No. 08-871

In the Supreme Court of the United States

CANADIAN PACIFIC RAILWAY COMPANY, ET AL.,
PETITIONERS

v.

TOM LUNDEEN, ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the application of a statutory amendment to cases that were pending on appeal when the amendment was enacted violates the separation of powers principles associated with *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995).

2. Whether the application of a statutory amendment to cases that were pending on appeal when the amendment was enacted violates the separation of powers principles associated with *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes and rules:

Statutes and rules—Continued: Page

Miscellaneous:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is reported at 532 F.3d 682. The opinion of the district court (Pet. App. 81a-102a) is reported at 507 F. Supp. 2d 1006.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 2008. A petition for rehearing was denied on October 10, 2008 (Pet. App. 42a-60a). The petition for a writ of certiorari was filed on January 8, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On January 18, 2002, a freight train owned and operated by petitioners derailed near Minot, North Dakota. As a result of the derailment, more than 220,000 gallons of anhydrous ammonia were released into the air. Pet. App. 8a, 82a.

2. a. Respondents and others filed suit against petitioners in Minnesota state court. Petitioners removed the actions filed by respondents to federal district court. Respondents filed a motion to remand the cases to state court. The district court denied that motion, holding that a reference to "United States law" in respondents' complaints had alleged a federal cause of action and thus created a basis for federal subject matter jurisdiction. Pet. App. 8a-9a; 342 F. Supp. 2d 826 (D. Minn. 2004)

After the district court denied their motion to remand, respondents sought and were granted permission to amend their complaints to delete the reference to "United States law." The district court then granted respondents' renewed motions to remand their cases to state court. Pet. App. 9a; 2005 WL 563111 (D. Minn. Mar. 9, 2005). The court concluded that the complaints no longer pleaded any federal causes of action and that continuing to exercise supplemental jurisdiction over respondents' remaining state law claims "would be inappropriate" under the circumstances. 2005 WL 563111, at *2; see *Carnegie-Mellon Univ.* v. *Cohill*, 484 U.S. 343 (1988).

b. Petitioners appealed the district court's remand order, and the court of appeals reversed and remanded to the district court for further proceedings. Pet. App. 61a-78a (*Lundeen I*). In that decision, the court of appeals held that respondents' state law claims regarding negligent track inspection were completely preempted

by the Federal Railroad Safety Act of 1970 (FRSA), 49 U.S.C. 20101 *et seq*. Pet. App. 78a. As a result, the court of appeals concluded that any claims for negligent track maintenance were necessarily federal in nature and that "[t]he district court * * * has subject-matter jurisdiction in the instant case." *Ibid.* The court of appeals "remanded [to the district court] for proceedings consistent with this opinion." *Ibid.*

c. Respondents filed a petition for rehearing en banc. The court of appeals denied that petition, with two judges stating that they would have granted it. Pet. App. 79a. Respondents filed a petition for a writ of certiorari (No. 06-528), which this Court denied. *Id.* at 80a.

3. When the cases were returned to the district court, petitioners filed a motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). The district court granted that motion. Pet. App. 81a-102a. The court concluded that all of respondents' state law claims failed as a matter of law because they were "preempted by the FRSA" and because federal law did not provide respondents with a cause of action. *Id.* at 100a.

4. Respondents appealed the district court's dismissal of their amended complaints to the court of appeals. Pet. App. 7a. On August 3, 2007, while respondents' appeals were pending, the President signed into law the Implementing Recommendations of the 9/11 Commission Act of 2007 (2007 Act), Pub. L. No. 110-53, 121 Stat. 266. Section 1528 of the 2007 Act, 121 Stat. 453 (2007 Amendment), amended the preemption provision of the FRSA by adding two new subsections (Subsec-

tions (b) and (c)) to 49 U.S.C. 20106 (2000 & Supp. V 2005).[1]

Subsection (b) is captioned "Clarification Regarding State Law Causes of Action." 2007 Act § 1528, 121 Stat. 453. Subsection (b)(1) provides that "[n]othing in this section shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage" based on a failure to comply with certain enumerated standards of care. 49 U.S.C. 20106(b)(1). Subsection (b)(2) provides that "[t]his subsection shall apply to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002," 49 U.S.C. 20106(b)(2), the date of the Minot derailment. Subsection (c) is captioned "Jurisdiction." It states that "[n]othing in this section creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action." 49 U.S.C. 20106(c).

