No. 15-456

IN THE

Supreme Court of the United States

JOANNIE JEFFERSON, *et al.*,

Petitioners,

v.

CERTAIN UNDERWRITERS AT LLOYD'S LONDON,

Respondent.

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

BRIEF IN OPPOSITION

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OBJECTIONS TO PETITIONER'S QUESTIONS PRESENTED

I. In the four decades since this Court decided *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), Congress has not disturbed the limited judicial review set forth in *Thermtron* and its progeny even though it has amended 28 u.s.c. § 1447 four times since 1976.

II. There is no conflict amongst the Circuits that requires clarification from this Court concerning the application of *Thermtron* and its progeny by the Courts of Appeals.

III. As *Thermtron* and its progeny have remained controlling precedent for almost forty years, *stare decisis* precludes the relief sought by petitioners.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

To the best knowledge of Respondent, Certain Underwriters at Lloyd's, London, no subscribing member to any Umbrella Liability Policy allegedly issued to Lykes Bros. Steamship Company, Inc. is a corporation.

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STATEMENT OF THE CASE

Respondents, Certain Underwriters at Lloyds, London ("Underwriters"), were named by Petitioners as direct action defendants in this multi-party asbestos lawsuit for allegedly having provided excess employers liability insurance to Lykes Bros. Steamship Company, Inc. ("Lykes"). After Petitioners settled their claims against all defendants except Underwriters and after the District Court had exercised supplemental jurisdiction over this case for more than a year (up until two weeks before a scheduled jury trial was to begin), the District Court *sua sponte* remanded the case to state court. In remanding, the District Court abused its discretion by declining to continue exercising the supplemental jurisdiction it had maintained over this case for more than a year, moreover, a case that had been litigated in the federal courts for over four years.

In 2007, Petitioners filed this asbestos lawsuit in Louisiana state court. In addition to numerous other defendants, Petitioners named as direct action defendants Hartford Accident and Indemnity Company ("Hartford"), as an alleged liability insurer for Lykes, and Underwriters as an alleged excess insurer for Lykes. In 2010, two entities owned by the South African government, Industrial Development Corporation of South Africa, Ltd. (IDC) and South African Marine, were added as third-party defendants and this case was removed to federal court pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330 and 1441(d).[1] Following removal, this case was transferred to the United States District Court for

1. *See* CA Rec. 37-40.

the Eastern District of Pennsylvania as part of the MDL-875 panel for asbestos litigation, the Honorable Eduardo C. Robreno presiding.[2]

On August 20, 2012, Judge Robreno granted IDC's and South African Marine's Motions for Summary Judgment and dismissed the claims against these parties.[3] Since only state law claims remained, Petitioners then orally moved to remand this case to state court.[4] Judge Robreno denied their motion and properly "determined that, in light of the posture of this case, and in the interest of judicial economy, it will retain jurisdiction over this case by way of supplemental jurisdiction."[5] On January 21, 2014, this case was transferred back to the United States District Court for the Eastern District of Louisiana for trial.

Petitioners did not re-urge their motion to remand this case to state court when it was transferred from the MDL court to the Eastern District of Louisiana. The District Court continued to exercise supplemental jurisdiction over this case for over a year. In fact, in its June 27, 2014 Order issued after a preliminary Pre-Trial Conference, the District Court specifically found jurisdiction and venue were established.[6]

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2. *See* CA Rec. 1165-1166, and 1764.

3. *See* CA Rec. 1759.

4. *See* CA Rec. 1759.

5. *See* CA Rec. 1759.

6. *See* CA Rec. 21.

Petitioners ultimately settled their claims against all defendants except for Underwriters.[7] The District Court dismissed Petitioners' claims against the settled parties and, thereafter, on February 13, 2015, *sua sponte* reversed its position on the propriety of exercising supplemental jurisdiction over Plaintiffs' state law claims and remanded this case to state court.[8] Because the District Court abused its discretion by remanding this case to state court, Underwriters filed its Notice of Appeal. The Fifth Circuit Court of Appeals denied Petitioners' Motion to Dismiss Underwriters' appeal for want of jurisdiction. Respondents' appeal, which has been briefed on the merits, is pending before the Fifth Circuit. Thereafter, Petitioners filed their Petition for a Writ of Certiorari in this Court. Underwriters oppose Petitioners' Petition.

