NO.15-712

IN THE
SUPREME COURT OF THE UNITED STATES

ANNE MERCY KAKARALA

Petitioner

v.

WELLS FARGO BANK N.A.

Respondent

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

REPLY TO WELLS FARGO'S BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Petitioner Anne Mercy Kakarala respectfully replies to Wells Fargo's Brief in Opposition as follows.

I. RESPONDENT AVOIDS THE JUDICIAL AND SCHOLARLY CRITICISM, AND JUDICIAL CONFUSION, CONCERNING *THERMTRON*, PREFERRING INSTEAD TO PRESENT STRAWMAN ARGUMENTS AND TO ARGUE AN UNSUPPORTED ALTERNATE REALITY OF *THERMTRON* AS MERELY BEING A SIMPLE EASY-TO-FOLLOW RULE OF SETTLED LAW.

Respondent Wells Fargo merely presents inconsistent and strawman arguments, without truly addressing the sources cited in the Petition for Writ of Certiorari, which note in brief the criticism, problems or issues with *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336 (1976) ("*Thermtron*"), and its progeny.

Indeed, despite the concern and perspectives about the plain statutory language that have been previously expressed by members of this very Court, as set forth in the Petition for Writ of Certiorari, Respondent instead argues that *Thermtron* and its progeny are merely applications of a simple rule and claims that the rule has not been so unduly criticized as described in the Petition for Writ of Certiorari.

Respondent steps onto a plank over troubled legal waters, arguing that because no other Justice expressly joined in Justice Scalia's view in *Carlsbad Tech., Inc. v.*

HIF Bio, Inc., 556 U.S. 635 (2009) ("*Carlsbad*"), where he stated "*Thremtron* was questionable in its day and is ripe for reconsideration….", that this means Petitioner Kakarala's argument was "joined" (rejected) "in 2009, and no other member of this Court expressed a like view." Respondent also suggests this means the Court's view is that the law is "sufficiently simple and workable that casting aside decades of settled law would create more instability than it would resolve."(Brief in Opposition, at 8-9.) With these claims, however, Respondent figuratively steps off the plank and into the water with this line of argument.

First, this Court undoubtedly recalls that the issues for which certiorari was sought and granted in *Carlsbad* in 2009 did not present the question squarely sought by the current Petition. Thus, the claim that Petitioner Kakarala's issue was essentially rejected in *Carlsbad* because no other Justice expressly stated agreement with Justice Scalia's view that *Thermtron* is ripe for reconsideration — evaporates because overruling *Thermtron* was not sought on certiorari in *Carlsbad* and not presented for decision. Furthermore, the oral argument in *Carlsbad* underscores this point and also illustrates other factors in support of granting certiorari, contrary to the Respondent's claim that overruling *Thermtron* would create uncertainty.

At oral argument in *Carlsbad*, Justice Ginsberg explained that the Court in *Thermtr*on had gone against the statutory language of 28 U.S.C. § 1447(d) in its absolute terms, presented a rationale for the new test, and "read the statute to say less than it did." (Oral Argument Transcript in *Carlsbad*, Case No. 07-1437, Feb. 24th, 2009, lines 1-9.)

In reply, petitioner's counsel in *Carlsbad* orally argued this was the exact holding of *Thermtron*, and that they were "not going to construe that so woodenly to allow a district court to abdicate its mandatory jurisdiction." (Oral Argument Transcript in Case No. 07-1437, dated February 24, 2009, lines 10-13.)

Chief Justice Roberts then interjected and stated: "Well, 'woodenly' is a bit much. I mean, they're going to read it not to say what it says." (Id. at page 14, lines 14-15.) The Chief Justice asked if limiting *Thermtron* to its unusual situation of a district court simply remanding and refusing to hear a case because it was too busy with other matters, would simply resolve the case in *Carlsbad*, and suggesting this would also resolve a concern raised by Justice Ginsberg about the rule not allowing for the appeal of "big" issues like subject matter jurisdiction, "but you do get to appeal picayune" issues. (*Id.* at page 14, lines 16-25, and page 15, line 1.)

The petitioner's counsel in *Carlsbad* responded, *inter alia*, that the rule was working, and that it would be a large departure to go back and modify what the courts of appeal had adopted as a workable framework to solve these kinds of problems. (*Id.* at page 15, lines 2-19.)

