No. 00-449

In the Supreme Court of the United States

JOHN MICHAEL BORNEMAN, PETITIONER

v.

UNITED STATES OF AMERICA AND
RICHARD MCCAULEY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

The Westfall Act, 28 U.S.C. 2679, provides that in certain tort actions against a federal employee, upon certification by the Attorney General that the employee was acting within the scope of his employment, the United States shall be substituted as the party defendant and the action shall be removed to federal court, and for this purpose the Attorney General's certification shall conclusively establish scope of employment. The questions presented for review are:

1. Whether an order rejecting the Attorney General's certification and remanding to state court is reviewable notwithstanding the ban on review of remand orders contained in the general removal statute, 28 U.S.C. 1447(d); and

2. Whether the court of appeals applied the proper standard in reviewing the district court's denial of attorney's fees pursuant to 28 U.S.C. 1447(c) (1994 & Supp. IV 1998).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 213 F.3d 819. The orders of the district court remanding the case to state court (Pet. App. 18-25), denying reconsideration of its remand order (Pet. App. 26-31), and denying the motion for attorney's fees (Pet. App. 32-33) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 30, 2000. The petition for a writ of certiorari was filed on August 28, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1997, petitioner was a United States Postal Service (USPS) rural mail carrier working in Wilmington, North Carolina. He was also a local shop steward for the North Carolina Rural Letter Carriers Association. Pet. App. 3. Richard P. McCauley, a USPS manager of customer services, was petitioner's supervisor. On May 9, 1997, during work hours, petitioner and McCauley had a heated argument regarding petitioner's use of official time to conduct union business. *Ibid.* Petitioner sustained a knee injury during the course of the argument. *Id.* at 4.

2. Petitioner filed suit in state court seeking damages against McCauley for common law assault and battery. In his complaint, petitioner alleged that McCauley kicked and pushed him during their argument, thereby causing the knee injury. Pet. App. 3-4.

The United States Attorney for the Eastern District of North Carolina determined that McCauley's actions were within the scope of his employment as a federal employee at the time of the incident and filed in state court a certification of scope of employment and notice of substitution of the United States as the sole defendant pursuant to the Westfall Act.[1] Pet. App. 4.

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[1] The Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563, commonly known as the "Westfall Act," provides in part (28 U.S.C. 2679(d)(2)):

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action * * * commenced upon such claim in a State court shall be removed * * * at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the

See 28 U.S.C. 2679(d)(2). The United States Attorney also filed a notice of removal to federal district court (citing 28 U.S.C. 1441, 1442 and 2679(d)(2)) and a motion to dismiss for lack of subject matter jurisdiction and failure to state a claim.[2] *Ibid.*

Petitioner opposed the removal and moved to remand to state court, arguing that under North Carolina's respondeat superior case law McCauley was not acting within the scope of his employment during the alleged assault. Pet. App. 4. In reply, the government challenged petitioner's version of the incident, attaching McCauley's declaration in which he stated "I never touched [petitioner], did not push him, and presume he tripped while walking backwards." *Ibid.* Thereafter, petitioner submitted his own affidavit and a letter from his physician stating that petitioner's injuries were consistent with a "forward fall." *Id.* at 5.

3. The district court ordered remand to state court. The court concluded that "[petitioner] ha[d] shown that McCauley was not acting within the scope of his employment when he allegedly assaulted and battered the [petitioner]." Pet. App. 18, 24. The district court therefore stated that substitution of the United States as defendant was erroneous and that removal of the

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action or proceeding is pending. Such action * * * shall be deemed to be an action * * * brought against the United States under the provisions of this title * * *, and the United States shall be substituted as the party defendant.

[2] In a memorandum of law supporting the motion to dismiss, the government argued that petitioner's suit was barred because he failed to file an administrative claim as required by the Federal Tort Claims Act (FTCA), 28 U.S.C. 2675(a), and that, in any event, claims arising out of assault and battery are specifically excepted from the waiver of sovereign immunity contained in the FTCA. See 28 U.S.C. 2680(h).

action was improper because the federal court lacked jurisdiction over a common-law intentional tort claim. *Id.* at 25.

