No. 15-712

In The
Supreme Court of the United States

ANNE MERCY KAKARALA,

Petitioner,

v.

WELLS FARGO BANK, N.A.,

Respondent.

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

BRIEF FOR WELLS FARGO IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner's second question presented states an issue that is not presented by the record of this case. Wells Fargo corrects the record below pursuant to Supreme Court Rule 15, to clarify that the second question raised by Petitioner would not properly be before this Court. Thus, the single Question Presented that is properly before this Court is:

1. Whether this Court should reconsider and overrule *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976) ("*Thermtron*"), which permits appeal of remand orders.

CORPORATE DISCLOSURE STATEMENT

The undersigned, counsel of record for Wells Fargo Bank, N.A. certifies that the following have an interest in the outcome of this case or are related to entities interested in the case:

- Wells Fargo Bank National Association a/k/a Wells Fargo Bank, N.A.;
- Wells Fargo Bank, N.A. d/b/a Wells Fargo Home Equity; and
- Wells Fargo Home Mortgage, a division of Wells Fargo Bank, N.A. d/b/a America's Servicing Company.

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OPINIONS BELOW

The unpublished memorandum opinion of the court of appeals was decided on August 31, 2015, and appears in Petitioner's Appendix ("App.") at 1a-5a.

JURISDICTION

The Ninth Circuit had jurisdiction over the appeal from the district court under 28 U.S.C. § 1291. The court of appeals entered its judgment on August 31, 2015. App. 1a-5a. Petitioner Anne Mercy Kakarala ("Kakarala") timely filed her Petition for a Writ of Certiorari on November 25, 2015. This Court docketed the case on December 1, 2015, making the Brief in Opposition due on December 31, 2015. On December 18, 2015, this Court granted the request for an extension of time to file this Brief in Opposition through January 29, 2016. This Court has jurisdiction over this case under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

In addition to 28 U.S.C. § 1447(d), which is reproduced in the Appendix to the Petition, App. 45a, also at issue is 28 U.S.C. § 1291.

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District

Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

STATEMENT OF THE CASE

This is a case about a default under a home loan, and a resulting nonjudicial foreclosure on the home at issue. Kakarala defaulted on her home loan in or around January 2009. RE 131-32. Wells Fargo then initiated a nonjudicial foreclosure under Arizona law upon her home, located at 1152 North Thunder Ridge Drive, Tucson, Arizona ("the Property"). RE 125-26. Wells Fargo recorded a Notice of Trustee's Sale, to be held by Trustee Michael A. Bosco, Jr. Kakarala admitted that she had notice of the initial Trustee's Sale scheduled for March 27, 2009, and that she had even called the Trustee's firm, the law office of Tiffany & Bosco, P.A., regarding the sale. RE 125-26, 302, 315, 436. The Trustee's Sale was postponed four times, but the Trustee's agent provided notice of date, time, and place of the rescheduled sale by public declaration each time, pursuant to A.R.S. § 33-811(B). RE 308. On July 28, 2009, the property was finally sold. RE 306-07. A company called Robin's Nest was the high bidder and purchased the Property for $126,000.00,

which Kakarala contended was below fair market value. RE 306-07.

On September 18, 2009, Kakarala sued Wells Fargo in state court, alleging a violation of A.R.S. §§ 33-808 and 33-809 based on her supposed failure to receive notice of the Trustee's Sale, and complaining that she was negotiating a loan modification when Wells Fargo foreclosed. App. 13a-14a. Kakarala has also asserted in this Court that her 2009 Complaint alleged that Wells Fargo represented "that it would not foreclose while she visited family in India, so long as she made some payments beforehand, which she did." Pet. at 2. That is incorrect. Kakarala's Complaint alleges merely that Wells Fargo sold the Property "without giving [her] any notice of sale." App. 16a. None of her Complaints contained the allegation that Wells Fargo promised not to foreclose while she visited relatives abroad. App. 13a-16a. In any event, Wells Fargo answered Kakarala's original Complaint on November 2, 2009. App. 17a-21a.

