

19-1244
No. _____

ORIGINAL

IN THE

Supreme Court of the United States

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SUPREME COURT, U.S.

ANTHONY JOHNSON,

Petitioner,

v.

STORIX, INC.,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit denied Petitioner's Fifth Amendment right to due process by refusing to consider any legal arguments raised on appeal, including whether the district court complied with its mandate on remand, when affirming an award of copyright attorney's fees expressly aimed at deterring Petitioner from exercising his First Amendment rights to free speech and petition on unrelated matters.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR A WRIT OF CERTIORARI**OPINIONS BELOW**

1. The memorandum decision of the Ninth Circuit Court of Appeals in *Johnson v. STORIX, INC.*, case no. 18-56106 (docket no. 15) entered on Feb. 5, 2020 is unreported and reprinted at App. at pp. 2a-4a.
2. The Ninth Circuit's Order denying a petition for panel rehearing (docket no. 18) entered on February 21, 2020 is reprinted at App. at p. 5a.
3. The district court's Order Awarding Attorney Fees on Remand in the Southern District of California, *Johnson v. STORIX, INC.*, case no. 3:14-cv-1873-H-BLM (docket no. 299) entered on Aug. 7, 2018 is reprinted at App. at p. 6a-49a.
4. The district court's Second Amended Judgment (docket no. 300) entered Aug 7, 2018 is reprinted at App. at pp. 48a-50a.
5. The memorandum decision of the Ninth Circuit Court of Appeals in *Johnson v. STORIX, INC.*, case no. 16-55439 (docket no. 69) entered on Dec. 19, 2017 is unreported and reprinted at App. at pp. 51a-57a.

JURISDICTION

The judgment of the Ninth Circuit was entered on February 5, 2020. A timely petition for panel rehearing was denied on February 20, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED**U.S. Constitution, Amendment I**

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

U.S. Constitution, Amendment V

“No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

Copyright Act of 1976, 17 U.S.C. § 505

“In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney’s fee to the prevailing party as part of the costs.”

INTRODUCTION

Petitioner and appellant Anthony Johnson (“Johnson”) brought this copyright infringement lawsuit against defendant and respondent Storix, Inc. (“Storix”) to protect the integrity of the software he designed, developed and had registered in his name with the U.S. Copyright Office for 15 years. The district court found Johnson’s copyright registration immaterial when deciding he *implicitly* transferred all copyrights to Storix when forming the company in 2003 – a decision the Ninth Circuit upheld without addressing Johnson’s arguments.¹

Although the Ninth Circuit first found the attorney’s fee award excessive and unreasonable, a different panel denied Johnson due process by affirming the subsequent fee award without addressing his legal arguments involving clear violations of his constitutional rights and the district court’s failure to comply with the Ninth Circuit’s mandate on remand.

STATEMENT OF FACTS

A. The Attorney’s Fee Award

After awaiting this Court’s decision in *Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 1979 (2016) (*Kirtsaeng*), the district court awarded Storix **\$543,704** in attorney’s fees (App. at p. 15a) based on emails Johnson sent in 2015 while the copyright litigation was pending. Johnson therein threatened to bring a shareholder derivative lawsuit in California state court against Storix’s new controlling

¹ Johnson exhausted all efforts to appeal the ownership decision, but the unprecedented ruling shows the Ninth Circuit’s persistent refusal to address dispositive legal arguments contrary to the district court’s factual conclusions.

shareholders and directors on unrelated matters and to instruct Storix's customers not to purchase new copies of the software until the copyright ownership was decided. (App. at pp. 31a-32a.) The court found the emails to be "inappropriate conduct [that] should be deterred." (App. at p. 40a.) The court thereby ordered Johnson to pay all Storix's attorney's fees incurred "on and after October 6, 2015, the date of Plaintiff Johnson's email[.]" (App. at p. 43a.) The same day, the court denied Storix's demand for injunctive relief based on the same emails. (See Dist. Ct. Doc. No. 245.)

Johnson timely appealed the judgment, which the Ninth Circuit had jurisdiction to review under 28 U.S.C. § 1291.

