

No. 21-481

**IN THE
SUPREME COURT OF THE UNITED STATES**

BETTY R. SHIPLEY,

Petitioner

v.

HELPING HANDS THERAPY AND SARAH BEAUGEZ,

Respondents

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Section 1447(c) of Title 28 of the United States Code 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 under [28 U.S.C. § 1446(a)].” The question presented is whether a district court exceeds its authority under Section 1447(c) by remanding a case to state court on the basis of a procedural defect first brought to the Court’s attention more than 30 days after removal.

CORPORATE DISCLOSURE STATEMENT

New Hope, LLC d/b/a Helping Hands Therapy is not a publicly traded corporation and no publicly traded corporation owns 10% or more of the stock of New Hope, LLC.

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INTRODUCTION

The petition in this case raises a narrow issue of law concerning when a procedural defect in the removal process must be raised in order to trigger a district court's authority under 28 U.S.C. § 1447(c) to remand a case to State court. Over the last 26 years, the Courts of Appeals have addressed this issue only three times. During that same time period, more than 780,000 cases have been removed to federal court. This issue is not central to removal jurisprudence and does not rise in importance to a level that merits this Court's attention.

Petitioner's reliance on the existence of a difference of opinion in the interpretation of Section 1447(c) among the three Courts of Appeals to have considered this issue does not change the calculus. While the reasoning employed by one Court of Appeals is inconsistent with the correct interpretation of Section 1447(c) adopted by the other two Courts of Appeals, the results of the cases are not inconsistent. The petition for a writ of certiorari, therefore, should be denied.

STATEMENT OF THE CASE

A. Proceedings in State Court

On October 12, 2017, Petitioner filed this action in state court, alleging negligence against Respondents, Helping Hands Therapy and Sarah Beaugez. Petitioner's Complaint failed to claim any specific amount of damages. (Pet. App. 11a-12a.) After answering the Complaint, Respondents issued multiple rounds of written discovery and even filed a

motion to compel in an attempt to determine the amount in controversy. (Pet. App. 12a-13a.) Petitioner refused to provide information regarding damages and sought to delay the hearing on the motion to compel until after October 12, 2018—the one-year deadline for removal. (*Id.*)

B. Proceedings in the District Court

On October 11, 2018, Respondents removed the case to federal court based on diversity jurisdiction. (Pet. App. at 11a-12a.) On November 8, 2018—28 days after removal—Petitioner filed a motion to remand based solely on the argument that the court lacked subject matter jurisdiction. (Pet. App. 13a-14a.) After Respondents filed their opposition to the motion to remand, Petitioner filed a reply brief on December 4, 2018 – 54 days after the case had been removed from state court. (Pet. App. 16a.) In this reply, Petitioner for the first time raised a claim that the Notice of Removal was untimely. (*Id.*)

The Magistrate Judge issued a Report and Recommendation that the Motion to Remand be denied. (Pet. App. 54a.) In doing so, the Magistrate Judge concluded that Petitioner had “failed to timely raise the timeliness of removal” and, thus, had “waived the timeliness argument.” (*Id.*)

Petitioner objected to the Report and Recommendation. (Pet. App. 17a.) The District Judge overruled the Magistrate Judge and issued a ruling granting Petitioner’s motion to remand. The District Court concluded that “a Plaintiff does not waive a procedural defect by failing to raise that issue in an otherwise timely motion to remand.” (Pet. App. 22a.) Although noting that Petitioner had “been less than

forthcoming about her damages pre-removal,” the District Court concluded that Respondents were on notice that the amount in controversy exceeded \$75,000 no later than August 31, 2018, and, thus, the notice of removal was untimely. (Pet. App. 31a-32a.)

C. Proceedings in the Court of Appeals

Respondents appealed the district court’s remand order to the Eleventh Circuit. Applying the plain text of Section 1447(c), the Eleventh Circuit concluded that “a remand order pursuant to § 1447(c) must be openly based on (1) lack of 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.” (Pet. App. 5a. (internal quotation marks omitted).) Noting that the remand order was not based on a lack of subject matter jurisdiction, the Eleventh Circuit identified the dispositive question: “whether the remand order is based on 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.” (Pet. App. 6a (internal quotation marks omitted).) Finding “[n]either [Petitioner]’s motion nor her reply brief was [a] motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction ... made within 30 days after the filing of the notice of removal,” the Eleventh Circuit concluded that the district court had exceeded its authority and vacated the remand order. (*Id.* (internal quotation marks omitted).)

