10/4/22

No. 22-990

In the Supreme Court of the United States

BRIGHT HARRY and RONALD S. DRAPER,

Petitioners,

v.

KCG AMERICAS LLC, ET AL,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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December 30, 2022

QUESTION PRESENTED

This is an extremely complex commodity futures Case of Respondents' fraud against Petitioners. Just as this Court held in *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-257 (1986)*, that the "Court of Appeals did not apply the correct standard in reviewing the district court's grant of summary judgment", Petitioners similarly hold that the 9th Circuit "Court of Appeals did not apply the correct standard[s] in reviewing the district court[s'] grant of [interlocutory orders that undergird all the subsequent orders and judgment including the judgment order and,] summary judgment". Thus, the Question Presented is:

Whether in arrogant defiance of 36 years of this Court's precedent in *Anderson v. Liberty Lobby, Inc.*, the Ninth Circuit, just like the other Appellate Courts, has statutory authority to disingenuously combine,

- application of incorrect inter- and intra- circuit-split Local-Rule-Modified-FRAP 34(a)(2) instead of the correct FRAP 34(a)(2), to deny Indigents and/or unrepresented Litigants oral argument,
- application of incorrect standards for Appellate Review of district courts' grants of summary judgments, and
- misapplication of Article II, §2 of the U.S. Constitution, in deploying appellate judicial staff-attorneys, as impostor judges, to adjudicate federal cases, instead of the actual Federal Appellate Judges,

to create the devastating perfect legal storm that destroys 99% of Federal Appellate Cases of the most vulnerable Litigants — Indigents and/or Unrepresented (*Pro Se*), Litigants whose case loss or failure rate is a stunning 99%, with violation of their 1st, 5th and 7th Amendment Rights to boot.

Henceforth, this "*devastating combination of misapplication of standards and/or application of incorrect standards* " will be shortened to ("*Combo*"), and interchangeably applied throughout this Petition.

PARTIES TO THE PROCEEDINGS

The following individuals and entities are parties to the proceedings in the courts below:

Petitioners are Bright Harry ("Harry") and Ronald S. Draper ("Draper") who were the Plaintiffs in the District Courts and Appellants in the Court of Appeals.

Respondents are KCG Americas LLC, Daniel B. Coleman, Carl Gilmore, Greg Hostetler, Main Street Trading, Inc., Patrick J. Flynn, Wedbush Securities Inc., Gary L. Wedbush, ION Trading, Inc., Andrea Pignataro, Robert Sylverne, Computer Voice Systems, Inc., Paul Sturm and Scott William Benz.

Related Proceedings:
Harry vs. KCG Americas LLC et al., District Court Case # 4:17-cv-2385-HSG

THE COURTS

The following are the Courts involved in this Case, (i) the Ninth Circuit Court of Appeals, (ii) the **legitimate** and assigned *Harry-Draper/Judge Tigar* District Court, (iii) the **illegitimate** *Harry-Draper/Judge Gilliam, Jr.* District Court, and (iv) the **illegal closed** *Harry* District Court. The Courts and their respective Cases are succinctly described below.

(i) The Ninth Circuit Court of Appeals
Harry and Draper vs. KCG Americas LLC et al. Case No. 21-16258

(ii) The Legitimate and Assigned *Harry-Draper/Judge Tigar* Case and Court
(a) Harry and Draper vs. KCG Americas LLC et al. Case # 4:20-cv-7352-**JST** ("*Harry-Draper/Judge Tigar* Case")
(b) Harry and Draper vs. KCG Americas LLC et al. Case # 4:20-cv-7352-**JST** Court ("*Harry-Draper/Judge Tigar* Court")

(iii) The Illegitimate *Harry-Draper/Judge Gilliam, Jr.* Case and Court
(a) Harry and Draper vs. KCG Americas LLC et al. Case # 4:20-cv-7352-**HSG** ("*Harry-Draper/Judge Gilliam, Jr.* Case")
(b) Harry and Draper vs. KCG Americas LLC et al. Case # 4:20-cv-7352-**HSG** Court ("*Harry-Draper/Judge Gilliam, Jr.* Court")

(iv) The Illegal Closed *Harry* Case and Court
(a) Harry vs. KCG Americas LLC et al., Case # 4:17-cv-2385-HSG ("*Harry* Case")
(b) Harry vs. KCG Americas LLC et al., Case # 4:17-cv-2385-HSG Court ("*Harry* Court")

CORPORATE DISCLOSURE STATEMENT

Per Supreme Court Rule 29, Petitioners/Appellants Harry and Draper state that they have no parent companies or publicly-held companies with a 10% or greater ownership interest in them.

TABLE OF CONTENTS

APPENDICES A, B AND C TABLES OF CONTENTS

Appendix A Table of Contents and its sub-Appendices

Appendix B Table of Contents and its sub-Appendices

Appendix C Table of Contents and its sub-Appendices

TABLE OF AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

1. Petitioners'/Appellants' Bright Harry ("Harry") and Ronald S. Draper ("Draper") respectfully petition for a writ of certiorari to review the profoundly legally erroneous, unpublished memorandum decision by the judicial staff-attorneys of the Ninth Circuit Court of Appeals, the "impostor-judges", instead of the actual appointed Federal Judges, in violation of Article II, §2 of the United States Constitution.

OPINIONS BELOW

2. The 9th Circuit's unpublished Decision is reproduced as App. A1 at 3-6. The judgment order and judgment of U.S. district court for the Northern District of California, *Harry and Draper vs. KCG Americas LLC et al*, filed 07/1/2021 is reproduced as App. A2 at 7-24. The judgment order and judgment of U.S. district court for the Northern District of California, *Harry vs. KCG Americas LLC et al*, filed 04/19/2019 is reproduced as App. A3 at 25-29. The judgment order of U.S. District Court for the Northern District of California, *Harry vs. KCG Americas LLC et al*, filed 08/28/2018 is reproduced as App. A4 at 30-44. The 9th Circuit's order denying panel rehearing en banc is unreported but reproduced as App. A5 at 45-46. The **illegal closed** *Harry* Court's fraudulent, illegal and void order, ECF #163, in the **illegal closed** *Harry* Case is reproduced as App. B8 at 90-92. The **illegal closed** *Harry* Court's fraudulent, illegal and void mirror-image of ECF #163, order ECF #14, in the *Harry-Draper/Judge Tigar* Case is reproduced as App. B9 at 93-95.

JURISDICTION

3. The Ninth Circuit issued its opinion on 03/24/2022. Petitioners filed a petition for rehearing en banc with the Ninth Circuit, which temporarily stayed issuance of the mandate. That petition was denied on 07/07/2022. On 07/13/2022, Petitioners filed a request with the Ninth Circuit to stay its mandate pending certiorari review by this Court, which again temporarily stayed issuance of the mandate. That request was denied on 07/21/2022. Petitioners then filed a stay of mandate with this Court on 07/25/2022, which was denied on 08/08/22. This Court has jurisdiction to review, the foundational interlocutory orders that undergird final decisions and, final decisions, of Appellate Courts pursuant to 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

4. The 1st, 5th and 7th Amendments, and Article II, §2 of the United States Constitution are in App. C5 @ 117.

STATEMENT OF THE CASE

5. Arrogantly defying 36 years of this Court's precedent in *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-257 (1986)*, the 9th Circuit Court of Appeals, just like the other Appellate Courts, has disingenuously combined,

- application of incorrect inter- and intra- circuit-split Local-Rule-Modified-FRAP 34(a)(2) instead of the correct FRAP 34(a)(2), to deny Indigents and/or unrepresented Litigants oral argument,
- application of incorrect standards for Appellate Review of district courts' grants of foundational interlocutory orders and summary judgments, and
- misapplication of Article II, §2 of the U.S. Constitution, in deploying appellate judicial staff-attorneys, as impostor judges, to adjudicate federal cases, instead of the actual Federal Appellate Judges,

to create the devastating perfect legal storm (*Combo*) that continues to destroy 99% of the federal appellate cases of the most vulnerable Litigants — Indigents and/or Unrepresented Litigants whose case loss or failure rate is a stunning 99%, with violation of their 1st, 5th and 7th Amendment Rights to boot.

