No. 13-36183

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ERIC A. DOVER, M.D.
Plaintiff-Appellant,

v.

KATHLEEN HALEY, J.D., et al.,
Defendants-Appellees.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

REPLY BRIEF OF APPELLANT

ERIC A. DOVER, M.D.
In Pro Per
1615 Cloverleaf Rd.
Lake Oswego, OR 97034

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REPLY BRIEF OF APPELLANT

INTRODUCTION

Appellant filed his Opening Brief with this Court. Counsel for Appellees filed the "APPELLEES' BRIEF", to which this REPLY BRIEF OF APPELLANT is submitted herein .

From the start, Appellant makes it clear that he rejects all of the Appellees' assertions to claims of immunity, as the privilege of absolute immunity they claim is to be accorded on limited criminal cases to persons intimately connected with criminal proceedings – not civil proceedings. Harlow v. Fitzgerald, 457 US 800, 810, 811 (1982).

Appellees submitted a number of claims of the privilege purporting to depend upon criminal cases adjudicated in the Supreme Court (e.g. Imbler v. Patchman), which bear no resemblance to the present case Appellees argue before this Court.

It is established that the new Federal claim created by 42 USC 1983 differs in important ways from those preexisting torts. It is broader in that it reaches constitutional and statutory violations that do not correspond to any previously known tort. Kalina v. Fletcher, 522 US 118, 123 (1997); Rehberg v. Paulk, [No. 10-

788 (S. Ct.) 566 US ___ (2012)].

Moreover, at common law, no immunity existed "where a party had maliciously, and without probable cause, procured the Plaintiff to be indicted or arrested for an offense of which he was not guilty". Dinsman v. Wilkes, 12 How. 390, 402 (1852). Furthermore, the common law jurisprudence of 1871 clearly shows that, with few exceptions, no absolute immunity existed for anyone who was found to conduct his governmental business dishonestly or contrary to the Constitution. Justice Scalia noted, for example, that the approach taken by the high court was in fact far removed from the immunities granted to private prosecutors at the time that Section 1983 was enacted. Kalina, 522 US, at 132; Buckley v. Fitzsimmons, 509 US 259, 280 (1993); Burns v. Reed, 500 US 478, at 499 (1991).

In the twentieth century, long after the common law era of 1871, Supreme Court Chief Justices cautioned State officials that they are "potential defendants" in a Section 1983 action:

> "A reasonable division of function between law enforcement officers, committing magistrates, and judicial officers – all of whom may be potential defendants in a 1983 action...". Baker v. McCollan, 443 US 137, 146 (1979).

Appellant submits that Appellees did not controvert any supreme authorities cited and the arguments in the Opening Brief. This is serious, considering that federal law preempts a lot of Appellees' basis upon which they depend. As it will be demonstrated following, it is hereby submitted that this Appellant has met the burden of showing that "absolute immunity", pursuant to historical perspective and federal legislation underlying 42 USC 1983, was not the norm neither the rule during 1871 era.

ARGUMENT OF APPELLANT

DISCUSSION

I. THE ABSOLUTE IMMUNITY ANALYSIS IN LIGHT OF HISTORY OF COMMON LAW EXISTING IN 1871 IN THE UNITED STATES

a. Absolute Immunity Prior to Reconstruction Era, 1871

The Appellees have invoked the privilege of "absolute immunity". However Appellant's 42 USC 1983 claims are cognizable and rely upon constitutional violations stated in the Complaint. Curiously, their own counsel supplied one (Verizon Maryland Inc. v. Public Sev. Comm'n, 535 US 635, 644, n.3 (2002) (holding that Rooker – Feldman does not apply to..."executive action, including determinations made by a state administrative agency."). As it will be demonstrated following, the doctrine of "absolute immunity" upon which

Appellees largely depend is in fact far removed from immunities granted to prosecutors and judges at the time Section 1983 was enacted. Kalina v. Fletcher, 522 US 118, at 132 (1997); Burns v.Reed, 500 US 478, 499 (1991).

During the common law era, the Supreme Court established that Appellant's constitutional rights claimed in the Complaint "cannot be bartered away, or given away, or taken away, **except in punishment of crime.**" Butchers' Union v. Crescent City Co., 111 US 746, 756-757 (1884). This was the common law jurisprudence prevailing at the time The Civil Rights Act of 1871 was enacted. Appellees undermine the foundation of this federal legislation, in addition to 28 USC 1331, which grants federal courts jurisdiction **"in all cases arising under the Constitution"**. The literal sense of these two federal statutes is clear and unambiguous. The literal meaning prevails over any interpretation. Barnhart v. Sigmon Coal Co., 534 US 438, 450 (2002); United States v. Sprague, 282 US 716, 731-732 (1931). Also, Appellees and their counsel undermine the supremacy of the U.S. Constitution, for the Supreme Court has determined that:

> **"The Constitution is certain and fixed, it contains the permanent will of the people, and is the Supreme Law of the land; it is paramount to the power of the legislature."** Vanhorne's Lessee v. Dorrance, 2 US 304, 308 (1795).

During 1871, the common law operated intertwined with the Constitution first, before any State legislatures' acts. The Constitution, as written, remains the voice of supreme authority. Monell v. New York Dept. of Social Services, 436 US 658 (1978); Scheuer v. Rhodes, 416 US 232, 237 (1974); Monroe v. Pape, 365 US 167 (1961). The Supreme Court has determined that:

> **"The Act (Civil Rights Act of 1871) also unquestionably was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights."**. Monell, at 700-701.

This Act, codified 42 USC 1983, became the federal statute **"to enforce the provisions of the Fourteenth Amendment to the Constitution of the United States, and for other purposes."**. Monell, at 666. Moreover, the high court determined that:

> "[Congress has always] assumed to enforce, as against the States and also persons, everyone of the provisions of the Constitution. Most of the provisions of the Constitution which restrained...such as these in Article I Section 10 relate to the divisions of the political powers of the State in general governance...these prohibitions upon political powers of the States are all of such nature that they can be, and even have been, ...enforced by the courts of the United States declaring void all State acts of encroachment on Federal powers. Thus, and thus sufficiently, has the United States enforced these provisions (Article I, Section 10) of the Constitution." Monell, at 670-671; see also Corfield v. Coryell, 6 Fed. Cas. 546, no. 3,230 C.C.E.D. Pa (1823)).

Moreover, the Supreme Court has determined that:

> "One of the purposes of this (Section 1983, Civil Rights Act of 1871) was to afford a federal remedy in Federal Courts because, by reason of prejudice, passion, neglect, intolerance, or otherwise, State laws might not be enforced and the claims of citizens to the enjoinment of rights, privileges and immunities guaranteed by the Fourteenth Amendment, might be denied by State agencies.". Monroe, at 174-180.

