

NO. 19-5939

IN THE SUPREME COURT OF THE UNITED STATES

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FRANK R. MONTERO,

PETITIONER,

v.

TULSA AIRPORTS IMPROVEMENT TRUST, A/K/A T.A.I.T.,

RESPONDENT.

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

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RESPONDENT'S BRIEF IN OPPOSITION TO  
PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

In January 2014 Petitioner sued Respondent in state court. After judgments were entered in Respondent's favor dismissing Petitioner's claims and awarding Respondent attorney fees, Petitioner filed a Motion to Transfer Venue in the Federal District Court. Respondent filed a Motion to Strike Filings and to Dismiss, contending the case could not be transferred or removed from state court to federal court, and the Federal District Court did not have jurisdiction. The Federal District Court dismissed the case on the basis of the *Rooker-Feldman* doctrine, holding Petitioner was essentially seeking reconsideration of the claims he raised in state court and relief from the judgments entered against him in state court. Petitioner appealed the dismissal to the Tenth Circuit and filed a Rule 59 motion in the District Court. After Petitioner's Rule 59 motion was denied, the Tenth Circuit held Petitioner could not transfer or remove his case from state court to federal court, so the Federal District Court never obtained jurisdiction and the case should be remanded to state court.

Petitioner purports to raise five questions, but based on the Tenth Circuit's decision the only question presented is: Did the Tenth Circuit correctly decide the District Court did not have subject matter jurisdiction over this case because Petitioner could not transfer or remove the pending state court action to federal court?

## STATEMENT OF RELATED CASES

In accordance with Sup. Ct. R. 15.2, Respondent lists the following related cases:

1. *Frank R. Montero d/b/a AA, Inc., Plaintiff, v. Tulsa Airport Authority, a/k/a TAIT a/k/a TAA, Defendant*, Case No. CV-2014-72, Tulsa County, Oklahoma District Court, a Final Judgment dismissing the case was entered in favor of Respondent on July 14, 2015; a Judgment awarding Respondent its attorney fees was entered December 20, 2016; Post-Judgments to vacate were denied January 26, 2017.
2. *Frank R. Montero, Plaintiff/Appellant v. Tulsa Airport Authority, a/k/a TAIT, Defendant/Appellee*, Case No. 115748, Supreme Court of Oklahoma, Order dismissing appeal was filed December 15, 2017.
3. *Frank R. Montero v. Tulsa Airport Improvements Trust a/ka/ T.A.I.T., a/k/a TAA*, Case No. 17-CV-622-TCK-JFJ, United States District Court, Northern District of Oklahoma, Opinion and Order was filed January 10, 2018, and Petitioner's Rule 59 Motion was denied by Order entered January 29, 2019.
4. *Frank R. Montero v. Tulsa Airports Improvement Trust, a/k/a T.A.I.T.*, Case No. 18-5011, United States Court of Appeals for the Tenth Circuit, Order and Judgment entered on May 20, 2019, and Petition for Rehearing denied June 13, 2019.

## **TABLE OF CONTENTS**

	<u>Page</u>
QUESTION PRESENTED .....	i
STATEMENT OF RELATED CASES .....	ii
TABLE OF CONTENTS .....	iii
TABLE OF AUTHORITIES .....	iv
STATEMENT OF THE CASE .....	1
REASONS FOR DENYING THE PETITION .....	4
I.    The Tenth Circuit properly held the Federal District Court did not acquire subject matter jurisdiction because the case was improperly transferred/removed from state court .....	4
II.   Petitioner has not given any compelling reason for this Court to review the Tenth Circuit's decision .....	5
CONCLUSION .....	8

## **TABLE OF AUTHORITIES**

	<u>Page(s)</u>
<b><u>Federal Statutes</u></b>	
Sup. Ct. R. 10 .....	5
28 U.S.C. §1404 .....	3
28 U.S.C. §1404(a) .....	5, 6
28 U.S.C. §1441 .....	3, 5, 6
<b><u>Federal Rules</u></b>	
Fed. R. App. P. 40 .....	8
<b><u>Other Authorities</u></b>	
<i>Rooker-Feldman</i> doctrine .....	3, 4

## STATEMENT OF THE CASE

This case originated in state court. In January 2014 Petitioner sued Respondent in Tulsa County, Oklahoma, District Court Case No. CV-2014-72 (the “State Court Action”) alleging Respondent was liable for various breaches of contract and torts in connection with Petitioner’s lease from Respondent of real property containing an airplane hangar. Aplee. App. at 1-13. Among the claims made by Petitioner against Respondent in the State Court Action were the claims made by Petitioner here concerning bootlegged septic tanks, failure to comply with EPA and DEQ (Oklahoma Department of Environmental Quality) regulations, polluted groundwater, and failure to comply with Federal Grant Assurance Program 22.

