No. 05-85

# In the Supreme Court of the United States

POWEREX CORP., PETITIONER

*v.*

RELIANT ENERGY SERVICES, INC., ET AL.

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE NINTH CIRCUIT*

**BRIEF FOR THE UNITED STATES**
**AS AMICUS CURIAE SUPPORTING PETITIONER**


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## QUESTIONS PRESENTED

1. Whether petitioner, which is wholly owned by a crown corporation that is itself wholly owned by the Canadian Province of British Columbia, and which performs obligations and exercises rights of the Province pursuant to treaties with the United States, is entitled to the protections of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602 *et seq.*, as an "organ of a foreign state or political subdivision thereof," 28 U.S.C. 1603(b)(2).

2. Whether the court of appeals had jurisdiction to review the district court's remand order, notwithstanding 28 U.S.C. 1447(d).

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## INTEREST OF THE UNITED STATES

The United States has an interest in the proper interpretation of the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1602 *et seq.*, and in the proper procedures to be followed when federal agencies and foreign sovereigns remove a case to federal court. In response to the Court's invitation, the Solicitor General filed a brief at the petition stage expressing the views of the United States.

## STATEMENT

1. The FSIA "contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 488 (1983). The FSIA defines "foreign state" to include "an agency or instrumentality of a foreign state," 28 U.S.C. 1603(a), which, in turn, is defined to mean:

> any entity—(1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. 1603(b). The FSIA "guarantees foreign states the right to remove any civil action from a state court to a federal court," *Verlinden*, 461 U.S. at 489, and that, "[u]pon removal[,] the action shall be tried by the court without jury," 28 U.S.C. 1441(d). Those rights exist whether or not the foreign state is immune from suit in the particular case, and they extend to agencies and instrumentalities of a foreign state as well as the foreign state itself. *Ibid.*; 28 U.S.C. 1603(a).

2. Petitioner is a corporation organized under the laws of the Province of British Columbia, a political subdivision of Canada. Petitioner is wholly owned by the British Columbia Power and Hydro Authority (BC Hydro), a provincial crown corporation that is in turn wholly owned by the Province. Pet. App. 53a, 58a. BC Hydro, by law, "is for all its purposes an agent of the government and its powers may be exercised only as an agent of the government." *Id.* at 166a. The directors of BC Hydro are appointed by the Lieutenant Governor in Council and hold office during pleasure, and the exercise of the board of directors' powers is subject to the approval of the Lieutenant Governor in Council. *Id.* at 166a-167a.

BC Hydro's responsibilities include the construction of dams, storage facilities, and reservoirs, and the generation, transmission, and distribution of electricity. Pet. App. 32a, 167a-168a. BC Hydro is also responsible for implementing on behalf of Canada the Columbia River Treaty between the United States and Canada, which is designed to control the flow of the Columbia River for both flood control and power-generation purposes benefitting both nations. *Id.* at 50a-51a.[1] Under the treaty-based management system, Canadian dams sometimes must release more water than would be optimal for their own power-generating purposes, in order to maintain water levels in the United States. *Id.* at 51a. The treaty accordingly provides that the United States will reimburse the Province (as assignee of Canada) for foregone power-generating opportunities. See *id.* at 51a, 55a.

BC Hydro generates more electric power than the Province needs. In 1988, BC Hydro created petitioner, at the direction of the Province, as a wholly owned subsidiary to market BC Hydro's excess power to the United States. See Pet.

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[1] See Treaty Between the United States of America and Canada Relating to Cooperative Development of the Water Resources of the Columbia River Basin, signed Jan. 17, 1961, entered into force Sept. 16, 1964, 15 U.S.T. 1555; Pet. App. 61a-137a.

App. 30a; J.A. 267. The directors of petitioner are appointed by the board of BC Hydro. J.A. 234. A majority of petitioner's directors are members of the BC Hydro board, *ibid.*, and appointment of the single outside member was subject to the concurrence of the Office of the Premier, *ibid.*; Pet. App. 58a-59a. Petitioner's business activities are subject to a risk management policy established and overseen by BC Hydro, and there is close operational coordination between BC Hydro and petitioner to optimize BC Hydro's generating capacity. *Id.* at 28a. Petitioner's income is consolidated with that of BC Hydro, *ibid.*, and a significant portion of those consolidated profits are either transferred to the Province, *id.* at 202a-204a, or taken into account in the rate charged for BC Hydro's power, thereby subsidizing the cost of power to the Province's citizens, see J.A. 206.

After petitioner was created, it worked together with the Province in negotiating agreements regarding Canada's entitlement under the Columbia River Treaty. See Pet. App. 55a. Ultimately, the Province assigned to petitioner its rights under that Treaty. See J.A. 133-159. In addition, petitioner is responsible for providing power to the City of Seattle as required in the Skagit River Treaty between the United States and Canada.[2] See J.A. 190-194.

3. a. Plaintiffs—including the State of California and individual energy consumers—sued cross-plaintiffs (among others) in California state court, seeking damages for alleged manipulation of the electricity market in violation of state law. The latter parties filed cross-complaints against petitioner, BC Hydro, the Bonneville Power Administration (BPA), and Western Area Power Administration (WAPA), alleging that they participated in the manipulation of energy markets.

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[2] See Treaty Between Canada and the United States of America Relating to the Skagit River and Ross Lake, and the Seven Mile Reservoir on the Pond D'Oreille River, with annex, signed Apr. 2, 1984, entered into force Dec. 14, 1984, T.I.A.S. No. 11,088; Pet. App. 138a-146a.

Petitioner and BC Hydro removed the case to federal district court pursuant to the FSIA, 28 U.S.C. 1441(d). The federal agencies invoked 28 U.S.C. 1442(a)(1) as additional authority for removal. Pet. App. 19a. The plaintiffs moved to remand the case to state court. They argued that the court lacked jurisdiction to adjudicate the claims against BC Hydro and the federal agencies because they were immune from the cross-claims, and that petitioner could not remove under the FSIA because it was not an agency or instrumentality of British Columbia. *Id.* at 20a, 22a, 33a, 38a.

The district court granted the motion to remand. Pet. App. 18a-44a. The court held that, as "a corporation wholly-owned by a political subdivision of a foreign government," BC Hydro qualified as a "foreign state" for purposes of the FSIA, *id.* at 21a (citing 28 U.S.C. 1603(a)), and that the claims against it did not fall within any of the FSIA's exceptions to immunity, see *id.* at 21a-33a. The court also held that BPA and WAPA were immune from suit, *id.* at 40a, and that because the state court lacked jurisdiction over the claims against BPA and WAPA, so did the federal court, because its jurisdiction on removal was derivative of that of the state court, *id.* at 43a-44a. The court concluded, however, that petitioner did not come within the statutory definition of an agency or instrumentality, and therefore did not qualify as a "foreign state" under the FSIA. *Id.* at 33a-38a.

