SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 73 | Issue 4 Article 11

2023

One and Done: Respecting Statutory Limits on Review of Remand Orders

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— Note —

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INTRODUCTION

Imagine you are a plaintiff who has filed an action in state court. Imagine further that the defendant removes the case to federal court, and you quickly move to remand the case back to state court, arguing either that the federal court lacked subject matter jurisdiction over the case or that the notice of removal violated removal procedure. Should a district court or an appellate court make the final decision on whether the case remains in federal court or returns to state court?

Congress indicated in 28 U.S.C. § 1447(d) that the remand decision made by the district court should not be appealable.[1] This serves the goal of minimizing interruptions in the litigation of the merits.[2] Nevertheless, appellate courts occasionally permit appeals of district court decisions to remand.

But does this jockeying over federal or state court under the removal statute even matter? At first blush, the difference between federal and state adjudication may seem insignificant. After all, your case will be adjudicated in roughly the same manner, right?

Plaintiffs, however, frequently prefer to litigate actions in state court, which they view as more receptive to their claims.[3] Plaintiffs often strategically choose state court to take advantage of actual or theoretical state court preference for plaintiffs.[4] This perception is not limited to plaintiffs, as defense attorneys view the federal forum as more

1. 28 U.S.C. § 1447(d) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . .").

2. Powerex Corp. v. Reliant Energy Servs., Inc., 551 U.S. 224, 238 (quoting State v. Rice, 327 U.S. 742, 751 (1946)).

3. Kevin L. Pratt, Twombly*,* Iqbal*, and the Rise of Fraudulent Joinder Litigation*, 6 CHARLESTON L. REV. 729, 730 n.3 (2012).

4. Paul Rosenthal, *Improper Joinder: Confronting Plaintiffs' Attempts to Destroy Federal Subject Matter Jurisdiction*, 59 AM. U. L. REV. 49, 57–58 (2009).

evenhanded.[5] In fact, bias concerns "influenced" the Framers to create diversity jurisdiction, a primary grant of federal court jurisdiction.[6] Additionally, "case[s] do[] not receive the same treatment or have the same chance of success in federal court as [they do] in state court."[7] In fact, law professors Kevin M. Clermont and Theodore Eisenberg found empirical evidence supporting a "removal effect" in "all . . . jurisdictional bases," including diversity and federal question cases.[8] For example, they found that plaintiffs had a 71 percent win rate in diversity cases originally filed in federal court but only a 34 percent win rate in diversity cases originally filed in state court and removed by defendants to federal court.[9] Additionally, plaintiffs' success in federal question cases dropped from 52 percent in cases originally filed in federal court to 25 percent in cases where the defendant removed the case to federal court.[10] The authors then analyzed the possible causes of the "removal effect" on win rate and concluded that the "soundest interpretation" is that "a shift to an unfavorable forum depresses the plaintiffs' win rate, even after accounting for case-selection forces."[11]

Beyond the real or perceived bias and the empirical change in win percentage, which Professors Clermont and Eisenberg concluded "depresses the plaintiffs' win rate,"[12] Professor Howard B. Stravitz identified several "personal, practical, and tactical" reasons that plaintiffs generally prefer state court and defendants generally prefer federal court.[13] Some of the reasons Professor Stravitz articulated are (1) "plaintiffs' lawyers are generally more familiar with [state] procedure" than federal procedure; (2) "federal courts are more likely to grant summary judgment to defendants"; and (3) "federal courts are more likely to bifurcate a trial into liability and damages phases, which tends to increase the plaintiff's burden."[14]

Due in part to the important impact forum plays in litigation, a large amount of time and money is spent litigating removal issues.[15]

5. Howard B. Stravitz, *Recocking the Removal Trigger*, 53 S.C. L. REV. 185, 185 n.1 (2002).

6. Rosenthal, *supra* note 4, at 53–54.

7. *Id.* at 57.

8. Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 593–95 (1998).

9. *Id.* at 593–94.

10. *Id.* at 593–95 & tbl.1.

11. *Id.* at 593.

12. *Id.*

13. Stravitz, *supra* note 5, at 185.

14. *Id.* at 185 n.1.

15. *Id.* at 186 n.2.

And when a defendant files a notice to remove followed by a plaintiff's motion to remand, an important aspect of removal litigation is which court ultimately decides whether the litigation should proceed in federal or state court. For example, regardless of whether a party receives a favorable or unfavorable trial court decision regarding removal litigation, the party will be interested in knowing whether that decision is final or appealable.

Under 28 U.S.C. § 1447(d), the district court often makes the ultimate decision on remand motions.[16] In fact, § 1447(d) seems to require that district courts make the final decision on most motions to remand removed cases to state court, providing (with two limited exceptions not applicable to this Note) that "[a]n order remanding a case to the State court from which it has been removed is not reviewable on appeal or otherwise."[17] Additionally, both congressional policy and Supreme Court case law seem to indicate that a simple jurisdictional rule for § 1447(d) should be preferred. The Court has indicated that Congress's intent in enacting § 1447(d) was to avoid "interruption of litigation of the merits of a removed case."[18] The Court has also embraced the importance of simple jurisdictional rules.[19] In *Thermtron Products, Inc. v. Hermansdorfer*,[20] however, the Supreme Court concluded that § 1447(c) and (d) must be read together, which has led to the articulation of some seemingly narrow, but ultimately leaky, exceptions to the statutory rule that the district court makes the ultimate decision.[21] These exceptions have led to circuit discord that contravenes congressional policy and Supreme Court case law.

This Note discusses several instances in which the application of these exceptions has produced circuit court splits. This Note will argue that the exceptions created by the Supreme Court are complex and confusing for lower courts to apply and that the Court should consider overruling *Thermtron* or, alternatively, narrowly construing the exceptions to create clear rules for lower courts to apply. If either

16. *See* 28 U.S.C. § 1447(d) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . .").

17. *Id.* Under § 1447(d), remand orders are reviewable only when a remanded case was removed from state to federal court under either 28 U.S.C. §§ 1442 or 1443. These limited situations that allow appellate review under § 1447(d) are not applicable to this case.

18. Powerex Corp. v. Reliant Energy Servs., Inc., 551 U.S. 224, 238 (quoting State v. Rice, 327 U.S. 742, 751 (1946)).

19. *See* Hertz Corp. v. Friend, 559 U.S. 77, 94 (2010); *infra* notes 235–44 and accompanying text.

20. 423 U.S. 336 (1976).

21. *E.g.*, *id.* at 344; Carlsbad Tech., Inc. v. HIF Bio, Inc., 556 U.S. 635, 638 (2009).

approach is adopted, the circuit splits discussed in Part II will be remedied and many, if not all, future circuit splits will be avoided.

This Note proceeds as follows. Part I discusses the Supreme Court's interpretation of § 1447(c) and (d), the two federal subsections relevant to understanding whether remand orders are appealable despite the clear language of § 1447(d) precluding most appeals. Part II discusses several circuit splits that have resulted from applying *Thermtron*'s precedent. Part III argues that the Supreme Court should revisit *Thermtron* with an eye toward overruling it because it has proven to be a complex, unworkable interpretation of § 1447(d). Part IV addresses the scenario in which the Court does not overrule *Thermtron*. It proposes a clearer way forward under *Thermtron*.

I. The Supreme Court's Interpretation of the Ability to Appeal Remand Orders

A. 28 U.S.C. § 1447(c) and (d)

Section 1447(c) provides in pertinent part:

> A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal . . . . If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.[22]

Section 1447(d) provides in pertinent part: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise."[23] On its face, § 1447(d) bars appellate review of remand orders.[24] As discussed in Part I.B below, however, the Court has interpreted § 1447(d) more narrowly than its text reads.

B. The Supreme Court's In Pari Materia *Interpretation of § 1447(c) and (d)*

Read alone, § 1447(d) purports to bar appellate review in all circumstances pertinent to this discussion.[25] The Supreme Court has, however, concluded that § 1447(c) and (d) "must be" interpreted "*in*

22. 28 U.S.C. § 1447(c).

23. *Id.* § 1447(d).

24. *Id.* ("An order remanding a case . . . is not reviewable on appeal or otherwise."); *infra* notes 206, 245 and accompanying text.

25. 28 U.S.C. § 1447(d); *see also infra* notes 206, 245 and accompanying text. Although not applicable to this Note, § 1447(d) does not bar review of orders remanding cases removed under §§ 1442 or 1443. 28 U.S.C. § 1447(d).

pari materia"; that is, construed with reference to each other.[26] When § 1447(c) and (d) are read together, appellate review of remand orders is prohibited only when the remand order is based on one of the two grounds in § 1447(c)—lack of subject matter jurisdiction or a procedural defect in removal (including issues regarding untimely filing of the removal notice, when the forum defendant rule applies, and lack of unanimous consent to remove the case).[27] Importantly, § 1447(c) does not provide bases for appeal of remand orders in its text, rather it sets time limits for when some motions to remand should be made.[28]

In its 1976 decision *Thermtron Products, Inc. v. Hermansdorfer*, the Court made clear that remand orders based on grounds not authorized under § 1447(c) are reviewable despite § 1447(d)'s purported ban on review.[29] In *Thermtron*, the district court remanded the case to state court because it concluded its crowded docket would delay trial of the case for the "foreseeable future" and that the plaintiffs' right to a timely determination of their rights outweighed defendants' right to remove.[30] The Supreme Court reversed the district court's remand order despite the plain language of § 1447(d) because it concluded that § 1447(c) and (d) "must be construed together" and that a remand order based on a crowded docket fell outside the scope of § 1447(c).[31]

The *Thermtron in pari materia* interpretation of § 1447(c) and (d) has been followed by the Court ever since.[32] Crowded dockets,[33] abstention,[34] and declining to exercise supplemental jurisdiction[35] are

26. *Carlsbad*, 556 U.S. at 638 (first citing *Thermtron*, 423 U.S. at 345–46; then citing Powerex Corp. v. Reliant Energy Servs., Inc., 551 U.S. 224, 229 (2007); then citing Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 711–12 (1996); and then citing Things Remembered, Inc. v. Petrarca, 516 U.S. 124, 127 (1995)).

27. *Thermtron*, 423 U.S. at 345–46.

28. *See* 28 U.S.C. § 1447(c).

29. *Thermtron*, 423 U.S. at 346. Although *Quackenbush v. Allstate Insurance Co.* overruled the part of *Thermtron* that required appeal of remand orders to be done only through writs of mandamus, it embraced and reaffirmed *Thermtron*'s holding that § 1447(c) and (d) must be read together. *Quackenbush*, 517 U.S. at 711–12, 714–15.

30. *Thermtron*, 423 U.S. at 339–41.

31. *Id.* at 345, 351.

32. *E.g.*, Carlsbad Tech., Inc. v. HIF Bio, Inc., 556 U.S. 635, 638 (2009); Powerex Corp. v. Reliant Energy Servs., Inc., 551 U.S. 224, 229 (2007); *Quackenbush*, 517 U.S. at 711–12; Things Remembered, Inc. v. Petrarca, 516 U.S. 124, 127 (1995).

33. *Thermtron*, 423 U.S. at 340–42.

34. *Quackenbush*, 517 U.S. at 712.

35. *Carlsbad*, 556 U.S. at 636.

several bases for district court remand orders that the Court has held fall outside of § 1447(c) and thus are reviewable by appeal under *Thermtron*'s *in pari materia* interpretation of § 1447(c) and (d). While *Thermtron* and its progeny make clear that remand orders are reviewable when based on grounds not authorized by § 1447(c), they fail to define clearly what type of remand orders fall outside the scope § 1447(c). Instead, the Supreme Court cases provide examples of individual bases that fall outside or inside the scope of § 1447(c) without articulating general principles, thus leaving the lower courts to determine whether each new district court remand scenario is appealable. For example, in *Thermtron*, the Court concluded that remand orders based on a district court's "heavy docket" are not based upon § 1447(c) because a heavy docket implicates "neither" procedural defects nor subject matter jurisdiction "in the slightest."[36] The Court's *in pari materia* interpretation has proved confusing and led to numerous circuit splits[37] and repeated instances in which the Supreme Court vacated or reversed lower court applications of *Thermtron*.[38]

C. The Court's Colorable Standard of Appellate Review of Remand Orders

As demonstrated in *Thermtron*, the Court's *in pari materia* standard for appellate review of remand orders may be straightforward enough when a remand order is clearly not based on either of the two grounds—subject matter jurisdiction or a defect raised within thirty days of the notice of removal—provided in § 1447(c). But when the basis of a remand order is, at the very least, arguably related to one of

36. *Thermtron*, 423 U.S. at 343–44.

37. *E.g.*, *Quackenbush*, 517 U.S. at 710–12 (resolving a circuit split by holding that circuit courts have jurisdiction to review abstention-based remand orders because they are outside the scope of § 1447(c)); City of Albuquerque v. Soto Enters., Inc., 864 F.3d 1089, 1092 (10th Cir. 2017) (acknowledging then wading into a currently unresolved circuit split over whether a remand order based on "waiver by participation falls within . . . § 1447(c)"); Shipley v. Helping Hands Therapy, 996 F.3d 1157, 1159 (11th Cir. 2021), *cert. denied*, 142 S. Ct. 861 (2022) (acknowledging then wading into a currently unresolved circuit split over whether a remand order "based on a procedural removal defect when the plaintiff files a motion to remand within 30 days of the notice of removal, but raises a procedural defect only outside the 30-day time limit" falls within § 1447(c)).