Furthermore, the high court also determined that "the federal remedy (42 USC 1983) is supplementary to the State remedy, and the State remedy need not be sought and refused before the Federal remedy is invoked." Monroe, at 183. The legislative intent of the Civil Rights Act of 1871, is described so well by U.S. Senator Thurman of Ohio, who spoke about it:

> "It [Civil Rights Act of 1871 – 42 USC 1983] **authorizes any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States,** to bring an action against the wrongdoer in the Federal Courts, and that without any limit whatsoever as to the amount in controversy. The deprivation may be of the slightest conceivable character, the damages in the estimation of any sensible man may not be five dollars or even five cents; they may be what lawyers call merely nominal damages, and yet, by this section (42 USC 1983) jurisdiction of that civil action is given to the Federal Courts instead of its being prosecuted as now in the courts of the States." Monroe v. Pape, 365 US 167, 180 (1961).

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b. Absolute Immunity During the Reconstruction Era, 1871

There were only thirteen States which adopted the super privilege of "absolute immunity" during the 1871 era of common law, and curiously, the rest of the States rejected it. Law professor Margaret Z. Johns explains:

> "Far from being [the super privilege of "absolute immunity"] a well settled doctrine in 1871, there is not a single case adopting any form of prosecutorial immunity until many years later."...

Professor Johns authored an amici brief in Van de Kamp v. Goldstein, 535 US 335 (2009) (No. 07-854), making the same argument . Brief of Amici Curiae of Law Professors in Support of Respondents, at 18, Van de Kamp v. Goldstein. (see also, Margaret Z. Johns, Reconsidering Absolute Prosecutorial Immunity, 2005 B.Y.U.L. Rev. 53, 107-125, 131-139 (2005). Moreover, the history of common law informs us that the office of public prosecutor did not exist in most jurisdictions in 1871. Most crime victims relied on private prosecutors (criminal lawyers) to pursue the perpetrators. Law professor Johns explains that the **"criminal justice system employed by the States in the 1800's 'bore little resemblance' to our current system of public administration of criminal laws."**. Id. at 108. **Most crimes were not prosecuted by public prosecutors, but by attorneys hired by victims to bring a private criminal action against the alleged perpetrators.** Id. 109-110. These private attorneys or prosecutors could be subjected, along with the parties who hired them, to liability pursuant to the tort of malicious

prosecution. Id. at 111-112.

Justice Scalia explored the boundaries of official immunities under the common law of 1871. Burns v. Reed, 500 US 478 (1991); Buckley v. Fitzsimmons, 509 US 259 (1993); Kalina v. Fletcher, 533 US 118 (1997). In Burns, Justice Scalia explained, that there were three types of immunities under the common law of 1871: (1) judicial immunity, (2) defamation immunity, and (3) quasi-judicial immunity. Also, it is evident from the common law, that judicial immunity, as it existed in 1871, cannot support Appellees' argument based upon Imbler type of immunity to the **criminal prosecutors**, because judicial immunity applied only to those adjudicating disputes between parties. Burns, at 499-500. **There was no such thing as absolute prosecutorial immunity when Section 1983 was enacted by Congress**. Kalina v. Fletcher, 522 US 118, 131-132 (1997). The common law rule was opposite to our modern courts holdings in 1990's. Kalina, at 131-132. Justice Scalia noted that the approach taken by the high court was in fact far removed from the immunities granted to prosecutors at the time Section 1983 was enacted by Congress. Kalina, 522 US at 132; Buckley, 509 US at 280; Burns, 500 US, at 499.

To be sure, in England, the common law penalized judges for failure to comply with the Acts of Parliament. Habeas Corpus Act of 1679, 36 Eng. Rep. Jenkes' Case, 518 (1676). **In the United States there was hardly any immunity for criminal prosecutors, let alone other State officials**. Wheeler v. Nesbitt, 24 How.

544, 550 (1861) (no immunity for malicious prosecutors); Dinsman v. Wilkes, 12 How. 390, 402 (1852) (no immunity for wrongful indictment). The common law cases are many and make clear, that no State officials enjoyed any immunity, let alone "absolute immunity" for their wrongful acts while employed as public servants. Dinsman v. Wilkes, 12 How. 390, 402 (1852); Ex Parte Young, 209 US 123, 124 (1908).

At common law it was universally acknowledged that:

> "The grant of the privilege is an idle, empty form, conveying nothing, unless it convey the right to which the privilege is attached, and in the exercise of which its whole value consists." Gibbons v. Ogden, 22 US 1, 213, 226, 230, 232 (1824).

Appellant respectfully submits that the criminal cases cited by Appellees in defense of charges based on Section 1983 will not absolve them from liability for violating the constitutional rights of this grievously harmed Appellant.

The purpose of absolute immunity is not to protect malice and malevolence, but **to guard persons acting honestly** in the discharge of a public function. Columbia Law Rev., page 468-470, Vol. 9 No. 6, June 1909 "absolute immunity"; see also, Spalding v. Vilas, 161 US 483 (1896); White v. Nicholls, 3 How. (US) 266 (1845). Appellees' reliance upon criminal cases as defense for their liability accrued pursuant to Section 1983 in this matter should fall.

In an extraordinary turn of events, during the debates of The Civil Rights Act of 1871, Congressman John Bingham characterized the rights of Americans

enshrined in the Bill of Rights with the words "immortal" and "sacred". For him, the Bill of Rights was not simply "immortal", as he argued in support of his Act, but also "sacred":

> "As a further security for the enforcement of the Constitution, and especially of this sacred Bill of Rights, to all the citizens and all the people of the United States, it is further provided that the members of the several State legislatures and all Executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution. The oath, the most solemn compact which man can make with his Maker, was to bind the State legislatures, Executive officers, and judges to sacredly respect the Constitution and all the rights secured by it...[The Bill of Rights encompasses] all the sacred rights of person – those rights dear to freemen and formidable only to tyrants- and of which the fathers of the Republic spoke, after God had given them victory...". Cong. Globe, 39th Congress, 1st Sess., 1090, 1094 (1866).

Congressman Bingham, who was called by Supreme Court Justice Hugo Black "the Madison of the Fourteenth Amendment", revealed an extraordinary and stunning fact, which will shape the post reconstruction jurisprudence, that the Amendment was intended to overturn the decision in Barron v. Baltimore, 32 US 243 (1833), in which the Supreme Court held that The Bill of Rights was not applicable to the States, and that his bill will bind the States to the Fourteenth Amendment – which indeed it has happened since.

In light of the foregoing, it is clear that the States' governmental officials are not constitutionally authorized to abridge or destroy Appellants' constitutional guarantees, privileges or immunities, and 42 USC 1983 is the Federal statute which enforces the Fourteenth Amendment guarantees of this Appellant.

It is also clear that the super privilege of "absolute immunity" arises in the context of a criminal procedure – not a civil procedure, especially one for damages under 42 USC 1983 involving State actors such as the Appellees. Baker v. McCollan, 443 US 137 (1979); Forrester v. White, 484 US 219, 220 (1988)(**"A State court judge does not have absolute immunity from a damages suit under section 1983"**); Monell v. City of New York Dept. of Social Services, 436 US 658, 695-701 (1978); Washington v. Glucksberg, 521 US 702 (1997).