6. This is the legal saga of these two vulnerable, elderly Petitioners, including a 76-year old, entrapped by the 9th Circuit's legal maelstrom of this devastating *Combo*, that is depriving them of their 5th Amendment Right of their retirement Fund, their lifetime nest egg of more than $400,000, the district and appellate courts are knowingly and willfully handing over to the Multimillionaire-and-Multibillionaire Respondents who own resort for Billionaires only. This is an unconscionably mind-numbing reverse Robin Hood of Multimillionaire- and Multibillionaire- Respondents robbing the most vulnerable Elderly Petitioners of their Retirement Fund, aided and abetted by the District and Appellate Courts, the so-called Arbiters of Justice.

7. When Multimillionaires/Multibillionaires who own resort for only Billionaires can freely appropriate or steal more than $400,000 retirement fund of vulnerable elderly Citizens, to be richer, that Society is on the precipice. But when the Arbiters of Justice, federal district and appellate courts, knowingly and willfully aid and abet such theft, by intentionally breaking the law with judicial impunity, the arc of Justice is on the verge of total collapse, held only by the judicial arm of this Court of Last Resort. And if this Court fails to redirect that arc of Justice toward Justice to give relief to these vulnerable elderly Citizens, such a Society is finished. In other words, if this Court fails to grant this writ of certiorari, it affirms the 9th Circuit's decision, that aids and abets Respondents' theft of the $400,000 retirement fund of these vulnerable elderly Petitioners, while perpetuating Injustice against them. Hence, this Court should grant the petition. Besides, the 9th Circuit's legally erroneous decision, based on the said *Combo*, in conflict with *Anderson*

v. Liberty Lobby, Inc., is not just unconstitutional but violates the 1st, 5th and 7th Amendment Rights. This means, if this Court fails to grant this writ of certiorari, it is also violating the 1st, 5th and 7th Amendment Rights of these vulnerable elderly Petitioners. That's egregious elder abuse and manifest injustice this Court would be perpetrating against these elderly Petitioners. This Court must do the opposite, stop itself from aiding and abetting this theft and manifest injustice by stopping the lower courts' aiding and abetting of this theft and manifest injustice. For, Law is not about efficiency or expediency or wealth. Law is the prevention of Injustice, and the Purpose of this Court of Last Resort is not about efficiency or expediency or wealth, but prevention of Injustice, especially for this nationwide phenomenon.

Factual and Procedural Background

8. On 10/13/2020, Petitioners/Appellants filed their Complaint against the 14 Respondents listed above, who avoided service like a plague. As shown in App. B1 at 59, the Complaint was originally assigned to Hon. Magistrate Judge Sallie Kim.

9. On 10/28/2020, the Case was reassigned to the Hon. Judge Jon S. Tigar in Oakland, from the Hon. Magistrate Sallie Kim in San Francisco when Petitioners declined Magistrate Adjudication. *See* Apps. B2, B3 and B4 @ 70 - 76.

10. On 12/03/2020, instead of answering Petitioners' well-detailed and well-pled Complaint, (*See* complaint summary, App. B1 @ 58-69). Respondents knowingly and willfully deployed Improper Legal Standards, Civil Local Rules 3-3 and 3-12, in violation of FRCP 12(h)(3), pursuant to FRCP 83, to file, and filed their fraudulent, frivolous and illegal "Administrative Motion To Consider Whether Cases Should Be Related", ECF #162, in the **closed** *Harry* Case. *See* App. B7 at 81 - 89.

11. On 12/21/2020, in collusion with the Defendants, through their attorneys, the **closed** *Harry* Court and Judge Gilliam, Jr. illegally deployed improper-legal-standards, Civil Local Rules 3-3 and 3-12, instead of the proper and controlling legal standard, FRCP 12(h)(3), pursuant to FRCP 83, to egregiously, usurp, and usurped, judicial power, to illegally assume, and illegally assumed, subject matter jurisdiction over the **closed** *Harry* Case, to make, and made, the fraudulent, illegal and **Void** Order, ECF #163 in the **closed** *Harry* Case. *See* App. B8 at 90. The **closed** *Harry* Court and Judge Gilliam, Jr. further made the fraudulent, illegal and **Void** mirror image of ECF #163, Order ECF #14 in the *Harry-Draper/Judge Tigar* Case of the *Harry-Draper-Judge Tigar* Court (*See* App. B9 at 93) to create the **illegitimate** *Harry-Draper/Judge Gilliam, Jr.* case and the **illegitimate** *Harry-Draper/Judge Gilliam, Jr.* court. A mirror-image of a fraudulent, illegal and **Void**, order is a fraudulent, illegal and **Void** order.

12. On 12/22/2020, the District Court sent Petitioners ECF #16, "Order Reassig-

ning case", from Judge Tigar to Judge Gilliam, Jr., affirming this fraud. *See* App. B10 at 96. With no legal backing, the *Harry-Draper* case was illegally transferred from Judge Tigar to Judge Gilliam, Jr., in violation of Civil L.Rs. 3-3, 3-12, CAND General Order 44, and Federal Rules 12(h)(3) and 83. With the completion of this egregiously fraudulent and illegal hijacking of the *Harry-Draper* Case from Judge Tigar to Judge Gilliam, Jr. (Judge-shopping at its worst), the **illegitimate** *Harry-Draper/Judge Gilliam, Jr.* Court made all its subsequent fraudulent, illegal and **Void** Orders and Judgment in the *Harry-Draper* Case, that this Court, **must** now reverse pursuant to FRCP 12(h)(3), and Vacate pursuant to FRCP 60(b)(4), starting with review and resolution of the inter- and intra-Circuit Conflict.

STATEMENT OF THE COURSE OF PROCEEDINGS

A. The Conflict

The 9th Circuit's decision deepens a preexisting inter- and intra- circuit split in Federal Appellate Courts' application of incorrect Local-Rule-Modified-FRAP 34(a)(2) instead of the correct FRAP 34(a)(2), to deny Indigents and/or unrepresented Litigants oral argument, resulting in these Litigants' stunning 99% case loss rate, conflicting with *Anderson v. Liberty Lobby, Inc.*, and violating their 1st, 5th and 7th Amendment Rights

13. As succinctly explained in ¶¶10-14 of Petitioners'/Appellants' petition for rehearing en banc (DktEntry #55) and further expanded in ¶¶37-41 below, the Appellate Circuits' application of incorrect Local-Rule-Modified-FRAP 34(a)(2) standard, instead of the actual FRAP 34(a)(2) standard, in conflict with *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-257 (1986)*, has created an unnecessary and irrelevant inter- and intra-circuit split whereby some circuits, and some courts within the circuits, allow oral argument, while others do not. This denial of oral argument to litigants, especially the thousands of indigents or unrepresented litigants including Petitioners, prevents them from voicing their "dispositive issues [that] have [not] been authoritatively decided in their meritorious "Appeal[s] [that are not] frivolous", and where "the facts and legal arguments are [not] adequately presented in the briefs and record" (*See* FRAP 34(a)(2) *Standards* below). The consequence is the loss of their Cases, manifest injustice, and **unconscionable violation** of their 1st, 5th and 7th Amendment Rights.

