law being

prohibited, the United States need only fear that it would have to return assets wrongfully taken when a taxpayer had the courage and resources to successfully challenge the wrongful act(s). In this environment, what noble federal employee could push back upon these dishonest policies when, on the one hand, they had no personal liability, and on the other hand, because it was policy, their job was at stake? Predictably, a lawless environment emerged[19]. The system wasn't without its limits though. Federal employees are (were) still personally liable to allegations of RICO. Yet herein lies the conflict: §7433 undoes deterrence while RICO reinforces it. There is no problem until IRS employees are caught participating in a pattern of racketeering.

Accordingly, the federal judiciary and the DOJ[20], maybe on behalf of other misguided

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[19] The San Diego United States Attorney has summed up the state of affairs in the IRS today: 'Even if the Court were to find that plaintiffs had established a constitutional or statutory right that they claimed the IRS Defendants had violated, which they cannot, the actions taken by the IRS Defendants in investigating and collecting outstanding tax liabilities cannot be said to be "clearly unlawful" to a reasonable officer in that situation.' (United States Attorney Laura Duffy, 10-cv-02105: Doc. 63);

[20] Deputy Assistant Attorney General Tamara Ashford: "We nevertheless maintain that the language in Wilkie, as well as the principles underlying that decision, are broad enough to bar a RICO suit against government employees in any situation where the employees are acting for the financial benefit of the United States." (United States 9th Circuit RICO Appeal Opposition, 11-56062: Doc. 18; 31, ¶2);

unspoken federal policies, has nearly upended the justice system to defeat RICO Lawsuit #1. It seems that defendants and judges knew that the rule of law had been undermined through specific federal statutes. What judge, after all, would break the law to immunize defendants engaged in breaking laws he otherwise supports?

Federal employees' behavior is nonetheless wrong[21]. There might be some judicial agreement on this point now too. Just maybe the Ninth Circuit wants federal employee lawlessness to be curtailed by this court, because: (1) though the Ninth circuit affirmed the district court's decision in precise accordance with United States' wants, (2), that sole affirming decision fails as a matter of Supreme Court law, and (3) the court has held the rehearing of the RICO lawsuit in limbo, making this court's participation in this dispute all but unavoidable. In any event, at this point, to ignore the Ninth Circuit's decision would grant federal employees an implied right to immunity for a *pattern of racketeering*. Accordingly, federal employee respect for the rule of law hangs in the balance, while 26 U.S.C. § 7433, as it is presently constructed, is a bête noire.

XI. RELIEF

We respectfully request that the Supreme Court consider and grant our petition for a *writ of*

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[21] Forgive our movie reference, but *possibly* like defendants' "conduct unbecoming …" in the movie *A Few Good Men.*

mandamus enabling or compelling Federal Judge Dana Sabraw in Federal District Court for the Southern District of California to move the Kenner RICO lawsuit to trial.

Dated: July 30, 2013 Brian Kenner

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Dated: July 30, 2013 Kathleen Kenner

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XII. APPENDIX A

1. Appeals Court Decision Memorandum:

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIAN & KATHLEEN KENNER Plaintiff-Appellants, v. E. KELLY, an individual, IRS employee; et al., Defendants-Appellees.	No. 11-56062 D.C. 3:10-cv-02105-AJB-WVG MEMORANDUM*

BRIAN & KATHLEEN KENNER Plaintiff-Appellees, v. E. KELLY, an individual, IRS employee; et al., Defendants, And, BARBARA DUNN, and individual; LACY DUNN & DO, PC, Defendant-Appellants.	No. 11-56252 D.C. 3:10-cv-02105-AJB-WVG

*This disposition is not appropriate * for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Appeal from the United States District Court
for the Southern District of California

Anthony J. Battaglia, District Judge, Presiding

Submitted June 18, 2013[22]

Before: TALLMAN, M. SMITH, and HURWITZ, Circuit Judges.

Brian and Kathleen Kenner appeal pro se from the district court's judgment dismissing their action alleging that defendants violated the Racketeer Influenced and Corrupt Organizations Act ("RICO") in connection with the collection of their federal income tax liabilities. Barbara Dunn and Lacey Dunn & Do, PC ("Dunn defendants") cross appeal from the order denying their motion for sanctions under Fed. R. Civ. P. 11. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a dismissal for failure to state a claim. Odom v. Microsoft Corp., 486 F.3d 541, 545 (9th Cir. 2007) (en banc). We review for an abuse of discretion the district court's Rule 11 determination. Retail Flooring Dealers of Am., Inc. v. Beaulieu of Am., LLC, 339 F.3d 1146, 1150 (9th Cir. 2003). We affirm.

In No. 11-56062, the district court properly dismissed the Kenners' RICO claims against the Internal Revenue Service ("IRS") defendants for failure to state a claim because the Kenners' allegations against the IRS defendants constitute violations of the Internal

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[22] The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Revenue Code ("IRC") in connection with tax collection activities, and the sole remedy for such claims is under 26 U.S.C. § 7433. See 26 U.S.C. § 7433 (providing that a civil action against the United States under § 7433 "shall be the exclusive remedy for recovering damages" resulting from IRS employees' negligent, reckless, or intentional disregard of any IRC provision or treasury regulation in connection with any collection of federal tax). Accordingly, the district court properly dismissed the conspiracy claim against the Dunn defendants as well. See Howard v. Am. Online Inc., 208 F.3d 741, 751 (9th Cir. 2000) (RICO conspiracy claim fails to state a claim where underlying substantive RICO claim fails).

The district court did not abuse its discretion in dismissing the complaint without leave to amend because amendment would have been futile. See Albrecht v. Lund, 845 F.2d 193, 195 (9th Cir. 1998) (reviewing for an abuse of discretion and stating that leave to amend may be denied where amendment would be futile); see also World Wide Rush, LLC v. City of Los Angeles, 606 F.3d 676, 690 (9th Cir. 2010) (discretion to deny leave to amend is "particularly broad" where plaintiff has Case: 11-56062 06/20/2013 previously filed an amended complaint).

In No. 11-56252, the district court did not abuse its discretion in denying the Dunn defendants' motion for sanctions under Rule 11

after determining that the allegations in the operative complaint are not sufficiently frivolous. See Christian v. Mattel, Inc., 286 F.3d 1118, 1127 (9th Cir. 2002) (listing factors that district courts must consider in determining whether to impose Rule 11 sanctions); see also Warren v. Guelker, 29 F.3d 1386, 1390 (9th Cir. 1994) (per curiam) ("Although Rule 11 applies to pro se plaintiffs, the court must take into account a plaintiff's pro se status when it determines whether the filing was reasonable.").

AFFIRMED.