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Exploring Federal Diversity Jurisdiction: Testimony in Front of the House of Representatives Committee on the Judiciary, Subcommittee on the Constitution and Civil Justice

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UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON THE CONSTITUTION
AND CIVIL JUSTICE

“EXPLORING FEDERAL DIVERSITY JURISDICTION”

September 13, 2016

TESTIMONY OF RONALD WEICH

DEAN, UNIVERSITY OF BALTIMORE SCHOOL OF LAW

Good morning Chairman Franks, Ranking Member Cohen and members of the Subcommittee. My name is Ronald Weich and I am the dean of the University of Baltimore School of Law. Thank you for the opportunity to testify at this hearing entitled “Exploring Federal Diversity Jurisdiction.”

The subject of today’s hearing is technical, complex, little-understood by the general public, and yet fundamental to the administration of justice in this country. Federal diversity jurisdiction touches on profound questions of federalism, state sovereignty and the proper functioning of the federal courts.

The importance of federal diversity jurisdiction leads me to urge the subcommittee to proceed with great caution in this field. I appreciate that you have titled this hearing “Exploring Federal Diversity Jurisdiction.” It is fine to “explore” issues surrounding diversity jurisdiction, but it would be entirely premature for Congress to legislate on this subject. If Congress were to consider seriously any modification of the status quo in this area, this should be the first of many hearings on the subject. A one panel hearing convened on one-week notice does not permit meaningful input by key stakeholders or experts in the field of civil procedure.

I want to state candidly, and without false modesty, that I am not one of those experts. As a law school dean I maintain a general familiarity with the core subjects taught in my school, including civil procedure. As the dean of a public law school and one of only two law school deans in Maryland, I have an institutional awareness of and concern for the well-being of both the Maryland state judiciary and the federal courts that sit in Maryland. Finally I have long been involved in efforts to ensure access to the courts for all Americans. But none of that qualifies me as an expert on civil procedure, especially not on the relatively arcane subject of federal diversity jurisdiction.

It is my understanding that when the minority members of the subcommittee were given notice of this hearing one week ago, their staff unsuccessfully sought to identify true experts in this specific field who would be available to testify on such short notice. I am very glad to offer my perspective on the issues at hand, but my participation in this hearing does not suffice. I

encourage the subcommittee to adopt a longer term approach to any future hearings on this subject so that you will hear from those with greater familiarity of the subject matter, including practitioners on both sides of such lawsuits, state and federal judges, court administrators, and a broad range of law professors who teach and write about civil procedure.¹

Having expressed that concern, I will now address the questions that I understand to be of interest to the subcommittee.

- I. The doctrine of complete diversity has been the law of the land since the earliest days of the Republic.

The basic contours of federal diversity jurisdiction have been well-established for more than 200 years. Article III, section 2 of the Constitution provides, in relevant part, that the federal judicial power shall extend to controversies “between Citizens of different States.” Congress gave life to that provision in the Judiciary Act of 1789, but from the outset sought to limit the reach of diversity jurisdiction by imposing a monetary threshold – one mentioned nowhere in the Constitution – that must be met before federal diversity jurisdiction is invoked.

Soon thereafter, in an opinion by Chief Justice John Marshall, the Supreme Court interpreted that statute to require complete diversity. In other words, the Court held that the words “between citizens of different states” means that all plaintiffs in a lawsuit must be citizens of different states than all defendants in the lawsuit to establish this type of federal jurisdiction. That is the holding in the landmark case of Strawbridge v. Curtiss, 7 (3 Cranch) U.S. 267 (1806).

An article co-authored by my distinguished colleague at the witness table today, Charles Cooper, suggests that Chief Justice Marshall came to regret his decision in Strawbridge. That may or may not be so, but it is of no current

¹ In the short time that I was afforded to prepare this testimony, I did have an opportunity to consult with colleagues at my law school and am particularly grateful for the assistance provided by Professor Christopher J. Peters of the University of Baltimore law faculty.

significance because the Supreme Court itself has never looked back. The holding in Strawbridge has been repeatedly reaffirmed over the last two centuries.²

As recently as 2005 the Court observed that it has always “adhered to the complete diversity rule in light of the purpose of the diversity requirement, which is to provide a federal forum for important disputes where state courts might favor, or be perceived as favoring, home-state litigants. The presence of parties from the same State on both sides of a case dispels this concern...” Exxon Mobil Corp. v. Allapattah Services, Inc., 545 U.S. 546, 553–54 (2005) (citations omitted).

