No. 01-757

IN THE

Supreme Court of the United States

SYNGENTA CROP PROTECTION, INC., ROBERT BABB, EDEE TEMPLET, AND KENNETH A. DEVUN,
Petitioners,

v.

HURLEY HENSON,
Respondent.

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

BRIEF OF THE STATE OF TEXAS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Does the All Writs Act, 28 U.S.C. § 1651(a), authorize the removal of civil actions to federal district court?

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INTEREST OF *AMICUS CURIAE*

Texas appears in support of Respondent, *see* SUP. CT. R. 37.4, urging the Court to affirm the judgment of the Eleventh Circuit and hold that the All Writs Act, 28 U.S.C. § 1651(a), does not authorize the removal of civil actions to federal district court. Texas has been involved in litigation in which the All Writs Act has been invoked repeatedly as a means of removing proceedings initiated by the state and in contravention of the state's Eleventh Amendment immunity. *See, e.g.*, *Texas v. Real Parties in Interest*, 259 F.3d 387 (CA5 2001). While the Fifth Circuit has expressed considerable doubt about the propriety of a removal under the All

Writs Act, it has not yet been willing to reject categorically a federal court's power to exercise jurisdiction over a case removed solely on the basis of the All Writs Act. Texas has expended substantial time and resources litigating this issue and has a strong interest in having it fully resolved.

In some, but not all of the circuit and district court decisions approving removal under the All Writs Act, the asserted basis for removal has been the existence of a prior federal judgment said to be preclusive of a subsequent state court action. The present case raises the All Writs Act removal question in this preclusion context. Other courts have upheld removal under § 1651(a) on the assertion that a subsequent state case threatened to interfere with a federal court's jurisdiction before judgment in separate, on-going proceedings. Although this case raises the All Writs Act removal question in the preclusion context, the question on which this Court granted *certiorari* touches both contexts and thereby implicates Texas's broader interests. Texas believes it is appropriate for the Court to declare, consistent with the text, structure, and history of the All Writs Act, that under no circumstances may the All Writs Act be invoked to remove civil actions to federal district court.

SUMMARY OF ARGUMENT

The All Writs Act may not be relied upon to remove civil actions to federal district court.

A. The plain and unambiguous language of 28 U.S.C. § 1651(a) does not confer original jurisdiction on the district courts. This is significant because in the general removal statute, 28 U.S.C. § 1441, Congress has authorized removal only of civil actions of which the federal court would have had "original jurisdiction" had suit been commenced in the federal forum. The Court has insisted on strict adherence to the § 1441 original jurisdiction requirement and recently reiterated that although Congress possesses the power to

authorize removal without an accompanying grant of original jurisdiction to the federal courts, it must do so expressly. *Rivet v. Regions Bank*, 522 U.S. 470, 474 (1998).

Further proof that the statute plainly and unambiguously does not vest district courts with authority to exercise jurisdiction over a case removed under the All Writs Act may be found by comparing § 1651(a) to other statutes that expressly authorize removal. Not only has Congress specifically granted a right of removal in a number of statutory provisions, but on every occasion it has done so, Congress has either included particular procedures to govern removal in the specific statute itself or incorporated by reference the general procedural rules on removal contained in 28 U.S.C. §§ 1446-50. By comparison, the All Writs Act contains no reference to removal, let alone any specific procedural guidelines that would apply to a removal effected under § 1651(a). Congress did not intend to vest district courts with authority to exercise jurisdiction over cases removed under §1651(a). The Court should not read into the statute what Congress has declined to write into it.

B. Two centuries of history of the All Writs Act demonstrates that the drafters of the original "all other Writs" clause of § 14 of the Judiciary Act of 1789 did not intend the statutory provision to vest the lower federal courts with original jurisdiction or to be used to authorize the removal of civil actions. The drafters' purpose in enacting § 14 solely was to grant power to enforce the limited jurisdiction the lower federal courts were accorded in other statutory provisions of the Act. Neither the First Congress nor any since have intended the All Writs Act to carry additional, unstated and expansive powers to authorize removal beyond those removal rights narrowly enumerated in other statutory provisions.

C. Even if the plain and unambiguous language of the statute and its legislative history are ignored, removal under

the All Writs Act is not authorized because the exercise of writ power is neither "necessary" nor "appropriate." In a long line of cases, the Court has insisted that where adequate, alternative remedies exist, resort may not be made to the All Writs Act to fashion "ad hoc" relief. Long before the Second Circuit first read additional removal authority into the All Writs Act, federal judgments were protected adequately by state courts applying preclusion law to determine the preclusive effect of prior federal judgments. A district court's jurisdiction both before and after judgment may also be protected through the issuance of injunctive relief by the federal court. Because preclusion law and injunctive relief are adequate alternatives to removal, § 1651(a) may not be invoked to remove a civil action to federal court.

D. The exercise of ancillary jurisdiction will not validate removal under the All Writs Act of a civil action lacking an independent basis of federal subject matter jurisdiction. The right of removal is entirely a matter of legislative prerogative, and it is one that Congress has narrowly accorded since 1789. Drawing on a federal court's ancillary jurisdiction to justify removal under the All Writs Act invites judicial usurpation of the legislature's authority to define the scope of the privilege of removal. Additionally, Congress has set forth in the Anti-Injunction Act, 28 U.S.C. § 2283, three narrow and limited exceptions to the general rule of non-interference in state judicial proceedings. To read the All Writs Act as an independent source of removal authority substitutes the stringent standards in the Anti-Injunction Act for an inchoate, ill-defined measure of "extraordinary circumstances" that pays no heed to the strict limits of § 2283. As the Eleventh Circuit observed in its opinion in the present case, permitting removal based exclusively on the All Writs Act "perverts" § 1651(a) "from a tool for effectuating Congress's intent into a device for judicially reequalibrating a state-federal balance that is Congress's to strike." *Henson v. Ciba-Geigy Corp.*, 261 F.3d 1065, 1071 (CA11 2001).

