No.

# In the Supreme Court of the United States

JAVITCH BLOCK, LLC,

*Petitioner*,
v.
JEROME REDMAN, Individually and on behalf of all others similarly situated,

*Respondent*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

28 U.S.C. § 1331 vests U.S. District Courts with original jurisdiction over actions presenting a federal question. An action under the Fair Debt Collection Practices Act is within the original jurisdiction of U.S. District Courts. 15 U.S.C. § 1692k(d). Under 28 U.S.C. § 1441 and § 1446(b), a defendant in an action commenced in state court that presents a federal question claim has 30 days from receipt by the defendant to file a notice of removal. Neither 28 U.S.C. § 1446 nor § 1447 expressly provide that a U.S. District Court may decline to exercise jurisdiction and remand a matter to state court, a timely removed action over which it has federal question jurisdiction on the grounds of waiver by participation in state court litigation. This Court held in *Thermtron Prod., Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), a District Court exceeds its authority in remanding the case on grounds not permitted by § 1447(c).

The questions presented are whether waiver by participation in state court litigation is a permissible basis for District Courts to decline to exercise their original jurisdiction and remand a case under 28 U.S.C. § 1447(c).

If so, whether such waiver applies when a motion to dismiss addressing the merits is filed before removal as the Fourth Circuit held here, or only when there has been an adjudication of the merits as the Seventh Circuit recently held, but not when the motion to dismiss was compelled to be filed before removal by the time frame set by state court rules, as the Tenth and Eleventh Circuits have held.

## PARTIES TO THE PROCEEDINGS BELOW

The caption contains the name of all the parties in the court of appeals.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Javitch Block LLC ("Javitch") states there is no parent or publicly held company owning 10% or more of the corporation's stock.

## STATEMENT OF RELATED CASES

Pursuant to Supreme Court Rule 14.1, the following proceedings in state and federal courts are directly related to this case:

Circuit Court of Berkely County, West Virginia, Case No. 21-C-11, captioned *Jerome Redman v. Javitch Block, LLC*. The case remains pending and has no date of final judgment.

United States Court of Appeals for the Fourth Circuit, Case No. 21-2236, captioned *Jerome Redman v. Javitch Block, LLC*, decided December 15, 2022.

United States District Court for the Northern District of West Virginia, at Martinsburg, Case No. 3:21−cv−00037−GMG, captioned *Jerome Redman v. Javitch Block, LLC*, decided October 12, 2021.

West Virginia Supreme Court of Appeals, Case No. 23-90, captioned *State of West Virginia ex rel. Javitch Block LLC, v. The Honorable R. Steven Redding, Judge of the Circuit Court of Berkeley County, and Jerome D. Redman*. The case remains pending and has no date of final judgment.

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Javitch Block LLC ("Javitch") respectfully files this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

## OPINIONS BELOW

The per curiam order of the Court of Appeals affirming the District Court's remand decision is unreported and available at 2022 WL 17716772 (4th Cir. Dec. 15, 2022). Pet. App. 1a. The order of the District Court remanding the case to Berkeley County, West Virginia Circuit Court is unreported and available at 2021 WL 5177462 (N.D.W. Va. Oct. 12, 2021). Pet. App. 7a. The District Court's order denying the motion to stay pending appeal is

unreported and available at 2021 WL 7448734 (N.D.W. Va. Nov. 2, 2021). Pet. App. 12a. The Circuit Court of Berkely County, West Virginia entered an order after remand; its decision is unreported. Pet. App. 16a.

## JURISDICTION

The Fourth Circuit Court of Appeals entered its judgment on December 15, 2022. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1). This Petition is timely pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rules 13.1 and 13.3. Original jurisdiction over Mr. Redman's action presenting a federal question arose when he served his first amended complaint on February 11, 2021 asserting claims under the Fair Debt Collection Practices Act. 15 U.S.C. § 1692k(d). Under 28 U.S.C. § 1441 and § 1446(b), Javitch timely filed its notice of removal on March 5, 2021.

## STATUTES INVOLVED

28 U.S.C. § 1331 provides:

> "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

15 U.S.C. § 1692k(d) provides:

> "An action to enforce any liability created by this subchapter may be brought in any appropriate United States district court without regard to the amount in controversy,

> or in any other court of competent jurisdiction, within one year from the date on which the violation occurs."

28 U.S.C. § 1441 provides in pertinent part:

> "Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

28 U.S.C. § 1446 provides in pertinent part:

> (a) Generally.—
>
> A defendant or defendants 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 signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.
>
> (b) Requirements; Generally.—
> (1) The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading

> setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.
>
> . . .
>
> (3) Except as provided in subsection (c), if the case stated by the initial pleading 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.

28 U.S.C. § 1447 provides in pertinent part:

> (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.

