No. 18-279

IN THE
SUPREME COURT OF THE UNITED STATES

FRANK KONARSKI, ET AL.,

Petitioners,

-vs-

CITY OF TUCSON, A BODY POLITIC, ET AL.,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

A. Introduction

The Brief in Opposition ("BIO") by City of Tucson officials ("Respondents") encompasses a charade of, *inter alia*, empirically discernible falsehoods, other misrepresentations and personal *ad hominem* attacks against Petitioner. This charade is legally *inconsequential*—done by Respondents to distract and deflect from the incontrovertible circumstances that make the Petition ideal for this Court's issuance of a writ of certiorari: The Petition concerns legal questions emanating from the appeal of a case dismissal by the District Court of Arizona ("District Court") per Rule 12(b)(6) of the Federal Rules of Civil Procedure ("FRCP"). Inherently, this means there are no convoluted, up-for-debate facts with which to wade through in order to address the discord among the circuit courts and this Court concerning the appellate ruling in this case.

The crux of this case revolves around the Ninth Circuit's divergence from the established legal jurisprudence—stemming from the underlying legal guidance of *Wickard v. Filburn*, 317 U.S. 111 (1942) and cases thereafter—that housing rental businesses are legally a part of the federally protected domain of interstate commerce. This Ninth Circuit's divergence has emerged in the course of Petitioners' seeking relief from the non-state-sanctioned interference conduct of Respondents directed at the commerce of Petitioners' housing rental business.

As a preface to the instant case—to appreciate

the repugnancy of Respondents' misconduct—another Ninth Circuit panel, in *Konarski v. City of Tucson,* Case No. CV-4:11-00612-TUC-LAB (D. Ariz.), *rev'd in part*, 599 Fed. Appx. 652 (9th Cir. 2015) (No. 12-17703) ("Baltazar Personal Vendetta-Revelation Case"), previously found legally sufficient video evidence of "**"personal vendetta"**-driven local governance directed at Petitioners. *Id.* at 653-654. A screen-grab of such video evidence is below:

—Baltazar's revealing
"'personal vendetta'" admission receipt
http://www.youtube.com/watch?v=Fg7gmOk6cno[1,2]

Depicted above is Bonita Baltazar. Ms. Baltazar's then-tenancy at Petitioners' inspection-passed housing unit was subsidized with the application of a

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[1] *See* Pet. 5 n.1.

[2] *See id.* n.2(judicial notice authority).

monetary housing voucher issued through the federal Section 8 Housing program Respondents locally administer. As found in the video evidence, in 2010, Ms. Baltazar publicly revealed Respondents' city administrator's audacious admission of a "'personal vendetta'" with Petitioners as the basis for why she (and other tenants) was denied continued residency at Petitioners' inspection-passed housing rental as a Section 8 Housing tenant. *Id.; see* Pet. 2-7.

Now, the instant case for certiorari review concerns Respondents' expansion of such misconduct—their interfering with and restraining Petitioners' commerce of engaging in housing rental transactions with, *nota bene*, their *private* (i.e.,*non*-subsidized/*non*-Section 8 Housing) tenants. In particular, this case focuses on Respondents' then-latest interference with and caused 2014 loss of Petitioners' private tenancy of Haley Dye and Carlos Solis (collectively,"Tenants Dye"): Petitioners' attorney filed the complaint—relying on the legal precedents that Petitioners' housing rental business is a legally *per se* interstate commerce business—to assert a Hybrid *Per se* Sherman Act Claim, Commerce Clause Claim, and Substantive Due Process Claim. Pet. App. 57-149 (Compl.).

The Ninth Circuit affirmed the dismissal of these federal claims, finding Petitioners had pled no appreciable connection to interstate commerce. Pet App. 11-12. Petitioners assert this affirmation suffers from the exponential fallacy of disregarding the legal precedents that make it clear that Petitioners' housing rental business is a *per se* interstate commerce business, and, thus, such claims

are viable. Pet. 12-29. The Ninth Circuit also affirmed the issuance of a vexatious-business litigant injunction against Petitioners. Pet. App. 7-9. Petitioners assert this affirmation is erroneous because the said injunction was issued without due process. Pet. 29-31.

Respondents' BIO seeks to muddy clear waters. It provides no legal substantiation to prevent this Court from, *inter alia*, ensuring a uniform application of the *per se* interstate commerce classification and the effect of such application with respect to non-state-sanctioned, unilateral municipal action, and also inherently addressing related issues of civil rights and due process—particularly when the Ninth Circuit's opinion demonstrates an untenable discord. *E.g.*,Pet. i,13-15, 19-21.