ARGUMENT

I. THE PLAIN, UNAMBIGUOUS LANGUAGE OF THE ALL WRITS ACT DOES NOT VEST DISTRICT COURTS WITH AUTHORITY TO EXERCISE JURISDICTION OVER A CASE REMOVED UNDER § 1651(a).

A. The Language of the All Writs Act is Plain and Unambiguous and Does Not Confer Original Jurisdiction on the District Courts.

The plain and unambiguous language of § 1651(a) does not confer original jurisdiction on the federal district courts. In the All Writs Act, the Supreme Court and lower federal courts are given authority to issue writs "in aid of their respective jurisdictions." This contrasts sharply with the language of numerous other statutory provisions in Title 28 in which Congress specifically has conferred "original jurisdiction" on the federal courts.[1] The plain and unambiguous language of the All Writs Act demonstrates, then, that Congress did not confer original subject matter jurisdiction on the federal district courts in the Act.

That the language of the All Writs Act plainly and unambiguously does not confer original jurisdiction long has been accepted by this Court. *See, e.g., Clinton v. Goldsmith*, 526 U.S. 529, 534 (1999)(observing that "[w]hile the All Writs Act authorizes employment of extraordinary writs, . . . the express terms of the Act confine the power of the CAAF to issuing process 'in aid of' its existing statutory jurisdiction;

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[1] *See* 28 U.S.C. §§ 1330, 1331, 1332, 1333, 1335, 1337(a), 1338(a), 1339, 1340, 1343, 1344, 1345, 1346(a), 1347, 1348, 1350, 1351, 1352, 1353, 1354, 1355, 1356, 1357, 1361, 1362, 1363, 1365 and 1368. In addition to these grants of "original jurisdiction" in Title 28, Congress has also provided the federal district courts with "original jurisdiction" under other titles of the United States Code. *See, e.g.*, 33 U.S.C. § 466g-1.

the Act does not enlarge that jurisdiction"); *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. 34, 41 (1985)(remarking that §1651(a) may be used only for "filling the interstices of federal judicial power when those gaps threatened to thwart the otherwise proper exercise of federal courts' jurisdiction"); *Covington & Cincinnati Bridge Co. v. Hager*, 203 U.S. 109, 110 (1906)(observing that "[i]t has been too frequently decided in this court to require the citation of cases that the circuit courts of the United States have no jurisdiction in original cases of mandamus, and have only power to issue such writs in aid of their jurisdiction in cases already pending, wherein jurisdiction has been acquired by other means and by other process").

Congressional failure to provide for "original jurisdiction" in the All Writs Act is significant. In the general removal provision, 28 U.S.C. § 1441, Congress has authorized removal only of civil actions of which the federal court would have had "original jurisdiction" had suit been initiated there. This Court has insisted on close adherence to the requirements of § 1441. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987)("Only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant."); *Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838, 840 (1989)(citing 28 U.S.C. § 1441(a) for the general proposition that "'[e]xcept as otherwise expressly provided by Act of Congress, a case is not properly removed to federal court unless it might have been brought there originally"). Because the unambiguous language of the All Writs Act does not confer original jurisdiction on the federal courts, predicating removal on the All Writs Act impermissibly expands the subject matter jurisdiction of the federal district courts beyond the maximum limits authorized by Congress.

While it is true that Congress, in its discretion, may authorize removal jurisdiction without conferring original

jurisdiction on the district courts, there is no indication that Congress intended to do so in the All Writs Act. In the few instances in which Congress has authorized removal of a case without directly conferring original jurisdiction, it has done so by conferring the privilege of removal specifically and expressly in the statutory language. *See, e.g.*, 28 U.S.C. §1442 (allowing removal of civil or criminal suits and without regard to whether the claims arise under federal law within the meaning of 28 U.S.C. § 1331 or the diversity requirements of 28 U.S.C. § 1332 have been satisfied); 28 U.S.C. § 1442a (same); 28 U.S.C. § 1443 (allowing removal of an action seeking to enforce a right under any law providing for equal civil rights); *see also Oklahoma Tax Comm'n*, 489 U.S., at 841 (holding state tax case against Indian tribe was improperly removed where district court lacked original jurisdiction over the case and observing that "[t]he jurisdictional question in this case is not affected by the fact that tribal immunity is governed by federal law. . . . Congress has expressly provided by statute for removal when it desired federal courts to adjudicate defenses based on federal immunities."). By contrast, § 1651(a) contains no mention of any removal authority and the Court has emphasized that, although Congress possesses the power to authorize removal without an accompanying grant of original jurisdiction, it must do so expressly. *Rivet v. Regions Bank*, 522 U.S. 470, 474 (1998).

B. Further Proof of the All Writs Act's Plain Meaning Is Evident in the Absence of Specific Details, Procedures and Limits for Removal in § 1651(a).

In every instance in which Congress has granted removal authority it has provided specific criteria to address by whom, of what, to where, and how removal will be permitted, either in the specific statute itself, or by making applicable the general procedural rules on removal contained in 28 U.S.C.

§§ 1446-50. Thus, in 9 U.S.C. §205, Congress promulgated specific removal authority for matters relating to an arbitration agreement or award under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards but prescribed that the general procedures for removal in §§ 1446-50 be used. *See* 9 U.S.C. § 205 ("The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal."). In other statutory enactments in which removal has been authorized, Congress has chosen to promulgate specific removal procedures to be followed, rather than cross-reference the general procedures in §§ 1446-50. *See, e.g.*, 12 U.S.C. § 1819(b)(2)(B).

