No.

IN THE

Supreme Court of the United States

TIBERIU KLEIN, JOHN XYDAKIS, PETITIONERS

v.

CRISTINA ZVUNCA, DANIEL O'BRIEN, WINTERS SALZETTA O'BRIEN & RICHARDSON, ADAMS POWERS, STEVEN LADUZINSKY, LADUZINSKY & ASSOC. P.C., GREYHOUND LINES INC., FIRST GROUP PLC, LAIDLAW CORP., PAUL BOZYCH, CLAUSEN MILLER LLP, WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP, NIELSEN ZEHE & ANTAS P.C., MICHAEL VRANICAR, MOTOR COACH IND. INC., MOTOR COACH IND. INT'L. INC., PATTON & RYAN LLC

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

1. Did the Seventh Circuit violates its own Standards and Rules and violate petitioners' due process rights in falsely accusing an attorney of pretense, fraud, lying, and incompetence in a judicial opinion, without any notice and opportunity to be heard?

2. Did the Seventh Circuit violate petitioners' due process rights in *sua sponte* ordering that sanctions would be imposed against petitioners for any further actions related to the case?

3. Did the Seventh Circuit err by allowing the district court to state only subject matter jurisdiction would be briefed, but then claim the district court dismissed on the merits and petitioners waived any merit's arguments on appeal, without first giving petitioners an opportunity to respond?

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On March 9, 2018, the Seventh Circuit Court of Appeals issued its published opinion (1a-6a). The Seventh Circuit affirmed the District Court's opinion dismissing with prejudice (7a-27a, 29a-30a). On April 9, 2018, the Seventh Circuit denied Petitioners' Petition for Rehearing & Rehearing En Banc (28a).

JURISDICTION

The Seventh Circuit denied the petition for rehearing on April 9, 2018 (28a). This petition for writ of certiorari is filed within 90 days of the decision in accordance with Supreme Court Rule 13. This Honorable Court has jurisdiction pursuant to 28 U.S.C. §2101(c).

RELEVANT PROVISIONS INVOLVED

Seventh Circuit Standards for Professional Conduct, Courts' Duties to Lawyers

COURTS' DUTIES TO LAWYERS

1. We will be courteous, respectful, and civil to lawyers, parties, and witnesses. We will maintain control of the proceedings, recognizing that judges have both the obligation and the authority to insure that all litigation proceedings are conducted in a civil manner.

2. We will not employ hostile, demeaning, or humiliating words in opinions or in written or oral communications with lawyers, parties, or witnesses.

> 6. We will give the issues in controversy deliberate, impartial, and studied analysis and consideration.
>
> 8. [W]e will allow lawyers to present proper arguments and to make a
> complete and accurate record.
>
> 12. We will bring to lawyers' attention uncivil conduct which we observe.

Rules for Judicial Conduct and Judicial Disability Proceedings Guide to Judiciary Policy (May 2016)

> (h). Misconduct. Cognizable misconduct (1) is conduct prejudicial to the effective and expeditious administration of the business of the courts. Misconduct includes, but is not limited to: … (D) treating litigants, attorneys, or others in a demonstrably egregious and hostile manner.
>
> An allegation that a judge treated litigants or attorneys in a demonstrably egregious and hostile manner while on the bench is also not merits-related.

Code of Conduct for United States Judges

> Canon 2(A)
>
> Respect for Law. A judge to respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
>
> Canon 3(A)(3)

> A judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity. A judge should require similar conduct of those subject to the judge's control, including lawyers to the extent consistent with their role in the adversary process.
>
> Commentary Canon 3(A)(3)
>
> The duty to be respectful includes the responsibility to avoid comment or behavior that could reasonably be interpreted as harassment, prejudice or bias.

STATEMENT

In 2002, in Colorado, a Greyhound bus ran over and killed Claudia Zvunca in Colorado with her seven year old daughter (Cristina) present. Claudia was married to Illinois resident Tiberiu Klein. Klein is not Cristina's adoptive or biological father.

Several months later, Klein filed a wrongful death case in Cook County, Illinois against Greyhound. Greyhound removed the case to the District Court for the Northern District of Illinois, and then had it transferred to the District Court of Colorado.

In 2004, Cristina filed a wrongful death case in Cook County, Illinois against Motor Coach Industries ("MCI"), the bus maker. Months later, Cristina added Greyhound. Cristina's complaint also included counts for her own personal injuries from seeing the incident.

