No. 12-929

IN THE

Supreme Court of the United States

ATLANTIC MARINE CONSTRUCTION COMPANY, INC.,

Petitioner,

v.

J-CREW MANAGEMENT, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Petitioners have presented compelling reasons to grant the Petition for *Certiorari*, where the Fifth Circuit Court of Appeals unanimously held that Atlantic Marine Construction Company, Inc. failed to satisfy the standard for a Petition for a Writ of Mandamus directing this case be transferred to the Eastern District of Virginia?

2. Whether private parties can render a venue that is proper pursuant to 28 U.S.C. § 1391, "improper" and divest federal judges of the discretion Congress entrusted to them and mandated they exercise?

CORPORATE DISCLOSURE STATEMENT

Respondent, J-Crew Management, Inc., pursuant to Supreme Court Rule 29.6, states the following:

J-Crew is a privately-owned corporation. It has no parent company and no corporation owns 10% or more of Respondent's shares.

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INTRODUCTION

District courts are not bound by the whim of private parties in determining the manner in which they adjudicate disputes; rather, they are bound by Congress, pursuant to 28 U.S.C. § 1404(a), and by this Court's precedent to consider additional factors so that the interests of justice are served. The Court in *Stewart* was clear: "[w]e hold that federal law, specifically 28 U.S.C. § 1404(a), governs the District Court's decision whether to give effect to the parties' forum-selection clause and transfer this case to [the district designated in the parties' contract]." *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 32 (1988).

Atlantic Marine Construction Company, Inc. ("Atlantic") failed to meet its burden in the trial court of showing that transferring this case to the Eastern District of Virginia would advance the interests protected by § 1404(a). It failed again in the Fifth Circuit to show that its right to a writ of mandamus directing the case to be transferred was "clear and indisputable." While the disagreement among the Circuit Courts identified in the Petition may warrant this Court's consideration under more appropriate circumstances, it serves only to demonstrate why a writ of mandamus was not appropriate in this case. Consequently, Atlantic's Petition for Writ of *Certiorari* should be denied.

STATEMENT OF THE CASE

This case presents the precise circumstances confronted by the Court in *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988)—a diversity case filed in a venue that is proper pursuant to 28 U.S.C. § 1391, but contrary to a forum-selection clause designating an alternative federal district as the location to resolve any disputes.

Factual Background:

This case arises from J-Crew's delivery of labor and materials to a construction project located at Fort Hood, Texas, pursuant to a subcontract entered into between Atlantic and Respondent, J-Crew Management, Inc. ("J-Crew"). Atlantic asserts offsets against payments due to J-Crew for untimely or nonconforming work performed on the project. Although not mentioned in Atlantic's Petition, Fort Hood is located in the Western District of Texas, as are the subcontractors, suppliers and tradesmen who performed the work at issue. These second-tier subcontractors are expected to testify in this matter regarding the timing and quality of the labor and materials delivered to Atlantic and may themselves become necessary parties to this litigation. Pet. 12a; 38a. None of these non-party witnesses would be subject to process in the Eastern District of Virginia, and none are under the control of J-Crew.

Tellingly, Petitioner could not specifically identify a single witness located in the Eastern District of Virginia and conceded that its own witnesses with relevant knowledge of this dispute are themselves located in the Western District of Texas. Pet. 37a.

Proceedings in the District Court:

Petitioner filed a motion to dismiss J-Crew's complaint based on the forum-selection clause pursuant to 28 U.S.C. § 1406 and Fed. R. Civ. P. 12(b)(3).[1] The District

1. Atlantic's Motion to Dismiss, as it related to the forum-selection clause, was premised only upon 28 U.S.C. § 1406 and Fed.

Court denied Petitioner's motion, concluding that that enforcement of the forum-selection clause should be determined pursuant to § 1404(a). The court found support for its decision to deny Atlantic's motion to dismiss in *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 32 (1988) ("[w]e hold that federal law, specifically 28 U.S.C. § 1404(a), governs the District Court's decision whether to give effect to the parties' forum-selection clause and transfer this case to [the district designated in the parties' contract].").

The court then considered and denied Atlantic's alternative motion to transfer venue pursuant to § 1404(a). A review of the district judge's order reveals that the court's decision was the result of a reasoned and balanced analysis, giving appropriate consideration to Atlantic's forum-selection clause, in accordance with 28 U.S.C. § 1404(a) and this Court's precedent. Pet. 35a-40a; *Stewart*, 487 U.S. 22, 31 (1988) ("[t]he forum-selection clause, which represents the parties' agreement as to the most proper forum, should receive neither dispositive consideration . . . nor no consideration . . . but rather the consideration for which Congress provided in § 1404(a).").