By comparison, the All Writs Act contains neither reference to particular removal procedures nor cross-reference to the general removal procedures in §§ 1446-50. That absence is significant because the privilege of removal is entirely a matter of legislative prerogative. No provision in the Constitution allows removal of cases from state to federal court. While a right of removal has been authorized continuously from the Judiciary Act of 1789 to the present day, Congress has never conferred removal authority to the full extent permissible under Article III, just as it has never conferred on the federal courts all of the original jurisdiction Article III would allow.[2] Consequently, it would be inconsistent with a

[2] *See generally* Richard H. Fallon, Jr. et al., Hart and Wechsler's The Federal Courts and the Federal System 32 (4th ed. 1996) [hereinafter Hart & Wechsler]("When the respective jurisdictions of the district and circuit courts and the Supreme Court are viewed together, the 1789 Act fell short of vesting the federal courts in "all Cases" in which Article III would have permitted jurisdiction based primarily on subject matter); 13 Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 3503, at 9 (2d ed. 1996)(observing that "at no time in history has the entire judicial power been vested in the federal courts").

plain and unambiguous reading of the All Writs Act to maintain that Congress intended to vest district courts with authority to exercise jurisdiction over a case removed under § 1651(a) when it set specific limitations on the privilege of removal in all other enabling legislation. Congress plainly has not conferred removal authority in the All Writs Act or legislated specific procedures for removal under the statute, and the Court should not read into the statute what Congress has declined to write into it.

The plain and unambiguous text of the All Writs Act demonstrates no intent by Congress to confer original jurisdiction on the district courts or to otherwise sanction removal under § 1651(a). Where the statutory language is unambiguous and the "statutory scheme is coherent and consistent," no further inquiry is warranted. *See Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'")(internal citations omitted).

II. LEGISLATIVE AND JUDICIAL HISTORY CONFIRM THAT THE ALL WRITS ACT DOES NOT AUTHORIZE REMOVAL.

The historical record of congressional intent in enacting the original "all other Writs" provision of the Judiciary Act of 1789 demonstrates the First Congress did not intend it to serve as an independent source of jurisdiction for the lower federal courts or to be used to authorize the removal of civil actions. This evidence of legislative intent is itself further supported by the widely accepted historical account of the context in which the First Judiciary Act was enacted. Section 14 was promulgated by a legislature torn by

conflicting attitudes toward the lower federal courts being created. The compromises reflected in the Act, which are reflective of the battles waged between the broad and narrow pro-Constitution forces, cannot be squared with the belief that a majority of legislators ceded unbridled and additional removal authority on the lower federal courts in § 14 to hear cases otherwise not within the limited jurisdiction accorded to them.

A. Statutory Antecedents of § 1651(a).

The All Writs Act had its beginning in §§ 13 and 14 of the Judiciary Act of 1789. *See* Judiciary Act of 1789, ch. 20, §§ 13 and 14, 1 Stat. 73, 81-2.[3] When Congress enacted the 1948 codification of the Judicial Code, it consolidated §§ 342, 376, and 377 of the Judicial Code of 1940 into 28 U.S.C. § 1651(a). Sections 342, 376 and 377 of the 1940 Code, in turn, had been derived from §§ 234, 261, and 262 of the Judicial Code of 1911. *See* Act of March 3, 1911, ch. 231, 36 Stat. 1156, 1162. Prior to 1911, §§ 13 and 14 of the 1789 Act were the sole sources of power for the Supreme Court and lower federal courts to issue extraordinary writs. The statutory language of §1651(a) promulgated in the 1948 codification remains unchanged. *See* 28 U.S.C. § 1651(a) (1994) (amending 28 U.S.C. § 1651(a) (1948)).

The 1948 codification of § 1651(a) deleted the phrase "not specially provided for by statute," originally found in § 14 of the First Judiciary Act. The legislative history indicates, however, that the recodification made only "necessary

[3] Section 13 authorized the Supreme Court to issue writs of prohibition to the district courts "when proceeding as Courts of admiralty and maritime jurisdiction; and writs of mandamus in cases warranted by the principles and usages of law, to any Courts appointed, or persons holding office, under the authority of the United States." *See* Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 81.

changes in phraseology" and not substantive modifications to the prior statutory sections. *See* 28 U.S.C. §1651(a) (1994) (reviser's note). Section 1651(a) continued to be limited by the pre-existing statutory requirement that writs may issue only after a federal court's jurisdiction otherwise has been established. *See id*. The legislative history of §1651(a) also reveals that the new section was intended to codify the holding of the Supreme Court in *United States Alkali Export Ass'n v. United States*, 325 U.S. 196 (1945). *See* 28 U.S.C. § 1651(a) (1994) (reviser's note). In *Alkali*, the Court reversed the district court's use of the All Writs Act power, observing that the "writs may not be used as a substitute for an authorized appeal; and where, as here, the statutory scheme permits appellate review of interlocutory orders only on appeal from the final judgment, review by certiorari or other extraordinary writ is not permissible." *Alkali*, 325 U.S., at 203.[4]

As a result of the revisions made by Congress to the Judicial Code in 1948, the All Writs Act is now the only statutory authority on which the issuance of extraordinary writs (excluding writs of habeas corpus) may be based. *See* Hart & Wechsler, at 343 (noting that "the only statutory authority for the issuance of the extraordinary writs . . . is . . . the famous all-writs section—now 28 U.S.C. §1651(a)").

B. Interpreting Legislative Intent.

Although there is "scant" historical evidence of legislative intent regarding §§ 13 and 14 of the Judiciary Act of 1789, *see Pennsylvania Bureau of Correction*, 474 U.S., at 41, it is still possible to determine legislative intent (i) by considering the structure of the statutory language and (ii) by comparing

[4] This latter portion of § 1651(a)'s legislative history is especially relevant to the argument that, where adequate, alternative remedies exist, resort to the All Writs Act is unwarranted. *See infra* Part III.

this evidence with what is known about the period generally in terms of legislative attitudes in the First Congress toward the lower federal courts that were being created in the 1789 Act. Together, this evidence demonstrates that in promulgating § 14 the First Congress did not intend to confer original jurisdiction on the lower federal courts beyond the limited jurisdiction given in other provisions of the Act.

Section 14, drafted by Oliver Ellsworth,[5] was not discussed at any length in the debates in the First Congress regarding enactment of the Judiciary Act of 1789. Only one change to §14 was recorded.[6] The final version, as reflected in the Act's enrolled version, provided in relevant part:

> [A]ll the before mentioned Courts of the United States shall have power to issue writs of Scire facias, habeas Corpus, and all other Writs not specially provided for by Statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.[7]

The language of § 14 is strongly suggestive that the First Congress did not intend the statutory provision to serve as an independent source of original jurisdiction for the lower

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[5] *See* 4 The Documentary History of the Supreme Court of the United States, 1789-1800, Organizing the Federal Judiciary: Legislation and Commentaries, at 36 (Maeva Marcus et al. eds., 1992)[hereinafter DHSC] (noting that "sections 10-24 [of the original Senate bill of the Judiciary Act] are in Oliver Ellsworth's hand").

[6] In DHSC, Professor Marcus remarks that the words "subpoena & protection for witnesses" were probably excised from the original manuscript senate bill, first read in the Senate on June 12, 1789, by the senate judiciary committee and did not appear in the printed Senate bill, which was produced between June 12 and June 16, 1789. *See* 4 DHSC, at 36, 71.

[7] *See* 4 DHSC, at 71.

federal courts.[8] Section 14 distinguishes between the writs that are listed by name in the 1789 Act—scire facias and habeas corpus in § 14 and mandamus and prohibition in § 13—and "all other Writs not specially provided for by Statute." Section 14 authorizes issuance of the former, named writs without qualification; but under the "all other Writs" clause the federal courts could not issue one of the unnamed writs unless it was shown that issuance was "necessary for the exercise of their respective jurisdictions." Constructed in this fashion, the language of § 14 makes only the latter, unnamed writs expressly subject to the limitation of prior jurisdiction having been established.

The grant of general removal jurisdiction in the Judiciary Act of 1789 further supports this understanding of § 14's "all other Writs" provision. In §12 of the First Judiciary Act, when the amount in controversy was $500 or more, Congress expressly authorized removal to federal circuit court for alien defendants; for defendants in diversity cases in which the plaintiff was a citizen of the state in which suit was brought; and for either party in cases involving title disputes when the parties were relying on grants from different states. Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79-80. No mention was made in § 12 of any additional writ power of removal, and § 14 contained no such reference. The limited circumstances

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[8] Academic commentators concur that §14 was not intended to confer original jurisdiction on the lower federal courts. *See, e.g.*, James E. Pfander, Marbury, Original Jurisdiction and the Supreme Court's Supervisory Powers, 101 Colum. L. Rev. 1515, 1547, 1587-88 (2001) (concluding that § 14 gave the lower federal courts only "ancillary or auxiliary power" to issue writs in aid of their jurisdiction otherwise established); Akhil R. Amar, Marbury, Section 13 and the Original Jurisdiction of the Supreme Court, 56 U. Chi. L. Rev. 443, 458 (1989) (noting that § 14 invested "courts with certain authority if and when they have independently founded jurisdiction. . . . . 'Jurisdiction' must be established first, and independently; 'power' then follows derivatively.").

in which removal of a state case was allowed by § 12 cannot be squared with the notion that the drafters—without explicitly saying so—also enacted a general, residual grant of removal jurisdiction in § 14.

That the original "all other Writs"provision of § 14 did not vest the lower federal courts with additional jurisdictional authority is consistent with the widely accepted historical account of legislative attitudes generally during the period toward the federal judiciary. At the time §§ 13 and 14 were debated, there was considerable opposition already within the First Congress to the mere creation of inferior federal courts. Charles Warren described "the crucial contest in the enactment of the Judiciary Act" as between the broad pro-Constitution forces who urged that the legislative branch must give full Article III powers to the federal courts, once created, and their narrow pro-Constitution opponents who advocated forcefully for a limited grant of jurisdiction.[9]

Viewed against this historical backdrop, it is not plausible to maintain that a majority of this Congress intended to cede unbridled and additional powers to the lower federal courts in § 14 beyond those specifically enumerated. The compromises struck by the First Congress in the Judiciary Act of 1789 are illustrative of the powerful political battles being waged at the time by competing constituencies.[10] Section 14 was not intended to invest the inferior federal courts, if Congress chose to establish them, with broader jurisdiction than the limited jurisdiction they were given explicitly elsewhere in the Act.

In sum, neither the legislative history of § 14 nor the historical evidence of congressional attitudes toward the

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[9] Charles Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49, 65-70 (1923).

[10] *See generally* 4 DHSC, at 22-35.

newly established lower federal courts reveals any evidence of legislative intent to vest these courts with an expansive and unstated grant of additional jurisdiction in the residual "all other Writs" provision of § 14 or that the statutory section was meant to be used as an additional source of removal authority. The drafters' clear and plainly expressed purpose in enacting § 14 of the First Judiciary Act was to give the lower federal courts power to enforce the limited jurisdiction they were accorded in other statutory provisions. At the time, and indeed for another two centuries, the power to issue injunctive relief pursuant to the All Writs Act was understood to be entirely sufficient to protect and effectuate federal judgments. Only after 1988, when the Second Circuit first suggested that a more expansive removal authority was contained in the All Writs Act, did the lower courts begin to hold that the powers conferred by Congress in §1651(a) were more expansive than previously believed. Neither the Second Circuit's revisionist historical interpretation, nor the adoption of that interpretation by other courts, however, can be squared with the available historical evidence. The First Congress intended in § 14 only to confer on the lower federal courts power to issue writs under jurisdiction previously established.

III. REMOVAL UNDER THE ALL WRITS ACT IS NOT AUTHORIZED SO LONG AS OTHER REMEDIES EXIST FOR AIDING FEDERAL JURISDICTION AND PROTECTING FEDERAL JUDGMENTS.

A. Writs Under § 1651(a) May Not Issue When Adequate Alternative Remedies Exist.

It is so well-established as to be an axiom of the federal writ power under § 1651(a) that no writ may issue if an adequate remedy at law exists. As a result, even if the plain language of the statute and its legislative history are ignored, removal under the All Writs Act is not authorized so long

as other means exist for aiding federal jurisdiction and protecting and effectuating federal judgments.

The Court in *Pennsylvania Bureau of Correction* made clear the limits of § 1651. The All Writs Act

> is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling. Although that Act empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate. 474 U.S., at 43.

In its most recent discussion of the All Writs Act, the Court again reaffirmed that § 1651(a) "invests a court with a power essentially equitable and, as such, not generally available to provide alternatives to other, adequate remedies at law." *Clinton v. Goldsmith*, 526 U.S. 529, 538 (1999).

The Court consistently has held that the availability of writ power is similarly circumscribed for all writs authorized by § 1651(a). *Carlisle v. United States*, 517 U.S. 416, 429 (1996) ("'The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute'") (quoting *Pennsylvania Bureau*, 474 U.S., at 43); *Allied Chem. Corp. v. Daiflon, Inc*., 449 U.S. 33, 35 (1980) (observing that "[i]n order to insure that the writ will issue only in extra-ordinary circumstances, this Court has required that a party seeking issuance have no other adequate means to attain the relief he desires"); *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 30 (1943) ("[w]here the appeal statutes establish the conditions of appellate review, an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions").

B. Preclusion Defenses and Injunctive Relief Adequately Aid Federal Jurisdiction and Protect and Effectuate Federal Judgments.

Congress and the Court have outlined the relevant rules and doctrinal principles that guide the determination of whether and how a federal court's judgment may be protected and/or its jurisdiction before judgment aided. Although numerous authorities could be considered,[11] State *amicus* focuses on two of the most significant methods. The first—and, as this Court has noted, often preferred—method for protecting federal judgments is by *state* courts applying preclusion law to determine the preclusive effect of a prior federal judgment. The second method, though less commonly used, for protecting federal judgments is by *federal* courts issuing injunctive relief.

1. *Adequacy of Preclusion Defenses to Protect and Effectuate Federal Judgments.*

Courts that have relied on the All Writs Act to uphold a defendant's removal of an otherwise unremovable case have done so either because a prior federal judgment has been found to be preclusive of subsequently filed state claims or because a subsequently filed suit allegedly threatened to interfere with a prior federal judgment. The present case is an example of the former: the district court in the Southern District of Alabama upheld the removal of the state court

[11] A comprehensive, though probably not exhaustive, list would include the Federal Full Faith and Credit Statute (28 U.S.C. § 1738 (1994)); the *Rooker-Feldman* doctrine; traditional equitable principles; various abstention doctrines; the due process clauses of the Fifth and Fourteenth Amendments (*see, e.g.*, *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979)); the Supremacy Clause (U.S. Const. art. VI, cl. 2); the non-binding but influential Restatement (Second) of Judgments, and general principles of federalism and comity (*see generally* Hart & Wechsler, at 1222-30)).

action filed in Iberville Parish, Louisiana after concluding that it was precluded by a settlement previously approved by the federal district court in related proceedings. J.A. 28a.

Arguably, the Court has indicated already that such preclusion-based removals are not proper. The Court recently ruled that where a prior federal judgment was said to be preclusive of a subsequent suit, the appropriate remedy was for the party seeking to enforce the federal decree to ask the state court to decide the preclusive effect of the prior judgment. *Rivet v. Regions Bank*, 522 U.S. 470 (1998). *Rivet* concerned a decision by a district court to retain jurisdiction over a case removed from Louisiana state court on the ground that the plaintiff's state cause of action was completely precluded by a federal bankruptcy court's prior judgment. The Fifth Circuit had approved the district court's denial of the plaintiff's motion to remand, construing *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394 (1981) as authorizing removal when a prior federal judgment was preclusive of a subsequently filed state case on a question of federal law.

The Court reversed the Fifth Circuit, clarifying that "*Moitie* did not create a preclusion exception to the rule, fundamental under currently governing legislation, that a defendant cannot remove on the basis of a federal defense." *Id*., at 472. A defense of claim preclusion "is not part of a plaintiff's properly-pleaded statement of his or her claim." *Id*., at 475. Although an action completely preempted by federal law may be removed under the "artful pleading" doctrine, the Court distinguished complete preemption from claim preclusion. "A case blocked by the claim preclusive effect of a prior federal judgment differs from the standard case governed by a completely preemptive federal statute in this critical respect: The prior federal judgment does not transform the plaintiff's state-law claims into federal claims but rather extinguishes

them altogether." *Id.*, at 476. Thus, "claim preclusion by reason of a prior federal judgment is a defensive plea that provides no basis for removal under § 1441(b)." *Id.*, at 478.

Following *Rivet*'s clarification of *Moitie*, if removal is foreclosed under the "*Moitie* claim preclusion exception," then it should be equally clear that the All Writs Act provides no more valid basis for removal when grounded on the preclusive effect of a prior federal judgment. If a subsequent state case is precluded by a prior federal judgment, then the proper course for the party seeking to enforce the federal judgment typically will be to bring a defensive plea of preclusion in the state court. To permit removal under the All Writs Act where the sole ground is that the state suit is precluded by a prior federal judgment would render meaningless the rationale of *Rivet*.

2. *Injunctive Relief Adequately Aids Federal Jurisdiction and Protects and Effectuates Federal Judgments.*

Removal under the All Writs Act may also be regarded as improper because, where authorized by existing law, injunctive relief is an adequate, available remedy to aid federal jurisdiction and/or to protect and effectuate federal judgments.

The availability of injunctive relief depends on application of the Anti-Injunction Act, 28 U.S.C. § 2283 (1994), and, additionally, on a determination that no other statutory or common law doctrinal principles proscribe interference with state proceedings. As regards § 2283, the Court has ruled that a federal court may not enjoin state proceedings unless one of the express statutory exceptions contained within the Anti-Injunction Act is satisfied, and further cautioned that the exceptions "should not be enlarged by loose statutory construction." *Atlantic Coast Line R. Co. v. Locomotive Engineers*, 398 U.S. 281, 287 (1970).

That a court may find injunctive relief proscribed in any particular case (or, for that matter, that no preclusive effect flows from a prior federal judgment) is immaterial to the question of whether resort may be made to the All Writs Act to remove a case otherwise not removable under existing law. The unavailability of injunctive relief is reflective not of any gap in federal power, of course, but instead merely illustrates the statutory and doctrinal limits on federal injunctive power and preclusion law. It is precisely when a request for injunctive relief is found to contravene the Anti-Injunction Act (or it is found that a prior federal judgment lacks preclusive effect) that resort to the All Writs Act to justify removal is most obviously unwarranted. To hold otherwise is to construe § 1651(a) as authorizing the issuance of "ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate." *Pennsylvania Bureau of Correction*, 474 U.S., at 43. Where no injunction is authorized and/or no preclusive effect is owed to a prior federal judgment, removal under the All Writs Act amounts to an end-run under § 2283 and federal preclusion law, which is precisely the rationale buttressing the well-established rule against issuance of writs where alternative remedies at law exist.

Amicus for Petitioners erroneously asserts that the defendants in the present case had an equal choice between removal of the state suit and an injunction against its continued prosecution. First, the "equal choice" paradigm ignores that the Court has counseled repeatedly that—absent unusual circumstances—principles of "Our Federalism" and the dictates of § 2283 provide a strong presumption against interference with state judicial proceedings. *See Younger v. Harris*, 401 U.S. 37, 41, 46, 53-54 (1971)(stating that interference with state proceedings is appropriate only where irreparable injury is "both great and immediate," where the state law is "flagrantly and patently violative of express constitutional prohibitions," or where there is a showing of

"bad faith, harassment, or . . . other unusual circumstances that would call for equitable relief"); *see also Atlantic Coast Line*, 398 U.S., at 287, 297 (observing that "[p]roceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court"). Consequently, unless it is demonstrated that the state court cannot or will not decide correctly the preclusive effect of a prior federal judgment, the preferred method for protecting and effectuating federal judgments usually will be through reliance on a state court to make the preclusion determination, with review of that decision ultimately by the state's highest court and this Court. *See Rivet*, 522 U.S., at 478; *see also Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 524 (1986)("[c]hallenges to the correctness of a state court's determination as to the conclusive effect of a federal judgment must be pursued by way of appeal through the state-court system and certiorari from this Court").

Even if the state courts could not be relied on to determine the preclusive effect of prior federal judgments—an assumption the Court has never been willing to make—the availability of injunctive relief or removal rights depends not on litigant preferences, but legislative prerogative. The choice is Congress's to make—and it has made its choice. Removal of a civil action is proper only when the federal district court would have had original jurisdiction over the suit had it been initiated there, pursuant to 28 U.S.C. § 1441 (or, if one of the other, more specific removal statutes allow removal even when § 1441 does not). Injunctive relief may issue only if one of the express exceptions to the Anti-Injunction Act is satisfied, *Atlantic Coast Line*, 398 U.S., at 287. Allowing removal of a civil action solely on the basis of the All Writs Act contravenes existing statutory restrictions on the jurisdiction of the lower federal courts, as well as the

existing statutory proscriptions against interference with state proceedings Congress has promulgated in the Anti-Injunction Act.[12]

IV. THE EXERCISE OF ANCILLARY JURISDICTION WILL NOT VALIDATE REMOVAL UNDER THE ALL WRITS ACT.

The "ancillary jurisdiction" argument advanced by petitioners, also referred to as the "jurisdictional caulk" argument by the Eleventh Circuit in its decision in this case, will not validate a removal based solely on the All Writs Act. According to petitioners, even if the All Writs Act does not provide an independent source of original jurisdiction to support the removal of a state case, a federal court's ancillary jurisdiction to protect and effectuate its judgments may permit removal based solely on the All Writs Act. However, the existence of ancillary jurisdiction will not support removal under the All Writs Act because the argument (i) ignores the predicate requirement that no writ may issue when alternative, adequate remedies at law exist; (ii) misinterprets this Court's precedents; and, if adopted, would (iii) invite judicial usurpation of the legislative prerogative to define the scope of the privilege of removal and (iv) interfere with the balance between federal-state relations on which Congress has statutorily insisted.

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[12] Recognizing that it is Congress's prerogative to define the right of removal, along with the jurisdiction of the lower federal courts, makes readily apparent the error of characterizing removal as "nothing more than another form of writ authorized by 28 U.S.C. § 1651." *See* Brief of *amicus curiae* Product Liability Advisory Council, Inc. at 22. While it is unassailably true that removal requires both injunctive power to enjoin state proceedings after removal and *certiorari* power to bring up the record, the statutory limits on federal subject matter jurisdiction and the restrictions on interference in state proceedings embodied in § 2283 render any exact equation of removal with other writ powers inapposite.

The ancillary jurisdiction argument ignores the well established principle that no writ may issue unless its issuance has been demonstrated to be "necessary or appropriate" and where no other adequate remedy at law exists. *See supra* Part III(A). Invoking ancillary jurisdiction, petitioners observe that federal judgments should be protected, but that truism does little more than serve as a reminder that such protection is to be sought, when appropriate, under existing law. The courts are not free simply to invent new procedures when they perceive the traditional means as inadequate. Because state courts normally should be relied upon to determine the preclusive effect of prior federal judgments and, where authorized, a federal court may issue injunctive relief, ancillary jurisdiction will not validate an All Writs Act removal.

Second, petitioners and their *amicus curiae* are incorrect in suggesting that this Court's decisions in *Kokkonen v. Guardian Life Insurance Co.*, 511 U.S. 375 (1994), and *Peacock v. Thomas*, 516 U.S. 349 (1996), demonstrate that the exercise of a federal court's ancillary jurisdiction is sufficient to support removal under the All Writs Act. In *Kokkonen*, the Court made clear that federal courts exercise ancillary jurisdiction either "to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent" or "to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." *Id*., at 379-80. The first occasion for ancillary jurisdiction was inapplicable in *Kokkonen*, just as it is in the present case, because the subsequent claims were brought in a separate action.

The latter basis for ancillary jurisdiction articulated by *Kokkonen*, ancillary enforcement jurisdiction, also will not support an All Writs Act removal. Ancillary enforcement jurisdiction may be sufficient to support the issuance of injunctive relief, in appropriate cases, but never removal

under the All Writs Act of an otherwise unremovable case. A fundamental fallacy in this ancillary jurisdiction argument is that it confuses a federal court's power to issue injunctive relief to aid its jurisdiction and protect its judgments with the separate and distinct power to exercise original jurisdiction over a removed state case.

In *Peacock*, the Court denied the attempted exercise of jurisdiction over a suit to establish independent liability against a third party. The decision recognized, in *dicta*, that federal courts have power to enforce their judgments, although in the particular context of that case the reference was specifically and only to a court's ancillary jurisdiction over supplemental proceedings to collect and enforce its prior judgments.[13] *Peacock*, however, never gave its imprimatur to removal of a case without an independent basis of subject matter jurisdiction. Indeed, such a reading of *Peacock* is contrary both to other language in the case[14] and, more significantly, to numerous decisions of the Court expressly disapproving of the removal of civil actions that lack an independent basis of subject matter jurisdiction. *See, e.g.*,

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[13] *Peacock*, 516 U.S., at 356, 358 (observing that "[w]e have reserved the use of ancillary jurisdiction in subsequent proceedings for the exercise of a federal court's inherent power to enforce its judgments. . . . In defining that power, we have approved the exercise of ancillary jurisdiction over a broad range of supplementary proceedings involving third parties to assist in the protection and enforcement of federal judgments—including attachment, mandamus, garnishment, and the prejudgment avoidance of fraudulent conveyances" and that "[t]o protect and aid the collection of a federal judgment, the Federal Rules of Civil Procedure provide fast and effective mechanisms for execution").

[14] *See, e.g., id.*, at 355 ("The court must have jurisdiction over a case or controversy before it may assert jurisdiction over ancillary claims. In a subsequent lawsuit involving claims with no independent basis for jurisdiction, a federal court lacks the threshold jurisdictional power that exists when ancillary claims are asserted in the same proceeding as the claims conferring federal jurisdiction.")(citations omitted).

Rivet, 522 U.S., at 478; *Oklahoma Tax Comm'n*, 489 U.S., at 840; *Caterpillar*, 482 U.S., at 393. In *Rivet*, for instance, this Court's remand of the Louisiana state case demonstrates that even state court proceedings that appear to directly threaten a prior federal judgment may not be removed in the absence of an independent basis of subject matter jurisdiction. *Rivet*, 522 U.S., at 478. Although the jurisdiction a federal court possesses that is ancillary to its original jurisdiction in a case may be sufficient to support the issuance of an injunction, ancillary jurisdiction can never provide a basis for removal under the All Writs Act of an otherwise unremovable case.

Third, this reading of *Kokkonen* and *Peacock* to permit removal under the All Writs Act of civil actions lacking an independent basis of federal subject matter jurisdiction would amount to judicial trumping of the legislative prerogative to define the jurisdictional limits of the federal district courts. Petitioners' mistaken interpretation of *Kokkonen* and *Peacock* is made evident by considering the class action context referenced by *amicus* for petitioners. Under current law, a state class action lacking an independent basis of federal subject matter jurisdiction may not be removed, even if the subject matter of the suit relates to prior or parallel federal proceedings. Congress is considering, but has not passed, legislation that, *inter alia*, would allow removal of certain state class action suits unremovable under existing law. Class Action Fairness Act, H.R. 2341, 107th Cong. (2001); S. 1712, 107th Cong. (2001). To suggest, however, that a federal court's ancillary jurisdiction may be drawn upon to permit removal on any occasion in which a subsequent state suit is perceived to threaten a prior federal court judgment or its jurisdiction before judgment ignores that it is for Congress to

determine the jurisdiction of the federal district courts.[15] *See generally* Martin H. Redish, Abstention, Separation of Powers, and the Judicial Function, 94 Yale L. J. 71, 74 (1985) (observing that where Congress has enacted express statutes providing for federal jurisdiction, separation of powers would be offended if legislative limitations on federal jurisdiction are ignored). This loose interpretation of ancillary jurisdiction may be desirable to some, but it is decidedly not what Congress has authorized. As the Court repeatedly has made clear, federal courts are courts of limited jurisdiction. They may exercise only those powers conferred upon them by the Constitution and by statute. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). Their powers are "not to be expanded by judicial decree." *Kokkonen*, 511 U.S., at 377. The presumption is against jurisdiction "and the

[15] Even if enacted, such legislation still would only produce a fractional enlargement of federal judicial power through its broadening of the original jurisdiction of the district courts, as compared with the virtually unfettered expansion of federal judicial power that adoption of petitioners' reading of ancillary jurisdiction entails. H.R. 2341 applies only to certain class action suits; by comparison, petitioners urge removal rights for all state court litigation. Additionally, the proposed legislation is limited expressly to interstate class actions (*see id.*, at § 1(A)(7)(b) and "Purpose and Summary"); by comparison, there is no comparable restraint on an All Writs Act removal. Finally, and perhaps most significantly, where the proposed legislation would expand federal original jurisdiction in specific and definable ways (to make cognizable before the federal courts certain state class action suits now lacking an independent basis of federal subject matter jurisdiction), allowing All Writs Act removal expands federal jurisdictional power almost without limit. Petitioners permit removal merely on the tenuous assertion that subsequent state proceedings threaten a federal court's continuing jurisdiction before judgment. Endorsement of such an inexact threshold to justify removal expands federal subject matter jurisdiction not only beyond existing law, but well beyond anything contemplated by the proposed class action legislation.

burden of establishing the contrary rests upon the party asserting jurisdiction." *Id.*[16]

Finally, petitioners' position endorses judicial interference with the balance of federal-state relations Congress statutorily

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[16] In addition to the problem of subject matter jurisdiction, petitioners' ancillary jurisdiction argument also ignores existing limitations on the exercise of personal jurisdiction by the federal district courts. It is settled that the failure of absent class members to opt out of (at least some) Rule 23(b)(3) actions is a *necessary* condition to bind one who otherwise lacks minimum contacts with the forum court that certified the class action (the "F1" court). *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). A failure to opt out, however, is not a *sufficient* condition for territorial jurisdiction if the minimum procedural due process requirements of *Shutts* are not satisfied. Where nonresident class members lack minimum contacts with the forum, their absolute right under existing law to collaterally attack F1's procedural due process determinations are protected by constitutional limits on personal jurisdiction. *See, e.g.*, *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996)(observing that a person "'is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process'" (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)) and that "[t]he law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger" (quoting *Chase National Bank v. Norwalk*, 291 U.S. 431, 441 (1934)). Yet, by allowing removal of any state action said to interfere with a federal court's judgment or its jurisdiction, a standard presumably broad enough to include a nonresident class member's collateral attack in a distant forum, petitioners read into the All Writs Act nationwide territorial jurisdictional authority to bind all persons from challenging the F1 judgment, without regard to their lack of minimum contacts with the forum. Yet, as Professor Monaghan has shown, "the All Writs Act cannot properly be read to side-step standard tests governing in personam jurisdiction. . . .[None of the Court's prior precedents provide a basis] "for believing that the Act should be construed as a general 'emergency all purpose' nationwide long-arm statute used to relax the requirements of Rule 4(k)(1)(A) whenever a court deems that result desirable." Henry P. Monaghan, Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members, 98 Colum. L. Rev. 1148, 1190-91 (1998).

has struck. Congress primarily determines the proper allocation of power between the federal and state courts. *See generally* Herbert Wechsler, The Political Safeguards of Federalism: The Role of the States in The Composition and Selection of the National Government, 54 Colum. L. Rev. 543 (1954). Congress has set forth in the Anti-Injunction Act, 28 U.S.C. § 2283, three narrow and limited exceptions to the general rule of non-interference in state judicial proceedings. If a federal injunction of state proceedings is sought, the applicant must first demonstrate that the requested relief is not barred by § 2283. Courts that have upheld removal pursuant to the All Writs Act, however, have purported to do so by relying instead only on a showing that "extraordinary circumstances" exist.[17] In this manner, the stringent standards limiting federal interventions into state proceedings that are embodied in the Anti-Injunction Act and that have been taken seriously by the Court for over two centuries are replaced with an ill-defined measure that pays no heed to the strict limits on non-interference set forth in § 2283. That removal of a civil action solely under the All Writs Act might withstand a motion to remand even as a request for injunctive relief properly would be denied under the Anti-Injunction Act is an anomalous result patently contrary to the accepted view that § 1651(a) should be read in harmony with and subject to § 2283.[18]

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[17] *See, e.g., Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855 (CA2 1988), *cert. denied*, 489 U.S. 1077 (1989); *Sable v. General Motors Corp.*, 90 F.3d 171, 175 (CA6 1996); *see generally* Joan Steinman, The Newest Frontier of Judicial Activism: Removal Under the All Writs Act, 80 B.U. L. Rev. 773, 794-814 (2000)(discussing cases approving removal based solely on the All Writs Act).

[18] *See, e.g., Atlantic Coast Line*, 398 U.S., at 295 (finding close similarities between the "in aid of jurisdiction" clause of §1651 and the "to protect or effectuate judgments" exception in the Anti-Injunction Act).

In *Vendo Co. v. Lektro-Vend Corp*., 433 U.S. 623 (1977), the Court reiterated its earlier holding that the initial presumption under § 2283 is that "'any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy.'" *Id*., at 630 (quoting *Atlantic Coast Line*, 398 U.S., at 297). Relaxing this strict standard, the Court cautioned, would result in "whittl[ing] away by judicial improvisation" the prohibitions against intervention in state proceedings. *Id*., at 631 (quoting *Amalgamated Clothing Workers v. Richman Bros. Co*., 348 U.S. 511, 514 (1955)).

Upholding removal of an otherwise unremovable case based solely on the All Writs Act further exacerbates the danger of "judicial improvisation" against which the Court in *Vendo* cautioned. Removal under these circumstances amounts to judicial usurpation of the legislative prerogative to define the scope of the privilege of removal and judicial interference with the balance between state and federal rights on which Congress in § 2283 has insisted.

CONCLUSION

Texas respectfully urges the Court to affirm the decision of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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