No. 19-6944

ORIGINAL

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SUPREME COURT, U.S.

SUPREME COURT OF THE UNITED STATES

BAHMAN KHODAYARI,

Petitioner,

vs.

CITY OF LOS ANGELES, PAUL TERRIS, GABRIEL ORONA, SAFI LODIN and MARK BIVENS,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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Petitioner, Pro Se

Question Presented

A. Does the Ninth Circuit's affirmance of the District Court's dismissal of Petitioner's 42 U.S.C. § 1983 claim under Fed.R.Civ.P. Rule 41(b) due to Rule 37(c)(1) evidentiary sanctions for failing to disclose computation of damages under Rule 26(a)(1)(A)(iii), conflict with relevant decisions of this Court regarding Petitioner's entitlement to nominal damages?

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Petition for Writ of Certiorari

Bahman Kodayari, respectfully petitions this court for a writ of certiorari to review the final decision of the Ninth Circuit Court of Appeals.

Opinions Below

The order of the District Court of Central District of California dismissing Petitioner's case for violations of discovery Fed.R.Civ.P. Rule 26 and Rule 37 is attached at Appendix ("Appx") A. The Ninth Circuit Court of Appeals decision affirming the district court was filed May 23, 2019 and is attached at Appx at B. Petitioner timely filed a petition for rehearing which was denied on August 29, 2019 and is attached at Appx at C.

Jurisdiction

Petitioner's petition for rehearing to The Ninth Circuit Court of Appeals was denied on August 29, 2019. [Appx C.] Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1), having timely filed this petition for a writ of certiorari within ninety-days of the decision of the Ninth Circuit Court of Appeals denying rehearing.

Constitutional and Statutory Provisions Involved

United States Constitution, Amendment VII:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

42 U.S.C. § 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

Statement of the Case

On or about April 23, 2015, Respondent City of Los Angeles ("City") and its personnel began to violate Petitioner's rights. At this time, Petitioner was a resident of Los Angeles, and lawfully occupied real property on Cantara Street in Reseda, California, which is within the City. On such date, Paul Terris ("Terris") tried to enter Petitioner's property without permission and berated and intimidated Petitioner in order to gain entry into the premises. Terris did not explain the situation to Petitioner or why he needed to gain entry. Petitioner asked Terris to produce a warrant or legal authorization, but Terris declined and then threatened Petitioner and stated that his team would cut down Petitioner's locks and forcibly enter Petitioner's property using physical force. Terris tried to bully and intimidate Petitioner at that point. Since that did not work, Terris left for a few minutes, but soon returned with a team of mostly unidentified individuals to assist him.

Rather than procure a warrant or legal authorization, Terris and his personnel used a ladder and a big truck to climb up and trespass on to the property

and then open up the property gates by force. Petitioner objected and was upset by what was going on, but was also frightened by this chaos. There was no fire or illegal activity occurring at the time nor any complaint of any such issues requiring a breaking and entering into Petitioner's property.

Once on to the Property, Terris and his team started randomly issuing tickets to automobile vehicles that were at the property. Around this time, Safi Lodin ("Lodin") appeared on the scene and was helping direct everyone along with Terris. Terris and Lodin were working together and directing everyone else as to what to do. Terris and Lodin were implementing a policy, custom or practice of the City. In the alternative, Terris and Lodin could have been acting outside of City policies, customs and practices by conducting an unauthorized operation of their own.

Later, when Petitioner complained and protested more about what was going on, the Terris and Lodin and their team grew upset and started to tell Petitioner that he was creating a public nuisance. In this regard, the labeling of nuisance occurred to cover up the fact that the Respondents improperly entered, searched and trespassed upon Petitioner's property without any legitimate cause.

Based on the false labeling of Petitioner as a nuisance by Terris and Lodin, City employees then indicated that they would seize Petitioner's vehicles as a nuisance. No such nuisance exists, and even if such nuisance existed, it was never in plain sight from outside the property and only discovered after false entry and unlawful search occurred.

Once the City personnel left the property, Petitioner saw that on some of the vehicles there was a paper on the windshield. The paper posted there by the City stated that a number could be called in order to request a hearing. Petitioner tried to call the number posted to request a hearing. However, there was no answer and nobody called back after Petitioner left a message requesting a hearing.