BC Hydro, BPA, and WAPA sought to clarify that the claims against them had been dismissed, but the district court denied their requests. The court reasoned that, because it could not exercise jurisdiction over the claims against those parties, it could not dismiss the claims, and was instead required by 28 U.S.C. 1447(c) to remand the entire action to state court. See J.A. 281-286, 287-289.

b. The cross-plaintiffs, BPA, WAPA, and petitioner each appealed. Pet. App. 8a-9a. The court of appeals first held that 28 U.S.C. 1447(d) did not bar appellate review. The court reasoned that the district court had removal jurisdiction over

the case at the outset because of BC Hydro's status as a foreign state and BPA and WAPA's status as federal agencies. *Id.* at 10a. Because the district court had jurisdiction, and had exercised that jurisdiction to decide the claims of immunity and the status of petitioner, the court of appeals held that it was "not deprived by § 1447(d) of jurisdiction to review these substantive rulings." *Ibid.*

The court then held (on the appeal of the cross-plaintiffs) that BC Hydro, BPA, and WAPA were entitled to immunity. Pet. App. 11a, 14a. It also held (on the appeal of BPA and WAPA) that the district court erred in refusing to dismiss the claims against them because, in a removed action, a defendant's immunity "is vindicated only by the district court's dismissal of the claims." *Id.* at 16a.

With respect to petitioner's appeal, the court of appeals affirmed, holding that petitioner is not an "organ of a foreign state or political subdivision thereof," 28 U.S.C. 1603(b)(2). Pet. App. 14a. The court stated that its determination of organ status would turn ultimately on "whether the entity engages in a public activity on behalf of the foreign government," and that it would "look to the purposes of an entity's activities, the entity's independence from government, the level of financial support received from the government, and the entity's privileges and obligations under the law." *Id.* at 15a (quoting *Patrickson* v. *Dole Food Co.*, 251 F.3d 795, 807 (9th Cir. 2001), aff'd and dismissed in part, 538 U.S. 468 (2003)). The court of appeals observed that petitioner "was not run by government appointees, was not staffed with civil servants, was not wholly owned by the government, was not immune from suit, and did not exercise any regulatory authority." *Id.* at 15a-16a. The court acknowledged that petitioner offered evidence that it "serves a public purpose," but the court concluded that what it regarded as petitioner's "high degree of independence from the government of British Columbia, combined with its lack of financial support from the government and its lack of special privileges or obligations

under Canadian law dictate [the] holding that PowerEx is not an organ of British Columbia." *Id.* at 16a.

## SUMMARY OF ARGUMENT

1. The district court recognized that BC Hydro, BPA, and WAPA properly removed this action to federal court in order to vindicate their sovereign immunity from suit. The court nevertheless remanded the case to state court on the ground that, although the defendants properly removed, their immunity prevented the court from actually hearing the claims against them. That is not a proper basis for remand under Section 1447(c), which provides for remand only on the basis of a defect in removal procedure or jurisdiction, not on the basis of developments in federal court after a case was properly removed. More particularly, with respect to this case, Congress specifically provided for removal by foreign states and the United States, as well as their agencies and instrumentalities, in large part to permit questions of immunity to be decided by the federal courts. Plainly, it did not intend an affirmative finding of immunity to be a basis for remanding the immune parties to state court. Because the district court's remand was not for a reason specified in Section 1447(c), review of its order was not barred by Section 1447(d).

2. The court of appeals' mechanical application of the test for whether an entity is an "organ" of a foreign state was flawed. The factors must be applied flexibly in service of, and with constant reference to, the ultimate question: whether the defendant serves a public purpose on behalf of its government. Many of the factors the court found lacking, such as immunity under domestic law, would be significant if they were present because they would be strongly suggestive of a certain type of government entity, but their absence is not significant. Many United States government instrumentalities lack some of the factors the court of appeals emphasized, and the test has to be flexible enough to capture the wide variety of government instrumentalities. Much more signifi-

cant, in this case, are the circumstances of petitioner's creation, its close involvement with BC Hydro—its sole shareholder, and the Province's wholly owned statutory agent—on matters of public interest, and the close financial relationship between petitioner and BC Hydro. Under a proper analysis, it is clear that petitioner qualifies as an "organ" of the Province.

## ARGUMENT

### I. BECAUSE THE DISTRICT COURT HAD REMOVAL JURISDICTION, ITS SUBSEQUENT REMAND ORDER WAS SUBJECT TO APPELLATE REVIEW

The district court plainly had subject-matter jurisdiction at the time of removal, and it properly proceeded to resolve numerous questions of federal law in the exercise of that jurisdiction. The district court's erroneous decision, after holding several of the defendants immune from the claims against them, to remand the entire case to the state court was subject to review by the court of appeals. The language and history of 28 U.S.C. 1447(d), and this Court's decisions construing that provision, make clear that a district court's order remanding a case that was properly removed at the outset is not subject to Section 1447(d)'s bar on appellate review.

#### A. Section 1447(d) Does Not Preclude Appellate Review Of An Order Remanding A Properly Removed Case On The Basis Of The District Court's Post-Removal Rulings

1. This Court has made clear that Section 1447(d) must be read in *pari materia* with 28 U.S.C. 1447(c). See *Thermtron Prods., Inc.* v. *Hermansdorfer*, 423 U.S. 336, 343 (1976). "[O]nly 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). See *Kircher* v. *Putnam Funds Trust*, 126 S. Ct. 2145, 2153 (2006) (same). Thus, this Court has upheld appellate review of remand or-

ders based on: a district court's decision to overturn the Attorney General's certification that a federal employee was acting within the scope of his employment and thus immune from suit, *Osborn* v. *Haley*, 127 S. Ct. 881, 893-896 (2007); a district court's crowded docket, *Thermtron*, 423 U.S. at 340-341; abstention, *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 710-712 (1996); and the discretionary remand of state law claims after the federal law claims that had supported removal were eliminated from the case, *Carnegie-Mellon Univ.* v. *Cohill*, 484 U.S. 343, 348, 355 n.11 (1988). Each of those cases was properly removed to federal district court. The district court therefore was properly vested with jurisdiction from the outset, and the purported ground for the remand was not one encompassed within Section 1447(c) or, therefore, by the bar to appellate review in Section 1447(d).

One ground for remand provided in Section 1447(c) is lack of subject matter jurisdiction. But that reference must be understood, and has been understood by all but one of the courts of appeals to address the issue, as limited to remand orders based on a defect in subject matter jurisdiction *at the time of removal* that rendered the *removal itself* jurisdictionally improper.[3] That reading is consistent with the general rule that a federal court's subject matter jurisdiction is fixed at the time the suit is brought and is not defeated by subsequent events. See, *e.g.*, *Osborn*, 127 S. Ct. at 896; *Grupo Dataflux* v. *Atlas Global Group, L.P.*, 541 U.S. 567, 574 (2004); *Freeport-McMoRan, Inc.* v. *KN Energy, Inc.*, 498 U.S.

