

No. 06-_____

IN THE

Supreme Court of the United States

Emma Lively,
Petitioner,

v.

Wild Oats Markets, Inc.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the “forum defendant rule” of 28 U.S.C. § 1441(b), a civil defendant may remove a case from state to federal court based on diversity jurisdiction only if no defendant in the case is a citizen of the state in which the action was commenced. 28 U.S.C. § 1447(c) further provides that “[a] motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal.”

The question presented is:

Whether the forum defendant exception to removal jurisdiction is inapplicable whenever a plaintiff seeking remand fails to raise it within thirty days of removal.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Emma Lively respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 1a-14a) vacating the district court's order remanding the action to state court is published at 456 F.3d 933. The district court's order and memorandum (Pet. App. 15a-19a) are unpublished.

JURISDICTION

The Ninth Circuit's decision was issued on July 27, 2006. On October 17, 2006, Justice Kennedy extended the time to file this petition to and including November 24, 2006. App. No. 06A383. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(a).

RELEVANT STATUTORY PROVISIONS

28 U.S.C. § 1441(b) provides:

Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

28 U.S.C. § 1447(c) provides, in relevant part:

A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

28 U.S.C. § 1447(d) provides:

An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

STATEMENT

1. The general grant of removal jurisdiction in 28 U.S.C. § 1441 outlines different criteria for removing a case to federal court based on the nature of the civil action filed in state court. If the district court would have had original federal-question jurisdiction – that is, jurisdiction “founded on a claim or right arising under the Constitution, treaties or laws of the United States – then the case is removable regardless of the citizenship or residence of the parties. *See* 28 U.S.C. § 1441(b). In all other cases, however – such as those in which the district court would have had jurisdiction based solely on the diversity of citizenship of the parties – the case may be removed only if none of the defendants is a citizen of the forum state. *See id.*

If a case is improperly removed to federal court, the district court may remand it back to state court. The timing of the remand depends on the nature of the defect in removal. If the defect is a lack of subject matter jurisdiction over the case, the district court may remand the case at “any time before final judgment.” 28 U.S.C. § 1447(c). Any other defect must be raised within thirty days after the notice of removal is filed. *Id.*

2. In September 2003, petitioner Emma C. Lively filed this suit against respondent Wild Oats Markets, Inc. in California state court, seeking damages for a slip-and-fall accident that occurred in a store owned by respondent in California. Pet. App. 4a.

On January 8, 2004, respondent removed the case to the U.S. District Court for the Central District of California. Pet. App. 14a. In its notice of removal, respondent represented that removal jurisdiction was proper under Section 1441(b) because it was a citizen of Delaware (its state of incorporation) and of Colorado (its principal place of business), while petitioner was a citizen of New York.¹ *Id.* 4a. Relying on this representation, petitioner did not object to removal, and discovery followed. *Id.*

On August 10, 2004, respondent filed a motion for summary judgment. Pet. App. 15a. However, on August 25, the district court – concerned that its removal jurisdiction was called into question by the facts proffered by respondent – issued an Order to Show Cause in which it requested information from respondent regarding its principal place of business. *Id.* 16a. Respondent did not respond to the court’s inquiries directly; instead, it reiterated only that diversity jurisdiction was proper because it was a citizen of Delaware and Colorado and does no business in New York. *Id.* 17a. Based on information indicating that respondent operated more stores in California than anywhere else, the district court determined that respondent’s principal place of business was in fact California. *Id.*

Concluding that the removal violated the forum defendant rule, the district court remanded the case to state court. Pet. App. 19a. The court reasoned that because the forum defendant rule is jurisdictional, the court “may and should remand the action to state court at any time before final judgment” under Section 1447(c) when the rule is violated. *Id.* 17a. The district court deemed “well-founded” the reasoning outlined in *WRS Motion Picture & Video Laboratory v. Post Modern Edit, Inc.*, 33 F. Supp. 2d 876

¹ For diversity purposes, a corporation such as respondent is “deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business.” 28 U.S.C. § 1332.

