No. _____

In The

Supreme Court of the United States

ERIC S. CLARK, JONATHAN CLARK,

Petitioners,

v.

CITY OF SHAWNEE, KANSAS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

QUESTION 1:

The application of Federal Rule of Appellate Procedure Rule 4(a)(4) that is followed in practice by all circuits except the Tenth Circuit is that the ***last remaining*** motion which was *timely* filed under the rule tolls (shifts anew) the time to file a notice of appeal. The Tenth Circuit has held that ***no* successive** motions (i.e., none but the first 4(a)(4)(A) motion) tolls (shifts anew) the time to file a notice of appeal. As there are conflicting applications of FRAP Rule 4(a)(4) among the circuits, the Question Presented is:

> Was the Tenth Circuit's application of FRAP Rule 4(a)(4) an *improper* application?

QUESTION 2:

Presuming that the Tenth Circuit's application of FRAP Rule 4(a)(4) to petitioners was the *proper* application of the rule, the Question Presented is:

> Was the Tenth Circuit's application of FRAP Rule 4(a)(4) in error because the rule is facially unconstitutional for failing to provide adequate notice that *no* successive post-judgment motions under FRAP 4(a)(4)(A) toll (shift anew) the time to file a notice of appeal even if *timely* filed?

PARTIES TO THE PROCEEDINGS

Petitioners were Plaintiffs and Appellants below.

Respondent City of Shawnee, Kansas was Defendant and Appellee below.

RULE 29.6 DISCLOSURE

Petitioners certify that no corporation is involved concerning the petitioners of this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Eric S. Clark and Jonathan Clark respectfully petition for a writ of certiorari to review the judgment of the federal Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The October 12, 2017 "ORDER" (Cir. App. Dk. 01019884768) by the federal Court of Appeals for the Tenth Circuit DENYING petitioners' petition for rehearing is in the Appendix at a25.

The September 1, 2017 "ORDER AND JUDGMENT" (Cir. App. Dk. 01019864873) by the federal Court of Appeals for the Tenth Circuit DISMISSING petitioners' appeal is in the Appendix at a1.

The January 5, 2017 "JUDGMENT IN A CIVIL CASE" (Dist. Dk. 141) granting the defendant's motion for summary judgment by the federal District Court is in the Appendix at a10.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254(1) and 28 U.S.C. §2101(c). The denial of petition for rehearing by the federal Court of Appeals for the Tenth Circuit issued on October 12, 2017 and the time

to file a petition for writ of certiorari with the U.S. Supreme Court runs from that denial.

RELEVANT CONSTITUTIONAL PROVISIONS

Constitution of the United States, **art. III, Sec. 2**: . . . "the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

Constitution of the United States, **Amendment I**: . . . "Congress shall make no law [. . .] abridging [. . .] the right of the people [. . .] to **petition the Government** for a redress of grievances."

Constitution of the United States, **Amendment V**: "No person shall [. . .] be deprived of life, liberty, or property, without **due process** of law [. . .]"

INTRODUCTION

Background

The constitution (art. III, Sec. 2) provided that the "supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under *such Regulations* as the *Congress* shall make". (emphasis added)

Congress then made *such Regulations* (See 28 U.S.C. §2071(a)) and those regulations provide that

"[t]he Supreme Court and all courts established by Act of Congress may from time to time *prescribe rules* for the conduct of their business". And this Supreme Court *prescribed rules* by promulgating the Federal Rules of Appellate Procedure ("FRAP") for the conduct of appeals to the circuit courts.