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[3] See, *e.g.*, *Reddam* v. *KPMG LLP*, 457 F.3d 1054, 1058 (9th Cir. 2006); *Letherer* v. *Alger Group, L.L.C.*, 328 F.3d 262, 265 (6th Cir. 2003); *Poore* v. *American-Amicable Life Ins. Co.*, 218 F.3d 1287, 1290-1291 (11th Cir. 2000); *Transit Cas. Co.* v. *Certain Underwriters at Lloyd's*, 119 F.3d 619, 623 (8th Cir. 1997), cert. denied, 522 U.S. 1075 (1998); *Trans Penn Wax Corp.* v. *McCandless*, 50 F.3d 217, 223 (3d Cir. 1995); *In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 708-709 (7th Cir. 1992). But see *Linton* v. *Airbus Industrie*, 30 F.3d 592, 599-600 (5th Cir.), cert. denied, 513 U.S. 1044 (1994).

426 (1991); *Cohill*, 484 U.S. at 350-351; *St. Paul Mercury Indem. Co.* v. *Red Cab Co.*, 303 U.S. 283, 294 (1938).

2. That reading is also consistent with the historical development of Section 1447(c). Before 1988, the text of Section 1447(c) made explicit that it authorized remand only based on defects at the time of removal. It mandated remand "[i]f at any time before final judgment it appears that the case was removed improvidently and without jurisdiction." 28 U.S.C. 1447(c) (1982). In *Thermtron*, the Court recognized that "only remand orders" issued on the ground that "removal was improvident and without jurisdiction[] are immune from review." 423 U.S. at 346. Thus, under the pre-1988 version, it was clear that an order remanding a properly removed case based on post-removal developments, such as the dismissal of the federal claims on which removal was based, was not a remand order under Section 1447(c) and was therefore not immune from review under Section 1447(d). See, *e.g.*, *Cohill*, 484 U.S. at 348; *Kunzi* v. *Pan-Am*, 833 F.2d 1291, 1295 (9th Cir. 1987) (where district court found removal jurisdiction proper, case "could not have been removed 'improvidently and without jurisdiction,' and thus the remand[] could not have been based on section 1447(c)").

That rule was not altered by later amendments to Section 1447(c), which established different time limitations for remands based on two types of defects in removal—a defect in removal procedure and a defect in removal relating to subject matter jurisdiction. In 1988, Congress amended Section 1447(c), Pub. L. No. 100-702, § 1016(c)(1), 102 Stat. 4670, to require a party to file "[a] motion to remand the case on the basis of any defect in removal procedure * * * within 30 days" or forfeit the objection. 28 U.S.C. 1447(c) (1988). The House Report explained that "[s]o long as the defect in removal procedure does not involve a lack of federal subject matter jurisdiction," there is no reason the case should be sent back to state court long after the fact. H.R. Rep. No. 889, 100th Cong., 2d Sess. Pt. 1, at 72 (1988). In contrast, with regard to

a "defect" that *did* "involve a lack of federal subject matter jurisdiction," *ibid.*, the amended statute required remand "at any time before final judgment," 28 U.S.C. 1447(c) (1988).[4]

In 1996, the provision was again amended, Pub. L. No. 104-219, § 1, 110 Stat. 3022, to clarify that waivable objections to removal include "any defect other than lack of subject matter jurisdiction." 28 U.S.C. 1447(c) (Supp. II 1996). The reference to "any defect"—like the similar reference in the 1988 House Report—makes clear that the phrase "lack of subject matter jurisdiction" means a non-waivable jurisdictional "defect" in the removal itself. *Ibid.*; see H.R. Rep. No. 799, 104th Cong., 2d Sess. 1 (1996) ("30-day limit applies to any 'defect' other than the lack of subject matter jurisdiction").

The foregoing history demonstrates that Congress did not intend to broaden the class of unreviewable remand orders, but rather sought only to ensure that plaintiffs promptly raise any objection to the removal on *non*-jurisdictional grounds. See H.R. Rep. No. 889, at 72. As under *Thermtron*, "the proper inquiry is still whether the court had jurisdiction at the time of removal." *Poore*, 218 F.3d at 1290; see n.3, *supra*.

3. There are, moreover, sound reasons why Congress would not bar appellate review of decisions rendered by the district court in the exercise of acknowledged jurisdiction. Section 1447(c) is an "antishuttling provision[]." *Osborn*, 127 S. Ct. at 895. "Ordinarily, when the plaintiff moves to remand a removed case for lack of subject matter jurisdiction, the federal district court undertakes a *threshold* inquiry; typically

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[4] The House Report makes clear that Congress understood a mandatory (and therefore unreviewable) remand for lack of subject matter jurisdiction at the time of removal to be distinct from a remand in a properly removed case after the court had resolved disputed federal questions, which was discretionary. See H.R. Rep. No. 889, at 72 (emphasizing that "[t]he amendment is written in terms of a defect in 'removal procedure' in order to avoid any implication that remand is unavailable after disposition of all federal questions leaves only State law questions that might be decided as a matter of ancillary or pendent jurisdiction or that instead might be remanded").

the court determines whether complete diversity exists or whether the complaint raises a federal question." *Ibid.* (emphasis added). Such "threshold" jurisdictional questions, which determine whether the case was properly removed in the first place, should, and most often will, be decided at the outset. Section 1447(d) embodies Congress's judgment that little would be gained, and much lost, from protracted appellate litigation about whether such threshold determinations were correct. See *Kircher* v. *Putnam Funds Trust*, 126 S. Ct. 2145, 2152 (2006).

Those considerations are quite different where, as here, the district court unquestionably possessed jurisdiction over the removed case from the outset and proceeded to adjudicate rights of the parties under federal law. At that point, considerations of efficiency may weigh against transfer of the case back to state court, which would be "perfectly free to reject the remanding court's" federal rulings. *Kircher*, 126 S. Ct. at 2157. That is particularly true in a case like this, when the district court remanded only after making rulings on federal issues that confirmed that a federal forum was appropriate. Assuring access to the federal judicial system for resolution of such questions is the reason that Congress provided for removal in the first place. See *Thermtron*, 423 U.S. at 344 (comparing remand of "an otherwise properly removed action" to dismissal and referral to state court of "an action properly filed in the federal court in the first instance").

### B. Because This Case Was Properly Removed, The Court Of Appeals Had Jurisdiction To Review The District Court's Rulings In The Exercise Of That Jurisdiction

1. In this case, the district court stressed that no party contested that the actions could be removed pursuant to 28 U.S.C. 1441 and 1442. See Pet. App. 20a. As federal agencies, BPA and WAPA were entitled to remove the action pursuant to 28 U.S.C. 1442(a)(1) and have their amenability to suit adjudicated by the federal district court, which they did. See

Pet. App. 7a, 39a-40a. Similarly, as a crown corporation wholly owned by the Province of British Columbia, BC Hydro unquestionably qualifies as an agency or instrumentality of Canada and therefore as a foreign state under 28 U.S.C. 1603(a) and (b). Pet. App. 12a-14a, 21a. Therefore, BC Hydro had the right to remove the action under 28 U.S.C. 1441(d) in order to have its claim of immunity decided by the federal court, which claim the court upheld. Pet. App. 21a-33a.