Few legal doctrines are as venerable and as deeply ingrained in practice as the complete diversity doctrine. At any time over the 210 years since Strawbridge, Congress could have amended the diversity statute to impose only a minimal diversity requirement. But with a few narrow exceptions I will discuss below, Congress has done the opposite – it has systematically restricted access to diversity jurisdiction. For example:

- Congress has regularly raised the minimum amount-in-controversy requirement in order to limit the reach of diversity jurisdiction. The \$500 threshold in the 1789 Act was raised to \$2,000 in 1887, to \$3,000 in 1911, to \$10,000 in 1958, to \$50,000 in 1988 and to the current level of \$75,000 in 1996.
- Congress has amended the diversity statute to provide that corporations are considered citizens of both their state of incorporation and their principal place of business, thus making it more difficult to satisfy the complete diversity requirement.

² Mr. Cooper’s article also raises the novel constitutional argument that the complete diversity doctrine violates Article III. But 210 years of consistent precedent and practice deserves substantial deference. The Supreme Court has *never* questioned the basic principle that Congress is free to restrict the subject-matter jurisdiction of the lower federal courts within the outer boundaries specified by Article III. In addition, the logic of Mr. Cooper’s argument would prohibit Congress from restricting in any way the maximum scope of federal subject-matter jurisdiction allowed by the constitutional text. This would render other long-established statutory provisions unconstitutional, chief among them the minimum-amount-in-controversy requirement which is nowhere mentioned in the constitutional text. The result of such a radical, latter day reinterpretation of Article III would be a catastrophic increase in the caseload of the federal courts.

- Congress has included in the removal statute the "forum defendant rule," which prohibits removal even of a completely diverse case if any defendant is a citizen of the state in which the case was brought.
- Congress has erected other procedural obstacles to removal based on diversity, such as a 30-day time limit to remove once a case becomes removable and an absolute one-year time limit for removal based on diversity jurisdiction.

There are a handful of contemporary exceptions to this trend of Congress restricting the reach of diversity jurisdiction. A 1990 law gave the federal courts supplemental jurisdiction over claims that formed "part of the same case or controversy" even in the absence of complete diversity over those claims. In 2002, the Multiparty, Multiforum Trial Jurisdiction Act eliminated the complete diversity requirement for litigation arising from a single accident in which at least 75 people died. Finally, in the Class Action Fairness Act of 2005, Congress allowed federal jurisdiction over class action lawsuits involving over 100 plaintiffs and more than \$5 million in controversy when only a minimal diversity standard is satisfied.

But these were surgical adjustments to federal jurisdiction intended to enhance judicial efficiency or provide for federal consideration of cases with national economic implications. In contrast, a shift from the complete diversity rule to a minimal diversity rule would be anything but surgical – it would recklessly allow hundreds of thousands of routine, locally-based disputes to be filed in or removed to federal court.

The 2005 Class Action Fairness Act (CAFA) is a cautionary tale. A number of judges and lawyers believe that the law has proved to be overbroad, resulting in a federal forum for cases that state courts would be perfectly well-equipped to handle. Rather than exploring federal diversity jurisdiction in general, the subcommittee may wish to examine the decade of experience under that 2005 law to see if it should be fine-tuned in one way or another.

But in any event, CAFA is an exception to a two century-long trend. There are several excellent reasons why Congress has most often limited, rather than expanded, the availability of diversity jurisdiction. I will review these reasons in turn, while noting that any proposal to expand diversity jurisdiction would undermine the policy values that have caused Congress to disfavor an expanded role for the federal courts in state law disputes.

II. An expansion of diversity jurisdiction threatens state sovereignty and principles of federalism.

Every case filed in or removed to federal court based on diversity jurisdiction is a case in which a federal court, not a state court, will interpret, apply and develop state law. Almost as well-established as the complete diversity doctrine is the Erie doctrine, which provides that diversity cases are governed by state statutes and state common law, not federal law. Erie Railroad Co. v. Tompkins, 304 US 64 (1938). But just as federal courts are generally better suited to decide issues of federal law, so state courts are generally better suited to decide issues of state law.

