22-648
No. ORIGINAL

In the Supreme Court of the United States

In re: Igor Lukashin,

Petitioner

CA9 No. 22-80034

On Petition for Writ of Certiorari
to the Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

Igor Lukashin, *pro se*

PO Box 2002
Bremerton, WA 98310
(360) 447-8837

QUESTIONS PRESENTED

1. Whether the Ninth Circuit has been denying Due Process by applying a purportedly categorical rule, *Ramirez-Alejandre v. Ashcroft*, 320 F.3d 858, 875 (9th Cir. 2003) (en banc), allegedly supported by *Padgett v. Wright*, 587 F.3d 983, 985 n. 2 (9th Cir. 2009) to thousands of *pro se* appeals, *a-la* secret policy in *Schexnayder v. Vannoy*, 140 S. Ct. 354 (U.S. 2019) (Sotomayor, J.), when this Court's and the circuit's actual waiver / forfeiture law has discretion, *e.g. In re Apple Inc. Device Performance Litigation*, 50 F. 4th 769, 782 n. 9 (9th Cir. 2022)?

2. Whether the Ninth Circuit retaliated against Lukashin for repeatedly bringing the "*Padgett* fraud" to that court's attention via Circuit Rule 36-4 requests for publication and motions to intervene, *e.g. California River Watch v. City of Vacaville*, 14 F.4th 1076, 1079 (9th Cir. 2021), *intervention denied by amended opinion*, 39 F.4th 624 (9th Cir. 2022) ("*CRW*"), via a pre-filing review order and denying reconsideration, all without following requirements of binding circuit precedent (*Molski / DeLong / Ringgold*) or engaging with Lukashin's arguments.

3. Whether the entered pre-filing review order is a de-facto filing ban and violates Due Process for failing to follow circuit precedent, *Johnson v. Missouri*, No. 22A463, p. 1 (U.S. Nov. 30, 2022) (Jackson, J.) ("*Kevin Johnson*"), lack of a reasoned explanation, *Jonhson v. Ryan*, No. 20-15293, pp. 57–60 (9th Cir. Dec. 15, 2022) ("*Richard Johnson*"), and effective *ultra vires* suspension of Circuit Rule 27-10 by the clerk's office?

PARTIES TO THE PROCEEDING

Petitioner is Igor Lukashin, *pro se*. Lukashin was the only party to the case below, *In re Igor Lukashin*, No. 22-80034 (9th Cir. 2022), *sua sponte* initiated by the Ninth Circuit Court of Appeals via an April 22, 2022 Order to show cause why a pre-filing review order should not be entered against Lukashin.

Related recent proceeding in this Court was *Lukashin v. Washington State Department of Revenue*, No. 22-189, *petition denied* (U.S. October 14, 2022).

DECISIONS BELOW

On May 24, 2022, the Ninth Circuit entered a pre-filing review order, *In re: Igor Lukashin* (9th Cir. 2022) (DE:8). On July 19, the Court denied, without explanation, a motion for reconsideration / reconsideration *en banc*. On July 20, the Clerk denied permission to proceed in *CRW*, CA9 No. 20-16605, including to seek reconsideration of unexplained denial of a motion to intervene (DE: 60 therein), filed subject to the pre-filing order in No. 22-80034.

JURISDICTION

This Court has jurisdiction to review May 24, July 19, and July 20, 2022 orders, as well as subsequent orders, pursuant to 28 U.S.C. § 1254(1). A request to extend time to file to December 16 was granted by Justice Kagan.

STATEMENT OF THE CASE

On April 22, 2022, the Ninth Circuit, *sua sponte*, ordered Lukashin to show cause why a pre-filing order should not be entered against him. After Lukashin requested clarification and "*Molski*-compliant notice", a stay pending *CRW* resolution, and oral argument on April 25, CA9 denied all requested relief on April 27, DE: 4.

