No. 21-771

IN THE
Supreme Court of the United States

JUSTIN HERRERA,
Petitioner,
v.
THERESA CLEVELAND, SAMUEL DIAZ, AND ENRIQUE MARTINEZ,
Respondents.

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

REPLY BRIEF FOR PETITIONER

Todd A. Gale
DYKEMA GOSSETT PLLC
10 South Wacker Dr.
Suite 2300
Chicago, IL 60606

Jill M. Wheaton
DYKEMA GOSSETT PLLC
2723 South State St.
Suite 400
Ann Arbor, MI 48014

Kelsi Brown Corkran
Counsel of Record
Amy L. Marshak
Joseph W. Mead
INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION,
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Ave., NW
Washington, DC 20001
(202) 661-6728
kbc74@georgetown.edu

Counsel for Petitioner

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Respondents do not dispute that there is a long-established and widely acknowledged circuit split over whether Rule 15(c)(1)(C) categorically excludes relation back where the plaintiff seeks to add a defendant she initially identified as a John Doe. Nor do respondents identify any reason for this Court to decline resolving the division of authority in this case. The split is entrenched, exceptionally important to countless litigants, and squarely presented by the decision below. The Court should grant review.

I. The Circuit Split Over The Question Presented Is Ready For This Court's Resolution

The courts of appeals have been openly divided over the question presented for nearly three decades. Respondents do not contest this point, but nonetheless urge the Court to delay intervening to see whether *Krupski v. Costa Crociere S. p. A.*, 560 U.S. 538 (2010), resolves the split. BIO 10-13. The only possible impact of *Krupski*, however, is to abrogate the majority approach disallowing relation back for Doe substitutions, and five of the six majority circuits have re-committed to that approach post-*Krupski*. Pet. 17-23.

To the extent respondents contend that the Third and Fourth Circuits might in the future reject their minority approach because of *Krupski*, that argument is baseless. Of the many hundreds of cases involving Doe substitutions under Rule 15(c)(1)(C) since the Court decided *Krupski* twelve years ago, respondents

do not identify a *single* decision (or any other legal authority) suggesting that *Krupski* abrogates the minority approach. The majority circuits have held only that *Krupski* does not compel abandoning their own precedent. *See* Pet. App. 7a-11a; *Ceara v. Deacon*, 916 F.3d 208, 212-13 (2d Cir. 2019); *Heglund v. Aitkin County*, 871 F.3d 572, 580-81 (8th Cir. 2017).

Meanwhile, without any plausible argument that *Krupski* calls the minority approach into doubt, the Third and Fourth Circuits have had no reason to revisit their precedent and never will, barring intervention by this Court. The vitality of the minority approach—and thus the circuit split—is reflected in the dozens of district court decisions applying that approach as settled precedent in those circuits post-*Krupski*, along with the unpublished affirmances by the courts of appeals. Pet. 20-21 n.10.

II. Rule 15(c)(1)(A) Does Not Diminish The Importance Of The Question Presented

Respondents assert that the circuit split over Doe substitutions under Rule 15(c)(1)(C) is unimportant because 15(c)(1)(A) separately allows relation back under applicable state law.[1] BIO 14-17. That argument immediately collapses under the weight of the

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[1] Respondents' claim that 15(c)(1)(C) "is designed to play only a limited role in civil rights cases" compared to 15(c)(1)(A), BIO 14, gets the relationship between the two provisions backwards: 15(c)(1)(C) provides the federal standard for relation back involving party amendments, and 15(c)(1)(A) was added later to clarify that the Rule did not "preclude" a more forgiving state law from *(cont'd)*

over 800 cases in the Howard Civil Rights Clinic amicus brief appendices involving Doe substitutions under 15(c)(1)(C). Howard Amicus Br. Apps. 1a-68a.

As those cases indicate, in many jurisdictions, 15(c)(1)(A) is not an alternative route to relation back for Doe substitutions because the state law relation back rules are either less permissible than Rule 15 or mirror Rule 15. Remarkably, at oral argument below, respondents' counsel made this very point about Illinois's relation back provision:

> [15(c)(1)(A) is] really a red herring because the Illinois standard and the federal standard, there's no difference between the two. In fact, the Illinois rule was amended to bring itself into compliance with the federal rule. So it takes its cues from the federal rule not vice versa.

