No. 19-1375

In the

Supreme Court of the United States

AARON L. KATZ,

Petitioner,

v.

INCLINE VILLAGE GENERAL IMPROVEMENT DISTRICT,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Nevada

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES- Continued

Page

Petitioner is compelled to file this Reply Brief per SCR 15(6) because, in the Brief for Respondent ("RB"), the Incline Village General Improvement District ("IVGID") has confused the issue and omitted some critical facts in misstating the record. With the issue and the record clarified, the Court should see this is an extremely important First Amendment case upon which certiorari should be granted:

I.

THE ISSUE IS NOT WHETHER LIMITED FIRST AMENDMENT IMMUNITY APPLIES TO SOMETHING OTHER THAN AN ANTI-TRUST CASE.

At RB 1, IVGID contends that Petitioner asserts that the Nevada Supreme Court improperly refused to apply a limited First Amendment immunity because it was not an anti-trust case.

IVGID has feigned confusion. As we point out at pages 24-28 of the Petition for Writ of Certiorari ("PWC"), *Noerr-Pennington* immunity extends to virtually any civil context where one petitions on a matter of public concern.

Rather, the questions presented for review are:

1) May a petitioning litigant be held liable for his or her adversary's litigation costs and attorney fees based upon a *punitive* statute where the litigant has filed a "pure petition" to redress grievances of public concern, and his/her litigation is not a "sham"?

2) Should cases such as *Premier Electric Construction Company v. National Electric Contractors Association, Inc.*, 814 F.2d 358, 373 (7th Cir. 1987) and *Octane Fitness, LLC v. Icon Health & Fitness, Inc.*, 572 U.S. 545, 554-57, 134 S.Ct. 1749

(2014), be limited to lawsuits that do *not* involve local government nor seek redress of public grievances? And if so, should cases such as *Equilon Enterprises, LLC v. Consumer Cause, Inc.*, 29 Cal.4th 53, 62, 52 P.3d 685 (2002), *Vargas v. City of Salinas*, 200 Cal.App.4th 1331, 134 Cal.Rptr.3d 244 (2001) *and this one*, be overruled/vacated?

That this issue(s) is (are) vitally important cannot be understated. The second part of the Nevada Supreme Court's disposition was to say, citing *Vargas* and *Premier*, that liability for attorney fees to a prevailing party is not the same as civil liability for filing a lawsuit. Likewise, "NRS 18.010(2)(b) merely requires that Katz bear the costs incurred in exercising his rights."

But if we take "penalty statutes," as NRS 18.010(2)(b) is per its text, and apply them to pure petitions for redress of grievances, then the effect is to undermine the very First Amendment protection that the "petition clause" creates. Most people cannot afford to pay a quarter-million dollar penalty for exercising their rights. Forcing that upon citizens chills that exercise. If a citizen determines a legal basis upon which his/her local government has illegally taxed its citizens, this result tells the citizen "unless you're willing to pay a quarter million dollars to make that argument, too bad. You get taxed without representation."

II.

THE FACT THAT THIS COURT REFUSED TO GRANT CERTIORARI IN TWO PRIOR CASES INVOLVING SIMILAR ISSUES IS IRRELEVANT.

IVGID argues that because this Court refused to grant certiorari in *Vargas*[1]

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[1] *Vargas v. City of Salinas*, 568 U.S. 958, 133 S.Ct. 924 (2012)

and *The Petersen Law Firm v. City of Los Angeles* (2011) WL1380059 (Cal.App. 2011)[2] that it should do likewise here.

In the words of Justice Frankfurter in *Daniels v. Allen*, 344 U.S. 443, 491-92, 73 S.Ct. 397, 438-39, 97 L.Ed. 469 (1953):

> "If we were to sanction a rule directing the District Courts to give any effect to a denial to certiorari, let alone the effect of res judicata which is the practical result of the Fourth Circuit, we would be ignoring actualities recognized ever since certiorari jurisdiction was conferred upon this Court more than sixty years ago.
>
> From its inception certiorari jurisdiction has been treated for what it is in view of the function that it was devised to serve. It was designed to permit this Court to keep within manageable proportions, having due regard to the conditions indispensable for the wise adjudication of those cases which must be decided here, the business that is allowed to come before us.
>
> ...
>
> It is within the experience of every member of this Court that we do not have to, and frequently do not, reach the merits of a case to decide that it is not of sufficient importance to warrant review here. Thirty years ago the Court rather sharply reminded the Bar not to draw strength from lower court opinions from the fact that they were left unreviewed here. The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the Bar has been told many times. [cite omitted] We have repeatedly indicated that a denial of certiorari means only that, for one reason or another which is seldom disclosed, and not infrequently for conflicting reasons which may have nothing to do with the merits and certainly have nothing to do with any review of the merits, taken by the majority of the Court there were not four members of the Court who thought the case should be heard..."

