Supreme Court, U.S.
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No. 08-38

In The

Supreme Court of the United States

JAREK MOLSKI, THOMAS E. FRANCOVICH,
THOMAS E. FRANCOVICH
a Professional Law Corporation,

Petitioners,

v.

EVERGREEN DYNASTY CORPORATION,
D/B/A MANDARIN TOUCH RESTAURANT,

Respondent.

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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QUESTION PRESENTED

Jarek Molski and his attorney, Thomas E. Francovich, were declared vexatious litigants and precluded from filing further suits under Title III of the Americans with Disabilities Act, 42 U.S.C. §12101, et seq., or under state laws, without prior approval of the United States District Court for the Central District of California. This sanction was imposed based on the number of prior lawsuits that they had filed complaining of places of public accommodation not being accessible to those with disabilities, even though their District Court and the Ninth Circuit recognized that most (if not all) of the prior suits were meritorious. This sanction was imposed by the District Court without an evidentiary hearing ever being held to determine whether any, let alone many or most, of the prior suits had been frivolous or contained false allegations. This decision thus raises the question:

Whether a federal district court may deem a litigant or an attorney to be vexatious litigants and preclude the filing of future lawsuits without express permission from the district court when there was no determination that the prior lawsuits were meritless and no evidentiary hearing to ascertain whether the prior suits were frivolous or contained false allegations.

PARTIES TO THE PROCEEDING

Petitioner Jarek Molski was the plaintiff in the action below and Thomas E. Francovich (and Thomas E. Francovich a Professional Law Corporation) was his attorney. They were parties to the proceedings below, and subject to the court order being challenged in this petition. They were appellants in the United States Court of Appeals for the Ninth Circuit.

Evergreen Dynasty Corporation, d/b/a Mandarin Touch Restaurant, was the defendant in the district court proceedings and appellee in the United States Court of Appeals for the Ninth Circuit.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Thomas E. Francovich a Professional Law Corporation has no parent corporation and no publicly listed company holds more than 10% of its stock.

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The order of the United States District Court for the Central District of California declaring Jarek Molski and Thomas Francovich "vexatious litigants" and precluding them from filing further lawsuits under Title III of the Americans with Disabilities Act without prior permission of the court is reported at 347 F.Supp.2d 860 (C.D. Cal. 2004) and is reprinted at App. 71. The order of the United States District Court for the Central District of California dismissing this lawsuit is reported at 385 F.Supp.2d 1042 (C.D. Cal. 2005) and is reprinted at App. 39.

The decision of the United States Court of Appeals for the Ninth Circuit affirming the District Court's orders is reported at 500 F.3d 1047 (9th Cir. 2007) and is reprinted at App. 1.

Finally, the Order of the United States Court of Appeals denying rehearing and rehearing en banc is reported at 521 F.3d 1215 (9th Cir. 2008) and is reprinted at App. 91. Nine judges on the Ninth Circuit, including Chief Judge Kozinski, dissented from the denial of en banc review and their opinion is included with this Order.

STATEMENT OF JURISDICTION

The Ninth Circuit's order denying the petition for en banc review, with nine judges of that court dissenting, was issued on April 7, 2008 (and modified on

April 22, 2008). This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution provides, in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for redress of grievances."

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

The All Writs Act, 28 U.S.C. §1651(a) provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

STATEMENT OF THE CASE

Jarek Molski, along with co-plaintiff Disability Rights Enforcement, Education Services: Helping You Help Others ("DREES"), a non-profit corporation, sued Mandarin Touch Restaurant and Evergreen Dynasty Corporation for violating Title III of the Americans with Disabilities Act, 42 U.S.C. §12101, et

seq., which prohibits discrimination against individuals with disabilities in places of public accommodation. The plaintiffs also raised state law claims. The plaintiffs sought injunctive relief, attorneys' fees and costs, and damages. Molski was represented by Thomas Francovich.

