No. 13-719

In the
Supreme Court of the United States

DART CHEROKEE BASIN OPERATING COMPANY, LLC, AND CHEROKEE BASIN PIPELINE, LLC,
Petitioners,

v.

BRANDON W. OWENS, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

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

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INTEREST OF THE *AMICUS CURIAE* *

Amicus curiae DRI—The Voice of the Defense Bar is an international organization of more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to address issues germane to defense attorneys, to promote the role of defense attorneys, and to improve the civil justice system. DRI has long participated in the ongoing effort to make the civil justice system fairer, more consistent, and more efficient.

To promote these objectives, DRI participates as *amicus curiae* in cases that raise issues important to its membership, clientele, and the judicial system. This is such a case. DRI members have extensive experience removing litigation from state to federal court and a strong interest in ensuring that interpretation of the removal statutes remains consistent and fair.

The decision below rewrites the primary federal removal statute and thwarts the policies embodied in that statute. Under the lower court's decision, defendants must amass and submit evidence of removability along with the notice of removal that must be filed within 30 days of a complaint's filing.

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* Pursuant to Supreme Court Rule 37.6, DRI certifies that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from DRI, its members, and its counsel, made any monetary contribution toward the brief's preparation and submission. Counsel consented to the brief's filing in letters that are on file with the Clerk's office.

In DRI's experience, this rule poses all sorts of practical problems. For example, in many cases, it would be extremely difficult, if not impossible, for a defendant to retain counsel, review and analyze the complaint, decide whether to remove the case, and complete its investigation and responsive jurisdictional discovery in state court all within the 30-day removal window. The lower court's decision imposing such a needlessly burdensome requirement should be reversed.

SUMMARY OF THE ARGUMENT

Congress set forth the requirements for removing a case from state court in 28 U.S.C. § 1446(a). That statute does not require defendants to attach to a notice of removal evidence of the jurisdictional amount in controversy. The lower court's decision imposing such an implied burden is inconsistent with (1) the text of Section 1446(a) and (2) the policies embodied in that provision.

1. If Congress wanted to require the attachment of materials to a notice of removal, it knew precisely how to do so. Section 1446(a) *does* require defendants to attach "a copy of all process, pleadings, and orders served upon such defendant or defendants in such action." But Section 1446(a) does *not* require defendants to attach evidence of the amount in controversy.

Instead, Section 1446(a) adopts language from Federal Rule of Civil Procedure 8(a) requiring only a "short and plain statement of the grounds" for removal. Rule 8(a) has never been interpreted to require plaintiffs to submit evidence of the amount in

controversy along with a complaint. Section 1446(a)'s identical language should be interpreted the same way.

The lower court's decision mistakenly relies on a purported "strong presumption against removal." Any antiquated case law that could be read to support such a presumption should be disavowed. Even if there were such a presumption, it would not justify the judicial creation of a burden that is absent from and foreclosed by Section 1446(a)'s plain and unambiguous language.

2. Section 1446(a), as written, creates a simple, efficient, and fair process for removing a case from state to federal court. Defendants need only provide a "short and plain statement of the grounds for removal." Defendants need not prove those allegations unless challenged in a motion to remand filed pursuant to 28 U.S.C. § 1447(c).

The decision below, however, requires defendants to prove those jurisdictional allegations in virtually every case, regardless of whether the allegations are challenged. Such an approach to removal is wasteful. It also places an incredible burden on removing defendants. Under the lower court's rule, defendants must conduct their investigation and complete any jurisdictional discovery in state court within 30 days of a complaint's filing. Section 1446(a) does not impose such a needless and costly discovery burden. The decision below imposing it should be reversed.

ARGUMENT

I. Section 1446(a)'s Plain And Unambiguous Language Resolves The Question Presented.

Although courts "are not free to rewrite the statute that Congress has enacted," *Dodd v. United States*, 545 U.S. 353, 359 (2005), that is exactly what the court below did. As relevant here, Section 1446(a) requires a notice of removal to contain only a "short and plain statement of the grounds for removal." It does *not* require defendants to collect and attach evidence of removability to the notice.