(C.D. Cal. 1999), which held that a violation of the forum defendant rule “creates a jurisdictional defect that can be overcome only if: (1) the case proceeds to judgment on the merits, and (2) the federal court would have had jurisdiction had the case been filed in federal court in the posture it had at the time of judgment.” Pet. App. 18a. In *WRS*, the court relied on this Court’s precedents holding that “removal defects [do] not defeat jurisdiction *if the matter ha[s] already proceeded to a judgment on the merits.*” 33 F. Supp. 2d at 877 (emphasis in original) (citing *Baggs v. Martin*, 179 U.S. 206 (1900); *Mackay v. Uinta Dev. Co.*, 229 U.S. 173 (1913); and *Grubbs v. Gen. Elec. Credit Corp.*, 405 U.S. 699 (1972)). This case, by contrast, had not reached a final judgment.

On the district court’s view of Section 1441(b), “the presence of a local defendant defeats federal jurisdiction at the outset, before the procedure for removal becomes an issue.” Pet. App. 19a. Thus, the district court concluded, respondent’s “removal of this action in violation of” the forum defendant rule “constitutes a jurisdictional defect.” *Id.* In so holding, the district court acknowledged a split between the Eighth Circuit, which holds that the limitation imposed by the forum defendant rule “is jurisdictional and cannot be waived unless the case has gone to final judgment,” and the Third and Fifth Circuits, which regard the rule as procedural and thus waived if not raised within thirty days after removal. *Id.* 17a.

3. On appeal, the Ninth Circuit vacated the district court’s order. It held that “the forum defendant rule is procedural, and therefore a violation of this rule is a waivable defect in the removal process that cannot form the basis for a district court’s *sua sponte* remand order.” Pet. App. 3a.²

² As a threshold matter, the court of appeals addressed its own jurisdiction, in light of Section 1447(d)’s bar on appellate review of remand orders. Pet. App. 5a. Noting that this Court has construed the Section 1447(d) bar as applying only to remand

The Ninth Circuit first found support for its holding that the forum defendant rule is procedural, rather than jurisdictional, in the legislative history of Section 1447(c). In 1996, Congress had amended the statute – which had previously provided that “[a] motion to remand the case on the basis of *any defect in removal procedure* must be made within 30 days after the filing of the notice of removal” – to impose a thirty-day limit on “motion[s] to remand on the basis of *any defect other than lack of subject matter jurisdiction.*” Adopting the logic of the Eleventh Circuit in *Snapper, Inc. v. Redan*, 171 F.3d 1249, 1257-58 (11th Cir. 1999), which dealt with a remand on the basis of a forum selection clause, the Ninth Circuit construed the amendment as reflecting Congress’s intent to subject “more substantive” removal defects – including violations of the forum defendant rule – to the thirty-day limit. Pet. App. 9a.

The Ninth Circuit next invoked its understanding of the purpose of the forum defendant rule. The court reasoned that, although removal based on diversity of citizenship is “intended to protect out-of-state defendants from possible prejudices in state court,” “[t]he need for such protection is absent . . . [when] the defendant is a citizen of the state in

orders issued pursuant to Section 1447(c), *id.* (citing *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), *abrogated on other grounds by Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996)), the Ninth Circuit agreed that “if the district court remanded under its § 1447(c) authority,” it would “lack jurisdiction to review the order.” However, such a premise did not preclude review altogether, but instead required it to “determine whether the district court had [such] authority” at all. *Id.* 6a. “Stated differently,” the court explained, “the question raised on appeal is not whether the district court’s remand order was correct, but whether the district court exceeded the scope of its § 1447(c) authority by issuing the remand order in the first place.” *Id.* The court reasoned that because the district court’s authority to remand under Section 1447(c) would depend on whether the forum defendant rule is jurisdictional or procedural, it therefore had “jurisdiction to decide jurisdiction.” *Id.* (internal citation omitted).

which the case is brought.” Pet. App. 9a-10a. In the Ninth Circuit’s view, treating the forum defendant rule as procedural “honors” the rule’s purpose by allowing the plaintiff either to move to remand the case within thirty days of removal or, alternatively, remain in federal court. *Id.* 10a.