Because removal by BC Hydro, BPA, and WAPA was proper, the district court had (and retained) subject-matter jurisdiction over the entire case irrespective of the "foreign state" status of petitioner. Remand therefore was not required by 28 U.S.C. 1447(c). See, *e.g.*, *Nolan* v. *Boeing Co.*, 919 F.2d 1058 (5th Cir. 1990), cert. denied, 499 U.S. 962 (1991); see also H.R. Rep. No. 1487, 94th Cong., 2d Sess. 32. (1976). It follows that the bar to appellate review in Section 1447(d)—which applies only to "remand orders issued under § 1447(c) and invoking the [mandatory] grounds specified therein," *Osborn*, 127 S. Ct. at 893 (quoting *Thermtron*, 423 U.S. at 346) (brackets added in *Osborn*)—does not apply to a district court order remanding a case after it resolved certain questions of federal law properly brought before it.[5]

2. The district court made no reference to Section 1447(c) in its initial remand order. The court did, however, invoke

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[5] In holding that appellate review of the remand order was not barred in *Osborn*, the Court relied on the specification in 28 U.S.C. 2679(d)(2) that the Attorney General's certification that the defendant federal employee was acting within the scope of his employment "shall conclusively establish scope of office or employment for purposes of removal." The Court concluded that that "anti-shuttling" provision must be given precedence over 28 U.S.C. 1447(d). The Attorney General's certification is the threshold jurisdictional predicate for removal under 28 U.S.C. 2679(d)(2). The specification that his certification is conclusive "for purposes of removal" thus serves to foreclose any contention that remand is required by Section 1447(c) if the district court overturns that certification. Here, because removal jurisdiction was unquestionably proper from the outset, the absence of a provision like Section 2679(d)(2) is irrelevant.

that provision in subsequent orders that, *inter alia*, denied motions by BC Hydro, BPA, and WAPA to clarify that the claims against them had been *dismissed* on immunity grounds. J.A. 283, 288. The district court's belated invocation of Section 1447(c), and its statement that the case was "remanded for lack of subject matter jurisdiction," J.A. 283-284, are not dispositive. A court's characterization of its action is not binding on this Court either to confer or to deny appellate jurisdiction. See, *e.g.*, *United States* v. *Jorn*, 400 U.S. 470, 478 n.7 (1971) (plurality opinion of Harlan, J.) (trial court's characterization of its action as "acquittal" did not deprive Court of appellate jurisdiction); *Oliver Am. Trading Co.* v. *Mexico*, 264 U.S. 440, 442 (1924) (district court's characterization of dismissal of Mexico on grounds of immunity as a "jurisdictional question" did not bar this Court from "determining for itself whether the question which was certified is in truth one of the jurisdiction of the lower court as a federal court"); *Things Remembered*, 516 U.S. at 134 (Ginsburg, J., concurring). Allowing a district court's mischaracterization of its decision as "jurisdictional" to defeat appellate jurisdiction is particularly problematic in light of the oft-remarked confusion surrounding that term. See *Steel Co.* v. *Citizens for Better Env't*, 523 U.S. 83, 90 (1998) ("Jurisdiction is a word of many, too many, meanings.").

In this case, it is evident from the district court's own orders that its reference to "lack of subject matter jurisdiction" was not a finding that it lacked *removal* jurisdiction. To the contrary, the court drew a clear distinction between the question "whether the actions were properly removed in the first instance," which was not contested, and the question whether the court had "jurisdictional authority to hear the removed claims," because of the defendants' immunity. Pet. App. 20a. Thus, the court noted that "[n]one of the parties contend that the cross-[defendants] could not remove these actions under the provisions of 28 U.S.C. §§ 1441 and 1442." *Ibid.* "*Rather*," the court continued, "[p]laintiffs argue that the

Court lacks jurisdiction over the removed actions and, as such, they must be remanded." *Ibid.* (emphasis added). The court stressed that "[t]he issue hinges, then, on the Court's jurisdictional authority *to hear* the removed claims, *not* whether the actions were *properly removed in the first instance*." *Ibid.* (emphases added).

Those questions are, indeed, distinct. Unlike the federal courts' original subject matter jurisdiction over foreign states under Section 1330, which exists only if an exception to the foreign state's immunity applies, removal jurisdiction under Section 1441(d) exists over "*[a]ny* civil action brought in a State court against a foreign state as defined in section 1603(a)" (emphasis added). If, in a case properly removed under this provision, the district court concludes that the foreign state is immune, the proper response is to dismiss the claims against it. That would be the point of a federal immunity. Likewise, as the court of appeals held (Pet. App. 16a-17a), when a suit against the United States or an agency, such as BPA and WAPA, that is not subject to suit in state court is removed under 28 U.S.C. 1442, "the proper course for a federal district court to take after removal would be to *dismiss the case altogether*, without reaching the merits." *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n.27 (1983) (emphasis added).

Thus, a holding that a defendant that properly removed a case to federal court under one of those provisions is immune from the claims against it is not a finding that the court lacked *removal* jurisdiction. It therefore is neither a determination of a "lack of subject matter jurisdiction" for purposes of Section 1447(c), nor an order within the bar to appellate review in Section 1447(d). To the contrary, it is a ruling that accentuates the need for a federal forum, which is provided to ensure that the federal-law immunity is fully protected. The district court's invocation of Section 1447(c) cannot shield a remand order on that mistaken ground from appellate review. See *Thermtron*, 423 U.S. at 350-352 (Section 1447(d) does not bar

review of question whether remand was of the type authorized by Section 1447(c)).

In Sections 1442(a) and 1441(d), "Congress has expressly provided by statute for removal [because] it desired federal courts to adjudicate defenses based on federal immunities" for the federal government and its agencies and officers, and for foreign states and their agencies and instrumentalities. *Oklahoma Tax Comm'n* v. *Graham*, 489 U.S. 838, 841-842 (1989); see S. Rep. No. 366, 104th Cong., 2d Sess. 30-31 (1996) (Section 1442(a)(1) reflects "Congress' intent that questions concerning * * * the scope of Federal immunity * * * be adjudicated in Federal court"); H.R. Rep. No. 1487, at 32 (FSIA's removal provision reflects "the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area"). It would be absurd to think that Congress, which provided both immunity from suit *and* a right of removal to federal court to vindicate that immunity, would have intended to shield from appellate review an order like that of the district court here holding that, *because* the defendants have a federal immunity from suit, the claims against them must be remanded to state court. Nothing in the text, history, or purposes of Section 1447(c) and (d) requires that absurd result.[6]

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[6] Even if Section 1447(d) did preclude review of the remand order itself, it would not bar appeal of the separate aspect of the court's order denying the motions of BC Hydro, BPA, and WAPA to dismiss the claims against them, which can be reversed even if the case is to be remanded. See *Osborn*, 127 S. Ct. at 902 (Souter, J., concurring and dissenting in part) (citing *City of Waco* v. *United States Fid. & Guar. Co.*, 293 U.S. 140 (1934)). Here, for example, the court of appeals correctly upheld its appellate jurisdiction over the district court's order denying BPA and WAPA's motions to dismiss on immunity grounds. Pet. App. 16a-17a. Because no party has sought review of that aspect of the court of appeals' judgment, it is not before the Court.