The decision below—engrafting an evidentiary requirement onto Section 1446(a)'s plain and unambiguous text—"more closely resembles inventing a statute rather than interpreting one." *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252 (2010) (internal quotations omitted). The lower court's decision should be reversed and Section 1446 given its plain meaning.

A. Section 1446(a) Does Not Require Defendants To Submit Evidence Of Removability Along With A Notice Of Removal.

"The controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992). "Congress says in a statute what it means and means in a statute what it says there." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (internal quotations omitted). Courts must therefore "enforce plain and

unambiguous statutory language according to its terms." *Hardt*, 560 U.S. at 251.

Section 1446(a) is unequivocal. It sets forth the three filing requirements for removing a case from state to federal court: (1) "a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure" that (2) "contain[s] a short and plain statement of the grounds for removal" and that (3) attaches "a copy of all process, pleadings, and orders served upon such defendant or defendants in such action." 28 U.S.C. § 1446(a).

There is *no requirement* that removing defendants collect and submit evidence of removability along with a notice of removal. If Congress intended to require submission of such evidence, "it easily could have drafted language to that effect." *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 742 (2014). For example, Section 1446(a) expressly requires removing defendants to attach "a copy of all process, pleadings, and orders served upon such defendant or defendants in such action." Congress, however, did not require defendants to attach evidentiary proof to support its jurisdictional allegations. "The fact that [Congress] did not adopt this readily available and apparent alternative strongly supports rejecting the [lower court's] reading." *Knight v. C.I.R.*, 552 U.S. 181, 188 (2008).

A court's task is to apply a statute "on the basis of what Congress has written, not what Congress might have written." *United States v. Great N. Ry. Co.*, 343 U.S. 562, 575 (1952). As this Court has

emphasized, "[w]e do not—we cannot—add provisions to a federal statute." *Alabama v. North Carolina*, 560 U.S. 330, 352 (2010). Because Congress did not require the submission of jurisdictional evidence along with a notice of removal, the decision of the court below imposing such a requirement should be reversed.

B. Section 1446(a) Adopts Language From The Federal Rules Of Civil Procedure That Has A Settled Legal Meaning.

Congress did not simply omit an evidentiary requirement from Section 1446(a). It also adopted language with a settled legal meaning that forecloses any such requirement.

"It is a cardinal rule of statutory construction that, when Congress employs a term of art, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it is taken." *Air Wisconsin Airlines Corp. v. Hoeper*, 134 S. Ct. 852, 861–62 (2014). Consequently, if a word or phrase "is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." *Sekhar v. United States*, 133 S. Ct. 2720, 2724 (2013); *accord Microsoft Corp. v. i4i Ltd. P'ship*, 131 S. Ct. 2238, 2247 (2011) (holding that this "basic principle[] of statutory construction require[d] [the Court] to assume that Congress meant to incorporate 'the cluster of ideas' attached to" the employed term).

The Court recently applied this rule of construction in *Mississippi ex rel Hood v. AU*

Optronics Corp., 134 S. Ct. 736 (2014). At issue there was the meaning of the term "persons" in the mass action provision of the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1332(d)(11)(B)(i). Recognizing that CAFA's language mirrored that of Federal Rule of Civil Procedure 20, the Court gave the term the same meaning that courts have given to it in construing Rule 20. As the Court explained, courts must "presume that Congress is aware of existing law when it passes legislation." 134 S. Ct. at 742 (internal quotations omitted).

