No. 13-309

In The
Supreme Court of the United States

LARRY C. MAYO, *et al.*,

Petitioners,

v.

BOARD OF EDUCATION OF PRINCE GEORGE'S COUNTY, *et al.*,

Respondents.

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When it is undisputed that a defendant consented to removal of a state court action involving multiple defendants to federal court, whether the form of defendant's consent presents an issue of importance which this Court should review?

RULE 29.6 CORPORTATE DISCLOSURE STATEMENT

Pursuant to Sup. Ct. R. 29.6, Respondent Association of Classified Employees/American Federation of State, County and Municipal Employees certifies that it is not an affiliate or parent of any corporation, and no corporation, unincorporated association, partnership or other business entity, not a party to this case has a financial interest in the outcome of this litigation. Respondent Board of Education of Prince George's County, Maryland is a state governmental corporation.

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Respondents, Board of Education of Prince George's County, its former chair Verjeana M. Jacobs (collectively "Board"), and the Association of Classified Employees/American Federation of State, County and Municipal Employees ("Union") file this brief in opposition to the petition for a writ of certiorari.

INTRODUCTION

The petition does not raise any question that warrants review by this Court because it utterly fails to meet any of the established criteria warranting certiorari. Sup. Ct. R. 10. In removal cases involving more than one defendant, the Fourth Circuit, like all Circuits, adheres to the rule of unanimity regarding removal of a state court action to federal court and requires a court filing indicating that all defendants consent to the removal.

Despite the rendering of a final judgment on the merits of their claims, Petitioners have raised a non-material issue as to the form of consent to removal as a tactic to remand this case to state court in order to obtain a second review of the merits of their case. Because the petition does not identify an unresolved question of federal law that must be decided by this Court, it should be denied.

COUNTERSTATEMENT OF THE CASE

The underlying matter that led to this lawsuit involved a grievance filed by the Union seeking to enforce a work preservation provision of its labor contract with the Board, and a subsequent

arbitration decision issued as a result of that grievance. (App. 5a-9a). In his Award, the Arbitrator upheld the Union's grievance, but refused to provide the broad remedies sought by the Union. Instead, the Arbitrator ordered the parties to attempt to negotiate an appropriate remedy. (App. 7a). Subsequently, the Union and the Board negotiated a resolution of the outstanding issues. (App. 7a-8a).

On March 11, 2011, five current or former temporary employees commenced a "putative" class action in the Circuit Court for Prince George's County, Maryland against the Union and the Board, challenging their resolution of the arbitration. In the lawsuit, Petitioners asserted only state law claims against the Union. Petitioners asserted state law claims and claims pursuant to the 5th and 14th Amendments to the U.S. Constitution and 42 U.S.C. § 1983 against the Board. (App. 8a-9a).

The Board filed a timely notice of removal pursuant to 28 U.S.C. § 1446. *Id.* In its notice, the Board indicated that the Union had been consulted and "agreed to the removal of this action to federal court." *Id.* Thereafter, consistent with the Union's representation, its counsel filed a notice of appearance in the district court three days later. *Id.* After another three days, the Union filed its motion to dismiss for failure to state a claim. *Id.* In its supporting memorandum, the Union stated that it had been served with a copy of the Complaint "on or about March 26, 2011" and noted that it consented to the removal. (App. 9a). The Board also filed a motion to dismiss on the same grounds, albeit for

different reasons given the federal claims filed against the Board.

Petitioners filed a motion to remand, claiming the Union had not timely filed its own independent notice of removal or a separate writing with the district court indicating its consent to removal. *Id.* The district court denied the motion to remand.

Relying on *Harper v. AutoAlliance Int'l, Inc.*, 392 F.3d 195 (6th Cir. 2004), the district court concluded that remand was not appropriate because nothing in the applicable removal statutes (28 U.S.C. §§ 1441, 1446) "imposes a requirement that a defendant submit a writing reflecting consent to removal." (App. 27a). Thereafter, the district court addressed the merits of Petitioners' claims and dismissed all claims against the Board and the Union. (App. 30a-33a).