REASONS FOR DENYING THE PETITION

I. Introduction

On December 1, 2010, this case was removed to federal court pursuant to the original jurisdiction conferred by the Foreign Sovereign Immunities Act. On August 20, 2012, the MDL District Court exercised supplemental jurisdiction over Petitioners' remaining state law claims after it granted summary judgment to the foreign entities and dismissed the third party claims against them. Until February 13, 2015, ten days before a two-week jury trial was scheduled to commence, this matter was litigated in federal court pursuant to the District Court's supplemental jurisdiction over this case. At that time, the

7. *See* CA Rec. 5611-5612.

8. *See* CA Rec. 5613-5614.

District Court *sua sponte* remanded this case to state court after dismissing Petitioners' claims against all defendants but Underwriters.

Appellate review of the District Court's Order remanding this case on the eve of trial does not implicate any Congressional concerns identified in *Thermtron* regarding potential delays in trying remanded cases caused "by protracted litigation of jurisdictional issues." *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 351 (1976). Indeed, this case was on the eve of trial when it was improvidently remanded. Clearly, Underwriters' appeal of the District Court's Order remanding this case to state court involves an appropriate issue over which the Court of Appeals should exercise its limited judicial review.

II. No Conflict Exists in the Circuits

In *Thermtron*, this Court held that 28 U.S.C. § 1447(d) must be read *in pari materia* with 28 U.S.C. § 1447(c), "thus limiting the remands barred from appellate review by § 1447(d) to those that are based on a ground specified in § 1447(c)." *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 638 (2009) (citing *Thermtron*, 423 U.S. at 345-346; *Powerex Corp. v. Reliant Energy Services, Inc.*, 551 U.S. 224, 229 (2007); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711–712 (1996); *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1995)).

There exists no conflict between the Circuits as a result of how the Courts of Appeals have exercised the limited judicial review over remand orders that is

permitted by *Thermtron* and its progeny. *See Com. of Mass. v. V & M Mgmt., Inc.*, 929 F.2d 830, 833 (1st Cir. 1991) ("Because the order to remand was not issued pursuant to § 1447(c), the bar to appellate review of such orders found in § 1447(d) is, as defendants suggest, simply inapplicable."); *Williams v. Beemiller, Inc.*, 527 F.3d 259, 263 (2d Cir. 2008); *Mitskovski v. Buffalo & Fort Erie Pub. Bridge Auth.*, 435 F.3d 127, 131-32 (2d Cir. 2006) ("We understand *Hamilton [v. Aetna Life and Casualty Co.*, 5 F.3d 642, 644 (2d Cir.1993)] to permit review not only of a remand order issued by a district court on its own motion more than 30 days after removal in the absence of a party's timely remand motion, but also of a remand order issued by a district court on a ground identified by a district court on its own motion more than 30 days after removal even though a party has filed a timely motion to remand.); *Ariel Land Owners, Inc. v. Dring*, 351 F.3d 611, 613 (3d Cir. 2003) (holding "Section 1447(d), however, does not bar review of 'remand orders issued outside the authority granted to District Courts under section 1447(c).'" and quoting *In re FMC Corp. Packaging Sys. Div.*, 208 F.3d 445, 448 (3d Cir. 2000)); *Ellenburg v. Spartan Motors Chassis, Inc.*, 519 F.3d 192, 196 (4th Cir. 2008) (holding "the protection against delay caused by review is tightly circumscribed to cover only remand orders within the scope of 28 U.S.C. § 1447(c), based on (1) a district court's lack of subject matter jurisdiction or (2) a defect in removal "other than lack of subject matter jurisdiction" that was raised by the motion of a party within 30 days after the notice of removal was filed."); *Jamison v. Wiley*, 14 F.3d 222, 231 (4th Cir. 1994) (holding "the Supreme Court has declined to give § 1447(d) such a literal meaning, holding instead that it insulates from review only those remand orders that are based on grounds specified in 28 U.S.C.

§ 1447(c)"); *Vaillancourt v. PNC Bank, Nat'l Ass'n.*, 771 F.3d 843, 846 (5th Cir. 2014); *Cuevas v. BAC Home Loans Servicing, LP*, 648 F. 3d 242 (5th Cir. 2011); *Adair v. Lease Partners, Inc.*, 587 F. 3d 238 (5th Cir. 2009); *Schexnayder v. Entergy La., Inc.*, 394 F.3d 280, 283 (5th Cir. 2004) (holding "a remand under § 1447 is reviewable if the district court remanded for a reason other than those listed in § 1447(c)."); *Gamel v. City of Cincinnati*, 625 F.3d 949, 951 (6th Cir. 2010) (holding "A district court's decision declining to exercise supplemental jurisdiction to hear a plaintiff's state-law claims and remanding those claims to state court is an appealable decision that we review under the abuse-of-discretion standard."); *Ball v. City of Indianapolis*, 760 F.3d 636, 641 (7th Cir. 2014) (holding "The bar does not govern cases like this one, in which there is no dispute that the removal was proper under section 1446, and the remand resulted from the district court's later discretionary decision to relinquish its supplemental jurisdiction over Ball's remaining state-law claim pursuant to 28 U.S.C. § 1367(c) once the federal claims were disposed of."); *Pub. Sch. Ret. Sys. of Missouri v. State St. Bank & Trust Co.*, 640 F.3d 821, 825 (8th Cir. 2011) (holding "§ 1447(d) only bars appellate review of a district court's remand order that is based on a ground specified in 28 U.S.C. § 1447(c)."); *Harmston v. City & Cty. of San Francisco*, 627 F.3d 1273, 1277 (9th Cir. 2010) (holding "if a district court remands a case to state court for any reason other than lack of subject matter jurisdiction, its remand order is appealable under 28 U.S.C. § 1291."); *Kelton Arms Condo. Owners Ass'n, Inc. v. Homestead Ins. Co.*, 346 F.3d 1190, 1191 (9th Cir. 2003); *Dalrymple v. Grand River Dam Auth.*, 145 F.3d 1180, 1184 (10th Cir.1998) (holding "the application of § 1447(d) is not as broad as its language suggests. Appellate

review is barred by § 1447(d) only when the district court remands on grounds permitted by § 1447(c)."); *Whole Health Chiropractic & Wellness, Inc. v. Humana Med. Plan, Inc.*, 254 F.3d 1317, 1319 (11th Cir. 2001) (holding "A remand order is reviewable if and only if it is openly based on grounds other than (1) lack of district court subject matter jurisdiction; or (2) a motion to remand the case filed within 30 days of the notice of removal which is based upon a defect in the removal procedure." and quoting *In re: Bethesda Mem'l Hosp., Inc.*, 123 F.3d 1407, 1409 (11th Cir. 1997)).

Given these holdings across the circuit courts, this Court does not need to clarify appellate court jurisprudence regarding the limited appellate review of remand orders set forth in this Court's interpretation of § 1447 in *Thermtron* and its progeny.

III. Congress has tacitly approved *Thermtron* and its progeny

While the Constitution does not provide defendants an absolute right to remove state court cases to federal court, Congress has recognized such a right since 1789. *See* Judiciary Act, ch. 20, § 12, I Stat. 79-80 (1789) (current version at 28 U.S.C. § 1441); *see also Thermtron*, 423 U.S. at 344. It was not until 1875, however, that Congress enacted a law permitting judicial review of Orders remanding cases to state court. *See* Judiciary Act, ch. 137, § 5, 18(3) Stat. 472 (1875) (current version at 28 U.S.C. §1447(d)). Congress then reversed course on this issue in 1887 by explicitly stating that no appeal or writ of error would be allowed from decisions remanding cases to state court. *See* Judiciary Act, ch. 373, § 2, 24 Stat. 553 (1887)

(current version at 28 U.S.C. § 1447 (1988)). Congress did not revise its stance on the reviewability of remand orders again until 1948, when it enacted 28 U.S.C. § 1447, thereby allowing limited appellate review of the kind sought by Underwriters.[9]

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9. Section 1447 states:

> (a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.
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> (b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.
>
> (c) 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. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.
>
> (d) 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 1442 or 1443 of this title shall be reviewable by appeal or otherwise.