The Reconstruction Congress even enacted two criminal analogue statutes aimed at all State officials who will violate the constitutional rights of American citizens (18 U.S.C. 241 and 18 U.S.C. 242), to make sure that the will of Congress would be enforced for decades to come.

Moreover, in 1871, the common law permitted other officials engaged in discretionary activities to claim "quasi-judicial immunity", but that immunity required the official to show that he was acting in good faith. Id. at 119-120. There was no "absolute immunity" for prosecutors in 1871, as abundantly shown herein. Thus, the validity of Imbler's reasoning, upon which Appellees' arguments largely depend has been significantly undermined. A number of States permitted

suits against prosecutors for malicious prosecution well into the twentieth century. Johns, supra, note 4 at 116.

The first common law decision to provide prosecutors with "absolute immunity, upon which Imbler relied, was not decided until 1896. Griffith v. Slinkard, 44 N.E. 1001 (Ind. 1896). This decision was not accepted in most jurisdictions.

There was a split among the States regarding the ability to sue public prosecutors. Johns, supra note 4, 114-116. Prosecutors were protected for conduct that is **"intimately associated with the judicial phase of the criminal process** – not civil process, as Appellees and their counsel misrepresent to this Court. Imbler, 424 US at 430. Curiously, in Imbler, Justices White, Brennan and Marshall, all three concurring in the judgment, made clear that:

> "it is manifest then that all State officials as a class cannot be immune absolutely from damage suits under 42 USC 1983 and that to extend absolute immunity to any group of State officials is to negate pro tanto the very remedy which it appears Congress sought to create. Scheuer v. Rhodes, 416 US 232, 243 (1974). "Thus, as there is no language in 42 USC 1983 extending any immunity to any State officials, the Court has not extended (the super privilege of) "absolute immunity" to such officials in the absence of the most convincing showing that the immunity is necessary. The Court has constructed the statute (42 USC 1983) to extend only a qualified immunity to these officials, and **they may be held liable for unconstitutional conduct absent "good faith"**. Wood v. Strickland,

420 US 308, 315 (1975). "Any other result would 'deny much of the promise of Section 1983'". Wood, 420 US 308,322 (1975); Imbler, 424 US 409, 433-435 (1976).

Appellees and their counsel's attempt to undermine the purpose and scope of Section 1983, by arguing that this high court should consider criminal cases, such as Imbler, to shield them from the liability imposed by Section 1983, which is directly aimed at them by The Civil Rights Act of 1871. That will not help Appellees, for Section 1983 imposes liability upon **"every person acting under color of any statute"** (42 USC 1983). The literal sense is crystal clear.

It is very clear from the foregoing analysis that the Supreme Court has determined that **"absolute immunity" is to be accorded in limited criminal cases to persons intimately connected with criminal proceedings, not civil proceedings.** Harlow v. Fitzgerald, 457 US 800, 810, 811 (1982).

Congress created Section 1983 as the only realistic avenue for vindication of Constitutional guarantees – an action for damages – which these Appellees undermined, and the court below acquiesced in error not sanctionable under Section 1983 and its legislative intent. Harlow, 457 US 800, 814. **Moreover, the high court stated that " it is this recognition that has required the denial of absolute immunity to most public officers".** Harlow, at 814.

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II. CONSTITUTIONAL RIGHTS OF APPELLANT WERE VIOLATED BY APPELLEES

a. Unalienable Rights of Appellant at Common Law

Appellant respectfully submits, that Appellees' argument pertaining to liability established by 42 Section 1983 as being inapplicable to them is misguided. In this respect, the Supreme Court has determined that:

> "If the law at the time was not clearly established, an official could not reasonably be expected to anticipate legal developments, nor could he be fairly be said to "know" that the law forbade conduct not previously identified as unlawful. **Until this threshold immunity question is resolved,** discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily **should fail**, since a reasonably competent public official should know the law governing his conduct". Harlow, 457 US 800, 819 (1982).

Furthermore, the Supreme Court held that "government officials performing discretionary functions, generally are shielded from liability for civil damages in so far as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known". Procunier v. Navarette, 434 US 555, 565 (1978); Wood v. Strickland, 420 US 308, at 322 (1975); Harlow, at 815-819. Appellees, including their governmental attorneys, knew that they have violated the U.S. Constitution upon which this Appellant depended.

The Supreme Court states that our judicial system relies on private lawsuits **to keep government conduct in check**. Monroe v. Pape, 365 US 167, 172 (1961); Monell v. New York City Dept. of Social Services, 436 US 658, 695-701 (1978).

b. Fundamental Rights of Appellant as Existing During and After the Common Law Era, 1871

The Supreme Court has determined that "the touchstone of due process is protection of the individual against arbitrary action of government". County of Sacramento v. Lewis, 523 US 833, 845 (1998) (quoting Wolff v. Mc Donald, 418 US 539, 558 (1974). To be sure, 42 USC 1983 aimed at State officials violating the constitutional rights of citizens is not without force and effect. The high court clearly indicated that the taking away of constitutional rights of citizens is not permitted by the Constitution of the United States **"except in punishment of crime"**. Butchers' Union Co. v. Crescent City Co., 111 US 746, 757 (1884).

During the common law era, before the Reconstruction, the States never once deprived medical doctors of their privileges and immunities guaranteed by the Constitution, although State regulations allowed suspension for six months for criminal misdemeanors – not civil infractions. **A doctor's profession was considered his "estate" which "cannot be arbitrarily taken from them, any**

more that their real or personal property can be thus taken." Dent v. West Virginia, 129 US 114, 121-122, 123 (1889).

Moreover, it was during the common law era, the U.S. Supreme Court established, that a constitutional right "cannot be bartered away, or given away, or taken away, **except in punishment of crime**." Butchers' Union v. Crescent City Co., 111 US 746, 756-757 (1884). **This was the common law jurisprudence prevailing at the time The Civil Rights Act of 1871 was enacted.**

Furthermore, from the highest offices of our Nation, particularly the U.S. Senate, the prevailing fact was that the fundamental rights of citizens of the United States were placed on par with the rights of public servants, and of these rights at common law, every official knew that they were so "innumerable as the sand of the sea". Congressional Globe, Feb. 6, 1872, p. 843, 42nd Congress, 2d Session, Speech of Senator John Sherman. This highly respected Senator, John Sherman, explained before the Nation that :

> "The rights that are secured by the amendments are 'the common privileges of every English subject and American citizen, however humble he may be, and they are classed as privileges in the old common law.'" The Congressional Globe, 843, 42d Cong., 2d Session (1872).

Unlike in our modern twenty-first century, during the common law era of 1871, both Supreme Court and Congress were very particular, and on guard, about any governmental power being "used for purposes of oppression". Daniels v. Williams, 474 US 327, 331-332 (1986). Any legitimate deprivation of property or liberty interests were accomplished **only after trial**. Darmouth College v. Woodward, 17 US 518, 581-582 (1819). And, during the common law, the trials were held "trial by jury of peers" – not otherwise.

