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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The statement of the parties to the proceeding and the corporate disclosure statement included in the petition for a writ of certiorari remain accurate.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

PETITIONERS' REPLY BRIEF

Grasping for ways to hide the Tenth Circuit's break from 28 U.S.C. § 1446(a)'s plain language and from at least seven other Circuits' decisions, Respondent distorts the record and purports to harmonize cases that defy harmonization. But no amount of spin can alter the facts. The circuit split is real: In one corner stand (at least) the First, Fourth, Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits, which—following § 1446's plain language—require a notice of removal to contain only allegations (not evidence) of the jurisdictional facts supporting removal. In the other corner stands the Tenth Circuit—alone—requiring (not merely permitting) a defendant to attach evidence to the notice of removal.

The Tenth Circuit's rule betrays the statutory language, which requires only a "short and plain statement of the grounds for removal." 28 U.S.C. § 1446(a). Petitioners were denied access to the federal courts even though the case satisfies CAFA's jurisdictional requirements. This Court should grant *certiorari* to correct the Tenth Circuit's rogue approach to removal.

I. THE CIRCUIT SPLIT IS REAL (AND LOPSIDED).

Respondent spends several pages trying to explain away the circuit split. In certain instances, he seizes on inconsequential factual differences; in others, he mischaracterizes a case's holding. But as Respondent surely appreciated as he went through that exercise, "[f]acts are stubborn things." John Adams, *Argument in Defense of the Soldiers in the Boston Massacre Trials* (Dec. 1770).

The stubborn facts: At least seven other circuits, in contradistinction to the Tenth Circuit, do not require a defendant seeking removal to attach evidence to the notice of removal. They require only what § 1446 requires—"a short and plain statement of the grounds for removal":

Eleventh Circuit: In *Sierminski v. Transouth Financial Corp*., 216 F.3d 945 (11th Cir. 2000), the court *rejected* the Tenth Circuit's "restrictive approach." The defendant submitted no evidence with its notice of removal, but attached a declaration concerning defendant's records to its response to the motion to remand. *Id*. at 947. The Eleventh Circuit rejected the plaintiff's argument that "defendant must submit evidence" with the notice of removal and held "there is no good reason to keep a district court from eliciting or reviewing evidence outside the removal petition." *Id*. at 948-49.

In *Lowery v. Alabama Power Co*., 483 F.3d 1184 (11th Cir. 2007), the Eleventh Circuit—observing that "Section 1446(a)'s requirement of 'a short and plain statement of the grounds for removal' is consonant with the pleading requirements of Rule 8(a)"—held that "[j]ust as a plaintiff bringing an original action is bound to assert jurisdictional bases under Rule 8(a), a removing defendant must also allege the factual bases for federal jurisdiction in its notice of removal under § 1446(a)." *Id*. at 1216-17 & n.73.

And in *Pretka v. Kolter City Plaza II, Inc*., 608 F.3d 744 (11th Cir. 2010), a CAFA case, the Eleventh Circuit again rejected the argument that a defendant had to submit evidence with its notice of removal and held that "the jurisdictional evidence that [defendant] attached to its opposition to remand should *not* have been excluded merely because it was submitted in

response to the plaintiff's motion to remand." *Id*. at 774 (emphasis added).

Ninth Circuit: In *Janis v. Health Net, Inc*., 472 F.Appx. 533 (9th Cir. 2012) (unpublished)—a case that is factually indistinguishable from this one—the defendant "sufficiently alleged" the requirements for CAFA jurisdiction in the notice of removal, but attached no evidence. *Id*. at 534. In response to a motion to remand, the defendant submitted evidence available to it at the time of removal. *Id*. at 535. The district court refused to consider the evidence because it was not submitted with the notice. *Id*. at 534. The Ninth Circuit reversed because "[n]othing in 28 U.S.C. § 1446 requires a removing defendant to attach evidence of the federal court's jurisdiction to its notice of removal. Section 1446(a) requires merely a 'short and plain statement of the grounds for removal.'" *Id*. at 534. *See also Singer v. State Farm Mut. Auto. Ins. Co*., 116 F.3d 373, 374, 376-77 (9th Cir. 1997) (removal was proper even though defendant attached no evidence to its notice of removal).