MCI and Greyhound wanted both cases in Colorado, where damages were capped. But the

Colorado District Court and Cook County court refused to dismiss either suit or grant an avenue for consolidation. The cases proceeded separately.

In 2012, the Cook County court settled Cristina's case and tried to bind Klein to the settlement. The Colorado District Court then dismissed Klein's case as moot. The Illinois Appellate Court reversed (*Cushing v. Greyhound*, 2013 IL App (1st) 103197). That opinion also revealed Cook County judges wrongly helped the settling attorneys remove another judge and prior attorneys to take over Cristina's case. After remand, two Cook County judges "retired." The Chicago Tribune ran a full page Sunday story.

Because the Cook County settlement was vacated, the Tenth Circuit reversed the Colorado District Court's dismissal of Klein's case (*Klein v. Greyhound*, 530 Fed.Appx. 672 (10th Cir. 2013)). On remand, the District Court then dismissed Klein's case for lack of subject matter jurisdiction.

Illinois grants one year to refile for a dismissal of lack of subject matter jurisdiction from a Federal court. Klein then timely refiled a loss of consortium and wrongful death case in Cook County.

The Probate Division of the Circuit Court of Cook County ordered that Klein and Cristina keep their cases separate. Cristina's complaint even disclaimed seeking damages for Klein. Also, Defendants objected to consolidating Klein's case with Cristina's. They also objected to Klein's intervening in Cristina's case to have one trial with two verdict forms. Hence, the two cases again proceeded separately.

In 2016, Cristina's attorneys claimed they settled for $4.95 million, and the settlement again bound Klein, who received nothing. Cristina, now an adult, lives in Romania. Klein filed a §1983 action in the District

Court for the Northern District of Illinois alleging Cristina's attorneys and the parties conspired with another Cook County judge to wrongly settle his claims, similar to what different other defendants did in 2012.

The District Court ordered that *Rooker-Feldman*, lack of subject matter jurisdiction, alone would be briefed and decided before any briefing on the merits. The District Court then granted defendants motion to dismiss for lack of subject matter jurisdiction (*Rooker-Feldman*) with prejudice (7a-30a).

But the Seventh Circuit *sua sponte* claimed the District Court dismissed on the merits, and petitioner's waived their claims on appeal (1a-6a). Then, the Opinion (authored by Judge Easterbrook) falsely demeans Klein and his attorney (1a-6a):

- "It [the Rule 58 document evidencing judgment] is not there, despite Circuit Rule 30(a), which requires the judgment to be attached to the appellant's brief, and Circuit Rule 30(d), which requires counsel to certify that all materials required elsewhere in Rule 30 have been included. Xydakis [Klein's attorney] so certified, falsely." "At oral argument we asked him [Xydakis] why; he did not explain. It soon became clear that Xydakis has no idea what a 'judgment' is."

- "Klein had not been appointed as administrator." "That has not prevented Klein from continuing to describe himself as co-administrator of Claudia's estate – this very suit was filed using that false description – and from attempting to manage or block the tort litigation." "[I]n this suit Klein's

attorney John Xydakis pretended that Klein is a coadministrator of Claudia's estate…"

- "If Xydakis believed that the district judge erred in making a substantive decision in response to a jurisdictional motion . . . he might have contended on appeal that the judge erred by denying him that opportunity. Instead, Xydakis chose to pretend that his client lost on a jurisdictional ground. Pretense gets a lawyer nowhere."

The Opinion then *sua sponte* ordered that petitioners would be sanctioned if they brought any claims related to the case (1a-6a). The panel denied petitioners' motion to disqualify the panel from rehearing (28a). The Seventh Circuit also denied petitioners' petition for rehearing and rehearing en banc (28a).

REASONS FOR GRANTING THE PETITION

University of Chicago Law Professor Albert Alschuler states, Seventh Circuit "Judge Easterbook's bullying rests on stuff he just makes up. The truth is not in him."[1] Moreover, "Judge Easterbrook presents wildly inaccurate, made up statements as unquestionable statements of fact." *Alschuler* at 15.

