NO. 05-85

IN THE

Supreme Court of the United States

POWEREX CORP.,
Petitioner,

v.

RELIANT ENERGY SERVICES, INC., *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF LAW PROFESSORS ARTHUR R. MILLER, ERWIN CHEMERINSKY, MICHAEL E. SOLIMINE, ADAM N. STEINMAN, E. FARISH PERCY, AND RHONDA WASSERMAN AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTERESTS OF AMICI CURIAE[1]

Professor Arthur R. Miller is the Bruce Bromley Professor of Law at Harvard Law School. He has devoted his teaching and writing career to an understanding of federal courts, civil procedure, and federal practice. Among his numerous publications are the leading treatise in federal practice and the leading casebook in civil procedure. Charles Alan Wright & Arthur R. Miller, *et al.*, *Federal Practice and Procedure* (West 2006); Jack H. Friedenthal, Arthur R. Miller, John E. Sexton & Helen Hershkoff, *Civil Procedure: Cases and Materials* (West 9th ed. 2005). In addition, he has written numerous articles and consulted on numerous cases raising novel issues of federal practice and procedure.

Professor Erwin Chemerinsky is the Alston & Bird Professor of Law and Political Science at Duke University. He is the author of *Federal Jurisdiction* (Aspen Law & Business 4th ed. 2003), a one-volume treatise on the jurisdiction of the federal courts, as well as three books on constitutional law. He is the author of numerous law review articles on constitutional law and federal procedure, and frequently argues appellate cases in the United States Supreme Court and the United States Courts of Appeals.

Professor Michael E. Solimine is the Donald P. Klekamp Professor of Law at the University of Cincinnati College of Law, where he has been a member of the faculty

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[1] Letters of consent to the filing of this brief are being filed in conjunction with this brief. Pursuant to this Court's Rule 37.6, counsel states that this brief was not authored in whole or in part by counsel for a party and that no one other than amici and their counsel made a monetary contribution to the preparation or submission of this brief.

since 1987. He teaches and has written numerous articles on civil procedure and federal courts. He also has written extensively on federal appellate practice, and is the co-author of the new edition of a leading appellate practice casebook. Robert J. Martineau, Kent Sinclair, Michael E. Solimine & Randy J. Holland, *Appellate Practice and Procedure: Cases and Materials* (West 2d ed. 2005).

Professor Adam N. Steinman is an Assistant Professor of Law at the University of Cincinnati College of Law. His areas of expertise include civil procedure, federal practice and procedure, and appellate practice and procedure. Professor Steinman has published numerous articles in the areas of civil procedure, federal jurisdiction, removal, appellate procedure, and statutory interpretation. He has also briefed and argued numerous cases in the United States Courts of Appeals.

Professor E. Farish Percy is an Assistant Professor of Law at the University of Mississippi School of Law and teaches Civil Procedure. Her recent research and publications have focused on civil procedure and federal court jurisdiction. She has repeatedly argued that federal courts should not exceed their limited statutory jurisdiction.

Professor Rhonda Wasserman is a Professor of Law at the University of Pittsburgh School of Law, where she has been a member of the faculty since 1986. She teaches and has written numerous articles on civil procedure and federal practice. She serves as the Reporter to the Local Rules Committee of the United States District Court for the Western District of Pennsylvania. Professor Wasserman is the author of *Procedural Due Process* (Praeger 2004), a one-volume treatise on due process.

Having devoted their careers to teaching and writing about the federal courts and working for their improved

administration, amici have a keen interest in seeing that those courts function efficiently. It is equally important that the lower federal courts function only as Congress has authorized. Unless the court below is reversed, appellate panels will continue to entertain appeals that Congress has specifically prohibited.

SUMMARY OF THE ARGUMENT

Prior to *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), this Court had consistently held that 28 U.S.C. § 1447(d) and its predecessor statutes forbade appeal of a district court's remand order under *any* circumstances. *See United States v. Rice*, 327 U.S. 742, 749 (1946). This time-honored bar to appellate review of remand orders rested on Congress's legislative "policy of not permitting interrupt[ion] of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed." *Id.* at 751. In an apparent effort to address an injustice in a particular case, *Thermtron* for the first time created an exception to § 1447(d)'s categorical rule, holding despite the statute's plain language that when a district court's decision to remand is based on "grounds not provided by [] statute," the court's order is subject to appellate review. *Thermtron*, 423 U.S. at 350.

