No. 07-872

In The
Supreme Court of the United States

CSX TRANSPORTATION, INC.,
Petitioner,

v.

UNITED TRANSPORTATION UNION ET AL.,
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF OF THE PETITIONER

The court of appeals dismissed this case against the unnamed individual defendants on the sole ground that Eleventh Circuit law categorically forbids the naming of "Doe" defendants. Respondents make no effort to defend that judgment on the merits. Nor could they. As explained in the petition (Pet. 7-9), that holding is directly contrary to the ruling of every other circuit to consider the question, all of which permit the naming of "Doe" defendants. Respondents instead argue that review should be denied because (i) other circuits would hold on the facts of this case that petitioner's particular use of Doe defendants was improper (BIO 5-6), and (ii) the Eleventh Circuit's error was harmless because the statute of limitations has now run on petitioner' claims (BIO 6-8). Those arguments are not only wrong, but also have no bearing on whether this Court's review is appropriate. Speculation about whether, if the Eleventh Circuit adopted and applied a correct standard of law, petitioner's complaint might ultimately be dismissed, does not undercut the importance of reviewing that court's broadly applicable rule of law that both denied petitioner the individualized consideration to which it was entitled and will continue to deny such individualized consideration in every case arising within the Eleventh Circuit's jurisdiction, unless reversed by this Court. Accordingly, the petition for a writ of certiorari should be granted. Indeed, decision of the court departs so far from established precedent that summary reversal may be appropriate.

1. At the outset, it is telling that respondents do not defend the merits of the ruling below. The Eleventh Circuit has never identified a basis for its gen-

eral prohibition on Doe defendants, and respondents apparently cannot devise one either. The Eleventh Circuit's rule is contrary to the practice of this Court (*e.g.*, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 390, n.2 (1971)), federal statutory schemes (*e.g.*, 28 U.S.C. § 1144(a)), and bedrock principles of civil procedure. *See* Pet. 11-13. In particular, it has no footing in either the text or purposes of the governing Rule of Civil Procedure (Fed. R. Civ. P. 10), and the Rules' framers could not have intended to erect such an unnecessary procedural hurdle that may make it "impossible as a practical matter to obtain complete relief" (*Palmer v. Bd. of Educ.*, 46 F.3d 682, 688 (7th Cir. 1995)). There is accordingly no serious question that the decision below – and the long line of authority in the courts of the Eleventh Circuit routinely dismissing Doe defendants as a matter of law – is erroneous.

2. The petition fully anticipated respondents' passing attempt to invoke *Dean v. Barber*, 951 F.2d 1210 (11th Cir. 1992), to argue that the Eleventh Circuit does in fact permit citations naming Doe defendants. *See* Pet. 11 n.4. *Dean* involved the special circumstance of a *pro se* plaintiff (given that "pleadings of *pro se* plaintiffs are treated with special care," 951 F.2d at 1215-16) who moreover in his complaint identified the particular defendant in question *by title*, just not by name, such that the defendant could be served. 951 F.2d at 1215. The *Dean* decision has been strictly limited to at least the latter circumstance. See*, e.g.*, *Zolin v. Caruth*, No. 3:07cv538, 2008 U.S. Dist. LEXIS 7039, at *3 (N.D. Fla. Jan. 30, 2008) (dismissing Doe defendants, reasoning that *Dean* is limited to circumstance in which defendant is

identified with sufficient specificity in the complaint "to be served"); *Richardson v. Fla. Dept. of Corrs.*, No. 2:07-cv-388, 2007 U.S. Dist. LEXIS 94078, at *4 (M.D. Fla. Dec. 21, 2007) (dismissing Doe defendant, deeming designation of defendant as prison guard insufficiently definite under *Dean*); *Aviles v. Pace*, No. 7:06-ov-118, 2007 U.S. Dist. LEXIS 25418 (M.D. Ga. Apr. 5, 2007) (dismissing Doe defendants, reasoning that, notwithstanding *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), *Dean* permits Doe defendants only if "a plaintiff provides sufficient information for service of process to issue").