Eighth Circuit: In *Hartis v. Chicago Title Insurance Co*., 694 F.3d 935 (8th Cir. 2012), a CAFA case which Respondent does not attempt to reconcile with the Tenth Circuit precedent, the Eighth Circuit held that "[t]he removing party's burden of describing how the controversy exceeds $5 million constitutes a pleading requirement, not a demand for proof." *Id*. at 944-45 (internal quotation marks omitted).

Seventh Circuit: In *Spivey v. Vertrue, Inc*., 528 F.3d 982 (7th Cir. 2008) (Easterbrook, C.J.), also a CAFA case, the Seventh Circuit held that "[t]he removing party, as the proponent of federal jurisdiction, bears the burden of describing how the

controversy exceeds $5 million. This is a *pleading requirement*, not a demand for proof." *Id*. at 986 (emphasis added).

And in *Harmon v. OKI Systems*, 115 F.3d 477 (7th Cir.), *cert. denied*, 522 U.S. 966 (1997), the court rejected the Tenth Circuit's *Laughlin* decision, along with the plaintiffs' position that the "courts are limited to the evidence in the record when removal is sought" and, instead, considered post-removal evidence because the "test should simply be whether the evidence sheds light on the situation which existed when the case was removed." *Id*. at 479-80.

Fifth Circuit: In *Rachel v. Georgia*, 342 F.2d 336 (5th Cir. 1965), *aff'd*, 384 U.S. 780 (1966), the Fifth Circuit, citing § 1446(a)'s requirement of a "short and plain statement," held that "the rules of notice pleading apply with as much vigor to petitions for removal as they do to other pleadings." *Id*. at 340. *See also Gebbia v. Wal-Mart Stores, Inc*., 233 F.3d 880, 883 (5th Cir. 2000) (concluding "post-removal affidavits may be considered in determining the amount in controversy at the time of removal").

Fourth Circuit: In *Ellenburg v. Spartan Motors Chassis, Inc*., 519 F.3d 192 (4th Cir. 2008), the Fourth Circuit "h[e]ld that the Notice of Removal's allegations . . . were sufficient as a matter of law to allege subject matter jurisdiction." *Id*. at 199. Noting that the "language in § 1446(a) is deliberately parallel to the requirements for notice pleading found in Rule 8(a) of the Federal Rules of Civil Procedure," the court "conclude[d] that it was inappropriate for the district court to have required a removing party's notice of removal to meet a higher pleading standard than the one imposed on a plaintiff in drafting an initial complaint." *Id*. at 199-200. *See also Bartnikowski v.*

NVR, Inc., 307 F.Appx. 730, 732-33, 735-37, 739 (4th Cir. 2009) (unpublished) (considering the defendant's payroll director's declaration proffered in response to a motion to remand in deciding whether CAFA's $5 million threshold was satisfied).

First Circuit: Contrary to Respondent's assertion (Opp. 19), in *Amoche v. Guarantee Trust Life Insurance Co*., 556 F.3d 41 (1st Cir. 2009), the defendant did *not* attach any evidence to its notice of removal. *Id*. at 45-46. Instead of requiring as much, the First Circuit held that "the entire record . . . must be evaluated" to decide whether removal is proper and considered an affidavit concerning information from the defendant's records submitted in response to the motion to remand. *Id*. at 46, 51.

* * *

Tenth Circuit: Against these seven circuits stands the Tenth Circuit with its contrary rule that a defendant seeking removal must attach evidence to the notice of removal. As the District Court put it below, "the Tenth Circuit has consistently held that reference to factual allegations or evidence outside of the petition and notice of removal is not permitted to determine the amount in controversy." App. 26 (citing *Laughlin v. Kmart Corp*., 50 F.3d 871, 873 (10th Cir.), *cert. denied*, 116 S.Ct. 174 (1995); *Martin v. Franklin Capital Corp*., 251 F.3d 1284 (10th Cir. 2001); and *Oklahoma Farm Bureau Mut. Ins. Co. v. JSSJ Corp*., 149 F.Appx. 775 (10th Cir. 2005) (unpublished)).

