No. 05-

IN THE

Supreme Court of the United States

WARREN DAVIS,

Petitioner,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), UAW REGION 2B, RONALD GETTELFINGER, AND LLOYD MAHAFFEY,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

DAVID G. OAKLEY
KRAMER & ASSOCIATES L.P.A.
3214 Prospect Avenue East
Cleveland, Ohio 44115-2600
(216) 431-5300

PAUL ALAN LEVY
Counsel of Record
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

Counsel for Petitioner Warren Davis

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QUESTIONS PRESENTED

1. May an order remanding a removed case to state court be reviewed, notwithstanding the prohibition in 28 U.S.C. § 1447(d),

> (a) where the district court expressly states that it is basing its decision to remand on lack of jurisdiction, and not that the remand is based on a ground not specified by section 1447(c) or by a comparable statute, or
>
> (b) where the court of appeals hypothesized that the district court had supplemental jurisdiction?

2. May a state law claim be removed from state court on grounds of complete preemption absent a determination that Congress created an alternate private right of action and intended to displace the state claims with federal claims of which the district court would have had jurisdiction?

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The opinion of the United States Court of Appeals for the Sixth Circuit (Pet. App. 1a-11a) is reported at 392 F.3d 834. The district court's opinion and order, remanding the case to the Cuyahoga County, Ohio Court of Common Pleas (Pet App. 12a to 32a), is unreported.

JURISDICTION

The decision of the United States Court of Appeals was issued on December 15, 2004. Pet. App. 1a. A timely petition for rehearing was denied on February 28, 2005. Pet. App. 33a. On May 26, 2005, Justice Stevens granted a motion for extension of time, until June 30, 2005. On June 22, 2005 Justice Stevens further extended the time for filing until July 15, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant portions of 28 U.S.C. §§ 1367 and 1447, the Labor-Management Reporting and Disclosure Act, and the Ohio Age Discrimination law are set forth at Pet. App. 35a to 41a.

STATEMENT

A. Facts.

Petitioner Warren Davis was the elected Director of Region 2 of the respondent United Auto Workers Union ("UAW"), which contained approximately 41,000 union members in Ohio, Pennsylvania and West Virginia. The UAW's regional and national officers are elected at a quadrennial convention, the most recent of which was in June 2002. The UAW does not have any official enacted retirement

rule. However, all elected officials of the UAW comprise the "Administration Caucus" of the UAW which, in turn, maintains a series of customary rules governing union activities.[1]

One such rule is a facially discriminatory prohibition against members running for office after their 65th birthday, even though the federal age discrimination law, and many state laws, extend protection against compulsory retirement to employees over 65. In defiance of this rule, and without prior warning of his intentions, petitioner Davis ran for re-election as director at the UAW's Convention in June, 2002; because he was the only candidate in the election he was elected. Respondents, including Ronald Gettelfinger, President of the UAW, and Lloyd Mahaffey, who was ultimately elected as director of respondent Region 2B, were outraged by Davis' successful candidacy in defiance of the retirement rule. Respondents took several actions in reprisal, including the issuance of statements that Davis had violated the retirement rule, lied to the membership, and denied them an honest election by failing to reveal his candidacy until the last moment, when it was too late for the Administration Caucus to arrange an alternate candidate to run against him. At the behest of the Administration Caucus, the territory of Region 2 was divided into several surrounding regions, each of which now contained portions of Region 2, for the purpose of eliminating the position

[1]Many Caucus rules would be patently unlawful if adopted by the union; the Caucus attempts to insulate the union from liability by keeping the rules "informal" and enforceable only through iron political discipline. One of the ultimate issues on the merits of this case is whether this strategem succeeds in insulating the union from liability under state law, and whether federal law forbids a state from reaching union discrimination that is implemented in this manner.

to which Davis had been elected. New elections were then held for the newly created regions. Davis, who had not campaigned in the areas surrounding his old region, recognized the effectiveness of the gerrymander and declined to run in these elections.

After exhausting his intra-union remedies, Davis protested to the United States Department of Labor against the maneuvers that had eliminated his election. Although Davis' protest did not address the issue of age discrimination, the Labor Department, in rejecting Davis' claims, stated that the Administration Caucus retirement rule was not a "governing rule imposing an age limitation on candidates for office," and that, in any event, the ADEA exception for employees who hold "high policymaking positions" applied to the position of Director of Region 2. Accordingly, the Secretary declined to file suit under section 402(b) of the LMRDA, 29 U.S.C. § 482(b), to set aside the election for the UAW positions that had been created in retaliation for Davis' candidacy.