Foreground

This is a case where petitioners followed the clear direction given by the plain language of those *prescribed rules* only to have the Tenth Circuit dismiss the case through *sua sponte* determining that it lacked jurisdiction based on its own unique and *erroneous* application of FRAP Rule 4(a)(4). That *erroneous* application is considered to be Tenth Circuit precedent rooted in *United States v. Marsh*, 700 F.2d 1322 (10th Cir. 1983) which is the very case referenced in this Court's opinion in *United States v. Ibarra*, 502 U.S. 1 (1991) noting that the factual circumstances to provide opportunity to address "successive motions" was not currently at bar:

> "only a single motion for reconsideration was filed. We thus also have no occasion to consider whether it is appropriate to refuse to extend the time to appeal in cases in which ***successive motions*** for reconsideration are submitted. *See United States v. Marsh*, 700 F.2d 1322 (CA10 1983)."

502 U.S. 1 at n. 3. (emphasis added)

The fact of "successive motions" is now present before the Court in the instant case and there are no other facts in dispute which are pertinent to resolution of the Questions Presented. Docket entries themselves telegraph all of the pertinent facts needed to decide this case.

The Tenth Circuit not only treated FRAP Rule 4(a)(4) as jurisdictional in contravention of this Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007) and *Hamer v. Neighborhood Housing*, 583 U.S. ___ (2017) (though the Tenth Circuit decision in this case was rendered without benefit of *Hamer*) but, more importantly, did so while erroneously construing the rule against its plain meaning.

This Supreme Court could simply vacate the judgment of the Tenth Circuit and remand to that court for reconsideration in light of *Hamer* **BUT** (the classic big "but") because the erroneous application of FRAP Rule 4(a)(4) is controlling precedent in the Tenth Circuit, it would be compelled to continue following it, leaving the very error which prompted this petition.

Respondent below argued that "there are multiple published opinions from no less than three circuits that hold that successive post-judgment motions *do not* toll the time to appeal" (Cir. App. Dk. 01019876547, p. 7). Petitioners assert that the two cases relied upon for that claim about the Fifth and Eleventh circuits are clearly distinguishable.

As *arguendo*, if there truly are other circuits which have held to the same erroneous application then that

only shows that the cancer has spread. No matter how far the cancer has spread, it is time to remove it because improper application of that appellate rule results in preventing any appeal **on the merits** and erroneous dismissals warrant review and correction because error in determinations about existence of jurisdiction is the most egregious of applications. Most egregious because of denying petitioners their First Amendment fundamental right to petition for redress – thus, chipping away the very cornerstone of the judicial system (public faith in the judiciary to provide that those who are aggrieved may have their day in court).

Error in the record

The unique and erroneous holding by the Tenth Circuit that FRAP Rule 4(a)(4) does not toll the time to file a notice of appeal for any successive post-judgment motions can be found in its judgment issued September 1, 2017 (See Cir. App. Dk. 01019864873, p. 5, "because successive post-judgment motions do not toll the time for appealing an underlying judgment.").

Supporting Notes

Will correcting this erroneous holding of Tenth Circuit mean that more cases will get addressed on the merits, increasing the case load in that circuit court? Perhaps, but that falls directly in line with the rules regarding "Appeal as of Right" and case law supports that goal as well. See e.g., *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966) ("If rules of procedure

work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee, that *bona fide* complaints be carried to an adjudication on the merits."). And that guarantee as concerning the present case is no different than a fraudulent guarantee.

SUMMARY OF THE ARGUMENT

Question 1: If the application of FRAP Rule 4(a)(4) used by the Tenth Circuit is ***not*** the *proper* application of the rule as intended by the promulgator of the rules (i.e., this Supreme Court), then it was an error which violates protection of the fundamental rights to due process and to petition for redress and; if not corrected by this Court, *leaves a wide circuit split* concerning application of the rule, the Tenth Circuit being the lone circuit in error.

Question 2: If the application of FRAP Rule 4(a)(4) used by the Tenth Circuit **truly is** the *proper* application of the rule as intended by the promulgator of the rules (i.e., this Supreme Court), then the rule is facially unconstitutional for failure to provide adequate notice and; if not affirmed by this Court as being the *proper* application, *leaves a wide circuit split* concerning application of the rule, the Tenth Circuit being the lone circuit correctly applying the rule.

