No. 22-670

In The
Supreme Court of the United States

PACESETTER CONSULTING, LLC,

Petitioner,

v.

HERBERT A. KAPREILIAN; EASTSIDE PACKING, INC.; CRAIG L. KAPREILIAN; FRUIT WORLD NURSERY, INC.; AGRICARE, INC.; TOM AVINELIS; MARK R. BASSETTI; MICHAEL MOORADIAN; DUDA & SONS, LLC; A. DUDA & SONS, INC.; DUDA FARM FRESH FOODS, INC.; AND DAN DUDA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

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1. This Court has never authorized "special appearances" in civil actions. Their existence, and the impact of the special appearance by the Duda defendants in our case, deprived Pacesetter of any chance to prove the fraud committed against it.

Every day, from Guam in the Pacific to Puerto Rico in the Atlantic, from Alaska to Florida, from Maine to California, and in every other jurisdiction that has a federal district court, lawyers appear in civil cases in federal district court and file notices of special appearance. But they have no authority whatsoever to do that.

It is true that some non-federal-district court jurisdictions allow special appearances instead of general appearances. The Colorado Court of Appeals recently explained the difference between general and special appearances:

> "A special appearance is one made for the purpose of urging jurisdictional objections. If a defendant separately or in conjunction with a motion going only to the jurisdiction invokes the power of the court on the merits, or moves to dismiss the action, or asks relief which presupposes that jurisdiction has attached, this constitutes a general appearance."

Delta County Memorial Hospital v. Industrial Claim Appeals Office, 495 P.3d 984, 991 ¶ 22 (Colo. App. 2021) (quoting *Everett v. Wilson*, 83 P. 211, 212 (Colo. 1905)).

But the federal procedural rules have not allowed special appearances in federal district courts since 1938, when the Federal Rules of Civil Procedure that this Court adopted went into effect. *See Orange Theatre Corp. v. Rayherstz Amusement Corp*., 139 F.2d 871, 874 (3d Cir. 1944) ("Rule 12 abolished the . . . age-old distinction between general and special appearances.").

Any lawyer or judge who now takes the trouble to look into a standard legal dictionary will promptly discover this fundamental fact about special appearances: "Special appearances have been abolished in federal court." *Black's Law Dictionary* 122 (11th ed. 2019).

Despite the lack of any authority to enter special appearances in federal district court, the word has definitely not reached lawyers who practice there and it has definitely not reached federal district-court judges. Our case is a typical example. The district-court judge in our case thought that the procedural rules allowed special appearances—as supposedly did the lawyers who filed the purported special appearance on behalf of Dan Duda and his Florida-based company, A. Duda and Sons, Inc. (the "Duda defendants").

And so, the district-court judge held that service of the Third Amended Complaint against the Duda defendants was improper because it was made on the lawyer who had entered a purported special appearance (really a general appearance, since there is no such thing as a special appearance in federal district court). Because of that, Pacesetter could not obtain

documents from, propound interrogatories on, demand admissions from, or conduct any sort of substantive depositions of Dan Duda and the other officers and agents of the Duda defendants. That was devastating to Pacesetter's case against the other defendants because the Duda defendants formed the financial hub of the fraud committed against the Trust that was Pacesetter's predecessor in interest. Without the financial manipulations and the money that the Duda defendants collected, mulcted, and distributed to the other defendants, the fraud would have been impracticable, if not impossible.

Speaking of impossible, the district-court's error in upholding the Duda defendants' special appearance made it impossible to win the lawsuit against the other defendants. They were all collaborators and co-conspirators of the Duda defendants. And they all benefitted from the misconduct of the Duda defendants, who were immune from the discovery obligations imposed on any defendant who makes a general appearance (in reality, the only kind of appearance) in a federal district-court case.

In their briefs in opposition, the Respondents claim that none of this matters because the Ninth Circuit eventually recognized that the Duda defendants' purported special appearance was really a general appearance. That happened, however, *after* the lawsuit ended with adverse summary-judgment rulings against Pacesetter on the damages issues and on other issues. In large part, those adverse summary-judgment

rulings resulted from a lack of discovery from the Duda defendants.

In the 85 years since the Federal Rules of Civil Procedure went into effect, this Court has occasionally mentioned that a party had made a special appearance at a federal district court. *See*, *e.g.*, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985). But this Court has never ruled on the legitimacy of special appearances in civil cases. This is therefore an unresolved issue of first impression.

The two oddest things about special appearances are: (1) they recur every day in district courts throughout the federal judicial system and (2) many excellent lawyers and judges are morally convinced that special appearances in the federal district courts are absolutely proper—when they are absolutely not.

When a party appears in a case, whether the appearance is called a general appearance or a special appearance, the appearance is a general appearance. Still, the lower federal courts persist in believing, perpetuating, and propagating the myth that special appearances exist. The ramifications from that myth are far reaching. For instance, a federal district court recently ruled that "it is axiomatic that only a general appearance by defendants results in a waiver of defect in the manner of service" and that a "petition for removal does not amount to a general appearance." *Topstone Communications, Inc. v. Xu*, 603 F.Supp.3d 493, 498 (S.D. Tex. 2022). Both of those propositions are incorrect. An appearance in federal district court is a

general appearance whether it is called a "special" appearance or a "general" appearance.

In addition, the Sixth Circuit has held that a "personal jurisdiction defense is not waived when a party makes a special appearance in order to contest personal jurisdiction." *Parchman v. SLM Corporation*, 896 F.3d 728, 734 (6th Cir. 2018). There is no rule, however, providing for that. If a party makes an appearance, that appearance is a general appearance no matter what the party chooses to call it.

