No. ____________________

IN THE
SUPREME COURT OF THE UNITED STATES

FRANK KONARSKI, ET AL.,

Petitioners,

-vs-

CITY OF TUCSON, A BODY POLITIC, ET AL.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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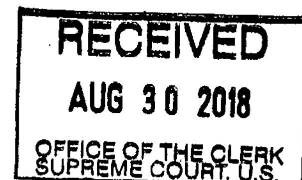

QUESTIONS PRESENTED

Questions here primarily evolve from what this Court determined in 1942: Back then—and what became a foundation for legal guidance—it was determined that the U.S. Congress, under the Commerce Clause, could regulate even a small-time farmer's harvest of wheat for his personal use because such circumstances were legally assigned to be considered in the aggregate sense. *Wickard v. Filburn*, 317 U.S. 111 (1942). Under this legal wisdom—like farming considered in the aggregate—a single housing rental unit structure, considered in the aggregate of all housing rental units, would also come to fall within the federally protected domain of interstate commerce. As such, a street thug, like many before and after him under similar circumstances, was convicted and incarcerated in a federal prison for effectively interfering with interstate commerce by having used a Molotov cocktail to set a single housing rental structure on fire. *United States v. Gomez*, 87 F.3d 1093 (9th Cir. 1996); *see also, e.g., Russell v. United States*, 471 U.S. 858 (1985); *United States v. McMasters*, 90 F.3d 1394, 1398 (8th Cir. 1996) (upholding federal conviction for single rental unit arson).

The Fifth Circuit, as with other circuits, has relied on criminal cases like *Russell* to instill—in civil cases—that a housing rental transaction "'unquestionably' is an 'activity that affects commerce,'" and, thus, is a transaction that falls within the said federal domain to be subject to the Fair Housing Act (42 U.S. Code §3601, *et seq.*), among other acts of Congress, because of the

Commerce Clause. *Groome Resources, Ltd. v. Parish of Jefferson*, 234 F.3d 192, 207 (5th Cir. 2000).

Against this backdrop, Petitioners' attorney filed a complaint, seeking relief from an alleged effort by municipal Respondents to interfere with and restrain Petitioners' commerce of engaging in housing rental transactions with their tenants. Denied relief and, what is more, having an extreme sanction imposed upon them for the complaint, Petitioners submit this: This case presents itself as what seems to be the Ninth Circuit's now swimming against the legal current of interstate commerce jurisprudence—provoking these questions:

1. Whether housing rental businesses are a part of the federally protected domain of interstate commerce.

2. If such business are *per se* a part of the federal domain, whether municipal actors, like Respondents—merely because they are local actors—are totally free from federal law to engage in the non-state-sanctioned conduct of restraining housing rental competition by pursuing a self-designated unilateral municipal action that, by design, causes the losses of housing rental transactions of some of such businesses, like Petitioners', in order to have tenants from there move/funneled to other such businesses that are favored, thus enabling the latter businesses, through no action of their own but that of the municipal actors, to have a competitive advantage over the former businesses.

3. Whether a court's replacement of the content of a moving party's motion for an extreme sanction obligates the court to first provide the alleged offending party, who is subject to the extreme sanction, notice and opportunity to address such content replacement as part of due process before the actual issuance of the extreme sanction.

PARTIES TO THE PROCEEDING

In accordance with Rule 14.1, the following list below identifies the parties to the proceeding.

Petitioners here are Frank Konarski and Gabriela Konarski, husband and wife; Patricia Konarski, a single woman; John F. Konarski, a single man; Frank E. Konarski, a single man, dba FGPJ Apartments & Development.

Respondents are the City of Tucson, a body politic; Michael G. Rankin and Catalina O. Rankin husband and wife; Julianne K. Hughes and Graeme Hughes, wife and husband; Mark R. Christensen and Nancy Stanley, husband and wife; Albert Elias and Sarah Starling-Elias, husband and wife; Sally Stang and Michael Stang, wife and husband; Rick Shear and Jeanette Shear, husband and wife; Ronald Koenig and Erin Koenig, husband and wife; Lisa Swanson (aka, Lisa Higgins) and William Higgins, wife and husband; Vanessa Gonzalez and John Doe Gonzalez, wife and husband; Arturo Encinas and Jane Doe Encinas, husband and wife; Martin Pena and Jane Doe Pena, husband and wife; and DOES 1-10, who were fictitiously named since their identities were not known at the time of the filing of this case, and have yet to be determined

There are no corporations of which to report per Rule 29.6.

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals in this case.

OPINION BELOW

The opinion of the Ninth Circuit (App. 1-13), dated November 28, 2017, is serially reported at 716 Fed. Appx. 609, 2017 U.S. App. LEXIS 24058, 2017-2 Trade Cas. (CCH) P80,214, and 2017 WL 5712132 (9th Cir. Nov. 28, 2017). The order of the Ninth Circuit (App. 54-56), dated February 26, 2018, denying Petitioners' petition for panel rehearing and petition for en banc review, is reported at 2018 U.S. App. LEXIS 4736 (9th Cir. Feb. 26, 2018).

The order of the District Court for Arizona ("District Court") (App. 14-51), dated March 18, 2016, dismissing Petitioners' complaint, is reported at 2016 U.S. Dist. LEXIS 193057 (D. Ariz. Mar. 18, 2016).

The order of the District Court (Excerpts at App. 52-53), dated March 18, 2016, declaring Petitioners vexatious and enjoining their ability to file new actions, is reported at 2016 U.S. Dist. LEXIS 193053 (D. Ariz. Mar. 18, 2016).

JURISDICTION

The Ninth Circuit filed its opinion on November 28, 2017, denying Petitioners the appellate relief they sought under 28 U.S.C. § 1291. App. 1-13.

A timely petition for panel rehearing and en banc review was denied on February 26, 2018. App.

54-56.

On June 29, 2018, the Clerk of this Court informed Petitioners to perfect their petition for writ certiorari within sixty days of the latter date.