In response, Justice Ginsberg explained that one clear way to do this would be to overrule *Thermtron*:

> JUSTICE GINSBURG: Well, one clear way to do it would be to overrule *Thermtron*, but neither party has asked for that. You haven't asked for it and the other side hasn't asked for it.
>
> MR. RHODES: That's correct, Justice Ginsburg.

(*Id.* at page 15, lines 20-25.)

This oral argument exchange in *Carlsbad* shows several things. It shows that overruling *Thermtron* was not at issue in *Carlsbad*, undercutting Respondent's speculative claim that the current members of this Court are happy with *Thermtron* and believe the rule is a workable – or a correct – holding. Second, it shows that Chief Justice Robert's view may be that the Justices in *Thermtron* did not merely decline to interpret the statute "woodenly" but instead that they "they're going to read it not to say what it says", and even Justice Ginberg's comments seem to acknowledge that the *Thermtron* holding went against the absolute words of the statute.

Respondent's claim about the lack of additional discussion in *Carlsbad* by other justices about overruling *Thermtron* is speculative, and the oral argument transcript suggests that other Justices (aside from Justice Scalia, or even Justice Stewart's remarks who said he would hold differently if considering the issue on a clean slate) believe *Thermtron* is not so easily reconciled with § 1447(d).

Furthermore, the oral argument exchange and comments by Justice Ginsberg suggest that overruling *Thermtron* would not lead to disarray among the circuits, and instead would be a clear way to resolve such assertions. As such, Respondent's claim that overruling *Thermtron* would create judicial instability is simply not supported.

Finally, Respondent's arguments that the rule is simple and workable are directly inconsistent with its own admission that even Justices Breyer and Souter suggested a panel of experts and Congressional revision is in order. The Petition has noted the Justices' conclusion that the

rule leads to inconsistent and anomalous results. Respondent's own citation to these Justices' suggestion implicitly admits that there is a problem with the rule, while inconsistently claiming the rule is simple and workable.

Last, Respondent relies on Congressional inaction on the appellate bar in § 1447(d) as potential evidence that the judicial construction of *Thermtron* is correct, and has been implicitly ratified by Congress, but this view is not well taken. Congress recently amended the removal statutes in 2011, for the purpose of clarifying the removal process (*H. Rept. 112-10*, *112th Congress* (2011-2012), February 11, 2011, As Reported by the Judiciary Committee [concerning H.R. 394, signed and enacted 12/7/2011]), but there was no mention of appellate review in the bill or the truncated process by which changes were adopted. Nothing suggests members of Congress considered, much less ratified, the provision barring appellate review. The bill was designed to be limited and to secure passage. Prior to its introduction, there was an informal process by the Administrative Office of the Courts with various scholars and stakeholders designed to vet, identify and delete any provisions in advance that were deemed controversial. (*Id.* at pages 2-3.) This relatively recent action on removal was intentionally limited, and measures taken so as not to have debate on a full range of issues, or amendments (though some minor, mostly technical Senate amendments were accepted), and appellate review issues were not part of the bill or process.

Certiorari should be granted for the reasons stated in the initial Petition and for the reasons stated herein.

II. RESPONDENT INGORES THE JUDICIAL AND SCHOLARLY CRITICISM OF *THERMTRON*.

Respondent unsuccessfully tries to characterize some of the cases cited in the Petition as "an attempt to create the appearance of 'confusion'", while Respondent quibbles about how those cases should be viewed. (Brief in Opposition at 11.) Respondent's effort to distract fails.

Respondent refuses to address the fact that a circuit court emphasized: "'Straightforward' is about the last word judges attach to § 1447(d) these days…." *In re Amoco Pretroleum Additives Co.*, 964 F.2d 706, 708 (7th Cir. 1992). Respondent similarly hides its head in the sand and declines to address law review articles cited, one expressly stating: "There is widespread judicial confusion regarding reviewability of remand orders." Thomas Lamprecht, *How Can it Be So Wrong When it Feels So Right? Appellate Review of Remand Orders Under the Securities Litigation Uniform Standards* Act, 50 Villanova L. Rev. 305 (2005).