B. Arguments

I. Respondents' BIO: a frivolous attempt to muddy clear waters to avoid certiorari review.

Respondents futilely attempt to create *false* doubt about the Petition's suitability: **(1)** Respondents falsely assert jurisdictional untimeliness, making an—empirically discernible—underlying false assertion of the existence of a new argument; **(2)** Respondents misleadingly omit the across-the-board precedent-conflicting nature of the Ninth Circuit's errors to undercut their certworthiness; **(3)** Respondents specifically disregard how the Ninth Circuit's opinion conflicts

with legal precedents on *per se* interstate commerce identification and its effect on non-state-sanctioned, unilateral municipal action by Respondents; and **(4)** Respondents deftly disregard how the Ninth Circuit's opinion defies the sanctity of due process in affirming an extreme sanction.

1. The Petition is timely, giving this Court jurisdiction.

In fallaciously asserting untimeliness, Respondents state that the current Petition is substantively new in terms of argument when compared to Petitioners' prior imperfect May 2018 Petition ("Imperfect Petition"), which would not be permitted under the Clerk's extension to correct the Imperfect Petition. BIO 1-2,4.

a. Petition is timely: The Petition encompasses *no* new arguments, its only having been perfected per the rules within the extension allowed by the Clerk.

Granted, the current Petition now before this Court is different from the previous 35-page Imperfect Petition—but it is *permissibly* different: Per the Clerk's instructions to follow applicable rules, the current Petition—a virtual cut-and-paste of the content of the Imperfect Petition—was perfected. This involved reformatting/adjusting its content: adding more headings/subheadings, tables of content and authority; rephrasing the content as necessary with respect to the headings/subheadings

for smoother transitions; converting the content text to a permissible font type/size/spacing/margin set; and discarding unnecessary words to meet the word-count limit, etc.[3,4]

Such perfection of the Petition does *not* translate into new untimely arguments. Nor does it remove this Court from being able to address Petitioners' long-standing arguments.[5]

The Petition is timely because it encompasses *no* new argument not previously found in the now-replaced Imperfect Petition. Indeed, Respondents do

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[3] In BIO 2 n.1, Respondents misleadingly assert a disparity of "approximately 700 words to over 2,000 words" between one section of the Imperfect Petition and what they say is the same section found in the current Petition. How inconsequential—even if accurate! Respondents' approximation is erroneous: First, there actually is no specifically entitled "Nature of the Case" section heading in the current Petition for such a comparison to even be made (but, instead, many headings/subheadings therein). Further, such a word-allocation disparity is *not* absolutely indicative of new arguments—a disparity can be due to the reallocation/rephrasing of words as part of combining and/or creating headings/subheadings for clarity. No cited legal authority substantively changes the arguments between the Imperfect Petition and current Petition.

[4] In BIO 2 and n.2, Respondents misleadingly assert that Petitioners "remove[d]"/reduced the reference to the equal protection claim of the Baltazar Personal Vendetta-Revelation Case (CV-4:11-00612-TUC-LAB) from the Petition. How inconsequential—even if accurate! This case's focus is the inconsistent application of the *per se* interstate commerce classification and its effect on the Hybrid *Per se* Sherman Act Claim, Commerce Clause Claim, and Substantive Due Process Claim. These three federal claims are viable *regardless* of any equal protection claim.

[5] *See* n.4,*supra.*

not legitimately identify, much less explain, what argument is new in the Petition. It is no surprise, then, that Respondents' 28-page BIO Appendix does not even include any excerpt of the Imperfect Petition to compare with the Petition—because there is *no* truth to the baseless assertion of a new argument.

b. Petition is timely: Respondents *empirically falsify* information to perpetuate the *false* idea that the Petition is untimely because it (allegedly) encompasses a new argument.

Respondents' empirically false statement:

> 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.

BIO 5 (emphasis added). This quoted statement of Respondents empirically defies reality: The *Pike* argument expressly—repeatedly—appears in, e.g., Petitioners' Petition for Rehearing (ReplyApp.1-11) filed in the Ninth Circuit, and, of course, in the subsequent Imperfect Petition (ReplyApp.12-21) before again appearing in the current Petition (at 22-26) in this Court.[6] As such, Respondents' new-argument assertion is based on their fabrication.

