No. _____

In The
Supreme Court of the United States

DOCTORDIRECTORY.COM, LLC
AND EVERYDAY HEALTH, INC.,

Petitioners,

v.

DAVIS NEUROLOGY, P.A.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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March 11, 2019

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QUESTION PRESENTED

Whether the thirty-day deadline for filing a notice of second removal from a state court pursuant to 28 U.S.C. § 1446(b)(3) can begin and expire in federal court, before the case was initially remanded, based upon an "other paper" filed in federal court.

PARTIES AND RULE 29.6 STATEMENT

Petitioners: Everyday Health, Inc. and DoctorDirectory.com, LLC

Pursuant to United States Supreme Court Rule 29.6, Defendants DoctorDirectory.com, LLC and Everyday Health, Inc. make the following disclosure: As of December 5, 2016, Everyday Health, Inc. is a wholly owned subsidiary of Ziff Davis, LLC. Everyday Health, Inc. is the parent company of DoctorDirectory.com, LLC.

Respondent: Davis Neurology, P.A.

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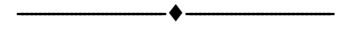
PETITION FOR WRIT OF CERTIORARI

Petitioners Everyday Health, Inc. and DoctorDirectory.com, LLC respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit. This case was impacted by this Court's holding in *Spokeo v. Robins*, 136 S. Ct. 1540 (2016), which changed the law on Article III standing during the pendency of this case. The decision below—which resulted in a determination that the time to remove a case under 28 U.S.C. § 1446(b)(3) can begin while a case is pending in federal court—produces an absurd result. That decision is wrong and conflicts with the opinions of other cases from the Eighth Circuit and other circuit courts regarding the interpretation of 28 U.S.C. § 1446(b)(3), which merits this Court's prompt review.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 896 F.3d 827. Pet.App.1-7. The memorandum opinion and order of the United States District Court for the Eastern District of Arkansas is available at 2017 WL 1528769 *See* Pet.App.8-15.



JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered judgment on July 23, 2018. Pet.App.1-7. On December 11, 2018, the court of appeals denied the Petitioners' petition for rehearing and for en banc rehearing. *See* Pet.App.18. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the interpretation of 28 U.S.C. § 1446(b)(3), which allows for removal "within thirty days after receipt by the defendant . . . of a copy of an amended pleading, motion, order, or other paper from which it may first be ascertained that the case is one which is or has become removable."

STATEMENT OF THE CASE

A. Background.

In January 2016, Respondent Davis Neurology, P.A. ("Davis Neurology") brought a putative class action in state court alleging that defendants DoctorDirectory.com, LLC and Everyday Health, Inc. (collectively, "Doctor Directory") violated the Telephone Consumer Protection Act ("TCPA"). When the putative class action was filed, the Eighth Circuit took a broad view of Article III standing, holding that injury-in-fact could be shown solely from the invasion of

a Congressionally-created right. Doctor Directory promptly removed based upon federal question jurisdiction pursuant to 28 U.S.C. § 1331 and this Court's ruling in *Mims v. Arrow Financial Services, LLC*, 565 U.S. 368 (2012) (the "First Removal").

After the First Removal, the standard for Article III standing changed. In May 2016, the Supreme Court clarified in *Spokeo v. Robins*, 136 S. Ct. 1540, that Article III "requires a concrete injury even in the context of a statutory violation," and that a plaintiff cannot "allege a bare procedural violation, divorced from any concrete harm." *Id.* at 1549. The operative complaint was silent as to concrete harm, stating only that a common question of fact that might warrant class treatment was "[w]hether Representative Plaintiff and the Class are entitled to compensatory damages." The complaint did not allege that Davis Neurology suffered any injury, describe any facts that would suggest a concrete injury, or seek within the prayer for relief compensable damages; it stated only that Davis Neurology sought a $1,500 statutory damage award as a result of an alleged statutory violation of the TCPA.