Specifically, the district court considered the parties' forum-selection clause, the location of Atlantic's books and records, as well as Atlantic's argument that the Eastern District of Virginia disposes of cases, on average, 2.3 months faster than the courts of the Western District of

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R. Civ. P. 12(b)(3)—not Rule 12(b)(6). Consequently, the separate question as to whether a party may move for dismissal pursuant to Fed. R. Civ. P. 12(b)(6) based upon a forum-selection clause could not properly be before the Court on the merits.

Texas. The court then balanced these factors against the expense and inconvenience to at least seven non-party witnesses, applying the "100-mile rule" set forth by the Fifth Circuit in *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 317 (5th Cir. 2008), *cert. denied, Singleton v. Volkswagen of America,* 129 S.Ct. 1336 (2009), the problems with securing compulsory process over key witnesses to attend trial, as well as efficiency in conducting discovery, familiarity with the Texas law, and the importance of the litigation to the people of the Western District of Texas. [2]

Weighing these competing factors, the district court concluded that the matter should not be transferred to Virginia.

Proceedings in the Court of Appeals:

Atlantic filed a Petition for Writ of Mandamus, compelling the district court to dismiss or transfer the case to the Eastern District of Virginia. The Fifth Circuit unanimously held that the district court did not "clearly abuse its discretion" and denied Atlantic's petition.

The Fifth Circuit relied upon *Stewart's* explicit holding that "federal law, ***specifically § 1404(a),*** not state law, governs a motion to transfer to another federal court

2. Texas has expressed a strong interest in having local construction disputes decided in Texas. Tex. Bus & Com. Code § 272.001, which applies to contracts for the improvement of real property located in the State of Texas, provides: "[i]f a contract contains a provision making the contract or any conflict arising under the contract subject to another state's law, litigation in the courts of another state, or arbitration in another state, that provision is voidable by the party obligated by the contract to perform the construction or repair."

pursuant to a forum-selection clause." Pet. 5a-6a (emphasis added). The court also adopted the well-recognized implicit corollary "that a forum-selection clause does not render the venue of an otherwise properly venued claim 'improper' because Section 1404(a) is the proper procedural tool for transferring a case only when venue is proper in the chosen district; if venue is improper, Section 1406(a) is used to transfer venue." Pet. 6a. Judge Higginbotham writing for the Majority further reasoned that "private parties should not have the power to transcend federal venue statutes that have been duly enacted by Congress and render venue improper in a district where it otherwise would be proper under congressional legislation." *Id.*

Circuit Judge Haynes filed a special concurrence in which she not only joined in the Majority's holding that Atlantic failed to meet its heavy burden for a writ of mandamus, but also agreed with the Majority that forum-selection clauses may be enforced under § 1404(a). Pet. 15a ("[t]he majority opinion correctly concludes that a forum-selection clause may be enforced through a motion to transfer based on § 1404(a)."). Judge Haynes, however, disagreed that § 1404(a) "is the *exclusive* means of enforcing a forum-selection clause that contemplates a federal forum when the original federal forum is valid under a permissive venue statute." Pet. 15a (emphasis added).

Significantly, Judge Haynes did not explain how venue could be both proper (and therefore within the scope of § 1404) and "improper" or "wrong" (and therefore within the scope of § 1406 and Rule 12(b)(3)) at the same time based on the same facts. The determination of whether venue is proper cannot depend upon the method of enforcement.

Atlantic now seeks this Court's review of the Fifth Circuit's decision, without any mention of the mandamus standard it failed to meet, or any assertion that the Fifth Circuit abused its discretion in denying the Writ of Mandamus. Petitioner merely states that the court erred by holding that enforcement of the forum-selection clause was subject to § 1404(a), following the Third, Sixth, and Seventh Circuits. Consequently, the Petition for *Certiorari* should be denied.

REASONS FOR DENYING THE PETITION

The Petition should be denied because disagreement among the circuit courts does not provide Atlantic a basis to circumvent the requirements for mandamus relief that it failed to satisfy before the Fifth Circuit; moreover, the primary question Atlantic presents for review avoids the central issue and cannot resolve the underlying disagreement among the circuits. Even if the transfer question warranted review in the abstract, this case would not be an appropriate vehicle for resolving the split in authority among the Circuit Courts of Appeal.

Most importantly, however, the Fifth Circuit's decision is compelled by this Court's holding in *Stewart* and by the demands of Congress. District courts are not bound by the decisions of private parties in determining the manner in which they adjudicate disputes; rather, they are bound by Congress and this Court's precedent to weigh competing factors and to ensure that the interests of justice are served.