On or after June 1, 2015, Petitioner spoke to Terris by telephone about the situation and requested that he confirm in writing that there were no reasons why Terris or his team would violate Petitioner's rights again. Petitioner did not receive any proper response, and Petitioner followed up again via telephone. Terris then started to become angry and abusive in his tone and threated to impound Petitioner's vehicles if Petitioner complained about anything. Petitioner was then told to call Bivens at the Department of Transportation (DOT) Branch of the City. Petitioner then called and left messages for Bivens, but never received any call back.

Shortly thereafter, apparently in retaliation, Terris and his team sent Petitioner a letter stating that on June 1, 2015 that they had allegedly observed some plastic bags and broken electrical pipes improperly left outside Petitioner's property. However, these allegations were untrue – no such bags or pipes were left outside of the property by Petitioner – the perimeter was clean.

Petitioner then phoned Terris to inform them that their letter was wrong and allegations were incorrect. Terris threatened to monitor the property and keep tabs on Petitioner. Terris also said that he wanted vehicles that they had observed

(unlawfully through an unlawful entry) at the property to be moved. Petitioner explained to Terris that these vehicles were properly and lawfully stored and that Bivens never called back in any case. Terris was upset and then inexplicably switched gears and told Petitioner that he needed to cut down a palm tree near the property. Petitioner stated he had no obligation to cut down any such tree, and that was actually the responsibility of the City. Terris then became furious.

Worried about this situation with Terris and the City's growing hostility, Petitioner then spoke with Orona, a supervising inspector. Orona stated that he would check on the situation and speak to other City personnel, and then get back to Petitioner. Although he promised to get back to Petitioner in a few days, Orona never called back. *Id.*

On or about June 20, 2015, Petitioner's brother (who owns the subject property which is rented out to Petitioner) received a certified letter from the City (the certified letter was postmarked June 18, 2015; however, oddly enough, the letter enclosed was apparently dated as of April 23, 2015 and signed by a City employee). The letter stated that vehicles at the property posed a public nuisance and the City wants to take these vehicles as they are non-operative and in deteriorating condition. The letter specified that there was a right to appeal and have a hearing on the issue to determine whether the vehicles are subject to abatement under State ordinances. The letter specifically noted that Petitioner had 10 days to request a hearing regarding this matter. Even though the letter was dated as of April 23, 2015, it was not mailed by the City until two months later. The

letter was addressed to Mohammad Khodayari, 11964 Wilshire Blvd., Los Angeles, CA 90025 with respect to 19100 Cantara Street. The letter cited Chapter 7 of Division 19 of the Los Angeles Administrative Code and section 22660 of the California Vehicle Code. However, neither Petitioner nor the property/vehicles violated the applicable legal provisions.

Over the next few days later, Petitioner made several phone calls to DOT or City phone numbers stated on the letter to ask about a hearing and other questions. However, Petitioner was not getting any answers. Petitioner then drove with his brother to the DOT Valley Abatement Office at 12544 Saticoy Street, North Hollywood, CA 91605 during regular business hours to ask questions about this letter and the situation. However, even though this DOT office had issued the letter sent June 18, 2015, nobody at the City's DOT Valley Abatement Office had any idea what was occurring in this matter. Finally, somebody suggested that Petitioner drive over to the other location where apparently Bivens worked (411 N. Vermont Drive, Hollywood (Los Angeles, CA). Petitioner and his brother then drove to go see Bivens.

Once at the Hollywood location, Petitioner met with Bivens and requested that a hearing be provided on this matter. Petitioner explained that he had called several times at the phone numbers provided on the notices/letter, but nobody from the DOT or City was calling back or providing any information. Even though the City's letter said a hearing could be demanded in 10 days by contacting the DOT, it appeared that there was no actual way to get a hearing. Bivens became visibly

angry that Petitioner kept demanding a hearing (as Petitioner is entitled to under applicable law), and Bivens said that he was not going to give Petitioner any hearing but rather call up City Building and Safety, the Los Angeles Police Department and the Fire Department and go in and get all of Petitioner's vehicles that were stored at the Property as a punishment. Bivens was enraged and wanted to punish Petitioner for questioning Bivens and asking for the required hearing.

On or about June 29, 2015, Petitioner wrote a letter to the City, Bivens in particular, to inform them of the problems and demanding a hearing as required under law. The letter was sent to the City by certified mail. No response was received and no remedial action taken by the City. Attached as Exhibit 1 to this Complaint, and incorporated herein by reference, is a copy of that letter. Petitioner personally delivered this letter to the DOT on June 29, 2015, but they did not acknowledge it or take proper action.

