No. 03-1032

# In The Supreme Court of the United States

COUNTY OF HUMBOLDT, *et al.*,

*Petitioners,*

v.

HEADWATERS FOREST DEFENSE, *et al.*,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION


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## QUESTION PRESENTED RESTATED

Whether the action of the Court of Appeals, in setting aside the *sua sponte* transfer and directing re-assignment of the case, on finding an appearance of bias created by the transfer, raised any concern which warrants the supervisory attention of this honorable Court; and, if so, whether the court below was not correct, as well as wholly within its discretion – in circumstances where the 1998 dismissal order by the district judge, which the Court had reversed, reflected untoward prejudice against the plaintiffs – in concluding that the transfer of the trial to a place rife with antagonism to plaintiffs created an appearance of bias?

## PARTIES TO THE PROCEEDING

*Petitioners*

County of Humboldt, California; Sheriff Dennis Lewis; Chief Deputy Gary Philp; and the City of Eureka, California.

*Respondents*

Vernell "Spring" Lundberg; Noel Tendick; Terri Slanetz; Eric Samuel Neuwirth; Lisa Sanderson-Fox; Maya Portugal; Jennifer Schneider; and Michael McCurdy. Headwaters Forest Defense is no longer a party to this action.

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## STATEMENT OF THE CASE AND QUESTION PRESENTED RESTATED

Respondents sued the Sheriff of Humboldt County, petitioner Lewis, his chief deputy, petitioner Philp, the County, and the City of Eureka, California, under 42 U.S.C. § 1983, for damages arising from police actions against them on three occasions in the Fall of 1997. There – supposedly to get them to release themselves from 'lock-box' devices, with which they sought to prolong sit-ins they conducted to protest destructive corporate logging practices in the region – the officers, on the orders of petitioners and as a matter of County and City policy, swabbed pepper spray liquid directly on the protesters' faces, in and around the eyes, causing excruciating pain, despite the lack of any resistance; in many cases relief from flooding water rinse was also withheld for long periods. A small minority released themselves in response to this cruelty.

The case was assigned to the Hon. Vaughn R. Walker, D.J., in the Northern District of California, and came on for trial in San Francisco, in July, 1998. The Court had granted qualified immunity to the several officers who had done the actual swabbing – graphically depicted in videotapes, which were played on television news all over the world – and held only the 'policy defendants' (petitioners here) to answer. The Court then granted qualified immunity to the Sheriff and his chief deputy also, at the close of plaintiffs' case, and submitted the claims against the County and the City to the jury.

The jury deadlocked, four to four, and were discharged, and the Court declared a mistrial, saying the issue of excessive for in the case was "a simple and straightforward one. . . . It's obvious one on which reasonable people can

differ".[1] Eight weeks later, however, the Court entered an Order vacating the trial date and dismissing the case, holding that, "The plaintiffs' claims are legally untenable . . . ," and observing that, "[T]he jury's inability to reach a verdict does not necessarily indicate that reasonable minds could differ . . . " 1998 WL 754575 (N.D. Cal.), p1.

An appeal followed, in which a panel of the Ninth U.S. Circuit Court of Appeals roundly reversed the dismissal and the grant of qualified immunity to the individual petitioners (where the grant to the officers who did the actual swabbing was not appealed), and ordered a new trial. *Headwaters Forest Defense, et al. v. County of Humboldt, et al.*, 240 F.3d 1185 (9th Cir. 2000) ("*Headwaters I*") The petitioners sought certiorari in this Court, shortly after its decision in *Saucier v. Katz*, 533 U.S. 194 (2001), establishing a mandatory routine for testing claims of qualified immunity in excessive force cases; accordingly, this Court sent the case back to the Circuit Court for re-determination under *Saucier*. 122 S.Ct. 24 (2001).

The court below affirmed its previous ruling with a second opinion – incorporating by reference its analysis of the facts in the first, *Headwaters Forest Defense, et al. v. County of Humboldt, et al.*, 276 F.3d 1125 (9th Cir. 2002) ("*Headwaters II*") – and this Court declined further review. 123 S.Ct. 513 (2002). The undersigned entered the case as new counsel, and attended an off-the-record status conference with Judge Walker on January 23, 2003, in which the Judge announced, *sua sponte*, that the case would be tried

[1] See the Court of Appeals' recusal order, Petitioners' Appendix A, p2a.

in Eureka, where there is a federal courtroom in the post office, sometimes used by a magistrate. Eureka has been the epicenter of anti-logging protests in the area over a period of many years, and was at the time a hotbed of controversy over the strategy and tactics – including various forms of civil disobedience such as the 'lock-box' sit-ins – pursued by Earth First! Earth First! is a long-established, activist environmental defense movement plaintiffs were part of, attempting to stop clear-cutting in northern California and save the old trees, the water-sheds, the fishing industry, the local economy, etc. As everyone knew, this was not a good place to go in search of an impartial jury. See plaintiffs' petition below, *post*, App. A, p11-16.

Plaintiffs said that to the district court informally at the next status conference, in March, but were rebuffed. Having studied the district court's 1998 order of dismissal in the meantime, we sought recusal, as well as transfer of the trial back from Eureka, in a mandamus petition, and we asked that it go back to the panel who heard the appeal. It did, relief was granted on both counts, and the instant petition follows.

Fairly and properly framed then, the issue presented is:

> Whether the action of the Court of Appeals, in setting aside the *sua sponte* transfer and directing re-assignment of the case, on finding an appearance of bias created by the transfer, raised any concern which warrants the supervisory attention of this honorable Court; and, if so, whether the court below was not correct, as well as wholly within its discretion – in circumstances where the 1998 dismissal order by the district

judge, which the Court had reversed, reflected untoward prejudice against the plaintiffs – in concluding that the transfer of the trial to a place rife with antagonism to plaintiffs created an appearance of bias?

## RESPONSE TO PETITIONERS' STATEMENT

Numerous assertions in defendant-petitioners' "Statement" require response. They begin with calumny against Earth First!, the movement plaintiffs were (and are) part of, and acted with in staging the sit-ins where they were brutally mistreated by police as complained of herein, calling it "a world-wide movement that advocates and practices criminal actions." (Petition, p2) They add a footnote, gratuitously advising the Court that Earth First! adherents were also involved in the protests against the World Trade Organization in Seattle several years ago (where, like these plaintiffs, they were also victims of lawless police assaults). Such statements should be understood as attempts to evoke the same bias which, as it played out in the district court, is the subject matter of the case.

Next, more substantively, there is the smooth narrative assertion that, at each of the three protests in question, "the on-scene officer in charge determined that the tactical use of OC (*sic* – they *never* refer to it as pepper spray) was the safest means of accomplishing the arrests." (Id.) This must be understood as defendant-petitioners' (false) version of what happened, in circumstances where plaintiffs' evidence is that the on-scene officers proceeded according to a pre-set decision and plan, by their individual defendant-petitioner commanders, to attack the

self-same Earth First! movement in Humboldt County with torture tactics, in the attempt to break it of this increasingly effective and productive sit-in practice.

