NO. 23-_____

In the Supreme Court of the United States

JULIO YEE CABRERA ET AL.,

Petitioners,

v.

ENRIQUE LOZANO 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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July 17, 2023

**Sup. Ct. Bar Admission Pending*

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QUESTION PRESENTED

Whether a U.S. Court of Appeals panel has unfettered discretion in every matter (outside of a small number of statutory exceptions) to withhold all indication of its reasons for ruling in a particular way without regard for consistency or resort to policy.

LIST OF PROCEEDINGS

U.S. Court of Appeals for the Ninth Circuit

Appeal No. 22-55273

Enrique Lozano, Plaintiff-Appellant and *Mark D. Potter*, *Appellant v. Julio Yee Cabrera; Enrique Wong Vasquez, Defendants-Appellees;* and *William Anthony Adams*, Appellee, and Beamspeed LLC, an Arizona Limited Liability Company; Does, 1-10, *Defendants.*

Memorandum Opinion: March 7, 2023

Order Denying Motion for Attorney Fees: April 18, 2023

Order Denying Motion for Clarification, Modification, or Reconsideration: May 18, 2023

U.S. District Court, Southern District of California

Case No. 3:14-cv-00333 JAH-RBB

Enrique Lozano, Plaintiff *v. Julio Yee Cabrera and Enrique Wong Vasquez,* Defendants.

Order Granting Sanctions / Attorney Fees: March 2, 2022

Order Spreading the Mandate of the Ninth Circuit - affirming in part, vacating in part, and remanding to the USDC: March 1, 2017

Order Denying Sanctions: October 5, 2016

Order Granting Sanctions: March 31, 2016

Order Granting Defendants' Motion to Dismiss: March 12, 2015

U.S. Court of Appeals for the Ninth Circuit

Appeal No. 15-55535, 16-55522

Enrique Lozano, Mark D. Potter, Plaintiffs-Appellants *v. Julio Yee Cabrera and Enrique Wong Vasquez*, Defendants-Appellees

Memorandum Opinion: February 7, 2017

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PETITION FOR A WRIT OF CERTIORARI

Julio Yee Cabrera, Mario Wong, personal representative of the estate of Enrique Wong Vasquez, and William A. Adams petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The order of the United States Court of Appeals for the Ninth Circuit denying Petitioners' Motion for Clarification, Modification, or Reconsideration is attached at Appendix ("App.") at 3a. The order of the same appellate panel denying Petitioners' motion for appellate attorneys fees and costs is reported at *Lozano v. Cabrera* (9th Cir. Apr. 18, 2023, No. 22-55273) 2023 U.S. App. LEXIS 9205, and is attached at App.1a. The decision of the United States Court of Appeals for the Ninth Circuit upholding the District Court award of attorneys fees to Petitioners is reported at *Lozano v. Cabrera* (9th Cir. Mar. 7, 2023, No. 22-55273) 2023 U.S. App. LEXIS 5394 and attached at App.5a. The United States District Court for the Southern District of California order sanctioning Respondents under Rule 11 and granting Petitioners attorneys fees under 28 U.S.C. § 1927 is reported at *Lozano v. Yee Cabrera* (S.D.Cal. Mar. 2, 2022, No. 14cv00333 JAH-RBB) 2022 U.S.Dist.LEXIS 37201 and attached at App.15a. These orders and decisions were not designated for publication.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit denied Petitioners' motion for appellate attorneys fees on April 18, 2023. The same court thereafter denied Petitioners' Motion for Clarification, Modification, or Reconsideration on May 18, 2023. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1), having timely filed this petition for a writ of certiorari within ninety days of the Ninth Circuit Court of Appeal's judgment on the issue of appellate attorneys fees.

CONSTITUTIONAL PROVISIONS, STATUTES AND JUDICIAL RULES INVOLVED

U.S. Const. amend. V

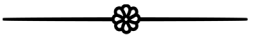
> . . . No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. § 1927
Counsel's liability for excessive costs

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Ninth Circuit Rule 36-1
Opinions, Memoranda, Orders; Publication

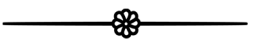
> Each written disposition of a matter before this Court shall bear under the number in the caption the designation OPINION, or MEMORANDUM, or ORDER. A written, reasoned disposition of a case or motion which is designated as an opinion under Circuit Rule 36-2 is an OPINION of the Court. It may be an authored opinion or a per curiam opinion. A written, reasoned disposition of a case or a motion which is not intended for publication under Circuit Rule 36-2 is a MEMORANDUM. Any other disposition of a matter before the Court is an ORDER. A memorandum or order shall not identify its author, nor shall it be designated "Per Curiam."
>
> All opinions are published; no memoranda are published; orders are not published except by order of the court. As used in this rule, the term PUBLICATION means to make a disposition available to legal publishing companies to be reported and cited.