We do not know why four members of this Court were not willing to hear the litigants at that time. We do know this, however:

1) Both *Vargas* and *The Petersen Law Firm* arose out of an award of

[2] Cert denied, 132 S.Ct. 1101 (2012)

attorney's fees after those defendants prevailed on anti-SLAPP special motions to strike. Thus, an award of attorney's fees is mandatory. *Vargas*, 200 Cal.App.4th at 1340, 134 Cal.Rptr.3d at 252. This case, however, does not arise in an anti-SLAPP context. Moreover, any award of attorney's fees under NRS 18.010(2)(b) post-judgment is not mandatory, but rather, discretionary. A partial list of Nevada Supreme Court cases that reverse the trial court for awarding attorney's fees under NRS 18.010(2)(b), as an abuse of discretion, includes: *Frantz v. Johnson*, 116 Nev. 455, 472, 999 P.2d 351, 361-62 (2000); *Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 967-68, 194 P.3d 96, 106-07 (2008); *Frederic and Barber Rosenberg Living Trust v. MacDonald Highlands Realty, LLC*, 134 Nev. 570, 580-81, 427 P.3d 104, 112-13 (2018).

2) The more important and disturbing query is this: In California a governmental agency is permitted to file a motion for attorney's fees after prevailing on an anti-SLAPP special motion to strike. But the trial court may apply a more relaxed standard than "sham." How then can any award be constitutional?

III.

ONLY IN CIVIL CASES BETWEEN PRIVATE LITIGANTS AND ORGANIZATIONS INVOLVING PUBLIC PETITIONING ISSUES SHOULD THE "FEE-SHIFTING STATUTE" EXCEPTION TO PETITIONING IMMUNITY BE RECOGNIZED.

In the United States parties are ordinarily required to bear their own attorney's fees. The prevailing party is not entitled to collect from the loser. Under this "American rule" this Court follows the general practice of not awarding fees to a prevailing party absent explicit statutory authority. *Buckhannon Board & Care*

Home, Inc. v. West Virginia Department of Health & Human Resources, 532 U.S. 598, 121 S.Ct. 1835, 1839, 149 L.Ed.2d 855 (2001).

So from that perspective, NRS 18.010(2)(b) might be considered a "fee shifting statute." But the rule contained in *Premier Electric* concerns "loser-pays-winner" fee statutes, not "bad-faith attorney's fees" statutes intended to penalize. As stated by the Tenth Circuit in *Boyd Rosene and Associates, Inc. v. Kansas Municipal Gas Agency*, 174 F.3d 1115, 1125-26 (10th Cir. 1999):

> "This Court recognizes a distinction, as do other courts and commentators, between loser-pays-attorney's fees, that is attorney's fees awarded to a party simply because it prevailed, and attorney's fees assessed for a willful violation of a court order or against a losing party who acted in bad faith, vexatiously, wantonly or for oppressive reasons [hereinafter 'bad-faith attorney's fees'][cite omitted].
>
> Loser-pays-attorney's fees are normally not within a court's inherent power. Instead, they reflect a conscious policy choice by a legislature to depart from the American rule and codify the English rule. *See*: 20 Am. Jur. 2d *Costs* § 57 (1995) . . . The authority to award bad-faith attorney's fees, though frequently codified, is usually within a court's inherent powers, which it has discretion to exercise in the interest of justice and efficient judicial administration."

Premier Electric references a standard "loser-pays-winner," or "attorney's fees as costs" statute, generally for the plaintiff who acts as a "private attorney general." Thus, we have "fees as costs" statutes in the context of civil rights actions,[3] Fair Housing Amendment Act actions[4], the Clean Air Act and other like environmental statutes[5], and American Disabilities Act actions[6]. In all of these actions costs and

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[3] 42 U.S.C. § 1988(b)
[4] 42 U.S.C. § 3613(c)(2)
[5] 42 U.S.C. § 7604(d)

fees are mandatorily entered after the party (typically the plaintiff) prevails in his/her lawsuit. The judicial "discretion" involved is not whether to award fees, but how much and for what services[7]. In that situation, it makes sense that "fee-shifting" is not a civil liability, because creating fees for a private attorney general plaintiff is "no more a violation of the First Amendment than a requirement that a person who wants to publish a newspaper pays for the ink, the paper and the press."