## STATEMENT OF THE CASE

The pending case below was preceded by an action brought in by FIA Card Services, N.A. against Jerome Redman on December 27, 2012, in the Berkeley County Circuit Court, West Virginia, Civil Action No. 12-C-1011, to recover the balance owed on a credit card ("*Redman I*"). Pet. App. 2a, 7a. The case resulted in a default judgment against Mr. Redman on July 2, 2013. *Id.* Javitch was later retained to collect the judgment and in 2019, filed wage garnishment proceedings attaching a portion of Mr. Redman's wages due from his employer Southland Concrete, a Virginia company (referred to as a suggestee execution under West Virginia law). Pet. App. 2a, 7a, 17a. The judgment was later set aside, the wage garnishment proceedings were terminated and Mr. Redman's wages were returned. *Id.* Nonetheless, Mr. Redman filed a class action counterclaim against FIA Card Services and a third-party complaint against Javitch. *Id.* Mr. Redman and FIA Card Services then settled their respective claims and they jointly dismissed the entire action with prejudice. *Id.* Mr. Redman later filed a dismissal as to Javitch without prejudice. *Id.* at 18a.

On January 14, 2021, Mr. Redman filed a second class action complaint against Javitch in the Berkeley County Circuit Court, West Virginia, Civil Action No. CC-02-2021-C-11 ("*Redman II*"). *Id.* The complaint in *Redman II* did not contain any federal claims nor an amount in controversy that afforded a basis for removal under diversity jurisdiction. *Id.* On February 11, 2021, Mr. Redman amended the complaint in *Redman II* to include a Fair Debt Collection Practices Act claim. *Id.* Mr. Redman's

claims against Javitch allege that West Virginia Circuit Courts lack authority to enforce their judgments in cross-border cases (where a judgment debtor lives in the judgment rendering state but works for an employer in a neighboring state), and that Javitch's suggestee execution in West Virginia was unlawful under the FDCPA and state law. Pet. App. 26a-28a. Mr. Redman maintains that in such cases, domestication of the West Virginia judgment where the wages were paid from was necessary to acquire jurisdiction over the wages. Pet. App. 17a, 26a-28a.

Javitch was compelled to respond to the amended complaint under the West Virginia Rules of Civil Procedure on or before March 1, 2021 (the longer of 30 days from service of the original complaint or 10 days from service of the amended complaint). W.Va. Civ. P. Rule 6(a), 12(a)(1) and 15(a). Javitch's removal deadline was March 15, 2021. On February 25, 2021, Javitch filed a combined motion pursuant to Rules 12(B)(1) and 12(b)(6) of the West Virginia Rules of Civil Procedure, to dismiss the action for lack of subject matter jurisdiction (lack of standing) and failure to state a claim. Pet. App. 10a, 19a. Javitch filed a notice of supplemental authority on March 1, 2021, with recently decided cases from the West Virginia Supreme Court of Appeals. *Id.* at 10a. On March 3, 2021, Javitch moved to stay discovery pending its motion to dismiss. *Id.* On March 5, 2021, the state court judge assigned to hear *Redman II* recused himself and transferred the case to the previous judge who handled *Redman I*. Pet. App. 3a.

Javitch timely filed its notice of removal on March 5, 2021, within hours of the recusal/transfer, ten days before the time to remove expired. Pet. App. 4a, 10a. The state court did not address the motion beyond setting a briefing schedule, and Mr. Redman did not respond to the motion before removal. On March 22, 2021, Mr. Redman moved to remand on the grounds of waiver, Javitch opposed, and on October 12, 2021, the District Court granted Redman's motion to remand. Pet. App. 7a. The District Court did not directly address Javitch's argument that waiver of the right to remove for participation in state court proceedings was not statutorily authorized. Pet. App. 10a.

In its remand order, the District Court noted that the Amended Complaint filed in *Redman II* "triggered the case's removability – which neither party contests" and that "the Defendant timely filed its notice of removal within thirty days of Plaintiff filing his amended complaint, which for the first time included a claim giving rise to federal jurisdiction." Pet. App. 8a. However, the District Court also found that "Defendant manifested an intent to litigate in state court, thereby waiving its right to remove." Pet. App. 11a. The District Court pointed to the following facts in support of its conclusion:

> Between February 25 and March 3, 2021, the Defendant filed a motion to dismiss, a letter with supplemental authority to the judge, and a motion to stay discovery pending resolution of the motion to dismiss. These filings demonstrate the Defendant's desire to litigate the matter in state court. The motion to dismiss was filed pursuant to 12(b)(1) and

> 12(b)(6) and raised dispositive arguments. Particularly interesting is that the Defendant filed its notice of removal just over three hours after the case was reassigned to the judge who handled the first litigation involving these parties. The Court further notes that one of the Defendant's arguments in its motion to dismiss was res judicata. The Defendant argued that the first litigation precludes the Plaintiff's claims in the instant case. Who better to consider and decide that question than the judge who handled the first litigation? Yet, the Defendant fled to federal court within a few hours of that judge's assignment to the case.

Pet. App. 10a. Javitch appealed, requested mandamus relief, and sought a stay pending appeal which the District Court, and later the appellate court, also denied. Pet. App. 12a. During the appeal to the Fourth Circuit, Javitch provided notice of the U.S. Court of Appeals decision in *Rock Hemp Corp. v. Dunn*, 51 F.4th 693 (7th Cir. 2022) which re-examined *Rothner v. City of Chicago*, 879 F.2d 1402 (7th Cir. 1989).

