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

REPLY TO EVERGREEN DYNASTY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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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.

It is striking that the Opposition to Certiorari filed by Evergreen Dynasty Corporation does not deny the need for this Court to grant review to resolve a conflict among the Circuits and an issue of national importance that constantly arises: what is the legal standard for determining whether a person may be deemed a vexatious litigant and greatly restricted in his or her ability to seek redress in the federal courts? Specifically, must a federal court hold an evidentiary hearing and make a finding that the individual has filed frivolous or non-meritorious lawsuits in order to deem a person or a lawyer to be a vexatious litigant?[1]

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[1] Petitioners agree that Brian McInerney, Kathy S. McInerney are no longer parties to this lawsuit. The sole Respondent is thus Evergreen Dynasty Corporation, d/b/a Mandarin Touch Restaurant.

It is important to emphasize all of the areas in which there is no disagreement between the parties in this case. These areas of apparent agreement – as to the state of the law and as to the facts of this case – make it clear why certiorari is appropriate.

1. There is no dispute that restrictions on access to the courts – such as those imposed on petitioners Jarek Molski and his attorney, Thomas Francovich – implicate the fundamental First Amendment right to petition government for redress of grievances and the Fifth Amendment's right to due process of law. *See, e.g., BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 524 (2002) (citation omitted) (the First Amendment right to "petition the Government for a redress of grievances" – which includes the filing of law-suits – is "one of 'the most precious of the liberties safeguarded by the Bill of Rights'"); *Truax v. Corrigan*, 257 U.S. 312, 332 (1921) ("[t]he due process clause requires that every man shall have the protection of his day in court").

2. There is no dispute that Jarek Molski and Thomas Francovich have had their ability to file lawsuits greatly restricted by the District Court's deeming them vexatious litigants and requiring that they receive advance permission before filing future lawsuits for disability discrimination. Indeed, Respondent Evergreen Dynasty Corporation declares in its Brief in Opposition to Certiorari: "Simply put, the Orders at issue before this Court put Molski and the Francovich Group out of business." Brief in Opposition to Certiorari at 4.

3. Most importantly, there is no dispute among the parties that this is an issue that constantly arises in the federal courts and that there is a split among the Circuits as to the standard to be used in determining whether a person is a vexatious litigant. district courts across the country constantly face this question of when they may declare a person or a lawyer to be a vexatious litigant. As explained in the Petition for a Writ of Certiorari, virtually every Circuit has articulated a test and they vary greatly.

To be specific, several Circuits have held that a person can be deemed a vexatious litigant only if there is a finding that he or she had filed non-meritorious, frivolous lawsuits. *Cromer v. Kraft Foods North America, Inc.*, 390 F.3d 812, 818 (4th Cir. 2004); *Brown v. Farrelly*, 994 F.2d 1027, 1038 (3d Cir. 1993); *Procup v. Strickland*, 792 F.2d 1069 (11th Cir. 1986) (en banc); *Gordon v. United States Department of Justice*, 558 F.2d 618 (1st Cir. 1977).

But other Circuits, such as the Ninth Circuit in this case and the Second Circuit, have held that there need not be a finding that a person had filed non-meritorious, frivolous suits in order to find the person to be a vexatious litigant. *See, e.g., In re Hartford Textile Corp.*, 681 F.2d 895, 897 (2d Cir. 1982), *cert. denied*, 459 U.S. 1206 (1983) (a person can be deemed a vexatious litigant if he or she places "an unnecessary burden on the courts and their supporting personnel"); *Safir v. United States Lines, Inc.*, 792 F.2d 19, 24 (2d Cir. 1986) (articulating test for finding a vexatious litigant, but not requiring that there be a

finding that the individual filed non-meritorious suits).

In fact, the Ninth Circuit in this case expressly acknowledged that the lawsuits by Molski and Francovich were likely meritorious. It stated: "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." Appendix to Petition for Certiorari at 30-31.

Thus, under the approach used by the First, Third, Fourth, and Eleventh Circuits, Molski and Francovich could not have been deemed vexatious litigants, even though they filed many lawsuits, because their claims were meritorious. But under the approach used in the Second and Ninth Circuit they could be barred because they filed a large number of lawsuits, often for events occurring over a short period of time. Simply put, the disagreement is over whether civil rights litigants who file a large number of suits challenging discriminatory practices may be deemed vexatious litigants even if their suits are largely or even entirely meritorious.