B. Proceedings Below.

Davis commenced this action in the Court of Common Pleas, Cuyahoga County, Ohio. The complaint alleged that the elimination of Davis' position violated Ohio Revised Code § 4112.14, which forbids both age discrimination in employment and retaliation against persons who oppose discrimination. Similarly, Davis alleged wrongful discharge in violation of Ohio public policy against retaliation against persons who oppose age discrimination. Finally, the complaint alleged libel claims based on respondents' written statements about Davis' "lying," "fraud," and "unethical, self-dealing" conduct in office, and slander claims based on similar oral statements accusing Davis of having "lied" and been "deceitful." The complaint sought compensatory and punitive damages, attorney fees, and

injunctive relief including reinstatement to the position that had been discriminatorily eliminated.[2]

On July 2, 2003, respondents removed the case to the United States District Court for the Northern District of Ohio, claiming subject matter jurisdiction under 28 U.S.C. § 1331 and sections 401 through 403 of the LMRDA, 29 U.S.C. §§ 481-483.[3] A week later, respondents moved to dismiss, arguing that, because Davis' claims challenged the outcome of a union election, they were completely preempted by federal law, and hence within the district court's original jurisdiction. Respondents also asserted that any state claims that were not "completely preempted" were within the district court's supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a).

Davis moved to remand, arguing that his claims were based entirely on state law, and were neither preempted nor completely preempted. He pointed out that he was not challenging the outcome of a union election, but only claiming that the elimination of his position, which happened to be subject to election, was based on age discrimination and

[2] Davis was also a plaintiff, along with three other UAW members, in a lawsuit filed in the Eastern District of Michigan alleging that the UAW violated Title I of the LMRDA when it eliminated Region 2 to punish the delegates who re-elected him. This action was dismissed as forbidden by Title IV of the LMRDA, and the court of appeals affirmed. 390 F.3d 908 (6th Cir. 2004).

[3] Respondents also claimed that Davis' claims relied in part on the UAW's Constitution, and hence were completely preempted by section 301 of the Labor Management Relations Act. Because the district court rejected this argument and respondents did not pursue it on appeal, it is not discussed here.

retaliation. In any event, Davis argued that even if his claims were preempted, preemption is generally a federal defense, and the state courts were fully capable of assessing that defense. Davis further explained that his defamation claims were independent of any claims he might have had that the elections at the UAW Convention were invalid. After all, election winners as well as election losers can sue over defamatory campaign statements; hence, the validity of the claims cannot depend on whether the election should be set aside.

The district court agreed that it lacked jurisdiction, and remanded to state court. Pet. App. 13a-14a, 32a. The court decided that a state claim for retaliatory elimination of an elected position, or for defamatory statements made about an elected official in the course of eliminating his position, does not necessarily arise under federal law simply because Title IV provides the exclusive procedure for challenging a union election after it has been conducted. Although respondents had argued, in part, that seeking the remedy of reinstatement showed that he was challenging an election already conducted, the district court thought that Davis had conceded that reinstatement was not available to him, which "goes a long way toward mooting [respondents'] argument." *Id.* 30a. But that was not, in the end, the basis for its decision, because the district court decided that "the nature of the relief requested by Davis, alone, does not create federal preemption jurisdiction." *Id.* Moreover, the LMRDA has an express non-preemption provision, *id.*, and does not condone age discrimination. *Id.* 32a. Finally, Davis was not challenging "the ultimate validity of any Union election results," just the means by which respondents had eliminated him. *Id.* 32a. Accordingly, there was no preemption, and "defendants' removal of the case to this Court was not well-taken." *Id.*

Respondents appealed, and Davis challenged the court of appeals' jurisdiction to hear the case, asserting that remand

to state court for lack of subject matter jurisdiction is not a permissible basis for appeal under 28 U.S.C. § 1447(d). On appeal, both parties agreed that the district court was factually incorrect in perceiving that Davis had agreed not to pursue the issue of reinstatement to the position that had been eliminated, and that, to the extent the district court had relied on that assumption in its remand decision, the reliance was erroneous. Pet. App. 7a.

The Sixth Circuit decided that, even though the district court had attributed its remand decision to the absence of jurisdiction, it would have jurisdiction to review the remand if the district court's ruling were that it had jurisdiction at time of removal, but subsequent events made remand appropriate. *Id.*, citing *First Nat'l Bank of Pulaski v. Curry*, 301 F.3d 456 (6th Cir. 2002). The district court's reference to Davis' relinquishment of his claim for reinstatement as having "mooted" one of respondents' preemption arguments was deemed sufficient to bring the case within this line of authority. Thus, in effect, the Sixth Circuit decided, appellate jurisdiction is precluded only when a district court expressly bases its decision to remand on the lack of subject matter jurisdiction at the time of removal. If the district court decided to remand because of events occurring after removal, Sixth Circuit law holds that § 1447(d) does not bar appellate review of the remand order. *Id.* 6a-7a.

Here, even though the district court had expressly stated that it lacked jurisdiction, and even though the district court's assumption about whether Davis had relinquished the claim to reinstatement was erroneous, the Sixth Circuit concluded that this mistake of fact placed the district court's remand decision within the class of decisions that are remanded based on a post-removal event having deprived the court of subject matter jurisdiction. *Id.* 7a. Accordingly, the Court decided it could review the remand decision on appeal. *Id.*