Appellees fail to discern that 42 USC 1983 legislation was never concerned with "personal injury torts" (e.g. one A/G employee hit me with his car and broke my legs). Rather, the 42d Congress was concerned with "constitutional rights, immunities and privileges" of citizens of the United States, not personal injuries. Senator John Sherman explained this aspect:

> "There may be sometimes great dispute and doubt as to what is the right, immunity or privilege conferred upon a citizen of the United States. That right must be determined from time to time by judicial tribunals, and in determining it, they will look first at the Constitution of the United States as the primary fountain of authority. If that does not define the right, they will look for unenumerated powers to the Declaration of American Independence, to every scrap of American history, to the history of England...back to the earliest recorded decisions of the common law. There, they will find the fountain and

reservoir of the rights of American as well as English citizens". The Congressional Globe p. 844, 42d Congress, 2d Session (1872).

Even in our twentieth century, both the highest court and this Court have the same appreciation for the constitutional rights of American citizens, once revered by the framers of the Fourteenth Amendment, and have ruled that **"The loss of [a constitutional right], for even minimal periods of time, unquestionably constitutes irreparable harm,"** Elrod v. Burns, 427 US 347, 373-374 (1976); see, Murray v. Hoboken Land & Imp. Co., 59 US 272, 276 (1856).

This Court recently stated that the constitutional harm, such as this Appellant has suffered at the hands of Appellees, is **"particularly irreparable"**. Long Beach Area Peace Network v. City of Long Beach, 522 F.3d 1010, 1020 (9th Cir. 2008). Not only has this Appellant suffered irreparable harm at the hands of the Appellees, but also suffered deprivation of constitutional rights as stated in the complaint. **These tyrannical practices were severely prohibited during the common law era**. The Supreme Court specifically acknowledged a fundamental class of rights, even before 1871, which were of constitutional magnitude and beyond governmental reach:

"those privileges and immunities...are in their nature

> **fundamental: which belong, of right, to the citizens of all free governments; and which have, at all times been enjoyed by the citizens of the several States...from the time of their becoming free, independent, and sovereign."** Corfield v. Coryell, 6 Fed. Cas. 546, no. 3,230 C.C.E.D. Pa. (1823).

As demonstrated herein, constitutional rights guaranteed to various professionals during the common law era were beyond the reach of government to deprive, unless **in punishment of crime**. Butchers' Union Co. v. Crescent City Co., 111 US 746, 757 (1884). This Appellant did not commit any crimes, not even a misdemeanor as Dr. Dent did during the common law. And it follows that if Appellees are projecting themselves back to the common law era in their claim for the super privilege of "absolute immunity", **then this Appellant is entitled to the same treatment under the Constitution and common law pursuant to the Fourteenth Amendment Equal Protection of the laws**. One of the speakers during this 42d Congress, Rep. Henry L. Dawes, emphasized that "Congress assigned to the Federal courts a paramount role in protecting constitutional rights", that is "rights, privileges and immunities" of the citizens of the United States which are to be secured against invasion by official action. Cong. Globe, 42d Cong. 1st Session, 475-476 (April 5, 1871).

Speaking of Equal Protection of the Laws, the highly skilled Federal Legislators explained:

> "...it [the Equal Protection Clause] means that no State shall deny to any person within its jurisdiction the equal protection of the Constitution of the United States, as that Constitution is the supreme law of the land, and of course, that no State should deny to any such person any of the rights which it [the Constitution] guarantees to all men, nor should any State deny to any such person any right secured to him either by the laws and treaties of the United States". [emphasis in bracket added] [Cong. Globe, 42d Sess., 1871] See, also, The Adoption of the Fourteenth Amendment, p. 232(John Hopkins Press, 1908].

Moreover, the framers of the Fourteenth Amendment explained that:

> "The States exercise their judicial power under the Constitution, and in subordination to the Constitution, and subject to the express limitations of the Constitution but for the purpose of aiding its enforcement, not of breaking it". Cong. Globe, 42d Cong., 1st Session, March 31, 1871 (John Bingham)

During the common law era, it was acknowledged both by Supreme Court and Congress that:

> **"The right to follow any of the common occupations of life is an inalienable right, it was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence,** which commence with the fundamental proposition that 'all men are created equal; that they are endowed by their Creator with certain inalienable rights;

> that among these are life, liberty, and the pursuit of happiness'. This right is a large ingredient of the civil liberty of the citizen." Butchers' Union Co. v. Crescent City Co., 111 US 746, 762 (1884).

It was understood by Congress and the U.S. Supreme Court that **"privileges and immunities cannot be abridged by State authority, that State laws must be so framed as to secure life, liberty, property from arbitrary violation and secure protection of law to all."** [In Re: Slaughter-House Cases, 83 US 36, 53 (1872)].

During the common law, the U.S. Supreme Court determined that:

> **"The Constitution is certain and fixed, it contains the permanent will of the people, and is the Supreme Law of the Land; it is paramount to the power of the legislature"...**[Vanhorne's Lessee v. Dorrance, 2 US 304, 308 (1795).

The high court, in a seemingly terse speech, cautioned that encroachments by legislatures eventually destroys the Constitution:

> ..."One encroachment leads to another,...what has been done may be done again...and the Constitution eventually destroyed." [2 US 304, 311-312].

III. ANALYSIS OF THE ROOKER-FELDMAN THEORY

The Rooker-Feldman theory arises as a result of two Supreme Court cases, 60 years apart. The first case of this legal theory is Rooker v. Fidelity Trust Co.,

263 US 413 (1923). The second case is District of Columbia Court of Appeals v. Feldman, 460 US 462 (1983).

The driving force behind this theory is the federal judicial code, 28 U.S.C. 1257 (2000) (**conferring on the U.S. Supreme Court certiorari jurisdiction over final judgments of the highest courts of the States**); see, also, 28 U.S.C. 1331 (**giving Federal District Courts original jurisdiction over federal question suits**); and see, 28 U.S.C. 1332 (**giving Federal District Courts original jurisdiction over diversity suits**). The full text of the federal judicial statute, 28 USC 1257 (2000) is:

> **(a) Final judgments or decrees rendered by the highest court of a State** in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or statutes of, or any commission held or authority exercised under, the United States.
>
> **(b) For the purposes of this section, the term "highest court of a State"** includes the District of Columbia Court of Appeals.

Appellees and the court below seriously err when they imply that the

Supreme Court, under the above said judicial statutes, would accept their administrative opinions or written decisions, when in fact the federal statute clearly says that the Supreme Court is to accept "**certiorari jurisdiction over final judgments of the highest courts of the States**" - not from OMB, State Circuit Courts or even Appeals Courts, but from **"the highest courts of the States"**, which is not the case here. Appellant did not have a State Supreme Court judgment to present to the District Court. Instead, Appellant filed his complaint alleging that State officials violated his constitutional rights by acting under color of law – this threshold of the Section 1983 being in compliance. It is immaterial that the State actors were OMB employees or any other State agency. The fact remains that these governmental actors acted "under color of law" – **this is a requirement of the federal statute.**

State government officials may be sued in their individual capacity. Such a suit does not represent a suit against the government entity for which he is associated Kentucky v. Graham, 473 US 159, 165 (1985); Hafer v. Melo, 502 US 25 (1991).