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[6] Relevant pages in appendix.

2. The Ninth Circuit errors are certworthy.

Respondents misleadingly downplay the Ninth Circuit's errors. BIO 5. Such errors are actually certworthy since—in addition to concerning important subjects—they highlight conflicting judicial positions across the board.

For example, in its dismissal order, the District Court states it "is not persuaded by the case law[, e.g., *Russell v. United States*, 471 U.S. 858, 862 (1985)] cited by [Petitioners] in support of their claim that their housing rental business is part of interstate commerce" because—it critically states—such "case law [*Russell*] relates to [a] federal [criminal] arson statute...." Pet.App.24 n.4.

In *direct* contradiction of the District Court's dismissal order (in the Ninth Circuit), the Fifth Circuit, as found in the civil case of *Groome Resources,Ltd. v. Parish of Jefferson*, 234 F.3d 192,207 (5th Cir. 2000), specifically holds that the same criminal case of *Russell* as one that—actually—instills the legal conclusion, in a civil case, that a housing rental transaction "'unquestionably' is an 'activity that affects commerce'" (quoting *Russell*, 471 U.S. at 862)). The Ninth Circuit, in affirming the District Court's dismissal, defies the Fifth Circuit (and other circuits and this Court) on this issue.

3. Respondents erroneously assert that even if the Ninth Circuit's opinion conflicts with legal precedents, such conflicts do not justify certiorari review of the FRCP Rule 12(b)(6) dismissal.

Relevant pled context (Pet. App. 72-109 (Compl.)):[7] As with the then-latest 2014 loss of Petitioners' *private* Tenants Dye tenancy—despite public policy to abstain from interfering with a private business transaction between parties—Respondents, in defying cease-and-desist notices, have weaponized monetary housing vouchers to *knowingly* interfere with, as opposed to respecting, the natural duration of Petitioners' existing private housing rental transactions.

In their then-latest tenancy interference and disregard of warnings, Respondents specifically misused such monetary vouchers as part of their 'carrot-and-stick' approach: to simultaneously bribe Tenants Dye with a financial incentive to knowingly breach their existing private housing rental transaction with Petitioners and boycott their business, and also threaten Tenants Dye with the loss of such a financial incentive forever if such tenants failed to leave and boycott Petitioners' housing rental business and patronize other housing rental businesses favored by Respondents that

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[7] In BIO 3, Respondents violate the FRCP Rule12(b)(6) dismissal standard by slyly interjecting a fallacious and out-of-context backstory to legitimatize themselves and falsely paint Petitioners.

compete with Petitioners—competitors of whom, by the design of Respondents' "'unilateral municipal action'" (Pet. 16(citation omitted)), benefit through no action of their own in receiving the artificial influx of Petitioners' existing private tenants/customers, like Tenants Dye. *See generally* Pet. 12-28.

Considering such pled harm, the Ninth Circuit affirmed the dismissal of Petitioners' interstate commerce-related federal claims per FRCP Rule12(b)(6). This affirmation defies legal precedents. Respondents argue not so.

Specifically, Respondents fallaciously argue that regardless of whether the Ninth Circuit erred in *defying* precedents, such "was not the basis on which the Ninth Circuit affirmed dismissal" (BIO 5), attempting to evade certiorari review with vagueness:

> The Ninth Circuit affirmed holding that Petitioners' complaint lacked the requisite factual support to survive a motion to dismiss under Rule 12(b)(6).

BIO 5. Notably, Respondents' BIO *fails* to identify what requisite factual support was found lacking to lead to the complaint dismissal.

What was the lacking requisite factual support?

Answer: For each of the three dismissed federal claims—because the Ninth Circuit's opinion defies precedents in not recognizing the *per se* interstate commerce identity of Petitioners' housing rental business and its effect on non-state-sanctioned, unilateral municipal action—

Respondents' BIO *fails* to specifically acknowledge that the Ninth Circuit's opinion exponentially errs on the basis of its *incorrect* underlying holding that there was no pled requisite fact of a legally appreciable connection to interstate commerce to trigger any such claim. This erroneous holding is exponentially pervasive:

- On the supposed factual deficiency of the Hybrid *Per se* Sherman Act Claim, the Ninth Circuit erroneously opines,**"[Petitioners'] pleadings fail to indicate how [Respondents'] purely local activities are related to interstate commerce"** (Pet. App. 11 (emphasis added))—so opining by *defying* precedents on the *per se* interstate commerce identity of Petitioners' business and how federal protection is particularly afforded to Petitioners' *per se* interstate commerce transactions **regardless** of the localness of the offending non-state-sanctioned, unilateral municipal action (Pet 15-21).