Under 28 U.S.C. § 1254(1), Petitioners now timely submit this instant petition for writ of certiorari, along with contemporaneously paying the docket fee.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions involved—specifically 15 U.S.C. § 1 (Sherman Antitrust Act); Article I, Section 8, Clause 3 of the U.S. Constitution (Commerce Clause); Fourteenth Amendment to the U.S. Constitution (Due Process Clause)—are set forth in Appendix F-H, *infra.*

STATEMENT OF CASE

A. Introduction

This case involves questions of exceptional importance concerning the subjects of the federally protected domain of interstate commerce, civil rights and due process before a court. Specifically, it has been alleged that City of Tucson, Arizona officials ("Respondents") have engaged in unsanctioned and improper conduct that, *inter alia,* **(i)** has interfered with competition, per se, in the federal domain of interstate commerce, in violation of the Sherman Act;

and **(ii)** has interfered with the commerce of particular participants, Petitioners, acting in the federal domain of interstate commerce, in violation of the Commerce Clause and the Due Process Clause.

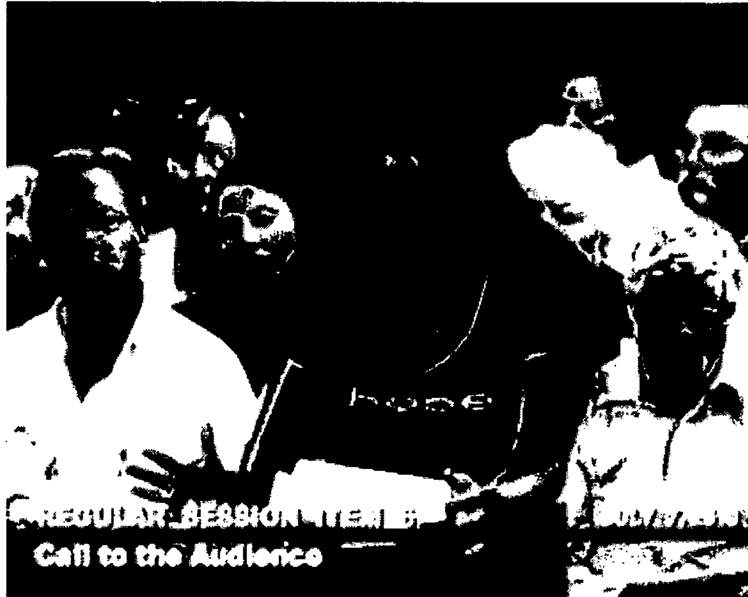
Petitioners have come to be subject to such unsanctioned and improper conduct of Respondents in the course of Petitioners' operating their housing rental business. In this business, Petitioners encounter two types of prospective housing tenants: **(i)** rent-subsidized tenants who are recipients of monetary housing vouchers under what is called the Section 8 Housing Choice Voucher program ("Section 8 Housing"), a program of the United States Department of Housing and Urban Development ("HUD") that Respondents locally administer; and **(ii)** private (i.e., *non*-subsidized/*non*-Section 8 Housing) tenants.

Respondents have interfered with both types of tenancies in Petitioners' housing rental business. The case, *sub judice*, concerns the 2014 loss of Petitioners' private tenancy of Haley Dye and Carlos Solis (tenants collectively, "Tenants Dye"). The loss of this tenancy came on the heels of an already ever-growing list—pattern—of Petitioners' housing tenancies lost at the hands of Respondents. App. 77-79 para. 28 (pleading a slew of lost tenancies).

The egregious nature of the violations committed against Petitioners—stemming from Respondents' causes of Petitioners' lost tenancies—is informed by a prior case Petitioners brought before the Ninth Circuit in *Konarski v. City of Tucson,* Case No. CV 4:11-00612-TUC-LAB (D. Ariz.), *rev'd in part,* 599 Fed. Appx. 652, 653-654 (9th Cir. 2015) (No. 12-

17703) ("Baltazar Personal Vendetta-Revelation Case"). The remanded and currently ongoing Baltazar Personal Vendetta-Revelation Case concerns Petitioners' 2010 losses of Section 8 Housing tenancies, including particularly the loss of the Section 8 Housing tenancy of Bonita Baltazar.

What was revealed in the Baltazar Personal Vendetta-Revelation Case that is informative of the instant Tenants Dye case is this: Ms. Baltazar, a then-Section 8 Housing tenant of Petitioners, as shown below, publicly revealed in a city council meeting that a city administrator of Respondents gave her a new monetary housing voucher to use elsewhere other than at Petitioners' housing rental business because the said administrator would not allow her (and other tenants) to continue to reside as a Section 8 Housing tenant at Petitioners' inspection-passed housing rental due to the said administrator's admission of harboring a "'**personal vendetta**'" with Petitioners. *Konarski*, 599 Fed. Appx. at 653-654 (emphasis added).



—Screen-grab of video recording: Bonita Baltazar revealing "'personal vendetta'" admission of Respondents' city administrator. http://www.youtube.com/watch?v=Fg7gmOk6cno[1,2]

This personal vendetta-driven local governance revelation by Ms. Baltazar was video recorded, the screen-grab (and video recording link) of which is shown above. Based on this video recorded

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[1] Source: Pls.' Opening Br. 28-29, *Konarski*, 599 Fed. Appx. 652 (9th Cir. 2015) (No. 12-17703).

[2] *See Papasan v. Allain, 478 U.S. 265, 268 n.1 (1986); Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006) ("We may take judicial notice of court filings and other matters of public record.") The reference to the public document/item is provided for a contextual purpose; it is not made a part of the appendix because it is not absolutely essential for this Court's requested certiorari determination.

revelation, the Ninth Circuit reversed the dismissal of Petitioners' Fourteenth Amendment class-of-one equal protection claim of the Baltazar Personal Vendetta-Revelation Case, and remanded it back to the District Court. *Konarski,* 599 Fed. Appx. at 653-654.

On remand—despite her being brought to tears in the midst of being not only disparaged but also deftly threatened by Respondent legal counsel James Stuehringer with "prison" time[3] during her deposition—Ms. Baltazar refused to recant the truth of her receipt of the admitted personal vendetta-driven governance towards Petitioners. In fact, Ms. Baltazar—in taking the opportunity the Ninth Circuit effectively gave her to speak out on the disastrous state of local governance—bravely doubled down on the validity of the Ninth Circuit's previously considered personal vendetta evidence: She testified her receipt of the personal vendetta-driven governance admission was a "hundred percent" true, and that receiving such an admission actually "blew" her away.[4] In response to Ms. Baltazar's shedding light on the personal vendetta-driven governance towards Petitioners, Respondents audaciously expanded such unlawful governance, going so far as to openly (and more aggressively) target Petitioners'

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[3] Doc. 226 at 7 (citation omitted), *Konarski,* Case No. CV 4:11-00612-TUC-LAB (D. Ariz.), 599 Fed. Appx. 652 (No. 12-17703). *See also* n.2, *supra* (for non-essential contextual purpose).

