ORIGINAL

No. 24-462

In the Supreme Court of the United States

Mark Kelly

Petitioner,

v.

Daniel Dorman et al.

Respondents

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Federal circuit courts' local rules governing citation of unpublished dispositions prior to January 1, 2007 for purposes of establishing facts and governing how courts are to consider such citations vary significantly. While circuits allow such citations to establish preclusion, double jeopardy, and like purposes, several circuits' local rules prohibit such citations to establish other facts, even those of which the issuing court had first hand knowledge. Dispositive effects of circuits' local rules vary, especially when disposing summary judgment under Federal Rules of Civil Procedure R. 56, R. 12, and R. 8.

The questions presented are:

1. Do the Federal Rules of Evidence and related law require courts to permit citation of statements from and to consider cited statements from an unpublished disposition for purposes of establishing any material facts in a case, even under circumstances when other statements within that same disposition are shown to be untrustworthy, provided that the individual cited statements are credible?

2. On initial screening of complaints and when deciding summary dismissal, are federal courts to consider allegations composed of statements quoted and cited from unpublished dispositions individually as plausible sources of relevant facts and factual descriptions of the issuing court's reasoning and actions, and to draw all reasonable inferences in favor of the party against whom summary dismissal is sought when deciding Article III standing and jurisdiction, when the statements are cited for the purpose of establishing facts and the cited statements are not shown to be untrustworthy?

3. Are courts to allow into the record and to consider, for purposes of establishing relevant facts, any authentic unpublished dispositions issued from any courts at any time (provided compliance with Federal Rules of Appellate Procedure R. 32.1(b)), or are courts permitted to only allow and consider citations to unpublished dispositions issued from federal courts after January 1, 2007?

PARTIES TO THE PROCEEDINGS

Petitioner is Mark Kelly, 10955 South Fork Road, Dillsboro, Indiana.

Respondents are: the Nuclear Regulatory Commission (NRC), Daniel Dorman, in his official capacity as the NRC Executive Director of Operations (EDO); David Wright, in his official capacity as Chairman of the NRC; Christopher Hanson, in his official capacity as NRC Commissioner; Jeff Baran, in his official capacity as NRC Commissioner. The NRC is a government agency established by Congress under 42 USC §5313-5315, the Energy Reorganization Act (ERA). Under the ERA and 42 USC 2011 *et seq*, the Atomic Energy Act of 1954 (AEA), the NRC has authorities to regulate civilian use of radioactive materials and facilities in the interests of maintaining public safety. The NRC is located in Washington, DC 20555-0001.

RULE 29.6 STATEMENT

Petitioner Mark Kelly has no associations with a publically traded company.

PROCEEDINGS DIRECTLY RELATED TO THIS CASE

Kelly v. Dorman et al, No. 23-1765, United States Court of Appeals for the Seventh Circuit. Judgment entered Feb. 9, 2024. Unpublished.

Order denying rehearing en banc, entered April 9, 2024.

Kelly v. Dorman et al, No. 4:22-cv-00071-TWP-KMB, United States District Court, Southern District of Indiana, New Albany Division. Judgment entered February 24, 2023. Unpublished.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Kelly respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS REPRODUCED BELOW

The Order of the US Court of Appeals for the Seventh Circuit (hereafter, the "Seventh" or "7th") Case No. 23-1765 (App. 1a) affirms dismissal of petitioner's action.

The US District Court for the Southern District of Indiana (hereafter, the "district") Case No. 4:22-cv-00071 (App. 5a) dismisses petitioner's action.

The decision of the Sixth Circuit Court of Appeals (hereafter, the "Sixth" or "6th") Case No. 02-3035 affirming dismissal of Kelly v. Lambda Research in the Southern District of Ohio Case No. C-1-00-661 (The 6th decision is at 27a in the Appendix).

All three above are unpublished, but are available on PACER.

The Department of Labor Office Administrative Law Judges (hereafter, ALJ) recommended decision

(Case No: 2000-ERA-0035) dismissing the case is available on the ALJ web site (59a in the Appendix).

JURISDICTION

Petitioner seeks review of the judgment of the US Court of Appeals for the 7th Circuit Order, Case No. 23-1765 (decided February 9, 2024) (1a). Petition for rehearing en bank was denied on April 9, 2024 (266a in Supplemental Appendix). Petitioner was granted extension by this Court to file and to correct this petition. This Court's jurisdiction rests on 28 USC §1254(1) and 28 USC §2072(a).

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2 of the U. S. Constitution provides that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under *** the Laws of the United States ***."

Amendment 1 of the US Constitution provides that "Congress shall make no law*** abridging the freedom of Speech***."

Relevant provisions of the Federal Rules of Civil Procedure (FRCP), Federal Rules of Appellate Procedure (FRAP), Federal Rules of Evidence, (FRE)

and circuits' local rules are quoted verbatim in argument below.

A. STATEMENT

A. Statutory Overview

Circuits' local rules governing citation and consideration of unpublished dispositions issued before January 1, 2007 (hereafter, unpublished pre-2007 dispositions) are split between the circuits. Differences in circuits' rules have led to different findings in different courts based on consideration of the exact same evidence.

Some circuits' rules governing citation of unpublished decisions to establish facts split with the Federal Rules of Evidence (FRE) provisions governing admissibility of public documents into the record and requirements in Federal Rules of Civil Procedures (FRCP) governing consideration of evidence when disposing summary judgment, per FRCP Rules 56, 8, and 12.

Federal Rules of Appellate Procedure R. 47 provides that circuits may establish local rules for administration of justice. 28 USC §2072(b) provides that such rules shall not modify any substantive right.

Circuits' considerations of quotes comprising allegations to establish facts determine Article III standing and jurisdiction.

This case presents the questions of what types

of unpublished dispositions are admissible into the record for purposes of establishing relevant facts and how courts are to consider individual statements quoted from such decisions. Can circuit rules restrict citations for purposes of establishing facts based on issuing date or issuing court? Can circuits limit the types of facts that can be established by citations to dispositions? Can cited disposition statements be considered or challenged as untrustworthy individually, or are courts to consider cited decisions "All or Nothing"?

The questions concern consideration of such citations as record evidence. In some disposition statements, the issuing court asserts facts of which the court had first-had knowledge – facts like the courts actions and reasoning. The questions also concern consideration of other statements in such decisions describing findings for which the court relied on other evidence found or presumed to be true. The questions do not concern citations as precedent or persuasive authority to provide guidance on application of relevant law.

The questions are particularly relevant to how courts are to consider allegations consisting of quotes from unpublished dispositions for purposes of establishing these two types of facts when determining Article III standing and disposing summary judgment.

Federal Rules of Civil Procedure (FRCP) R. 12(h)(3) provides that the court must dismiss an action should it determine at any time that it lacks subject matter jurisdiction. R. 56(c)(1) provides that a party must support an assertion that a fact cannot be or is genuinely disputed by citing the record. R. 56(f) provides that a court may consider summary judgment on its own, based on material facts in the record. When applied to R. 8 claims, R. 56 summary dismissal closes the doors of discovery and further development of the record. What evidence is allowed into the record and how courts consider the evidence submitted and cited in complaints are dispositive.

Some circuits rules allow citations to unpublished pre-2007 dispositions for purposes of establishing any relevant facts (eg, the First, Fourth, Sixth, and Federal circuits – *see below*). Other circuits' rules limit such citations to those purposes explicitly listed in rules (eg, the 7th, Fifth, and Ninth circuits – *see below*). Many leave gaps in coverage. Some circuits' rules are unclear. Some local rules require a circuit to consider a citation from another court differently, sometimes based on the issuing circuit's rules (*see below.*)

A decision in this case simply allowing individual consideration of statements of fact quoted from unpublished decisions could provide guidance resolving these splits among the circuits' rules.

B. The Court of Appeals Disposition

In Petitioner's case, rules governing consideration of quotes comprising allegations were dispositive. Conflicting findings from the 7th circuit and the Sixth circuit on the exact same evidence and harm are traceable to the 7th's more-limiting circuit rules and practices governing citations of unpublished pre-2007 decision for purposes of establishing facts. This case presents the questions concerning citations to unpublished dispositions to establish facts cleanly and clearly.

In his complaint, Plaintiff's allegations quoted statements from a 6th circuit decision in order to show how a 1999 report reissued by the NRC in two 2020 reports harms him. Referring to the 6th's decision issued in 2004 (27a), his complaint states:

> "The decision states the following:
> 'virtually all of the significant acts of discipline and retaliation allegedly employed by Lambda against Kelly, including ... the February 18, 2000 re-assignment of certain of Kelly's erstwhile Lab II supervisory duties...the plaintiff's February 25, 2000 alleged constructive discharge, all occurred after Kelly had received and studied the NRC's December 16, 1999 report and letter...' ". [(159a) which quotes the Sixth Circuit decision at (48a)].

and:

> "The decision states the evidence (presumably referring to the December 16, 1999 NRC Report) could not support a finding that: 'at the time that Kelly sustained his alleged material punishments for his 'whistleblower' activities – namely his post-December 16, 1999 employer admonitions, release from supervisory duties, and alleged ultimate constructive discharge – that he was protected either by the letter *or the spirit* of state public policy undergirding the Whistleblower Laws. Ohio public policy does *not* protect an uncooperative employee who unjustifiably complains to management or the authorities about non-existent employer misconduct; to the contrary, *Ohio law expressly stipulates that such recalcitrant employees may be lawfully disciplined or discharged.*' " [(160a-161a), which quotes the Sixth Circuit at (54a-55a).]

The allegation cites the Sixth decision statements describing how the 1999 NRC report influenced its decision -- influences which the issuing court had first-hand knowledge of – to support Article III standing. NRC records and events relevant to the current case prove the 1999 report--

which the NRC reissued in two 2020 reports – is speculative and inaccurate (126a,141a,139a), (ROA.23-1765.Doc:9-2.265-268,297-300).

The 7th's order's final statement before "AFFIRMED" asserts:

> "Kelly's complaint does not meet this standard because he failed to plausibly allege that any injury he suffered --- loss of a job he resigned from, harm to his reputation, his unsuccessful lawsuit – is remotely traceable to the Commission's 1999 response." (4a)

This differences between the Sixth's and 7th's findings on the 1999 report's influences and harm are due to the 7th's circuit rule limiting citation and consideration of unpublished pre-2007 dispositions. In practice, the 7th's rule clearly departs from FRE R. 803(8)(ii), which does not exclude the Sixth's statements from the record. (*See below.*)

While some circuits' rules have the same effects as the 7th's rule, some don't. Under some circuits' rules, such citations and allegations composed of them would be considered plausible when disposing summary judgment.

Unless this Court steps in, the effects of

circuits' conflicting rules governing admission and consideration of unpublished decisions in order to establish facts will persist. Practices and outcomes among the circuits will continue to diverge. Different circuits will continue to issue dispositions that conflict with each other due only to their different rules on citations of unpublished pre-2007 dispositions

C. The Extraordinary Impact Of The Originating Case On Public Policy And Safety.

This Court could also consider that, if allowed to proceed, this case will address illegal NRC practices that are harmful to whistleblowers and, for related reasons, extraordinarily harmful to advancement of safe nuclear technology.

This case shows how NRC implements strategies to manipulate courts and abuse the law to punish those who do not cooperate with their agenda -- to the detriment of those who follow the law, and ultimately, to the detriment of important public interests that Congress enacted the ERA and AEA to protect. Recently-found NRC records show that the 1999 NRC report and related information employed by the NRC to support short-term industry agenda are inaccurate; they were based on speculation and opinions of their selected unqualified conflicted experts and are linked to numerous hazardous reactor component failures

(126a,141a,136a),(ROA.23-1765.Doc:9-2.265-268,297-300). NRC compliance with laws intended to promote public policy by protecting communications, and actions required to correct inaccurate technical information is necessary for the responsible advancement of nuclear technology.

Because this petition's questions address fundamental and unsettled issues determining Article III standing and jurisdiction, and because of the importance of the outcome of the larger case to public policy should it be allowed to proceed, this Court's review is plainly warranted.

D. Factual Background And Court Proceedings.

This background provides details to aid understanding of the circumstances and importance of the case. This Court need not consider these details to answer this petition's questions. Only comparison of the 7th's Order with the allegations' quotes from the Sixth's decision and review of relevant rules are required to answer the questions.

Petitioner Mark Kelly (hereafter "Kelly") is a Ph.D. research chemist with experience in gathering data describing physical properties and capabilities of materials and components for General Electric (GE) and others (28a). Relevant training and experience include: i) metallurgy; ii) radiation effects on materials; iii) Quality Assurance (QA); iv) failure

analysis (FA); and vi) computer modeling (ROA.23-1765.Doc:9-2.217-218). Although most of Kelly's reports are proprietary, one publication was cited in a paper authored by two Nobel laureates; his results were regarded as reliable (165a). Later, Kelly conducted analysis helping GE FA investigations resolve origins of and prevent recurrences of a disc failure caused by a 18-year-old metal defect that initiated the infamous Flight 232 Sioux City crash that killed 112, injured 170+, and grounded fleets of jets. The pre-crash "one-in-a-billion" estimation of failure frequency was consequently increased considerably. False information impeded this FA investigation and contributed to gross pre-crash underestimation of component deterioration. (ROA.4:22-cv-71.Doc:16-11.24-27). The NRC lacks FA expertise required to evaluate long-term impacts of erroneous information on technical decisions (ROA.23-1765.Doc:9-2.278-279,298-299), (ROA.23-1765.Doc:9-1.154-156).

Kelly identified false and erroneous reactor component properties information. The NRC distributed erroneous information to courts and others to support projects that later ended in error-related failures (ROA.23-1765.Doc:9-2.258-265), (ROA.23-1765.Doc:9-1.94-107). The NRC responded to inquiries by issuing more false information

harmful to Kelly, giving rise to this action (144a, 126a, 136a), (ROA.23-1765.Doc:9-2.258-265).

Respondent Daniel Dorman was NRC EDO in 2022. The EDO implements decisions of the NRC leadership and directs NRC staff actions. EDOs wrote letters "on behalf of the commission" to Senators and others citing false information that bolstered other erroneous information that, in effect, removed otherwise-operative rights and legal protections and disparaged Kelly. (ROA.23-1765.Doc:9-1.176) Respondent David Wright was NRC Chairman. Respondents Christopher Hanson and Jeff Baran were NRC commissioners. The chairman and the commissioner were the NRC's leadership who made final 2022 decisions preventing corrections after reviewing Kelly's allegations. (157a, ROA.23-1765.Doc:9-2.277-280)

2020-2022 Events. In 2020, Petitioner contacted Senator Young requesting assistance with corrections of erroneous NRC technical information and practices that were related to numerous in-reactor component failures. Prior attempts to persuade the NRC to correct erroneous information were ineffective. The persistence of the errors and misunderstanding risked repeats of bad decisions, failures, and safety hazards. The nuclear industry had a history of bad decisions due to misunderstandings of properties Kelly tested.

Industry repeatedly underestimated inevitable component degradation, causing repeated hazardous failures described in a 1983 publication as "not observed in modern designs"-- repeatedly "reinventing the ~~wheel~~ flat tire" for decades. Failures proved that GE warnings about these errors' safety implications were prescient and that the 1999 NRC report was wrong. "Misunderstanding" component limitations enabled industry gambling without legal liabilities for failures. (ROA.23-1765.Doc:9-1.5-15)

When Kelly initiated inquiries through contacts with Senators Lugar, Coats and others, the NRC EDO had responded with letters citing the 1999 Report investigation and two "expert" opinions described therein several times from 2011 to 2020. (ROA.23-1765.Doc:9-1.176)

In response to Senator Young's inquiries and subsequent discussions with Petitioner, the NRC issued reports in September and December 2020. (144a). Both 2020 reports include a version of the 1999 report(126a). This report substantiated errors, but states that the NRC took no action because they did not regard these errors as safety related.

Both 2020 reports expand 1999 conclusions to cover later-found errors and additional safety issues which Petitioner brought to NRC attention. 2020 reports include new errors, but omit the "References"

(135a) which now support GE and Petitioner's safety concerns in light of 2000-2014 component failures.

Petitioner asked NRC staff to correct 2020 reports' errors. NRC staff confirmed some information was in error. After reviewing Petitioner's request for corrections, NRC Office of Inspector General (OIG) staff informed Petitioner that Respondents made 2022 final decisions that NRC staff would not correct the information and related practices (157a).

1999 Report Origins and Influences. The NRC initially issued the 1999 report in response to Petitioner's request for NRC assistance with corrections of industry errors he found when managing a lab for Lambda Research (126a). GE had warned him, as manager, that errors risked creation of significant radiological hazards and that GE required notification of errors per 10CFR21 and 10CFR50b (31a,32a) (ROA.23-1765.Doc:9-1.8).

In February 1999, he found "wrong-way" errors in Lambda information sent to industry. "Up" results were turned "sideways". Some results were distorted. Some reports were corrected. Some were not. Lambda refused to allow correction of all of the information or notification to GE, harassed Petitioner, and threatened to fire him if he discussed the problems with anyone (74a-75a). He requested

NRC assistance in July, 1999 (70a, 90a).

After initially confirming that the tested components were critical to safe reactor operations and confirming GE warnings, the NRC issued the 1999 report on December 16, 1999 stating the errors were not safety concerns (90a-91a).

The1999 report states the NRC "substantiated" errors, but was "unsure" how GE and others used the information. Relying on the opinions of two unidentified experts, the NRC concluded errors weren't safety concerns, and did not "pursue" erroneous reports or Lambda prohibitions on reviews of suspect data (132a-134a).

In February 2000, Lambda renewed demands that Petitioner to use flawed methods on GE samples and sign a false QA Report (QAR) that GE auditors examined. Petitioner attempted to again contact NRC staff. They did not respond until after he resigned on February 25, 2000 rather than sign the false QAR (91a-92a,141a)

After resigning from Lambda, Kelly was unable to obtain materials analysis work. Professors and colleagues who had previously provided favorable references did not return calls. (ROA.23-1765.Doc:9-2.245)

In March 2000, the NRC again recommended that Petitioner file discrimination complaints with the Department of Labor (DOL) and NRC. Petitioner

filed complaints (142a,59a).

The DOL ALJ dismissed the complaint (ALJ Case No. 2000-ERA-0035(59a)). The ALJ cited the 1999 Report several times to support credibility determinations and dismissal (104a-105a,118a)

Kelly filed a complaint against Lambda concerning QA issues in the US District Court for the Southern District of Ohio (Case No. C-1-00-661). Citing the 1999 NRC report, the district dismissed on summary judgment (27a).

Kelly appealed in the US Court of Appeals for the Sixth Circuit (hereafter, the "6th"). The 6th's unpublished 2004 decision affirmed dismissal, citing the 1999 NRC report to support findings that : i) evidence contradicting the report be disregarded (40a); ii) Kelly's efforts towards corrections and notifications were not legally protected (54a); and iii) Lambda actions harmful to Kelly were lawful (55a).

A decision issued by the ALJ in the DOL process into which the NRC directed him found Kelly's communications and actions prior to the NRC 1999 report were protected activities(98a,100a,101a), but those after this report's date were not protected (104a), post-report safety concerns were unreasonable (105a), and his refusals to cooperate with Lambda demands were unreasonable (123). The ALJ cited this report to support credibility determinations and other findings prejudicial to

Kelly (118a).

Failures From Bad Decisions Based On Inaccurate Information and NRC Misconduct. From 2006-2021, Kelly read reports of numerous reactor component failures. The types of failures indicated that they were due to bad decisions made due to misunderstandings that the types of errors he had found (and that the NRC refused to correct) would create (ROA.23.1765.Doc:9-1.9,11,12,87-107).

Kelly found the same types of erroneous properties information he had identified earlier in other NRC materials produced by, accepted by, and promoted by the NRC as "authoritative" in courts and elsewhere. Some are simple "wrong-way" errors in directional properties influencing deformations. Some are complex. Others are 3rd grade geometry errors. Anyone can recognize most, once pointed out. (ROA.23-1765.Doc:9-1.94,105-107).

Kelly obtained internal Nov. 1999 NRC investigation records underpinning the 1999 report and his case from NRC sources. These were not available to earlier courts. They state that NRC staff speculated about GE uses of the erroneous information. They identify the NRC-selected "experts" cited in their 1999 report. Both "experts" were unqualified and conflicted; one was linked to Lambda's errors addressed in the 1999 report. (ROA.23-1765.Doc:9-2.309-312.)(147a,136a-140a.)

Kelly's research found news reports indicating that the NRC employed one tactic they had employed against him against a purported Davis-Besse whistleblower; he was convicted of a felony because of circumstances created by this tactic. (ROA.23-1765.Doc:9-2.244-245)

Kelly found an NRC audit record of Lambda contained false statements about his case that conflict with a prior NRC Lambda audit record; they conceal Lambda problems. (ROA.23-1765.Doc:9-1.177-187.)

The NRC had not responded to Kelly's inquiries. Concerns led Kelly to contact Senator Young and others in 2020. The NRC responded to resulting inquiries with the 2020 NRC reports that include versions of the 1999 report (147a) NRC staff later acknowledged errors existed in these 2020 reports and other NRC information.

During a meeting in Senator Young's office on March 24, 2022, NRC staff informed Kelly in writing and orally that Respondents had made final decisions that no corrections would be made – they asked Kelly to read these statements aloud. However, they did not allow him to read the entire OIG report or have a copy. (ROA.23-1765.Doc:9-2.277-280)(157a).

E. Kelly's Complaint Allegations Quote Sixth Circuit and ALJ Decisions' Statements

Describing Harmful Influences of the 1999 NRC Report

Petitioner filed suit in the US District Court for the Southern District of Indiana, alleging violations of the Administrative Procedures Act (5 USC§702-706), ERA, AEA, and Information Quality Act (IQA), 44 USC § 3515, and seeking corrections of NRC information and practices harmful to him. (Case No. 4:22-cv-0071, (5a.) The US District Court for the Southern District of Indiana has jurisdiction under 28 USC § 1331 because defendants violated US federal laws (ROA.23-1765.Doc:9-2.220.)

The district designated as petitioner's second amended complaint as the operative complaint (10a). It adds the NRC as defendant (17a). Referring to two 2020 NRC reports and the December 16, 1999 Commission response within them, its first legal question is: "Has the NRC illegally issued inaccurate NRC Zr Texture Reports that illegally removed Plaintiff's Constitutional Rights to Free Speech and Due Process and removed Plaintiff's Legal Protections under the ERA and other state and federal laws?" (ROA.23-1765.Doc:9-2.221).

Referring to and quoting Sixth Decision statements describing the 1999 reports influences on its reasoning, complaint allegations state: "Relying heavily on the NRC Report, the appeal was denied". (ROA.23-1765.Doc:9-2.256.)

Unaware of effects of the 7th's local R. 32.1(d) on citations to establish facts, Kelly's allegations quoted statements from the Sixth and ALJ decisions that explicitly describe prejudicial influences of the 1999 report on its consideration of evidence, findings, and conclusions (159a-164a).

ALJ, Sixth, and NRC records were cited to support allegations that the NRC initially issued the 1999 report with the intent of ensuring Kelly would lose if he pursued DOL discrimination allegations that NRC staff recommended, and intended the 2020 reports to have the same effects in any subsequent legal action against Kelly. Kelly alleged that the 6th and ALJ conclusions were untrustworthy in light of later-found NRC investigation records that demonstrate that the NRC relied on speculation and opinions of unqualified conflicted experts for the 1999 report and, in light of numerous subsequent component failures, the quoted dispositions be regarded as evidence that the NRC repeated its illegal tactics – successful in 1999 -- in 2020. (162a-164a)(ROA.23-1765.Doc:9-2.312,325,304-327)

The Southern District of Indiana dismissed for lack of standing and jurisdiction on February 24, 2023 (Case No. 4:22-cv-00071), reiterating a magistrate's finding that Kelly's allegations of harm from the 1999 report were only "conclusory" (4a).

E. The Seventh Disregarded Quotes Of

Statements In Decisions Of The 6th Circuit Court of Appeals And DOL-ALJ Court.

The 7th Circuit Court of Appeals (hereafter, the "7th") issued an order affirming the district's dismissal for lack of standing and jurisdiction (1a).

The 7th reiterated district and magistrate findings "that Kelly lacked standing because his conclusory allegations of harm were insufficient to suggest how any conduct by the defendants concretely harmed him" (4a).

After citing the standard established by Baysal v. Midvale Indemnity Co., 78 F.4th 976, 978 (7th Cir. 2023) and Lujan v. Defenders of Wildlife, 504 US 555, 560 (1992), the 7th found that his alleged injuries were not "remotely traceable to the Commission's 1999 response." The 7th affirmed dismissal. (4a)

The 7th's local rule 32.1(d) prohibits citing unpublished pre-2007 decisions like the 6th and ALJ to establish such facts.

> 7th Circuit Rule 32.1 Publication of Opinions. ...
> (d) No order of this court issued before January 1, 2007, may be cited except to support a claim of preclusion (res judicata or collateral estoppel) or to establish the law of the case from an earlier appeal in the same proceeding.
> (Federal Rules of Appellate Procedure. Circuit

Rules of the United States Court of Appeals for the Seventh Circuit. December 1, 2023)

The 7th's order indicates in three ways that the allegations individual quotes of the 6th and the ALJ decisions were disregarded, as required by their rule.

First, the 7th's order focuses squarely on the traceability of the 1999 report to the exact same harm the complaint alleged by quoting the 6th decision. (See above pp. 6-8). The 7th cannot support its conclusions if the allegations' quoted 6th decision and the ALJ statements were considered.

Second, the 7th's order reiterates the district court and magistrate findings that the allegations were only "conclusory allegations of harm"(a4). The Merriam-Webster Dictionary of Law defines "conclusory" as "consisting of or relating to a conclusion or assertion for which no supporting evidence is offered". Allegations quoting the 6th and ALJ are evidence supporting the allegations of harm from the 1999 report (159a-164a). The 6th and ALJ each knew and their decisions explicitly describe how the 1999 report influenced their reasoning and actions. For the 7th to describe the allegations as "conclusory", it had to disregard the quotes from the 6th and ALJ decisions.

Third, the 7th's order stops at the traceability

of the 1999 report to harm as the dispositive issue. It did not reach consideration of related issues, such as the 1999 and 2020 reports' errors, speculation, and reliance on unqualified conflicted experts.

Like the district and magistrate dispositions, in accordance with R. 32.1, the 7th's order did not consider the quoted statements from the decision individually to establish facts.

Quoted 6th statements are *prima facie* evidence of reputational harm and dismissal of his lawsuit caused by the 1999 report. In this day where employers routinely include court record searches in background checks, employers generally don't hire those described by courts as "uncooperative" and "recalcitrant" employees. The 7th had to disregard the quoted 6th statements, per their rule, to find that reputational harm was not traceable to the 1999 response.

Reasons For Granting This Petition

A. Current Rules Governing Unpublished Dispositions Do Not Address All Citations To Establish Facts

Federal Rules of Appellate Procedure (FRAP) R. 32.1 governs citation of judicial dispositions.

> Rule 32.1. Citing Judicial Dispositions.
> (a) Citation Permitted. A court may not

> prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been:
> (i) designated as "unpublished," "not for publication," "nonprecedential," "not precedent," or the like; and
> (ii) issued on or after January 1, 2007.
> (b) Copies Required. If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited.
> (Federal Rules of Appellate Procedure, December 1, 2021.)

This rule does not explicitly: i) prohibit or allow citation of unpublished federal court dispositions issued prior to January 1, 2007; ii) address citations of such decisions for purposes of establishing facts about which the issuing court had first hand knowledge, which include facts relevant to preclusion, double jeopardy, and similar issues; iii) address how citations to such decisions are to be considered, such as presumptions of credibility or plausibility of allegations or reasonable inferences when the party against whom summary judgment is sought quotes or cites such decisions; iv) distinguish

effects of citations to such dispositions by circuit; or v) address citations to unpublished decisions that are not federal courts.

B. Splits In Local Circuit Rules On Citation Of Unpublished Pre-2007 Dispositions Impede Administration of Justice

The Advisory Committee Notes on FRAP R. 32.1 states: "The citation of unpublished opinions issued before January 1,2007 will continue to be governed by the local rules of the circuits."
[(Committee Notes on Rules –2006—Rule 32.1]

FRAP R. 47 and 28 USC§332 provide that each circuit may establish its own local circuit rules and practices, but they must be consistent with acts of congress and rules established under 28USC§2072.

> 28 USC §332 – Judicial councils of circuits.
> (d)(1) Each judicial council shall make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit.

Local circuit rules governing citation of unpublished pre-2007 dispositions issued by federal courts, dispositions issued from other courts, and how courts are to consider them (ie, their effects) vary significantly.

[Despite considerable efforts to present a

clear, accurate, and concise overview of the current situation in the following, some of the following descriptions of local rules and their effects might seem a little unclear and confusing. Rules incorporate significant variations in wording and uses of terms and phrases like "precedent" and "binding". Alternative incongruent-but-reasonable interpretations of the circuits' rules are possible. But maybe that's the point. Ambiguous hierarchy and orders of application of various circuit rules, FRE 803, and other applicable rules compound the confusion about allowed uses and the effects of consideration of some unpublished dispositions.

Some circuits' local rules on publication influence courts' considerations of such dispositions (see below). Word limits do not allow this petition to delve into definitions of "unpublished", "criteria for publication", or "affirmation without opinion" beyond noting that "affirmation without opinion" conceals a circuit's rationale for affirmations. This concealment makes reliable research on summary dismissals due to application of local rules prohibiting citations to unpublished pre-2007 dispositions for purposes not excepted in circuits' local rules impractical. FRCP R. 56(a) does not require a court to state on the record the reasons for granting or denying a motion for summary judgment, so identifying some effects of

circuit rule splits on citation of unpublished pre-2007 dispositions is sometimes beyond difficult. But Petitioner's case alone makes it clear that some local rules' effects are dispositive.

The variations render understanding effects uncertain in some circuits. Lawyers are reluctant to risk their licenses representing parties in such actions, and are even less likely to represent parties with limited resources on contingency regardless of the merits and importance of the case. Quality and effectiveness of pleadings are degraded by misunderstandings, which wastes time and resources of both parties and courts. The necessity for *pro se* filings magnifies these difficulties.

This petition's focus is limited to requesting this Court's answers to the questions about consideration and effects of citing and quoting individual statements in unpublished pre-2007 dispositions to plausibly establish facts, particularly on summary dismissal. It does not seek guidance on all aspects of local circuit rules governing citations of unpublished pre-2007 dispositions.]

C. Some Circuits Expressly or In Effect Remove All Rule 32.1 Limitations On Such Citations

The 6th's local rule and Federal Circuit local rule removes all limitations, seeming to allow even

citations to such dispositions that are not federal.

> 6 Cir. R. 32.1 Citing Judicial Dispositions; Effect of Published Decisions
> (a) Citing Unpublished Dispositions. The court permits citation of any unpublished opinion, order, judgment, or other written disposition. The limitations of Fed. R. App. P. 32.1(a) do not apply.
> (Sixth Circuit Rules [Last Amended April 15, 2023])

The wording differs, but the Federal Circuit local rule seems to have the same effect as the 6th.

> Federal Circuit Rule 32.1(c) Parties' Citation of Nonprecedential Dispositions. Parties are not prohibited or restricted from citing nonprecedential dispositions.
> (Federal Circuit Rules of Practice (December 1, 2023))

D. Local Rules Indicating That "FRAP R. 32.1 Applies..." Are Not Clear

The Third Circuit does not have a local rule on FRAP 32.1, indicating that FRAP Rule 32.1 applies as written (United States Court of Appeals for the Third Circuit Local Appellate Rules August 1, 2011). But what exactly does that mean? The gaps and

ambiguities of R. 32.1 described above provide room for confusion and inconsistencies. Given the 6th's and other circuits' rules indicate "limitations of FRAP 32.1 do not apply", one might reasonably presume FRAP 32.1 implicitly prohibits citation to unpublished pre-2007 opinions under most circumstances. Citations to unpublished non-federal dispositions might also be reasonably presumed to be implicitly prohibited by this rule. However, every court of appeal has allowed unpublished decisions to be cited under some circumstances, such as to support a claim of preclusion, law of the case, double jeopardy, sanctionable conduct, and for like purposes. (Memorandum RE: Report of Advisory Committee on Appellate Rule, May 14, 2004, p.44).

E. Some Circuits' Local 32.1 Rules Expressly Permit Citation of Unpublished Pre-2007 Dispositions To Establish Relevant Facts

The First Circuit Local Rule 32.1.0 permits citations of pre-2007 unpublished dispositions from any court to establish a fact regardless of the date of issuance.

The Fourth Circuit's Local Rule 32.1 "disfavors" some such citations.

> Local Rule 32.1 Citation of Unpublished Dispositions.

> Citation of this Court's unpublished dispositions issued prior to January 1, 2007, in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case.
>
> If a party believes, nevertheless, that an unpublished disposition of this Court issued prior to January 1, 2007, has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited if the requirements of FRAP 32.1(b) are met.
>
> (Local Rules of the Fourth Circuit Internal Operating Procedures. December 1, 2023)

F. Some Circuits' Local 32.1 Rules Expressly Permit Such Citations Only For The Purpose Of Establishing Certain Specified Types Of Facts

The Eighth Circuit's local Rule 32.1A states that pre-2007 opinions generally should not be cited, but lists exceptions.

> RULE 32.1A: CITATION OF UNPUBLISHED OPINIONS

> Unpublished opinions are decisions a court designates for unpublished status. They are not precedent. ... Unpublished opinions issued before January 1, 2007, generally should not be cited. When relevant to establishing the doctrines of res judicata, collateral estoppel, or the law of the case, however, parties may cite an unpublished opinion. Parties may also cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion of this court or another court would serve as well. ...
> (UNITED STATES COURT OF APPEALS FOR THE EIGTH CIRCUIT LOCAL RULES June 17, 2024)

The Fifth Circuit rule indicates FRAP 32.1(a) permits some citations to unpublished pre-2007 judicial dispositions, but its wording can be confusing.

> Fifth Cir. R. 28.7 Citation to Unpublished Opinions, Orders, etc. FED R. APP. P. 32.1(a) permits citation to unpublished judicial dispositions. ...

> Fifth Cir. R. 47.5.4 Unpublished Opinions Issued on or After January 1, 1996.
> Unpublished decisions issued on or after January 1, 1996, are not precedent, except under the doctrine of res judicata, collateral estoppel or law of the case (or similarly to show double jeopardy, notice, sanctionable conduct, entitlement to attorney's fees, or the like). An unpublished opinion may be cited pursuant to FED. R. APP. P. 32.1(a). ...
> (Rules and Internal Operating Procedures of the United States Court of Appeals for the Fifth Circuit, February 2024)

The Fifth's use of "precedent" differs from the other circuits' rules which state that unpublished decisions are not precedent. But in effect, they allow the same uses as the Fifth.

The Tenth Circuit rules expressly lists exceptions to FRAP 32.1, but states they are not "precedential".

> 10th Cir. R. 32.1
> 32.1 Citing judicial dispositions.
> (A) Precedential value. While citation to published authority is preferred, citation of unpublished decisions is permitted as authorized in Federal Rules of Appellate

> Procedure 32.1. Unpublished decisions are not precedential, but may be cited for their persuasive value. They may also be cited under the doctrines of law of the case, claim preclusion, and issue preclusion. ...
> (C) Retroactive effect. Parties may cite unpublished decisions issued prior to January 1, 2007, in the same manner and under the same circumstances as are allowed by Federal Rule of Appellate Procedure 32.1(a)(i) and part (A) of this local rule.
> (FEDERAL RULES OF APPELLATE PROCEDURE Effective December 1, 2023 And TENTH CIRCUIT RULES Effective January 1, 2024)

The Eleventh Circuit has no 32.1 local rule governing citation to unpublished decisions. But its Internal Operating Procedures (IOP) provide guidance to the court's consideration of such decision

> FRAP 36
> I.O.P.-
> *7. Citation to Unpublished Opinions by the Court. The court generally does not cite to its "unpublished" decisions because they are not binding precedent. The court may cite to them where they are specifically relevant to*

> *determine whether the predicates for res judicata, collateral estoppel, or double jeopardy exist in the case, to ascertain the law of the case, or to establish the procedural history or facts of the case.*
> (Federal Rules of Appellate Procedure with Eleventh Circuit Rules and Internal Operating Procedures. p. 154. December 1, 2023.)

The Eleventh's local rules do not distinguish unpublished decisions by date of issuance.

The Seventh's Circuit Rule and practices restrictions are more extreme, allowing few exceptions.

As quoted above (p. 20), the 7th's Rule 32.1(d) generally prohibits such citations, but lists exceptions. The 7th Circuit's "Practitioner's Handbook For Appeals to the United States Court of Appeals For the Seventh Circuit, 2020 Edition" clearly states on p. 203: "Citation of older orders is not permitted except to support a claim of *res judicata*, collateral estoppel, or law of the case. Cir. R. 32(d)."

G. Circuits' Local Rules Governing Unpublished Decisions Diverge in Other Ways That Can Be Dispositive

The Second Circuit IOP 32.1.1 and Local Rule 32.1.1 explicitly addresses only unpublished

"Summary Orders".

> Local Rule 32.1.1 Citation by Summary Orders ...
> (b) (2) Summary Orders Issued Prior to January 1, 2007. In a document filed with this court, a party may not cite a summary order of this court issued prior to January 1, 2007, except; (A) in a subsequent stage of a case in which the summary order has been entered, in a related case, or in any case for purposes of estoppel or res judicata; or (B) when a party cites the summary order as a subsequent history for another opinion that it appropriately cites.
> (Local Rules and Internal Operating Procedures of the Court of Appeals for the Second Circuit (Effective December 14, 2023))

The Second's rule on other unpublished dispositions is not explicit.

H. Some Circuits' Rules and Practices Distinguish Dispositions Issued By Their Own Circuits From Those Issued By Other Circuits

Some circuits condition citations on local rules of other circuits. Citations can have different effects under rules of different circuits. This adds complications and opportunities for inconsistencies.

The Federal, First, Eleventh, and DC local circuit rules and practices indicate consideration of citations are governed by those of the issuing court.

> Federal Circuit Rule 32.1(d) Court's Consideration of Nonprecedential or Unpublished Dispositions. ...
> The court will not consider nonprecedential or unpublished dispositions of another court as binding precedent of that court unless the rules of that court so provide.
> (Federal Circuit Rules of Practice (December 1, 2023))
>
> .
>
> The First Circuit's local rule:
> *Local Rule 32.1.0. Citation of Unpublished Dispositions.*
> *(a) Disposition of this court. An unpublished judicial opinion, order, judgment or other written disposition of this court may be cited regardless of the date of issuance. The court will consider such dispositions for their persuasive value but not as binding precedent..*
> *(b)...The citation of dispositions of other courts is governed by Fed. R. App. P. 32.1 and the local rules of the issuing court.*
> *Notwithstanding the above, unpublished or non-precedential dispositions of other courts*

> *may always be cited to establish a fact about the case before the court (for example, its procedural history) or when the binding or preclusive effect of the opinion, rather than its quality as precedent, is relevant to support a claim of res judicata, collateral estoppel, law of the case, double jeopardy, abuse of the writ, or other similar doctrine.*
> (United States Court of Appeals For the First Circuit, Rulebook Effective with amendments through May 29, 2024)

The Eleventh circuit's local rule under "FRAP 36. Entry of Judgment" addresses consideration of unpublished opinions from the Eleventh.

> 11th Cir. R. 36-2 Unpublished Opinions.
> ...Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority. ...

The Eleventh provides guidance to the court's consideration entry of judgment notice per FRAP 36 with IOPs 6 and 7.

> *IOP 6. Unpublished Opinions. ... The court will not give the unpublished decision of another circuit more weight than the decision*

is given in that circuit under its own rules. ...

IOP 7. Citation to Unpublished Opinions by the Court. The court generally does not cite to its own "unpublished" opinions because they are not binding precedent. The court may cite to them when they are specifically relevant to determine whether the predicates for res judicata, collateral estoppel, or double jeopardy exist in the case, to ascertain the law of the case, or to establish the procedural history or facts of the case.
(Federal Rules of Appellate Procedure with Eleventh Circuit Rules and Internal Operating Procedures. p. 154. December 1, 2023.)

DC Circuit rules prohibit citation to lower court decisions from other circuits, which are sometimes unique records of relevant facts.

District of Columbia Circuit R. 32.1(b) permits citation of unpublished pre-2007 dispositions from the DC circuit and other circuits' court of appeals "when the binding (ie, the res judicata or law of the case) or preclusive effect of the disposition, rather than its quality as precedent, is relevant." However, it specifically prohibits citations to unpublished pre-2007 dispositions issued by district courts of other circuits.

> ...All unpublished orders or judgments of this court..., entered on or after January 1, 2002, may be cited as precedent. ...Otherwise, unpublished dispositions of other courts of appeals entered before January 1, 2007, may be cited only under the circumstances and only for the purposes permitted by the court issuing the disposition, and unpublished dispositions of district courts entered before that date may not be cited. ...
> Circuit Rules of the United States Court of Appeals for the District Of Columbia Circuit...As Amended Through April 1, 2024.

Influences of this rule's prohibition on citation to district dispositions on establishing the record and material facts stand out from rules in other circuits. Not all lower court decisions are appealed. Even if lower court decisions are appealed, some courts of appeals dispositions (especially orders) do not explicitly describe or even mention facts known first-hand and described by district courts in decisions.

In effect, R. 32.(b)(2) and like rules from other circuits exclude facts that might be dispositive solely on the basis of the circuit of the issuing court.

Rule variations' effects on consideration of dispositions based on issuing circuits introduce

inconsistencies into dispensation of justice prohibited by 28 USC § 332, even when dispositions are cited to establish facts of which the issuing court had personal knowledge. Opportunities for confusion and compounded inconsistencies increase.

Guidance providing uniform rules on citations of decisions for the purposes of establishing facts of which the issuing court had first hand knowledge resolves many inconsistencies and complications arising from current circuit rules and practices.

I. Some Circuits' 32.1 Rules Are Not In Concordance With FRE

FRAP R. 47(a)(1) provides that each circuit may establish its own local circuit rules and practices, but they must be consistent with acts of congress and rules established under 18USC 2072. FRAP 47(b) provides that, absent controlling law, a court of appeals may regulate practice in a particular case in any way consistent with federal law, these rules, or local rules of the circuit.

The Federal Rules of Evidence (FRE) were enacted by congress in Public Law 93-595 (FRE, p. III). 28 USC § 2072(a) provides this Court's power to prescribe FRE. Effects of circuit rules should conform with FRE requirements, absent compelling reasons to depart from them.

FRE provides Judges may testify.

FRE Rule 601. Competency to Testify in General.

Every person is competent to be a witness unless these rules provide otherwise. ...

Rule 602. Need for Personal Knowledge.

A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.

Federal Rules of Evidence (FRE) R. 602 distinguishes statements from most public records on the basis of whether or not the issuing party had personal first-hand knowledge. Judges have personal knowledge of what they write in dispositions.

FRE 801 and 803 provide that statements in written dispositions are not excluded from the record.

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

(a) STATEMENT. "Statement" means a

person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion. ...

Rule 803. Exceptions to the Rule Against Hearsay—Regardless of Whether the Declarant Is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

...

(8) *Public Records.* A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) the opponent does not show that the source of the information or other circumstances indicate a lack of trustworthiness. ...

The Federal Circuit's Rule explicitly states that its dispositions are public records.

> Federal Circuit Rule 32.1(f) Public Records. All dispositions by the court in any form will be in writing and are public records. (Federal Circuit Rules of Practice (December 1, 2023))

A court's written disposition can be considered as consisting of two types of statements. i) Those statements asserting facts of which the issuing court has personal first-hand knowledge. These statements fall under FRE 803(8)(A)(ii) and FRE 803(8)(A)(iii). ii) Other statements for which the issuing court relied on evidence and other information sources. These statements fall under only FRE 803(8)(A)(iii). Both types of statements can be excluded from the record if they are shown to be untrustworthy, per 803(8)(B).

For example, the court issuing a disposition certainly has first hand knowledge of the truth of statements asserting that it considered evidence and describing how that evidence influenced its holdings. Absent clerical error or fraud, the statement is true. So these statements are clearly allowed into the record to support factual assertions in a later action.

In contrast, the issuing court usually does not

personally know the truth of that evidence upon which it based its findings. Statements that reiterate testimony or rely on evidence about which the issuing court has no personal knowledge of its truth – such as a disposition's assertions of findings based on evidence -- are not necessarily "true" facts. An opponent can show these disposition statements to be untrustworthy by showing that the evidence that the issuing court relied on for described findings was untrustworthy. If evidence relied on by the issuing court is later shown to be untrustworthy, the issuing court's findings and actions may not have been actually justifiable. Under these circumstances, disposition statements describing them, which could include findings, are untrustworthy. These disposition statements are not admissible under Rule 803. (Reversal of the issuing court's decision is not considered, absent timely motions under FRCP R. 60 and similar rules.)

If law relevant to the case has changed, some disposition assertions may not be relevant or "true" in the context of the later case. For example, an issuing court's pronouncement that a defendant's activity was legal is no longer relevant to ongoing activities if the law has changed. (This issue of establishing facts under the FRE could be seen as confounded with the issue of citing dispositions for legal guidance and precedent. But FRE 803(8)(B)

provides clear guidance that such statements can be distinguished and excluded from the record as untrustworthy in a later case.)

Under circumstances where relevant law changed after a disposition was issued, a dispositions' statements wherein the issuing court describes its actions and findings can be irrelevant as facts to the later case, even though other statements in the same disposition are admissible into the record as relevant evidence. For these reasons, FRE can be seen as providing that statements within decisions can be considered by a court individually. Statements can be cited, but even dispositive conclusions by the issuing court can be disregarded as irrelevant by a court considering other statements within the same disposition. Citations to unpublished decisions are not necessarily "All or nothing".

J. Unpublished Disposition Statements Shown To Be Untrustworthy Might Be Relevant Evidence Indicating That The Issuing Court Was Intentionally And Successfully Misled By A Party.

Untrustworthy statements based on false evidence can demonstrate that a party falsified evidence with the intent of misleading the issuing court, and, as a result, the issuing court took actions prejudicial or harmful to another party. Although

untrustworthy, these types of statements can be relevant evidence of fraud.

The collective effects of FRE R. 602 and R. 803(8) are to allow citations to individual statements from unpublished pre-2007 dispositions into the record for the purposes of establishing any type of facts, absent showing of untrustworthiness, while allowing disregard of other statements within the same disposition shown to be untrustworthy. In effect, FRE 803(8) provides that statements from cited dispositions be considered individually on their merits. Like any other public records, nonprecedential dispositions in evidence need not be considered as "all or nothing".

This leads to the conclusion that, when disposing summary dismissal, the court must consider statements cited from a disposition and their trustworthiness individually.

K. Some Circuit Rules That Split From FRE R. 803(8)

Circuits' local rules allowances of such citations for listed purposes such as establishing res judicata or double jeopardy or the like (as the Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh do) -- which usually require establishing facts of which the issuing court had first hand knowledge -- are consistent with FRE R. 803(8)(ii).

However, some local rules from these circuits

that, in effect, exclude such citations to establish other relevant facts of which the issuing court has first hand knowledge under the same rules are not consistent with FRE R. 803(8)(ii). The 7th's rule is one clear example of a rule conflicting with FRE 803(8)(ii).

The First, Fourth, Sixth, and Federal Circuit rules allowing citation to unpublished dispositions to establish any facts are only in concordance with these FRE rules only so long as the instant court considers showings of untrustworthiness of assertions for which the issuing court relied on evidence and other information sources of which it does not have first hand knowledge.

This Court should clarify this constraint imposed by FRE 803(8).

This Court should resolve splits between local rules and FRE.

L. No Circuits Local Rules Address Consideration of Unpublished Dispositions When Cited To Establish Facts For Purposes Of Opposing Summary Dismissal

Article III of the Constitution requires three conditions to establish standing. 1. The Plaintiff has suffered harm in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. 2. The harm is traceable to Defendant's unlawful actions. 3. It is likely, not

merely speculative, that a favorable decision will mitigate the harm. (*Friends of the Earth v. Laidlaw Envtl. Services*, 528 US 167, (2000).)

FRCP Rule 56(f)(3) provides that the court may "consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute".

FRCP 12(b)(6) allows the defense of failure to state a claim upon which relief can be granted.

FRCP 12(h)(3) requires a court to dismiss if it determines that it lacks subject matter jurisdiction.

Rule 8(a)(2) requires the court to assess whether or not the plaintiff has stated a claim upon which relief may be granted. Rule 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief" in order to "give the defendant fair notice of what the ... claim is and the ground upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 US 554, 555 (2007). The claim's "factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the allegations in the complaint are true." *Association of Cleveland Fire Fighters v. City of Cleveland*, 502 F.3d 545, 548 (6th Cir. 2007), quoting *Twombly* 550 US at 555.

A court may grant summary judgment under FRCP Rule 56 only if, after construing the record evidence, and the reasonable inferences which may

be drawn therefrom, most favorably for the party opposing the motion, the proof could not support a judgment in favor of the nonmoving party. *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 US 574, 587-588, (1986).

FRCP Rule 56(c)(1) provides that a party asserting that a fact can be disputed must support the assertion by citing to particular materials on the record.

If a party does so, Rule 56(c)(3) requires the court to consider those cited materials, although it may consider other materials.

Therefore, local rules that prohibit citation to unpublished decisions to establish facts relevant to Article III standing and that have the effect of determining whether or not allegations and cited facts supporting them are considered plausible are dispositive. Citation prohibitions are not in accordance with FRCP R. 8(e) requirement that "Pleadings must be construed so as to do justice."

No circuit's local 32.1 rules explicitly address the specific issue of whether or not allegations citing or directly quoting such decisions' statements to establish facts are to be regarded as plausible for the purposes of supporting Article III standing or disputing summary dismissal.

M. Citations To Older Decisions For Purposes Of Establishing Facts Do Not Present

The Many Difficulties of Their Citations As Legal Precedent Or Persuasive Authority, But Do Provide Benefits

The May 14, 2004 Report of the Advisory Committee on Appellate Rules cites numerous opinions describing difficulties and burdens imposed by allowing citation of unpublished decisions issued before 2007. Most objections concern citation as persuasive authority for the purpose of providing legal guidance in the instant case. Citations to establish facts documented in decisions do not present these problems.

While unpublished dispositions may contain imprecise statements of law, their renditions of facts should be accurate descriptions of, for example, how evidence influenced the issuing court's reasoning and evidence influenced its actions, in the issuing court's own words, often available nowhere else. If not challenged as untrustworthy, citations are fast and efficient means to credibly establish relevant facts.

N. Petitioner's Case Provides An Ideal Vehicle For This Court To Resolve The Splits Among Circuit Rules And Conflicts With FRE

Petitioner's case presents the issues of court's consideration of unpublished decisions, splits among circuits, and conflicts with FRE clearly and cleanly.

The facts required to answer the questions are undisputed and are simple.

To decide this case, this Court only needs to compare the 7th's statement that the complaint fails because Petitioner "failed to plausibly allege that any injury he suffered...is remotely traceable to the Commission's 1999 response" with the quoted 6th decision statements, which explicitly describe how the 1999 report led them to affirm dismissal, to disregard evidence supporting Kelly, and to refer to Kelly as "uncooperative" and "recalcitrant" in a publically available record, (which is prima facie evidence of harm) (See pp. 5-8 and 4a, 159a-164a).

Disregard of quoted 6th statements of statements describing matters of which the 6th had personal knowledge was dispositive. The 6th had first hand knowledge of the quoted statements, which are therefore admissible into the record per FRE 601, 602, and 803(8)(A)(ii). These facts are available nowhere else. The 7th's disregard of these quotes was in accordance with the 7th's rule, but not with FRE or other circuits' rules.

Individual consideration of 6th and ALJ statements shown to be irrelevant and untrustworthy due to changes of law and in light of other evidence is an important issue presented in Petitioner's case. The allegations' quotes demonstrate that the 6th's consideration of the 1999 report led it to dismiss the earlier case. The 7th cited the 6th's dismissal as if it were "*res*

judicata" in the current case, which is in accordance with its Rule 32.1(d) (3a). But evidence in the current case shows the 6th dismissal is at most irrelevant in the current case due to differences in law and facts showing the evidence on which the 6th's assertions relied to be untrustworthy. NRC investigation records obtained from NRC sources -- whose authenticities have never been disputed -- demonstrate that the 1999 report (and therefore the 2020 reports) relied on speculation and opinions of two unqualified and conflicted "experts" (139a). Kelly argued that such reliance is now illegal under the IQA. (NRC Management Directive 3.17, "NRC Information Quality program", (ROA.23-1765.Doc:8.42-46,55-56,9,16,25)).

Independently, cited NRC records of numerous related failures in evidence show that the 1999 report's safety conclusions (and therefore the 2020 conclusions) are wrong and that GE warnings and Petitioner's concerns are valid (*see* pp. 14-17 above). (Kelly alleged that, if considered individually in light of the record in the current case, the 6th's action of dismissal and allegation quotes are evidence that the NRC fabricated the 2020 reports with the intent of removing Kelly's otherwise-operative legal protections and to chill his rights to free speech. The NRC is aware that Petitioner would know the 2020 report would persuade courts to find against

him should his actions or communications provide opportunity for legal action against him. The NRC wanted Petitioner to know that he faces serious legal consequences for certain communications and actions.) The 7th should have considered quoted statements individually in light of current evidence and law, and not cited the 6th decision -- in its entirety -- as *res judicata.*

This case provides this Court with an opportunity to clearly indicate that statements cited from dispositions are to be considered individually. Like all public records, disposition contents aren't necessarily considered "All or Nothing".

Summary Judgment: Petitioner's case was dismissed on summary judgment. The 7th disregarded the quotes, and did not consider the quotes, individually, to be plausible. Reasonable inferences were not drawn in favor of Petitioner, the party opposing dismissal. Discovery, which would have revealed additional evidence supporting Petitioner's allegations, was prevented by dismissal. This provides this Court with a vehicle to address consideration of citations in disposing summary judgment, should it choose to do so.

Petitioner's Case Cleanly Presents The Benefits Of Allowing Such Citations. Allowing citations to unpublished decisions enable establishment of relevant facts quickly and

efficiently. Some facts are available nowhere else. While other facts might be proven again, presenting the required evidence places time and resource burdens on the Courts and parties. In Petitioner's case, the cited and quoted decision statements efficiently present relevant facts.

Issuing Courts and Dates: The Complaint quoted decisions statements from the 2002 ALJ decision to support harm done by the 1999 report. The ALJ is a DOL court, not a "federal" court under FRAP R. 32.1. The ALJ had first hand knowledge of influences of the 1999 report and other matters the quotes were employed to establish (162a-164). The 7th's disregard of ALJ citations was dispositive in this case. This situation provides this Court with a vehicle to address splits in local rules that, in effect, distinguish consideration of facts in dispositions based on which court issued them on what date.

Review of Extraordinary Harmful Illegal NRC Conduct is Available In This Case (But Not Necessary To Answer The Questions). If this Court wants to review additional evidence of NRC "cancel culture", spread of erroneous information, and extraordinary consequential harm to nuclear technology and public policy, the record provides abundant evidence. But that is not necessary to answer this petition's questions.

O. A Decision From This Court Simply Allowing Statements From Any Authentic Court Decision To Be Considered Individually For The Purpose Of Establishing Facts Would Provide Guidance That Resolves Many Splits In Circuits Local Rules And Allows A Case Important To Public Policy To Proceed.

The originating case provides an opportunity to ensure more concordant administration of justice across circuits. But this case also is extraordinarily important to the responsible advancement of nuclear technology and public safety should it be allowed to proceed in lower courts (or should Respondents then agree to make previously-refused corrections of information and related practices that impede free communications -- ie, settle).

Conclusion.

This petition for a writ of certiorari should be granted.

Respectfully submitted.

Mark Kelly

_____ Sept. 5, 2024

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This petition is resubmitted with corrections and the Supplemental Appendix with the 7th Circuit's order denying rehearing required for docketing, as instructed by the Office of the Clerk Sept. 17 2024 letter. In order to facilitate secure binding, Appendices F to M have been moved to the Supplemental Appendix.

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Oct. 11, 2024

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