The phrase that Congress adopted in Section 1446(a)—requiring "a short and plain statement of the grounds for removal"—is a legal phrase of art with a settled meaning. Since its adoption in 1938, Federal Rule of Civil Procedure 8(a)(1) has required plaintiffs to include "a short and plain statement of the grounds for the court's jurisdiction" in a complaint. Courts have uniformly interpreted this language to require only a good faith allegation that the requisite jurisdictional amount exists. *See, e.g.*, *Meridian Sec. Ins. Co. v. Sadowski*, 441 F.3d 536, 540–41 (7th Cir. 2006) (Easterbrook, J.); *Jaconski v. Avisun Corp.*, 359 F.2d 931, 934 (3d Cir. 1966). Only "[w]hen challenged on allegations of jurisdictional facts" must the parties "support their allegations by competent proof." *Hertz Corp. v. Friend*, 559 U.S. 77, 96–97 (2010).

Courts have never interpreted Rule 8(a)(1) to require plaintiffs to attach evidence of the federal court's jurisdiction to a complaint. *See, e.g.*, *Gardner v. First Am. Title Ins. Co.*, 294 F.3d 991, 994 (8th Cir. 2002) ("Rule 8(a)(1) is satisfied if the complaint

say[s] enough about jurisdiction to create some reasonable likelihood that the court is not about to hear a case that it is not supposed to have the power to hear.") (internal quotations omitted); *Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 778 (7th Cir. 1994) (Posner, J.) (explaining that Rule 8 only requires "the complaint [to] allege the citizenship of the parties and the amount in controversy"); 5 Charles Alan Wright, Arthur R. Miller, et al. *Federal Practice and Procedure* § 1206 (3d ed. 2014) ("[A]ll that is required is that the allegations in the complaint clearly show that the court's subject matter jurisdiction exists.").

Congress transplanted this exact phrase of art from Rule 8 into Section 1446(a) to define a defendant's obligations in establishing federal jurisdiction in a notice of removal. *See* David D. Siegal, Commentary on 1988 Revision, printed in 28 U.S.C.A. § 1446 (explaining that Section 1446(a) adopts "language borrowed from the general pleading mandate of Rule 8(a)"). It should therefore be given the same settled meaning. Just as plaintiffs need not submit evidence of federal jurisdiction along with a complaint, removing defendants need not attach such evidence to a notice of removal. In both instances, all that is required is a "short and plain statement" of the grounds for federal jurisdiction.

C. Legislative History Supports A Plain-Meaning Construction of Section 1446(a).

"[R]esort to secondary materials is unnecessary to decide this case." *Negonsott v. Samuels*, 507 U.S. 99, 106 (1993). Nevertheless, legislative history

further supports giving Section 1446(a) its plain meaning.

The Federal Courts Jurisdiction and Venue Clarification Act of 2011 amended Section 1446(c) into its present form "to address issues relating to uncertainty of the amount in controversy when removal is sought." H.R. Rep. No. 112-10, at 15 (2011). Under Section 1446(c), the "removal of [an] action is proper . . . if the district court finds, by the preponderance of the evidence, that the amount in controversy exceeds" the minimum jurisdictional amount.

Removing defendants, however, need not satisfy this evidentiary burden by attaching evidence to a notice of removal. As the House Judiciary Committee Report explains, only "[i]n case of a dispute" must the district court "make findings of jurisdictional fact to which the preponderance standard applies." H.R. Rep. No. 112-10, at 16.

> [D]efendants do not need to prove to a legal certainty that the amount in controversy requirement has been met. Rather, *defendants may simply allege or assert that the jurisdictional threshold has been met*.

Id. (emphasis added).

This rule is consistent with the general trend in recent decades toward easing the procedural requirements of removability in order to make removal practice fairer and more efficient. *See generally* Scott Haiber, *Removing the Bias Against Removal*, 53 Cath. U. L. Rev. 609, 632 (2004).