Kakarala, who was then *pro se*, sought leave many times to amend her Complaint. On March 12, 2010, she filed a further proposed Complaint as an attachment to a Motion For Leave To Amend. App. 21a-23a. That proposed Complaint asserted seventeen claims: fraud; failure to follow loan requirements of the U.S. Department of Housing and Urban Development ("HUD"); foreclosure without having acquired the note in due course; a request for an accounting, invoking the Fair Debt Collection Practices Act ("FDCPA"); failure of the trustee to obtain the "best

possible price" for the property in foreclosure; failure to provide required notice prior to sale; failure to produce the original note; improper loan assignment to Mortgage Electronic Registration Systems, Inc. ("MERS"); inducement; failure to provide federal assistance; failure to offer a refinance; Truth in Lending Act ("TILA") violations; violations of the Real Estate Settlement Procedures Act ("RESPA"); lack of foreclosure authority; an Equal Credit Opportunity Act ("ECOA") violation under 15 U.S.C. § 1691; securitization fraud; and failure to comply with the Home Ownership and Equity Protection Act ("HOEPA") disclosure requirements. It also sought the return of Kakarala's home and $150,000 in damages. App. 22a-23a.

The Arizona state court granted Kakarala leave to amend her Complaint on April 7, 2010, and Wells Fargo timely removed her case on Monday, April 12, 2010. App. 7a-10a. Wells Fargo cited as bases to remove both federal question jurisdiction pursuant to 28 U.S.C. § 1331, and supplemental jurisdiction over the related state law claims under 28 U.S.C. § 1367. App. 8a-9a. Wells Fargo did not invoke diversity jurisdiction at that time under 28 U.S.C. § 1332, because codefendant Robin's Nest did not appear to be diverse from Kakarala. Kakarala opposed removal, arguing that Wells Fargo had removed her case "to cause more delay and pain to me" and that the removal "is causing me more financial and technical problems." App. 28a. Nonetheless, she did not argue

that there was no federal jurisdiction over her case. App. 28a.

In her new Complaint, Kakarala also asserted various claims against Robin's Nest. Robin's Nest moved for summary judgment, arguing that it paid value for the Property, had no notice of any defect in the Trustee's Sale, and therefore had good title to the Property. The district court agreed, and on March 30, 2011, granted summary judgment to Robin's Nest. RE 156-61. The court's ruling perfected diversity jurisdiction pursuant to 28 U.S.C. § 1332, because the only non-diverse defendant – Robin's Nest – was no longer part of the case.

On March 30, 2011, the court also granted Kakarala's motion for leave to amend her Complaint again. RE 160-61. Wells Fargo moved to dismiss this amended complaint under Federal Rules of Civil Procedure 8(a), 9(b), and 12(b)(6). Kakarala finally retained counsel, but notably, did not request remand of the state law claims in her opposition to the motion to dismiss. RE 66-83.

On April 27, 2012, the district court granted Wells Fargo's motion to dismiss, and entered judgment in favor of Wells Fargo on all of Kakarala's claims on the same day. RE 484.

On May 25, 2012, Kakarala moved to alter or amend the judgment, arguing for the first time that the court – while dismissing her federal claims – should have remanded her state law claims to the Arizona state court for further litigation. RE 484.

Wells Fargo opposed her request, pointing out that district courts have the discretion to exercise jurisdiction over supplemental state law claims, and there was no reason to remand those claims when the court already dismissed them. App. 35a-36a.

On February 20, 2013, the district court disagreed, and remanded Kakarala's state law claims to the Arizona state court, stating:

> Plaintiff has presented a plausible argument that this matter should have been remanded to state court for consideration of the state law claims as presented on the merits. Based on the foregoing, in light of the procedural history of this action, originally filed by Plaintiff pro se in state court, and the fact that Plaintiff now has the benefit of the representation of counsel to present her state law claims, the Court will remand this matter to state court for consideration of Plaintiff's pendent state claims.