On April 28, Lukashin requested judicial notice by, and discovery from, the court, including seeking information on the number of Circuit Rule 36-4 publication requests filed annually, arguing the court was the entity with "peculiar means of knowledge", *Nayab v. Capital One Bank (USA), NA*, 942 F.3d 480, 493–495 (9th Cir. 2019).

On April 30, Lukashin moved for panel recusal and out-of-circuit reassignment, relying on *Strickland v. US*, No. 21-1346 (4th Cir. Apr. 26, 2022) ("Caryn S.") and *Glick v. Edwards*, 803 F.3d 505, 509 & n. 2 (9th Cir. 2015).

On May 6, Lukashin filed his response (DE: 7) to the order to show cause. On May 24, the court denied all requested relief, failed to engage with any arguments or authority, and stated, as relevant: "Upon review of the response to the April 22, 2022 order to show cause, we conclude that entry of the following pre-filing review order is warranted." DE: 8 at 1. The "Pre-Filing Review Order", *Id.* at 1–2 is **a verbatim match** to the one in order to show cause, DE: 2 at 2–3, even though Lukashin made three specific arguments how the order, if warranted, should be revised (limit to *Padgett*-use filing; provide Due Process notice on review)

Justice Kagan granted Lukashin's request to extend time to file this certiorari petition until December 16, 2022[1], *see* docket No. 22A320[2].

REASONS TO GRANT CERTIORARI

1. Ninth Circuit has been wrongfully denying Due Process by applying a purportedly categorical rule allegedly supported by *Padgett, supra*, to thousands of *pro se* appeals

The main allegation, QP 1, is that the Ninth Circuit routinely denies equal protection of the law to pro se appellants via application of a purported categorical rule ("*Padgett* fraud"), where the actual rule, contemporaneously applied in published opinions, permits discretion.

This Court's building engraving promises EQUAL JUSTICE UNDER LAW, so Sup. Ct. R. 10(a) calls for the Court's supervisory power.

---

[1] 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

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

Over 2,300 (!) *pro se* appeals have been affected[3], including *e.g. Meniooh v. Two Jinn*, Inc., No. 21-16234 (9th Cir. Dec. 14, 2022).

Yet compare *Apple, supra*, 50 F. at 782 n. 9 (considering forfeited argument); ***US v. Kirilyuk***, 29 F. 4th 1128, 1136–37, 1140 (9th Cir. 2022) reminded "'[I]t is claims that are deemed waived or forfeited, not arguments." *Cf. also* original *CRW, supra*, 14 F. 4th at 1079 (declining to find forfeiture[4])

Shinn v. Ramirez, 142 S. Ct. 1718, 1730 n. 1, 596 US __ (2022) noted "discretion to forgive any forfeiture", while *Hemphill v. New York*, 142 S. Ct. 681, 689, 595 U.S. ___, 211 L. Ed. 2d 534 (2022) restated this Court's law:

> "Once a federal claim is properly presented, a party can make any

---

[3] Searching Google Scholar case law for Ninth Circuit Court of Appeals cases that cite *Padgett v. Wright*, 587 F. 3d 983, 985 n. 2 (9th Cir. 2009) (per curiam) and contain the following search terms +"pro se" +"not for publication" +"We do not consider" yielded 2,370 results on 12/16/22. See https://bit.ly/3W2AHOA . The purported rule is "We do not consider matters not specifically and distinctly raised and argued in the opening brief, or arguments or allegations raised for the first time on appeal."

[4] Lukashin's post-decision motion to intervene in *CRW*, Dkt: 60, *denied by amended opinion*, 39 F. 4th 624, 626, pointed to the categorical *Padgett* statement in memorandum dispositions

argument in support of that claim." *Yee v. Escondido*, 503 U.S. 519, 534, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992).

Accord, Egbert v. Boule , 142 S. Ct. 1793, 1806 n. 3, 596 U.S., 213 L. Ed. 2d 54 (2022), "under our precedents, he is "not limited to the precise arguments [he] made below." *Yee v. Escondido*, 503 U.S. 519, 534, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992).