[4] *E.g.*, Doc. 226-1 at 59 (citation omitted), *Konarski,* Case No. CV 4:11-00612-TUC-LAB (D. Ariz.), 599 Fed. Appx. 652 (No. 12-17703). *See also* n.2, *supra* (for non-essential contextual purpose).

remaining tenant clientele: *private/non*-Section 8 Housing tenants—like Tenants Dye.

As can be discerned from the above, generally, the harm Petitioners have encountered is Respondents' unsanctioned and repugnantly improper use of public monetary vouchers as personal pawns in a personal war to interfere with Petitioners' housing rental business.

As civilized business people, Petitioners have availed themselves to the court system via their attorney's taking legal action on their behalf to address such harm done to them, and recently in Petitioners' instant Tenants Dye case, but Petitioners' constitutional right to pursue legal action, per se—one regarded as a civil man's fundamental right that is the "alternative of force," and "the right conservative of all other rights, and lies at the foundation of orderly government" in a civilized society, *Chambers v. Baltimore & Ohio Railroad*, 207 U.S. 142, 154 (1907)—has come to also be thwarted with an injunction against Petitioners all without due process owed to them.

The questions now before this Court emanate from the Ninth Circuit's opinion that conflicts with its prior precedents, and those of its sister circuits and this Court concerning such subjects.

B. Case Facts

As alleged in the complaint, Respondents' targeting of Petitioners' private tenancy of Tenants Dye followed how Petitioners' other private tenancies have similarly been the subject of what amounts to be a concerted boycott pattern and practice by

Respondents: Respondents bribe existing private tenants of Petitioners with the receipt of monetary housing vouchers (i.e., monetary incentives) of the Section 8 Housing Program attached with the specific instructions that such vouchers be used at housing rental businesses of Respondents' preference, and other than Petitioners'. App. 73-77 paras. 22-27. If such tenants initially refuse to breach their secured private housing rental transactions with Petitioners, they are threatened by Respondents that they will lose out on the financial incentives. App. 73-74 para. 23; App. 76-77 para. 26; App. 108 para. 63. Respondents also help facilitate the move-in process of funneling such tenants into select housing units other than Petitioners' under this scheme—all in spite of Respondents' knowing, *in advance*, that such tenants have previously established private housing rental transactions with Petitioners. App. 75 para. 24; App. 95-96 para. 44(e). This is what occurred with Petitioners' tenancy of Tenants Dye. App. 81-105 paras. 33-58.

In fact, Respondents' intentionally causing Tenants Dye to boycott and breach their secured private housing rental business transaction with Petitioners occurred even after Tenants Dye sought to apply their monetary housing voucher towards their continued tenancy at Petitioners' housing unit (App. 81-82 paras. 33-34); Petitioners, in an effort to mitigate Respondents' boycott interference, made clear they were willing to accept Tenants Dye's application of the monetary housing voucher in order to continue the tenancy of such tenants (from a private tenancy to now a subsidized tenancy of the

Section 8 Housing program via the application of the monetary housing voucher), particularly since Petitioners had shown to be *qualified* to rent to another Section 8 Housing tenant (App. 82-87 paras. 35-41); and Petitioners had issued at least eleven (11) cease-and-desist legal notices to Respondents in Petitioners' attempt to prevent Respondents from causing the loss of the private tenancy of Tenants Dye (App. 71 para. 18; App. 87-88 para. 43; App. 96-97 para. 45; App. 99-100 para. 50; App. 135 para. 109; App. 139-140 para. 114). Respondents remained undaunted by any threat of legal consequences (App. 71 para. 18; App. 96-99 paras. 45-49; App. 139-140 para. 114), and, along with Respondents' having issued another (2nd) monetary housing voucher to Tenants Dye—Respondents issued and maintained the explicit instructions to such tenants to ensure they would boycott Petitioners' housing rental business: **(i)** that the additional monetary housing voucher be applied towards a housing unit other than Petitioners', and **(ii)** that if it were not applied per such instructions, they would lose the offered financial benefits (App. 84-86 paras.39-40).

As it did with the tenancy of Tenants Dye, this scheme creates the anticompetitive effect of having Petitioners' private tenants **(i)** breach their previously secured private housing rental transactions with Petitioners and **(ii)** become a part of the artificially created influx of prospective tenants who re-enter the rental market to find housing units from Respondents' select landlords. App. 73-75 paras. 22-24; App. 107-109 paras. 62-66. These select landlords benefit, through no initial

action of their own, from such an influx, all at the expense of Petitioners' lost private tenancies. *Id.* The loss of the private tenancy of Tenants Dye became one of the many private tenancies Petitioners have lost because of this boycott scheme. App. 77-80 paras. 28-29 (list of some other private tenancy losses).

Based on the foregoing summary of circumstances, an attorney for Petitioners filed the instant case's complaint on their behalf in the District Court. App. 57-149. The complaint encompasses various state and federal claims against Respondents, the following federal claims of which were dismissed: special hybrid per se violations of the Sherman Act (15 U.S.C. § 1) (for Respondents' unlawful restraint of commerce business) ("Hybrid *Per se* Sherman Act Claim"); violations of the Commerce Clause (Article I, Section 8, Clause 3 of the U.S. Constitution; pursued under 42 U.S.C. § 1983) ("Commerce Clause Claim"); and violations of the Fourteenth Amendment Substantive Due Process Clause (pursued under 42 U.S.C. § 1983) ("Substantive Due Process Claim"). The complaint came before a judge of the District Court with whom Petitioners had an extra-judicial and intra-judicial history.[5]

Initiated by Respondents' motion, the District Court dismissed the said federal claims of the complaint pursuant to FRCP Rule 12(b)(6). App. 14-

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[5] *See* Pls.' Opening Br. 15-34, *Konarski*, 716 Fed. Appx. 609 (9th Cir. Nov. 28, 2017) (No. 16-15476). *See also* n.2, *supra* (for non-essential contextual purpose).

