NO. 18-279

In the Supreme Court of the United States

FRANK KONARSKI, ET AL.,

Petitioners,

–v–

CITY OF TUCSON, ARIZONA ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

JAMES W. STUEHRINGER
COUNSEL OF RECORD
WATERFALL, ECONOMIDIS, CALDWELL, HANSHAW & VILLAMANA, P.C.
5210 EAST WILLIAMS CIRCLE, SUITE 800
TUCSON, AZ 85711
(520) 745-7824
JSTUEHRINGER@WATERFALLATTORNEYS.COM

OCTOBER 4, 2018 *COUNSEL FOR RESPONDENTS*

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

TABLE OF CONTENTS

APPENDIX TABLE OF CONTENTS

TABLE OF AUTHORITIES

COUNTER STATEMENT OF JURISDICTION

The Petition for writ of certiorari is jurisdictionally untimely.

After the Ninth Circuit affirmed the district court's orders, it denied Petitioners' petition for panel rehearing and *en banc* review on February 26, 2018. The deadline for Petitioners to file their petition for writ of certiorari was May 27, 2018.

On May 12, 2018, Petitioners applied to extend the time to file a petition for a writ of certiorari ninety days, from May 27, 2018, to August 27, 2018. Docket No.17A1288. Justice Kennedy denied the application on May 22, 2018. *Id.*

On May 26, 2018, Petitioners filed a petition for writ of certiorari. On June 29, 2018, the Clerk determined that the petition did not comply with the content requirements of Rule 14 and the appendix did not include the documents required by Rule 14.1(i): "the opinions, orders, findings of fact, and conclusions of law, whether written or orally given and transcribed, entered in conjunction with the judgment sought to be reviewed." Sup. Ct. R. 14(5). The Clerk granted Petitioners sixty days to correct the petition and stated: "When making the required corrections to a petition, no change to the substance of the petition may be made."

The Petition now before this Court is not in compliance with the Clerk's leave to amend pursuant to Rule 14.5. The instant Petition contains new arguments, additional authority, and substantive changes, thereby

circumventing Justice Kennedy's denial of an extension. *E.g.* Pet.i-iii, 2-11.[1] The Petition also removes an argument that, if this Court were to review and decide, would control the sole remaining case Petitioners have against Respondents.[2] Because the Petition is substantively different from the one timely filed, it is untimely, improper, and should not be considered by the Court.

STATEMENT OF THE CASE

This is the ninth in a series of lawsuits filed by Petitioners against the City alleging claims related to deprivation of constitutional rights through the City's administration of its Section 8 housing program. Petitioner's Appendix ("Pet.App.") at 3.

Pursuant to 42 U.S.C.S. § 1437f and 24 C.F.R. 982.1, the City administers the Section 8 Housing Choice Voucher Program which allows eligible applicant families to receive vouchers for rent subsidies. The program authorizes assistance payments "[f]or the purpose of aiding low-income families in obtaining a decent place to live." (42 U.S.C. § 1437f(a).) Under this program, after the family selects a suitable unit, the

---

[1] The statement of the case expands the previous Nature of the Case section, May 26, 2018 (Petition ("Pet.") at 2-6), from approximately 700 words to over 2,000 and includes new legal authority at Pet.7.

[2] May 26, 2018 Pet.28-32 regarding a class-of one equal protection claim, a theory now pending on remand in *Konarski v. City of Tucson*, Case No. CV 4:11-00612-TUC-LAB (D. Ariz.).

City inspects the premises to ensure it complies with federal and local housing requirements. If the tenancy is approved, the City enters into a contract with an approved landlord to make rental subsidy payments to subsidize occupancy by the family.

Petitioners run a rental housing business in Tucson, Arizona that until 2001 rented exclusively to Section 8 housing tenants. In 2001, after repeated complaints regarding discriminatory, retaliatory, and boorish conduct by Frank Konarski towards tenants and the employees who administered the Section 8 Housing program for the City of Tucson ("the City'), the City determined it would no longer enter into Section 8 housing contracts with Petitioners.

In August 2014, two of Petitioners' tenants breached their lease agreement after receiving Section 8 housing vouchers with a different landlord. Petitioners sued the City. The gravamen of their complaint was that by allowing Petitioners' tenants to receive Section 8 housing vouchers, the City engaged in restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 and denied Petitioners' constitutional rights to substantive due process, procedural due process, equal protection, and ability to engage in interstate commerce in violation of 42 U.S.C. § 1983.