B. Johnson I

In *Johnson v. STORIX, INC.*, No. 16-55439 (9th Cir. Dec. 19, 2017) ("*Johnson I*"), Johnson argued that the court erred in denying his summary judgment and new trial motions as a matter of law because Storix possessed no written agreement required by the Copyright Act to transfer exclusive copyrights, and because the "work for hire" doctrine does not apply to the sole owner of a company. (See Doc. No. 25 at pp. 35-36.) Johnson further appealed the attorney's fee award because his case was objectively reasonable and not frivolous (see *Kirtsaeng*, *supra*), the fees were based entirely on protected conduct unrelated to the copyright litigation, and the extraordinary amount was contrary to the purpose of the Copyright Act. (See *Id.* at pp. 18-38.)

The Ninth Circuit affirmed the district court's denial of Johnson's summary judgment and new trial motions on the basis that copyright ownership was a factual

issue for the jury to decide. (App. at pp. 52a-56a.) The panel did not address Johnson's legal arguments or authority showing the Copyright Act requires a clear and unambiguous written agreement or that the work for hire doctrine does not apply to a sole owner of a company. However, the panel reversed the attorney's fee award as unreasonable and excessive and remanded to the district court with instructions to reduce the fees to a reasonable amount based on the unique facts and circumstances of the case in accordance with *Kirtsaeng*, *supra*. (App. at pp. 56a-57a.)

C. The Attorney's Fee Award on Remand

On remand, Johnson argued that the court improperly determined the amount of fees based entirely on three emails unrelated to the copyright litigation. (*See* Dist. Ct. Doc. 288 at pp. 6-7; *See also* Doc. 311 ("Remand Transcript") at pp. 31-36.) Johnson also argued that, based on the Ninth Circuit's specific mandate to reduce the fees to a reasonable amount, only nominal fees were warranted. (Remand Transcript at p. 46.) The district court stated that it "thoroughly reviewed the Ninth Circuit's opinion, the parties' arguments, the relevant law, and the Court's prior fees Orders", but its order was silent on all Johnson's legal and factual arguments. (App. at p. 20a.) The court reduced the prior award to **\$419,192.64**, but the fees were still based solely on the same emails. (App. at p. 50a.)

Johnson timely appealed the order and second amended judgment following remand pursuant to 28 U.S.C. § 1291.

D. Johnson II

In *Johnson v. STORIX, INC.*, No. 18-56106 (9th Cir. Feb. 5, 2020) (“*Johnson II*”), Johnson raised the issues of (1) whether the attorney fee award can be based on matters unrelated to the copyright litigation and having no effect on its attorney’s fees, (2) whether the district court erred in determining an amount of fees necessary to deter Johnson from exercising his First Amendment rights to petition and free speech, and (3) whether the district court failed to address the reasonableness of the fee amount remanded for reconsideration under the facts and circumstance of the case. (9th Cir. Case No. 18-56106, Doc. No. 2 (“AOB”) at pp. 1-2.)

Johnson’s brief expressly stated that his arguments were *not* directed to the district court’s decision to award fees but to legal and factual errors in determining the award amount. (AOB at p. 25.) He concluded that, although the facts and law warrant no fees, the procedural history dictates that only a nominal amount is reasonable under the circumstances. (*Id.*)

The Ninth Circuit panel affirmed the district court’s order in a 2-page memorandum stating, “Given the scope of this court’s remand order, we conclude the district court did not err in holding that it was not required to reexamine its original *decision to award attorneys’ fees* to Storix under the Copyright Act, 17 U.S.C. § 505.” (App. at p. 3a; italics added.) It further found “[t]he district court did not abuse its discretion in making a 25% reduction of the total fee award on remand.” (App. at p. 4a.) The panel thereby affirmed the fee award without

reference to Johnson's brief specifically directing his arguments to the reasonableness of the amount.

REASONS WHY CERTIORARTI SHOULD BE GRANTED

This case meets the Court's criteria for granting certiorari. By joining the district court in refusing to acknowledge any facts or legal arguments contrary to its decision to award unprecedented attorney's fees against a pro se plaintiff, the Ninth Circuit "so far departed from the accepted and usual course of judicial proceedings, [and] sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." S.C. Rule 10(a).