Petitioners appealed both the denial of their motion to remand and dismissal of their lawsuit to the Fourth Circuit. On appeal, the Fourth Circuit upheld the district court's denial of Petitioners' remand motion, as well as the district court's dismissal of Petitioners' claims against the Union and the Board. The Fourth Circuit affirmed the district court's remand ruling based upon the protections provided by Rule 11 of the Federal Rules of Civil Procedure and noted that "the practice of having one attorney represent to the court the position of the other parties in the case, with the intent that the court act on such representations, is quite common." (App. 16a). In the context of a notice of removal, the Fourth Circuit reasoned that if

such representations were untrue, "it would be within the district court's power to impose appropriate sanctions, including a remand to state court." *Id.* (internal quotations and citations omitted).

REASONS TO DENY THE PETITION

I. Summary of Argument

There is no compelling reason to grant this petition for three reasons:

First, the Circuits agree that the rule of unanimity applies in removal cases involving multiple defendants – all defendants must join or consent in the removal. The only difference occurs with respect to the acceptable form to notify the district court of unanimity for the removal. Because the different approaches embraced by the Circuits all ensure the same result – compliance with the rule of unanimity – these differences do not rise to the level of a Circuit split. Moreover, these approaches are clearly articulated by a majority of the Circuits. Thus, there is little to no danger that litigants within specific Circuits are confused as to which procedural approach they must follow to satisfy the "rule of unanimity."

Second, the petition should be denied because, even if the differing procedural approaches can be viewed as creating a Circuit split, this issue arises in such a small number of cases, that any supposed split should be viewed as tolerable and not worthy of this Court's review. Likewise, the purported Circuit

split is not important enough to merit review and is therefore, unworthy of a grant of certiorari.

Third, the petition should be denied because when Congress recently amended the applicable removal statues, it did not seek to correct the purported Circuit split identified by Petitioners. This refusal to act is particularly relevant because, through its amendments, Congress did identify and address a Circuit split with respect to the interpretation of the removal statutes. Thus, it stands to reason that Congress did not view any variation in the form of consent to merit reference when addressing amendments to the removal statute.

For these reasons, the underlying decision issued by the Fourth Circuit should not be disturbed.

II. The Differing Approaches Used by the Circuit Courts in Enforcing the Rule of Unanimity Do Not Create a Split

The rule of unanimity "serves the interests of plaintiff, defendants and the judiciary." *Esposito v. Home Depot U.S.A., Inc.*, 590 F.3d 72, 75 (1st Cir. 2009). This requirement prevents defendants from splitting the litigation, thereby "forcing a plaintiff to pursue its case in two separate forums." *Id*. Likewise, "[d]efendants also stand to benefit from the requirement, as it precludes one defendant from imposing his choice of forum on a co-defendant." *Id*. Finally, the rule of unanimity "prevents the needless

duplication of litigation, thereby preserving court resources and eliminating the unattractive prospect of inconsistent state and federal adjudications." *Esposito*, 590 F.3d at 75.

Petitioners do not suggest that a conflict exists among the Circuits over enforcement of the rule of unanimity; nor do they suggest that any Circuit has issued a decision that undermines the goals of the rule of unanimity as expressed by the First Circuit in *Esposito*. Rather, Petitioners merely quibble over the differing procedural approaches used by the Circuits to ensure compliance with the rule of unanimity. Because these different paths all lead to the same result, there is no Circuit split. Accordingly, there is no compelling reason to grant the petition, and it should be denied. Sup. Ct. R. 10.

Because no actual Circuit conflict exists, Petitioners seek to conjure up a conflict based upon the different approaches adopted by the Circuits to enforce the rule of unanimity. (Pet. at 9). Specifically, Petitioners suggest that "clarity" is needed on this issue. *Id*. at 29. They also claim that "six circuits [ ] have not addressed this issue" and, therefore, "litigants cannot predict with confidence what standard will govern the removal of multi-defendant cases." *Id*. at 30. These claims are false and they do not provide a basis for granting the petition.

In a majority of the Circuits, clear guidance exists on the question of what procedural steps must be taken to effectuate removal in cases involving multiple defendants. Thus, the Sixth and Ninth

Circuits require that at least one attorney of record sign the notice of removal and certify that the remaining defendants consent to the removal. *See Harper v. AutoAlliance Int'l Inc.*, 392 F.3d 195, 201-202 (6th Cir. 2004); *Proctor v. Vishay Intertechnology Inc.*, 584 F.3d 1208, 1224-25 (9th Cir. 2009). The Fourth Circuit adopted the same approach in this case.[1] Such an approach is straightforward and clear. It certainly does not foster any possible confusion for any party to litigation.

