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

REPLY BRIEF FOR THE PETITIONER

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PRELIMINARY STATEMENT

Respondents acknowledge that 28 U.S.C. § 1447(d) significantly restricts the jurisdiction of the court of appeals to review remand orders. Opp. at 12. Indeed, Respondents do not dispute that Section 1447(d) generally bars review "on appeal or otherwise," of any order "remanding a case to the State court from which it was removed," unless that order falls into two narrow, carefully crafted exceptions—for cases alleging violations of federal civil rights laws or for cases involving federal officers. *See* 28 U.S.C. § 1447(d). The statute's express bar on appellate jurisdiction is by design, and was specifically intended to prevent "prolonged litigation of questions of jurisdiction," *Powerex Corp. v. Reliant Energy Serv. Inc.*, 551 U.S. 224, 238 (2007) (quoting *United States v. Rice*, 327 U.S. 742, 751 (1946)), including in circumstances where the court of appeals would otherwise conclude that the district court committed reversible error, *id*. at 238–39 ("Appellate courts must take [section 1447(d)'s] jurisdictional prescription seriously, however pressing the merits of the appeal might seem.").

Respondents simultaneously assert that the circuit split on the question presented is "shallow or nascent," Opp. at 4, and that there is no conflict, *see* Opp. at 7 ("Although Petitioner presents [*BEPCO, L.P. v. Santa Fe Minerals, Inc.*, 675 F.3d 466 (5th Cir. 2012)] 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."). But both the Fifth and Eleventh Circuits expressly acknowledged the split, *see* Pet. App. 4a–5a ("Our sister circuits have split on this issue."); *BEP-*

CO, L.P., 675 F.3d at 470 n.4 ("We are unpersuaded by [the Ninth Circuit]'s Section 1447(c) analysis, and thus refuse to follow it."), and two other courts of appeals have acknowledged the confusion on this question, *see, e.g.*, *Pierpoint v. Barnes*, 94 F.3d 813, 820 (2d Cir. 1996); *Arnold Crossroads, LLC v. Gander Mountain Co.*, 751 F.3d 935, 941 (8th Cir. 2014) ("We therefore need not address the sometimes vexing question of whether an appellate court has jurisdiction over a remand based on a procedural flaw not timely raised."). This Court should grant certiorari to resolve this acknowledged, active split.

Respondents are also mistaken in their assertion that the question presented does not implicate an "important issue of federal law." *See* Opp. at 11. The decision below undermines the goal of Congress—and this Court—to ensure that "removal statutes . . . have uniform nationwide application." *See Grubbs v. General Elec. Credit Corp.*, 405 U.S. 699, 705 (1972). And the decision below will force Petitioner to litigate her state-law claims in federal court as opposed to her chosen court, which is the traditional forum for resolution of claims like hers.

The decision below not only improperly extends appellate jurisdiction beyond the text of the statute, it also undermines the effective and uniform operation of Section 1447(d). Certiorari is thus warranted.

ARGUMENT

A. There Is a Deep and Entrenched Circuit Split on the Question Presented.

Three courts of appeals have squarely addressed whether a court of appeals has jurisdiction under 28

U.S.C. § 1447(d) to review a remand order based on a procedural defect articulated on reply. Respondents dismiss this conflict as "shallow or nascent," Opp. at 4, or non-existent, Opp. at 7. Respondents misread these decisions.

The circuit split on the question presented is entrenched and active. Two of the three courts of appeals to decide the question have acknowledged a circuit split. The Eleventh Circuit, in the decision below, expressly acknowledged that the "circuits have split on this issue." Pet. App. 4a–5a. The Fifth Circuit similarly described the Ninth Circuit's contrary holding in *Northern California District Council of Laborers v. Pittsburg-Des Moines Steel Co.*, 69 F.3d 1034 (9th Cir. 1995), as "unpersuasive" and "thus refuse[d] to follow it." *BEPCO, L.P.*, 675 F.3d at 470 n.4. This split has not resolved on its own since it developed in 2012, and Respondents have not provided any reason to believe that any court is reconsidering its approach.

Respondents seek to harmonize these decisions by suggesting that the Fifth, Ninth, and Eleventh Circuits reached different outcomes because of the unique facts presented in each case. But the underlying facts, and the published opinion of each court of appeals, confirm that these three decisions reflect a fundamental disagreement about the effect of Section 1447(c)'s 30-day time limit on Section 1447(d)'s bar on appellate review.

In each of the three cases that define the split—*BEPCO*, *Pittsburg-Des Moines Steel*, and the decision below—the plaintiff filed a motion to remand within 30 days of the notice of removal. *BEPCO, L.P.*, 675 F.3d at 468–69; *Pittsburg-Des Moines Steel Co.*, 69 F.3d at 1037; Pet. App. 2a. In each of the three cas-

es, the plaintiff filed a reply in support of their motion to remand more than 30 days after the notice of removal, and raised a procedural defect not initially raised in the motion to remand. *BEPCO, L.P.*, 675 F.3d at 469; *Pittsburg-Des Moines Steel Co.*, 69 F.3d at 1037; Pet. App. 3a. And in each of the three cases, the district court ordered—on the basis of the procedural defect raised on reply—that the proceedings be remanded to state court. *BEPCO, L.P.*, 675 F.3d at 469; *Pittsburg-Des Moines Steel Co.*, 69 F.3d at 1036; Pet. App. 3a.