14. There is no reason, whatsoever, for any inter- and intra- Circuit Split to deprive these Litigants of their voice in the argument because FRAP 34(a)(2) is explicit and simple enough to comprehend, to not cause any confusion, and it states as follows:

"*Standards.* Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons:

(A) the appeal is frivolous;

(B) the dispositive issue or issues have been authoritatively decided; or

(C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument."

15. Furthermore, the relevant parts of the "Committee Notes on Rules—1998 Amendment" (*See* App. C3b. @ 113) states as follows:

> "The amendments omit the local rule requirement and make the criteria applicable by force of the national rule. The local rule is an unnecessary instrument."

As such, circuit split or no circuit split, the Appellate Courts have no statutory authority to apply any Local Rules to modify FRAP 34(a)(2), to deprive Litigants, especially the thousands of indigents or unrepresented Litigants including Petitioners, oral arguments, to further deprive them of their 1st, 5th and 7th Amendment Rights with **Judicial Impunity**. Moreover, although FRAP 47 authorizes the Federal Circuits to adopt local rules for the courts of appeals within their jurisdiction, the rule states that *"[a] local rule must be consistent with —but not duplicative of—Acts of Congress and rules adopted under 28 U.S.C. §2072 [The Rules Enabling Act]."* FRAP 47(a)(1). *See* App. C3c. @ 114. As well-detailed in Petitioners' 03/28/2022 letter to the 9th Circuit Chief Judge (*See* App. A6 @ 47), the Circuits', including the 9th Circuit's, application of incorrect Local-Rule-Modified-FRAP 34(a)(2) instead of the correct and actual FRAP 34(a)(2) contravenes FRAP 47(a)(1), because it violates the 1st, 5th and 7th Amendment Rights which are even beyond the "Acts of Congress", while conflicting with *Anderson v. Liberty Lobby, Inc.* Besides, it is pure discrimination for represented Litigants to be granted oral arguments while unrepresented Litigants are denied. That's illegal. Thus, this Court's intervention is necessary to bring uniformity to the Application of FRAP 34(a)(2) in all the federal appellate Courts, through the review of this Case, especially the Controversy.

B. The Controversy

The Ninth Circuit's application of incorrect standards for review of, the district courts' assumption of subject matter jurisdictions and, summary judgment, conflicts with FRCP 12(h)(3), and *Anderson v. Liberty Lobby, Inc.*

On appeal—even for the first time at the Supreme Court—a party may attack jurisdiction after the entry of judgment in the district court. See Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006)

16. Petitioners have been attacking and would continue to attack subject matter jurisdiction of the **illegal closed** *Harry* Court and the **illegitimate** *Harry-Draper/Judge Gilliam, Jr.* Court, until the fraudulent and void interlocutory orders, ECF #163 in the **illegal closed** *Harry* case, and its fraudulent and void mirror-image order, ECF #14 in the *Harry-Draper/Judge Tigar* case, that birthed the **illegitimate** *Harry-Draper-Judge Gilliam, Jr.* case and court, premised on incorrect Standards, are reversed and vacated by this Court.

17. In every appeal to the Circuit Courts, the parties are required to cite the standard of review that applies to each issue. *See* FRAP 28 (a)(8)(B), App. C3a. @ 112. In each Circuit the parties cite to that Circuit's iteration of its standard of review. The primary Standard of Review each and every Court including this Court cites and applies is the standard of review for assumption of subject matter jurisdiction to adjudicate the case. This is very important because this standard of review is critical to the outcome of the case. *See Dickinson v. Zurko*, 527 U.S. 150, 152-61 (1999) ("The upshot in terms of judicial review is some practical difference in outcome depending upon which standard is used."); *see also Southwest Voter Registration Educ. Pro. v. Shelley*, 344 F.3d 914, 917 (9th Cir. 2003) (en banc) (per curiam) (noting "standard of review is important to our resolution of this case"); *Payne v. Borg*, 982 F.2d 335, 338 (9th Cir. 1992) ("The relevant standards of review are critical to the outcome of this case, and in this case.") The following are the Standards of Review cited and applied by the Litigants and the Courts.

a. The 9th Circuit's Standard of Review

18. In App. A1 @ 4, line 6 and @ 5, line 1 of the 9th Circuits' Memorandum Decision, DktEntry #48-1, the Panel states as follows:

> "We review de novo a dismissal under Federal Rule of Civil Procedure 12(b)(6). *Hebbe v. Pliler*, 627 F.3d 338, 341 (9th Cir. 2010)."

It's quite obvious that the 9th Circuit adopted Respondents' and the **illegitimate** *Harry-Draper/Judge Gilliam, Jr.* Court's Rule 12(b)(6) Motion to Dismiss Standard of Review, as shown in **b.** and **c.** below.

b. Respondents' Standard of Review in their 9th Circuit Answering Brief

19. ¶V, line 1, Page 9 of Respondents' 9th Circuit Answering Brief states as follows:

> "A District Court's decision to grant a motion to dismiss is reviewed *de novo*. See *Henry A. v. Willden*, 678 F.3d 991, 998 (9th Cir. 2012) (We review de novo the district court's decision to grant Defendants' motion to dismiss under Rule 12(b)(6))."

This demonstrates that the Standard of Review Respondents cited and applied on the *Harry-Draper/Judge Tigar* Case is Rule 12(b)(6).

c. The illegitimate *Harry-Draper/Judge Gilliam, Jr.'s* Court's Standard of Review

20. The **illegitimate** *Harry-Draper/Judge Gilliam, Jr.* Court did not state any Standard of Review upon which it made its ruling but seems to have adopted Respondents' Rule 12(b)(6) Motion to Dismiss Standard of Review. This is confirmed in App. A2 @ 9, ¶1 of the Judgment Order, ECF #39, of *Harry-Draper* which states,

> "Pending before the Court are Defendants' motion to dismiss Plaintiff Bright Harry and Ronald S. Draper's complaint and motion to deem Plaintiffs vexatious litigants. Dkt. Nos. 26, 28. The Court finds these matters appropriate for disposition without oral argument and the matters are deemed submitted. *See* Civil L.R. 7-1(b). For the reasons detailed below, the Court **GRANTS** the motions."

On the other hand, Petitioners cited the correct and relevant Standard of Review for subject matter jurisdiction assumption.

d. Petitioners' Standard of Review in their 9th Circuit Opening Brief

21. ¶3 of Petitioners' Opening Brief, DktEntry #16 states as follows:

> "The 9th Circuit reviews de novo a district court's assumption of jurisdiction. *Cf. Carriger v. Lewis*, 971 F.2d 329, 332 (9th Cir. 1992) (en banc) (assumption of jurisdiction under FRC P 60(b)). The existence of subject matter jurisdiction is a question of law reviewed de novo. *See Bishop Paiute Tribe v. Inyo Cty.*, 863 F.3d 1144, 1151 (9th Cir. 2017)."

This means Petitioners' cited and applied Rule 12(h)(3) Standard of Review for the *Harry-Draper* Case. Rule 12(h)(3) states that "[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."