The State Court Action resulted in a judgment in favor of Respondent dismissing Petitioner’s claims. *Id.* at 29-30. During post-trial proceedings Petitioner sought to recuse the trial judge, and pursued recusal proceedings all the way to the Oklahoma Supreme Court. On May 31, 2016, the Oklahoma Supreme Court entered an order declining to disqualify the trial judge. *Id.* at 31.<sup>1</sup>

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<sup>1</sup> In his Petition Petitioner states the Oklahoma Supreme Court held in a Writ of Mandamus that the state trial judge violated Petitioner’s Federal Due Process rights, citing a March 21, 2016 Order entered by the Oklahoma Supreme Court. *See* Petition at 1 (first question presented); 2; 13. The March 21 Order is attached to the Petition at Appendix B-1. The March 21 Order cited by Petitioner found only that the state trial court’s docket entry denying Petitioner’s motion to recuse

Following the Oklahoma Supreme Court’s May 31, 2016 order, the case returned to the trial court. On December 20, 2016, the state trial court awarded Respondent its reasonable attorney fees. Pet. App. B-2. In January 2017 the trial court denied Petitioner’s motion to vacate final judgment and motion for new trial on the attorney fee judgment. Aplee. App. at 36, 37.

On February 7, 2017, Petitioner filed an appeal from those orders with the Oklahoma Supreme Court in Appeal No. 115748. *Id.* at 38-88. On December 15, 2017, the Oklahoma Supreme Court entered an order dismissing the appeal, and mandate issued January 18, 2018. Therefore, the state court judgments dismissing Petitioner’s claims against Respondent and awarding Respondent attorney fees are final.

Petitioner did not post a bond to stay enforcement of the judgment. After Respondent attempted to execute on the judgment, on November 14, 2017, Petitioner filed a “Motion to Transfer Venue” in the Federal District Court, resulting in the opening of this case. *Id.* at 95-102. The case caption includes the words “Lower Court Case No. CV-2014-72, Tulsa County District Court, Tulsa,

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was procedurally insufficient to memorialize the denial, and ordered the trial court to properly memorialize its order. Once the trial court did so, the Oklahoma Supreme Court took the matter up again and on May 31, 2016, entered an order declining to recuse the state court trial judge.

OK". In the body of the pleading Petitioner mentions transfer of venue, citing 28 U.S.C. §1404; and mentions he has a right to remove the action under 28 U.S.C. §1441. *Id.* at 95, 97.

On December 8, 2017, Petitioner filed a Motion for Summary Judgment and Statement of Undisputed Facts. *Id.* at 194, 216. Petitioner moved for summary judgment on some of the same claims he made and lost on in the State Court Action. Petitioner did not submit any admissible evidence in support of the motion.

On December 13, 2017, Respondent filed a Motion to Strike Filings and to Dismiss. *Id.* at 235. In its Motion to Strike and Dismiss, Respondent argued the District Court did not acquire subject matter jurisdiction because the case could not be transferred or removed from state court.

On January 10, 2018, the District Court entered its Opinion and Order. Pet. App. A-1. The District Court *sua sponte* concluded Petitioner was "seeking, essentially, a review of the judgment in the State Court Action, rather than the adjudication of separate claims," and therefore held it lacked subject matter jurisdiction pursuant to the *Rooker-Feldman* doctrine. The same day the District Court entered a Judgment of Dismissal. Aplee. App. at 257.

Petitioner appealed the judgment to the Tenth Circuit. He also filed a Motion to Alter Judgment in the District Court. The Tenth Circuit treated

Petitioner's motion in the District Court as a Rule 59 Motion, and held the appeal in abeyance until the District Court ruled on it. *See, e.g.*, Pet. App. A-2. On January 29, 2019, the District Court denied the Motion. Pet. App. A-3.

The Tenth Circuit then lifted its order holding the appeal in abeyance, and issued an unpublished decision on May 20, 2019. Pet. Ap. A-4. Because Petitioner's appeal in the State Court Action was pending when Petitioner attempted to transfer/remove the State Court Action to federal court, the Tenth Circuit held the *Rooker-Feldman* doctrine did not apply. The Tenth Circuit held, however, the District Court never acquired subject matter jurisdiction because the case could not be transferred or removed from state court to federal court. Accordingly, the Tenth Circuit vacated the District Court's dismissal with the instruction that the District Court remand the case back to state court. On June 13, 2019, the Tenth Circuit denied Petitioner's Petition for Rehearing. Pet. App. A-5.

