No. 22-1091

In The

Supreme Court of the United States

DAVID H. ZOOK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

Tenth Circuit Court Of Appeals No. 22-1060

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Must the issuance and/or enforcement of an administrative subpoena (EPA) to a private individual be supported by something beyond "official curiosity" (i.e., whim) such as reasonable suspicion?

II. Ought Rule 6(A), Fed.R. Civ.P. be construed to add three additional days to the time-frame provided in Rule 59(e), Fed.R. Civ.P. when service of the Judgment/Order is by mail, particularly, when the opposing party (the government) is served electronically (instantaneously)?

PROCEEDINGS – RELATED CASES

United States District Court for the District of Colorado, Civil Action No. 21cv01077RM, United States of America, Petitioner v. David Zook, Respondent, Order to Show Cause Entered April 20, 2021

United States District Court for the District of Colorado, Civil Action No. 21cv01077RM, United States of America, Petitioner v. David Zook, Respondent, Order on Petition entered October 28, 2021

United States District Court for the District of Colorado, Civil Action No. 21cv01077RM, United States of America, Petitioner v. David Zook, Respondent, Order on Motion to Alter or Amend Judgment entered February 1, 2022

United States Court of Appeals for the Tenth Circuit, No. 22 1060, United States of America, Petitioner Appellee v. David Zook, Respondent Appellant, Order and Judgment entered December 6, 2022

Supreme Court of the United States, Application No. 22A816, David Zook v. United States, Order extending time to file Petition for Writ of Certiorari to May 5, 2023; Entered March 15, 2023

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PROCEEDINGS – RELATED CASES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
BASIS FOR JURISDICTION	1
STATUTES AND REGULATIONS INVOLVED IN THE CASE	1
STATEMENT OF THE CASE	5
STATEMENT OF FACTS	6
CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI	8
ARGUMENT	9
I. MUST THE ISSUANCE AND/OR ENFORCEMENT OF AN ADMINISTRATIVE SUBPOENA (EPA) TO A PRIVATE INDIVIDUAL BE SUPPORTED BY SOMETHING BEYOND "OFFICIAL CURIOSITY," SUCH AS "REASONABLE SUSPICION"?	9
II. SHOULD RULE 6(a), FED.R. CIV.P., BE CONSTRUED TO ADD THREE (3) ADDITIONAL DAYS TO THE TIME-FRAME PROVIDED IN RULE 59(e), FED.R. CIV.P., WHEN SERVICE OF THE ORDER IS BY MAIL, PARTICULARLY WHEN THE OTHER PARTY (THE GOVERNMENT) IS SERVED ELECTRONICALLY?	13

TABLE OF CONTENTS – Continued

Page

CONCLUSION 16

APPENDIX

United States Court of Appeals for the Tenth Circuit, Order and Judgment, December 6, 2022 ..... App. 1

United States District Court for the District of Colorado, Order to Show Cause, April 20, 2021 ..... App. 12

United States District Court for the District of Colorado, Order on Petition, October 28, 2021 ..... App. 14

United States District Court for the District of Colorado, Final Judgment, October 28, 2021 ..... App. 31

United States District Court for the District of Colorado, Order on Motion to Alter or Amend Judgment, February 1, 2022 ..... App. 32

TABLE OF AUTHORITIES

Page

CASES

FDIC v. Wentz, 55 F.3d 905 (3d Cir. 1995) 12

In re Gimbel, 77 F.3d 593 (2d Cir. 1996) 9, 11, 12

Parks v. Federal Deposit Insurance Corporation, 1995 WL 529629, 65 F.3d 207 (1st Cir. 1995) 9, 12, 13

Parker v. Board of Public Utilities, 77 F.3d 1289 (10th Cir. 1996) 14, 15

Resolution Trust Corporation v. Walde, 18 F.3d 943 (D.C. Cir. 1984) 12

United States v. Morton Salt Company, 338 U.S. 642 (1950) 9-13

United States v. Powell, 379 U.S. 48 (1964) 13

United States v. White, 322 U.S. 694 (1944) 11

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV 13

U.S. Const. amend. V 13, 14

STATUTES

15 USC § 2610 .....1, 7

15 USC § 2696 .....2, 4

28 USC § 1291 4

28 USC § 2072 .....4, 16

28 USC § 2101 1

TABLE OF AUTHORITIES – Continued

Page

40 CFR § 745.103 2

40 CFR § 745.107 2

40 CFR § 745.113 ..... 2, 7

RULES

Fed.R. App.P. 4(a)(4)(A)(vi) 5

Fed.R. Civ.P. 4(1)(b) 15

Fed.R. Civ.P. 5(b)(2)(C) 4

Fed.R. Civ.P. 6(a) 4, 13, 16

Fed.R. Civ.P. 6(b)(2) 14

Fed.R. Civ.P. 6(d) 4, 14

Fed.R. Civ.P. 59(e) 4, 13-16

Sup. Ct. R. 10 1

Sup. Ct. R. 10(C) 8

OPINIONS BELOW

The order sought to be reviewed was entered on December 6, 2022, by the United States Court of Appeals for the Tenth Circuit.

