No. 01-757

IN THE SUPREME COURT OF THE UNITED STATES

SYNGENTA CROP PROTECTION, INC.,
ROBERT RABB, 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

RESPONDENT'S BRIEF ON THE MERITS

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QUESTION PRESENTED FOR REVIEW

Does the All Writs Act, 28 U.S.C. § 1651(a), grant federal district courts the original jurisdiction required under 28 U.S.C. § 1441 to permit removal of cases that would otherwise be ineligible for removal?

LIST OF PARTIES BELOW

In addition to the parties reflected in the caption, also plaintiffs in the proceedings below were Phillip Hano, Joe Bowman, Randall Sevario, Sr., Betty Hano, David Gray, and Randall Sevario, Jr., as well as a specified class of similarly-situated parties. J.A. 97a.

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RESPONDENT'S BRIEF ON THE MERITS

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The opinion and judgment of the U.S. Court of Appeals for the Eleventh Circuit, *Henson v. Ciba-Geigy Corp.*, Nos. 99-6021 & 99-6130 (11th Cir. Aug. 14, 2001), is reported at 261 F.3d 1065, and is reprinted at Pet. App. 1a; J.A. 13a. The U.S. District Court's Order of November 24, 1998, is unreported but is reprinted at Pet. App. 15a; J.A. 27a.

STATEMENT OF JURISDICTION

Petitioners have been granted review from the opinion and judgment of the U.S. Court of Appeals for the Eleventh Circuit of August 14, 2001. This Court granted the Petition for Writ of Certiorari on February 19, 2002. The Supreme Court has jurisdiction to review cases from the courts of appeals under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The All Writs Act, currently codified at 28 U.S.C. § 1651(a), provides in pertinent part that "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

The removal statute, codified in relevant part at 28 U.S.C. § 1441, provides that "Except as otherwise expressly provided by

Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." Id. § 1441(a). In addition, "Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties." Id. § 1441(b).

28 U.S.C. § 2283, known as the Anti-Injunction Act, provides that "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Supplemental or ancillary jurisdiction is prescribed by 28 U.S.C. § 1367, which provides in relevant part that "Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." Id. § 1367(a).

STATEMENT

1. The Respondent, Hurley Henson, is the lead plaintiff in a class action (hereinafter, the "*Henson* action") arising from exposure to Petitioners' pesticide chemicals, including the chlordimeform-based insecticide, Galecron. The exposures took

place at Petitioner Syngenta Crop Protection, Inc.'s (previously Ciba-Geigy Corporation) production facility at St. Gabriel, Louisiana. Henson filed the original class action petition, asserting exclusively state-law tort claims, in September 1993 in the 18th Judicial District Court in Iberville Parish, Louisiana. Subsequently, Henson and other Louisiana residents employed at the St. Gabriel facility sought intervention and became members of a class action lawsuit, styled *Price v. Ciba-Geigy* (the "*Price* action"), originally filed in the state circuit court of Mobile County, Alabama, and then properly removed to the U.S. District Court for the Southern District of Alabama. The *Henson* action remained in state court; it was never removed nor consolidated with *Price*.

The federal district court in the *Price* action certified a nationwide class action and approved a Stipulation of Settlement, concluded by the parties on August 26, 1994. See J.A. 32a. The Stipulation defined the relevant "claim[s]" governed by the settlement, and indicated that the settlement only extended to damages arising from exposure to Galecron. See id. (¶ I(G)). No other claims were settled. The Stipulation did refer to the *Henson* action as a "related case," J.A. 36a (¶ AI(1)), and in a clause entitled "Dismissal of Related Case," provided that

> CLASS COUNSEL hereby stipulates that the RELATED CASE, including any and all claims (including, without limitation any CLAIMS defined herein) against CIBA GEIGY CORPORATION and individual defendants . . . shall be dismissed, with prejudice, as of the APPROVAL DATE, and that such RELATED CASE shall be stayed until the APPROVAL DATE. . . .

J.A. 38a (¶ II(4)). Class Counsel for the plaintiffs in the *Henson*

action subscribed to the Stipulation of Settlement.

On January 30, 1995, the original Stipulation of Settlement was amended. Paragraph 8 of the Amendment made clear that "CLAIMS of spouses, parents, children and other relatives do not include claims by such persons of alleged direct exposure to GALECRON®, unless such person is an EXPOSED PERSON as defined in the STIPULATION." J.A. 53a (¶ 8). The federal district court, on March 31, 1995, accepted the Stipulation of Settlement and indicated that "The Court shall retain jurisdiction to determine attorneys' fees and expenses, and with respect to future performance of, and any claims relating to performance of, the Settlement agreement and judgment." J.A. 93a (¶ 6).

2. Over three years later, on June 5, 1998, a status conference was held before Judge Marionneaux of the Louisiana 18th Judicial District Court of Iberville Parish regarding the *Henson* action. At that meeting, class counsel in the *Price* action moved for dismissal of the *Henson* case, as per the Stipulation. Mr. Hany Zohdy, counsel for the *Henson* plaintiffs, objected to dismissal of the entirety of the action, based on his interpretation of the Stipulation as amended. The Judicial District Court issued a Notice of a Rule to Show Cause and a hearing was held on August 18, 1998, at which Mr. Pendley (class counsel in *Price*) and Mr. Zohdy attended, but, inexplicably, no representative of the defendants did. At the Show Cause Hearing, Pendley and Zohdy represented that the Stipulation of Settlement applied only to Galecron exposures and, in any event, did not extend to family members of those exposed to other chemicals. J.A. 75a, 83a-85a.

The state court dismissed those aspects of the *Henson* action "as to the Chlordimeform or Galecron" and gave Mr. Zohdy thirty days to amend the complaint to reflect that dismissal and to

restate the remaining claims. J.A. 86a. On September 8, 1998, Zohdy filed an Amendment to the Original Class Action Petition. J.A. 94a. In both the First Amended Petition and a Second Amended Petition, lodged and served on October 10, 1998 (but not filed because of the supervening removal and stay[1]), plaintiffs made clear that the causes of action arising from the workers' direct exposure to chlordimeform were dismissed pursuant to the *Price* settlement, and that they were seeking relief only for claims not earlier settled. J.A. 95a (First Amended Petition); Res. Br. App. 43a-47a (Second Amended Petition).

3. a. On October 13, 1998, in response to the First Amended Complaint, the defendants in the *Henson* action removed the case to the U.S. District Court for the Middle District of Louisiana. J.A. 58a. As already noted, the *Henson* complaint (even as amended), did not assert a federal cause of action, and, because of the individual defendants sued, there was no diversity of citizenship among the litigants. The *Henson* defendants nonetheless asserted that the federal district court had original jurisdiction over the action under the All Writs Act, 28 U.S.C. § 1651, J.A. 60a-62a (¶¶ VII-XII) or, alternatively, under the supplemental jurisdiction statute, id. § 1367, "because the claims in this action are so related to the claims in the Price Class Action 'that they form part of the same case or controversy under Article III of the United States

[1] This document, although designated by Counsel for Respondent pursuant to S.Ct. R. 26.2, was nevertheless excluded from the second printing of the Joint Appendix by the Petitioners on the grounds that it was not properly part of the record below. Respondent respectfully disagrees with this conclusion, and observes that the document was included (without objection) in the Excerpts of Record filed in the court of appeals. It is reprinted in the Appendix as it appeared in the first printing of the Joint Appendix. See, infra, Resp. Br. App. 42a-47a.