Two further points illustrate that respondents' characterization of *Dean* is incorrect. First, if the Eleventh Circuit did in fact freely permit Doe designations, it would not have held (Pet. App. A at 3a n.1) that petitioner's complaint in this case was properly dismissed on that basis. Second, respondents do not dispute that the district courts in the Eleventh Circuit recognize that court's broad prohibition on Doe defendants. *See* Pet. 9-11 (citing more than two dozen examples within the last year alone).[1]

Respondents also note that the Eleventh Circuit's decision in *New v. Sports & Recreation, Inc.*, 114 F.3d 1092 (1997), does not itself necessarily dictate a broad prohibition on Doe defendants. BIO 4. That is a fair point, and it was one of petitioner's principal

[1] Respondents ignore 23 of the 25 cases cited by petitioner on the apparent theory that only "published" district court decisions are relevant. BIO 5. That assertion ignores not only that most district court rulings are unpublished, but more importantly that the point of the rulings cited by the petition is to demonstrate the district courts' clear understanding of the Eleventh Circuit's rule and the great frequency with which the issue arises. Respondents dispute neither point.

arguments in seeking en banc review. But time has passed that view of *New* by, as the denial of rehearing en banc in this case illustrates. Subsequent rulings of the Eleventh Circuit and – equally important for both understanding the court of appeals' rule and recognizing the practical importance of the question presented – a massive tide of district court authority in that circuit has read *New* much more broadly. For examples in only the past few months, see Pet. App. A at 3a n.1; *Gulf Winds Fed. Credit Union v. Firestone Bldg. Products Co.*, No. 3:07-cv-468, 2008 U.S. Dist. LEXIS 9561, at *24 (N.D. Fla. Feb. 8, 2008); *Slaughter v. City of Unadilla*, No. 5:06-cv-187 (CAR), 2008 U.S. Dist. LEXIS 8350, at *2 (M.D. Ga. Feb. 5, 2008); *Zolin v. Caruth*, No: 3:07cv538/RV/EMT 2008, U.S. Dist. LEXIS 7039, at *3-*4 (N.D. Fla. Jan. 30, 2008); *Richardson v. Fl. Dept. of Corrs.*, No. 2:07-cv-388-FtM-34DNF, 2007 U.S. Dist. LEXIS 94078, at *4 (M.D. Fla. Dec. 21, 2007); *White v. City of Atlanta*, 1:07-cv-01739-WSD, 2007 U.S. Dist. LEXIS 93073, at *11-*12 (N.D. Ga. Dec. 19, 2007).

3. Respondents argue that other circuits would hold that the Doe defendants here were properly dismissed because petitioner was insufficiently diligent in identifying them. If respondents mean to highlight the fact that other circuits apply a flatly contrary rule of law to that adopted by the Eleventh Circuit here and individually examine the necessity and propriety of Doe defendants on a case-by-case basis, then we are in agreement that there is a conflict in the circuits and this Court's review is necessitated. But respondents' further suggestion that the Eleventh Circuit's outlier rule of law should not be reviewed or reversed because of petitioner's purported

lack of diligence is without basis and, indeed, defies the record in this case.

Petitioner filed its complaint on July 18, 2005 and secured a temporary restraining order. The district court subsequently declined to issue an injunction based, *inter alia*, on its view that petitioner had "failed to prove any actual work stoppage had occurred." Pet. App. B at 7a. Respondents then moved for summary judgment on the ground that no work stoppage had occurred. Petitioner, in turn, promptly sought discovery of the named defendants (the union and its officer) to determine which employees were involved in the work stoppage. Petitioner thus diligently sought information on all communications between the Union and its members regarding whether the members should make themselves available for work at the conclusion of the relevant track "curfew." App., *infra* (reproducing Pl. CSX Transp., Inc.'s 1st Set of Interrog., Nos. 2, 3; CSX Transp., Inc.'s 1st Req. for Production of Docs. 1, 4, 6, 8, 9, 10, 11, 12, 13, 14, 16, 17, 27, 28, 30). Petitioner's efforts did not stop there – petitioner also sought to subpoena relevant telephone records. *See* Mem. in Support of the UTU's (Second) Motion for a Protective Order, *CSX Transp., Inc. v. United Transp. Union*, No. 3:05-CV-672 (M.D. Fla.).

Respondents, however, refused to provide any discovery, and sought a protective order, which petitioner opposed. Respondents then argued that discovery should be stayed "pending a ruling on the UTU's motion for summary judgment," and specifically arguing that discovery concerning the union's contacts with "some 120 union members" would be too burdensome. Mem. in Support of the UTU's Mo-

tion for a Protective Order at 2, *CSX Transp., Inc. v. United Transp. Union*, No. 3:05-CV-672 (M.D. Fla.).