Since this Court decided *Thermtron* in 1976, Congress has amended § 1447 on four separate occasions. *See* 28 U.S.C.A. § 1447 (West) (citing Nov. 19, 1988, Pub.L. 100-702, Title X, § 1016(c), 102 Stat. 4670; Dec. 9, 1991, Pub.L. 102-198, § 10(b), 105 Stat. 1626; Oct. 1, 1996, Pub.L. 104-219, § 1, 110 Stat. 3022; Pub.L. 112-51, § 2(d), Nov. 9, 2011, 125 Stat. 546). Congress has not disturbed the statutory language that established limited judicial review of remand orders as interpreted by *Thermtron* and its progeny despite the suggestion by members of this Court that experts should examine § 1447 "with an eye toward determining whether statutory revision is appropriate." *Carlsbad*, 556 U.S. at 645 (Breyer, J. and Souter, J. concurring). Congress's refusal to act in the four decades since this Court issued *Thermtron* suggests its tacit approval of the procedures put in place that permit litigants to seek appellate review of remand orders in cases such as this one. Accordingly, as Congress has not seen fit to act, this Court should not grant this Petition.

IV. As *Thermtron* and its progeny have remained controlling precedent for almost forty years, *stare decisis* precludes the relief sought by Petitioners.

As this Court recently held in *Kimble v. Marvel Entm't, LLC*,

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> (e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

28 U.S.C.A. § 1447 (West)

Respecting *stare decisis* means sticking to some wrong decisions. The doctrine rests on the idea, as Justice Brandeis famously wrote, that it is usually "more important that the applicable rule of law be settled than that it be settled right." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406, 52 S.Ct. 443, 76 L.Ed. 815 (1932) (dissenting opinion). Indeed, *stare decisis* has consequence only to the extent it sustains incorrect decisions; correct judgments have no need for that principle to prop them up. Accordingly, an argument that we got something wrong—even a good argument to that effect—cannot by itself justify scrapping settled precedent. Or otherwise said, it is not alone sufficient that we would decide a case differently now than we did then. To reverse course, we require as well what we have termed a "special justification"—over and above the belief "that the precedent was wrongly decided." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. ––––, ––––, 134 S.Ct. 2398, 2407, 189 L.Ed.2d 339 (2014).

What is more, *stare decisis* carries enhanced force when a decision, like *Brulotte*, interprets a statute. Then, unlike in a constitutional case, critics of our ruling can take their objections across the street, and Congress can correct any mistake it sees. *See, e.g., Patterson v. McLean Credit Union*, 491 U.S. 164, 172–173, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989). That is true, contrary to the dissent's view, see post, at 2417 – 2418 (opinion of ALITO, J.), regardless

> whether our decision focused only on statutory text or also relied, as *Brulotte* did, on the policies and purposes animating the law. *See, e.g., Bilski v. Kappos*, 561 U.S. 593, 601–602, 130 S.Ct. 3218, 177 L.Ed.2d 792 (2010). Indeed, we apply statutory *stare decisis* even when a decision has announced a "judicially created doctrine" designed to implement a federal statute. *Halliburton*, 573 U.S., at ––––, 134 S.Ct., at 2411. All our interpretive decisions, in whatever way reasoned, effectively become part of the statutory scheme, subject (just like the rest) to congressional change. Absent special justification, they are balls tossed into Congress's court, for acceptance or not as that branch elects.

Id., --- U.S. ---, 135 S. Ct. 2401, 2409, 192 L. Ed. 2d 463 (2015).

As in *Kimble*, there exists no special justification for this Court to reverse *Thermtron* in this case "over and above the belief that the precedent was wrongly decided." *Id.* (citation omitted). While *Thermtron* has been criticized by members of this Court, "*stare decisis* compels the conclusion that the District Court's remand order is reviewable[.]" *Carlsbad*, 556 U.S. at 642 (Stevens, J. concurring).

V. Conclusion

As members of this Court have noted, any issue raised by this Court's interpretation of 28 U.S.C. § 1447 should be resolved by Congress. *See Carlsbad*, 556 U.S. at 645 (Breyer, J. and Souter, J. concurring). Yet, despite the fact it has amended this statute four times in the four decades since this Court decided *Thermtron*, Congress has chosen not to revise the statutory language interpreted in *Thermtron* and its progeny. Petitioners' Petition for a Writ of Certiorari requesting this Court to overrule *Thermtron* should, therefore, be denied.

Respectfully submitted,

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