App. 5a.

On March 6, 2013, Wells Fargo moved the district court to reconsider its remand order, arguing that the district court also had diversity jurisdiction over the state law claims due to the previous dismissal of all claims against Robin's Nest. RE 484. On May 24, 2013, the district court denied the motion for reconsideration without explanation, and without ordering any response by Kakarala's counsel pursuant to District of Arizona Local Civil Rule 7.2(g). RE 45.

On June 7, 2013, Wells Fargo timely filed a notice of appeal of the district court's remand order. On appeal, Wells Fargo argued that the district court had diversity jurisdiction over all of Kakarala's claims at the time of the remand, and that the district court abused its discretion by remanding them. App. 2a-3a. Kakarala argued that Wells Fargo's removal of the case from Arizona state court was untimely. App. 2a-3a. But Kakarala had never said that in the *district* court, either when she was *pro se* and filed a document entitled "Opposing Removal," or thereafter when she was represented by counsel. The court of appeals ultimately agreed that the district court had diversity jurisdiction when it remanded Kakarala's state law claims against Wells Fargo, and found that Kakarala had waived the supposed untimeliness of Wells Fargo's removal by failing to raise it in the district court at any time. App. 4a. Consequently, the court of appeals reversed the district court's order remanding Kakarala's state law claims. App. 4a.

Kakarala's timely Petition For a Writ of Certiorari then followed.

REASONS FOR DENYING THE PETITION

I. There Is No Compelling Reason To Revisit *Thermtron*.

The major thrust of Kakarala's Petition is that concurrences in the Court's unanimous decision in

Carlsbad Technology, Inc. v. HIF Bio, Inc., 556 U.S. 635, 129 S. Ct. 1862 (2009) – which applies *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976) – provides a compelling reason to revisit *Thermtron* here. This argument fails badly.

First, as the Court's unanimous opinion summarized the simple rule at issue: "[T]his Court has consistently held that § 1447(d) must be read in pari materia with § 1447(c), thus limiting the remands barred from appellate review by § 1447(d) to those that are based on a ground specified in § 1447(c)." *Carlsbad Technology*, 556 U.S. at 638, 129 S. Ct. at 1865-66. And the *Carlsbad Technology* opinion cited that rule to a line of four cases that this Court has decided over the last forty years: *Thermtron*, but also *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127, 116 S. Ct. 494 (1995); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711-12, 116 S. Ct. 1712 (1996); and *Powerex Corp. v. Reliant Energy Services, Inc.*, 551 U.S. 224, 235 n.4, 127 S. Ct. 2411 (2007). As such, *Thermtron* represents this Court's unanimous reaffirmation of a straightforward rule that it has reaffirmed many times over the past four decades.

Second, the Petition overstates the degree of critique in the *Carlsbad Technology* concurrences. Pet. 7-8. Justice Stevens called the decision a "welcome departure" from what he framed as the Court's "sometimes single-minded focus" on literal textualism. *Carlsbad Technology*, 556 U.S. at 642, 129 S. Ct. at 1868 (Stevens, J., concurring). And rather than saying he would depart from *Thermtron*, he said he