Even after the district court denied respondents' motion, respondents refused to provide the requested telephone records. Petitioner then filed a motion to compel their production. Petitioner also served subpoenas on individual union members seeking both the production of documents and to take their depositions. But respondents filed a motion to quash those subpoenas. The district court never acted on these discovery motions.

The case was then stalled before the district court pending the disposition of respondents' motion for summary judgment, despite petitioner's best efforts to secure discovery regarding the participation of individual union members in the alleged work stoppage. The district court did not finally resolve respondents' motion for summary judgment until September 25, 2006. Pet. App. B at 14a. It then dismissed the case in full, without ever ruling on the discovery motions, and petitioner appealed.

The record thus demonstrates that the lack of information needed to identify the Doe defendants is the product of respondents' obstruction, not petitioner's lack of diligence. At every stage, petitioner did everything possible to identify through discovery which union members had participated in the work stoppage, only to be greeted with refusals to comply and requests to stay by respondents. *Contra* BIO 6 n.2 (suggesting that petitioner could have named any union member who did not report for work as a defendant, despite lacking proof that the employees were absent for unlawful reasons).

Respondents' further contention that petitioner did not "more particularly identify, or name, or serve any of these alleged people" (BIO 6) misunderstands the relevant inquiry, which is whether petitioner diligently sought to identify the Doe defendants and to obtain the information necessary to take the steps that respondents outline, which petitioner did at every turn. *E.g.*, *Roper v. Grayson*, 81 F.3d 124, 126 (10th Cir. 1996) (citing *Colle v. Brazons County, Tex.*, 981 F.2d 237, 243 (5th Cir. 1993) (dismissal appropriate when "defendants remained unnamed for three years")).

Likewise, respondents statement that petitioner "disavowed the need for discovery" (BIO 6) is simply wrong. In fact, petitioner diligently sought discovery on the identity of the Does (*supra*) and asserted the need to take this discovery throughout the district court proceedings. Petitioner only stated narrowly that further discovery was not necessary (given the facts already adduced through the injunction hearings) to determine whether summary judgment was appropriate on the question whether there had been a work stoppage.

4. Nor is there any further merit to respondents' argument that the question presented is irrelevant to the disposition of this case because the statute of limitations has run. Respondents do not dispute that petitioner timely filed its complaint. Instead, they argue that, if this case were returned to the district court so that petitioner could take the discovery it promptly sought but was never granted, the court would inevitably deny leave to amend the complaint to name individual union members because the limitations period has long since run. In support, respondents rely on the principle that "claims against

[a] named party substituted for a 'John Doe' do not relate back to [the] original complaint for limitations purposes." BIO 7.

Preliminarily, the relation-back question is not presented by the petition, nor of course was it decided by the Eleventh Circuit. That issue properly can be resolved by the court of appeals or district court on remand. On respondents' contrary view of the exercise of this Court's jurisdiction, the Eleventh Circuit's rule will almost certainly *forever* evade review because it is all but impossible to imagine a case that will – within the applicable limitations period – be filed, dismissed, briefed and decided in the Eleventh Circuit, petitioned to this Court, briefed and decided here on the merits, remanded for discovery regarding the Doe defendants, and then amended to name the parties as identified through discovery. Respondents statement that "[b]y now, in 2008, more than six months [the limitations period under the Railway Labor Act] has passed" (BIO 7) thus rings quite hollow.

But in any event, the prospect that this Court would reach the question whether the amendment would "relate back" to the original filing of petitioner's complaint is a reason to *grant* review, not deny it. Respondents fail to recognize that the question is the subject of a well-recognized and recurring conflict in the circuits. So long as the plaintiff has been diligent in seeking to identify Doe defendants, the Third Circuit permits relation back (*e.g.*, *Garvin v. City of Phila.*, 354 F.3d 215 (2003)[2]; *Singletary v.*

[2] Respondents thus cite the Third Circuit's decision in *Garvin* for precisely the opposition proposition for which it actually stands. BIO 8.