With leave of the court of appeals, the parties filed supplemental briefs addressing the impact of the 2007 Amendment on respondents' pending appeals. Pet. App. 11a. In their supplemental brief, petitioners argued that the 2007 Amendment is unconstitutional for a variety of reasons, Pet. C.A. Supp. Br. 11-59, 61-67, although they did not argue that it directs the reopening of final judgments as prohibited by *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). See Pet. C.A. Supp. Br. 27 n.9. The United States intervened and filed a brief defending the constitutionality of the 2007 Amendment. Pet. App. 11a; see 28 U.S.C. 517, 2403(a).

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[1] All citations of 49 U.S.C. 20106(b) and (c) are to the statute as it will be codified in Supplement I (2007) of the United States Code.

5. a. The court of appeals held that the 2007 Amendment is constitutional, vacated its earlier decision in *Lundeen I*, and remanded the cases to the district court with directions to remand them to state court. Pet. App. 1a-41a. The court of appeals rejected petitioners' contention that the 2007 Amendment violates separation of powers principles. The court stated that "Congress possesses the power to amend existing law even if the amendment affects the outcome of pending cases," and that "the separation of powers doctrine is violated only when Congress tries to apply new law to cases which have already reached a final judgment." *Id.* at 12a (citing *Plaut*, 514 U.S. at 218, 226). The court of appeals determined that Congress had not violated that principle here "because when the amendment became effective these cases were on appeal and had not reached final judgments." *Id.* at 13a. The court also rejected petitioners' argument that Congress's reference to the 2007 amendment "as a '[c]larification' of existing law somehow alters our analysis." *Ibid.* (brackets in original). The court of appeals stated that it was "obliged to apply the amendment to pending cases regardless of the label Congress attached to it," and it noted that "[t]he statute's clear language indicates that state law causes of action are no longer preempted under § 20106." *Ibid.*[2]

b. Judge Beam dissented. Pet. App. 18a-41a. In his view, "the jurisdictional finding of *Lundeen I* was a final

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[2] The court of appeals also rejected petitioners' arguments that the application of the 2007 Amendment to these cases violated the Due Process Clause (Pet. App. 13a-15a), the equal protection component of the Due Process Clause (*id.* at 16a-17a), and the Ex Post Facto Clause (*id.* at 17a). Petitioners do not renew those claims before this Court.

judgment that cannot constitutionally be reopened or reversed by Congress or this court." *Id.* at 37a-38a.[3]

6. Petitioners filed petitions for rehearing by the panel and for rehearing en banc. The court of appeals denied those petitions. Judge Beam dissented. Pet. App. 42a-60a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of another court of appeals. In any event, this petition for a writ of certiorari would not be an appropriate vehicle for considering petitioners' constitutional claims. Further review is therefore unwarranted.

1. Petitioners contend (Pet. 11-12) that the application of the 2007 Amendment to these cases violates the separation-of-powers principles set forth in *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). In *Plaut*, this Court considered whether amendments to the Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.*, could constitutionally revive a suit in which the plaintiffs' claims had been dismissed, final judgment had been en-

[3] Judge Beam also concluded that, as a statutory matter, respondents' state law claims were still preempted notwithstanding the enactment of the 2007 Amendment, Pet. App. 26a-36a, and that "none of the issues decided by [the district court] or this panel in *Lundeen I* are reached by the language of" the 2007 Amendment, *id.* at 37a.

Petitioners have not sought further review of the court of appeals' decision based on any of the statutory grounds identified by Judge Beam, see Pet. i, and their assertion in a one-sentence footnote that the constitutional issues upon which they do seek review "could be avoided by construing the statute narrowly," Pet. 11 n.2, is insufficient to preserve any statutory questions for this Court's review. In any event, petitioners do not even directly assert that the court of appeals' statutory analysis is incorrect, much less that it conflicts with any decision of this Court or of another court of appeals.

tered, and the time for appeal had expired. See 514 U.S. at 214. Because the new statute "retroactively command[ed] the federal courts to reopen final judgments" —that is, judgments that "conclusively resolve[d] the case"—this Court held that Congress had exercised authority reserved for the Judiciary, in violation of the separation of powers. *Id.* at 219 (quoting Frank H. Easterbrook, *Presidential Review*, 40 Case W. Res. L. Rev. 905, 926 (1990)).