51. The District Court so dismissed under the said rule's legal standard of assuming "'all the allegations in the complaint [were] true (even if doubtful in fact)'" and based on its interpretation of the applicable law. App. 19 (Order (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

As part of their strategy, Respondents also filed a motion to declare Petitioners vexatious and restrict their ability to file new legal actions, on the basis of, *inter alia*, Petitioners' ongoing litigation. The District Court discarded the content of Respondents' said motion because of the assertions that it contained glaring misrepresentations, and, instead—*sua sponte* and *without* prior notice to Petitioners—substituted such content with its own to declare Petitioners vexatious business litigants and issue a pre-filing instructions order against them. App. 52-53 (Order ("vexatious-business litigant injunction")).

Petitioners appealed the FRCP Rule 12(b)(6) dismissal of the said federal claims and the issuance of the vexatious-business litigant injunction to the Ninth Circuit, which affirmed based on its own determinations of the law. Such Ninth Circuit determinations of the law are now subject to review after it denied Petitioners' request for panel rehearing and petition for en banc review.[6]

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[6] While it has no bearing on the significant legal issues before this Court—like the legal issue of whether a housing rental business is a part of the federally protected domain of interstate commerce—the Ninth Circuit was previously led to incidentally make erroneous factual determinations, to include erroneously

C. Federal Jurisdiction in the Court of First Instance

The court of original instance, the District Court, had jurisdiction under 15 U.S.C. §§ 15 and 26, and 28 U.S.C. § 1331 and §§ 2201-2202.

D. Reasons for Granting Petition

I. Case law conflicts: The Ninth Circuit opinion errs in *failing* to recognize a housing rental business is sufficiently a part of the federally protected domain of interstate commerce—exponentially leading to the denial of Petitioners' federal claims.

The Ninth Circuit opinion fails to recognize that Petitioners' housing rental transactions are activities that are well within the federally protected

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asserting that Petitioners were "barred" from acting as Section 8 Housing landlords, when that is certainly not true. App. 3; *see* App. 86-87 para. 41. In an effort to cease the use of the court system to further perpetuate such an inflammatory falsehood, Petitioners underscore how such an assertion can be empirically discerned as false: The act of barring/debarring a landlord from the Section 8 Housing program is a public one in the sense that it is exclusively pursued by HUD (*see* 24 C.F.R. § 982.306), and not Respondents as municipal actors, via due process that takes the established form of what is known as the federal Excluded Parties List System ("EPLS") (also known as the federal government's System for Award Management ("SAM")), per 2 C.F.R. § 2424, et seq. As can be discerned from the publicly accessible EPLS database, Petitioners have never been on the EPLS, having never been disbarred, suspended or otherwise subjected to any prohibitive-directive by the federal government (including HUD).

domain of interstate commerce, and, as such, exponentially errs in affirming the dismissal of their federal claims. App. 9-12. This recognition failure conflicts with legal precedent.

Indeed, the Ninth Circuit opinion acts in contravention of a plethora of case law: It fails to observe prior cases of the Ninth Circuit (and sister circuit courts), like *United States v. Lamont*, 330 F.3d 1249 (9th Cir. 2003), that expressly make it clear "rental property is ***per se*** **sufficiently** connected to interstate commerce," *id.* at 1258 n.10 (emphasis added) (citing *United States v. DiSanto*, 86 F.3d 1238, 1248 (1st Cir. 1996)). With such contravention, the opinion inherently defies this Court's declaration of long ago that the rental of real property "**unquestionably**" substantially affects interstate commerce to the extent that the U.S. Congress has the power to "regulate individual activity within th[e] class" of rental activity. *Russell v. United States*, 471 U.S. 858, 862 (1985) (emphasis added).

Corroborating this interstate commerce nature of housing rental businesses like Petitioners', the U.S. Congress passed and applied to such businesses the Fair Housing Act, as amended (42 U.S. Code § 3601, *et seq.*), on the very basis of the Commerce Clause (Article I, Section 8, Clause 3) of the U.S. Constitution. *E.g., Oxford House-C v. City of St. Louis*, 77 F.3d 249, 251 (8th Cir. 1996); *Morgan v. HUD*, 985 F.2d 1451, 1455 (10th Cir. 1993); *Seniors Civil Liberties Ass'n v. Kemp*, 965 F.2d 1030, 1034 (11th Cir. 1992); and *Groome Resources, Ltd. v. Parish of Jefferson*, 234 F.3d 192, 195 (5th Cir. 2000). In the same vein of protecting interstate commerce,

housing rental units are also federally protected by a federal arson statute. 18 U.S.C. § 844(i). There are other, ever-increasing reminders that Petitioners' housing business has a legally substantial connection to interstate commerce: In the course of this case, and at the direction of the U.S. Congress, HUD publicly issued its April 2016 housing guide that revised how landlords, like Petitioners, should engage in housing rental transactions with prospective tenants who have a criminal history, all relative to HUD's expanded interpretation of the Fair Housing Act, as amended.[7] *See also, e.g., Groome Resources, Ltd.*, 234 F.3d at 200-205.

As such, it need not be belabored more that appellate courts have understood "both the commercial and interstate nature of renting real property," that it is "**clear that renting...housing for commercial purposes implicates the federal commerce power**." *Groome Resources, Ltd.*, 234 F.3d at 207 (emphasis added) (citing *Russell* and *Jones v. United States*, 529 U.S. 848 (2000)). *See United States v. Mahon*, 804 F.3d 946, 951-952 (9th Cir. 2015) (finding apartments as part of a recognized entity that "actively engages in interstate commerce or activity that affects interstate commerce," being "inherently commercial").

Yet, in spite of all this case law that has long cemented housing rental businesses like Petitioners' as substantially linked to—are *per se* a part of—

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[7] *See* Pls.' Opening Br. 42-47 and Reply Br. 23-25, *Konarski*, 716 Fed. Appx. 609 (9th Cir. Nov. 28, 2017) (No. 16-15476). *See also* n.2, *supra* (for non-essential contextual purpose).

interstate commerce, the Ninth Circuit opinion shows itself as dismissive of such a long-established stance in the course of denying the viability of Petitioners' federal claims: **(1)** Hybrid *Per se* Sherman Act Claim; **(2)** Commerce Clause Claim; and **(3)** Substantive Due Process Claim. Although these three federal claims are, *nota bene*, viable independent of each other, they are all dependent on the foregone legal recognition that the opinion completely disregards: Petitioners' housing rental business is legally engaged in the federally protected domain of interstate commerce.