Pa. Dept. of Corrs., 266 F.3d 186, 200-01 (2001)), expressly recognizing that its rule conflicts with decisions of other circuits (*Arthur v. Maersk, Inc.*, 434 F.3d 196, 211 (2006) (recognizing conflict with "*e.g.*" *Barrow v. Wethersfield Police Dep't*, 66 F.3d 466, 469 (2d Cir. 1995), *amended by* 74 F.3d 1366 (2d Cir. 1996))). *See also, e.g.*, *Garrett v. L.E. Fleming*, 362 F.3d 692, 696 (10th Cir. 2004) (recognizing the split); Note, Steven S. Sparling, *Relation Back of "John Doe" Complaints in Federal Court: What You Don't Know Can Hurt You*, 19 Cardozo L. Rev. 1235 (1997) (same; arguing that Third Circuit's interpretation is correct).

But even if an amendment of petitioner's complaint did not formally "relate back," it would be permitted on the ground that petitioner's immediate filing of the complaint and diligent efforts to identify the Doe defendants *tolled* the applicable limitations period. It is commonplace that statutes of limitations under federal causes of action generally may be tolled (*Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 95 (1990)), and the Railway Labor Act is no exception (*West v. Conrail*, 481 U.S. 35 (1985)). As discussed *supra*, in this case, petitioner could not have been more diligent in attempting to discover the Doe defendants. On that basis, the limitations period would have been tolled. *See, e.g.*, *Green v. Doe*, No. 06-20257, 2007 U.S. App. LEXIS 29943 (5th Cir. Dec. 28, 2007) (without regard to relation back; amendment to identify Doe defendants permitted under principles of equitable tolling because district court did not permit discovery); Fed. R. App. P. 32.1 (citation to unpublished opinions is permitted). *See generally Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005) (equitable tolling applies when plaintiff "has been pursuing his

rights diligently" but "some extraordinary circumstance stood in his way"); *Burnett v. New York Cent. R. Co.*, 380 U.S. 424, 429 (1965) (plaintiff entitled to equitable tolling where plaintiff "did not sleep on his rights"); *Chung v. United States Dep't of Justice*, 333 F.3d 273, 279 (D.C. Cir. 2003) (equitable tolling "ensures that the plaintiff is not, by dint of circumstances beyond his control, deprived of a 'reasonable time' in which to file suit"); *Singletary v. Cont'l Illinois Nat. Bank & Trust Co. of Chicago*, 9 F.3d 1236 (7th Cir. 1993) (equitable tolling applies when a plaintiff has been "unable despite all reasonable diligence . . . to learn the wrongdoer's identity").

5. Finally, respondents err in their assertion (BIO 8) that this case is insufficiently important to warrant this Court's attention. The avalanche of district court authority collected in the petition demonstrates that the Eleventh Circuit's rule has tremendous ongoing consequences for the course of federal court litigation. Pet. 9-11. The petition also demonstrated that the ruling below threatens to seriously impede the efficacy of the Railway Labor Act in the southeastern United States, undermining Congress's determination to prevent the "wasteful strikes and interruptions" that threaten the nation's commerce (*Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union*, 396 U.S. 142 (1969)). *See* Pet. 13-15.

The leading organizations representing both the nation's railroads and its airlines in labor matters have notably filed an *amicus curiae* brief reinforcing that conclusion and attesting to the serious consequences of the ruling in this case. Those organizations correctly recognize that, by effectively precluding naming individual union members as defendants in RLA actions, the ruling below "seriously hampers

the ability of rail and air carriers to secure emergency relief against wildcat strikes and other job actions in which the union's role is ambiguous or concealed," because the individual members' participation in wildcat actions is very difficult for carriers to discern absent discovery. Br. for the National Railway Labor Conf. and the Airline Indus. Rela. Conf. 2.

Respondents hope to suggest that the inability to name Doe defendants is immaterial under the RLA because in *Delta v. ALPA*, 238 F.3d 1300, 1310 (11th Cir. 2001), the airline named Doe defendants and the court of appeals held that an injunction in the case could extend to "all appropriate parties." That assertion mischaracterizes *Delta*, in which the airline's complaint included "several individual pilots" as *named* defendants (*id.* at 1304), which explains the court's statement that the airline could seek "injunctive relief against individual parties" (BIO 8). Although respondents are correct that the complaint also named Doe defendants, the court of appeals never approved that practice, directly or indirectly. If Eleventh Circuit precedent in fact permitted Doe defendants, it would not have affirmed the dismissal of the complaint in this case.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition for certiorari, certiorari should be granted.

Respectfully submitted,

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