The traditional definition of "acting under the color of law" requires that the defendant exercised power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law,"....West v.

Atkins, 487 US 42, 49 (1988) (quoting United States v. Classic, 313 US 299, 326 (1941). For all practical purposes, the "color of state law" requirement is identical to the "state action" prerequisite to constitutional liability. Lugar v. Edmondson Oil Co., 457 US 922, 929 (1982).

The U.S. Supreme Court has established that:

> "To state a claim for a deprivation of Due Process a plaintiff must show: (1) that he possessed a constitutionally protected property interest; and (2) that he was deprived of that interest without due process of law." Cleveland Board of Education v. Loudermill, 470 US 532 (1985); Baker v. McCollan, 443 US 137, 145 (1979).

The Supreme Court also established that "The existence of concurrent State remedies is not a bar to a Section 1983 action." Zimmerman v. Burch, 493 US 113, 124 (1990). Appellant is accused by Appellees in the court below that he did not exhaust State "remedies", but the Supreme Court has determined that the exhaustion of State judicial remedies and/or administrative remedies is not a prerequisite. Monroe v. Pape, 365 US 167, 183 (1961); Patsy v. Florida Board of Regents, 457 US 496, 501 (1982).

Curiously, Alexander Hamilton, explaining the powers of the federal judiciary, in The Federalist Number 80 stated that:

> "The reasonableness of the agency of the National courts in cases in which the State tribunals cannot be supposed to be impartial, speaks for itself."

After the ratification of the Constitution, Justice Story also argued that doubts about the ability of States to create and apply law objectively was a foundational assumption on which the National court system was based:

> "It is manifest that the Constitution has proceeded on a theory of its own...the Constitution as presumed that State attachments, State prejudices, State jealousies and State interests might obstruct, or control the regular administration of justice."
> A Theory of Federal Common Law, p. 261-262, Northwestern University Law Review, Vol. 100, No. 2 (2006).

It is obvious from the above, that Hamilton understood that a State could discriminate in favor of itself in the creation and application of legal standards. Such is the case about this Appellant in the court below.

Appellees and the court below believe that The Civil Rights Act of 1871 has been drained of its force and effect by the theories of "absolute immunity", "sovereign immunity", and the "Rooker-Feldman" theory. However, the final text of The Civil Rights Act of 1871 which emerged from the debates in Congress does not say "every person who is injured by a judgment or administrative decree

palming as a legitimate ruling of a State Supreme Court...shall be precluded from seeking redress of his constitutional injury in an action of law, suit in equity, or other proper proceeding for redress..." in a Federal Court. The framers of The Civil Rights Act of 1871 and of the Fourteenth Amendment would have been mortified and stunned to have heard such a grotesquely composed "enforcing Federal statute" of the Fourteenth Amendment. These architects of the Civil Rights Act, John Bingham and his colleagues agreed, without a challenge to the contrary, to the current text which **clearly displays their legislative intent**. The Federal statute 42 USC 1983 commands as follows:

> "Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof **to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress**, except that any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted less a declaratory decree was violated or declaratory relief was unavailable. [original text amended to accommodate a judicial state officer's privilege of his/her "absolute immunity"].

Given the historical fact underlying Section 1983, **the architects of this statute**

were not thinking of any immunity at common law for anyone; for these highly skilled Federal legislators complained in Congress that **"immunity is given to [officials], and the records of public tribunals are searched in vain for any evidence of effective redress."** [(emphasis in bracket) (this part-quote is from Representative Lowe of the 42d Congress) (Cong. Globe, 42d Cong. 1st Sess., 374 (1871) (remarks of Rep. Lowe)(quoted in Wilson v. Garcia, 471 US 261, 276 (1985)]. Senator John Bingham, in his speech, lamented about the foregoing denials and rampant constitutional violations, as follows:

> **"As I have already said, the States did deny to citizens the equal protection of the laws, they did deny the rights of citizens under the Constitution, and except to the extent of the express limitations upon the States, as I have shown, the citizen had no remedy. They denied trial by jury, and he had no remedy. They took property without compensation, and he had no remedy. They restricted the freedom of the press, and he had no remedy. They restricted the freedom of speech, and he had no remedy. They restricted the rights of conscience, and he had no remedy. They bought and sold men who had no remedy. Who dare say, now that the Constitution has been amended, that the nation cannot by law provide against all such abuses and denials of right as these in States and by States or combinations of person?"** Speech of Hon. John Bingham, In the House of Representatives. Cong. Globe, 42d Cong. 1st Sess., March 31, 1871, **see, Exhibit A1--A13** ("I pray, Mr.

> Speaker, that the House will not misunderstand me as placing the government, either National or State, above the citizen.")

The framers of The Civil Rights Act and the Fourteenth Amendment were thinking about **legislating in advance**, regardless of common law jurisprudence and its constraints:

> **"Why not in advance provide against the denial of rights by States, whether the denial be acts of omission or commission, as well as against the unlawful acts of combinations and conspiracies against the rights of the people?"** Cong. Globe, 42d Cong. 1st Sess., March 31, 1871.

As demonstrated in this analysis, it clearly appears that the framers of the Fourteenth Amendment and The Civil Rights Act of 1871 were not thinking about maintaining the status quo for governmental oppressors and law breakers. Rather, they were thinking about securing the constitutional and fundamental rights of all Americans against the oppressive governmental officials of the States. This further demonstrates that by **legislating in advance**, with such severe language as that of Section 1983 and the Fourteenth Amendment against the States, the framers did not have any notions of special governmental privileges of "absolute immunity", "qualified immunity" or "sovereign immunity in mind".

Even in our twenty first century the Supreme Court recognizes that:

> **"The loss of [a constitutional right], for even minimal periods of time, unquestionably constitutes irreparable harm."** Elrod v. Burns, 427 US 347, 373-374 (1976) (emphasis in brackets]

This Court agrees that the loss of constitutional rights for **minimal periods of time** constitutes "**particularly irreparable" harm.** Long Beach Area Peace Network v. City of Long Beach, 522 F.3d 1010 1020 (9th Cir. 2008). The framers of the Fourteenth Amendment and The Civil Rights Act of 1871, rather were thinking how to double secure the rights of American citizens against the hostile and menacing power of the States' governments for decades to come. They were thinking in terms of common law type protections, such as the Constitution and Corfield v. Coryell:

> **"those privileges and immunities (at common law) are in their nature fundamental , which belong, of right, to the citizens of all free governments, and which have, at all times, been enjoyed by citizens of the several States...from the time of their becoming free, independent, and sovereign."** [emphasis in brackets] Corfield v. Coryell, 6 Fed.Cas. 546, no. 3, 230 C.C.E.D. Pa. (1823).