Congress has, for example, extended the time for filing a notice of removal. *See, e.g., Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 759–60 (11th Cir. 2010). Congress has also simplified the pleading requirements for removal, eliminating the requirement of a verified petition and stating that a notice of removal need only comply with Rule 11. *See, e.g.*, *Ellenburg v. Spartan Motors Chassis, Inc.*, 519 F.3d 192, 199–200 (4th Cir. 2008). Moreover, Congress has eased the burden on removing defendants by eliminating the requirement that they post a bond. *See* H.R. Rep. No. 100-889, at 72 (1988) (explaining that the bond requirement "impose[d] a cost that may be substantial to some litigants"). More recently, Congress resolved a circuit split regarding the thirty-day period for removal in favor of broader availability of removal. *See, e.g.*, *Pietrangelo v. Alvas Corp.*, 686 F.3d 62, 64–65 (2d Cir. 2012).

The trend toward easing the procedural requirements for removal is especially evident in cases brought under CAFA. Congress enacted CAFA's removal provisions with the goal of furthering the Act's "primary objective: ensuring 'Federal court consideration of interstate cases of national importance.'" *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013) (quoting Act of Feb. 18, 2005, Pub. L. No. 109-2, § 2(b)(2), 119 Stat. 4, 5). Section 1453, CAFA's removal counterpart, advances this goal by explicitly relaxing Section 1446's requirements: it allows for any defendant to remove without the consent of all other defendants (otherwise required under Section 1446(b)(2)(A)), and it excludes the prohibition on removing class actions

after one year (otherwise prohibited under Section 1446(c)(1)). *See* 28 U.S.C. § 1453(b). This trend toward easing the procedural requirements of removability further supports giving Section 1446(a) its plain meaning.

II. Judicial Presumptions Cannot Invalidate Section 1446(a)'s Plain And Unambiguous Language.

In construing Section 1446(a), the lower court was "[g]uided by" a purported "strong presumption against removal." Pet. App. 28a. Many other federal courts also give substantial weight to an alleged strong presumption against removal in construing federal removal statutes. *See* 16 James Wm. Moore et al., *Moore's Federal Practice* §§ 107.05, 107.06 (3d ed. 2014) (collecting cases applying presumption against removal). There is no support for this purported "strong presumption," and the Court should disavow it.

This Court has never announced a "presumption" against removal, let alone a "strong" one. To the contrary, this Court has emphasized the rule that "[a] statute affecting federal jurisdiction must be construed both with precision and with fidelity to the terms by which Congress has expressed its wishes." *Kucana v. Holder*, 558 U.S. 233, 252 (2010). A court cannot, as the court below did, use a presumption against removal to justify imposing new pleading requirements onto plain and unambiguous statutory text.

Courts applying a presumption against removal generally rely on two of this Court's decisions.

Neither decision, however, establishes a presumption against removal.

First, in *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, this Court considered whether remand is required when a plaintiff, after removal, amends a complaint to reduce his claimed damages to an amount less than the jurisdictional minimum. 303 U.S. 283 (1938). The Court held that removal was proper notwithstanding a reduction in the claimed damages. *Id.* at 292. In so holding, the Court stated in dicta that "[t]he intent of Congress drastically to restrict federal jurisdiction" in diversity cases "has always been rigorously enforced." *Id.* at 288. This language in no way supports a presumption against removal. Instead, it is merely a restatement of the general principle that statutes affecting jurisdiction should be construed with "precision" and "fidelity" to the words that Congress chose to express its intent. Nothing in that statement suggests that the scales should be tipped against removal.

Second, in *Shamrock Oil & Gas Corp. v. Sheets*, the Court addressed whether a plaintiff who files a suit in state court can later remove that case to federal court if the defendant files a counterclaim against him. 313 U.S. 100 (1941). The Court began by analyzing Congress's amendments to the statutes governing removal. *Id.* at 104–07. Specifically, the Court emphasized that although the statute had previously allowed removal by "either party," later amendments had allowed removal by the "defendant or defendants" alone. *Id.* at 106–07. The Court concluded that those alterations in the statute were "of *controlling significance* as indicating the

Congressional purpose" of restricting the right of removal to defendants only. *Id.* at 107 (emphasis added).