The Ninth Circuit noted that its interpretation of Section 1441(b) was consistent with “the prevailing law” of a majority of other circuit courts. Pet. App. 8a. While acknowledging the Eighth Circuit’s rule that “a violation of § 1441(b) is a non-waivable jurisdictional defect,” *id.* 10a, the court of appeals expressly declined to follow that rule, deeming itself “not persuaded that the forum defendant rule is a statutory requirement which, if not met, deprives the district court of original jurisdiction,” *id.* 11a (internal quotations omitted).

Finally, the Ninth Circuit opined that its holding, rather than the contrary ruling of the district court, was most consistent with this Court’s decision in *Grubbs*. The Ninth Circuit reasoned that because a lack of subject matter jurisdiction is a non-waivable defect that may be raised at any time, and because this Court in *Grubbs* permitted a judgment against improperly removed forum defendants to stand, this Court has “clearly suggested, even if it did not directly hold, that it does not view the removal statute as imposing independent jurisdictional restrictions on the federal courts.” Pet. App. 12a (quoting *Korea Exch. Bank, N.Y. Branch v. Trackwise Sales Corp.*, 66 F.3d 46, 50 (3d Cir. 1995)).

This petition followed.³

³ On remand, the district court granted respondent’s motion for summary judgment. That decision has no bearing on this petition, however, as a ruling in petitioner’s favor would establish that the district court lacked jurisdiction over the case, and thus lacked the power to enter such an order.

REASONS FOR GRANTING THE WRIT

The courts of appeals are intractably divided over the question whether a case removed in violation of the forum defendant rule may be remanded to state court only when the violation is raised within thirty days. This conflict is untenable because it has the potential to alter the course of many cases removed from state to federal court each year and flies in the face of congressional intent to create uniform rules of removal. This case presents the ideal vehicle to resolve the question presented, which was squarely addressed below and was the sole basis for the Ninth Circuit's decision. Finally, certiorari is also warranted because the decision below is wrong on the merits.

I. The Courts of Appeals Are Intractably Divided Over the Question Presented.

Whether the forum defendant rule imposes a jurisdictional limitation on removal, thereby allowing a district court to remand a case to state court for violation of the rule at any time prior to judgment, is the subject of a widely acknowledged circuit conflict. *See, e.g.*, Pet. App. 10a; *Horton v. Conklin*, 431 F.3d 602, 605 (8th Cir. 2005), *cert. denied*, 127 S. Ct. 60 (2006). Four circuits – the Second, Third, Fifth, and Ninth – hold that the forum defendant rule is procedural, and thus is waived thirty days after removal. By contrast, the Eighth Circuit holds that the rule is a jurisdictional limitation that either a party or the district court may raise at any time before judgment is rendered on the merits in the district court.

1. As the Ninth Circuit acknowledged, *see* Pet. App. 11a, its holding directly conflicts with the precedents of the Eighth Circuit. In *Hurt v. Dow Chemical Co.*, 963 F.2d 1142 (8th Cir. 1992), the plaintiff sued in Missouri state court over injuries she attributed to pesticide exposure. *Id.* at 1143. Asserting that plaintiff's claims were pre-empted by the Federal Insecticide, Fungicide, and Rodenticide Act