- On the supposed factual deficiency of the Commerce Clause Claim, by *first failing* to recognize the *per se* interstate commerce identity of Petitioners' business, the Ninth Circuit erroneously opines,

"[Petitioners] failed to explain how [Respondents'] decision to provide [monetary vouchers] to [Petitioners'] tenants favored in-state economic interests over out-of-state interests, or incidentally burdened interstate transactions" (Pet. App. 11-12 (emphasis added))—so opining by *defying* precedents, namely *Pike*, that make clear Respondents' conscientious unilateral action to interfere with transactions is *per se* unlawful because (i) **it lacks a public interest in the sense of, *inter alia*, never having state authority** to so interfere (and defying *per se* public policy of non-interference), and (ii) **it results in inexcusably excessive commerce burdens** (Pet. 21-26).[8]

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[8] Respondents misrepresent that *Pike* is "inapposite" because it "concerns the validity of a state statute...." BIO5-6. Misrepresentation for two reasons: (1) *Pike* does *not* stand for the proposition that municipalities can freely interfere with interstate commerce because their action is merely not a state statute; and (2) Respondents' self-admitted "unilateral municipal action" (Pet. 16 (citation omitted)) is all the more prohibited because it is neither a state action nor authorized by the state, *e.g., Anheuser-Busch, Inc. v. Goodman*,745 F. Supp. 1048,1051-52 (M.D.Pa. Sept. 21,1990)(citation omitted), all of which *Pike* underscores.

- On the supposed factual deficiency of the Substantive Due Process Claim, by *first failing* to recognize the *per se* interstate commerce identity of Petitioners' business, the Ninth Circuit erroneously opines,**"[Petitioners'] pleadings do not show how [Respondents'] conduct deprived them of life, liberty, or property, or explain how its behavior could be considered 'conscience-shocking'"** (Pet. App. 12 (emphasis added))—so opining by *defying* precedents that **recognize freely engaging in interstate commerce as a "substantive right"** (Pet. 26-27 (citations omitted)), and, given the deliberate indifference test and other precedents, *failing* to recognize that because Respondents certainly do not act as police officers in making split-second decisions to interfere with Petitioners' substantive right to freely engage in the commerce of housing rental transactions and, instead, as in the instance of Tenants Dye, Respondents have actually defied cease-and-desist notices, etc., Respondents' unilateral municipal action is an

> act of **deliberate indifference to Petitioners' said substantive right that is legally *per se* conscience shocking** (Pet.26-29).

Respondents' silence on this is deafening.

4. Respondents *avoid* addressing the due process flaw of the *de facto sua sponte* extreme sanction of a vexatious-business litigant injunction.

Respondents do *not* disprove that the District Court issued its *de facto sua sponte* vexatious-business litigant injunction against Petitioners based on its own "factual summary" expedition (Pet.App. 52-53)—all *without* Petitioners' receiving prior notice and opportunity to defend themselves from such. *See* BIO 6; Pet. 29-31.

Admittedly, there are scenarios in which—because of *exigent* circumstances—a court can dispense with due process to summarily issue a sanction.

No such scenario existed here.

Neither the Ninth Circuit nor Respondents cite any case law in which due process can be dispensed with when no such scenario exists. In being accused, and even if "'richly deserved,'" Petitioners were entitled to "'indispensable prerequisites'" of minimal due process. Pet.29-31 (citations omitted).

In BIO 6, Respondents attack Petitioners' having—openly—included an excerpt highlight of the

District Court's effective concession to its *de facto sua sponte* proceeding *without* Petitioners' notice-and-opportunity due process (Pet. App. 52-53). While intending to bury the highlight, Respondents inadvertently emphasize Petitioners' point about the depth of such due process violation: Respondents' BIO Appendix includes the whole said *de facto sua sponte* injunction—all approximately 28 pages that, also without qualifying and mitigating circumstance consideration, were *never subject to any* due process scrutiny. BIOApp. 1a-28a. The failure to vacate this due process-violation by-product is untenable.

II. Respondents' counsel, James Stuehringer, ironically demonstrates his own misconduct in attempting to put Petitioners in a bad light.

Unfortunately, Respondents' counsel, James Stuehringer, hurls false personal *ad hominem* attacks against Petitioners, believing such can distract this Court from his unpersuasive BIO. *Id.* at 6. Petitioners deny his accusations as false.

To appreciate his audacity to mislead in the BIO, the context of Mr. Stuehringer's troubling, "'[h]eavy-hitter'"[9] law practice is needed:

- He has used a now-disbarred prosecutor to attempt to influence a judge assigned to his son's criminal case in which his son was

[9] Doc.321 at 5 (citation omitted),*Konarski,* Case No.CV4:11-00612-TUC-LAB (D. Ariz.).

charged with trafficking drugs while possessing a handgun for which he faced a three-year prison sentence (Jeffrey Toobin, *Killer Instincts,* THE NEW YORKER, Jan. 17, 2005, at 54; *Soto Fong v. Ryan*, No.CV-04-68-TUC-DCB, 2011 U.S. Dist. LEXIS 87110, at *13 (D.Ariz. Aug. 5, 2011)).

- He has sought to intimidate, threaten, disparage and harass Ms. Baltazar and Petitioners—even having his handgun-toting representative do it for him, prompting an attorney's complaint (Reply App. 30-34; *see* Pet 6).

- He has made other false and unhinged statements to other courts—including falsely informing the Ninth Circuit that Petitioners never provided a copy of the subject Imperfect Petition to, notably, *even this Court* and Respondents, prompting Respondents to point out the absurdity of such a statement (Reply App. 22-29).

- He has, *ironically*, falsified mailing certificates, his resorting to his default unapologetic and disingenuous remark—e.g., the

"**[o]n the off chance that I did not mail or email** [a copy of court filing]" remark ((Reply App. 28) (emphasis added))—when attempting to 'save face' while being **compelled** to make belated service.

- He has caused attorneys, like Richard Lougee and David Lipartito, to pursue bar complaints against him (Reply App. 27).

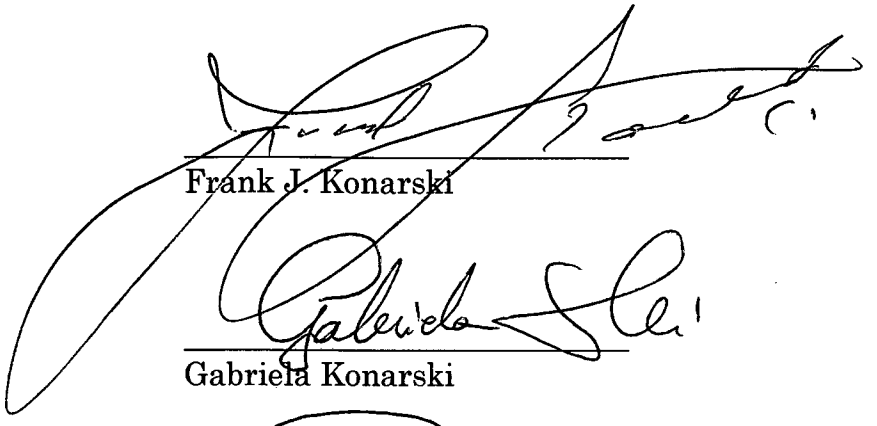
In short, Mr. Stuehringer's words cannot be accepted at full value.

CONCLUSION

Counsel will argue Petitioners' case.

The Petition should be granted.

RESPECTFULLY SIGNED this 16 day of October 2018.



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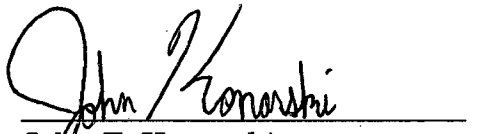

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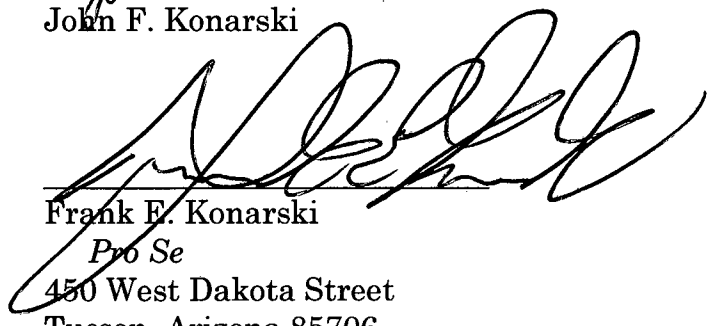

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