It is very clear from the foregoing analysis, that the Supreme Courts' Appellate

jurisdiction in 28 USC 1257 over the States' Supreme Court judgments or decrees is not bearing on this case and neither controls any adjudication of this case in this Court.

Congress meant to provide individuals immediate access to the federal courts and did not contemplate that those who sought to vindicate their federal rights in State courts could be required to seek redress in the first instance from the very State officials whose hostility to those rights precipitated their injuries. The high court stated that "the Supremacy Clause imposes on State courts a constitutional duty to proceed in such manner that all the substantial rights of the parties under controlling federal law are protected". Bobby Felder v. Duane Casey, et al, 487 US 131, 146-150 (1988). The Supreme Court held that:

> "...the 1871 Congress clearly intended Section 1983 to apply to such officers and all agreed that such officers could constitutionally be subject to liability under Section 1983. The Act also unquestionably was intended to provide a remedy, to be broadly construed against all forms of official violation of federally protected rights". Monell v. New York City Dept. of Social Sevices, 436 US 658, 660, 670 (1978).

During the common law era, our National and State governments were looking to the Constitutional standards as the yardstick by which all governmental activity

SPEECH

OF

JOHN A. BINGHAM,

OF OHIO,

DELIVERED

IN THE HOUSE OF REPRESENTATIVES,

MARCH 31, 1871.

The Enforcement of the Constitution and Laws of the United States and the Rights of the People.

EXHIBIT B

The House having under consideration the bill (H. R. No. 320) to enforce the provisions of the fourteenth amendment to the Constitution of the United States, and for other purposes—

Mr. BINGHAM said:

Mr. SPEAKER: No man is equal to the task of discussing, as it ought to be discussed, the issue before this House within the limits of a single hour. I scarcely hope that I shall have done more than touch the hem of the garment of the argument when my hour shall have expired. But, sir, whatever I may fail to do, the great people behind me will not fail to supply. They, sir, constitute the tribunal before whom this issue is on trial.

It is the old issue with which the people have become familiar within the last ten years. It presents itself, sir, this day only in another form. In substance it is precisely the issue which was presented ten years ago upon this floor, and was discussed ably and exhaustively upon this side of the House and upon that. The question then, sir, and the question now, is, whether it is competent for the Congress of the United States, under the Constitution of the United States, in pursuance of its provisions, and in the exercise of the powers vested by it "in the Government of the United States or in any department or officer thereof," to provide by law for the enforcement of the Constitution, on behalf of the whole people, the nation, and for the enforcement as well of the Constitution on behalf of every individual citizen of the Republic in every State and Territory of the Union to the extent of the rights guaranteed to him by the Constitution.

Until this issue was raised, in 1860-61, the constitutional power of Congress to provide for the common defense and the enforcement of the Constitution and laws of the United States had not been seriously questioned in this House. Now, as then, this power, essential to the nation's life and the safety of the people, is here challenged. It amazes me that, after all that has transpired in this country for the final settlement of this very question, gentlemen on either side of the House would dare to open it again. It has been settled by your courts of justice; it has been settled by the repeated action of your Congress within the last ten years; it has been settled by the people themselves, by the ballot and by battle, by laws and by arms; and from their decision thus made there cannot rightfully lie an appeal. And yet gentlemen substantially again open this question to-day.

The question as presented here and now may be stated thus: is it competent for Congress to provide by law for the better enforcement of the Constitution and laws of the United States and the better security of the life, liberty, and property of the citizens of the United States in the several States of the Union? The Constitution is not self-executing, therefore laws must be enacted by Congress for the due execution of all the powers vested by the Constitution in the Government of the United States, or in any department or any officer thereof. No man can successfully deny the power of Congress so to legislate, for it is expressly provided in the Constitution that "Congress shall have power to make all laws which shall be necessary and proper for carrying into execution" the powers therein expressly granted to Congress, "and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

My honorable friend from Indiana [Mr. KERR] discussed this question, upon the Constitution as it was and not upon the Constitu-

tion as it is. In the progress of his remarks the gentleman [Mr. KERR] did disclose to this House and to the country the fact that, under the Constitution as it was, it always was competent for the Congress of the United States, by law, to enforce every affirmative grant of power and every express negative limitation imposed by the Constitution upon the States. The great case from which the gentleman read in 6 Wheaton, pages 370–447, (Cohens vs. Virginia,) is a judicial ruling that clearly, distinctly, and beyond all question, to the extent of all the affirmative grants of power in the Constitution, and of all the express negative limitations of power imposed by the Constitution upon the States, it is competent for Congress to legislate. From the opinion in this case, delivered by Marshall, C. J., I read the following:

"America has chosen to be, in many respects and to many purposes, a nation; and for all these purposes, her Government is complete; to all these objects it is competent. The people have declared that in the exercise of all powers given for those objects it is supreme. It can, then, in effecting these objects, legitimately control all individuals or governments within the American territory. The constitution and laws of a State, so far as they are repugnant to the Constitution and laws of the United States, are absolutely void. These States are constituent parts of the United States. They are members of one great empire." (6 Wheat., p. 424.)

Mr. Speaker, I have not the time to read from that opinion further. I will state, however, to the House that in this opinion, scarcely second in importance to any of the opinions that emanated from that matchless Chief Justice whose full-orbed intellect for thirty years illumined the jurisprudence of his country, you will find incorporated the words of Hamilton, who was second to no man in gifts of mind and second to no man in the service which he rendered to the people of his own day and to the millions who have come after him in framing the Constitution of the United States. Marshall incorporates the words of Hamilton with approval, words in which Hamilton, while the Constitution was on trial for adoption or rejection before all the people of the States, referring to the dual system of government, national government, and State governments, and the judicial powers of each for the administration of the laws of the Union, declared "that the national and State systems are to be regarded as one whole," and that "the courts of the latter [the States] will, of course, be national auxiliaries to the execution of all the laws of the Union."

The States exercise their judicial power under the Constitution, and in subordination to the Constitution, and subject to the express limitations of the Constitution, but for the purpose of aiding its enforcement, not of impeding it. The Constitution declares—

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

By the legislation of the First Congress, passed by the votes of many of the eminent men who framed the Constitution, then members of Congress, and approved by Washington, the power was given to the humblest citizen aggrieved by the final decision of State courts against his guaranteed rights under the Constitution and laws of the United States, to bring the same for review and reversal before the Supreme Court of the United States, and thereby set aside the usurpations of a State. The judiciary act of 1789 asserts this power of the Government of the United States fully and expressly.