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[1] *How Frank Easterbrook Kept George Ryan in Prison*, Univ. of Chicago Professor Albert Alschuler, 50 Val. U. L. Rev. 7, 49 (2015)(hereafter *Alschuler*) (https://scholar.valpo.edu/cgi/viewcontent.cgi?article=2397&context=vulr)(last accessed July 1, 2018)

Judge Easterbrook's "penchant for confabulation" is notorious. *Alschulser* at 87. The Chicago Council of Lawyers agrees. "[M]any of Judge Easterbrook's opinions appear to be based on unproven factual assumptions and/or hypotheses not obtained from the record in the case."[2] And *Injustice Watch* "documented a pattern of misrepresented facts in Easterbrook's opinions."[3]

At oral argument, Judge Easterbrook "displays a brutal lack of civility" and "treats lawyers with utter contempt." *Richard Posner*, William Domnarski, p. 214. (Oxford. Univ. 2016). He has "been resoundingly and repeatedly criticized as being extremely rude to attorneys at oral argument." *Council* at 760.

To non-parties and laymen, Judge Easterbrook's opinions may reveal wit and knowledge beyond the average judge. Judge Easterbrook's opinions often reveal some angle in the law or record others failed to grasp. But to parties who know the record and law, it reveals Judge Easterbrook is more concerned about showing his "knowledge is superior" to the lawyers" - - - even if he has to "disregard the facts or the law." *Council* at 769.

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[2] *Chicago Council of Lawyers valuation of the United States Court of Appeals for the Seventh Circuit– Report*, 43 DePaul. L. Rev. 673, 650-751 (1994)(hereafter *Council*) (http://via.library.depaul.edu/cgi/viewcontent.cgi?article=1869&context=law-review)(last accessed July 1, 2018)

[3] *Pattern of misstated facts found in opinions of renowned U.S. Judge Easterbrook*, *Injustice Watch* (https://www.injusticewatch.org/projects/2017/pattern-of-misstated-facts-found-in-probe-of-renowned-federal-judges-opinions/)(last accessed July 1, 2018).

In this case, Judge Easterbrook again was bullying and sarcastic at oral argument,[4] misstated the record and issued a written opinion accusing petitioner's attorney of "falsely" certifying an appendix was complete, "pretend[ing]" and "false[ly]" claiming a person was an administrator, and asserting the attorney "has no idea what a judgment is" --- all demonstrably false and violate the Seventh Circuit's own rules against demeaning and uncivil language.

Also, the district court ordered subject matter jurisdiction (*Rooker-Feldman* doctrine) alone would be decided first. Both petitioner and respondent's briefs focused on this. But Judge Easterbrook claimed the district court dismissed on the merits and petitioner "waived" his arguments on appeal. Judge Easterbrook is notorious for "applying procedural rules to defeat discussion on the merits." *Council* at 750.

This Honorable Court should grant the writ because:

1. Judge Easterbrook's misstating the record and false claims have violated parties' due process rights and affected their livelihood for years. A published opinion falsely accusing an attorney of pretense, fraud, lying, and incompetence brings the judiciary and legal profession into disrepute and deters others from appealing.

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[4] http://media.ca7.uscourts.gov/oralArguments/oar.jsp?caseyear=&casenumber(then search by case number) For Judge Easterbrook, audio at approx 3:20, 4:12, 4:29, 7:54, 15:07. Judge Wood appears to laugh at approximately 3:30.

2. Absent extreme circumstances, Federal courts cannot enter sanction/injunction orders relating to court access, especially to protect their mistaken opinions. Moreover, notice and opportunity must first be provided.

3. District courts cannot order that only subject matter jurisdiction would be briefed, and then look past it and dismiss on the merits. Similarly, Circuit courts cannot uphold dismissals on the merits or claim appellants failed to raise this issue in their briefs, without first providing an opportunity for appellants to respond.

I. Opinion Brings Judiciary & Legal Profession Into Disrepute.

The Opinion (1a-6a) misstates the record and makes outrageous, false and derogatory claims against petitioner's attorney (John Xydakis).

A. Judge Easterbrook Falsely Accuses Attorney of Incompetence.

For example, Judge Easterbrook claimed the district court dismissed on the merits, not for lack of subject matter jurisdiction. The Opinion states Judge Easterbrook asked Xydakis at oral argument why the judgment was not included in the brief's appendix.

Xydakis responded that he thought it was. Later that day, Xydakis filed a letter stating the District Court's Memorandum Opinion and Order was included. Yet, Judge Easterbrook claimed:

> "It [the Rule 58 document] is not there, despite Circuit Rule 30(a), which requires the judgment to be attached to the appellant's brief, and Circuit Rule 30(d), which requires counsel to certify that all materials required elsewhere in Rule 30 have been included. Xydakis so certified, falsely."
>
> "At oral argument we asked him why; he did not explain. It soon became clear that Xydakis has no idea what a 'judgment' is."