No hearing was ever scheduled regarding the alleged nuisance. Instead, in July 2015, Petitioner unexpectedly received a call one day while he was not at the property. The City's personnel were on the phone and said that they were at the property and wanted to pick up the cars and wanted access to the property. Petitioner stated clearly that he did not authorize the City to enter the property and stated that he did not approve them to disturb any of his personal property or to enter his real property for any purpose whatsoever. The City then proceeded to break the locks, tear open the gates, and forcibly enter the property. Thereafter, the City seized whatever vehicles they could and transported them off the Property

through a tow truck. Petitioner had several vehicles properly maintained at the property, but the City forcibly towed and impounded them without just cause.

Petitioner was later forced to go recover his several automobiles from impound and pay unnecessary costs and fees. Petitioner's vehicles incurred significant damage during the process, and in addition, the property itself was damaged from the breaking and entering and trespass committed by the City. *Id.*

On or about October 19, 2015, Petitioner filed an administrative claim with the City. A copy of that claim was attached as Exhibit 2 to the complaint. The claim substantively disclosed all matters required under Rule 26(a)(1) disclosures.

On April 22, 2016, Petitioner filed his complaint in the US District Court Central District of California, styled Khodayari vs. City of Los Angeles, et al, USDC Case No. 2:16-CV-02810. Petitioner alleged claims for violations under 42 U.S.C. § 1983 and additional state claims.

On January 29, 2018, the district court dismissed the case under Rule 41(b) after the Court ruled under Rule 37(c)(1) that Petitioner could not present any evidence of damages since Petitioner allegedly did not disclose the technical calculations under Rule 26(a)(1). [Appx. A.]

Petitioner filed a timely appeal with the Ninth Circuit Court of Appeals. The Court of Appeals affirmed the dismissal of the district court. [Appx. B.]. Rehearing was denied on August 29, 2019 [Appx. C.]

Reasons for Granting Writ

A. The Ninth Circuit's affirmance of the District Court's dismissal of Petitioner's 42 U.S.C. § 1983 claim under Rule 41(b) due to Rule 37(c)(1) evidentiary sanctions for failing to disclose computation of damages under Rule 26(a)(1)(A)(iii), conflicts with relevant decisions of this Court regarding Petitioner's entitlement to nominal damages

The Ninth Circuit Court of Appeal affirmed the district court's dismissal under Rule 41(b), on the eve of trial, of Petitioner's complaint including the 42 U.S.C. §1983 claim against the Respondent City of Los Angeles and Respondent agents. [Appx B].

The Rule 41(b) dismissal was based on evidentiary sanctions under Rule 37(c)(1) for Petitioner's alleged failure to disclose a computation of damages under Rule 26(a)(1). [Appx A].

Rule 26(a)(1)(A)(iii) provides:

"a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered."

Rule 37(c)(1)(C) allows the court to prohibit introduction of matters into evidence upon a finding of a violation of Rule 26(a) for failure to provide information required therein, "unless the failure was substantially justified or is harmless."

Rule 41 allows the court to dismiss a case for failure to comply with these rules or a court order.

Petitioner's underlying complaint was against the government entity of the Respondent City of Los Angeles and its agents for the trespass and seizure of his property without a prior hearing. A classic violation of Petitioner's due process rights. *Fuentes v. Shevin*, 407 U.S. 67, 96, 92 S.Ct. 1983 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 343, 89 S.Ct. 1820 (1969).

1. The purpose and intent of Rule 26(a)(1)

> "The purpose of discovery is to provide a mechanism for making relevant information available to the litigants. "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). Thus the spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues by overuse of discovery or unnecessary use of defensive weapons or evasive responses. All of this results in excessively costly and time-consuming activities that are disproportionate to the nature of the case, the amount involved, or the issues or values at stake." *Notes of Advisory Committee on Rules-1983 Amendment.*
>
> "Subdivision (a). Through the addition of paragraphs (1)–(4), this subdivision imposes on parties a duty to disclose, without awaiting formal discovery requests, certain basic information that is needed in most cases to prepare for trial or make an informed decision about settlement. The rule requires all parties (1) early in the case to exchange information regarding potential witnesses, documentary evidence, damages, and insurance, (2) at an appropriate time during the discovery period to identify expert witnesses and provide a detailed written statement of the testimony that may be offered at trial through specially retained experts, and (3) as the trial date approaches to identify the particular evidence that may be offered at trial. The enumeration in Rule 26(a) of items to be disclosed does not prevent a court from requiring by order or local rule that the parties disclose additional information without a discovery request. Nor are parties precluded from using traditional discovery methods to obtain further information regarding these matters, as for example asking an expert

during a deposition about testimony given in other litigation beyond the four-year period specified in Rule 26(a)(2)(B)." *Notes of Advisory Committee on Rules-1993 Amendment.*