(FIFRA), the defendant removed the case to federal court on the basis of federal-question jurisdiction. *Id.* Approximately one year later, the plaintiff moved to remand the case to state court, asserting that removal based on federal-question jurisdiction was improper. *Id.* at 1143-44. The district court denied the motion, holding that plaintiff had “waived any non-jurisdictional objection to the impropriety of removal,” *id.* at 1144, but the Eighth Circuit reversed. Holding first that removal based on federal-question jurisdiction was improper because the federal question was not apparent on the face of the complaint, *id.* at 1144-45, the court then rejected the defendant’s alternate basis for removal, diversity jurisdiction, on the ground that the removal violated the forum defendant rule because one of the defendants was a citizen of Missouri, *id.* at 1145. Emphasizing that “[t]he jurisdiction of the lower federal courts, both original and removal, is entirely a creature of statute,” and that Section 1441(b) “makes diversity jurisdiction in removal cases narrower than if the case were originally filed in federal court by the plaintiff,” the court concluded that when Section 1441(b) is violated, “one of the statutory requirements [for removal jurisdiction] is not met” and thus “the district court has no jurisdiction.” *Id.*

While acknowledging that other courts had relied on this Court’s decision in *Grubbs* to hold that a violation of the forum defendant rule was waived if not raised within thirty days of removal, the Eighth Circuit deemed that view an “unwarranted extension” of *Grubbs*. 963 F.2d at 1145. In the Eighth Circuit’s view, this Court in *Grubbs* “expressly relied on the fact that the plaintiff had never objected to removal in the district court,” *id.* at 1146, while the plaintiff in *Hurt* had objected in the district court well before judgment. *Id.* Because “subject matter jurisdiction is not a mere procedural irregularity capable of being waived, and *Grubbs* does not apply to these facts,” the Eighth Circuit concluded, “the District Court did not have jurisdiction over these parties,” and the case was improperly removed. *Id.*

The Eighth Circuit recently reaffirmed its rule, holding in *Horton* that a violation of the forum defendant rule constitutes a jurisdictional defect, such that a district court may remand the case to state court at any time before final judgment even in the absence of an objection by the plaintiff. In *Horton*, the plaintiff brought an action to construe a trust in Missouri state court, naming twelve defendants. 431 F.3d at 603. One defendant, a citizen of Arizona, filed a notice of removal based on diversity of citizenship. *Id.* Noting that three of the named defendants appeared to be citizens of Missouri, such that removal would be improper under the forum defendant rule, the district court subsequently remanded the case to Missouri state court. *Id.* at 604.

On appeal, the Eighth Circuit held that removal was precluded by the forum defendant rule. 431 F.3d at 604-05. While recognizing that other circuits had, since its holding in *Hurt*, subsequently held that a violation of the forum defendant rule constitutes a waivable procedural defect, the court of appeals rejected those decisions, declaring that “*Hurt* sets forth the better rule.” *Id.* at 605.

b. In contrast to the holding of the Eighth Circuit, the Ninth Circuit in this case and three other courts of appeals hold that the forum defendant rule is procedural and thus waived if not raised within thirty days of removal.

In *Korea Exchange Bank, N.Y. Branch v. Trackwise Sales Corp.* – which involved a sua sponte, pre-judgment remand made seven-and-a-half months after removal – the Third Circuit explained that “in considering whether jurisdictional defects exist[]” for purposes of the forum defendant rule, the relevant inquiry is whether the case could have been filed originally in federal court.” 66 F.3d at 50 (citing *Grubbs*, 405 U.S. at 704). In so holding, that court relied on this Court’s decisions in *Baggs*, *Mackay*, and *Grubbs*. *Id.* at 49-50. Although, “[u]nlike this case,” each of those cases “had already been tried before the removal to federal court was questioned,” *id.* at 50, the Third Circuit

construed those decisions as “clearly suggest[ing], even if [they] did not directly hold, that [this Court] does not view the removal statute as imposing independent jurisdictional restrictions on the federal courts,” *id.*, cited in Pet. App. 12a.