On December 15, 2022, in a per curiam order, the Fourth Circuit Court of Appeals affirmed the order remanding, without addressing Javitch's request for mandamus relief or *Rock Hemp Corp. v. Dunn*. The Court reiterated that "[t]here is no dispute that Javitch timely filed its notice of removal within 30 days of receiving Redman's amended complaint raising the federal FDCPA issue." Pet. App. 4a. The Court did not directly address Javitch's argument that waiver of the right to remove for

participation in state court proceedings was not statutorily authorized. *Id.* Instead, the Court referred to its precedents which applied the federal common law waiver doctrine in this context. *Id.* The Court observed:

> We have found that "a defendant may yet waive its 30-day right to removal by demonstrating a 'clear and unequivocal' intent to remain in state court." *Grubb* [*v. Donegal Mut. Ins. Co.*, 935 F.2d 57, 57 (4th Cir. 1991)], (quoting *Rothner* [*v. City of Chicago,* 879 F.2d 1402, 1416 (7th Cir. 1989)). Waiver of this right is only appropriate "in extreme situations, when judicial economy, fairness, and comity demand it." *Northrop Grumman*, [*v. Dyncorp Int'l LLC*, 865 F.3d 181, 186 (4th Cir. 2017)] (internal quotations omitted). In past cases, we have looked to see whether a defendant has taken substantial defensive action in state court before petitioning for removal. *See Aqualon Co. v. MAC Equipment, Inc.*, 149 F.3d 262, 264 (4th Cir. 1998); see also *Northrop Grumman*, 865 F.3d at 188.

Pet. App. 4a.

In affirming the remand order and finding a waiver by participation, the Court pointed to the following facts:

> Here, Javitch took several actions which expressed the requisite intent to remain in state court. First, Javitch filed a motion to dismiss in which it raised substantive arguments before the state court. Under West

Virginia law, a ruling on a motion to dismiss amounts to an adjudication on the merits. See *Sprouse v. Clay Comm., Inc.*, 211 S.E.2d 674, 696 (W. Va. 1975). Thus, Javitch opened itself up to a complete merits determination in state court. Further, Javitch filed this motion a full two weeks after receiving notice that the case was removable. Instead of proceeding straight to federal court, Javitch decided to avail itself of state court. Then, before removing the case, Javitch supplemented its motion to dismiss with additional authority, further demonstrating an intent to receive a merits determination on the matter in state court. And finally, Javitch moved to stay discovery pending resolution on the motion to dismiss. These actions show Javitch "actively engage[d] in defensive litigation in the state court[.]" *Northrop Grumman*, 865 F.3d at 188.

As for the "extreme situations" determination, the district court was also not clearly erroneous in finding this satisfied. It found that "judicial economy clearly weighs in favor of this case being decided by the court in which it originated and was already, partially litigated." J.A. 630. We note that Javitch waited 22 days before removing the complaint, and only did so three hours after the case was reassigned to Judge Redding. Javitch cannot "be allowed to test the waters in state court ... and finding the temperature not to its liking, beat a swift retreat to federal court." *Northrop Grumman*, 865 F.3d at 188 (*quoting Estate of Krasnow v. Texaco, Inc.*, 773 F.Supp. 806, 809 (E.D. Va. 1991)). Javitch sought to use the

> state court proceedings to its advantage several times over, and only changed its mind once Judge Redding was assigned to the case. Under these circumstances, the district court was not clearly erroneous in finding Javitch waived its right to removal, and we affirm.

Pet. App. 5a.

After entry of the order remanding the action to state court, the Circuit Court Judge in *Redman II* denied Javitch's motion to dismiss. Pet. App. 16a. On February 17, 2023, Javitch brought an original action for a writ of prohibition in the West Virginia Supreme Court of Appeals, Case No. 23-90, captioned *State of West Virginia ex rel. Javitch Block LLC, v. The Honorable R. Steven Redding, Judge of the Circuit Court of Berkeley County, and Jerome D. Redman*. That action remains pending.

## REASONS FOR GRANTING THE PETITION

This Court should grant certiorari and clarify once and for all that under 28 U.S.C. § 1447, waiver by participation in state court litigation is not a permissible basis for district courts to decline to exercise their original jurisdiction over a timely filed notice of removal. This Court held that "Congress [n]ever intended to extend carte blanche authority to the district courts to revise the federal statutes governing removal by remanding cases on grounds that seem justifiable to them but which are not recognized by the controlling statute." *Thermtron Prod., Inc. v. Hermansdorfer*, 423 U.S. 336, 344(1976), *abrogated by Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996). This Court should also

grant certiorari to resolve the circuit split over whether an adjudication of the merits or mere filing of a motion to dismiss in state court prior to filing a timely notice of removal qualifies as a waiver of the right to removal. As this Court held in *Thermtron*, a District Court exceeds its authority in remanding the case on grounds not permitted by § 1447(c).

Over 30,000 cases a year are removed from state courts to U.S. District Courts.[1] One standard should exist in every circuit to assess whether remand is authorized.