We agree with petitioner (Br. 40-41, 48-50) that, even apart from the district court's uncontested removal jurisdiction based on the removals by BC Hydro, BPA, and WAPA, there are strong arguments that the remand order denying petitioner's claim to foreign state status and the right under the FSIA to a

## II. PETITIONER IS AN AGENCY OR INSTRUMENTALITY OF THE PROVINCE FOR PURPOSES OF THE FSIA

### A. In The FSIA, Congress Restricted The Scope Of Foreign State Immunity While Expanding The Class Of Entities That Could Invoke The Act's Procedural Benefits

1. Until 1952, the United States adhered to the "absolute" theory of foreign sovereign immunity, *Verlinden*, 461 U.S. at 486, under which "foreign sovereigns and their public property [we]re * * * not * * * amenable to suit in our courts without their consent," *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 134 (1938). In 1952, the Department of State announced the adoption of the "restrictive" theory of foreign sovereign immunity. See Letter from Jack B. Tate, Acting Legal Adviser, to Philip B. Perlman, Acting Att'y Gen. (May 19, 1952) (Tate Letter) *in Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 711-715 (1976). The Tate Letter stated that thenceforth the Department would recommend that foreign states be granted immunity only for their sovereign or public acts (*jure imperii*), and not for their commercial acts (*jure gestionis*). *Id.* at 711. See *Verlinden*, 461 U.S. at 486-487. The United States adopted the restrictive theory in light of the growing acceptance of that theory among for-

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federal forum and bench trial is subject to appellate review in the federal courts. *Mitchell* v. *Forsyth*, 472 U.S. 511, 525 n.8 (1985) ("we have held that state-court decisions rejecting a party's federal-law claim that he is not subject to suit before a particular tribunal are 'final' for purposes of our certiorari jurisdiction under 28 U.S.C. § 1257"); cf. *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500, 511 (1959) (right to interlocutory mandamus relief for denial of jury trial "is settled"). The right to a non-jury trial is an important aspect of foreign sovereigns' immunity from suit. Cf. *Lehman* v. *Nakshian*, 453 U.S. 156, 160-161 (1981) (holding the United States' immunity from a jury trial must be separately and expressly waived). Further, that right would be irretrievably lost in the event of a remand, because the right to a bench trial applies only in the federal forum. See 28 U.S.C. 1330, 1441(d).

eign nations and the need for a judicial forum to resolve disputes stemming from the "widespread and increasing practice on the part of governments of engaging in commercial activities." Tate Letter (*Alfred Dunhill*, 425 U.S. at 714).

In 1976, Congress enacted the FSIA to establish a "comprehensive scheme" governing the manner by which "foreign sovereigns may be held liable in a court in the United States," *Verlinden*, 461 U.S. at 496-497. The FSIA provides rules ranging from the manner of serving process, 28 U.S.C. 1608(a), (b) and (c), to the execution of judgments, 28 U.S.C. 1609-1611. As a general matter, the FSIA codifies the "restrictive theory" of sovereign immunity, allowing foreign states to be sued for their "commercial activities." *Verlinden*, 461 U.S. at 487-488. Even where the FSIA denies immunity, the Act guarantees foreign states the right to remove a civil action from state to federal court and the right to a bench, rather than jury, trial in federal court. *Id.* at 489 (citation omitted); 28 U.S.C. 1330(a), 1441(d).

2. During the time when the United States adhered to a policy of "absolute" immunity for foreign states, a significant practical limitation on that doctrine was the courts' refusal to extend immunity to separate legal entities owned by foreign governments. Following this Court's rule with respect to domestic government corporations, many courts held that "[a] suit against a corporation is not a suit against a government merely because it has been incorporated by direction of the government, and is used as a governmental agent, and its stock is owned solely by the government." *United States* v. *Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199, 202 (S.D.N.Y. 1929) (citing *Sloan Shipyards Corp.* v. *U.S. Shipping Bd. Emergency Fleet Corp.*, 258 U.S. 549 (1922)). See *Coale* v. *Societe Coop. Suisse de Charbons*, 21 F.2d 180 (S.D.N.Y. 1921) (A. Hand, J.).

Some commentators characterized the separate entity rule as applied to foreign sovereigns as a "judicial effort[] to restrict the applicability of the absolute theory." Comment, *The*

*Jurisdictional Immunity of Foreign Sovereigns*, 63 Yale L.J. 1148, 1154 (1954). The effort was criticized as "unsatisfactory" because it failed to focus on more substantial policy concerns, such as whether the entity's actions were undertaken in a sovereign capacity. *Id.* at 1153-1154. See Bernard Fensterwald, Jr., *Sovereign Immunity and Soviet State Trading*, 63 Harv. L. Rev. 614, 619 (1950) (criticizing rule as "a makeweight used to avoid application of the generally undesirable doctrine of absolute immunity").

The United States' adoption of the restrictive theory of immunity created an opportunity for the courts to refine the separate entity rule. Just as with foreign sovereigns themselves, courts could hold their separate corporate entities subject to suit when engaging in commercial activity, but not when engaged in activity of a sovereign nature. In practice, however, there was "chaos" among the lower courts concerning separate entities. William C. Hoffman, *The Separate Entity Rule in International Perspective: Should State Ownership of Corporate Shares Confer Sovereign Status for Immunity Purposes?*, 65 Tul. L. Rev. 535, 548 (1991). There were several approaches a court might employ: continue to apply "the classic separate entity rule"; infer a waiver of the entity's immunity if "the corporate charter contained a 'sue and be sued' clause"; or apply the restrictive theory to corporate entities, with some courts "looking to the 'purpose' of the activity" and others "to the 'nature' of the activity." *Id.* at 550 n.77. Some courts "analogized to the doctrine of disregard of the corporate form," but diverged significantly from traditional corporate law. *Id.* at 548 & n.71.

When Congress enacted the FSIA, it rejected the either/or dichotomy of the traditional separate entity rule in favor of a considerably more calibrated approach. While Congress limited foreign states' immunity in keeping with the restrictive theory, it extended the Act's protections to foreign states' agencies and instrumentalities, see 28 U.S.C. 1603(b). Congress thus rejected the analogy of piercing the corporate veil.

