No. 22-189

ORIGINAL

In The

Supreme Court of the United States

Igor Lukashin,

Petitioner

v.

Washington State Department of Revenue,
Lakeside Industries, Inc.

Respondents

On Petition for Writ of Certiorari
to the Washington Supreme Court

PETITION FOR WRIT OF CERTIORARI

Igor Lukashin, *pro se*

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QUESTIONS PRESENTED

1. Whether a state court may enter a filing ban (or a pre-filing review order) with no pre-deprivation notice or post-deprivation opportunity to be heard; if not, whether it should be summarily GVRed for violating Due Process

2. Whether this Court should adopt CA9's *DeLong* and / or CA2's *Safir* standard to establish the Due Process floor before filing bans or pre-filing review orders are entered against *pro se* nonlawyer litigants.

3. Whether, in light of the Court's intervention precedents last term, a *pro se* nonparty nonlawyer may attempt to intervene post-decision on appeal in state or federal courts to point out inequitable treatment or seek an authoritative and binding interpretation of legal issues the parties raised but no longer have an interest in advancing or defending?

4. Must an order denying intervention post-decision on appeal provide a statement of reasons?

PARTIES TO THE PROCEEDING

Petitioner, who was petitioner below, seeking discretionary review of the Washington Court of Appeals unexplained order denying his post-decision intervention request on appeal, is Igor Lukashin.

Respondents, which were respondents below, are Washington State Department of Revenue and Lakeside Industries, Inc.

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DECISION BELOW

On March 04, 2022, en banc Washington Supreme Court issued an order denying Lukashin's motions for discretionary review and to modify, declared Lukashin a "vexatious litigant" and prohibited him "from filing any future pro se non-party motions with the Supreme Court in any case."

JURISDICTION

This Court has jurisdiction to review the March 4, 2022 Order pursuant to 28 U.S.C. § 1257(a), as in violation of the Due Process and Supremacy Clauses. Request to extend time to file to August 1 was granted by Justice Kagan.

STATEMENT OF THE CASE

Washington Court of Appeals issued a published decision in *Lakeside Indus. v. Wash. Dept. of Revenue*, 495 P.3d 257 (Wash. Ct. App. 2021)[1] on September 13.

On September 27, Lukashin moved to intervene post-decision on appeal, asserting a potential conflict between *Lakeside*'s treatment

[1] Citations are from Google Scholar case law or from a relevant court's web site for slip opinions with page nos.

of subject matter jurisdiction,495 P. 3d at 260–61, and a holding of the state Supreme Court in *Ronald Wastewater v. Olympic View Water*, 474 P.3d 547, 558 (Wash. 2020).

Citing *Sutton v. Hirvonen*, 113 Wash. 2d 1, 8–9, 775 P.2d 448 (1989) for the proposition that intervention at appellate level may be considered, Lukashin argued then-recent *Cooper v. Newsom*, 13 F.4th 857 (9th Cir. 2021) and Judge VanDyke's dissent to allege he had a significant protectable interest and otherwise met criteria to allow intervention.

On November 18, *Lakeside* panel, in an unexplained order, denied Lukashin's motion.

On December 2, Lukashin sought discretionary review in the Washington Supreme Court, No. 100,437-1, alleging he was a "party" for purposes of seeking review of the order denying intervention, relying on *Robert Ito Farm, Inc. v. County of Maui*, 842 F.3d 681, 687 (9th Cir. 2016) and alleged violation of Due Process-required "full statement of reasons", citing recent Third and Ninth Circuit's cases[2].

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[2] Including *Kashem v. Barr*, 941 F.3d 358, 377–383 (9th Cir. 2019) (statement of reasons); *Zerezghi v. USCIS*, 955

On January 2, 2022, Lukashin moved to recuse Commissioner Johnston and to have a recorded Zoom oral argument in the case. On January 5, the Clerk denied the former, but granted the latter, scheduled for January 26.

However, on January 7, the Clerk unexpectedly informed the parties that the Commissioner determined that the case would be referred to a department of the Court for consideration during March 1 motion calendar, and the January 26 hearing would be stricken.

On March 4, around 11 a.m., Lukashin inquired by email about the status of the case, offering this Court's just-issued *Cameron*[3] opinion. Responding within minutes, the clerk advised decisions will be going out within the next few days. That afternoon, Lukashin received the relevant Order (App. A).

On March 11, Lukashin requested, and received, Clerk's clarification that the Court would not allow a motion for reconsideration to be filed given the Order's language. Copies of the email are available in this Court's docket for

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F.3d 802, 808–13 (9th Cir. 2020); *Calderon-Rosas v. US Att'y General*, 957 F. 3d 378, 385-86 & n. 3 (3d Cir. 2020)

[3] *Cameron v. EMW Women's Surgical Center, PSC* , 142 S. Ct. 1002, 595 U.S. __ (2022).

