UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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THOMAS NEMETH, Executor of the Estate of Anthony Berardinelli, Plaintiff-Appellee, v. MONTEFIORE, et al., Defendants-Appellants.	No. 22-3855

PLAINTIFFS-APPELLEES' OPPOSITION TO PETITION FOR REHEARING AND REHEARING EN BANC

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INTRODUCTION

"A petition for rehearing en banc is an extraordinary procedure intended to bring to the attention of the entire court a precedent-setting error of exceptional public importance or an opinion that directly conflicts with Supreme Court or Sixth Circuit precedent." 6 Cir. I.O.P. 35(a). The motions panel's November 21, 2022 unpublished order dismissing these appeals, which applied the plain text of the review bar of 28 U.S.C. § 1447(d) to unique procedural facts, satisfies neither of these criteria. Defendant-Appellant Ariel Hyman's petitions for rehearing en banc should therefore be denied.

Section 1447(d) imposes a bar on appellate review of remand orders other than those "remanding a case to the State court from which it was removed pursuant to [28 U.S.C.] section 1442 or 1443." To fall within this exception, "a defendant's notice of removal must assert [that] the case is removable in accordance with or by reason of" either of those two sections. *BP p.l.c. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 1538 (2021) (cleaned up). Here, in dismissing the appeals in an unpublished, nonprecedential order that cites *BP*, the motions panel held that a case removed from state court *without* any reference to section 1442 or 1443, and with the consent of all defendants, is not a "case … removed pursuant to" either of those sections—even if *after* the case has been removed, a defendant asserts that one of those statutory bases for jurisdiction applies. Order at 6–7. The panel did

not, as Petitioner Hyman suggests, resolve, much less create circuit precedent on, the distinct question whether a defendant may invoke additional bases of removal jurisdiction in the district court after a case has already been removed—a question not governed by section 1447(d).

Indeed, despite Hyman's repeated contrary assertions, the panel's unpublished order established no precedent *at all*. Furthermore, as to the appeals addressed by the Order, the panel's holding addresses the unusual set of procedural circumstances that resulted from Hyman's own litigation choices. While that holding may be of importance to Hyman, the panel's application of section 1447(d) to a fact pattern that does not appear to have been considered in any other federal appellate decision is not a matter of "exceptional public importance."

Hyman does not suggest that the panel's order directly conflicts with any decision of this Court or the Supreme Court. And the order also does not conflict with any decision of any other circuit. Indeed, Hyman cites no authority from any circuit even addressing whether a purported removal notice filed after a case has already been removed can make the case one removed "pursuant to" section 1442 or section 1443 within the meaning of section 1447(d). The order's resolution of that question of first impression is consistent with the Supreme Court's recent holding in *BP* that, in determining how and whether section 1447(d)'s bar on appellate review applies to a given remand order, courts may not disregard the statute's text to avoid

"the policy consequences that follow from giving the text its ordinary meaning." 141 S. Ct. at 1542. Yet relying on hypothetical policy concerns—concerns that are not even logically implicated by the panel's reasoning—is what Hyman asks this Court to do. The statutory text, however, compels the panel's result: Because each of these cases "was removed" from state court by notices of removal that did not invoke section 1442 or section 1443, section 1447(d)'s bar on appellate review applies.

ARGUMENT

I. The panel correctly dismissed Hyman's appeals.

Under section 1447(d), the appealability of a given remand order turns solely on whether that order "remand[s] a *case* to the State court from which it *was removed* pursuant to section 1442 or 1443" (emphases added). The panel therefore correctly recognized that the sole relevant question is whether each of the state court actions filed by Plaintiffs-Appellants "was removed pursuant to section 1442 or 1443." Because, by the time Hyman filed his notices of removal, "the cases had already been removed to federal court," Order at 6, the panel properly found those notices irrelevant to the section 1447(d) inquiry.

This conclusion is compelled by both the ordinary meaning of the phrase "was removed" and precedent as to what constitutes effective removal. As explained in *BP*, all that is necessary "to remove a case" is compliance with the requirements of 28 U.S.C. § 1446. *See* 141 S. Ct. at 1538. Hyman does not dispute that the Facility

Defendants' notices of removal satisfied these requirements and that the cases were "removed" when those notices were filed—before he separately purported to remove.