The City filed a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Applying the standard articulated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 551 (2007), the district court dismissed each of Petitioner's federal claims because they were unsupported by evidentiary facts and relied on only labels, conclusions, and formulaic recitations of the elements. On November 28, 2017, the Ninth

Circuit affirmed dismissal in a memorandum decision designated as not appropriate for publication and not precedent.

During the proceedings, the City filed a motion for an order declaring Petitioners vexatious litigants. Petitioners received notice and filed a response in opposition, but explicitly refused the opportunity for a hearing. Pet.App.8-9. Because Petitioners alleged that the City's recitation of their litigation history was inaccurate, the district court based its decision to grant the motion on its own review of the dockets, pleadings and motions in every case filed by Petitioners in the United States District Court, District of Arizona. On review, the Ninth Circuit found Petitioners had received adequate notice and opportunity to be heard, and ruled the district court's substantive findings concerning Petitioners' litigation history were proper under *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1057-58 (9th Cir. 2007). Pet.App.8-9.

REASONS FOR DENYING THE PETITION

The Petition should be considered untimely such that this Court is without jurisdiction to review the decision below.

Even if this Court has jurisdiction, this case presents no reason, much less a compelling one, to grant a writ of certiorari. *See* Sup. Ct. R. 10. Petitioners seek review simply because they disagree with the lower courts' determination that their complaint lacks merit. This is not a compelling reason justifying review. *Id.*

Petitioners devote their entire argument section attempting to show that the "Ninth Circuit opinion errs." Pet.12 (heading for arguments on pages 12 through 30). The Ninth Circuit did not err, but even if it did, that would not justify this Court's review. *See* Sup. Ct. R. 10; Stephen M. Shapiro et al., *Supreme Court Practice* 352 (10th ed. 2013).

The district court order dismissing the complaint involved a straightforward and correct application of the pleading standards required to survive a motion to dismiss under Rule 12(b)(6) as articulated in *Twombly*, 550 U.S. at 555. Pet.App.19-20. The Ninth Circuit affirmed holding that Petitioner's complaint lacked the requisite factual support to survive a motion to dismiss under Rule 12 (b)(6). Pet.App.10-13. There is no division of authority on the requirement of factual support to survive a motion to dismiss that would warrant review.

Petitioners incorrectly claim that the question of whether housing rental businesses are "per se" interstate commerce is before this Court. *E.g.*, Pet.ii, 12, 15. Whether or not this is true was not the basis on which the Ninth Circuit affirmed dismissal. Pet.App.10-13. A determination that a local housing rental business is *per se* interstate commerce would still not provide the necessary factual support for Petitioners' Sherman Act and § 1983 claims to proceed.

Petitioners' argument that the Ninth Circuit failed to properly apply *Pike v. Bruce Church*, 397 U.S. 137, 145 (1970), was raised for the first time in the Petition for Certiorari and is improper. Pet.22-23, 25-26. Furthermore, *Pike* concerns the validity of a state statute affecting interstate commerce. Petitioners do

not contest the legality of 42 U.S.C.S. § 1437f and 24 C.F.R. 982.1. *Pike* is thus inapposite.

Petitioners also argue it was error for the Ninth Circuit to affirm the vexatious litigant order against them because it was based on their litigation history that the district court compiled from its review of court dockets. Conveniently, Petitioners omit the majority of the district court's vexatious litigant order that contains this history. Pet.App.52-53. The Ninth Circuit affirmed the vexatious litigant order, correctly ruling that the district court had complied with *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1050 (9th Cir. 2007), in issuing the order. Pet.App.8-9. There is no circuit division on the application of *Molski* that would warrant review.

Finally, Petitioners misconduct merits denial of review. Not only did Petitioners substantively change their petition without leave, in contravention of Rule 14.1(i) and the Clerk's June 29, 2018 letter, Petitioners intentionally omitted the majority of the vexatious litigant order at issue in their Appendix. Pet.App.52-53. Furthermore, Petitioners falsely certified in their May 12, 2018, application for an extension and in their May 16, 2018, petition that they had served those documents on Respondents. They did not. Petitioners continued disrespect of the judicial system, even here, before the highest Court in the United States, merits denial of their Petition.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

JAMES W. STUEHRINGER
COUNSEL OF RECORD
WATERFALL, ECONOMIDIS, CALDWELL, HANSHAW & VILLAMANA, P.C.
5210 EAST WILLIAMS CIRCLE,
SUITE 800
TUCSON, AZ 85711
(520) 745-7824
JSTUEHRINGER@WATERFALLATTORNEYS.COM

COUNSEL FOR RESPONDENTS

OCTOBER 4, 2018