ARGUMENT

A. The asserted conflict does not warrant review.

Petitioner fails to demonstrate the existence of a meaningful split of authority among the Courts of Appeals. Three Courts of Appeals have addressed whether a district court exceeds its authority under Section 1447(c) when it remands a case based on a procedural defect when the plaintiff fails to identify any procedural defect in a timely filed motion to remand only to raise a defect in a later filing. The Ninth and Eleventh Circuit Courts of Appeals concluded that such a remand order does exceed the district court's statutory authority. The Fifth Circuit, in a different factual context, concluded that the district court does have the statutory authority to issue such a remand order. While the Fifth Circuit's analysis diverges from the analysis of the Ninth and Eleventh Circuits, the result reached by the Fifth Circuit would also be the result under the interpretation of Section 1447(c) employed within the Ninth and Eleventh Circuits. In this situation, Petitioner has identified at most a shallow or nascent split of authority. Given time for this issue to further percolate within the lower federal courts, the purported split will likely resolve on its own.

1. a. In *Northern California District Council of Laborers v. Pittsburgh-Des Moines Steel Co.*, the plaintiff moved to remand based on non-procedural grounds. 69 F.3d 1034, 1035-36 (9th Cir. 1995). In its reply before the trial court, the plaintiff for the first time argued that remand of the case was proper based

on a procedural defect in the removal filing. *Id.* at 1037.

On appeal, the Ninth Circuit addressed “[t]he narrow question ... whether § 1447(c) requires that a defect in removal procedure be raised within 30 days after the filing of the removal petition ... or whether § 1447(c) permits a procedural defect to be raised after the 30-day period as long as the defect is raised in connection with a timely motion to remand.” *Id.* at 1037. The court concluded “that § 1447(c) prohibits a defect in removal procedure from being raised later than 30 days after the filing of the notice of removal, regardless of whether a timely remand motion has been filed.” *Id.* at 1038. Looking at the text of the statute, the court concluded that “the critical date is not when a motion to remand is filed, but when the moving party asserts a procedural defect as a basis for remand.” *Id.* Accordingly, “the district court had no authority to remand the case to the state court on the basis of a defect in removal procedure raised for the first time more than 30 days after the filing of the notice of removal.” *Id.*

b. In the decision below, the Eleventh Circuit addressed whether a district court exceeds its authority by remanding a case “based on a procedural defect in removal when (1) a motion to remand for lack of subject matter jurisdiction is filed within 30 days of the notice of removal, but (2) a procedural defect is not raised until after the 30-day statutory time limit.” (Pet. App. 2a.)

Like the Ninth Circuit, the Eleventh Circuit concluded that such an order exceeds the district court’s authority. Basing its analysis on “§ 1447(c)’s

plain text,” the court interpreted the statute “to mean that a remand order pursuant to § 1447(c) must be openly based on (1) lack of 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.” (Pet. App. 5a (internal quotation marks and citations omitted).) Because Petitioner did not file a “motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction ... made within 30 days after the filing of the notice of removal,” the Eleventh Circuit concluded that the district court’s remand order based on a procedural defect “exceeded its authority under §1447(c).” (Pet. App. 6a.)

2. In *BEPCO, L.P. v. Santa Fe Minerals, Inc.*, the Fifth Circuit’s analysis suggested that a district court has broader authority to consider procedural defects under Section 1447(c) than the interpretations adopted by the Eleventh and Ninth Circuits. 675 F.3d 466 (5th 2012). After reviewing the language of Section 1447(c), the court concluded, “On its face, Section 1447(c)'s 30-day requirement governs the timeliness of the filing of a motion to remand, not the time limit for raising removal defects.” *Id.* at 471. Concluding the statutory language to be unambiguous and requiring enforcement “according to its terms,” the court “reject[ed] any suggestion that the timing of the presentation of a removal defect—rather than the submission of the remand motion—is what matters for a timeliness analysis under Section 1447(c).” *Id.*

Under this interpretation, the Fifth Circuit found that the district court acted within its statutory authority when it entered a remand order based on a

procedural defect raised more than 30 days after the filing of the notice of removal. *Id.* at 470, 471.

3. Although Petitioner presents this Fifth Circuit holding as in conflict with its sister Circuits, the result in *BEPCO* would not have differed under the analysis adopted by the Ninth and Eleventh Circuits.