a. The court of appeals correctly held that the application of the 2007 Amendment to these cases does not violate *Plaut*. Section 20106(b)(2) expressly provides that "[t]his subsection shall apply to *all pending* State law causes of action arising from events or activities occurring on or after January 18, 2002." 49 U.SC. 20106(b)(2) (emphasis added). No final judgments had been entered in respondents' suits when the 2007 Amendment was enacted; to the contrary, those suits were pending on appeal at the time. As the court of appeals correctly explained, "[w]hen a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly." Pet. App. 12a (quoting *Plaut*, 514 U.S. at 226); cf. *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 576 (2006) (noting that this Court has "applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed") (quoting *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 274 (1994)).

Petitioners assert that the Eighth Circuit's "jurisdictional determination" (Pet. 12) in *Lundeen I* constituted a "final judgment" (Pet. 11) within the meaning of *Plaut*. That contention is without merit. Although "[f]inality is

variously defined," *Clay* v. *United States*, 537 U.S. 522, 527 (2003), *Plaut* makes clear that there has been no final judgment for separation-of-powers purposes until the entire "case[]" or "suit[]" has been "*finally* dismissed," 514 U.S. at 217; see *id.* at 225 ("When retroactive legislation requires its own application in a *case* already finally adjudicated, it does no more and no less than 'reverse a determination once made, in a particular case.'") (emphasis added; citation omitted). In fact, *Plaut* specifically identified "suits still pending on appeal" as a situation in which there has *not* yet been a final judgment. *Id.* at 217.

Petitioners assert that this Court's denial of a writ of certiorari in connection with petitioners' previous interlocutory appeal rendered the court of appeals' jurisdictional holding in *Lundeen I* "the final word of the judicial department." Pet. 12 n.4; see Pet. 11-12. But this Court has explained that its denial of a petition for a writ of certiorari at an interlocutory stage of a case does not even conclusively resolve any discrete question of law. See *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 257 (1916) (characterizing the contrary position as "based on an erroneous view" of the Court's certiorari jurisdiction); Eugene Gressman et al., *Supreme Court Practice* 283 (9th ed. 2007) (Gressman) ("Denial of certiorari at the interlocutory stage of a proceeding is without prejudice to renewal of the questions presented when certiorari is later sought from the final judgment.") (citing cases). Neither the Eighth Circuit's interlocutory ruling in *Lundeen I* nor this Court's subsequent denial of certiorari expressed "the final word of the [judicial] department as a whole" with respect to these cases. *Plaut*, 514 U.S. at 227. To the contrary, because federal courts have a continuing and independ-

ent obligation to satisfy themselves that they and any lower courts possess subject matter jurisdiction, see, *e.g.*, *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 95 (1998), a court's initial holding that it possesses jurisdiction over a particular action cannot be deemed "final" until the case has been resolved in its entirety and a final judgment has been entered.

b. Petitioners have failed to demonstrate that the court of appeals' decision in this case conflicts with a decision of any other court of appeals. Petitioners rely most prominently on *United States* v. *Vazquez-Rivera*, 135 F.3d 172 (1st Cir. 1998). See Pet. 13. *Vazquez-Rivera*, however, was a criminal prosecution, and it involved an ex post facto challenge to an amended sentencing statute, not a separation-of-powers challenge to an amended jurisdictional statute, which is what this case involves. See 135 F.3d at 177 ("[T]here should be little doubt that the application of the provisions of the Carjacking Correction Act to appellant * * * violates the ex post facto clause of the Constitution."). As the court of appeals correctly explained, the Ex Post Facto Clause "applies only in the criminal context." Pet. App. 17a.

Petitioners quote (Pet. 13) language in *Vazquez-Rivera* in which the First Circuit declined to revisit its earlier interpretation of the pre-amendment statute on the ground that Congress's "labeling [of] the * * * amendment as a 'clarification' of Congress's intent in the original law [was] legally irrelevant." 135 F.3d at 177.[4]

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[4] As petitioners correctly note (see Pet. 13), the *Vazquez-Rivera* panel cited *Plaut* in support of this proposition, and it also stated that "post hoc statements regarding the original legislative intent do not affect this court's previous, and final, finding as to what that intent was." *Vazquez-Rivera*, 135 F.3d at 177. But the *Vazquez-Rivera* panel did not

There is no conflict between that statement and the court of appeals' decision in this case. The court of appeals did not hold that the 2007 Amendment required it to alter its previous view about the correct interpretation of the pre-2007 law, and it expressly declined to attach any significance to Congress's decision to label the 2007 Amendment a "[c]larification." Pet. App. 13a (brackets in original). Instead, the court of appeals held that the 2007 Amendment meant that "state law causes of action are *no longer preempted* under § 20106." *Ibid.* (emphasis added).