STATEMENT OF THE CASE

On January 5, 2017, the District Court entered judgment (See Dist. Dk. 141 at a10) which granted summary judgment against petitioners. Petitioners then timely filed two different motions (i.e., successive motions) on two different days, both motions in compliance with the requirements of FRAP Rule 4(a)(4)(iv) and FRAP Rule 4(a)(4)(ii) respectively. The District Court properly treated the first motion (See Dist. Dk. 143) filed on January 12, 2017 as a Rule 59 motion, that motion having been filed within 10 days of the judgment it sought to amend. The District Court then properly treated the second motion (See Dist. Dk. 156) filed on January 31, 2017 as a Rule 52(b) motion, that motion having been filed within 28 days of the judgment for which it sought additional findings. The District Court disposed of the first motion by Order (See Dist. Dk., 149 at a22) issued on January 20, 2017 and disposed of the second motion by Order (Dist. Dk. 160 at a12) issued on February 22, 2017. Petitioners then filed a notice of appeal on February 28, 2017 (See Dist. Dk. 161 at a26). On September 1, 2017, the Court of Appeals for the Tenth Circuit issued the order and judgment (See Cir. App. Dk. 01019864873 at a1) dismissing petitioners' appeal citing "**DISMISS** this appeal for lack of jurisdiction." Petitioners now appeal to this Supreme Court of the United States for relief.

REASON FOR GRANTING THE PETITION

Grant this petition because the United States circuit court of appeals for the Tenth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court.

I. The warning of *Ibarra* went unheeded

The Tenth Circuit continues to erroneously apply FRAP Rule 4(a)(4) in contravention of the plain language of the Federal Rules of Appellate Procedure and; in contravention of this Supreme Court's admonition in *Ibarra*, infra, that a litigant should not be required to "guess at the date on which the time to appeal commences to run" and; deprives meritorious cases of review on their merits, including the present case.

United States v. Healy, 376 U.S. 75 (1964), *United States v. Dieter*, 429 U.S. 6 (1976), and *United States v. Ibarra*, 502 U.S. 1 (1991) set the stage for the scene played out herein.

This Supreme Court remarked in *Ibarra* that the instant case presented "no occasion to consider whether it is appropriate to refuse to extend the time to appeal in cases in which successive motions for reconsideration are submitted. See *United States v. Marsh*, 700 F.2d 1322 (CA10 1983)."

That occasion to consider successive motions is here, now. The Tenth Circuit not only prevents effect of the tolling provision of FRAP 4(a)(4) for successive motions *for reconsideration* (i.e., Rule 59) but obviously

prevents effective tolling (shifting anew) of the time to file a notice of appeal for *all* successive post-judgment motions, even if one is a timely filed Rule 59 motion and the other is a timely filed Rule 52 motion.

The opinion of the Tenth Circuit (See Cir. App. Dk. 01019864873) at pages 4-5 stated:

> 'Although the Clarks filed a Rule 52(b) motion to make additional findings on January 31, 2017, that motion did *not* extend the time to appeal beyond the February 21, 2017 deadline ***because successive post-judgment motions*** do not toll the time for appealing an underlying judgment. *See Ysais v. Richardson*, 603 F.3d 1175, 1178 (10th Cir. 2010)' (emphasis added)

And then concluded (at page 5) that petitioners' "appeal is untimely as to the January 5, 2017 judgment and we ***lack jurisdiction*** to review it." (emphasis added)

The rule clearly gives inadequate notice (under the unique application used by the Tenth Circuit) thus setting a trap for the unwary litigant.

That trap resulting from a litigant being "required to guess at their peril the date on which the time to appeal commences to run" (See *Ibarra*, supra). A rule that fails to give adequate notice runs afoul of the Constitution's due process protection.

