No. 19-1371

In the

SUPREME COURT of the UNITED STATES

ROGER DEAN WALDNER,
Petitioner,
v.

BRADLEY R. HARTKE; DOUGLAS P. HARTKE; JOAN L. HARTKE, INDIVIDUALLY AND AS TRUSTEES OF THE JOAN L. HARTKE QTIP MARITAL TRUST DATED 7/12/1996 AND AS TRUSTEES OF THE ROBERT EUGENE HARTKE FAMILY TRUST DATED 7/12/1996; THE JOAN L. HARTKE QTIP MARITAL TRUST DATED 7/12/1996; THE ROBERT EUGENE HARTKE FAMILY TRUST DATED 7/12/1996,
Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED FOR REVIEW

Relief from a void judgment under "Rule 60(b)(4) applies only in the rare instance where a judgment is premised either on a certain type of jurisdictional error . . ." *United Student Aid Funds v. Espinosa,* 559 U.S. 260, 270 (2010). "Article III of the Constitution limits the 'judicial power' of the United States to the resolution of 'cases' and 'controversies.'" *Valley Forge College v. Americans United,* 454 U.S. 464, 471 (1982). See also *Campbell-Ewald Co. v. Gomez,* 136 S. Ct. 663, 679 (2016) ("If either the plaintiff or the defendant ceases to have a concrete interest in the outcome of the litigation, there is no longer a live case or controversy.").

The Hartke-Respondents brought suit in 2017 against Roger and others to void stale notes and mortgages. After appeal in their favor, the Hartkes made judicial admissions that Roger was not a party to the notes or mortgages and had no interest in the judgment obtained. Their judicial admissions mean that Roger never had a *concrete interest in the outcome of the litigation.* The district court exercised Article III judicial power over a non-case and a non-controversy.

The following questions are presented for review:

1. Is a district court's exercise of Article III judicial power over a non-controversy a rare instance of jurisdictional error that renders its judgment void?

2. If so, is the judgment so affected by a fundamental infirmity that the infirmity can be raised even after the judgment became final?

3. In lieu of plenary review by this Court, is a GVR[1]

[1] Roger uses shaded highlight herein for ease of reference.

Order, without determining the merits, appropriate for the following reasons:

- There is a reasonable probability that a GVR Order in light of the Hartkes' judicial admissions will result in voiding the judgment?

- The Hartke admissions are "confessions of error" that, because Roger had *no concrete interest* in the dispute, no case or controversy existed?

- A GVR Order would promote fairness to Roger without using much of this Court's limited docket?

- There is reason to believe the Eighth Circuit did not fully consider the legal significance of the Hartkes' judicial admissions?

II. ALL PROCEEDINGS BELOW

1. United States District Court, District of Minnesota, Case 0:17-cv-01851, Bradley R. Hartke, et al., v. WIPT, Inc., et al.

2. United States Court of Appeals for the Eighth Circuit, No. 17-3702, Bradley R. Hartke, et al., v. WIPT, Inc., et al.

3. United States Court of Appeals for the Eighth Circuit, No. 17-3685, Bradley R. Hartke, et al., v. WIPT, Inc., et al.

4. United States District Court, for the District of Minnesota, 18-cv-976 JRT/SER, Bradley R. Hartke, et al., v. WIPT, Inc., et al.

5. United States Court of Appeals for the Eighth Circuit, No. 19-2813, Bradley R. Hartke, et al., v. WIPT, Inc., et al.

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Roger Dean Waldner petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit, Case 19-2813.

VI. OPINIONS BELOW

The Panel denial of Roger's first appeal, Case 17-3685, of the district court's judgment, Case 17-cv-01851, is unpublished and included at Appendix A ("App."). The denial of petition for rehearing *en banc* is included in App. B. The opinion of the district court is unpublished and is included in App. C.

The Panel denial of the corporate defendants' related appeal, Case 17-3702, of the district court's judgment, Case 0:17-cv-01851, is unpublished and included at App. D. The denial of petition for rehearing *en banc* is included in App. E. The opinion of the district court is unpublished and is included in App. C.

The Panel denial of Roger's appeal, Case 19-2813, of the district court's denial of his Rule 60(b)(4) motion, Case 17-cv-01851, is unpublished and included in App. F. The denial of petition for rehearing *en banc* is included in App. G. The district court's Order of denial is unpublished and is included in App. H.