1. In contradicting precedent by disregarding the *per se* interstate commerce identity of Petitioners' housing rental business, the Ninth Circuit opinion *errs* in finding the Hybrid *Per se* Sherman Act Claim is not plausibly viable.

a. Background.

The Sherman Act prohibits unreasonable restraint of commerce: "If the purpose be unlawful it may not be carried out even by means that otherwise would be legal; and although the purpose be lawful it may not be carried out by criminal or unlawful means." *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 465-466 (1921). Here, a *per se* violation of the Sherman Act is pled in Respondents' bad-faith exercise of commerce restraint via their acting as a municipality alongside private actors—an exercise that is legally considered a "'hybrid' restraint on trade." *Xcaliber Int'l Ltd., LLC v. Edmondson*, No.

04-CV-0922-CVE-PJC, 2005 U.S. Dist. LEXIS 43890, at *22 (N.D. Okla. Apr. 5, 2005) (citation omitted).

The complaint pleads a plausible hybrid *per se* Sherman Act violation (App. 105-111) that encompasses what Respondents self-designate as a "unilateral municipal action":[8] **(i)** Respondents' action obviates the need for other landlords to act on their own to create the anticompetitive scheme of their improperly receiving an influx of Petitioners' existing private tenants/customers, like Tenants Dye, whom Respondents coerce to knowingly withdraw their patronage from (and knowingly breach their existing private rental transactions with) Petitioners' qualified housing rental business to so funnel them to such other landlords—Respondents' so coercing via their misuse of the Section 8 Housing program's monetary housing vouchers by offering and then threatening the loss of such incentives to such private tenants/customers if they continue to patronize Petitioners' housing rental business; and **(ii)** Respondents' action lacks state action immunity, *id.* at *22-27 (citations omitted), particularly given its unsanctioned poaching of Petitioners' clientele tied to existing transactions (state statute, A.R.S. § 41-621(L)(2), prohibits insuring government agents who breach transactions (App. 109 para. 66)), and despite Petitioners' demonstrated and pled housing qualification to rent to Section 8 Housing tenants

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[8] Defs.' Doc. 60 at 5:12-13, *Konarski,* No. CV 4:14-02264-TUC-JGZ (D. Ariz. Mar. 18, 2016), *aff'd,* 716 Fed. Appx. 609 (9th Cir. Nov 28, 2017) (No. 16-15476). *See also* n.2, *supra* (for non-essential contextual purpose).

who receive such vouchers (like Petitioners' then-Section 8 Housing tenant Marina Duran (App. 86-87 para. 41)).

b. Case law-conflict exponential error of Ninth Circuit opinion: failing to recognize that Respondents' offending unilateral municipal action—however local it is—is still subject to Sherman Act preemption because it targets Petitioners' *per se* interstate commerce housing rental operation.

The Ninth Circuit opinion correctly notes that interstate commerce activity can take place in one state and need not take place among several states to be afforded protection of the Sherman Act. App. 110. However, it errs when it narrowly looks to solely Respondents as local municipal agents—and not Petitioners' housing rental business as a *per se* interstate commerce business. App. 111. Such an erroneously narrow consideration leads the opinion to wrongfully find the non-existence of the element of legally appreciable amount of interstate commerce needed to trigger the Sherman Act protection, to wit:

> [Petitioners'] pleadings fail to indicate how [Respondents'] purely local activities are related to interstate commerce. [Respondents'] alleged interference with their tenants does not, without more, have any impact or effect

> on interstate commerce, let alone a substantial effect.

Id. (citing *United States v. ORS, Inc.*, 997 F.2d 628, 629 (9th Cir. 1993); 15 U.S.C. § 1.). To reach this erroneous finding of law, the Ninth Circuit opinion violates *stare decisis*, and its citation to legal authority like *ORS, Inc.* does nothing to avert this error.

First, again, the opinion erroneously denies the legally recognized *per se* interstate commerce identity of Petitioners' housing rental business. *See* case law (on interstate commerce recognition), *supra*. The opinion incontrovertibly makes this erroneous denial of the *per se* interstate commerce identity because it proceeds to expressly state that Petitioners "fail to indicate how [Respondents'] purely local activities are related to interstate commerce." App. 111. To find the appreciable interstate commerce link, there was no reason to look beyond Petitioners' housing rental business.

Second, as a result of failing to recognize the *per se* interstate commerce identity of Petitioners' housing rental business, the opinion exponentially errs in failing to appreciate this: The *per se* Sherman Act was plausibly violated when Respondents' offending unilateral municipal action interfered with and caused the losses of what are *per se* interstate commerce housing rental transactions, like the loss of the private tenancy of Tenants Dye—regardless of how "purely local" Respondents' offense, itself, may be. In other words, the local nature of an actor's offending action is not what matters—it is the interstate commerce target of that offense that

matters. (In this case, the interstate commerce target is Petitioners' *per se* interstate commerce housing rental transactions.) Courts have come to this conclusion in citing to the precedent of this Court, to wit:

> The activities being restricted in the present case need only take place in interstate commerce and there is **no** requirement for a showing that the challenged regulation itself substantially affects interstate commerce.

Anheuser-Busch, Inc. v. Goodman, 745 F. Supp. 1048, 1054 (M.D. Pa. Sept. 21, 1990) (emphasis added) (citing *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232, 245 (1980)). Thus, the local nature of Respondents' offending action, itself, is irrelevant. With this understanding, the opinion clearly fails to appreciate this: that Respondents' offending unilateral municipal action is preempted by the Sherman Act not because it is alleged it is an action that, itself, substantially affects interstate commerce, but solely because its target is Petitioners' interstate commerce activities that are not only legally recognized as taking part in "substantially" affecting interstate commerce, *Russell,* 471 U.S. at 862—they are, in fact, "*per se*" sufficiently connected to interstate commerce," *Lamont,* 330 F.3d at 1258 n.10. *See also United States v. Gomez,* 87 F.3d 1093, 1096 (9th Cir. 1996) (finding the renting of housing "*per se* substantially affects interstate commerce").