Shortly after the defendants answered the complaint, Mandarin Touch and Evergreen Dynasty filed a motion for an order (1) declaring Molski a vexatious litigant; (2) requiring Molski to obtain the court's permission before filing any more complaints under the ADA; and (3) imposing monetary sanctions against Molski and his attorney, Frankovich. In a published order, the district court granted the motion in part, declaring Molski a vexatious litigant and granting the defendants' request for a pre-filing order. *Molski v. Mandarin Touch Rest.*, 347 F.Supp.2d 860, 868 (C.D. Cal. 2004). App. 71.

Three months later, the district court issued a published memorandum decision regarding that order to show cause. *See Molski v. Mandarin Touch Rest.*, 359 F.Supp.2d 924 (C.D. Cal. 2005). The district court imposed a pre-filing order on the Frankovich Group similar to the order that it had imposed on Molski. On August 31, 2005, the district court, in a third published order, granted the defendants summary judgment on Molski's ADA claim and dismissing the lawsuit. *Molski v. Mandarin Touch Rest.*, 385 F.Supp.2d 1042 (C.D. Cal. 2005). App. 39.

On September 13, 2005, Molski and DREES filed their notice of appeal. On August 31, 2007, the United States Court of Appeals for the Ninth Circuit affirmed the orders of the District Court. 500 F.3d 1047 (9th Cir. 2007). App. at 1. On April 7, 2008, the Ninth Circuit denied rehearing and rehearing en banc. Nine judges of the court, including Chief Judge Alex Kozinski, dissented from the denial of en banc review. App. 91.

STATEMENT OF FACTS

Jarek Molski is paralyzed from the chest down and is confined to a wheelchair. He frequently travels and often is forced to deal with restaurants and other public accommodations that are not equipped to accommodate individuals with disabilities, despite federal and state laws requiring such accommodations. His response is often to sue such establishments to ensure their compliance with the law. He has filed about 400 lawsuits in the federal courts within the districts in California.

Molski's amended complaint alleged that he stopped at the Mandarin Touch Restaurant in Solvang, California on January 25, 2003. After finishing his meal, Molski decided to use the restroom. Molski was able to pass through the narrow restroom door, but there was not enough clear space to permit him to access the toilet from his wheelchair. Molski then exited the restroom, and in the course of doing so, got

his hand caught in the restroom door, "causing trauma" to his hand.

Asserting claims under the ADA and California law, Molski, along with co-plaintiff Disability Rights Enforcement, Education Services: Helping You Help Others ("DREES"), a non-profit corporation, sought injunctive relief, attorneys' fees and costs, and damages. Specifically, the complaint sought "daily damages of not less than $4,000/day . . . for each day after [Molski's] visit until such time as the restaurant is made fully accessible" as well as punitive damages and pre-judgment interest. The amended complaint named as defendants Mandarin Touch Restaurant, Evergreen Dynasty Corp., and Brian and Kathy McInerney.[1]

The defendants answered the complaint, but then filed a motion to have Molski and his counsel, Thomas Francovich, declared vexatious litigants and to require prior court approval for them to file further complaints in federal court under the Americans with Disabilities Act or state law. The District Court granted this motion.

The District Court held no evidentiary hearing. Chief Judge Kozinski, in his dissent from the denial of en banc review, describes the procedure followed by the District Court in coming to its conclusion:

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[1] The claims against Brian and Kathy McInerney were dismissed below and they are no longer parties to this proceeding.

> [T]he docket indicates (somewhat misleadingly) that a "hearing" was held on the vexatious litigant motion, but it plainly was not an evidentiary hearing. What happened instead is this: The judge spent the first half of the hearing berating Molski and his lawyers, in pretty much the same terms as his subsequent order – which suggests that his views were cast in cement by the time of the "hearing." Compare Excerpts of Record (ER) 1094 ("After examining plaintiff's extensive collection of lawsuits. . . ."), and ER 1097 ("The Court simply does not believe that Molski suffered 13 identical injuries generally to the same part of his body, in the course of performing the same activity, over a five-day period."), with *Mandarin Touch Restaurant*, 347 F.Supp.2d at 864 ("After examining Plaintiff's extensive collection of law suits. . . ."), *and id.* at 865 ("The Court simply does not believe that Molski suffered 13 nearly identical injuries, generally to the same part of his body, in the course of performing the same activity, over a five-day period."). After the judge was done, Molski's counsel was allowed to address the court, ER 1102-06, but no witnesses testified, no evidence was presented, there was no cross-examination and there were no evidentiary rulings – in short, there was no trial. Molski, whose veracity the district court impugned, was not even present.