The court of appeals then turned directly to the question of whether Davis' state law claims are preempted by the LMRDA. *Id.* 8a-11a. The court did not first consider whether the district court had abused its discretion in deciding to remand. Nor did the court consider whether federal law creates a private cause of action that supersedes and supplants Davis' claims under state law, such that Davis' state law claims must be considered as arising under federal law. Instead, the court of appeals held that it was sufficient to determine that all of Davis' state law claims, for age discrimination or for libel, all hinge on whether Davis was properly elected, and whether "defendants' statements regarding the impropriety of his actions in the election were false . . .. To determine whether the statements are false, however, the validity of the election and Davis's tactics must be examined." *Id.* 10a. Because the Secretary of Labor had previously decided that the delegates' action at the convention had not violated Davis' election-related rights, Davis' state-law claims would necessarily call those findings into question, and hence were preempted by Title IV of the LMRDA. *Id.* 10-11a.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this case to decide three persistent questions on which the lower federal courts have been deeply divided, about removal based on complete preemption and about appellate jurisdiction to review remand decisions. First, even assuming that review is ever available for decisions remanding remaining state claims after the elimination of federal claims on which removal was originally based, the lower courts are hopelessly divided about whether and how far the courts of appeals may go in second-guessing a district court's statement that its remand decision was based on lack of jurisdiction. Indeed, the Court has never decided

whether the general rule against appellate review of remand decisions, 28 U.S.C. § 1447(d), authorizes appellate jurisdiction to review remand decisions based on the statutory authority to decline supplemental jurisdiction over state law claims that were properly removed along with federal claims that were eliminated post-removal, and two Justices have noted that the question remains open.

Contrary to the apparently clear command of section 1447(d), the courts of appeals are spending an inordinate amount of time deciding whether one of the many exceptions to that subsection apply to a particular case; further, there is little consistency among the circuits on what the exceptions to the subsection are. Certiorari should be granted here to restore clarity to this area, and to reaffirm the Congressional mandate that, absent clear legislation to the contrary, states may be trusted to consider federal issues, and even if there may be federal defenses to state claims, district court decisions remanding those claims should not be reviewed on appeal.

Finally, contrary to each of the decisions of this Court in which removal has been held appropriate based on the doctrine of complete preemption, and to the holdings of most circuits, the court below joined the Seventh and Eighth Circuits, and district courts in several states, in allowing a state claim to be removed based on a federal preemption defense even though the preempting statute did not contain any federal right of action over which the district court could have had original jurisdiction. Under the holding below, removal based on preemption is proper whenever federal law bars any state regulation. Review should be granted to decide whether complete preemption can be found where there is no private cause of action within the district court's jurisdiction to which the state claims could be converted.

A. This Case Presents Important Questions About Whether, and Under What Standards, Courts of Appeals May Review District Court Remand Decisions That May Be Based on the Elimination of Claims That Were Properly Removed.

1. Background Principles Governing Appellate Jurisdiction Over Remand Orders.

Section 1447(d) provides that, except for certain civil rights cases, "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." Despite this seemingly simple command, the rule has become so hedged about with exceptions that it sometimes seems as if the rule is the exception. Further, the exceptions vary in application and content among the circuits.

This Court recognized a narrow exception to section 1447(d) in *Thermtron Prod. v. Hermansdorfer,* 423 U.S. 336 (1976), where a district judge had acknowledged that there was subject matter jurisdiction, but decided that the federal court dockets were so overcrowded that the case could be resolved more quickly if it were sent back to state court. The Court held that section 1447(d) was not 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 . . .. Because the District Judge remanded a properly removed case on grounds that he had no authority to consider, he exceeded his statutorily defined power; and issuance of the writ of mandamus was not barred by § 1447(d)." *Id.* at 351. The following year, the Court reaffirmed that **even a remand based on erroneous principles** is nevertheless

unreviewable. *Gravitt v. Southwestern Bell Tel. Co.*, 430 U.S. 723 (1977).

Then, in *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343 (1988), the Court held that, despite the lack of express statutory authorization for the remand of state claims that were joined in a complaint with federal claims after the federal claims were dismissed, federal courts have inherent authority to remand such claims even though they were within the court's pendent jurisdiction. The Court did not have occasion to decide whether the court of appeals had jurisdiction to review such remand decisions, because the Court affirmed the denial of a petition for mandamus. Two years later, Congress provided express statutory authorization for supplemental jurisdiction over state-law claims that are part of the same case or controversy as other claims of which the district courts have original jurisdiction. 28 U.S.C. § 1367(a). The same statute expressly gave district courts discretion to decline supplemental jurisdiction, while enumerating four specified reasons for declining jurisdiction. 28 U.S.C. § 1367(c).

Finally, in *Things Remembered v. Petrarca*, 516 U.S. 124 (1995), the Court made clear that the remands insulated from review were not confined to those which were specified in section 1447(c). That case involved the removal of a state claim under the bankruptcy provision, 28 U.S.C. § 1452, which had its own provision for remands to state court. Concurring in the opinion of the Court, Justices Kennedy and Ginsburg stated their understanding that the Court's reliance on *Thermtron* was not intended to bear on the reviewability of *Cohill* remand orders. 516 U.S. at 129-130. Although all courts of appeals to have addressed this open question have ruled that they do have jurisdiction to decide whether supplemental jurisdiction was properly declined through a remand order, the standard by which they evaluate the propriety of remand varies among the circuits.

2. The Court Should Decide Whether There Is Appellate Jurisdiction to Second-Guess the "Real" Reasons for Remand When the District Court Finds Lack of Federal Jurisdiction.