We also disagree that the district court's invitation to plaintiffs to file a motion concerning their misgivings about having the trial in Eureka was made at the January conference (Petition, p4, ¶ 5.) Rather, the invitation came at the next status call, on March 27, 2003, after co-counsel J. Tony Serra asked the court to reconsider its Eureka plan, describing his own and others' experience with the level of ill feeling plaintiffs could expect to encounter in Humboldt. It was only after Serra's informal plea was spurned, that we reluctantly began to divert energy and resources from the impending trial into a move for mandamus relief; in preparing it, and considering the 1998 dismissal order in light of what we had learned about the evidence, we saw that the judge was disqualified by bias, and had to be recused.

Also, we cannot let pass without comment the would-be slam defendants take at plaintiffs for Tony Serra's earlier fiery statement to the press, promising a "political trial" – the very idea of which defendants purport to be so scandalized by – and for one plaintiff's affirmation that San Francisco would provide a needed "international forum" for the issues in the case. (Petition, p5, ¶ 1.) So, we comment: the notion that there is anything wrong with those statements, or the sentiments or intentions (or hopes) expressed in them, is un-American.

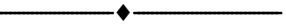
Continuing, it must also be noted that defendant-petitioners do say, and acknowledge, that the claim of bias was based on the 1998 purported Rule 50 dismissal (and the unexampled skein of false facts and mis-impressions it

was constructed upon), *and* the *sua sponte* transfer (Petition, p5, ¶ 3.); later, they say the Court of Appeals' order was based only on the transfer. (Id., p7) ("Incredibly, the panel's recusal order is based on a single ruling . . . "). Precisely what happened was that the "single ruling" showed the district judge was still operating out of bounds, and so 'the panel' issued its writ, to protect the integrity of its earlier decision(s).

In taking this action, however rare it might be, the Circuit Court was not obliged to expatiate on the intricacies of its earlier rigorous attentions to the words and actions of the district judge in disposing of the case in 1998, and their meaning in the sequel arising from the outlandish transfer; it was obviously free to stick to bare bones in its mandamus order. Neither was 'the panel' barred from reassembling to deal with the matter, or required to refer it *en banc* (as defendant-petitioners backhandedly concede; see Petition, p17, n.12; p18). Those matters were, and belonged, completely in the wisdom and discretion of 'the panel', following its case administratively as it were, to make sure it didn't go off track again. In this connection, the idleness of defendants' further protest, that they were not allowed 'input' on a purported issue of whether this new plea by plaintiffs should "come back" before the panel, and that the panel grabbed the case with undue haste (id. p6, ¶ 5), just shows how natural, inevitable and essentially ministerial those actions were. The

same goes for the decision to dispense with *en banc* inquiry. See Rule 35, F.R.A.P.[2]

Clearly, in the Court's mind, none of those things were needed; they saw through the district court's maneuver, and understood what it meant. The 'extremely rare' case, that 'almost never' happens, had happened. There was no hesitation, because the underlying demonstration of bias in the October Order was so unmistakable, categorical, overwhelming. The matter was cut and dried. To go to the end of petitioners' Statement, on p7, where they refer to the response of 'a noted Ninth Circuit historian' to the order appealed from, the more one reads the dismissal order, and the work of the Court of Appeals in *Headwaters I* undressing it, the more one sees that the "unheard of", had to be heard.[3]



## REASONS TO DENY THE PETITION

The claims petitioners raise are far from anything which might legitimately engage the attention of this

[2] "The rule that a vote will not be taken as a result of the suggestion of the party unless requested by a judge . . . is intended to make it clear that the suggestion of a party as such does not require any action by the court. See *Western Pacific R. Corp. v. Western Pacific R. Co.,* 345 U.S. 247, 73 S.Ct. 656 (1953)." R.35, F.R.A.P., Advisory Committee Notes, 1967.

[3] This is something this Court can see for itself, and marvel at, in the analytic bright light of *Headwaters I*; if it will, it can also use the moral light of the videotapes, which can be made available on short notice if there's any question about what actually happened, and what was done to plaintiffs by the police on the Orders and under the Official Policy of these petitioners.

Court, under its rules.[4] For all intents and purposes, their complaint concerns only the Circuit Court's application of its own rules and procedures, and discretionary interpretation, and vindication, of its own prior decision(s). In circumstances where defendant-petitioners have managed to pointlessly and expensively drag out the proceedings in two courts below for years, long past a decisive determination by the Court of Appeals that they were wrong in the case-in-chief, and hadn't a legal or factual leg to stand on, this honorable Court should make short work of this latest dilatory maneuver.

Defendant-petitioners make much of the copious literature showing that recusal by the appellate court in the course of a case is seldom called for, and this is true; but the extreme prejudice shown by the district court is what is really rare. As we showed in our petition to the Circuit Court, the *sua sponte* transfer to the Eureka hotbed for trial was not the 'sole basis' for the conclusion that he was biased. Rather, it was a crowning transgression, confirming the continuing, active, threatening presence of the virulent bias displayed in his 1998 dismissal order, which led to his disqualification.[5]

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[4] See, Rules of the Supreme Court of the United States, Rule 10, "Considerations Governing Review On Certiorari."

[5] In addition, Plaintiffs protested, and adduced, the court's announced (wrongful and prejudicial) intention to submit the issue of qualified immunity, already decided against defendants by the Court of Appeals, to the jury (plaintiffs' petition, *post*, App. A, p21; we also protested the court's failure to honor the plaintiffs' choice of forum, and its 'blind eye' to the district court's General Order 44(E)(3), which provides: "Whenever a civil or criminal case is transferred from one courthouse to another, the Clerk shall randomly re-assign the case to a

(Continued on following page)

Certainly the court below was as well aware as petitioners of the strength of the principle forbidding recusal based on prejudice shown within the proceedings, *except in the most severe case*; it is "almost never" appropriate, in this Court's words.[6] But, once in awhile it *is* appropriate, and necessary, and the Circuit Court – quite logically and appropriately acting through the panel which was met with the original affront – has duly determined that this is such a time. We submit that is strictly their business, as a supervisory matter – and really a question of the Court enforcing its own decision – where it had made quite plain to the district judge, in two decisions reversing him, just how far out of bounds he had gone. See, *Headwaters I, supra; Headwaters II, supra*.

## I.

Defendant-petitioners, in asking this Court to restore their unfair advantage going into the re-trial, raise four claims against the action taken by the Court of Appeals in response to the emergency petition by plaintiffs on the eve

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Judge designated to hold court at the receiving Courthouse." See *post*, App. A, p21).