Constitution'." J.A. 63a (¶ XIII). Recognizing also that the removal was filed more than a year after the filing of the original action, in contravention of 28 U.S.C. § 1446(b), defendants asserted that the relevant date was the filing of the Amended Complaint. J.A. 63a (¶ XIV).

b. The defendants, immediately after removal of the action to federal court, sought and received a transfer to the Southern District of Alabama under 28 U.S.C. § 1404(a). J.A. 65a. That court proceeded in November 1998 to dismiss with prejudice the entirety of the *Henson* action, see Pet. App. 18a; J.A. 31a, and pursuant to its continuing jurisdiction in the *Price* proceeding, to sanction Attorney Zohdy for attempting "to thwart the court's jurisdiction by filing an amended complaint in *Henson* in which they put forward claims which they say do not fall within the ambit of the Stipulation of Settlement." Pet. App. 16a; J.A. 28a.

c. Henson appealed to the U.S. Court of Appeals for the Eleventh Circuit, which (in a per curiam opinion), affirmed the attorney sanctions but vacated the district court's assertion of removal jurisdiction over the *Henson* action and ordered that the matter be remanded to the Louisiana state court. See Pet. App. 12a; J.A. 24a. First, the court of appeals noted that Ciba-Geigy's removal was untimely under 28 U.S.C. § 1446(b) and impermissible under id. §§ 1332 and 1441(a) because of the presence of diversity-defeating defendants. Pet. App. 4a & n.2; J.A. 16a & n.2 Next, the Eleventh Circuit ruled

> "there is no other possible ground of federal subject-matter jurisdiction. Ciba-Geigy's removal notice also alleged supplemental jurisdiction, by virtue of [the] *Price* [litigation], under 28 U.S.C. § 1367. But § 1367 cannot provide the 'original

> jurisdiction' that § 1441 demands for an action to be removable. *Ahearn v. Charter Township*, 100 F.3d 451, 456 (6th Cir. 1996). Ciba-Geigy did not, furthermore, assert ancillary jurisdiction, if such jurisdiction exists independent of § 1367 (*see Peacock v. Thomas*, 516 U.S. 349, 116 S. Ct. 862 (1996)), and we therefore do not address it as a potential basis." Pet. App. 7a & n.3; J.A. 19a & n.3.

The court of appeals thus proceeded to consider the defendants' reliance on the All Writs Act, 28 U.S.C. § 1651(a), as the basis for removal.

The Eleventh Circuit observed that this Court has consistently reiterated that removal under 28 U.S.C. § 1441 is possible only where a case "originally could have been filed in federal court." Pet. App. 10a; J.A. 22a (citing *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987)). Moreover, the All Writs Act's grant of authority "necessary or appropriate in aid [of federal court] jurisdiction[]," 28 U.S.C. § 1651(a), has never been regarded as an independent basis for federal subject-matter jurisdiction. The All Writs Act thus could not, by itself, supply original jurisdiction where it does not otherwise exist. See *Clinton v. Goldsmith*, 526 U.S. 529, 534-35 (1999); *Pennsylvania Bureau of Corr. v. United States Marshals Serv.*, 474 U.S. 34, 40 (1985). See Pet. App. 10a; J.A. 22a

The court of appeals noted that its conclusion was consistent with the history and purpose of the All Writs Act. No description of the Act as "jurisdictional caulk . . . plug[ging] the cracks in federal jurisdiction," Pet. App. 11a; J.A. 23a (citing *United States v. New York Tel. Co.*, 434 U.S. 159, 172-73 (1977), for this "broad view"

of the Act), would sanction what is otherwise an impermissibly wide expansion of federal jurisdiction at the expense of state courts. As the Eleventh Circuit observed, such a "re-equilibrating [of the] federal-state balance" is Congress's to make. Id.

d. Both sides sought review here. Respondent joined in supporting Syngenta's petition for review of the question of removal jurisdiction under the All Writs Act. See Pet. (i). Henson sought a conditional cross petition to review the propriety of the imposition of attorneys' sanctions absent an express finding of bad faith conduct. This Court granted review on the All Writs Act question, see 122 S.Ct. 1062 (2002), but denied certiorari on the sanctions matter. Id. at 1079.

SUMMARY OF THE ARGUMENT

Neither the All Writs Act nor the ancillary jurisdiction doctrine permit removal of a case without the original jurisdiction required by 28 U.S.C. § 1441. This is particularly so where Congress has established the statutory scheme for removal, alternate remedies exist to vindicate prior federal judgments, and any other result would profoundly unsettle the balance of authority between state and federal courts.

1. Petitioners concede that the All Writs Act ("AWA") cannot, on its own, provide the original jurisdiction required for removal under section 1441. See Pet. Br. 6, 9. The original jurisdiction requirement is a statutory one, 28 U.S.C. § 1441(a), consistently recognized by this Court, and has never been relaxed absent a clear declaration by Congress to that effect. See *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 163 (1997); *Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838, 841 (1989).

No basis for original jurisdiction was presented by the amended class action petition filed by Respondent. J.A. 94a.

Two hundred years of this Court's jurisprudence has held that the All Writs Act, now codified at 28 U.S.C. § 1651(a), cannot provide the original jurisdiction required by the removal statutes. See *McIntire v. Wood*, 11 U.S. (7 Cranch) 504, 506 (1813); *Clinton v. Goldsmith*, 526 U.S. 529, 534-35 (1999). This is entirely consonant with the statutory language of the AWA which makes clear that federal courts can issue writs only "in aid of their respective jurisdictions. . . ." 28 U.S.C. § 1651(a).

2. Even if the All Writs Act could be construed to sanction removals to federal court without original jurisdiction, the "extraordinary circumstances" that would be required, consistent with the AWA's requirement that a writ only issue where "necessary or appropriate" and "agreeable to the usages and principles of law," id., *United States v. New York Tel. Co.*, 434 U.S. 159, 172 (1977), are not present where either (1) a federal statutory remedy already exists, or (2) other mechanisms are available to secure relief. Removals based on the All Writs Act can be neither appropriate nor necessary.

Resort to the All Writs Act is "'appropriately confined by Congress'," *New York Tel. Co.*, 434 U.S. at 172-73 (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273 (1942)), and "[w]here a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling." *Pennsylvania Bureau of Corr. v. United States Marshals Serv.*, 474 U.S. 34, 43 (1985). Since removal is solely conditioned by Act of Congress, in no way could a "common law" removal be considered an appropriate exercise of judicial power under the AWA.

Necessity is also a threshold statutory requirement under the All Writs Act, *Adams*, 317 U.S. at 273, and demands that a party not have available to it other, satisfactory, remedial mechanisms. In this case, Petitioners had no fewer than two alternatives to seeking an unauthorized removal to federal court. First, they could have, consistent with the relitigation exception to the Anti-Injunction Act, 28 U.S.C. § 2283, sought to enjoin the state proceedings in an action brought in federal court for matters actually decided earlier by the district court. See *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 147-48 (1988). An injunction may be properly brought before a state court has ruled on the merits of the res judicata issue, see *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 524 (1986); and such is less offensive to the prerogatives of state tribunals than actually ousting state court jurisdiction via removal of a case. The second alternative available to Petitioners was simply to allow Louisiana's courts to rule on the preclusive effects of the earlier federal judgment, confident that they would reach the correct result. See id. at 525; *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 478 (1998). In any event, an extra-statutory removal under these circumstances can never be a necessary application of the relief afforded by the All Writs Act.

3. Assuming the question of ancillary jurisdiction is even properly before this Court, that doctrine cannot provide the missing link for federal jurisdiction otherwise absent from this case. While ancillary jurisdiction might be invoked "to enable a court to . . . effectuate its decrees," *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 380 (1994), such cannot be properly understood to allow the removal of cases that are otherwise ineligible under section 1441 because of a lack of original jurisdiction. Moreover, ancillary enforcement jurisdiction could possibly justify removal only to a federal court that had issued the

original judgment in question. That is not the case here, and the required transfer of the removed action to the issuing court, J.A. 65a, voids any conceivable ancillary jurisdiction under *Kokkonen*.

"Ancillary enforcement jurisdiction is, at its core, a creature of necessity." *Peacock v. Thomas*, 516 U.S. 349, 359 (1996). No necessity can be shown here by virtue of the availability to Petitioners of the two complete alternatives of an anti-suit injunction and deference to state courts' preclusion determinations. Thus none of the predicates for even a notional application of ancillary jurisdiction can be argued to exist here. Indeed, judicial countenance of such a theory could fundamentally alter the balance of power between state and federal courts, without the required approval of Congress, and might raise the specter of an unconstitutional expansion of federal court jurisdiction beyond Article III limits.

ARGUMENT

I. THE ALL WRITS ACT CAN NEVER PROVIDE THE ORIGINAL JURISDICTION REQUIRED FOR REMOVAL UNDER 28 U.S.C. § 1441

This case requires the Court to consider and confirm some first principles of federal jurisdiction. One of those implicated here is that removal is limited to instances where cases could be within the original jurisdiction of federal district courts, and that otherwise removal is a procedure completely constrained by Act of Congress. Petitioners properly conceded in their removal papers, see J.A. 60a-63a, that removal would not have been permitted in this case, but for their assertion of the All Writs Act, 28 U.S.C. § 1651(a) (1994)

("AWA"). To prevail in this submission, Petitioners would have to demonstrate either (1) original jurisdiction is not required as a prerequisite for removal here, or (2) the AWA provides an independent basis of federal jurisdiction. And while Petitioners appear to have conceded that these arguments are really untenable, Respondent is obliged – at least briefly – to review these points.

A. Removal under 28 U.S.C. § 1441(a) is permissible only where the district court would have original jurisdiction in the case.

1. Section 1441(a) allows for removal of certain cases from state court to federal court. Section 1441(a) provides that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." Id. The propriety of a removal has thus depended on whether the case originally could have been filed in federal court. *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 163 (1997) (citing *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987) ("Only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant.")); *Franchise Tax Bd. of California v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 8 (1983)).

Therefore, for removal to a federal district court to be proper, there must be either diversity of citizenship between the parties or a federal question at issue. See, e.g., *Caterpillar*, 482 U.S. at 393; see also *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 349 (1816). Diversity jurisdiction is not available when any plaintiff is a citizen of the same state as any defendant.

Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 373-74 (1978). In this case, there was a lack of complete diversity among the parties. See J.A. 96a.

Likewise, Respondent's class action petitions presented no federal question. J.A. 106a-130a, Resp. Br. App. 42a-47a. A case only asserts a federal cause of action when the plaintiff's well-pleaded complaint raises issues of federal law. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987); *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908). In the case at bar, the plaintiffs' complaint did not raise an issue of federal law. See also *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 476-78 (1998) (rejecting "artful pleading" doctrine enigmatically advanced in *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n.2 (1981)). There is no federal question jurisdiction because, "Congress has not authorized removal based on a defense or an anticipated defense federal in character." *Rivet*, 522 U.S. at 472. And since "[c]laim preclusion (res judicata) . . . is an affirmative defense," id. at 476 (citing FRCP 8(c) and *Blonder-Tongue Labs., Inc. v. Univ. of Illinois Found.*, 402 U.S. 313, 350 (1971)), a "prior federal judgment does not transform . . . state-law claims into federal claims but rather extinguishes them altogether." Id. at 476-77. See also Lonny Sheinkopf Hoffman, *Removal Jurisdiction and the All Writs Act*, 148 U. PA. L. REV. 401, 420-25 (1999) (suggesting *Rivet* entirely forecloses use of the All Writs Act for removal).

This action could not have been originally filed in federal court because the parties were not completely diverse and Henson never raised an issue of federal law. Therefore, removal of this case – in the normal course of federal procedure – would have been manifestly improper.

2. Lest it be suggested that Petitioners could have relied on some removal mechanism not requiring original jurisdiction in the federal district court, this theory would be unavailing. While Congress may, in its discretion, authorize removal without conferring original jurisdiction on the federal courts, see 12 U.S.C. § 632; 22 U.S.C. § 286g, this must be done specifically and expressly. *Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838, 841 (1989). No such congressional statement was made in the All Writs Act to this effect. Moreover, where Congress has allowed removal unencumbered by the requirement of original jurisdiction, it has either made a cross-reference to the provisions of 28 U.S.C. §§ 1446-50, or has prescribed particular procedures and modalities. See, e.g., 9 U.S.C. § 205; 12 U.S.C. § 632. Again, the AWA does not indicate any such procedural allowance by Congress. See Joan Steinman, *The Newest Frontier of Judicial Activism: Removal under the All Writs Act*, 80 B.U. L. REV. 773, 820-21 (2000).

In short, no basis for removal jurisdiction relied upon by the Petitioners would have permitted them to remove Henson's First Amended Class Action, J.A. 94a, without a showing of original jurisdiction in the federal district court. Petitioners are thus obliged to show that the All Writs Act confers such, and this they cannot do.

B. The All Writs Act does not provide an independent basis of original jurisdiction.

While this point appears to be conceded by Petitioners, see Pet. Br. 6, 9 ("The [All Writs] Act does not provide federal courts with an independent grant of jurisdiction."), it is important to explain why this is so.

