

18-5382

Supreme Court, U.S.  
FILED

OCT 23 2018

OFFICE OF THE CLERK

**PETITION FOR REHEARING**

This petition for rehearing involves a question of exceptional importance. Petitioners question the constitutionality of 28 U.S.C. § 1441(b)(2), as applied to diverse plaintiffs, and asks, Does the forum defendant rule, 28 U.S.C. § 1441(b)(2) override the diversity statute so that such plaintiffs who remove, in violation of the forum defendant rule, lose access to the federal courts? Pursuant to Rule 44 of this Court, Petitioners respectfully petitions this Court for rehearing of its October 1, 2018 order denying the writ of certiorari in this case. This petition challenges the constitutionality of 28 U.S.C. § 1441(b)(2) as applied to plaintiffs, 28 U.S.C. § 2403(a) may apply.

1. Petitioners have not filed this rehearing request to delay and to repeat the arguments contained in the writ of certiorari. Rather, petitioners have filed this request to put forth arguments that were only mentioned in passing but not argued in the writ. Petitioner should have argued these points in her writ to this Court, but the petitioner's inexperience developed arguments concerning other matters. Petitioner has joined with her husband, an interested party, on this petition for rehearing. Both recognize that review in this Court is generally discouraged and that rehearing is discretionary. Recognizing that this Court rarely grants rehearing once it has decided, the petitioners hope that they can convey to this Court the importance of the "due process test" in accessing the plain interpretation of 28 U.S.C. § 1441(b)(2) which denies statutory, diverse plaintiffs' access to the federal courts.

2. Under Article III § 1 of the Constitution, The Framers of our Nation empowered Congress to create subordinate federal courts. Under this framework, the Framers of our Nation gave the federal judiciary the decision-making power to hear only certain types of cases. Article III § 2 par. 1 of the United States Constitution reads:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . .to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States.<sup>1</sup>

The Framers understood that without an impartial tribunal to govern controversies between citizens of different states, partiality in the state courts would leave non-citizens without justice. That being the case, Congress created federal courts to ensure that diverse litigants are afforded the opportunity to have his or her case heard before a fair tribunal.

3. History demonstrates that Congress never intended the diversity statute to prevent litigants, who otherwise meet the threshold for jurisdiction, access to the federal courts. When the Judiciary Act of 1789 was passed, Congress “granted [j]urisdiction to [f]ederal courts in suits between a citizen of the [s]tate where suit was brought and a citizen of another [s]tate involving” a certain monetary amount.”<sup>2</sup> Twenty-seven years later, this Court in *Martin v. Hunter’s Lessee*<sup>3</sup> held

---

<sup>1</sup> U.S. CONST. art. III, § 1.

<sup>2</sup> H.R. REP. No. 1706, at 21 (1958).

<sup>3</sup> *Martin v. Hunter’s Lessee*, 14 U.S. 304, 348 (1816)

“that the judicial power of the United States was not intended” to benefit only plaintiffs “but was also for the protection of defendants who might want to appear before a federal forum.”<sup>4</sup> This Court explained:

The constitution of the United States was designed for the common and equal benefit of all the people of the United States. . . It was not to be exercised exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection of defendants who might be entitled to try their rights, or assert their privileges, before the same forum. . . it will follow, that as the plaintiff may always elect the state court, the defendant may be deprived of all the security which the constitution intended in aid of his rights. Such a state of things can, in no respect, be considered as giving equal rights.<sup>3</sup>

4. More importantly, this Court has said that “[a] fair trial in a fair tribunal is a basic requirement of due process.”<sup>5</sup> After *Murchison*, Attorney Joseph F. Spaniol Jr., of the Division of Procedural Studies and Statistics, Administrative Office of the United States Courts of the Effect of the Changes, acknowledged the committee’s opinion that “diversity jurisdiction. . . is essential to the proper administration of justice.”<sup>2</sup> In his own words, Attorney Spaniol remarked:

[T]he Constitution provides courts of the Federal Government, the government of all the people of the country, to administer justice in cases where citizens of different [s]tates are involved, so that neither party may be required to seek justice from the [s]tate of his adversary. . . To deny the right to resort to the [f]ederal courts means that, in controversies between citizens of different [s]tates, one must seek justice in the courts of the [s]tate of his adversary where he will find, in many of the [s]tates, that trial by jury has been stripped of many of

---

<sup>4</sup> Michelle S. Simon, *Hogan vs. Gawker II: A Statutory Solution to Fraudulent Joinder*, 70 *Baylor L. Rev.* 1, 42 (2018).