Even if there is appellate jurisdiction to review remand orders that are issued in cases in which there was unquestionably federal jurisdiction at the time of removal, but later events have eliminated the claims that afforded a basis for the removal, this case presents two significant questions, on which the courts of appeals are divided. Both concern **how** such cases are reviewed. **First**, the courts of appeals are deeply divided on the question of whether, and to what extent, the court should "second–guess" the opinion of a district judge who has decided to remand a case for a stated reason that facially complies with section 1447(c), and determine whether the real reason for remand might have been one not within the statute, and hence subject to appellate review under *Thermtron*. The Third, Fifth and Tenth Circuits employ an approach that is deeply at odds with approaches in the Fourth, Sixth, Seventh, and Eighth Circuits.

For example, in the Fifth Circuit, "Reviewable non-section 1447(c) remands constitute a narrow class of cases, meaning we will review a remand order only if the district court 'clearly and affirmatively' relies on a non-section 1447(c) basis." *Heaton v Monogram Credit Card Bank of Georgia*, 231 F.3d 994, 997 (5th Cir. 2000), *quoting Copling v. Container Store*, 174 F.3d 590, 596 (5th Cir. 1999). Review is forbidden even if the district court states that it is remanding because a post-removal amendment destroyed its jurisdiction, and even if that statement is legally erroneous. *Tillman v. CSX Transp.*, 929 F.2d 1023, 1026-1028 (5th Cir. 1991); *accord Angelides v. Baylor College of Medicine*, 117 F.3d 833, 836 & n.3 (5th Cir.

1997). In *Heaton*, for example, the defendant argued that the record showed that the district court had jurisdiction at one time, that the district judge was really remanding pursuant to its discretionary authority under section 1367(c), and that the district court's erroneous reliance on lack of jurisdiction should not be sufficient to bar appellate review. However, the Fifth Circuit held that the conclusory statement that there was no jurisdiction was sufficient basis to deny review.

Similarly, in the Third Circuit, if the trial judge "**purports** to remand a case on § 1447(c) grounds, his order is not subject to challenge in the court of appeals, by mandamus or otherwise. . . . Our review is forestalled only when the **stated reasons** for the remand include procedural or jurisdictional defects." *Balazik v. County of Dauphin*, 44 F.3d 209, 213 (3d Cir. 1995) (punctuation and citations omitted; emphasis in original). In *Balazik*, the district judge alluded to a section 1447(c) procedural ground, but expressly refrained from relying on that ground as a basis for remand, deciding instead to remand for comity reasons. The court accepted jurisdiction for that reason only.

The Tenth Circuit's standard allows slightly more penetrating review of the stated reasons for remand: The district judge's statement that subject matter jurisdiction is lacking is not alone sufficient, but so long as the finding of lack of subject matter jurisdiction was made in good faith, that is enough to bar review under § 1447(d). *Archuleta v. Lacuesta*, 131 F.3d 1359, 1362 (10th Cir. 1997).

In the Fourth Circuit, by contrast, the district court's reference to lack of jurisdiction does not end the matter; if there is any ambiguity about whether the district judge felt that a remand was compelled, the court of appeals "must . . . determine by independent review of the record" what the real basis for remand was. *Mangold v. Analytic Serv*, 77 F.3d 1442, 1450 (1996). A strong dissent argued that an express finding

that subject matter jurisdiction is lacking should be enough to bar review. *Id.* at 1455-1456. The Fifth Circuit explicitly recognized its differences with the Fourth Circuit in *Angelides v. Baylor College Of Medicine*, 117 F.3d 833, 836 (5th Cir. 1997) ("we purposefully decline to follow the Fourth Circuit's evisceration of § 1447(d) [allowing review] when a district court's remand error was of a 'sufficient magnitude.'"). But the Eighth Circuit has followed *Mangold*, holding that even a remand that is expressly based on lack of jurisdiction can be reviewed if it was based on reasons that are plainly wrong under existing circuit precedent. *Xiong v. State*, 195 F.3d 424, 426-427 (8th Cir. 1999). Similarly, in the Eighth Circuit, the district court's statement that it lacks jurisdiction will not bar review if inspection of the record reveals that the district court was "really" relying on the elimination of federal claims and thus, implicitly albeit unwittingly, on a discretionary decision to decline supplemental jurisdiction. *Lindsey v. Dillard's*, 306 F.3d 596, 598 (8th Cir. 2002). *Accord Poore v. American-Amicable Life Ins. Co.*, 218 F.3d 1287, 1290-1291 (11th Cir. 2000). Adopting a standard comparable to these circuits, the Seventh Circuit has held that a district court's use of the term "jurisdiction" in deciding to remand is not conclusive of appellate authority to review. *Kircher v. Putnam Funds Trust*, 373 F.3d 847, 849 (7th Cir. 2004). The Seventh Circuit characterized the Second and Ninth Circuits as having held squarely to the contrary with respect to the specialized topic of removal and remand under the Securities Litigation Uniform Standards Act of 1998. *Id.* at 850-851 (Second and Ninth Circuits "were mesmerized by the word 'jurisdiction' and did not see the difference between a case that should never have

been removed and a case properly removed and remanded only when the federal job is done").[4]

