No. _____

In the Supreme Court of the United States

JOHN P. DEROSE, PETITIONER,

v.

VILLAGE OF ORLAND PARK, ET AL., RESPONDENTS.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The 1993 amendments to Rule 11 of the Federal Rules of Civil Procedure added a safe harbor provision to allow the nonmovant a 21 day period to reconsider the legal and factual basis for the challenged contentions and, if necessary, to withdraw the offending document. The safe harbor provision is triggered by service of a motion that "must describe the specific conduct that allegedly violates Rule 11(b)." FED R. CIV. P. (c)(2).

The question presented is:

May a party satisfy the safe-harbor provision of Federal Rule of Civil Procedure 11 by informal communications, the rule applied by Seventh Circuit, or must the party comply with the text of the rule and serve the nonmovant with a formal motion for sanctions 21 days before filing, as required by the courts of appeals for the Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits?

PARTIES TO THE PROCEEDINGS

Petitioner is John D. DeRose.

Respondents are the Village of Orland Park, Illinois, Timothy McCarthy, Patrick Duggan, and James Bianchi.

RELATED PROCEEDINGS

United States District Court (N.D. Ill.):

McGreal v. Village of Orland Park, No. 12-cv-5135 (August 3, 2013) (ruling on motion to dismiss)

McGreal v. Village of Orland Park, No. 12-cv-5135 (April 15, 2016) (granting defendants' motion for summary judgment)

McGreal v. Village of Orland Park, No. 12-cv-5135 (September 29, 2017) (granting Rule 11 sanctions)

McGreal v. Village of Orland Park, No. 12-cv-5135 (September 26, 2018) (granting motion to set amount of fees)

McGreal v. Village of Orland Park, No. 12-cv-5135 (October 12, 2018) (denying motion to reconsider award of fees)

United States Court of Appeals (7th Cir.):

McGreal v. Village of Orland Park, No. 16-2365 (March 6, 2017) (affirming grant of summary judgment)

McGreal v. Village of Orland Park, No. 18-3342 (June 26, 2019) (affirming sanctions)

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

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John P. DeRose respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-7a) is reported at 928 F.3d 556 (7th Cir. 2019). The orders of the district court granting respondents' motion for sanctions (App. 66a-76a), setting the monetary amount of the sanctions (App. 77a-78a), and denying reconsideration (App. 79a-80a) are not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 2019. The court of appeals denied rehearing on August 20, 2019. (App. 81a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULE INVOLVED

Rule 11 of the Federal Rules of Civil Procedure is reproduced in the appendix to this petition. (App. 82a-84a.)

STATEMENT

Joseph McGreal, a former police officer for the Village of Orland Park, Illinois, brought this action complaining about his loss of employment; McGreal brought federal constitutional claims under 42 U.S.C. § 1983 and a variety of supplemental state law claims. (App. 52a-54a.)

After completing discovery, McGreal agreed to the dismissal of several defendants. (District Court Docket 172, 178.) The remaining defendants moved for summary judgment on March 24, 2015. (District Court Docket 202.) The district court overruled McGreal's objections (filed on May 8, 2015, District Court Docket 220) and granted summary judgment to defendants. (App. 33a-54a.)

After the grant of summary judgment, and while McGreal was prosecuting his ultimately unsuccessful appeal (App. 55a-65a), respondents filed on June 23, 2016 a motion seeking fees under 42 U.S.C. § 1988 against McGreal and sanctions under Federal Rule of Civil Procedure 11 against McGreal's attorney, petitioner John P. DeRose. (App. 3a.) Respondents supported their request for Rule 11 sanctions with copies of correspondence their counsel had sent to petitioner by email on February 3, 2014 and "formal letters" dated July 14, 2014, September 3, 2014, and September 30, 2014. (App. 71a-72a.)