Thermtron's exception to § 1447(d)'s explicit bar to appeals was without support in the language of the statute as it then existed. Moreover, since *Thermtron* was decided, Congress has amended the removal statute in a way that eliminated the textual basis on which the *Thermtron* exception is based. Therefore, even if the removal statute as it stood in 1976 supported appeals of a limited class of remand orders, it no longer does so. In those cases where Congress has sought to create appellate jurisdiction over remand orders in spite of § 1447(d), it specifically provided for such review. Federal courts should not supplement these express statutory exceptions

with additional, judicially created exceptions to Congress's no-appeal rule.

Chief Justice Rehnquist, then Associate Justice, in his dissent in *Thermtron* called the Court's new exception "both unworkable and portentous of the significant impairment of Congress' carefully worked out scheme." *Id.* at 357 (Rehnquist, J., dissenting). Chief Justice Rehnquist's words have proved prophetic. In the years since *Thermtron*, the lower courts have struggled with the limits of the exception, creating several circuit splits and eviscerating Congress's clear statutory rule. *See* 14C Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3740 (3d ed. 2006). In practice, *Thermtron* has allowed defendants to undermine the purpose of § 1447(d) by subjecting plaintiffs in state court actions to unjustified delays during the appeal of a district court's remand order.

Because it is difficult or impossible to distinguish a remand order that is not authorized by statute and is thus subject to appeal under *Thermtron* from a remand order that is merely erroneous and thus unappealable under § 1447(d), the Court should take this opportunity to end the confusion in the lower courts by overruling *Thermtron* or limiting it to its particular facts. In any case, the district court's decision below purported to be based on a lack of subject matter jurisdiction and therefore is barred from appellate review by § 1447(d).

ARGUMENT

I. The Plain Language of § 1447 Does Not Support the *Thermtron* Exception.

A. *Thermtron* Incorrectly Interpreted the Statutory Language as It Then Existed.

It is difficult to imagine how Congress could more clearly have expressed an intent to bar all appellate review of remand orders than it did in 28 U.S.C. § 1447(d): "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . ." Prior to *Thermtron*, the Court faithfully enforced Congress's explicit statutory bar regardless of the reasons underlying the district court's decision to remand. *See Rice*, 327 U.S. at 748-50. Indeed, since the first predecessor to § 1447(d) was enacted in 1887, the Court had consistently held that *no* appeal of remand orders was permissible under the statute. *Id.* at 749.

Thermtron for the first time created an exception to this categorical rule, holding that the basis of the district court's decision to remand in that case—its crowded dockets—was one that the court "had no authority to consider." *Thermtron*, 423 U.S. at 351. The Court held that § 1447(d) "must be read *in pari materia* with § 1447(c), so that only remands based on grounds specified in § 1447(c) are immune from review under § 1447(d)." *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1995). Thus, courts of appeals had jurisdiction over a remand order as long as the remand was not based on either a defect in removal procedure or a lack of subject matter jurisdiction—the two grounds for remand recognized by § 1447(c). *Id.* at 127-28.

Given the unambiguous statutory language of § 1447(d), however, the Court's resort in *Thermtron* to a canon of statutory construction for its interpretation of the statute was, with all

respect, unconvincing. Section 1447(d) states simply and plainly that *any* order remanding a case is unreviewable. As the Court noted in *Rice* when construing § 1447(d)'s predecessor, "[s]tatutory language and objective, thus appearing with reasonable clarity, are not to be overcome by resort to a mechanical rule of construction, whose function is not to create doubts, but to resolve them when the real issue or statutory purpose is otherwise obscure." *Rice*, 327 U.S. at 752-53. The plain meaning of § 1447(d) does not lead to results that are "absurd or glaringly unjust," *United States v. Rodgers*, 466 U.S. 475, 484 (1984) (quotation omitted), and is therefore controlling. Yet, the Court's decision in *Thermtron* discounted the clear statutory language, holding in effect "that § 1447(d) does not mean what it says." *In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 708 (7th Cir. 1992).

Since *Thermtron* was decided, it has faced substantial academic criticism on the ground that it ignored Congress's expressed intent to bar appellate review of remand orders.[2] The Court should take this opportunity to recognize that *Thermtron* was wrongly decided and that its implicit exception to the appellate bar contravenes the statute's plain language.

