No. 11-1349

In The
Supreme Court of the United States

THE WEITZ COMPANY, LLC,

Petitioner,

v.

MACKENZIE HOUSE, LLC, *et alia*,

Respondents.

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

REPLY OF THE PETITIONER

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ARGUMENT

Petitioner The Weitz Company, LLC, seeks a writ of certiorari to review whether this Court's longstanding *Erie*[1] jurisprudence permits a federal court sitting in diversity to refuse to follow a state high court decision on an issue of state law unquestioned by any subsequent state authority (Petition i).

In this case, the Eighth Circuit refused to follow the Supreme Court of Missouri's decision in *Moore v. Bd. of Regents*, 115 S.W. 6 (Mo. 1908), and its progeny, *Twin River Constr. Co. v. Pub. Water Dist.*, 653 S.W.2d 682 (Mo. App. 1983), simply because it questioned the logic of *Moore* and merely speculated that Missouri's highest court today would decide the issue differently (Appendix to Petition 9-11). As Weitz explained in its petition, this conflicts with this Court's longstanding *Erie* jurisprudence, under which neither this Court nor any other federal court ever successfully has overruled a state high court decision in a similar circumstance.

In their brief in opposition, Respondents MacKenzie House, LLC, and MH Metropolitan, LLC (collectively "MH"), seek to sidestep *Erie*. MH admits *Moore* "discussed the issue of whether and under what circumstances liquidated damages may continue to accrue after a contractor has been terminated" (Brief in Opposition 8). Nonetheless, it primarily argues

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[1] *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)

Moore is "factually distinguishable" and "not 'on point'" and thus the "Eighth Circuit correctly concluded there was no controlling Missouri case law on the issue in dispute" (Opp. 5-6, 10).

The glaring problem with MH's argument is that, while the district court may have agreed with their contention that *Moore* was not on point, the Eighth Circuit expressly *did not* (App. 9). Rather, the Eighth Circuit stated *Moore did* decide the question at issue (App. 9). It simply did not agree with *Moore*'s logic or result. Given the Eighth Circuit's actual approach to this issue, for the reasons addressed in Weitz's petition the question presented in this case is ripe for a writ of certiorari.

A. The Eighth Circuit disagreed with MH and the district court, holding *Moore v. Bd. of Regents*, 115 S.W. 6 (Mo. 1908), was on point but discarding it anyway.

MH argues that, because the project owner in *Moore* "terminated the contract over two months before the time fixed by the contract" for completion (Opp. 2) (quoting *Moore*, 115 S.W. at 13), *Moore* is "factually distinguishable" from this case and "not 'on point. . . .'" (Opp. 6, 10). Thus, it distills, the "Eighth Circuit correctly concluded there was no controlling Missouri case law on the issue in dispute" and the decision below "fully comports with the *Erie* doctrine" (Opp. 4-5).

While Weitz does not disagree, as it explained in its petition, that this was what the district court's unpublished memorandum held (Pet. 8-10 (citing App. 33-37)), the Eighth Circuit plainly and expressly disagreed (App. 9-11). Tellingly, while MH greatly relies on the district court's order, which it cites throughout its brief (Opp. 7, 10-11, 14), only *once* does it mention any part of the Eighth Circuit's actual holding in the published opinion under review, and even then just the Eighth Circuit's bald conclusion (Opp. 11).

MH claims without citation that the Eighth Circuit found there was no "Missouri case law on" – "whether liquidated damages under a construction contract can continue beyond the date that a contractor is terminated by the owner" (Opp. 5). Unlike the district court, however, the Eighth Circuit expressly stated *Moore* is "a Missouri Supreme Court decision limiting liquidated damages for construction delay to the time *before* the owner removes the contractor from the project" (App. 9) (emphasis in the original). It also stated that, while states had "divided authorities" on this issue, the Missouri Court of Appeals in *Twin River* had "follow[ed] *Moore*" (App. 10). The court acknowledged there were no subsequent, contrary Missouri authorities (App. 9-11).

Nonetheless, *purely* because it did not like the logic of *Moore*, citing the *Erie* cases at issue here concerning "persuasive data" and "clear evidence" a state high court today would overrule its prior precedent (but not a single Missouri authority), it held the

Missouri Supreme Court today would overrule *Moore* (App. 11) (citing *Gilstrap v. Amtrak*, 998 F.2d 559 (8th Cir. 1993); *Six Cos. of Cal. v. Jt. Highway Dist. No. 13*, 311 U.S. 180 (1940)).