A. This Case Would Be a Poor Vehicle for Deciding the Questions Posed by Petitioner:

1. Petitioner Cannot Side-Step the High Hurdle to a Writ of Mandamus:

This Court has admonished that a writ of mandamus is an extraordinary remedy, to be granted only in extreme cases where a petitioner's "right to issuance of the writ is clear and indisputable." *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380-81 (2004). Atlantic failed to overcome this high hurdle to obtaining a writ of mandamus, as the Fifth Circuit held neither the district court's denial of Atlantic's Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(3) and 28 U.S.C. § 1406 nor its denial of Atlantic's Motion to Transfer Venue pursuant to 28 U.S.C. § 1404(a) was in error—let alone the "clear and indisputable" error required to justify a writ of mandamus.

Indeed, Circuit Judge Haynes, while diverging from the Fifth Circuit Majority's analysis, adhered faithfully to this Court's standards for mandamus relief, recognizing that Atlantic failed to meet its burden and joining in the Majority's core holding. Pet. 14a ("I cannot credibly contend that the right to the writ is 'clear and indisputable' as required for mandamus relief.").

Atlantic now comes before this Court seeking *certiorari* to the Fifth Circuit Court of Appeals—not because the court disregarded well-established precedent, but rather because Petitioner claims the law is unsettled. While the disagreement among the Circuit Courts may warrant this Court's consideration under more appropriate circumstances, it serves only to demonstrate why a writ of

mandamus was not appropriate in this case. If there is any question as to the propriety of the trial court's decision, then there is no question at all: the petition for a writ of mandamus must be—and properly was—denied.

"[I]t is established that the extraordinary writs cannot be used as substitutes for appeals . . . even though hardship may result from delay and perhaps unnecessary trial." *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 380-8 (1953). The limited use of mandamus review to correct clearly erroneous denials of motions to transfer has become generally accepted since this pronouncement;[3] however, Atlantic now seeks to eliminate the boundaries of extraordinary appellate review, asking this Court to review the Fifth Circuit's unanimous denial of Atlantic's petition—not to correct an obvious miscarriage of justice, but to "provide clarity." The appellate process cannot be so easily manipulated and abused.

Equally significant, the issuance of a writ of mandamus is a matter vested in the discretion of the court to which

3. *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 309 (5th Cir. 2008) (citing *In re Sealed Case,* 141 F.3d 337, 340 (D.C. Cir. 1998); *In re Josephson,* 218 F.2d 174, 183 (1st Cir. 1954), *abrogated on other grounds by In re Union Leader Corp.,* 292 F.2d 381, 383 (1st Cir.), *cert. denied*, 368 U.S. 927 (1961); *In re Warrick,* 70 F.3d 736, 740 (2d Cir. 1995); *In re Federal-Mogul Global, Inc.,* 300 F.3d 368, 378 (3d Cir. 2002), *cert. denied*, 537 U.S. 1148 (2003); *In re Ralston Purina Co.,* 726 F.2d 1002, 1005 (4th Cir. 1984); *Lemon v. Druffel,* 253 F.2d 680, 685 (6th Cir.), *cert. denied*, 358 U.S. 821 (1958); *In re National Presto Indus., Inc.,* 347 F.3d 662, 663 (7th Cir. 2003); *Toro Co. v. Alsop,* 565 F.2d 998, 1000 (8th Cir. 1977), *cert. denied*, 435 U.S. 952 (1978); *Kasey v. Molybdenum Corp.,* 408 F.2d 16, 19-20 (9th Cir. 1969); *Cessna Aircraft Co. v. Brown,* 348 F.2d 689, 692 (10th Cir. 1965); *In re Ricoh Corp.,* 870 F.2d 570, 573 n. 5 (11th Cir. 1989)).

the petition is made—in this case, the Fifth Circuit Court of Appeals. *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 391 (2004). Indeed, even if the district court had erred—which it did not—mandamus still would only have been appropriate if the result was "patently erroneous." *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 312 (5th Cir. 2008)("[the Court will] review only for *clear* abuses of discretion ***that produce patently erroneous results.***")(emphasis added). Retaining venue in the Western District of Texas, where all the relevant party witnesses are located, where more than seven non-party witnesses are located, where the physical evidence is located, where the forum state has expressed a strong interest in deciding disputes arising from construction projects locally, where Atlantic's own witnesses are located, and where the burden on the trial court would be minimized—in short, where the interests of justice are best served—is not a "patently erroneous result."

