

No. 17-610

IN THE
Supreme Court of the United States

A.R. THANE RITCHIE, RITCHIE RISK-LINKED
STRATEGIES, LLC, RITCHIE PARTNERS, LLC,
RITCHIE CAPITAL MANAGEMENT, LLC,

Petitioners,

v.

HUIZENGA MANAGERS FUND, LLC,
Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Illinois

**PETITIONERS' REPLY BRIEF
IN SUPPORT OF A WRIT OF CERTIORARI**

December 20, 2017

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ARGUMENT IN REPLY

Ritchie’s Petition raises a straightforward and cleanly presented question: Did the Illinois appellate courts violate the Full Faith and Credit Clause by refusing to even consider the interpretation of the Delaware Supreme Court when applying Delaware law?

Huizenga’s Response distracts from this simple issue and asks this Court to rule on substantive and procedural state-law issues that are not properly before it. The arguments Huizenga raises inappropriately focus on the merits of the underlying litigation and matters of state procedure that are best left to the Illinois courts on remand. By changing the Question Presented to focus on such matters, Huizenga also ignores the only substantive issue before this Court: the fact that both Illinois appellate courts had notice of new, “clearly established” Delaware law—as reflected in *A&R Logistics Holdings, Inc. v. FdG Logistics LLC*, 148 A.3d 1171 (Table) (Del. 2016)—yet both courts failed to consider that decision. This failure violated the Full Faith and Credit Clause of the United States Constitution.

This Court should reject Huizenga’s arguments and its attempt to evade the Question Presented, should grant the Petition, and—at the very least—should remand this case to the Illinois courts, where Huizenga will have the opportunity to raise these arguments in the appropriate forum.

I. Huizenga’s jurisdiction and waiver arguments distract from the constitutional violation at issue.

Ritchie is not seeking review of the substance of the judgment rendered by either Illinois appellate court. As such, Huizenga’s contention that Ritchie appealed from the wrong judgment is incorrect, as is the argument based on that contention. (Resp. at 12-13). To the contrary, Ritchie is simply asking this Court—either summarily or after hearing argument—to vacate the Illinois Supreme Court’s order denying review as a matter of right, (App. 165a), and to remand this case to that court. The Illinois Supreme Court should then consider Ritchie’s appeal and correct the Full Faith and Credit violation that occurred when the Illinois Appellate Court failed to consider the *A&R Logistics* decision.

What is more, Huizenga’s arguments based upon the timing of events in the Illinois appellate courts are flawed. The record is clear: Ritchie brought the *A&R Logistics* decision to the Illinois Appellate Court’s attention by filing a Motion for Leave to Submit Supplemental Authority on its Petition for Rehearing. (Pet. at 14). Ritchie filed that Motion **before** the Appellate Court entered its decision on the rehearing petition, (App. 39a-40a)—and the court held it for **two weeks** before denying it without explanation. (App. 41a; Pet. at 14). Thus, the Appellate Court had notice of the supplemental authority well within the 35-day window it had to

issue its mandate—and could have acted upon it in that time. *See* Ill. Sup. Ct. R. 368(a) (providing that a reviewing court’s mandate “shall issue not earlier than 35 days after entry of the order denying the petition [for rehearing]”). In sum, the Illinois Appellate Court had more than enough time to comply with the Full Faith and Credit Clause, but failed to do so.

Ritchie, therefore, sought review in the Illinois Supreme Court and raised the Full Faith and Credit argument in its petition. (Pet. at 14). Because of the constitutional dimensions of the Illinois Appellate Court’s error—which had nothing to do with the merits of the case—Ritchie filed a petition for appeal as a matter of right under Illinois Supreme Court Rule 317, thus preserving the issue for review. (App. 165a).

Indeed, by raising it in the petition for appeal as a matter of right, Ritchie presented its Full Faith and Credit argument at the earliest possible time, because the constitutional violation did not occur in this case *until* the Illinois Appellate Court failed to consider Ritchie’s motion to submit supplemental authority. (App. 41a). *See Sun Oil Co. v. Wortman*, 486 U.S. 717, 730-31 (1988) (explaining that the Full Faith and Credit Clause is violated when one state’s construction of another state’s law contradicts the other state’s own “clearly established” construction, which “has been brought to the court’s attention”).