Thus, MH is plainly wrong to insist that the Eighth Circuit held "there was no controlling Missouri case law on the issue" (Opp. 5). It therefore is unsurprising that MH barely addresses the Eighth Circuit's actual decision. The holding below simply does not comport with MH's argument as to why it was proper. Whether the Eighth Circuit's discarding of *Moore* in the manner it *actually* did comports with *Erie* warrants certiorari.

B. *Moore* is on point, as the Eighth Circuit recognized.

MH argues *Moore* is distinguishable and inapplicable to this case because "the facts of *Moore* differed in [a] critical manner from this case" in that, in *Moore*, "the owner terminated the contractor and took over the project more than two months *before* the scheduled completion date" (Opp. 7) (citing *Moore*, 115 S.W. at 13). It also argues *Moore* differed because the contract in that case "conditioned the payment of liquidated damages upon the contractor actually completing the project," whereas the contract here did not (p. 7) (citing *Moore*, 115 S.W. at 13; App. 22-23).

These are distinctions without a material difference. In *Moore* and the cases from other jurisdictions stating its rule, the fulcrum is not *when* the contract

terminated, but the fact that it *did* terminate. *See* 15 A.L.R.5th 376; 24 WILLISTON ON CONTRACTS § 65:20 (Supp. 2007 to 4th ed. 1990). The rule is that once the contractor loses control of the ability to complete, as a matter of public policy liquidated delay damages cannot accrue any further. *Id.*

This rule makes sense. Doubtless, very few owners hiring contractors would be so bold as to claim liquidated delay damages for the period while the owner, itself, controlled the work's completion date. For, the owner then could delay as long as it wanted so as to "rack up" more damages from the terminated contractor.

Thus, under *Moore*'s rule, whether a project is past its agreed completion date at the time the contractor is terminated is immaterial.[2] Neither the district court, the Eighth Circuit, nor MH cited any authority from Missouri or any other jurisdictions following the *Moore* rule to show otherwise. Arguably, the circumstances in Moore made for a much stronger case for allowing liquidated damages past the termination date. For, at least the contractor there arguably still was liable for that remaining period between the termination date and the agreed completion date.

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[2] MH attacks Weitz for quoting *Moore*'s language that the contractor in that case admitted it had "caused much delay" in the project (Opp. 2, 7). The project in *Moore* was delayed, just not past its contracted completion date. As explained herein, this has no bearing on the analysis in this case, nor did the Eighth Circuit lend it controlling import (App. 9).

Here, however, MH sought liquidated delay damages past *either* date. In applying this rule in truly indistinguishable circumstances, the Missouri Court of Appeals in *Twin River* saw that this question of termination date versus completion date was of no consequence. 653 S.W.2d at 693-94. The crux of the *Moore* rule, as applied in Missouri and every other state adopting it, is whether the contractor retains the ability to control construction. As soon as it does not, as when MH terminated Weitz, the further accrual of liquidated delay damages violates the public policy of the state.

MH also attempts to show that the law of Missouri had changed since *Moore* to create "a fundamental principle of contract law . . . that a court should not interfere with a party's right to contract, so long as the contract is not illegal, procured by fraud or prohibited as a matter of public policy" (Opp. 8) (citing Missouri cases from the past two decades). But MH neglects to mention that this "fundamental principle" firmly was the law of Missouri at the time *Moore* was decided and, indeed, long before. *See*, *e.g.*, *Corder v. O'Neill*, 106 S.W. 10, 12-13 (Mo. 1907); *Hook v. Turner*, 22 Mo. 333 (1859).

As the Eighth Circuit recognized, *Moore* held the public policy of Missouri, just as in the other states that have adopted its rule, is that liquidated damages for construction delay are limited "to the time *before* the owner removes the contractor from the project" (App. 9). The Missouri Court of Appeals applied this policy in *Twin River* to reverse post-removal liquidated

delay damages in indistinguishable circumstances from those here. But for the Eighth Circuit's decision, this plainly is the law of Missouri. As such, whether the *Erie* doctrine allowed the Eighth Circuit to discard this existing, unquestioned Missouri law warrants certiorari.