See *Dole Food*, 538 U.S. at 474-476. Rather, it crafted a calibrated set of rules that afford immunity and procedural safeguards to agencies and instrumentalities that are in some ways more limited than those afforded foreign states proper. See, *e.g.*, 28 U.S.C. 1605(a)(3) (less immunity from expropriation claims), 1606 (limiting punitive damages against foreign state but not instrumentality), 1608(b) (less restrictive service of process rules for instrumentalities), 1610(b) (broader rights to execute judgments against property of instrumentalities). But the important rights to remove a suit to federal court and to a non-jury trial in federal court were extended to an "agency or instrumentality of a foreign state." H.R. Rep. No. 1487, at 32. Congress viewed such protections, even for a commercial agency or instrumentality, as necessary "[i]n view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area." *Ibid.*

3. By providing that foreign state agencies and instrumentalities will generally be subject to suit for their commercial activities, but guarantying certain procedural protections, Congress approximated the treatment accorded agencies and instrumentalities of the federal government. The long-standing practice with respect to government-owned corporations is that they are subject to suit, see *Keifer & Keifer* v. *RFC.*, 306 U.S. 381, 390-391 (1939), but are nonetheless routinely recognized as agencies or instrumentalities of the government for other purposes, including the right to remove a suit to federal court. See, *e.g.*, *American Nat'l Red Cross* v. *S.G.*, 505 U.S. 247, 249, 257 (1992) (Red Cross entitled to remove state suit); *FSLIC* v. *Ticktin*, 490 U.S. 82, 85-86 (1989) (28 U.S.C. 1345 provides jurisdiction over suit brought by FSLIC); *Department of Employment* v. *United States*, 385 U.S. 355 (1966) (Red Cross immune from state taxation); *Cherry Cotton Mills, Inc.* v. *United States*, 327 U.S. 536, 539 (1946) (claims of RFC could be asserted as counterclaims of the United States); *Inland Waterways Corp.* v. *Young*, 309 U.S.

517, 522-524 (1940); *Emergency Fleet Corp.* v. *Western Union Tel. Co.*, 275 U.S. 415, 420-421 (1928).

### B. Congress Intended The Definition Of Agency Or Instrumentality To Be Flexible And Inclusive

1. Congress recognized that there are many ways in which foreign governments may organize functions carried out on their behalf, and it made certain that the FSIA would be flexible enough to accommodate that variety. Thus, in extending the protections of the FSIA to an "agency or instrumentality" of a foreign state, 28 U.S.C. 1603(a), Congress provided that entities could qualify several ways. Specifically, a "separate legal person, corporate or otherwise," qualifies as an "agency or instrumentality" if it is either "an organ of a foreign state or political subdivision thereof," or "a majority of [its] shares or other ownership interest is owned by a foreign state or a political subdivision thereof." 28 U.S.C. 1603(a) and (b).

The majority ownership prong of the definition establishes a categorical rule of inclusion. See *Dole Food*, 538 U.S. at 474 (construing that categorical protection to require direct ownership by the foreign state or political subdivision). Thus, Congress provided that, even "[w]here ownership is divided between a foreign state and private interests, the entity will be deemed to be an agency or instrumentality" as long as "a majority of the ownership interests (shares of stock or otherwise) is owned by a foreign state or by a foreign state's political subdivision." H.R. Rep. No. 1487, at 15. There is no inquiry into the entity's purpose or function—it is treated as a sovereign based solely on majority ownership.

The other prong of the definition is intended to allow qualification regardless of the entity's particular form of organization or control, based upon a more functional analysis. See H.R. Rep. No. 1487, at 15-16 (recognizing that an agency or instrumentality "could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel com-

pany, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name"). "A flexible approach is particularly appropriate after *Dole*, inasmuch as courts likely now will be asked to evaluate the possible organ status of a wide variety of entities controlled by foreign states through tiering arrangements and because of the widely differing forms of ownership or control foreign states may exert over entities." *USX Corp.* v. *Adriatic Ins. Co.*, 345 F.3d 190, 208 (3d Cir. 2003), cert. denied, 541 U.S. 903 (2004).

2. In determining whether an entity qualifies as an organ under Section 1603(b), the courts of appeals consider multiple factors including, *inter alia*, the circumstances of the entity's creation, its purpose, the involvement of the state in its affairs, any financial support or grant of exclusive economic rights from the state, its privileges and obligations under local law, and its employment practices. See Pet. App. 15a; *Filler* v. *Hanvit Bank*, 378 F.3d 213, 217 (2d Cir.), cert. denied, 543 U.S. 1022 (2004); *USX*, 345 F.3d at 209; *Patrickson*, 251 F.3d at 807;[7] *Kelly* v. *Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 846-847 (5th Cir.), cert. denied, 531 U.S. 979 (2000).

The listed factors certainly can be relevant in determining whether an entity is an "organ" of a foreign state. But, as the Fifth Circuit has emphasized, a court should "*not* apply [the factors] mechanically." *Kelly*, 213 F.3d at 847; see also *USX*, 345 F.3d at 208. Instead, they should be consulted with constant reference to the ultimate question: whether the defendant is "an entity that engages in activity serving a national interest and does so on behalf of its national government." *Id.* at 209. The weight of any particular factor in a given case depends on the extent to which it informs that ultimate test.

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[7] In *Patrickson*, the Ninth Circuit held that the foreign entity there was neither an organ of nor majority-owned by a foreign state or political subdivision. This Court considered only the question of majority ownership.

See *id.* at 214 ("[w]eighing the[] factors qualitiatively as well as quantitatively").

### C. Petitioner Is An Organ Of British Columbia Because It Serves A Public Purpose On Behalf Of The Province

1. Petitioner is an organ of British Columbia in light of the circumstances and purposes surrounding its creation and its ongoing activities in relation to public resources in the Province and Canada's rights and obligations under international agreements. Petitioner was created at the specific direction of the Cabinet of the Province, which decided, after debates in the Provincial legislative assembly, J.A. 197-202, to "provide a single window agency to be responsible to market the export of power outside the province," J.A. 267. The government's decision was communicated, through the Minister of Mines and Petroleum Resources, to BC Hydro, a crown corporation wholly owned by the Province, with the direction to "incorporate the Export Agency" as a "wholly owned subsidiary of B.C. Hydro." *Ibid.* It is commonly recognized that state agencies and instrumentalities frequently manage the export of natural resources in furtherance of governmental interests. See H.R. Rep. No. 1487, at 15-16 ("state trading corporation" and "export association" are examples of agencies or instrumentalities); *USX*, 345 F.3d at 210 (noting that the exploitation and distribution of public resources is a "government purpose" that "would weigh * * * heavily in favor of organ status") (citing *Kelly*, 213 F.3d at 848, and *Corporacion Mexicana de Servicios Meritimos, S.A. de C.V.* v. *M/T Respect*, 89 F.3d 650, 654-655 (9th Cir. 1996)).

Petitioner furthers another quintessential governmental interest: Canada and the Province have assigned to petitioner the right to market Canada's entitlement to power generated by BPA pursuant to the Columbia River Treaty and the responsibility of providing power to the City of Seattle as required by the Skagit River Treaty. See Pet. App. 55a, 56a-57a; cf. *Department of Employment*, 385 U.S. at 359 (noting,

as supporting American Red Cross's status as government instrumentality, that the government had "devolved upon the Red Cross the right and the obligation to meet this Nation's commitments under various Geneva Conventions"). Petitioner actively participated with the Province in negotiating with the responsible American entities in carrying out the agreements. See Pet. App. 55a.[8]

2. Moreover, it is evident, in light of the close relationship between petitioner and the Province, through BC Hydro, that petitioner engages in its activities for the benefit of the government. BC Hydro by statute "is for all its purposes an agent of the government and its powers may be exercised only as an agent of the government." Pet. App. 166a. Thus, BC Hydro's interactions with petitioner are undertaken on behalf of the government. Those interactions are considerable.