would adhere to it, owing to stare decisis. *See id.* The idea that references to stare decisis imply a need to overrule would turn the doctrine of stare decisis on its head. Justices Breyer and Souter likewise adhered to *Thermtron*, but suggested in their concurrence that a revision of 28 U.S.C. § 1447 might be appropriate, with Congress to be guided by "experts in this area of the law." *Carlsbad Technology*, 556 U.S. at 642, 129 S. Ct. at 1868 (Breyer and Souter, J.J., concurring). A suggestion of congressional action while adhering to *Thermtron* suggests a viable rule of law that those Justices did not wish to overrule or revisit. Finally, Justice Scalia, while joining the unanimous opinion of the Court, did note that "*Thermtron* was questionable in its day and is ripe for reconsideration. . . ." *Carlsbad Technology*, 556 U.S. at 642, 129 S. Ct. at 1868 (Scalia, J., concurring). The argument raised by Petitioner was thus joined in 2009, and no other member of this Court expressed a like view. That in turn suggests that this Court's view in 2009 was that the law of 28 U.S.C. § 1447(c) and (d) was sufficiently simple and workable that casting aside decades of settled law would create more instability than it would resolve.

That was right in 2009, and is more true today with the continued reliance of the lower courts on *Thermtron* and its progeny. *See, e.g.*, *Perfect Puppy, Inc. v. City of E. Providence, R.I.*, 807 F.3d 415, 419 (1st Cir. 2015); *Vermont v. MPHJ Tech. Invs., LLC*, 763 F.3d 1350, 1353 (Fed. Cir. 2014); *Campbell v. Am. Int'l Grp., Inc.*, 760 F.3d 62, 66 (D.C. Cir. 2014); *Moody v. Great W. Ry. Co.*, 536 F.3d 1158, 1166 (10th

Cir. 2008); *Holmstrom v. Peterson*, 492 F.3d 833, 836 (7th Cir. 2007); *Stevens v. Brink's Home Sec., Inc.*, 378 F.3d 944, 948 (9th Cir. 2004); *Cook v. Wikler*, 320 F.3d 431, 435 (3d Cir. 2003); *Snapper, Inc. v. Redan*, 171 F.3d 1249, 1252 (11th Cir. 1999); *Carney v. BIC Corp.*, 88 F.3d 629, 631 (8th Cir. 1996); *Pierpoint v. Barnes*, 94 F.3d 813, 815 (2d Cir. 1996); *In re Lowe*, 102 F.3d 731, 734 (4th Cir. 1996); *Anusbigian v. Trugreen/Chemlawn, Inc.*, 72 F.3d 1253, 1255 (6th Cir. 1996); *In re Allstate Ins. Co.*, 8 F.3d 219, 221 (5th Cir. 1993).

Third, Congress' inaction in the face of forty years of *Thermtron*'s rule – including two Justices proposing a need to revise 28 U.S.C. § 1447(c) and (d) – suggests to some degree that Congress has ratified or acquiesced in this Court's now longstanding interpretation of those provisions. *See, e.g.*, *Grove City Coll. v. Bell*, 465 U.S. 555, 567-68, 104 S. Ct. 1211, 1218-19 (1984) (Congress' failure to disapprove regulations, though not dispositive, "strongly implie[d]" that the regulations "accurately reflect[ed] congressional intent."); *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940) ("The long time failure of Congress to alter the Act after it had been judicially construed . . . is persuasive legislative recognition that the judicial construction is the correct one."). While Congressional inaction is not conclusive here, it should provide some guidance as this Court considers whether to revisit *Thermtron*. Consistent with Congress' implied acquiescence in this Court's interpretation of 28 U.S.C. § 1447, this Court should not issue the writ here.

II. There Is No Confusion Over *Thermtron* in the Lower Courts, Much Less "Widespread Confusion," That Would Justify Certiorari Here.

Kakarala urges that *Thermtron* has led to heavier appellate dockets and "widespread judicial confusion." (Pet. at pp. 7-8, citation omitted). However, courts of appeal recognize that the reviewability of remand orders is, at its heart, a statutory issue of the interplay between 28 U.S.C. § 1447(c) and § 1447(d), rather than a policy decision by the courts of the appropriateness of appellate review. *See, e.g.*, *In re Shell Oil Co.*, 932 F.2d 1518, 1520 (5th Cir. 1991) (noting that Section 1447(c) "leaves remand orders for lack of subject matter jurisdiction as the only clearly unreviewable remand orders"). Ascertaining the existence of subject matter jurisdiction is not a "burden." It is simply what federal courts do. *See Reynolds v. Sheet Metal Workers, Local 102*, 702 F.2d 221, 223 (D.C. Cir. 1981) ("Federal courts are courts of limited jurisdiction, and are obliged always to ascertain whether they have subject matter jurisdiction over the litigation before them, even when the parties prefer to ignore the question.").