INTRODUCTION

This Petition presents an ideal vehicle for the Court to begin to address a growing and important conflict in appellate review in the United States Court of Appeals: On the one hand, the importance of transparent decision-making through reason-giving is an important characteristic of appellate jurisprudence.

On the other hand, U.S. Courts of Appeals have unfettered discretion (except in a limited number of statutory carve-outs) to be opaque in their decisions. This Petition does not ask the Court to define the entire landscape of decisions requiring explanations. Rather, it asks the Court to explore whether there is a limit to an appellate court's discretion to withhold its reasons and whether there are some common principles that should guide an appellate court. The present lack of any guiding principles has resulted in arbitrary differences between similar cases – both in the form and the substance of decisions, even within the same appellate court. This situation undermines the public trust in the integrity of federal appellate courts. Additionally, it creates a double standard between district courts, on the one hand, whose decisions are often vacated and remanded due to inadequate explanations, and appellate courts, on the other hand, in which explanations of decisions are arguably most important.



STATEMENT OF THE CASE

This Petition seeks review of an appellate order denying – without explanation – Petitioners' motion for appellate attorneys fees and costs. Factors that put the Court's decision to withhold its reasoning at the extreme of Court decisional non-transparency included:

1) Petitioners had a right to their appellate attorney fees as a matter of law, with only the reasonableness of the amount requested subject to review;

2) Nothing in the record provide a substantive or procedural reason for the Panel's denial because, among other things, Petitioners' motion was unopposed;

3) Petitioners moved for clarification or modification of the Court's denial, which was also denied without explanation.

A. Proceedings Below

On March 2, 2022, the District Court awarded the Petitioners attorney fees under 28 U.S.C. § 1927 because Respondents had vexatiously and unreasonably multiplied the proceedings. The Court also granted sanctions against the Respondents under Rule 11 for filing a frivolous lawsuit. Respondents appealed. *Lozano v. Yee Cabrera* (S.D.Cal. Mar. 2, 2022, No. 14cv00333 JAH-RBB) 2022 U.S.Dist.LEXIS 37201 (App.15a). On March 7, 2023, a 3-judge panel of the Ninth Circuit Court of Appeal upheld the District Court's grant of attorney fees pursuant to 28 U.S.C. § 1927 but overturned the District Court's award of sanctions under Rule 11. (App.5a)

On March 30, 2023, Petitioner filed a motion for attorney fees within fourteen days of "the expiration of the period within which a petition for rehearing may be filed." (Ninth Circuit Local Rule 39-1.6(a)) (App.21a – excluding exhibits; ECF No. 38). Simultaneously, Petitioners filed a motion for transfer of their attorney fees motion back to the District Court for consideration and a ruling. (ECF 38) The combined motion was 22 pages, including legal authority and exhibits. (*Id*., exhibits omitted in appendix) Respondents filed no opposition. On April 17, 2023, the same Court panel issued an Order simply stating: "Appellees'

Motion for Attorneys Fees' (ECF No. 38) is DENIED." (App.1a; DktEntry: 39). The panel provided no further explanation for its decision.

Thereafter, on April 28, 2023, Petitioner filed a timely motion for reconsideration or clarification. (App. 33a). On May 18, 2023, the same panel of the Court also denied this motion, again stating simply: "Appellees' Motion for Clarification, Modification or Reconsideration re: Denial of Attorneys' Fees (DktEntry: 41) is DENIED." (App.3a, DktEntry: 43). This time, Respondents had filed an opposition arguing that because their appeal wasn't in violation of § 1927, Petitioners could not recover their appellate attorney fees, citing *In re Girardi*, 611 F.3d 1027, 1060-61 (9th Cir. 2010). (Appx. 42a; ECF No. 42, p.2) This argument missed the point. Petitioner's right to attorney fees is based on the Respondents' violation of § 1927 in the District Court, which the Court of Appeal upheld. It was not based on a claim that Respondents' appeal itself was a violation of § 1927. Petitioners were entitled to fees incurred in pursuing and preserving the District Court fee award. (*See e.g.*, *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 981 (9th Cir.2008); *Legal Voice v. Stormans Inc.* (9th Cir. 2014) 757 F.3d 1015, 1017). *In re Girardi* is not relevant because it did not pertain to a violation of § 1927 in the lower court proceedings that was subsequently appealed. However, when the court panel ruled on Petitioner's motion for clarification, it again denied the motion with no indication of the basis for its ruling. (App.3a, DktEntry: 43)

Because Petitioners were required to decide whether to file a petition for rehearing en banc within 14 days of the decision (Ninth Circuit Local Rule

40(a)(1)), the withholding of any explanation, even after a motion for clarification, deprived the Petitioners of the ability to properly evaluate whether to file such a petition.