22. The 9th Circuit should have first applied Rule 12(h)(3) to ascertain that the **illegitimate** *Harry-Draper/Judge Gilliam, Jr.* Court has subject matter jurisdiction over the *Harry-Draper/Judge Tigar* Case before applying the merits-based Rule 12(b)(6). Thus, in holding that Rule 12(b)(6) *de novo* standard of Review in *Hebbe v. Pliler*, 627 F.3d 338, 341 (9th Cir. 2010) supersedes the proper and controlling Rule 12(h)(3) *de novo* standard of Review, in *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 94 (1998), per Rule 83, to validate subject matter jurisdiction assumption by the **illegitimate** *Harry-Draper/Judge Gilliam, Jr.* Court, the 9th Circuit misapplied the standard of review dictated by Rule 12(h)(3). *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-257 (1986).* "[the 9th Circuit] court of appeals did not apply the correct standard in reviewing the district courts' grant of [interlocutory orders, ECF #163 in the **closed** *Harry* Case (*See* App. B8 at 90) for the **closed** *Harry* court's assumption of subject-

matter-jurisdiction, and ECF #14 in the *Harry-Draper/Judge Tigar* Case (*See* App. B9 at 93) for the **illegitimate** *Harry-Draper/Judge Gilliam, Jr.* Court's assumption of subject-matter-jurisdiction, and] summary judgment", as succinctly described below.

e. The "initial" and closed *Harry* Courts' Standards of Review

i. Initial *Harry* Court (04/26/2017 to 04/19/2019)

23. In App. A2 @ 11, line 3, ECF #39 of the *Harry-Draper* Case, the **illegitimate** *Harry-Draper/Judge Gilliam, Jr.* Court stated as follows:

> On March 7, 2018, the Court dismissed the operative complaint in the *Harry Case*, finding that Harry (1) lacked standing to seek the vast majority of his requested relief because Draper had contributed the $275,000 with which he traded, and the trading account was in Draper's name.

Exhibit B16 of App. A7 at 53-55 shows Petitioner Harry's $1,227.80 Economic-Injury-In-Fact or Software Subscription check Payments he made to Respondents through Respondent Flynn of MST, that Respondents defrauded him of. These are copies of the actual checks paid to, and cashed by, Respondent Flynn of MST. This $1,227.80 Economic Injury In Fact alone, unrelated to the $275,000, satisfies *Lujan* and, gives Harry Article III Standing, as detailed in all Harry's filings at the district and appellate courts. But back to basics – No Article III standing, no subject matter jurisdiction. By alleging, albeit **falsely**, that Harry lacked Article III standing in the **initial** *Harry* case, the **initial** *Harry* Court and Judge Gilliam, Jr. volitionally declared that they lacked subject matter jurisdiction over the **initial** *Harry* case, and closed the **initial** *Harry* case. Thus, there is no scintilla of doubt that the **initial** *Harry* court that is now closed as the **closed** *Harry* court, and Judge Gilliam, Jr., lack subject matter jurisdiction to make the fraudulent, illegal and **void** order, ECF #163 in the **closed** *Harry* case, and the similarly fraudulent, illegal and **void** mirror-image order, ECF #14, in the *Harry-Draper-Judge/Tigar* Case. Furthermore, in App. A4 @ 39, ¶1, ECF #123 of the **initial** *Harry* Case, the **initial** *Harry* Court stated as follows:

> **"Legal Standard**
> Under Federal Rule of Civil Procedure 12(b)(1), a party may move to dismiss based on the court's lack of subject matter jurisdiction."

This demonstrates that the Standard of Review cited and applied by the **initial** *Harry* Court is Rule 12(b)(1) or Rule 12(h)(3).

ii. Closed *Harry* Court (12/03/2020 -12/22/2020)

24. In App. B7 @ 85, line 24, of Respondents' Administrative Motion, ECF #162, in the **closed** *Harry* Case, Respondents stated as follows:

"**ACTION REQUESTED:** An Order pursuant to Civil Local Rule 3-12 that Refiled Case and the Dismissed Cases are deemed related and reassigning the Refiled Case to this Court for all proceedings."

This means, the standard of review Respondents cited and applied to the **closed** *Harry* case under the **closed** *Harry* court is Civil L.R 3-12. Since the standard of review for the **initial** *Harry* Case (Rule 12(b)(1)) is different from the standard of review for the **closed** *Harry* case, res judicata or collateral estoppel is inapplicable to the **closed** *Harry* Case. Besides, since the standard of review for the *Harry-Draper* Case (Rule 12(b)(1) or Rule 12(h(3) or even Respondents' wrong Rule 12(b)(6) is different from the standard of review for the **closed** *Harry* Case (Civil L.R. 3-12), neither res judicata nor collateral estoppel is applicable to the *Harry-Draper* Case. Res judicata or collateral estoppel does not apply where, as here, the prior proceeding applied a different legal standard for evaluating the disputed issue, lack of subject-matter jurisdiction. "[I]ssues are not identical if the second action involves application of a different legal standard, even though the factual setting of both suits may be the same." *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1306 (2015). Although, it's a fact that a federal court has authority to determine whether it has jurisdiction to hear a particular case (*United States v. Ruiz*, 536 U.S. 622, 628 (2002) (citing *United States v. Mine Workers of Am.*, 330 U.S. 258, 291 (1947)), but "[o]nce a court expresses the view that it lacks jurisdiction, the court thereafter does not have the power to rule on any other matter. Any finding made by a court when the court has determined that it does not have subject matter jurisdiction carries no *res judicata* consequences." *Bunker Ramo Corp. v. United Bus. Forms, Inc.*, 713 F.2d 1272, 1279 (7th Cir. 1983). (citations omitted). And that **Voids** the issue and claim preclusion- premised *Harry-Draper* Rule 12(b)(6) judgment. "[A] judgment is void because of a jurisdictional defect [only in the] exceptional case in which the court that rendered judgment lacked even an 'arguable basis' for jurisdiction", as here. *United Student Aid Funds, Inc. v. Espi* 559 U.S. 260, 271 (2010). Thus, "lack[ing] even an 'arguable basis' for jurisdiction", the **closed** *Harry* Court's orders ECF #163 and ECF #14, and the **illegitimate** *Harry-Draper/Judge Gilliam, Jr.* Court's *Harry-Draper* Judgment are **Totally Void** and must be vacated.

(ii) Respondents' Actions to Dismiss Petitioners' Case without Trial are illegal

25. On 12/03/2020, Respondents deceptively filed their illegal, frivolous and fraudulent "Administrative Motion to consider whether cases should be related" ("*Administrative Motion*"), ECF #162, in the **illegal closed** *Harry* case, and essential parts of ¶III of ECF #162 (App. B7 @ 86, line 6) states,

"The fact that the prior filed case is closed does not relieve a party of its duties under Civil Local Rule 3-12.)....."

(iii) Petitioners' Response to Respondents' illegal Actions to Dismiss without Trial

26. FRCP 12(h)(3) supersedes Civ. L.R. 3-12, pursuant to FRCP 83, and thus, Petitioners have no legal obligation to respond to Respondents' fraudulent Administrative Motion, ECF #162, in the **illegal closed** *Harry* court, where the *Harry-Draper* case was not pending. As succinctly stated in §II, ¶4 of *Donald Snell and Cleveland, Inc. vs. Patricia Faber et al* ((9th Circuit Case No. 01-35957 District Court Case # CV-00-00009-SEH),

> "Federal Rule of Civil Procedure 12(h)(3) provides that a court may raise the question of subject matter jurisdiction, *sua sponte*, at any time during the pendency of the action, even on appeal. *Summers v. Interstate Tractor & Equip. Co.*, 466 F.2d 42, 49-50 (9th Cir. 1972). However, that rule only applies to an action pending before the court. It provides no support for extension of this authority to prior, closed cases, in which a court has entered a final judgment. Rule 12(h)(3) does not provide a jurisdictional grant over cases that are not before the court".