<sup>5</sup> *In re Murchison*, 349 U.S. 133 (1955).

its safeguards and the judges has been denied the common-law powers necessary to the proper administration of justice.<sup>2</sup>

The diversity statute, 28 U.S.C.1332 (a)(1), accomplishes what the Committee set out to undertake, that both diverse plaintiffs and defendants should have access to the federal courts. If a plaintiff can have access to the federal courts, how can the defendant get there if the plaintiff chooses to file in state court? To be fair, Congress enacted 28 U.S.C. § 1441(b)(2) to give statutory diverse defendants access to the federal courts. Now, if a statutory diverse plaintiff, a master of his or her complaint, mistakenly files state court, how does he or she get back to federal court if the defendant is unwilling to allow transfer? Today, there are no provisions that will allow statutory diverse plaintiff a way back to federal court. Most circuits will allow it some will not. Plain meaning interpretation of the forum defendant rule denies statutory diverse plaintiffs the same protection it gives defendants.

5. The forum defendant rule, 28 U.S.C. § 1441(b)(2) was never meant to defeat diversity jurisdiction once the threshold for federal jurisdiction has been met. However, plain meaning interpretation of 28 U.S.C. § 1441(b)(2) by the courts denies statutory diverse plaintiffs due process. When 28 U.S.C. § 1441(b)(2) statute is read plainly, it only allows one action, and regardless of statutory diversity the plaintiff is prevented from removing. The statute reads:

A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title [28 USCS § 1332(a)] may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.<sup>6</sup>

---

<sup>6</sup> 28 U.S.C. § 1441(b)(2).

The plain meaning interpretation restrains the plaintiff's liberty to access the federal forum and annuls supplemental jurisdiction over third-party plaintiffs. Third-party plaintiffs are unfairly forced to bring a separate action in the defendant's state court, and if the statute of limitations have run, these third-party plaintiffs loses their right to be heard. The "holistic interpretation is a preservative approach that guarantees plaintiffs, defendants and third parties due process protection.

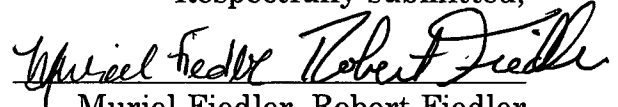
6. When statutes 28 U.S.C. § 1441(b)(2), 28 U.S.C. § 1332(a)(1) are read holistically, the intent of our Framers for Article III § 1 is preserved. Additionally, the "holistic" approach guarantees that statutory diverse, plaintiffs, defendants and third parties to have a fair share of equal protection and access to the federal courts.

CONCLUSION

For the foregoing reasons, the petitioners respectfully request that this Court grant a rehearing, limited to the constitutional question raised, or an order from this Court remanding the petitioner's case to district court.

Dated: October 28, 2018

Respectfully submitted,



Muriel Fiedler, Robert Fiedler

902 Lingo Ct.

Oviedo, FL 32765

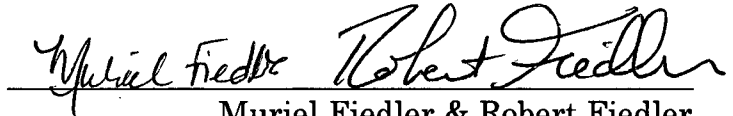
Tel. (407) 781-7274

Email: [murielfiedler1972@gmail.com](mailto:murielfiedler1972@gmail.com)

CERTIFICATE OF PETITIONER

As required by Supreme Court Rule 44.2, I certify that the Petition for Rehearing is limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented, and that this Petition for Rehearing is presented in good faith and not for delay.

Dated: October 28, 2018



Muriel Fiedler & Robert Fiedler  
Petitioners

902 Lingo Ct.

Oviedo, FL 32765

Tel. (407) 781-7274

Email: [murielfiedler1972@gmail.com](mailto:murielfiedler1972@gmail.com)