Indeed, in a federal system, our constitutional presumption is that the institutions of a state's government, including its courts, should play the primary role in developing the law of that state. To expand access to diversity jurisdiction would be to undermine this basic federalist presumption by denying state courts the capacity to interpret and apply their own laws. This is an affront to the principle of state sovereignty.

The argument that state courts are inherently biased or somehow incompetent to handle complex civil litigation is anecdotal at best, but really it is unfounded and insulting to the diligent, hard-working professionals who comprise the overwhelming majority of state court judges. In Maryland, the jurisdiction I know best, the state judiciary is highly skilled and well-trained. The Maryland courts promptly resolve a wide array of complex matters arising under Maryland law with wisdom, restraint and respect for precedent. Far from being a “judicial hellhole,” our state court system is a respected civic institution.

Litigants who are unhappy to find themselves in state court have remedies short of removal to federal court. If a judge is perceived to be biased, his or her recusal may be sought. If state law is thought to be unfair, the democratic process provides a means to change it. But seeking a federal forum to bypass state sovereignty is an illegitimate strategy.

It would be ironic indeed if this current congressional majority, which claims as one of its central tenets the power of states to develop their own laws and govern their own citizens without undue interference by the federal government, were to transfer power over state law from state judges to federal judges by amending the diversity statute.

III. The exercise of diversity jurisdiction tends to increase the complexity and cost of civil litigation.

As noted above, Congress has sometimes allowed federal courts to adjudicate state law claims in the interest of judicial efficiency. But the availability of diversity jurisdiction often works against judicial efficiency and increases litigation costs.

First, the potential availability of a federal forum as an alternative to state court naturally breeds litigation over which forum is appropriate. Once federal jurisdiction is established, the parties may well struggle over which state's law is to be applied by the federal court, and the manner in which federal procedural law interacts with state substantive law. Complexity also arises when federal courts must decide if they have supplemental jurisdiction over state law claims.

Finally, complexity and litigation costs mushroom when federal courts are confronted with state law issues that are unresolved or uncertain. In such instances, federal courts may seek to "certify" a question of state law – that is seek an advisory ruling on the question from the highest court in the state whose law is at issue in federal court.

But certification by a state court is not always available. For example, one practitioner brought to my attention the Bleak House-like litigation in Estate of McCall v. United States. In that case, a federal district court was called upon to

decide “a novel question of state law that the Supreme Court of Florida has not yet addressed.” The court noted that certification of state law questions “avoid[s] the risk of ‘friction-generating error’ when a federal court must construe a novel question of state law that has not been decided by the state's highest court. But “neither the Florida Constitution nor Florida's rules of procedure permit the Supreme Court of Florida to accept a question certified for review by a United States district court.” 663 F. Supp. 2d 1276, 1296 (N.D. Fla. 2009).

That federal judge engaged in an “Erie guess,” attempting to surmise what the Florida Supreme Court would do. The case was then appealed to the U.S. Court of Appeals for the Eleventh Circuit. Florida does accept certified questions from federal courts of appeal, so the Eleventh Circuit certified several issues to the Florida Supreme Court. Estate of McCall v. United States, 642 F.3d 944, 952-53 (11th Cir. 2011). After the case was briefed and argued in the Florida Supreme Court, that court came to a different conclusion about Florida law than had the U.S. District Court. Estate of McCall v. United States, 134 So. 3d 894 (Fla. 2014). The case was returned to the Eleventh Circuit, which issued a mandate to the District Court, which later that year issued a final judgment. It took five years and substantial expense just to resolve the state law issue.

A less tangible but very real cost of expanded diversity jurisdiction is that it will lead to greater disuniformity in the law. Federal courts sitting in diversity are required to apply state law to state-law claims and defenses, but state courts are not bound to follow federal interpretations of state law. The more opportunities the federal courts have to decide state-law issues, the greater the likelihood of divergence between federal- and state-court decisions on the same state-law issue. The result will be less consistency and more unpredictability in the law, as identical disputes are resolved differently depending on whether they are heard by a state or a federal court.

IV. An expansion of diversity jurisdiction threatens the proper functioning of the federal courts.

Another important reason Congress has generally limited diversity jurisdiction is to avoid imposing too heavy a burden on the already over-burdened

federal courts. Congress has recognized that the federal courts should not be distracted from their central responsibility: interpreting federal statutes and resolving federal constitutional questions.