Ritchie's supplemental authority motion brought the Delaware high court's contrary construction to the attention of the Illinois Appellate Court, and the Illinois Appellate Court violated the Full Faith and Credit clause by failing to consider it. (App. 39a-40a).

Ritchie appealed that error as a matter of right to the Illinois Supreme Court. But the Illinois Supreme Court erred and perpetuated the Full Faith and Credit violation that arose when the Appellate Court failed to consider Ritchie's supplemental authority motion. (App. 165a). Given these undisputed procedural facts, Ritchie properly presented its Full Faith and Credit argument to the Illinois Supreme Court, and this Court has jurisdiction to redress that court's error by remanding to the Illinois Supreme Court either summarily or after hearing argument, with instructions to consider Petitioners' argument in the first instance.

II. Illinois courts should interpret Illinois law.

Because Ritchie properly raised the Full Faith and Credit violation before the Illinois courts, Huizenga's Response relies upon Illinois waiver principles in an effort to suggest that there is an "adequate and independent state ground" for refusing to consider Ritchie's Petition based upon Ritchie's alleged waiver of the so-called "DSA 'nexus'" argument. (Resp. at 16-21). But this, too, is a distraction that invites this Court to weigh in on the

merits of the underlying litigation by interpreting Illinois waiver law and addressing whether, under Illinois law, Delaware or Illinois blue sky laws apply. (Resp. at i).¹ This Court need not go that far.

A. Whether Ritchie waived a “DSA ‘nexus’” argument is irrelevant.

It is well-established that issues of state law are best left for that state’s courts to address in the first instance. *See United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966) (“Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law.”). As such, Huizenga’s waiver arguments improperly ask this Court to delve into unnecessary issues of state law that should be addressed on remand.

Nevertheless, Huizenga maintains that Ritchie waived a “DSA ‘nexus’” argument in the Illinois trial and appellate courts—an issue that ultimately turns

¹ In addition to being irrelevant to the issues raised by Ritchie’s Petition, these arguments also misstate the record by suggesting that the Illinois courts faced a dichotomous choice: that is, between applying either the Illinois *or* the Delaware blue sky laws. This is false. Ritchie’s position throughout litigation has been simply that the Illinois blue sky laws do not apply in this case—leaving open the possibility that neither state’s laws apply.

on an interpretation of Illinois waiver law. (*See Resp.* at 16-21). Again, Ritchie is not asking this Court to interpret the record or Illinois law—nor does it argue that the Illinois courts erred with respect to a waiver ruling.² Indeed, such consideration is inappropriate at this time. *See United Mine Workers*, 383 U.S. at 726.

B. Huizenga’s argument that Ritchie waived its Full Faith and Credit argument under Illinois law is absurd.

Huizenga’s alternative argument that Ritchie waived its Full Faith and Credit Clause argument under Illinois law is internally inconsistent. (*See Resp.* at 18). It posits, on the one hand, that Ritchie waived its Full Faith and Credit argument by never raising it before the Illinois trial or appellate court, while on the other hand, it argues that the absence of such an argument—and the absence of a waiver ruling on it—constitutes an adequate and independent ground for rejecting Ritchie’s petition.

But the Illinois trial and appellate courts never rendered a decision that implicated the Full Faith and Credit Clause, other than the denial of Ritchie’s

² Notably, Huizenga identifies no point in the record where the Illinois courts actually found that Ritchie waived the DSA “nexus” argument.

motion for leave to file supplemental authority without explanation and the denial of Ritchie's subsequent petition to appeal as a matter of right. *See Durley v. Mayo*, 351 U.S. 277, 281 (1956) (cited in Huizenga's Response, (Resp. at 16), and holding that this Court will not review a "**decision** of the state court" where that decision was "sufficient to sustain the judgment." (emphasis added)). Absent a decision on the Full Faith and Credit argument, there can be no adequate and independent state ground for refusing to consider Ritchie's Petition and this Court should remand so that the Illinois courts may consider Ritchie's argument in the first instance. *See United Mine Workers*, 383 U.S. at 726.

When stripped of the questions of state law and viewed in the context of the constitutional issue in Ritchie's Petition—Huizenga's waiver arguments become untenable. Huizenga suggests that Ritchie had some duty to preserve its objection in the Illinois trial and appellate courts **to an error that had not yet occurred**. *See* Resp. at 18 (arguing that "Ritchie also never argued to the trial court that the Full Faith and Credit Clause of the U.S. Constitution was implicated in any way, and therefore, waived that argument under Illinois law."). This illustrates the degree to which Huizenga is grasping at straws and its arguments should be rejected.