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[2] *See, e.g.*, 14C Wright, Miller & Cooper, *supra*, § 3740, at 525-27; Thomas F. Lamprecht, Note, *How Can It Be Wrong When It Feels So Right? Appellate Review of Remand Orders Under the Securities Litigation Uniform Standards Act*, 50 Vill. L. Rev. 305, 313-15 (2005); Thomas R. Hrdlick, *Appellate Review of Remand Orders in Removed Cases: Are They Losing a Certain Appeal?*, 82 Marq. L. Rev. 535, 548-55 (1999); Rhonda Wasserman, *Rethinking Review of Remands: Proposed Amendments to the Federal Removal Statute*, 43 Emory L.J. 83, 115-19 (1994); Michael E. Solimine, *Removal, Remands, and Reforming Federal Appellate Review*, 58 Mo. L. Rev. 287, 297-306 (1993).

B. Congress's Subsequent Amendment of § 1447 Has Eliminated Any Textual Basis for the *Thermtron* Exception.

Regardless of the correctness of *Thermtron*'s interpretation of § 1447 as it stood in 1976, that interpretation is no longer tenable in light of Congress's subsequent amendment to the statute. In 1996, Congress amended § 1447(c) to read:

> A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

28 U.S.C. § 1447(c). The amended statutory language undermines *Thermtron*'s interpretation of the statute in two distinct but interrelated ways.

First, *Thermtron* predicated its holding that some remand orders are appealable on the majority's conclusion that Congress did not intend to permit remands unauthorized by § 1447(c), which prior to the 1996 amendment provided for remands only for lack of subject matter jurisdiction or for defects in removal procedure. *Things Remembered,* 516 U.S. at 127.[3] Because § 1447(c) covered only these two grounds for

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[3] At the time *Thermtron* was decided, § 1447(c) covered cases that were "removed improvidently" or "without jurisdiction." *See Thermtron*, 423 U.S. at 432. The Court interpreted "removed improvidently" to mean cases that were removed "improperly," in that there was some defect in removal procedure. *Id.* at 350 n.15; *see*

(continued...)

remands, the Court held remands for any other ground to be without legal basis and therefore outside § 1447(d)'s appellate bar. *Thermtron*, 423 U.S. at 351. The new version of § 1447(c), however, provides for remands based both on defects of subject matter jurisdiction and defects "*other than* lack of subject matter jurisdiction." 28 U.S.C. § 1447(c) (emphasis added). Because a remand is necessarily based either on lack of subject matter jurisdiction or on some other ground, the plain language of § 1447(c) now covers *all* remands, and *Thermtron*'s distinction between those remands that are "issued under § 1447(c)" and those that are not no longer finds any support in the statutory language. On the contrary, to read § 1447(d) "in pari materia" with § 1447(c), as *Thermtron* commands, 423 U.S. at 345-46, now compels the opposite conclusion as the one reached by the Court in *Thermtron*.

Second, the language of § 1447(c) can no longer be read, as the Court read it in *Thermtron*, as an enabling statute granting district courts the authority to remand. The statute's plain language does not purport to either grant or limit a district court's remand authority, but only to provide a thirty-day time limit for certain remand motions to be made. Thus, a key premise of *Thermtron*—that § 1447(c) set forth the sole basis for a district court's authority to remand—no longer has any basis in the statute. Indeed, this Court has recognized that *Thermtron*'s reading of § 1447(c) was incorrect, noting that, despite *Thermtron*'s "admittedly far-reaching" language, district courts have the power to remand cases in circumstances not

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[3](...continued)
Hrdlick, *supra* note 2, at 549 & n.67. Congress later replaced the "removed improvidently" language with "defects in removal procedure," which is how the statute stood when *Things Remembered* was decided. 516 U.S. at 127-28.

included in the statute. *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 355-56 (1988) (recognizing that a district court's discretionary remand of pendent state-law claims does not fall within § 1447(c)'s language); *see also Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711-12 (1996) (recognizing that a district court remand for reasons of abstention is outside § 1447(c)'s authority); *Things Remembered*, 516 U.S. at 128-29 (applying the § 1447(d) appellate bar to a remand of a bankruptcy case under § 1452(b)).

To be sure, the legislative history of this amendment to § 1447(c) does not indicate that Congress intended to modify the scope of § 1447(d)'s appellate bar. *See* Hrdlick, *supra* note 2, at 561-69 (examining the legislative history).[4] Resort to legislative history, however, is unnecessary given that the plain language of the statute no longer supports the implicit exception to § 1447(d) that *Thermtron* read into the statute. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (holding that legislative history may be consulted only when the statute is ambiguous). Congress's removal of the statutory basis for the *Thermtron* exception is particularly telling given the lack of evidence in the text or legislative history demonstrating Congress's intent to create such an exception in the first place.