As a secondary rationale, the Court noted that "the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation," and that federal courts should "scrupulously confine" their own jurisdiction in order to give "[d]ue regard for the rightful independence of state governments." *Id.* at 108–09. But even this secondary rationale does not support a presumption against removal. The Congressional "policy" favoring strict construction was the policy that existed in 1941, when *Shamrock* was decided. Later acts of Congress have expressed a different policy in favor of allowing easier access to federal courts, as discussed above. It is that policy, not the policy that existed over 70 years ago when *Shamrock* was decided, that should guide a court's interpretation of the removal statute.

This Court recognized as much in *Breuer v. Jim's Concrete of Brevard, Inc.*, when it explicitly rejected the argument, based on *Shamrock*, that removal statutes should be strictly construed. 538 U.S. 691, 697 (2003). Notably, this Court reasoned that "whatever apparent force this argument might have claimed when *Shamrock* was handed down *has been qualified by later statutory development*." *Id.* (emphasis added). In *Breuer*, the petitioner argued that ambiguous language in a statute could be read as an "express" prohibition on removal "once it is coupled with a federal policy of construing removal jurisdiction narrowly." *Id.* After rejecting the

petitioner's reliance on a rule of strict construction, this Court discussed relevant amendments to the removal statutes since the time of *Shamrock*, which unequivocally placed the burden on the plaintiff to find an "express exception" to the general rule allowing removal. *Id.* at 697–98. Notably, the Court concluded that "[a]s *Shamrock* itself said, 'the language of the Act . . . evidence[s] the Congressional purpose.'" *Id.* at 698.

Accordingly, any general policy of restricting federal jurisdiction "affords no basis for subtracting anything from provisions which are definite and free from ambiguity." *Lee v. Chesapeake & Ohio Ry. Co.*, 260 U.S. 653, 660 (1923). This is particularly true given the statutory changes since *St. Paul* and *Shamrock* were decided. As discussed above, those changes evince a Congressional policy of making removal simpler and more straightforward.

While the Court in *Shamrock* did allude to federalism concerns, those concerns do not give a court license to rewrite the plain language of the statute by creating and applying a judicial presumption against removal. In fact, because the remand of a case to a state court "frequently is not a reviewable order, the federal court should be cautious about directing remand too easily lest it erroneously deprive a removing defendant of the statutory right to a federal forum." 14B Charles Alan Wright, Arthur R. Miller, et al. *Federal Practice and Procedure* § 3721 (4th ed. 2014).

It is the plain language of the statute that should control a court's interpretation of the removal

statute, not judicially created, one-size-fits-all presumptions. The Court should therefore disavow the "strong presumption against removal" applied by the court below and reaffirm the primacy of Section 1446(a)'s text and congressional purpose.

III. The Lower Court's Rule Imposes Unwarranted Burdens On Removing Defendants.

In undertaking statutory interpretation, this Court remains "mindful of the confines of [its] judicial role," *Hui v. Castaneda*, 559 U.S. 799, 812 (2010), which is "to apply the text of [Section 1446(a)], not to improve upon it." *E.P.A. v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1600 (2014).

This Court has repeatedly "reiterate[d] that when a statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Sebelius v. Cloer*, 133 S. Ct. 1886, 1896 (2013). Thus, "it is not [a court's] task to assess the consequences of each [competing] approach and adopt the one that produces the least mischief." *Lewis v. City of Chicago*, 560 U.S. 205, 217 (2010). Instead, this Court's "charge is to give effect to the law Congress enacted." *Id.* Because Section 1446 employs such unambiguous language, the Court need not (and should not) weigh policy concerns in answering the question presented here.

In any event, Section 1446(a)'s plain meaning makes good policy sense for at least three reasons.

1. Simplicity. Applying Section 1446(a)'s plain language "comports with the commonsense observation that when judges must decide jurisdictional matters, simplicity is a virtue." *AU Optronics*, 134 S. Ct. at 744 (internal quotations omitted). This Court has repeatedly emphasized the importance of simplicity in jurisdictional rules. *See, e.g.*, *Knowles*, 133 S. Ct. at 1350; *Hertz Corp.*, 559 U.S. at 94. Simplicity "promote[s] greater predictability," which "is valuable to corporations making business and investment decisions." *Hertz Corp.*, 559 U.S. at 94.