The district court denial of related case 18-cv-976 is unpublished and appears in the denial of his Rule 60(b)(4) Motion. App. I. The denial of his Rule 59(e) motion is unpublished and appears in App. J.

VII. JURISDICTION

Roger seeks review of the Eighth Circuit's denial of his appeal, Case number 19-2813, issued on December 2, 2019,

App. F. His timely petition for rehearing was denied on January 7, 2020. App. G. This petition is timely filed pursuant to Supreme Court Rule 13.3, as modified by miscellaneous Order of this Court dated 3/19/2020. This Court has jurisdiction under 28 U.S.C. § 1254(1). Order at https://www.supremecourt.gov/orders/courtorders/031920zr_d1o3.pdf

VIII. CONSTITUTIONAL AND STATUTORY PROVISIONS

The Cases and Controversies Clause of the United States Constitution, Art. III, § 2, cl. 1, provides in part:

> The judicial Power shall extend to all Cases . . . to Controversies . . .

Federal Rule of Civil Procedure 60(b) provides in part:

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void.

IX. STATEMENT OF THE CASE

a. Background

The Hartke Plaintiffs sued Roger and the corporate defendants to void enforcement of notes and mortgages that encumbered their property in Minnesota. They described their success in their enforcement proceedings before the Honorable Nancy E. Brasel: "In 2017, the Hartkes obtained a declaratory judgment from Senior Judge Magnuson of the Minnesota Federal Court holding that certain notes and certain mortgages on properties located in Martin County, Watonwan County, and Cottonwood County are void and unenforceable due to the running of the statutes of

limitation." App N at 60. "App. N at 60" refers to Appendix N herein, at page 60.

In his judgment for the Hartkes, Judge Magnuson summarized the case: "The only real issue here is whether the relevant statutes of limitations bar Defendants from taking any action to enforce the notes." App. C at 22.

Defendant Community Bank's Motion to be dismissed from the case was granted. App. C at 22.

Petitioner Roger and the Corporate Defendants appealed to the Eighth Circuit. Their appeals and rehearing petitions were denied. App. A, B, D, E.

During these appeals, the Hartke Plaintiffs sought to enforce the judgment in Minnesota state court. Roger and the Corporate Defendants removed the state court case into the federal district court for the district of Minnesota. The case was assigned to Judge Brasel, 18-cv-00976-NEB-BRT. It was denied, App. I, as was Roger's Rule 59(e) Motion, App. J. No appeals of Judge Brasel's decisions were made.

b. *Hartkes' Judicial Admissions*.

On April 1, 2019, after appeals and rehearings had been completed, the Hartkes filed their Memorandum In Opposition To Defendant Waldner's Motion For Stay, in the related case before Judge Brasel. App. K. They stated: "Hartkes' motion to enforce the judgment is a motion to clear the Hartkes' land title of void mortgages and related real estate filings. Defendant Waldner has no property interest in any of the real estate that is the subject of the motion and has *no standing* to object to the enforcement of the judgment. He also has no interest in the defendant corporations." App. K at 46. (italics and shaded highlight added).

Roger included the latter statement in his appellate brief to the Eighth Circuit. App. L at 50.

The Hartkes identified the owners of the notes and mortgages as the corporations, not Roger: "The notes and mortgages originated in 2002 and were between the Hartkes and 'The One Stop'. . . .The mortgages were subsequently

assigned to Defendants WIPT, Inc. and RDW-KILT, Inc." App. O at 62. Roger had no "personal stake" in the notes: "Roger Waldner . . . is not a party to any of the notes, nor does he claim an interest in any of the mortgaged properties." App. O at 63.

The Hartkes' statements are judicial admissions of the truth of the facts alleged. *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 592 (2013) ("See 9 J. Wigmore, Evidence § 2588, p. 821 (J. Chadbourn rev. 1981) (defining a "judicial admission or stipulation" as an "express waiver made . . . by the party or his attorney conceding for the purposes of the trial the truth of some alleged fact" (emphasis deleted)); . . . 9 Wigmore, *supra*, § 2590, at 822 (the "vital feature" of a judicial admission is "universally conceded to be its *conclusiveness* upon the party making it").").