"[O]nce the removal petition is properly filed and notice is given, the entire case is transferred to federal court, and the state court is deprived of jurisdiction unless the federal court subsequently remands it." *Seaton v. Jabe*, 992 F.2d 79, 81 (6th Cir. 1993). A case already "removed" to federal court cannot be "removed" again until and unless it has been remanded to state court. As Hyman himself acknowledged in each of his notices, the cases had already been removed. *See, e.g.*, 21-cv-2120 ECF 1 ¶¶ 6, 21. The cases were no longer pending in state court for him to remove. *See* No. 22-3083 Dkt. 24 (Mot. to Consolidate) at 1 (conceding that Hyman's *Singer* removal notice concerned "the same case that was filed in and removed from state court" by the Facility Defendants). Accordingly, Hyman's subsequent notices of removal could not change the grounds upon which the "cases" had been "removed" from state court. Whatever effect Hyman's filings might have had, they did not "remove" the actions to federal court.[1]

Hyman's petition does not address the text of section 1447(d), addressing instead only section 1446(b). Section 1446(b), however, does not concern appellate

[1] Whether the notices could serve as a means for Hyman to raise new jurisdictional arguments in the *district* court (or in the court of appeals in an otherwise proper appeal) was not before the panel.

jurisdiction; it addresses the time for filing removal notices and the requirement of consent or joinder of all parties in removal notices filed pursuant to section 1441(a). His parade of hypotheticals repeatedly assumes that situations in which a defendant can "invoke federal-officer removal jurisdiction" are limited to the same set of cases in which a defendant "can[] appeal a remand." Pet. 3; *see also id.* at 2. But the premise of section 1447(d) is that there are cases where a defendant can invoke bases of removal jurisdiction in the district court, but not obtain appellate review if a district court disagrees. Section 1447(d) as definitively construed by the Supreme Court in *BP* tells us what those cases are: ones that were *not* removed from state to federal court by a notice of removal that "assert[ed] the case is removable" pursuant to section 1442 or 1443. 141 S. Ct. at 1538.

By directing his argument to the question of whether a party can invoke a ground of jurisdiction in the *district* court, Hyman ignores Congress's focus on the grounds upon which a "case … was removed" and instead s focuses on what jurisdictional arguments were made in the district court *after* the case was removed. But as another motions panel of this Court has held, the Supreme Court's decision in *BP* prohibits rewriting the statute in that way. In *BP*, the Court held that, where a "case … was removed" in part based upon section 1442 or 1443, any and all parts of an order remanding that case are exempt from the section 1447(d) review bar—not just the parts of that order addressing section 1442 or 1443. *See* 141 S. Ct. at

1538. In an unpublished order in *Hudak v. Elmcroft of Sagamore Hills*, No. 21-3836 (6th Cir. Mar. 25, 2022) (attached in Addendum), a panel of this Court held that *BP*'s focus on the notice of removal means that it is irrelevant for purposes of appellate jurisdiction whether a defendant invoked section 1442 in opposing remand, so long as it had asserted that the case was removable on that ground in the notice of removal that brought the case to federal court. So too here, actions and inaction after the case was removed and remained pending in federal court are irrelevant for purposes of appellate jurisdiction.

Had Hyman wanted to ensure appellate review of jurisdictional grounds *not* contained in the Facility Defendants' notices, he could have done so: He could have declined to consent to removal solely pursuant to section 1441(a) and filed his own notice of removal that invoked section 1442 as a ground for removal.[2] Unlike defendants seeking to remove an action on original jurisdiction grounds pursuant to section 1441(a), Hyman would *not* have needed consent of his co-defendants to effect removal of each action under section 1442. *See Steele v. United States*, 2019 WL 6712924, at *4 (S.D. Ohio Dec. 10, 2019); *Mays v. City of Flint*, 324 F. Supp. 3d 918, 920 n.1 (E.D. Mich. 2016), *aff'd on other grounds*, 671 F.3d 437 (6th Cir.

[2] As a practical matter, based on the Facility Defendants' later filings, it seems likely that if Hyman had simply mentioned section 1442 when approached by the Facility Defendants for consent to removal, the Facility Defendants would have included it in their notices of removal.

2017). But Hyman made the choice to consent to the section 1441(a) removals and thus could not the next week "remove" the cases on another basis. *See Spring v. Montefiore Home*, 2022 WL 1120381, at *6 n.2 (N.D. Ohio Apr. 14, 2022) (finding Hyman "consented to removal on the basis of federal question jurisdiction *only*"). He cannot now escape the consequences of his own choice.