7th Cir. Oral Arg. 4:48-5:05; *see also* 735 Ill. Comp. Stat. 5/2-616(d)(2) (Illinois relation back rule); *In re Safeco Ins. Co. of Am.*, 585 F.3d 326, 331 (7th Cir.

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being "available to save the claim." Fed R. Civ. P. 15 advisory committee's note to 1991 amendment. Indeed, if the federal standard in 15(c)(1)(C) permits relation back, it would be ill-advised for a federal court to instead embark on the perilous journey of determining what state law might say. *See West v. Conrail*, 481 U.S. 35, 39 (1987).

2009) ("Illinois' relation-back doctrine is, in all material respects, identical to the federal rule.").[2]

For this reason, the U.S. District Court for the Northern District of Illinois recently applied the Seventh Circuit's decision below to foreclose Doe substitutions via Illinois law. *Salameh v. MTF Club Operations Co.*, No. 21-CV-4080, 2021 WL 4951529, at *4 (N.D. Ill. Oct. 25, 2021); *see also* Pet. 18-19 n.8 (citing over a dozen decisions relying on Rule 15(c)(1)(C) to determine whether relation back is available for Doe substitutions in cases arising out of Illinois); *supra* n.4 (citing four more).

Respondents purport to identify five states that "expressly allow relation back" for Doe substitutions. BIO 16. Two of those states do not belong on the list. *Shade v. Kaiser*, 2012-Ohio-4979, at ¶ 30 (Ohio Ct. App. 2012) ("Ohio law does not permit amendments which relate back more liberally than the federal rule"); *Harvill v. Cmty. Methodist Hosp. Ass'n*, 786 S.W.2d 577, 581 (Ark. 1990) (disallowing relation back for Doe substitutions). In any event, the possibility of relation back under 15(c)(1)(A) in a handful of states does not change the significance of the question presented for the rest of the country, where the availability of relation back for Doe substitutions hinges solely on 15(c)(1)(C).

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[2] Although petitioner attempted during oral argument to defend its amici's position that 15(c)(1)(A) permits relation back in this case, 7th Cir. Oral Arg. 10:19-12:07, the Seventh Circuit declined to accept that argument.

Indeed, most states have relation back rules that simply copy the federal standard in Rule 15(c).[3] Federal courts typically treat 15(c)(1)(A) as superfluous in cases arising out of these states. *See, e.g.*, *Manns v. Lincoln County*, No. 6:17-CV-01120, 2018 WL 7078672, at *6 (D. Or. Dec. 12, 2018); *Autry v. Cleveland Cnty. Sheriff's Dep't*, No. 15-CV-1167, 2018 WL 846093, at *8 n.12 (W.D. Okla. Feb. 12, 2018); *Jones v. Motley*, No. 07-CV-111, 2009 WL 1458209, at *4 n.2 (E.D. Ky. May 26, 2009). And even in states with differently worded relation back rules, 15(c)(1)(A) is often unavailable because the state rule is just as restrictive as the federal standard in 15(c)(1)(C). *See, e.g.*, *Balle v. Nueces County*, 952 F.3d 552, 557 (5th Cir. 2017) (Texas); *Ruiz v. Taranovich*, No. 3:20-CV-316, 2021 WL 1969730, at *4 (D. Conn. May 5, 2021) (Connecticut).