An order was entered March 15, 2023, granting an extension of time to file a writ of Certiorari May 5, 2023.

BASIS FOR JURISDICTION

The statute which provides this Court jurisdiction to review the Order of December 6, 2022, 28 USC § 2101. Supreme Court Rule 10 also addresses the issue.

STATUTES AND REGULATIONS INVOLVED IN THE CASE

Toxic Substances Control Act, 15 USC § 2610, Inspections and Subpoenas

> (c) In carrying out this chapter, the administrator may by subpoena require the attendance and testimony of witnesses and the production of reports, papers, documents, answers to questions, and other information that the administrator deems necessary. . . . In the event of contumacy, failure, or refusal of any person to obey any such subpoena, any District Court of the United States, in which venue is proper, shall have jurisdiction to

> order any such person to comply with such subpoena. Any failure to obey such an order of the court, is punishable by the court as a contempt there of.

Code of Federal Regulations, 40 CFR § 745.103, Definitions

> Target housing means any housing constructed prior to 1978, except . . . any 0-bedroom dwelling. . . .
>
> 0-bedroom dwelling means any residential dwelling in which the living area is not separated from the sleeping area. The term includes efficiencies, studio apartments. . . .

Code of Federal Regulations, 40 CFR § 745.107, Disclosures

> (a)(1) The seller or lessor shall provide the purchaser or lessor with an EPA approved lead hazard information pamphlet. Such pamphlet includes the EPA document, entitled, Protect your family from lead in your home, (EPA number 747-K-94-001) or an equivalent pamphlet that has been approved for use in that state by the EPA.

Code of Federal Regulations, 40 CFR § 745.113, 15 USC § 2696, Certification and Acknowledgment of Disclosure

> (b) Lessor requirements. Each contract to leased target housing shall include, as an attachment, or within the contract, the following elements, in the language of the contracts.

(1) A lead warning statement with the following language: housing built before 1978 may contain lead-based paint. Lead from paint, paint, chips, and dust can pose health hazards, if not managed properly. Lead exposure is especially harmful to young children and pregnant women. Before renting pre-1978 housing, lessors must disclose the presence of lead-based paint, and or lead based paint hazards in the dwelling. Lessees must also receive a federally approved pamphlet on lead poisoning prevention.

(2) The statement by the lessor disclosing the presence of known lead-based paint, and or lead based paint hazards in the target housing being leased or indicating no knowledge of the presence of lead-based paint, and or lead-based paint hazards. The lessor shall also disclose any additional information available concerning the known lead based paint and or lead-based paint hazards, such as the basis for the determination, that lead-based paint and or lead-based paint, hazards exist, the location of the lead-based paint, and or lead-based, paint hazards, and the condition of the painted surfaces.

(3) A list of any records or reports available to the lesser pertaining to lead-based paint and or lead based paint hazards in the housing that have been provided to the lessor. If no such records or reports are available, the lessor shall so indicate.

> (4) A statement by the lessee affirming receipt of the information set out in paragraphs (b)(2) and (b)(3) of this section and the lead hazard information pamphlet required under 15 USC § 2696.

28 USC § 2072, Rules of Procedure and Evidence, Power to Prescribe

> The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States District Court . . . and courts of appeals.
>
> (c) Such rules may define when a ruling of a District Court is final for the purposes of appeal under Section 1291 of this Title.

Court Rules

Rule 6(d), Fed.R. Civ.P., Additional Time after certain kinds of service.

> When a party may or must act within a specified time after being served, and service is made under Rule 5(b)(2)(C), (Mail) . . . 3 days are added, after the period would otherwise expire under Rule 6(a).

Rule 59(e), Fed.R. Civ.P., Motion to Alter or Amend Judgment.

> A Motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.

Rule 4(a)(4)(A)(vi), Fed.R. App.P., Appeal in a Civil Case.