38. *E.g.*, *Carlsbad*, 556 U.S. at 636 (reversing the Federal Circuit's determination that it did not have jurisdiction to review a remand order "declining to exercise supplemental jurisdiction over state-law claims"); Powerex Corp. v. Reliant Energy Servs., Inc., 551 U.S. 224, 239 (2007) (vacating part of the Ninth Circuit's holding "and remanding the case with instructions to dismiss petitioner's appeal for want of jurisdiction"); Kircher v. Putnam Funds Tr., 547 U.S. 633, 648 (2006) (vacating the Seventh Circuit's holding and "remand[ing] the case with instructions to dismiss the appeal for lack of jurisdiction").

these two grounds, how are circuit courts to decide whether review is appropriate? Thirty-one years after its *Thermtron* decision, the Court provided what appeared to be helpful guidance in its 2007 decision, *Powerex Corp. v. Reliant Energy Services, Inc.*[39] In *Powerex*, which dealt with a remand order based on lack of subject matter jurisdiction, the Court declared: "[W]hen . . . [a] District Court relie[s] upon a ground that is colorably characterized as subject-matter jurisdiction, appellate review is barred by § 1447(d)."[40] The Court supported its "colorably characterized" standard, which would limit appellate review of remand orders, by stating that "[l]engthy appellate disputes about whether an arguable jurisdictional ground invoked by the district court was properly such would frustrate the purpose of § 1447(d) quite as much as determining whether the factfinding underlying that invocation was correct."[41]

In *Powerex*, the district court "initially concluded" that it had subject matter jurisdiction to hear the entire removed case because it deemed some, but not all, defendants to be either federal agencies that were authorized to remove under 28 U.S.C. § 1442(a) or foreign states that were authorized to remove under 28 U.S.C. § 1441(d).[42] The district court subsequently decided, however, that the defendants providing the court with subject matter jurisdiction—the federal agency and foreign state defendants—were entitled to immunity.[43] As a result, the district court concluded it no longer had subject matter jurisdiction to hear the case and remanded it to state court.[44] Petitioner, Powerex, which the district court concluded was not a foreign state, appealed, arguing that appellate courts could review the remand order because the remand order fell outside the scope of § 1447(c), since the district court concluded it had jurisdiction at the time of removal.[45] The Supreme Court rejected this argument and held that appellate jurisdiction was lacking because the district court "purported to remand" based on lack of subject matter jurisdiction and that the remand order was "colorably" based on lack of subject matter jurisdiction.[46] In holding that the district court's remand order was unreviewable, the Court noted that the district court's conclusion that it lacked subject matter jurisdiction was "certainly debatable."[47] The

39. 551 U.S. 224 (2007).

40. *Id.* at 234.

41. *Id.*

42. *Id.* at 227.

43. *Id.* at 228.

44. *Id.*

45. *Id.* at 230.

46. *Id.* at 232–34.

47. *Id.* at 233–34.

Court's "colorable" look behind the district court's "characterization" of its remand order consisted of noting that the "only . . . *plausible* explanation of what legal ground the District Court actually relied upon" when remanding the case was lack of subject matter jurisdiction.[48]

Although *Powerex* sheds some light on the standard circuit courts should use when considering whether remand orders based on *subject matter jurisdiction* may be appealed, it does not explicitly indicate whether the same colorable standard applies to remand orders based on procedural defects. Despite *Powerex* being based solely on subject matter jurisdiction,[49] some circuit courts have explicitly applied *Powerex*'s "colorably characterized" rationale to remand orders based on *procedural defects* under § 1447(c).[50] The circuit courts that have explicitly addressed the issue all agree that *Powerex*'s subject matter jurisdiction rationale also applies to remand orders based on procedural defects.[51] The Ninth and Tenth Circuits have held, respectively, that "the [Supreme] Court's reasons . . . are equally applicable to remands relying on a non-jurisdictional defect" and that "appellate review . . . of a remand based on a non-jurisdictional defect would frustrate Congress's intent to avoid interruption of the litigation of the merits."[52] Similarly, the Eleventh Circuit concluded: "We see no logical or prudential reason for restricting [*Powerex*] to only [remand orders] based solely on lack of subject matter jurisdiction."[53] This Note agrees with the Ninth, Tenth, and Eleventh Circuits that *Powerex*'s colorable review standard should be applied to procedural defects and concludes in Part IV that if the Supreme Court does not overrule *Thermtron*, it should expressly apply the *Powerex* colorable standard to remand orders based on procedural defects.

But even the Tenth and Eleventh Circuits, which have explicitly acknowledged that appellate review of remand orders based on procedural defects should be limited to "colorabl[e]" review, appear at least in some instances to apply more than "colorabl[e]" review of remand orders based on procedural defects, thus permitting the somewhat broad ability of appellate courts to review such remand

48. *Id.* at 233.

49. *Id.* at 234.

50. Atl. Nat'l Tr. LLC v. Mt. Hawley Ins. Co., 621 F.3d 931, 937–38 (9th Cir. 2010); Harvey v. Ute Indian Tribe of the Uintah and Ouray Rsrv., 797 F.3d 800, 805 (10th Cir. 2015); Overlook Gardens Props., LLC v. ORIX USA, L.P., 927 F.3d 1194, 1201 (11th Cir. 2019).

51. *Atl. Nat'l Tr. LLC*, 621 F.3d at 937–38; *Harvey*, 797 F.3d at 805; *Overlook Gardens*, 927 F.3d at 1201.

52. *Harvey*, 797 F.3d at 805 (quoting *Atl. Nat'l Tr. LLC*, 621 F.3d at 937).

53. *Overlook Gardens*, 927 F.3d at 1201.

orders.[54] The Supreme Court's lack of explicit guidance has led to circuit splits in determining when appellate jurisdiction to review remand orders is present under *Thermtron* and, for litigants, lengthy periods of interruption of the merits of a case to pursue appeals of satellite jurisdictional issues. Circuit splits have persisted even after *Powerex* announced the colorable review standard for remands based on subject matter jurisdiction and after some circuits adopted the colorable review standard for remands based on procedural defects. This Note specifically discusses several unresolved circuit splits in Part II to demonstrate the need to provide more explicit guidance to the lower courts, and it suggests several options for resolving the current circuit splits and preventing future circuit splits in Parts III and IV.

II. Confusion in Applying *Thermtron*: Unresolved Circuit Splits

This Part details two unresolved circuit splits born from circuit court application of the *Thermtron in pari materia* standard. In both splits, there is discord regarding whether appellate courts have jurisdiction to review a specific type of remand order. The two issues are (1) whether appellate courts may review remand orders based on a procedural defect when a motion to remand based solely on lack of subject matter jurisdiction was filed within thirty days after the notice of removal but the procedural defect was not raised until more than thirty days after the notice of removal and (2) whether appellate courts may review remand orders based on waiver of the right to remove to federal court by a defendant's participation in state court proceedings.

Each split illustrates the inability of even the *Powerex* colorable standard of review to produce lower court unanimity on issues regarding appellate jurisdiction of remand orders. Each also represents the types of jurisdictional issues that continually occupy both Supreme Court and circuit court resources and that circumvent Congress's objective of minimizing time away from the merits of a case.

A. The Split over Remands Based on an Untimely Raised Procedural Defect When a Timely Motion to Remand Was Filed

Despite *Powerex*'s colorable standard and several circuit courts' application of the colorable standard to remands based on procedural defects, circuit courts are split on whether they may review a district court's remand order when a motion for remand based on lack of subject matter jurisdiction is filed within thirty days after the filing of the notice of removal (the statutory period announced in § 1447(c) for filing motions to remand based on defects other than lack of subject

54. *See* City of Albuquerque v. Soto Enters., Inc., 684 F.3d 1089, 1097 (10th Cir. 2017); Shipley v. Helping Hands Therapy, 996 F.3d 1157, 1160 (11th Cir. 2021), *cert. denied*, 142 S. Ct. 861 (2022).

matter jurisdiction), but the order granting remand is based on a later-raised, and thus arguably untimely raised, procedural issue—such as (1) whether the action was untimely removed from state court, (2) whether the forum defendant rule prohibits removal, or (3) whether all defendants have consented to remove the case. In fact, the Eleventh Circuit created an intra-circuit split in 2021 on just this issue, with decisions that were announced within one week of each other.[55]

1. Circuit Court Decisions Declining Review

At least one case from the Eleventh Circuit indicates that § 1447(d) disables appellate courts from reviewing remand orders based on procedural defects when a timely motion for remand has been filed, regardless of whether the timely motion for remand is based on lack of subject matter jurisdiction or a procedural defect.[56] The Fifth Circuit, though it has not reached the exact issue, also has precedent indicating that what matters is the timeliness of the motion for remand and that the exact issues raised in the motion do not matter.[57]

In *MSP Recovery Claims, Series LLC v. Hanover Insurance Co.*,[58] the Eleventh Circuit concluded that it lacked jurisdiction to review the district court's remand orders based on procedural defects although the motions for remand were based solely on lack of subject matter jurisdiction, because the orders were "within the scope of 1447(c)" and therefore "unreviewable under 1447(d)."[59] In *MSP Recovery Claims*, the defendants removed the cases, the plaintiff moved "to remand the cases . . . for *lack of jurisdiction*," and the district court remanded the cases.[60]

The defendants appealed the district court's remand order, arguing that review was proper because "the district court *sua sponte* remanded each case for a non-jurisdictional procedural defect."[61] Specifically, the defendants argued that the remand orders were sua sponte, notwithstanding plaintiff's timely remand motions, because the district court "stated reasons for remanding [that] were not precisely the same

55. *Compare* MSP Recovery Claims, Series LLC v. Hanover Ins. Co., 995 F.3d 1289, 1295 (11th Cir. 2021) (refusing to review a district court remand order or to determine whether the remand order was based on procedural or jurisdictional reasons because the district court granted a timely motion for remand), *with Shipley*, 996 F.3d at 1161 (reversing a district court's remand order for a procedural defect despite a timely motion for remand because the original motion was based on a jurisdictional argument).

56. *MSP Recovery Claims*, 995 F.3d at 1295.

57. BEPCO, L.P. v. Santa Fe Mins., Inc., 675 F.3d 466, 471 (5th Cir. 2012).

58. 995 F.3d 1289 (11th Cir. 2021).

59. *Id.* at 1295.

60. *Id.* at 1293 (emphasis added).

61. *Id.* at 1294.

as the grounds listed in [the plaintiff's] timely motions to remand."[62] The Eleventh Circuit rejected this argument because the district court granted a timely motion to remand in every case.[63] The *MSP Recovery Claims* court then noted, "[I]f a remand order is for lack of subject matter jurisdiction or if it follows a timely motion, then 'we are precluded from reviewing such a remand order whether or not that order might be deemed erroneous by [the Eleventh Circuit].'"[64] The critical conclusion of *MSP Recovery Claims* is that because the plaintiff filed timely motions to remand, although based solely on lack of subject matter jurisdiction, the appellate court lacked jurisdiction to determine whether the district court actually remanded for "procedural or jurisdictional reasons."[65]

In a similar case, *BEPCO, L.P. v. Santa Fe Minerals, Inc.*,[66] the Fifth Circuit concluded that it lacked jurisdiction to review the basis for a district court's remand order.[67] In *BEPCO*, defendant ICAROM, a party to the case since March 2010, removed the case on January 27, 2011.[68] Within thirty days of the notice of removal—on February 18, 2011—BEPCO responded to ICAROM's removal by moving to remand, arguing that (1) ICAROM waived its right to removal and (2) "ICAROM was improperly joined for the sole purpose of invoking federal jurisdiction."[69] Although BEPCO did raise procedural defects, it did not argue in its motion to remand that ICAROM's removal was untimely. BEPCO first argued that ICAROM's removal was untimely in its reply brief, filed more than thirty days after the notice of removal. ICAROM filed a motion to strike BEPCO's untimeliness argument because, it argued, BEPCO's untimeliness argument "was itself tardy."[70] In *BEPCO*, the Fifth Circuit confronted whether a "district court exceed[s] its statutory authority by ordering a remand on the basis of an objection that was not raised within the 30-day limit

62. *Id.*

63. *Id.*

64. *Id.* (quoting Mgmt. Advisors, Inc. v. Artjen Complexus, Inc., 561 F.3d 1294, 1296 (11th Cir. 2009)).

65. *Id.* at 1295.

66. 675 F.3d 466 (5th Cir. 2012).

67. *Id.* at 472.

68. *Id.* at 468–69.

69. *Id.* at 469. A defendant filed crossclaims and third-party claims against multiple "insurers and underwriters," one of which was ICAROM, for "potential liability under policy T11669." *Id.* at 468. BEPCO argued that policy T11669 was not applicable to the case and that the defendant joined ICAROM to create federal jurisdiction. *Id.* at 469.

70. *Id.*

prescribed by 28 U.S.C. § 1447(c)."[71] The Fifth Circuit concluded that what "matter[s] is the timing of the remand motion."[72] Thus, in the Fifth Circuit's view, a plaintiff can raise a procedural defect after thirty days if it has filed a timely motion to remand.[73]

To reach this conclusion, the Fifth Circuit began by establishing that Congress significantly limited appellate jurisdiction over remand orders and that under the Supreme Court's construction of § 1447(c) and (d), appellate courts may only review remand orders not based on "lack of subject matter jurisdiction or a defect in removal procedure."[74] Despite ICAROM's protest, the Fifth Circuit concluded that § 1447(c)'s "30-day requirement governs the timeliness of a *motion to remand*, not the time limit for raising removal defects."[75] Thus, in the Fifth Circuit, the "central inquiry" of the "timeliness analysis under Section 1447(c) . . . is whether the *remand motion* satisfies the 30-day requirement."[76]

2. Circuit Court Decisions Allowing Review

Confusingly, the Eleventh Circuit also decided a case in 2021 indicating that even when a timely motion for remand based on lack subject matter jurisdiction is filed, the basis of the remand order does matter when determining appealability.[77] Interestingly, this Eleventh Circuit case neither acknowledges nor applies *Powerex*'s colorable review standard,[78] although the Eleventh Circuit explicitly adopted the *Powerex* standard for remand orders based on procedural defects in 2019.[79] Additionally, the Ninth Circuit has case law indicating that the relevant inquiry is the date on which the issue is raised, not the date on which the motion for remand is filed.[80] Notably, the Ninth Circuit case was decided in 1995, well before the Supreme Court articulated

71. *Id.*

72. *Id.* at 471.

73. *Id.*

74. *Id.* at 470 (quoting Schexnayder v. Entergy La., Inc., 394 F.3d 280, 283 (5th Cir. 2004)).