In *BEPCO*, the Fifth Circuit dismissed the appeal of the remand order for want of appellate jurisdiction. 675 F.3d at 472. In doing so, the Fifth Circuit held that whether "a removal defect is not raised by a plaintiff in the motion to remand, or is raised more than 30 days after removal, does not matter." *Id.* at 471. Where a plaintiff files a "timely motion to remand," and the district court relies "on a permissible Section 1447(c) ground," "the district court's remand order [is] unreviewable on appeal." *Id.* The court relied on "the unambiguous statutory language" to conclude that it is the timing of a remand motion, rather than the timing of the presentation of a removal defect, that "matters for a timeliness analysis under Section 1447(c)" and for purposes of determining appellate jurisdiction to review the order. *Id.*

In *Pittsburg-Des Moines Steel* and the decision below, the Ninth and Eleventh Circuits, respectively, vacated the district courts' remand orders. *Pittsburg-Des Moines Steel Co.*, 69 F.3d at 1038; Pet. App. 8a–9a. The Ninth Circuit held "that 1447(c) prohibits a defect in removal procedure from being raised more than 30 days after the filing of the notice of re-

moval, regardless of whether a timely remand motion has been filed." *Pittsburg-Des Moines Steel Co.*, 69 F.3d at 1038. It reasoned that the plain text of Section 1447(c) "requires that a defect in removal procedure be raised within 30 days after the filing of the removal petition," *id.* at 1037, and explained that the "purpose of the 30-day time limit is to resolve the choice of forum at the early stages of litigation, and to prevent the shuffling of cases between state and federal courts after the first thirty days," *id.* at 1038 (internal citations and quotations omitted). The Eleventh Circuit agreed. Pet. App. 5a–7a

Respondents seek to harmonize this clear split of authority by observing that the plaintiff's reply in *BEPCO* rested on a procedural defect that was first disclosed in the defendant's opposition to remand, and that courts "may treat new information disclosed in an opposition to a motion to remand as an amendment of the Notice of Removal." Opp. at 7 (citing *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); and *Willingham v. Morgan*, 395 U.S. 402, 408 n.3 (1969)). Under "this paradigm," Respondents suggest, the Fifth Circuit could have reasoned that Section 1447(c) was satisfied because the reply raising the procedural defect was filed within 30 days of the defendant's opposition to remand. Opp. at 8. But neither the district court nor the Fifth Circuit adopted, or even considered, that argument or any of the three inapposite cases on which Respondents rely. *See generally, BEPCO, L.P.*, 675 F.3d 466; *BEPCO, L.P. v. Santa Fe Minerals, Inc.*, Case No. 11-0132, 2011 WL 4499322 (W.D. La. April 25, 2011), *report and recommendation adopted at* 2011 WL 4499359 (W.D. La. Sept. 27,

2011). Indeed, the Fifth Circuit's decision was based entirely on an interpretation of Section 1447(c) that is at odds with the interpretation adopted by the Ninth and Eleventh Circuits.

Nor can Respondents show that this split, which concerns a fundamental question of federal jurisdiction, is unimportant. In addition to the three courts of appeals that have resolved the question presented, two others have acknowledged the confusion in this area, *see Pierpoint*, 94 F.3d at 820; *Arnold Crossroads, LLC*, 751 F.3d at 941, and a third has referenced the disagreement in passing, *see Harvey v. UTE Indian Tribe of the Uintah & Ouray Reservation*, 797 F.3d 800, 804 (10th Cir. 2015). The courts of appeals have also struggled more generally to consistently interpret and apply the appellate review bar embodied in Section 1447(d), resulting in confusion among the lower courts. *Compare City of Albuquerque v. Soto Enterprises, Inc.*, 864 F.3d 1089, 1097–98 (10th Cir. 2017) (remand order based on common law principles of waiver was reviewable under Section 1447(d)), *with Pierpoint*, 94 F.3d at 818 (Section 1447(d)'s appellate review bar applies to "*all* challenges to removal based on any impropriety . . . in the removal procedure").

This confusion extends to the question whether appellate review is appropriate when a district court grants a party's timely motion to remand, but relies on a procedural defect not asserted by the moving party. Two courts of appeals, including the Eleventh Circuit, have held that such orders are not reviewable, *see Velchez v. Carnival Corp.*, 331 F.3d 1207, 1210 (11th Cir. 2003); *Schexnayder v. Entergy Louisiana, Inc.*, 394 F.3d 280, 285 (5th Cir. 2004), while at least one other court has reached the opposite con-

clusion, *see Mitskovski v. Buffalo and Fort Erie Public Bridge Authority*, 435 F.3d 127, 131–32 (2d Cir. 2006) (remand order granting a timely motion to remand based on a procedural defect identified by the court was reviewable); *see also Carlsbad Technologies, Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 643 (2009) (Scalia, J., concurring) (describing the jurisprudence with respect to section 1447(d)'s appellate review bar as a "mess—entirely of our own making").