Aside from the judicial views and articles cited, other scholars have argued *Thermtron* created a problematic test for lower courts to apply. Deborah J. Challener & John B. Howell, III, *Remand and Appellate Review When a District Court Declines to Exercise Supplemental Jurisdiction under 28 U.S.C. Sec. 1367(C)*, 81 Temp. L. Rev. 1067, fn. 69 (2008), which noted criticism of *Thermtron*, and cited, *inter alia*, Justice Rehnquist's dissent, and described the law review article of Rhonda Wasserman, *Rethinking Review of Remands: Proposed Amendments to the Federal Removal Statute*, 43 EMORY L.J. 83, 115-119 (1994), as criticism:

> suggesting that [the] *Thermtron* Court manipulated precedent to reach its conclusion that § 1447(d) applies only to remands under § 1447(c), **arguing that *Thermtron* Court created [a] "test for reviewability of remand orders" that is problematic for lower courts to appl**y, and contending that *Thermtron* is difficult to square with Supreme Court's later decision in *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343 (1988)). (Emphasis added.)

Indeed, Respondent's Brief in Opposition is notable for what it ignores and refuses to discuss. Respondent's silence on these issues demonstrates that Respondent is refusing to consider the elephant in the living room, much less acknowledge its existence anywhere. Certiorari should be granted for the reasons stated here and in the Petition.

III. RESPONDENT'S CLAIMED 'CORRECTING' OF THE RECORD FALLS LIKE A HOUSE OF CARDS DUE TO THE RECORD ITSELF; ALSO, THE SECOND ISSUE IS FAIRLY PRESENTED.

Respondent, while purporting to "correct" the record pursuant to Rule 15, instead mischaracterizes the record. In reality, Respondent seeks to cloud this Court's vision by attempting to frame the second issue as a factual dispute. Furthermore, the second issue is fairly presented both on the record and as presented before the Ninth Circuit.

Simply put, the record supports Petitioner's arguments, despite Respondent's strained efforts to claim

otherwise. The record speaks for itself, and most of the relevant excerpts are in the Appendix to the Petition.

Petitioner argued how Wells Fargo abused the process in its removal, and raised the arguments presented as the second issue for certiorari, to the Ninth Circuit.

However, the Ninth Circuit, concluded Petitioner when *pro se* had waived any arguments concerning how and when and why removal was effected because they were not raised in her *pro se* Motion for Remand. But the *pro se* Petitioner had argued that removal was abusive and dilatory, for purposes of harassment and delay, but the motion was ignored by the District Court. Thereafter, she had no opportunity when *pro se* to further explain the circumstances, which she had indicated she would present.

Thus, although the Ninth Circuit itself made no factual findings about whether Wells Fargo abused the process and engaged in forum-shopping, Wells Fargo now disingenuously and wrongly claims Petitioner's factual descriptions and conclusions from the record are incorrect.

The record shows Petitioner requested in state trial court to amend her Complaint and attached a proposed amended complaint that included federal issues. Wells Fargo indicated that it would file a motion to dismiss for failure to state a claim, but did not object to the amendment. The state trial judge issued a scheduling order with a jury trial date, obviously believing that the case was going to continue to be litigated in state court.

Despite Respondent's stretch to claim that it did not say it intended to respond *in state court*, this was where the case was being litigated, and Respondent informed the court it did not object to the filing of the amended complaint and would file a motion to dismiss for failure to

state a claim. App. 24a-24b. Wells Fargo did not state it would remove, even though it was known by the parties and judge that the new allegations would include federal claims, since the proposed amended complaint was attached. App. 22a.

In a misguided effort to exonerate itself from its prior conduct, Wells Fargo now unfortunately seeks to mislead this Court by suggesting that its state court Response to the Motion to Amend did not mean what it said.

Just after receiving the court order definitively setting a jury trial date, Wells Fargo removed the case, after litigating in state court for more than half of a year while the parties were diverse.

Respondent points to required pre-trial filings that asked for trial dates as evidence suggesting Wells Fargo was not seeking to abuse the process by removing after the court set a trial date. Although both parties requested trial dates in prior pre-trial memorandums, it was not until the state court set a trial date that Respondent removed.