But here we have a post-judgment statute, NRS 18.010(2)(b), a penalty statute, generally favoring the defendant. It is the codification of special damages for the torts of malicious prosecution or abuse of process. As pointed out at PWC 25-28, a local governmental agency cannot sue one of its citizens for malicious prosecution or abuse of process; and even if otherwise, IVGID could not do so here as a matter of Nevada law. IVGID does not disagree. But if so, how can this Court countenance under the First Amendment petition clause an award in favor of a governmental agency that is in effect special damages for a malicious prosecution and/or abuse of process lawsuit against one of its citizens, when the agency cannot bring that lawsuit?

Consistent with *Octane Fitness* and *B.E.K.*[8], it is one thing to say that the judgment imposes a penalty in the nature of special damages for a bad faith lawsuit between private litigants and organizations. That does not run afoul of the First

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[6] 42 U.S.C. § 12205

[7] *See*: *Pennsylvania v. Delaware Valley Citizen's Council For Clean Air*, 478 U.S. 546, 106 S.Ct. 3088, 92 L.Ed.2d 439 (1986).

[8] *BE&K Construction Co. v. National Labor Relations Board*, 536 U.S. 516, 525, 528-37 (2002)

Amendment. However it is quite another to impose such "special damages" in a lawsuit between a private citizen and his/her local government, where the citizen petitions for redress of grievances by filing for declaratory and injunctive relief regarding the governance activities of his/her local governmental agency. That directly infringes on the citizen's First Amendment petitioning rights, and should not be countenanced unless it can be established that that lawsuit is "baseless" within the meaning of the First Amendment.

IVGID asserts there is a "separate and independent basis" upon which the award of nearly a quarter million dollars of attorney's fees can be upheld, or the "vexatious manner in which Petitioner pursued his claims through the Nevada court system."[9] But rather than this being a reason not to grant certiorari, it is the very reason to do so. As explained at PWC 32-33, per IVGID NRS 18.010(2)(b) can be strictly construed to authorize an award of attorney's fees based only on "vexatiousness" or "harassment," even if the lawsuit is not frivolous. But this position violates the First Amendment. And it is very important to correct the record:

1. In IVGID's Motion for Attorney's Fees, attached as Exhibit "1", nowhere did IVGID contend that any claim was "frivolous" within the meaning of NRS 18.010(2)(b). Rather, its theory was purely that Petitioner engaged in harassment of IVGID. In fact, IVGID claimed Petitioner's intent in filing his lawsuit was to "extort" settlement – with no evidence supporting this scandalous assertion.

2. Either IVGID is confused, or is misleading this Court. Nowhere in the

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[9] *See:* RB 27-28.

merits Order of Affirmance, Case No. 70440, did the Nevada Supreme Court state that any claim was baseless or frivolous. A copy of that Order is attached as Exhibit "2".

3. The standard for "baselessness" under NRS 18.010(2)(b) is different than that of "baselessness" under the First Amendment. Per *Frederick and Barbara Rosenberg Living Trust, supra,* "frivolous" and "groundless" basically mean the same thing: No credible evidence to support the cause of action. But a cause of action cannot be "frivolous" when it suggests a novel issue of state law which, if successful, can result in a significant expansion of existing law.

Contrast that to "baselessness" within the meaning of the First Amendment. In that context, as explained at PWC 29-31, it means that determined objectively no reasonable litigant could realistically expect success on the merits of his/her lawsuit. Put otherwise, the lawsuit is a "sham," meaning the citizen has used the governmental process, as opposed to the outcome of the process, for illegal and reprehensible practices which corrupt the judicial process.

The First Amendment test is akin to what this Court has stated re: *stare decisis,* most recently in *Ramos v. Louisiana,* __ U.S. ___, 140 S.Ct. 1390, 1405, 206 L.Ed.2d 583 (2020):

> "...*[Stare decisis]* isn't supposed to be the art of methodically ignoring what everyone knows to be true. Of course, the precedents of this Court warrant our deep respect as embodying the considered views of those who have come before. But *stare decisis* has never been treated as 'an inexorable command.' And the doctrine is 'at its weakest when we interpret the Constitution' because a mistaken judicial interpretation of that supreme law is practically impossible to correct by other means."