A. The Court Should Resolve the Question Involving Persistent Denial of Due Process

Although Johnson's petition asks the Court to consider issues involving fundamental procedural unfairness that deprived him due process, his petition also provides a perfect vehicle for the Court to prevent similar due process violations in other cases, especially those involving vulnerable pro se litigants.

The district court persistently denied Johnson due process by refusing to acknowledge important facts and legal arguments when rendering decisions so far outside the norm of judicial decision-making and in conflict with other decisions of the Ninth Circuit and this Court that they required appellate review. Neither the district court nor the Ninth Circuit addressed any of Johnson's legal arguments in their written decisions, despite Johnson showing clear violations of his First Amendment rights. As this Court noted in *Taylor v. McKeithen*, 407 U.S. 191, 194,

92 S. Ct. 1980 (1972), “Because this record does not fully inform us of the precise nature of the litigation and because we have not had the benefit of the insight of the Court of Appeals, we grant the petition for writ of certiorari[.]”

Such fundamental unfairness amounts to denial of Johnson’s Fifth Amendment right to due process. “Applying the Due Process Clause is [] an uncertain enterprise which must discover what ‘fundamental fairness’ consists of in a particular situation[.]” *Lassiter v. Department of Social Servs. of Durham Cty.*, 452 U.S. 18, 24-25, 101 S. Ct. 2153 (1981). “The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions.” *Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S. Ct. 1983 (1972).

1. The Ninth Circuit denied Johnson due process and sanctioned such conduct by the district court.

The Ninth Circuit first demonstrated its refusal to address important legal arguments in *Johnson I*. Therein, the district court disregarded purpose of the Copyright Act and Supreme Court precedent by ignoring all authority providing that a clear and unambiguous written agreement is required to transfer copyright ownership and that the “work for hire” doctrine does not apply to a sole owner of a company. The Ninth Circuit affirmed the district court’s denial of Johnson’s summary judgment and new trial motions by similarly ignoring Johnson’s *undisputed* arguments showing the copyright ownership decision was a clear error of law.

Although the *Johnson I* panel found the attorney's fee award against Johnson unreasonable and excessive, its remand with instructions to reconsider the amount achieved nothing. The district court simply reissued the fee award at a minor discount, but still based entirely on the same disproven facts involving constitutionally protected conduct. The fees were still awarded on the sole basis that Johnson threatened litigation on unrelated matters and exercised his rights under the Copyright Act while the copyright litigation was pending.

A different panel in *Johnson II* sanctioned the district court's violation of Johnson's First Amendment rights by further refusing to acknowledge any of Johnson's undisputed facts and arguments. Instead, the panel found Johnson improperly appealed the *decision* to award fees rather than the *amount* of fees remanded for reconsideration, ignoring Johnson's opening brief which clearly stated the contrary.

By expressly choosing to ignore all Johnson's arguments, the Ninth Circuit denied Johnson a fair hearing and sanctioned the district court's denial of due process as well as its violation of Johnson's First Amendment rights. "Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation." *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 480-481, 102 S. Ct. 1883 (1982) (citing *Montana v. United States*, 440 U. S. 147, 164, n.11 (1979).)

2. The Ninth Circuit failed to determine if the district court complied with its mandate.

This Court granted certiorari in *Yates v. Evatt*, 500 U.S. 391, 111 S. Ct. 1884 (1991), “out of concern that the State Supreme Court had not complied with the mandate to reconsider its earlier decision in light of *Francis v. Franklin*, [471 U. S. 307 (1985)].” *Id.* at 398. This petition similarly requests certiorari on the basis that the district court failed to comply with its mandate in *Johnson I* to reconsider its decision in light of *Kirtsaeng*, *supra*.

Johnson I noted *Kirtsaeng*’s requirement that the court give substantial weight to the objective reasonableness of Johnson’s position, and to consider the financial hardship a fee award may impose on an individual in accordance with the Copyright Act’s essential goal to “encourage parties with strong legal positions to stand on their rights.” *Kirtsaeng* at 1986.

The *Johnson II* panel’s only finding regarding the amount of award was that “[t]he district court did not abuse its discretion in making a 25% reduction of the total fee award on remand.” (App. at p. 4a.) Johnson did not argue the 25% reduction was an abuse of discretion, but that the resulting fees did not comply with the mandate in *Johnson I* to reduce the fees to a “reasonable amount.” *Johnson II* makes no reference to the reasonableness of the fee award and thus failed to determine if the district court complied with its mandate.