In holding that the forum defendant rule was “a procedural rule and . . . not jurisdictional” in another case involving a pre-judgment remand, the Second Circuit in *Shapiro v. Logistec USA Inc.*, 412 F.3d 307, 313 (2d Cir. 2005), relied on circuit precedent in which the violation of the forum defendant rule arose for the first time on appeal, *id.* (citing *Woodward v. D.H. Overmyer Co.*, 428 F.2d 880 (2d Cir. 1970); *Handelsman v. Bedford Vill. Assocs. Ltd. P’ship*, 213 F.3d 48 (2d Cir. 2000)). While acknowledging that its rule conflicted with that of the Eighth Circuit, the Second Circuit explained only that it “adhere[d] (as of course we must) to our rule that section 1441(b) is a rule of procedure and does not state a jurisdictional requirement.” *Id.*

The Fifth Circuit has also held that violations of the forum defendant rule are procedural defects subject to Section 1447(c)’s thirty-day time limit. *See In re Shell*, 932 F.2d 1518 (1991), *cert. denied sub nom. Acuna Castillo v. Shell Oil Co.*, 502 U.S. 1049 (1992). However, it rested its holding not on the *Grubbs* line of cases, but instead on the legislative history of the pre-1996 version of Section 1441(b) and its accompanying commentary. *Id.* at 1521-22 (citing David D. Siegel, *Commentary on 1988 Revision of Section 1447*, 28 U.S.C. § 1447 (West Supp. 1991)). The Fifth Circuit agreed that Section 1447(c) was drafted to allow “a remand [to] be made after the 30-day limit if something arises later” – for example, the dismissal of all federal questions, leaving only state law questions – “that would make remand proper.” *Id.* at 1521. By contrast, the Fifth Circuit noted, “procedural defects” – such as a violation of the forum defendant rule – would be apparent at the time of removal. *Id.* Construing the forum defendant rule to be waived if no objection is made within thirty days would, the

court concluded, serve the policy of “prevent[ing] a party who is aware of a defect in removal procedure from using the defect as insurance against later unfavorable developments in federal court.” *Id.* at 1522 (quoting Charles Wright et al., FEDERAL PRACTICE AND PROCEDURE § 3739, at 95 (2d ed. Supp. 1990)).⁴

2. The circuit split will not resolve itself without this Court’s intervention. The conflict has existed at least since 1992, when the Eighth Circuit’s decision in *Hurt* departed from the Fifth Circuit’s decision a year earlier in *Shell*. Since then, the Second, Third, and Ninth Circuits have directly confronted the question presented, acknowledged the split, and repudiated the Eighth Circuit position. *See, e.g.*, Pet. App. 10a-11a; *Shapiro*, 412 F.3d at 313 n.2; *Korea Exch. Bank*, 66 F.3d at 50. The Eighth Circuit in *Horton*, meanwhile, expressly acknowledged the majority rule but nonetheless declined to follow it, *see* 431 F.3d at 605 (describing *Hurt* as establishing “the better rule”), and then denied rehearing en banc, making it essentially certain that the circuit split will persist indefinitely absent this Court’s intervention.

Nor would the question presented benefit from further percolation. The circuit split is clear and well defined, and the courts of appeals have analyzed the issue at length. The

⁴ In addition to the four circuits that have directly addressed the question presented, five other circuits have suggested that they too would reach the same result as the Ninth Circuit, though those decisions are arguably distinguishable because remand was considered only after a final judgment was entered. *See Farm Constr. Servs., Inc. v. Fudge*, 831 F.2d 18, 22 (1st Cir. 1987) (per curiam); *Handley-Mack Co. v. Godchaux Sugar Co.*, 2 F.2d 435, 437 (6th Cir. 1924); *Hurley v. Motor Coach Industries, Inc.*, 222 F.3d 377, 379 (7th Cir. 2000), *cert. denied*, 531 U.S. 1148 (2001); *American Oil Co. v. McMullin*, 433 F.2d 1091, 1094 (10th Cir. 1970); *Borg-Warner Leasing v. Doyle Elec. Co.*, 733 F.2d 833, 835 n.2 (11th Cir. 1984).

conflict moreover is deeply rooted in disagreements about the proper construction of this Court's precedents, such as *Grubbs*, that only this Court can resolve.