The bottom line is that, in the vast majority of jurisdictions, the availability of relation back for Doe

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[3] *E.g.,* Alaska R. Civ. P. 15(c); Ariz. R. Civ. P. 15(c)(2)(B); Ark. R. Civ. P. 15(c)(2); Colo. R. Civ. P. 15(c); D.C. Super. Ct. R. Civ. P. 15(c)(1)(C); Del. Super. Ct. R. Civ. P. 15(c)(3); Ga. Code Ann. § 9-11-15(c); Idaho R. Civ. P. 15(c)(1)(C); Iowa R. Civ. P. 1.402(5); Kan. Stat. Ann. § 60-215(c); Ky. R. Civ. P. 15.03(2); Me. R. Civ. P. 15(c)(3); Mo. Sup. Ct. R. 55.33(c); Neb. Rev. Stat. § 25-201.02(2)(b); N.M. R. Civ. P. for Dist. Cts. 1-015(C)(3); N.D. R. Civ. P. 15(c)(1)(C); Ohio Civ. R. P. 15(C); Okla. Stat. Ann. tit. 12, § 2015(C)(3); Or. R. Civ. P. 23(C); R.I. Super. Ct. R. Civ. P. 15(c); S.C. R. Civ. P. 15(c); S.D. Codified Laws § 15-6-15(c); Tenn. R. Civ. P. 15.03; Utah R. Civ. P. 15(c)(3); Vt. R. Civ. P. 15(c)(3); Va. Code Ann. § 8.01-6; W. Va. R. Civ. P. 15(c)(3); Wis. Stat. § 802.09(3); Wyo. R. Civ. P. 15(c)(1)(C).

substitutions turns on the Court's resolution of the question presented here. The sheer number of cases arising out of those jurisdictions—over 800 and counting, with over a dozen more decisions issued just since the petition was filed—proves the question's exceptional importance. *See, e.g., Washington v. Macomb County*, No. 2:20-CV-10149, 2022 WL 264872, at *3 (E.D. Mich. Jan. 27, 2022) (disallowing relation back for Doe substitution under Sixth Circuit precedent); *Hayat v. Diaz*, No. 20-CV-02994, 2022 WL 252963, at *4–*5 (D. Md. Jan. 27, 2022) (allowing relation back for Doe substitution under Fourth Circuit precedent).[4]

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[4] *See also, e.g.*, *Murphy v. Strafford County*, No. 19-CV-1162, 2022 WL 124673, at *2-3 (D.N.H. Jan. 13, 2022); *Meredith v. Prince George's County*, No. 19-CV-03198, 2022 U.S. Dist. LEXIS 4908, at *7-14 (D. Md. Jan. 10, 2022); *James v. Buckhalter*, No. 11-C-4418, 2022 WL 103711, at *3 n.3 (N.D. Ill. Jan. 10, 2022); *Lane v. City of Chicago*, No. 21-CV-1977, 2022 WL 19325, at *2 (N.D. Ill. Jan. 3, 2022); *Young v. Lugo*, No. 18-CV-04216, 2021 WL 5989106, at *6-7 (E.D.N.Y. Dec. 17, 2021); *Williams v. City of Joliet*, No. 20-CV-5367, 2021 WL 5881681, at *2 (N.D. Ill. Dec. 13, 2021); *Domzil v. Jeuck*, No. 20-CV-1747, 2021 WL 5866703, at *1 (E.D. Wis. Dec. 10, 2021); *Hartsell v. Schaaf*, No. 20-CV-505, 2021 WL 5711539, at *2 (N.D. Ind. Dec. 2, 2021); *Boyd v. Doe*, No. 18-CV-1333, 2021 U.S. Dist. LEXIS 229447, at *61-64 (N.D.N.Y. Nov. 30, 2021); *Jones v. City of New York*, No. 18-CV-1937, 2021 WL 5562694, at *6-9 (S.D.N.Y. Nov. 29, 2021); *Nkansah v. United States*, No. 18-CV-10230, 2021 WL 5493214, at *2-4 (S.D.N.Y. Nov. 23, 2021); *Barclary v. 7-Eleven, Inc.*, No. 20-CV-5824, 2021 WL 5449345, at *2 (D.N.J. Nov. 22, 2021).

III. Respondents Are Wrong On The Merits

Respondents make no attempt to reconcile the majority reading of Rule 15(c)(1)(C) with the Rule's purposes or with common sense. Instead, their merits argument boils down to the notion that 15(c)(1)(C)'s text requires that the "mistake" in the original pleading be inadvertent. BIO 17-22. That argument fails because it is itself atextual: 15(c)(1)(C) does not ask whether the plaintiff "inadvertently named the wrong party." It asks whether the newly named defendant "knew or should have known" the complaint reflected "a mistake concerning the proper party's identity."