The Tenth Circuit's use of "successive post-judgment motions" *necessarily* holds two things:

> 1) only *one* timely motion of the six types (see subsections i,ii,iii,iv,v,vi) described under FRAP 4(a)(4)(A) can toll the time to file an appeal and;
>
> 2) the controlling motion of those described under Fed. R. App. P. 4(a)(4)(A) is the *first* such motion to be filed.

These two apparent holdings are in direct contravention of FRAP Rule 4(a)(4) which allows for *multiple* timely motions through its plain statement that the controlling motion for tolling is the "*last* such remaining motion" with use of "last" implying potential for "multiple". Theoretically, a party could file *timely* post-judgment motions as described by each of the six subsections of Rule 4(a)(4)(A). In the present case, a motion to review [Dist. Dk. 143] and a motion for additional findings [Dist. Dk. 156] were clearly two different motions and each was *timely* filed and each fit one of the motions described by Rule 4(a)(4)(A), specifically subsection "ii" and subsection "iv".

When both, a Rule 59(e) motion [See Rule 4(a)(4)(A)(iv)] and a Rule 52(b) motion [See Rule 4(a)(4)(A)(ii)] are each *timely* filed, Rule 4(a)(4)(A) is explicitly that "the time to file an appeal runs for all parties from the entry of the order disposing of the *last* such remaining motion".

The use of "the *last such* remaining motion" within Rule 4(a)(4)(A) *necessarily* means that there may be *more than one* tolling motion filed, thus, the necessarily implied holding of the Tenth Circuit that *only*

one such motion can toll the time to appeal either creates meaningless surplusage or else creates incoherency. Recognizing all "timely" filed motions (i.e., *plurality* of motions) described in Rule 4(a)(4)(A)(i-vi) is in keeping with the "Committee Notes on Rules – 2010 Amendment" for Rule 4, subdivision (a)(4)(A)(vi), that "Subdivision (a)(4) provides that certain timely posttrial **motions** extend the time for filing an appeal." (emphasis on plural usage)

The Tenth Circuit offered no explicit basis for its application of FRAP Rule 4(a)(4) other than citing to one case, *Ysais v. Richardson*, 603 F.3d 1175, 1178 (10th Cir. 2010) (See Cir. App. Dk. 01019864873 at p. 5); thus, the reasoning for its basis must be inferred from that line of cases. And that is a very short line of cases as *Ysais* traces directly back to *Marsh* (the very case noted by this Court in *Ibarra*). The direct trace to *Marsh* in *Ysais* is at page 7:

> "*See United States v. Marsh*, 700 F.2d 1322, 1324-28 (10th Cir. 1983) (rejecting use of successive tolling motions to obtain additional time to file notice of appeal)."

Ysais having its basis in *Marsh* reveals that the differing application of Rule 4(a)(4) was meant to cure a perceived, but nonexistent, harm based on the *Marsh* court's misunderstanding or failure to recognize how the *timeliness* requirement of the rule already prevented the supposed evil which its decision supposedly sought to cure (i.e., perpetual tolling of the time to file a notice of appeal for a specific judgment). The reality

was, and is, that the "timely" requirement of the motions described in Rule 4(a)(4)(A), combined with being limited to *the* judgment, prevents any such ability to prolong appealing an earlier judgment indefinitely – and so the *Marsh* court had no sound basis for seeking to cure anything. The Sixth Circuit has said basically the same thing as petitioners and it may help clarify the above by reviewing the Sixth Circuit unpublished opinion which addressed the issue directly on point. See *Robbins v. Saturn Corp.*, 532 F. App'x 623 (6th Cir. 2013) at 5.

In *Ysais*, the second motion for reconsideration did not toll the time to file an appeal concerning the amended final judgment but that was not because it was a successive post-judgment motion (as the *Ysais* court incorrectly held citing *Marsh*) but rather, under Rule 4(a)(4)(A), the second motion for reconsideration would not have tolled the time for appealing the amended final judgment because it was *not* ***timely*** filed (that is, it was not filed within ten days of the entry of the amended final judgment).