The Hartkes' judicial admissions are similar to the Solicitor General's "confession of error." Justice Scalia described the Court's GVR practice in such instances: "Our recent practice, however, has been to remand in light of the confession of error without determining the merits, leaving it to the lower court to decide if the confession is correct." *Lawrence v. Chater*, 516 U.S. 163, 183 (1996) (Scalia, J., dissenting). The per curiam opinion noted that "the dissent acknowledges as 'well entrenched,' *post*, at 183 (opinion of SCALIA, J.), our practice of GVR'ing in light of plausible confessions of error without determining their merits." *Id.* at 171.

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X. REASONS FOR GRANTING THE WRIT

A. A GVR Order, without determining the merits, may be appropriate, leaving it to the lower court to decide if the Hartkes' judicial admissions warrant dismissal of the judgment as void.

1. *Hartkes and their Counsel deceived the lower courts.*

The Hartkes' judicial admission that Roger was not a party to the notes and mortgages was made only *after* the judgment was affirmed on appeal and is an admission that no Article III case or controversy existed between them and Roger over the notes or mortgages. Yet, *before* judgment was affirmed, the Hartkes deceived the lower courts into believing that a case or controversy did in fact exist. They can't have it both ways. Either a controversy existed or it didn't. Which is true?

Prior to judgment, the Hartkes and their Counsel led Judge Magnuson to believe that Roger "controlled" the corporate defendants. See Judgment, App. C at 21 ("Over the next several years, Waldner-controlled entities such as The One Stop and Defendant WIPT . . . The November note was eventually assigned to Defendant RDW-KILT, another Waldner-controlled company . . .").

Yet, after judgment and appeal, they reversed their litigating position: "He also has no interest in the defendant corporations." Hartke Memorandum, App. K at 46.

How can this Court (or any court) affirm a judgment based on contradictory jurisdictional facts?

Judge Magnuson granted judgment on the Hartkes' pleadings without the discovery requested by Roger. App. C at 24 ("Plaintiffs' Motion for Judgment on the Pleadings (Docket Nos. 47, 49) is GRANTED").

The courts below had no opportunity to consider the jurisdictional deceit perpetrated on them by the Hartkes' pleadings *before* the judgment had been affirmed on appeal because discovery was not permitted and no opportunity for

jurisdictional discovery was allowed even *after* the Hartkes made their judicial admissions.

Diametrically opposite jurisdictional facts cannot both be truthful. The courts below were necessarily deceived by one set of facts.

2. *GVR is appropriate, because the Hartkes' judicial admissions were not fully considered below.*

This Court has noted that, "[w]here intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate." *Lawrence*, 516 U.S. at 167.

The Eighth Circuit Panel decision did not include a word about the Hartkes' judicial admissions that Roger had no interest in the notes, the mortgages, the Hartkes' real estate, or in the corporate defendants, and had "*no standing* to object to the enforcement of the judgment." App. K at 46 (italics added).

If this Court issues a GVR Order, in light of the Hartkes' judicial admissions, Roger submits that there is "a reasonable probability that giving the lower court the opportunity to consider that point anew will alter the result." *Lawrence*, 516 U.S. at 171-72.

3. *The Hartkes' jurisdictional fraud undermined the very legitimacy of the judgment.*

This Court has observed that the interest in the finality of judgments is undermined in "cases of fraud upon the court calling into question the very legitimacy of the judgment." See *Calderon v. Thompson*, 523 U.S. 538, 557 (1998) (citing *Hazel-Atlas Co. v. Hartford Co.*, 322 U.S. 238

(1944) (discussing "the historic power of equity to set aside fraudulently begotten judgments" and canvassing cases and treatises and vacating a judgment entered nine years earlier), *overruled on other grounds by Standard Oil Co. of Cal. v. United States*, 429 U.S. 17, 18 (1976)).

Here, the lower courts relied upon the truthfulness of the initial set of jurisdictional facts presented to them by the Hartkes. However, their *post-judgment* judicial admissions, if true, are *conclusive* evidence that they committed fraud and deceit in their *pre-judgment* jurisdictional facts. *Standard Fire Ins.*, 568 U.S. at 592 ("9 Wigmore, supra, § 2590, at 822 (the "vital feature" of a judicial admission is "universally conceded to be its *conclusiveness* upon the party making it")") (emphasis in original).