For the reasons explained in the petition, naming a Doe defendant falls comfortably within the definition of "a mistake concerning the proper party's identity" articulated in *Krupski*. Pet. 25-26; *see also* Civil Procedure Scholars Amicus Br. 11-12. Respondents emphasize that *Krupski* uses "error" as a synonym for "mistake," BIO 18, but that just further proves that neither Rule 15(c)(1)(C)'s text nor *Krupski* limits relation back to the correction of accidents: Forced error—i.e., taking a wrong action because you cannot take the correct action—is a familiar concept in life, whether you are playing tennis, making an illegal U-turn at a roadblock, taking a wild guess on a test, or substituting a missing ingredient in a recipe.

Respondents' textual argument falls apart further when reading the clause in full. Again, 15(c)(1)(C) does not ask what the *plaintiff* knew or did; it asks whether "the party to be brought in by amendment"—i.e., the newly named defendant—"knew or should

have known" he was the proper defendant. This textual focus on the defendant's knowledge is why *Krupski* rejected the argument that the plaintiff's alleged knowledge regarding the proper defendant meant no mistake occurred for 15(c)(1)(C) purposes. 560 U.S. at 548-49. Respondents' assertion that petitioner's *lack* of knowledge regarding the proper defendant means no mistake occurred, BIO 18-19, is untenable for the same reason: The textual inquiry is not what the plaintiff knew or did not know, but whether the newly named defendant understood or should have understood that he was the proper defendant.

Respondents make much of *Krupski*'s observation that 15(c)(1)(C) is unsatisfied where the plaintiff makes "a deliberate choice to sue one party instead of another while fully understanding the factual and legal differences between the two parties." BIO 20 (quoting 560 U.S. at 549). But the point of that observation is that, under those circumstances, the prospective defendant could "legitimately believ[e] that the limitations period had passed without any attempt to sue him." *Krupski*, 560 U.S. at 550. To illustrate, the Court cited *Nelson v. Adams USA, Inc.*, 529 U.S. 460 (2000), where relation back was disallowed because the newly named defendant reasonably believed the plaintiff made a "fully informed decision" not to name him in the complaint, as evidenced by the plaintiff's failure to add him until after the plaintiff learned that the original defendant was unable to pay the judgment. 560 U.S. at 551-52.

That rationale has no application to a prospective defendant who knows from reading the complaint that he is the intended Doe defendant and that he

would have been named if the plaintiff had been able to identify him before filing suit. Indeed, it is readily apparent from a plaintiff's use of Doe placeholders that she does not "fully understand[] the factual and legal differences between the two parties": the only reason a plaintiff uses a Doe placeholder is that she *lacks* factual knowledge about the proper defendant. Nor can the use of Doe placeholders reasonably be understood as a "choice" by the plaintiff to sue John Doe "instead of" the proper defendant: plaintiffs name Doe defendants only when they *cannot* name the proper defendant due to lack of knowledge regarding his identity.[5]

In short, respondents offer no meaningful textual defense for categorically disallowing Doe substitutions under 15(c)(1)(C), and no response whatsoever to the myriad ways in which the majority reading of 15(c)(1)(C) conflicts with the Rule's purposes, draws illogical lines, and creates perverse incentives. Pet. 28-33.

IV. This Case Is An Ideal Vehicle For Resolving The Circuit Split

Finally, respondents' vehicle argument misunderstands the Court's certiorari standard. Respondents do not contest that the question presented is squarely raised by the petition; instead, they rely on a 129-

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[5] The same is true when a prospective defendant sees himself described in a complaint as an "Unknown Defendant" and knows the plaintiff would have properly identified him by name if she could. *Contra* BIO 20-21.

year-old decision for the proposition that it is inappropriate for this Court to review an interlocutory decision "unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." BIO 8 (quoting *Am. Constr. Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 384 (1893)).[6]

In the modern era, the Court has routinely reviewed interlocutory decisions without requiring "extraordinary inconvenience and embarrassment," so long as the question presented is squarely raised and warrants the Court's attention. Section 1292(b) appeals are particularly well-suited for the Court's review because, by definition, they cleanly present "a controlling question of law as to which there is substantial ground for difference of opinion." 28 U.S.C. § 1292(b).