No. 21A750[4]; where Justice Kagan granted Lukashin's request to extend time to file this certiorari petition until August 1, 2022[5].

RELATED CASES

On March 29, 2022, Washington Supreme Court granted, *Lakeside Industries v. Dep't of Revenue*, 506 P.3d 637 (Wash. 2022), *a party's* opposed petition for review[6] of the case below.

On April 22, 2022, the Ninth Circuit ordered Lukashin to show cause why a pre-filing order should not be entered against him. Despite extensive motions practice, and without substantively engaging with his arguments and cited authority, the order was entered May 24, and the order denying motion for *en banc* / panel reconsideration was entered July 19, 2022, *In re Igor Lukashin*, No. 22-80034 (9th Cir. 2022)[7]

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[4] Judicial notice is requested and required, Fed. R. Evid. 201(c), (d). *See also In re Icenhower*, 755 F.3d 1130, 1142 (9th Cir. 2014).

[5] This document is timely filed, as it was mailed via USPS priority mail in a package bearing a postmark "showing that the document was mailed on or before the last day for filing" Sup. Ct. R. 29.2

[6] https://bit.ly/3Bro0p1 and https://bit.ly/3Q9uPzS ; No. 100497-4; argued June 16, 2022, https://bit.ly/3cUfNQf

[7] Relevant copies filed below, https://bit.ly/3SgUPLu judicial notice is requested; also available via PACER.

REASONS TO GRANT CERTIORARI

This case provides an opportunity to clarify Due Process constraints on entry of vexatious-litigant filing bans (or pre-filing orders) at the appellate level.

Plus, this Court may be able to examine whether *pro se* non-party nonlawyer *proposed* amici or intervenors are able to present their differing views in the appellate courts when they'd have standing vis-à-vis an issue of law. *Cf.* *Jones v. Cuomo*, 2 F. 4th 22, 24 n. † (2nd Cir. 2021) (issue would never come up for counseled parties, QP likely to recur); *Berger v. NC Conference of NAACP*, No. 21-248, pp. 13–18 (U.S. June 23, 2022) (adequate representation of interests; "giving voice to a different perspective"), and *Arizona v. City and County of San Francisco*, No. 20-1775 (U.S. June 15, 2022) (four-justice concurrence) (intervention to defend a rule might be proper).

1. State court of last resort below issued a decision in conflict with the CA9 approach and this Court's *In re McDonald* (1989)

Washington Supreme Court entered a filing ban, which conflicts with a Due-Process-grounded test in *Ringgold-Lockhart v. County of*

Los Angeles, 761 F.3d 1057, 1062–67 (9th Cir. 2014) (citing CA9's *Molski* and *DeLong*; and CA2's *Safir*), *see* Sup. Ct. R. 10(b) and (c).

Decision below also implicitly conflicts with *In re McDonald*, 489 U.S. 180, 184–85 (1989), cataloguing 73 filings with the Court at 180–82, nn. 2–5 and merely prohibiting a pro se litigant from filing only "requests for relief other than extraordinary writ" *in forma pauperis*; yet *McDonald* garnered a four-justice dissent.

Compare also US v. Witkemper, 27 F.4th 551, 555 (7th Cir. Feb. 28 2022) (issuing an order to show case) *Johnson v. 27th Ave. Caraf, Inc.*, 9 F.4th 1300, 1311-12 (11th Cir. 2021) ("Due process requires that the attorney (or party) be given fair notice that his conduct may warrant sanctions and the reasons why." *In re Mroz*, 65 F.3d 1567, 1575 (11th Cir. 1995)); *Tumey v. Mycroft AI, Inc.*, 27 F.4th 657, 665–66 (8th Cir. 2022) (notice and meaningful opportunity to prepare under FRCP 65(a)(1)).

See also Holt v. State, 232 P.3d 848, 853–55 (Kansas 2010) ("before the court-imposed filing restrictions become effective, the party subject to them is entitled to notice and an opportunity to be heard in opposition").

The test articulated in *Safir v. U.S. Lines, Inc.* , 792 F.2d 19, 24 (2d Cir.1986), as cited in *Ringgold-Lockhart, supra,* 761 F.3d at 1062,

> (1) the litigant's history of litigation and in particular whether it entailed vexatious, harassing or duplicative lawsuits; (2) the litigant's motive in pursuing the litigation, e.g., does the litigant have an objective good faith expectation of prevailing?; (3) whether the litigant is represented by counsel; (4) whether the litigant has caused needless expense to other parties or has posed an unnecessary burden on the courts and their personnel; and (5) whether other sanctions would be adequate to protect the courts and other parties.

has also been adopted by *e.g. Fox v. Fox*, 2022 V.T. 27 (Vt. 2022).

