No. 19-982

IN THE

Supreme Court of the United States

ERICA Y. BRYANT, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

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

REPLY BRIEF

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INTRODUCTION

Though this case presents as one which only seeks to restore the primary directive of MDL proceedings, that parties who have their cases transferred from one court to another in an MDL proceeding are treated no differently than they would be in their home courts, much more is at stake. Thousands of Marines and their families stand in the wings[1], having been injured by their government while serving in its defense at Camp Lejeune in North Carolina, and ask nothing more than that. While the government has not disputed what went on at Camp Lejeune, it nonetheless argues for denial of the petition, secure in the result that none of these claims will ever be heard.

That result would be in derogation of not only the legislature of the state which passed the statute of repose at issue, but of the circuit court for that state which agreed with the legislature's stated intent. In order to accomplish that, however, the Court would have to favor the decision of an MDL transferee court, which interprets the statutes of the transferor state differently, together with the circuit court for that transferee state as well. This requires that the Court agree that the practical result, having these claims and others like them dismissed only because of the choice of an MDL court, is consistent not only with the sense and purpose of multi-district litigation, but with the purpose and intent of the State of North Carolina as explicitly expressed by its legislature.

The petition should be granted.

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1. The district court below estimated there were "over 4,000 claimants in the administrative process" with the government at that time. *In re Camp Lejeune North Carolina Water Contamination Litigation*, 263 F.Supp.3d 1318, 1325 (N.D. Ga. 2016). With the administrative dismissal of these claims, they can only look to this Court for relief.

ARGUMENT

THE ACTION OF THE CIRCUIT COURT STANDS IN DEROGATION OF THE INTENT AND PURPOSE OF MULTI-DISTRICT LITIGATION

The government provides no reason which can sustain the decision of the circuit court in ignoring the obvious. Had that court been sitting in the circuit which encompassed North Carolina, the place of the occurrence, it could not have properly affirmed the dismissal of plaintiffs' actions. More particularly, reviewing the actions of an MDL transferee court, had it properly applied the law of the transferor court located, North Carolina, no statute of repose would have been applicable to bar plaintiffs' claims. This was the conclusion of the Fourth Circuit, which encompasses North Carolina, in *Stahle v. CTS Corp.*, 817 F.3d 96 (4th Cir. 2016) and the North Carolina legislature in its Clarifying Statute, N.C. Sess. L. 2014-44, § 1 (Pet. at 3-5).

The government agrees that the question decided by the Eleventh Circuit was one of state law. Opp. at 7. However, its rationale was that the court of appeals made the *correct* decision as to what that state law was simply because it said so in its own earlier decision in this case in *Bryant v. United States ["Bryant I"]*, 768 F.3d 1378 (11th Cir. 2014). *Id.* at 8.

The government's reliance on the opinion below requires it to support the circuit court's contention that even if the court had been wrong in *Bryant I*, it must adhere to that wrong decision until overruled by this Court or by that court, sitting *en banc*. Opp. at 8 [1(a)].

No authority cited by the government, however, restrains a court from correcting its own bad law. The court of appeals' rejection of *Stahle* was not based on the majority opinion of the 4th Circuit, but on a passing comment from its concurring opinion that North Carolina law was "unsettled," though not so "unsettled" that the writer did not concur in the result; a result that was entirely opposite to that of the Eleventh Circuit here. Opp. at 9. Rejecting the opinion of the circuit court whose jurisdiction actually included the state whose statute was at issue; a court that was infinitely more familiar with North Carolina, its statutory framework, and its legislature, makes no sense, especially when a court is ultimately reviewing the actions of an MDL transferee court. 28 USC 1407 (transferee court in MDL action to apply state law that transferor court would have applied).[2] The law of North Carolina is not what the court of appeals said it was and saying it twice, incorrectly, does not cure that error.[3]

The government's effort to cleanse the court of appeals disdain for the law of North Carolina is ineffective. The circuit court argued that the North Carolina statute of repose was "unambiguous" and does not involve any exception for causes of action involving latent diseases. Opp. at 10. The problem with that is the North Carolina legislature, which was so concerned with ambiguity that it passed a particular

2. In a similar manner the Federal Tort Claims Act would also require that the law of the jurisdiction where the tort occurred, North Carolina, control. 18 USC 1346(b)(1).

3. The government's statement that Plaintiffs' did not raise the argument below that the circuit court should have set aside its prior precedent in *Bryant I* is wishful thinking. Opp. at 9 [1(b)] For example, even in its opening words, the brief of Plaintiff Jones stated that for the circuit court to rely on its prior decision in *Bryant I* would be a "manifest injustice." Jones C.A. Br. at 2.

statute — a "Clarifying Act"[4] — to eliminate any "ambiguity and uncertainty" (Pet. at 3) do just that; not to rewrite the statute, but to dispel any chance that it would be misread or misinterpreted. While the government insists that the Clarifying Act is a "revision of the statute of repose" it is not, and required no retroactive application by the court of appeals. Opp. at 11. It only required that the law be applied as the legislature originally intended to be: "The General Assembly finds that it never intended the statute of repose in G.S. 1-52(16) to apply to claims for latent disease caused or contributed to by groundwater contamination, or to claims for any latent harm caused or contributed to by groundwater contamination." Pet. at 3. It would be odd, indeed, for any legislature to pass such a statute where the statute in question was "unambiguous," as the government suggests. Moreover, if the statute is a clarification, as the legislature intended, then it is not a revision and there is no question of retroactivity. *See* Opp. at 11. That intent is the essence of a statute to repose. *CTS Corp. v. Walburger*, 573 U.S. 1, 9 (2014) (statutes of repose effect a legislative judgment of when and under what circumstances a defendant should be free from liability).

The petition justifiably seeks review of a circuit court decision that has effectively non-suited thousands of servicemen and their families injured at Camp Lejeune by ignoring the language and intent of a North Carolina statute. The court accomplished this by failing to heed not only the directives of the legislature, but the decision of a sister circuit encompassing North Carolina. In this MDL, the actions of the court below ensured that plaintiffs were not treated in the transferee court in the same manner that they would be treated by the transferor court.

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4. The legislature used this term in the legislation itself, as the circuit court noted in *Bryant I* at 1383-1384.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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