No. 17-972

IN THE

Supreme Court of the United States

MICHAEL NORDYKE,

Petitioner,

v.

HOWMEDICA OSTEONICS CORP.,

Respondent.

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

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court held in *Atlantic Marine* that forum-selection clauses must be enforced in all but the most exceptional cases. In this case, four of the seven defendants agreed to litigate in New Jersey. The Third Circuit, following the approach developed by the Fifth Circuit, held that *Atlantic Marine* applied to these four defendants, while the traditional venue analysis under 28 U.S.C. § 1404(a) applied to the others. The court then ordered the district court to retain some defendants while severing and transferring the rest. Other than the Third and Fifth Circuits, no circuit court has addressed a similar situation.

Petitioner Nordyke, who did not agree to proceed in New Jersey, was retained and remains there. He now posits that *Atlantic Marine* has no applicability whatsoever when even one noncontracting party is present in the case. No circuit court has taken this position. Moreover, it is inconsistent with the position Nordyke took below.

Should this Court grant a writ of certiorari to consider Nordyke's new position?

RULE 29.6 DISCLOSURE STATEMENT

Respondent, Howmedica Osteonics Corp., is a wholly-owned subsidiary of Stryker Corporation, whose stock is publicly traded.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

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INTRODUCTION

This Court held in *Atlantic Marine Construction Co. v. United States District Court*, ___ U.S. ___, 134 S. Ct. 568, 581, 187 L.Ed.2d 487 (2013) that a forum-selection clause should receive controlling weight in all but the most exceptional cases. The Petition posits that *Atlantic Marine* has no applicability whatsoever when, as here, only some of the parties (but not all) have agreed to proceed in a particular forum. Pet. 14. As a threshold matter, that is an extreme position that no circuit court has ever adopted or addressed.

Howmedica respectfully suggests at the outset that this Court should not grant certiorari to consider a radical position that has not been reviewed by any circuit court.

No conflict exists among the circuit courts of appeals—quite the contrary. Although the Petition argues at length that *Atlantic Marine* has left the federal courts "confounded" and "deeply divided" over whether it applies to cases involving both signatories and nonsignatories, Pet. 3, 4, no circuit split exists. The only two circuits to have faced such a situation—the Third and the Fifth—are in complete harmony. As detailed below, the Third Circuit here adopted the Fifth Circuit's approach and then refined it to address certain threshold issues that the Fifth Circuit had no occasion to consider on the factual record before it. Far from signaling a conflict, these parallel decisions suggest that a strong consensus is already developing.

Nordyke's proposition also conflicts with *Atlantic Marine's* core premise that parties who agree to proceed in a particular venue should almost always be held to their bargain. If accepted, Nordyke's proposed rule would allow litigants to avoid their contractual obligations simply by pointing to (or impleading) noncontracting parties. It would make forum-shopping easy, while rendering forum-selection clauses wholly unreliable. In the process, it would vitiate *Atlantic Marine*.

This case does not satisfy the criteria for granting a writ of certiorari. The Court should deny the Petition.

STATEMENT OF THE CASE

1. Petitioner Michael Nordyke is a former sales representative of Respondent Howmedica Osteonics Corp. Pet. App. 6a. He and four of his California

colleagues simultaneously resigned from Howmedica and immediately began representing two of its competitors: DePuy Orthopaedics, Inc. and DePuy's regional distributor, Golden State Orthopaedics, Inc. *Id.* All five individual defendants had entered employment agreements containing noncompetition and nonsolicitation clauses. These agreements also contained forum-selection clauses—four specified a New Jersey venue, while Nordyke's agreement specified Michigan. *Id.*

2. Howmedica filed this action in the United States District Court for the District of New Jersey, asserting breach-of-contract and related claims against all five individuals and DePuy. Howmedica later joined Golden State as a defendant. *Id.* 7a; Pet. 5. Howmedica argued that these seven defendants were closely-related parties, and therefore could be sued in the same venue. *See* Pet. App. 25a.

3. All seven defendants filed a motion to dismiss or, in the alternative, to transfer the case to the Northern District of California. *Id.* 7a. Nordyke did not attempt to enforce his Michigan forum-selection clause, but rather joined the effort to have the entire case moved to California. *Id.* 25a. The Magistrate Judge granted the motion to transfer, and the District Judge affirmed that decision. *Id.* 7a-8a. Howmedica petitioned the Third Circuit for a writ of mandamus.