App. 104-05.

Instead, the District Court focused on the number of lawsuits that Molski and Francovich had filed and the fact that the complaints in these cases were essentially identical. The district court first noted that Molski had an extensive history of litigation. 347 F.Supp.2d at 864. The District Court concluded that the allegations in Molski's numerous and similar complaints were "contrived and not credible." *See id.* The court stressed that Molski often filed multiple complaints against separate establishments asserting that Molski had suffered identical injuries at each establishment on the same day. *Id.* at 865. The district court pointed out that Molski had filed thirteen separate complaints for essentially identical injuries allegedly sustained during one five-day period in May 2003. In particular, Molski had alleged that, at each establishment, he injured his "upper extremities" while transferring himself to a non-ADA-compliant toilet. *See id.* at 864-65. The district court said that it "simply [did] not believe that Molski suffered 13 nearly identical injuries." *Id.* Relying on its inherent power to levy sanctions, the district court ordered that the Frankovich Group, as presently constituted, and as it may hereafter be constituted, including shareholders, associates and employees, is required to file a motion requesting leave of court before filing any new complaints alleging violations of Title III of the Americans with Disabilities Act in the United States District Court for the Central District of California.

Although the District Court precluded Molski and Francovich from filing further lawsuits for disability discrimination without the permission of the court, it never found that any of the lawsuits were meritless or frivolous. Quite the contrary, both the Ninth Circuit and the District Court acknowledged that most of Molski's claims and Francovich's suits were meritorious. 500 F.3d at 1062 ("We acknowledge that Molski's numerous suits were probably meritorious in part – many of the establishments he sued were likely not in compliance with the ADA."); *Molski v. Mandarin Touch Rest.*, 347 F.Supp.2d 860, 865 (C.D. Cal. 2004) ("It is possible, even likely, that many of the businesses sued[by Molski] were not in full compliance with the ADA.") The District Court concluded that the orders were justified because of the number of prior lawsuits that Molski and Francovich had filed and what it believed to be false allegations in the complaints.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE STATES AND CIRCUITS AND AN ISSUE OF NATIONAL IMPORTANCE AS TO WHETHER AN INDIVIDUAL OR AN ATTORNEY MAY BE DECLARED A "VEXATIOUS LITIGANT" AND PRECLUDED FROM FILING FURTHER LAWSUITS WITHOUT COURT PERMISSION IN THE ABSENCE OF AN EVIDENTIARY HEARING AND A FINDING THAT THEY HAD FILED NON-MERITORIOUS LAWSUITS.

This case squarely and clearly presents the question of whether and under what circumstances a federal district court may declare a person or a lawyer to be a vexatious litigant and limit their ability to file future lawsuits. Every Circuit has ruled on this and they have articulated different and often conflicting standards. *See, e.g., Copeland v. Green*, 949 F.2d 390 (11th Cir. 1991); *Tripati v. Beaman*, 878 F.2d 351 (10th Cir. 1989); *Martin-Trigina v. Lavien*, 737 F.2d 1254 (2d Cir. 1984); *In re Oliver*, 682 F.2d 443 (3d Cir. 1982); *Green v. Warden*, 699 F.2d 364 (7th Cir. 1983); *In re Green,* 669 F.2d 779 (D.C. Cir. 1981); *In Re Hartford Textile Corp.*, 659 F.2d 299 (2d Cir. 1981), *cert. denied,* 455 U.S. 1018 (1982); *Green v. White*, 616 F.2d 1054 (8th Cir. 1980); *Harrelson v. United States*, 613 F.2d 114 (5th Cir. 1980); *Gordon v. United States Department of Justice*, 558 F.2d 618 (1st Cir. 1977); *Graham v. Riddle*, 554 F.2d 133 (4th Cir. 1977). There

are countless district court decisions considering whether an individual is a vexatious litigant and considering restrictions on the filing of future lawsuits.