If the Court were to grant Atlantic's Petition, it would allow Petitioner to slide under the high hurdle that must be met for mandamus relief and clear a new path for litigants to seek this Court's interlocutory review of ordinary trial court rulings. J-Crew submits that the benefit of providing clarity to the circuit courts regarding enforcement of a limited set of forum-selection clauses pales in comparison to the damage that would be inflicted upon the standard for mandamus relief if the Court were to grant *certiorari*. The Court should not permit Petitioner to circumvent these high standards by entertaining Atlantic's Petition.[4]

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4. This Court has repeatedly denied *certiorari* in similar contexts: See, e.g., *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 317 (5th Cir. 2008), *cert. denied*, *Singleton v. Volkswagen of America,* 129 S.C. 1336 (2009); *In re Horseshoe Entertainment*, 337 F.3d 429,

2. The Primary Question Posed by Petitioner Cannot Provide the Clarity Petitioner Seeks:

Atlantic asks the Court to clarify whether *Stewart* "change[d] the standard for enforcement of clauses that designate an alternative federal forum, limiting review of such clauses to a discretionary, balancing-of-conveniences analysis under 28 U.S.C. § 1404(a)." No court—let alone the Fifth Circuit in this case—has held that enforcement of forum-selection clauses is confined to such narrow review, nor has J-Crew ever advocated for such a standard.

Atlantic's primary question is premised upon the faulty assumption that this Court decided the proper mechanism to enforce forum-selection clauses designating an alternative federal forum prior to the Court's seminal decision in *Stewart*. It did not. *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) articulated a presumption of validity for forum selection clauses; it did not address the designation of federal forums at all, let alone the limits imposed by Congress to ensure the interests of justice are served by the federal courts. Indeed, the majority in *Stewart* expressly rejected applying the *Bremen* standards to the § 1404(a) analysis. *Stewart,* 487 U.S. 22,

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431-35 (5th Cir. 2003) (granting mandamus to compel a transfer of venue and "recogniz[ing] the availability of mandamus as a limited means to test the district court's discretion in issuing transfer orders."), *cert. denied*, 540 U.S. 1049 (2003); *In re Federal-Mogul Global, Inc.*, 300 F.3d 368, 378 (3d Cir. 2002) (holding that "we, like other courts, have held that mandamus is the appropriate mechanism for reviewing an allegedly improper transfer order."), *cert. denied*, 537 U.S. 1148 (2003); see also *Matter of Skupniewitz*, 73 F.3d 702 (7th Cir. 1996), c*ert. denied*, 517 U.S. 1124 (1996); *Toro Co. v. Alsop*, 565 F.2d 998, 1000 (8th Cir. 1977), *cert. denied*, 435 U.S. 952 (1978).

28-29 ("we disagree with the court's articulation of the relevant inquiry as 'whether the forum selection clause in this case is unenforceable under the standards set forth in The *Bremen*.'").

Moreover, the Fifth Circuit did not hold that § 1404(a) is the *only* means of enforcing a forum-selection clause that designates an alternative federal forum. Rather, the Fifth Circuit, along with the Third, Sixth, and Seventh Circuits, held that when a case is filed in a venue that is proper pursuant to § 1391, *and* the forum-selection clause provides for an alternative federal venue, that § 1404(a), and not § 1406 or Rule 12(b)(3), governs how to give effect to the clause. There is no dispute that dismissal may be appropriate when a case is filed in a venue that is not proper pursuant to § 1391—regardless of whether the forum-selection clause designates an alternate federal venue. The critical inquiry is whether the case was initially filed in a proper venue.

More importantly, Petitioner's primary question avoids the fundamental point of contention among the circuits: whether private parties can render an otherwise proper venue "improper" by agreement. The Fifth Circuit framed the issue as follows:

> The choice between Rule 12(b)(3) and § 1406 on the one hand and § 1404 on the other depends on whether private parties can, through a forum-selection clause, render venue improper in a court in which venue is otherwise proper under § 1391.

Pet. 4a. The Fifth Circuit, along with the Third, Sixth, and Seventh Circuits, has held that private parties cannot

render otherwise proper venue "improper" through a forum-selection clause. *In re Atl. Marine Const. Co., Inc.*, 701 F.3d 736 (5th Cir. 2012); *In re LimitNone, LLC*, 551 F.3d 572, 575-76 (7th Cir. 2008) ("Because the Northern District of Illinois was not an improper venue, § 1404(a), rather than § 1406(a), provided the authority for the transfer order.");[5] *Wong v. PartyGaming Ltd.*, 589 F.3d 821, 830 (6th Cir. 2009); *Kerobo v. Sw. Clean Fuels Corp.*, 285 F.3d 531, 535 (6th Cir. 2002); and *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 879 (3d Cir. 1995). This result necessarily follows from *Stewart,* as § 1404 could not have governed enforcement of the venue issue before the district court if the forum-selection clause rendered venue "improper" where the case was filed.