1. As courts of limited jurisdiction, the federal courts possess only that power authorized by the Constitution and statutes.

Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994) (citing *Willy v. Coastal Corp*., 503 U.S. 131, 136-37 (1992); *Bender v. Williamsport Area Sch. Dist*., 475 U.S. 534, 541 (1986)). "It is to be presumed that a case lies outside this limited jurisdiction." Id. at 377 (citing *Turner v. Bank of N. Am.*, 4 U.S. (4 Dall.) 8, 11 (1799)). The burden of establishing the contrary rests upon the party asserting the federal courts' jurisdiction. Id. (citing *McNutt v. General Motors Acceptance Corp. of Ind*., 298 U.S. 178, 182-83 (1936)).

The power of the federal courts is limited by Acts of Congress. *Kroger*, 437 U.S. at 372 (citing *Palmore v. United States*, 411 U.S. 389, 401 (1973); *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943); *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922); *Cary v. Curtis*, 44 U.S. (3 How.) 236 (1845)). Even if jurisdiction over a claim is within the power of the federal courts under Article III of the Constitution, it is not within the jurisdiction of the federal courts unless Congress has statutorily granted jurisdiction. It is up to Congress – not the courts – to prescribe the conditions of removal of matters to federal tribunals, and thus potentially to unsettle the delicate balance of concurrent jurisdictions between federal and state courts. *Rivet*, 522 U.S. at 474.

2. This Court has long recognized that the All Writs Act, 28 U.S.C. § 1651, and its precursor statutes cannot provide an independent basis of federal court jurisdiction. See Hoffman, supra, 148 U. PA. L. REV. at 433-39. This is clear from the text of the AWA, as well as the consistent jurisprudence of this Court in glossing its terms.

a. The All Writs Act allows federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28

U.S.C. § 1651(a). The phrase "in aid of their respective jurisdictions" would be meaningless if Congress had intended to have the AWA serve as an independent basis of federal jurisdiction. Manifestly, the All Writs Act did not confer original subject matter jurisdiction on federal district courts.

b. This straightforward construction of the All Writs Act has been invariably embraced by this Court for nearly two centuries. In *McIntire v. Wood*, 11 U.S. (7 Cranch) 503 (1813), the Court had its first opportunity to interpret section 14 of the Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81-82 (federal courts may "issue writs of Scire facias, habeas Corpus, and all other writs not specifically provided for by Statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.") — the predecessor of the current All Writs Act.[2] The Court held that the All Writs Act conferred no independent jurisdiction on the federal courts. Id. at 506. The plaintiff in *McIntire* urged that § 14 of the Judiciary Act allowed a federal circuit court to issue a writ of mandamus to the register of a state land office on the basis of federal law. Because Congress had not granted jurisdiction over the case to the federal court, however, the federal court had no power to issue a writ of mandamus under section 14. The power of the federal court was "confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction." Id. Thus, section 14 conferred no independent basis of jurisdiction.

The Court reaffirmed the holding of *McIntire* and extended

[2] It was, of course, in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), that the Court found section 13 of the First Judiciary Act, 1 Stat. 73, 81, to be unconstitutional to the extent that it purported to grant the Supreme Court original jurisdiction over mandamus proceedings.

its logic in *McClung v. Silliman*, 19 U.S. (6 Wheat.) 598 (1821), a case that involved the same parties and issue as *McIntire*. While the Court noted the language of section 14 allowed a court to issue a writ "necessary for the exercise" of its jurisdiction, the Court also noted the case before it involved an instance of "equivocal language, in which the proposition, though true in the abstract, is in its application to the subject glaringly incorrect." Id. at 601. The Court held section 14 could only have been intended to vest a power to issue writs in cases where jurisdiction already exists, "and not where it is to be courted or acquired, by means of the writ proposed to be sued out." Id. at 601-02.

In a case with particular similarities with this one, *Rosenbaum v. Bauer*, 120 U.S. 450 (1887), this Court made clear that an application for mandamus under the All Writs Act in section 14 (then codified as Rev. Stat. § 716) could not provide the basis required to give the federal court jurisdiction, either original or by removal. Id. at 456-57. There, one of the parties attempted to rely on section two of the Act of March 3, 1875, 18 Stat. 470, to boot-strap removal jurisdiction through the AWA. But this Court made clear that a long line of precedent precluded the use of the All Writs Act to provide an original basis of jurisdiction, even when used in combination with the removal of a case from state court. See id.

c. More recently, the Court has held that the modern version (dating from 1948) of § 14 of the Judiciary Act, the All Writs Act, authorizes a federal court to "issue such commands . . . as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction *otherwise obtained*." *United States v. New York Tel. Co.*, 434 U.S. 159, 172 (1977) (emphasis added). And while some lower federal courts have held that federal courts may issue extraordinary writs as though the All Writs Act does, in fact, provide

an independent basis of jurisdiction, this Court consistently has held that it does not. See also Charles Alan Wright & Mary Kay Kane, 20 FEDERAL PRACTICE AND PROCEDURE: FEDERAL PRACTICE DESKBOOK § 40, at 308 n.27 (2002) (the practice of using the AWA to justify removal "has been persuasively criticized by commentators."); Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148, 1187-91 (1998) (rejecting use of AWA as an independent basis for in personam jurisdiction over nonresident class members).

For example, in *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. 34 (1985), this Court observed that the All Writs Act is confined "to filling the interstices of federal judicial power when those gaps threatened to thwart the otherwise proper exercise of federal courts' jurisdiction." Id. at 41. See also *Carlisle v. United States*, 517 U.S. 416, 429 (1996) (AWA is a "residual source of authority" not generally available to provide alternatives to other, adequate remedies at law). Also in *Clinton v. Goldsmith*, 526 U.S. 529 (1999), the Court held that the express terms of the AWA confine a court's power to issue writs "'in aid of' its existing statutory jurisdiction; [and] the Act does not enlarge that jurisdiction." Id. at 534-35 (quoting *Pennsylvania Bureau*, 474 U.S. at 41; and citing 16 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE § 3932, at 470 (2d ed. 1996) and 19 J. Moore & G. Pratt, MOORE'S FEDERAL PRACTICE § 204.02[4] (3d ed. 1998)); see also Hoffman, supra, 148 U. PA. L. REV. at 433-35.

Amicus curiae of Petitioners attempts to minimize the relevance of these cases, see Brief of Products Liability Advisory Council (PLAC Br.), at 17-18, by either suggesting they do not apply in the removal context or by deflecting the inquiry into ancillary

jurisdiction. This move to distinguish a long line of this Court's authorities should be unavailing. These precedents stand for the clear and unremarkable proposition that the AWA has never been intended to "boot-strap" or justify otherwise impermissible invocations of federal court jurisdiction. Indeed, at least one of the cases – *Rosenbaum v. Bauer* – certainly contemplated the situation presented here where a party attempts to use removal as a mechanism for seeking federal court review of a case that otherwise would be ineligible. See 120 U.S. at 456-57. Nor, for reasons fully elaborated below, see infra at 31-37, does mixing the idioms of the All Writs Act and ancillary removal jurisdiction concoct some sort of judge-made "jurisdictional caulk" that certainly has not been sanctioned by Congress.

