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 REHEARING

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June 28, 2023

QUESTION PRESENTED (SIMPLIFIED)

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" and, correct FRAP 34(a)2*) Standards* which essentially state that,

> 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;

Thus, the simplified Question Presented, which has divided the lower courts, is:

Whether by applying Local-Rule-Modified FRAP 34(a)2), a panel of three judges can disallow oral argument in an appeal they've not concluded that is wholly frivolous, and unanimously agree that oral argument is unnecessary to determine "the dispositive issues [that] have [**not**] been authoritatively decided".

And the dispositive issues are:

a. A federal court of appeals cannot and should not apply the wrong standard in reviewing a district court's grant of summary judgment.

b. A federal court cannot and should not assume "hypothetical" Article III subject matter jurisdiction to reach a decision on the merits of a Case, when the *very* issue presented on appeal is that of federal subject matter jurisdiction.

c. A federal court adjudicating a dispute may not be able to predetermine the res judicata or collateral estoppel effect of its own judgment.

d. Where the record, taken as a whole, could lead a rational trier of fact to find for the nonmoving party, there is "genuine issue for trial." and thus, summary judgment is inappropriate.

e. A federal court of appeals cannot and should not deploy its judicial staff attorneys as impostor judges to adjudicate federal cases, in place of the actual federal appellate judges.

f. A federal court (district or appellate) has no statutory authority to knowingly and willfully break the law to violate the 1st, 5th and 7th Amendment Rights of any American Citizen with judicial impunity.

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

Appellate Judges: Hon. Judges Barry G. Silverman, Eric D. Miller and Patrick J. Bumatay

(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")

District Court Judge: Hon. Judge John S. Tigar

(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")

District Court Judge: Hon. Judge Haywood S. Gilliam, Jr.

(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")

District Court Judge: Hon. Judge Haywood S. Gilliam, Jr.

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.

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PREAMBLE

"Petitions for rehearing are generally denied unless something of unusual importance—such as a life— is at stake, or a real and significant error was made . . . .". (Hon. Richard S. Arnold, *Why Judges Don't Like Petitions for Rehearing*, 3 J. APP. PRAC. & PROCESS 29, 29 (2001), at 36). In this instance, "Life --- is at stake" and "real and significant error[s] [were] made" by the Courts. Besides, this case is similar to *Matsushita v. Zenith Radio Corp.*, 471 U.S. 1002 (1985) where this Court stated, "We granted certiorari to determine (i) whether the Court of Appeals applied the proper standards in evaluating the District Court's decision to grant petitioners' motion for summary judgment.. ..". This Court's failure to also grant certiorari in this case, warrants rehearing, starting with this story.

It was really chilly ..... 29°f or -1.67°c ..... so free-zing cold in Fremont, CA, in the night of December 9, 2013 that most people stayed home, but there he was, shivering, covered in mere thick clothes with an outer blanket, outside the 7-11 Store at Central Avenue and Fremont Boulevard, his usual place to drink beer and smoke cigarettes to while away his sorrows. He never recovered from this chilly night, and in a mere 6 months after, Phil, the homeless veteran in his late fifties or early sixties was dead. This happened in California, specifically Silicon Valley of Multimillionaires and Multi-billionaires? In death, Phil finally found peace from the inhumanity of man to man. Money is now more import-ant than Life. This experience left an indelible mark in the minds of Petitioners, and is forever seared in their memory, that without money in the United States, you will be homeless and penniless, and even freeze to death, and no one cares.

It is thus, unconscionable callousness that the Honorable Justices would violate this Court precedents in *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-257 (1986) to create the possibility of another Phil-like tragedy. By denying Petitioners' original cert., this Court affirmed the 9th circuit erroneous decision that affirmed the district courts' aiding and abetting the Multimillionaire- and Multibillionaire- Respondents' theft of these elderly Petitioners' $400,000+ retirement fund, a violation of their 5th Amendment Right, that creates the possibility of at least one of the Petitioners meeting Phil's tragedy. If this Court of last resort can affirm such an unconscionable judgment without trial or jury in this jury trial case, then no American is legally safe. The purpose of courts, judges, mediation and even arbitration, is to prevent Injustice, nothing more. All else are mere semantics. In the rehearing petition of *United States v. Ohio Power Co.*, 353 U.S. 98 (1957), this Court stated that "[it] ha[s] consistently ruled that the interest in finality of litigation must yield where the interests of justice would make unfair the strict applica-

tion of [its] rules. This policy finds expression in the manner in which [it] ha[s] exercised [its] power over [its] own judgments, both in civil and criminal cases. *Clark v. Manufacturers Trust Co.,* 337 U.S. 953. This Court's denial of Petitioners' original cert is a judgment that, affirms the 9th circuit erroneous judgment and, violates its own precedents in *Matsushita* and *Steel Co.* Since "[this Court has] power over [its] own judgments", it is incumbent on this Court to grant this rehearing and the original cert petitions and vacate the erroneous 9th circuit decision, and remand this case for real jury trial on the merits for the first time in almost a decade.

PETITION FOR REHEARING

1. Pursuant this Court's Rule 44.1, Petitioners Bright Harry ("Harry") and Ronald S. Draper ("Draper") respectfully petition for rehearing of the denial of their original cert. As reflected in Supreme Court Rule 10, this Court ordinarily grants certiorari for the following
reasons, in descending order of importance:

I. There is a conflict among the federal courts of appeals and/or state high courts on a federal question,
II. The issue is extremely important,
III. The 9th circuit's decision directly con-flits with this Court's precedents, and
IV. The lower court erred

Petitioners' original cert met all four criteria, but what stands out is this Court's denial of the original cert, thereby, affirming the 9th Circuit's application of the wrong standard, the merits-based Rule 12(b)(6) instead of jurisdiction-based Rule 12(h)(3), to review the **illegitimate** *Harry-Draper/Judge Gilliam, Jr.* court's assumption of "hypothetical [Constitutional subject-matter], jurisdiction", a violation of this Court's precedents in *Steel Co., Matsushita* and *Anderson* It is thus, ironic and befuddling that Petitioners are now legally forced to file a rehearing for a petition that should have been granted, the 9th circuit decision vacated, and this case remanded to the appropriate district court for real jury trial on the merits. In *Steel Co.*, this Court further held that, "[w]ithout jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." A possible reason for this Court's denial of the original cert might be the compound "question presented" which the Court clerks might have found too complex to understand, and thus, recommended the denial of the original cert in their cert pool memo. Thus, Petitioners have now simplified their original cert compound "Question Presented", as described further below.

REASONS FOR GRANTING THE REHEARING

2. "Intervening circumstances of a substantial or controlling effect" and "other substantial grounds not previously presented". *See* Rule 44.2.

A. Intervening circumstances of a substantial or controlling effect

3. The "intervening circumstances of a substantial or controlling effect" have been lucidly described in the above Preamble, demonstrating that this Court's denial of Petitioner's original cert., albeit without opinion, is a profound legal error that has, further deepened the preexisting outcome-determinative circuit split in the application of local rules to FRAP 34(a)(2) among the appellate circuits, affirmed the 9th Circuit's erroneous decision and leaving unanswered all the above dispositive issues. The consequence of this denial is Unconscionable Injustice, fraudulent Judgment against Petitioners, bench trial in a jury trial Case, violation of Petitioners' 1st, 5th and 7th Amendment Rights, and placing at least, one of the Petitioner's Life at risk. Furthermore,

I. There is a conflict among the federal courts of appeals on a federal question

4. The simplified "Question Presented", which has divided the lower courts, is:

> Whether by applying Local-Rule-Modified FRAP 34(a)2), a panel of three judges can disallow oral argument in an appeal they've not concluded that is wholly frivolous, and unanimously agree that oral argument is unnecessary to determine "the dispositive issues [that] have **[not]** been authoritatively decided".

And the dispositive issues are:

(a) A federal court of appeals cannot and should not apply the wrong standard in reviewing a district court's grant of summary judgment.

(b) A federal court cannot and should not assume "hypothetical" Article III subject matter jurisdiction to reach a decision on the merits of a Case, when the *very* issue presented on appeal is that of federal subject matter jurisdiction.

(c) A federal court adjudicating a dispute may not be able to predetermine the res judicator or collateral effect of its own judgment.

(d) Where the record, taken as a whole, could lead a rational trier of fact to find for the nonmoving party, there is "genuine issue for trial.", and thus, summary judgment is inappropriate.

(e) A federal court of appeals cannot and should not deploy its judicial staff attorneys as impostor judges to adjudicate federal cases, in place of the actual federal appellate judges.

(f) A federal court (district or appellate) has no statutory authority to knowingly and willfully break the law to violate the 1st, 5th and 7th Amendment Rights of any American Citizen with judicial impunity.

5. The simplified Question Presented and the above dispositive issues are further elucidated below:

The question:

> ***Whether by applying local-rule-modified FRAP 34(a)2), a panel of 3 judges can disallow oral argument in an appeal they've not concluded that is wholly frivolous, and unanimously agree that oral argument is unnecessary to deter-mine "the dispositive issues [that] have [not] been authoritatively decided"***

This is a very important question this Court must answer by creating a local-rule-modified FRAP 34(a)(2) standard, to eliminate the circuit split and discrimination it is causing between represented and unrepresented litigants. For the unrepresented, no oral argument, you lose, while for the represented litigants, oral argument, you win or fair better. This discrimination is illegal. In *Griffin v. Illinois*, 351 U.S. 12, 18(1956), this Court held that where appellate review is made avail-able, it cannot be afforded in a way that discriminates against some over others. 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 Court setting a Standard for the circuits is quite simple because the actual FRAP 34(a)(2) *Standards* essentially state that,

> 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;

Moreover, the relevant parts of the "Committee Notes on Rules 1998 Amendment" for FRAP 34(a)(2), (*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, it is unnecessary for the Appellate Circuits to create and apply Local-Rule-modified 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**. As this Court held in *Anderson*, "the [Ninth circuit] court of appeals did not apply the correct standard [the actual FRAP 34(a)(2)] in reviewing the district court's grant of summary judgment", and instead, applied the local-rule-modified FRAP 34(a)(2), here, leaving the dispositive issues unresolved.

6. **The dispositive issues:**

(a) A federal court of appeals cannot and should not apply the wrong standard in reviewing a district court's grant of summary judgment.

In *Anderson*, this Court held that "the court of appeals did not apply the correct standard in reviewing the district court's grant of summary judgment". Similarly, "the [9th Circuit] court of appeals did not apply the correct standard in reviewing the district court[s'] grant of [interlocutory orders, ECF #163 in the **closed** *Harry* Case (*See* App. B8 at 90) for the **closed** *Harry* court's assumption of "hypothetical" subject-matter-jurisdiction, and ECF #14 in the *Harry-Draper* Case (*See* App. B9 at 93) for the **illegitimate** *Harry-Draper/Judge Gilliam, Jr.* Court's assumption of "hypothetical" subject-matter-jurisdiction, and] summary judgment".

(b) A federal court cannot and should not assume "hypothetical" Article III subject matter jurisdiction to reach a decision on the merits of a Case, when the very issue presented on appeal is that of federal subject matter jurisdiction.

In *Steel Co.* this Court rightly denounced the practice among certain federal courts of "assuming" jurisdiction. and further explained that "hypothetical jurisdiction" is a dangerous exercise because it pushes the federal courts beyond the bounds of their authorized jurisdiction and threatens the separation of powers at the core of Article III. In this case, that exercise had severe consequences—dismissal of Petitioners' case by a court that had no statutory authority to decide such a case, and violating Petitioners 1st, 5th and 7th Amend-mint Rights to boot.

(c) A federal court adjudicating a dispute may not be able to predetermine the claim or issue preclusion effect of its own judgment.

In *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 805, 105 S. Ct. 2965, 86 L.Ed.2d 628 (1985), this Court emphatically stated that "[A] court adjudicating a dispute may not be able to predetermine the res judicata effect of its own judgment". Furthermore, 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4405, p. 82 (2d ed. 2002) states that "The first court does not get to dictate to other courts the preclusion consequences of its own judgment". Hence, the **illegitimate** *Harry-Draper/Judge*

Gilliam, Jr. court, birthed by the **illegal closed** *Harry* court, cannot predetermine the claim or issue preclusion effect of its own judgment in this *Harry-Draper* Case.

(d) Where the record, taken as a whole, could lead a rational trier of fact to find for the nonmoving party, there is "genuine issue for trial" and thus, summary judgment is inappropriate.

Where the record, taken as a whole, could [ ] lead a rational trier of fact to find for the nonmoving party, there is [ ] "genuine issue for trial", and thus, summary Judgment is inappropriate. *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1353, 89 L.Ed 2d 538 (1986). In other words, the record must be "taken as a whole" before granting summary judgment for this jury trial Case. *Matsushita*. Moreover, FRAP 34(a)(2) *Standards* state that "[o]ral argument must be allowed in every case unless a panel of [3] judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary .....". That's not the situation here. The panel of 3 judges of this Appeal did not examine Petitioners' 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. *See* App. B11 @ 98, B12 @ 100, and especially B13 @104 which states as follows, "The excerpts of record submitted on September 27, 2021 by Bright Harry and Ronald Stephen Draper are filed", affirm that Petitioners' 09/27/2021 record filed by the 9th Circuit on 04/04/2022, after the 03/24/2022 alleged Panel decision, was not examined by the Panel. Hence, "[this] panel [did not] unanimously conclude[ ] [that] this case is suitable for decision without oral argument", violating FRAP 34(a)(2).

(e) A federal court of appeals cannot and should not deploy its judicial staff attorneys as impostor judges to adjudicate federal cases, in place of the actual federal appellate judges.

"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). As such, the 9th Circuit has no statutory authority to deploy its judicial staff attorneys as impostor judges to adjudicate federal cases, as was the situation here, in violation of Article II, §2 of the U.S. Constitution.

(f) A federal court (district or appellate) has no statutory authority to knowingly and willfully break the law to violate the 1st, 5th and 7th Amendment Rights of any American Citizen with judicial impunity.

As explicitly detailed in ¶¶31-36 of the original cert, both federal appellate and district courts have no statutory authority to knowingly and willfully break the law to violate the 1st, 5th and 7th Amendment Rights of Petitioners with judicial impunity. That's illegal.

II. The 9th circuit's decision directly conflicts with this Court's precedents

7. These conflicts are described in 6 (a), (b), (c) (d), (e) and (f) above.

III. The issue is extremely important

8. This nationwide issue (application of local-rule-modified FRAP 34(a)(2) to deny Litigants oral argument) is extremely important because it causes thousands of indigents and unrepresented Litigants, lose their Cases almost 100% of the time.

IV. The lower court erred

9. As lucidly described in ¶¶1-6 above, and as this court held in *Anderson*, the 9th circuit erred by applying incorrect standard in reviewing the district court[s'] grant of [interlocutory orders, ECF #163 in the **closed** *Harry* case that allowed the closed *Harry* court assume "hypothetical" of subject-matter-jurisdiction, and ECF #14 in the *Harry-Draper* case that allowed the **illegitimate** *Harry-Draper/Judge Gilliam, Jr.* court assume "hypothetical" subject-matter-jurisdiction, and] summary judgment", violating *Steel Co.*

B. Other substantial grounds not previously presented

10. As this Court held in *United States v. Diebold, Inc.*, [475 U.S. 574, 588] 369 U.S. 654, 655 (1962), "[o]n summary judgment the inferences to be drawn from the underlying facts....must be viewed in the light most favorable to the party opposing the motion." In this case, the district courts drew inferences from facts in favor of Respondents (party for the motion), suppressed Petitioners' facts affirming Harry's Constitutional Standing and Draper's Timeliness, to grant the Summary Judgment, violating *Diebold.*

11. Even then, as this Court held in *B&B Hard-ware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1306 (2015), "[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." Hence, as pointed out in ¶¶ 10, 11, 12, 24 and 26 of the original cert, claim and issue preclusion 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-based claim preclusion, different statute of limitation standards were applied in the *Draper* case and the *Harry-*

Draper case. Thus, claim or issue preclusion does not apply where, as here, the prior proceeding applied a different legal standard for evaluating the disputed issue. With-out the issue or claim preclusion, the 9th circuit decision and the district court judgment have no legal grounds.

CONCLUSION

For all the foregoing reasons, Petitioners' petition for rehearing and petition for a writ of certiorari should be Granted, the profoundly legally erroneous Judgment of the 9th Circuit Vacated and the Case Remanded to the appropriate and unbiased District Court for real jury trial on the Merits for the first time in almost a decade.

Respectfully Submitted

Dated: June 28, 2023

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CERTIFICATE OF APPELLANTS

We hereby certify that this petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Supreme Court Rule 44.2.

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