So, to give a hypothetical example: Suppose in 1955 a citizen sued, contending that as an indigent charged with a felony he had the right to counsel appointed to him under the Sixth and Fourteenth Amendments of the Federal Constitution. That lawsuit might be deemed "frivolous" at that time because of *Betts v. Brady*, 316 U.S. 455 (1942); but it could not be deemed "baseless" because *Betts* was overruled by *Gideon v. Wainwright*, 372 U.S. 335 (1963).

IV.

NEITHER THE TRIAL COURT NOR THE NEVADA SUPREME COURT HAS MADE SPECIFIC FINDINGS CONSISTENT WITH THE TEST OF "SHAM" OR "BASELESS" WITHIN THE MEANING OF THE FIRST AMENDMENT PETITION CLAUSE.

As Petitioner anticipated, much of IVGID's brief argues that this case is inappropriate for the grant of certiorari because the Nevada Supreme Court has already declared his lawsuit was "baseless." OOA: 3.

That is why Petitioner argued at PWC 33-34 that the Court simply cannot rely upon such conclusion of law in the absence of findings of fact.

While this Court could grant certiorari, set forth the proper principles of First Amendment petitioning immunity when a citizen sues his/her government for declaratory and injunctive relief, and simply remand the case to the Nevada Supreme Court to make specific findings, why do that? Every cause of action was grounded in a statute that had never been interpreted or in a principle set forth in Nevada or general case law that very arguably applies. *See*: PWC 10-15.

In the absence of controlling Nevada or federal authority on point – much less

controlling authority that has existed for years – what is the point of a remand for specific findings of baselessness? Just because the trial court wanted to punish Petitioner for taking up its and IVGID's time, and the Nevada Supreme Court was all too willing to sign off on that with "magic words," should not make those "magic words" controlling.

A major truth about this case emerges: If a court had substantively looked at NRS 318.197(1) and Petitioner's evidence objectively, and had it agreed with Petitioner, the result would have been catastrophic to IVGID. IVGID probably would have been placed into Bankruptcy under Chapter 9 of the U.S. Bankruptcy Code. That more than anything else has driven IVGID and the state courts to be so inflammatory towards Petitioner. But to penalize him nearly a quarter of a million dollars because he "might have been right" in contending IVGID's taxation scheme is blatantly unconstitutional simply cannot be sustained.

V.

OTHER SMALLER POINTS

IVGID argues that Mr. Katz raised for the first time in this petition that *Noerr-Pennington* immunity extends to *extra-judicial* conduct incidental to a lawsuit or ancillary to litigation. Not so. He raised this issue in his Petition for Rehearing en banc. See Exhibit "3," at 5-6. The Nevada Supreme Court refused to consider it.

IVGID also complains that Petitioner attacks the constitutionality of NRS 18.010(2)(b), and that he did not follow the proper Nevada procedure for doing so.

This, too, is nonsense. There is no question that NRS 18.010(2)(b) is constitutional; the question is whether a constitutional statute has been applied in an unconstitutional manner. *See: Yick Wo v. Hopkins*, 118 U.S. 356 (1886), cited at PWC 21, 32.

Finally we must note: IVGID has proceeded with a considerable amount of "heat" relative to the "light" it has generated. The character assassination of Petitioner has been intense, and it continues in the RB[10]. But it obscures a bigger point:

Many would say Larry Flynt was not a reputable character, and likewise Paul Cohen. Yet, this Court recognized in *Hustler Magazine v. Falwell*, 485 U.S. 486 (1988) and *Cohen v. California*, 403 U.S. 15 (1971) that the First Amendment transcends the personalities of the litigants before this Court. If the First Amendment is to measure up to the intent of the Framers, the right to petition occupies the highest rung of First Amendment values. If "pure petitioning" is to be treated like "pure speech" and given special protection[11], the personality of the litigants before this Court becomes irrelevant.

The Petition Clause of the First Amendment does not exist "even" for citizens like Aaron Katz: It exists <u>especially</u> for citizens like Aaron Katz.

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[10] For example, Petitioner's felony conviction was expunged in 1988. (*In the Matter of Katz*, 1 Cal. State Bar Ct. Rptr. 502, 508 (1991)). IVGID knows this.

[11] See authorities, PWC 22-23

DATED this 7 of August, 2020.

Respectfully submitted,

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