The same can be said of the approach used in the Fifth, Seventh and Eighth Circuits. There, one defendant may remove an action and all remaining defendants must indicate their consent in writing. *Getty Oil Corp. v. Ins. Co. of No. Am.*, 841 F.2d 1254, 1262, n.11 (5th Cir. 1988) (non-removing defendant must submit a "timely, written indication" that it "has actually consented" to the removal); *Pritchett v. Cottrell, Inc.*, 512 F.3d 1057, 1062 (8th Cir. 2008); *Gossmeyer v. McDonald*, 128 F.3d 481, 489 (7th Cir. 1997) ("all served defendants still have to support

[1] Although Petitioners claim that no clear guidance exists from the Eleventh Circuit (Pet. 27-28), in *Boone v. JP Morgan Chase Bank*, 447 Fed. Appx. 961, 963 (11th Cir. 2011), a notice of removal was found to satisfy the rule of unanimity because the removing defendant's counsel "had express permission to sign the notice of removal on [the non-removing defendant's] behalf." Thus, in so holding the Eleventh Circuit joined the Fourth, Sixth and Ninth Circuits in their approach to enforcing the rule of unanimity.

the petition in writing, i.e., sign it").[2] This approach also makes clear the procedural steps to follow in order to remove a state lawsuit involving multiple defendants to federal court. Moreover, in the Circuits that have not provided the type of clear guidance discussed above, defendants need only follow the common sense guidance articulated by the First Circuit in *Esposito* – err on the side of caution by either signing the notice of removal or filing a separate written consent.

Thus, in light of the case law discussed above, clarity is not lacking as to the procedural steps that must be taken to satisfy the rule of unanimity. Defendants merely need to follow the applicable process adopted by the Circuit in which they wish to litigate. To that end, the procedural approaches adopted by the Circuits are no different than requirements set forth in local rules that often vary from court to court. Petitioners fail to provide any reason why the Court should endorse one approach at the expense of others.[3] Because the Circuits have provided adequate guidance on the procedural steps

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[2] In *Esposito*, the First Circuit indicated that it was "not inclined to establish a wooden rule" like the ones adopted by the Fifth, Seventh, and Eighth Circuits. 590 F.3d at 77. The First Circuit, nevertheless, provided sound practical guidance for litigants by stating "it is undoubtedly the better practice for a defendant who wants to be in federal court to join the removal notice explicitly, either by signing the notice itself or by filing its own consent." *Id*.

[3] Although Petitioners take issue with the different procedural approaches followed by the Circuits, they have not pointed to a case in any court where the procedural approach allowed a case that violated the rule of unanimity to proceed in federal court.

to take in order to satisfy the rule of unanimity, this case presents no problem of national importance for the Court to address, and the petition should be denied.

Petitioners suggest that that the procedural question over what steps must be taken to satisfy the rule of unanimity is worthy of this Court's review "because potentially removable state court actions against multiple defendants are common," arguing that "there are more than 120 district court decisions in which a plaintiff has challenged the sufficiency of such a removing party representation." (Pet. 9-10; 30). Likewise, Petitioners claim that "[i]n the Fourth Circuit, for example, there are 17 district court decisions on this issue in addition to the decision in the instant case." (Pet. 30). A closer consideration of this claim disproves Petitioners' suggestion that this issue is commonplace. Indeed, based upon Petitioners' own empirical data, the occurrence of this issue is extremely rare.

There are 94 federal judicial districts, with at least one district in each state, the District of Columbia and Puerto Rico. The three territories of the United States – the Virgin Islands, Guam and the Northern Mariana Islands, have district courts that hear federal cases. The federal judicial system is comprised of 12 regional circuits.[4] Here, the 120 cases relied on by Petitioners span approximately 25 years, disbursed among the 94 districts. (Pet. 11-20; 30.) Thus, the issue in this case arises in lower courts an average of less than five times per year.

[4] Refer to www.uscourts.gov/FederalCourts.

According to Petitioners, the rate is even less in the Fourth Circuit, the 17 cases cited in the petition were issued over a 20 year timeframe – thereby rendering a rate of less than one case per year.[5] This extremely low rate of occurrence in over 100 courts in the past 25 years strongly supports a conclusion that the guidance provided by the Circuits is being followed and there is no need for additional clarification from this Court. Therefore, the petition should be denied.

III. Even With the Differing Circuit Approaches This Conflict is Not Important Enough to Merit Review nor is it Intolerable

Rule 10 of the Supreme Court provides that "[a] petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. Among these reasons is when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a).