Such an erroneous failure of the opinion is significant. It defies the fundamentals of recognized

interstate commerce protection. It requires us to harken back to the established foundational finding that interstate commerce domain protection reaches even the purely local nature of an offender at a brick farmhouse in the outskirts of an Ohio city, as found in the story of *Wickard v. Filburn*, 317 U.S. 111 (1942). The Ninth Circuit applied *Wickard* in the *Gomez* case to affirm the federal conviction of an offender's setting fire to a small apartment building—clearly illustrating this point: Even a single instance of *per se* interstate commerce housing rental activity is federally protected—despite the local nature of the offender's action—because such a single instance is looked upon in a legally assigned aggregate sense when it comes to commercial activity like house renting. *Gomez*, 87 F.3d at 1095 (citing, *e.g., Wickard*, 317 U.S. at 127-128). Suffice it to say, the Ninth Circuit opinion here fails to acknowledge cases like *Gomez*.

Be it the localized arson offense in violation of the Organized Crime Control Act of 1970 (18 U.S.C. 1961, *et seq.*), *see, e.g., Gomez*, the localized housing discrimination offense in violation of the Fair Housing Amendments Act of 1988, *see, e.g., Groome Resources, Ltd.*, or the instant matter of the Respondents' localized offending unilateral municipal action in violation of the Sherman Act, *e.g., Xcaliber Int'l Ltd., LLC*—each single, local offense comes within the purview of legally offending the federal domain of interstate commerce because of the aggregate factor, or otherwise the Commerce Clause (Article I, Section 8, Clause 3) of the U.S. Constitution (and all of such emanating legislative

acts) would be legally impotent it, to say the least.

From this legally required assigned aggregate perspective, the opinion's "purely local" offense of Respondents directed at Petitioners' *per se* interstate commerce housing rental operation is an offense that actually could plausibly be preempted by the Sherman Act, and, thus, the FRCP Rule 12(b)(6) pleading stage dismissal of the Hybrid *Per se* Sherman Act Claim is in error of established precedent.

2. In contradicting precedent by disregarding the *per se* interstate commerce identity of Petitioners' housing rental business, the Ninth Circuit opinion *errs* in finding the Commerce Clause Claim is not plausibly viable.

a. Background.

While the Sherman Act protects competition *per se*, the Commerce Clause under a 42 U.S.C. § 1983 action, on the other hand, protects the actual participants in the domain of interstate commerce—Petitioners' individual interests. *Dennis v. Higgins*, 498 U.S. 439, 446-449 (1990). The complaint pleads a plausible Commerce Clause violation by Respondents. App. 111-116.

b. Case law-conflict exponential error of Ninth Circuit opinion: failing to properly apply the *Pike* test to the circumstance of *per se* interstate commerce housing rental operations like Petitioners' to realize that Respondents' unilateral municipal action violates the Commerce Clause.

The Ninth Circuit opinion erroneously finds no valid Commerce Clause Claim on this basis, to wit:

> [Petitioners] failed to explain how [Respondents'] decision to provide Section 8 [monetary vouchers] to [Petitioners'] tenants favored in-state economic interests over out-of-state interests, or incidentally burdened interstate transactions.

App. 11-12 (citing *Kleenwell Biohazard Waste and Gen. Ecology Consultants, Inc. v. Nelson,* 48 F.3d 391, 395 (9th Cir. 1995)). To reach this erroneous finding of law, as before, the Ninth Circuit opinion violates *stare decisis,* and its citation to *Kleenwell* does nothing to avert this error. While, in citing to *Kleenwell,* the opinion implicitly refers to some of the factors of the relevant *Pike* test originally found in *Pike v. Bruce Church, Inc.,* 397 U.S. 137,142 (1970), it fails to properly apply the said test that is used to determine whether a government's action is lawful, as explained below.

First, before the *Pike* test is addressed, preliminarily it must be noted that, yet again, the opinion erroneously fails to acknowledge the legally recognized *per se* interstate commerce identity of Petitioners' housing rental business. *See* App. 10-12. *See also* case law (on interstate commerce recognition), *supra*.

Second, even assuming *arguendo* the opinion does consider the *Pike* test with respect to housing rental businesses' being a *per se* part of interstate commerce, it still falls short: As quoted above, the opinion does not fully apply all the factors of the *Pike* test, particularly its legitimacy factor. In relevant part of the *Pike* test, Respondents' unilateral municipal action would need to "effectuate **(i)** a legitimate local public interest, and **(ii)** its effects on interstate commerce [would have to be] only incidental [in order to] be upheld unless the burden imposed on such commerce [would] clearly [be] excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142 (brackets and emphasis added). These factors, discussed below, make clear the Ninth Circuit opinion errs in denying the Commerce Clause Claim.

(i) Error: failing to realize no legitimate interest.

In violating the standard of needing to consider Petitioners' pled facts "as true" and "most favorabl[y] to [them]," *Chubb Custom Ins. Co. v. Space Sys.*, 710 F.3d 946, 956 (9th Cir. 2013), and inherently needing to infer, where possible, "that the [Respondents] [are] liable,'" *Faulkner v. ADT Sec.*

Servs., 706 F.3d 1017, 1019 (9th Cir. 2013) (citation omitted), and being misled by Respondents—the Ninth Circuit opinion improperly cleanses Respondents' offending unilateral municipal action free of its illegitimacy: In improperly infusing legitimacy in "provid[ing] Section 8 [monetary vouchers] to [Petitioners'] tenants," App. 11, *inter alia*, the opinion omits Respondents' said action's pled illegitimate/bad-faith characteristic (App. 79-80 paras. 29-30 (Compl.)) shown in various ways—shown in its *forcing* tenants like Tenants Dye to go to other landlords with such vouchers (App. 72-79 paras. 20-28) *irrespective* of the fact that such vouchers could be applied toward continued tenancy at Petitioners' housing units since Petitioners have been *qualified* to maintain voucher-based tenancies (App. 86-87 para. 41); shown in its knowingly *defying* the state public policy statute that disapproves interference with commerce transactions (App. 109 para. 66; App. 139-140 para. 114); shown in its knowingly *defying* cease-and-desist notices to stop commerce interference (*see, e.g.*, App. 71 para. 18; App. 99-100 paras. 50-51); shown in its scheme of intentionally *delaying* Petitioners' response to the interference so that the full effect of the then-latest tenancy interference could take place (App. 84-85 paras. 38-39); and shown in its being fueled by the said program's "'personal vendetta'" governance and intention to run Petitioners out of business (App. 77-80 paras. 27-30).