Given the change in the law caused by *Spokeo*, the District Court *sua sponte* considered whether Davis Neurology lacked Article III standing. On June 29, 2016, the district court held that there was "doubt" concerning the existence of adequate injury-in-fact post *Spokeo*, and "[i]f there is any doubt, . . . remand is appropriate."

Immediately upon remand, Doctor Directory moved the state court to order Davis Neurology to file a more definite statement about its injuries. Doctor Directory explained in its motion to the state court:

> There remains a question as to which court is the proper forum for this case. If Plaintiff alleges an actual injury, then re-removal to federal court may be proper. On the other hand, if plaintiff alleges that it was never injured, then this [state] Court will be faced with the threshold question of whether Plaintiff has standing to bring its claim in this [state] Court.

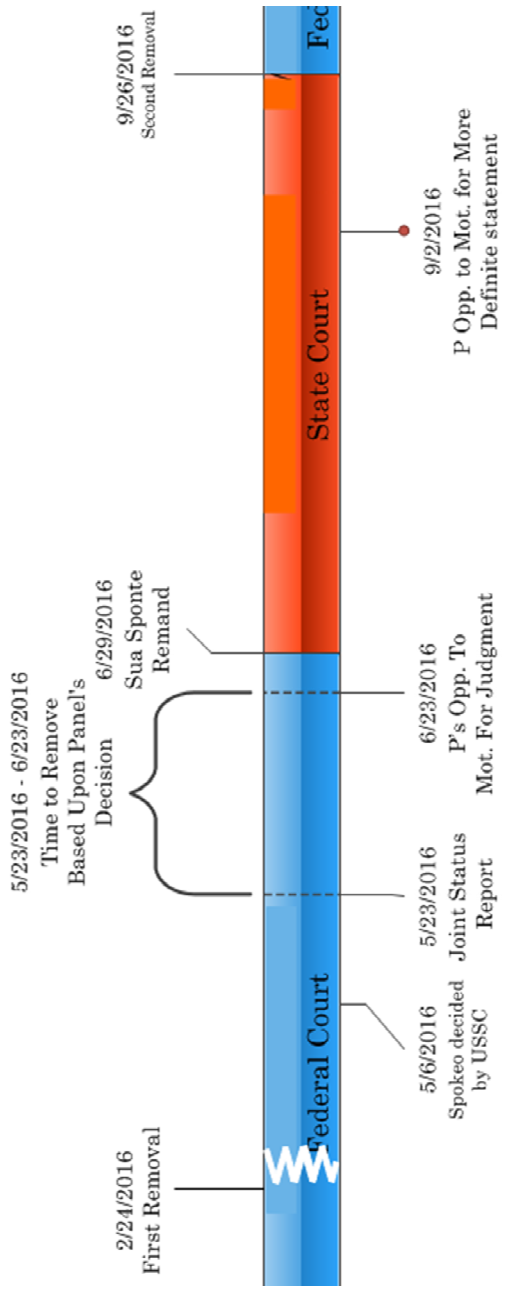
On September 2, 2016, Davis Neurology opposed the Motion for More Definite Statement, arguing that it *was* alleging "actual injury in addition to its statutory remedy."

Within thirty days of receiving this statement, Doctor Directory removed the case to federal court pursuant to 28 U.S.C. § 1446(b)(3), which allows for removal "within thirty days after receipt by the defendant . . . of a copy of an amended pleading, motion, order, or other paper from which it may first be ascertained that the case is one which is or has become removable" (the "Second Removal"). Respondent filed a Motion to Remand the case back to state court. Doctor Directory opposed the Motion to Remand. The federal district court concluded that the Second Removal was timely filed. *See* Pet.App.16-17. The federal district court later entered judgment with prejudice in favor of Doctor Directory. *See* Pet.App.8-15.