The government filed a motion for reconsideration of the district court's remand order, arguing that, because the facts surrounding the nature of the incident between petitioner and McCauley were in dispute, the court should have held an evidentiary hearing before definitively ruling on the scope of employment issue. Pet. App. 5. See *Gutierrez de Martinez* v. *DEA*, 111 F.3d 1148, 1155 (4th Cir. 1997); *Jamison* v. *Wiley*, 14 F.3d 222 (4th Cir. 1994). The United States also noted that, under clear Fourth Circuit authority, remand to state court was improper because Congress made the Attorney General's determination of scope of employment conclusive for purposes of removal. See 28 U.S.C. 2679(d)(2); *Jamison*, 14 F.3d at 239; *Mangold* v. *Analytic Serv., Inc.*, 77 F.3d 1442, 1453 (1996). The district court denied reconsideration, holding that it was precluded from reconsidering its remand order by 28 U.S.C. 1447(d), which provides that an order remanding a case to the state court from which was removed is not reviewable "on appeal or otherwise."[3] Pet. App. 30-31.

Following the district court's denial of the government's motion for reconsideration, petitioner moved for attorney's fees and costs pursuant to 28 U.S.C. 1447(c). The district court denied the request, noting that an award of fees is discretionary, and that the government did not act improvidently or in bad faith in removing the action. Pet. App. 32.

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[3] As discussed below, this statute has been construed to bar review of orders remanding for lack of subject matter jurisdiction. See *Thermtron Prods., Inc.* v. *Hermansdofer*, 423 U.S. 336, 346 (1976).

4. a. The government filed an appeal seeking review of the resubstitution decision as a collateral order under *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) and, at the same time, filed a petition for a writ of mandamus seeking an order compelling the district court to vacate its remand order on the ground that Section 2679(d)(2) made the Attorney General's certification conclusive for purposes of removal. Pet. App. 6. The court of appeals considered both issues together and affirmed in part, vacated in part and remanded the case to the district court for further proceedings. *Id.* at 1-17.

The appeals court first addressed the question whether it had jurisdiction to review the district court's rulings, acknowledging that Section 1447(d) "would, at first blush," appear to preclude it from reviewing the district court's remand order. Pet. App. 7. The Fourth Circuit noted, however, that the district court's conclusion that it lacked subject matter jurisdiction was based on two antecedent decisions that were both judicially reviewable and appealable: (1) that the scope of employment certification by the United States was erroneous; and (2) that the substitution of the United States as defendant was erroneous. *Id.* at. 7-8 (citing *Guiterrez de Martinez* v. *Lamagno*, 515 U.S. 417, 434 (1995); *Jamison*, 14 F.3d at 230 n.10, 233-234). The court concluded that an otherwise reviewable ruling is not barred from scrutiny "merely because it is a constituent aspect of a remand order that would itself appear to be insulated from review by § 1447(d)." *Id.* at 8 (citing *Waco* v. *United States Fidelity & Guar. Co.*, 293 U.S. 140, 143 (1934); *Mangold*, 77 F.3d at 1446). The court further concluded that because "these antecedent components of the district court's remand order are reviewable, it follows that the remand order itself

[is] reviewable because its propriety depends on premises that are not statutorily barred from review, rather than on whether the federal jurisdictional requirements referenced in § 1447(c) are satisfied." *Ibid.* (citing *Mangold*, 77 F.3d at 1450).

In the alternative, the Fourth Circuit held that the remand order was subject to review because removal by the United States was premised not only on Sections 1441 and 1442 of the general removal statute, but also on the Westfall Act's removal provision, 28 U.S.C. 2679(d)(2). Pet. App. 11. The appeals court explained that the Attorney General's scope of employment certification under Section 2679(d)(2) "conclusively establishes removal jurisdiction in the federal court, a consequence that is not judicially reviewable." *Id.* at 9 (citing *Gutierrez*, 515 U.S. at 432; *Aliota* v. *Graham*, 984 F.2d 1350, 1357 (3d Cir.), cert. denied, 510 U.S. 817 (1993)).

The court of appeals thus held that Section 1447(d) was no bar to either its review of the district court's ruling that the Attorney General's scope of employment certification was erroneous, or its review of the consequent remand order that was entered in violation of Section 2679(d)(2). Pet. App. 11. The Fourth Circuit further ruled that it had authority to review such rulings either as appealable decisions under 28 U.S.C. 1291 or on a petition for writ of mandamus. Pet. App. 11 (citing *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 714 (1996); *Thermtron Prods.*, 423 U.S. at 351; *Shives* v. *CSX Transp., Inc.*, 151 F.3d 164, 167-168 (4th Cir. 1998); *Mangold*, 77 F.3d at 1453).

b. Turning to the merits of the district court's rulings, the Fourth Circuit concluded that the trial court erred in its review of the Attorney General's scope of employment certification for purposes of

substituting the United States as defendant under the Westfall Act. Pet. App. 11. The court of appeals held that the district court neglected its obligation to resolve the parties' disputed factual contentions surrounding the incident and failed to hold petitioner to his burden of proof. *Id.* at 13; see *Maron* v. *United States*, 126 F.3d 317, 323 (4th Cir. 1997) (plaintiff has burden of proof to refute Attorney General's certification).