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[4] A number of appeals courts also scrutinize district court decisions that on their face rest on procedural grounds and allow the appeal to proceed if they consider that section 1447(c) was incorrectly applied. Because section 1447(c) distinguishes between remands based on lack of jurisdiction, which may be ordered sua sponte, and remands based on procedural defects, which may be ordered only in response to a timely motion, the Fifth and Eleventh Circuits have decided, over dissents, that a sua sponte district court decision directing remand for lack of subject matter jurisdiction must be carefully reviewed to ensure that it is not based on a mere failure properly to plead jurisdiction in the removal notice. *In re First Nat'l Bank of Boston*, 70 F.3d 1184, 1187 (11th Cir. 1995); *In re Allstate Ins. Co.*, 8 F.3d 219, 221-222 (5th Cir. 1993). But a procedural matter that the district court notices sua sponte, albeit in response to a timely motion about a different procedural matter, is held to be outside appellate jurisdiction. *Velchez v. Carnival Corp.*, 331 F.3d 1207, 1210 (11th Cir. 2003). Complicating matters still further, the Third Circuit holds that if the district court mischaracterizes as jurisdictional an objection to removal that is actually procedural but was not presented within thirty days of removal, the court of appeals has jurisdiction to reverse the remand. *Ariel Land Owners v. Dring*, 351 F.3d 611, 613 (3d Cir. 2003). In the Ninth Circuit, the fact that the procedural reason for the remand was not raised in the district court until the reply brief is a basis for appellate jurisdiction. *Northern California Dist. Coun. of Laborers v. Pittsburg-Des Moines Steel* Co., 69 F.3d 1034, 1038 (9th Cir. 1995)

Under the standards set forth by the Third, Fifth and Tenth Circuits, the remand order here would have been unreviewable, because the district judge unequivocally stated that her court did not have jurisdiction. Although the district judge stated in passing that a statement that she mistakenly thought Davis had made in a brief had "go[ne] a long way toward mooting" one of respondents' arguments for complete preemption, Pet. App. 30a, the court did not conclude that it had jurisdiction at time of removal (which would have provided a potential basis for supplemental jurisdiction over the remaining claims). At worst, the district court found lack of jurisdiction through a mistaken understanding of the law. Another interpretation of the district court's opinion is that the district judge's mistake of fact about whether Davis had changed his prayer for relief did not affect its view of its jurisdiction. Supporting this reading are the facts that, immediately after its statement about possible "mooting," the court stated that a claim for relief could not create "federal preemption jurisdiction," *id.*; *see also id.* 13a-14a; the statement that there was "no direct conflict between federal law and the state laws allegedly violated by the defendants in the present case," *id.* 31a; and the conclusion that the "removal of the case to this Court was not well-taken." *Id.* 32a. Thus, under the Tenth Circuit's standard, the determination of lack of subject matter jurisdiction would have been made "in good faith" and remand would have been unreviewable. In apparent agreement with the Seventh Circuit, however, the Sixth Circuit refused to be "mesmerized" by the reference to jurisdiction. The Court should grant review to resolve this conflict and provide guidance to the courts of appeals on the degree of deference to be given to the district court's stated reasons for the remand in deciding whether jurisdiction is available under section 1447(d).

3. The Court Should Decide Whether Section 1447(d) Forbids Review of Remand Decisions That Decline Jurisdiction As Expressly Authorized by Section 1367(c).

The Court should also resolve the question, left open in both *Cohill* and *Things Remembered*, whether there is appellate jurisdiction to review orders remanding to state court state law claims that were filed along with federal law claims, following the dismissal of claims over which there was at least arguably original jurisdiction, and over which the district courts had supplemental jurisdiction under Section 1367(a). The reason for limiting § 1447(d) in *Thermtron* was to give the courts of appeals the authority to rein in "rogue" decisions by district judges who remand cases to state court without any statutory authority. In other circumstances, when remands are fully supported by statutory authority, a ban on appellate review limits both the needless imposition on the power of the sovereign states to afford a local forum for their citizens who suffer wrongs under state law, and the avoidable delays in the litigation of those state-law issues when the decision to remand is appealed. These considerations apply equally to remands of state law issues under § 1367(c), especially when it is only one small aspect of the case that the district court deemed federal and whose elimination from the case destroyed the original basis for removal. Here, even reading the district court's decision as the court of appeals did, the district judge considered that one aspect of the relief sought on one cause of action – the prayer for reinstatement – presented a stronger argument for removal than several other claims that the district court expressly held provided no basis for removal.