Kakarala cites two Seventh Circuit cases in an attempt to create the appearance of "confusion," but neither case makes the point for which she cites them. In *Lu Junhong v. Boeing Co.*, the authority of the appellate court to review the remand order was undisputed. 792 F.3d 805, 808 (7th Cir. 2015). The principal issue there was whether the court could

review any other aspect of the same order. *Id.* at 812. Such issues are not present here. Likewise, *Townsquare Media, Inc. v. Brill* concerned removal in the bankruptcy context. 652 F.3d 767 (7th Cir. 2011). Indeed, in *Townsquare Media*, the Seventh Circuit cited *Carlsbad Technology, Inc. v. HIF Bio, Inc.*, 556 U.S. 635 (2009), for the straightforward proposition that "the Supreme Court has adhered to the limiting interpretation of subsection (d)." Other applications of *Carlsbad Technology* make clear that the lower courts are not even mildly puzzled, much less mystified, by the simple and unanimous holding of that case. *See, e.g.*, *Cleveland Hous. Renewal Project v. Deutsche Bank Trust Co.*, 621 F.3d 554, 558 (6th Cir. 2010) (explaining that pursuant to *Carlsbad Technology*, the court of appeals had appellate jurisdiction to review the order remanding state law claims under an abstention theory).

In short, even if the unpublished Ninth Circuit decision were a good vehicle for revisiting *Thermtron* – which it is not – Kakarala's petition for certiorari is a solution for which there is no problem, as evidenced by the Circuit decisions she cites.

III. Petitioner's Second Question Is Not Fairly Presented By the Record of This Case, Which Wells Fargo Thus Corrects Pursuant to Supreme Court Rule 15.

Petitioner suggests in her second Question Presented that an additional issue meriting this

Court's attention and review is whether Wells Fargo abandoned any claim of diversity by engaging in a course of litigation that amounted to "abusive, dilatory forum shopping." This Question Presented states an untrue conclusion, which in turn rests on incorrect factual assertions in the Petition, all of which Wells Fargo now corrects pursuant to Supreme Court Rule 15, paragraph 2.

As an initial matter, the assertion in Kakarala's second Question Presented that the removal was "abusive" or "dilatory" is false. Wells Fargo answered Kakarala's original complaint in Arizona state court – which did not assert federal claims – on November 2, 2009. App. 17a-21a. Kakarala moved for leave to amend her complaint and attached a proposed amended complaint raising claims under the federal TILA and HERA statutes on March 12, 2010. The Court granted her leave to amend on April 7, 2010, and Wells Fargo timely removed on Monday, April 12, 2010. App. 7a-10a. Kakarala's attempts in her factual narrative to make these innocuous facts seem improper or even abusive all fail in turn.

First, Kakarala incorrectly argues that Wells Fargo said it "would respond to the Amended Complaint once filed in state court" and "represent[ed] it would respond in state court to the Amended Complaint with a motion to dismiss." Pet. at 2-3, 10, 16. This is wrong. Wells Fargo's response to Kakarala's Motion To Amend merely states that "Wells Fargo will respond to the Amended Complaint upon this Court granting the Plaintiff's Motion, and the Plaintiff

thereafter lodging the Amended Complaint with this Court." App. 24a-25a. Wells Fargo never represented that it would move to dismiss in "state court," and did respond to the Amended Complaint, after it became the Complaint of record by removing it within five days and moving against it. There is no abuse in a removal permitted on the face of 28 U.S.C. § 1446.