As things stand, District Courts in different circuits continue to remand removed cases using no less than three different standards to assess waiver by participation in state court proceedings. In the Seventh Circuit, a motion to remand a removed case based on filing of a motion to dismiss in state court before removal "is a loser" unless the merits were fully litigated. In the Tenth and Eleventh Circuits, a motion to remand based on mere filing a motion to dismiss may or may not lose, depending on whether the motion was compelled to be filed under the time frame provided by state court rules. If so, remand motions in the Tenth and Eleventh Circuits are also losers. In the Fifth, Sixth and Ninth Circuits, taking purely defensive actions prior to removal that do not reach the merits will also not support a remand, but it is not clear whether a motion to dismiss filed before removal is "purely defensive." In the Fourth

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[1] Administrative Office of the U.S. Courts, Judicial Facts and Figures, Table 4.3, online at https://www.uscourts.gov/statistics-reports/judicial-facts-and-figures-2021

Circuit, however, any motion to dismiss that broaches the merits – even where combined with a non-merits motion – will give rise to waiver, even where the merits are not yet litigated.

The waiver by participation in state court doctrine is an anachronism borne out of ill-defined pre-1948 indefinite removal statutes. The common law waiver doctrine's contours have led to carte blanche authority to deny a federal forum based on equitable considerations that are inconsistent with the clear statutory text governing removal, unmoored from the remand statute, and should be buried once and for all in the sands of time.

### *I. Review is required because the decision of the Fourth Circuit conflicts with relevant decisions of this Court on the District Court's obligation to exercise original jurisdiction in removed cases.*

1. Waiver by participation in state court litigation is not a permissible basis for District Courts to decline to exercise their original jurisdiction over a timely removed action under 28 U.S.C. § 1447(c).

2. Only Congress can create or destroy subject-matter jurisdiction; a party's litigation conduct cannot create or destroy subject-matter jurisdiction. U.S. Const. art. III, § 1; *Kontrick v. Ryan,* 540 U.S. 443, 456 (2004)("a court's subject-matter jurisdiction cannot be expanded to account for the parties' litigation conduct; a claim-processing rule, on the other hand, even if unalterable on a party's application, can nonetheless be forfeited if the

party asserting the rule *waits too long* to raise the point.")(emphasis added); *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982)("no action of the parties can confer subject-matter jurisdiction upon a federal court….").

3. Removal of cases from state courts has been allowed since the first Judiciary Act. *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 286–89 (1938) (citing Judiciary Act of Sept. 24, 1789 § 12, 1 Stat. 73, 79). As pertinent here, a notice of removal must be filed within 30 days of service of an amended pleading setting forth a federal question claim first indicating it is removable. 28 U.S.C. § 1446(b)(3). *BP P.L.C. v. Mayor & City Council of Baltimore*, 209 L. Ed. 2d 631, 141 S. Ct. 1532, 1538 (2021); *Home Depot U. S. A., Inc. v. Jackson*, 204 L. Ed. 2d 34, 139 S. Ct. 1743, 1753 (2019)(Alito, J. dissenting). The remand statute, 28 U.S.C. § 1447, does not provide that waiver based on participation in state court proceedings is a basis for remanding a timely removed action. Ordinarily, a statute clear on its face must be enforced as written. *Dodd v. U.S.*, 545 U.S. 353, 359 (2005). "Exceptions to clearly delineated statutes will be implied only where essential to prevent absurd results or consequences obviously at variance with the policy of the enactment as a whole.'" *U.S. v. Rutherford*, 442 U.S. 544, 552 (1979). No implied exceptions are necessary here. *Cf.* Fed.R.Civ.P. 81(c)(2)(obviating repleading).

4. Remand for waiver by participation in state court proceedings is simply not authorized by the removal or remand statutes, and a timely filed notice of removal is only subject to remand for lack of jurisdiction or defects in the notice. *Thermtron Prod.,*

*Inc. v. Hermansdorfer*, 423 U.S. 336, 344("we are not convinced that Congress ever intended to extend carte blanche authority to the district courts to revise the federal statutes governing removal by remanding cases on grounds that seem justifiable to them but which are not recognized by the controlling statute."); *Things Remembered, Inc. v. Petrarca,* 516 U.S. 124, 130 (1995)(Kennedy, J., concurring). To end the quagmire *Thermtron* left unresolved by admitting the possibility for remands other than pursuant to 28 U.S.C. § 1447(c), the Court can also bring closure to appellate review of cases that are barred by 28 U.S.C. § 1447(d). *Kakarala v. Wells Fargo Bank, N.A.*, 578 U.S. 914, 136 S. Ct. 1153, 1154 (2016)(Thomas, J., dissenting).

5. Waiver by participation in state court litigation as grounds for remand of a timely filed notice of removal is "a bad wine of recent vintage." *TRW Inc. v. Andrews*, 534 U.S. 19, 37 (2001) (Scalia, J., concurring ).