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[4] Courts of appeals examining the question have relied on this legislative history to hold that the 1996 amendment did not alter the scope of the *Thermtron* exception. *Autoridad de Energia Electrica de Puerto Rico v. Ericsson Inc.*, 201 F.3d 15, 17 (1st Cir. 2000); *Snapper, Inc. v. Redan*, 171 F.3d 1249, 1258-59 (11th Cir. 1999); *Hudson United Bank v. LiTenda Mortgage Corp.*, 142 F.3d 151, 156 n.8 (3d Cir. 1998).

C. Congress Has Created Specific Exceptions to § 1447(d)'s Bar on Appeals When It Has Deemed Them Necessary.

Absent a "clear statutory command to the contrary," Congress is presumed to have intended § 1447(d)'s bar to apply to a district court's remand order, "regardless of whether removal was effected pursuant to § 1441(a)" (which is the general removal statute) or "under *any other statutes,* as well." *Things Remembered*, 516 U.S. at 128 (quotation omitted). When Congress has intended to create an exception to the general rule of non-appealability, it has not hesitated to provide the necessary statutory language. For example, § 1447(d) itself provides that civil rights cases "removed pursuant to section 1443 of this title *shall be reviewable* by appeal or otherwise." 28 U.S.C. § 1447(d) (emphasis added). Similarly, Congress in the Class Action Fairness Act of 2005 specifically provided for *permissive* appellate review "*notwithstanding section 1447(d)*." *Id.* § 1453(c)(1) (emphasis added).[5]

In *Osborn v. Haley*, 127 S. Ct. 881 (2007), this Court examined a provision of the Westfall Act mandating that the Attorney General's certification that a federal employee defendant was acting within the scope of his employment be considered "conclusiv[e] . . . for purposes of removal." 28

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[5] Other exceptions permit the United States to appeal remands in cases involving Native American tribes, and the Federal Deposit Insurance Corporation or Resolution Trust Corporation to appeal remands in cases where they are parties. Wasserman, *supra* note 2, at 104-08. Congress has also expressly allowed limited appeals in cases covered by the Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act. 28 U.S.C. § 1441(e)(3). In those cases, Congress provided that "the remand shall not be effective until the appeal has been finally disposed of." *Id.*

U.S.C. § 2679(d)(2). The Court held that the certification rule acts as an "antishuttling provision" that prohibits a district court from remanding a case to state court after the case has been removed pursuant to the Attorney General's certification. *Osborn*, 127 S. Ct. at 886. Prohibiting appellate review of remand orders despite the Attorney General's certification, the Court held, would render the certification provision "weightless." *Id.* at 895. Thus, the Court concluded that the Westfall Act's antishuttling provision directly conflicts with § 1447(d)'s own antishuttling provision, and that, "of the two antishuttling commands, . . . only one can prevail." *Id.* at 896. The Court emphasized, however, that "only in the extraordinary case in which Congress has ordered the intercourt shuttle to travel just one way—from state to federal court—does [the] decision hold sway." *Id.* It also stressed that its decision "scarcely means that whenever the district court misconstrues a jurisdictional statute, appellate review of the remand is in order," noting that such an exception would "collide head on with § 1447(d), and with our precedent." *Id.* at 895-96.

Congress has thus demonstrated its ability to create exceptions to its categorical rule against appeals of remand orders when it feels such an exception is necessary, either in the form of an explicit authorization of appeals or of an express antishuttling provision of the kind at issue in *Osborn* that is directly inconsistent with § 1447(d)'s categorical rule. The *Thermtron* exception, however, is not supported by a similar "clear statutory command." *Things Remembered*, 516 U.S. at 128. Nor does the Foreign Sovereign Immunities Act (FSIA)—the statute at issue in this case—contain such an exception. *See Linton v. Airbus Industrie*, 30 F.3d 592, 595-96 (5th Cir. 1994); *Mobil Corp. v. Abeille Gen. Ins. Co.*, 984 F.2d 664, 666 (5th Cir. 1993). This Court should use this case to make clear that, in the absence of express legislative authority, the federal courts may not entertain appeals of remand orders or

create new exceptions to Congress's clearly expressed policy.