In *BEPCO*, the plaintiff identified a procedural defect in its reply brief in response to new information included in a defendant's brief in opposition to *BEPCO*'s motion to remand. *Id.* at 469. Specifically, in attempting to counter *BEPCO*'s argument that one of the defendants had been improperly joined to create federal jurisdiction, the defendant disclosed facts that clearly revealed for the first time that it had been a party to the suit more than 10 months before it removed the case. *Id.* In receipt of this new information, *BEPCO* raised the procedural defect of an untimely removal in its reply. *Id.*

Courts may treat new information disclosed in an opposition to a motion to remand as an amendment of the Notice of Removal. *See Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 773 (11th Cir. 2010); *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 840 n.1 (9th Cir. 2002); *cf. Willingham v. Morgan*, 395 U.S. 402, 408 n.3 (1969) (noting that “for purposes of this review it is proper to treat the removal petition as if it had been amended to include the relevant information contained in the later-filed affidavits”). When a notice of removal is amended, the time for filing a motion to remand resets. Charles Alan Wright, et al. *Federal Practice & Procedure* §3739.2 (Rev. 4th ed. 2021) (“Some courts also have extended the time limitation imposed by Section 1447(c) when defendants have amended their

notice of removal after expiration of the 30-day period for objecting to nonjurisdictional defects in the removal.”); *see also Williams v. Wal-Mart Stores, Inc.*, 534 F. Supp. 2d 1239, 1242 (M.D. Ala. 2008); *Maiden v. Liberty Mut. Ins. Co.*, No. 15-1479, 2016 WL 3227984, at *6 (C.D. Ill. June 3, 2016); *see also Jones v. City of Buffalo*, 867 F. Supp. 1155, 1166 (W.D.N.Y. 1994). Under this paradigm, BEPCO’s reply brief raising for the first time a procedural defect in the removal filing, would have been filed within 30 days of an amended notice of removal and, thus, timely. (See *BEPCO, LP v. Santa Fe Minerals, Inc.*, Case No. 1:11-cv-00132, U.S. District Court for W.D. La., Civil Docket Sheet (Reply at D.E. 155 filed seven days after Opposition to Remand at D.E. 141).)¹

The laws and procedures surrounding removal practice suggest that—at least in the circumstances that have been presented to the Fifth Circuit—the results would not have differed. If the narrow issue presented in this case is allowed to percolate, the lower courts will likely reach a consensus in the interpretation of Section 1447(c) when a plaintiff raises a procedural defect for the first time after the statutory deadline for filing a motion to remand. *Cf. Holbein v. TAW Enterprises, Inc.*, 983 F.3d 1049, 1053 (8th Cir. 2020) (addressing “forum-defendant rule” under Section 1447(c) and eliminating a long-existing “circuit split”). The petition should be denied to allow for additional time for this issue to percolate in the lower courts.

¹ Undersigned counsel accessed this docket sheet through Pacer utilizing the following link: https://ecf.lawd.uscourts.gov/cgi-bin/DktRpt.pl?126398752094879-L_1_0-1.

B. The decision below is correct.

In the decision below, the Eleventh Circuit correctly interpreted the plain meaning of Section 1447(c).

1. Section 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).” 28 U.S.C. § 1447.

The Eleventh Circuit applied the “plain text” of the statute. (Pet. App. 5a.) In doing so, it concluded that its task was “to determine whether the remand order is based on 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.” (Pet. App. 6a (internal quotation marks omitted).) This interpretation gives effect to each portion of the relevant statutory provision: (i) it requires a motion; (ii) to be filed within 30 days after filing of the notice of removal; and (iii) the motion must include a defect other than lack of subject matter jurisdiction.

Answering the question before it, the Eleventh Circuit determined that the district court’s “remand order is not based on such a motion.” (Pet. App. 6a.) Specifically, the court noted that Petitioner had met the first two criteria: “[Petitioner] filed a motion that was timely.” (*Id.*) The motion to remand, however, did not meet the third criterion of including a procedural defect: “it was based on lack of subject matter jurisdiction—not a procedural defect.” (*Id.*) Alternatively, the court suggested that were it to deem Petitioner’s reply a “motion to remand,” Petitioner would have complied with Section 1447(c)’s

first and third criteria but not the second: “Her reply was based on a procedural defect—timeliness of removal. But it was filed 54 days after the notice of removal, well outside the 30-day timeframe set forth by the statute.” (*Id.*)

In short, the Eleventh Circuit reached the only proper conclusion: “Neither [Petitioner]’s motion nor her reply brief was [a] motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction ... made within 30 days after the filing of the notice of removal.” (Pet. App. 6a. (quoting 28 U.S.C. § 1447).) And, “[t]herefore, when the district court remanded because of a procedural defect, it did not base its order ‘on grounds specified in § 1447(c).’” (Pet. App. 6a-7a (quoting *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996)).) In doing so, the district court exceeded its statutory authority. The Eleventh Circuit was correct.