6. The Seventh Circuit's decision in *Rothner v. City of Chicago* explained the common law waiver doctrine grew out of pre-1948 "ambiguous and indefinite time requirements of the early removal statutes." *Rothner v. City of Chicago,* 879 F.2d 1402, 1413 (7th Cir. 1989). The Seventh Circuit's catalog of amendments to the removal statutes culminated in amendments in 1949 that set a finite time limit for removal. *Rothner*, 879 F.2d 1402, 1414. The new finite time limits set by Congress obviated the need to resort to the common law waiver doctrine, but by hook or by crook, the doctrine became ensconced in both leading treatises on federal civil procedure. *Rothner*, 879 F.2d 1402, 1414 (citing 14A C. WRIGHT,

A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3721 at 223–25 (1985) and 1A MOORE'S FEDERAL PRACTICE ¶ 0.157[9] at 151 (2d ed.1987)). Since then, the waiver by participation doctrine took on a life of its own. *Rothner*, 879 F.2d at 1415 (noting that "the treatise cites to district court cases which simply cite to pre-1948 cases, or back to the treatise, or to no authority at all.").

7. Section 1447(c) allows for a plaintiff to move to remand a case "on the basis of any defect other than lack of subject matter jurisdiction" within thirty days of the notice of removal being filed. 28 U.S.C. § 1447(c); *Wisconsin Dep't of Corr. v. Schacht*, 524 U.S. 381, 392 (1998).

8. Critically here, there was no lack of jurisdiction or "any defect" in the notice of removal, the motion to remand did not allege the contrary, and both the District Court and Fourth Circuit found that the removal was timely filed and involved a claim over which the District Court had original jurisdiction. Pet. App. 4a, 10a. Javitch's opposition to the motion to remand and its appellate brief (both urging reversal and praying for a writ of mandamus) argued that remand for waiver based on participation in state court proceedings is not authorized by the removal statute nor remand statute, but neither the district court or the court of appeals addressed the question.

9. "[W]hen a federal court has jurisdiction, it also has a 'virtually unflagging obligation ... to exercise' that authority." *Mata v. Lynch*, 576 U.S. 143, 150 (2015)(*quoting Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 817 (1976));

*BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 1537, 209 L. Ed. 2d 631 (2021)(quoting *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69, 72(2013)).

10. 28 U.S.C. § 1447(c) authorizes the court to entertain a motion to remand "on the basis of any defect other than lack of subject matter jurisdiction." 28 U.S.C. § 1447(c). The statutory grounds for remand "defects" contemplated by Section 1447(c) include noncompliance with the statutory requirements for removal, such as "untimely removal," *Things Remembered, Inc. v. Petrarca,* 516 U.S. 124, 128; not attaching the pleadings or other required documents, *Atkins v. AT&T Mobility Servs., LLC*, No. 2:18-CV-00599, 2019 WL 5190971, at *3 (S.D.W. Va. Oct. 15, 2019); a notice of removal that does not demonstrate federal subject-matter jurisdiction or not signing the notice of removal. *Shiboleth LLP v. Buhannic,* 779 F. App'x 57, 58 (2d Cir. 2019).

Waiver by participation in state court litigation is not within the scope of "defects" or subject matter remands contemplated by section 1447(c). *City of Albuquerque v. Soto Enterprises, Inc.*, 864 F.3d 1089, 1094-1095 (10th Cir. 2017).

Accordingly, the District Court's refusal to exercise its jurisdiction was not statutorily authorized by 28 U.S.C § 1446 or 28 U.S.C § 1447(c). *Thermtron Prod., Inc. v. Hermansdorfer*, 423 U.S. 336, 345; *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 130; *Rock Hemp Corp. v. Dunn*, 51 F.4th 693, 700 (7th Cir. 2022).

Because Congress established 30 days as the time within which to remove an action from state court to federal court in 28 U.S.C. § 1446(b)(3), a timely removed federal question is not subject to remand under 28 U.S.C § 1447 on the grounds of waiver by participation in state court.

## *II. The Fourth Circuit's decision conflicts with decisions of the Seventh Circuit.*

### *A. If waiver by participation in state court litigation is a valid reason for declining to exercise original jurisdiction over a timely removed federal question claim, waiver cannot be found absent an adjudication of the merits.*

1. Even if waiver by participation in state court proceedings were a valid and necessary federal common law doctrine allowing a District Court to decline to exercise its federal question jurisdiction in a timely removed case over which it has original jurisdiction, waiver cannot be found absent an adjudication of the merits.

2. By definition, waiver exists when there is a voluntary and intentional relinquishment of a known and existing right. *Morgan v. Sundance, Inc.*, 212 L. Ed. 2d 753, 142 S. Ct. 1708, 1713 (2022) (waiver "is the intentional relinquishment or abandonment of a known right.")(*quoting United States v. Olano*, 507 U.S. 725, 733 (1993)). Waiver may be express or implied through a course of

conduct. *Hemphill v. New York*, 211 L. Ed. 2d 534, 142 S. Ct. 681, 694 (2022)(Alito, J., concurring).