II. *Thermtron*'s Holding Undermines the Purpose of § 1447(d) by Encouraging Appeal as a Delaying Tactic.

The bar to appellate review of remand orders arises from Congress's "policy of not permitting interrupt[ion] of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed." *Rice*, 327 U.S. at 751. Congress understood that district courts are not infallible and that some remand orders—presumably a small minority—would be erroneously granted. *Adkins v. Ill. Cent. R.R. Co.*, 326 F.3d 828, 834 (7th Cir. 2003). Nevertheless, a defendant whose case is mistakenly remanded to state court can still obtain a fair trial in that forum, and, in Congress's judgment, any degree of prejudice resulting from denying defendants their forum of choice is outweighed by the importance of avoiding delays caused by prolonged federal court proceedings. *See Thermtron*, 423 U.S. at 355 (Rehnquist, J., dissenting); *see also Kircher v. Putnam Funds Trust*, 126 S. Ct. 2145, 2156 (2006) (recognizing that a state court is "an equally competent body" to decide a case). By providing for removal to the district court but disallowing appeals, Congress struck a balance between the desirability of allowing access to a federal forum and the significant costs of delay on appeal. *Thermtron*, 423 U.S. at 354-55 (Rehnquist, J., dissenting).

The Court in *Thermtron* apparently expected the exception it created to § 1447(d)'s previously firm rule to be a narrow one. After *Thermtron*, the particular basis for the district court's remand in that case—its clogged dockets—cannot be expected to be invoked explicitly as a ground for remand by district courts. *Thermtron*, however, has not been limited to that ground. Courts of appeals have often

been reluctant to let pass a district court's perceived mistakes and, as in this case, have stretched to find the authority to correct them. Indeed, commentators have noted that "[a]t virtually every opportunity, many of the lower courts chose to expand *Thermtron* and create additional exceptions to Section 1447(d)." Solimine, *supra* note 2, at 332; *see also* 14C Wright, Miller & Cooper, *supra*, § 3740 (documenting the long line of lower court cases struggling with the application of *Thermtron* and expanding its scope); Lamprecht, *supra* note 2, at 312 (noting that courts have "whittled away at [§ 1447(d)'s] seemingly decisive language"); Wasserman, *supra* note 2, at 119. The result has been a "gradual evisceration" of the § 1447(d) bar. Lamprecht, *supra* note 2, at 311; *see also* Solimine, *supra* note 2, at 288 (noting that post-*Thermtron* cases in the lower courts "permit federal appellate review of district court remand orders in a wide variety of circumstances").[6]

The Ninth Circuit decision below represents just one way in which the courts of appeals have adopted rules to avoid the appellate bar. Relying on a line of cases originating with its decision in *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273 (9th Cir. 1984), the court held that it had the authority to review "substantive" decisions that "preceded the remand order." Pet. App. 10a. Other circuits have relied on

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[6]A 2005 Westlaw search identified 250 cases in the previous ten years in which courts of appeals had to construe and apply § 1447(d). Out of 148 reported decisions addressing the propriety of hearing an appeal from a remand order (not including cases removed under § 1443), the majority of cases (83) allowed review. Of the 102 unreported decisions, 19 cases were found to be within the court of appeals' jurisdiction. Thus, even counting the unreported cases, more than 40 percent of the appealed remands were found to be within the court's appellate jurisdiction.

Pelleport for authority to review substantive decisions of district courts.[7] Courts of appeals have also adopted various other judicially created exceptions to the statutory no-appeal rule, holding, for example, that the appellate bar excludes jurisdictional issues that arise after the time of removal,[8] appeals of constitutional issues,[9] and a variety of other categories of cases.[10]

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[7] *See, e.g.*, *Milk 'N' More, Inc. v. Beavert*, 963 F.2d 1342, 1344-45 (10th Cir. 1992); *McDermott Int'l, Inc. v. Lloyds Underwriters of London*, 944 F.2d 1199, 1204 (5th Cir. 1991); *Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207, 1211 (3d Cir. 1991); *Regis Assocs. v. Rank Hotels Mgt. Ltd.*, 894 F.2d 193, 194-95 (6th Cir. 1990); *Karl Koch Erecting Co. v. N.Y. Convention Ctr. Dev. Corp.*, 838 F.2d 656, 658-59 (2d Cir. 1988). The Ninth Circuit's decision in *Pelleport* was based on this Court's decision in *Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140, 143 (1934), which allowed appeal of a district court decision that "in logic and in fact" preceded a remand order. *Waco*, however, was decided before Congress adopted § 1447(d)'s appellate bar. *See Osborn*, 127 S. Ct. at 909 (Scalia, J., dissenting) (noting that "the continued vitality of *Waco* is dubious in light of more recent precedents").