B. The Legal Basis for an Appellate Attorneys Fees Award

Ninth Circuit legal precedent establishes that a party may recover reasonable attorneys fees incurred to establish her/his right to the recovery of attorneys fees under fee-shifting statutes ("fees on fees"). The Court has reasoned:

> In statutory fee cases, federal courts, including our own, have uniformly held that time spent in establishing the entitlement to and amount of the fee is compensable. This is so because it would be inconsistent to dilute a fees award by refusing to compensate attorneys for the time they reasonably spent in establishing their rightful claim to the fee."

Camacho v. Bridgeport Fin., Inc., 523 F.3d 973, 981 (9th Cir. 2008 – internal citations omitted).

The Ninth has further clarified that recovery of such fees includes appellate fees incurred in successfully defending a district court award of fees under a fee shifting statute. *Legal Voice v. Stormans Inc.* (9th Cir. 2014) 757 F.3d 1015, 1017. The Ninth stated:

> Our holding that the Law Center is entitled to attorneys' fees in the district court necessarily leads to the conclusion that the Law Center also is entitled to attorneys' fees on appeal . . . We have no trouble applying this general rule here, when the very purpose of

> the appeal was to establish the entitlement to fees.

(*Id*. at 1016.) Moreover, the Ninth has included 28 U.S.C. § 1927 in such fee-shifting statutes for the purpose of awarding "fees on fees." In a 2017 opinion, the Ninth distinguished motions for appellate fees under 28 U.S.C. § 1927 from similar motions under Fed. Rule of App. Proc. 38 for frivolous appeals, as well as distinguishing § 1927 from the former version of Rule 11. The Court stated in part:

> Accordingly, we follow *Norelus* in holding that § 1927 allows an award of attorneys' fees incurred in obtaining a *sanctions* award. *See Norelus*, 628 F.3d at 1297-1302. Appellees' attorneys' fees and non-taxable costs incurred in preparing appellees' statements regarding Flynn's responses to the order to show cause are awardable against Flynn under § 1927.

Blixseth v. Yellowstone Mt. Club, LLC (9th Cir. 2017) 854 F.3d 626, 632. The Court in the *Blixseth* (and the Norelus case it cited) likened § 1927 to other fee-shifting statutes that had been held to provide for appellate fees on trial court fees awarded to an appellee.

The Ninth Circuit has also long-held that *District Courts* must provide a basis or explanation for reducing attorney fee awards, stating:

> Finally, even where the district court does explain adequately the decision to cut the lodestar hours compensated by the across-the-board method, there is still the need for the district court to provide, after an inde-

> pendent perusal of the record, some explanation for the precise reduction chosen. *Gates*' concern that a district court's "cursory statement affords us no explanation as to how the court arrived at . . . the correct reduction and thus, it does not allow for us meaningfully to assess its determination," 987 F.2d at 1400, applies equally when the fee award is relatively small as when it is large. In either case, "absent some indication of how the district court exercised its discretion, we are unable to assess whether the court abused that discretion." *Id.*

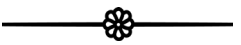
In a very recent unpublished case, the Ninth awarded appellate attorneys fees in a case of a similar nature (Americans with Disabilities Act – public accommodations private enforcer litigation):

> "Generally, a party that is entitled to an award of attorneys' fees in the district court is also entitled to an award of attorneys' fees on appeal." *Legal Voice v. Stormans Inc.*, 757 F.3d 1015, 1016 (9th Cir. 2014). We have determined that Appellees were entitled to an award of attorneys' fees in the district court. They are therefore entitled to fees on appeal as well.

Whitaker v. 370 N. Canon Drive, 2022 U.S. App. LEXIS 1171, *1-2 (9th Cir. 2022).