Never, however, has this Court considered the circumstances and procedures which permit a district court to declare an individual or a lawyer a vexatious litigant and restrict that person's access to the courts. This Court has been emphatic that the First Amendment right to "petition the Government for a redress of grievances" – which includes the filing of lawsuits – is "one of the most precious of the liberties safeguarded by the Bill of Rights." *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 524 (2002) (quoting *United Mine Workers v. Illinois Bar Assn.*, 389 U.S. 217, 222 (1967)). Consequently, a determination that a litigant has repeatedly filed frivolous and harassing lawsuits directly implicates his or her First Amendment interest in access to the courts. Indeed, where an individual's use of the courts is declared abusive or baseless, "the threat of reputational harm[,] ... different and additional to any burden posed by other penalties," is alone sufficient to trigger First Amendment concerns. *See id.* at 530.

Moreover, a restriction on the ability of a litigant or a lawyer to have access to the courts, as was imposed in this case, strikes at the heart of due process of law. This Court has explained that "[t]he due process clause requires that every man shall have the protection of his day in court." *Truax v. Corrigan*, 257 U.S. 312, 332 (1921). Thus, this Court has observed

that access to the courts is "the right conservative of all other rights, and lies at the foundation of orderly government." *Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907).

In the absence of guidance from this Court, the Circuits have adopted conflicting approaches to determining whether a person can be deemed a vexatious litigant. The most important disagreement – and one that is squarely presented in this case – is whether a district court must find that the prior lawsuits were frivolous and without merit in order to issue an order precluding further lawsuits. Several Circuits have expressly held that a litigant may be limited in filing future lawsuits only if there is an express finding that he or she had filed frivolous suits. For example, in *Procup v. Strickland*, 792 F.2d 1069 (11th Cir. 1986) (en banc), the Eleventh Circuit allowed restrictions on the ability of a pro se litigant to bring suits without any attorney. The Court of Appeals stressed that the individual, a prisoner serving a life sentence, had "engaged in ridiculously extensive litigation," having filed 176 cases. The Court of Appeals stressed that "most have been frivolous." *Id.* at 1070.

Likewise, the Third Circuit has allowed restrictions on litigants' access to the courts only on a finding that the individual had filed a significant number of meritless lawsuits. *In re Oliver*, 682 F.2d 443 (3rd Cir. 1982). The Third Circuit has ruled that a judge should not in any way limit a litigant's access to the courts absent "exigent circumstances, such as a

litigant's continuous abuse of the judicial process by filing meritless and repetitive actions." *Brow v. Farrelly*, 994 F.2d 1027, 1038 (3d Cir. 1993). The Fourth Circuit has cited this test approvingly and applied it, requiring a finding of frivolousness to justify limiting the filing of lawsuits. *Cromer v. Kraft Foods North America, Inc.*, 390 F.3d 812, 818 (4th Cir. 2004) (noting the finding that the litigant had filed "frivolous" suits).

In sharp contrast, other Circuits have held that a finding of frivolousness is not a requirement in order to impose restrictions on the filing of further lawsuits. The Second Circuit has declared that a history of litigation entailing "vexation, harassment and needless expense to [other parties]" and "an unnecessary burden on the courts and their supporting personnel" is enough. *Matter of Hartford Textile Corp.*, 681 F.2d 895, 897 (2d Cir. 1982), *cert. denied*, 459 U.S. 1206 (1983).