[8] *See, e.g.*, *Reddam v. KPMG LLP*, 457 F.3d 1054, 1058-59 (9th Cir. 2006). *But see Linton*, 30 F.3d at 599-600.

[9] *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 843 (3d Cir. 1991).

[10] *See, e.g., Carr v. Am. Red Cross*, 17 F.3d 671, 680 (3d Cir. 1994) (allowing appellate review of dispositive district court orders that are separable from the merits, even if the order is jurisdictional in nature and triggers an order of remand); *Air-Shields, Inc. v. Fullam*, 891 F.2d 63, 66 (3d Cir. 1989) (allowing review where the district court remanded a case for procedural defects after expiration of the thirty-day time limit in § 1447(c)); *Rothner v. City of Chicago*, 879 F.2d 1402, 1408 (7th Cir. 1989) (allowing appellate review of a remand based on waiver of the right to remove); *see also* 14C

(continued...)

Moreover, lower courts have generally held that a district court's remand order based on its discretionary power to remand supplemental state law claims pursuant to 28 U.S.C. § 1367 are appealable because they do not fall within the bounds of § 1447(c).[11] As previously mentioned, however, *Thermtron*'s holding of reviewability was predicated on the majority's conclusion that Congress did not intend to permit remands unauthorized by statute. *Thermtron*, 423 U.S. at 350. Now that this Court has recognized the district courts' authority to remand supplemental claims, *see Carnegie-Mellon Univ.*, 484 U.S. at 355-56, these remands should not be appealable even under the logic of *Thermtron*. *See* Solimine, *supra* note 2, at 307-08; *see also Things Remembered*, 516 U.S. 124, 129-30 (1995) (Kennedy, J., concurring) (noting that the Court has not decided whether remands pursuant to a district court's supplemental jurisdiction are appealable).

Unfortunately, the courts of appeals' allowance of appellate review in *some* remand cases effectively allows appellate review in *all* remand cases. Defendants in state court actions can always argue that appellate review of the district court's remand decision should be available under an exception to § 1447(d). These appeals do not need to be meritorious to achieve the purpose of delay; it was, after all, primarily a concern with the possibility of the delay resulting from *unmeritorious* removals that caused Congress to enact the appeals bar in the first place, and there is no reason to think that

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[10](...continued)
Wright, Miller & Cooper, supra, § 3740, at n.30 (listing cases); Wasserman, *supra* note 2, at 126-27 (listing a variety of other exceptions).

[11] *See, e.g.*, *Thomas v. LTV Corp.*, 39 F.3d 611, 616 (5th Cir. 1994).

litigants who engage in such removals will not press their positions on appeal. The median length of an appeal in the federal courts of appeals is 12.2 months, which includes many appeals that are dismissed promptly because of procedural flaws or failure to meet deadlines.[12] By appealing a district court's remand order and arguing that an exception to the no-appeal rule applies, state court defendants compound the initial delay caused by removal by achieving an additional delay on appeal. *Amoco*, 964 F.2d at 708 ("Complex proceedings just to determine whether a remand is reviewable by the court of appeals defeat the speed and simplicity that one would have thought to be the principal justification for § 1447(d)."); *see* Solimine, *supra* note 2, at 304-05 ("The bar to review does little good if the putative reviewing authority is forced to ask in every case if the remand order is without the bounds of 'correctness.'").

In this case, Petitioner argues for yet another implicit exception to § 1447(d)'s appellate bar for cases remanded pursuant to the FSIA, an exception that has never been adopted by any lower court. *See Linton*, 30 F.3d at 595-96; *Mobil Corp.*, 984 F.2d at 666. In support of this proposed exception, Petitioner stresses the potential for an erroneous decision by the district court and asserts that "Congress could not have intended § 1447(d) to confer on a single federal district judge unreviewable authority to deny a foreign sovereign its right

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[12] Administrative Office of the United States Courts, 2006 Annual Report of the Director, Table B-4, *available at* http://www.uscourts.gov/judbus2006/appendices/b4.pdf. In the Ninth Circuit, the median length of an appeal is even longer—15.9 months. *Id.* Of course, if the defendant petitions for a writ of certiorari, the delay is further increased. The Ninth Circuit decided this case, for example, in December 2004.

under the FSIA to a bench trial in federal court." Pet. Br. 48. But the potential that a district court will make an erroneous determination is *always* a cost of denying appellate review in removal cases. Moreover, Petitioner's view of what Congress must have intended runs headlong into Congress's contrary and clearly expressed policy against "interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction." *Kircher*, 126 S. Ct. at 2152 (quotation omitted).