The Hartke Complaint identified WIPT as the owner of one of the notes and alleged that WIPT made the December 2016 demand for payment. Judge Magnuson paraphrased these two facts in his judgment of 11/28/2017:

> "In late December 2016, WIPT notified the Hartkes that it had acquired the July note and mortgage from Community Bank, and demanded payment from the Hartkes for $1.5 million that WIPT had ostensibly paid on the note. (Id. 53.)." Judge Magnuson's Judgment, App. C at 21-22 (citing ¶ 53 of the Hartkes' Complaint).

Yet, in their Appellees' brief to the Eighth Circuit, the Hartkes changed their litigating position and stated that "the payment demand was made *by Waldner's December letter*." (Emphasis added). App. M at 58.

> Hartkes' complaint for declaratory judgment recites in sufficient factual detail an actual and legal controversy between parties, and when the controversy became justiciable, in late December 2016. The threat of injury to Hartkes became imminent, and the controversy became justiciable after the demand for payment on the note was made.
>
> Because of standing, ripeness and justiciability issues, the declaratory judgment claim did not exist and was not

"owned" by the Hartkes until after the payment demand was made by Waldner's December letter.

App. M at page 58. The Hartkes continued:

Hartkes did not have a declaratory claim of sufficient immediacy and reality to warrant the issuance of a declaratory judgment until they received Waldner's demand for payment.

App. M at 59.

In their enforcement proceedings, the Hartkes reversed position 100% in judicial admissions before Judge Brasel but did so only *after* the judgment had been affirmed on appeal. See App. K at 44-48.

Roger brought these facts to the attention of the Eighth Circuit Panel and summarized the issue: "to ensnare Waldner in their web of deceit the Plaintiffs were compelled to manufacture deliberately false jurisdictional facts before this Court, as well." App. L at 49-50.

4. *A GVR Order is appropriate because the very temple of justice has been defiled.*

Fraud on the court has been recognized for centuries as a basis for setting aside a final judgment, sometimes even years after it was entered. *Hazel-Atlas*, 322 U.S. at 245.

It is, of course, true that "in most instances society is best served by putting an end to litigation after a case has been tried and judgment entered." *Id.* at 244. For this reason, a final judgment, once entered, normally is not subject to challenge. However, the policy of repose yields when "the court finds after a proper hearing that fraud has been practiced upon it, or the very temple of justice has been defiled." *Universal Oil Co. v. Root Rfg. Co.*, 328 U.S. 575, 580 (1946). "[A] case of fraud upon the court [calls] into question the very legitimacy of the judgment." *Calderon v. Thompson*, 523 U.S. 538, 557 (1998). One treatise states the issue as follows: "[w]hen a judgment is shown to have been procured" by fraud upon the court, "no worthwhile interest is served in protecting the judgment." Restatement (Second) of

Judgments § 70 cmt. b (1982).

Here, the deceit by the Hartkes and their Counsel is spread out on the pages before two district courts and the Eighth Circuit. Roger challenges only the judgment as to him. The Hartkes knew that they could obtain a judgment against Roger *only* if they manufactured false jurisdictional facts against him. They admit that he had no interest in the notes and mortgages encumbering their property.

The Hartkes and their Counsel essentially revealed, perhaps inadvertently, the deceit they practiced on all three courts by their judicial admissions before Judge Brasel.

Roger's statement to the Eighth Circuit may prove to have been correct: "to ensnare Waldner in their web of deceit the Plaintiffs were compelled to manufacture deliberately false jurisdictional facts before this Court, as well." App. L at 49-50.

B. The Hartkes' pre-judgment deceit is revealed by their post-appeal judicial admissions.

If the Hartkes' judicial admissions are truthful, then they are *conclusive* against them. There was no controversy between them and Roger on the notes and mortgages, and they had no Article III standing to bring their action against him. The courts were lulled by the Hartkes' deceit into exercising Article III "judicial power" over a non-controversy.

Hartkes' judicial admissions are laid bare in their pleadings clearly and convincingly. Yet, the courts below had no way of telling from the immediate record before them that the Hartkes had manufactured false jurisdictional facts. No discovery was had. The courts were compelled to rule on the pre-judgment false facts pled by the Hartkes.