> If a party files in the District Court, any of the following motions under the federal rules of civil procedure, and does so within the time allowed by those rules – the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:
>
> . . . (iv) to alter or amend judgment under Rule 59. . . .

STATEMENT OF THE CASE

On May 27, 2020, Respondent herein, the EPA, issued an administrative subpoena to petitioner herein, David Zook, seeking voluminous documents, disclosures and admissions from petitioner regarding any properties owned, rented or sold during the previous three years. Petitioner responded by requesting that the EPA provide him with the reason for this onerous, surprising, out of the blue request. Receiving no response from the EPA, petitioner declined to comply.

Ten months later, on March 21, 2021, the EPA filed a petition in US District Court seeking to enforce its subpoena. On April 20, 2021, the District Court issued its order to show cause (Order to show Cause, Appendix, p.12). Respondent filed his response and motion to quash on May 21, 2021. The court issued its order on petition on October 28, 2021 (Order on Petition,

Appendix, p. 14) ordering that Zook comply with the EPA subpoena and closing the case.

The court's order was mailed October 28, 2021, to Zook by United States mail and received November 1, 2021. The EPA received its copy/notice of the order electronically, on October 28, 2021. Petitioner, Zook, then filed his motion to alter or amend judgment on Monday, November 29, 2021, believing service by mail accorded him three additional days to do so. The district court denied said motion on February 1, 2022. Petitioner then filed his notice of appeal on February 28, 2022.

On December 6, 2022, the Tenth Circuit entered its order and judgment (Order and Judgment, Appendix, p. 1) affirming the district court. This petitioner then requested additional time to file his petition to this court for a writ of certiorari on March 3, 2023. This request was granted until May 5, 2023, by Mr. Justice Gorsuch on March 15, 2023. See application number 22A 816.

STATEMENT OF FACTS

Petitioner's ordeal with the EPA began with the bad faith, complaint of a disgruntled tenant to the EPA. The tenant, who occupied a studio unit in petitioner's small, older apartment, house, reported that "the property was in complete disrepair, and the paint was constantly chipping off from the building onto the ground." The tenant provided the EPA with a copy of

her simple lease, which contained a warning that "there may be lead paint on the structure."

Because the tenant occupied a studio apartment, the lead paint disclosures required by the Toxic Substance Control Act (TSCA) were not applicable to her; and though she received a written caution in her lease regarding lead paint – it was wholly gratuitous, and not required by law. Thus, nothing offered by the tenant to the EPA, supported even a suspicion, reasonable or not, that petitioner was not complying with any and all of the disclosure requirements of TSCA (40 CFR § 745.113) – or for that matter, that he was required to do so.

Nevertheless, the EPA, inexplicably, focused on petitioner and petitioner's properties, eventually bringing an action in US District Court to enforce a broad-based subpoena for his records, regarding whether he was required to provide a 13 page EPA approved, pamphlet warning of the perils of lead-based paint, and whether if so required, he had done so.

It is petitioner's view that a subpoena issued to an individual by the EPA must have a basis in fact to support, at least an articulable, reasonable suspicion, and cannot be issued Willie-Nilly. The EPA and the District Court have disagreed, insisting that no threshold of suspicion is required, relying on the curious standard applied to corporations of "official curiosity."

CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI

Rule 10(C) reads in part,

> a. United States Court of Appeals has decided an important Question of federal law that has not been, but should be settled by this Court. . . .

Both issues raised herein meet this criteria and should be determined by this Court.

This Petitioner would suggest that administrative subpoenas are subject to massive abuse by the myriad of governmental agencies. This case demonstrates how a powerful agency like the EPA, incapable of setting reasonable limits on itself, can lose its way. This is an opportunity for this Court to place reasonable limits on this and other seriously misguided agencies who actually boast that they do not have to have any reason, no reason at all, to require a citizen to jump through its bureaucratic hoops.

ARGUMENT

I. MUST THE ISSUANCE AND/OR ENFORCEMENT OF AN ADMINISTRATIVE SUBPOENA (EPA) TO A PRIVATE INDIVIDUAL BE SUPPORTED BY SOMETHING BEYOND "OFFICIAL CURIOSITY," SUCH AS "REASONABLE SUSPICION"?

The seminal case of United States v. Morton Salt Company, 338 U.S. 642 (1950), more than intimated that the privacy rights of corporations and individuals are different. In the nearly 75 years since this Court has yet to ratify, or reject, the observations of Mr. Justice Jackson. Lesser courts have reached mostly contrary, results. See In re Gimbel, 77 F.3d 593 (2d Cir. 1996). But it has not been entirely unanimous. See Parks v. Federal Deposit Insurance Corporation, 1995 WL 529629, 65 F.3d 207 (1st Cir. 1995). Parks was later withdrawn but it's reasoning remains sound.

It has been the position of the EPA, that no threshold of suspicion is required before it unleashes its enormous resources on a lone individual through its arbitrary enforcement of its administrative subpoena power, a position supported by the district court. It is clear that the EPA did not argue, and the court did not find, that there was any basis, let alone, reasonable basis, for the issuance of the subpoena issued in the instant matter – other than its ostensible authority to issue subpoenas. i.e., Absolutely no probable cause, reasonable suspicion, or lesser threshold, was ever established by the EPA or recognized by the court.

It is likewise clear that the court agreed, saying, in its order, enforcing the subpoena,

> "Thus, as long as it is lawfully authorized by Congress, and the information sought is relevant to that 'legitimate' investigation (emphasis added), the EPA is authorized to issue a subpoena even without meeting a particular threshold of suspicion."

(Order on Petition, Appendix p. 20).

The Court seconded it's finding in its Order on Motion to Alter or Amend Judgment saying,

> "moreover, as the Court explained in its Order, the EPA is authorized to issue a subpoena even without meeting a particular threshold of suspicion.

(Order on Motion to Alter or Amend Judgment, Appendix, p. 40).

In Morton, the court loudly proclaimed that the privacy rights of corporations are much inferior to those of an individual, strongly suggesting that were the Respondent therein, Mr. Morton, rather than Morton, Inc., the outcome of the case would have been different. Mr. Justice Jackson began his opinion with this note,

> "This is a controversy as to the powers of the Federal Trade Commission to require 'corporations' to file a report showing how they have complied with a decree . . . , Id. (emphasis supplied).

Morton Salt, a large corporation, was already under a court ordered enforcement decree when served with the subpoena in question. Thus, reasonable suspicion had already been confirmed by a finding of the United States Court of Appeals. Two major distinctions, then, from the instant matter, are, "corporation" and "enforcement decree." Mr. Justice Jackson reiterated his focus on corporations. Citing United States v. White, 322 U.S. 694 (1944), he explained,

> " . . . corporations can claim no equality with individuals in the enjoyment of a right to privacy."

Continuing, he explained the reasoning and the difference,

> " . . . (corporations) are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities . . . favors from government often carry with them an enhanced measure of regulation."

Id., p. 653.

Indeed, then, we know from Morton, that individuals are to be treated differently from corporations, such as Morton Salt, and that the limits of the governments reach can only be more restrictive as it relates to individuals. Thus, for the court to apply the Morton corporation standard in the instant matter was error.

Respondent is aware of two Circuit Court cases directly discussing this issue. One of which, In re Gimbel,

77 F.3d 593 (2d Cir. 1996), the Court cited. The other case is Parks v. Federal Deposit Insurance Corporation, No. 94-2262, 1995 WL 529629, 65 F.3d 207 (1st Cir. 1995). Gimbel discussed Parks at length and unconvincingly rejected its reasoning. As Gimbel points out, the Parks opinion was later vacated and withdrawn.

Nevertheless, Parks' reasoning remains sound. That is, if the Morton court noted that an individual's right to privacy clearly exceeds that of a corporation, which is a fair reading of what Mr. Justice Jackson said, then the standard/no standard of official curiosity, cannot be applied to individuals.

The Parks court reasoned that a reasonable suspicion standard, short of probable cause, ought to apply. Quoting from Resolution Trust Corporation v. Walde, 18 F.3d 943 (D.C. Cir. 1984), the Court said,

> "Under a reasonable suspicion standard, if the FDIC has no specific basis upon which to suspect that a target engaged in wrongdoing, then the subpoena cannot be enforced."

Id. p. 949.

In FDIC v. Wentz, 55 F.3d 905 (3d Cir. 1995), as noted by the Parks Court, the Court recognized that subpoenas for privately held financial documents implicate privacy concerns, and should, therefore, be evaluated by a stricter standard than corporate documents. See also, the dissents Justices Stewart,

Goldberg and Douglas in United States v. Powell, 379 U.S. 48 (1964).

Here, it is worthwhile to distinguish between the authority to issue a subpoena and the authority to enforce it. i.e., it doesn't hurt to ask, but if a subpoenaed party balks at complying, he may be entitled to embrace his right to privacy under the Fourth and Fifth Amendments.