Finally, this Court has previously discerned a strong congressional preference for uniform application of the removal statutes. *See Grubbs*, 405 U.S. at 705 (“[T]he removal statutes . . . are intended to have uniform nationwide application.”). Absent review by this Court, this pervasive and intractable circuit split defeats, and will continue to defeat, that uniform application.

3. This case presents an ideal vehicle for resolving the persistent conflict over the forum defendant rule and, in particular, the applicability of this Court's holding in *Grubbs* to remand orders issued prior to the entry of judgment in the district courts. The issue was squarely presented and preserved below and – unlike *Horton* – the decision below rests solely on the forum defendant rule. *See* Resp. Br. in Opp. 22-26, *Waugh v. Horton* (No. 05-1419) (detailing reasons why case was properly remanded regardless of Eighth Circuit's holding that forum defendant rule was jurisdictional), *cert. denied*, 127 S. Ct. 60 (2006). Moreover, the issue is outcome-determinative: had petitioner's case been brought in the Eighth Circuit rather than the Ninth, it unquestionably would have been remanded to state court based on the violation of the forum defendant rule.

4. The enduring conflict over the question presented creates confusion regarding an issue of fundamental importance. Whether the forum defendant rule is treated as “jurisdictional” may have a direct impact on a plaintiff's choice of forum, which in turn has been shown to directly affect the outcome of a case. Kevin Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 594 (1998) (win rate for plaintiffs who opt to file diversity cases in federal courts is seventy-one percent, compared with thirty-four percent for plaintiffs

whose cases are removed to federal court based on diversity jurisdiction).

II. The Decision Below Erroneously Construes the Federal Removal Statute.

Certiorari is also warranted because the decision below is erroneous. A construction of the forum defendant rule as jurisdictional, rather than procedural, is most consistent with both the statutory scheme and this Court's precedents. Such a construction is also consistent with the purpose of the forum defendant rule and the legislative history of Section 1447(c).

1. In enacting the statutory scheme governing removal, Congress drew a clear distinction between removal procedure and removal jurisdiction. It is a "fundamental canon of statutory construction" that courts should read provisions "with a view toward the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (internal quotation and citation omitted). *See also Bailey v. United States*, 516 U.S. 137, 145 (1995) (looking to the "placement and purpose [of text] in the statutory scheme"). Sections 1446 and 1447 govern the procedural aspects of removal – specifying, for example, what must be included in the notice of removal, 28 U.S.C. § 1446(a), when such a notice must be filed, *id.* § 1446(b)-(c), and when a motion to remand must be filed, *id.* § 1447(c). By contrast, Section 1441 outlines the circumstances in which a case is subject to removal *vel non*. This distinction between removal procedure and removal jurisdiction is not only clear from the statutory scheme, but has also been expressly recognized by this Court, which has both indicated that Sections 1446 and 1447 govern removal procedure, *see Thermtron*, 423 U.S. at 342, and referred to "the removal jurisdiction conferred by 28 U.S.C. § 1441." *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 7 (1983).

Even if any doubt that Section 1441 established jurisdictional, as opposed to procedural, requirements for removal remained, that doubt would be erased by a comparison of Section 1441's title with those of Sections 1446 and 1447. See *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (explaining that a statute's heading is a tool "available for the resolution of a doubt about the meaning of a statute") (internal quotation and citation omitted). Sections 1446 and 1447 are titled, respectively, "Procedure for Removal" and "Procedure after Removal Generally." Not surprisingly, this Court in *Wisconsin Department of Corrections v. Schacht*, 524 U.S. 381, 392 (1998), relied in part on Section 1447's title to conclude that that statute imposed procedural requirements on removal. By contrast, the title of Section 1441 – "Actions removable generally" – makes no reference to procedure.