B. The Court Of Appeals' Decision.

The United States Court of Appeals for the Eighth Circuit ("Eighth Circuit") reversed and concluded that statements made in federal court after the first removal, but before the case was remanded, started the thirty-day clock for removing a case from state court. *See* Pet.App.1-7. In particular, the Eighth Circuit identified two papers filed in the District Court—one on May 23, 2016, and one on June 23, 2016—that the Eighth Circuit held showed that the case "is or has become removable." *See* Pet.App.6. The Eighth Circuit held that these federal court papers were "at least equivalent to the statement set forth" in the state court on September 2, 2016, concerning injury. *Id.* As a result, the Eighth Circuit held that the thirty-day clock for removal under 28 U.SC. 1446(b)(3) began on either of those dates, and, as a result, the "second notice of removal filed September 26 was well outside the thirty-day time limit established by § 1446(b)(3)." *Id.*

In so ruling, the Eighth Circuit held that the thirty days to remove from state court expired on June 23, 2016, six days *before* the case was remanded to state court. The following provides an overview of the dates and events relevant to the jurisdictional issues addressed by the Eighth Circuit:


2/24/2016
First Removal
Federal Court
5/6/2016
Spokeo decided by USSC
5/23/2016
Joint Status Report
6/23/2016
P's Opp. To Mot. For Judgment
5/23/2016 - 6/23/2016
Time to Remove Based Upon Panel's Decision
6/29/2016
Sua Sponte Remand
State Court
9/2/2016
P Opp. to Mot. for More Definite statement
9/26/2016
Second Removal
Fed

REASONS FOR GRANTING THE PETITION

I. The Decision Below Warrants Review Because It Conflicts With The Plain Language Of The Removal Statute And With Previous Decisions Of The Eighth Circuit And The Decisions Of Other Circuits.

The Eighth Circuit's decision conflicts with the plain language of 28 U.S.C. § 1446(b)(3), which states that if a "case stated by the initial pleadings is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which *is or has become removable*." (emphasis added).

It is well accepted that "other paper" refers to "any other document that is part and parcel of the ***state court proceedings*** and that has its origin and existence by virtue of ***state court processes***." 16 James Wm. Moore et al., MOORE'S FEDERAL PRACTICE § 107.140[3][e] (3d ed. 2019) (emphasis added). This is consistent with the holdings of other circuits that the purpose of Section 1446(b) is to remove an action that "has become removable due to the ***filing in state court*** of an 'amended pleading, motion, order or other paper from which is or has become removable.'" *O'Bryan v. Chandler*, 496 F.2d 403, 409 (10th Cir. 1974) (emphasis added). Indeed, counsel reviewed every circuit court decision that references a removal under 28 U.S.C. § 1446(b)(3), in *every single case* (with the exception of the present case) the removal-triggering event

occurred while the parties were in state court.[1] In no case did a court point to a triggering event happening in federal court before an initial remand.

The rule that only papers received while a case is in state court trigger the removal period is compelled by the text of the removal statute. Section 1446(a) is clear that the statute concerns removal "from a State court." Section 1446(b)(3) states that an "other paper" relevant to removal must be one which, at the time that it is served, allows it to "first be ascertained that the case is or has become removable." Put simply, a case is not "removable" while it is pending in federal court, because "[t]o be eligible for removal, the case must be 'pending' in state court." 16 James Wm. Moore et al., MOORE'S FEDERAL PRACTICE § 107.23 (3d ed. 2019). As a result, it is axiomatic that the receipt of a paper while in federal court cannot make a case "removable."

Moreover, the statute refers to "[a] defendant or defendants desiring to remove any civil action *from a state court*," not to defendants already in federal court desiring to solidify the federal court's jurisdiction. The statute likewise refers to removing to the federal court "for the district and division" where the state case "*is* pending," but a case that is already in federal court is not "pending" in state court. *See* 28 U.S.C. § 1446(d) (providing that "the State court shall proceed no further unless and until the case is remanded"). The

[1] Counsel conducted a Westlaw search in August 2018 to identify any circuit court decision that referenced 28 U.S.C. § 1446(b)(3) or 28 U.S.C. § 1446(b) and "other papers." Each case was then reviewed to identify the removal event at issue.

statute similarly refers to filing the notice of removal "with the clerk of such State court" (*i.e.*, the state court where the action "is pending"), which "*shall effect the removal*"—language that cannot apply to cases already in federal court.