There remains, at least, a philosophical split amongst two circuits on this key issue. The logic of Parks, however is clearly superior. To ignore Parks is to ignore Morton. Nearly 75 years late, it is time to reaffirm the wise words of Mr. Justice Jackson, that corporations and individuals are not cut from the same cloth.

II. SHOULD RULE 6(a), FED.R. CIV.P., BE CONSTRUED TO ADD THREE (3) ADDITIONAL DAYS TO THE TIME-FRAME PROVIDED IN RULE 59(e), FED.R. CIV.P., WHEN SERVICE OF THE ORDER IS BY MAIL, PARTICULARLY WHEN THE OTHER PARTY (THE GOVERNMENT) IS SERVED ELECTRONICALLY?

The trial court entered judgment on October 28, 2021, and mailed same to Petitioner. The government received notice of the order electronically (instantly). If, as the court recognized, three days are added to the 28 days provided by Rule 59(e), Fed.R. Civ.P., the 31st day falls on a Sunday, November 28, extending the

deadline to Monday, November 29 – the day Petitioner filed his motion. (Footnote 3, Court's Order and Judgment, Appendix, p. 4).

Petitioner, as likely have many others, relied upon Rule 6(d), Fed.R. Civ.P., which provides that,

> "When a party may or must act within a specified time after being served and service is made (by) . . . (mail) . . . three days are added after the period would otherwise expire. . . ."

Applying the mailbox extension to the time requirements of Rule 59(e) would make Petitioner's motion to alter or amend timely. The Circuit Court, however, refused to do so, citing the Tenth Circuit case of Parker v. Board of Public Utilities, 77 F.3d 1289 (10th Cir. 1996). The Court reasoned that Rule 59(e)'s time period is triggered by entry of the judgment, not by its service and Rule 6(b)(2) prohibits the Court from extending Rule 59(e)'s time period. (Order and Judgment, Appendix, p. 5).

The circuit court viewed it a matter of jurisdiction, and refused to review the district court's judgment on the merits. Petitioner suggests that this is a distinction without a difference in that the Fifth Amendment requirement of due process (and thus equal protection) preclude such a construction.

It goes without saying that one cannot act on an order/judgment before receiving notice of it. In this case, the government electronically received notice of a

court order days prior to Petitioner and was thus given 28 days to respond compared to Petitioner's 24 days (no mail delivery on Sunday). The rule might just as well read, "the government shall have 28 days to file its rule 59 motion and all pro se parties shall have 24 days." The Equal Protection violation is obvious.

This court has recognized and addressed a similar disparity with Rule 4(1)(b), Fed.R. Civ.P., wherein it provides that whenever one of the parties is the government all parties shall have 60 days to file their notice of appeal, doubling the usual 30 day period for any case wherein the government is not a party.

When Rule 59(e) was written, electronic mail did not exist. When orders were entered, they were mailed out to all parties, who, presumably would receive them at the same time. When Parker v. Board of Public Utilities, supra, was decided in 1996, Parker's counsel obviously had been served by mail, the electronic service having not yet been implemented. No fairness issue, then, was present. Thus, the instant situation, unequal timeframe, was not addressed in Parker, supra, nor has it been by any court per this Petitioner's research.

A final note on Parker, Id. The Parker Court wrote,

> "Rule 59(e) provides that 'a motion to alter or amend the judgment shall be "served"

(emphasis added) not later than 10 days after entry of the judgment."

The Rule now reads "filed" rather than "served." It is clear that the terms "served" and "filed" have been used interchangeably by the courts, indeed, this court; as have been the terms, "entered" and "filed."

28 USC § 2072, provides that this Court shall prescribe the procedural rules for the Federal Court system. This court, then, is clearly the last word on interpreting those rules in a constitutional manner. To provide the government or any represented party an advantage in time over a pro se party is unfair, unequal and unconstitutional. Indeed, present day mail times can be much longer than three days, even a week or more.

Petitioner submits that this Court ought to construe Rule 6(a) to apply to the time requirements of Rule 59(e). In this case the Court's saying so, makes it so!

CONCLUSION

The facts of this case demonstrate that the EPA had no articulable reason to single out this Petitioner. According to the district court, they didn't need one. That the EPA's official curiosity included, not only the property in question, but any and all of petitioner's properties, known or unknown, existent or nonexistent, demonstrates the acuteness of the problem.

Unchecked administrative subpoenas represent a most serious threat to our privacy – all of us.

Respectfully submitted,

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