The appeals court also stated that, even accepting petitioner's version of the facts, "it is not clear that [respondent] acted outside the scope of his employment under North Carolina law." Pet. App. 14. Accordingly, the appeals court ordered that the case be remanded to the district court for an evidentiary hearing.[4] *Id.* at 15-16.

c. Finally, the Fourth Circuit rejected petitioner's cross-appeal, affirming the district court's denial of petitioner's request for attorney's fees, "[i]n light of [its] ruling on the merits." Pet. App. 17. The appeals court also noted that, "in any event, * * * the district

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[4] The court of appeals also stated that if on remand the district court concludes, after resolving all material facts, that McCauley was not acting within the scope of his employment, McCauley must be resubstituted as the defendant. Pet. App. 16. Nevertheless, the appeals court stressed, the case must remain in federal court, with the trial court applying North Carolina law, because Section 2679(d)(2) precludes the district court from again remanding the case to state court. *Ibid.*; see *Garcia* v. *United States*, 88 F.3d 318, 324 (5th Cir. 1996); *Aliota*, 984 F.2d at 1356. But see *Haddon* v. *United States*, 68 F.3d 1420, 1426 (D.C. Cir. 1995) (remand is required if district court ultimately rejects Attorney General's certification); *Nasuti* v. *Scannell*, 906 F.2d 802, 814 & n.17 (1st Cir. 1990) (same). The various rulings on the consequences of the determination of scope of employment are not contained within the questions presented for review in this petition, and are therefore not before this Court.

court did not abuse its discretion" in denying the fee request. *Ibid.*

ARGUMENT

1. Petitioner mistakenly asserts (Pet. 13-16) that the court of appeals' decision in this case conflicts with the interpretation of 1447(d) set forth in *Waco* v. *United States Fidelity & Guaranty Co.*, 293 U.S. 140 (1934). To the contrary, the court of appeals' decision in this case explicitly followed *Waco*.

Section 1447(d) provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." 28 U.S.C. 1447(d). In *Waco*, this Court held that Section 1447(d) is addressed only to the remand order itself and does not bar appellate review of a ruling made in conjunction with a remand, even if the ruling was the basis for the decision to remand. 293 U.S. at 143. Thus Section 1447(d) did not bar review of a determination that a party who supplied the basis for diversity jurisdiction had been improperly joined by cross-claims, even though the order that dismissed the party also directed a remand as a result; the dismissal decision was analytically anterior to and separate from the decision to remand, and review was not barred by Section 1447(d). See *Waco*, 293 U.S. at 143.

As several courts of appeals have held, the same principle applies to a resubstitution order like the one in this case. See *Kimbro* v. *Velten*, 30 F.3d 1501, 1503 (D.C. Cir. 1994), cert. denied, 515 U.S. 1145 (1995); *Aliota*, 984 F.2d at 1353; *Mitchell* v. *Carlson*, 896 F.2d 128, 132-133 (5th Cir. 1990). The resubstitution issue "logically precedes the question of remand," *Aliota*, 984 F.2d at 1353, and it hinges upon appealable issues of substantive law and is thus separable from the decision

to remand. Like the other courts of appeals that have considered the question, the appeals court here concluded that Section 1447(d) did not preclude its review of the ruling antecedent to the district court's remand order—*i.e.*, that McCauley did not act within the scope of his employment and should therefore be resubstituted as the defendant.[5] Pet. App. 11. Therefore, the court of appeals reviewed the resubstitution order and remanded the case to the district court for an evidentiary hearing on the scope of employment issue.

2. Petitioner is also mistaken in arguing (Pet. 7) that the Fourth Circuit's decision has "carved out a judicially created exception" to 28 U.S.C. 1447(d)'s bar on judicial review of remand orders based on lack of subject matter jurisdiction and conflicts with this Court's decision in *Thermtron*. Pet. 7.

As this Court explained in *Thermtron*, "Section 1447(d) is not dispositive of the reviewability of remand orders in and of itself." 423 U.S. at 345. Rather, Section 1447(d) must be read in *pari materia* with Section 1447(c), which in its present form authorizes remand "[i]f at any time before final judgment it appears that

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[5] The Fourth Circuit held that the resubstitution ruling was "not shielded from review merely because it is a constituent aspect of a remand order that would itself appear to be insulated from review by § 1447(d)." Pet. App. 8. The court then concluded that the consequent remand order, entered in violation of Section 2679(d)(2), was reviewable as a final judgment under 28 U.S.C. 1291 (see *Quackenbush*, 517 U.S. at 714), or by mandamus under *Thermtron*, 423 U.S. at 351. Even if this second conclusion were in error, however, review is unwarranted, as the Fourth Circuit first correctly concluded that the resubstitution order was subject to review, and appeal on this issue was proper under the collateral order doctrine. See *Flohr* v. *Mackovjak*, 84 F.3d 386, 390 (11th Cir. 1996); *Kimbro*, 30 F.3d at 1503; *Aliota*, 984 F.2d at 1353-1354; *Mitchell*, 896 F.2d at 133.

the district court lacks subject matter jurisdiction."[6] 28 U.S.C. 1447(c) (1994 & Supp. IV 1998). In other words, only remand orders based on grounds specified in Section 1447(c) are shielded from review under Section 1447(d), 423 U.S. at 345-346, and the prohibition of appellate review in Section 1447(d) does not bar review of remand orders entered on authority other than subsection (c), *id.* at 345-350. Concluding that the remand order in *Thermtron* had "no warrant in the law," the Court ruled that the order could be reviewed by mandamus.[7] *Id.* at 353.

Although petitioner correctly notes (Pet. 5, 7) that the district court's remand order here cites Section 1447(c) and states the court's view that it lacked subject matter jurisdiction (Pet. App. 25), that does not end the inquiry into whether Section 1447(d) bars review of the remand order. As the appeals court stated, removal by the United States in this case was based not only on the provisions of the general removal statute, "but also on § 2679(d)(2), which provides that upon a scope-of-employment certification by the Attorney General, the state-court action 'shall be removed' to federal court[,]

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[6] At the time *Thermtron* was decided, Section 1447(c) authorized remand "[i]f at any time before final judgment it appears that the case was removed improvidently and without jurisdiction." 28 U.S.C. 1447(c) (1982 & Supp. V 1987). Section 1447(c) was amended by Congress in 1988 to read as quoted in the text above. See Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1016(c)(1), 102 Stat. 4670. The 1988 amendment of Section 1447(c) does not affect the provision's meaning for present purposes.

[7] See also *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 715 (1996) (remand orders may be reviewable in certain instances as "final" judgments under the collateral order doctrine).

* * * [and] *for purposes of removal*, the certification is 'conclusive[.]'" *Id.* at 8 (quoting 28 U.S.C. 2679(d)(2)).

The appeals court, relying on this Court's decision in *Guiterrez*, explained that the Attorney General's certification serves two purposes: "It forms the basis for the United States to be substituted defendant, a consequence that is subject to judicial review. * * * It also conclusively establishes removal jurisdiction in the federal court, a consequence that is not judicially reviewable."[8] Pet. App. 9 (citing 515 U.S. at 432, 434). Thus, the appeals court stated, in Section 2679(d)(2) "Congress withdrew from judicial determination any review of the Attorney General's decision to remove a case and have it determined in a federal forum,"[9] *ibid.*, and Section 2679(d)(2) is in tension with Section 1447(d)'s apparent bar on review.

The appeals court concluded that the tension between 1447(d) and 2679(d) "can best be resolved by giving effect to the intent of each statute and preserving to the district court its exclusive authority under § 1447(d)

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[8] See *Gutierrez*, 515 U.S. at 433 n.10 (Westfall Act language making certification "conclusiv[e] . . . for purposes of removal" likely indicates Congress's decision "to foreclose needless shuttling of a case from one court to another") (plurality opinion); see also *id.* at 440 ("there is nothing equivocal about the Act's provision that once a state tort action has been removed to a federal court after certification by the Attorney General, it may never be remanded to the state system") (Souter, J., dissenting).

[9] On this basis, the court of appeals determined that a district court that attempts to review the propriety of the Attorney General's removal in a Westfall Act case exceeds its statutory authority. Pet. App. 9; accord *Aliota*, 984 F.2d at 1357 ("Since subject matter jurisdiction has been conclusively established, there is no jurisdictional question to be resolved by the district court."); cf. *Garcia* v. *United States*, 88 F.3d 318, 324 (5th Cir. 1996) (remand is not permitted under Section 2679(d)(2)).

over remand orders based on § 1447(c) except when Congress directs otherwise in a more specific situation, such as where Congress gives the Attorney General the exclusive power to decide whether to have a Westfall Act case tried in federal court." Pet. App. 9. The Fourth Circuit reasoned that:

> Because § 2679(d)(2) "conclusively" vests federal jurisdiction over a suit against a federal employee who the Attorney General has certified "was acting within the scope of his office or employment," a district court has no authority to remand a case removed pursuant to that section, and the bar of § 1447(d) does not preclude us from reviewing a remand order when the district court exceeds its authority.

Id. at 10. The court of appeals was following *Thermtron* when it concluded that, just as the district court in *Thermtron* exceeded its statutorily defined powers in ordering a remand based on a ground not authorized by Section 1447(c), so too here the district court acted in excess of its jurisdiction when it purported to review the Attorney General's determination to remove this matter to federal court pursuant to Section 2679(d)(2).

In *Things Remembered, Inc.* v. *Petrarca*, 516 U.S. 124 (1995), this Court reasoned that Section 1447(d) barred review of a remand order entered in a case removed under the bankruptcy removal statute (28 U.S.C. 1452(a)) as well as the general removal statute (28 U.S.C. 1441(a)), because Congress is assumed to be "aware of the universality of the practice of denying appellate review of remand orders when Congress creates a new ground for removal." 516 U.S. at 128 (internal quotation marks omitted). This Court suggested, however, that "a clear statutory command to the con-

trary" in a particular removal statute would undermine that assumption. *Ibid.* The Fourth Circuit correctly determined that Section 2679(d) contains just such a clear statutory command. When Congress created a new ground for removal in Section 2679(d)(2), it was presumably aware of Section 1447(d)'s general rule. Thus, Section 2679(d)(2)'s command that the Attorney General's certification shall be conclusive for purposes of removal is an "express indication * * * that Congress intended that statute to be the exclusive provision governing removals and remands" in Westfall Act cases. See *id.* at 129. Despite petitioner's arguments to the contrary, the district court's reference to Section 1447(c) is not dispositive here. The appeals court properly determined that Section 1447(d) did not bar judicial review of the remand order in this case.

3. Nor is there any merit to petitioner's alternative argument that, to the extent *Thermtron* "allowed appellate review of an order of remand for a reason not set out in §1447(c)," that case was wrongly decided and should be overruled. Pet. 23. Once this Court has determined a statute's meaning, it adheres to that ruling under the doctrine of stare decisis. *Neal* v. *United States*, 516 U.S. 284, 295 (1996). "[G]reat weight" is given to stare decisis in the area of statutory construction because "Congress is free to change this Court's interpretation of its legislation." *Id.* at 295 (quoting *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 736 (1977)). In this instance, there has been no intervening development of the law that has "removed or weakened the conceptual underpinnings from the prior decision, * * * [nor has] the later law * * * rendered the decision irreconcilable with competing legal doctrines or policies." *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 173 (1989) (citations omitted). Thus this Court

should adhere to its holding in *Thermtron* that Section 1447(d) does not bar review of a remand order issued outside the authority of Section 1447(c).

4. Finally, petitioner urges this Court to grant certiorari to settle "a disagreement among the circuit courts" regarding whether a party must show that the removing party acted "improvidently" or in "bad faith" in obtaining removal in order to recover attorney's fees pursuant to Section 1447(c). Pet. 24-25. That issue is simply not presented in this case, however, nor is there any conflict among the circuits on this issue. The Fourth Circuit, consistent with the decisions of the other circuit courts of appeals, has recognized that "bad faith is not a prerequisite to an award of attorney's fees under § 1447(c)." *In re Lowe*, 102 F.3d 731, 733 n.2 (4th Cir. 1996); *Mints* v. *Educational Testing Serv.*, 99 F.3d 1253 (3d Cir. 1996); *Morris* v. *Bridgestone-Firestone, Inc.*, 985 F.2d 238 (6th Cir. 1993); *Miranti* v. *Lee*, 3 F.3d 925 (5th Cir. 1993); *Moore* v. *Permanente*, 981 F.2d 443 (9th Cir. 1992); *Morgan Guar. Trust Co.* v. *Republic of Palau*, 971 F.2d 917 (2d Cir. 1992)). Moreover, the Fourth Circuit did not hold in this case that such a showing was required under Section 1447(c). Rather, in its one-sentence discussion of this issue, the appeals court stated: "[i]n light of our ruling on the merits and our belief, in any event, that the district court did not abuse its discretion in denying [petitioner] his attorney's fees, we affirm the district court's ruling in that regard." Pet. App. 17. Hence, this case does not present the question whether a showing of bad faith is required under Section 1447(c).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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