[6] This Court had its last word on this subject in *Liteky v. United States*, 510 U.S. 540 (1994): "[J]udicial rulings alone *almost never* constitute a valid basis for a bias or partiality motion. . . . [They] can only *in the rarest circumstances* evidence the degree of favoritism or antagonism required [for recusal] . . . [O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion *unless* they display *a deep-seated favoritism or antagonism that would make fair judgment impossible*." 510 U.S. 555 (Emphasis added).

of trial; in each, they insist the court below exceeded its authority or abused its discretion:

+ That the court recused the district judge on finding an appearance of bias, and reversed his order transferring the case to Eureka for trial;

+ That it did so in violation of normal rules governing grants of extraordinary relief (and, although they don't make a Point of it, in derogation of an order by another judge of the district, denying that relief);

+ That it did so by and through the same judges who had heard the earlier substantive appeal, and granted the new trial now ordered to Eureka – thereby unconscionably permitting plaintiffs to 'select their own panel'; and,

+ That that very panel wickedly refused to circulate their petition for re-hearing *en banc*.

It is true the Court did all these things, but they were right to do so; and, more to the point, they were entirely within their discretion, and shouldn't be subject to second-guessing in these premises. As noted, the January, 2003, status conference absolutely began with Judge Walker's smiling announcement, as he settled fraternally into his seat with us at counsel table for the off-the-record discussion, that, "We're going to try this case in Eureka." As new counsel, we weren't immediately aware of just how bad an idea this was; some in the plaintiffs' movement looked on it as a good thing – guaranteeing a "political trial" in the fullest sense, defendants' mock horror at the idea notwithstanding – but the plaintiffs' camp soon realized the truth of the situation: we were facing another hung jury, at best.

At the same time, we knew the Court of Appeals had clearly held, under the rule of *Graham v. Connor,* 490 U.S. 386 (1989), that the forcible infliction of great pain on peaceful protesters as shown here would be unconstitutional if confirmed by a jury; we also knew that, despite this unequivocal decision, defendants still insisted (as they do today) that they cannot lawfully be denied the use of this "tool" of compulsion, if only they express the professional opinion or belief that they need it, and that they were (and are) depending on a jury verdict, excusing them from liability, as a premise to continue its use. And it was this view – and the implicated crossing of the line into the realm of what one of defendants' own minions called, accurately, torture – that the district judge, in his reflections on the trial, unconscionably made his own.

And, it is this constitutionally wrong-headed, partisan view, and the apparent partisan desire to see it vindicated, that caused the judge to outlandishly move the trial to the hotbed of controversy – centered around Earth First!, and the plaintiffs, and their strategy and tactics in the agonizing effort to stop or impede the corporate raiders' slaughter of the redwoods and the whole forest land. And the transfer to Eureka in these circumstances obviously proved to the Court of Appeals that the wrongful, fabricated judgment Judge Walker rendered in 1998 was still with him; or at least, that's the way it *appeared*, from the outlandish transfer. And they were right.

## II.

While we are confident the re-transfer and recusal would be affirmed on the merits, we believe the whole

business is out of this Court's purview, a matter of housekeeping within the circuit, and not something the Supreme Court should be concerned with. Certainly, where defendant-petitioners rail on about how unique, ungodly and unprecedented the Circuit Court's action was, there can be little concern that it reflects a growing mischief in the land which must be curbed. Nor is there any other aspect which could lay claim on the extraordinary supervisory interest of the Court, let alone qualify under Rule 10.

Likewise, the defendants clearly have no interest in having their case tried by a particular member of the district bench, where the Court of Appeals has seen fit to make a change; even less are they entitled to one who has made up his mind in advance that they are right, has said so at great length in previously dismissing all claims, and would be likely to withhold, at trial, in their interest, the crucial jury instruction required by the Court of Appeals' interpretation of *Graham v. Connor* in reversing him. With a new judge duly assigned and a new trial date set, defendants' continuing struggle to keep the case before a judge who has shown bias – and keep the trial in a 'company town' – is unseemly, to say the least.

The point is, Judge Walker was roundly reversed, twice, by the court below, and rebuked.[7] The reversal clearly re-affirmed the principle against torturous use of pepper spray, yet, now, the court has found the district

[7] The Court said this Court's words, per Justice Kennedy in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 287 (1993) "should not be invoked to justify the use of force to effect arrests *in factual circumstances that do not justify the use of force.*" *Headwaters I, supra*, 240 F.3d at 1203 (Emphasis added).

judge *appearing* to implement his wrong, contrary view in another way – by playing for a stacked jury – despite its decision. The Court caught him in a prejudicial act, outside the record, where he had already established his prejudice within it. The remedy was obvious, and was – and in this Court's eyes, respectfully, should be seen as – the Court's own business, a follow-up in an ongoing matter between it and the district judge.

Equally obvious, and significant to the 'mere housekeeping' interpretation – defendants' high dudgeon notwithstanding – is the way the remedy came about: enacted by the same panel, in a summary order, without being offered for *en banc* consideration (where the same had previously been declined on the merits); and without reference to the mooted collateral Order finagled from Judge Hamilton in the district court.[8]

## III.

The seriousness of the district judge's transgression of the rule of impartiality in the 1998 Order can scarcely be overstated: he not only improperly weighed the evidence, he made up facts and issues outright – in addition to

[8] For what it is worth, Judge Hamilton treated the rule discussed in *Liteky* as an absolute, rather than a general rule which allowed for an exception, as in a case like this, and she ignored plaintiffs' contention that the transfer to Eureka was a material and prejudicial application of a categorical bias, shown in the dismissal order. She also pre-empted decision of the claim that the transfer raised an appearance of bias, under 28 U.S.C. § 455, thereby relieving Judge Walker of the obligation under the statute and case law to decide this issue himself, and state his reasons. See defendants' petition, Appendix C and Appendix D; plaintiffs' petition, *post*, App. A, p10.

inverting the position previously forced upon him by the jury splitting four to four. On that occasion he said it was obvious reasonable people could differ. Eight weeks later, he said the precise opposite, *and based it on fabrications*. Why he thought this wouldn't be noticed – or wouldn't be acted upon by the aggrieved plaintiffs – is hard to fathom.[9] The Circuit Court's repudiation of it, however, is plain as a pikestaff, and it is impossible that they did not fathom Judge Walker's prejudice, at that moment, and remember it when plaintiffs' petition was filed. The action he took could have had no other source.

The judge had ruled, after all, in effect, that the swabbing of pepper spray in and around the eyes of unresisting, locked-down protesters was reasonable as a matter of law; that it had been shown to be so by the evidence in the trial – including, willy-nilly, the shocking videotapes of the brutal events. And he had opened his Order with a negation of his earlier mistrial declaration, that reasonable minds could differ about the justification for such bootless, excruciating, police tactics, against young people the police knew to be solemnly pledged to non-violence, engaged in peaceful sit-ins.