4. The Third Circuit analyzed the extent to which *Atlantic Marine* applied, given that only four of the seven defendants had agreed to litigate in New Jersey. It fully embraced the approach used by the Fifth Circuit in *In re Rolls Royce Corp.*, 775 F.3d 671 (5th Cir. 2014), *cert. denied sub nom. PHI, Inc. v. Rolls Royce Corp.*, ___ U.S. ___, 136 S. Ct. 45, 193 L.Ed.2d 27 (2015), but concluded that certain modifications

were needed in order to account for fact-specific threshold issues that this case presented, such as Golden State's personal-jurisdiction challenge and whether Golden State was a necessary party. Pet. App. 7a, 8a, 17a-18a.

5. The court then applied a four-step analysis, which is detailed in the legal analysis below. *Id.* 18a-22a. In a nutshell, the court applied *Atlantic Marine's* standards to the four defendants who agreed to litigate in New Jersey—as for the others (including Nordyke), it applied the traditional venue analysis under 28 U.S.C. Section 1404(a). Based on this analysis, the Third Circuit determined that the case should be severed, with the five individual defendants (including Nordyke) retained in New Jersey and the two corporate defendants transferred to California.

6. Nordyke did not argue to the Third Circuit, as he does here, that *Atlantic Marine* has no applicability whatsoever to cases involving a combination of contracting and noncontracting parties. Rather, he argued that the District Court "acted well within its broad discretion" in "applying *Atlantic Marine* [and resolving] the *forum non conveniens* balancing test in favor of California." Mand. Resp. Brief 10 (C.A. Doc. No. 003112466208).

7. Nordyke now seeks a writ of certiorari. His ultimate position is that *Atlantic Marine* should not extend to cases involving both signatories and nonsignatories to a forum-selection clause. Pet. 14.

REASONS FOR DENYING A WRIT

I. THE PETITION ESPOUSES AN EXTREME POSITION THAT NO CIRCUIT COURT HAS ADOPTED OR ADDRESSED AND THAT CANNOT BE RECONCILED WITH *ATLANTIC MARINE*.

The question presented in the Petition is whether *Atlantic Marine* "supplants" the traditional Section 1404(a) analysis when some parties, but not all, have agreed to a forum-selection clause. According to Nordyke, *Atlantic Marine* should not extend to cases whose parties include a combination of signatories and nonsignatories. Pet. 14. This is a radical position that has never been decided, or even squarely addressed, by a circuit court. It also conflicts with *Atlantic Marine*.

1. The Petition's proposed rule is extreme, and would require a serious departure from existing jurisprudence. No circuit court has taken the view that the mere presence of a nonsignatory will relieve signatories of the contractual obligations this Court strove to preserve and enforce in *Atlantic Marine*.[1]

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[1] *See*, *e.g.*, *Atlantic Marine*, 134 S. Ct. at 579 (a forum-selection clause must receive "controlling weight in all but the most exceptional cases"); *id.* at 581 (such agreements must be honored except in "extraordinary circumstances unrelated to the convenience of the parties"); *id.* at 582 (even public-interest factors "will rarely defeat" such a clause); *id.* (cases in which a forum-selection clause can be defeated "will not be common"); *id.* at 583 ("In all but the most unusual cases, . . . the 'interest of justice' is served by holding parties to their bargain."); *id.* (to defeat a forum-selection clause, the challenging party must show that the public-interest factors "overwhelmingly disfavor" the agreed-upon venue).

Nordyke certainly did not take such a position before the Third Circuit. If anything, he took the opposite position by arguing that the district court "acted well within its broad discretion" in "applying *Atlantic Marine* [and resolving] the *forum non conveniens* balancing test in favor of California." Mand. Resp. Brief 10 (C.A. Doc. No. 003112466208). Nordyke's new position cannot be reconciled with the one he presented below. Howmedica respectfully suggests that the Petition should be denied for that reason alone.

2. Nor can Nordyke's new position be reconciled with *Atlantic Marine*. Allowing a party to escape its obligations simply by pointing to the presence of a nonsignatory (or worse, by impleading one) would create a massive, readily-available exception that would swallow *Atlantic Marine's* rule and invite the kind of forum-shopping mischief that the decision was meant to avoid. *E.g.*, *Atlantic Marine*, 134 S. Ct. at 583 ("§ 1404(a) should not create or multiply opportunities for forum shopping") (internal quotation marks omitted) (quoting *Ferens v. John Deere Co.*, 494 U.S. 516, 525, 110 S. Ct. 1274, 108 L.Ed.2d 443 (1990)).

