No. 10-222

In the Supreme Court of the United States

WYETH LLC, ET AL.,
Petitioners,

v.

SANDRA KIRKLAND, ET AL.,
Respondents.

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

BRIEF OF DRI – THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

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INTEREST OF *AMICUS CURIAE*

DRI – The Voice of the Defense Bar ("DRI") submits this *amicus curiae* brief in support of petitioners.[1] DRI is an international organization that includes more than 22,000 attorneys involved in the defense of civil litigation. A hallmark of DRI's institutional mission is a commitment to enhancing the skills, effectiveness, and professionalism of defense attorneys. Consistent with this commitment, DRI seeks to address issues germane to defense attorneys, to promote the role of the defense attorney, and to improve the civil justice system. Accordingly, DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, and – where national issues are involved – consistent.

To promote these objectives, DRI participates as *amicus curiae* in cases that raise issues of import to its membership and to the judicial system. In particular, DRI seeks to contribute to the Court's consideration of cases in which the practical experience of DRI's members may assist the decisionmaking process.

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[1] All parties have consented to the filing of this brief. Counsel of record received notice at least 10 days prior to the due date of *amicus'* intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus*, its members, or its counsel made a monetary contribution to the brief's preparation or submission.

With respect to this case, the evolving law of "fraudulent misjoinder" is of great interest to DRI and its membership. This doctrine provides an important procedural tool for defendants to protect their right to obtain and preserve federal subject matter jurisdiction over cases that would satisfy the standards for diversity of citizenship jurisdiction but for the improper addition of "spoiler" parties who do not belong in the case.

In its formulation of the doctrine of "fraudulent misjoinder," the Eighth Circuit requires not only misjoinder of non-diverse parties as a condition of severing and remanding those parties, but "egregious" misjoinder. This articulation, which has also been adopted by other courts of appeals, is of concern to DRI because the "egregiousness" standard is vague, confusing to lower courts, and prejudicial to defendants who must meet an ill-defined requirement to protect their right to litigate in federal court.

SUMMARY OF THE ARGUMENT

Among the historic roots of the federal court system was the need for our young republic to provide a forum for the resolution of disputes between residents of different states. To avoid even the perception that state courts might harbor bias against out-of-state parties, defendants have the right to remove from state court to federal court under diversity of citizenship jurisdiction. For more than two centuries, this Court and others have reaffirmed the importance of this right of removal. Over the same time span, Congress has expanded the right of removal. Moreover, in recent years

Congress has increased safeguards to protect plaintiffs and defendants alike from jurisdictional gamesmanship (particularly, but not exclusively, in the class action context).

Yet even as federal law has endeavored to provide structure and to ensure fairness in class and "mass" actions, some plaintiffs have concocted novel ways of constructing multi-party lawsuits that would dodge diverse defendants' right of removal. One such method is to join claims by plaintiffs – or against defendants – that are wholly unrelated to the primary claims alleged in the complaint. The practical consequence of this tactic is to defeat federal jurisdiction.

To combat the improper joinder of so-called jurisdictional "spoilers" that prevent removal in an otherwise diverse action, courts have crafted several cures, including the doctrine of "fraudulent misjoinder." Employing a standard that the Eleventh Circuit created and the Eighth Circuit has now adopted, the decision in this case requires more than "mere misjoinder" to sever and remand improperly joined claims and parties to state court. Beyond "mere misjoinder," this standard requires something denominated "egregious misjoinder."

To say the least, courts are understandably confused about the meaning and proper application of this vague standard, which is ill-suited to protect defendants' removal rights. Review by this Court is necessary to resolve this conflict and to shut the door to the procedural gamesmanship that the decision below encourages.

ARGUMENT

I. This Court Should Grant Certiorari to Provide Guidance on the Applicability and Scope of the "Fraudulent Misjoinder" Doctrine in a Way that Gives Due Regard to Diverse Defendants' Right of Access to Federal Courts

The Eighth Circuit is one of four appellate courts to adopt the version of fraudulent misjoinder articulated by the Eleventh Circuit in *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1360 (11th Cir. 1996). The Fifth and Ninth Circuits have also acknowledged the doctrine, as have several district courts. *See* Pet. 9-11 (citing, *e.g.*, *In re Benjamin Moore & Co.*, 309 F.3d 296, 298, *mandamus denied,* 318 F.3d 626, 630-31 (5th Cir. 2002); *Cal. Dump Truck Owners Ass'n v. Cummins Engine Co.*, 24 Fed. Appx. 727, 729 (9th Cir. 2001)).