3. The Ninth Circuit treated Johnson unfairly as a pro se litigant.

Pro se litigants are particularly vulnerable to due process violations in lower courts since they usually lack knowledge and financial resources to appeal the

decisions. For years, Johnson overcame those hurdles only to be subjected to a harsh procedural decision that effectively voided his entire appeal.

First, the Ninth Circuit acted against to its own directive that courts liberally construe the pleadings of a pro se litigant. “This circuit has long had a rule of liberal construction of pleadings presented by *pro se* litigants[.]” *Garaux v. Pulley*, 739 F.2d 437, 439 (9th Cir. 1984). The panel asserted a technical error in Johnson failing to direct his arguments to the proper decision. “Once a *pro se* litigant has done everything possible to bring his action, he should not be penalized by strict rules which might otherwise apply if he were represented by counsel.” *Oritz v. Cornetta*, 867 F.2d 146, 148 (2nd Cir. 1989). Johnson’s arguments pertained to the basis and calculation of the fees. Whether legal or factual, the arguments should have been construed as applicable to the reasonableness of the amount.

Secondly, a self-represented litigant is rarely allowed oral argument on appeal. In this case, “[t]he panel unanimously conclude[d] the case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).” (App. at p. 2a.) Ninth Circuit Local Rule 36-1 requires some form of written decision, the least of which is a “memorandum” containing a “reasoned disposition.” The only *reason* the panel gave for disposing of Johnson’s appeal was based on a misconception that could have easily been cured at oral argument. Had Johnson been afforded oral argument, he could have explained how his arguments concerned the exact issue remanded for reconsideration.

While Johnson does not challenge the authority of circuit courts to set requirements and procedures for managing their own dockets, the Court should exercise its supervisory authority when a court of appeals applies overly-strict policies that cause a pro se litigant to inadvertently forfeit his right to be heard.

4. Courts should acknowledge important legal arguments in written decisions.

Not all factual arguments warrant discussion, but appellate courts should at least indicate in their *written* decisions that they considered legal arguments subject to de novo review. Although decisions in this case were clearly erroneous, the Court should look to the broader issue of the damage such fundamental procedural unfairness works on the entire system. Failure to address important legal arguments not only deprives a party due process, but also prevents further review by this Court since the decisions contain no reference to the issues or arguments and therefore cannot be found in conflict with other decisions or cited as precedent.

In *Johnson I* the Ninth Circuit provided no reason for rejecting Johnson's legal arguments pertaining to the copyright ownership decision. In *Johnson II*, Johnson specifically argued the district court's refusal to acknowledge any of his facts or arguments pertaining to the attorney's fee award, and the Ninth Circuit similarly refused to address the same. It cannot be implied from a summary affirmance that the panel agreed with the district court on legal issues to which its order was also silent.

All appellate courts should be required to provide at least minimal reasoning in written decisions involving important legal issues – even if only to acknowledge its agreement with a lower court’s decision. A single sentence would assure an appellant that his argument was considered without adding any burden on the courts. If an appellate court considered but rejected a legal argument that was raised but not decided below, it should simply say so. Otherwise, an appellant, as in this case, may wait years for his appeal to be heard only to have his arguments ignored again without explanation.

Requiring appellate courts to provide a minimal explanation for its decision in written opinions helps ensure litigants are afforded a fair and satisfactory hearing, reduces the need for petitions for rehearing and certiorari, and aids in restoring the public’s eroding trust in the legal system.

B. The Ninth Circuit Was Wrong to Affirm the District Court’s Award of Attorney’s Fees

This Petition asks the Court to consider whether the Ninth Circuit and lower court’s refusal to address important constitutional issues amounts to a denial of due process. If so, the Court may simply remand the decision for further proceedings or remand with instructions to reverse the judgment based on clear errors of law.