Equally important, this case does not permit the Court to resolve the lingering question as to whether dismissal based upon a forum-selection clause pursuant to Rule 12(b)(6) would be appropriate. Atlantic's Motion to Dismiss, as it related to the forum-selection clause, was premised only

5. Petitioner and at least one commentator mistakenly rely upon *Muzumdar v. Wellness Int'l Network, Ltd.*, 438 F.3d 759 (7th Cir. 2006) as holding that § 1406 is the proper means of enforcing a forum-selection clause designating an alternate federal forum. *Muzumdar*, however, did not involve the application of § 1404 or § 1406; rather, the defendants moved to dismiss pursuant to Rule 12(b)(3). The Plaintiffs did not oppose the Motion to Dismiss on the basis that venue was proper pursuant to § 1391; rather, they insisted that the clause was unenforceable since it was a contract of adhesion—an argument properly rejected by the Seventh Circuit as being contrary to *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991). Two years later, the Seventh Circuit directly addressed the issue before the Court and held that when venue is proper pursuant to § 1391, § 1404 applies. *In re LimitNone, LLC*, 551 F.3d 572, 575-76 (7th Cir. 2008).

upon 28 U.S.C. § 1406 and Fed. R. Civ. P. 12(b)(3), not Rule 12(b)(6); nor did Petitioner raise the separate, but related, issues identified by the Second Circuit in *TradeComet* that would remain the subject of dispute regardless of the outcome of this case. *TradeComet LLC.com v. Google, Inc.*, 647 F.3d 472 (2d Cir. 2011)("[c]onsequently, we do not address the related, but separate, question whether a district court may, *sua sponte*, convert a Rule 12(b) motion to dismiss into a § 1404(a) motion to transfer. We also do not address circumstances in which a defendant moves in the alternative for both dismissal under Rule 12(b) and transfer under §§ 1404 or 1406(a)."). These issues lie at the heart of the underlying dispute among the circuit courts.

Neither the district court nor the Fifth Circuit Court of Appeals directly addressed these issues below as they were not raised by Petitioner.[6] Consequently, even if the Court granted *certiorari*, reversed *Stewart*, and held that enforcement of forum-selection clauses was not limited to § 1404(a), the result still would not provide any meaningful guidance for lower courts or serve to resolve the fundamental dispute. The Petition should therefore be denied.

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6. While J-Crew submits that a party cannot escape the limits imposed by Congress on forum-selection clauses—that such clauses be for the convenience of the parties, and witnesses, and for the interests of justice—by filing a motion to dismiss instead of a motion to transfer venue, the fact remains that the issue has not been properly presented and cannot be raised for the first time on this appeal.

B. The Fifth Circuit was Correct:

The Petition for *Certiorari* should be denied for a second, and more simple reason: the Fifth Circuit was correct in ruling that private parties cannot render venue improper in a district where it otherwise would be proper under congressional legislation. Pet. 6a. Indeed, as Justice Scalia observed in *Stewart*, "while the parties may decide who between them should bear any inconvenience, only a court can decide how much weight should be given under § 1404(a) to the factor of the parties' convenience as against other relevant factors such as the convenience of witnesses." *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 35 (1988) (Scalia, J., dissenting on other grounds).

1. Private Parties Cannot Render Otherwise Proper Venue Improper:

Venue is either proper or it is not—it cannot be both. Congress has made clear that private parties cannot render venue improper within the federal system. *Red Bull Associates v. Best W. Intern., Inc.*, 862 F.2d 963, 967 (2d Cir. 1988) ("[t]he other component of the analysis—the interest of justice—is not properly within the power of private individuals to control. The existence of a forum selection clause cannot preclude the district court's inquiry into the public policy ramifications of transfer decisions."); *but c.f.*, *TradeComet LLC.com v. Google, Inc.*, 647 F.3d 472 (2d Cir. 2011).

The relevant statutory framework is not disputed: § 1391 governs whether venue is proper in a given federal district. Rule 12(b)(3) and § 1406(a) provide for dismissal or transfer of an action that has been brought in an

improper venue. By contrast, § 1404 provides for transfer of the action within the federal system to another federal venue when the action has been initially brought in a proper venue. Pet. 4a.

If Petitoner were correct that a forum-selection clause renders venue "improper," then the foundation of S*tewart*—that 28 U.S.C. § 1404 was a valid congressional act specifically addressing enforcement of the forum-selection clause at issue—crumbles since § 1404 could not have been applicable. *Stewart*, 487 U.S. at 28, 32 ("[a]pplying the above analysis to this case persuades us that federal law, specifically 28 U.S.C. § 1404(a), governs the parties' venue dispute.").