2. In advancing the contrary position, Petitioner argues that Section 1447(c) merely “describes the vehicle a plaintiff must use to seek remand—a ‘motion’—and defines the timing requirement for such a motion—‘30 days after the filing of the notice of removal,’ unless the motion is based on a lack of subject matter jurisdiction.” (Pet. at 21.) But that interpretation renders meaningless Section 1447(c)’s inclusion of the phrase “on the basis of any defect,” violating the “cardinal principle of interpretation that courts must give effect, if possible, to every clause and word of a statute.” *E.g.*, *Liu v. SEC*, 140 S. Ct. 1936, 1948 (2020) (citation omitted). By contrast, the decision comports with that cardinal principle by interpreting the phrase “on the basis of any defect” to define what type of motion must be filed within 30

days: a motion “on the basis of any defect other than subject matter jurisdiction.” Petitioner’s request that this Court grant certiorari in order to re-write the statutory language should be denied.

C. The Petition does not present an important issue of federal law.

1. This Court’s jurisdiction is reserved for special and important issues of federal law. *See* SUP. CT. R. 10. “Special and important reasons imply a reach to a problem beyond the academic or the episodic.” *Rice v. Sioux City Mem’l Park Cemetery*, 349 U.S. 70, 74 (1955) (internal quotation marks omitted). The petition fails to present a problem beyond the academic or the episodic.

The petition addresses whether a district court exceeds its statutory authority when it remands a case based on a procedural defect even though the plaintiff failed to allege any procedural defect in a timely filed motion to remand. This issue rarely arises. Since at least 1995, the United States District Courts have received approximately 30,000 removals from State Courts each year. (*See* [jff 4.3 0930.2020.pdf \(uscourts.gov\)](#) (noting removal filings ranged from 30,178 to 39,901 for twelve month periods ending June 30, 1995 through September 30, 2020).) Thus, during the 26-year period from 1995 through 2020, more than 780,000 cases have been removed from State Courts. Of these more than three-quarter of a million cases, Petitioner has identified only three cases in which a Court of Appeals has addressed the narrow issue raised in the petition. This is the very definition of episodic.

2. In an effort to bolster the importance of her petition, Petitioner conflates the narrow issue raised in the petition (whether a district court exceeds its authority by remanding a case based on a procedural defect not raised in a motion filed within 30 days of removal) with the issue of the appellate review of remand orders more broadly. (*See* Pet. at 19.) Plaintiff, however, acknowledges and does not challenge the general principle that Section 1447(d)'s prohibition on appellate review applies only to remand orders issued on grounds authorized by § 1447(c). (*See* also Pet. at p. 10.) *See also Quackenbush*, 517 U.S. at 712 (holding that “only remands based on grounds specified in [28 U.S.C.] § 1447(c) are immune from review under [28 U.S.C.] § 1448(d).”); *see also Thermtron Prod., Inc. v. Hermansdorfer*, 423 U.S. 336, 351 (1976) (concluding that limitation on appellate review applies only to “any remand order issued on the grounds specified in s 1447(c)”).

Plaintiff suggests that declining to address her petition may “encourage forum shopping” and “threatens to introduce another element of gamesmanship into the removal process.” (Pet. at 19, 20.)² The paucity of case law related to this issue, however, demonstrates that this issue does not drive

² Petitioner was in a position to raise (even belatedly) a procedural defect in this case only due to her gamesmanship while her claim was pending in State Court. As the district court found, Petitioner was “less than forthcoming about her damages pre-removal, while arguing post-removal that the damages threshold had clearly been met since the Complaint was filed” and that, accordingly, “[r]eason suggests that to remand this action would be unfair.” (Pet. App. 31a.)

litigation decisions. Rather, this issue falls into the category of issues that are merely “intellectually interesting” without reaching “beyond the academic or the episodic.” *Rice*, 349 U.S. at 74.

Indeed, a defendant seeking to remove a case from state to federal court does not have a choice of federal courts in which to file the removal. Rather, a defendant “desiring to remove any civil action from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal” 28 U.S.C. § 1446. The plaintiff’s choice of venue, thus, defines the removal venue. And a plaintiff is in position to ensure that a remand order based on a procedural defect falls within the ambit of Section 1447(c)—and thus the district court’s authority. To do so, a plaintiff need only timely file a motion to remand that includes the alleged procedural defect(s) in the defendant’s removal filing.

D. This is the wrong case to address the interpretation of Section 1447(c).

To the extent the Court believes that the interpretation of Section 1447(c) merits this Court’s attention, this is the wrong case. The Eleventh Circuit correctly interpreted and applied the statute to find that the United States District Court for the Southern District of Alabama exceeded its authority when it entered its remand order. Granting certiorari only to affirm the Eleventh Circuit’s decision unnecessarily delays the resolution of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

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