The faulty "successive motion" conclusion in *Marsh* that:

> "viewing Marsh's motion for reconsideration as one seeking reargument of the original motion for new trial it has to be concluded that the time to appeal the original trial court judgment is not to be extended."

. . . was right for the wrong reason. The conclusion not to extend the time to appeal was right because motion

was not timely. Similarly right for the wrong reason in *Ysais*. But in the present case, it's not just a wrong reason, it a wrong conclusion. Thus, the cure of *Marsh* manifests as harm in cases like the present petitioners.

Clearly, *Marsh* is differentiated from the present case in that the successive motion in *Marsh* was not filed timely to address the amended final judgment (i.e., within 10 days of the amended final judgment) whereas the successive motion of the present case ***was timely*** filed (i.e., filed "within the time allowed").

Petitioners' first such tolling motion was a motion for reconsideration (See Dist. Dk. 143) which was filed 7 days after the final judgment (See Dist. Dk. 140/141) and was disposed of on January 20, 2017 (See Dist. Dk. 149) and; petitioners' **successive motion** was a motion to make additional findings (See Dist. Dk. 156) which was timely filed (i.e., filed within 28 days after the final judgment) and was the "last such remaining motion" (i.e., tolling motions) and it was disposed of on February 22, 2017 (See Dist. Dk. 160), thus petitioners had until 30 days after February 22, 2017 (i.e., until March 24, 2017) to file their notice of appeal of the final judgment. Petitioners filed that notice of appeal on February 28, 2017 well in advance of the 30 days elapsing.

That last remaining tolling motion was indirectly stripped of its effectual tolling through the Tenth Circuit finding that it lacked jurisdiction beyond expiry of the ***first*** such (tolling) motion rather than properly

finding that it retains jurisdiction at least until expiry of the "***last*** such remaining motion" (See Fed. R. App. P. Rule 4).

In *Ibarra*, this Court stated that "without a clear general rule" to guide litigants, that lack of clarity would lead to undesirable developments including the filing of notices of appeal when such notice may not be needed at all, such as when a judge favorably amends in response to a motion for reconsideration. In the present case, so as not to needlessly make filings with the court, the litigants (i.e., petitioners) properly waited until after the need for a notice of appeal was clear, and then, promptly filed their notice.

In conclusion, successive post-judgment motions, *as described by the six subsections under Rule 4(a)(4)(A)*, which are filed *timely* (i.e., "*within the time allowed by those rules*") **do** toll (shift anew) the time to file a notice of appeal.

Constitutional avoidance (when possible) is a sound principle but that principle should be inapplicable, or even the reverse, for appellate rules used for determining jurisdiction over appeals to the circuit courts.

This Court should make clear that there is a consistent foundation that can be relied upon by petitioners who wish to appeal under the Federal Rules of Appellate Procedure and that part of that foundation includes the plain and unambiguous meaning set forth in Rule 4(a)(4) that a successive motion can and does

toll (shift anew) the time to file an appeal when each motion is filed timely.

II. Opposite notice is not adequate notice

The plain language of FRAP Rule 4(a)(4) provides clear notice that when multiple motions (as described by that rule) are timely filed, the time to file a notice of appeal is 30 days after the order disposing of the last such remaining motion; therefore:

If the Tenth Circuit's application of FRAP Rule 4(a)(4) was the *proper* application then the rule is facially unconstitutional for being violative due process by failing to provide "adequate notice". That is, the rule does not provide adequate notice to litigants that no "successive post-judgment motions" toll (shift anew) the time to file an appeal and; in fact, the plain language of the rule provides the nearly opposite notice which is clearly . . . inadequate notice and; thus, facially unconstitutional for lack of due process.

CONCLUSION

This petition for a writ of certiorari should be granted.

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