Whatever had come over Judge Walker since the trial, to so consolidate his feelings 'against the protesters and in

[9] It was the Court of Appeals that first picked out the judge's earlier statement in the record: "Indeed, the fact that the district judge, after initially declaring a mistrial and ordering a new trial, stated that 'reasonable people can differ' on the use of excessive force in this case speaks directly to the wisdom of our decision now to reverse the court's grant of judgment as a matter of law in favor of the defendants." *Headwaters I, supra*, 240 F.3d at 1206.

favor of the police' – in the wake of a four-to-four split of his jury, *and after seeing the tapes* – he had to know he was wrong to throw the case out, and he distorted the evidence and the record in his order, to cover it up; and he was apprehended by the court below, and his mischief was undone.

This honorable Court would have done the same. It would have seen how the district judge spun a story from the police defendants' absolutist viewpoint, and twisted facts and mis-stated evidence to make it work, in circumstances where, in fact – as the Court of Appeals found – reasonable minds could scarcely differ as to the *un*-reasonableness of swabbing pepper spray juice in the eyes of unresisting demonstrators. This Court would have known – and can see now – that such an Order reflected, precisely, the type of 'antagonism that makes fair judgment impossible'. *Liteky, supra*, 510 U.S. at 555.

Only consider: the judge fabricated an urgent basis for the heinous police action, when there was none; he conjured up a threat from other demonstrators outside, when that wasn't true either; he said this method of 'arrest' was quicker, when it manifestly took much longer; he pronounced it a reasonable "pain compliance" technique, when it did not qualify as such because the pain it causes is uncontrollable;[10] and he pretended the police had no alternative way to arrest the people in the sit-in, when the officers had testified they used grinders "hundreds" of

[10] The Court of Appeals held that pepper spray swabbing was to be distinguished from a 'pain compliance technique', because the pain cannot be immediately relieved when compliance is obtained; quite the contrary. See *Headwaters I*, *supra*, 240 F.3d at 1200-1201.

times against lockdowns in the past. See, *Headwaters I*, 240 F.3d at 1199-1205; plaintiffs' petition, *post*, at App. A, p8-9, n. 3. The judge synthesized a very false and misleading discourse to support his judgment, much as if he were writing a brief for the cops. And he dismissed out of hand the "transient" pain experienced by the plaintiffs, so great and so gratuitously inflicted that one of the very officers themselves called it torture.

## CONCLUSION

In short, Judge Walker showed clearly in the 1998 Order that he had chosen sides against the plaintiffs, and the transfer to Eureka proved he would abuse his power and authority in an attempt to vindicate the police. He was rebuked by the court below for misappropriating the words of this Court. Contrary to the burden of his disquisition, the Circuit Court found that it had been shown, in fact, that " . . . the protesters' conduct [in the sit-ins] posed no danger to themselves or others . . . ", and said the officers' frustration with the lockdown was "irrelevant" under the test for reasonableness in the use of force prescribed by this Court in *Graham v. Connor*; which is certainly correct. In a long opinion which, ironically, was later vacated by this Court for procedural reasons, but then incorporated in the subsequent re-statement, the Court of Appeals spelled out in detail the inversions and perversions of the evidence the district judge had concocted in his Order, and repudiated them soundly. The defendants' second petition for certiorari, challenging those determinations, was denied by this Court. On the

same, underlying merits, if not the failure to meet the threshold jurisdictional requirement, this one should be also.

DATED: February 19, 2004

Respectfully submitted,

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**No. _____**
**(N.D.C.A. Case No. C-97-3989-VRW)**

**TIME FACTOR: Trial Set For May 12, 2003**

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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**HEADWATERS FOREST DEFENSE**

**(*Ex. rel*. Vernell "Spring" Lundberg, Noel Tendick, Terri Slanetz, Eric Samuel Neuwirth, Lisa Sanderson-Fox, Maya Portugal, Jennifer Schneider, and Michael McCurdy)**

**Petitioners,**

**vs.**

**UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA (Real Parties in Interest: County of Humboldt, Calif., City of Eureka, Calif., Sheriff Dennis Lewis, and Chief Deputy Gary Philp)**

**Respondent.**

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# PETITION FOR WRIT OF MANDAMUS AND EXERCISE OF SUPERVISORY AUTHORITY

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## STATEMENT OF JURISDICTION

This Court's jurisdiction is based on 28 U.S.C. § 1651 F.R.A.P. 21(a).

## ISSUES PRESENTED FOR REVIEW

**I.** Whether the district judge has abused his discretion, and violated plaintiffs' Seventh Amendment right to a fair trial, and Fifth and Fourteenth Amendment right to due process, by *sua sponte* transferring the re-trial from

San Francisco, a neutral place, to Eureka, where there is pervasive hostility toward plaintiffs and their movement?

**II.** Whether the district judge is biased, and/or appears to be biased against plaintiffs, requiring that the case be reassigned to a different judge?

## RELIEF SOUGHT

Petitioners request that this Court issue a Writ of Mandamus, or otherwise intervene and direct the district court to:

1. Return the trial, scheduled to begin May 12, 2003, to the neutral site of San Francisco, where the first trial occurred, the case and all subsequent papers have been filed, and all hearings have been conducted; and

2. reassign the case to a judge other than Judge Walker.

## SUMMARY OF THE ARGUMENT

Plaintiff-petitioners are environmental activists who were injured by the cruel misuse of pepper spray by law enforcement officials during a series of anti-logging protests. They seek extraordinary relief from this Court, in order to prevent the impending retrial of their case on May 12, 2003 from becoming an exercise in futility, by virtue of the district court's abuse of discretion in moving the trial from San Francisco to Eureka. There was a hung jury in the first trial in San Francisco – part of a history well known to this Court by way of its double reversal of

the district court, leading to the instant remand.[1] Now, the district judge, the honorable Vaughn R. Walker, plans to hold the re-trial in the very location where the wrongful, essentially sadistic use of pepper spray occurred – a community seething with active, current, overt hostility toward the plaintiffs and their Earth First! colleagues.

Plaintiffs believe there is great likelihood of another hung jury in Eureka; there is also a real threat of dishonest responses from jurors who may seek to help defeat the plaintiffs and/or avoid the disdain of their friends and family who harbor an intense dislike of the plaintiffs and their efforts to protect the Redwoods from clear-cutting. As the Court can see from the eight declarations, fifteen press clippings, two print ads, two press releases, and videotape of a television ad by Pacific Lumber Company equating environmentalists with terrorists, there is in Eureka just now exactly the type of atmosphere which generally prompts courts to move a trial *away* from a particular place. To move a trial *into* such a battle zone is unheard of, and simply unfair. Plaintiffs request that that this Court assert its supervisory authority, in the form of a writ or other direction to the Court below, to prevent a miscarriage of justice, and to keep the district judge from making the retrial a vehicle for vindication of his own viewpoint on the merits of the case.