The email of February 3, 2014 asserted that the complaint against six individual defendants was meritless and stated that these defendants would "seek Rule 11

sanctions" if plaintiff did not voluntarily dismiss those defendants. (District Court Docket 248-3 at 4.) The letters of July 16, 2014, September 3, 2014, and September 30, 2014 requested that plaintiff voluntarily dismiss his claims against one additional defendant. (District Court Docket 248-3 at 6-7, 12-16, 17-19.) Plaintiff later agreed to dismissal of four of the individual defendants and proceeded against the Village of Orland Park and three individuals. (District Court Docket 178.)

Following affirmance by the court of appeals of the summary judgment ruling (App. 55a-65a), the district court denied the request for fees under 42 U.SC. § 1988 (App. 73a) but granted Rule 11 sanctions (App. 74a), concluding that petitioner's "summary judgment filings were not well grounded in fact or warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." (*Id.*) The district court imposed monetary sanctions (App. 75a-76a) and set the amount of sanctions at $66,191.75. (App. 77a.)

Petitioner pointed out, in opposing the amount of fees claimed, that respondents had not served him with the separate motion required by Rule 11's safe harbor provision, FED. R. CIV. P. 11(c)(2), and had failed to provide petitioner with "at least 21 days to withdraw or correct the offending matter" as also required by Rule 11. (District Court Docket 289 at 5-8.) Petitioner renewed this argument in a motion to reconsider, but the district court denied relief, relying on the Seventh Circuit's holding in *Nisenbaum v. Milwaukee Cty.*, 333 F.3d 804, 808 (7th Cir. 2003) that "substantial compliance with the warning-shot requirement is sufficient for the court to rule on the merits of the motion." (App. 79a.)

Petitioner advanced his argument about defendants' failure to have complied with the safe harbor provision in his appeal to the Seventh Circuit, asserting that the "emails and letters exchanged between counsel discussing a motion for sanctions is not sufficient." Brief of Appellant, *McGreal v. Village of Orland Park*, 7th Cir., No. 18-3342 at 29. Respondents answered this argument by citing *Nisenbaum v. Milwaukee County*, *supra*, for the proposition that Rule 11 requires only "substantial compliance" with the safe harbor provision. Brief of Appellee, *McGreal v. Village of Orland Park*, 7th Cir., No. 18-3342 at 23. Respondents also conceded that that they had not complied with the text of Rule 11 when they failed to serve their sanctions motion 21 days before filing it.[1] *Id.* at 26-27.

The Seventh Circuit recognized that eight circuits would reverse the imposition of sanctions because those circuits hold that "informal communications" do not comply with the safe harbor provision of Federal Rule of Civil Procedure 11(c)(2). (App. 5a.) The court affirmed, because "[t]he Seventh Circuit, however, interprets Rule 11(c)(2) differently." (*Id.*)

> In *Nisenbaum v. Milwaukee Cty.*, we held that the defendants "complied substantially" with Rule 11(c) when they sent opposing counsel "a 'letter' or 'demand' rather than a 'motion.'" 333 F.3d 804, 808 (7th Cir. 2003).

(App. 5a.) The Seventh Circuit explicitly acknowledged its outlier status:

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[1] Defense counsel sent their emails and letters in 2014, long before plaintiff filed his response to summary judgment (the "challenged paper") in 2015.

> We are the sole circuit to adopt this "substantial compliance" theory, and other circuits have subsequently criticized our analysis as cursory and atextual.

(App. 5a.)

The court of appeals construed two colloquies at oral argument as petitioner's waiver of any request to revisit *Nisenbaum*. (App. 5a.) The first colloquy appears at 4:44 in the recording of oral argument:[2]

Judge: Our substantial compliance doctrine in the Rule 11 context traces to the *Nisenbaum* case.

Counsel: Yes.

Judge: Are you asking us to overrule that case? Judge Hamilton in his opinion for the panel in that *PNC Bank* Case did observe how out of step it is from other circuits and from the text of the rule itself and the conference committee notes, but didn't go any further than that because the panel found that there was not substantial compliance. Are you asking us to revisit the substantial compliance doctrine and to overrule that *Nisenbaum* case?

