No. 22-648

In the Supreme Court of the United States

Igor Lukashin,

Petitioner

v.

U.S. Court of Appeals for the Ninth Circuit,

Respondent

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

PETITIONER'S SUPPLEMENTAL BRIEF

Igor Lukashin, *pro se*

PO Box 2002
Bremerton, WA 98310
(360) 447-8837

Table of Contents

Table of Authorities

Pursuant to Sup. Ct. R. 15.8, Lukashin files this supplemental brief, including to inform the Court of developments in CA9 proceedings below, No. 22-80034, since December 16, 2022.

"*Padgett* fraud" continues in the Ninth Circuit

The Ninth Circuit continued to engage in "*Padgett* fraud", *see* QP 1, 2, by applying a purportedly categorical waiver / forfeiture rule[1] against *pro se* appellants. *See Carr v. IRS*, No. 21-17100, p. 2 (9th Cir. Jan. 25, 2023) (mem.)[2]; *Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009) is quoted in 12 *pro se* appellants' dispositions[3], including *Carr*, Graber-Paez-Nguyen panel decided January 25–27, 2023.

But, that rule conflicts with *Malgesini v. Malley*, No. 22-15625, p. 3 (9th Cir. Jan. 31, 2023) (mem.) (Gould-Rawlinson-Bress panel; discretion to consider an argument raised for the first time on appeal) and *Babbitt v. Afework*,

---

[1] General version of the alleged rule reads: "We do not consider matters not specifically and distinctly raised and argued in the opening brief, or arguments and allegations raised for the first time on appeal."

[2] Lukashin's Cir. R. 36-4 publication request filed 02/01/2023, subject to pre-filing review order (PRO), CA9 No. 22-80034 DE: 46.

[3] https://bit.ly/3ygaZvM

No. 18-56576, p. 2 (9th Cir. Jan. 31, 2023) (Kleinfeld-Nguyen-Bade panel withdrew 8/10/2020 memorandum and filed a replacement, after ordering supplemental briefing to address this Court's *BP* opinion, 141 S.Ct. 1532 (2021)).

Calloway v. Davis, No. 21-16638, p. 2 (9th Cir. Feb. 7, 2023) (mem.), in a *pro se* prisoner appeal, also categorically (and incorrectly) claimed, "Any issues raised for the first time on appeal are waived. *See United States v. Carlson*, 900 F.2d 1346, 1349 (9th Cir. 1990)." *But compare Bradley v. Village of University Park*, No. 22-1903, pp. 11–14, 19–21 (7th Cir. Feb. 03, 2023) (CA7 waiver rule; discussing when an appellate court may entertain issues raised for the first time on appeal)[4]. *Cf. also Nyberg v. Portfolio Recovery Assoc.*, No. 17-35315 (9th Cir. Mar. 8, 2023) (reaching lack-of-Article-III-standing issue raised for the first time on appeal).

In *Wentworth v. Mission Vista High School*, No. 22-55566, p. 2 (9th Cir. Feb. 24,

---

[4] Lukashin previously attempted to notify CA9 and this Court of these additional authorities by filing a FRAP 28(j) letter (DE: 48) below and sending this Court a copy; but proper procedure in this Court is to file a supplemental brief, Sup. Ct. R. 15.8.

2023)[5] (mem.), as well as seven other *pro se* appeals decided February 23–24, Fernandez-Friedman-H.A. Thomas ("FFT") panel applied[6] variations of the purported *Padgett* rule.

Yet, just two days earlier, this Court disagreed that an argument was "forfeited" in *Bartenwerfer v. Buckley*, No. 21-908, p. 4 n. 2 (U.S. Feb. 22, 2023), observing: "Bartenwerfer's current argument ... is "fairly included" within that question and her position in the lower courts. Supreme Court Rule 14.1(a); *Yee v. Escondido*, 503 U. S. 519, 534 (1992)."