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[1] See *Headwaters Forest Defense v. County of Humboldt* ("*Headwaters I*"), 240 F.3d 1185, 1209 (9th Cir. 2001), *vacated and remanded,* 122 S.Ct. 24 (2001), with order to conform opinion to *Saucier v Katz*, 121 S.Ct. 2151, 2155 (2001), and conformed in *Headwaters II*, 276 F.3d 1125 (9th Cir. 2002), reversing the district court's grant of qualified immunity to the policymakers and dismissal of the action, and remanding for a new trial.

Plaintiffs do not say this lightly. They have sought recusal of the district judge, on grounds that he has resolutely taken sides against the plaintiffs, and reconfirmed the bias demonstrated in his October 1998 Order dismissing the case, resoundingly reversed by this Court, in two recent decisions: (1) his decision to move the trial to Eureka for no legitimate reason, and (2) his stated intention to present the *thrice-decided* issue of qualified immunity to the jury, despite a total lack of legal authority, inviting jurors to cancel out any finding they might make in plaintiffs' favor. With trial just one week away, the undersigned pray for swift intervention by this Court.[2]

## FACTUAL AND PROCEDURAL HISTORY

### Factual History

This case arises from the actions of deputy sheriffs at the direction of the two individual defendants, Sheriff Lewis and Chief Deputy Philp, and pursuant to the official policy of Humboldt County and the City of Eureka, in using repeated, violently painful, wholly unorthodox and unprecedented swabbed-on applications of pepper spray base ointment, and spray itself at close range, directly in the eyes and faces of several young, non-violent protesters – who never resisted, and remained in the complete and unchallenged physical control of the police at all times – in prolonged and agonizing attempts to make them unfasten themselves from human chains, constructed by means of

[2] Plaintiffs understand that the relief they seek may cause a delay in the start of trial. However, plaintiffs are willing to suffer such a delay in order to ensure that they receive a fair trial.

metal lockboxes covering their forearms. The sit-ins were part of an intense campaign by the Earth First! movement and various allied groupings in Humboldt County, in the Fall of 1997, protesting the continued heedless "harvesting" of 1000 to 2000 year-old redwood trees on California's North Coast, and a then-pending deal in the U.S. Congress for the supposed preservation of the Headwaters Forest, which actually promised a lingering doom for that last great part of the ancient forest still in private hands.

The metal lockboxes, sometimes called "black bears", had been used in this fashion in the region for several years, and police had developed a familiar methodology for opening them with hard-edged, steel-cutting electric wheels, or "grinders". They could normally disengage the protesters from the boxes in 15 or 20 minutes, sometimes as quickly as five minutes, and routinely used the grinders to end literally dozens of sit-ins, without mishap.

By the Summer of 1997 there had been a series of increasingly effective and visible demonstrations aimed at saving Headwaters from the axe, and a corresponding sharp rise in public attention to the issue. In response, defendants Philp and Lewis developed the idea of smearing pepper spray ointment around the eyes of protesters who would refuse police orders to release themselves from the black bears, and then of refusing to immediately wash the substance away, as a means of forcing them to unlock to seek relief from the pain. Each time, as shown on videotape, officers acting on defendants' orders held back the heads of the plaintiffs, and, sometimes forcing open their eyes with their fingers, used Q-tips to smear the pepper ointment along the crack of the eye and on the skin of the eyelids and eye sockets, whence it sometimes also ran down the face and into the nose and mouth.

**Procedural History**

Plaintiffs brought suit. The court denied injunctive relief, and granted summary judgment to the underling deputies who carried out the swabbing, finding they were entitled to qualified immunity. At trial, the court further granted immunity to the supervisors, Lewis and Philp, at the close of plaintiffs' case. The jury deadlocked four to four on the liability of Humboldt County and the City of Eureka, and the Court ordered a new trial. Thereafter, however, the Court dismissed the claims against the two entities in October 1998, holding that no reasonable jury could find that the swabbing, etc. violated the Fourth Amendment.

In dismissing the case, the district court said it had concluded "that plaintiffs' claims are legally untenable". It held that the "uncontroverted evidence presented at trial unequivocally supports the conclusion that the officers acted reasonably in using OC [pepper spray] as a pain compliance technique in arresting plaintiffs." (October 26, 1998 Order, 1998 WL 754575, *1, *4.) In a strong rebuke, this Court reversed, holding that the district court misapplied the Supreme Court test for excessive force established in *Graham v. Connor*, improperly weighed the evidence against plaintiffs, and erred extensively in stating that plaintiffs had failed to present certain evidence.[3] *Headwaters I*, 240 F.3d at 1197, 1199, 1204-1205.

[3] In *Headwaters I*, this Court found that the district judge mischaracterized key evidence in his October 26, 1998 Order dismissing the case, i.e.: (1) that the physical intrusion against plaintiffs was minimal, when in fact it created "excruciating pain" (240 F.3d at 1199-1200); (2) that the use of pepper spray was necessary to remove

(Continued on following page)

On certiorari, the U.S. Supreme Court vacated the decision in *Headwaters I*, with instructions to reconsider it in light of *Saucier v. Katz* 533 U.S. 194 (2001). On remand, this Court affirmed its decision and re-ordered the new trial. *Headwaters II*, *supra*.

Plaintiffs retained new trial counsel. At a status conference on January 23, 2003, Judge Walker announced *sua sponte* that he was transferring the trial to Eureka, where there is a federal courtroom, but no regular session, and that he would travel there too and preside at trial. Plaintiffs voiced their concern at the next hearing on March 27, 2003, but the court remained firm. On April 14, 2003, plaintiffs filed a motion to return the trial to San Francisco (Ex. 1), supported by eight declarations (Ex. 2) and fifteen press clippings (Exhibits 3 & 4) describing the bias and hostility currently being directed at environmental activists in and around Eureka.

At the same time, plaintiffs moved for recusal (Ex. 5) on the grounds that the Judge's decision to move the trial to a hostile place, coupled with the clearly erroneous findings he made in his 1998 Order dismissing the case, demonstrate both actual bias and the appearance of bias, under 28 U.S.C. §§ 144 and 455, respectively. Judge Walker had the recusal motion reassigned (April 17, 2003

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plaintiffs quickly from the premises, when the evidence showed that this actually delayed their removal (*id*. at 1201-1202); (3) that the officers made no effort to pry open the eyes of plaintiffs, when in fact the videotapes show they did (*id*. at 1201 n. 9); and (4) that plaintiffs failed to show that defendants had a viable alternative, when in fact plaintiffs showed that defendants could have used the "grinders," as they had done so many times before (*id*. at 1204-1205).

Order, Ex. 6), alerting the new judge that the decision as to any appearance of bias (§ 455) was *his* to make, in keeping with this Court's decision in *In re Bernard*, 31 F.3d 842 (9th Cir. 1994)[4] Judge Phyllis Hamilton received the motion, and ruled against plaintiffs as to both actual bias (§ 144) and appearance of bias (§ 455), ignoring the holding in *In re Bernard*. (April 23, 2003 Order, Ex. 7.)