The lower court's approach creates, rather than avoids, uncertainty. Defendants often do not know whether or to what extent a plaintiff will challenge jurisdictional allegations. Yet, under the lower court's decision, all of the defendant's jurisdictional evidence must be attached to the notice of removal. *See* Pet. App. 26a. Without knowing whether the plaintiff will contest the jurisdictional allegations at all—much less what arguments the plaintiff might offer in response to those allegations—defendants will feel compelled to err on the side of conducting extensive investigations and seeking voluminous discovery on jurisdictional facts in state court. Otherwise, a defendant would risk falling into the lower court's unwarranted procedural trap.

That uncertainty is avoided, however, by following the plain language of Section 1446(a), which requires a defendant to produce evidence supporting jurisdictional facts only if the plaintiff challenges the allegations set out in the notice of removal.

2. Conserving judicial and litigant resources. The costly investigation and discovery required by the lower court's rule would take place *in virtually every single case*. This includes cases, such as this one, where there is no dispute among the parties that the amount in controversy exceeds the jurisdictional threshold. This approach wastes valuable judicial and litigant resources. If there is no dispute among the parties or court as to the amount in controversy, there is no need to impose such a costly evidentiary burden.

3. Fairness. The lower court's decision is not only wasteful, but it also requires defendants to conduct the requisite investigation and discovery in an extremely limited timeframe. Section 1446 generally requires a defendant file a notice of removal "within 30 days after the receipt . . . of a copy of the initial pleading." 28 U.S.C. § 1446(b)(1). As a result, defendants will be forced to amass evidence supporting jurisdictional facts before the 30-day deadline.

That deadline, however, may be impossible to meet for a host of reasons. In seeking jurisdictional discovery, defendants would be subject to widely variable state discovery rules, not the uniform federal rules applicable after removal. *See* Fed. R. Civ. P. 81(c) (providing that Federal Rules of Civil Procedure apply after removal). Defendants would be entirely dependent upon a state court to expedite discovery to ensure compliance with the 30-day deadline. Discovery in state courts generally does not move at such an expedited pace. *See*, *e.g.*, Kan. Stat. Ann. § 60-226(b)(6)(C) (2013) (providing that

absent court direction, expert disclosures do not need to be made until 90 days before trial date).

The lower court's rule also invites plaintiff gamesmanship in withholding, limiting, or delaying jurisdictional discovery, which would frustrate or foreclose removal altogether. Even in those situations where the defendant has the requisite evidence in its possession, it may take considerable time and effort to collect the data and analyze it (perhaps with expert assistance) to prove the amount in controversy.

Although there may be limited exceptions to the strict 30-day window for removal, defendants would still face uncertainty about whether those exceptions might apply in their case. For example, a defendant may remove within 30 days of receiving any "paper from which it may first be ascertained" that the case is removable. 28 U.S.C. § 1446(b)(3), (c)(3)(A). That exception, however, provides little comfort for defendants who will be forced to either comply with the 30-day deadline or hope that they will be able to identify a document meeting that standard and then remove within 30 days of its receipt. Similarly, while the decision below appears to leave open some possibility that a defendant may seek jurisdictional discovery after removal in some undefined situations, *see* Pet. App. 26a, that exception also provides little assurance to a prudent defendant seeking to create the requisite evidentiary record.

The better approach is mandated by Section 1446(a)'s plain and unambiguous language. A defendant's notice of removal need only "contain[] a

short and plain statement of the grounds for removal." Only if that statement is challenged must jurisdictional evidence be presented.

CONCLUSION

Section 1446(a) does not require defendants to submit evidence of removability along with a notice of removal. The Court should reverse the decision below imposing such a requirement.

Respectfully submitted,

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