But cf. Helix Energy Solutions Group, Inc. v. Hewitt, No. 21-984, p. 7 n. 2 (U.S. Feb. 22, 2023) ("But Helix did not raise that argument in the courts below. Following our usual practice, we therefore decline to address its merits. *See, e.g., Kingdomware Technologies, Inc. v. United States*, 579 U. S. 162, 173 (2016)"

Plus, this Court, on 1/13/2013, granted certiorari in *Dupree v. Younger*, No. 22-210, on an issue-preservation question. Granting certiorari herein will help ensure uniformity of general waiver / forfeiture rules across all

---

[5] Lukashin's Circuit Rule 36-4 publication request filed February 25, 2023, subject to PRO, CA9 No. 22-80034, DE: 49.

[6] https://bit.ly/3JjPr7K

federal appellate courts and litigants, the rules even this Court appears to apply inconsistently, *see Bartenwerfer* and *Helix Energy, supra.*

Just last week, in *Bittner v. United States*, No. 21-1195, p. 10 & n. 5 (U.S. Feb. 28, 2023), this Court's majority observed:

> Here, the government has repeatedly issued guidance to the public at odds with the interpretation it now asks us to adopt. And surely that counts as one more reason yet to question whether its current position represents the best view of the law...
>
> It is simply that, when the government (or any litigant) speaks out of both sides of its mouth, no one should be surprised if its latest utterance isn't the most convincing one. (portion omitted)

When the Ninth Circuit applies a categorical waiver / forfeiture rule to thousands of *pro se* appeals, while recognizing the power of circuit precedent via the prior-panel rule and applying actual discretionary rule in published, counseled cases, the Ninth Circuit "speaks out

of both sides of its mouth," *Bittner*[7], *supra*, so granting review is warranted here.

As *Dupree* oral argument is set for 4/24/2023, the Court may consider GVRing the petition herein for further proceedings in light of the forthcoming *Dupree* opinion. *Cf.* just-issued GVR in *Burns v. Arizona*, No. 21-847 (U.S. Mar. 6, 2023) (citing *Cruz v. Arizona*, 598 U.S. ___ (2023)). Notably, petition in *Burns* was filed 11/22/21 and distributed for conference on March 18 and 25, 2022, as well as March 3, 2023, with a year-long gap likely due to pending proceedings in *Cruz*[8].

CA9 reaffirms *Molski* & *Ringgold-Lockhart* standard in two vexatious-litigant cases

In *Garcia v. Beck*, No. 22-15594 (9th Cir. Feb. 13, 2023)[9] (mem.) ("*LCS II*") McKeown-Bybee-Bumatay panel affirmed the denial of a request for sanctions and to declare the plaintiff there a vexatious litigant, observing:

---

[7] Cited by Judge Bumatay's dissent in ***Seaview Trading, LLC v. CIR***, No. 20-72416, p. 20 (9th Cir. Mar. 10, 2022)(en banc)

[8] No. 21-846, decided February 22, 2023

[9] Lukashin's Circuit Rule 36-4 publication request filed February 13, 2023, subject to PRO, CA9 No. 22-80034, DE: 48.

> "[T]he simple fact that a plaintiff has filed a large number of complaints, standing alone, is not a basis for designating a litigant as 'vexatious.'" *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1061 (9th Cir. 2007).

Notably, the decision below being reviewed, *Garcia v. Beck*, No. 21-cv-04575-CRB (N.D. Cal. Nov. 15, 2021) ("*LCS I*"), stated, in part:

> Defendants do not nearly come close to establishing that Garcia is a vexatious litigant. *See Fink v. Gomez*, 239 F.3d 989, 994 (9th Cir. 2001) (sanctions appropriate for "frivolousness, harassment, or an improper purpose.")...Garcia does not deny that he is an ADA tester... The Ninth Circuit has recognized that "[f]or the ADA to yield its promise of equal access for the disabled, it may indeed be necessary and desirable for committed individuals to bring serial litigation advancing the time when public accommodations will be compliant with the ADA." *Molski*, 500 F.3d at 1062. ADA testers can still be vexatious litigants, just like any litigant can be. But Defendants have failed to demonstrate