Thereafter, in a written order dated April 30, 2003, Judge Walker denied plaintiffs' motion to return the trial to San Francisco. (Ex. 8.) In the same Order, he avoided deciding the appearance of bias question which he had indirectly reserved, instead relying on Judge Hamilton's order. (pgs. 15:25-16:5.) This Petition follows.

## ARGUMENT

### I. THIS COURT SHOULD ORDER THAT THE TRIAL BE RETURNED TO SAN FRANCISCO

#### A. Plaintiffs have a constitutional right to an impartial jury.

Clearly, plaintiffs are entitled to a fair and impartial jury. *Frank v Mangum*, 237 U.S. 309 (1915); *Moore v Dempsey* (1923) 261 U.S. 86; *Irvin v Dowd,* 366 U.S. 717 (1961); *Rideau v Lousiana* 373 U.S. 723 (1963); *Estes v Texas*, 381 U.S. 532 (1965); *Sheppard v Maxwell* 384 U.S. 333 (1966); *Groppi v Wisconsin*, 400 U.S. 505 (1971); *Pamplin v Mason* (5th Cir. 1966) 364 F.2d 1. Plaintiffs'

[4] Accord 28 U.S.C. § 455(a), which provides that a judge or magistrate "shall disqualify *himself* in any proceeding in which his impartiality might reasonably be questioned". (Emphasis added.)

right to an impartial jury is "inherent in the [Seventh Amendment] right of trial by jury and is implicit in the requirement of the Fifth Amendment" due process clause. *Kiernan v. Van Schaik*, 347 F. 2d 775, 778 (3rd Cir. 1965).

Historically, federal courts have endorsed changes in the place of trial to protect a litigant from having to brave hostility in the community to the litigant or his or her interests. "As we read the Supreme Court cases, the test is: Where outside influences affecting the community's climate of opinion as to a defendant are inherently suspect, the resulting probability of unfairness requires suitable procedural safeguards, such as a change of venue, to assure a fair and impartial trial." *Pamplin*, 364 F.2d at 5. *Pamplin* also pointed out that the courts must be skeptical to protestations by jurors as to their absence of bias in circumstances where certain community feelings are pervasive. *Id*. at 7.

The Supreme Court has held that a fair trial simply cannot be conducted in a community where a significant segment of that community harbored hostility toward one of the parties. *Groppi v. Wisconsin*, *supra*, 400 U.S. at 509-510; *Irvin v Dowd*, *supra*, 366 U.S. at 728. *Irvin* and *Groppi* made clear that all litigants are entitled to a trial by an "indifferent" jury. A jury drawn from Humboldt and neighboring counties, and seated in Eureka, will be the antithesis of "indifferent".

### B. The district court has abused its discretion by relocating the trial from San Francisco to Eureka.

The district court's decision to move the trial, pursuant to 28 U.S.C. § 1404(c), is reviewable for abuse of

discretion. *El Ranco, Inc. v. First National Bank*, 406 F.2d 1205, 1219 (9th Cir.1968), cert. denied 90 S.Ct. 150 (1969).[5] In this case, all of the following facts evidence the court's abuse of discretion: (1) the court plans to move the trial from San Francisco, a neutral place, to a community in which a large percentage of the population is openly hostile toward plaintiffs and their movement; (2) the court has articulated no legitimate reason for relocating the trial, and the one reason it does offer – that the excessive force question should be decided according to a local, community standard – reflects the court's determination to have the jury decide the case based on passion or prejudice, not law; (3) the court has failed to respect plaintiffs' choice to file in federal court *in San Francisco*, rather than state court in Eureka, in order to avoid the prejudice and hostility there; and (4) a jury comprised substantially of residents of Humboldt County would face a financial

[5] It is not a foregone conclusion that the court was even allowed to act under 28 U.S.C. § 1404(c). Subsection (c) provides, "A district court may order any civil action to be tried at any place within the division in which it is pending." However, as the court acknowledges, the Northern District is not divided into divisions like, for example, the Central District is. (4/30/03 Order, p2:10-27.) Compare 28 U.S.C. §§ 84(a) and 84(c).

Whereas cases within the Circuit have held that § 1404(c) permits a court to move a trial around the district in a state like Nevada or Alaska which only has one district, no case within the Circuit has held that the same applies to a state like California, which has multiple districts. *El Ranco, Inc. v. First National Bank*, 406 F.2d 1205, 1219 (9th Cir.1969) (Nevada); *U.S. v. Rybachek*, 643 F.Supp. 1086 (D. Ala. 1986) (Alaska). To the contrary, at least one case outside the Circuit has held that "Section 1404(c) is clearly inapplicable [where the district] is not subdivided into divisions." *Buchheit v. United Air Lines, Inc.*, 202 F.Supp. 811, 815 (S.D.N.Y. 1962) (Southern District of New York).

conflict of interest in awarding damages to plaintiffs, enhanced by a natural tendency to favor its "home team."

### 1. Eureka is full of community hostility toward plaintiffs and their interests.

As a result of their work to save California's ancient forests from clear-cutting, plaintiffs and other environmental activists have become the targets of intense hostility in Humboldt County, where the timber business is central to the livelihoods, and the lives, of a high percentage of the population. Eureka is the timber capital of northern California, and the epicenter of the "Timber Wars". Currently, the huge landowner and employer Pacific Lumber, the main object of plaintiffs' protests in this case, is physically (often assaultively) extracting tree sitters from ancient redwood trees, bringing civil "SLAPP" suits against them and their supporters, and running daily radio, television, and print ads which explicitly brand environmental activists as "terrorists", and call on the community to band together in "defense". (See Pacific Lumber press releases, print ads, and videotape of television ad, Exhibits 9 & 11.) Meanwhile, the Humboldt County District Attorney has filed a highly publicized civil fraud suit against Pacific Lumber related to its environmental impact statements, provoking a backlash and recall effort in the community against the D.A. Environmental activists throughout the region face increasing epithets, taunts, threats, and physical violence. Recently, one of plaintiffs attorneys feared for his own safety while representing a tree-sitter during a criminal case in Eureka. (Declaration of Tony Serra, Ex. 2.) The Mayor of Arcata, eight miles northeast of Eureka, characterizes the hostility against environmental activists in the community

as "extreme", and declares that it would be "impossible for [plaintiffs] to receive a fair trial in Humboldt County or anywhere in timber country." (Declaration of Robert Ornelas, Ex. 2.)

The district court concludes that plaintiffs have not demonstrated there is a "wave of public passion" against them in northern California. (4/30/03 Order, pgs. 6:16-24, 8:19-28.) Plaintiffs submit that the court is simply wrong. Moreover, the court has turned a deaf ear to any further proof by declining counsel's offer, at the hearing on 4/24/03, to submit live witnesses who would testify to the hostility. In *Groppi*, *supra*, the Supreme Court took issue with a trial court's similar refusal.