Counsel: I'm not that brave to ask the judges to reverse anything that the judges stand for. But I am trying to say that my case is very much closer to the *Northern Illinois* case, then it ever will be to the *Nisenbaum* case …

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[2] The recording of oral argument is available at: http://media.ca7.uscourts.gov/sound/2019/lj.18-3342.18-3342_05_29_2019.mp3

There was a further colloquy in rebuttal argument, starting at 23:42:

Judge: But this circuit allows substantial compliance by letter and that doctrine – you're not asking us to overrule …

Counsel: I am.

Judge: You are not.

Counsel: I am just asking you to protect me. If you can help the rest of us, I'd love it.

[laughter.]

The Seventh Circuit treated these colloquies as a waiver of petitioner's argument that respondents had not complied with the safe harbor provision of Rule 11. (App. 5a.) The Court of Appeals also ruled that petitioner's failure to have asked the district court to overrule circuit precedent (*Nisenbaum v. Milwaukee County*, *supra)* was an independent waiver of any challenge to compliance with the safe harbor provision of Rule 11. (App. 5a-6a.)

REASONS FOR GRANTING THE PETITION

I. The Seventh Circuit Interprets Rule 11(c)(2) Differently than Eight Circuits

The Seventh Circuit acknowledged in its opinion in this case that it is the only circuit to apply a rule of substantial compliance to the safe harbor provision of Rule 11(c)(2). (App. 5a.)

The safe harbor provision was added to Rule 11 of the Federal Rules of Civil Procedure in 1993. The amended rule permits a party to withdraw an offending pleading within 21 days of service of a "separate motion" for sanctions. Rule 11(c)(2) provides as follows:

> (2) *Motion for Sanctions.* A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

The Seventh Circuit acknowledged in this case that it interprets this "safe harbor" provision differently than eight other circuits. (Pet. 4a-5a.) Since its decision in *Nisenbaum v. Milwaukee Cty.*, 333 F.3d 804 (7th Cir. 2003), the rule in the Seventh Circuit has been that the safe harbor provision of Rule 11(c)(2) is triggered by "a 'letter' or 'demand' rather than a 'motion.'" *Id.* at 808. In the view of the Seventh Circuit, a party who provides such informal notice has "complied substantially" with the safe harbor provision. *Id.* Rather than the formal motion required by the express language of Rule 11, the Seventh Circuit accepts "a letter informing the opposing party of the intent to seek sanctions and the basis for the imposition of sanctions." *Matrix IV, Inc. v. American Nat. Bank and Trust Co. of Chicago*, 649 F.3d 539, 552 (7th Cir. 2011).

The Fifth Circuit reached the opposite result in one of the first appellate decisions to apply the 1993 amendments to Rule 11. In *Elliott v. Tilton*, 64 F.3d 213 (5th Cir. 1995), the court of appeals reversed the award of sanctions because "plaintiffs did not serve their motion for sanctions on the defendants and defense counsel prior to filing." *Id.* at 216.

The Fifth Circuit applied its reading of Rule 11 to informal notice in *In re Pratt*, 524 F.3d 580 (5th Cir. 2008) when it rejected the rule followed by the Seventh Circuit:

> In *Nisenbaum v. Milwaukee County*, the Seventh Circuit awarded sanctions under Rule 11 even though the defendant had sent the respondent only a "letter" or "demand" and not a copy of the motion for sanctions. In reaching its conclusion, the Seventh Circuit did not address the language of Rule 11, the Advisory Committee Notes to the Rule, or any other Rule 11 jurisprudence. The court simply stated that the "[d]efendants have complied substantially with Rule 11(c)(1)(A) and are entitled to a decision on the merits of their request for sanctions under Rule 11." Because the Seventh Circuit provided little analysis and cited no authority for its holding, the propriety of its holding has been called into doubt on more than one occasion.