75. *Id.* at 471 (emphasis added).

76. *Id.* (emphasis added).

77. Shipley v. Helping Hands Therapy, 996 F.3d 1157, 1160 (11th Cir. 2021), *cert. denied*, 142 S. Ct. 861 (2022).

78. *See id.*

79. Overlook Gardens Props., LLC v. ORIX USA, L.P., 927 F.3d 1194, 1201–02 (11th Cir. 2019).

80. N. Cal. Dist. Council of Laborers v. Pittsburg-Des Moines Steel Co., 69 F.3d 1034, 1038 (9th Cir. 1995).

the *Powerex* standard and well before the Ninth Circuit applied the *Powerex* standard to remand orders based on procedural defects.[81]

On May 6, 2021—less than one week after the Eleventh Circuit decided in *MSP Recovery Claims* that when a timely motion for remand based on subject matter jurisdiction is filed, it "need not address whether the district court remanded for procedural or jurisdiction reasons,"[82] and despite the fact that the Eleventh Circuit applies the Supreme Court's colorable standard from *Powerex* to remands based on procedural defects[83]—the Eleventh Circuit created an intra-circuit split in *Shipley v. Helping Hands Therapy*[84] by applying more than colorable review to a remand order based on a procedural defect.[85] Indeed, the Eleventh Circuit held in *Shipley* that even when a timely motion to remand based on a jurisdictional argument is raised, a circuit court may review a district court's remand order granting the motion to remand based on a procedural defect.[86]

In *Shipley*, plaintiff Betty Shipley filed her action in state court on October 12, 2017. On October 11, 2018, the defendants untimely removed the case to federal court, and on November 8, 2018, Shipley moved to remand within thirty days of removal, arguing only that the federal court did not have subject matter jurisdiction (but not also seeking remand based on a procedural defect). On December 4, 2018—more than thirty days after removal—Shipley filed a reply raising a procedural defect argument that the defendants' purported removal of the case was untimely.[87]

Although Shipley filed a timely motion to remand based on subject matter jurisdiction, the defendants argued that she waived procedural remand arguments because her motion to remand raised only jurisdictional arguments.[88] The Eleventh Circuit acknowledged that the Supreme Court has created exceptions to § 1447(d)'s purported blanket ban on appellate review.[89] Curiously, however, the Eleventh Circuit did not mention that the Supreme Court implemented a colorable standard

81. Atl. Nat'l Tr. LLC v. Mt. Hawley Ins. Co., 621 F.3d 931, 937–38 (9th Cir. 2010).

82. MSP Recovery Claims, Series LLC v. Hanover Ins. Co., 995 F.3d 1289, 1295 (11th Cir. 2021); *see supra* Part II.A.1.

83. *Overlook Gardens*, 927 F.3d at 1201–02.

84. 996 F.3d 1157 (11th Cir. 2021).

85. *Id.* at 1160. The procedural defect the district court based its remand order on was that the defendants "failed to remove the case within the statutory timeframe." *Id.* at 1159.

86. *Id.* at 1160.

87. *Id.* at 1158–59.

88. *Id.* at 1159.

89. *Id.*

to limit appellate review.[90] Even more curious is the court's failure to mention that the Eleventh Circuit itself applies *Powerex*'s colorable standard to remand orders based on procedural defects.[91] Instead, the Eleventh Circuit in *Shipley* proceeded by articulating, "[O]ur task is to determine whether the remand order is based on 'a motion to remand the case filed within 30 days of the notice of removal which is based upon a defect in removal procedure.'"[92]

The Eleventh Circuit concluded that it had jurisdiction to review the remand order because it deemed the remand based on grounds not specified in § 1447(c).[93] In reaching this conclusion, the court stressed that the timely motion was based only on jurisdiction and that the reply, which first raised a procedural argument, was filed "well outside the 30-day time frame set forth by [§ 1447(c)]."[94] The Eleventh Circuit declined to follow the rationale adopted by the Fifth Circuit in its 2012 decision in *BEPCO*,[95] which was decided after *Powerex*, and instead followed the reasoning articulated by the Ninth Circuit in its 1995 decision in *Northern California District Council of Laborers v. Pittsburg-Des Moines Steel Co.*,[96] which was decided well before *Powerex*.

Pittsburg-Des Moines concluded that under § 1447(c), procedural defects cannot be raised more than thirty days after removal, even when a timely motion is filed.[97] The Ninth Circuit acknowledged in *Pittsburg-*

90. *See* Shipley v. Helping Hands Therapy, 996 F.3d 1157 (11th Cir. 2021), *cert. denied*, 142 S. Ct. 861 (2022) (showing that the case does not articulate the Supreme Court's standard from *Powerex*).

91. *See id.* In 2019, the Eleventh Circuit applied the Supreme Court's colorable standard of review to remands based on procedural defects, concluding that there is "no logical or prudential reason for restricting the Supreme Court's discussion in *Powerex* of the scope of § 1447(d)" to jurisdictional remands. Overlook Gardens Props., LLC v. ORIX USA, L.P., 927 F.3d 1194, 1201–02 (11th Cir. 2019).

92. *Shipley*, 996 F.3d at 1160 (quoting *In re* Bethesda Mem'l Hosp., Inc., 123 F.3d 1407, 1409 (11th Cir. 1997)).

93. *Id.*

94. *Id.*

95. *See supra* notes 66–76 and accompanying text.

96. 69 F.3d 1034 (9th Cir. 1995).

97. *Id.* at 1038. Notably, this case was decided in 1995, well before the Ninth Circuit applied the colorable review standard articulated by the Supreme Court in *Powerex* to remands based on procedural defects. Atl. Nat'l Tr. LLC v. Mt. Hawley Ins. Co., 621 F.3d 931, 937–38 (9th Cir. 2010) (holding that the "[Supreme] Court's reasons for holding that 'review of the District Court's characterization of its remand . . . should be limited to confirming that that characterization was colorable,' are equally applicable to remands relying on . . . non-jurisdictional defect[s]." (quoting Powerex v. Reliant Energy Servs., Inc., 551 U.S. 224, 234 (2007)).

Des Moines that the plaintiffs filed a timely remand motion, but emphasized that it was based "solely" on a forum-selection clause argument and the procedural defect argument was first raised more than thirty days after removal.[98] The *Pittsburg-Des Moines* court, under the then-current Supreme Court precedent, stated that it had jurisdiction to review the remand order.[99]

After claiming jurisdiction to review the remand order, the Ninth Circuit concluded that the "critical date" is when a procedural defect is raised, not when a remand motion is filed.[100] In the court's opinion, "[a]ny other reading of the statute would elevate form over substance. The purpose of the 30-day time limit is 'to resolve the choice of forum at the early stages of litigation,' and to 'prevent the "shuffling [of] cases between state and federal courts after the first thirty days."'"[101]

Notably, this case was decided in 1995, well before 2007 when the Supreme Court articulated the narrow colorable standard of review for remands based on subject matter jurisdiction.[102] The Supreme Court reasoned that colorable review is the proper standard because it avoids "[l]engthy appellate disputes about whether an arguable jurisdictional ground invoked by the district court was properly such" and that these lengthy appellate disputes "would frustrate the purpose of § 1447(d) quite as much as determining whether the factfinding underlying the invocation was correct."[103] Moreover, the Ninth Circuit subsequently held in 2010 that the Supreme Court's rationale for applying a colorable standard to remands based on subject matter jurisdiction also applies to remands based on procedural defects.[104] These subsequent developments in Supreme Court and Ninth Circuit case law call into question the rationale articulated in *Pittsburg-Des Moines* as the basis for reviewing district court remand orders in which a timely motion to remand is filed but a procedural defect is first argued only after the thirty-day time period for remand based on procedural defects has passed.

98. *Pittsburg-Des Moines*, 69 F.3d at 1037.

99. *Id.* at 1038.

100. *Id.*

101. *Id.* (quoting Maniar v. Fed. Deposit Ins. Corp., 979 F.2d 782 at 785–86 (9th Cir. 1992)). This is a valid rationale, but the purpose it aims to achieve can be served by allowing parties and the court to raise alternate grounds for remand after the motion but before the court has ruled on the motion. *See, e.g.*, *In re* Cont'l Cas. Co., 29 F.3d 292 (7th Cir. 1994); Velchez v. Carnival Corp., 331 F.3d 1207 (11th Cir. 2003); Schexnayder v. Entergy La., Inc., 394 F.3d 280 (5th Cir. 2004).

102. *Powerex*, 551 U.S. at 234.

103. *Id.*

104. Atl. Nat'l Tr. LLC v. Mt. Hawley Ins. Co., 621 F.3d 931, 937–38 (9th Cir. 2010).

B. Remand Orders Based on Waiver by Participation in State Court

The circuit courts are also split on whether, under *Thermtron*, they may review a remand order based on a defendant's waiver of the right to remove to federal court by participating in the state court litigation.[105] There is a split on whether waiver by participation in state court proceedings deprives federal courts of subject matter jurisdiction.[106] In addition, there is disagreement among circuit court judges regarding whether waiver by participation constitutes a defect in removal procedure.[107] In 2017, a decade after *Powerex* announced the colorable review standard for remands based on subject matter jurisdiction[108] and two years after the Tenth Circuit applied *Powerex*'s colorable review standard to remands based on procedural defects,[109] the Tenth Circuit joined the split over subject matter jurisdiction and the disagreement over procedural defects.[110]

In *City of Albuquerque v. Soto Enterprises, Inc.*,[111] the district court remanded the case to state court because, it concluded, the defendant "waived its right to remove the case to federal court [by] participating in the state court."[112] The district court concluded the defendant waived its right to remove to federal court because the defendant filed its motion to dismiss one hour and twenty minutes before filing its notice of removal.[113] The Tenth Circuit concluded that the district court's remand order, based on the defendant's participation in the state court proceedings, was not based on either of the grounds in § 1447(c) and thus that § 1447(d) did not bar appellate jurisdiction.[114]

1. The Split Regarding Whether Waiver by Participation Deprives Federal Courts of Subject Matter Jurisdiction

In its 2017 decision in *Soto*, the Tenth Circuit joined an existing circuit split by concluding that waiver by participation in state court does not deprive the federal courts of subject matter jurisdiction.[115]

105. City of Albuquerque v. Soto Enters., Inc., 864 F.3d 1089, 1092 (10th Cir. 2017).

106. *Id.*

107. *Id.* at 1097.

108. *Powerex*, 551 U.S. at 234.

109. Harvey v. Ute Indian Tribe of the Uintah and Ouray Rsrv., 797 F.3d 800, 804–05 (10th Cir. 2015).

110. *Soto*, 864 F.3d at 1092, 1097.

111. 864 F.3d 1089.

112. *Id.* at 1091.

113. *Id.* (a cautionary tale for all litigators).

114. *Id.* at 1098.

115. *Id.* at 1093–94.

Based on this conclusion, the Tenth Circuit concluded that a remand based on participation in state court "falls outside § 1447(c)'s subject-matter-jurisdiction basis."[116] The Tenth Circuit concluded that waiver by participation does not deprive federal courts of subject matter jurisdiction because, it held, waiver by participation is a common law rule and common law rules do not deprive the federal courts of jurisdiction.[117] The Eleventh Circuit has also held that waiver by participation does not deprive federal courts of jurisdiction.[118]

The Fifth and Ninth Circuits, however, concluded that waiver by participation does deprive the federal courts of subject matter jurisdiction. The Fifth Circuit, in *In re Weaver*,[119] concluded that it did not have jurisdiction to review the district court's remand order based on waiver by participation because the remand order was based on lack of subject matter jurisdiction.[120] Similarly, the Ninth Circuit has concluded that appellate jurisdiction is lacking when a district court remands based on waiver by participation.[121]

2. The Disagreement over Whether Waiver by Participation Is a Procedural Defect

In *Soto*, the Tenth Circuit concluded that "'any defect'" as used in § 1447(c) encompasses only "failures to comply with the statutory requirements for removal."[122] The Tenth Circuit then concluded that waiver by participation violates the common law but does not violate statutory removal requirements.[123] Therefore, it concluded that remand orders based on waiver by participation in state court are not

116. *Id.* at 1094.

117. *Id.* at 1093.

118. Codgell v. Wyeth, 366 F.3d 1245, 1248–49 (11th Cir. 2004) (concluding that "[w]aiver may be a proper basis upon which to find lack of *removal* jurisdiction; however, waiver does not divest the court of *subject matter* jurisdiction").

119. 610 F.2d 335 (5th Cir. 1980).

120. *Id.* at 337 (finding that the district court judge "believed the case was not removable, leading to the logical inference that he felt jurisdiction was lacking").

121. Schmitt v. Ins. Co. of N. Am., 845 F.2d 1546, 1549 (9th Cir. 1988) ("[A]n order remanding a case on the ground that the defendant waived the right to remove by seeking relief in the state court is governed by the requirements of section 1447(c)."); *see also* Ferrari, Alvarez, Olsen & Ottoboni v. Home Ins. Co., 940 F.2d 550, 552–53 (9th Cir. 1991) (finding that the remand order was not based on waiver by participation but concluding that if it had been, *Schmitt v. Insurance Co. of North America* would control).

122. *Soto*, 864 F.3d at 1095, 1097.

123. *Id.* at 1097–98.

procedural defects under § 1447(c).[124] This conclusion, as the Tenth Circuit acknowledged, does not enjoy unanimous support among circuit court judges.[125]

In 2015, just two years before a Tenth Circuit panel concluded otherwise, Judge Hartz, a Tenth Circuit judge, concluded that waiver by participation is a procedural defect that falls within § 1447(c).[126] Judge Hartz, like the Tenth Circuit panel in *Soto*, found that "defect in removal procedure" under § 1447(c) encompasses "failure to comply with the procedural requirements of federal law."[127] Nevertheless, Judge Hartz, unlike the Tenth Circuit panel in *Soto*, found waiver by participation to be a procedural defect, concluding that it "is like untimely removal," which is undoubtedly a procedural defect under § 1447(c).[128]

In *Rothner v. City of Chicago*,[129] the Seventh Circuit, like the *Soto* court, concluded that remands based on waiver by participation in state court are reviewable, but Judge Easterbrook vehemently disagreed in his dissent.[130] Judge Easterbrook argued that § 1446(b) requires that removals be timely and that when defendants waive their right to remove, they have failed to remove in a timely manner.[131] Judge Easterbrook argued that if untimely removal is a procedural defect, waiver is too, because waiver is a conclusion that "the defendant *waited too long* in light of events taking place in state court."[132] He argued that waiver means "that the defendant's time ran out in advance of the limit in the statute. So viewed, it is a defect in removal procedure."[133]

The most convincing point made by Judge Easterbrook is that the panel majority was "not demonstrably wrong—but they are not demonstrably right either."[134] That is the definition of "colorable." Even if one does not agree with Judge Hartz's and Judge Easterbrook's conclusions, many would agree there are colorable bases for their conclusions. As a result, it is surprising that the Tenth Circuit in *Soto* concluded that waiver by participation is not a procedural defect within

124. *Id.*

125. Harvey v. Ute Indian Tribe of the Uintah and Ouray Rsrv., 797 F.3d 800, 809 (10th Cir. 2015) (Hartz, J., concurring); Rothner v. City of Chicago, 879 F.2d 1402, 1419–22 (7th Cir. 1989) (Easterbrook, J., dissenting).

126. *Harvey*, 797 F.3d at 809 (Hartz, J., concurring).

127. *Id.*

128. *Id.* (citing Things Remembered, Inc. v. Petrarca, 516 U.S. 124, 128 (1995)).

129. 879 F.3d 1402 (7th Cir. 1989).

130. *Id.* at 1420–21, 23–24 (Easterbrook, J., dissenting).

131. *Id.* at 1420.

132. *Id.* at 1422.

133. *Id.*

134. *Id.* at 1421.

§ 1447(c). *Soto*'s conclusion is especially surprising given that it cited *Harvey v. Ute Indian Tribe of the Uintah & Ouray Reservation*,[135] a Tenth Circuit decision decided just two years prior to *Soto*, which held that the Tenth Circuit only "colorabl[y]" reviews remands based on procedural defects.[136] A major reason for only applying colorable review is that it is "difficult to distinguish the line between misclassifying a ground as a defect, and correctly classifying an issue as a defect but then misapplying the law to the facts of the case."[137] *Soto* violates this rationale by acknowledging that circuit judges disagree with its conclusion.[138] Where circuit court judges disagree about a whether a remand order is within § 1447(c), the disagreement highlights the difficulty in distinguishing whether a remand order is based on § 1447(c) and the order thus, at least colorably, falls within § 1447(c).

C. The Circuit Split Takeaway

Soto and *Shipley* illustrate that despite the clarifying colorable standard given in *Powerex*, circuit courts continue to struggle in their determination of when appellate jurisdiction exists under *Thermtron*. This Note proposes two ways forward. Part III proposes rethinking *Thermtron* and holding that § "'1447(d) means what it says' . . . and what it says is no appellate review of remand orders."[139] Part IV proposes continued adherence to *Thermtron* but narrowing its exceptions to § 1447(d)'s bar on appellate review.

III. Rethinking *Thermtron*

The text of § 1447(d) purports to prohibit appellate review in the circumstances relevant to this Note.[140] That section states in pertinent part: "An order remanding a case . . . is not reviewable on appeal or otherwise."[141] Indeed, several Justices, in separate opinions, have interpreted § 1447(d) to be a complete bar on appellate review of orders

135. 797 F.3d 800 (10th Cir. 2015).

136. *Id.* at 804–05.

137. *Id.* at 805 (this proposition was first advanced by the Supreme Court in *Powerex* for remands based on subject matter jurisdiction and *Harvey* embraced it for remands based on procedural defects).

138. City of Albuquerque v. Soto Enters., Inc., 864 F.3d 1089, 1097 (10th Cir. 2017).

139. Carlsbad Tech., Inc. v. HIF Bio, Inc., 556 U.S. 635, 643 (2009) (Scalia, J., concurring) (quoting Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 354 (1976) (Rehnquist, J., dissenting)).

140. 28 U.S.C. § 1447(d).

141. *Id.*

remanding removed cases to state court.[142] Several Justices have even indicated their belief that *Thermtron* should be overruled since it seemingly circumvents the plain language of § 1447(d) by permitting review of remand orders not based on grounds enumerated in § 1447(c). In the 2009, post-*Powerex* case *Carlsbad Technology, Inc. v. HIF Bio, Inc.*,[143] Justice Scalia concluded in a concurring opinion that "*Thermtron* was questionable in its day and is ripe for reconsideration in the appropriate case."[144] Justice Thomas took the criticism of *Thermtron* one step further in his dissent from the denial of certiorari in *Kakarala v. Wells Fargo Bank, N.A.*[145] Justice Thomas argued that "the question presented by th[e] [*Kakarala*] petition is whether the court should overrule *Thermtron*"[146] and wrote that "*Thermtron* was wrongly decided" because it "adopted an atextual reading of 28 U.S.C. § 1447(d)."[147] The above views regarding *Thermtron* and § 1447(d) have never persuaded a majority of Justices. Instead, subsequent cases indicate that the Court is willing to follow the precedent set in *Thermtron*.[148]

This Part suggests that *Thermtron*'s *in pari materia* construction of § 1447(c) and (d) may be subject to reconsideration based on (1) theories of stare decisis and statutory construction that suggest that "unworkable" constructions of a statute or judicial "implementation" test that does not, in fact, construe the statutory text are not subject to strict stare decisis consideration and (2) the principle of jurisdictional clarity.

A. Clarifying Statutory Stare Decisis

Although *Thermtron* interpreted § 1447(d) and subsequent decisions have adhered to its interpretation, it does not mean the Court will continue to follow the *Thermtron* precedent, given the ongoing debate regarding the amount of deference courts should give to precedents construing statutes. In some cases, the Supreme Court

142. *Thermtron*, 423 U.S. at 361 (1976) (Rehnquist, J., joined by Burger, C.J., and Stewart, J., dissenting); Carlsbad Tech., Inc. v. HIF Bio, Inc., 556 U.S. 635, 641–43 (2009) (Scalia, J., concurring) (Stevens, J., concurring); Kakarala v. Wells Fargo Bank, N.A., 136 S. Ct. 1153, 1154 (2016) (Thomas, J., dissenting from denial of cert.).

143. 556 U.S. 635 (2009).

144. *Id.* at 642 (Scalia, J., concurring).

145. 136 S. Ct. 1153, 1154 (2016) (Thomas, J., dissenting from denial of cert.).

146. *Id.* at 1153.

147. *Id.*

148. *E.g.*, *Carlsbad*, 556 U.S. at 638; Powerex Corp. v. Reliant Energy Servs., Inc., 551 U.S. 224, 229 (2007); Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 711–12 (1996); Things Remembered, Inc. v. Petrarca, 516 U.S. 124, 127–28 (1995).

accords great deference to statutory precedents.[149] In other cases, however, the Court, or at least some Justices, seems more willing to overrule statutory precedents.[150]

A strong position for according great deference to precedents interpreting statutes is set forth in *Kimble v. Marvel Entertainment, LLC*.[151] *Kimble* starts by declaring a strong deference to stare decisis in general, followed by an argument that even greater deference should be afforded to precedents interpreting statutes.[152] In general, the *Kimble* Court declared, a strong principle of stare decisis is "preferred . . . because it promotes evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual perceived integrity of the judicial process."[153] Additionally, the Court declared "that it is usually 'more important that the applicable rule of law be settled than that it be settled right.'"[154] *Kimble* then argued that stare decisis is only relevant to upholding wrongly decided decisions and that the Court "require[s] . . . special justification" beyond the "belief 'that the precedent was wrongly decided'" before it will overturn precedent.[155]

The *Kimble* Court further emphasized that decisions interpreting statutes—based on "statutory text," "policies and purposes," or "judicially created doctrine[s]"—receive even greater deference than constitutional precedents because Congress is able to alter the Court's statutory precedents.[156] The Court thus concluded that "all" statutory decisions "effectively become part of the statutory scheme" and are for Congress, not the Court, to change.[157] The Court also highlighted that Congress had amended the statute multiple times without altering the precedent petitioners asked the Court to overrule. In fact, the Court

149. *E.g.*, Kimble v. Marvel Ent., LLC, 135 S. Ct. 2401, 2410–11 (2015); Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 274 (2014); Neal v. United States, 516 U.S. 284, 295 (1996); NLRB v. Int'l Longshoremen's Ass'n, AFL-CIO, 473 U.S. 61, 84 (1985).

150. *E.g.*, Gross v. FBL Fin. Servs., 557 U.S. 167, 179 (2009); Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 899–900 (2007); Irwin v. Dep't of Veterans Affs., 498 U.S. 89, 94–95 (1990).

151. 135 S. Ct. 2401 (2015).

152. *Id.* at 2409–11.

153. *Id.* at 2409 (quoting Payne v. Tennessee, 501 U.S. 808, 827–28 (1991)).

154. *Id.* (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)).

155. *Id.* (quoting Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 266 (2014)).

156. *Id.* (citing Patterson v. McLean Credit Union, 491 U.S. 164, 172–73 (1989)).

157. *Id.* at 2409.

noted that Congress explicitly rejected bills to replace the precedent petitioners asked the Court to replace.[158]

Similarly, Congress has amended parts of § 1447 four times since *Thermtron* but has not disturbed *Thermtron*'s holding.[159] The fact that Congress has amended § 1447 without altering *Thermtron* would, under *Kimble*, provide stronger ground for upholding *Thermtron*.[160] Additionally, *Kimble* cites *Watson v. United States*,[161] which concluded that congressional inaction for long periods increases the great deference already afforded to statutory interpretation precedents.[162] In *Watson*, the "long congressional acquiescence" referenced by the Court was only fourteen years, whereas Congress has acquiesced in *Thermtron*'s precedent for more than three times as long. Thus, under *Kimble* and *Kimble*-like precedents, it would seem clear that the Court should uphold *Thermtron* even if the current Court believed *Thermtron* was wrongly decided.

The Court, or at least some of the Justices, has, however, been skeptical of employing deferential statutory stare decisis in cases where, as Professor Anita Krishnakumar puts it, "'unworkable' precedents" or "implementation tests" are announced.[163] The Supreme Court's departure from the plain text of § 1447(d) in *Thermtron* created an unworkable precedent, which has produced and continues to produce many lower court disagreements and repeatedly requires Supreme Court intervention.[164] Further, *Thermtron*'s gloss on § 1447(d) is not a

158. *Id.* at 2409–10.

159. Act of 1988, Pub. L. No. 100-702, § 1016, 102 Stat. 4642; Act of 1991, Pub. L. No. 102-198, § 10, 105 Stat. 1623 (section 1447(b) changed "petitioner" to "removing party"); Act of 1996, Pub. L. No. 104-219, § 1, 110 Stat. 3022 (section 1447 (c) changed "any defect in removal procedure to "any defect other than lack of subject matter jurisdiction"); Act of 2011, Pub. L. No. 112-51, 125 Stat. 545 (section 1447(d) added "1442 or" before "1443").

160. *Kimble*, 135 S. Ct. at 2410.

161. 552 U.S. 74 (2007).

162. *Kimble*, 135 S. Ct. at 2410 (citing *Watson*, 552 U.S. at 82–83).

163. Anita S. Krishnakumar, *Textualism and Statutory Precedents*, 104 VA. L. REV. 157, 178–82, 185–89 (2018) (highlighting other instances in which the Court or some of its members are skeptical of deferring to statutory precedents, but "'unworkable' precedents" and "implementation tests" are the situations most relevant to the discussion of overruling *Thermtron*).

164. *Id.* at 178–79. "'Unworkability' is a long-standing, traditional ground for abandoning a precedent, statutory or otherwise . . . ." *Id.* at 179 & n.90 (citing Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989)). *Thermtron*'s gloss on § 1447(d) has proven time and again that it creates confusion, is unpredictable, and has done anything but settle the law regarding which remand orders are subject to review. *E.g.*, Kakarala v. Wells Fargo Bank, N.A., 136 S. Ct. 1153, 1154 (2016) (Thomas, J.,

judicial interpretation of § 1447(d) but can be viewed instead as an implementation test that is not based on the text of § 1447(d).[165] In addition, wholly apart from these relaxations of stare decisis, the Court has emphasized that jurisdictional statutes should be interpreted to provide clear, simple rules.[166]

1. Stare Decisis and Unworkability— *Thermtron* and Chaos in the Lower Courts

As Professor Krishnakumar has noted, "'Unworkability' is a long-standing, traditional ground for abandoning a precedent, statutory or otherwise."[167] A precedent may be considered unworkable when it is "a positive detriment to coherence and consistency"; for example, when there is "inherent confusion created by an unworkable decision."[168] Additionally, unworkability "has been invoked by jurists of all jurisprudential philosophies."[169] Professor Krishnakumar highlighted several instances where the Court or several Justices have overruled or expressed their desire to overrule statutory precedents because they are unworkable.[170] I quickly summarize several of those examples and then articulate why *Thermtron* is unworkable.

First, in *Patterson v. McLean Credit Union*,[171] although the Court stressed that deference to stare decisis is always important, emphasized that statutory stare decisis has "special force," and declined to overrule the statutory precedent at issue,[172] the Court acknowledged that "precedents are not sacrosanct" and articulated several justifications that, when present, may call for overruling statutory precedent.[173] One of the *Patterson* Court's justifications for overruling precedent occurs when the case is a "positive detriment to coherence and consistency in

dissenting from denial of cert.) (enumerating examples in which *Thermtron* has shown to be unworkable); Carlsbad Tech., Inc. v. HIF Bio, Inc., 556 U.S. 635, 643 (Scalia, J., concurring) (same); *supra* Part II.

165. Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336, 360–61 (1976) (Rehnquist, J., dissenting).