3. Because the right to remove exists for 30 days from the date the case first becomes removable under 28 U.S.C. § 1446(b)(1), the timely exercise that right cannot logically constitute waiver because the time for performance has not expired. One need only file a notice of removal "*within 30 days*…." § 1446(b)(1)(emphasis added). "Within" means "before the end of." https://www.merriam-webster.com/dictionary/within. Nothing filed in state court alters the fact that the right endures for 30 days. By timely removing a case to federal court before any adjudication of the merits, waiver is inapplicable.

4. "[A] perusal of the decided cases shows that the line between what will constitute waiver of the right to remove and what will not is far from clear." 14C CHARLES A. WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 3721, collecting cases at nn. 99-100 (rev. 4th ed.); 16 MOORE'S FEDERAL PRACTICE - CIVIL § 107.132[1] ("a particular act may be held to waive a defendant's right to remove in one case and not in another."); *id.* at [2][c]. Courts have decided these questions on a case- by-case basis. Elizabeth Williams, Annotation, *Waiver of Right to Remove Action to Federal District Court by Participation in State Court Proceeding*, 35 A.L.R. Fed. 3d Art. 10 (Originally published in 2018).

5. The Fourth Circuit decision in this case is in direct conflict with a Seventh Circuit case on whether merely filing a dispositive motion, as opposed to actually adjudicating the merits, suffices.

*Compare Rock Hemp Corp. v. Dunn*, 51 F.4th 693, 700 ("waiver of the right to removal may still be found under 'the common law doctrine of waiver ... *only where the parties have fully litigated the merits' of the case in state court*.")(emphasis added), with Pet. App. 5a (asking whether the defendant has "taken substantial defensive action in state court before petitioning for removal" and "opened itself up to a complete merits determination in state court."). This Court should grant review to resolve this conflict.

In *Rock Hemp Corp. v. Dunn*, the Seventh Circuit considered a case involving a Defendant who filed a motion to dismiss, engaged in discovery and attended a hearing on the motion, all before removal occurred. *Rock Hemp Corp. v. Dunn*, 51 F.4th 693, 700. As in this case, the *Rock Hemp* case was not initially removable, and the Defendant filed a motion to dismiss to avoid dismissal before learning the case was removable. The Seventh Circuit began by revisiting *Rothner* and confirmed its view that "waiver of the right to removal may still be found under "the common law doctrine of waiver ... *only where the parties have fully litigated the merits*" of the case in state court." *Rock Hemp Corp. v. Dunn*, 51 F.4th 693, 700. Filing of a motion to dismiss and addressing the merits before removal do not suffice. Rather, in the Seventh Circuit, to constitute waiver, a case must be "considered at length in state court" and the defendant's state court actions must demonstrate "a clear and unequivocal waiver[,]" and constitute "fully litigat[ing] the merits" of the case in state court. *Rock Hemp Corp. v. Dunn,* 51 F.4th at 701. *See Perez v. Air & Liquid Sys. Corp.*, 223 F. Supp. 3d 756, 760 (S.D. Ill. 2016)("most district

courts in this Circuit have continued to follow *Rothner* and have held that filing motions to dismiss or taking other preliminary actions in state court does not constitute waiver of the right to remove.")(collecting cases); *Hill v. Maton,* 944 F.Supp. 695, 697 n. 3 (N.D.Ill.1996) (argument that the filing of a motion to dismiss in state court constituted a waiver of right to remove "is a loser in the Seventh Circuit" (citing *Rothner*)); *In re Bridgestone/Firestone, Inc., ATX, ATX II*, 128 F. Supp. 2d 1198, 1201 (S.D. Ind. 2001).

### *B. The Eleventh and Tenth Circuits except motions to dismiss compelled to be filed by state court rules in advance of removal from waiver.*

1. The Fourth Circuit's decision is also inconsistent with the Eleventh Circuit's decision in *Yusefzadeh v. Nelson, Mullins, Riley & Scarborough, LLP*, 365 F.3d 1244, 1245 (11th Cir. 2004). In *Yusefzadeh,* the Eleventh Circuit considered the filing of a combined motion to dismiss for lack of jurisdiction and failure to state a claim which had to be filed under state rules before the removal deadline. *Yusefzadeh*, 365 F.3d 1244, 1245. The court reversed a finding of waiver, holding that the defendant did not take substantial offensive or defensive actions in state court by filing the motion. *Id.* at 1246-1247 (11th Cir. 2004). The Court noted that the Defendant's response to the complaint before filing the notice of removal was compelled by state court rules, creating a "quandary of either: (1) removing the action and filing the motion to dismiss in federal court within [7] days, (2) filing a motion to dismiss in state court and then immediately seeking

removal or (3) requesting an extension to file responsive pleadings in state court prior to removing." *Yusefzadeh*, 365 F.3d 1244, 1246. While the Court recognized the tension between the two deadlines, the Court remarked "[t]his quandary should not be used to forestall a state court defendant who chooses to pursue the second option from swiftly seeking to remove his case to the federal court. Therefore '[t]he filing of a motion to dismiss in and of itself does not necessarily constitute a waiver of the defendant's right to proceed in the federal forum.' " *Yusefzadeh*, 365 F.3d at 1246 (quoting *Hill v. State Farm Mut. Auto. Ins. Co.*, 72 F. Supp. 2d 1353, 1354 (M.D. Fla. 1999)). See also FEDERAL PRACTICE & PROCEDURE § 3721 (rev. 4th ed.)(courts "have refused to find a waiver, however, when the defendant's participation in the state action was . . . dictated by the rules of that court…."). *See also Cogdell v. Wyeth*, 366 F.3d 1245, 1249 (11th Cir. 2004)(no waiver found where Defendant "moved the state court to dismiss the case and (before the court could rule on the motion) removed the case the case to the district court").