4. No evidentiary hearing ever was held on whether the lawsuits filed by Molski and Francovich were non-meritorious. Nor was there ever a finding that these suits were non-meritorious. This was the point that ten judges on the Ninth Circuit made in their dissent from the denial of en banc review. *See* Appendix to Petition for Certiorari at 97-98 (Berzon,

J., dissenting from the denial of en banc review); at 106 (Kozinski, C.J., dissenting from the denial of en banc review).

Respondent Evergreen Dynasty Corporation quotes at length from the District Court opinion that Molski and Francovich filed a large number of lawsuits, often for events that occurred on the same days or within a few days of each other. Respondent argues that Molski and Francovich thus received "due process" because the District Court concluded that they were vexatious litigants. Brief in Opposition to Certiorari at 8. But Respondent entirely misses the point: Molski and Francovich were found to be vexatious litigants without an evidentiary hearing on whether their suits were frivolous and without any finding that their suits were meritless. The District Court clearly disapproved of litigants and lawyers using the courts in this way, even if they were filing meritorious lawsuits to enforce civil rights laws, and concluded that Molski and Francovich were vexatious litigants.

But as Judge Kozinski noted in his dissent from the denial of en banc review, "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." Appendix to Petition for Certiorari at 106.

There is no dispute that Molski and Francovich filed a large number of lawsuits. Molski saw himself as a crusader for the rights of the disabled and if he

found restaurants that were not in compliance with the law, he and his attorney, Francovich, filed lawsuits. Sometimes he visited more than one restaurant in a day. Of course, Petitioners did not challenge the District Court's conclusion that they filed many suits to enforce federal and state laws protecting people with disabilities or that they sought the damages that they were entitled to under civil rights laws. But the error of the District Court and Respondent is in assuming that this means that the lawsuits were non-meritorious or frivolous. Quite the contrary, there was never a finding that the suits were meritless and even the Ninth Circuit decision upholding the District Court acknowledged that the suits were likely meritorious. Appendix to Petition for Writ of Certiorari at 30-31.

Under the test used in several other Circuits, Molski and Francovich could not have been deemed vexatious litigants simply because they filed a large number of lawsuits challenging discriminatory conduct unless there also was a determination that the suits were meritless.

5. Finally, the national importance of this case is reflected in the frequency with which courts are now using the opinions of the Ninth Circuit and the District Court in this case to restrict access to the courts. It is frequently being cited by judges to justify restrictions on lawyers and litigants. *Ellis v. Emery (In re Upland Partners)*, 2008 U.S. App. LEXIS 150 (9th Cir. Haw. Jan. 4, 2008) (the court cited *Molski* to affirm a district court pre-filing order regarding

bankruptcy litigation); *Skaff v. Meridien N. Am. Beverly Hills, LLC,* 506 F.3d 832 (9th Cir. Cal. 2007) (cited *Molski* for the proposition that "if there is a persistent pattern of unfounded allegations, in an appropriate case a litigant or his or her counsel may be subjected to the rigors of a pre-filing order"); *Gabor v. County of Santa Clara Bd. of Supervisors,* 2008 U.S. Dist. LEXIS 32115 (N.D. Cal. Mar. 31, 2008) (granting the defendant's motion for a pre-trial filing order against civil rights plaintiffs, citing *Molski*); *Wilson v. Kayo Oil Co.,* 535 F. Supp. 2d 1063 (S.D. Cal. 2007) (citing *Molski* to explain when a court may grant a defendant's motion to impose a pre-trial filing order on the plaintiff, applied here to ADA litigation); *Clark v. Nevans*, 2007 U.S. Dist. LEXIS 76898 (E.D. Cal. Oct. 16, 2007) (citing *Molski* for standards on when a court may grant a defendant's motion to impose a pre-trial filing order on the plaintiff, applied here to find the plaintiff a vexatious litigant); *Smith v. Indiana Dep't of Corr.,* 883 N.E.2d 802, 2008 Ind. LEXIS 316 (Ind. 2008) (citing *Molski* for the proposition that pre-trial filing orders have survived constitutional challenge as a way to ease the burden on courts of frivolous filings).

Thus, this case poses an issue of great national significance that never has been addressed 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?

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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