While parties are free to negotiate contracts and allocate any inconvenience of litigation amongst themselves, they cannot divest the district courts of discretion allocated by Congress and handcuff the judiciary in the administration of justice. It is well-settled that a district court may *sua sponte* transfer a case to a more appropriate forum in the interests of justice. See, *Tazoe v. Airbus S.A.S.*, 631 F.3d 1321, 1336 (11th Cir.2011) ("[a] district court may *sua sponte* transfer a civil action to any other district where it might have been brought if doing so will be convenient for the parties and witnesses and serve the interest of justice.").

The court's authority to transfer a case *sua sponte* is derived from § 1404(a) and § 1406 which both provide that district courts may transfer a matter "to any other district or division *where it might have been brought.*" 28 U.S.C. § 1404(a); 28 U.S.C. § 1406. If a forum-selection clause renders every other district "improper" despite

§ 1391, then the district court will be rendered impotent to transfer a case in the interest of justice. Private parties simply do not command such power over the court.

2. The Legislative History of § 1404(a) Confirms the Fifth Circuit's Decision:

Congress has directed that multiple considerations govern transfer within the federal court system and place discretion in the district courts to make this determination on an individualized case-by-case basis. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 35 (1988). This has been the law since *Stewart*, and the Federal Court Jurisdiction and Venue Clarification Act of 2011 reaffirms this view. Atlantic may be disappointed in the balance Congress struck, but the arguable benefits of a bright-line rule do not provide a basis to ignore Congress's authority.

The House Report to the Federal Venue Act reaffirms that Congress expects district courts to make a case-by-case determination, and that the parties' expressed preference is but one consideration. Notably, Congress stated that "under the proposed amendment, such transfers would only be possible where all parties agreed *and only if the court found it to be for the convenience of the parties and witnesses and in the interest of justice.*" H.R. Rep. No. 10, H.R. REP. 112-10, 24, 2011 U.S.C.C.A.N. 576, 580 (emphasis added). Thus, while Atlantic mocks the Fifth Circuit for subjecting enforcement of the forum-selection clause to considerations of "discretionary rules" including "convenience," that is precisely the standard Congress mandates that district courts employ. Notably, the Act also modified 28 U.S.C. § 1391, the general venue statute, yet Congress did not enact any provision that

would make venue exclusive to the forum set forth in a contract between private parties.

One can hypothesize as to why Congress has not blessed forum-selection clauses with the certainty it has brought to arbitration agreements, but it is clear that is not its intent.[7] The fact remains that district courts still retain an interest in determining the most efficient and just location within the federal system to hear the cases they decide, unlike when parties select arbitration.

Judge Haynes correctly noted in her concurrence that the Venue Clarification Act is an expression of congressional intent to encourage forum-selection clauses. Pet. 23a. While it is true that Congress sought to enable parties to choose the venue in which to litigate, Congress still subjected this choice to judicial review to ensure whatever venue the parties selected was for the convenience of the parties and witnesses and in the interests of justice.

Atlantic asserts that concerns for certainty in commerce and contract preclude the Fifth Circuit's decision. But in making its claims, Atlantic fails to recognize that Congress and the federal judiciary must balance private economic concerns with a multitude of

7. Congress could have adopted a rule favoring enforcement of forum-selection clauses as it has with arbitration provisions. 9 U.S.C. § 2 ("A written provision in any [contract] evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."). It chose not to do so, instead opting for a flexible approach.

other factors in the administration of justice. The Fifth Circuit recognized the proper role of § 1404 and denied Atlantic's petition.

C. The Burden of Proof Issue Does Not Warrant this Court's Review:

This Court repeatedly has recognized "[w]here the burden of proof lies on a given issue is, of course, rarely without consequence and frequently may be dispositive to the outcome of the litigation or application, . . . [o]utside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of federal constitutional moment." *Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Trust for S. California*, 508 U.S. 602, 626 (1993) (citing *Lavine v. Milne,* 424 U.S. 577, 585 (1976)).

The apparent split in authority identified by Petitioner regarding allocation of the burden of proof, and specifically the burden of persuasion, in a § 1404(a) analysis is illusory and not deserving of this Court's review. More importantly, the private and public interest factors weigh so decidedly in favor of venue in the Western District of Texas that J-Crew easily could overcome any burden it had to bear. Consequently, any decision by this Court, regardless of who bears the burden of persuasion, will not affect the result of where this matter is venued.

1. The Circuit Courts are in Agreement regarding the Burden of Proof:

Petitioner correctly states that the Eleventh and Third Circuits shift the burden of persuasion in a § 1404(a) analysis to the party seeking to avoid transfer. Conversely, the Fifth Circuit and the Ninth Circuit state that that the burden remains on the movant to demonstrate that transfer is warranted pursuant to § 1404(a), despite the existence of a valid forum-selection clause. *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 499 (9th Cir. 2000), *cert. denied*, *GNC Franchising, Inc. v. Jones,* 531 U.S. 928 (2000). Each of these circuits, however, still recognize that the "significant" weight to be accorded to forum-selection clauses would require transfer pursuant to § 1404(a) in the absence of countervailing private and public interest factors.