It matters not, as the district judge argues, that this lawsuit directly concerns police practices, not logging. (4/30/03 Order, p5:2-6.) In each case in which the courts have addressed the problem of community hostility and prejudice, the case itself could have been narrowly characterized to make it seem like the hostility was about something else. For example, *Irvin v. Dowd*, *supra*, was about a murder. And *Groppi v. Wisconsin*, *supra*, was about a priest involved in anti-(Vietnam) war demonstrations. The salient factor in all of the cases cited by plaintiffs is the *attitude of the community toward one of the parties*. Thus, the district judge's narrow emphasis on the behavior of the police defendants is misplaced.

Moreover, the police defendants changed their policy and began using swabbed pepper spray on plaintiffs and their associates just as plaintiffs were drawing increasing attention to the rapacious logging practices through their protests. Defendants Lewis at one time worked for Pacific Lumber, and has family working there still. It is likely

that a large number of the prospective jurors summoned from this community will have close, personal ties to the logging industry, and betting otherwise will only make a vain and wasteful exercise of this trial, or worse, irrevocably prejudice plaintiffs, given the pressure to seat a jury anyway.

Nor can the court rely on voir dire to unmask the bias or avert the prejudice. In *Irvin*, *supra*, the Supreme Court specifically pointed out that jurors' statements of impartiality, as expressed in voir dire in a community where feelings run deep, can be given "little weight". 366 U.S. at 728. Furthermore, as Justice Holmes observed in his dissent in *Frank v Mangum*, *supra,* "[jurors]....are extremely likely to be impregnated by the environing atmosphere" 237 U.S. at 349. There is a substantial likelihood that voir dire in Eureka will not reveal the true hostility of the community toward plaintiffs. Similarly, voir dire is unlikely to reveal the immense pressure that jurors in Eureka will be under to protect the pecuniary interests of their friends, their family, and their neighbors. *Pamplin*, *supra*, 364 F.2d at 7. Expecting jurors to resist such pressures is simply unrealistic and, given the availability of San Francisco/Oakland for the re-trial, completely unnecessary.

The case was first tried in San Francisco in 1998. There is no community hostility in San Francisco against any of the parties in this case. No one complained that the jury was infected by bias; yet the excessive force issue was still contentious enough that the jury could not resolve it. Plaintiffs are aware of no case upholding the idea that a trial should be relocated from a neutral place to one which is thoroughly polarized, and hostile – and potentially physically dangerous – toward some of the parties and/or

their attorneys. Certainly, 28 U.S.C. § 1404(c) is not intended to authorize such a transfer. Nor can plaintiffs and their attorneys be expected to concentrate on their work at trial under such circumstances, or if they must seek the protection of U.S. Marshals, as the court's 4/30/03 Order appears to contemplate. (p9:2-12.) This case should no more be tried in Eureka than a civil rights trial in 1965 should have been moved to Selma, Alabama.

**2. The court has cited no legitimate reason for the transfer.**

Insisting – incorrectly, as shown above – that it has unfettered discretion to transfer the trial to Eureka, and "need not present 'good cause'" (4/30/03 Order, p3:3-14), the court fights shy of adducing any reason for the transfer. The reason the court finally supplies – that excessive force should be judged by a local, community standard – is both legally incorrect and illogical.

**Legally incorrect**

The court writes that "[t]he community living under the use of force at issue certainly possesses a strong interest in considering the reasonableness of the practice, and it is appropriate to submit the question to a jury drawn from that community for determination," based on its own "conscience" and "community judgment." (Order, p12:13-21). The court cites two district court cases from other Circuits: But it is well-settled that excessive force is judged by an objective standard. *Graham v. Connor*, 490 US 386, 397 (1989); *Chew v. Gates*, 27 F.3d 1432, 1441 (9th Cir.1994). The cases cited by the court do not say otherwise. In *Bennett v. Murphy*, 127 F.Supp.2d 689, 690 (WD

Pa 2000), a pre-*Saucier v. Katz* excessive force case, the court found, as this court had in *Headwaters I*, that the police officer defendant was not entitled to qualified immunity because the reasonableness inquiry was the same as the question on the merits, and thus for a jury to decide. The *Bennett* court held that the "standard of reasonableness . . . should emerge from the conscience of the community, not the mind of a single judge." Thus, the court used the term "community" to distinguish a group of jurors from a single judge, but did not opine on the scope of community. 127 F.Supp.2d at 690.

In *Wells v. Smith*, 778 F.Supp.7, 8 (D. Md. 1991), the court barred expert testimony on the question of what constituted excessive force, on the grounds that it would not be helpful to the trier of fact, per F.R.E. 702, which must decide excessive force based upon its "common sense and community sense." 778 F.Supp. at 8. Once again, the court did not opine on the scope of community.[6]

**Illogical**

In the case at bar, the court takes great pains to show that the Eureka session is ostensibly part of the San Francisco/Oakland "division" (though 28 U.S.C. § 84(a) does not say so), and that the venires for the two courthouses substantially overlap. (Order, pgs. 4:10-27, 11:9-12.) One is

[6] The court also spends considerable time in its order extolling the civics opportunity which will be created for a Northern California jury by moving the case to Eureka. (Order, p11.) But plaintiffs' constitutional and concrete right to a fair trial and impartial jury can hardly be offset by the abstract value which might accrue to prospective jurors summoned in Northern California.

forced to wonder, therefore, what different community standard the court has in mind, except for one which it knows will be infected with bias against plaintiffs.

It is also revealing of the district judge's biased motive that he continues to cast about for a justification for the transfer, after originally suggesting that it was simply because the jury in San Francisco had deadlocked. Plaintiffs are not aware of any case which supports such a reason for relocating a trial. Nor has the court substantiated such a reason. Moreover, the logic is counter-intuitive. Jury deliberations inflamed by passion and prejudice increase, not decrease, the likelihood that the jury will deadlock.

### 3. Plaintiffs' choice of forum is entitled to respect.

While moving the trial to Eureka does not constitute a change of venue, plaintiffs' choice of a federal forum *in San Francisco* is nevertheless entitled to respect.[7] In electing to file their action in federal court, plaintiffs specifically declined to pursue their case in Eureka. Their choice is consistent with the basic purpose of Section 1983 of the Civil Rights Act, which was to provide a federal forum for civil rights claims, often remote from the community where the violation occurred. See, e.g., *Mitchum v. Foster*,

[7] In its 4/30/03 Order, the district court sets up a straw man argument about venue, to hold that "plaintiffs' motion to 'change venue' is denied." (p2:25-26.) Plaintiffs never brought a change of venue motion. Venue is not the issue. The issue, rather, is plaintiffs' fundamental rights to an impartial jury, and an impartial jurist.

407 U.S. 225 (1972).[8] Plaintiffs did not, and *could not*, have filed their federal action in Eureka. Under Civil Local Rule 3-2(d), "All civil actions which arise in the count[y] of . . . Humboldt . . . *shall* be assigned to the San Francisco Division or the Oakland Division." (Emphasis added.)[9] For these reasons, and by analogy to the cases on venue, plaintiffs' choice to file their action in federal court, and thereby avoid the hostility against them in Eureka that would have attended a state-court trial, is entitled to respect.[10]

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[8] "Proponents of [§ 1983] noted that state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights." *Mitchum*, 407 U.S. at 240-242.

[9] As the court observes, the Local Rules use the term "division" for administrative convenience; it does not have statutory significance. (4/30/03 Order, p2:20-23.)

[10] "[T]here is ordinarily a strong presumption in favor of the plaintiff's choice of forum, which may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). "[U]nless the balance [of private and public interest factors] is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947). There is a "strong presumption" in favor of a plaintiff's choice of forum. *Royal Queentex v Sara-Lee*, 2000 WL 246599 *2 (Judge Jenkins), cited with approval by Judge Walker in *Williams v Bowman*, 157 F.Supp.2d 1103, 1106 (2001). In *Williams*, Judge Walker himself noted that "substantial deference" should be given to plaintiff's choice of venue, and that the "moving party" carries the burden of establishing that any transfer is appropriate. *Id*. at 1107.

**4. Jurors from in and around Humboldt County would face a fiscal conflict of interest.**

It seems clear that jurors from in and around Humboldt County would be reluctant to find for plaintiffs because, given the relatively small county budget (further depleted by the economic downturn), they would effectively have to pay plaintiffs' damages and attorneys' fees themselves. Various courts have found that change of venue is appropriate in such circumstances. See, e.g., *Berry v North Pine Elec. Co-op*, 50 NW2d 117 (Minn. 1951); *Board of Public Instruction v First National Bank*, 111 Fla 4 (Fla. 1932); *Brace v Steele County*, 78 ND 429 (N.D. 951); *Linington v McLean County*,150 NW2d 239 (N.D. 1967); *Brittain v Monroe County*, 214 Pa 648 (Pa 1906). The case cited by the district court, *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 726 F.2d 1381, 1400 (9th Cir. 1984), is distinguishable because it involved a much larger county, with a vastly larger budget, than Humboldt County.

## II. THIS COURT SHOULD ORDER THAT THE CASE BE REASSIGNED TO A DIFFERENT JUDGE, IN ORDER TO CURTAIL THE BIAS AGAINST PLAINTIFFS, AND TO FORESTALL ANOTHER APPEAL AND A THIRD TRIAL

The district court's bias has become increasingly apparent, as shown by this highly prejudicial transfer of the case, which can have no rational purpose except to ensure plaintiffs' defeat, and to vindicate the court's 1998 Order of dismissal. Specifically, the district judge has (1) relocated the trial from neutral ground, to a place which is overtly hostile toward plaintiffs and their interests,

without any legally sufficient justification; (2) plainly ignored General Order 44(E)(3), requiring random reassignment to another judge in such circumstances;[11] and (3) strained to preserve some means to award qualified immunity to defendants, by submitting the question to the jury, despite the fact that this Court has already firmly decided qualified immunity against defendants, and there is no legal or rational basis for submitting the question to the jury.[12] (See Plaintiffs' submissions re qualified immunity, and the district court's 4/28/03 Order, Ex. 10.)

While it is true that recusal is ordinarily reserved for situations in which "bias stems from 'extrajudicial source[s] and not from a judge's conduct or rulings during the course of judicial proceedings," *Cordoza v. Pacific States Steel Corp.*, 320 F.3d 989, 998-999 (9th Cir. 2003) (internal quotes and cites omitted), recusal may be appropriate in a case,

[11] General Order 44(E)(3) provides: "Whenever a civil or criminal case is transferred from one Courthouse of the Court to another, the Clerk shall randomly reassign the case to a Judge designated to hold court at the receiving Courthouse." (G.O. No. 44, "Assignment Plan", amended through 1/30/03.) The Court's failure to direct the clerk to randomly reassign the case is a flagrant abuse of discretion, and further evidence that the district judge has its own agenda in remaining on this case. Why else would the court ignore such a clear rule, raised by plaintiffs both in their motion, and at oral argument? Notably, the court does not say a word about General Order 44(E)(3) in its Order of 4/30/03.

[12] In its Model Civil Jury Instructions, this Court does not provide a qualified immunity instruction, but rather makes clear that qualified immunity is only for a jury to consider in a rare case, where an issue of fact prevents the court from determining qualified immunity. No. 11.3 (Comment Only). Such is not the case here, where both the district court and this Court have decided qualified immunity against defendants, and no purpose could be served by submitting this vexing legal question to the jury, after a trial has been had.

such as this one, where the bias and/or appearance of bias is apparent within the four walls of the case by the rulings and/or statements of the judge.

Indeed, the district court's bias first began to emerge in 1998, when it dismissed the municipal entities, and granted qualified immunity to the commanders, Sheriff Lewis and Chief Deputy Philp. The court held that the "uncontroverted evidence presented at trial unequivocally supports the conclusion that the officers acted reasonably in using OC [pepper spray] as a pain compliance technique in arresting plaintiffs," 1998 WL 754575, *4. In reversing and remanding for a new trial, this Court strongly rebuked the district court, finding that it had misapplied the Supreme Court test for excessive force established in *Graham v. Connor*, improperly weighed the evidence against plaintiffs, and clearly erred in stating that plaintiffs had failed to present certain evidence, which they clearly presented. *Headwaters I*, 240 F.3d at 1197, 1199, 1204-1205. (See footnote 3, supra.)

## CONCLUSION

For all the foregoing reasons, and in order to conserve everyone's resources and to ensure that plaintiffs receive a fair trial by an impartial jury, plaintiffs ask this honorable Court to issue a Writ of Mandamus or other supervisory order directing the district court to (1) return the trial to the neutral place of San Francisco, and (2) reassign the case to a judge other than Judge Walker for trial.

Respectfully submitted,

DATED: May 6, 2003:

Ben Rosenfeld
Robert Bloom
Dennis Cunningham
William Simpich
J. Tony Serra
Brendan Cummings
Attorneys for Plaintiff-Petitioners

**CERTIFICATE OF SERVICE**

I certify that I served the within Petition for Writ of Mandamus and Exercise of Supervisory Authority on the respondent, Honorable Vaughn R. Walker, U.S. District Court Judge, Northern District of California, by delivering a true copy to the Clerk's Office, in an envelope addressed to Judge Walker, and on the real parties in interest, defendants in the underlying case, by emailing, and thereafter mailing a true copy to their attorneys of record, Nancy Delaney and William Mitchell, at their office at 814 7th Street, Eureka, CA 95501, on May 6, 2003.

Ben Rosenfeld

**CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULE 32-1**

I certify that the within Petition is proportionately spaced, has a typeface of 14 points, and contains 5,335 words.

Ben Rosenfeld