II. THERE CAN BE NO OTHER BASIS FOR REMOVAL UNDER THE ALL WRITS ACT.

The All Writs Act, 28 U.S.C. § 1651(a), allows courts to issue orders under "exceptional circumstances," *Pennsylvania Bureau*, 474 U.S. at 43, and "as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in jurisdiction otherwise obtained." *New York Tel. Co.*, 434 U.S. at 172 (quoting All Writs Act). This seemingly broad grant of judicial authority has its limits, however. These include, at a minimum, that (1) where a federal statutory mechanism already exists, courts may not fashion their own ad hoc remedies, thus making recourse to the AWA "[in]appropriate" and not "agreeable to the usages and principles of law," and (2) other mechanisms are available to secure relief, thus making recourse to the AWA "[un]necessary." Neither the element of appropriateness or the

requirement of necessity is satisfied in this case.

A. Recourse to the AWA is inappropriate because Congress has already specified the mechanism for removals.

The All Writs Act cannot justify a "common law" removal, unconstrained and unacknowledged by Congress. Petitioners appear to concede this. Pet. Br. 9 ("Likewise, the [AWA] does not *enlarge* the federal courts' existing statutory jurisdiction." (original emphasis) (citing *Clinton v. Goldsmith*, 526 U.S. at 535)). In *New York Telephone*, the Court specifically noted the All Writs Act was available, "'[u]nless [the Act's use is] appropriately confined by Congress'." 434 U.S. at 172-73 (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273 (1942)). Judicial discretion to allow an extra-statutory removal has been so constrained by Congress.

More recently, this Court in *Pennsylvania Bureau* distinguished instances where the All Writs Act was the only method by which a federal court could "achieve the rational ends of law" from cases in which there are other alternative statutory mechanisms available for the court to use. 474 U.S. at 42 n.7 (citing *Harris v. Nelson*, 394 U.S. 286, 299 (1969), quoting *Price v. Johnston*, 334 U.S. 266, 282 (1948); *Adams*, 317 U.S. at 273). Moreover, the Court in *Pennsylvania Bureau* indicated that the former language of the All Writs Act, contained in section 14 of the First Judiciary Act, limiting writs to those "not specifically provided for by Statute," was deemed to be applicable to the modern form of the Act. See 474 U.S. at 41. See also 28 U.S.C. § 1651 (1994) (revisers' note of 1948) (indicating that revision was intended to reflect this Court's decision in *United States Alkali Exp. Ass'n, Inc. v. United States*, 325 U.S. 196, 203 (1945), and not to alter

any other element or requirement contained in the earlier versions of the statute). Moreover, in *United States Alkali*, this Court pointedly held that "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." 325 U.S. at 203.

This Court in *Pennsylvania Bureau* thus required the use of other available statutory measures instead of resorting to the All Writs Act. "Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling." 474 U.S. at 43. "[The All Writs Act] does not authorize [courts] to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate." Id. See also *Clinton v. Goldsmith*, 526 U.S. at 537 (AWA "invests a court with a power essentially equitable and, as such, not generally available to provide alternatives to other, adequate remedies at law."); *Carlisle*, 517 U.S. at 429 ("'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). Consequently, the Court ruled in *Pennsylvania Bureau* that recourse to the AWA was inappropriate because of the existence of relevant provisions of the habeas corpus statute. See 474 U.S. at 42-43.

It hardly bears reminding that removal is solely a creature of statute. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941); *Great N. Ry. Co. v. Alexander*, 246 U.S. 276, 280 (1918); *Gold-Washing & Water Co. v. Keyes*, 96 U.S. 199 (1877). The assertion by amicus curiae of Petitioners, PLAC Br. 19, that the removal statute somehow fails to occupy the field of congressional action in this sphere, or can be equated to an

"ordinary writ" within the meaning of the AWA, id. 22 n.6, overlooks this Court's holdings that removal is a unique statutory mechanism with significant federalism implications for the proper balance of power between federal and state tribunals. It is simply extravagant to suggest that it would be appropriate, within the meaning of the All Writs Act's language, for federal courts to permit removal of a case where the clear application of Congress's statutory scheme of removal would bar such an action. Under no circumstances could the removal of a case be considered an appropriate exercise of judicial power pursuant to the All Writs Act.

B. In this case, removal under the AWA is unnecessary because of the availability of injunctions or deference to state court determinations of the preclusive effect of federal judgments.

Necessity is a threshold element for the application of the All Writs Act. This is entirely consonant with the All Writs Act's statutory terms. As this Court noted in *Adams*, the two preliminary inquiries for invocation of the AWA are whether jurisdiction over the matter already vests in the federal court, and then "could the issuance of the writ be deemed 'necessary for the exercise' of that jurisdiction?" 317 U.S. at 273 (quoting *Whitney v. Dick*, 202 U.S. 132, 136-37 (1906)).

Despite the suggestion of amicus curiae of Petitioners, see PLAC Br. 23, necessity has always been regarded by this Court as a statutory predicate for invocation of the All Writs Act, and does not merely come into play by informing a court's discretion as to which sort of writ is to be selected or what sort of relief is to be granted. See *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980) ("[i]n order to insure that the writ will issue only in extraordinary circumstances, this Court has required that a party seeking issuance have no other means to attain the relief he desires."); *Ex Parte Republic of Peru*, 318 U.S. 578, 584 (1943) (discussing section 262 of 1911 Judicial Code, a precursor to the AWA, and observing that "common law writs, like equitable remedies . . . are usually denied where other adequate remedy is available.").

Necessity, in the context of the AWA, means that recourse to a particular remedial writ offers the only avenue of legitimate relief sought by a party. Notwithstanding the broad language in *New York Telephone*, see 434 U.S. at 172-75, partly repudiated by this

Court in *Pennsylvania Bureau*, see 474 U.S. at 40-43, but still extensively relied upon by Petitioners, this Court was careful to reaffirm the requirement of practical necessity by noting "that without [an order under the All Writs Act] there is no conceivable way in which the [original order] by the District Court could have been successfully accomplished." 434 U.S. at 175. See also *United States Alkali*, 325 U.S. at 201-04. Although "necessariness" need not connote that a court "could not otherwise physically discharge its appellate duties," *Adams*, 317 U.S. at 273, it does require there be no alternative mechanisms for gaining the relief desired.

In this case, Petitioners had no fewer than two alternatives to seeking an unauthorized removal of Henson's first amended class action petition to federal court. Syngenta could have applied for an injunction in federal court, requiring Henson to dismiss the state action, at least to the extent it was inconsistent with the terms of the earlier federal settlement. Alternatively, Syngenta could have – consistent with this Court's precedents – allowed the Louisiana courts to determine the proper preclusive effect of the prior federal judgment, confident that the state courts would have reached the correct result. The availability of these alternative procedural mechanisms made recourse to removal under the authority of the All Writs Act unnecessary.

1. Instead of removing cases, federal courts can properly issue, pursuant to 28 U.S.C. § 2283, an injunction to have the state court action dismissed. The Anti-Injunction Act, 28 U.S.C. § 2283, prohibits a federal court from enjoining state court proceedings unless one of the three express statutory exceptions is satisfied. "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." Id. The essential purpose of

the Anti-Injunction Act is to "forestall[] 'the inevitable friction between the state and federal courts that ensues from the injunction of state judicial proceedings by a federal court.'" *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146 (1988) (quoting *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 630-631 (1977)). By articulating three express exceptions to the Anti-Injunction Act, Congress recognized that federal interference with state proceedings may sometimes be unavoidable. Congress has permitted injunctions in certain circumstances, "to ensure the effectiveness and supremacy of federal law." Id.

The relitigation exception to the Anti-Injunction Act would have at least allowed Syngenta to apply for an injunction of the state court proceedings, although whether it would have secured such relief would have turned on the merits of its preclusion arguments. The relitigation exception finds its textual basis in the Anti-Injunction Act's provision that a federal court can enjoin a state court proceeding "to protect or effectuate its judgment." 28 U.S.C. § 2283. Once again, the purpose of this clause has been well-articulated by this Court: "The relitigation exception was designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by a federal court. It is founded in the well-recognized concepts of *res judicata* and collateral estoppel." *Chick Kam Choo*, 486 U.S. at 147.

a. Respondent is mindful that there are significant prerequisites for the use of the relitigation exception under the Anti-Injunction Act, consonant with the important federalism goals advanced by that legislation. Each of these threshold requirements would have been satisfied by Syngenta, had they applied for an injunction within a reasonable period after Henson's filing of the amended class action petition. Aside from attaining personal jurisdiction over the parties, the first of these requirements is that a

federal court must, in the prior proceeding, have actually disputed the issue that was later sought to be relitigated and the federal trier of fact must have actually resolved it. See *Atlantic Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281, 287 (1970). "[A]n essential prerequisite for applying the relitigation exception is that the claims or issues which the federal injunction insulates from litigation in state proceedings actually have been decided by the federal court." *Chick Kam Choo*, 486 U.S. at 148. "Moreover . . . this prerequisite is strict and narrow." Id. Insofar as Syngenta could have argued in its injunction application that the state proceeding was entirely barred by the earlier federal settlement and judgment, this prerequisite assuredly would have been satisfied.

Use of the relitigation exception to the Anti-Injunction Act is also limited "to those situations in which the state court has not yet ruled on the merits of the res judicata issue." *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 524 (1986). "[U]nder the Full Faith and Credit Act a federal court must give the same preclusive effect to a state-court judgment as another court of that State would give." Id. at 523. The relitigation exception of the Anti-Injunction Act does not limit application of the Full Faith and Credit Act, 28 U.S.C. § 1738. See *Parsons Steel*, 474 U.S. at 523-24. Once the state court has ruled on the res judicata issue, "then the Full Faith and Credit Act becomes applicable and federal courts must turn to state law to determine the preclusive effect of the state court's decision." Id. at 524. Had Syngenta immediately sought an injunction in federal court to bar the state proceedings, it would have been clear that the state court had not ruled on the res judicata issue, satisfying the *Parsons Steel* timing requirement. The Louisiana state court proceedings had not reached a stage of ruling on the prior preclusive effect of the federal settlement, having only invited the plaintiffs to amend their complaint, without any motion or

ruling on dismissal, except for the dismissal of the settled chlordimeform exposure count. See J.A. 86a.

As the prerequisites of the relitigation exception to the Anti-Injunction Act were satisfied here, an injunction could have been sought from a federal court to Henson to discontinue the state court proceeding (at least to the extent that a federal court would have found that the state court proceedings were barred by the earlier federal settlement). This is not to suggest, of course, that an injunction necessarily would have issued in the equitable discretion of the federal court; that would have depended on the district court's appreciation of the preclusive effect of the earlier federal settlement on the subsequent state proceeding. But, in any event, recourse to the All Writs Act to justify a removal was clearly unnecessary.

b. Use of an injunction in these circumstances is less chafing of the federalism concerns implicated in the autonomy and dignity of state courts than the outright ousting of state court jurisdiction via removal. See Hoffman, supra, 148 U. PA. L. REV. at 447, 463-64; Steinman, supra, 80 B.U. L. REV. at 775-76, 816-18. Although a contrary position has been asserted by the amicus curiae of Petitioners and some other authorities, see *NAACP, Minneapolis Branch v. Metro. Council*, 125 F.3d 1171, 1174 (8th Cir. 1997); PLAC Amicus Br. 23-26, this cannot be seriously countenanced. Removal divests the jurisdiction of a state court, and prevents it from carrying-out its adjudicatory responsibilities in toto. By contrast, an injunction addressed to the parties can be narrowly tailored to achieve whatever preclusive relief is sought. The fact that an injunction typically would be directed towards the litigants, and not the state court itself, is further consistent with the dignity interests enshrined in the Anti-Injunction Act.

Moreover, Congress already has made the determination

that injunctions of state court proceedings (consistent with the Anti-Injunction Act) are to be preferred to removals. When the Anti-Injunction Act was amended in 1948 in reaction to *Toucey v. New York Life Ins. Co.*, 314 U.S. 118 (1941), see 28 U.S.C. § 2283 (revisers' note), it was precisely with the purpose of allowing federal courts to protect the res judicata effects of their judgments. See *Atlantic Coast Line R.R.*, 398 U.S. at 286-87; Steinman, supra, 80 B.U. L. REV. at 781-82. Congress could have amended the removal statute to achieve this same result, but it did not, making the choice that injunctions were a superior avenue of relief than removals. This Court should not lightly depart from Congress's determination in that respect.

2. Preferably, state courts should be permitted to resolve for themselves issues of the preclusive effect of previous federal judgments. This Court has made clear that absent the application of the relitigation exception to the Anti-Injunction Act, federal courts should allow state court proceedings on the preclusive effect of federal judgments to run their course, including the ultimate reviewing power of this Court. See *Amalgamated Clothing Workers of Am. v. Richman Bros. Co.*, 348 U.S. 511, 520-21 (1955); *Atlantic Coast Line R.R.*, 398 U.S. at 297 ("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."); *Chick Kam Choo*, 486 U.S. at 149-50 ("when a state proceeding presents a federal issue, even a pre-emption issue, the proper course is to seek resolution of that issue by the state court").