1. Johnson properly appealed the decision remanded for reconsideration.

In *Johnson I*, the Ninth Circuit found the fee award unreasonable and excessive and thus “reverse[d] the fee award and remand[ed] to the district court to reconsider the amount.” (App. at p. 57a.) The panel quoted *Yellow Pages Photos, Inc. v. Ziplocal, LP*, 846 F.3d 1159, 1165 (11th Cir. 2017) in adding: “At the end of

the day, the substantive reasonableness of the amount awarded is the touchstone of our evaluation of a district court's award of fees and costs." (App. at p. 57a.) The panel also noted that, although the district court has discretion to award fees, "[the Copyright Act] § 505 demands that it be reasonable." (*Ibid.*, citing *Woodhaven Homes & Realty, Inc. v. Hotz*, 396 F.3d 822, 824 (7th Cir. 2005).)

Johnson specifically argued on remand that, "if the Court is compelled to reconsider only the amount of the award, the Court should set the only fair and reasonable amount to \$0 in view of all facts and circumstances of this case." (Dist. Ct. Doc. 288 at p. 19.) The district court stated it would only consider the fee amount, but that "[i]t could be, though, anywhere from \$1.50 I guess or even .25 cents all the way up to whatever the Court considers to be reasonable under the standard set by law." (Remand Transcript, pp. 11, 19; *See also* AOB at p. 25.) All Johnson's legal arguments were as relevant to the reasonableness of the amount of fees as they were to district court's decision to award fees.

In *Johnson II*, Johnson demonstrated that his arguments were raised but ignored by the district court, all of which demonstrated that "[t]he findings of fact underlying the fee determination were clearly erroneous, and there were legal errors in calculating the attorney fee award based on dates, conduct and speculation of Johnson's motivation unrelated to Johnson's copyright claims." (AOB at p. 11.) The Ninth Circuit similarly ignored all Johnson's facts and arguments, instead finding that "the district court did not err in holding that it was not required to reexamine its original decision to award attorneys' fees to Storix[.]" (App. at p. 3a.)

The panel thereby ignored Johnson's brief clearly directing his arguments to the award amount.

Johnson I did not dispose of any specific issues pertaining to the attorney's fees, so "any issue not expressly or impliedly disposed of on appeal may be considered by the trial court on remand." *Kearns v. Field*, 453 F.2d 349, 354 (9th Cir. 1971). Not only did the district court explicitly say it considered all arguments on remand, but it was *obligated* to consider any issues that "could have affected aspects of the final judgment in the case." *Laitram Corp. v. NEC Corp.*, 115 F.3d 947, 953 (Fed. Cir. 1997). The attorney fee award is part of the final judgment since Storix requested attorney's fees in the prayer along with a declaration of copyright ownership. (See Dist. Ct. Doc. 5 at pp. 5, 10.) *See Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 201, 108 S. Ct. 1717 (1988). See also *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 742, 96 S. Ct. 1202 (1976) (similarly involved declaratory relief and attorney's fees).

There was no reason for the Ninth Circuit to refuse to address Johnson's legal or factual arguments pertaining to the exact issue remanded for reconsideration by the district court.

2. The attorney's fee award should be reversed as a matter of law.

The fee award was not only unreasonable but unlawful. Johnson argued on appeal that the district court denied him due process by failing to acknowledge any of his facts or arguments. "Asserted denial [of due process] is to be tested by an appraisal of the totality of facts in a given case." *Cty. of Sacramento v. Lewis*, 523

U.S. 833, 850, 118 S. Ct. 1708 (1998) (citing *Betts v. Brady*, 316 U. S. 455, 462 (1942).)

Johnson II states, “We review a district court’s award of attorneys’ fees for an abuse of discretion.” (App. at p. 3a.) The amount of fees was predicated on errors of law, not factual issues, thus subject to *de novo* review. The Ninth Circuit was required to review *de novo* any issues of law and mixed questions of fact and law, including any legal analysis pertaining to attorneys’ fees. *Entm’t Research Grp., Inc. v. Genesis Creative Grp., Inc.*, 122 F.3d 1211, 1216 (9th Cir. 1997); *United States v. Mateo-Mendez*, 215 F.3d 1039, 1042 (9th Cir. 2000); *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982). The Ninth Circuit avoided reviewing a legally erroneous decision by asserting a factually incorrect reason to ignore Johnson’s arguments, thereby deferring to findings that should have been reviewed as if no decision had previously been rendered. See *Barrientos v. Wells Fargo Bank, N.A.*, 633 F.3d 1186, 1188 (9th Cir. 2011); *Lawrence v. Dep’t of Interior*, 525 F.3d 916, 920 (9th Cir. 2008).