While memorandum dispositions are not binding precedent, as *Powell v. Lambert*, 357 F. 3d 871, 879 (9th Cir. 2004) noted, "unpublished decisions are a particularly useful means of determining actual practice", and Lukashin believes and asserts thousands of pro se appellants, himself included[5], do not receive a Due-Process-required procedure, *Richard Johnson, supra*, as evidenced by *Padgett* categorical rule and often-boilerplate statements in memorandum dispositions.

EQUAL JUSTICE UNDER LAW compels this Court to invoke its supervisory powers to address the Ninth Circuit's apparent secret policy *a-la Schexnayder, supra.*

---

[5] *Lukashin v. Allianceone Receivables Management Inc.*, No. 13-35429 (9th Cir. Sept. 25, 2015) (mem.) *(Padgett* quote); *Lukashin Vv Suttell & Hammer PS*, No. 13-35353 (9th Cir. Sept. 25, 2015).

This case also provides another chance to clarify Due Process limits on entry of pre-filing vexatious-litigant orders at the appellate level.

Plus, this Court may be able to examine whether *pro se* non-party nonlawyer *proposed* 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*, 142 S. Ct. 2191, 2203–06 (U.S. 2022) (adequate representation of interests; giving voice to a different perspective), and *AZ v. City and County of San Francisco*, 142 S. Ct. 1926, 1928–29 (U.S. 2022) (four-justice concurrence) (intervention to defend a rule might be proper).

2. The Ninth Circuit issued decisions in conflict with the CA9's own precedent and this Court's *In re McDonald* (1989)

The Ninth Circuit entered a pre-filing order without following its own 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(a) and (c).

Despite citing it (App. 1–2) in the Order to show cause, the vague-facts decisions below also implicitly conflict with *In re McDonald*, 489 U.S. 180, 184–85 (1989), which catalogued 73 filings with the Court at 180–82, nn. 2–5 and narrowly tailored the sanction imposed.

Compare also *Jonhson v. Ryan*, No. 20-15293, pp. 57–60 (9th Cir. Dec. 15, 2022) ("*Richard Johnson*") *Johnson v. 27th Ave. Caraf, Inc.*, 9 F.4th 1300, 1311-12 (11th Cir. 2021) ("*Alexander Jonhson*") ("Due process requires that the attorney (or party) be given fair notice that his conduct may warrant sanctions and the reasons why."); *Tumey v. Mycroft AI, Inc.*, 27 F.4th 657, 665–66 (8th Cir. 2022) (notice and meaningful opportunity to prepare). *See also* *Holt v. State*, 232 P.3d 848, 853–55 (Kansas 2010).

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.

However, the Ninth Circuit below failed to properly articulate elements of the *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).

Review is thus warranted due to departure "from the accepted and usual course of judicial proceedings," Rule 10(a), as well as the need to settle "an important question of federal law", fair, equitable, and consistent application of the waiver / forfeiture law, by this Court, Rule 10(c).

3. The Order below is contrary to this Court's Due Process precedent, as shown by the same Bybee-R. Nelson panel majority in *Richard Johnson.*

The April 22 Order to show cause (DE: 2) below clearly failed to comply with subsequent *Richard Johnson*[6] holding at 57:

> The Supreme Court's "procedural due process cases have consistently observed that [notice of the factual basis for a decision and a fair opportunity for rebuttal] are among the most important procedural mechanisms for purposes of avoiding erroneous deprivations." *Wilkinson*, 545 U.S. at 226.

Aside from *ipse dixit* vague factual assertions, that Order failed to provide notice of a single specific filing the court deemed frivolous or vexatious, or that Lukashin was previously informed that sanctions might be possible.