In accordance with the Tenth Circuit decision, on June 21, 2019, the case was remanded back to state court. Pet. App. A-6.

## **REASONS FOR DENYING THE PETITION**

### **I. The Tenth Circuit properly held the Federal District Court did not acquire subject matter jurisdiction because the case was improperly transferred/removed from state court.**

While his appeal was pending in the State Court Action, Petitioner began this action in Federal District Court by filing a "Motion to Transfer Venue". In the

motion Petitioner purported to transfer the case from state court, citing 28 U.S.C. §1404(a); and he purported to remove the case to federal court, citing 28 U.S.C. §1441.

As the Tenth Circuit properly held, §1404(a) governs the transfer of cases from one federal district court to another; this section does not allow a state court to transfer a case to a federal court. Pet. App. A-4, at 4. The Tenth Circuit also properly held §1441 does not permit a state court plaintiff (like Petitioner) to remove a case to federal court. Therefore, as the Tenth Circuit held, the federal court never obtained jurisdiction.

Petitioner has not demonstrated any error in the Tenth Circuit’s ruling. The Petition for Writ of Certiorari should therefore be denied.<sup>2</sup>

**II. Petitioner has not given any compelling reason for this Court to review the Tenth Circuit’s decision.**

This Court grants certiorari “only for compelling reasons”. Sup. Ct. R. 10. None of the compelling reasons listed in Rule 10 is present in this case – the Tenth Circuit’s decision is not in conflict with a decision of another circuit; the Tenth Circuit has not decided an important federal question in a way that conflicts with a state court decision; and the Tenth Circuit has not so far departed from the

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<sup>2</sup> Petitioner did not seek a stay of the mandate. As noted above, the case has already been remanded back to state court.

accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory power.

Indeed, Petitioner doesn't even quarrel with the Tenth Circuit's legal rulings that a party cannot transfer a case from state court to federal court under 28 U.S.C. §1404(a), and a state court plaintiff cannot remove a case to federal court under 28 U.S.C. §1441.

Instead, Petitioner presents a list of five questions. None of the questions presented by Petitioner warrant certiorari review.

- First, Petitioner refers to the Oklahoma Supreme Court's March 21, 2016 Writ of Mandamus and states that Court held the state trial judge violated federal due process, raising federal question jurisdiction. Petitioner misstates both the Oklahoma Supreme Court's Writ and the effect of the Writ. The Writ simply stated the state trial judge did not properly memorialize his order denying Petitioner's motion to recuse, and sent the case back for the trial judge to do so. The Writ did not state the trial judge violated Petitioner's federal due process rights, and it had no effect on establishing federal court jurisdiction.
- Second, Petitioner states the Tenth Circuit had an obligation to rule on his Motion for Summary Judgment. But because the federal court

does not have subject matter jurisdiction, it had no authority to consider or rule on the Motion for Summary Judgment.<sup>3</sup>

- Third, Petitioner contends federal court jurisdiction is established by the Tenth Circuit’s order holding the appeal in abeyance pending the District Court’s decision on Petitioner’s Rule 59 Motion, and the Tenth Circuit’s subsequent orders for status reports. There is no argument accompanying this contention, and no support for such a contention exists.
- Fourth, Petitioner contends the Tenth Circuit abused its discretion in remanding the case back to state court. There is no argument accompanying this contention. Because the Federal Court never acquired jurisdiction, the Tenth Circuit properly ordered the case remanded back to state court.
- Fifth, Petitioner contends the Tenth Circuit denied Petitioner his due process rights by entering an order denying rehearing before

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<sup>3</sup> Petitioner states Respondent did not respond to the Motion for Summary Judgment so it should have been granted. In addition to the Federal District Court lacking jurisdiction to grant the motion, this argument is without merit for two more reasons. First, Respondent did respond – five days after the Motion for Summary Judgment was filed Respondent filed a Motion to Strike Filings and Dismiss based on the lack of federal court jurisdiction. Second, the Motion for Summary Judgment was not supported by any admissible evidence, and therefore could not have been granted in any event.

reviewing Petitioner's "final optional brief". The Federal Rules of Appellate Procedure do not provide for such a brief. *See* Fed. R. App. P. 40. Indeed, no answer to a petition for rehearing is permitted unless requested by the Court, and here the Tenth Circuit did not even request an answer from Respondent.

Simply, Petitioner has failed to demonstrate any reason, much less a compelling one, for this Court to review the Tenth Circuit's decision.

## **CONCLUSION**

The Tenth Circuit's decision does not warrant review. Accordingly, the Court should deny the Petition for a Writ of Certiorari.

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