Critically, the reason that the Eleventh Circuit "shifted" the burden of persuasion to the party opposing enforcement of the forum-selection clause was that the presence of a valid clause eliminates the traditional deference accorded to a plaintiff's choice of forum. *In re Ricoh Corp.*, 870 F.2d 570, 573 (11th Cir. 1989). Neither the Ninth Circuit, the Fifth Circuit, nor the district court in this case attributed *any* deference to J-Crew's choice of forum. Instead, the district court accorded the forum-selection clause "significant" weight as directed by *Stewart* and still found the clause to be outweighed by the other private and public factors it was compelled to consider. Pet. 39a. While the more appropriate articulation of the standard to be applied is that the movant continues to bear the burden to demonstrate transfer is warranted, the reality is that the circuits all are applying the same standard.

2. The District Court Properly Placed the Burden of Proof on Atlantic to Demonstrate Why Transfer was Warranted:

The district court properly held Atlantic, as movant, bore the burden of establishing the propriety of transfer pursuant to 28 U.S.C. § 1404(a). Pet.9a-10a. The Court in *Stewart* did not leave the weight to be accorded to a forum-selection clause "to a future day" as Petitioner implies; the Court expressly advised:

> The forum-selection clause, which represents the parties' agreement as to the most proper forum, should receive neither dispositive consideration . . . nor no consideration . . . but rather the consideration for which Congress provided in § 1404(a).

Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 31 (1988).[8]

As the Fifth Circuit explained, "[p]lacing the burden on the moving party still allows the court to give the forum-selection clause 'the consideration for which Congress has provided in § 1404' because the district court will consider the forum-selection clause in evaluating both the private and public interest factors." Pet 10a.

While the presence of the forum-selection clause may be a "significant factor," as many courts have

8. Moreover, as the Court explained, "[t]he flexible and individualized analysis Congress prescribed in § 1404(a) thus encompasses consideration of the parties' private expression of their venue preferences." *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29-30 (1988).

observed, Atlantic offers no basis for shifting the burden of persuasion beyond the *Bremen* standards that were considered and rejected by this Court in the context of a § 1404(a) analysis. As Congress reaffirmed in the legislative history to the Federal Court Jurisdiction and Venue Clarification Act of 2011, "transfers [are] only [ ] possible where all parties agreed ***and*** *only if the court found it to be for the convenience of the parties and witnesses and in the interest of justice*." H.R. Rep. No. 10, H.R. REP. 112-10, 24, 2011 U.S.C.C.A.N. 576, 580 (emphasis added). Thus, the movant still bears the burden to satisfy the court not only that the parties agreed, but also that transfer be for the *convenience of the parties* ***and*** *witnesses* ***and*** *in the interest of justice.*

3. The Western District of Texas Prevails Regardless of which Party Bears the Burden of Proof:

The Court should decline Petitioner's invitation to "provide guidance on the role of a forum-selection clause in the 1404(a) analysis" for an even more simple reason: the balancing of the private and public interest factors weighs so decidedly in favor of retaining venue of this matter in the Western District of Texas that the burden of persuasion will not affect the result in this case.

Atlantic misconstrues the graveman of the district court's analysis, concluding that the decision was based upon placing the burden on Atlantic. Pet. 23. It was not. A fair reading of the district court's opinion leaves the clear understanding that the district court concluded that the private and public interest factors overwhelmingly pointed

to the Western District of Texas as the appropriate venue for this dispute.

Nevertheless, Petitioner summarily concludes that "had the burden been allocated correctly, the district court should have reached the opposite conclusion and ordered transfer of this case to Virginia under Section 1404(a)." Pet. 23. Petitioner tellingly omits, however, any discussions of the relevant factors that would compel a different result had the "burden" shifted to J-Crew. Again, the district court found, after giving due consideration to the forum-selection clause, that both the private and public interest factors weighed in favor of retaining venue of this matter in the Western District of Texas. J-Crew submits that one would need to attribute "dispositive weight" to Atlantic's forum-selection clause—a standard expressly rejected by this Court—before transfer to the Eastern District of Virginia could be justified.

D. Petitioner Overstates the Urgency of this Matter:

Petitioner overstates the urgency for this Court to resolve the circuit split regarding the proper procedure for enforcing forum-selection clauses that designate an alternate federal forum, and ignores the corresponding damage that would be inflicted upon the standard for mandamus review if the Court were to grant the Petition.