Since FRCP 12(h)(3) which supersedes Civ. L.R. 3-12 cannot be applied to the **closed** *Harry* Case, neither can Civ. L.R. 3-12.

a. The Case Assignment is Improper

27. Pursuant to 28 U.S.C. § 137, a case must be assigned among judges in accordance with local rules and general orders. By operation of U.S. District Court, CAND. General Order ("G.O.") 44 § D(2) (Assignment of Cases), "Cases shall be assigned blindly and at random by the Clerk by means of an automated system approved by the judges of the court". Notably, the clerk of the court had no power to alter this directive. Pursuant to Local Civil Rule 3-3(a), "... The Clerk may not make or change any assignment, except as provided in these local rules or in the Assignment Plan (G.O. No. 44)". By statute, the power to divide the business of the court is vested only in the judges of th[e] court." *United States v. Phillips*, 59 F. Supp. 2d 1178, 1182-83 (D. Utah 1999); *see also* 28 U.S.C. § 137; ("Neither the Clerk nor any Deputy Clerk shall have discretion in determining the judge to whom any civil case shall be assigned. The action of the Clerk in the assignment of cases is ministerial only").

28. The exception to the random case assignment is Related Cases, which Civil Local Rule 3-12(a) defines as follows: "An action is related to another when: (1) The actions concern substantially the same parties, property, transaction or event; and (2) It appears likely that there will be an unduly burdensome duplication of labor and expense or conflicting results if the cases are conducted before different Judges." But, per Civil L.R. 3-12(c) on related cases, the reassignment of the *Harry-Draper* Case from Judge

Tigar to Judge Gilliam, Jr. is improper, fraudulent and illegal, and Civil L.R. 3-12(c) states as follows:

> **Sua Sponte Judicial Referral for Purpose of Determining Relationship.** Whenever a Judge believes that a case pending before that Judge is related to another case, the Judge may refer the case to the Judge assigned to the lowest-numbered case with a request that the Judge assigned to the lowest-numbered case consider whether the cases are related.
>
> The referring Judge shall file and send a copy of the referral to all parties to all affected cases. The parties must file any response in opposition to or support of relating the cases pursuant to Civil L.R. 3-12(e). Alternatively, a Judge may order the parties to file a motion pursuant to Civil L.R. 3-12(b).

The pending case is the *Harry-Draper/Judge Tigar* Case in the *Harry-Draper/Judge Tigar* Court before Judge Tigar, the referring Judge. Judge Tigar never filed and never sent a copy of any referral to Petitioners, as required by Civil L.R. 3-12(c), for Petitioners to file an opposition response. Judge Tigar also did not "order the parties to file a motion pursuant to Civil L.R. 3-12(b)" because Respondents, especially their Attorneys, particularly Jeffry Henderson, fully aware of the *Harry-Draper* Case in Judge Tigar's Court, never filed an *Administrative Motion* to "Consider Whether Cases Should be Related", before Judge Tigar. Respondents had a different plan, to fraudulently reassign the *Harry-Draper* Case to their favorite Judge, Judge Gilliam, Jr.

b. Petitioners' Response to the Genesis of Respondents' Contentious Argument

29. First, Respondents contend in App. B7 @ 86, line 11 that,

> ".....(a party who does not file a motion to consider whether a refiled case is related to a previously dismissed case as required by Civil Local Rule 3-12, fail[s] to follow the court's local rules). In fact, pursuant to Civil Local Rule 3-3, the Plaintiffs themselves were required to file a motion to consider whether their Refiled Case is related to the Dismissed Cases, something which they blatantly failed to do".

This is the genesis of Respondents' fraud in relating the *Harry-Draper* Case to the **illegal closed** *Harry* Case, to fraudulently hijack the *Harry-Draper* Case from Judge Tigar to Judge Gilliam, Jr., and the following is Petitioners' Response.

Local Rules Must not be Inconsistent with Federal Rules

30. Second, as stated in ¶¶24-28, Petitioners have no Refiled Case. Third, the **closed** *Harry* Court or Judge Gilliam, Jr., lacking subject matter jurisdiction, cannot assume subject matter jurisdiction through Civil L.R. 3-3 or 3-12, in violation of the controlling legal standard, FRCP 12(h)(3), per FRCP 83, to make the related case orders, ECF #163, in the **closed** *Harry* case and ECF #14, in the *Harry-Draper/Judge Tigar*

Case, even if the **closed** *Harry* Case is the lowest-numbered case. Civil Local Rule 3-3 or 3-12 is inconsistent with FRCP 12(h)(3) and pursuant to FRCP 83, Civil Local Rules cannot be inconsistent with Federal Rules. In *Richardson Green-shields Securities, Inc. v. Lau* 825 F.2d 647 (2d Cir. 1987), the 2nd Circuit noted that individual judges' rules must not be inconsistent with the federal rules, and likewise, local rules cannot supplant the federal rules. *See also Wilson v. City of Zanesville*, 954 F.2d 349, 352 (6th Cir. 1992) (citing Carver v. Bunch, 946 F.2d 451, 453 (6th Cir. 1991)). In *Wilson,* the circuit court stated that federal rules 26(b)(1) and 34(a)(1) superseded the local rules. *Id.* Judge Martin held that the district court "erred in denying Wilson's motion to compel discovery based on his failure to adhere to local court rules in a situation clearly governed by the Federal Rules." *Id.* at 353. Similarly, the **closed** *Harry* Court erred in granting Respondents' motion, ECF #162 in the **closed** *Harry* case "based on alleged Petitioners' failure to adhere to local court rules [Civil L.Rs. 3-3 and 3-12] in a situation clearly governed by the Federal Rule 12(h)(3) ". Moreover, the *Harry-Draper* Case was pending before the *Harry-Draper/Judge Tigar* Court and Judge Tigar, and not before the **closed** *Harry* Court and Judge Gilliam, Jr. Thus, this Court must reverse per FRCP 12(h)(3) and vacate per FRCP 60(b)(4), since the 9th Circuit failed to reverse and vacate, the district courts' fraudulent, illegal and **void** orders, ECF #163 and ECF #14, for **Total** Lack of Subject Matter Jurisdictions. "[T]otal [lack] of jurisdiction [has been] distinguished from an error in the exercise of jurisdiction [here], and ... only [this] rare instance[ ] of a clear usurpation of power [here,] render[ed] [the orders and] judgment void" See *United States* v. *Boch Oldsmobile, Inc.*, 909 F. 2d 657, 661 (CA1 1990), at 661–662. With these reversals and vacations, the District Court's orders and judgment, and the Ninth Circuit's decision cannot stand.

REASONS FOR GRANTING THE WRIT

I. The question presented is of exceptional National importance because it highlights a stunning 99% failure rate of federal appellate cases of Indigents and/or unrepresented Litigants, with consequent violation of their 1st, 5th and 7th Amendment Rights, warranting this Court's review and remedy.

31. The destructive legal power of the *Combo* has reached a judicial crescendo demanding the attention of this Court. This Court cannot, must not and should not ignore this *Combo's* nationwide destructive impact of causing the thousands of the most vulnerable and helpless Indigents and/or unrepresented litigants like Petitioners continue to lose their appellate cases with almost 100% certainty, and violation of their 1st, 5th and 7th Amendment Rights to boot.

Violation of Petitioners'/Appellants' 1st, 5th and 7th Amendment Rights

(i) The Lower Courts' Violation of Petitioners'/Appellants' 1st Amendment Right

32. That the **illegal closed** *Harry* Court under Judge Gilliam, Jr. would have the Judicial Impunity to grant the fraudulent, illegal and **void** order, ECF #163 in the **illegal closed** *Harry* case, to **illegally**, assume and **illegally** assumed subject matter jurisdictions over the **closed** *Harry* case, and the *Harry-Draper/Judge Tigar* case, to deprive, and deprived, Petitioners of their 1st Amendment Right to petition the Government, for a redress of their grievances, including their right to access the courts, is incredulous and pure judicial rascality. And that the 9th Circuit would affirm the district Courts' judicial rascality is an Unconscionable Manifest Injustice that must not stand. No Judge, not even the Chief Justice of the United States, and no court, not even this Court has any statutory authority to intentionally and knowingly deprive any American Citizen of his/her Constitutional 1st Amendment Right. That's against the law, and no one is above the law. The following statements of the 9th Circuit Judge, the Hon. Judge Berzon in Ringgold vs. L.A. County; 761 F.3d 1057 (9th Cir. 2014) is instructive:

> Restricting access to the courts is, however, a serious matter. "[T]he right of access to the courts is a fundamental right protected by the Constitution." *Delew v. Wagner,* 143 F.3d 1219, 1222 (9th Cir.1998). The First Amendment "right of the people ... to petition the Government for a redress of grievances," which secures the right to access the courts, has been termed "one of the most precious of the liberties safeguarded by the Bill of Rights." *BE & K Const. Co. v. NLRB,* 536 U.S. 516, 524–25, 122 S. Ct. 2390, 153 L.Ed.2d 499 (2002) (internal quotation marks omitted, alteration in original); *see also Christopher v. Harbury,* 536 U.S. 403, 415 n. 12, 122 S. Ct. 2179, 153 L.Ed.2d 413 (2002) (noting that the Supreme Court has located the court access right in the Privileges and Immunities clause, the First Amendment petition clause, the Fifth Amendment due process clause, and the Fourteenth Amendment equal protection clause).

That the District court under Judge Gilliam, Jr. without subject-matter-jurisdiction to adjudicate the *Harry-Draper* Case, would file such an illegal and **void** Pre-filing order, where Harry has had only 2 Federal Cases (the *Harry* Case and the *Harry-Draper* Case in 10 years) and Draper 3 Cases (CFTC *Draper* Case, *Draper* Federal Case and the *Harry-Draper* Federal Case in 6 years) is the epitome of judicial impunity that warrant this Court's Reversal and Vacation of the fraudulent, illegal and **void** orders, ECF #163 in the **closed** *Harry* Case and ECF #14 in the *Harry-Draper/Judge Tigar* Case, the progenitors of the 1st Amendment Right violation, since the 9th Circuit failed to do so.

(i) The Lower Courts' Violation of Petitioners' 5th Amendment Right of due process

33. The 5th Amendment prohibits deprivation of "life, liberty, or property" without

due process of law. In the context of adjudication, due process requires notice and opportunity to be heard. This Court has often stated that the core rights of due process are notice and hearing. *Cleveland Bd. of Educ. v. Loudermill, 105 S. Ct. 1487, 1493 (1985)* ("An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'") (quoting Mullane v. Central Hano. The procedural due process aims to ensure fundamental fairness by guaranteeing a party the right to be heard, including receiving proper notification throughout the litigation, and ensuring that the adjudicating court has the appropriate jurisdiction to render a judgment. In this instance, Petitioners were not heard, did not receive proper notification throughout the litigation, and the *Harry-Draper /Judge Gilliam, Jr.* Court lacks subject-matter-jurisdiction to render the summary judgment of the *Harry-Draper* Case that deprived Petitioners of their properties, especially their $400,000 Retirement nest egg, a violation of their 5th Amendment Due Process Right, warranting this Court's review.

(iii) The Lower Courts' Violation of Petitioners' 7th Amendment Right to Jury Trial

34. The **illegitimate** *Harry-Draper/Judge Gilliam, Jr.* Court's "egregious" "usurpation of judicial power" to assume subject matter jurisdiction over the *Harry-Draper Case* it had no statutory authority to adjudicate, and then dismissing the Case without jury trial is a violation of Petitioners' Constitutional 7th Amendment Right of Jury Trial. Although Courts have broad discretion to decide jurisdictional facts, they may not exercise that discretion where it would infringe upon the plaintiffs' right to jury trial. *See Beacon Theaters, Inc. v. Westover*, 359 U.S.500 (1959); *Lytle v. Household Manufacturing, Inc.*, 494 U.S. 545. By deciding issues that are intertwined with the merits of the case under the guise of determining a purely jurisdictional issue, courts are limiting a plaintiff's right to jury trial. Because the **illegitimate** *Harry-Draper/Judge Gilliam, Jr.* court lacks subject matter jurisdiction to adjudicate the issues that are intertwined with the merits of this case, its orders and judgment are totally void. A judgment entered by a court lacking subject matter jurisdiction is void. *Gonzalez v. Crosby,* 545 U.S. 524, 534, 125 S. Ct. 2641, 162 L.Ed.2d 480 (2005). Besides, the 9th Circuit's affirmation of the **illegitimate** *Harry-Draper/Judge Gilliam, Jr.* Court's summary judgment was wrong, especially when the trier of the facts is the jury. After a Rule 12(b)(6) motion is converted to a motion for summary judgment, "a party is entitled to have the jurisdictional issue submitted to the jury, rather than having the court resolve factual issues". *Thornhill Pub. Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 735 (9th Cir. 1979). Hence, this Court must reverse and vacate the 9th Circuit's profoundly legally erroneous decision, and the **illegal closed** *Harry* Court's fraudulent, illegal and void interlocutory orders, ECF #163 and ECF #14, that undergird all the subsequent orders and judgment of the **illegitimate**

Harry-Draper/Judge Gilliam, Jr. Court, pursuant to Rules 12(h)(3) and 60(b)(4). With this reversal and vacation, there would be no violation of Petitioners' 1st, 5th and 7th Amendment Rights, and the correct FRAP 34(a)(2) would be applied granting Petitioners oral argument.

35. Had there been oral argument, the 9th Circuit's application of incorrect inter- and intra- circuit-split local-rule-modified-FRAP 34(a)(2) would be irrelevant because oral argument was already taking place. Had there been oral argument, Petitioners would have told the Panel Judges, face to face, of their profound legal errors, (i) **that they cannot, must not, should not, and should not have, applied incorrect legal standards to affirm the district courts' fraudulent and illegal assumption of subject matter jurisdictions**, (ii) that they must review the record "taken as a whole" before granting summary judgment for this jury trial Case, in accordance with *Matsushita Elec. Industrial Co.* v. *Zenith Radio Corp., 475* U. S. 574, 587 (1986). Had there been oral argument, the 9th Circuit would not have dared use their judicial staff attorneys as impostor judges to adjudicate this case.

36. Besides, had there been oral argument, Petitioners would have told the Panel Judges, face to face, that they have no statutory authority to aid and abet the multimillionaire- and multibillionaire- Respondents' theft of two vulnerable elderly Petitioners' $400,000 retirement fund. Furthermore, Petitioners would have told the Panel that its affirmance of the district court's fraudulent, illegal and void rulings also affirms its adoption of the reasons given by the district courts, and by adopting the district courts' *ratio decidendi*, the 9th Circuit took a position on the question presented, warranting granting this petition for certiorari. Again, 99% case loss or failure rate is a stunning and mind-bending number that should grab the attention of this Court, to also grant the writ of certiorari, to review and remedy this immense judicial anomaly and tragedy. And the solution is quite simple — oral argument as decreed by FRAP 34(a)(2), and the technological solution is also simple, straight-forward and readily available, Videoconferencing.

A. This Court should grant review to decide whether the inter- and intra- circuit split in federal appellate Courts' application of incorrect Local-Rule-Modified-FRAP 34(a)(2) instead of the correct FRAP 34(a)(2), to deny Indigents and/or unrepresented litigants oral argument, resulting in these litigants' stunning 99% case failure rate, and conflicting with Anderson v. Liberty Lobby, Inc., is not unconstitutional since it violates their 1st, 5th and 7th Amendment Rights

37. As succinctly explained in ¶¶5, 13-15 and 35-36 above, the Appellate Circuits' application of incorrect local-rule-modified-FRAP 34(a)(2) that conflicts with the actual FRAP 34(a)(2) standard, and *Anderson v. Liberty Lobby, Inc.*, has created an unneces-

sary and irrelevant inter- and intra- circuit Split whereby some circuits, and some courts within the Circuits, allow oral arguments, while others do not. This denial of oral argument to Litigants, especially indigents or unrepresented Litigants including Petitioners, has resulted in their losing their cases by a stunning 99% failure rate, accompanied by an **unconscionable violation** of their 1st, 5th and 7th Amendment Rights, as detailed in ¶¶31-36 above.

38. Moreover, the local rules and internal operating procedures in each and every circuit do not alter or supplement the test for granting or denying oral argument set out in the FRAP 34(a)(2) as detailed in ¶14 above, and summarized in the Table below.

Circuit	Local Rules and Internal Operating Procedures (IOP)
Fed or DC	Fed Cir. R. 34 and I.O.P. XI restate the text of FRAP 34(a)(2)
1st	1st Cir. R. 34. and I.O.P. VIII rely on the standard of grant/denial of oral argument in FRAP. 34(a)(2)
2nd	2nd Cir. R. 34. and I.O.P. VII restate the requirement of unanimity stated in FRAP 34(a)(2)
3rd	3d Cir. R. 34.1(a) restate the requirement of unanimity stated in FRAP 34(a)(2))
4th	4th Cir. R. 34(a)(2) provides that the standard to be applied will be the same as found in FRAP 34(a)(2)
5th	5th Cir. R. 34 refers briefly to FRAP 34(a)(2) as the governing standard
6th	6th Cir. R. 34 relies on FRAP 34(a)(2) standard for grant or denial of oral argument
7th	7th Cir. R. 34(4) mentions only briefly that the standards of FRAP 34(a) are controlling
8th	8th Cir. R. 34A and I.O.P. I(D) rely on the standard of grant/denial of oral argument in FRAP 34(a)(2), and refers to the federal rule in a cross-reference
9th	9th Cir. R. 34 restates the text of FRAP 34(a)(2) Standards, supported and conditioned by 9th Cir. General Orders 3.4, 3.5, 6.5(a) and 6.5(b)
10th	10th Cir. R. 34. 1(G) allows "[s]ubmission on briefs", "[e]xcept in *pro se* appeals or when both parties have waived oral argument, the court will advise the parties when a panel decides that oral argument is not necessary".
11th	11th Cir. R. 34-3(b) expressly states that standard to be applied will be the minimum standard found in FRAP 34(a)(2)

As shown in the table above, the Rules and IOPs of each and every Circuit affirm FRAP 34(a)(2) standards.

39. The 9th Circuit Panel's memorandum decision starts with, "Submitted March 16, 2022**" (App. A1, @ 1), and the asterisks "**" point to a footnote stating that, "The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2)". FRAP 34(a)(2) allows oral argument "in every case unless a panel of three judges who have examined the briefs and record unanimously agree[ ] that oral argument is unnecessary", setting out the 3 conditions in ¶14 above. Now, Petitioners Appeal is **NOT** frivolous and "the dispositive issue", the woeful failure of the Respondents, the illegal **closed** *Harry* Court and the **illegitimate** *Harry-Draper/Judge Gilliam, Jr.* Court to establish that subject-matter-jurisdictions exist, "ha[s] [**NOT**] been authoritatively decided." As such, oral argument is required in this Appeal. Besides, the Panel Judges of this Appeal, the Honorable Judges, Barry G. Silverman, Eric D. Miller and Patrick J. Bumatay, neither saw nor read Petitioners' opening brief, motions and excerpts of Record from 09/27/2021 when the excerpts of record were filed with the 9th Circuit, to 03/24/2022 when the memorandum decision was made. App. B11 @ 99, B12 @ 101-103, and especially B13 @105 which states as follows, "The excerpts of record submitted on September 27, 2021 by Bright Harry and Ronald Stephen Draper are filed", attest to the fact that Petitioners' 09/27/2021 excerpts of record filed by the 9th Circuit on 04/04/2022, after the 03/24/2022 alleged Panel decision, was not seen or read by the Panel. Hence, "[this] panel [did not] unanimously conclude[ ] [that] this case is suitable for decision without oral argument." Rather, "the impostor-judges" made the denial of oral argument decision in violation of FRAP 34(a)(2), and the memorandum decision on behalf of the above-named Judges, and rubber-stamped the Judges' names on the decision, in violation of Article II, §2 of the U.S. Constitution. (*See* App. A6 @ 48-51).

40. The local-rule-modified-FRAP 34(a)(2)-caused split is outcome-determinative. Had Petitioners been granted oral argument, they would have prevailed because of the strength of their arguments and case. Similarly, had counsel represented Petitioners, oral argument would have been granted, and Petitioners would have prevailed because of the strength of their arguments and case. Hence, this Court's intervention is necessary to bring uniformity to the Application of FRAP 34(a)(2) in all the federal appellate Courts, through the review of this case.

B. This Court should grant review to decide whether the Ninth Circuit application of incorrect standards for review of the district courts' assumption of subject matter jurisdictions, in conflict with FRCP 12(h)(3) and Anderson v. Liberty Lobby, Inc., is not unconstitutional since it violates the 1st, 5th and 7th Amendment Rights.