There is no reason to believe that Congress viewed appeals of remands under the FSIA as any more important than appeals in the variety of other contexts in which defendants are entitled to a federal forum. This Court rejected a similar argument—that Congress must have intended for appellate review of remand orders in cases removed pursuant to the Securities Litigation Uniform Standards Act—last term in *Kircher*, noting that Congress had not specifically provided for such appeals. *Id*. at 2154 n.8. When Congress believes that policy interests make appellate review necessary, it has created specific statutory exceptions. *See* Wasserman, *supra* note 2, at 105-07. Section 1447(d)'s exception for appeals of remand orders in civil rights cases, for example, was based on Congress's "perception that remands of civil rights cases were particularly injurious to defendants in those cases, and that appellate exposition of Section 1443 was necessary." Solimine, *supra* note 2, at 293. In other circumstances, however, courts must respect Congress's judgment that the desirability of granting access to a federal court of appeals does not justify the resulting cost of delay. *See Kircher*, 126 S. Ct. at 2154 n.8 (holding that, in the absence of a "clear statutory command," Congress's "silence tells us we must look to 28 U.S.C. § 1447(d) to determine the reviewability of remand orders").

III. Appellate Review of the District Court's Remand Order in This Case Should Be Prohibited.

A. This Court Should Overrule *Thermtron* Or Limit It to Its Specific Facts.

Because *Thermtron* has led to widespread uncertainty and disregard of the statute's plain meaning in the lower courts, amici urge the Court to take this opportunity to overrule *Thermtron* and eliminate the judicially created exception to Congress's express policy against appeals of remand orders. Alternatively, this Court should prevent any additional erosion of § 1447(d)'s rule by limiting *Thermtron* to the particular facts of that case, leaving any further modifications of § 1447(d) to Congress. *See Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 332 F.3d 116, 127 (2d Cir. 2003) ("It is not our place as jurists to supply that which is omitted by the legislature.").

Developments before this Court in another area of appellate jurisdiction parallel the approach that amici suggest here with respect to *Thermtron*. The principal basis for federal appellate jurisdiction is 28 U.S.C. § 1291, under which litigants may appeal only from "final decisions" of the district courts. In general, § 1291 means what it says: A final decision is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Van Cauwenberghe v. Biard*, 486 U.S. 517, 521-22 (1988) (quotation omitted). Under *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949), § 1291 also includes a narrow category of orders that do not end the entire litigation, but finally decide an important issue that is wholly collateral to the merits of the litigation, review of which is necessary to prevent irreparable harm. Some fifteen years after *Cohen*, however, in *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964), the Court took *Cohen* well beyond its original narrow purpose and allowed an interlocutory

appeal simply where the district court had dismissed one set of claims on their merits but not another. The Court acknowledged that appellate review in that case "could be called 'piecemeal,'" but justified erosion of the "final decision" rule based on the Court's own view of "the inconvenience and cost" of trying the case prior to appeal, and its concern that delay in resolving the claims could work "a great injustice" to the plaintiffs. *Id.* at 153. In dissent, Justice Harlan noted that these reasons "furnishe[d] no excuse for avoidance of the finality rule," and sounded an alarm, not unlike the alarm sounded by Chief Justice Rehnquist in *Thermtron*, that such arguments could support review in many interlocutory appeals. *Id.* at 167-70 (Harlan, J., dissenting).

In *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), the Court put on the brakes. After holding that a district court order denying class certification is not an appealable collateral order under *Cohen*, as properly and narrowly construed, the Court rejected the plaintiffs' reliance on *Gillespie*, effectively ending its relevance as a § 1291 precedent. "If *Gillespie* were extended beyond the unique facts of that case," Justice Stevens explained, "§ 1291 would be stripped of all significance." *Id.* at 477 n.30. So, too, here, if *Thermtron* were allowed to expand beyond its highly unusual circumstances, the strict no-appeal policy expressed by Congress in § 1447(d) would be seriously eroded, if not destroyed entirely.

