No. 15-456

IN THE

Supreme Court of the United States

JOANNIE JEFFERSON, *et al.*,

Petitioners,

v.

CERTAIN UNDERWRITERS OF LLOYD'S, LONDON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY FOR PETITIONERS

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INTRODUCTION

"What we can decide, we can undecide." *Kimble v. Marvel Entm't, LLC*, 135 S.Ct. 2401, 2415 (2015). As set forth in the Petition for a Writ of Certiorari, there are "superspecial justification[s]" (*id.* at 2410) to warrant reversing *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976).

In an effort to prove that *Thermtron* is "workable," Lloyds makes the erroneous claim that there has been no conflict in the circuit courts as to how to apply *Thermtron's* abstruse holding that § 1447(d) must be read in *pari materia* with a prior version of § 1447(c). Lloyd's' "no conflict" claim is belied by the ***seven*** times that this Court has had to step in to resolve the circuit courts' confusion as to whether, post-*Thermtron*, § 1447(d) prohibits appellate review of a remand order. And Lloyd's ignores entirely the current circuit split as to whether, post-*Thermtron*, a remand based on waiver is reviewable on appeal.

Further, Lloyd's' claim that *Thermtron* must stand, because "Congress has tacitly approved *Thermtron*" (BIO 7), contravenes this Court's long-standing precept that "[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *Girourd v. United States*, 328 U.S. 61, 69 (1946). Lloyd's has no answer for how Congress could have amended § 1447(d)'s language—"An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . ."—to make it any more clear that remand orders are not reviewable on appeal. 28 U.S.C. § 1447(d); *see Osborn v. Haley*, 549 U.S. 225, 268–69 (2006) (Scalia, J., dissenting) ("[I]t is hard to imagine new statutory

language accomplishing the desired result any more clearly than § 1447(d) already does.").

No one disputes that this case presents a clean vehicle on this pure question of law of widespread practical importance. Certiorari is warranted.

I. *Stare decisis* does not compel sticking to *Thermtron*.

Lloyd's does not contest that *Thermtron's* "statutory and doctrinal underpinnings have eroded over time." *Kimble*, 135 S.Ct. at 2410. Specifically, there is no longer any basis for *Thermtron's* holding that remands not included within the scope of § 1447(c) are reviewable, because the amended § 1447(c) covers all remands—remands based on subject matter jurisdiction or "any defect other than lack of subject matter jurisdiction." 28 U.S.C. § 1447(c); *see* Pet. 16–18.

Further, Lloyd's does not contest that there are no reliance interests served by adhering to *Thermtron*. Unlike cases involving "property and contract rights," where considerations favoring *stare decisis* are "at their acme" (*Payne v. Tennessee*, 501 U.S. 808, 828 (1991)), here it is impossible to conceive how people could have relied on *Thermtron* "when ordering their affairs." *Kimble*, 135 S.Ct. at 2410; *see* Pet. 24–25.

Moreover, Lloyd's has no answer to the wealth of judicial and academic commentary that *Thermtron* has proven to be "unworkable." *Kimble*, 135 S.Ct. at 2411; *see, e.g.*, *Carlsbad Technology, Inc., v. HIF Bio, Inc.*, 556 U.S. 635, 642 (2009) (Scalia, J., concurring) ("[O]ur decision in *Thermtron* was questionable in its day and is ripe for

reconsideration in the appropriate case."); Thomas R. Hrdlick, *Appellate Review of Remand Orders in Removed Cases: Are They Losing a Certain Appeal?*, 82 Marq. L. Rev. 535, 555 (1999) ("[*Thermton*] recalls the old maxim that bad facts make for bad law, or at least for dubious reasoning in support of (presumably) good law. As usually happens with such decisions, the underlying reasoning proved difficult to sustain over time."); *see also* Pet. 18–24.

Finally, Lloyd's does not dispute that *Thermtron* has clogged the appellate dockets with ever-expanding exceptions to § 1447(d)'s ban on appellate review, creating "a hodgepodge of jurisdictional rules that have no evident basis even in common sense." *Carlsbad*, 556 U.S. at 642 (Scalia, J., concurring); *In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 708 (7th Cir. 1992) ("'Straightforward' is about the last word judges attach to § 1447(d) these days.").

Instead, Lloyd's makes the baseless assertions that (i) *Thermtron* has not created conflicts in the circuit courts as to its application; and (ii) Congress has "tacitly approved" (BIO 7) *Thermtron*. Both are without merit.

A. ***Thermtron*** **has created conflicts in the circuit courts.**

In what appears to be a willful blind eye to the actual confusion created by *Thermtron*, Lloyd's cites a series of cases that stand for the unremarkable proposition that the lower courts are bound by *Thermtron's* holding. BIO 5-7.

But this obligation to apply *Thermtron* does not erase the fact that *Thermtron* has created a tangled web overlying what should otherwise be a straightforward

statutory analysis. Indeed, circuit courts appear to be calling on this Court to untangle them from *Themtron*. *See, e.g.*, *Perfect Puppy, Inc. v. City of E. Providence, R.I.*, No. 15-1553, 2015 WL 8121973, at *n.4 (1st Cir. Dec. 8, 2015) ("**Regarding *Thermtron's* holding**—that circuit courts can review cases remanded on grounds having nothing to do with section 1447(c), despite section 1447(d)—**not every Justice has been a fan. Of course we remain bound by *Thermtron* until the day (if it ever comes) the Court tells us we are not.**") (internal citations omitted) (emphasis added).