166. Hertz Corp. v. Friend, 559 U.S. 77, 80 (2010); Direct Marketing Ass'n v. Brohl, 575 U.S. 1, 14 (2015).

167. Krishnakumar, *supra* note 163, at 179 & n.90 (citing *Patterson*, 491 U.S. at 173).

168. *Id.* at 179 n.90 (quoting *Patterson* 491 U.S. at 173).

169. *Id.* at 179 & n.91 (first citing Gulfstream Aerospace v. Mayacamas Corp., 485 U.S. 271, 283 (1988); then citing Moragne v. States Marine Lines, Inc., 398 U.S. 375, 378 (1970); and then citing Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965)).

170. *Id.* at 179–83, App. I.

171. 491 U.S. 164 (1989).

172. *Id.* at 171–73.

173. *Id.* at 171–74.

the law . . . because of inherent confusion created by an unworkable decision."[174]

Second, in *Altria Group, Inc. v. Good*,[175] a four-Justice dissent expressed a desire to depart from the predicate-duty test the Supreme Court announced in *Cipollone v. Liggett Group, Inc.*[176] and had used for determining which state-law claims are preempted by section 5(b) of the Federal Cigarette Labeling and Advertising Act.[177] The predicate-duty test, much like *Thermtron*'s *in pari materia* interpretation of § 1447(c) and (d), requires a claim-by-claim analysis to determine whether a state-law claim is preempted by the federal statute.[178] The predicate-duty test garnered only a plurality in *Cipollone*.[179] And although the dissent concluded that *Cipollone* did not bind the Court because it was a plurality opinion,[180] it concluded that the Court should overrule even binding statutory precedent in order to give effect to the "true meaning" of a statute when precedent is "unworkable" or "badly reasoned."[181] The dissent concluded that the time between *Cipollone* and *Altria* "vindicated" Justice Scalia's conclusion in *Cipollone* that the predicate-duty test was unworkable.[182] This conclusion was supported by (1) "consistent[]" "frustration" and "difficulty in applying the *Cipollone* . . . test" and (2) splits among courts regarding how to "apply" the predicate-duty test.[183] Additionally, the dissent emphasized that though the predicate-duty test is "clear in theory, [it] def[ies] clear application."[184] The dissent then emphasized that the Court should abandon unworkable "interpretative test[s]" because the costs to both "litigants and courts" are "too great."[185] The dissent also stressed the sentiment that the Court "owe[s]

174. *Id.* at 173.

175. 555 U.S. 70 (2008).

176. 505 U.S. 504 (1992).

177. *Altria*, 555 U.S. at 91–92 (Thomas, J., dissenting).

178. *Id.* at 93. Five Justices—in two separate concurrences—criticized the claim-by-claim approach adopted by the plurality in *Cipollone*. *Id.* at 94–95.

179. *Id.* at 91–92.

180. *Id.* at 96.

181. *Id.* at 108 (quoting Clark v. Martinez 543 U.S. 371, 402 (2005) (Thomas, J., dissenting)).

182. *Id.* at 92.

183. *Id.* at 92, 97.

184. *Id.* at 97 (quoting Good v. Altria Group, Inc., 436 F. Supp. 2d 132, 142 (D. Me. 2006)).

185. *Id.* at 97–98 (quoting Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965)). Further, the dissent cited a Justice Scalia concurrence, which stated that "[*s*]*tare decisis* considerations carry little weight when an erroneous

far more to the lower courts, which depend on th[e] Court's guidance, and to litigants, who must conform their actions to the Court's interpretation of federal law."[186] Finally, the dissent concluded that when the court has erred in statutory interpretation, the Court should not rely on Congress to fix the "Court's own error."[187]

Third, in *John R. Sand & Gravel Co. v. United States*,[188] Justice Ginsburg dissented, arguing that the case presented several "concerns" that the Court "previously" identified as justifying revisiting and overruling statutory precedent.[189] And although she emphasized that overruling precedent should not be done "routinely . . . whenever the majority disagrees with a past decision" and that statutory precedents are afforded great deference,[190] she concluded that deference to precedents is not "inflexible" and that this case presented an issue "strongly . . . favor[ing]" overruling statutory precedent.[191] She also highlighted the stare decisis policies of "stability and predictability."[192] Justice Ginsburg reasoned that "it is altogether appropriate to overrule a precedent that has become 'a positive detriment to coherence and consistency in the law.'"[193] She concluded that "inconsiste[nt]" Supreme Court precedents caused "theoretical incoherence and practical confusion."[194] Justice Ginsburg highlighted a split among the circuit courts to support her conclusion and criticized the majority for failing to better help resolve the split.[195] She also emphasized that it is proper

'governing decisio[n]' has created an 'unworkable' legal regime." *Id.* (citing Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 501 (2007) (Scalia, J., concurring in part and concurring in the judgment)).

186. *Id.* at 98.

187. *Id.* at 108 (quoting Girouard v. United States, 328 U.S. 61, 69–70 (1946)).

188. 552 U.S. 130 (2008).

189. *Id.* at 145 (Ginsburg, J., dissenting). Justice Ginsburg articulated three "concerns" that counsel in favor of revisiting the statutory precedents. *Id.* at 145–146 (stating that overruling is appropriate (1) "to achieve a uniform interpretation of similar statutory language" (quoting Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989)); (2) "when 'intervening development of the law' has 'removed or weakened [its] conceptual underpinnings'" (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989)); and (3) when the precedent is "a positive detriment to coherence and consistency in the law" (quoting *Patterson*, 491 U.S. at 173)).

190. *Id.* at 144–45 (citing *Patterson*, 491 U.S. at 172).

191. *Id.*

192. *Id.* at 144.

193. *Id.* at 145 (quoting *Patterson*, 491 U.S. at 173).

194. *Id.*

195. *Id.*

to "revisit[]" decisions when subsequent legal changes have "removed or weakened [the precedent's] conceptual underpinnings."[196]

Five Justices, in three separate opinions, have called *Thermtron*'s *in pari materia* interpretations of § 1447(c) and (d) unworkable. As mentioned above, Justice Scalia stated in his *Carlsbad* concurrence that *Thermtron* is "ripe for reconsideration in the appropriate case" before enumerating a "hodgepodge of jurisdictional rules" spawned from *Thermtron* and concluding the "mess—entirely of [the Court's] own making—" could be resolved by following the text of § 1447(d).[197] Also, as mentioned above, Justice Thomas's dissent from the denial of certiorari in *Kakarala* explicitly stated that he would overrule *Thermtron*, that *Thermtron* is "unworkable," and that its progeny have created additional "confusion" by "adding . . . ancillary rules."[198] Additionally, in *Thermtron* itself, a three-Justice dissent predicted that the Court's *in pari materia* interpretation of § 1447(c) and (d) would be "unworkable."[199]

Similar to the dissent's conclusion in *Altria* that time "vindicated" Justice Scalia's conclusion that *Cipollone* was unworkable, time has vindicated Justice Rehnquist's conclusion that *Thermtron*'s *in pari materia* reading of § 1447(c) and (d) is unworkable. Like *Cipollone*'s predicate-duty test, *Thermtron*'s *in pari materia* test has created numerous circuit splits[200] and lower court frustration and confusion in its application.[201] Similarly, like *Cipollone*'s predicate-duty test, *Thermtron*'s *in pari materia* test, though "clear in theory, def[ies] clear

196. *Id.* (quoting *Patterson*, 491 U.S. at 173).

197. Carlsbad Tech., Inc. v. HIF Bio, Inc., 556 U.S. 635, 642–43 (2009) (Scalia, J., concurring). The "hodgepodge of jurisdictional rules" referred to by Justice Scalia were post-*Thermtron* cases creating a "muddle." *Id.* at 643.

198. Kakarala v. Wells Fargo Bank, N.A., 136 S. Ct. 1153, 1154 (2016) (Thomas, J., dissenting from denial of cert.).

199. Thermtron Prods. v. Hermansdorfer, 423 U.S. 336, 357 (1976) (Rehnquist, J., dissenting).

200. *Kakarala*, 136 S. Ct. 1153, 1154 (2016) (Thomas, J., dissenting from denial of cert.) (enumerating circuit splits caused by *Thermtron*'s *in pari materia* interpretation of § 1447(c) and (d)); *Carlsbad*, 556 U.S. at 643 (Scalia, J., concurring) (listing instances when the Supreme Court has resolved circuit splits); *see supra* Part II (discussing two current circuit splits).

201. *E.g.*, Harvey v. Ute Indian Tribe of the Uintah and Ouray Rsrv., 797 F.3d 800, 802, 808 (10th Cir. 2015) ("Notwithstanding th[e] apparently clear language [of § 1447(d)], federal courts have frequently wrestled with the question of whether the 'not reviewable' language of § 1447(d) genuinely precludes appellate review of a remand order."); Townsquare Media, Inc. v. Brill, 652 F.3d 767, 772–73, 775–76 (7th Cir. 2011) (concluding that the colorable standard announced in *Powerex* can be interpreted in two different ways).

application."[202] On its face, the *Thermtron* rule seems clear—there is appellate jurisdiction to review remand orders when they are not based on subject matter jurisdiction or a procedural defect. In practice, however, the circuit courts have repeatedly reached conflicting conclusions regarding which types of remand orders they have jurisdiction to review.[203] Overruling *Thermtron* is appropriate because the differing conclusions continually reached by circuit courts in applying its *in pari materia* interpretation of § 1447(c) and (d) demonstrate its test is unworkable, "confusi[ng]," and a "positive detriment to coherence and consistency in the law."[204]

The repeated circuit splits borne from applying *Thermtron*'s gloss on § 1447(d) present two additional reasons why it should not be given great deference. First, the *Kimble* Court stated that the doctrine underlying stare decisis is, as Justice Brandeis put it, "[T]hat it is usually more important that the applicable rule of law be settled than it be settled right."[205] *Thermtron*, however, as evidenced by repeated circuit splits, has done little if anything to settle the question of when circuit courts may, consistent with § 1447(c) and (d), review remand orders. In fact, *Thermtron* has done the opposite, creating confusion rather than settling the law. *Thermtron* has created confusion through its atextual interpretation of the unambiguous language of § 1447(d), which, in turn, has raised numerous jurisdictional questions.[206] Second,

202. Altria Group, Inc. v. Good, 555 U.S. 70, 97 (2008) (Thomas, J., dissenting) (quoting Good v. Altria Group, Inc., 436 F. Supp. 2d 132, 142 (D. Me. 2006)).

203. *See supra* note 37 and accompanying text.

204. Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989).

205. Kimble v. Marvel Ent., LLC, 135 S. Ct. 2401, 2409 (2015) (quoting Burnett v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)).

206. *E.g.*, Carlsbad Tech., Inc., v. HIF Bio, Inc., 556 U.S. 635, 643 (Scalia, J., concurring) ("[T]he Court has replaced [§ 1447(d)]'s clear bar on appellate review with a hodgepodge of jurisdictional rules . . . ."); *Harvey*, 797 F.3d at 802 ("Notwithstanding th[e] apparently clear language [of § 1447(d)], federal courts have frequently wrestled with the question of whether the 'not reviewable' language of § 1447(d) genuinely precludes appellate review of a remand order."); *Townsquare Media*, 652 F.3d at 775–76 (concluding that the colorable standard announced in *Powerex* can be interpreted in two different ways). Additionally, at least six circuit courts have concluded that the Supreme Court's interpretation strays from the text of § 1447(d). Atl. Nat'l Tr. LLC v. Mt. Hawley Ins. Co., 621 F.3d 931, 934 (9th Cir. 2010) ("The Supreme Court has interpreted [§ 1447(d)] more narrowly than its plain language would indicate."); *Harvey*, 797 F.3d at 803 ("However, the Supreme Court has concluded that some remand orders are appealable despite the plain language of [§ 1447(d)]."); Fontenot v. Watson Pharms., Inc., 718 F.3d 518, 520 (5th Cir. 2013) (concluding that "the Supreme Court added its own gloss to [§ 1447(d)]," and stating that "[§ 1447(d)'s] bar to appellate

repeated circuit splits show that the stare decisis policies articulated by Justice Ginsburg—"stability and predictability"—weigh against placing heightened deference on *Thermtron*'s precedent.[207] The Court's atextual reading of § 1447(d) is an error of its own creation.[208] The Court "owe[s] far more to the lower courts."[209] Thus, the Court should alter its interpretation of § 1447 rather than relying on Congress to fix the "Court's own error."[210]

2. Stare Decisis and "Implementation" Tests—*Thermtron*'s "Interpretation" of § 1447(d)

Similarly, statutory precedents are owed less deference when the decision does not provide an interpretation of the text of the statute but instead creates an implementation test. A statutory precedent may be said to employ an implementation test when it articulates a judicial policy rather than interpreting the text of the statute.[211] Some Justices are more willing to overrule statutory precedents that employ implementation tests instead of interpreting a statute's text because they view these precedents "as more like common-law decision-making than traditional statutory interpretation."[212] *Thermtron* is an example of a precedent that employed an implementation test instead of actually construing the statute's text.

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review, however, is narrower than the text of the statute would suggest"); Holmstrom v. Peterson, 492 F.3d 833, 836 (7th Cir. 2007) ("Although the language of [§ 1447(d)] appears absolute, the Supreme Court [has] held [otherwise] . . . ."); Overlook Gardens Props., LLC v. ORIX USA, L.P., 927 F.3d 1194, 1198 (11th Cir. 2019) ("Notwithstanding [§ 1447(d)'s] apparent bar to appellate review, the Supreme Court [has read § 1447(d) more narrowly]"); Price v. J & H Marsh & McLennan, Inc., 493 F.3d 55, 59 (2d Cir. 2007) ("Although section 1447(d) could be read expansively to apply to all remand orders, the Supreme Court has held that it must be read in conjunction with section 1447(c).").