District courts in the Ninth Circuit use *DeLong / Molski / Ringgold / Safir* ("DMRS-based") approach, *see e.g. AT&T Mobility LLC v. Yeager*, No. 2: 13-cv-00007-KJM-DB (E.D. Cal. Mar. 30, 2018)[8] (identifying specific state and

[8] Affirmed, *AT&T Mobility, LLC v. Bowlin*, No. 20-17253 (9th Cir. Apr. 7, 2022) (mem.)

federal cases, noting "have no merit" language and that an application to intervene was stricken "for failure to comply with court rules"). The ***Yeager*** court held, in part,

> what counts as "repeated" or "unmeritorious" is left to the sound discretion of the trial court, *Holcomb*, 129 Cal. App. 4th at 1505-06, a discretion this court exercises conservatively and only after careful consideration.

Bruzzone v. Intel Corporation, No. 2: 21-cv-1539-TLN-CKD PS (E.D. Cal. Nov. 15, 2021) ("*Bruzzone I*"), *affirmed as modified*[9]; *Drevaleva v. Alameda Health System*, No. 22-cv-01585-EMC (N.D. Cal. July 7, 2022) (DMRS based)

However, in a related case, *In re Igor Lukashin,* No. 22-80034, *supra*, the Ninth Circuit failed to articulate elements of *DeLong / Molski / Ringgold / Safir* approach, despite repeat requests (*e.g.* DE: 3, 7, 15), so review is also warranted because of the Ninth Circuit's failure to consistently apply its own precedent and/or this Court's *McDonald's* lead (narrow tailoring; explicitly identifying problem filings).

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[9] CA9 No. 22-15172, *Bruzzone v. Intel Corp.*; Lukashin's Rule 36-4 publication request is pending pre-filing review

Furthermore, the order below is **a filing ban**, not a pre-filing order. While it is somewhat tailored to prohibit "filing any future pro se non-party motions with the Supreme Court in any case", it unduly restricts some forms of access to the court, including seeking to file an amicus brief or a permission to intervene on appeal.

Plus, the order below does not mention Lukashin's success in ***State v. Towessnute***, 197 Wn.2d 574, 578, 486 P.3d 111 (2020) (Order) ("Under the Rules of Appellate Procedure (RAP) 1.2(c), this court may act and waive any of the RAP "to serve the ends of justice." We do so today."), *Lukashin's non-party nonlawyer motion to re-designate granted,* ***State v. Towessnute***, 2021 Wash. LEXIS 244 (Wash. Apr. 26, 2021)

2. The Order below is contrary to this Court's Due Process precedent

The Order below states, at 1, that a department of that court, on March 1, 2022, "referred [Lukashin's motions] to the March 3, 2022, En Banc Conference for decision."

Thus, if the Court was considering a filing ban, it could have notified Lukashin on March 1 that such action was contemplated. The Eighth

Circuit in *Tumey, supra*, in the context of Fed. R. Civ. P. 65(a)(1), reminded:

> The United States Supreme Court explained in 1972 that "[f]or more than a century the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) (cleaned up). To be effective, notice must be given "at a meaningful time and in a meaningful manner." *Id.* (discussing the notice requirement in the context of procedural due process)

The order below certainly affected Lukashin's rights of access to the state supreme court, a right he previously successfully exercised at least once, in *Towessnute, supra*, ensuring that the breadth of the RAP 1.2(c) court rule was understood by all and available to be cited as precedent. A pre-deprivation notice could and should have been given, but was not.

To make the Due Process violation more egregious, Lukashin was also denied a *post*-deprivation opportunity to be heard in

opposition, *see* SCOTUS Dkt. No. 21A750, copies of emails attached to the time extension request.

This matter should be GVRed, *Nunez v. US*, 554 U.S. 911, 128 S. Ct. 2990, (2008) (Scalia, J., dissenting) (discussing entrenched habit of entering a GVR order *without an independent examination of the merits* when the Government, as respondent, confesses error in the judgment below, should the parties concede error (or waive the right to respond), including due to reasoning in ***Espinoza v. Montana Dept. of Revenue***, 140 S. Ct. 2246, 2262, 591 U.S. ___, 207 L. Ed. 2d 679 (2020) (threshold error of federal law).

Similar to *Espinoza*, the court below "was obligated by the Federal Constitution to reject the invitation" to enter a filing ban in violation of the Due Process, since "[t]he Supremacy Clause provides that "the Judges in every State shall be bound" by the Federal Constitution" *Id.*

3. This Court should adopt CA9's *DeLong* and / or CA2's *Safir* standard to establish the Due Process floor before filing bans or pre-filing review orders are entered against *pro se* nonlawyer litigants.