41. As Petitioners made clear in their Ninth Circuit appellate opening brief in *Harry-Draper*, and in ¶¶5-12, 16-30 above, they did not appeal "the [**illegitimate** *Harry-Draper/Judge Gilliam, Jr.*] district court's judgment - dismissing their action, declaring them vexatious litigants, and entering a pre-filing review order against them"] - that is totally irrelevant and immaterial to the outcome" (App. A1 @ 4, ¶1 of the 9th Circuit decision, DKtEntry #48-1). Instead, Petitioners argued that the foundational interlocutory orders, ECF #163, in the **illegal closed** *Harry* case, and ECF #14 in the *Harry-Draper-Judge Tigar* Case, upon which the judgment order and judgment of the *Harry-Draper* Case are based, are fraudulent and illegal because the **illegal closed** *Harry* court lacks subject matter jurisdiction to make the interlocutory orders, ECF #163 and ECF #14, that birthed the **illegitimate** *Harry-Draper/Judge Gilliam, Jr.* case and court. A court "generally may not rule on the merits of a case without first determining that it has jurisdiction over the category of claim in the suit (subject-matter-jurisdiction) . . . ." *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430–31 (2007). "It is to be presumed that a cause lies outside [of federal courts'] limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations omitted) (jurisdiction lacking). Thus, Petitioners demanded that the 9th Circuit reverse the interlocutory orders pursuant to FRAP 12(h)(3), and vacate them pursuant to FRAP 60(b)(4). Instead of doing so, the 9th circuit affirmed the district court's judgment based on Rule 12(b)(6) standard of review. By holding that Rule 12(b)(6) *de novo* standard of review in *Hebbe v. Pliler*, 627 F.3d 338, 341 (9th Cir. 2010) supersedes the proper and controlling FRCP 12(h)(3) *de novo* standard of review, in *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 94 (1998), per Rule 83, to validate the **closed** *Harry* Court's assumption of subject matter jurisdiction, the 9th Circuit misapplied the standard of review dictated by Rule 12(h)(3). *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-257 (1986)*. Despite Petitioners' entreaties, objections, complaints and motions that the **closed** *Harry* court and the **illegitimate** *Harry-Draper/Judge Gilliam, Jr.* court lack subject matter jurisdiction to adjudicate their respective **closed** *Harry* case and *Harry-Draper* case, the 9th Circuit did not care, and with judicial impunity, made its legally erroneous decision. The consequence is the violation of Petitioners' 1st, 5th and 7th Amendment Rights as succinctly detailed in ¶¶31-36 above. That's pure illegality, warranting this Court to reverse the 9th Circuit's profoundly legally erroneous decision, and then reverse and vacate the fraudulent, illegal and void interlocutory orders, ECF #163 and ECF #14 of the **illegal closed** *Harry* Court, and remand the case for real jury trial on the merits.

C. This Court should grant review to decide whether the 9th Circuit's misapplication of Article II, §2 of the U.S. Constitution, in deploying appellate judi-cial staff-attorneys, as impostor judges, to adjudicate federal cases, instead of the actual Federal Appellate Judges, in conflict with Anderson v. Liberty Lobby, Inc., is not unconstitutional since it also violates Petitioners' 1st, 5th and 7th Amendment Rights

42. It is unconstitutional for the 9th Circuit, especially the Panel Judges of this Appeal, the Hon. Judges Silverman, Miller and Bumatay to permit their judicial staff attorneys, the impostor-judges, to adjudicate such a complex Commodity Futures Case, in violation of Article II, §2 of the U.S. Constitution, whose relevant parts state that,

> [The President] shall have Power, by and with the Advice and Consent of the Senate,..... shall appoint ..... Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

"Supreme Court justices, court of appeals judges, and district court judges are nominated by the President and confirmed by the United States Senate, as stated in the Constitution. ..... The federal Judiciary, the Judicial Conference of the United States, and the Administrative Office of the U.S. Courts play no role in the nomination and confirmation process" (https://www.uscourts.gov/faqs-federal-judges).

43. This misapplication of Article II, §2 of the U.S. Constitution, in deploying judicial staff-attorneys, as impostor judges, to adjudicate federal cases, instead of the actual federal Appellate Judges, coupled with the creation of the inferior unpublished decision by Appellate Courts including the 9th Circuit Court of Appeals which calls it Memorandum, has created an inferior track of appellate justice for a class of Appellants, mostly unrepresented Litigants, whose Appeals are pushed to a second-tier appellate process in which the impostor judges (judicial staff attorneys) resolve appeals, and even render judgments on behalf of the assigned appellate judges, without oral argument or meaningful judicial oversight. For the system's most vulnerable participants, the unrepresented Litigants, the promise of an appeal as of right often becomes a rubber stamp: "You lose ". This is the legal nightmare of thousands of vulnerable unrepresented Litigants nationwide, including Petitioners, who are illegally relegated to the inferior Second-tier appellate judicial process, in violation of Article II, §2 of the Constitution. This is pure discrimination. This court has held that where appellate review is made available, it cannot be afforded in a way that discriminates against some over others. *See Griffin v. Illinois*, 351 U.S. 12, 18(1956). Affording some Litigants a meaningful right to

an appeal while denying it to others violates the Equal Protection Clause. *See Lindsay v. Normet*, 405U.S. 56, 77 (1972). This demands this Court's Review.

II. This case is the appropriate vehicle for this Court to remedy the appellate courts' anomalously tragic *Combo* that destroys 99% of all federal appellate cases of the most vulnerable Litigants – Indigents and/or unrepresented Litigants, including Petitioners, and violating their 1st, 5th and 7th Amendment Rights to boot.

44. This *Combo* gave the Ninth Circuit license (i) to apply incorrect standards in reviewing the district courts' grant of [interlocutory orders, ECF #163 in the **closed** *Harry* Case for the **closed** *Harry* court's assumption of subject-matter-jurisdiction, and ECF #14 in the *Harry-Draper/Judge Tigar* case for the **illegitimate** *Harry-Draper-Judge Gilliam, Jr.* Court's assumption of subject-matter-jurisdiction, and] summary judgment and (ii) to further allege erroneously that "The district court properly dismissed Harry's claims as barred by issue preclusion and Draper's claims as barred by claim preclusion....." *See* App. A1 @ 5, line 3. Regarding Petitioner Harry, the contentious issue is his standing, and just as in the 9th Circuit's cited *Janjua*, the issue of Harry's standing was not collaterally estopped because it was not "raised, contested, and submitted for determination" by Respondents, and hence, not litigated. Respondents raised only the immaterial res judicata doctrine on Harry's standing. Even then, as shown in ¶23, Harry has standing, and as pointed out in ¶¶ 10, 11, 12, 24 and 26, res judicata and collateral estoppel are inapplicable to Harry's standing in the *Harry-Draper* case because different legal standards were applied in the *Harry* case and the *Harry-Draper* case. Similarly, in *Draper's* contentious statute of limitation-premised claim preclusion, different statute of limitation standards were applied in the *Draper* case and the *Harry-Draper* case. Thus, res judicata or collateral estoppel does not apply where, as here, the prior proceeding applied a different legal standard for evaluating the disputed issue. "[I]ssues are not identical if the second action involves application of a different legal standard, even though the factual setting of both suits may be the same." *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1306 (2015) But both issue and claim preclusion are immaterial and irrelevant to the crux of the 9th Circuit Appeal and this Petition, the *Combo*, which has made this Case the appropriate vehicle for this Court to, finally, remedy the appellate courts' tragic actions that destroy 99% of federal appellate cases of indigents and/or unrepresented litigants, including Petitioners, and violating their 1st, 5th and 7th Amendment Rights to boot. Through this Review, this Court can and should prevent the tragic destruction of the livelihoods or retirement funds of the thousands of commodity futures traders, investors and hedgers nationwide, including

Petitioners and their $400,000 retirement fund, by this destructive *Combo*. This legally-lethal *Combo* is not confined to the thousands of commodity futures traders, investors and hedgers but also to other unrepresented litigants, nationwide. Subsequently, this Case is the appropriate vehicle for this Court to remedy this anomalously tragic *Combo*, once and for all.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

APPENDICES

There are three major Appendices, A, B and C, with their respective sub-Appendices. Appendix A starts from Page 2 and ends at Page 55. Appendix B starts from Page 56 and ends at Page 105. Appendix C starts from Page 106 and ends at Page 117.

Respectfully Submitted

Dated: December 30, 2022

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