While Atlantic details the well-developed disagreement among circuits, it fails to articulate why the Fifth Circuit's decision creates an urgent need for review beyond the split in authority itself. Circuit Courts have subjected forum-selection clauses providing for an alternate federal venue to the required § 1404(a) analysis ever since this

Court's holding in *Stewart*. See, *Red Bull Associates v. Best W. Intern., Inc.*, 862 F.2d 963, 967 (2d Cir. 1988); *Jumara v. State Farm Ins. Co.*, 55 F.3d 873 (3d Cir. 1995). Still, businesses engaged in interstate commerce have managed to flourish over the past 25 years despite the split in authority and the "discretionary" § 1404(a) limits imposed upon their right to contract for a designated federal venue. The Sixth and Seventh Circuits similarly have followed this approach. *In re LimitNone, LLC*, 551 F.3d 572, 575-76 (7th Cir. 2008); *Kerobo v. Sw. Clean Fuels Corp.*, 285 F.3d 531, 535 (6th Cir. 2002). The mere fact the Fifth Circuit recently followed suit does not create an urgent need for review.

Similarly, district courts in every district of the Fifth Circuit have been analyzing forum-selection clauses providing for venue in another federal district court in accordance with *Stewart* and § 1404(a) for years.[9] The

9. *See Southeastern Consulting Group, Inc. v. Maximus, Inc.*, 387 F.2d 681 (S.D. Miss. 2005) (holding dismissal of suit was not appropriate when another federal court was the agreed venue under forum-selection clause); *Wal-Mart Stores, Inc. v. QORE, Inc.,* 2007 WL 2769835 (N.D. Miss. September 20, 2007) (holding where transfer of venue to another federal court is an option, a § 1404 motion to transfer venue under *Stewart* is the proper procedural means for enforcing a forum-selection clause); *Williamson-Dickie MFG. Co. v. M/V Heinrichj*, 762 F.2d 1023 (S.D. Tex. 2011) (same); *Canvas Records, Inc. v. Koch Entertainment Distribution, LLC*, 2007 WL 1239243 (S.D. Tex. April 27, 2007) (holding that the "proper procedure to enforce a forum-selection clause that provides for suit in another federal court is through Section 1404(a) and *Stewart's* balancing test."); *Pinnacle Interior Elements, Ltd. v. Panalpina, Inc.*, 2010 WL 445927, 6-7 (N.D. Tex. 2010) (same); *Brock v. Baskin-Robbins USA Co.*, 113 F. Supp. 2d 1078 (E.D. Tex. 2000) (same)**;** *Asar Family Holdings, LLC v.*

Fifth Circuit's recent decision did not drastically change the landscape for enforcement of such clauses, it merely endorsed these past holdings.

Petitioner argues that "to relegate enforcement of forum-selection clauses to a discretionary convenience analysis under Section 1404(a), is to invite error and erode the right to contract." Pet. 25. But the need for parties to have contractual certainty is not incompatible with the flexible case-by-case analysis demanded by § 1404(a).

The truth is that it is not certainty that Petitioner seeks, rather it is an iron-clad right to forum-shop, without any regard for collateral effects of this decision on the public or the courts. Congress's decision to subject forum-selection clauses to the individualized, case-by-case review of § 1404 does not eliminate certainty; it merely requires the parties to consider factors beyond their own indiscriminate desires—including institutional concerns—in deciding where the agreed-upon forum will be located. Parties remain free to contract for an agreed upon forum within the limits prescribed by Congress. The more consideration parties give to these factors at the outset, the more certain they may be that such a clause will be enforced.

Direct TV, Inc., 2010 WL 3732933 (W.D. La. September 20, 2010) (surveying cases from Fifth Circuit district courts and holding motion to dismiss pursuant to 12(b)(3) and motion to transfer under 28 U.S.C. § 1406 is not proper where forum selection clause provides for venue in another district court); *Dorsey v. Northern Life Ins. Co.*, 2004 WL 2496214, at *9 (E.D. La. November 5, 2004); *CamSoft Data Sys., Inc. v. S. Electronics Supply, Inc.*, CIV.A. 09-1047-JJB, 2010 WL 3199949 (M.D. La. Aug. 12, 2010).

Finally, while the analysis differs, the result between § 1404 and § 1406 will be the same in all but extreme cases. Petitioner simply fails to acknowledge that this case, in which every private and public interest factor relevant to a § 1404(a) analysis other than the boilerplate forum-selection clause itself, favors the Western District of Texas is, in fact, an exceptional case.

CONCLUSION

J-Crew Management, Inc. respectfully prays that this Court deny the Petition for Certiorari, and respect the high bar that must be met to obtain mandamus relief.

Respectfully submitted,

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