C. The new authorities MH raises are inapposite.

MH cites five Eighth Circuit cases to show the decision below comports with the circuit's existing law governing the application of state court decisions under *Erie* (Opp. 11): *Bogan v. Gen. Motors Corp.*, 500 F.3d 828, 831 (8th Cir. 2007); *Minn. Supply Co. v. Raymond Corp.*, 472 F.3d 524, 534 (8th Cir. 2006); *Continental Cas. Co. v. Advance Terrazzo & Tile Co.*, 462 F.3d 1002, 1007 (8th Cir. 2006); *Pa. Nat'l Mut. Cas. Ins. Co. v. City of Pine Bluff*, 354 F.3d 945, 952 (8th Cir. 2004); *Maschka v. Genuine Parts Co.*, 122 F.3d 566, 573 (8th Cir. 1997).

Weitz already addressed *Bogan*, *Pa. Nat'l*, and *Maschka* in its petition, explaining these decisions addressed situations unlike this case in which there truly was *no* state decision addressing the law at issue (*Pa. Nat'l*, *Maschka*) or in which a state's highest court had overruled previous intermediate decisions (*Bogan*) (Pet. 17-18, 20-21). *Minn. Supply* and *Continental* are similarly inapposite. Neither discarded an older, unquestioned state high court decision on point without citing any subsequent, contrary state law. In *Minn. Supply*, after discussing the

present law of Minnesota in detail, the Eighth Circuit found and followed controlling, recent Minnesota law on point, holding in the process (unlike the decision below) that intermediate state appellate court decisions are followed when there is no conflict with the state's highest court. 472 F.3d at 534-35. The court did the same in *Continental*. 462 F.3d at 1007-09. Neither decision bears any resemblance to the opinion below.

Finally, MH invokes several Eighth, First, and Seventh Circuit decisions involving and applying the "standard for determining state law, in the absence of a state supreme court decision on the subject," to argue the decision below does not create a circuit split (Opp. 13-15): *Ventura v. Titan Sports, Inc.*, 65 F.3d 725, 729-30 (8th Cir. 1995); *B.B. v. Continental Ins. Co.*, 8 F.3d 1288, 1291 (8th Cir. 1993); *Jackson v. Anchor Packing Co.*, 994 F.2d 1295, 1302-04 (8th Cir. 1993); *Hardy v. Loon Mtn. Recreation Corp.*, 276 F.3d 18, 20 (1st Cir. 2002); *Stratford Sch. Dist., S.A.U. #58 v. Empl. Reinsurance Corp.*, 162 F.3d 718, 720 (1st Cir. 1998); *Noonan v. Staples, Inc.*, 556 F.3d 20, 32 (1st Cir. 2009); *Vigortone AG Prods., Inc. v. PM AG Prods., Inc.*, 316 F.3d 641, 644 (7th Cir. 2002).

As Weitz explained in its petition (Pet. 15-16), no circuit split exists over the standard of divination to be applied when there is no "state supreme court decision on the subject," as in all these decisions where there truly was *no* state high court decision addressing the respective questions at issue. As the

Eighth Circuit recognized, however, that simply was not true here: it held *Moore did* address the question at issue (and without any subsequent supersession under Missouri law), just not to its liking (App. 9-11).

As Weitz further explained in its petition, no other court facing this situation ever has done anything other than apply that existing, unquestioned law (Pet. 29-31) (citing *Bernhardt v. Polygraphic Co. of Am., Inc.*, 350 U.S. 198, 205 (1956); *In re Ryan*, 851 F.2d 502, 509-10 (1st Cir. 1988); *Gilstrap*, 998 F.2d at 561-62; *Delta Air Lines v. McDonnell Douglas Corp.*, 503 F.2d 239, 245 (5th Cir. 1974); 19 Charles A. Wright, Arthur R. Miller & Edward H. Hooper, FED. PRACTICE AND PROCEDURE § 4507). MH does not address or even cite any of these authorities. Instead, it insufficiently rests on a patently flawed supposition that the Eighth Circuit held *Moore* was distinguishable and not the law of Missouri. The Eighth Circuit plainly did no such thing. MH's argument is without merit.

Whether changes in existing state law still should be left to the state's own authorities, as every application of the *Erie* doctrine until the decision below has recognized, is a nationally important question warranting certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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