Finally, there was no basis for entirely offsetting Petitioners' right to attorneys fees on the theory that the appeal produced a mixed result. There was no statute or law in the appeal that could have awarded the Appellants-Respondents their attorneys fees as

prevailing-parties. Therefore, Respondents' success in overturning the Rule 11 sanctions would, at best for them, reduce the amount of Petitioners' recovery of attorneys fees by the amount of fees attributable to the Rule 11 sanctions appeal. As a result of the panel's denial of any fee recovery, the parties were left to speculate as to the basis of the panel's decision.



REASONS FOR GRANTING THE PETITION

I. THIS CASE IS JURISPRUDENTIALLY AND PRACTICALLY IMPORTANT.

"Democracy dies in Darkness" is the motto of the Washington Post. It applies equally to justice – including judicial decisions. Accordingly, there is a long judicial tradition of justifying decisions with reasons. This is done either in open court or in written decisions. Among appellate courts, whether in published or unpublished form, those reasons are expressed in written decisions. The practice is so ingrained that it is often assumed to be required. (*See e.g.*, Kathleen Waits, *Values, Intuitions, And Opinion Writing: The Judicial Process And State Court Jurisdiction*, 1983 U. Ill. L. Rev. 917, 931 (1983 – "A final 'steadying factor' is the requirement that an appellate court must memorialize its decision in a written opinion."). An oft cited reason for courts to divulge their reasoning is as follows:

> The discipline of a written opinion, when combined with the goal of neutral principles and the doctrine of stare decisis, also operates as an important control on judicial

> arbitrariness. An opinion should state the general principles by which the court will be willing to stand in future cases.

Ibid.

Nevertheless, except for a few statutory exceptions, there is surprisingly little guidance in judicial rules or in case law as to when courts should or must provide reasons for their decisions. There are neither appellate opinions stating that appellate explanations are required nor opinions stating explanations are unrequired. The Local Rules for the U.S. Court of Appeals of the Tenth Circuit goes even further: "The court may dispose of an appeal or petition without written opinion." (USCS Ct App 10th Cir, Rule 36.1)

In contrast, appellate opinions reversing district court rulings for insufficient explanations are common, including in attorney fee motions. *See e.g.*, *D'Emanuele v. Montgomery Ward & Co.* (9th Cir. 1990) 904 F.2d 1379, 1384. Ironically, in the first stage of this appeal itself, the appellate court remanded, in part, for the District Court "to clarify its reasons for imposing sanctions under Rule 11." *Lozano v. Yee Cabrera* (9th Cir. 2017) 678 F.App'x 511, 514.

In a case involving one of those statutory exceptions requiring written reasons – a criminal sentencing statute – this Supreme Court opined:

> The statute does call for the judge to "state" his "reasons." And that requirement reflects sound judicial practice. Judicial decisions are reasoned decisions. Confidence in a judge's use of reason underlies the public's trust in the judicial institution. A public statement of those reasons helps provide the public with

the assurance that creates that trust.

Rita v. United States (2007) 551 U.S. 338, 356. This reasoning did not focus on the wording of the statute, nor on factors unique to criminal sentencing. These were broad words based on broad concepts of justice, applicable to every corner of judicial review. Additionally, a decision that states the reasons for its conclusion ensures a certain level of intellectual rigor. It deters an arbitrary decision or one made in haste. It thus helps to ensure due process. This is particularly true in a court of last resort, when as it was here, there is no right to appellate review. The transparency of the decision is all there is to instill trust of the process in the parties and the public.

The California Supreme Court, discussing the state's 1879 adoption of a constitutional requirement that "[d]ecisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated," (Article VI, section 14, of the California Constitution) cited three fundamental and independent reasons for such a rule: (1) Creating precedent and guidance of courts in other cases; (2) "providing guidance to the parties and the judiciary in subsequent litigation arising out of the same "cause,"" and (3) "promoting a careful examination of each case and a result supported by law and reason." *People v. Kelly* (2006) 40 Cal.4th 106, 120. Of course, such reasons are not unique to California.

One author has referred to decisions with no explanations as "Kafkaesque decisions" and after analyzing data related to such decisions, concluded that they do not achieve the efficiency which they are supposed to achieve while at the same time they undermine the trust and legitimacy of the court by giving a party to

an appeal " . . . no reason to believe that it even understood the arguments he made (or, worse, even read the briefs)." Merritt E. McAlister, "*Downright Indifference": Examining Unpublished Decisions in the Federal Courts of Appeals,* 118:4 MICH. L. REV. 533, 575-581, 593-594 (2020).