There is likewise no conflict (see Pet. 13-14) between the court of appeals' decision in this case and decisions of other courts of appeals stating that Congress lacks the power to alter the result in completed cases simply because certain collateral proceedings persist. As explained above, the present appeals are not "a collateral attack upon an adverse judgment." *Insurance Corp. of Ir.* v. *Compagnie des Bauxites*, 456 U.S. 694, 702 n.9 (1982). Instead, they are a *continuation* of the primary litigation that was previously the subject of an interlocutory appeal in *Lundeen I*.[5]

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elaborate further on that latter statement, and it ultimately *upheld* the imposition of an enhanced sentence under the pre-enactment statute. *Id.* at 177-178. As a result, the First Circuit's abbreviated reasoning on this score, which was not essential to its holding, does not contradict the court of appeals' decision in this case, let alone furnish adequate ground for this Court's review.

[5] In fact, petitioners cite cases (see Pet. 14) that expressly recognize that Congress *may* amend the rules that govern pending litigation, and that Congress may do so even "after [the pre-amended rules] have been applied in a case," so long as the amendment is promulgated "before final judgment has been entered." *United States* v. *Enjady*, 134 F.3d 1427, 1429-1430 (10th Cir.) (quoting *Plaut*, 514 U.S. at 229), cert. denied, 525 U.S. 887 (1998); see *ibid.* (applying amended version of Fed-

2. Petitioners also contend (Pet. 16-26) that the application of the 2007 Amendment in these cases conflicts with *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872). In *Klein*, the administrator of a Confederate sympathizer's estate sued to recover for property seized during the Civil War, based on legislation authorizing payment to owners who proved that they had not aided the rebellion. *Id.* at 136, 138-139, 142-143. This Court had previously held that a Presidential pardon (which the decedent had received) satisfied that burden of proof. *United States* v. *Padelford*, 76 U.S. (9 Wall.) 531, 542-543 (1870). After Klein prevailed in the Court of Claims, however, Congress enacted a statute providing that a pardon would instead be taken as proof that an individual had aided the Confederacy and eliminating federal jurisdiction over such claims. *Klein*, 80 U.S. (13 Wall.) at 143-144. This Court held that the statute was unconstitutional, stating that the legislation had improperly attempted to "prescribe rules of decision to the Judicial Department of the government in cases pending before it." *Id.* at 146.

a. The court of appeals' decision in this case is fully consistent with *Klein*. As this Court has explained, *Klein* relied on a combination of factors to hold Congress's enactment unconstitutional, including the fact that Congress had assured a favorable result for the

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eral Rule of Evidence 413 on appeal, even though the court of appeals had held in a previous appeal that the pre-amendment version did not permit the introduction of certain evidence and the defendant's trial had occurred before the amended version of the Rule took effect); accord *Hernandez-Rodriguez* v. *Pasquarell*, 118 F.3d 1034, 1042 (5th Cir. 1997) (stating that courts must apply new amendments "in reviewing judgments still on appeal that were rendered before the law was enacted") (quoting *Plaut*, 514 U.S. at 226).

government in all cases and had infringed upon the President's pardon power. *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 404-405 (1980). Those factors are not present here.

Even assuming that *Klein* retains some force in situations that do not involve either of the two factors mentioned above, moreover, this Court has made clear that *Klein* does not apply when Congress "amend[s] applicable law" or "set[s] out substantive legal standards for the Judiciary to apply." *Plaut*, 514 U.S. at 218 (first set of brackets in original) (quoting *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992)). The 2007 Amendment alters the FRSA in a manner that sets out substantive standards. The new statute enumerates specific categories of suits that may proceed in state court, notwithstanding certain statutory principles of federal preemption in the field of railroad safety. In particular, new Subsection (b)(1) sets forth a limited class of duties and types of recovery, and provides that "[n]othing in this section shall be construed to preempt an action under State law" meeting those criteria. 49 U.S.C. 20106(b)(1). That standard applies to all causes of action accruing after the statute's effective date, see *Fernandez-Vargas* v. *Gonzales*, 126 S. Ct. 2422, 2428 (2006), as well as all "pending State law causes of action" that arise from events "occurring on or after January 18, 2002," 42 U.S.C. 20106(b)(2).