Petitioners' removal petition would have turned out differently in the First, Fourth, Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits than it did in the Tenth Circuit. In each of those circuits, the district court would have considered Petitioners' evidence

submitted in response to Respondent's motion to remand, would have found the CAFA requirements were satisfied, and would have upheld federal jurisdiction.

II. THE TENTH CIRCUIT'S RULE FLOUTS THE PLAIN STATUTORY LANGUAGE.

Congress engrafted Rule 8's notice-pleading language into the removal statute and eliminated any evidentiary requirement long ago. *See* Pet. 13-14. Respondent concedes (as he must) that 28 U.S.C. §1446(a) does not require a defendant seeking removal to attach evidence to the notice of removal. Instead, Respondent argues that §1446(a) "was never at issue" and that Petitioners "ignore[] §1446(c)(2)(B) which requires the district court to find by a preponderance of evidence the amount in controversy requirement" was satisfied. Opp. 26-27.[1]

Respondent misses the point. The question presented is not whether the district court had to find the jurisdictional facts by a preponderance of the evidence. It did. The question presented is whether the district court erred in refusing to consider (conclusive) evidence of the jurisdictional facts simply because Petitioners did not attach the evidence to their notice of removal. It did. Under § 1446(a), a notice of removal must contain a "short and plain *statement* of the grounds for removal," not evidence

[1] Petitioners did not, of course, ignore § 1446(c)(2)(B). They showed how that subsection and subsection (A), both of which were codified as part of the JVCA (*see* App. 9-10), require evidence *only after* a plaintiff has challenged the allegations in a notice of removal. Pet. 14-16. The principle that the evidentiary burden arises after a challenge to the jurisdictional allegations is rooted in this Court's own jurisprudence, which served as a model for the JVCA. App. 8-10.

supporting removal. (Emphasis added.) The evidence can come later in a response to a motion to remand.

Contrary to Respondent's assertion (Opp. 14 n.7), Petitioners' notice of removal contained detailed allegations of the jurisdictional facts. App. 4 ("there should be no dispute that Petitioner[s'] notice of removal was adequate, even if we apply *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)"). In response to the motion to remand, Petitioners submitted evidence that conclusively established federal jurisdiction. *See* Pet. 6, 9, 17; App. 2-3, 7; 20-21; 75-90. The district court's decision to ignore that evidence simply because Petitioners did not attach it to the notice of removal cannot be squared with § 1446(a)'s plain language.[2] For that reason, this case is also ripe for summary reversal. *See* S. Ct. R. 16.

* * *

Although Respondent suggests otherwise (*see* Opp. 12), Judge Hartz emphasized in his dissent from the denial of rehearing *en banc* that this case may be the only opportunity to correct the Tenth's Circuit's erroneous approach to removal:

> Unfortunately, this may be the only opportunity for this court to correct the law in our circuit. After today's decision, any diligent attorney (and one can assume that an attorney representing a defendant in a case involving at least $5 million—the threshold for removal under CAFA—would have substantial incentive to be diligent) would

[2] Moreover, by placing higher burdens on defendants and requiring remand of cases that satisfy the CAFA requirements, the Tenth Circuit precedent runs counter to the very purpose of CAFA. *See* Pet. 15-17; U.S. Chamber *Amicus* Br. 12-16.

> submit to the evidentiary burden rather than take a chance on remand to state court; if so, the issue will not arise again.

App. 2 (Hartz, J., dissenting); *see also* U.S. Chamber *Amicus* Br. 11-12. The net result, Judge Hartz concluded, is that defendants seeking removal in the Tenth Circuit will continue to face "an evidentiary burden on the notice of removal that is foreign to federal-court practice and, to my knowledge, has never been imposed by a federal appellate court." App. 2. This Court should seize this opportunity to correct the Tenth Circuit's wayward approach.

CONCLUSION

This Court should grant the petition for writ of certiorari.

Respectfully submitted,

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