"A major purpose of the revision is to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information, and the rule should be applied in a manner to achieve those objectives. The concepts of imposing a duty of disclosure were set forth in Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 *Vand. L. Rev.* 1348 (1978), and Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 *U. Pitt. L. Rev.* 703, 721–23 (1989)." *Id.* *"Paragraph (1).* As the functional equivalent of court-ordered interrogatories, this paragraph requires early disclosure, without need for any request, of four types of information that have been customarily secured early in litigation through formal discovery. The introductory clause permits the court, by local rule, to exempt all or particular types of cases from these disclosure requirement[s] or to modify the nature of the information to be disclosed. It is expected that courts would, for example, exempt cases like Social Security reviews and government collection cases in which discovery would not be appropriate or would be unlikely. By order the court may eliminate or modify the disclosure requirements in a particular case, and similarly the parties, unless precluded by order or local rule, can stipulate to elimination or modification of the requirements for that case. The disclosure obligations specified in paragraph (1) will not be appropriate for all cases, and it is expected that changes in these obligations will be made by the court or parties when the circumstances warrant." *Id.*

"Subparagraph (C) imposes a burden of disclosure that includes the functional equivalent of a standing Request for Production under Rule 34. A party claiming damages or other monetary relief must, in addition to disclosing the calculation of such damages, make available the supporting documents for inspection and copying as if a request for such materials had been made under Rule 34. This obligation applies only with respect to documents then reasonably available to it and not privileged or protected as work product. Likewise, a party would not be expected to provide a calculation of damages which, as in many patent infringement actions, depends on information in the possession of another party or person." *Id.*

"Unless the court directs a different time, the disclosures required by subdivision (a)(1) are to be made at or within 10 days after the meeting of the parties under subdivision (f). One of the purposes of this meeting is to refine the factual disputes with respect to which disclosures

should be made under paragraphs (1)(A) and (1)(B), particularly if an answer has not been filed by a defendant, or, indeed, to afford the parties an opportunity to modify by stipulation the timing or scope of these obligations. The time of this meeting is generally left to the parties provided it is held at least 14 days before a scheduling conference is held or before a scheduling order is due under Rule 16(b). In cases in which no scheduling conference is held, this will mean that the meeting must ordinarily be held within 75 days after a defendant has first appeared in the case and hence that the initial disclosures would be due no later than 85 days after the first appearance of a defendant." *Id.*

2. Petitioner's pre-suit administrative claim

Prior to filing his complaint, Petitioner was required to file with the Respondent City of Los Angeles an administrative claim setting forth detailed information exactly similar to the disclosure requirements of Rule 26(a). The claim had to be signed under penalty of perjury and formally received by the Respondent City of Los Angeles. The claim was also attached as an Exhibit to the Petitioner's complaint. Thus, prior to even filing his complaint, the Respondents had notice and full disclosure under the penalty of perjury of all matters required under Rule 26(a).

3. Common sense application of Rule 26(a)(1)

Circuits seem to agree that the Rule 26(a)(1) disclosure requirements should be applied with common sense and in accord with the principles of Rule 1. Books Are Fun, LTD v. Rosebrough, 239 F.R.D. 532, 552 (S.D. Ia. 2007); Poitra v. Sch. Dist. No. 1 in the Cty. of Denver, 311 F.R.D. 659, 664 (D. Colo. 2015).

4. The purpose and intent of Rule 37(c)(1)

"*Subdivision (c).* The revision provides a self-executing sanction for failure to make a disclosure required by Rule 26(a), without need for a motion under subdivision (a)(2)(A)." *Notes of Advisory Committee on Rules-1993 Amendment.*

"Paragraph (1) prevents a party from using as evidence any witnesses or information that, without substantial justification, has not been disclosed as required by Rules 26(a) and 26(e)(1). This automatic sanction provides a strong inducement for disclosure of material that the disclosing party would expect to use as evidence, whether at a trial, at a hearing, or on a motion, such as one under Rule 56. As disclosure of evidence offered solely for impeachment purposes is not required under those rules, this preclusion sanction likewise does not apply to that evidence." *Id.*