Howmedica respectfully suggests that the Petition's new and extreme position does not justify discretionary review.

II. NO CIRCUIT SPLIT EXISTS.

The Petition erroneously contends that the circuit courts of appeals are split on how to apply *Atlantic Marine* when some parties, but not all, are subject to a forum-selection clause. To support this position, Nordyke cites three sources: the Third Circuit's opinion in this case, the Fifth Circuit's opinion in *Rolls*

Royce, *supra*, and a handful of decisions from the federal district courts.

But despite what the Petition claims, the Third Circuit and the Fifth Circuit employ consistent, parallel tests that would have led to the same result in both cases. No circuit split exists; and the district-court decisions Nordyke cites cannot serve as a proxy to manufacture one.

A. The Third Circuit's decision below is in harmony with—and indeed derives from—the Fifth Circuit's approach.

This Court decided *Atlantic Marine* in 2013, holding that when the parties have entered into a forum-selection clause, their agreement controls except in the most exceptional circumstances. The following year, the Fifth Circuit applied *Atlantic Marine* in *Rolls Royce*—a case in which some parties, but not all, were bound by such an agreement. The Fifth Circuit's decision was the blueprint for the Third Circuit's decision here.

1. In *Rolls Royce*, a helicopter operator sued three corporate defendants in Louisiana state court after one of its aircraft crashed in the Gulf of Mexico. One of the defendants was Rolls Royce Corporation, which designed and made one of the engine parts that allegedly failed and caused the crash. *Rolls Royce*, 775 F.3d at 674. Unlike the other defendants, Rolls Royce had an enforceable forum-selection agreement that required all litigation relating to the disputed engine part to proceed in Indiana. *Id.* After the defendants removed the case to the Western District of Louisiana, Rolls Royce moved to sever the claims against it and have them transferred to the Southern District of Indiana. *Id.* The plaintiff and the other defendants

all opposed Rolls Royce's motion. The district court denied it. *Id.* at 675. Rolls Royce sought a writ of mandamus, and the Fifth Circuit granted one. It reversed the district court's order and remanded the case with instructions to sever the claims against Rolls Royce and transfer them to the Southern District of Indiana. *Id.* at 683.

The Fifth Circuit developed a three-part analysis designed to incorporate the rule of *Atlantic Marine* into cases involving both signatories and nonsignatories:

> (1) For signatories, courts must recognize that 28 U.S.C. § 1404(a)'s private-interest factors cut in favor of litigating in the agreed-upon forum (in *Rolls Royce*, through severance and transfer).
>
> (2) For nonsignatories, courts must consider the private-interest factors as it would normally do under Section 1404(a).
>
> (3) Courts must then determine "whether this preliminary weighing is outweighed by the judicial economy considerations of having all claims determined in a single lawsuit," and must consider whether procedural mechanisms such as common pretrial procedures may reduce the costs of severance.

Id. at 681.

2. Here, the Third Circuit began its analysis by approving and adopting the Fifth Circuit's approach:

> Fortunately, . . . we do not write on a blank slate. Our colleagues in the Fifth Circuit have forged an approach that we consider a helpful starting point for our own.

Pet. App. 17a. The court then tailored The Fifth Circuit's approach to account for certain threshold issues that the Fifth Circuit did not have occasion to consider—in particular, Golden State's personal-jurisdiction challenge and a question whether Golden State was a necessary party. The Third Circuit accounted for these threshold issues by refining the Fifth Circuit's three-step analysis—most notably by inserting an additional step:

> (1) As in the Fifth Circuit, courts must assume that *Atlantic Marine* applies to signatories and that the signatories' private interests cut in favor of litigating their claims in the chosen forum.
>
> (2) As in the Fifth Circuit, courts must apply Section 1404(a) to nonsignatories. If the first two steps point to the same forum, then courts should allow the case to proceed there.
>
> (3) If the first two steps point in opposite directions, courts must consider severance, but must also account for allegations of jurisdictional and procedural defects and whether severance is disallowed (as when a party is indispensable under Federal Rule of Civil Procedure 19). If only one severance-and-transfer outcome satisfies these constraints, then a court should adopt that outcome. If more than one outcome is allowable, courts should proceed to the fourth step.
>
> (4) As in the Fifth Circuit, courts must consider the interests of efficiency. They

> must also consider how severance, retention of all claims, or transfer of all claims will affect the nonsignatories' private interests. Only if the strong public interest in upholding the signatories' settled expectations is "overwhelmingly" outweighed by countervailing interests may the court decline to enforce a valid forum-selection clause.