II. The order is not precedential and does not resolve a question of substantial public importance.

To justify en banc review, a litigant must do more than assert that the three-judge panel initially assigned the case reached the wrong conclusion. "In the run-of-the-mine case that ground rarely suffices, else many cases a year would be decided in panels of 16, a rarely satisfying, often unproductive, always inefficient process." *Mitts v. Bagley*, 626 F.3d 366, 370 (6th Cir. 2010) (Sutton, J., concurring in denial of rehearing en banc). Rather, en banc review is saved for "the rarest of circumstances." *Id.* (citation omitted). Under this Court's Internal Operating Procedures, those rare circumstances exist when a panel decision has made "a precedent-setting error of exceptional public importance or [issued] an opinion that directly conflicts with Supreme Court or Sixth Circuit precedent." 6 Cir. I.O.P. 35(a); *see also* Fed. R. App. P. 35 (specifying that en banc rehearing ordinarily will not be ordered unless "(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance").

Here, Hyman argues only that the "precedent-setting error of exceptional public importance" standard is met. Not only is he wrong because the motions panel made no error, but because the unpublished panel order creates no precedent *at all* and the fact-specific scenario it addressed is not one of exceptional public importance.

First, under this Court's rules, only "[p]ublished panel opinions are binding on later panels" of this Court. 6 Cir. R. 32.1(a). "Unpublished decisions of this Court," on the other hand, "are non-precedential and bind only the parties to those cases." *Sun Life Assurance Co. of Canada v. Jackson*, 877 F.3d 698, 702 (6th Cir. 2017). As an unpublished order of the Court, the panel order at issue thus cannot contain any "precedent-setting errors." The order is relevant to future panels only "insofar as it is persuasive and correctly identifies governing legal principles." *Twumasi-Ankrah v. Checkr, Inc.*, 954 F.3d 938, 944 (6th Cir. 2020). If, as Hyman argues, the panel order "fail[ed] to meet th[is] standard," future panels presumably would "not hesitate to correct course." *Id.* There is no need to invest the resources associated with en banc rehearing now.

Second, the order does not resolve a question of substantial public importance. The order's holding is limited to an unusual factual scenario: where a defendant seeks to appeal the remand of a case when he consented to removal of the action by co-defendants pursuant to section 1441, and later, *after* those co-

defendants removed the cases, raised section 1442 as a basis of jurisdiction. The absence of any decisions, published or otherwise, of this or any other court of appeals addressing this fact pattern suggests that it does not frequently occur—a factor that weighs against en banc rehearing. *Cf. Issa v. Bradshaw*, 910 F.3d 872, 877 (6th Cir. 2018) (Sutton, J., concurring in denial of rehearing en banc) (finding standard for en banc rehearing not met where "the number of cases presenting this issue is small and growing smaller").

The panel's nonprecedential interpretation of section 1447(d)'s text also does not, as Hyman suggests, deprive defendants of the right to invoke section 1442 as a basis of subject-matter jurisdiction. For one, the order only interprets the bar on appellate review contained in section 1447(d); it does not resolve whether a defendant can invoke section 1442 jurisdiction in the *district court* after he has consented to removal by other defendants who did not include those grounds. Additionally, even as to appellate jurisdiction, a defendant like Hyman retains full control, because co-defendant consent is not needed to remove an action pursuant to section 1442 but is needed for removal under section 1441. If co-defendants approach a defendant for consent to removal prior to his filing of a notice of removal invoking section 1442, he may withhold consent if those co-defendants do not agree to invoke section 1442, and then himself remove "the case" pursuant to section 1442. Here, the panel held only that appellate jurisdiction will not exist if a defendant

proceeds in a third, unusual way: consenting to removal of the case solely under section 1441 and invoking section 1442 only after the case has been removed. Regardless of whether this holding is incorrect, it does not create an intractable problem for litigants.

In addition, it is not exceptionally important to the public that this Court hear Hyman's appeals on the merits. A panel of this Court has already heard oral argument in an appeal raising the same theories of federal jurisdiction over state-law claims relating to COVID transmission in care facilities that Hyman raised in the district court. *See Hudak v. Elmcroft of Sagamore Hills*, No. 21-3836 (argued Dec. 7, 2022).[3] There is thus no concern that the underlying legal questions, which have been answered consistently by four sister courts of appeals and eleven district judges within this Circuit, will go unaddressed by this Court.[4] The Court will even have the

[3] Plaintiffs-Appellees are aware of one other fully briefed appeal in this Court raising the same jurisdictional questions, *Massamore v. RBRC, Inc.*, No. 22-5381, which the Court *sua sponte* ordered held in abeyance pending its decision in *Hudak*.