The act of 1789, the validity and constitutionality of which has never been challenged by a respectable court in America, ought to have satisfied gentlemen that it is too late to raise the question they are raising here to-day, the power of Congress to provide by law for the enforcement of the powers vested by the Constitution in the Government of the United States, both against individuals and States, as Marshall expressed it. I desire to read, merely for the purpose of recalling the recollection of the members of the House to its provisions, from the twenty-fifth section of that act, under which the case of Cohens vs. Virginia, to which the honorable gentlemen from Indiana [Mr. KERR] referred, came into the Supreme Court of the United States for review. That section is as follows:

"A final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of such their validity; or where is drawn in question the construction of any clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege, or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute, or commission, may be re-examined and reversed or affirmed in the Supreme Court of the Uni-

EXHIBIT A-3

EXHIBIT A-4

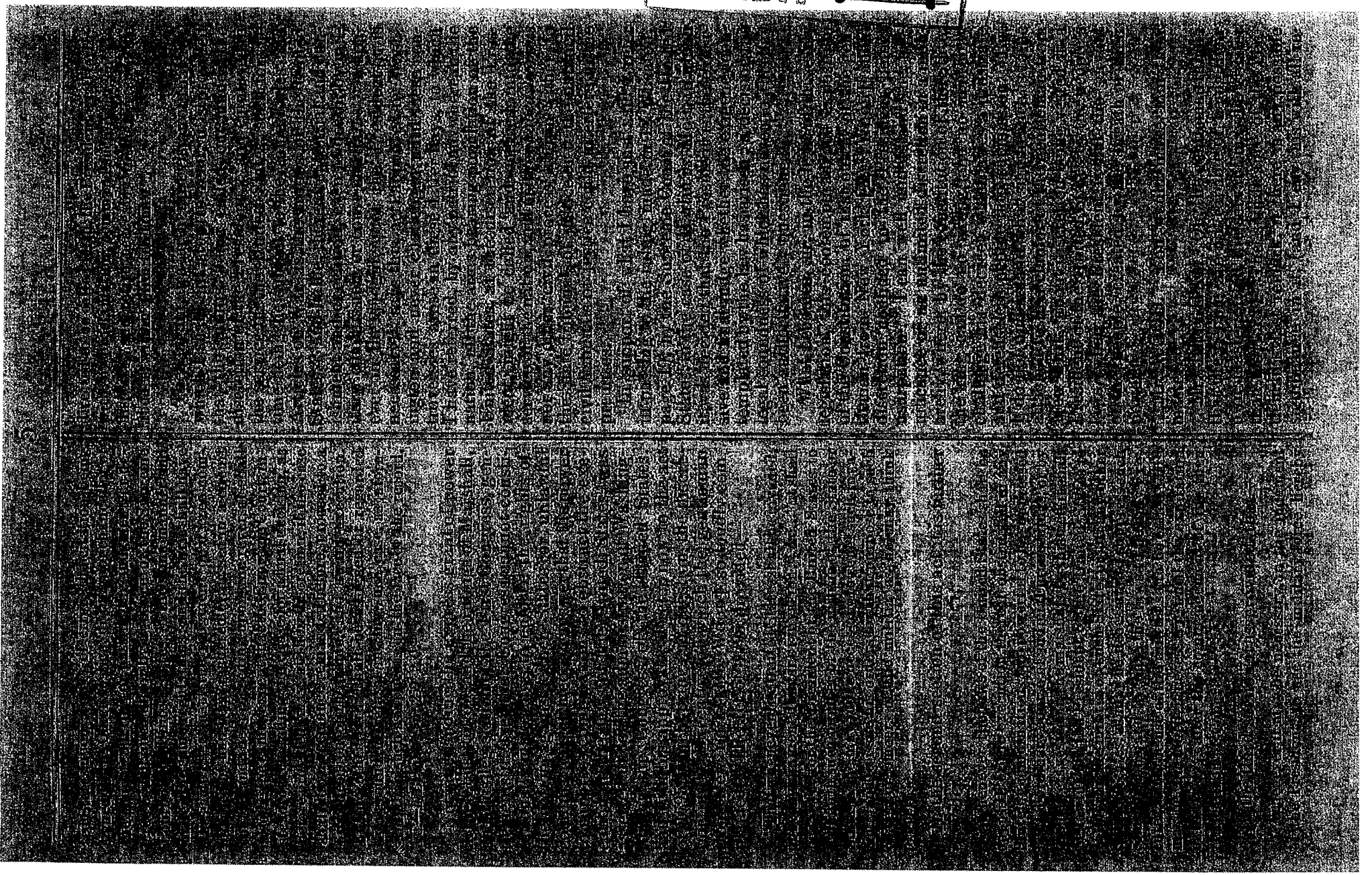


EXHIBIT A-1

Constitution of the United States. Those eight amendments are as follows:

ARTICLE I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

ARTICLE II.

A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

ARTICLE III.

No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in the manner to be prescribed by law.

ARTICLE IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

ARTICLE VII.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

ARTICLE VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

These eight articles I have shown never were limitations upon the power of the States, until made so by the fourteenth amendment. The words of that amendment, "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," are an express prohibition upon every State of the Union, which may be enforced under existing laws of Congress, and such other laws for their better enforcement as Congress may make.

Mr. Speaker, that decision in the fourth of Washington's Circuit Court Reports, to which my learned colleague [Mr. SMITH, of Arizona] has referred is only a construction of the second section, fourth article of the original Constitution, to wit, "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." In that case the court only held that in civil rights the State could not refuse to extend to citizens of other States the same general rights secured to its own.

In the case of The United States vs. Primrose, Mr. Webster said that—

"For the purposes of trade, it is evidently not in the power of any State to impose any hinderance or embarrassment, &c., upon citizens of other States, or to place them, on coming there, upon a different footing from her own citizens."—6 *Webster's Works*, 112.

The learned Justice Story declared that—

"The intention of the clause ('the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States,') was to confer on the citizens of each State a general citizenship, and communicated all the privileges and immunities which a citizen of the same State would be entitled to under the same circumstances."—*Story on the Constitution*, vol. 2, page 605.

Is it not clear that other and different privileges and immunities than those to which a citizen of a State was entitled are secured by the provision of the fourteenth article, that no State shall abridge the privileges and immunities of citizens of the United States, which are defined in the eight articles of amendment, and which were not limitations on the power of the States before the fourteenth amendment made them limitations?

Sir, before the ratification of the fourteenth amendment, the State could deny to any citizen the right of trial by jury, and it was done. Before that the State could abridge the freedom of the press, and it was so done in half of the States of the Union. Before that a State, as in the case of the State of Illinois, could make it a crime punishable by fine and imprisonment for any citizen within her limits, in obedience to the injunction of our divine Master, to help a slave who was ready to perish; to give him shelter, or break with him his crust

EXHIBIT A-9

EXHIBIT A-10

says that the maintenance of this Constitution does not depend on the plighted faith of the States as States to support it. It relies on individual duty and obligation. That was his judgment; and logically it was followed by his other words, "The Government owes high and solemn duties to every citizen of the country. It is bound to protect him in his most important rights." Has he rights any more important than the rights of life, liberty, and property?