Pet. App. 18a-22a.

3. The four-part analysis developed in this case does not conflict with the Fifth Circuit's approach. To the contrary, the courts' approaches parallel each other and are entirely consistent—which is to be expected, since the former derives from the latter. Indeed, were it not for the threshold personal jurisdiction and joinder issues raised here, the two courts' approaches would be indistinguishable.

Notably, the Third Circuit's more tailored approach would not have changed the outcome in *Rolls Royce*. Under either test, the Fifth Circuit would have taken the same path: it would have applied the forum-selection clause to the signatories as *Atlantic Marine* requires, considered the nonsignatories' private interests and considerations of judicial economy, and found that the proper course of action was a severance and a partial transfer.

Thus, any differences that exist between the two courts' approaches are solely the result of unique, case-specific circumstances present on the respective factual records. Notably, these differences may disappear over time: should the Fifth Circuit confront the kinds of threshold issues the Third Circuit faced here, it could adopt the Third Circuit's refinements without

offending its existing framework. Nordyke's attempt to drive a wedge between the two circuits fails.

B. The purported disagreements among district courts do not create a circuit split.

To demonstrate the existence of a conflict, the Petition also points to district-court decisions it claims are in conflict. But an alleged conflict at the district-court level is not a reason for granting certiorari. *See* S. Ct. R. 10 (providing that certiorari may be appropriate when, among other things, "a United States *court of appeals* has entered a decision in conflict with the decision of another United States *court of appeals* on the same important matter") (emphasis added).

Moreover, the district court decisions cited at pages 10 through 12 of the Petition are not in conflict for present purposes. While the courts in those cases reached varying conclusions, none squarely addressed the Petition's position that *Atlantic Marine* should cease to apply any time a nonsignatory is among the parties.

There is no basis for finding that these district-court opinions create a conflict among the courts of appeals.

C. The Third Circuit's decision does not conflict with this Court's precedents.

The Petition also asserts that *Atlantic Marine*, "[b]y its plain language, . . . supplanted the traditional 1404(a) transfer analysis *only* where *all* of the parties to a case 'have contracted in advance to litigate disputes in a particular forum,'" and suggests that the case has no application outside those narrow circumstances. Pet. 13 (emphasis in original). But nothing

in *Atlantic Marine* imposes such a limitation. If anything, it suggests the opposite when it states at least half a dozen times that the public has a broad, vital interest in holding parties to their bargains, and that only the most extraordinary circumstances will justify abandoning that interest.[2] The Third Circuit, like the Fifth Circuit, incorporated *Atlantic Marine* as appropriate and ensured that these essential principles received the consideration they deserve. Its decision is entirely consistent with *Atlantic Marine*, and thus does not conflict with this Court's precedents.

III. THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR REVISITING *ATLANTIC MARINE*.

A. The Petition fails to recognize that Nordyke waived his right to insist on a Michigan venue.

The Petition contends that the Third Circuit erred by disregarding Nordyke's agreement to litigate in Michigan. According to the Petition, the Third Circuit behaved inconsistently when it disregarded Nordyke's forum-selection clause while enforcing those of the other individual defendants. Pet. 8, 14-15. But the Third Circuit correctly found that Nordyke had waived his right to invoke the Michigan forum-selection clause when he sought a transfer to California. Pet. App. 25a. Consequently, the possible venues included only California and New Jersey. *Id.*

Nordyke, having actively repudiated his Michigan forum-selection clause, cannot assign error to the Third Circuit for following his lead. His argument, now waived, does not justify Supreme Court review.

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[2] *See* note 1, *supra*.

B. The question presented has not matured and is not ripe for this Court's review.

The question presented in the Petition—whether to apply *Atlantic Marine* in cases involving signatories and nonsignatories to a forum-selection clause—is not ripe for Supreme Court review. Only two of the 13 federal courts of appeals have had occasion to address such a case. And as explained above, their decisions do not conflict.

As for the remaining circuits, it appears that any potential issues currently reside at the district-court level. This leaves ample room for the jurisprudence to develop. It is entirely possible that, as more circuit courts confront this situation, a strong consensus will continue to emerge. The time for this Court's intervention has not yet come, and indeed it may never come. This Court should not issue a writ of certiorari.

CONCLUSION

This Court should deny the Petition for a writ of certiorari.

Respectfully submitted,

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