And, contrary to Lloyd's' unsupported claim that *Thermtron* has caused no circuit splits (BIO 4), the Court has stepped in ***seven*** times to resolve the circuit courts' confusion created simply from the question as to whether, post-*Thermtron*, § 1447(d) prohibits appellate review of a remand order. *See Carlsbad*, 556 U.S. at 641; *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 238–39 (2007); *Osborn*, 549 U.S. at 243; *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 648 (2006); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711 (1996); *Things Remembered, Inc. v. Petrarca,* 516 U.S. 129 (1995); *Gravitt v. Sw. Bell Tel. Co.*, 430 U.S. 723, 723–24 (1977) (per curium); *see also* Pet. 19–20.

And Lloyd's ignores the unresolved circuit splits that continue to percolate. *See Harvey v. UTE Indian Tribe of the Uintah & Ouray Reservation*, 797 F.3d 800, 804 (10th Cir. 2015) ("Our sibling circuits are divided as to whether a remand based on waiver through participation in state court proceedings is reviewable."); *see also* Pet. 21.

Thus, Lloyd's' attempt to show that *Thermtron* has remained a workable precedent by claiming that there have been no circuit splits as to its application is demonstrably false.

B. There has been no Congressional acquiescence to the *Thermtron* exception.

As anticipated in the Petition for a Writ of Certiorari (Pet. 25–27), Lloyd's argues that because Congress has not "disturbed" § 1447(d), despite amending § 1447(d) four times since *Thermtron* was decided, this Court should not act. BIO 8–9.

First, Lloyd's grossly misleads this Court in stating that Congress, when it enacted 28 U.S.C. § 1447 in 1948, permitted "limited appellate review of the kind sought by Underwriters." BIO 8. The prohibition against appellate review of remand orders was first enacted in 1887, and "endured until 1948 when 28 U.S.C. § 1447 was enacted minus, however, the prohibition against appellate review. The omission was *corrected* in 1949 when the predecessor of the present subsection (d) came into being." *Thermtron*, 423 U.S. at 346–49 (emphasis added). Thus, Lloyd's' attempt to rely on a one year aberration as the basis for its Congressional "acquiescence" argument is without merit.

Moreover, "it cannot be inferred that Congress' failure to act shows that it approved the ruling." *Kimble*, 135 S.Ct. at 2418 (Alito, J., dissenting). First, it is undisputed that Congress did not "rebuff" bills that would have corrected *Thermtron's* statutory interpretation of § 1447(d). *Kimble*, 135 S.Ct. at 2410. On the contrary, the bills submitted to Congress for consideration to amend § 1447(d) did not

contain language that would have overturned *Thermtron*.[1] Second, "it is hard to imagine new statutory language accomplishing the desired result any more clearly than § 1447(d) already does." *Osborn*, 549 U.S. at 268–69 (Scalia, J., dissenting). "[W]e do not give super-duper protection to decisions that do not actually interpret a statute." *Kimble*, 135 S.Ct. at 2418 (Alito, J., dissenting). Third, Congress' actions as to § 1447(d) post-*Thermtron* demonstrate that Congress has understood that, if there is an exception to § 1447(d)'s plain language, then Congress must explicitly set forth that exception, and not allude to an exception by requiring courts to read § 1447(d) *in pari materia* with § 1447(c). *See Powerex*, 551 U.S. at 237 (describing how Congress exempted 1442 and § 1443 removals explicitly in the text of §1447(d) as well as in separate statutes).

Thus, Lloyd's puts too much weight on Congress' inaction with respect to the already plain language of § 1447(d) prohibiting appellate review of remand orders. "When a precedent is based on a judge-made rule and is not grounded in anything that Congress has enacted, we cannot 'properly place on the shoulders of Congress' the entire burden of correcting 'the Court's own error.'" *Kimble*, 135 S.Ct. at 2418 (Alito, J., dissenting) (*citing Girouard*, 328 U.S. at 69–70).

II. This case presents the ideal vehicle for overturning Thermtron.

The parties agree that, absent *Thermtron*, there would be no appellate review of the underlying remand order

1. *See* H.R. 4807, 100th Cong. (1988); S.1284, 102nd Cong. (1991); S.533, 104th Cong. (1996); H.R. 368, 112th Cong. (2011).

declining to exercise supplemental jurisdiction. Instead, in this case, as in countless others post-*Thermtron*, "[d]efendants who wish to delay litigation on the merits by contesting remand and other collateral orders have shown a marked propensity to exploit opportunities for as-of-right appellate review." James E. Pfander, *Collateral Review of Remand Orders: Reasserting the Supervisory Role of the Supreme Court*, 159 U. Pa. L. Rev. 493, 496 (2011).

This pure question of law cleanly presented is an issue of widespread practical importance. "[W]ith great power there must also come—great responsibility." *Kimble*, 135 S.Ct. at 2415 (*citing* S. Lee and S. Ditko, Amazing Fantasy No. 15: "Spider-Man," p. 13 (1962)). While *stare decisis* requires that this power be exercised sparingly, no precepts are present that would compel "sticking" with the "wrong decision[]" made in *Thermtron*. *Kimble*, 135 S.Ct. at 2409. It is time for *Thermtron* to have spun its last web.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully Submitted,

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