Yet Bybee-Hurwitz-R. Nelson panel (which fortuitously shares Bybee-R. Nelson majority with *Richard Johnson*), when entering May 24 and July 19 orders below, failed to enter specific findings, or provide sufficient

---

[6] Heard April 13, 2022, by Bybee-Nelson-Rakoff panel, *see* https://www.ca9.uscourts.gov/media/video/?20220413/20-15293/ , before the Order to show cause herein was issued

explanation, even though the majority found similar defects rendering a procedure "not adequate to satisfy the Due Process Clause ... not given a meaningful opportunity to learn of the factual basis ... or prepare a defense to the accusations" in *Richard Johnson* at 60.

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.*

Lukashin's access to the Ninth Circuit and the right to petition, otherwise available to nonlawyer non-parties via motions to intervene on appeal or Circuit Rule 36-4 requests for publication, have been curtailed, subject to a de-facto filing ban via unexplained denials of

permission to proceed, App. 7–10, foreclosing Rule 27-10 motions for reconsideration, an *ultra vires* action for the Clerk, *see id*, since the rule explicitly provides for review of decisions delegated under Circuit Rule 27-7.

4. 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 adopted the DMRS-based approach, yet failed to faithfully apply it below, in violation of the prior-panel rule, *e.g.* Kassas v. State Bar of California, 49 F. 4th 1158, 1166 (9th Cir. 2022)[7]:

> A panel can only depart from our own precedent "if a subsequent Supreme Court opinion `undercut[s] the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable.'" *In re Nichols*, 10 F.4th 956, 961 (9th Cir. 2021)

[7] Also decided by Bybee-R. Nelson-Rakoff panel on 04/12, see https://www.ca9.uscourts.gov/media/video/?20220412/21-55900/

Yet, the DMRS-based 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.

This Court already adopted a very similar approach in *McDonald, supra*, in the context of perceived *in forma pauperis* abuses. *See also* Martin v. District of Columbia Court of Appeals, 506 U.S. 1–4 (1992) ("totally frivolous demands", "demonstrably frivolous", noting single arguable exception[8], noting prior warning in *Zatko*). 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 Ninth Circuit, where the opportunity for further review is discretionary, rather than a right.

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

[8] *Martin v. Knox*, 502 U. S. 999 (1991) (Stevens, J., joined by Blackmun, J., respecting denial of certiorari)

This Court considered several post-decision intervention cases last term, *see Cameron, Berger*, and *AZ, supra.* The Chief Justice Roberts's concurrence in *AZ*, in particular, left open the possibility that the question of appellate intervention will be considered in an appropriate case.

Lukashin sought to intervene post-decision in *CRW, supra*, before the pre-filing order was entered below, to point out a possible conflict with treatment of the waiver / forfeiture legal issue in published opinions and memorandum dispositions targeting *pro se* nonlawyer appellants. Despite the rule that unsuccessful intervenor is a party for the purposes of appealing the denial, e.g. Callahan v. Brookdale Senior Living Communities, 42 F.4th 1013, 1020, 1023 (9th Cir. 2022), the court below denied permission to proceed, even with a motion to reconsider denial of permissive intervention, with the only reason being that Lukashin was "not a party in appeal No. 20-16605", clearly inconsistent with *Callahan.*

Robert Ito[9] reasoning (a prospective intervenor is a party for the purposes of

[9] Robert Ito Farm, Inc. v. Cnty. of Maui, 842 F.3d 681, 688 (9th Cir. 2016) ("denial of a motion to intervene is appealable under the

reviewing 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.

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

Lukashin previously 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);

---

collateral order doctrine. *Eisenstein*, 556 U.S. at 931 n.2, 129 S.Ct. 2230. "In such a case, the [would-be intervenor] is a party for purposes of appealing the specific order at issue)

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 developed to allow examination of this Due Process issue and promote development of intervention law, so the Court should grant certiorari on all questions.

CONCLUSION

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

Dated: December 16, 2022

s/ Igor Lukashin
PO Box 2002
Bremerton, WA 98310
(360) 447-8837 igor_lukashin@comcast.net

APPENDIX