III. The Illinois courts should have considered *A&R Logistics*.

Despite Huizenga's arguments to the contrary, this Court need not decide if *A&R Logistics* represented a change in Delaware law, or if Illinois courts should give that decision retroactive effect. Instead, the question is whether the Illinois courts should have *considered A&R Logistics*. Ritchie's Full Faith and Credit Claim ripened at the moment those courts failed to even consider *A&R Logistics* and what that decision means in the context of this case. All Ritchie seeks from this Court is a directive that will allow it to argue in Illinois court that *A&R Logistics* applies in this case now that it represents the "clearly established" construction of the DSA by the highest court in Delaware. The Full Faith and Credit clause gives Ritchie that right. *See Sun Oil*, 486 U.S. at 730-31. What follows will be up to the Illinois courts.

Huizenga's suggestion that nothing changed in Delaware law is disingenuous and legally wrong, because it confuses Ritchie's earlier reliance upon the Delaware Chancery Court's decision in *FdG Logistics LLC v. A&R Logistics Holdings, Inc.*, 131 A.3d 842 (Del. Ch. 2016) (*See Resp.* at 22-23 (citing R. V.13 C-003087-88)), with the interpretation of Delaware's Supreme Court in *A&R Logistics*. To be sure, Ritchie did argue to the Illinois courts that they should follow the earlier, nonbinding decision. But the Chancery Court's decision was not a final

determination of Delaware law by the state's highest court, and the Full Faith and Credit Clause did not require the Illinois courts to follow it. By contrast, the later Delaware Supreme Court decision was such a final determination, and the Illinois courts' refusal to even consider it was a violation of the Full Faith and Credit Clause. Thus, remand is appropriate to allow the Illinois courts to pass on these questions in the first instance.

IV. High-Ranking Officials in Both Delaware and Illinois Have an Interest in This Case.

Huizenga argues that this case is unimportant because the Illinois Appellate Court's decision is unpublished and because the parties are engaged in litigation elsewhere. Both arguments are unpersuasive.

First, as noted herein, Ritchie's challenge is not to the substance of the Illinois Appellate Court's decision. As such, whether it was published or not is of no moment. Second, the fact that the parties are involved in other litigation is irrelevant to this Court's consideration of Ritchie's Petition. Huizenga cites no legal authority supporting the proposition that this Court should overlook a significant constitutional violation merely because the parties are litigating related issues in other courts. Nor does

Huizenga suggest that the other litigation will correct the Full Faith and Credit violation here.³

Other factors, however, demonstrate why review is necessary in this case. Specifically, several high-ranking and bipartisan potential *amici curiae*—including the Delaware Secretary of State, the Speaker of the Delaware House of Representatives, the Majority Leader in the Illinois Senate, the Spokesman for the Judiciary (Civil) Committee of the Illinois House of Representatives, the Majority Leader of the Illinois House of Representatives, and an Assistant Majority Leader in the Illinois House of Representatives—have all sought leave to file a brief as *amici curiae* in support of this Petition. The brief outlines the importance of consistent and predictable interpretations of state laws that frequently govern contracts between corporations. Such considerations are particularly important where (as here) Delaware law is at issue.

³ Huizenga’s assertion that, “according to Ritchie, the entire Illinois judgment will be rendered moot by [Ritchie’s] Delaware lawsuit” (Resp. 26) is no reason to ignore the constitutional violation here. First—while that indemnification suit may, as a practical matter, require Huizenga to reimburse Ritchie for the judgment below—it will not present an opportunity to correct the Illinois courts’ constitutional error. Second—if, as Huizenga asserts, that indemnification suit should fail—then Ritchie will remain liable based on a constitutional error that will remain uncorrected and unreviewed.

Because Delaware law has a disproportionate impact on corporations across the country (many of which are incorporated therein), there is an even greater need for predictability and stability in other states' interpretations of its law. This Court can ensure such predictability and stability by using this case as a reminder of the importance of considering and enforcing binding judicial precedent when interpreting Delaware law.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Alternatively the judgment should be summarily reversed and remanded under this Court's Rule 16.1, for consideration in light of the *A&R Logistics* decision.

Respectfully submitted,

December 20, 2017

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