[4] *See Manyweather v. Woodlawn Manor, Inc.*, 40 F.4th 237 (5th Cir. 2022); *Martin v. Petersen Health Ops., LLC*, 37 F.4th 1210 (7th Cir. 2022); *Mitchell v. Advanced H.C.S., LLC*, 28 F.4th 580 (5th Cir. 2022); *Saldana v. Glenhaven Healthcare LLC*, 27 F.4th 679 (9th Cir. 2022); *Maglioli v. Alliance HC Holdings LLC*, 16 F.4th 393 (3d Cir. 2021); *Nemeth v. Montefiore*, 2022 WL 4779035 (N.D. Ohio Oct. 3, 2022); *Levert v. Montefiore Home*, 2022 WL 4591253 (N.D. Ohio Sept. 30, 2022); *DeMarcus v. Homesteadidence OPCO, LLC*, 2022 WL 3718480 (E.D. Ky. Aug. 29, 2022); *Friedman v. Montefiore*, 2022 WL 3584481 (N.D. Ohio July 11, 2022); *Spring*, 2022 WL 1120381; *Massamore v. RBRC, Inc.*, 595 F. Supp. 3d 594 (W.D. Ky. 2022); *Rosen v. Montefiore*, 582 F. Supp. 3d 553 (N.D. Ohio 2022); *Singer v. Montefiore*, 577 F. Supp. 3d 633 (N.D. Ohio 2021); *Hudak v. Elmcroft of*

opportunity to address the particulars of the claims against Hyman and the Facility Defendants arising out of the outbreak at the Montefiore Home: Realizing that their failure to remove pursuant to section 1442 had consequences for appellate jurisdiction, the Facility Defendants invoked section 1442 in notices removing subsequent cases. As the panel recognized, there is no section 1447(d) obstacle to review of the remand orders in those cases. *See* Order at 5–6 (discussing *Levert v. Montefiore Home*, No. 22-3876).

Finally, specific features of these cases make them poor ones through which to address questions about how section 1447(d) functions in the context of successive notices of removal. As Plaintiffs-Appellees argued in the underlying motion practice, *see, e.g.*, No. 22-3083 Dkt. 46 at 12–14; No. 22-3083 Dkt. 48 at 4–9, even if Hyman's notices of removal were relevant to the section 1447(d) inquiry, those notices do not purport to remove the action pursuant to section 1442. Those notices each explicitly, repeatedly, asserted that the case was removable under 28 U.S.C. § 1441(a), invoking federal-question jurisdiction. *E.g.*, 21-cv-2120 RE 1 at ¶¶ 4, 12. The notices made only a passing reference to section 1442(a)(1) in a section entitled "Argument and Citation to Authority," stating that "Original jurisdiction is

Sagamore Hills, 566 F. Supp. 3d 771 (N.D. Ohio 2021); *Roderick v. Life Care Ctrs. of Am., Inc.*, 2021 WL 6337496 (E.D. Tenn. Apr. 30, 2021); *Bolton v. Gallatin Ctr. for Rehab. & Healing*, 535 F. Supp. 3d 709 (M.D. Tenn. 2021); *Cowan v. LP Columbia KY, LLC*, 530 F. Supp. 3d 695 (W.D. Ky. 2021).

also through an action pursuant to 28 U.S.C. § 1442(a)(1).” Original jurisdiction and removal jurisdiction are not the same thing, of course, and section 1442 provides only the latter. *Cf. Spring*, 2022 WL 1120381, at *6 n.2. (“Hyman’s sole mention of § 1442(a) in his Notice is nearly impossible to parse.”). Furthermore, the notices contained no factual allegations that would support an invocation of federal-officer removal. *Cf. Dart Cherokee Basin Operating Co. v. Owens*, 574 U.S. 81, 87 (2014) (holding that Rule 8 pleading standards apply to notices of removal); *Mays*, 871 F.3d at 445 (a notice of removal must “identify … specific actions or inactions alleged in the complaint” that were taken at the direction of a federal officer). The panel’s conclusion that Hyman’s notices were irrelevant eliminated the need to examine whether such a cursory reference to section 1442 is equivalent to an “assert[ion that] the case is removable ‘in accordance with or by reason of’” section 1442 or 1443, as *BP* requires for the exception to section 1447(d)’s bar on review to apply. 141 S. Ct. at 1538. If this Court were to grant en banc review, however, it would have to address this issue as well.