"Limiting the automatic sanction to violations "without substantial justification," coupled with the exception for violations that are "harmless," is needed to avoid unduly harsh penalties in a variety of situations: *e.g.*, the inadvertent omission from a Rule 26(a)(1)(A) disclosure of the name of a potential witness known to all parties; the failure to list as a trial witness a person so listed by another party; or the lack of knowledge of a pro se litigant of the requirement to make disclosures. In the latter situation, however, exclusion would be proper if the requirement for disclosure had been called to the litigant's attention by either the court or another party." *Id.*

5. Substantially Justified or Harmless exception

Rule 37(c)(1) provides an exception to sanctions if a party's failure to disclose under Rule 26(a)(1) was substantially justified or is harmless. Though the sister Circuits acknowledge this exception, the application of the clearly stated exceptions are not uniform and rather arbitrary. The Courts of Appeal have created an addition to the exceptions to Rule 37(c)(1) by placing the "burden of proof" requirement on the party seeking refuge of the exceptions. *Roberts ex. rel. Johnson v. Galen of Virginia, Inc.*, 325 F.3d 776, 782 (6th Cir. 2003); *Finley v. Marathon Oil Co.*, 75 F.3d 1225, 1230 (7th Cir.1996); *Torres v. City of Los Angeles,* 548 F.3d 1197, 1213 (9th Cir.2008); *Wilson v. Bradlees of New England, Inc.*, 250 F.3d 10, 21 (1st Cir.2001); *Heidtman v. County of El Paso*, 171 F.3d 1038, 1040 (5th Cir.1999).

The problem with the addition of a burden of proof to the stated exceptions is that there is no uniform standard such as preponderance, clear and convincing or just some proof to qualify for the exceptions under Rule 37(c)(1).

Due to the exactitude that the Circuits enforce under the disclosure requirements of Rule 26(a)(1), notwithstanding the "common sense" sub-rule, this Court should establish a more precise guideline for the stated exceptions under Rule 37(c)(1) to conform to the purpose and intent of the stated exceptions. A more precise standard also prevents random case by case methodology and arbitrary results similar to the present case.

6. Nominal damages under 42 U.S.C. § 1983

This Court has held that a denial of procedural due process is actionable for nominal damages without proof of actual injury. *Farrar v. Hobby*, 506 U.S. 103, 112, 113 S.Ct. 566 (1992); *Carey v. Piphus*, 435 U.S. 247, 254, 98 S.Ct. 1042, 1047 (1978). "The awarding of nominal damages for the 'absolute' right to procedural due process 'recognizes the importance to organized society that [this] righ[t] be scrupulously observed' while 'remain[ing] true to the principle that substantial damages should be awarded only to compensate actual injury.' " *Farrar v. Hobby*, 506 U.S. at 112, *Carey v. Piphus*, 435 U.S. at 266.

Thus, in the present case the district court was obligated to award nominal damages to Petitioner when he establishes the violation of his right to procedural due process but cannot prove actual injury. *Id.*

Absolute rigid adherence to the disclosure requirements of Rule 26(a)(1) and the sanctions of Rule 37(c)(1) which resulted in the dismissal of Petitioner's case are incompatible with the Petitioner's entitlement to nominal damages for the "absolute right to procedural due process."

7. Analysis to the present case

The Court of Appeals affirmed the district court's dismissal based on Petitioner's alleged failure to provide Respondents with a computation of damages under Rule 26(a)(1). [Appx B].

The Court of Appeals and district court did not consider Petitioner's administrative claim which provided all information required by Rule 26(a)(1) as compliance with the disclosure requirements. [Appx. A & B].

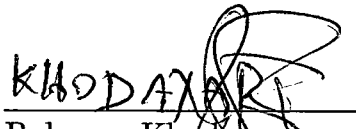
The Court of Appeals and the district court did not consider Petitioner's failure to technically disclose a computation of damages as harmless or justified under Rule 37(c)(1), despite the information provided in the administrative claim. [Appx. A & B].

The Court of Appeals and the district court did not consider the application of Petitioner's right to nominal damages in context of the Rule 26(a)(1) and Rule 37(c)(1). [Appx. A & B].

Conclusion

For the above stated reasons, Petitioner respectfully requests that this Court issue a writ of certiorari to review the decision and judgment of the Ninth Circuit Court of Appeals and the dismissal of by the U.S. District Court.

Dated: November 27, 2019



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PROOF OF SERVICE

I, Bahman Khodayari, do swear or declare that on this date, November 27, 2019, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

OFFICE OF THE CITY ATTORNEY
Matthew A. Scherb, Deputy City Attorney
200 North Main Street, 7th Floor
Los Angeles, CA 90012

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 27. 2019

KHODAYARI

Bahman Khodayari