While "[s]pecific facts are not necessary," *Erickson v. Pardus*, 551 U.S. 89, 93 (2007), the Complaint plausibly pleads the illegitimacy of

Respondents' said action, which the opinion disregards. Given that Respondents' said action cannot surpass the legitimacy factor of the *Pike* test, it is unlawful. *See Pike*, 397 U.S. at 142.

(ii) Error: alternatively, failing to realize excessive commerce burden (and lesser-impact alternative).

Even assuming *arguendo* that Respondents' unilateral municipal action could be wholly legitimate, it is invalid because of its nature of causing excessive burdens—knowingly and inherently causing interferences with and losses of *per se* interstate commerce housing rental transactions without limitation to any *per se* interstate housing rental business under the thumb of Respondents. *See* App. 72-79 paras.20-28.

The opinion fails to appreciate how the supposedly legitimate interest of Respondents' said action "**could be promoted...with a lesser impact on interest activities.**" *Pike*, 397 U.S. at 142 (emphasis added). One lesser-impact example: requiring Respondents' said municipal action to observe (and discontinue interference with) the natural duration of existing *per se* interstate commerce housing rental transactions and—**only after the natural expiration** of such transactions—issue monetary vouchers to tenants that Respondents desire such tenants to use elsewhere. This observance would also put Respondents' said action in line with state public

policy that prohibits commerce interference. *See, e.g.,* App. 109 para. 66. Respondents' said action violates the Commerce Clause because it eschews this lesser-impact alternative. *Pike*, 397 U.S. at 142.

3. In contradicting precedent by disregarding the *per se* interstate commerce identity of Petitioners' housing rental business, the Ninth Circuit opinion *errs* in finding the Substantive Due Process Claim is not plausibly viable.

a. Case law-conflict exponential error of Ninth Circuit opinion: failing to recognize that Respondents' unilateral municipal action violates Petitioners' substantive right to freely engage in interstate commerce, and failing to recognize deliberate-indifference test that plausibly establishes such a violation.

The complaint pleads a plausible Substantive Due Process violation. App. 116-122. Yet, the Ninth Circuit opinion erroneously finds no valid Substantive Due Process Claim on this basis, to wit:

> [Petitioners'] pleadings do not show how [Respondents'] conduct deprived them of life, liberty, or property, or explain how its behavior could be considered "conscience-shocking."

App. 12 (citing *Brittain v. Hansen*, 451 F.3d 982, 991 (9th Cir. 2006)). To reach this erroneous finding of law, as before, the Ninth Circuit opinion violates *stare decisis*, and its citation to *Brittain* does nothing to avert this error. *Brittain* is, in fact, inapposite to this case's circumstances.

First, before addressing the likes of *Brittain*, preliminarily it must be noted that, yet again, the opinion erroneously fails to acknowledge the legally recognized *per se* interstate commerce identity of Petitioners' housing rental business. *See* App. 10-12. *See also* case law (on interstate commerce recognition), *supra*.

Second, the opinion conflicts with precedent in two other respects discussed below.

(i) Error: failure to recognize substantive right.

The Ninth Circuit opinion fails to recognize Petitioners' substantive right to freely engage in interstate commerce. *Dennis*, 498 U.S. at 446-449; *Dickerson v. Bailey*, 87 F. Supp. 2d 691, 695 (S.D. Tex. 2000) (finding "fundamental liberty of interstate commerce"), *aff'd*, 336 F.3d 388 (5th Cir. 2003); *City of Hugo v. Nichols*, 656 F.3d 1251, 1257 (10th Cir. 2011) (finding the "substantive right" to freely engage in interstate commerce (citing *Dennis*, 498 U.S. 439)); *Wolkind v. Selph*, 495 F. Supp. 507, 516 (E.D. Va. 1980) ((finding substantive rights "are 'fundamental or 'implicit' in the concept of ordered liberty," thus being afforded substantive due process protection) (citation omitted)). *See* App. 116-121 paras. 77-87.

(ii) Error: failure to recognize deliberate-indifference test.

Inapposite to *Brittain*'s case circumstances, the Ninth Circuit opinion fails to recognize Respondents here are not police officers and that, as such, they had the time to reflect on and opportunities to cease the pursuit of their complained-of action—thus making them subject to the requisite "deliberate indifference" test. *Tatum v. Moody*, 768 F.3d 806, 820-821 (9th Cir. 2014) (citation omitted). This test legally confirms such action of theirs as plausibly what can "'shock[] the conscience,'" *id.*: Respondents are plausibly pled to have been deliberately indifferent to the harm they would cause Petitioners, including the denial of the freedom to engage in *per se* interstate commerce housing rental transactions.

Specifically, Respondents are pled to have knowingly disregarded the state public policy statute that disapproves commerce interference (e.g., App. 109 para. 66) and—furthermore—eleven (11) cease-and-desist legal notices (including case law in such notices) (App. 71 para. 18; App. 87-88 para. 43; App. 96-97 para. 45; App. 98 para. 48; App. 99-100 para. 50; App. 135 para. 109; App. 139-140 para. 114), as they pressed forward to knowingly interfere with Petitioners' interstate commerce business and cause the latest loss of a *per se* interstate commerce housing rental transaction (e.g., App. 70-71 para. 17; App. 79-80 para. 29; App. 98-99 para. 48), all as a matter of a pattern and practice (App. 72-105 paras.

20-58).[9]

II. Case law conflicts: The Ninth Circuit opinion errs in denying the vacatur of the vexatious-business litigant injunction.

The Ninth Circuit opinion erroneously affirms the vexatious-business litigant injunction. App. 8-9. The basis for the affirmation is flawed—**(1)** it fails to acknowledge the lack of actual notice and opportunity, **(2)** it fails to acknowledge this amounts to a lack of due process that, legally, makes the vexatious-business litigant injunction invalid.