Seventh Circuit Rule 30(a) requires the appendix contain "the judgment or order under review." Similarly, Federal Rule 30(a)(C) requires the appendix contain "the judgment, order, or decision in question." 'Or' is "almost always disjunctive" and "the words it connects are to be given separate meanings." *Loughrin v. U.S.*, 134 S.Ct. 2384, 2390 (2014).

A "distinction" exists between "the judgment itself" and the "'filing' or the 'entry' of the judgment." 10 Fed. Pract. & Proc, §2651. The "[e]ntry of judgment involves a ministerial duty by the clerk." *Butler v. Stover*, 546 F.2d 544, 548 (7th Cir. 1977). "[C]ourts render judgments; clerks only enter them on the court records" *Burke v. C.I.R.*, 301 F.2d 903 (1st Cir. 1962).

The appendix included the "Memorandum Opinion and Order" necessary for review (7a-27a). A "'Memorandum Opinion' signed by" a district judge adjudicating "all the matters in controversy" "is [t]he] judgment of the court." *Steccone v. Morse-Starrett*, 191 F.2d 197, 200 (9th Cir. 1951).

But a Rule 58(b)(1)(C) document reflecting "entry of judgment" is merely the "recording in a

docket" that a "judgment has been rendered[,]" not the judgment itself. *Houston v. Greiner*, 174 F.2d 287, 288 (2nd Cir. 1999).

Rule 58's "sole purpose" is "to clarify when the time for appeal" begins to run. *Banker's v. Mallis*, 435 U.S. 381, 384 (1978). Parties are "free to waive" the Rule 58 document and appeal anyways. *Id.* In the Opinion, Judge Easterbrook then doubled down:

> "We tracked down the judgment and found that it corresponds to the opinion: it resolves the suit in defendants' favor on the merits rather than dismissing, without prejudice, for lack of jurisdiction."

The Rule 58 document (29a-30a) did no such thing:

JUDGMENT IN A CIVIL CASE

Judgment is hereby entered (check appropriate box):

☒ other: in favor of defendants' Daniel E. O'Brien, et al and against the plaintiffs'.

This action was *(check one)*:

☐ tried by a jury with Judge presiding, and the jury has rendered a verdict.
☐ tried by Judge without a jury and the above decision was reached.
☒ decided by Judge Harry D. Leinenweber on a motion by defendants' to dismiss.

Date: 8/1/2017 Thomas G. Bruton, Clerk of Court

Wanda Parker , Deputy Clerk

The document states the case was "decided by Judge Harry D. Leinenweber on a motion by defendants' to dismiss." That motion was 'Defendants' Motion to Dismiss for Lack of Subject Matter

Jurisdiction.' The District Court's opinion (19a) even states, "Defendants have moved to dismiss bases on this Court's lack of jurisdiction to hear the case under the familiar *Rooker-Feldman* doctrine."

B. Judge Easterbrook Falsely Accuses Attorney of Pretending.

Judge Easterbrook's Opinion contained other demonstrably false claims. For example, in Illinois, an administrator of decedent brings the wrongful death case. The Opinion claimed (1a-6a):

> "Klein had not been appointed as administrator."
>
> "That has not prevented Klein from continuing to describe himself as co-administrator of Claudia's estate – this very suit was filed using that false description – and from attempting to manage or block the tort litigation."
>
> "[I]n this suit Klein's attorney John Xydakis pretended that Klein is a coadministrator of Claudia's estate.."

In fact, Klein was appointed administrator of Claudia's estate (73a-80a). The Order and Letters of Administration were public record. Defendants even admitted Klein opened a "second probate case" and was appointed administrator. Two estates for one decedent are allowed. *Wisemantle v. Hull*, 103 Ill.App.3d 878, 881 (Ill.App.Ct. 1981).

Finally, the Opinion claimed "Xydakis also named himself as a plaintiff in the suit, though he has no conceivable standing to sue." But the case was first

filed by Xydakis only seeking attorney's fees. Cristina is a Romanian citizen; Xydakis resides here. Diversity existed and the amount in controversy exceeded $75,000. 28 U.S.C. §1332(a)(2).