Indeed, this Court has described an earlier version of the forum defendant rule as jurisdictional. In *Martin v. Snyder*, 148 U.S. 663, 664 (1893), this Court held that a defendant's failure to satisfy the forum defendant rule resulted in a "want of jurisdiction," vacated a decree in the defendant's favor, and ordered that the case be remanded to state court, *id.* Notably, when Congress enacted the forum defendant rule in 1887, it situated that rule in a provision that explicitly articulated its purpose: "to regulate the removal of cases from State courts . . . and to *further* regulate the jurisdiction of circuit courts of the United States, and for other purposes." 24 Stat. 552 ch. 373(emphasis added).⁵

2. Recognizing that the forum defendant rule is jurisdictional, rather than procedural, also preserves the distinction that Congress carefully drew between original and removal jurisdiction – that is, between a plaintiff's ability to

⁵ At the time, like district courts today, circuit courts had original jurisdiction over cases based on diversity jurisdiction. 1 Stat. 78-79 (establishing circuit courts' original jurisdiction in non-diversity cases).

file a case in federal district court and a defendant's ability to remove a case from state to federal court. Federal district courts have original jurisdiction (and, thus a plaintiff may bring a case in federal court) in two scenarios: when the claim at issue "aris[es] under" federal law, 28 U.S.C. § 1331, or when the defendant is a citizen of a different state, *id.* § 1332. By contrast, Congress significantly narrowed the circumstances in which a defendant may remove a case from federal to state court: although a case may always be removed if it presents a federal question, *id.* § 1441(b), it may not be removed based on diversity of citizenship if the defendant is a citizen of the state in which the case was filed.

The rule established by the Ninth Circuit in the decision below, by contrast, effectively obliterates this distinction by expanding the relevant inquiry when the forum defendant rule is violated from whether a defendant can meet the requirements of removal jurisdiction to whether the district court would have had original jurisdiction over the case had it been filed in that court in the first instance. As the Eighth Circuit explained in *Hurt*, however, the latter inquiry is "irrelevant," 963 F.2d at 1145; had Congress intended to make removal jurisdiction co-extensive with the original jurisdiction of the district courts, it could have done so explicitly.⁶

Moreover, construing the forum defendant rule as jurisdictional in no way conflicts with this Court's decision in *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699

⁶ Indeed, Congress elsewhere made clear that original and removal jurisdictions are not co-extensive by withdrawing removal jurisdiction over certain cases in which original jurisdiction would otherwise exist, *see, e.g.*, 28 U.S.C. § 1445(c) (prohibiting removal of state worker's compensation claims even when diversity jurisdiction would exist), and by extending removal jurisdiction to cases in which original jurisdiction would otherwise be absent, *see, e.g.*, 28 U.S.C. § 1441(c) (providing for removal of "separate and independent" claims that would not fall under any statute for original jurisdiction).

(1972), which did not address the forum defendant rule at all. In *Grubbs*, the appellant raised concerns about removal for the first time only *after* the district court entered an adverse judgment. This Court concluded that “where after removal a case is tried on the merits without objection and the federal court enters judgment, the issue in subsequent proceedings on appeal is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in that court,” *id.* at 702. Indeed, Section 1447(c) itself mirrors that rule, providing that a case shall be remanded when – as in petitioner’s case – “at any time before final judgment it appears that the district court lacks subject matter jurisdiction.” By contrast, the district court in petitioner’s case broached the issue of its subject matter jurisdiction *before* it considered the merits of petitioner’s claims, let alone entered a judgment. The district court’s order remanding petitioner’s case was thus fully consistent with this Court’s holding in *Grubbs*.

3. Construing the forum defendant rule as jurisdictional in cases such as petitioner’s also promotes, rather than undermines, the purpose of the rule. First, as the Ninth Circuit acknowledged in petitioner’s case, Congress provided defendants with the option of removing their case to federal court based on diversity jurisdiction to protect out-of-state defendants from the possibility of prejudice in state courts but, in accordance with the purposes of diversity jurisdiction, limited the removal right to out-of-state defendants. *See* Pet. App. 9a-10a.