Second, Kakarala is likewise wrong to suggest that Wells Fargo removed her case to avoid an October 2010 trial date (Pet. at 2-3, 10, 16) – the record clearly shows that Wells Fargo requested that trial setting before Kakarala filed her motion to amend with federal claims. Wells Fargo requested a September trial in its pretrial memorandum filed on February 22, 2010, while Kakarala wanted a May trial date. Ultimately, the state court set the October 2010 trial date at a March 1, 2010 hearing held before Kakarala filed her March 12, 2010 Motion To Amend. App. 26a-27a.

Third, while Kakarala is right that Wells Fargo did not remove on diversity grounds, that fact suggests nothing malign or even tactical on Wells Fargo's part. Wells Fargo could not have removed on the basis of diversity, because the state court order permitting Kakarala to amend also ordered the joinder of the non-diverse defendant, Robin's Nest. And any delay after that was authored by Kakarala, who filed serial motions to amend – four of them – so that Wells Fargo was not able to move to dismiss her case by April 18, 2011.

Fourth, as the Ninth Circuit's memorandum decision correctly notes, Kakarala waived any objections she might have had to the timeliness of Wells Fargo's removal by failing to object to the timeliness of the removal in the district court. Mem. Op., at 3, ¶ 2. While Kakarala did file a document called "Opposing Removal" which Wells Fargo treated as a Motion To Remand, she did not raise untimeliness of removal at any time in the district court. *See id.* Thus, her emphasis on timing to create the appearance of abuse is not only factually incorrect, it is also waived, and thus is not a question that should lead this Court to grant certiorari.

IV. This Is Not the Case To Revisit *Thermtron*.

Even if there were a pressing need to revisit *Thermtron* – and as shown above, there is not – this case would not be the right vehicle to do so.

First and foremost, her case cannot be that vehicle because Kakarala waived the argument that removal here was untimely by her failure to raise it in the district court, as the court of appeals correctly determined. Mem. Op., at 3, ¶ 2. So even if one accepts Kakarala's premise that *Thermtron* should be reversed, this Court would not be able to direct a remand of her state law claims to Arizona state court unless it also reversed the court of appeals' manifestly correct holding that Kakarala waived the timeliness of the removal. Her Petition points to no record materials in which she raised timeliness to the district court,

because she did not. For this reason, her case cannot be the vehicle, if there is to be one, to overrule *Thermtron*.

Additionally, Kakarala's claim that Wells Fargo somehow "forfeited" the right to point to diversity in federal court by litigating in state court while the parties were diverse does not make sense. Pet. at 10. Robin's Nest entered this case when Kakarala amended her Complaint to add the federal claims on April 7, 2012. Thereafter, the federal case had Arizonans on opposite sides – Robin's Nest and Kakarala – so there was no diversity in federal court until Robin's Nest was later dismissed. And again, if her point is really that Wells Fargo needed to remove for diversity at the outset of the case, that is another argument about timeliness of removal. A claim of untimely removal is a procedural argument that Kakarala can waive. *See Kelton Arms Condo. Owners Ass'n, Inc. v. Homestead Ins. Co.*, 346 F.3d 1190, 1192 (9th Cir. 2003) (an objection to untimely removal "can be waived"); *Maniar v. FDIC*, 979 F.2d 782, 785 (9th Cir. 1992) ("untimely removal is a procedural rather than a jurisdictional defect"). Kakarala waived it by failing to raise it within 30 days after removal. *See N. Cal. Dist. Council of Laborers v. Pittsburg-Des Moines Steel Co.*, 69 F.3d 1034, 1038 (9th Cir. 1995). This Court should decline to issue the writ here.

CONCLUSION

For the foregoing reasons, Wells Fargo respectfully requests that the Court deny the Petition for a Writ of Certiorari.

Respectfully submitted on January 28, 2016.

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