In re Pratt, 524 F.3d at 587-88 (footnotes omitted).

The Second Circuit has also refused to equate a letter from counsel with "the separate notice referred to in Rule 11." *L.B. Foster Co. v. America Piles, Inc.*, 138 F.3d 81, 90 (2d Cir. 1998). Thereafter, the Second Circuit noted in S*tar Mark Management, Inc. v. Koon Chun Hing Kee Soy & Sauce Factory, Ltd.*, 682 F.3d 170 (2d Cir. 2012) its disagreement with the "substantial compliance" rule of the Seventh Circuit: "An informal warning in the form of a letter without service of a separate Rule 11 motion is not sufficient to trigger the 21-day safe harbor period." *Id.* at 175.

The Third Circuit, while not squarely confronting the "substantial compliance" question in a precedential

opinion, *see In re Miller*, 730 F.3d 198, 204 n.5 (3d Cir. 2016), held in *In re Schaefer Salt Recovery, Inc.*, 542 F.3d 90 (3d Cir. 2010), that a motion for sanctions under Rule 11 cannot be filed until "twenty-one days after service of the motion on the offending party." *Id.* at 99.

The Fourth Circuit recognized in *Brickwood Contractors, Inc. v. Datanet Engineering, Inc.*, 369 F.3d 385 (4th Cir. 2004) "that the safe harbor provisions of Rule 11 are inflexible claim-processing rules and that a district court exceeds its authority by imposing sanctions requested through a procedurally-deficient Rule 11 motion." *Id.* at 396.

The Sixth Circuit also rejected the Seventh Circuit's rule in *Penn, LLC v. Prosper Business Development Corp.*, 773 F.3d 764, 768 (6th Cir. 2014). The court of appeals had "no doubt that the word 'motion'" definitionally excludes warning letters." *Id.* at 767. The Sixth Circuit concluded that "permitting litigants to substitute warning letters, or other types of informal notice, for a motion timely served pursuant to Rule 5" undermines the goals of the safe harbor provision to "reduce 'Rule 11's volume, formalize appropriate due process considerations of sanctions litigation, and diminish the rule's chilling effect.'" *Id.* (quoting *Ridder v. City of Springfield*, 109 F.3d 288, 294 (6th Cir. 1997).)

The Eighth Circuit also declined to accept the Seventh Circuit's "substantial compliance" rule in *Gordon v. Unifund CCR Partners*, 345 F.3d 1028 (8th Cir. 2003). There, the defendant used email and a follow-up letter to request the plaintiff to withdraw an offending pleading. *Id.* at 1029. The Eighth Circuit reversed the imposition of sanctions, concluding that an award of sanctions "in contravention of the explicit procedural

requirements of Rule 11 was an abuse of discretion." *Id.* at 1030.

The Ninth Circuit rejected "informal notice" in *Barber v. Miller*, 146 F.3d 707 (9th Cir. 1998), concluding that it would "wrench both the language and purpose of the amendment to the Rule to permit an informal warning to substitute for service of a motion." *Id.* at 710.

The Tenth Circuit likewise refused to follow the Seventh Circuit in *Roth v. Green*, 466 F.3d 1179, 1193 (10th Cir. 2006), finding *Nisenbaum* to be "unpersuasive, however, because it contains no analysis of the language of Rule 11(c)(1)(A) or the Advisory Committee Notes, cites to no authority for its holding, and indeed is the only published circuit decision reaching such a conclusion." *Id.* at 1193.

The 1993 amendments to Rule 11(c) were intended to provide litigants with "protection against sanctions if they withdraw or correct contentions after a potential violation is called to their attention." Advisory Committee's 1993 Note on Amendments to FED. R. CIV. P. The amendments were "intended to provide a type of 'safe harbor' against motions under Rule 11." *Id.* The 1993 amendments provide that the "'safe harbor' period begins to run only upon service of the motion." *Id.* Moreover, the drafters of the amended rule expected the Rule 11 motion to be preceded by "informal notice … whether in person or by telephone call or letter." *Id.*

The "substantial compliance" rule followed by the Seventh Circuit and applied in this case is contrary to the plain language of Rule 11 and has been rejected by eight other circuits. The Court should grant certiorari to resolve this conflict.