The 2007 Amendment does not require any particular findings or results in cases to which it applies. It expresses no position on whether respondents in this case (or any other plaintiffs) have stated a cause of action for breach of any of the duties listed in Subsection (b), and thus whether their claims avoid preemption. Rather, the 2007 Amendment establishes a standard that governs

current and future railway tort suits; it elaborates particular duties of care and classes of injury and provides that state lawsuits involving those duties and injuries may proceed without federal preemption. The statute does not "instruct[] a court automatically to enter a judgment pursuant to a decision the court has no authority to evaluate," *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 430 (1995), but instead provides a general standard under which railroad safety suits may be judged by the courts in particular cases.

Petitioners err in contending (Pet. 18-19, 25-26) that the 2007 Amendment violates the principles identified in *Klein* because the heading that Congress chose for new Subsection (b) contains the word "[c]larification." Congress's choice of that word likely reflects nothing more than the fact that, before the 2007 Amendment, federal courts had disagreed about whether the FRSA preempted only state law standards of care or also state law remedies. Compare Pet. App. 61a-78a (holding the latter), with *Michael* v. *Norfolk S. Ry.*, 74 F.3d 271, 273 (11th Cir. 1996) (holding the former).[6] In any event, as the court of appeals correctly explained, "the label Congress attache[s] to" a particular piece of legislation is

[6] Petitioners assert that this Court has "construed" Section 20106 to preempt not just state tort law, but all state law causes of action addressing the "'same subject matter'" as that "'cover[ed]' by federal regulations and not within the scope of the savings provision." Pet. 3 n.1 (brackets in original) (quoting *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664-665 (1993) (*CSX*)). That is incorrect. *CSX* held that the pre-2007 Amendment version of Section 20106 preempted state tort law that would impose duties of care beyond those imposed by federal regulation. This Court has never passed upon whether plaintiffs may bring state claims for violations of a duty of care imposed by federal regulations. See *CSX*, 507 U.S. at 671; *Norfolk S. Ry.* v. *Shanklin*, 529 U.S. 344, 357 (2000).

simply not controlling in assessing that legislation's substantive effect or its constitutionality. Pet. App. 13a. "Congress, of course, has the power to amend a statute that it believes [the courts] have misconstrued." *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 313 (1994); see *Lane* v. *Pena*, 518 U.S. 187, 212 n.15 (1996) (Stevens, J., dissenting) ("In recent years Congress has enacted numerous pieces of legislation designed to override statutory opinions of this Court."). Congress did so here by codifying the Eleventh Circuit's interpretation and providing that it would govern all pending and future cases.[7]

b. Petitioners have failed to demonstrate that the court of appeals' rejection of their *Klein* claim conflicts with a decision of any other court of appeals. The courts of appeals have repeatedly rejected *Klein*-based challenges to statutes (like the 2007 Amendment) in which Congress has amended applicable law and set forth a new substantive standard for the judiciary to apply. See *Green* v. *French*, 143 F.3d 865 (4th Cir. 1998) (rejecting *Klein*-based challenge to the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-332, 110 Stat. 1214), cert. denied, 525 U.S. 1090 (1999); *Lindh* v. *Murphy*, 96 F.3d 856 (7th Cir. 1996) (en banc) (same), rev'd on other grounds, 521 U.S. 320 (1997); see also Pet. 20-21 (discussing *Green* and *Lindh*). Petitioners fail to cite a single case in which a federal court has relied upon

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[7] Petitioners err in assserting (Pet. 18) that Congress "disclaim[ed] any intent to change the text or meaning of § 20106." Congress added two entirely new subsections of text, and it provided that, regardless of what the statute had previously meant, "[n]othing in this section creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action." 49 U.S.C. 20106(c).