II. The Eighth Circuit's Decision That The Thirty-Day Clock For Removal Under 28 U.S.C. § 1446(b)(3) Can Start From An Event That Occurs While The Parties Are In Federal Court Could Make Removal Under Section 1446(b)(3) Impossible.

Congress added the language that is now codified as Section 1446(b)(3) by amendment in 1949. According to the House and Senate Report accompanying the amendment, the change was intended to "make clear that the right of removal may be exercised at a later stage of the case if the initial pleading does not state a removable case" by memorializing the "existing rule laid down" by the United States Supreme Court in *Powers v. Chesapeake*, 169 U.S. 92 (1898). S. REP. NO. 303 (Apr. 26, 1949), *as reprinted in* 1949 U.S.C.S. 1268. In *Powers*, Justice Gray stated that when interpreting the federal removal statute, courts must find a reasonable construction that does not "prevent the right of removal" from being exercised. 169 U.S. at 100. Justice Gray also specified that the time for removal begins to run when the action assumes a removable form "in the court in which it was brought":

> The reasonable construction of the act of congress, and the only one which will prevent the

> right of removal, to which the statute declares the party to be entitled, from being defeated by circumstances wholly beyond his control, is to hold that the incidental provision as to the time must, when necessary to carry out the purpose of the statute, yield to the principal enactment as to the right; and to consider the statute as, in intention and effect, permitting and requiring the defendant to file a petition for removal ***as soon as the action assumes the shape of a removable case in the court in which it was brought***.

Id. (emphasis added).

The Eighth Circuit's holding that the thirty-day clock for removal pursuant to Section 1446(b)(3) could begin to run in federal court contradicts the Supreme Court's directive that the key is when the case becomes removable "in the court in which it was brought" (*i.e*., state court) and not when the defendant learns of a fact that might relate to the case in a different forum. More importantly, the Eighth Circuit's holding interprets Section 1446(b)(3) in a manner that would prevent the ability of defendants in many cases to ever utilize Section 1446(b)(3) to obtain federal court jurisdiction. This litigation provides a perfect example.

The underlying litigation was originally removed pursuant to Section 1446(b)(1). When a case is removed pursuant to Section 1446(b)(1) on federal question grounds, the district court is prohibited from looking beyond the removing documents (*i.e.*, the notice of removal, the complaint, and any affidavits

attached to the notice of removal) to determine whether jurisdiction exists. *Lowery v. Alabama Power*, 483 F.3d 1184 (11th Cir. 2007) (holding that "jurisdiction is either evident from the removing documents or remand is appropriate"); *Bosky v. Kroger Texas, LP*, 288 F.3d 208, 210 (5th Cir. 2002) (holding that a pleading must "affirmatively reveal on its face" facts demonstrating jurisdiction).

Put differently, a district court cannot look to an "other paper" for removal pursuant to Section 1446(b)(1). As a result, it would have been improper for the District Court to consider statements made by Davis Neurology after the case had been removed, and while it was pending in the federal court, in order to determine whether the Complaint—standing by itself—alleged sufficient injury post *Spokeo* to confer standing. Instead, the District Court correctly determined that, based upon the only document that it was permitted to consider (the Complaint), there was doubt concerning whether injury-in-fact had been alleged.

According to the Eighth Circuit's decision, the first time that Davis Neurology put Doctor Directory on notice that it may have suffered an injury-in-fact was a statement made to the District Court in a status report on May 23, 2016. *See* Pet.App.6. If the Eighth Circuit's decision were correct, and that status report constituted an "other paper" that started the clock on removal pursuant to Section 1446(b)(3), Doctor Directory's time period for removing would have expired on June 22, 2016 (*i.e.*, thirty days after receiving the status report), at a time when the case was still pending

before the District Court.[2] In other words, the time period for removing would have expired *before* Doctor Directory was remanded to state court. Put differently, based upon the Eighth Circuit's decision, Doctor Directory never had an opportunity to remove under Section 1446(b)(3) based upon the "other paper," because the removal time period expired *before* the removal opportunity began.