In *Parsons Steel*, this Court was adamant that "[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." 474 U.S. at 525. In any event, "[s]tate courts are bound to apply federal rules in determining the preclusive effect of federal-court decisions on issues of federal law." *Heck v. Humphrey*, 512 U.S. 477, 488 n.9 (1994); see also *Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 361-63 (1984). Litigants in possession of favorable, prior federal judgments should have confidence in the ability of state courts to rule correctly on the preclusive effects of those earlier rulings, and should not seek to oust state court jurisdiction through such a device as removals under the All Writs Act.

Despite the contrary intimation of amicus curiae of Petitioners, PLAC Amicus Br. 16-17 n.5, any doubts on this score were conclusively resolved by this Court's recent decision in *Rivet*, where, in the context of removal (and not an injunction), the Court indicated that "[t]he defense of claim preclusion, we emphasize, is properly made in the state proceeding, subject to this Court's ultimate review." 522 U.S. at 472.

> "In sum, claim preclusion by reason of a prior federal judgment is a defensive plea that provides no basis for removal under § 1441(b). Such a defense is properly made in the state proceedings, and the state courts' disposition of it is subject to this Court's ultimate review. . . . We note also that under the relitigation exception to the Anti-Injunction Act, 28 U.S.C. § 2283, a federal court may enjoin state-court proceedings 'where necessary . . . to protect or effectuate its judgments.' Ibid." Id. at 478 & n.3.

In view of *Rivet*'s clarification that removal is not permissible under *Moitie*'s "claim preclusion exception," then it should be beyond

peradventure that the All Writs Act cannot provide a legitimate ground for removal based on the preclusive effect of a prior federal judgment.

Even if an injunction is unavailable, this Court has strenuously held that deference to state courts in determining the preclusive effect of prior federal court judgments is preferable to removal of the case. Despite Petitioners' and their amici's notable lack of confidence in state courts to determine correctly the preclusive effect of a prior federal judgment or settlement, this Court should not succumb to speculative fears of untoward rejections of federal judgments by state tribunals. See *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 586 (1999) ("federal and state courts are complementary systems for administering justice in our Nation. Cooperation and comity, not competition and conflict, are essential to the federal design."). In view of the availability of two remedial mechanisms – an application under the Anti-Injunction Act and deference to state court preclusion determinations – that have been either statutorily endorsed, or judicially declared, to be preferable to removal, it cannot be seriously maintained that removal is a necessary proceeding under the All Writs Act. The proper procedural course for this case is, consistent with the court of appeals' disposition, Pet. App. 12a; J.A. 24a, for it to be remanded to state court for a determination on the preclusive effect of the prior federal settlement on any remaining state-law claims.

III. "ANCILLARY REMOVAL JURISDICTION," PREMISED ON THE AWA OR A PRIOR FEDERAL JUDGMENT, IS IMPERMISSIBLE.

A. Ancillary jurisdiction is not properly before this Court.

In addition to the All Writs Act, supplemental jurisdiction, under section 1367, was asserted by Syngenta as a ground for removal jurisdiction in its removal papers. See J.A. 63a. But, as the court of appeals noted, supplemental jurisdiction obviously cannot provide the original jurisdiction required for removal under section 1441. See Pet. App. 7a n.3; J.A. 19a n.3. As for ancillary jurisdiction, the Eleventh Circuit noted that "Ciba-Geigy did not . . . assert [it]" and questioned whether "such jurisdiction exists independent of § 1367." Id. In any event, the Eleventh Circuit did "not address it as a potential basis" of removal jurisdiction. Id. Indeed, the question of ancillary jurisdiction was not raised by Syngenta in its Petition to this Court. See Pet. (i). In fact, nowhere in their Petition are cited the key cases that Petitioners now rely upon, see Pet. Br. 14-16, for their ancillary removal jurisdiction argument - *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994); and *Peacock v. Thomas*, 516 U.S. 349 (1996).

The suggestion that invoking the All Writs Act is tantamount to raising ancillary jurisdiction, such as to make it "fairly included" within Petitioners' Question Presented, see S.Ct. R. 14.1(a); *Yee v. City of Escondido*, 503 U.S. 519, 535-38 (1992), is untenable. Indeed, Petitioners appear to recognize this by the fact they have reformulated their Question Presented in their main brief. Compare Pet. Br. (i), with Pet (i). Respondent, like the Court, is regrettably left to speculate whether Syngenta's invocation of ancillary jurisdiction is intended as an analytically distinct submission (and thus runs afoul of Rule 14), or as subsidiary to its arguments based on the All Writs Act. In one sense, however, this dispute may be irrelevant; ancillary jurisdiction cannot provide Syngenta with the missing ingredient needed to justify removal here.

B. The ancillary jurisdiction doctrine does not provide a basis for removal jurisdiction.

1. Although with some understatement this Court has observed that "[t]he doctrine of ancillary jurisdiction can hardly be criticized for being overly rigid or precise," *Kokkonen*, 511 U.S. at 379, the broad contours of this exceptional aspect of federal procedure can be readily discerned, and they clearly counsel against its application to sanction removal of a case to federal court that otherwise would be ineligible. For starters, ancillary jurisdiction can properly be asserted only for:

> "two separate, though sometimes related, purposes: (1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent; . . . and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." Id. at 379-80 (citations omitted).

The parties seem to agree that the first prong – "factual[] interdependen[ce]" – is inapplicable, as the removed action is a second, subsequent lawsuit. See *Peacock*, 516 U.S. at 355 ("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.")(citing *Kokkonen*, 511 U.S. at 380-81; *H.C. Cook Co. v. Beecher*, 217 U.S. 497, 498-99 (1910)). See also PLAC Amicus Br. 15.

As for the second prong of ancillary enforcement jurisdiction, typically once a federal court dismisses a case pursuant to a settlement, it may not later obtain jurisdiction to enforce the

settlement through ancillary jurisdiction. *Kokkonen*, 511 U.S. at 381. Petitioners argue, Pet. Br. 16, that this Court carved out an exception where the district court's order of dismissal (1) expressly retained jurisdiction over the settlement agreement and (2) incorporated the terms of the settlement. See *Kokkonen*, 511 U.S. at 381 ("In that event, a breach of the agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist."). A retention of jurisdiction did occur here. J.A. 93a. Nevertheless, the action filed by Respondent in state court was avowedly not seeking to litigate the terms of the earlier federal settlement. See J.A. 83a-86a, 95a; Resp. Br. App. 43a-46a.

2. a. Under these conditions, *Kokkonen* cannot properly be read to allow the removal of cases that are otherwise not removable under section 1441 because of a lack of original jurisdiction. To begin with, the language in *Kokkonen* relied upon by Petitioners is *dicta* – the Court has not contemplated a situation where these factors were present and did not expressly rule that ancillary jurisdiction sanctions removal. The holding of *Kokkonen* was simply that a district court dismissing a case pursuant to a settlement agreement does not retain ancillary jurisdiction to enforce that agreement (a power which belongs to state courts). See 511 U.S. at 381. Ironically, the Court advised in *Kokkonen*:

> "[i]t is to the holdings of our cases, rather than their dicta, that we must attend, and we find none of them that has, for purposes of asserting otherwise nonexistent federal jurisdiction, relied upon a relationship so tenuous as the breach of an agreement that produced the dismissal of an earlier federal suit." Id. at 379.

Allowing ancillary jurisdiction to operate as a judge-made exception to the Congressionally-imposed requirements of removal would also lead to the anomalous result that something could be achieved by ancillary jurisdiction that could not otherwise be attained by supplemental jurisdiction under section 1367. Courts have regularly rejected section 1441 removal predicated on 28 U.S.C. § 1367 and a previously pending federal suit. See, e.g., *Ahearn v. Charter Township of Bloomfield*, 100 F.3d 451, 456 (6th Cir. 1996). These decisions indicate that the removal statutes call for an analysis of the state suit alone to determine whether it satisfies the original jurisdiction requirement. See also 28 U.S.C. § 1441(b); Hoffman, supra, 148 U. PA. L. REV. at 404 n.11.

This is also consistent with this Court's later ruling in *Peacock* that:

> "a 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." 516 U.S. at 355 (citations omitted).

Likewise, in *Rivet*, this Court's remand of the Louisiana state case demonstrates that even state court proceedings that appear to threaten directly a prior federal judgment may not be removed in the absence of an independent basis of subject matter jurisdiction. See 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.

b. Even if the dicta in *Kokkonen* is somehow controlling here, ancillary jurisdiction still does not support removal in this matter. This case does not involve an affirmative use of ancillary jurisdiction by a party bringing an action to enforce a settlement agreement in the court that retained jurisdiction. Instead, the defendants in this case are attempting to use ancillary jurisdiction as the basis for removal to a court that did not issue the order. According to § 1441, a party can remove a case only "to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a). Under ancillary jurisdiction, only the court that issued the original order of dismissal, having explicitly retained jurisdiction, can later assume jurisdiction over an action to enforce the settlement. *Kokkonen*, 511 U.S. at 381. The required transfer of the removed action, J.A. 65a, negated any conceivable ancillary jurisdiction under *Kokkonen*.

c. The last, and most significant, reason that the ancillary jurisdiction doctrine cannot apply here is that, like the use of the All Writs Act, it is conditioned upon necessity. The relevance of this prong is conceded by Petitioners. Pet. Br. 15. "Ancillary enforcement jurisdiction is, at its core, a creature of necessity." *Peacock*, 516 U.S. at 359 (citing *Kokkonen*, 511 U.S. at 380; *Riggs v. Johnson County*, 73 U.S. (6 Wall.) 166, 187-88 (1867)); see id. at 355 ("The basis of the doctrine of ancillary jurisdiction is the practical need 'to protect legal rights or effectively to resolve an entire, logically entwined lawsuit'." (quoting *Kroger*, 437 U.S. at 377)); see also Hoffman, supra, 148 U. PA. L. REV. at 444-45. It is the presence of necessity that confers the "extraordinary circumstances" required to trigger the exercise of ancillary jurisdiction. *Peacock*, 516 U.S. at 359. The Court in *Peacock*, in

denying ancillary jurisdiction, emphasized the presence of other "procedural safeguards" that were sufficient for use by a party seeking to enforce a federal judgment. Id.

As discussed above in relation to the All Writs Act, supra at 22-29, ancillary removal jurisdiction is unnecessary, as two alternatives exist, including deferral to state courts and a proceeding under the Anti-Injunction Act's relitigation exception. Even if, by its broad terms, ancillary jurisdiction were notionally applicable here, its logical predicate of necessity and the availability of other remedial mechanisms would defeat its use. Simply put, Petitioners had no reason or necessity to seek an unauthorized removal to federal court.

3. The suggestion made by amicus curiae of Petitioners to use ancillary jurisdiction as some wide-ranging and far-reaching mechanism to patrol the enforceability of federal settlements is unprecedented. Not only does this proposal carry with it the likelihood of subverting the finely-wrought balance between state and federal court jurisdiction as established by Congress through the removal and Anti-Injunction statutes, it also will make it more likely (not less) that federal and state tribunals will be brought into conflict. And despite their reliance on *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), the teaching of that case is that this Court is properly cautious of suggestions to rewrite statutes or the federal rules in order to pursue some ostensible goal of facilitating the efficiency of multi-state mass tort litigation. See id. at 620, 628-29. Such decisions and policy judgments are properly left to Congress.[3]

[3] For example, legislation is currently before Congress that would allow a broader range of class actions to be removed to federal court. See H.R. 2341, 107th Cong., § 5 (2002). By no means, though, does this proposed (continued...)

In any event, sanctioning an illegitimate use of the All Writs Act in order to permit "common law" removals of cases that would otherwise have to remain in state court is an untoward and dangerous development that this Court should roundly reject.

Finally, accepting the possibility of using some combination of ancillary jurisdiction and the All Writs Act to allow statutorily unauthorized removals of cases would also raise the specter of an unconstitutional expansion of the federal courts' Article III powers. See Steinman, supra, 80 B.U. L. REV. at 827-28 ("where an exercise of jurisdiction is impermissible under the ordinary removal statutes, and cannot be legitimated by reference to ancillary or supplemental jurisdiction, an assertion of jurisdiction via a removal power teased out of the All Writs Act could pose a significant Article III problem. . . . [Where original jurisdiction does not exist], the assertion of jurisdiction over a case via All Writs removal would not merely stretch that statute; it would violate Article III."). To follow the path suggested by Petitioners and their amici would be to ask the Court to accomplish, via judicial fiat, what it has sternly forbade Congress from doing. See *Nat'l Mut. Ins. Co. v. Tidewater Transfer Co. Inc.*, 337 U.S. 582 (1949); *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922) ("[Congress] may give, withhold or restrict such jurisdiction [to inferior courts] at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution."); *Marbury*, 5 U.S. (1 Cranch) at 174-75.

No recourse to plumbing metaphors of the All Writs Act and ancillary jurisdiction as "jurisdictional caulk . . . plug[ging] the cracks in federal jurisdiction," Pet. App. 11a; J.A. 23a, can sanction

[3](...continued)
legislation go as far as Petitioners' submissions here concerning the use of the All Writs Act or ancillary jurisdiction.

what would otherwise be an impermissibly wide expansion of federal jurisdiction at the expense of state courts. If our system of judicial federalism means anything, it requires that Congress sets the rules for ousting state court jurisdiction through removals, and that proper deference be paid to the power and authority of state courts correctly to render judgment on the enforceability of prior federal decrees. Any other result would mean that on the flimsiest of grounds, and even with robust remedial alternatives, parties can secure removals of cases that properly belong in state court.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Eleventh Circuit should be affirmed.

Respectfully submitted,

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Appendix

Joint Appendix pages 42a-47a