Since *Cohill* was decided, Congress has given district courts express authority for the remand of state law claims that

remain in a case after the federal claims have been dismissed. Although the courts of appeals have generally concluded that they have jurisdiction to review remand decisions that are based on section 1367(c) once the admittedly federal claims on which removal was based have been removed from the case, *e.g.*, *In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 708-09 (7th Cir. 1992); *Trans Penn Wax Corp. v. McCandless*, 50 F.3d 217, 223 (3d Cir. 1995), some courts of appeals have construed *Thermtron* to forbid appellate review of remands based on statutory authority other than section 1447(c). For example, many courts of appeals agree that section 1447(d) extends to prohibit review of remands pursuant to 28 U.S.C. § 1447(e) as well as section 1447(c). *E.g.*, *Stevens v. Brink's Home Security*, 378 F.3d 944, 948 (9th Cir. 2004); *Matter of Florida Wire & Cable Co.*, 102 F.3d 866, 868 (7th Cir. 1996). ("The Court's opinion in *Things Remembered*, as well as Justice White's dissenting opinion in *Cohill*, make it clear that the important distinction is between remand orders authorized by statute, which are nonreviewable, and those that are not, which are reviewable."). Similarly, the majority rule bars review of remands based on 28 U.S.C. § 1445, *New v. Sports & Recreation*, 114 F.3d 1092, 1095-1097 (11th Cir.1997) (no appellate jurisdiction to review remands based on section 1445(c)); *In re CSAX Transp*, 151 F3d 164, 167 (4th Cir. 1998) (agreeing that section 1445(a) remands can ordinarily not be reviewed on appeal, but allowing appeal because the remand was based on reasons about the application of the FELA that are seriously wrong), although the Fifth Circuit view is to the contrary. *In re Excel. Corp.*, 106 F.3d 1197, 1200 (5th Cir. 1997) (section 1445(c) remands may be reviewed under *Thermtron* which bars review only if based on section 1447(c)). These decisions support the contention that section 1447(d) is not limited to protecting against review of remands under only

one small subsection of the Congressional scheme governing removal and remand.

Moreover, the fact that some circuits have concluded that they need to decide whether the district court was really thinking about a post-removal event in deciding whether there is subject matter jurisdiction, and thus whether they have jurisdiction to review the remand decision, *see* pages 11-12, *supra*, discussing *Dillard's* and *Poore*, has added to the needless complications that have come to attend the determination of whether section 1447(d) bars appellate review. Yet if this Court were to rule that remands following the elimination of the claims over which there was subject matter jurisdiction at the time of removal are **also** authorized by statute, the animating concerns behind *Thermtron* would not require any exception to section 1447(d). For this reason alone, the Court should grant certiorari to decide whether remands pursuant to the statutory authorization provided by section 1367(c) are subject to appellate review or whether they stand on the same footing under section 1447(d) as remands pursuant to the statutory authorizations provided by section 1447(c) and other remand statutes.[5]

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[5]Even assuming that jurisdiction to review the remand order was appropriate under section 1367(c), because the remand was based on the purported relinquishment of the "reinstatement" claim, almost every circuit has held that because section 1367(c) states that a district court "may" remand for one of several reasons, such remand decisions are discretionary, and hence appellate review is only for abuse of discretion. *Hinson v. Norwest Financial South Carolina,* 239 F.3d 611, 617 (4th Cir. 2001); *Giles v NYLCare Health Plans,* 172 F.3d 332, 339 (5th Cir. 1999); *Executive Software v. United*

(continued...)

* * *

Since *Thermtron* and *Cohill* were decided, there has been a steady increase in the number of appeals from remands to state court, requiring the courts of appeals to decide whether section 1447(d) bars review in the circumstances of the particular case. A Westlaw search identified 250 cases in the past ten years in which courts of appeals had to construe and apply section 1447(d). Among the reported cases, the **majority** of cases allowed review; even counting the unreported cases, more than 40 percent of the appealed remands were found to be within the court's appellate jurisdiction.[6] Although it cannot yet be said that section 1447(d) states the exception rather than the rule, at the very least it is clear that instead of the express bar against remands that section 1447(d) would appear on its face to represent, the courts of appeals are burdened with an uncertain standard that must be applied to the facts of each case while the litigants wait to learn whether state law claims will be decided in a state or federal forum. The Court should grant

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[5](...continued)
States District Court, 24 F.3d 1545, 1556-1557 (9th Cir. 1994); *In re Prairie Island Dakota Sioux*, 21 F.3d 302, 304 (8th Cir. 1994). Without any attention to the standard of review, however, the court below plunged directly into a de novo review of the remand decision and the district court's analysis of the preemption issues that were presented by the remanded claims.

[6]Out of 148 reported decisions since 1995 addressing the propriety of hearing an appeal from a remand order (not involving removal under section 1443), review was found proper in 83 cases. Among the 102 unreported decisions, 19 cases were found to be within the court of appeals' jurisdiction.

review to decide whether this class of appeals should be eliminated altogether, because § 1447(d) bars review of statutory remands under § 1367(c), or at least to clarify the circumstances in which such remands can be reviewed, by insisting on an abuse of discretion standard and adopting the majority rule that when a district judge states a reason for remand that is facially authorized by section 1447(c), the courts of appeals should investigate no further to determine the "real" reason for the remand.

B. Review Should Be Granted to Decide Whether a Federal Statute Can "Completely Preempt" a State Claim, Thus Transforming It Into a Federal Claim That Can Be Removed From State Court, Where the Federal Statute Does Not Afford a Private Right of Action Within the District Court's Original Jurisdiction.

The decision below deepens the conflict among the lower courts about the kinds of federal laws that provide a basis for "complete preemption" of state law claims, and thus can make state claims removable to federal court.