As explained above, the procedural approaches used by the courts of appeal to ensure compliance with the rule of unanimity in removal cases involving multiple defendants fail to present a conflict on an important matter – or really any conflict at all, given the same outcome occurs regardless of the approach followed. As explained below, however, even if the differing Circuit

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[5] Of course, the rate of occurrence in the Fourth Circuit is now immaterial, in light of the clear guidance provided by that Court in the opinion below.

approaches to this procedural question may be considered a conflict, the conflict certainly does not rise to the level of being important or intolerable. Therefore, for this additional reason, the petition should be denied.

A. This Court Has Determined that Procedural Removal Issues which do not Affect the Substance of Removal Are not "Important" Enough to Require Appellate Review

The rule of unanimity represents a substantive decision that no defendant should be forced to litigate in federal court against its will. *Esposito*, 590 F.3d at 75. Petitioners raise only a procedural question concerning the form used to express consent to removal. In this case, of course, there is no dispute that all defendants consented to the removal. The Court has already determined that, so long as the substantive requirements of removal are satisfied, it is unconcerned with the procedure or form in which removal is effectuated and the district courts and circuit courts can superintend this. Thus, it considers these matters not to be "important" enough to adjudicate. *Caterpillar v. Lewis*, 519 U.S. 61 (1996).

In *Caterpillar*, the Court spoke to its lack of concern with the form of removals. There, removal was procedurally improper at the time of removal, but the defect—lack of complete diversity—was remedied before final judgment was rendered. The Court held that, because there was subject matter

jurisdiction at the time of final judgment (the non-diverse defendant having been dismissed), no remand was appropriate even though the removal was improperly effectuated at the time it occurred. *Id.* at 476-77. This was due to judicial economy and other factors. *Id*. at 476.

Respondent in *Caterpillar* raised the issue that the "all's well that ends well" approach meant that procedurally improper removals which were later remedied outside the time for removal could effectively never be remanded to state court because an appeal could not be brought until final judgment, at which point it would be unreviewable under the rule ultimately adopted by *Caterpillar*. *Id*. at 475-76. The Court acknowledged this argument, but found that this situation did not present an important question of appellate concern for the following reasons: (1) "Congress ordered a procedure calling for expeditious superintendence by the district courts" and the district courts on their own could police removal issues. *Id.* at 476; (2) Congress had already determined that court decisions to remand were generally not reviewable, demonstrating that it was more concerned with efficiency in the removal process than with appellate review. *Id*. at 476-77; and (3) while Congress did not exclude removals from appellate review, the Court reasoned that this was likely because of a concern that "relates to federal courts' subject-matter jurisdiction" given that they are courts of limited jurisdiction, not out of a concern for review of the procedure of removals. *Id*. at 477.

Petitioners do not raise any issue with respect to subject matter jurisdiction, which is the Court's primary concern on removal matters. Rather, they are merely concerned with procedure, and mainly form, which the Court has seen fit to leave to the district and circuit courts to address because it does not rise to a level of significant importance for this Court. As a result, the petition should be denied.

B. The Alleged Circuit Split Would not be Intolerable

The petition should also be denied because any purported Circuit split falls well short of being considered intolerable. Congress identified relevant factors to consider on the question of whether a Circuit conflict rises to the intolerable level, thus requiring the Court's review. *See* Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 302, 104 Stat. 5089, 5104 (1990). These factors include consideration of whether the purported Circuit conflict:

> (1) imposes economic costs or other harm to multicircuit actors, such as firms engaged in maritime and interstate commerce;
>
> (2) encourages forum shopping among circuits, especially since venue is frequently available to litigants in different fora;
>
> (3) creates unfairness to litigants in different circuits--for example, by allowing federal benefits in one circuit that are denied elsewhere; or

> (4) encourages "non-acquiescence" by federal administrative agencies, by forcing them to choose between the uniform administration of statutory schemes and obedience to the different holdings of courts in different regions.

Similarly, Justice White cast more light on the question of what rises to the level of an intolerable Circuit conflict in a statement he made which was quoted during congressional hearings on a 1985 proposal for an "Intercircuit Panel." Justice White explained that an intercircuit conflict warranted review by the Court when the conflict

> results in the federal law being enforced differently in different parts of the country. What is a crime, an unfair labor practice, or an unreasonable search and seizure in one place is not a crime, an unfair labor practice or illegal search in another jurisdiction. Or citizens in one circuit do not pay the same taxes that those in other circuits must pay.