Federal court caseloads have increased significantly in recent years. According to the Administrative Office of the Courts, civil filings in U.S. District Courts are 8 percent higher than a decade ago, even after a decline in 2015.

Moreover, the workload of individual federal judges has risen due to unconscionable delays in the Senate's confirmation of judicial nominees. There were an average of 61 judicial vacancies throughout 2014, as compared to 33 in 2006. According to the Congressional Research Service, this is the longest period of historically high vacancy rates in 35 years.

Partly because of increasing caseloads and partly because of increases in judicial vacancies, federal court dockets are already stressed. Counting both full-time active judges and part-time senior judges, the number of pending cases per sitting judge reached an all-time high in 2009 and was higher in 2012 than at any point from 1992-2007.

In 2014, for instance, the number of cases per authorized judgeship was 436, which was 14 percent higher than 10 years ago. But adjusting for judicial vacancies, the true number of cases per sitting judge in 2014 was 479 – almost 20% higher than in 2006.

In response to these unprecedented pressures on the federal courts, the Judicial Conference recommended last March that Congress create 77 more judgeships for district courts and five more for circuit courts to keep up with current workloads. But Congress has disregarded that recommendation, just as it has disregarded the repeated call by Chief Justice Roberts to restore cuts made to the federal judiciary under the budget sequestration process.

The proposal to shift from complete diversity jurisdiction to minimal diversity jurisdiction would bring even more cases into the federal system, exacerbating a dire situation. It is uncertain how many new cases would be filed in or removed to federal court, but the threat is ominous.

In a study commissioned by the National Association of Manufacturers, my fellow panelist Professor Joanna Shepherd has estimated that a minimal diversity standard would increase federal district court caseloads by “only” 7.7 percent, an average of 43 cases per judge per year. Even assuming the accuracy of this estimate, an increase of 7.7% cases represents a significant additional burden on federal courts across the country.

Moreover, the 7.7% increase in district court cases predicted by the Shepherd study does not take account of the inevitable ripple effects on the Courts of Appeals. Federal litigants have a right to appeal, even on issues solely of state law, and surely many of the additional cases litigated under minimal diversity would be appealed. The caseloads of the Courts of Appeals would increase accordingly.

But in fact, there is reason to fear that Professor Shepherd’s methodology underestimates the number of cases that would be added to federal dockets. She determined that a minimal diversity standard would make 557,791 additional cases eligible to be added to the federal court caseload. That is a huge number – it is about twice the existing caseload of the federal courts.

Shepherd asserts, however, that only 2.5% of those additional cases would actually be removed to federal court because only 2.5 percent of cases currently eligible to be removed are in fact removed. This extrapolation is purely speculative. There are any number of reasons why defense lawyers in the 557,791 additional removable lawsuits might choose a federal forum, even though only a small number do so now. And in multi-defendant cases, any single defendant could seek removal regardless of the other defendants' preferences.

Therefore I am much less confident that a change in law which doubles the number of cases eligible to be heard in federal court will not overwhelm the federal courts. In Maryland alone, there would be an additional 97,834 cases subject to federal jurisdiction, a 9.9% increase in that district’s potential caseload. Professor Shepherd believes that only a small fraction of these cases would end up in federal court, but that academic assumption would be little comfort to the federal judges in the District of Maryland looking at a potential influx of almost 100,000 new filings each year.

What is the impact on justice when the federal courts are overburdened? Cases are adjudicated less promptly, and individual cases receive less individualized attention. When judges are overworked, the quality of justice inevitably suffers.

Congress has long sought to protect the federal courts from a flood of routine state law cases so that those courts are available to resolve important federal questions, including crucial constitutional questions, in a timely manner. The importance of maintaining the excellence of the federal courts is a paramount reason to limit rather than expand federal diversity jurisdiction.

V. Conclusion

I hope that today's exploration of federal diversity jurisdiction convinces the subcommittee that this well-settled portion of federal law should not be unsettled. The 210 year old doctrine of complete diversity protects state sovereignty, guards against unnecessary litigation costs and insulates the federal courts from an explosion of their already bulging dockets. It has worked well for 210 years; now is not the time to change course.