The normal rule is that the existence of a federal-law defense to a state-law claim, including the defense of preemption, does not cause the state-law claim to arise under federal law, and hence is neither a basis for filing the claim in federal court under federal question jurisdiction nor for removing the claim to federal court. *Caterpillar v. Williams*, 482 U.S. 386, 393 (1987); *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983). The Court has, however, identified a handful of federal preemption defenses as being so powerful that they not only extinguish state law claims, but transform them into federal-law claims that can,

therefore, be removed to federal court. *Avco Corp. v. Machinists Lodge 735*, 390 U.S. 557 (1968). "Thus, a state claim may be removed to federal court in only two circumstances – when Congress expressly so provides, such as in the Price-Anderson Act, or when a federal statute wholly displaces the state-law cause of action through complete preemption." *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003). Complete preemption is a very narrow exception to the rule that preemption is only a defense that does not warrant removal, *id.* at 5; *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 67 (1987) (concurring opinion), and this Court has identified only three federal preemption defenses that rise to this level – preemption by section 301 of the Labor Management Relations Act ("LMRA"), *Avco, supra*, preemption by sections 85 and 86 of the National Bank Act, *Beneficial, supra*; and preemption by section 502 of the Employee Retirement Income Security Act (ERISA"). *Metropolitan Life, supra.*

In seeking to identify the essential characteristics that confine complete preemption claims to a narrow class of cases, several lower courts have held that a federal statute cannot be completely preemptive if Congress did not create a federal, private cause of action that it intended to substitute for a state cause of action. *E.g., Briarpatch Ltd. v. Phoenix Pictures*, 373 F.3d 296, 304-405 (2d Cir. 2004) (Copyright Act); *Hoskins v. Bekins Van Lines*, 343 F.3d 769, 775 (5th Cir. 2003) (Carmack Amendment); *Opera Plaza Residential Parcel Homeowners Ass'n v. Hoang*, 376 F.3d 831, 839 (9th Cir. 2004) (Telecommunications Act of 1996); *Wayne v. DHL Worldwide Express*, 294 F.3d 1179, 1184 (9th Cir. 2002) (Airline Deregulation Act); *Williams v. Midwest Express Airlines*, 315 F. Supp.2d 975, 979 (E.D. Wis. 2004) (same); *Burton v. Southwood Door Co.*, 305 F. Supp.2d 629, 637-638 (S.D. Miss. 2003) (Federal Omnibus Transportation Employee Testing

Act). Similarly, in the ERISA context, courts routinely held that, because "a vital feature for complete preemption is the existence of a federal cause of action that replaces the state cause of action," complete preemption extends only to claims for relief that could have been sought under ERISA section 502, *King v. Marriott Int'l*, 337 F.3d 421, 425 (4th Cir. 2003), and that the state plaintiff would have had standing to file under section 502. *Pascack Valley Hospital v. Local 464A UFCW Welfare Reimb. Plan*, 388 F.3d 393, 400 (3d Cir. 2004); *Felix v. Lucent Technologies*, 387 F.3d 1146, 1158 (10th Cir. 2004)

The fact that the federal statute may give regulatory authority to a federal agency, which in turn has the authority to institute an enforcement proceeding in district court, does not mean that the enforcement scheme completely preempts state claims, even if the regulatory scheme is established as the exclusive means of enforcement in the area. *Opera Plaza v. Hoang, supra*, 376 F.3d at 838-839; *Schmeling v. NORDAM*, 97 F.3d 1336, 1342-1344 (10th Cir. 1996). *See also Lontz v. Tharp*, —F.3d—, 2005 WL 1539282 (5th Cir., July 1, 2005), at *5-*6. Otherwise, every case of claimed "field preemption" could support removal of the allegedly preempted state claims to federal court. But complete preemption is not "a crude measure of the breadth of the preemption (in the ordinary sense) of a state law by a federal law, but rather . . . a description of the specific situation in which a federal law not only preempts a state law to some degree but also substitutes a federal cause of action for the state cause of action, thereby manifesting Congress's intent to permit removal." *Id.* at 1342, *quoted in Lucent Technologies, supra*, 387 F.3d at 1156-1157.

Such decisions comport with the theoretical basis for the doctrine of complete preemption – that Congress has created a cause of action that actually displaces the state cause of action and "converts it" into the federal cause of action that is within the district court's original jurisdiction. *Aetna Health v. Davila*,

542 U.S. 200, 124 S. Ct. 2488, 2496 (2004). Moreover, each of the federal statutes that this Court has found to completely preempt state claims does, in fact, create a cause of action litigable in federal court that the plaintiff could have had standing to bring.[7]

There are, however, several lower court decisions which, in accord with the Sixth Circuit's decision below (although in conflict with other federal courts), have found complete preemption by certain federal statutes that do not create such a cause of action over which district courts would have had original jurisdiction. For example, the Eighth Circuit has held that the Railway Labor Act ("RLA") preempts some state claims that are arguably based on an interpretation of a collective bargaining agreement ("CBA") in the railway or airline industries, even though the statute does not create a federal cause of action. *Deford v. Soo Line*, 867 F.2d 1080, 1086 (8th Cir. 1989). *See also, e.g., Anderson v. American Airlines*, 2 F.3d 590, 595 (8th Cir. 1993) (RLA can completely preempt, but removal reversed because particular state claims at issue did not require interpretation of CBA). Many other circuits, however, hold that the RLA does not completely preempt state law claims, reasoning that, unlike the LMRA, the RLA does not create a federal cause of action to enforce