The "stigma of being accused by a federal judge of 'reprehensible' conduct" should suffice for standing. *Bolte v. Hom*e, 744 F.2d 572, 573 (7th Cir. 1984). In addition to prejudicing parties' rights, published opinions accusing attorneys of incompetence, falsehoods, or pretending are especially serious to their livelihood. *Paters v. U.S.*, 159 F.2d 1043, 1057 (7th Cir. 1998).

Similarly, a "federal judge's derogatory statement, entered of record, [is] equivalent to a penalty that must be preceded by due process of law." *Fleury v. Clayton*, 847 F.2d 1229, 1233 (7th Cir. 1988). Alleging an attorney's conduct was fraudulent "in effect beg[ins] a disciplinary proceeding against the lawyer." *Bolte* at 573.

C. The Opinion and Judge Easterbrook's Actions Violate Ethical Rules.

The Opinion and Judge Easterbrook's demeaning, false statements and misreading the record also violate numerous ethical rules and standards:

1. Judges "will not apply hostile, demeaning, or humiliating words in opinions." Seventh Circuit Stds. For Prof. Conduct

2. We will "let the parties make a complete and accurate record," and give the issues "deliberate, impartial, and studying analysis

and consideration." Rules for Judicial Conduct.

3. "[I]t is misconduct to treat" litigants or attorneys in a demonstrably egregious and hostile manner." Commentary to Canon 2A, Rules for Judicial Conduct.

4. "A judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity." "The duty to be respectful includes the responsibility to avoid comment or behavior that could reasonably be interpreted as harassment, prejudice or bias." Code Conduct U.S. Judges Canon 3(A)(3) & Commentary.

5. "Actual improprieties under this standard include violations of law, court rules, or other specific provisions of this Code." Commentary to Canon 2A (ABA).

Others have also documented Judge Easterbrook's misstatements (41a-46a, and below).

II. Seventh Circuit Cannot Enter Litigation Sanction/Injunction Order.

After misstating the record, the Opinion (1a-6a) stated that any further federal litigation relating to the suit "will be penalized under Fed. R.Civ.P.ll(c), Fed.R.App.P. 38 and 46(b), (c), 28 U.S.C. §l927, and other sources of authority to deal with frivolous and repetitious suits."

Absent extreme, repeated, vexatious, harassing filings, a litigant's court access should not be limited. *Cromer v. Kraft*, F.3d 812, 818-819 (4th Cir. 2004). The Court also failed to give petitioner and his attorney the required notice and an opportunity to be heard before issuing the sanction order. *Cromer* at 819.

For example, Federal Rule of Civil Procedure 11(c) requires "notice and a reasonable opportunity to respond." If the court initiates sanctions, Rule 11(c)(1)(B) requires an "order describing the specific conduct" allegedly sanctionable.

Similarly, 28 U.S.C. §1927 requires "prior notice and an opportunity to respond." *Larsen v. Beloit*, 130 F.2d 1278, 1286 (7th Cir. 1997). Even "inherent power" sanctions requires "a rule to show cause or similar procedure" rather than "sudden imposition of sanctions with no opportunity to respond." *Id.* at 1286-1287.

Likewise Federal Rule of Appellate Procedure 38 requires a "separately filed motion or notice from the court and reasonable opportunity to respond" before sanctions can issue. Similarly, Federal Rule of Appellate Procedure 46(c) requires giving the "attorney reasonable notice, and opportunity to show cause to the contrary, and, if requested, a hearing" before imposing any discipline.

Parties have a constitutional right of access to the courts. *Surita v. Hyde*, 665 F.3d 860, 878 (7th Cir. 2011). A litigation injunction/sanction restricting court access is an extraordinary remedy and must be narrowly tailored. *Cromer* at 819. Here, the Court threatened sanctions against even meritorious filings. For example, the District Court later *sua sponte* dismissed petitioner's attorney separate suit for attorney's fees based on the Opinion (Case 17 CV 3976 N.D. Ill).

III. Sua Sponte Decisions On Issues Not Raised Violated Dues Process.

A. District Court Ordered That Only Subject Matter Jurisdiction Was at Issue.

Defendants' Rule 12(b)(1) motion in the District Court was "for lack of subject matter jurisdiction" pursuant to the District Court's directive:

> COURT: That would be my suggestion, yes, to brief the jurisdictional issue and then to -- we are encouraged to get that out of the way first.
>
> DEFENDANT: Right.
>
> PLAINTIFF: I think that's the proper procedure,
> Judge.
>
> COURT: So it would be a motion to dismiss under
> 12(b)(2) [meant 12(b)(1)].
>
> DEFENDANT: Correct.
> * * * * * *
> PLAINTIFF: I have to look at that, your Honor. Your Honor, can we make clear, though, that the motions are going to be limited to the jurisdictional issue at this point?
>
> COURT: Yes, let's keep it at the jurisdiction.