1. The Ninth Circuit opinion *errs* in failing to acknowledge the lack of actual notice and opportunity.

The Ninth Circuit opinion obscures and otherwise omits these facts: Respondents filed their vexatious-business litigant motion that Petitioners identified as being plagued with falsifications and

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[9] Incidentally, the opinion, again, makes an error: It erroneously finds that Petitioners "sued [Respondents] for engaging in activities that are authorized by law...." App. 12. The erroneousness of this finding is in the opinion's omission that Respondents' unilateral municipal action of interfering with Petitioners' *per se* interstate commerce housing rental as plausibly unlawful and illegitimate/done in bad faith (App. 79-80 para. 29 (Compl.))—unlawful in terms of state policy as a state statute makes clear no governmental actor should be insured from liability for commerce interference (e.g., App. 109 para. 66), unlawful in terms of means (App. 72-79 paras. 20-28; App. 86-87 para. 41), and unlawful in terms of personal vendetta-driven intent (App. 77-80 paras. 27-30) (*see, e.g., Perry v. Brown*, 671 F.3d 1052, 1101 (9th Cir. 2012) ("'animosity...is not a legitimate...interest" (citation omitted))).

misrepresentations. In turn, as opposed to denying or striking the vexatious-business litigant motion (and thus putting an end to the vexatious-business litigant injunction request), the District Court—unexpectedly—in the actual vexatious-business litigant injunction simultaneously informed Petitioners for the **first time** that it had declared Petitioners vexatious after **discarding** the content of Respondents' vexatious-business litigant motion (App. 52-53), and (**without prior notice**) venturing *sua sponte* in its own "factual summary" expedition (App. 53) to determine Petitioners vexatious.

No notice and opportunity was given to Petitioners to address the District Court's *de fact sua sponte* vexatious-business litigant injunction (based on the District Court's aforesaid expedition that substituted the discarded content) before it was issued. (The Ninth Circuit opinion confusingly states Petitioners "declined" a hearing opportunity, but that hearing declination pertained to only Respondents' *per se* vexatious-business litigant motion given its prima facie flaws—**not** the District Court's separate and independent expedition-based vexatious 'finding.' App. 8.)

2. The Ninth Circuit opinion *errs* in failing to vacate the vexatious-business litigant injunction as a matter of law given the lack of due process.

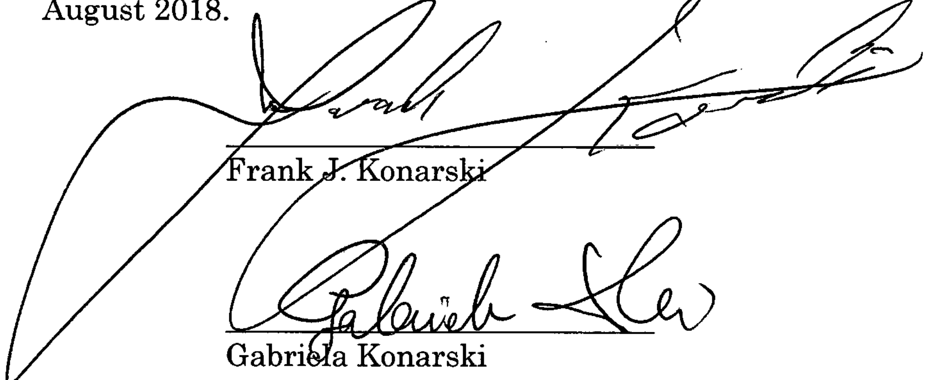
Even if the District Court thought that Petitioners "richly deserved" the vexatious-business litigant injunction issued against them, they were

still owed the due process protection of notice and opportunity. *In re Deville*, 280 B.R. 483, 498 (9th Cir. BAP 2002). This is particularly so because the District Court's content substitution of Respondents' vexatious-business litigant motion with its own ventured findings made the vexatious-business litigant injunction a *de fact sua sponte* order, requiring, before its issuance, the "indispensable perquisite" issuance of a show-cause order, *Lasar v. Ford Motor Co.*, 399 F.3d 1101, 1109 (9th Cir. 2005), to inform Petitioners of the District Court's own findings and allow Petitioners to prepare a defense particularly relative to what the District Court gathered from its point of view, *Tom Growney Equip. v. Shelley Irrigation Dev.*, 834 F.2d 833, 835-837 (9th Cir. 1987). *See Lasar,* 399 F.3d at 1110; *In re Soo Hyun Cha,* BAP NO. CC-07-1027-MoDMc, 2007 Bankr. LEXIS 4932, at *15-20 (9th Cir. BAP Aug. 16, 2007); *Weissman v. Quail Lodge, Inc.*, 179 F.3d 1194, 1197-1200 (9th Cir. 1999). With the lack of such due process for an injunction that is considered "extreme remedy" for which "particular caution" be taken, the vexatious-business litigant injunction must be vacated. *De Long v. Hennessey,* 912 F.2d 1144, 1147 (9th Cir.1990).

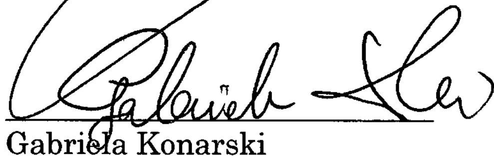
CONCLUSION

Wherefore, for all the reasons presented above, Petitioners request the grant of their petition for writ of certiorari, and that ultimately the Ninth Circuit opinion be reversed.

RESPECTFULLY SIGNED this 27th day of August 2018.

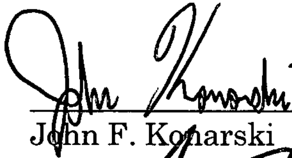


Frank J. Konarski



Gabriela Konarski

Patricia Konarski



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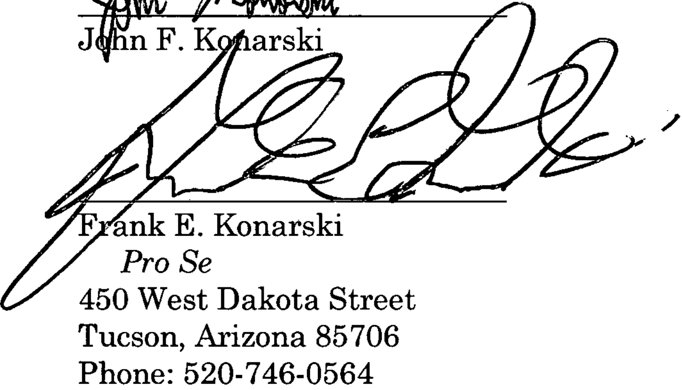

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