The Eighth Circuit's interpretation of 28 U.S.C. § 1446(b)(3) would allow a plaintiff to file an ambiguous complaint, and then provide facts to evidence jurisdiction once the case was removed to federal court. The plaintiff could then simultaneously block an attempt by a district court to rely upon the subsequently disclosed facts as the initial removal was based upon Section 1446(b)(1) and cause the Section 1446(b)(3) removal clock to start (and expire) before a defendant has an opportunity to re-remove based upon the disclosed facts. The net result would be a one-shot-only removal rule that would place defendants in an untenable Hobson choice—if they do not remove an ambiguous complaint under Section 1446(b)(1), they risk

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[2] While the Eighth Circuit stated that "the clock started to run no later than June 23" (*i.e.*, the date of Davis Neurology's response to the Motion for Judgment on the Pleadings), the operative date when determining when a notice pursuant to 28 U.S.C. § 1446(b)(3) must be filed is the earliest date upon which it may first be ascertained that an action is removable. 28 U.S.C. § 1446(b)(3). As the Eighth Circuit held that the earliest date that a "nearly identical statement of injury" was made occurred on May 23, 2016, based upon the Eighth Circuit's logic, that is the date that the thirty-day clock began to run.

waiving federal jurisdiction; if they do remove an ambiguous complaint under Section 1446(b)(1), they forfeit the ability to re-remove under Section 1446(b)(3) when the plaintiff later resolves the ambiguity and discloses facts that support federal jurisdiction. As the Seventh Circuit has stated, "[t]he only effect of adopting an absolute one-bite rule would be to encourage plaintiffs to be coy" and to "reward game-playing." *Benson v. Handling Systems, Inc.*, 188 F.3d 780, 783 (1999). Without a doubt, the interpretation of the parameters to remove under 28 U.S.C. § 1446(b)(3) is exceptionally important as removal is such a basic tenet in litigation.

III. Review By This Court Is Of Particular Importance As The Precedent Will Not Be Subject To Future Review And Correction.

Petitioners realize and appreciate the limited resources of this Court and would not typically present a request to review the procedural decision of a lower court. This Petition is of particular importance as the unique procedural posture of this issue prevents the Eighth Circuit, and in many instances, other circuits, from reevaluating the underlying holding.

28 U.S.C. § 1447(d) prohibits the appeal of an order for remand. As a result, and as a practical matter, because district courts within the Eighth Circuit are bound by the Eighth Circuit's opinion, they will remand all future cases where a defendant attempts to re-remove a case pursuant to 28 U.S.C. § 1446(b)(3)

based upon information that a plaintiff provided while a case was originally pending in federal court. Those cases will, under 28 U.S.C. § 1447(d), be incapable of being appealed to the Eighth Circuit, and the Eighth Circuit will, consequently, be incapable of revisiting this issue. A similar result will occur outside of the Eighth Circuit. If a district court in another circuit bases a remand decision upon the Eighth Circuit's holding, that case will also be incapable of review within that circuit pursuant to 28 U.S.C. § 1447(d).

The net result is that if the Eighth Circuit's decision is not corrected, it will be impossible for any future litigant that is remanded as a result of a district court's determination that the clock for filing a second removal began to run based upon information provided by a plaintiff while in district court, and while still bound by the allegations in the four corners of the complaint, to seek review of that decision. Given the finality of the Eighth Circuit's decision for other litigants, and the inability for the Eighth Circuit to correct the decision at a later point in time (or any other circuit to correct the decision of a district court that decides to follow the Eighth Circuit's reasoning), the question of whether the Eighth Circuit properly interpreted 28 U.S.C. § 1446(b)(3) is of critical importance and should be decided by this Court.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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