BC Hydro's board, which is appointed by the Provincial Lieutenant Governor, appoints the members of petitioner's board of directors. J.A. 234. A majority of petitioner's board members are also members of the BC Hydro board, *ibid.*, and its one outside member was "subject to concurrence by the Office of the Premier." Pet. App. 59a; J.A. 234.

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[8] The district court erroneously discounted the significance of petitioner's role in marketing the Canadian entitlement under the Columbia River Treaty because a provision of the assignment agreement provides that "Powerex will not be or be construed as *the agent* of the Province." See Pet. App. 36a n.11. It is understandable that the Province, which otherwise has the corporate veil standing between itself and its government-owned corporations, would have made separate provision in connection with the direct assignment of its treaty rights to petitioner to clarify that the Province would not be held liable for petitioner's losses or other wrongs in regard to the assignment, nor subject petitioner to the direct control of the Province. See *First Nat'l City Bank* v. *Banco Para el Comercio Exterior*, 462 U.S. 611, 625 (1983) (noting that "the instrumentality's assets and liabilities must be treated as distinct from those of its sovereign in order to facilitate credit transactions with third parties"). The quoted provision therefore has little independent significance to petitioner's status under the FSIA beyond the fact, which the FSIA presumes, that petitioner is a separate legal entity.

The Province has, moreover, sole beneficial ownership and control of petitioner, albeit through BC Hydro. In such circumstances, the inference that petitioner is an organ of the Province is particularly strong. See *USX*, 345 F.3d at 213 (when a foreign government "has complete control over all shares of [the defendant] albeit through a tiered arrangement," and the subsidiary serves the government's purposes, "this factor weighs in favor of a finding of organ status"). When no private person owns any interest in an entity, then the ultimate fiduciary responsibility is to the state and the state alone.[9] Indeed, the United States regards its own second-tier subsidiaries of wholly owned government corporations to be, like their parents, "wholly owned Government corporation[s]."[10] Moreover, such second-tier government corporations are afforded numerous advantages as agencies or instrumentalities of the government. See, *e.g.*, 12 U.S.C. 84(c)(5) (loans to "any corporation wholly owned directly or indirectly by the United States"), 28 U.S.C. 1733 (admissibil-

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[9] In contrast, in *Dole Food*, Bromine Compounds, Ltd., was three levels removed from the government, and private owners participated at two different levels, thereby reducing the government's ultimate beneficial interest to 66%, and obligating the entity to serve interests other than the government's alone. See J.A. at 93, *Dole Food*, *supra*, No. 01-593, J.A. 93.

[10] See Government Corporation Control Act, ch. 557, § 101, 59 Stat. 597-598 (listing as "wholly owned Government corporation[s]" the Regional Agricultural Credit Corps., Defense Plant Corp., Defense Supplies Corp., Metals Reserve Co., War Damage Corp., RFC Mortgage Co., Petroleum Reserves Corp., Rubber Development Corp., Tennessee Valley Associated Cooperatives, Inc., and FSLIC); *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 388-389 (1995) (noting, with respect to all but the last of these, that they were incorporated by other government owned corporations); *Acron Invs., Inc.* v. *FSLIC*, 363 F.2d 236, 239-240 (9th Cir.) (noting that the FSLIC was, in 1945, a wholly owned subsidiary of the Home Owner's Loan Corporation), cert. denied, 385 U.S. 970 (1966).

ity of copies of records), 2408 (no requirement to post security).[11]

The close relationship between the Province and its wholly owned second-tier subsidiary is demonstrated in several ways. Petitioner's business activities are subject to a risk management policy established by BC Hydro, and there is close coordination between BC Hydro and petitioner to optimize BC Hydro's generating capacity. Pet. App. 28a. Petitioner's net income is reported with BC Hydro's on consolidated income statements, thereby eliminating the financial effect of dealings between the two. J.A. 215, 220; BC Hydro, *Annual Report 2006*, at 83 <http://www.bchydro.com/rx_files/info/info46749.pdf.>. A significant portion of BC Hydro's consolidated profits is either transferred to the Province, *id.* at 202a-204a, or taken into account in the rate charged for BC Hydro's power, with the effect that those profits subsidize the cost of power to the Province's citizens. See J.A. 206.

### D. The Court Of Appeals' Analysis Of The Various Factors In Isolation Failed To Appreciate The Extent Of Petitioner's Relationship To BC Hydro And The Province

1. Although the court of appeals made reference to "the ultimate question" of whether petitioner "engages in a public activity on behalf of the foreign government," Pet. App. 15a, it proceeded mechanically, as through a checklist. Its analy-

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[11] As presently worded, Sections 1733 and 2408 confer procedural benefits on any "agency" of the United States, but the Reviser's notes from the 1948 revision of Title 28 confirm that that word encompasses corporations indirectly owned by the United States. See 28 U.S.C. 1733, historical and revision notes (the words "any corporation all the stock of which is beneficially owned by the United States either directly or indirectly" in 28 U.S.C. 661 (1940) "were omitted as covered by 'or agency' "); 28 U.S.C. 2408, historical and revision notes ("Word 'agency' was substituted" for phrase in 28 U.S.C. 870 (1940), "in view of the creation of many independent governmental agencies since the enactment of the original law").

sis, in full, of the factors as they apply to petitioner was as follows:

> [Petitioner] was not run by government appointees, was not staffed with civil servants, was not wholly owned by the government, was not immune from suit, and did not exercise any regulatory authority. *Even though [petitioner] offers some evidence that it serves a public purpose*, its high degree of independence from the government of British Columbia, combined with its lack of financial support from the government and its lack of special privileges or obligations under Canadian law dictate our holding that [petitioner] is not an organ of British Columbia.

*Id.* at 15a-16a (emphasis added) (citation omitted). In other words, the court of appeals put to one side the substantial evidence that petitioner "serves a public purpose" because it did not conform with or was outnumbered by the other specified factors. The court did not analyze those factors to see what light they shed on whether petitioner serves the public interests of the Province.