Intercircuit Panel of the United States Act: Hearing Before the Subcomm. on Courts of the S. Comm. on the Judiciary, 99th Cong. 147 (1985) (prepared statement of A. Leo Levin).

The procedural issue presented in the petition fails to lead to any of these results. In the first instance, multi-circuit actors do not incur economic costs or other harm as a result of the different

Circuit approaches. As previously stated, if such entities desire to remove a state court lawsuit to federal court they merely must ascertain the relevant guidance to follow, and then take the appropriate steps to satisfy this guidance.

Compliance with the relevant approach in a particular case does not create potential financial liability for the multi-circuit actor in another geographic region of the country. Moreover, given the fact that disputes of this nature occur so infrequently it appears that multi-circuit actors and their counsel have been able to sufficiently discern the procedural requirements necessary to satisfy the rule of unanimity.

In addition, because a plaintiff will have elected the particular location of the state lawsuit being removed, there is absolutely no concern over improper forum shopping by the removing defendants. Likewise, the different procedural approaches do not create unfairness for litigants in different circuits. The burden of filing a separate written consent (in those Circuits that have adopted such an approach) is nominal when compared to litigants who may only be required to express their consent to the removing defendant, who must then report that consent in writing to the federal court as part of the notice of removal.

Indeed, the burden is no greater than litigants who must be aware, and follow, more stringent local rules in certain jurisdictions. Like the multi-circuit actors, the burden of being aware of the procedural rules of a court in which one plans to litigate does

not create the type of burden or cost that would lead to an intolerable conflict. For the same reason, it is practically impossible to envision a factual scenario generated by the different Circuit approaches here that would lead to "non-acquiescence" by federal administrative agencies.

Finally, the issue of different procedural approaches being used by the Circuits to ensure compliance with the rule of unanimity does not lead to any of the circumstances identified by Justice White to suggest an intolerable conflict exists – the rule of unanimity is being uniformly applied across the federal courts. Accordingly, this issue is not intolerable and the petition should be denied.

IV. Congress Chose Not to Address the Form of Notice of Unanimity in Amending the Removal Statute in 2011

In *Merck & Co., Inc. v. Reynolds*, 559 U.S. 633, 648 (2010), the Court stated that "[w]e normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent." *See also Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) ("We assume that Congress is aware of existing law when it passes legislation."); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."); *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 106 (1941) (In construing the removal statute, the Court assumes that when Congress revises a statute, it is aware of that statute's relevant history.). The fundamental

concept of congressional awareness of existing law and judicial interpretation of that law provides another basis for denying the petition in this case.

Congress recently codified the rule of unanimity as part of the Federal Courts Jurisdiction and Venue Clarification Act of 2011 ("JVCA"). 28 U.S.C. 1446 § (b)(2)(A) (2011). Through the JVCA, Congress addressed a specific Circuit split concerning the removal statutes involving multiple defendants.

Specifically, Congress explained that the JVCA amended portions of Section 1446 in order to clarify "the provisions governing timeliness of removal by giving each defendant 30 days after service to file a notice of removal, while allowing any earlier-served defendants to consent to removal by the later-served defendant." 157 Cong. Rec. H1367. Congress explained that the clarification to the removal statute was necessary because in cases involving multiple defendants "[f]ederal courts have differed in determining the date on which the 30 day period [for removal] begins to run." H.R. Rep. No. 112-10 at 13 (2011).

In contrast, Congress chose not to address the purported conflict Petitioners identify here. Rather, Congress merely explained that

> [n]ew subparagraph (b)(2)(A) codifies the well-established "rule of unanimity" for cases involving multiple defendants. Under that rule, which is generally traced to the Supreme Court decision in

> *Chicago, Rock Island & Pac. Ry. v. Martin*, 178 U.S. 245, 251 (1900), all defendants who have been properly joined and served must join in or consent to removal.

H.R. Rep. No. 112-10 at 13 (2011).

Thus, Congress left undisturbed the procedural approaches used by the Circuits to enforce the rule of unanimity. Congressional silence on this issue provides further support for the conclusion that this issue does not create an intolerable conflict in need of redress. Therefore, the petition should be denied.

CONCLUSION

If Petitioners, in the way now attempted, can secure a second review of a cause of action where they have presented no controverted question except an alleged procedural one, the fundamental purpose of granting certiorari review will be frustrated. The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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