Second, characterizing this limitation as jurisdictional allows the plaintiff to preserve his choice of forum – which, as this Court has noted, generally “must be honored,” *see Ferens v. John Deere Co.*, 494 U.S. 516, 535 (1990) – by requiring a remand if, at any time before judgment, a plaintiff or the court becomes aware that the case was improperly removed. This respect for a plaintiff’s choice of forum is

also particularly important in light of the negative effects that removal has been shown to have on a plaintiff's chances for success on the merits. *See* Kevin Clermont & Theodore Eisenberg, *Litigation Realities*, 83 CORNELL L. REV. 119, 124 (2002).⁷

Third, as petitioner's case illustrates, characterizing the forum defendant rule as procedural provides a perverse incentive for defendants to resist efforts to resolve questions relating to their citizenship. Put another way, a procedural characterization shifts the burden to plaintiffs to uncover any information revealing defendants' true citizenship within thirty days of removal. By contrast, a jurisdictional characterization of the rule properly shifts the burden to defendants, who have exclusive control over such information.

4. Nor is the legislative history of Section 1447(c) inconsistent with construing the forum defendant rule as jurisdictional, rather than procedural. *Contra* Pet. App. 8a-9a; *Snapper*, 171 F.3d at 1254-59. Indeed, as one commentator has observed, the legislative history of the forum defendant rule is so sparse that "it is difficult to imagine how a survey of legislative history could be less helpful in construing a statute than in the context of the forum defendant rule." *See* Brian W. Portugal, Note, *More Than a Legal Nicety: Why the Forum Defendant Rule of 28 U.S.C. Section 1441(b) Is Jurisdictional*, 56 BAYLOR L. REV. 1019, 1033-34 (2004). The legislative history reveals only that the 1996 amendment deleted the phrase "any defect in removal procedure" from the first sentence of Section

⁷ By contrast, characterizing the rule as procedural does nothing to protect the plaintiff's choice of forum. *Contra* Pet. App. 10a. If a plaintiff files a case in state court that could have been brought in federal court based on diversity jurisdiction, there is no reason to assume that if the defendant removes the case to federal court the plaintiff – despite having originally filed the action in state court – might prefer to remain in federal court.

1447(c) – which specifies which motions must be made within thirty days of removal – and replaced it with the phrase “any defect other than lack of subject matter jurisdiction.” H.R. Rep. No. 104-799, at 2 (1996). The House Report that accompanied the amendment indicated that the change was necessary because “[t]he intent of the Congress is not entirely clear from the current wording of 28 U.S.C. S 1447(c), and it has been interpreted differently by different courts.” *Id.* To the extent that Congress intended to eliminate confusion among the lower courts,⁸ however, the confusion likely stemmed not from a construction of the forum defendant rule as jurisdictional, but instead from the view of some courts that a case could be remanded under the 1988 version of Section 1447(c) merely because removal was, in the court’s eye, “improvident.” *See In re General Motors Corp.*, 3 F.3d 980 (6th Cir. 1993) (internal quotation and citation omitted) (maintaining that Section 1447(c) “provides that cases removed improvidently and without jurisdiction must be remanded”) (internal quotes omitted). Notably, the amendment did not in any way attempt to define what constitutes a lack of subject matter jurisdiction for purposes of Section 1447(c), much less suggest that a violation of the forum defendant rule would not constitute a lack of subject matter jurisdiction. Indeed, nothing in the legislative history suggests that Congress held such bold aspirations when passing what it depicted as a “noncontroversial” and “technical” bill. *See* Thomas R. Hrdlick, *Appellate Review of Remand Orders in Removed Cases: Are They Losing a Certain Appeal*, 82 MARQ. L. REV. 535, 564 (1999) (“Congress did not think it was altering the operation of § 1447(c) so much as clarifying.”).

CONCLUSION

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

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