2. The Tenth Circuit in *City of Albuquerque v. Soto Enterprises, Inc.*, held that filing a motion to dismiss addressing the merits before filing a notice of removal did amount to a waiver, but noted an exception for compelled participation – that is, where state procedural rules required a response to the complaint before the removal deadline lapsed akin to the issue in *Yusefzadeh* – the filing of such a motion will not support waiver. 864 F.3d 1089, 1100 (10th Cir. 2017), *cert. denied*, 200 L. Ed. 2d 249, 138 S. Ct. 983 (2018).

3. In this case, Javitch was also compelled by the state court rules to take some action before its time for removal expired. Javitch's responsive pleading deadline was March 1, 2021, and Javitch's removal deadline was March 15, 2021. Javitch filed its motion to dismiss on February 25 and its notice of removal on March 5, 2021. Pet. App.2a, 3a, 8a.

### *C. The Fifth, Sixth, Eighth and Ninth Circuits also employ a different standard than the Fourth Circuit in assessing whether pre-removal participation in state court litigation gives rise to waiver.*

1. In *Tedford v. Warner-Lambert Co.*, the Fifth Circuit held that the waiver of right to remove must be clear and unequivocal and the defendant did not waive removal by participating in state court proceedings including moving to transfer to another county, moving for confidentiality order, moving to consolidate under state law, and filing special exceptions, because nothing defendant did, including agreeing to trial date before learning of nonsuit of nondiverse defendant, submitted the cause to adjudication on merits in state court. 327 F.3d 423, 428–429 (5th Cir. 2003). *See also Robertson v. U.S. Bank, N.A.*, 831 F.3d 757, 761 (6th Cir. 2016) ("waiver usually must be explicit, but a defendant may constructively waive the right to remove by taking substantial action in state court that manifests a willingness to litigate on the merits…. Affirmative actions, like filing a cross-claim or permissive counterclaim in state court, are the kinds of steps that may amount to waivers.").

2. In *PR Group, LLC v. Windmill Intern., Ltd.*, the Eighth Circuit found that filing a motion to dismiss for lack of prosecution does not constitute the clear and unequivocal waiver of the right to remove, because it neither addressed the merits of the plaintiff's complaint nor sought an adjudication on the merits, and the motion did not clearly and unequivocally demonstrate any willingness by the defendant to litigate in state court. *PR Group, LLC v. Windmill Intern., Ltd.*, 792 F.3d 1025 (8th Cir. 2015).

3. The Ninth Circuit *Kenny v. Wal-Mart Stores, Inc.*, held that taking "necessary defensive action to avoid a judgment being entered automatically against him, … does not manifest an intent to litigate in state court" and that "the right of removal is not lost by action in the state court short of proceeding to an adjudication on the merits." 881 F.3d 786, 790 (9th Cir. 2018) (internal reference omitted). *See also Song v. MTC Fin., Inc.*, 812 F. App'x 609, 610 (9th Cir. 2020)(no waiver by opposing motion for preliminary injunction and in exercising peremptory challenge to state court judge); *Resol. Tr. Corp. v. Bayside Devs.*, 43 F.3d 1230, 1240 (9th Cir. 1994), as amended (Jan. 20, 1995)("Where, as here, a party takes necessary defensive action to avoid a judgment being entered automatically against him, such action does not manifest an intent to litigate in state court, and accordingly, does not waive the right to remove.").

4. As noted above, Javitch was compelled by the state court rules to take some action before its time for removal expired. Javitch's combined non-merits motion to dismiss for lack of subject matter jurisdiction and motion to dismiss based on the

merits is the epitome of an equivocal expression – expressing both a desire that the court not exercise its jurisdiction and *not to address the merits at all,* along with an expression of a desire that in the case of exercising jurisdiction, the court reach the merits and find in the movant's favor. This type of joint motion does not unequivocally reflect an "unequivocal" intent to remain in state court. *Yusefzadeh,* 365 F.3d 1244, 1246. Even coupled with the two other filings – a notice of additional authority and a motion to stay discovery – Javitch's actions did no more than comply with state court rules and defend against judgment being entered automatically. In any case, the merits were never reached by the state court before the removal.

5. The Seventh Circuit has the test right: only where there has been an adjudication of the merits may the right to remove be lost. Congress did not bestow the right to have a federal court re-adjudicate a dispute that was already decided in state court before removal. Because an adjudication on the merits before removal is antithetical to the purpose of the removal statutes, mere filing a pleading or motion prior to removal is immaterial.

### *D. There was no testing of the waters*

1. Redman devoted much of his argument below to an *ad hominem* attack against Javitch as a villain on the run from a judge bearing enduring animus toward Javitch from *Redman I*, who turned tail and ran to federal court "three hours after the court filed notice that … judge was assigned to the [*Redman II*] case." The Court of Appeals found the

timing of Javitch's removal indicative of an effort to "test the waters." Pet. App. 6a.

2. Significantly, the unexplained recusal followed by removal cannot be seen as "testing the waters." For an adverse inference to arise, there must have been a prior adverse decision, and here, there was none. *Cf. Rosenthal v. Coates*, 148 U.S. 142, 147(1893) (removal acts "do not contemplate that a party may experiment on his case in the state court, and, *upon an adverse decision*, then transfer it to the Federal court.")(emphasis added). There were no rulings on the merits by the judge from *Redman I* in *Redman II* before the case was removed, and the removal was timely filed. A single ruling in a prior case, or a win-loss ratio from prior cases before a specific judge of a court cannot be a litmus test for the permissibility of removal.

A party's ability to remove because the party sees an advantage in federal court is part of the design of the Congressional grant of the right of removal as a means of avoiding perceived prejudice against non-resident defendants. 14C CHARLES A. WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3721 (rev. 4th ed.)("the original right to remove probably was designed to protect nonresidents from the local prejudices of state courts."). Indeed, many defendants' decision to remove could be sullied by pointing to success or failure in prior litigation with a given state court judge, or the judge's perceived propensity to rule adversely. A judge's decisions in one case do not necessarily predict any or all future decisions.

Every Defendant named in state court who has the right to remove an action based on federal question jurisdiction engages in some type of calculus in deciding whether to flee to federal court to avoid leaving their fate in the hands of a state court judge who is or is not likely to side with their position. Congress afforded all litigants 30 days to make that decision in 28 U.S.C. § 1446.

To say the die is cast immediately when filing some papers in state court and the calculus cannot change if the action is reassigned from one judge to another, makes a mockery of Congressional policy in 28 U.S.C. § 1446(b) affording all litigants with 30 days to make up their minds where their fate will be determined - in state court or federal court.

Here, the calculus changed for Javitch when the first state court judge inexplicably recused himself. That the case was reassigned to the judge who presided over *Redman I* was incidental to the recusal, and defendant timely removed the case.

### *E. The remand order and proceedings in state court do not moot this appeal*

1. Neither the District Court's remand order nor its entry in the state court pursuant to 28 U.S.C. § 1447(c) divested the lower courts of jurisdiction to entertain this appeal, because this Court retains jurisdiction to hear challenges to remand orders not based on a jurisdictional or procedural defect, despite § 1447(d). *Thermtron Prod., Inc. v. Hermansdorfer*, 423 U.S. 336, 346.

2. If the case was properly removed, the state court has no jurisdiction to proceed and any proceedings it conducts are void. *Roman Cath. Archdiocese of San Juan, Puerto Rico v. Acevedo Feliciano*, 140 S. Ct. 696, 700, 206 L. Ed. 2d 1 (2020). Courts have found that district and circuit courts retain jurisdiction over the proceedings despite the order remanding. *Cf. Acad. of Country Music v. Cont'l Cas. Co.*, 991 F.3d 1059, 1065 (9th Cir. 2021)("the transmittal of a remand order to the state court does not deprive a court of jurisdiction to review that order if review is not barred by § 1447(d)."); *In re Digicon Marine Inc.*, 966 F.2d 158, 160–61 (5th Cir.1992) ("Although we had previously stated that the district court was divested of jurisdiction once it mailed the remand order to the state court, ... where remand is reviewable on appeal a district court has jurisdiction to review its own order, and vacate or reinstate that order."); *Hammer v. United States Dep't of Health & Hum. Servs.*, 905 F.3d 517, 525 (7th Cir. 2018) ("Because the remand order in this case is reviewable, the certification of the remand order imposes no independent bar on either our jurisdiction or the district court's jurisdiction. In reaching this conclusion, we join the three other circuits that have considered this issue.")(citing *Shapiro v. Logistec USA, Inc.*, 412 F.3d 307, 312 (2d Cir. 2005); *Hudson United Bank v. LiTenda Mortg. Corp.*, 142 F.3d 151, 159 (3d Cir. 1998); *In re Digicon Marine, Inc.,* 966 F.2d 158, 160-61 (5th Cir. 1992).

3. Moreover, a reversal of the remand order may result in the nullification of the proceedings in state court by virtue of the Supremacy Clause. *Bryan v. BellSouth Commc'ns, Inc.*, 492 F.3d 231, 241, n. 5 (4th Cir. 2007).

The Fourth Circuit's decision in this case undermines the uniform procedure established by Congress allotting 30 days for filing removal petitions when state court deadlines compel a response before the deadline runs to timely file for removal. *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 351 (1999); *Grubbs v. Gen. Elec. Credit Corp.*, 405 U.S. 699, 705 (1972). The Court should grant the petition.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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