Respondents also ignore that this issue has arisen in federal courts with some regularity. *See, e.g.*, *Tennessee Gas Pipeline Co. v. Continental Cas. Co.*, 814 F. Supp. 1302, 1311 (M.D. La. 1993) ("As long as a motion to remand is timely filed within the thirty day period, the court should be allowed to determine *all* procedural defects which are raised while the motion to remand is pending."); *Novick v. Bankers Life Ins. Co. of New York*, 450 F. Supp. 2d 196, 197–98 (E.D.N.Y. 2006) (denying remand on the basis of a procedural defect raised on reply).

The confusion among the lower courts arises in a context in which uniformity is particularly important. *See Grubbs*, 405 U.S. at 705; *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 104 (1941). Allowing defendants in Selma, but not in New Orleans, to "interrupt[] . . . litigation of the merits of a removed case" by seeking appellate review of remand orders undermines the effective operation of the statute and creates unnecessary confusion with respect to the proper allocation of cases between the state and federal courts. *See Powerex Corp., Inc.*, 551 U.S. at 238.

B. The Decision Below Is Incorrect.

Respondents defend the Eleventh Circuit's decision below on the basis that the court simply applied the "plain text" of the removal statute. Opp. at 9. But the Fifth Circuit's decision adopting the opposite interpretation also invoked "the unambiguous statutory language." *BEPCO, L.P.*, 675 F.3d at 471. Further, the Eleventh Circuit's rule is contrary to both the plain text of Sections 1447(c) and 1447(d), and Congress's intent to bar appellate review of almost all removal orders, save those expressly exempted from Section 1447(d)'s mandate.

a. Section 1447(c) requires only that a "motion to remand a case on the basis of any defect other than lack of subject matter jurisdiction . . . be made within 30 days after the filing of the notice of removal." 28 U.S.C. § 1447(c). By its terms, Section 1447(c) "is limited to *motions*, not *issues*," *Schexnayder,* 394 F.3d at 284, and it requires the party who objects to removal to ask the district court to return the case to state court within 30 days. The plain text of the statute does not, however, require a party to identify particular issues within a set period of time. *See BEPCO, L.P.*, 675 F.3d at 471 ("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."). Indeed, where a party is required to present specific issues within a set period of time, a statute or rule says so explicitly. *Compare* 28 U.S.C. § 1447(c), *with* Fed. R. Civ. P 12(h) (certain bases for dismissal must be raised within a specified period of time); Fed. R. Civ. P. 60 (enumerating the bases for a motion for relief

from judgment and setting a one-year time limit on motions based on specific grounds for relief).

Here, Section 1447(c) defines the timing requirement for the *vehicle* a party must use to seek remand—"a motion." 28 U.S.C. § 1447(c); *see also Motion*, Black's Law (11th Ed. 2019) (defining "motion" as merely "[a] written or oral application requesting the court to make a specified ruling or order"). It does not prescribe the time within which a party must present each *issue* in support of that motion. And, to the extent the statute is ambiguous, this ambiguity should be construed against removal and in favor of resolution in the state courts. *See, e.g.*, *Allen v. Christenberry*, 327 F.3d 1290, 1293 (11th Cir. 2003).

Respondents' contention that the Eleventh Circuit simply applied the "plain text" of Section 1447(c) by requiring Petitioner to raise particular issues supporting the motion to remand within the 30-day statutory time limit thus finds no support in the text of that provision.

b. Furthermore, Respondents do not dispute that the plain text of Section 1447(d) is categorical: it bars appellate review of an "order remanding a case to State court . . . on appeal or otherwise," unless that order falls within one of two clearly-enumerated exceptions. 28 U.S.C. § 1447(d). This broad prohibition on appellate review, like Section 1447(c)'s 30-day time requirement, is designed to prevent additional delay or interference with the orderly resolution of the case. *See Thermtron Prod., Inc. v. Hermansdorfer*, 423 U.S. 336, 351 (1976). Indeed, both Congress and this Court have consistently and expressly restricted appeals from orders remanding a case to state court since 1887 to ensure

the swift and efficient resolution of cases on their merits in the appropriate court. *Rice*, 327 U.S. at 748–49. And, they have consistently done so even in circumstances in which the court of appeals would otherwise find that the district court committed reversible error. *Powerex Corp.*, 551 U.S. at 237–39 (noting that the Court is "well aware [of] § 1447(d)'s immunization of erroneous remands" but affirming that "[a]ppellate courts must take [section 1447(d)'s] jurisdictional prescription seriously, however pressing the merits of the appeal might seem"); *Thermtron Products, Inc.*, 423 U.S. at 351 ("Congress immunized from all forms of appellate review any remand order . . . whether or not that order might be deemed erroneous by an appellate court.").

The Eleventh Circuit's decision undermines this goal, and improperly expands appellate review to remand orders based on a timely filed motion, after both parties had a full and fair opportunity to be heard in connection with the bases for remand.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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