The underlying salient point being, however, that Respondent could have and should have removed at the earliest opportunity, which would have been 30 days after the original Complaint was filed in state court in the year prior, as the parties were completely diverse at that time. A notice of removal is proper if filed within thirty days from the date when the case qualifies for federal jurisdiction. *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 68-69 (1996); 28 U.S.C. § 1446(b). A defendant who does not remove within 30 days when the case is originally removable, does not get a second bite at the apple. *Caterpillar v. Lewis*, at 68-69 ("In a case not originally

removable," a defendant who receives a pleading satisfying removal requirements may remove) (emphasis added); *Harris v. Bankers Life and Cas. Co.*, 425 F.3d 689, 692-695 (9th Cir. 2005) (citing 28 U.S.C. § 1446(b)). Respondent's claim that the likely addition of Robins' Nest LLC in 2010 is why it did not remove for diversity ignores that the time of filing in 2009, controls.

Respondent selectively ignores the legal obligation to remove at its earliest opportunity – 30 days after the initial complaint was filed – and clings to self-serving assertions that are legally and factually unsupported.

Despite failing to remove when required at the outset when required, Wells Fargo argued to the Ninth Circuit that diversity existing after federal claims were dismissed mandated the District Court to hear the state claims no matter what, with no discretion to remand. This position added further insult to injury because Respondent ignored diversity in state court for half a year, and removed as an abuse of the process, which only delayed litigation on the merits. The record supports the view Respondent abandoned any claim of diversity, and that the removal was abusive, dilatory forum shopping.

Respondent's self-serving and incorrect description of its Response and conduct below ignores the record. There is no other reasonable reading of its Response to the Motion to Amend. Simply put, Wells Fargo consented to the filing of the proposed amendment, noting it would move for dismissal. After the case was set for trial, Respondent removed in an untimely manner on federal question grounds, citing the proposed amendment.

This Court should clarify when a District Court may remand a case where a party improperly invokes removal

jurisdiction to forum shop, after previously consenting to state jurisdiction and litigating in state court when diversity already existed in state court since the outset.

In its unsuccessful effort to recast the second issue as factually erroneous and not fairly presented, Respondent declines to provide any substantive response to the second issue for certiorari, while mischaracterizing the record before the Court. Certiorari should be granted.

IV. THE CASE PRESENTS THE APPROPRIATE OPPORTUNITY TO REVISIT *THERMTRON*.

Finally, Respondent revisits the first issue, as to whether *Thermtron* should be reconsidered and overruled, suggesting this is not the correct case to do so. Petitioner replies, if not now, when? The issue is squarely presented.

The four typical considerations this Court considers in whether to overrule its own precedent are met here. See generally, *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (workability of rule at issue, public reliance, changes in law, and changes in facts or perceived facts).

First, aside from Petitioner's respectfully submitted view that *Thermtron* is erroneous and cannot be squared with the statutory language, the *Thermtron* rule is unworkable and problematic. Second, the public cannot be said to have relied on it, given the criticism which has issued over the years from courts, scholars, and members of this Court. And, the legal audience which has relied on the rule – circuit courts – are *required* to apply the rule. Third, the legal doctrine has had twists and turns as evidenced by this Court's consideration of subsequent cases cited in the Petition. Also, Congress has since passed only a limited set of revisions to removal laws, in a truncated

process designed not to consider all issues. See *H. Rept. 112-10, 112th Congress* (2011-2012), February 11, 2011, As Reported by the Judiciary Committee. Congress does not appear to be inclined to readily resolve a full range of issues that would include appellate review, and was more concerned about implementing non-controversial changes to the process at the District Court level. It is up to this Court to take action regarding the rule it created in 1976.

Fourth and finally, there are changes in facts because *Thermtron* has caused an increase in the workload of the federal appellate courts. There is also now a perception that *Thermtron* could have been decided *sui generis*, as a narrow case that could have been limited to say District Courts cannot merely remand a case simply because they believe they are too busy.

CONCLUSION

Petitioner respectfully asks the Court to grant certiorari. The time is ripe to reconsider *Thermtron*. This Court should also conclude that District Courts can remand state law claims under the circumstances herein.

Respectfully submitted this 8th of February, 2016,

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