207. John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 144 (2008) (Ginsburg, J., dissenting) (citation omitted).

208. *Carlsbad*, 556 U.S. at 643 (Scalia, J., concurring) (referring to *Thermtron*'s *in pari materia* interpretation, Justice Scalia concluded, "[T]his mess [is] entirely of our own making"); *id.* at 644–45 (Breyer, J., concurring) (concluding that there is likely "something . . . wrong" with the Court's interpretations of § 1447); Kakarala v. Wells Fargo Bank, N.A., 136 S. Ct. 1153, 1154 (2016) (Thomas, J., dissenting from denial of cert.) (referring to *Thermtron*'s *in pari materia* interpretation and concluding that there is "no need to force Congress to fix a problem this Court created").

209. Altria Group, Inc. v. Good, 555 U.S. 70, 98 (2008) (Thomas, J., dissenting).

210. *Id.* at 108 (Thomas J., dissenting) (quoting Girouard v. United States, 328 U.S. 61, 69–70 (1946)).

211. Krishnakumar, *supra* note 163, at 184–85.

212. *Id.* at 186 (citations omitted).

A strong reason for placing decreased judicial deference on precedents employing implementation tests is that separation-of-powers concerns are not as strong. The theory is that the Supreme Court, not Congress, is better at correcting "errors in a judicially created test."[213] Professor Krishnakumar highlighted two examples of Justices arguing that decreased deference should be given to implementation tests.[214] First, in his three-Justice dissent in *Kimble*, Justice Alito argued that because the precedent at issue was "not based on anything that can plausibly be regarded as an interpretation of the terms of the Patent Act" but "was a bald act of judicial policymaking,"[215]

> we do not give super-duper protection to decisions that do not actually interpret a statue. When a precedent is *based on a judge-made rule* and is not grounded in anything that Congress has enacted, we cannot "properly place on the shoulders of Congress" the entire burden of correcting the "Court's own error."[216]

Justice Thomas articulated a similar view in a different three-Justice concurrence. He argued that the precedent under scrutiny "had nothing to do with statutory interpretation"; instead, it "concerned a judge-made evidentiary presumption for a judge-made element . . . 'a judicial construct that Congress did not enact in the text of the relevant statutes.'"[217] He added:

> In statutory cases, it is perhaps plausible that Congress watches over its enactments and will step in to fix our mistakes, so we may leave to Congress the judgment whether the interpretive question is better left "settled" or "settled right." But *this rationale is untenable when it comes to judge-made law* like "implied" private causes of action, which we retain a duty to superintend . . . . *[W]hen we err in areas of judge-made law, we ought to presume that Congress expects us to correct our own mistakes—not the other way around.*[218]

Similarly, some Justices have argued that *Thermtron* is a judge-made rule and that the Court should not rely on Congress to fix its mistake. Justice Scalia called *Thermtron* and its progeny a "mess—

213. *Id.* at 187.

214. *Id.* at 187–88 (first quoting Kimble v. Marvel Ent., LLC, 135 S. Ct. 2401, 2418 (2015) (Alito, J., dissenting); and then quoting Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 298 (2014) (Thomas, J., concurring)).

215. *Id.* at 185 (quoting *Kimble*, 135 S. Ct. at 2415 (Alito, J., dissenting)).

216. *Id.* at 187 (emphasis in Krishnakumar) (quoting *Kimble*, 135 S. Ct. at 2418 (Alito, J., dissenting)).

217. *Id.* at 185 (quoting *Halliburton*, 573 U.S. at 298 (Thomas, J., concurring)).

218. *Id.* at 187–88 (emphasis in Krishnakumar) (quoting *Halliburton*, 573 U.S. at 298 (Thomas, J., concurring)).

entirely of our own making" and urged the Court to reconsider *Thermtron* to "return to the . . . congressionally enacted text" in the appropriate case.[219] Justice Thomas, referring to *Thermtron*, expressed his view that there is "no need to force Congress to fix a problem that this Court created."[220]

Thermtron may be viewed as an implementation test rather than statutory interpretation because it does not construe the text of § 1447(d), which states that remand orders are "not reviewable on appeal or otherwise."[221] Instead, it creates a judge-made rule of law allowing review of some remand orders by construing § 1447(d) to be limited by § 1447(c).[222] As a result, *Thermtron* can be viewed "as more like common-law decision-making than traditional statutory interpretation."[223] Thus, at least for some Justices, *Thermtron* would be an opinion that is not entitled to "super-duper" deference.[224] And when a precedent is not entitled to "super-duper" deference, the Court need not rely on Congress to correct it, but instead may correct the precedent itself.[225]

B. The Advantages of Simple, Clear Jurisdictional Rules

The Supreme Court values simple, clear jurisdictional rules.[226] As a result, the Supreme Court should favor the simple, clear rule articulated

219. Carlsbad Tech., Inc. v. HIF Bio, Inc., 556 U.S. 635, 643 (2009) (Scalia, J., concurring).

220. Kakarala v. Wells Fargo Bank, N.A., 136 S. Ct. 1153, 1154 (2016) (Thomas, J., dissenting from denial of cert.).

221. 28 U.S.C. § 1447(d).

222. *Kakarala*, 136 S. Ct. at 1153–54 (Thomas, J., dissenting from denial of cert.) (concluding that *Thermtron*'s "interpretation of § 1447(d) defies established principles of statutory construction"); *Carlsbad*, 556 U.S. at 643 (Scalia, J., concurring) ("[T]he Court has replaced [1447(d)]'s clear bar on appellate review with a hodgepodge of jurisdictional rules . . . ."); Osborn v. Haley, 549 U.S. 225, 262–63 (2007) (Scalia, J., dissenting) ("Few statutes read more clearly than 28 U.S.C. § 1447(d) . . . . Yet beginning in 1976, this Court has repeatedly eroded § 1447(d)'s mandate . . . ."); Thermotron Prods., Inc. v. Petrarca, 423 U.S. 336, 355 (1976) (Rehnquist, J., dissenting) ("[T]he Court today holds that Congress did not mean what it so plainly said."). Additionally, at least six circuit courts have stated that *Thermtron*'s interpretation strays from the plain text. *See supra* note 206.

223. Krishnakumar, *supra* note 163, at 186.

224. Kimble v. Marvel Ent., LLC, 135 S. Ct. 2401, 2418 (2015) (Alito, J., dissenting).

225. *Id.*; Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 298 (Thomas, J., concurring).

226. Hertz Corp. v. Friend, 559 U.S. 77, 94 (2010); Direct Marketing Ass'n v. Brohl, 575 U.S. 1, 14 (2015).

by Congress in § 1447(d) rather than adhering to the complex *in pari materia* interpretation of § 1447(c) and (d) announced in *Thermtron*.

Hertz Corp. v. Friend[227] is a strong example of the doctrine favoring simple interpretation of jurisdictional statutes.[228] In *Hertz*, the Supreme Court sought to remedy a circuit split surrounding the interpretation of "principal place of business" as used in the federal diversity jurisdiction statute, 28 U.S.C. § 1332(c)(1).[229] In interpreting § 1332(c)(1), the Court "place[d] primary weight upon the need for judicial administration of a jurisdictional statute to remain as simple as possible."[230] The Court concluded that the "principal place of business" language "proved" harder to apply than intended.[231] The test employed by circuit courts required weighing many factors, and courts weighed "similar factors differently."[232] The "highly general multifactor tests" spawned inter- and intra-circuit splits.[233] The Court recognized that the "complexity" of the test might have been caused by trying to fulfill the "general purpose of diversity jurisdiction," but concluded that the circuit approach is "at war with administrative simplicity" and has "failed" to produce consistent interpretations of federal law.[234]

The *Hertz* Court therefore adopted a "simple to apply[,] comparatively speaking," interpretation of § 1332(c)(1).[235] "[S]implicity[, which] is a major virtue in a jurisdictional statute," was one of the Court's main reasons for adopting its interpretation.[236] "Complex jurisdictional tests" are disfavored for several reasons.[237] First, they require "time and money" to determine which court will hear the claims rather than the merits of the claims.[238] Second, they drain "[j]udicial resources" because courts must, in all instances, "determine whether subject-matter jurisdiction exists."[239] Third, they "produce appeals and reversals, encourage gamesmanship, and, again, diminish the likelihood that

227. 559 U.S. 77 (2010).

228. *Id.* at 94.

229. *Id.* at 80.

230. *Id.*

231. *Id.* at 89.

232. *Id.* at 90–91 (citing 15 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE, § 102.54[2], at 102–12 (3d ed. 2009)).

233. *Id.* at 91.

234. *Id.* at 92.

235. *Id.* at 93, 95.

236. *Id.* at 94 (citing Sisson v. Ruby, 497 U.S. 358, 375 (1990) (Scalia, J., concurring)).

237. *Id.* at 94.

238. *Id.* at 94 (citing Navarro Sav. Ass'n v. Lee, 446 U.S. 458, 464 (1980)).

239. *Id.* (citing Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006)).

results and settlements will reflect a claim's legal and factual merits."[240] Lastly, "[s]imple jurisdictional rules" increase "predictability," which benefits both corporations and plaintiffs.[241]

The Court opted for a simple interpretation of § 1332(c)(1) despite understanding that the interpretation may occasionally result in outcomes that "cut against the basic rationale [of section] 1332."[242] The Court, nevertheless, elected the simple test because "of the necessity of having a clearer rule."[243] It determined that "accepting" anomalies was a necessary "price" to pay to "avoid overly complex jurisdictional administration" and to reap the "benefits" of a "uniform legal system."[244]

Thermtron, however, departs from the preference for simple interpretations of jurisdictional statutes. *Thermtron* departs from the clear, simple instruction given by Congress in § 1447(d),[245] instead opting for an approach that has proved complex for lower courts to apply.[246] The complexity of *Thermtron*'s gloss on § 1447(d) is highlighted by multiple Supreme Court cases resolving lower court disagreements about what bases for remand orders convey or bar appellate jurisdiction and multiple instances in which the Court has

240. *Id.*

241. *Id.* at 94–95 (citations omitted).

242. *Id.* at 96.

243. *Id.*

244. *Id.*

245. Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 354 (1976) (Rehquist, J., dissenting) (concluding that it was not "unreasonabl[e]" for the circuit court to conclude that § "1447(d) means what it says," which is that remand orders are not appealable); Carlsbad Tech., Inc. v. HIF Bio, Inc., 556 U.S. 635, 643 (2009) (Scalia, J., concurring) (quoting *Thermtron*, 423 U.S. at 354) (agreeing with "then-Justice Rehnquist['s] . . . observ[ation] . . . [that] it would not be 'unreasonabl[e] [to] believe[e] that 28 U.S.C. § 1447(d) means what it says,' . . . ; and what it says is no appellate review of remand orders. . . . Since the District Court's order in this case 'remand[ed] a case to the State court from which it was removed,' it should be—in the words of § 1447(d)—'not reviewable on appeal or otherwise.'"); Kakarala v. Wells Fargo Bank, N.A., 136 S. Ct. 1153, 1153 (2016) (Thomas, J., dissenting from denial of cert.) ("[Through § 1447(d),] Congress has unambiguously deprived federal courts of jurisdiction to review an order remanding a case from federal to state court."). As discussed above, at least six circuit courts have noted that *Thermtron* departs from the plain language of § 1447(d). *See supra* note 206.

246. *Kakarala*, 136 S. Ct. at 1153–54 (Thomas, J., dissenting from denial of cert.) (enumerating examples of "divisions [created by *Thermtron*] in the lower courts over whether certain remands are based on jurisdictional or non-jurisdictional grounds, and how to determine which is which"); *supra* Part II; *supra* note 201 and accompanying text.

reversed or vacated lower court holdings.[247] Despite the Supreme Court's repeated intervention and its attempted clarification in *Powerex*, *Thermtron*'s gloss on § 1447(d) continues to produce inter- and intra-circuit splits, and parties continue to petition the Court for certiorari.[248]

The Court, when next presented with the issue, should overrule *Thermtron* and interpret § 1447(d), a jurisdictional statute, to provide courts with the simple, clear rule that Congress itself has given—"[a]n order remanding a case . . . is not reviewable on appeal or otherwise."[249] Adopting the simple rule that Congress itself has given would place "primary weight" on keeping jurisdictional rules "as simple as possible."[250] The *in pari materia* interpretation adopted in *Thermtron*, like the test rejected in *Hertz*, may attempt to serve Congress's general purpose for jurisdiction of remand orders.[251] It should, nevertheless, be rejected, like the test in *Hertz* was, because it "is at war with administrative simplicity. And it has failed to achieve a nationally uniform interpretation of federal law."[252]

Adopting Congress's simple direction that remand orders are not reviewable would produce similar benefits to those articulated in *Hertz*.[253] It would likely (1) reduce the amount of "time and money" spent litigating which court would hear the case,[254] (2) decrease judicial

247. *See supra* notes 37–38 and accompanying text.

248. *See supra* Part II.

249. 28 U.S.C. § 1447(d). Section 1447(d) provides two exceptions to its unqualified bar. Those exceptions are not applicable to this Note, but allow review of a remand order "removed pursuant to section 1442 or 1443."

250. Hertz Corp. v. Friend, 559 U.S. 77, 80 (2010).

251. *Id.* at 91–92; Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 351 (1976) ("[W]e 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.").

252. *Hertz*, 559 U.S. at 92; *see supra* notes 245–48 and accompanying text (highlighting the confusion lower courts have experienced in attempting to apply *Thermtron* and the numerous circuit splits it has created).

253. *Hertz*, 559 U.S. at 94–95.