There is substantial disagreement among the courts regarding the manner in which the fraudulent misjoinder doctrine is to be applied. Indeed, "[m]any courts have foundered on shoals of tautology in trying to define fraudulent misjoinder." *Rutherford v. Merck & Co., Inc.*, 428 F. Supp. 2d 842, 853 (S.D. Ill. 2006), *quoted in Palermo v. Letourneau Techs., Inc.*, 542 F. Supp. 2d 499, 515 (S.D. Miss. 2008). Of particular concern to the lower courts is the "egregiousness" test the Eleventh Circuit created and the Eighth Circuit has now adopted. This articulation is less a legal standard and more a bare label whose true meaning is unknown. Accordingly, some district courts have commented on the inherent difficulty in divining what the standard means and

how it operates: "'The theory of procedural misjoinder articulated in *Tapscott* is inherently ambiguous,' for one reason, because of the confusion surrounding when misjoinder is so 'egregious' as to constitute fraudulent misjoinder." *Palmer v. Davol*, No. 07-md-1842-ML, 2008 U.S. Dist. LEXIS 103738, at *16 (D.R.I. Dec. 23, 2008) (citing *In re Genetically Modified Rice Litig.*, No. 4:06 MD 1811, No. 4:07 CV 825, 2007 U.S. Dist. LEXIS 76820 (E.D. Mo. Oct. 15, 2007)).

The poorly-defined egregiousness requirement has added confusion and complexity to the law of diversity jurisdiction and removal. *See Conk v. Richards & O'Neil, LLP*, 77 F. Supp. 2d 956, 971 n. 5 (S.D. Ind. 1994) (citing 14B Wright, Miller & Cooper, *Federal Practice & Procedure* § 3723 at 658 (3d ed. 1998)); *see also Asher v. Minn. Mining & Mfg. Co.,* No. 04-CV-522, 2005 U.S. Dist. LEXIS 42266, at *30 (E.D. Ky. June 30, 2005) ("courts have recognized that 'the governing legal standards regarding the fraudulent misjoinder doctrine are far from clear'") (quoting *Walton v. Tower Loan of Miss.,* 338 F. Supp. 2d 691, 695 (N.D. Miss. 2004); *Rutherford,* 428 F.Supp.2d at 852 ("enormous judicial confusion [has been] engendered by the [fraudulent misjoinder] doctrine").

Exacerbating the "egregiousness" requirement's imprecision is its inherent high degree of subjectivity. The *Tapscott* rule, in the words of one district court, adds "a very subjective and troublesome element of complexity to an already knotty calculus." *Burns v. Western Southern Life Ins. Co.*, 298 F. Supp. 2d 401, 403 (S.D. W. Va. 2004). In

fact, "courts have questioned whether *Tapscott's* distinction between mere misjoinder and egregious misjoinder might be so subjective as to be unworkable." *Palermo*, 542 F. Supp. 2d at 523 (internal citations omitted).

It is evident from these lower court opinions that the "egregiousness" standard is not a meaningful, normative standard at all. Instead, it is a requirement that an otherwise diverse defendant show "something more" than improper joinder, but with zero guidance as to what that "something more" might be. *See, e.g., In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.,* 260 F. Supp. 2d 722, 728 (S.D. Ind. 2003) ("[p]recisely what the 'something more' is was not clearly established in *Tapscott* and has not been established since"). By employing this ill-defined label instead of acknowledging that all misjoined parties should be severed to preserve federal jurisdiction, the Eighth Circuit places an unfair burden on out-of-state defendants who have no clarity as to the means by which proper removal can be accomplished where in-state parties are misjoined. Accordingly, parties such as petitioners, who have the right to have their claims against diverse plaintiffs heard in federal court, are deprived of an effective mechanism for exercising that right.

In practice, and in absence of any objective standard, analysis of whether an improper joinder is "egregious" involves an inquiry into the plaintiff's state of mind. Laura J. Hines & Steven S. Gessler, *Driving Misjoinder: The Improper Party Problem in Removal Jurisdiction,* 57 Ala. L. Rev. 779, 820-21 (Spring 2006) ("Hines & Gensler I"). The Eighth

Circuit expressly adverted to this approach when it suggested that the "egregiousness" requirement could be satisfied by a showing that plaintiffs "acted in bad faith." Pet. App. 19a. But such an analysis is inherently flawed. Even the better-established fraudulent joinder doctrine, which permits severance of claims against non-diverse defendants who have been joined despite the lack of a meritorious claim against them, does not require inquiry into the plaintiff's subjective good faith. *Greene v. Wyeth,* 344 F. Supp. 2d 674, 685 (D. Nev. 2004) ("fraudulent joinder is a term of art which does not impugn the integrity of plaintiffs or their counsel and does not refer to an intent to deceive") (internal citations omitted).[2]