B. At a Minimum, this Court Should Prohibit Second-Guessing of a District Court's Basis for Remand.

As Chief Justice Rehnquist pointed out in his *Thermtron* dissent, a district court can be said to be acting outside its statutory authority, and therefore outside of § 1447(d)'s appellate bar, *any* time its grant of remand is erroneous. *See Thermtron*, 423 U.S. at 356 (Rehnquist, J.,

dissenting). Moreover, district courts sometimes remand on purportedly jurisdictional grounds, but either do not explain the basis for their lack of jurisdiction or provide an explanation that is not jurisdictional in nature. *See id.* at 357. These problems have led to a circuit split on the question whether the district court's mere use of the word "jurisdiction" is sufficient to deny appellate review, even when it is apparent that the court's ruling was erroneous or was based on a non-jurisdictional and impermissible ground.[13]

The district court's remand order in *Thermtron* was granted solely on the ground that the court's docket was too crowded to permit a speedy resolution of the case, a justification that was without legal basis and "plainly irrelevant to whether the District Court would have had jurisdiction of the case had it been filed initially in that court, to the removability of a case from the state court under § 1441, and hence to the question whether [the] cause was removed improvidently and without jurisdiction within the meaning of the statute." *Id.* Because the district court in *Thermtron* did

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[13] *Compare Heaton v. Monogram Credit Card Bank*, 231 F.3d 994, 997 (5th Cir. 2000) (holding that a court of appeals may review a remand order "only if the district court clearly and affirmatively relies on a non-section 1447(c) basis") (quotation omitted) and *Adkins*, 326 F.3d 828, *with Mangold v. Analytic Servs., Inc.*, 77 F.3d 1442, 1450 (4th Cir. 1996) (holding that 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). The former approach has also been adopted in slightly modified form by the Third and Tenth Circuits. *See Balazik v. County of Dauphin*, 44 F.3d 209, 213 (3d Cir. 1995); *Archuleta v. Lacuesta*, 131 F.3d 1359, 1362 (10th Cir. 1997) (barring review as long as the district court's finding of no subject matter jurisdiction was made in good faith).

not even purport to dismiss the case based on subject matter jurisdiction or a defect in removal procedure, this Court had no need to second-guess the claimed basis of the district court's decision. On the contrary, the Court stressed that a district court's decision to remand for lack of subject matter jurisdiction was unreviewable on appeal "*whether erroneous or not*." *Id.* at 343 (emphasis added); *see also Amoco*, 964 F.2d at 708 ("[E]ven an obviously erroneous invocation of § 1447(c) is untouchable."). In *Kircher*, this Court reaffirmed the principle that "review is unavailable no matter how plain the legal error in ordering the remand," 126 S. Ct. at 2154 (quotation omitted), but explicitly declined to decide whether a district court's characterization of its own remand is reviewable on appeal, *id.* at 2154 n.9; *but see id.* at 2157 (Scalia, J., dissenting) (arguing that appellate recharacterization of a district court's remand order is a prohibited form of review).

In contrast to the district court in *Thermtron*, the district court in this case specifically purported to remand on jurisdictional grounds, stating that "the issue hinges . . . on the Court's jurisdictional authority to hear the removed claims." Pet. App. 20a. Moreover, the district court in a later order explicitly invoked § 1447(c) and clarified that its remand order was based on lack of subject matter jurisdiction. *See* JA 283, 287. Petitioner nevertheless urges that the district court's remand order, properly recharacterized, was actually a discretionary remand of state causes of action within its supplemental jurisdiction. Pet. Br. 45-48. Amici take no position on whether Petitioner's view of the district court's jurisdiction is correct, but, regardless, it was not the basis of the court's decision. The district court's remand order never mentions § 1367 or indicates that the court believed the remand was discretionary.

Even if this Court declines to overrule *Thermtron* or limit it to its facts, amici urge it to clear up the uncertainty in the lower courts by deciding that appellate review is barred when a district court purports to rely on jurisdictional grounds in remanding a case. If a court of appeals can second-guess a district court's purported jurisdictional dismissal, § 1447(d)'s bar would "mean[] nothing at all, because appeals will be taken and sustained in those cases where the district court made a mistake, and rejected in cases where the district court was correct." *Adkins*, 326 F.3d 828. As Chief Justice Rehnquist feared, the purportedly narrow exception created in *Thermtron* would have begun to swallow § 1447(d)'s no-appeal rule. The Court should restore the statute to its textual foundation, leaving to Congress the decision to chart a new course on the appealability of remand orders.

CONCLUSION

For the reasons stated above, the decision of the court of appeals should be vacated and remanded with instructions that the case be further remanded to the state court in which it was filed.

Respectfully submitted,

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