II. This Is an Appropriate Case to Resolve the Conflict among the Circuits

The district judge that imposed sanctions in this case was required to follow the "substantial compliance" rule of the Seventh Circuit; as another district judge noted, "[a]lthough the plain language of Rule 11(c)(1)(A) appears to require the moving party to serve the motion itself at least twenty-one days before filing it, the Court is bound by *Nisenbaum*." *Henderson v. Jupiter Aluminum Corp.*, No. 2:05-cv-081, 2006 WL 361063, at *6 (N.D. Ind. Feb. 15, 2006).

It is correct, as the court of appeals stated, that petitioner "didn't argue before the district court that the defendants failed to comply with Rule 11(c)(2) until his motion for reconsideration of the order imposing sanctions." (App. 5a.) But petitioner did not have notice that his summary judgment filings were at issue until after the district court ruled because respondents failed to identify an offending pleading, written motion, or other paper as required by Rule 11(b) in their email and letters, all served long before petitioner responded to the summary judgment motion. Petitioner should therefore not be faulted for the timing of his argument about defendants' failure to have complied with Rule 11(c)(2).

Nor should petitioner be faulted for his failure to have made the futile request that the district judge overrule the decision of the court of appeals in *Nisenbaum*. Foregoing a useless gesture cannot be deemed a waiver. First, "*Nisenbaum* remains controlling circuit law on this point." *Northern Illinois Telecom, Inc. v. PNC Bank, N.A.*, 850 F.3d 880, 888 (7th Cir. 2017). Second, a district judge may not overrule circuit precedent and the failure to make a hopeless

argument cannot be the "relinquishment or abandonment of a known right," *United States v. Olano*, 507 U.S. 725, 733 (1993). Because any request to overrule circuit precedent would have been futile, petitioner did not waive his challenge to the "substantial compliance" rule. *Cf. MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 125 (2007) ("That petitioner limited its contract argument to a few pages of its appellate brief does not suggest a waiver; it merely reflects counsel's sound assessment that the argument would be futile.")

Equally unavailing is reliance on petitioner's reluctance at oral argument to explicitly ask the Seventh Circuit to reverse *Nisenbaum*. (App. 5a.) There is no dispute that petitioner argued in his written submissions to the court of appeals that its "substantial compliance" rule was inconsistent with Rule 11. *See ante* at 4. And in rebuttal argument, petitioner stated that he was indeed asking the Court to overturn *Nisenbaum*. It was a judge who insisted that petitioner was not making that request. *Ante* at 6. In any event, petitioner's ambiguous statements at oral argument, set out *ante* at 5-6, are not the "intentional relinquishment or abandonment of a known right" required for waiver. *Hamer v. Neighborhood Housing Services of Chicago*, 138 S. Ct. 13, 17 n.1 (2017) (internal quotations omitted).

Petitioner did not do anything to forfeit the safe harbor protections of Rule 11. As the Fourth Circuit holds, referring to the goals animating the 1993 amendment to Rule 11,

> Allowing the imposition of sanctions to stand in this case, where there was not even an attempt to comply with the requirements of the safe harbor provisions, would surely frustrate these important goals.

Brickwood Contractors, Inc. v. Datanet Engineering, Inc., 369 F.3d 385, 398 (4th Cir. 2004).

The "substantial compliance" rule followed by the Seventh Circuit required the district court to accept the letters from defense counsel as equivalent to the motion specified in Rule 11. As the Seventh Circuit held, petitioner's argument against the rule was "directly foreclosed by our holding in *Nisenbaum*." (App. 5a.) This case therefore provides the Court with an opportunity to resolve the conflict among the courts of appeals about the "substantial compliance" rule.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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