Particularly in the context of fraudulent misjoinder, any such state-of-mind analysis poses an unfair and nearly impossible burden for a defendant to overcome in seeking removal. Consequently, in crafting a standard for fraudulent misjoinder, attention should be given to the right of diverse defendants to remove a lawsuit with properly-joined parties, *see, e.g.* 28 U.S.C. § 1441(a); Fed. R. Civ. P. 20, 21, rather than to the motives of plaintiffs or to

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[2] Several commentators have observed that "fraudulent misjoinder" is a misnomer and that "procedural misjoinder" or "improper joinder" are more appropriate terms. Hines & Gessler I at 821; Paul Rosenthal, *Improper Joinder: Confronting Plaintiffs' Attempts to Destroy Federal Subject Matter Jurisdiction,* 59 Am. U.L. Rev. 49, 73-74 (October 2009). These alternatives share the salutary effect of focusing analysis on the misjoinder itself, rather than on plaintiff's intent or on a calibration of the degree of egregiousness.

the "egregiousness" of an improper joinder. *See* Hines & Gensler I at 821.

II. This Court Should Also Grant Review Because Narrowing the Fraudulent Misjoinder Doctrine Would Have a Substantial Adverse Impact on Diverse Defendants' Access to the Federal Courts

A. National Policy Favors Removal of Diverse Lawsuits

The need for diversity of citizenship jurisdiction to protect the rights of out-of-state litigants is – and has always been – a core principle of American jurisprudence. Indeed, the vital role of diversity jurisdiction was recognized by the First Congress when it passed the Nation's first Judiciary Act in 1789. James M. Underwood, *The Late, Great Diversity Jurisdiction,* 57 Case. W. Res. L. Rev. 179, 181 (Fall 2006). Among the Founding Fathers who championed diversity jurisdiction, Alexander Hamilton explained that:

> [I]n order to [ensure] the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments,

> will be likely to be impartial between the different States and their citizens, and which, owing to its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded.

The Federalist No. 80, at 463 (Alexander Hamilton) (ABA Publishing ed., 2009).

For more than two centuries, this Court has honored the Founders' original intent in establishing diversity jurisdiction. Chief Justice Marshall observed in 1809 that even if "the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description," the Constitution's Framers sought to alleviate even "apprehensions" and "fears" of bias by providing for diverse cases to be heard in federal courts. *Bank of United States v. Deveaux*, 9 U.S. 61, 87 (1809), *overruled in part on other grounds, Louisville, Cincinnati & Charleston R.R. Co. v. Letson,* 43 U.S. 497 (1844). And, as this Court recently affirmed, diversity jurisdiction exists "to provide a federal forum for important disputes where state courts might favor, or be perceived as favoring, home-state litigants." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 553-54 (2005), *superseded by statute on other grounds as recognized in Frisby v. Keith D. Weiner & Assocs.*, 669 F. Supp. 2d 863 (N.D. Ohio 2009) (citing 28 U.S.C. §1332(d)(2)).

The real-world experience of DRI's members reinforces the wisdom of this Court's decisions and evidences the continuing validity of these two-hundred year old concerns. When misjoinder is allowed to defeat diversity of citizenship jurisdiction,

the resulting deprivation of a federal forum fuels the perception that out-of-state defendants (particularly those that may be unpopular) will not receive fair treatment. In short, when the artifice of improperly gerry-built lawsuits eviscerates a defendant's right to litigate in federal court, the rule of law suffers.

Consistent with this Court's due concern for the appropriate availability of a federal forum, Congress reaffirmed the importance and desirability of federal jurisdiction in cases involving residents of different states as recently as 2005. The Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. §§1332(d), 1453 & 1711-1715, amended the diversity jurisdiction statute which had kept many interstate class actions out of federal courts. Congress enacted CAFA in response to evidence of gross abuses of the class action device, particularly in state courts. *Id.* The Senate report on CAFA noted that some state courts took an "'I never met a class action I didn't like' approach to class certification," S. Rep. No. 109-14, at 22 (2005), *reprinted in* 2005 U.S.S.C.A.N. 3, 22 (Leg.Hist.) (The Class Action Fairness Act of 2005). In the preceding years, there had been a "dramatic explosion of class actions in state courts" because those courts had not applied the Rule 23 requirements for certification with the same rigor as their federal counterparts. *Id.* at 14. The Senate viewed state courts' cavalier attitude toward class certification as unfairly damaging to the rights of plaintiffs and defendants alike, particularly in massive national class actions. *Id.* at 22-27.

In addition to expanding federal jurisdiction over class action litigation, CAFA also expanded the

protections to class action litigants, including the due process rights guaranteed by the Fourteenth Amendment. For example, absent plaintiff class members have the right to notice and an opportunity to opt out of the class. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). If the case settles, the court must review the settlement to ensure its fairness to absent class members. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 627 (1997). In passing CAFA, Congress specifically criticized so-called "coupon" settlements in which the attorneys receive the bulk of the settlement proceeds and class members only receive a coupon for products or services. S. Rep. No. 109-14, at 15.

These and other safeguards protect both plaintiffs and defendants in federal court class actions. But these protections, which Congress deems essential, are not necessarily available in state court cases with multiple joined plaintiffs. As a result:

> Ironically, recent developments in class action jurisdiction may well exacerbate the problem. Under [CAFA], Congress broadly expanded diversity jurisdiction over interstate class actions and mass actions…. One possible result is that plaintiffs will continue to file the same types of lawsuits, knowing that they are likely to be removed. But one also might suspect that plaintiffs will file ever more joined-but-not-mass actions in order to escape [CAFA]. And of that group, many are sure to deliberately join spoiler parties with an eye towards defeating ordinary diversity removal.

Laura J. Hines & Steven S. Gensler, *Driving Misjoinder: The Improper Party Problem in Removal Jurisdiction,* Berkeley Electronic Press Legal Series (2005) ("Hines & Gensler II"), at 43. Thus, the desire to avoid CAFA's protections – including such salutary measures as judicial oversight of settlements to ensure that plaintiffs' attorneys do not retain an unfair share of the proceeds – may be an unintended incentive to misjoin non-diverse defendants and other plaintiffs.

B. The Need to Eliminate Incentives Driving Fraudulent Misjoinder Also Supports Review

This Court should provide a much-needed disincentive to the strategic joinder of improper parties to prevent removal. "It is no secret that plaintiffs often deliberately structure their state court lawsuits to prevent removal by defendants to federal court." Hines & Gessler I, 57 Ala. L. Rev. at 781. Plaintiffs have a clear incentive to structure their lawsuits in this manner: there is a widespread perception that plaintiffs are more likely to succeed in state court than in federal court. *Id.*

This Court has been vigilant in its efforts to curtail procedural gamesmanship. In *Hertz Corp. v. Friend*, 130 S. Ct. 1181 (2010), California employees sued their employer, Hertz, in state court; Hertz removed the case, claiming diversity jurisdiction based on the location of its headquarters in New Jersey. The district court found that California was Hertz's "principal place of business" and remanded the case to state court. The Ninth Circuit affirmed, but this Court held that the correct standard for

assessing the locus of corporate citizenship is the "nerve center" test (rather than a "principal place of business" test or any test related to the magnitude of business activities conducted in a state). *Id*. at 1191-93. One of the Court's primary reasons for its holding was that the simplicity of the "nerve center" test would deter gamesmanship:

> Complex tests produce appeals and reversals, encourage gamesmanship, and, again, diminish the likelihood that results and settlements will reflect a claim's legal and factual merits.

Id. at 1193. This Court has also sought to curtail similar gamesmanship in other contexts. *See, e.g*., *Southland Corp. v. Keating*, 465 U.S. 1, 15 (1984) (interpreting Federal Arbitration Act to apply to claims brought in state courts in order to discourage forum shopping); *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 149, 154 (1987) (applying the statute of limitations for Clayton Act civil enforcement actions to RICO actions to avoid a "multiplicity of applicable state limitations periods" that would "present[] the dangers of forum shopping…").

Here, fraudulent misjoinder is another form of gamesmanship that "wrongfully deprives Defendants the right of removal," *In re Diet Drugs Prods. Liab. Litig.*, MDL Docket No. 1203, Civil No. 98-20478, 1999 U.S. Dist. LEXIS 11414, at *14 (E.D. Pa. July 16, 1999). This Court should grant *certiorari* here, as it has in other cases, to perform the important function of preventing the procedural gamesmanship that is so detrimental to the judicial system. In

doing so, the Court should clarify that federal law provides a mechanism to sever improperly-joined parties, and to preserve diversity jurisdiction, even in instances of "mere" misjoinder.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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