Sir, what would this Government be worth if it must rely upon States to execute its grants of power, its limitations of power upon States, and its express guarantees of rights to the people. Admitting that the States have concurrent power to enforce the Constitution of the United States within their respective limits, must we wait for their action? Are not laws preventive, as well as remedial and punitive? Is it not better to prevent a great transgression in advance, than to engage in the terrible work of imprisonment, and confiscation, and execution after the crime has been done? Our fathers in the beginning set us the example of legislating in advance. Yet gentlemen say, now that the Constitution is amended and new powers have been vested in Congress, we must wait until these combinations are made. Why, sir, if we pass this bill and these offenses are not attempted or actually committed anywhere, no man is hurt, no State is restrained in the exercise of any of the powers which rightfully belong to it. Why not in advance provide against the denial of rights by States, whether the denial be acts of omission or commission, as well as against the unlawful acts of combinations and conspiracies against the rights of the people?

The States never had the right, though they had the power, to inflict wrongs upon free citizens by a denial of the full protection of the laws; because all State officials are by the Constitution required to be bound by oath or affirmation to support the Constitution. As I have already said, the States did deny to citizens the equal protection of the laws, they did deny the rights of citizens under the Constitution, and except to the extent of the express limitations upon the States, as I have shown, the citizen had no remedy. They denied trial by jury, and he had no remedy. They took property without compensation, and he had no remedy. They restricted the freedom of the press, and he had no remedy. They restrained the freedom of speech, and he had no remedy. They restricted the rights of conscience, and he had no remedy. They bought and sold men who had no remedy. Who dare say, now that the Constitution has been amended, that the nation cannot by law provide against all such abuses and denials of right as these in States and by States, or combinations of persons?

I respectfully ask my friend from Illinois [Mr. Farnsworth] to review all that he has said on this subject. If I am not right in asserting that the negative limitations imposed by the Constitution on States can be enforced by law against individuals and States, then the Government was wrong from the administration of Washington down, and the Supreme Court of the United States was wrong every time this question has come before it.

Let gentlemen consider the last three amendments and the new limitations thereby imposed upon the power of the States, and the new powers thereby vested in Congress. The first of these (the thirteenth) provides that involuntary servitude, or slavery, shall not exist in the United States. That is negative. Then we have the further provision that Congress shall have power to enforce, by appropriate legislation, this amendment. That is affirmative. Do gentlemen undertake to say to day that this does not impose a new limitation upon the power of the States, and grant a new power to Congress?

Does the gentleman from Indiana [Mr. Kerr] wish to be understood as affirming that there is no new grant of power here to Congress and no new limitation on the States? I rather think not. Let any State try the experiment of again enslaving men, and we will see, whether it is not competent for the Congress of the United States to make it a felony punishable by death to reduce any man, white or black, under color of State law, to a system of enforced human servitude or slavery; that system which converts a man, endowed with immortal life, into a thing of trade, an article of merchandise, with no acknowledged rights in the present and no hope of a heritage in the great hereafter. In such case the nation would inflict the penalty for this crime upon individuals, not upon States.

Will gentlemen undertake to tell the country that we cannot enforce by positive enactment that negative provision, the thirteenth article of amendment?

We have fully considered the fourteenth amendment. We have seen that it expressly grants the power to Congress to enforce its provisions, all its provisions, by appropriate legislation. Consider the fifteenth amendment, which declares, "No State shall deny to any citizen of the United States the right to vote on account of race, color, or previous condition of servitude." Here is a negative provision, a mere limitation, like the thirteenth and fourteenth amendments, on the power of the States, but coupled with a grant of power to Congress to enforce it. Did not a large majority of this House vote for the enforcement act of last May, which set aside the constitutions as well as the statutes of half the States of the Union because they denied rights guaranteed to citi-

EXHIBIT A-11

EXHIBIT A-12

country, by which it is declared that, to establish justice and to secure the blessings of liberty, "We, the people of the United States, do ordain this Constitution."

Liberty secured by law is not license. Liberty, our own American constitutional liberty, is the right "to know, to argue, and to utter freely according to conscience." It is the liberty, sir, to know your duty and to do it. It is the liberty, sir, to work in an honest calling and contribute by your toil in some sort to the support of yourself, to the support of your fellowmen, and to be secure in the enjoyment of the fruits of your toil. Justice, sir, to establish which this Constitution was ordained, the people themselves being witness, is to give to every man his due. The justice to be established by the Constitution is the attribute of God, as to do justice is the perpetual obligation of men and nations. Let justice for all, by the power and majesty of American law be established for all, so that the poorest man in his hovel on the frontiers of your widely extended domain, bearing with him toward the setting sun the symbols of civilization, and laying in the wilderness the foundations of new commonwealths, may be made as secure in his person and property as the prince in his palace or the king on his throne.

Let equal and exact justice be established, that America may become the exemplar to all the nations of the world of the capacity of man for self-government, and in establishing it may illustrate the utterance of that grand intellect, Collard, of whom one of the most gifted of living men said:

"His words become indelibly engraved upon what ever spot they fall. 'The citizen,' said he, 'has a higher destiny than that of States.'"

* * * * * * * * * * *

"'States are born, live, and die upon the earth; here they accomplish their destiny; but they contain not the whole man. After the citizen has discharged every obligation he owes to society, every obligation that he owes to the State, there abides in him the nobler part of his nature—his immortal faculties, by which he ascends to God, to a future life, and to the unknown blessings of an invisible world.'"

[Applause.]

EXHIBIT A-13

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Eric A. Dover, M.D.,	)	No. 13-36183
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	CERTIFICATE OF SERVICE
	)	
Kathleen Haley, J.D., et al,	)	
	)	
Defendants-Appellees.	)	

I, the undersigned, Eric A. Dover, M.D., hereby certify that on the 2nd day of July, 2014, I have served the foregoing Appellant's Reply Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit, by mailing U.S. Postal Service First Class to:

Office of the Clerk
U.S. Court of Appeals
P.O. Box 193939
San Francisco, CA 94119-3939

Dated this 2nd day of July, 2014.

Eric A. Dover, M.D.

ERIC A. DOVER, MD
In Pro Per
Appellant
1615 Cloverleaf Rd.
Lake Oswego, OR 97034

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Eric A. Dover, M.D.,	)	No. 13-36183
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	CERTIFICATE OF SERVICE
	)	
Kathleen Haley, J.D., et al,	)	
	)	
Defendants-Appellees.	)	

I, the undersigned, Eric A. Dover, M.D., hereby certify that on the 2nd day of July, 2014, I have served a copy of the Appellant's Reply Brief for the U.S. Court of Appeals for the Ninth Circuit, to the Counsel for the Defendants-Appellees by mailing US Postal Service First Class to:

Oregon Dept. of Justice
ATTN: Senior AAG Carolyn Alexander
1162 Court St. NE
Salem, OR 97301-4096

Dated this 2nd day of July, 2014.

Eric A. Dover, MD

ERIC A. DOVER, M.D.
In Pro Per
Appellant
1615 Cloverleaf Rd.
Lake Oswego, OR 97034