Klein to invalidate a federal statute—much less a case in which a federal court has relied upon *Klein* to declare unconstitutional the particular statute that is actually before the Court here.[8]

3. Even assuming that the constitutional claims raised by petitioners would otherwise merit this Court's review (and they do not), there are also at least two reasons why this petition for a writ of certiorari would not present an appropriate vehicle for considering them.

a. The core of petitioners' argument to this Court is that the 2007 Amendment is unconstitutional because it required the court of appeals to vacate its interlocutory decision in *Lundeen I*. It is far from clear, however, that the Eighth Circuit possessed appellate jurisdiction to render that decision in the first place. Cf. *Steel Co.*, 523 U.S. at 95 ("[E]very federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause

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[8] The various dissenting opinions in the courts of appeals on which petitioners rely (see Pet. 24-25) do not merit this Court's review.

Petitioners also suggest (Pet. 21-23) that this case "provides an unusually good vehicle" to resolve a "related circuit split" over the weight to be given clarifying amendments in interpreting prior legislation. Any such split, however, is not implicated here. Issues about the proper weight to be accorded to clarifying legislation arise when a court is being asked to interpret a party's rights under the *prior* version of a statute in light of *subsequent* legislation. That was the situation involved in all of the cases cited in the relevant portions of pages 22 and 23 of the petition for a writ of certiorari. In this case, however, the court of appeals did not revise its interpretation of the *pre*-2007-Amendment statute in light of the 2007 Amendment. To the contrary, it viewed the 2007 Amendment as establishing that "state law causes of action *are no longer preempted*." Pet. App. 13a (emphasis added).

under review.") (internal quotation marks and citation omitted).[9]

As explained previously, the order of the district court that was appealed in *Lundeen I* had held that respondents' amended complaints asserted no federal claims and had remanded the remaining state law claims to state court pursuant to the district court's discretion under *Carnegie-Mellon University* v. *Cohill*, 484 U.S. 343 (1988). See 2005 WL 563111, at *2. Section 1447(d) of Title 28, United States Code, however, provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise."[10] 28 U.S.C. 1447(d). The Eighth Circuit's decision in *Lundeen I* made no mention of Section 1447(d), which bars appellate review whenever a district court "relie[s] upon a ground that is colorably characterized as subject-matter jurisdiction." *Powerex Corp.* v. *Reliant Energy Servs., Inc.*, 127 S. Ct. 2411, 2418 (2007).

This Court has "never passed on whether *Cohill* remands are subject-matter jurisdictional for purposes of" Section 1447(d), and it has described the matter as "far from clear." *Powerex Corp.*, 127 S. Ct. at 2416. On

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[9] Even assuming that the court of appeals had appellate jurisdiction in *Lundeen I*, moreover, it is far from clear that *Lundeen I*'s complete preemption holding—which formed the basis for the court of appeals' conclusion that the district court had federal question jurisdiction even after the amendments to the complaints—was itself correct. Cf. *Empire HealthChoice Assurance, Inc.* v. *McVeigh*, 547 U.S. 677, 698 (2006) ("If Congress intends a preemption instruction completely to displace ordinarily applicable state law, and to confer federal jurisdiction thereby, it may be expected to make that atypical intention clear.").

[10] Section 1447(d) exempts from this general rule "an order remanding a case to the State court from which it was removed pursuant to [28 U.S.C. 1443]." 28 U.S.C. 1447(d). These cases, however, were removed pursuant to 28 U.S.C. 1441. See 342 F. Supp. 2d at 828.

February 24, 2009, the Court heard oral argument in *Carlsbad Tech., Inc.* v. *HIF Bio, Inc.*, No. 07-1437, which presents the question whether a *Cohill* remand "is properly held to be a remand for a 'lack of subject matter jurisdiction' under 28 U.S.C. § 1447(c) so that such remand order is barred from any appellate review by 28 U.S.C. § 1447(d)." Pet. Br. at i, *Carlsbad Tech, Inc.*, *supra* (No. 07-1437). If the Court answers that question "yes," the Eighth Circuit's decision in *Lundeen I* would have been issued without subject matter jurisdiction and petitioners' constitutional objections (which are founded on that decision) would be fatally compromised.

b. There is an additional reason why the Court should decline to grant review. We have been advised that state court proceedings in the remanded cases are currently ongoing, that the parties are actively engaged in discovery, that the majority of the actions pending at the time of the court of appeals' decision have since been resolved and dismissed, and that trial in the remaining suits is set for early 2010. The state court is an "equally competent body" to adjudicate petitioners' preemption defense under the FRSA, and "any claim of error on that point can be considered on review by this Court." *Kircher* v. *Putnam Funds Trust*, 547 U.S. 633, 646, 648 (2006); accord *Board of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); Gressman 280.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2009