The Second Circuit has articulated a five-part test for determining whether a litigant may be restricted in filing further lawsuits. *Safir v. United States Lines, Inc.*, 792 F.2d 19, 24 (2d Cir. 1986). The District Court in this case expressly invoked and relied upon this test in prohibiting Molski and Francovich to file further suits without express court permission. 347 F.Supp.2d at 864. App. 79. The Second Circuit's test pointedly excluded any need to find that the prior suits were non-meritorious or frivolous. The five factors in the Second Circuit's test – and used by the District Court in this case – are:

(1) the litigant's history of litigation and in particular whether it entailed vexatious, harassing, or duplicative suits; (2) the litigant's motive in pursuing the litigation, for example, whether the litigant had a good faith expectation of prevailing; (3) whether the litigant is represented by counsel; (4) whether the litigant has caused unnecessary expense to the parties or placed a needless burden on the courts; and (5) whether other sanctions would be adequate to protect the courts and other parties. *Safir*, 792 F.2d at 724.

The Ninth Circuit in this case expressly cited and relied upon the *Safir* test. App. 21. Nowhere did it engage in an analysis of whether Molski's or Francovich's prior lawsuits were frivolous or meritless. Quite the contrary, the Ninth Circuit declared: "We acknowledge that Molski's numerous suits were probably meritorious in part – many of the establishments he sued were likely not in compliance with the ADA." App. 30-31.

Thus, the split among the Circuits could not be clearer. The First, Third, Fourth, and Eleventh Circuits would have required a finding that Molski's and Francovich's prior suits were meritless in order to justify a restriction on future access to the court. Under this standard, the order imposed in this case would not have been allowed. Indeed, another District Court within the Ninth Circuit denied a motion to have Molski declared a vexatious litigant on the ground that his lawsuits were meritorious. *Molski v. Rapazzini Winery*, 400 F.Supp.2d 1208 (N.D. Cal. 2005). But under the standard used by the Ninth

Circuit in this case, and by the Second Circuit, the sanction could be imposed on the litigant and the lawyer without any finding that the suits lacked merit.

A closely related question is procedural in nature: must there be an evidentiary hearing to determine whether the prior suits lacked merit? As Chief Judge Kozinski stressed in his dissent from the denial of en banc review, Molski and Francovich never received any evidentiary hearing to determine whether they had filed non-meritorious suits. App. 105.

Whether such an evidentiary hearing is required is particularly important in this case. The District Court and the Ninth Circuit both concluded that Molski and Francovich had made false factual statements based on the fact that the complaints in many cases contained the same factual allegations. Chief Judge Kozinski stressed the lack of anything in the record of this case, because there had not been an evidentiary hearing, to support this conclusion:

> The bottom line is this: The district court made, and the panel affirms, a finding that Molski is a liar and a bit of a thief, without any evidence at all. The district court and the panel also manage to find that plaintiff just couldn't have suffered the injuries he alleges, without the benefit of an expert or any other proof. But does the district court have authority to make findings that severely curtail access to the federal court, not only for plaintiff but also for his lawyers

> and their other clients (present and future), without swearing in a single witness? Without giving notice and an opportunity to present evidence? Without cross-examination? Without any of the other rudiments of due process? Isn't Molski at least entitled to get on the stand, look the judge in the eye and tell his story?

App. 106.

Moreover, Judge Berzon, in her dissent from the denial of en banc review which was joined by eight other judges, explained that the similarity of the allegations did not show that they were false.

> But the similarity of these injuries alone does not lead to the conclusion that the allegations are patently false. First, as the panel concedes, '[b]ecause many of the violations Molski challenged were similar, it would have been reasonable for Molski's complaints to contain similar allegations of barriers to entry, inadequate signage, and so on.' In addition, Molski provided a reasonable explanation for the similarity of his injuries and the injurious nature of seemingly small acts.

App. 97-98.

There is no dispute that Molski filed a large number of lawsuits against places of public accommodation that were not in compliance with the law and not accessible to individuals with disabilities. Francovich was his attorney in filing many of these

cases. Molski and Francovich saw themselves as playing a key role in enforcing the law. There also is no dispute – and the Ninth Circuit concedes – that most (and maybe all) of their lawsuits had merit. App. 24.

Thus, this case poses a question of national significance – never before faced by this Court – may a litigant and a lawyer have their access to the federal courts drastically limited without a finding that they had filed frivolous or meritless lawsuits and without an evidentiary hearing? This Court should grant certiorari to decide this question of national importance that constantly recurs in trial courts across the country.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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