Only after the judgment was affirmed on appeal did the Hartkes plead Roger's lack of a "personal stake" in the case. Without a defendant's "personal stake" in a dispute, no Article III case or controversy exists for a plaintiff to bring suit. Chief Justice Roberts explained the concept recently.

"A case or controversy exists when both the plaintiff

and the defendant have a 'personal stake' in the lawsuit. *Camreta v. Greene*, 563 U.S. 692, 701 (2011). A plaintiff demonstrates a personal stake by establishing standing to sue, which requires a 'personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.' *Allen*, 468 U.S., at 751. [quoting *Allen v. Wright*, 468 U.S. 737 (1984)]. A defendant demonstrates a personal stake through 'an ongoing interest in the dispute.' *Camreta*, 563 U.S., at 701, 131 S.Ct. 2020." *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 678-79 (2016). (Roberts, C. J., dissenting).

The Hartkes' judicial admissions describe facts that *conclusively* show that Roger lacked a "personal stake" in the case below:

- "Defendant Waldner has no property interest in any of the real estate that is the subject of the motion." App. K at 46.
- He "has no standing to object to the enforcement of the judgment." Id.
- "He also has no interest in the defendant corporations." Id.
- "Defendant Waldner's lower court claims, his appeal, and any possible issue to be raised on certiorari has no relevance to the enforcement of judgment intended to relieve the Hartkes' property of the burden of the void mortgages." Id.
- Waldner "does not have, and has never had, an interest in the properties nor was he a party to the notes." App. N at 61.
- "Roger Waldner is not an attorney, he is not a party to any of the notes, nor does he claim an interest in any of the mortgaged properties." App. O at 63.

C. The Hartkes lulled the district court into a clear usurpation of Article III "judicial power" that rendered its judgment void against Roger.

The Hartkes described the purpose of their lawsuit:

"Hartkes were seeking a declaration that certain mortgages on property primarily located in Martin County, but also parcels located in Cottonwood and Watonwan counties, all in Minnesota, were unenforceable based on statutes of limitation. Hartkes also sought judgment voiding the notes and assignments accompanying those mortgages." App. O at 62.

Their post-judgment judicial admissions *conclusively* show that Roger had no "personal stake" in the lawsuit. They lulled the court unwittingly into exercising Article III "judicial power" over a non-controversy, a violation of the case-or-controversy requirement of Article III.

""This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate. . . . The parties must continue to have a 'personal stake in the outcome' of the lawsuit.' *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-478 (1990). See also *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). This means that, throughout the litigation, the plaintiff 'must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.'" *Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (quoting *Lewis*, *supra*, at 477).

The Hartkes' judicial admissions show that they did not suffer an actual injury traceable to Roger that could be redressed by a favorable decision for them against him. No case or controversy existed between them and Roger as to the notes on their mortgaged properties.

"If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006). "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 37 (1976).

Roger submits that the Hartkes' post-appeal judicial admissions prove *conclusively*: **1)** that their pre-judgment

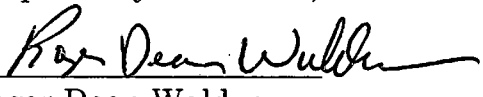
jurisdictional facts deceived the district court into exercising Article III "judicial power" over a non-case and non-controversy; **2)** that the district court's exercise was an unknowing usurpation of judicial power from the onset of the case; **3)** its exercise was a fundamental infirmity that so affected the case that Roger could raise the infirmity to the courts even after the judgment had become final; **4)** no "arguable basis" existed for jurisdiction by the court; and **5)** the jurisdictional error is one of those "rare instances of a clear usurpation of power [that] will render a judgment void." *United Student Aid Funds v. Espinosa*, 559 U.S. 260, 271 (2010) (citation and quote marks omitted) (alteration in brackets added).

XI. CONCLUSION

WHEREFORE, for the reasons cited and for such other reasons as seem appropriate, Petitioner Roger respectfully asks this Court to issue a GVR Order and to remand in light of the judicial admissions by the Hartkes and their Counsel, without determining the merits, leaving it to the Eighth Circuit to decide if the judicial admissions warrant dismissal of the judgment against Roger as void.

Dated: June 1, 2020

Respectfully submitted,



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