To give one of many examples: In *Mach Mining, LLC v. E.E.O.C.*, 575 U.S. 480, 485 (2015), the Seventh Circuit had held, pursuant to a § 1292(b) appeal, that the defendant could not raise the EEOC's failure

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[6] Respondents' reliance on *Ticor Title Insurance Co. v. Brown*, 511 U.S. 117 (1994) is also misplaced. The Court declined to reach the merits in that case not because the decision below was interlocutory, but because res judicata foreclosed the petitioner from asserting a procedural argument that potentially rendered the certified constitutional question irrelevant. *Id.* at 121. Accordingly, there was a "substantial possibility" that the Court's resolution of the question presented would be of "virtually no practical consequence in fact, except with respect to these particular litigants." *Id.* That concern has no relevance where, as here, the Court's resolution of the question presented indisputably will impact an enormous number of litigants. *Supra* p. 6.

to attempt conciliation before filing suit as an affirmative defense to the EEOC's employment discrimination claims, and then remanded for further proceedings. Although it was possible the defendant would prevail on other grounds on remand, thereby rendering the affirmative defense moot, the Court granted the defendant's petition without delay. *Id.* As the United States observed in its brief recommending certiorari, the "interlocutory posture" did not counsel against the Court's intervention because the issue presented was "purely legal" and involved "a recurring question of substantial importance on which the courts of appeals have disagreed." Brief for the Respondent, *Mach Mining, LLC v. E.E.O.C.*, 575 U.S. 480 (2014) (No. 13-1019), 2014 WL 2201045, at *7.

So too here. Rule 15(c)(1)(C)'s application to Doe substitutions is a purely legal question that has divided the circuits and significantly impacts countless litigants, thus warranting the Court's immediate review. *See also, e.g.*, *Pac. Bell Tel. Co. v. LinkLine Comm'ns, Inc.*, 555 U.S. 438, 445-46 (2009) (reviewing a § 1292(b) appeal after the court of appeals remanded for further proceedings with the potential to resolve the dispute on other grounds); *Cutter v. Wilkinson*, 544 U.S. 709, 717-18 (2005) (same); *Norfolk S. Ry. v. Kirby*, 543 U.S. 14, 22 (2004) (same); 17 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure Jurisdiction § 4036 (3d ed. April 2021 Update) ("In a wide range of cases, certiorari has been granted after a court of appeals has disposed of an appeal from a final judgment on terms that require further action in the district court, so that there is no longer any final judgment.").

The Court's review of the question presented here via a § 1292(b) appeal is especially appropriate because the nature of the question is such that it generally evades this Court's review despite its ubiquity in the lower courts. As the Howard Civil Rights Clinic amicus brief appendices illustrate, Apps. 1a-68a, the vast majority of cases involving Doe substitutions never make it to the courts of appeals, let alone to this Court. This is because a district court's decision to allow or deny relation back typically occurs so early in the proceedings that it makes more sense for the party who loses a Doe substitution dispute to settle or pursue other trial-level litigation strategies rather than wait for the opportunity to seek further review of the ruling, particularly given the long-settled circuit precedent controlling such rulings in most jurisdictions. The end result is a circuit split that has profoundly impacted an incalculable number of litigants yet persisted for nearly 30 years without a meaningful opportunity for this Court to intervene until now. The Court should grant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Todd A. Gale
DYKEMA GOSSETT PLLC
10 South Wacker Dr.
Suite 2300
Chicago, IL 60606

Jill M. Wheaton
DYKEMA GOSSETT PLLC
2723 South State St.
Suite 400
Ann Arbor, MI 48014

Kelsi Brown Corkran
Counsel of Record
Amy L. Marshak
Joseph W. Mead
INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Ave., NW
Washington, DC 20001
(202) 661-6728
kbc74@georgetown.edu

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