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[7]In very special circumstances not applicable here, a federal court may have federal question jurisdiction over a state law claim that depends on the construction of a federal statute that does not itself create a cause of action, where the federal interest in providing jurisdiction is strong enough to warrant such jurisdiction. *Grable & Sons Metal Prods. v. Darue Engineering & Mfg.*, 125 S. Ct. 2363 (2005). However, in a *Grable*-type case, the federal interest does not displace the state claim and warrant a finding of complete preemption.

contracts. *E.g., Geddes v. American Airlines*, 321 F.3d 1349, 1354-1355 (11th Cir. 2003); *Railway Labor Execs Ass'n v. Pittburgh & Lake Erie RR Co.*, 858 F.2d 936, 942 (3d Cir. 1988); *Price v. PSA*, 829 F.2d 871, 876 (9th Cir. 1987).

Similarly, the Seventh Circuit has held that even for claims on which the Federal Communication Act ("FCA") does not create a federal cause of action, the FCA provision that "no State or local government shall have any authority to regulate," 47 U.S.C. § 332(c)(3), is sufficient to show Congressional intention to authorize complete preemption, *Bastien v. AT & T Wireless Services*, Inc., 205 F.3d 983, 986-987 (7th Cir.2000), and some district courts have agreed. *E.g., Philips v AT&T Wireless*, 2004 WL 1737385 (S.D. Iowa, July 29, 2004); *Vermont v. Oncor Communications,* 166 F.R.D. 313, 318-319 (D. Vt. 1996). Most lower courts, however, hold that the FCA's restrictions on state regulation of rates and services of telephone companies do not completely preempt all state suits about such matters. *E.g., Marcus v. AT&T Corp.*, 138 F.3d 46, 54 (2d Cir.1998); *In re Wireless Telephone Federal Cost Recovery Fees Litigation*, 343 F. Supp.2d 838, 845 (W.D. Mo. 2004); *Bryceland v. AT & T Corp.*, 122 F. Supp.2d 703, 707-709 (N.D. Tex. 2000); *Bauchelle v. ATT Corp.*, 989 F. Supp. 636, 644-646 (D.N.J. 1997).

Similarly in this case, the Sixth Circuit upheld removal based on preemption by a federal statute that does not provide any cause of action for individual union members that might displace a state claim and convert it into a federal claim within the district court's original jurisdiction. At most, an individual member can file an administrative complaint with the Secretary of Labor, and the Secretary will take enforcement action if she finds a violation of Title IV. Far from finding that Title IV of the LMRDA supplants Davis' state claims with federal claims of which the district court had subject matter jurisdiction, the court below directed that the district court dismiss those claims

for **lack** of subject matter jurisdiction. Pet. App. 10a. Thus, the decision below deepens the conflict among the lower courts about whether a federal statute can completely preempt state claims without providing a cause of action that the plaintiff could have brought in federal court in the first instance.

Even in terms of ordinary conflict preemption (as opposed to complete preemption), the Sixth Circuit's preemption holdings are dubious, because this Court has held that Title IV does not preclude the enforcement of other statutes that could make the rules governing elections illegal. *Steelworkers v. Sadlowski*, 457 U.S. 102, 117 n.10 (1982). Moreover, Davis' claims are not directed at overturning the votes that were held to determine which candidates would fill the positions that were created after his position was abolished – he objects to the decision to redistrict his position out of existence, which he claims was done for a discriminatory purpose, and to defamatory comments about him that were made to encourage delegates to vote to abolish that position. Although preemption principles no doubt require that *New York Times* standards be applied to his defamation claims, *Linn v. Plant Guards Local 114*, 383 US 53, 64-65 (1966), this Court has refused to hold that the mere fact that statements were made in the course of a labor controversy bars any and all enforcement of state libel laws, regardless of the presence of actual malice and actual damage. *Id.* Nor has any other lower court so held. And the limited nature of Davis' administrative remedy bars the application of collateral estoppel to prevent Davis from bringing state law claims that might call into question the findings about respondents' statements that supported the Secretary's decision not to find any violation of Title IV. Indeed, in union elections as in other labor disputes, claimed false or even malicious campaign statements about the contending parties are not a basis for overturning the election. They may, however, form the basis for a libel suit.

In any event, neither the Secretary's exclusive power under 29 U.S.C. § 483 to set aside a union election that has already been conducted, nor the Secretary's finding that Title IV was violated, provides a basis for **complete** preemption of Davis' state law age discrimination and defamation claims. The Court should grant review to decide whether a statute such as Title IV of the LMRDA, which does not provide any federal, private right of action for litigants like Davis, can completely preempt state claims and hence afford a basis for removal of those claims from state court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Paul Alan Levy
Counsel of Record
Public Citizen Litigation Group
1600 - 20th Street, NW
Washington, DC. 20009
(202) 483-9578

David G. Oakley
Kramer and Associates, L.P.A.
3214 Prospect Avenue East
Cleveland, Ohio 44115-2600
(216) 431-5300

Counsel for Petitioner

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APPENDIX