As illustrated above, the Ninth Circuit district courts and even the Vermont Supreme Court adopted the DMRS-based approach.

The approach developed by the Ninth and Second Circuits ensures meaningful notice and opportunity to be heard in opposition are provided, alternative sanctions are considered, and, if entered, a pre-filing review order is narrowly tailored.

The Court already adopted a very similar approach in *McDonald, supra*, in the context of perceived *in forma pauperis* abuses. Accepting certiorari and establishing a Due Process floor applicable before a vexatious-litigant pre-filing review orders may be entered would help promote equal treatment under the law, particularly in the appellate courts like the Washington Supreme Court or the Ninth Circuit, where the opportunity for review is discretionary, rather than a right.

4. A *pro se* nonparty nonlawyer should be able to attempt to intervene post-decision on appeal in state or federal courts to point out inequitable treatment or seek an authoritative and binding interpretation of legal issues

This Court considered several post-decision intervention cases last term, *see Cameron, Berger*, and *Arizona, supra*. The Chief Justice Roberts's concurrence in *Arizona*, in particular, left open the possibility that the question of appellate intervention will be considered in an appropriate case. See also *Arizona v. San Francisco*, No. 20M81 (U.S. June 1, 2021) (holding a motion to intervene in this Court in abeyance)

Lukashin sought to intervene post-decision in the state appellate court below to point out a possible conflict on the legal issue of whether noncompliance with a statutory prerequisite for appellate jurisdiction affects the state trial court's subject matter jurisdiction. As *Ronald Wastewater, supra*, held, lack of compliance with a (different) statutory prerequisite can made a decades-old order void.

That general issue of law is indisputably of broad public importance in the state and affects Lukashin's own past civil matters.

Lukashin was able to successfully *de-facto* intervene in *Towessnute, supra*, for the limited purpose of seeking re-designation as a published opinion, already cited by ***State v. Gudgell***, 499 P. 3d 229, 239 n. 12 (Wash. App. Div. 2 2021) (excusing State's non-compliance with applicable RAP); so his *pro se* nonlawyer non-party motion provided a benefit to the public and the State of Washington itself.

Lukashin previously unsuccessfully attempted to intervene post-decision in *State v. Gaines*, 479 P.3d 735 (Wash. App. Div. 2 2021), *review denied*, No. 99562-1, *modification denied*. There, Lukashin asked the appellate courts to reach the Due Process question of statutory interpretation the *Gains* majority concurrence, 479 P. 3d at 739–40 noted, but did not reach. Review was denied because Lukashin was held not to be "a party"; yet *Robert Ito* reasoning (party for the purposes of review of an order denying intervention) was never addressed.

This case would provide an excellent vehicle to address what the Court left open last term in *Arizona, supra*: when a person may

intervene post-decision on appeal to advance a position *a party* to the case previously argued.

4. Must an order denying intervention post-decision on appeal provide a statement of reasons? Yes!

The decision below eventually stemmed from Lukashin's attempt to review a state court of appeals' order denying post-decision intervention without an explanation.

Seeking discretionary review below, Lukashin argued,

> An unexplained denial clearly violates "statement of reasons" Due Process requirement, *Kashem v. Barr*, 941 F.3d 358, 377–383 (9th Cir. 2019) (full statement of reasons); *Zerezghi v. USCIS*, 955 F.3d 802, 808–13 (9th Cir. 2020) (footnotes omitted)

citing also *Nnebe v. Daus*, 931 F. 3d 66, 88 (2d Cir. 2019) (quoting *Fuentes v. Shevin*, 407 U.S. 67, 80 (1983)), *Halo Electronics, Inc. v. Pulse Electronics*, 136 S. Ct. 1923, 1931-32 (2016); *accord Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 1979, 1985-86 (2016) to advocate for constraints on discretion, while noting that

"[D]ecisions that violate the Constitution cannot be `discretionary,'" *Poursina v. USCIS*, 936 F. 3d 868, 876 (9th Cir. 2019), and referencing sham-review precedent, including *Proctor v. LeClaire*, 846 F. 3d 597, 610-614 (2nd Cir. 2017) *Brokaw v. Mercer County*, 235 F. 3d 1000, 1021 (7th Cir. 2000), *Wilson v. IL Dep't Of Financial & Prof'l Reg.*, 871 F.3d 509 (7th Cir. 2017) and *Jefferson v. GDCP Warden*, 941 F. 3d 452, 463-65 (11th Cir. 2019).

The record below is well-developed to allow thorough examination of this Due Process issue and promote development of intervention law, so the Court should grant certiorari on this question as well.

CONCLUSION

This Court should grant certiorari to consider one or more of the Questions Presented.

Dated: August 1, 2022

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