To the extent that transparency of judicial decision-making is not an expressly recognized element of due process in the U.S., it appears to be recognized as an important adjunct to due process. In some judicial processes, *e.g.*, review of petitions for writ of certiorari, there may be strong practical and substantive reasons for not justifying a decision. (*See e.g.*, Louis J. Virelli III, *Transparency and Policymaking at the Supreme Court*, 32:4 GA. ST. U. L. REV. 903, 906-917 (August 2016); *See also* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 634 (April 1995)). However, when review is mandatory and final, relief is substantive, and no record has been developed that would support approval or denial, courts should justify their decisions with reasons as an adjunct component of due process.

Nor can a rational distinction be made as to whether a decision merits explanation simply on the basis that it is in response to a post-judgment motion rather than the principal appeal. For example, in this matter, Petitioners' motion for appellate attorney fees hinged on the identical legal and factual issues that the panel had already reviewed in the principal appeal. When the panel upheld the District Court's award of attorney fees, it necessarily granted Petitioners a right to recovery of the attorney fees they incurred in the appeal. It was fundamentally contradictory and arbitrary for the panel to uphold the

District Court award in a written opinion and then deny Petitioners' motion for appellate attorney fees. The fees Petitioners incurred as a result of Respondents' appeal were as important to Petitioners as the fees they incurred as result of Respondents' misconduct in District Court. The panel's denial of Petitioners' motion thus cried out for an explanation. It was also arbitrary to deny the motion without the slightest indication of reasoning while in a recent similar motion in a similar case, another panel of the same court provided its reasoning for granting the motion in an unpublished order. *Whitaker, supra*, 2022 U.S. App. LEXIS 1171, *1-2. This seemingly contradictory and arbitrary pattern of decisions leads to speculation that the decisions of the U.S. Court of Appeals are subject to whim and convenience rather than the consistent application of any guiding principles. It undermines the reputation of the appellate court.

II. THERE IS NO CLARITY NOR GUIDANCE IN THE CIRCUITS.

Despite widespread recognition of the importance of transparent decision-making, there appears to be very little guidance within the circuits of the U.S. Court of Appeal as to when a decision needs to contain some identification of its reasoning or basis. Only the following circuit courts appear to have any policy or procedure at all:

Fourth Circuit:

> If all judges on a panel of the Court agree following oral argument that an opinion in a case would have no precedential value, and that summary disposition is otherwise appropriate, the Court may decide the appeal by

> summary opinion. A summary opinion identifies the decision appealed from, sets forth the Court's decision and the reason or reasons therefor, and resolves any outstanding motions in the case. It does not discuss the facts or elaborate on the Court's reasoning.

USCS Ct App 4th Cir, I.O.P. 36.3.

Tenth Circuit:

> The court does not write opinions in every case. The court may dispose of an appeal or petition without written opinion. Disposition without opinion does not mean that the case is unimportant. It means that the case does not require application of new points of law that would make the decision a valuable precedent.

USCS Ct App 10th Cir, 36.1.

This lack of guidance on when explanations for decision-making should or needn't be given has led to an arbitrary pattern of giving or not giving reasons, at least within the Ninth Circuit Court of Appeals. For example, the lack of explanation for denial in this case, when there was no apparent basis for it, contrasts sharply with the written decision on a similar motion in a similar case a little more than a year earlier. *Cf. Whitaker*, supra.

Petitioner respectfully prays that on the important issue of transparency of decision-making through reason-giving, this Court establish some minimum threshold or some principles for Courts of Appeal to use in exercising their discretion whether or not to disclose the basis of their decisions.

CONCLUSION

Petitioner respectfully requests this Court to issue guidance to the U.S. Court of Appeal as to when it should provide at least some minimal explanation for a ruling. Petitioner further respectfully requests that this Court determine that when an appellate court denies a request for substantive relief, upon which review is mandatory and final, and when there were no arguments offered for denial, nor apparent fatal substantive or procedural grounds for denial in the record, statute, regulations, or legal precedent, that denying relief without providing any explanation, be deemed arbitrary and untenable.

Petitioners believe that upon review, this Court will vacate the orders of the U.S. Court of Appeals for the Ninth Circuit denying Petitioners' motion for attorney fees and motion for clarification or modification, with instructions to review Petitioners' motion in accordance with the law applicable to fee shifting statutes. Further, that this Court will instruct the U.S. Court of Appeals to support any further ruling on the motion with reasons.

Accordingly, Petitioner respectfully requests that this highest Court issue a writ of certiorari to review the orders by the U.S. Court of Appeals for the Ninth Circuit denying, without explanation, Petitioners' motion for attorney fees and motion for clarification or modification.

Respectfully submitted,

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