> that Garcia's cases generally are—or that this case in particular is—meritless, harassing, or improper...
>
> For the same reasons the Court will not deem Garcia a vexatious litigant, it will not sanction Garcia's counsel "for their actions of filing thirty-one complaints against Alameda County business, including Lola's, for harassment purposes to extort early settlement without any intention of litigation on the merits."... Garcia and his counsel are permitted to bring ADA cases. (portions omitted)

Lukashin's "disability" is proceeding as a *pro se* nonlawyer and seeking relief that's explicitly allowed by a rule (requesting publication) to bring about removal of a barrier ("*Padgett* fraud") that hinders *pro se* nonlawyer appellants' access to fair adjudication of their cases in the Ninth Circuit Court of Appeals.

In *Wentworth*, *supra*, while also engaging in *Padgett* fraud, and providing a boilerplate, generic discussion, FFT panel stated, in part:

> Wentworth appeals pro se from the district court's order declaring her a vexatious litigant and entering a pre-

> filing review order against her...We review for an abuse of discretion. *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1056 (9th Cir. 2007). We affirm.
>
> The district court did not abuse its discretion in declaring Wentworth to be a vexatious litigant and entering a pre-filing review order against her after providing notice and an opportunity to be heard, developing an adequate record for review, making substantive findings as to frivolousness, and narrowly tailoring the order to prevent abusive litigation conduct. *See Ringgold-Lockhart v. County of Los Angeles*, 761 F.3d 1057, 1062 (9th Cir. 2014) (setting forth the requirements the district court must consider before imposing pre-filing restrictions).

Compare *cert.* pet.[10] QP 2 and discussion at 1–2, 6–8, 9,11–12, referencing *Ringgold-Lockhart* and *Molski*, while also claiming CA9 failed to follow its own circuit precedent in the vexatious-litigant proceedings against Lukashin[11].

---

[10] https://bit.ly/3JjPgt5

[11] See cert. pet. App. 1–6, at https://bit.ly/3JiejwG

In March, CA9 denied permission to proceed with seven publication requests

On March 2, Lukashin was notified by email at 9:03, 10:05, and 10:05 a.m. (DE: 50, 51, and 52), that permission to proceed was denied for Nos. 21-16434 and 21-35781, No. 21-55504, and No. 21-55502. Orders are reproduced in the Supplemental Appendix ("Sup. App.")

Nelson v. Arizona Department of Economic Security, No. 21-16434 (9th Cir. Sept. 20, 2022) (mem.) and *Collins v. West*, No. 21-35781 (9th Cir. Sept. 27, 2022) were decided by the same O'Scannlain-Rawlinson-Owens panel. Lukashin requested publication due to alleged "*Padgett* fraud" issue on 9/20/22 and 9/30/22.

Sundby v. Marquee Funding Group, Inc., No. 21-55504 (9th Cir. Oct. 3, 2022) (mem.), decided by Wallace-Fernandez-panel majority, rejected Judge Silverman's claim in dissent that a specific non-jurisdictional "argument has been waived," creating an apparently novel exception from "our general rule", as "interests of other trust beneficiaries may be adversely affected by a layperson's spurious legal musings." Lukashin requested publication on 10/7/2022.

Lukashin requested publication of *Bryant v. City of Pomona*, No. 21-55502 (9th Cir. Sept.

21, 2022) (mem.) the day it was issued, focusing on leave-to-amend matters and also referencing *Morris v. State of California*, No. 21-16059 (9th Cir. Jul. 22, 2022) (mem.)[12], noting conflict with the approach in Lukashin's *pro se* appeals decided in 2015 (see cert. pet. at 5 n. 5), including unsupported assertions that amendment would have been futile.

The three March 2, 2023 orders denying permission to proceed with publication requests are nearly identical to those in App. 6–10, likewise failing to provide Lukashin with any meaningful notice as to why specifically CA9 denied permission to proceed. A substantial delay of about four months in issuing those pre-filing review orders also denies Lukashin the opportunity to incorporate CA9's substantive guidance in his future publication requests.

Lukashin also filed publication requests, subject to the PRO, in *LCS II*, *Wentworth* and *Carr*, *supra*, as well as *Hundley v. Aranas*, No. 21-15757 (9th Cir. Jan. 12, 2023) (focusing on alleged amendment futility and not dismissing a *pro se* once-amended complaint without leave to amend).

---

[12] Permission to proceed with a publication request denied 9/23/22, *see* App. 10

Yet CA9 denied permission to proceed in *LCS II*, *Carr*, and *Hundley* on March 8, at 11:37, 11:38, and 11:40 a.m. by orders identical but for a case number, Supp. App. 1–3.

Unless this Court intervenes by granting certiorari, this clearly unconstitutional practice, denying Lukashin a meaningful notice (PRO by its terms applies **only** when Lukashin attempts to file a document in a case where he is **not** (yet) a party), as required by Due Process, see cert. pet. at 9–11, citing *Richard Johnson*, pp. 57, 60, (now available as ***Johnson v. Ryan***, 55 F.4th 1167, 1199, 1200 (9th Cir. 2022)).is likely to continue.

Lukashin understands CA9 may deny permission to proceed with documents filed subject to the PRO, but just like in *Richard Johnson*, 55 F. 4th at 1200, Lukashin

> may or may not have violated the criteria for [being allowed to proceed], but the [court] officials making that decision should make informed decisions—and the record available to us does not specify whether [Lukashin] was made aware of the allegations against him. Without notice of the evidence against him, [Lukashin] could not meaningfully

respond and his hearing could not constitute an informed one.

Notably, all six (!) March 2023 orders denying permission to proceed were entered by the same "Deputy Clerk: MCD" according to email notifications Lukashin received from CA9.

This Court granted review in *Arizona v. Mayorkas*, No. 22-592 (intervention issue)

In *Arizona*, this Court construed an emergency application for stay[13] filed 12/19/2022 as a petition for certiorari and granted it, when the States sought to intervene after federal defendants stopped vigorously defending a legal rule.

In his cert. pet., at 6, 13–14, Lukashin urged this Court to consider "whether *pro se* non-party nonlawyer *proposed* intervenors are able to present their different views in the appellate courts... on an issue of law."

Granting the petition herein could complement the issue in *Arizona* by considering intervention not only by a State, but also by a *pro se* litigant, and developing a general rule.

---

[13] https://bit.ly/3L4lI8z

Conclusion

Schexnayder v. Vannoy, 140 S. Ct. 354, 355 (U.S. 2019) (Sotomayor, J.), cited in QP 1, discussed an appellate court's "secret, 13-year policy of "summarily denying *pro se* appeals" where "courthouse staff prepared rulings that judges signed "without so much as a glance"... or any review of the applications' merits."

Based on Lukashin's own petitioning activity, painstaking daily review of CA9's published *and unpublished* opinions over many years, as well as most recent clerk orders in No. 22-80034, Lukashin believes and asserts a similar policy is in play in the Ninth Circuit.

While *Padgett* fraud is an easily visible huge tip of the iceberg, "the magnitude of a legal wrong is no reason to perpetuate it,"*McGirt v. Oklahoma*, 140 S. Ct. 2452, 2480 (U.S. 2020).

This Court should grant certiorari to remedy Due Process and Equal Protection violations, ban CA9 from "speaking out of both sides of its mouth," as well as ensure **all** *pro se* litigants are treated fairly in the Ninth Circuit. Otherwise, CA9 will keep producing void decisions, *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367, 1371 (2010) (a judgment is void if it is premised "on a violation

of due process that deprives a party of notice or the opportunity to be heard").

Dated: March 10, 2023

s/ Igor Lukashin
PO Box 2002, Bremerton, WA 98310
(360) 447-8837 igor_lukashin@comcast.net

Supplemental Appendix