254. The following cases illustrate the delays caused by *Thermtron*'s interpretation of § 1447(c) and (d). In *Shipley*, the district court remanded the case to state court on August 26, 2019. Shipley v. Helping Hands Therapy, No. 18-0437-CG-B, 2019 WL 4014764, at *1 (S.D. Ala. Aug. 26, 2019). On May 6, 2021, more than twenty months after the district court remanded the case, the Eleventh Circuit vacated the district court's remand order. Shipley v. Helping Hands Therapy, 996 F.3d 1157, 1158 (11th Cir. 2021), *cert. denied*, 142 S. Ct. 861 (2022). The Eleventh Circuit's decision, however, did not end the pause in the litigation of the merits as a party petitioned the Supreme Court for certiorari. *Id.* Finally,

resources expended determining whether appellate courts have jurisdiction,[255] and (3) promote "predictability."[256]

An example of the delay in litigation of the merits of cases and decreased judicial economy caused by *Thermtron*'s complex interpretation of § 1447(c) and (d) is highlighted by *Kakarala*. In *Kakarala*, the district court remanded the case to state court on February 20, 2013.[257] Over thirty months after the district court's remand order, on August 31, 2015, the Ninth Circuit reversed the district court's remand order and returned the case to the district court.[258] The Ninth Circuit's reversal of the district court's remand order did not end the pause on the litigation of the merits. Instead, a party petitioned the Supreme Court for certiorari, which the Supreme Court denied on April 4, 2016.[259] The Supreme Court's denial of certiorari finally ended the more than three years spent litigating a jurisdictional issue rather than the merits. If the Supreme Court had granted certiorari, which it has done

on January 18, 2022, the Supreme Court denied certiorari concluding a nearly two-and-a-half-year pause on the litigation of the merits of the case. Shipley v. Helping Hands Therapy, 142 S. Ct. 861 (2022). Similarly, in *Carlsbad*, over thirty-four months were spent litigating a jurisdictional issue caused by *Thermtron*'s interpretation of § 1447(c) and (d) rather than the merits of the case. The district court remanded the case to state court on June 9, 2006. HIF Bio, Inc. v. Yung Shin Pharms. Indus. Co., Ltd, No. CV 05-07976 DDP, 2006 WL 6086295, at *6 (C.D. Cal. June 9, 2006). Over seventeen months later, on November 13, 2007, the Federal Circuit dismissed the appeal for lack of jurisdiction. HIF Bio, Inc. v. Yung Shin Pharms. Indus. Co., Ltd, 508 F.3d 659, 667 (Fed. Cir. 2007). On May 4, 2009, the Supreme Court reversed the Federal Circuit's conclusion that it lacked jurisdiction, reversed its ruling, and remanded the case to the Federal Circuit. Carlsbad Tech., Inc. v. HIF Bio, Inc., 556 U.S. 635, 641 (2009). At long last, after more than thirty-four months of jurisdictional litigation, litigation of the merits resumed.

255. *See supra* note 254 and accompanying text; *infra* notes 257–59 and accompanying text.

256. *See Hertz*, 559 U.S. at 94; Kakarala v. Wells Fargo Bank, N.A., 136 S. Ct. 1153, 1154 (2016) (Thomas, J., dissenting from denial of cert.) (stating that *Thermtron* is "unworkable" and that subsequent Supreme Court "cases have compounded the confusion over how to interpret § 1447(d)"); *Carlsbad*, 556 U.S. 635, 643 (Scalia, J., concurring) (charging the Court with "replac[ing § 1447(d)]'s clear bar on appellate review with a hodgepodge of jurisdictional rules that have no evident basis even in common sense," and creating a "muddle" and "mess").

257. Kakarala v. Wells Fargo Bank N.A., No. CV 10-208-TUC-FRZ, 2013 WL 11311261, at *1 (D. Ariz. Feb. 20, 2013), *rev'd and remanded*, 615 F. App'x 424 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 1153, 1153 (2016).

258. *Kakarala.*, 615 F. App'x at 425.

259. *Kakarala*, 136 S. Ct. at 1153.

in other § 1447(d) cases,[260] the litigation of the merits would have been delayed even longer.

Some may argue, as the Court did in *Thermtron*, that adopting the simple prohibition Congress gave in § 1447(d) would occasionally allow district courts to "revise the federal statutes . . . on grounds that seem justifiable to them."[261] They may argue that this would occur by allowing a district court to remand a case to state court, without appellate review, on bases such as having a crowded docket, declining to exercise supplemental jurisdiction, or abstention.[262] The Court in *Hertz*, however, adopted a simple interpretation of a jurisdictional statute despite stating that the simple test it adopted "may in some cases produce results that seem to cut against the basic rationale for 28 U.S.C. § 1332."[263] It nevertheless adopted the simple rule and accepted the occasional "anomal[ous]" results because "of the necessity of having a clearer rule."[264]

It may also be argued that *Hertz* dealt with an issue of first-impression that did not require the Court to overrule precedent.[265] But where, as in *Thermtron*, the Court interpreted a jurisdictional statute using an implementation test that has since proved unworkable and complex, the Court should find it permissible to overrule a prior statutory precedent to attain the benefits of jurisdictional simplicity and clarity the Court recognized in *Hertz*.

C. A Clear Resolution of Circuit Splits

Overruling *Thermtron* and holding that § "1447(d) means what it says"[266]—that it is a complete bar to appellate review of remand orders—would resolve the two circuit splits discussed in Part II in favor of prohibiting appellate review. A clear holding that there is no appellate jurisdiction to review remand orders would have the additional benefit of preventing percolation of many, if not all, future circuit splits over appellate jurisdiction of remand orders.

260. *E.g.*, Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 711 (1996); *Carlsbad*, 556 U.S. at 637.

261. Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 351 (1976).

262. Under *Thermtron*, the Supreme Court has held that appellate jurisdiction is proper when a district court remands because of having a crowded docket, declining to exercise supplemental jurisdiction, or abstaining. *Id.* at 343–45, 350–51; *Carlsbad Tech., Inc.*, 556 U.S. at 638–39; *Quackenbush*, 517 U.S. at 711–12.

263. Hertz Corp. v. Friend, 559 U.S. 77, 95–96 (2010).

264. *Id.* at 96.

265. *Id.* at 80.

266. *Carlsbad Tech., Inc.*, 556 U.S. at 643 (Scalia, J., concurring) (quoting *Thermtron*, 423 U.S. at 354 (Rehnquist, J., dissenting)).

D. Overruling Thermtron

These arguments show that overruling *Thermtron* would not be based solely on a belief that *Thermtron*'s atextual interpretation of § 1447(d) was wrong. Overruling *Thermtron* would also be based on grounds that *Thermtron*, unlike many other precedents, has not settled the applicable rule of law, as Justice Brandeis emphasized is an important aspect of stare decisis; rather, it has created multiple jurisdictional questions which have split the circuits and have even created intra-circuit splits. *Thermtron*'s atextual reading of the seemingly clear § 1447(d) language has created unpredictable and inconsistent lower court interpretations that have repeatedly required the Supreme Court's intervention. The Court has the power to right this course.

IV. A Workable Future Under *Thermtron*

If, however, the Court is inclined to continue to follow *Thermtron*, a single, uniform standard for all remands based on § 1447(c) will likely produce the least amount of lower court confusion. This Part makes the case that the colorable standard announced in *Powerex* should be used for all remand orders based on § 1447(c). It then advances an elaborated test, which it calls the "Clear Colorability" test, that is easy to apply and fulfills Congress's objective under § 1447(d).

A. Extending Powerex*'s Colorable Standard to Remands Based on Procedural Defects*

If the Court continues to follow the precedent set by *Thermtron*, it should not use *Thermtron* to depart further from the text of § 1447(d). Instead, the Court, at its earliest opportunity, should make clear that its adherence to the *Thermtron* precedent is not a license for circuit courts to engage in searching reviews of district court remand orders regardless of whether the remand is based on a procedural defect or lack of subject matter jurisdiction.[267] The Court should clearly state that the colorable review standard announced in *Powerex* applies with the same vigor to remands based on procedural defects. By cabining circuit court review of remand orders to the colorable standard announced in *Powerex*, the Court can simultaneously make the

267. Indeed, three circuit courts have taken the position that the rationale applied by the Supreme Court in cabining review of remands based on subject matter jurisdiction in *Powerex* applies with the same force to remands based on procedural defects. Atl. Nat'l Tr. LLC v. Mt. Hawley Ins., 621 F.3d 931, 937–38 (9th Cir. 2010); Harvey v. Ute Indian Tribe of the Uintah and Ouray Rsrv., 797 F.3d 800, 805 (10th Cir. 2015) (quoting *Atl. Nat'l Tr. LLC*, 621 F.3d at 937–38); Overlook Gardens Props., LLC v. ORIX USA, L.P., 927 F.3d 1194, 1201 (11th Cir. 2019).

statement that it firmly supports stare decisis[268] but that it will also not tolerate further straying from the plain text of § 1447(d). The rest of this Subpart analyzes Supreme Court precedent regarding § 1447(c) and (d) and concludes that the Court's precedent favors a single, unified standard for reviewing remand orders based on § 1447(c).

The Supreme Court has construed § 1447(d) and its predecessors to "prohibit[] review of all remand orders issued pursuant to § 1447(c) whether *erroneous or not*."[269] In *Kircher v. Putnam Funds Trust*,[270] the Court concluded that "[w]here the order is based on one of the [grounds enumerated in 28 U.S.C. § 1447(c)], review is unavailable no matter how plain the legal error in ordering the remand."[271] Additionally, the Supreme Court has made clear that under § 1447(d)'s prohibition on remand review, Congress "immunized . . . *any* remand order issued on the grounds specified in § 1447(c)."[272]

The Court, in accordance with its interpretation of Congress's policy, "ha[s] relentlessly repeated that 'any remand order issued on grounds specified in § 1447(c) [is immunized from all forms of appellate review], whether or not that order might be deemed erroneous by an appellate court.'"[273] Thus, under current Supreme Court precedent, there should be one uniform standard of review for all remand orders based on § 1447(c). That one standard should be the colorable standard articulated in *Powerex*. The colorable standard will likely be the clearest because it announces a narrow standard of review precluding review of remands issued on bases articulated in § 1447(c).[274]

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268. This point would be similar to the point made by Justice Stevens in a concurring opinion. Justice Stevens concluded that "[i]f [the Court] were writing on a clean slate, [he] would adhere to the statute's text." *Carlsbad Tech., Inc.*, 556 U.S. at 642 (Stevens, J., concurring). Nevertheless, Justice Stevens concluded that "*stare decisis* compel[led]" the resolution of *Carlsbad*. *Id.* (Stevens, J., concurring).

269. *Thermtron*, 423 U.S. at 343 (emphasis added) (first citing *In re* Pa. Co., 137 U.S. 451 (1890); then citing *Ex parte* Matthew Addy S.S. & Com. Co., 256 U.S. 417 (1921); then citing Emps. Reinsurance Corp. v. Bryant, 299 U.S. 374 (1937); and then citing United States v. Rice, 327 U.S. 742 (1946)).

270. 547 U.S. 633 (2006).

271. *Id.* at 642 (quoting Briscoe v. Bell, 432 U.S. 404, 414 n.13 (1977)).

272. *Thermtron*, 423 U.S. at 351 (emphasis added); *see also Kircher*, 547 U.S. at 640 (stating that the Supreme Court "ha[s] relentlessly repeated that 'any remand order issued on the grounds specified in § 1447(c) [is immunized from all forms of appellate review], whether or not that order might be deemed erroneous by an appellate court'" (quoting *Thermtron*, 423 U.S. at 351)).

273. *Kircher*, 547 U.S. at 640 (quoting *Thermtron*, 423 U.S. at 351).

274. *See* Powerex Corp. v. Reliant Energy Servs., Inc., 551 U.S. 224, 234 (2007).

B. Proposed Colorable Review Standard

The colorable review standard for appellate review of remand orders based on § 1447(c) is a narrow one.[275] Although the colorable standard is narrow, circuit courts still at least occasionally apply it in a broad manner.[276] This leads to the conclusion that increased elaboration of what is and is not colorable will achieve the Supreme Court's dual goals in announcing the colorable standard of eliminating current circuit splits and preventing future circuit splits. A perusal of appellate court cases applying the colorable standard illuminates several guiding principles that should be used to emphasize the shallowness of colorable review. Below are three additions that the "Clear Colorability" test advanced in this Note adds to the colorable standard announced in *Powerex*.

The Clear Colorability test emphasizes three guidelines, which are described in detail in the subsequent paragraphs. First, there is no appellate jurisdiction where a remand order contains a plausible § 1447(c) ground, even where the district court did not explicitly cite § 1447(c). It is immaterial that a ground in the remand order may be plausibly construed as resting outside of § 1447(c) as long as the remand order can be plausibly construed as resting on at least one § 1447(c) ground. Second, there is no appellate jurisdiction to review remand orders that, in the appellate court's view, "erroneously" interpret a jurisdictional statute even where the remand order fails to "literally appl[y]" the statute.[277] Lastly, the Clear Colorability test emphasizes that "erroneous" interpretations, even of § 1447(c), are not reviewable.[278]

1. Guideline One of Clear Colorability—Remand Orders Are Unreviewable When They Are Plausibly Based on § 1447(c), Regardless of Whether the Order Expressly Invokes § 1447(c)

First, the standard adopted by the Tenth Circuit in *Moody v. Great Western Railway Co.*[279] provides particularly helpful guidance. The Tenth Circuit has held that "when [a] district court characterizes its remand as one based on subject-matter jurisdiction, [its] inquiry is essentially a superficial determination of plausibility."[280] During one

275. *See id.* ("[R]eview . . . to the extent it is permissible at all, should be limited to confirming that [the district court's] characterization [of the remand order] was colorable.").

276. *See supra* Part II.

277. *See infra* notes 292–93 and accompanying text.

278. *See infra* notes 300–02 and accompanying text.

279. 536 F.3d 1158 (10th Cir. 2008).

280. *Id.* at 1163. The Tenth Circuit reiterated and applied this standard again in 2012 and 2015. Hill v. Vanderbilt Cap. Advisors, LLC, 702 F.3d 1220,

application of the test, the Tenth Circuit concluded that since the district court "explicitly" invoked subject matter jurisdiction, the *Powerex* colorable standard and the Tenth Circuit "superficial determination of plausibility" test applied, and appellate review was unavailable.[281] The Tenth Circuit dismissed a case using the superficial determination of plausibility standard for lack of appellate jurisdiction because "the only plausible reason for the district court's remand order was its conclusion that the statutory language of 49 U.S.C. § 10501(b) denied the court subject-matter jurisdiction."[282] Even if the district court erred in construing § 10501(b), review was unavailable.[283] The Clear Colorability test embraces this test but makes two minor changes to it. First, because this Note advances the theory that the *Powerex* colorable standard should apply to any § 1447(c) ground for remand, the Clear Colorability test expands the Tenth Circuit test to apply to remands based on procedural defects. Second, the Clear Colorability test does not require that a § 1447(c) ground be specifically invoked in the remand order.[284] The Clear Colorability test asks only whether a ground enumerated in a remand order may be plausibly construed as resting within § 1447(c) and does not look to whether the district court explicitly cited § 1447(c).[285]

1224 (10th Cir. 2012); Harvey v. Ute Indian Tribe of the Uintah and Ouray Rsrv., 797 F.3d 800, 804 (10th Cir. 2015).

281. *Hill*, 702 F.3d at 1224 (quoting *Moody*, 536 F.3d at 1163). *Powerex* also states that "review of the District Court's characterization of its remand order . . . [is] limited to confirming that that characterization is colorable," implying that deferential colorable review applies only when a district court actually characterizes its remand order as within § 1447(c). 551 U.S. 224, 234 (2007).

282. *Moody*, 536 F.3d at 1164.

283. *Id.* (citing Kircher v. Putnam Funds Tr., 547 U.S. 633, 642 (2006)).

284. Price v. J & H Marsh & McLennan, Inc., 493 F.3d 55, 59 (2d Cir. 2007) (holding that a remand order may be barred from review under § 1447(c) and (d) even when a district court did not explicitly cite § 1447(c) in its remand order).

285. Although *Powerex* asks whether the district court's characterization is colorable, this Note proposes expanding colorable review to include remand orders based on issues that could plausibly be construed as falling within § 1447(c) even when the district court does not explicitly invoke § 1447(c) or one of the grounds enumerated in § 1447(c). This construction would better serve Congress's intent to avoid long jurisdictional disputes and result in better unanimity of interpretation across circuits.

2. Guideline Two of Clear Colorability—Remand Orders Based on Interpretation of a Jurisdictional Statute Are Unreviewable, Regardless of Whether the District Court's Interpretation Was Incorrect

Second, the Seventh Circuit's approach in *Holmstrom v. Peterson*[286] also provides useful guidance. In *Holmstrom*, the Seventh Circuit held that it lacked jurisdiction to review the district court's remand order even though the remand order failed to "literally appl[y]" the forum defendant statute, 28 U.S.C. § 1441(b).[287] In *Holmstrom*, the plaintiff filed the case in state court; the defendant removed the action; the plaintiff filed for remand, arguing that the case was not removable under § 1441(b); and the district court granted remand under § 1441(b).[288] The defendant argued that § 1441(b) bars removal only if "a resident of the forum state actually is joined and served as a defendant at the time of removal" and correctly indicated that the forum defendant had not been joined and served at the time the case was removed.[289] The district court and the Seventh Circuit recognized that when the language of § 1441(b) is "literally applied," the remand order would not have been proper.[290] Nevertheless, the district court remanded the case under § 1441(b) because "literal application . . . would defeat the purpose of the statute."[291]

The defendant argued that the remand order was reviewable because it was not grounded in § 1447(c) but rather in a "judicially crafted exception."[292] The Seventh Circuit rejected this argument and held that it lacked jurisdiction to review the remand order because the district court's remand order, even if wrong, was based on its "interpretation of § 1441(b)."[293] The Seventh Circuit justified this holding in part by relying on Supreme Court precedent, which held that appellate review of a district court's incorrect interpretation of jurisdictional statutes "is available '[o]nly in the extraordinary case.'"[294]

286. 492 F.3d 833 (7th Cir. 2007).

287. *Id.* at 834–35.

288. *Id.*

289. *Id.* at 835.

290. *Id.*

291. *Id.*

292. *Id.* at 839.

293. *Id.* (citing Kircher v. Putnam Funds Tr., 547 U.S. 633, 640 (2006) (finding erroneous remand orders based on § 1447(c) are not reviewable)).

294. *Id.* at 840 (quoting Osborn v. Haley, 549 U.S. 225, 244 (2007)). The other reasons the Seventh Circuit gave for concluding that it lacked appellate jurisdiction to review the remand order were that appellate jurisdiction would (1) inhibit Congress's policy of avoiding delays in litigation of the merits and (2) violate "the principle that jurisdictional rules . . . should be clear." *Id.*

The Seventh Circuit concluded that holding otherwise would allow "clever litigant[s]" to frame interpretation errors as "judicially crafted exception[s]," which would violate the purpose of § 1447(d).[295] The Clear Colorability test embraces the Seventh Circuit test articulated in *Holmstrom* because it complies with the Supreme Court's holding that erroneous interpretations are not reviewable and that jurisdictional rules should be clear as well as with Congress's policy underlying § 1447(d) of avoiding delays in litigation of the merits.[296]

In the same vein, the Clear Colorability test adopts the powerful statement made by the Seventh Circuit in *In re Mutual Fund Market-Timing Litigation*.[297] In *Mutual Fund*, the Seventh Circuit stated that in remanding the case, the district court judge may have misinterpreted the word "order" as used in § 1446(b) but that *Kircher* and *Powerex* prohibit review of erroneous interpretations.[298] The Seventh Circuit then concluded powerfully by stating that if appellate review existed when the district court erroneously interpreted a statute, "§ 1447(d) would mean only that proper remands can't be reversed, and then it would have no effect at all."[299]

3. Guideline Three of Clear Colorability— Erroneous Interpretations, Even of § 1447(c), Are Unreviewable

Lastly, the Clear Colorability test reiterates the Supreme Court's emphasis that appellate jurisdiction is lacking even when a district court "*erroneously*" remands a case on a ground enumerated in § 1447(c).[300] The Clear Colorability test emphasizes this point because, at least in some circumstances, appellate courts exercise appellate jurisdiction based on what they believe to be erroneous district court interpretations.[301] The Clear Colorability test makes one addition. It would expand the bar on appellate review to "erroneous" district court

295. *Id.* (quoting Osborn v. Haley, 549 U.S. 225, 244 (2007)).

296. *Id.* For textualists and perhaps for many others who first look to the text of the statute, this may seem like an odd position to embrace. I agree; when the text is clear, ordinarily the text should be followed. However, in order to give effect to the text of § 1447(d), which precludes appellate review of remand orders, this is the position that must be embraced.

297. 495 F.3d 366 (7th Cir. 2007).

298. *Id.* at 368.

299. *Id.* at 369.

300. Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 343, 345 (1976) (emphasis added); Kircher v. Putnam Funds Tr., 547 U.S. 633, 640 (2006).

301. *See supra* Part III. Barring review of "erroneous" district court interpretations would also serve the congressional policy of avoiding delays in litigation of the merits. *Thermtron*, 423 U.S. at 351.

interpretations of § 1447(c) itself because this, too, will advance Congress's objective to avoid delays in litigation of the merits.[302]

In summary, when appellate courts are determining whether they have jurisdiction to review a remand order, they should consider *Powerex* and the three guidelines of the Clear Colorability test. If the appellate court finds that *Powerex* would prohibit review or that any of the three guidelines is satisfied, the court should, in accordance with the instruction of the Supreme Court in *Powerex*, conclude that the remand order was "colorably" within the ambit of § 1447(c) and, therefore, that it lacks jurisdiction to review the remand order.

C. Clear Colorability Applied to Circuit Splits

This Subpart applies the Clear Colorability test to the two circuit splits discussed in Part II: (1) the circuit split regarding whether there is appellate jurisdiction over remand orders when a timely motion for remand is filed but the order granting remand is based on an untimely raised procedural defect and (2) the circuit split regarding whether a remand order based on waiver by participation in state court deprives appellate courts of jurisdiction.[303] This Subpart then analyzes whether the Clear Colorability test will prevent future circuit splits. The Subpart concludes that the Clear Colorability test will likely remedy those two circuit splits and prevent many future circuit splits.

1. Application of the Clear Colorability Test to the Circuit Split Regarding Remand Orders When a Timely Motion to Remand Was Filed but the Remand Order Is Based on an Untimely Raised Procedural Defect

Under the Clear Colorability test, there would be no appellate jurisdiction to review remand orders based on an untimely raised procedural defect when a timely motion for remand based on subject matter jurisdiction has been filed.[304] The Clear Colorability test embraces the idea that remand orders based on the district court's interpretation of § 1447(c) are unreviewable because it furthers Congress's policy of avoiding delaying litigation of the merits and slightly expands the Supreme Court's policy of not reviewing erroneous district court remand orders.[305]

Applying the Clear Colorability test, remand orders based on an untimely raised procedural defect when a timely motion to remand was filed would be unreviewable because that ground for remand represents the district court's interpretation that such remand orders fall within § 1447(c). For example, the district court could have interpreted

302. *See Thermtron*, 423 U.S. at 351.

303. *See supra* Part III.

304. For a discussion of this circuit split, see *supra* Part III.A.

305. *See supra* note 302 and accompanying text.

§ 1447(c) like the Ninth Circuit in *BEPCO* and concluded that § 1447(c) only requires a motion for remand to be filed within thirty days, and that as long as a timely motion is filed, § 1447(c) allows procedural defects to be raised after thirty days.[306] Guideline three of the Clear Colorability test emphasizes that the district court's interpretation of § 1447(c), even if erroneous, is not subject to review because review would contravene Congress's policy of avoiding delays in litigation of the merits.

2. Application of the Clear Colorability Test to Circuit Dissension Regarding Waiver by Participation in State Court

Under the Clear Colorability test, circuit courts would not have jurisdiction to review remand orders based on waiver by participation.[307] Clear Colorability guidelines one and two would combine to render the district court decision unreviewable. First, Clear Colorability guideline one emphasizes that even if the district court did not explicitly cite § 1447(c) in its remand order, like the remand order reviewed in *Soto*,[308] the Clear Colorability test, like the Second Circuit, does not require explicit invocation of § 1447(c).[309] The Clear Colorability test only examines whether a ground enumerated in the remand order can be plausibly interpreted as within § 1447(c).[310] Second, even accepting *Soto*'s conclusion that procedural defects under § 1447(c) require violation of a federal statute, waiver by participation is a procedural defect under the Clear Colorability test. It is a procedural defect under guideline two of the Clear Colorability test even conceding, as *Soto* held, that waiver by participation does not violate the literal text of § 1446(b)(1).[311] This is so because the Clear Colorability test embraces the Seventh Circuit's rationale in *Holmstrom*.[312] Under *Holmstrom*, appellate jurisdiction is lacking even when a district court fails to "literally appl[y]" the text of a statute and wrongly interprets a statute

306. BEPCO, L.P. v. Santa Fe Mins., Inc., 675 F.3d 466, 471 (5th Cir. 2012).

307. For a discussion of the disagreement, see Part II.B.2. There is also a circuit split regarding whether waiver by participation deprives federal courts of subject matter jurisdiction. *See supra* Part II.B.1. But concluding that waiver by participation constitutes a defect in removal procedure largely obviates the necessity of analyzing whether waiver by participation also deprives a federal court of subject matter jurisdiction because, if a remand order is based on one of the two grounds enumerated in § 1447(c), then appellate review is unavailable. *See supra* note 27 and accompanying text.

308. City of Albuquerque v. Soto Enters., No. CIV 16-99, 2016 WL 9408547 (D.N.M. Apr. 11, 2016).

309. *See supra* note 284 and accompanying text.

310. *See supra* note 285 and accompanying text.

311. City of Albuquerque v. Soto Enters., 864 F.3d 1089, 1097–98 (10th Cir. 2017).

312. *See supra* note 296 and accompanying text.

because the district court, nonetheless, interpreted the statute.[313] If the appellate review existed because the district court erroneously interpreted a statute, "§ 1447(d) would mean only that proper remands can[not] be reversed, and then it would have no effect at all."[314] Therefore, under the Clear Colorability test, waiver by participation is a procedural defect and unreviewable because it represents the district court's interpretation of § 1446(b)(1), even if the interpretation is wrong and contravenes the literal text.[315]

3. The Clear Colorability Test and Prevention of Future Circuit Splits

The Clear Colorability test will likely prevent many future circuit splits because it emphasizes the dramatic shallowness of appellate review of remand orders based on § 1447(c) and clarifies areas that circuit courts have occasionally used to exercise expansive review, rather than colorable review, as directed by the Supreme Court in *Powerex*.[316] Although the Clear Colorability test will likely prevent many future circuit splits, it will not prevent as many circuit splits as holding, as Part III recommends, that § 1447(d) "'means what it says' . . . and what it says is no appellate review of remand orders."[317]

CONCLUSION

This Note proposed two solutions to the current confusion regarding appellate jurisdiction of remand orders: (1) overruling *Thermtron* and holding that § 1447(d) "'means what it says' . . . and what it says is no appellate review of remand orders,"[318] or, alternatively, (2) using the Clear Colorability test to clarify the most disruptive aspects of circuit court application of the *Powerex* colorable test.[319] Although this Note prefers overruling *Thermtron*, adoption of either would result in a simpler, less confusing definition of appellate jurisdiction over remand orders. Thus, adoption of either will likely fulfill both Congress's goal of limited appeal of remand orders and the Supreme Court's preference for simple jurisdictional tests that result in greater predictability, in less judicial and litigant time and resources

313. *See supra* notes 287, 293 and accompanying text. *Holmstrom*'s holding is persuasive because it follows Supreme Court precedent and congressional and Supreme Court rationale. *Supra* notes 294–96 and accompanying text.

314. *See supra* note 299.

315. *See supra* note 296.

316. *See supra* Part IV.

317. Carlsbad Tech., Inc. v. HIF Bio, Inc., 556 U.S. 635, 643 (2009) (Scalia, J., concurring) (quoting Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 354 (1976) (Rehnquist, J., dissenting)).

318. *Carlsbad Tech., Inc.*, 556 U.S. at 643; *see supra* Part III.

319. *See supra* Part IV.

spent litigating which court will hear a case, and in more time spent litigating the merits of a case.[320]

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320. Hertz Corp. v. Friend, 559 U.S. 77, 94 (2010).

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