Johnson argued on remand that it was an error of law for the district court to use attorney’s fees to punish him for conduct unrelated to the litigation. (Remand Transcript at pp. 32, 36.) Three years earlier, Johnson sent an email to Storix’s management threatening to bring a derivative lawsuit against them *on Storix’s behalf*, attaching an email he threatened to send to Storix’s customers asking them not to purchase new copies of the software until the copyright ownership was decided.

The order refers to Johnson “threatening litigation” (App. at pp. 9, 14, 22) and “demand[ing] that the customers cease paying Defendant Storix for the use of *its* software” (App. at p. 9a; italic added) as “inappropriate conduct” that must be deterred. (App. at pp. 14, 18, 23.) The court thereby found “[a]n award of attorneys’ fees is justified to deter litigants in copyright cases from interfering with the rights of a copyright holder” and “is also justified when a party’s actions unnecessarily expand another party’s work.” (App. at p. 40a-41a.) Johnson’s conduct in no way expanded on the copyright litigation. Nonetheless, “in order to narrowly tailor the award to Johnson’s misconduct, [...] the Court granted Storix only the fees it incurred from October 6, 2015—the date of Johnson’s ‘Buckle up boys!’ email—through the end of trial.” (App. at p. 15a.)

The court did not award fees to *deter* Johnson’s conduct, but to *punish* him for asserting his right to petition and exercising his rights under the Copyright Act before a jury later decided he implicitly transferred his copyrights to Storix.² Nevertheless, if deterrence was warranted, the district court would not have denied Storix’s motion for an injunction the same day it awarded fees to deter that same conduct. (See Dist. Ct. Doc. No. 245.)

This Court recently reversed a Ninth Circuit case, finding that attorney fees may awarded to sanction a party for acting in bad faith. *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1183, 581 U.S. __ (2017) However, such an award

² Storix still has no rights under the Copyright Act because it possesses no written agreement required by the Copyright Office to record the transfer. *See* 17 U.S.C. §§ 205, 411.

“must be compensatory rather than punitive in nature” and “may go no further than to redress the wronged party ‘for losses sustained.’” *Id.* at 1186. See also *Fox v. Vice*, 563 U.S. 826, 131 S. Ct. 2205, 180 L.Ed.2d 45 (2011). Awarding fees based on the date of Johnson’s email was punitive, not compensatory, since the email had no effect on the attorney’s fees. “[A]n award of punitive damages violates constitutional due process requirements if ‘grossly excessive.’” *Swinton v. Potomac Corp.*, 270 F.3d 794, 817 (9th Cir. 2001) (citing *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 562, 116 S. Ct. 1589 (1996).)

The district court had no discretion to use attorney’s fees to chill Johnson’s exercise of First Amendment rights, especially after denying an injunction aimed at deterring the same conduct. The district court’s order indicates no other ground for awarding fees.

3. The attorney’s fee award is excessive and unreasonable.

Johnson does not ask the Court to decide his factual arguments. However, *Johnson I* instructed the district court to reconsider a more reasonable fee amount, so it’s incumbent on the *Johnson II* panel to determine if the district court complied with the Ninth Circuit’s mandate.

Although the legal arguments show that reversal is necessary, the courts’ failure to address any equitable issues warrants further consideration. Johnson argued numerous equitable factors, including Storix cutting off Johnson’s only remaining income while making millions from his copyrights it paid nothing for, thereby forcing Johnson to sell his home to post a bond for the fee award. (Dist. Ct. Doc. 288 at pp. 16-19; AOB at pp. 23-25.)

This remains the only fee award against an author of a registered copyright and the only award against any objectively reasonable party since *Kirtsaeng*. It's also by far the largest fee award against any individual in a copyright case in U.S. history. (See Dist. Ct. Doc. 288 at pp. 15-16.) The decisions in this case are unconscionable and this Court should exercise its supervisory authority to ensure Johnson is finally afforded due process.

CONCLUSION

Johnson's petition for a writ of certiorari should be granted.

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Respectfully Submitted,



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