There is some occasional light in the analytical darkness. Some federal judges understand that the "Federal Rules of Civil Procedure abolished the technical distinction between general and special appearances, and changed that old method for attacking a court's personal jurisdiction over a defendant to a Rule 12(b)(2) motion." *China National Chartering Corp. v. Pactrans Air & Sea, Inc.*, 882 F.Supp.2d 579, 589-90 (S.D.N.Y. 2012). *See also Pouyeh v. Public Health Trust of Jackson Health System*, 718 Fed. Appx. 786, 791 (11th Cir. 2017) (The "Federal Rules of Civil Procedure abolished the technical distinction between general and special appearances.").

But more than anything else, the overall lower-federal-court treatment and analysis of special appearances reflects confusion and wishful thinking. Special appearances in federal civil cases do not exist. They have not existed for 85 years. This is an issue of recurring importance daily in every federal district court. This Court should therefore grant the petition for writ

of certiorari and file an opinion explaining that special appearances in federal district-court cases do not exist, that litigants in the district courts should stop filing them, and that the district courts should stop accepting them and assigning any significance to them.

Sometimes, this Court needs to turn from controversial and shatteringly important political and constitutional controversies to mind the store. This is one of those times. The mistaken belief that special appearances in the federal district courts still exist worked an injustice in our case and will continue to cause unjust results, delays, confusion, and avoidable problems in thousands of other cases every year unless this Court grants the petition and provides the guidance that the lower federal courts need to end their widespread, unauthorized, and incorrect practice of accepting and giving significance to special appearances.

2. The district court failed to apply Arizona's unique law on damages in cases alleging fraud.

From the very start of this case, Pacesetter sought to have the district court apply Arizona's unique benefit-of-the-bargain damages law for fraud claims. The district court, however, concluded that Pacesetter could not assert a claim for benefit-of-the bargain damages concurrently with a general clam for consequential damages. But that is how Arizona damages law in fraud cases operates.

In fraud cases, Arizona uniquely allows the recovery of: (1) benefit-of-the-bargain; (2) consequential; and (3) lost-profit damages. *Cole v. Gerhart*, 5 Ariz. App. 24, 27-28 (App. 1967).

But in our case, the district court failed to recognize and apply substantive Arizona law allowing a choice and combination of several measures of damages for fraud. That was a violation of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) and *Klaxon Co. v. Stentor Electric Mfg. Co*., 313 U.S. 487 (1941). *See also Clausen v. M/V New Carissa*, 339 F.3d 1049, 1064-65 (9th Cir. 2003) (In a diversity case, federal courts must apply substantive state law on damages.).

Because the Court should grant the petition for writ of certiorari to rationalize and uniformly apply the law and procedure concerning special appearances in federal district court, it can also devote some attention to the proper measure of Arizona fraud damages that the district court should have applied in our case.

3. The district court failed to apply Arizona's waiver-by-conduct doctrine and other statute-of-limitations principles.

The final issue to which this Court can and should devote some attention if it grants the petition to deal with the problem of special appearances is Arizona's unique waiver-by-conduct doctrine, which applies to the statute-of-limitations defense raised by Defendants Agricare and Avinelis, They escaped liability under a statute-of-limitations defense that they failed to

raise until 21 months had passed since they first announced its existence.

In some jurisdictions, that would be unremarkable. But in Arizona that sort of delay is not a laches situation. It is a situation where the waiver-by-conduct doctrine would apply and bar any right to pursue the claims based on the statute-of-limitations defense. That was a doctrine that confused the district court. But it is an important aspect of Arizona law that presents an issue of first impression for this Court. While the waiver-by-conduct defense applies in our case, it will potentially apply in many other cases in Arizona federal and state courts, and should be addressed if this Court grants the petition for writ of certiorari.

Significantly, as noted in the petition for review, there is a separate statute-of-limitations issue that has resulted in a split among the federal circuit courts. The Ninth Circuit holds that a defendant may raise an affirmative defense, including statute of limitations, for the first time in a summary-judgment motion. *Rivera v. Anaya*, 726 F.2d 564, 566 (9th Cir. 1984).

But the rule is different in other circuits. *See*, *e.g.*, *SEC v. Amerindo Inv. Advisors*, 639 Fed. Appx. 752, 754 (2d Cir. 2016) (A claim that a statute of limitations bars a suit is an affirmative defense and is waived if not raised in the answer to the complaint.); *Robinson v. Johnson*, 313 F.3d 128, 135 (3d Cir. 2002) (A statute-of-limitations defense is waived unless affirmatively pled in an answer.); *Eriline Co. S.A. v. Johnson*, 440 F.3d 648, 653-54 (4th Cir. 2006) (Where a defendant

fails to raise a statute-of-limitations defense in its answer, the defense is usually waived.); *JSK v. Hendry County School Bd.*, 941 F.2d 1563, 1570 (11th Cir. 1991) (A statute of limitations is waived if the defendant fails to raise it in its answer.).

This is another issue of first impression for this Court. It can and should resolve that issue if it grants the petition for writ of certiorari to address and explain, once and for all, that special appearances are unauthorized and improper, despite the fact that lawyers file notices of special appearance by the thousands each year in federal district courts, and despite the fact that most federal district courts accept them uncritically.

CONCLUSION

For the reasons set forth above, Pacesetter asks the Court to grant the petition for writ of certiorari.

Respectfully submitted,

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