DEFENDANT: Keep it at the jurisdiction.

COURT: Yes.

DEFENDANT: Leave the 12(b) stuff out of it.

COURT: 12(b)(2) [meant 12(b)(1)] motion.

DEFENDANT: Okay. And we'll do one motion, Judge --

COURT: Right, one motion for --

DEFENDANT: Okay.

Once the District Court announced this procedural path of subject matter jurisdiction, "it is objectively reasonable for the attorney to proceed in the manner made known to the court." *Pacific v. Barosh*, 22 F.3d 113, 119 (7th Cir. 1994). The District Court's memorandum opinion similarly (19a) stated, "Defendants have moved to dismiss based on this Court's lack of jurisdiction to hear the case under the familiar *Rooker-Feldman* doctrine."

Defendants (six law firms) also read the District Court's opinion similarly. Defendants' briefs in the District Court and on appeal solely argued *Rooker-Feldman*. At oral argument, Defendants stated, "I do believe that Judge Leinenweber's ruling contains elements of Rooker-Feldman argument." "[F]or instance, on page 21, of the Opinion," the [District Court] said, 'The answer to Klein's effort to rescue his case lies with the state courts." *Id.*

Federal courts must decide subject matter jurisdiction before proceeding "to any action respecting

the merits of the action." *Cook v. Winfrey*, 141 F.2d 322, 325 (7th Cir. 1998). Hypothetical jurisdiction -- even if the court had jurisdiction, it doesn't matter, because it can dismiss for failure to state a claim -- - is not allowed. *Steel Co. v. Citizens*, 523 U.S. 83, 101 (1998).

The District Court's hypothetical jurisdiction "produces nothing more than a hypothetical judgment" an "ultra vires" act "disapproved" by this Honorable Court "from the beginning." *Id.*

B. Decision Conflicts With Federal Rules Regarding Rule 12 Motions.

The District Court granted "Defendants' Motion to Dismiss [ECF No. 39]," for lack of subject matter jurisdiction (29a-30a). Decisions outside of the issues and briefing should not even be considered dicta as they lack "full airing of all the relevant considerations." *Monell v. Department*, 436 U.S. 658, 709 fn. 6 (1978)(concurrence). The adversary process is the best means of "minimizing the risk of error." *Mackley v. Montrym*, 443 U.S. 1, 13 (1979).

To accept the District Court reached the merits without notifying the parties, the District Court would have had to:

a. reverse its decision that only subject matter jurisdiction was to be addressed;

b. convert Defendants' Rule 12(b)(1) motion into a Rule 12(b)(6) motion; and

c. convert the Rule 12(b)(6) motion into a Rule 56 motion for summary judgment, all without notifying the parties.

However, Rule 12(d) lacks any provision to convert a Rule 12(b)(1) into a Rule 12(b)(6) motion. Rule 12(d) only allows converting Rule 12(b)(6) and Rule 12(c) motions into Rule 56 motions.

Moreover, if the district court converts, "[a]ll parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." Fed.R.Civ.Pro. 12(d). No notice was given here.

It is "erroneous" for a district court to make "clear that the only inquiry before it is whether it had subject matter jurisdiction[,]" and then turn around without notice and "reach[] the merits of plaintiffs' claims." *Peckmann v. Thompson*, 966 F.2d 295, 298 (7th Cir. 1992). Dismissal is "improper when it comes as a surprise to the adverse party." *Id.*

Finally, appellants cannot raise issues on appeal that have not been raised below. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). If the parties brief and the district court decides subject matter jurisdiction, a party can "assum[e]" and "is justified in not presenting" merit arguments "to the Court of Appeals." *Id.*

It is "essential" parties have an opportunity in the district court to offer all the evidence they believe relating to the issues" below. *Id.* District courts cannot "base their decisions on issues raised in such a manner that the losing party never had a real chance to respond." *Smith v. Bray*, 681 F.3d 888, 903 (7th Cir. 2012).

C. District Courts Cannot Bypass Subject Matter Jurisdiction to Reach Merits.

Judicial opinions usually decide "only questions presented by the parties." *Greenlaw v. U.S.*, 554 U.S.

237, 244 (2008). The opinion "must be read in light of the issues that were before the court for determination" *Nix v. Smith*, 32 Ill.2d 465, 470 (1965). Subject matter jurisdiction ("*Rooker-Feldman*") was the only issue before the District Court.

A claim "people involved in the" State court proceedings "violated some independent" right – "to be judged by a tribunal" that is uncorrupted --- is not "blocked by the *Rooker-Feldman* doctrine." *Nesses v. Shepard*, 68 F.2d 1003, 1004 (7th Cir. 1995). Plaintiffs can "sue to vindicate that right and show as part of his claim for damages that the violation caused the decision to be adverse to him and thus did him harm." *Id.*

Because *Rooker-Feldman* often overlaps with the merits and *res judicat*a, petitioner's briefs even extensively addressed why a claim was stated and Klein was not bound by Cristina's settlement. For example, the briefs extensively addressed that parties cannot "conclude the rights of strangers to the proceedings." *Richards v. Jefferson*, 517 U.S. 793, 798 (1996). Moreover, an "extreme application of state-law *res judicata* principles violates the Federal Constitution." *Id.* at 804.

The issues presented on appeal "comprise every subsidiary" issue fairly included within it. *Gross v. FBL*, 557 U.S. 167, 173 fn.1 (2009). The issue need not be "explicitly mentioned" as long as it was "essential to the analysis of the decisions below" or the "correct disposition of other issues." *Sherill v. Oneida*, 544 U.S. 197, 214 fn.8 (2005). Briefs should be "read liberally with respect to ascertaining what issues are raised on appeal." *Kincade v. General*, 635 F.2d 501, 504 (5th Cir. 1981).

Also, waiver limits the parties, not the court. *Mikels v. Evan*s, 2009 WL 87462 at *6 (N.D. Ill. Jan. 13,

2009). Moreover, "good cause" exists to "relieve litigants" of any manifest injustice that takes place, especially when both parties followed the District Court's directive that only subject matter jurisdiction was at issue. Fed.R.App.Pro. 2, Comm.Notes.

If an appeals court perceives "the issues on appeal" differently from the parties, it is an abuse of discretion not to give notice to the parties "of the court's concern about those issues and to present arguments on them." *Sua Sponte Decisions by Appellate Courts*, 69 Tenn.L.Rev. 245, 268 (2002). This is "precisely the type of situation for which the rehearing process was created." *Id.* at 304-05. Otherwise, "the end result is a violation of due process." *Id*. at 305.

CONCLUSION

For decades, Judge Easterbrook's opinions have condemned litigants for missing some angle in the law or the record. To do so, Judge Easterbrook invariably misstates the record or the law.

Here, Judge Easterbrook went even further with outrageous, demeaning and false accusations belied by the record and the law, and which violate numerous ethical rules.

This Honorable Court should grant certiorari or alternatively, use its supervisory authority to vacate the Seventh Circuit Opinion and bar Judge Easterbrook from further active participation in cases.[5]

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[5] *The Inherent Power of a State's Highest Court to Discipline the Judiciary*, James Cameron, 54 Chi. Kent L.Rev. 45 (1977); *Nearly Forgotten Supervisory Power*, Nathan Ross, 66 Mo.L.Rev. (2001)

A court's legitimacy depends on legally principled decisions free from derision, incivility and falsehoods. *Planned Parenthood v. Casey*, 505 U.S. 833, 865–66 (1992). It is an "abuse of judicial power" to misstate the record, make false and demeaning accusations against litigants, and then threaten to sanction them, especially without giving notice and an opportunity to be heard first. *In re Judicial Misconduct*, 425 F.3d 1179, 1185 (9th Cir. 2005)(dissent).

Legitimacy and procedural fairness are "especially important" to the legal system's "securing compliance" with its decisions, because "research suggests that it is not linked to agreement with the decisions made by legal authorities." *Building a Law-Abiding Society*, 28 Hofstra L.R. 707, 723 (2000). People "are more likely to defer" to the court's decisions if they believe they were treated fairly and the courts exercised their power legitimately. *Id.*

The damage is not only to those whom Judge Easterbrook condemns, falsely or otherwise. All those who don't appeal because the risks of such an outrageous opinion outweigh the benefits are also damaged. Judge Easterbrook's notoriety is well known (80a), has gone on for decades, and needs to be stopped.

Respectfully Submitted,

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