2. Furthermore, the factors that the court of appeals considered are not factors of equal weight that can be counted up and scored. Some factors would powerfully suggest agency status if present, but their absence may carry little, if any, significance. One example is whether petitioner is "immune from suit" under Canadian law. Pet. App. 16a. It would be a strong, perhaps even determinative, indication that a foreign state regarded a separate legal entity as its "organ" if the state extended to the entity the sovereign's immunity from suit in its own courts. But, the absence of such immunity cannot, consistent with Congress's intent, be deemed a "factor[] weighing against" that status. *Ibid.* In order to be an organ, "an entity *must* be a separate legal person," *USX*, 345 F.3d at 214; 28 U.S.C. 1603(b), and Congress intended that that requirement could be satisfied by "any * * * entity which, un-

der the law of the foreign state where it was created, *can sue or be sued in its own name*." H.R. Rep. No. 1487, at 15 (emphasis added). See *First Nat'l City Bank* v. *Banco Para el Comercio Exterior*, 462 U.S. 611, 624 (1983) (*Bancec)* (an "instrumentality is typically established as a separate juridical entity, with the power[] * * * to sue and be sued"); *USX*, 345 F.3d at 214 (concluding that whether the defendant "is subject to suit" in its home country "should not be considered [as] part of the organ analysis"). Indeed, treating the absence of immunity as counting against qualification as an organ is inconsistent with Congress's practice of subjecting its own corporate creations to suit while extending them other protections as agencies or instrumentalities of the government. See pp. 19-20, *supra*.

The court of appeals also counted as a factor against petitioner that it was "not wholly owned by the government," Pet. App. 15a-16a, by which it meant that petitioner "is not owned by the Province, but by BC Hydro," *id.* at 16a. That approach, which counts the fact that an entity fails to satisfy the majority-ownership test as a strike against recognizing it as an organ as well, ignores that Congress specifically established the two tests as *alternatives* in order to capture the full "variety of forms" by which a foreign state could organize its agencies or instrumentalities. H.R. Rep. No. 1487, at 15-16. Other arrangements besides the traditional one of direct ownership can also be indicative of a significant relationship between the government and the entity.

The court also counted as a factor against petitioner that it engaged in commercial, rather than regulatory, activities. Pet. App. 16a. However, as the Third Circuit has cautioned, "too heavy a focus on the commercial nature of an entity's activities would tend to confuse the question of the level of protection provided by the FSIA (full immunity or not) with the antecedent question * * * whether the entity comes within the purview of the FSIA at all." *USX*, 345 F.3d at 210. Congress itself recognized that foreign states are especially

likely to create separate legal entities as agencies or instrumentalities of the state to conduct activities that might also be undertaken by private corporations, such as "a mining enterprise, a transport organization such as a shipping line or airline, [or] a steel company." H.R. Rep. No. 1487, at 16.

The fact that petitioner is "not staffed with civil servants," Pet. App. 15a, should also be of little significance. Precisely because the organ prong of the test is a catch-all, it covers a range of entities with widely varying relationships with the state. While an organization staffed entirely with civil servants would mark an entity as particularly likely to qualify, one would not necessarily expect to find civil servants staffing even a wholly owned corporation. The Tennessee Valley Authority, for example, "perhaps the best known of the American public corporations," *Bancec*, 462 U.S. at 625 n.15, does not adhere to the laws regarding public employees, see 16 U.S.C. 831b (board shall appoint officers and employees "without regard to the provisions of Civil Service laws applicable to officers and employees of the United States"). See *Bancec*, 462 U.S. at 624 (instrumentalities are "often" not subject to governmental "personnel requirements"). Moreover, to the extent that there might be any negative inference from the fact that petitioner's employees are not civil servants, it is insignificant in light of those features of petitioner's relationship with the Province and BC Hydro that distinguish it from a purely private corporation. For example, petitioner's employees participate in BC Hydro's retirement plan, J.A. 247-248, and members of petitioner's board of directors are appointed by BC Hydro's board, which is appointed by the Provincial Lieutenant Governor, and outside members of petitioner's board are "subject to concurrence by the Office of the Premier." Pet. App. 58a-59a.

Finally, the court of appeals' statement that petitioner lacks "financial support from the government" and "special privileges or obligations under Canadian law," Pet. App. 16a, is inaccurate. As petitioner explains (Pet. Br. 31-32), it is

immune from taxation by the Province and Canada's federal government, and it is subject to numerous financial benefits, including the Province's ability to make loans to it or assume its debt. In addition, petitioner has the considerable advantage of a firm commitment to export surplus power generated by BC Hydro, the Province's statutory agent, and of being the assignee of the Province's rights under the Columbia River Treaty. Petitioner is also subject to reporting requirements that Canada imposes on corporations in which the government owns "directly or indirectly" a majority of the shares. See *id.* at 28 n.30, 30 n.31.[12]

3. As demonstrated, even those factors that the court of appeals viewed as detracting from a finding of organ status actually reinforce the close connection between the Province and petitioner and the conclusion that petitioner serves a public purpose on behalf of the Province. Petitioner is much more interrelated with the Province, and much more clearly serves a public purpose on behalf of a foreign sovereign, than many corporations in which a government simply owns a majority of the shares. An entity in which "ownership is divided between a foreign state and private interests," H.R. Rep. No. 1487, at 15, may well be subject to suit and engage predominantly, even exclusively, in activities deemed "commercial" under the FSIA, and may do so to the significant benefit of persons other than the state. But Congress nonetheless categorically afforded such entities the protections of the Act. The alternative "agency or instrumentality" standard should be construed in that expansive light.

There is no reason for the courts to strain, as they did during the period of absolute immunity (see pp. 17-18, *supra*), to avoid recognizing an entity as an agency or instrumentality of

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[12] In the United States, the Government Corporation Control Act, 31 U.S.C. 9101-9110, likewise imposes certain financial requirements, including reporting obligations, on "Government corporation[s]," including, as indicated above, see p. 24 & n.10, *supra*, corporations indirectly owned by the government.

a foreign state. Under the FSIA's framework, "the fact that an entity is an 'agency or instrumentality of a foreign state' does not in itself establish an entitlement to sovereign immunity." H.R. Rep. No. 1487, at 15. But by the same token, "[a]n entity which does not fall within the definitions of sections 1603(a) or (b) would not be entitled to sovereign immunity *in any case*," regardless of whether the conduct at issue was sovereign in nature. *Ibid.* (emphasis added). See *USX*, 345 F.3d at 210. As the Departments of State and Justice recognized when they submitted to Congress the 1973 version of the FSIA, extension of the Act's protections to agencies and instrumentalities was "not likely" to "result in a large number of immunity cases, as most foreign activities of such entities are likely to be commercial and will not be entitled to immunity." 119 Cong. Rec. 3436 (1973). By nonetheless bringing such entities within the FSIA's scope, Congress conferred on them its important procedural protections, as well as immunity from suit when undertaking sovereign functions.

## CONCLUSION

The court of appeals' ruling that petitioner is not an agency or instrumentality of British Columbia should be reversed. If the Court concludes that the court of appeals did not have jurisdiction of petitioner's appeal, the judgment of the court of appeals should be vacated only to that extent. See n.6, *supra*.

Respectfully submitted.

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## APPENDIX

1. 28 U.S.C. 1447(c) (1982) provides in pertinent part:

If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case and may order the payment of just costs. * * *.

2. 28 U.S.C. 1447(c) (1988) provides in pertinent part:

A motion to remand the case on the basis of any defect in removal procedure 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. * * *.

3. 28 U.S.C. 1447(c) (2000) provides in pertinent part:

A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal 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. * * *.