Additionally, in deciding whether to take the extraordinary step of convening an en banc court to revisit a non-precedential order, the Court may consider the context in which Hyman purports to have raised a federal-officer removal argument. Hyman’s theory of federal-officer removal jurisdiction—that all of the nation’s nursing homes became agents of federal officers with the onset of the COVID-19

pandemic—is, if not frivolous, "certainly strained, to say the least." *Fisher v. Rome Ctr. LLC*, 2022 WL 16949603, at *13 (N.D.N.Y. Nov. 15, 2022). As one district judge concluded as to a defendant in a similar case, it is likely that Hyman belatedly "asserted [h]is strained theory of federal officer removal jurisdiction primarily to secure the appealability of [any remand] order." *Id.* This supposition is supported not only by Hyman's removal notices' cursory and factually barren reference to the federal-officer removal statute, but also by the conclusion of four courts of appeals and literally hundreds of district courts finding this theory barred by existing Supreme Court precedent—including several that have found the theory so weak as to warrant awarding attorney's fees to the plaintiffs. *See, e.g.*, *Fisher*, 2022 WL 16949603, at *13; *Thomas v. Cantex Health Care Ctrs. III LLC*, 2021 WL 5163199, at *5 (N.D. Tex. Nov. 4, 2021) (finding removal was not "objectively reasonable"); *Moody v. Lake Worth Investments Inc.*, 2021 WL 4134414 (N.D. Tex. May 26, 2021) (noting that "[a] cursory attempt to research the law in this circuit regarding federal officer removal would have shown Defendant that making that argument is dubious"). In *BP*, the Supreme Court found the possibility of such "gamesmanship" was not a reason to hold that the appellate-review bar of section 1447(d) applies where the plain text would indicate otherwise. 141 S. Ct. at 1542. But nothing in that opinion or the statutory text prohibits the Court from considering this likelihood in

deciding whether to grant discretionary en banc review—especially where, as here, the plain text of section 1447(d) provides no support for appellate jurisdiction.

CONCLUSION

For the foregoing reasons, the Court should deny the petitions for rehearing and rehearing en banc.

January 17, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This response complies with the type-volume limitation of Fed. R. App. P. 35(e) and (b)(2) and this Court's January 4, 2023 Order because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and the Rules of this Court, it contains 3,449 words.

This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 MSO in 14-point Times New Roman.

January 17, 2023 s/ Adam R. Pulver
Adam R. Pulver

CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

January 17, 2023 s/ Adam R. Pulver
Adam R. Pulver

ADDENDUM

No. 21-3836

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Mar 25, 2022
DEBORAH S. HUNT, Clerk

LAURA HUDAK, Executrix of the Estate of William P. Koballa, deceased,

Plaintiff-Appellee,

v.

ELMCROFT OF SAGAMORE HILLS, et al.,

Defendants-Appellants.

O R D E R

Before: COLE, GIBBONS, and ROGERS, Circuit Judges.

This case arises out of the death of William P. Koballa, who died after contracting COVID-19 while living at Defendant Elmcroft of Sagamore Hills ("Elmcroft"), a senior living facility. Plaintiff Laura Hudak, Koballa's daughter and the executrix of his estate, brought various state law claims against Elmcroft, its affiliates, and Elmcroft's Executive Director, Jamie Ashley Cohen (collectively, "Defendants"), in state court. Defendants removed the action to federal court and Hudak moved to remand, which the district court granted. Defendants now appeal the district court's remand order. Hudak moves to dismiss the appeal for lack of jurisdiction.

"An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed [under 28 U.S.C. § 1442 or 1443] shall be reviewable by appeal or otherwise." 28 U.S.C. § 1447(d).

Defendants argue that because they premised removal in part on § 1442(a)(1), the federal officer removal statute, the district court's remand order is appealable under § 1447(d). Hudak argues, without citing to any authority, that Defendants waived removal under § 1442 because they did not allege facts supporting federal officer removal in their notice of removal, nor did they raise the argument in their briefing before the district court. Although it did not explicitly address waiver, the Supreme Court's reasoning in *BP P.L.C. v. Mayor and City Council of Baltimore*, 141 S. Ct. 1532, 1539 (2021), undercuts Hudak's argument, as the court there held that removal is generally effected by a defendant's actions under § 1446 and does not require affirmative argument or a judicial determination that removal is authorized under § 1442 or § 1443. *Id.* at 1539. In *BP*, the Supreme Court found that "[t]o remove a case pursuant to § 1442 or § 1443 . . . just means that a defendant's notice of removal must assert the case is removable in accordance with or by reason of one of those provisions." *Id.* at 1538 (internal quotation marks and citation omitted). Thus, the Supreme Court concluded that "citing § 1442 as one of its grounds for removal" rendered the district court's remand order reviewable on appeal. *Id.* That is the case here, where Defendants cited § 1442(a)(1) in their notice of removal.

Accordingly, the motion to dismiss is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk