REMAND AND APPELLATE REVIEW WHEN A DISTRICT COURT DECLINES TO EXERCISE SUPPLEMENTAL JURISDICTION UNDER 28 U.S.C. § 1367(C)

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I. INTRODUCTION

Under 28 U.S.C. § 1447(c) and (d), as well as Supreme Court precedent, remand orders in removed cases are immune from appellate review when they are based on a lack of subject matter jurisdiction. Until recently, all appellate courts that had addressed the issue had concluded that a district court's discretionary decision to decline to exercise supplemental jurisdiction under 28 U.S.C. § 1367(c) and remand the supplemental claims does not constitute a remand for lack of subject matter jurisdiction and therefore is reviewable on appeal.[1]

In 2007, however, the Supreme Court held in *Powerex Corp. v. Reliant Energy Services, Inc.*[2] that where a district court characterizes a remand as subject matter jurisdictional and that characterization is colorable, the remand order is not subject to appellate review.[3] Although the case did not involve the remand of supplemental claims, the Court stated the following in dictum: "It is far from clear . . . that when discretionary supplemental jurisdiction is declined the remand is not based on lack of subject-matter jurisdiction for purposes of § 1447(c) and § 1447(d)."[4]

Then, in *HIF Bio, Inc. v. Yung Shin Pharmaceuticals Industrial Co.*,[5] the United States Court of Appeals for the Federal Circuit, relying on *Powerex*, became the first circuit to hold that *Cohill* remands[6] fall within § 1447(c) and (d)

1. *See infra* Part II.D.1 for a discussion of appellate courts' remands of supplemental claims prior to the *Powerex* decision.

2. 127 S. Ct. 2411 (2007).

3. *Id.* at 2418.

4. *Id.* at 2418–19.

5. 508 F.3d 659 (Fed. Cir. 2007), *cert. granted sub nom*. Carlsbad Tech., Inc. v. HIF Bio, Inc., 129 S. Ct. 395 (Oct. 14, 2008) (No. 07-1437).

6. A remand that occurs after a district court declines to exercise supplemental jurisdiction under § 1367(c) is often referred to as a "remand under § 1367(c)," or a "§ 1367(c) remand." These remands are also referred to as "*Cohill* remands" because the Supreme Court held in *Carnegie-Mellon*

and therefore are not subject to appellate review.[7] The *HIF Bio* court reasoned that "because every § 1367(c) remand necessarily involves a predicate finding that the claims at issue lack an independent basis of subject matter jurisdiction, a remand based on declining supplemental jurisdiction can be colorably characterized as a remand based on lack of subject matter jurisdiction."[8] On October 14, 2008, the Supreme Court granted certiorari in *HIF Bio* to resolve the circuit split created by the Federal Circuit.[9]

This Article examines whether the *HIF Bio* decision was correct and ultimately concludes that it was not. Part II reviews the history of supplemental jurisdiction and § 1447(c) and (d). Part II also explains the relationship between § 1447(c) and (d) and explicates the pertinent Supreme Court and court of appeals precedent. Part III.A begins by explaining how some postremoval events can lead to remands for lack of subject matter jurisdiction under the current version of § 1447(c). Part III.B then argues that a district court's decision to decline to exercise supplemental jurisdiction is not the type of postremoval event that results in a jurisdictional defect and thereby renders *Cohill* remands unreviewable on appeal. More specifically, Part III.B contends that the *HIF Bio* court erred in concluding that it lacked jurisdiction over the appeal in that case for two reasons. First, the Federal Circuit misunderstood the language of § 1367 and confused the existence of judicial power with the discretionary decision whether to exercise such power. Second, the Federal Circuit incorrectly applied the *Powerex* test to the remand order in *HIF Bio*. Part III.B concludes that the Supreme Court should reverse the Federal Circuit and hold that the Federal Circuit must review the remand order on the merits.

Part III.C argues that even if the Supreme Court determines that *Cohill* remands are remands for lack of subject matter jurisdiction, that does not

University v. Cohill that district courts could remand pendent claims in removed cases instead of dismiss them. 484 U.S. 343, 354 (1988). See also *infra* Part II.C.1 for a discussion of the *Cohill* decision. At the time *Cohill* was decided, there was no statutory basis for the remand of pendent claims. Instead, the power to remand derived from the doctrine of pendent jurisdiction. *Cohill*, 484 U.S. at 356. When the supplemental jurisdiction statute was enacted, it did not (and still does not) provide for the remand or dismissal of supplemental claims once a district court declines to exercise supplemental jurisdiction over them. See *infra* note 41 and accompanying text. Nevertheless, there is no question that the supplemental jurisdiction statute applies to removed cases and district courts can remand supplemental claims in removed cases if they decline to exercise supplemental jurisdiction over them. See *infra* note 41 and accompanying text. Because the district court's remand authority does not derive from § 1367, it (presumably) continues to derive from *Cohill*. Thus, this Article refers to the remand of claims after a district court declines to exercise supplemental jurisdiction as *Cohill* remands.

7. *HIF Bio, Inc.*, 508 F.3d at 667.

8. *Id.*

9. Carlsbad Tech., Inc. v. HIF Bio, Inc., 129 S. Ct. 395 (Oct. 14, 2008) (No. 07-1437). The Petition for Certiorari phrased the question presented as follows:

> Whether a district court's order remanding a case to state court following its discretionary decision to decline to exercise the supplemental jurisdiction accorded to federal courts under 28 U.S.C. § 1367(c) is properly held to be a remand for a "lack of subject matter jurisdiction" under 28 U.S.C. § 1447(c) so that such remand order is barred from any appellate review by 28 U.S.C. § 1447(d).

Id.

automatically mean that they fall within § 1447(c) and are unreviewable under § 1447(d). Finally, Part III.D explores the consequences that will result if the Court (erroneously) concludes both that *Cohill* remands are based on a lack of subject matter jurisdiction and that they are immune from appellate review under § 1447(c) and (d).

II. BACKGROUND OF SUPPLEMENTAL JURISDICTION AND § 1447(C) AND (D)

A. Supplemental Jurisdiction

1. History

The history of supplemental jurisdiction is well documented[10] and is recounted only in relevant part here. In 1990, Congress enacted 28 U.S.C. § 1367, which codifies the common law doctrines of pendent and ancillary jurisdiction under the label of supplemental jurisdiction.[11] Pursuant to these doctrines, if a district court had an independent basis of subject matter jurisdiction over at least one claim, then the jurisdictional statutes[12] "*implicitly* authorized supplemental jurisdiction over all other claims between the same parties arising out of the same Article III case or controversy."[13] The "leading modern case for this principle"[14] is *United Mine Workers of America v. Gibbs*.[15]

10. *See, e.g.*, Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 552–57 (2005) (discussing previous Supreme Court cases dealing with supplemental jurisdiction); *see also id.* at 579–84 (Ginsburg, J., dissenting) (outlining prior Supreme Court holdings regarding supplemental jurisdiction); Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute—A Constitutional and Statutory Analysis*, 24 ARIZ. ST. L.J. 849, 852–89 (1992) (discussing Federal Courts Study Committee and prior case law which led to supplemental jurisdiction statute); John B. Oakley, *Recent Statutory Changes in the Law of Federal Jurisdiction and Venue: The Judicial Improvements Acts of 1988 and 1990*, 24 U.C. DAVIS L. REV. 735, 757–63 (1991) (discussing doctrines in place preceding supplemental jurisdiction statute); James E. Pfander, *Supplemental Jurisdiction and Section 1367: The Case for a Sympathetic Textualism*, 148 U. PA. L. REV. 109, 116–20 (1999) (discussing origins of supplemental jurisdiction).

11. City of Chicago v. Int'l Coll. of Surgeons, 522 U.S. 156, 164–65 (1997). Pendent jurisdiction "applied only in federal-question cases and allowed plaintiffs to attach nonfederal claims to their jurisdiction-qualifying claims." *Exxon Mobil Corp.*, 545 U.S. at 590–91 (Ginsburg, J., dissenting). In contrast, ancillary jurisdiction "applied primarily, although not exclusively, in diversity cases and typically involved claims by a defending party haled into court against his will." *Id.* at 591 (internal quotation marks and alterations in original omitted). Thus, prior to the enactment of the supplemental jurisdiction statute, courts regularly exercised ancillary jurisdiction "over compulsory counterclaims, impleader claims, cross-claims among defendants, and claims of parties who intervened of right." *Id.* at 581 (internal quotation marks omitted).

12. *E.g.*, 28 U.S.C. § 1331 (2006) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."); *id.* § 1332(a)(1) ("The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—(1) citizens of different States. . . .").

13. *Exxon Mobil Corp.*, 545 U.S. at 556 (citing United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725 (1966)) (emphasis added); *see also id.* at 554 ("In order for a federal court to invoke

In *Gibbs*, a pendent jurisdiction case, the plaintiff filed an action in federal court alleging violations of the Labor Management Relations Act ("LMRA") and state law against the defendant.[16] The district court had federal question jurisdiction over the LMRA claims[17] but lacked diversity jurisdiction over the state claim.[18] Nevertheless, the Supreme Court held that the district court had the "power" to hear the whole case because the district court had an independent basis of jurisdiction over the federal claim and the state and federal claims were sufficiently related.[19] The *Gibbs* Court emphasized, however, that "pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims."[20] Thus, although the district court may have the power to hear both the federal and state claims, "[t]hat power need not be exercised in every case in which it is found to exist."[21]

supplemental jurisdiction under *Gibbs*, it must first have original jurisdiction over at least one claim in the action.").

14. *Id.* at 552.

15. 383 U.S. 715 (1966).

16. *Gibbs*, 383 U.S at 717–18.

17. *See id.* at 717, 728 (stating that claims against defendant under § 303 of LMRA "generally were substantial").

18. *Id.* at 720, 722 (stating that jurisdiction over state law claim was based on doctrine of pendent jurisdiction and that diversity jurisdiction over state claim was absent).

19. *See id.* at 728 ("[T]he state and federal claims arose from the same nucleus of operative fact and reflected alternative remedies."); *id.* at 725 (stating that if federal claim has "substance sufficient to confer subject matter jurisdiction on the court" and "state and federal claims . . . derive from a common nucleus of operative fact," then "there is power in [the] federal courts to hear the whole" (emphasis omitted)).

20. *Gibbs*, 383 U.S. at 726. The *Gibbs* Court gave several examples of when a district court should or could decline to exercise pendent jurisdiction. *Id.* First, a district court should avoid "[n]eedless decisions of state law . . . both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." *Id.* Second, "if the federal claims [were] dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." *Id.* Third, "if it appear[ed] that the state issues substantially predominate[d] . . . the state claims [could] be dismissed without prejudice." *Id.* Finally, a district court could decline to exercise pendent jurisdiction if there were "reasons independent of jurisdictional considerations, such as the likelihood of jury confusion in treating divergent legal theories of relief, that . . . justif[ied] separating state and federal claims for trial." *Gibbs*, 383 U.S. at 727. Although the language used by the *Gibbs* Court "strongly suggested" that the district court should always dismiss the state law claims "if the federal claim was dismissed before trial, many courts treated this circumstance as simply one element to be considered in making the ultimate discretionary decision." JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 75 (4th ed. 2005) (footnote omitted); *see also* Rosado v. Wyman, 397 U.S. 397, 403–05 (1970) (holding that jurisdiction over plaintiff's state law claims continues even after plaintiff's federal claim becomes moot). See *infra* notes 203, 230 for a discussion of district courts' exercise of pendent jurisdiction in these situations.

21. *Gibbs*, 383 U.S. at 726; *see also id.* at 727 ("The question of *power* will ordinarily be resolved on the pleadings. But the issue whether pendent jurisdiction has been *properly assumed* is one which remains open throughout the litigation." (emphasis added)); Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 552–53 (2005) ("*Gibbs* confirmed that the District Court had the additional power

After the decision in *Gibbs*, the Court took issue with the common law nature of pendent and ancillary jurisdiction and the failure of the *Gibbs* Court to "mention, let alone come to grips with . . . the bedrock principle that federal courts have no jurisdiction without statutory authorization."[22] Although the Court reaffirmed *Gibbs* and the exercise of pendent and ancillary jurisdiction over claims between the same parties where at least one claim had an independent basis of jurisdiction, the Court refused to extend *Gibbs* and interpret the jurisdictional statutes to "authorize supplemental jurisdiction over additional claims involving other parties."[23]

For example, in *Finley v. United States*,[24] the Court refused to permit the exercise of supplemental jurisdiction where the plaintiff asserted a federal claim against one defendant and state law claims against the other defendants.[25] The federal claim had its own basis of jurisdiction under 28 U.S.C. § 1346(b), but the state law claims did not fall within the district court's diversity jurisdiction and no statute explicitly provided for the exercise of supplemental jurisdiction over them.[26] Because there was no specific statutory authorization for the district court to assert jurisdiction over the state law claims, the *Finley* Court held that the lower court did not have power to hear them.[27]

In reaching its decision, the *Finley* Court noted that Congress could change the result in *Finley* by passing a statute that authorized the exercise of supplemental jurisdiction over claims by and against parties joined to an action that did not have an independent basis of jurisdiction.[28] Congress responded by enacting § 1367.[29] The statute does "not acknowledge any distinction between

(though not the obligation) to exercise supplemental jurisdiction over related state claims that arose from the same Article III case or controversy.").

22. *Exxon Mobil Corp.*, 545 U.S. at 553 (citing Finley v. United States, 490 U.S. 545, 548 (1989)).

23. *Id.* at 557 (citing *Finley*, 490 U.S. at 549, 556; Zahn v. Int'l Paper Co., 414 U.S. 291, 300–01 (1973); Clark v. Paul Gray, Inc., 306 U.S. 583, 590 (1939)).

24. 490 U.S. 545 (1989).

25. *Finley*, 490 U.S. at 546, 555.

26. *Id.* at 547–55.

27. *Id.* at 555.

28. *Id.* at 556.

29. This statute provides:

> (a) 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. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.
>
> (b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.
>
> (c) The district courts may decline to exercise supplemental jurisdiction over a claim under

pendent . . . and . . . ancillary jurisdiction."[30] Section 1367(a) provides that unless another federal statute or subsection (b) or (c) applies, when a federal court has "original jurisdiction" over at least one claim in an action, it "shall have" supplemental jurisdiction over additional claims that are part of the same Article III case or controversy but do not by themselves fall within the court's original jurisdiction.[31] Section 1367(a) also overrules the result in *Finley* by providing that supplemental jurisdiction "include[s] claims that involve the joinder or intervention of additional parties."[32] Section 1367(b) "qualifies the broad rule of § 1367(a)" by creating specific exceptions to § 1367(a).[33]

In addition, supplemental jurisdiction, "'is a doctrine of discretion, not of plaintiff's right.'"[34] Section 1367(c) "confirms the discretionary nature of supplemental jurisdiction by enumerating the circumstances in which district courts can refuse its exercise."[35] Specifically, § 1367(c) provides that "district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a)" where

> (1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the

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> subsection (a) if—(1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.
>
> (d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.
>
> (e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

28 U.S.C. § 1367 (2006).

30. Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 559 (2005); *see also id.* ("Though the doctrines of pendent and ancillary jurisdiction developed separately as a historical matter, the Court has recognized that the doctrines are 'two species of the same generic problem.'" (quoting Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 370 (1978))).

31. *Id.* at 558–59; *see also* City of Chicago v. Int'l Coll. of Surgeons, 522 U.S. 156, 167 (1997) ("The whole point of supplemental jurisdiction is to allow the district courts to exercise . . . jurisdiction over claims as to which original jurisdiction is lacking.").

32. 28 U.S.C. § 1367(a); *see also Exxon Mobil Corp.*, 545 U.S. at 558 (noting that holding in *Finley* was overturned by § 1367).

33. *Exxon Mobil Corp.*, 545 U.S. at 560. Section 1367(b) applies only to diversity cases and to those claims over which there is no independent basis of subject matter jurisdiction. It "withholds supplemental jurisdiction over the claims of plaintiffs proposed to be joined as indispensable parties under Federal Rule of Civil Procedure 19, or who seek to intervene pursuant to Rule 24," and "explicitly excludes supplemental jurisdiction over claims against defendants joined under" Rules 14, 19, 20, and 24. *Id.*; *see also id.* at 593 (Ginsburg, J., dissenting) (stating that "§ 1367(b) stops plaintiffs from circumventing § 1332's jurisdictional requirements by using another's claim as a hook to add a claim that the plaintiff could not have brought in the first instance").

34. *Int'l Coll. of Surgeons*, 522 U.S. at 172 (quoting United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726 (1966)).

35. *Id.* at 173.

> district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.[36]

According to the Supreme Court, § 1367(c) "reflects the understanding that, when deciding whether to exercise supplemental jurisdiction, 'a federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity.'"[37]

2. Supplemental Jurisdiction and Removal

The general removal statute, 28 U.S.C. § 1441(a), provides that defendants may remove "any civil action brought in a State court of which the district courts of the United States have original jurisdiction."[38] Accordingly, removal is proper only if the entire case "originally could have been filed in federal court."[39] Although the text of the supplemental jurisdiction statute does not indicate whether it applies to removed cases, the Supreme Court has said that § 1367 "applies with equal force to cases removed to federal court as to cases initially filed there."[40] Thus, taking sections 1367 and 1441(a) together, when an action is removed the district court must have an independent basis of subject matter jurisdiction over at least one claim, and any claims that lack an independent basis of subject matter jurisdiction must fall within the court's supplemental jurisdiction under § 1367(a).[41] In addition, although neither § 1367 nor any other

36. 28 U.S.C. § 1367(c); *see also Int'l Coll. of Surgeons*, 522 U.S. at 173 (stating that courts may opt against invoking supplemental jurisdiction over state law claims based on several factors, including specific circumstances of case, type of claims available under state law, characteristics of state law, and correlation between state and federal law claims).

37. *Int'l Coll. of Surgeons*, 522 U.S. at 173 (quoting Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 (1988)).

38. 28 U.S.C. § 1441(a).

39. *Int'l Coll. of Surgeons*, 522 U.S. at 163; *see, e.g.*, Syngenta Crop Prot., Inc. v. Henson, 537 U.S. 28, 33 (2002) (stating that defendants must demonstrate original subject matter jurisdiction for proper removal to federal court); Okla. Tax Comm'n v. Graham, 489 U.S. 838, 840 (1989) (per curiam) (noting that removal to federal court is not proper unless case could have been brought there originally).

40. *Int'l Coll. of Surgeons*, 522 U.S. at 165; *see also* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 591 n.11 (2005) (Ginsburg, J., dissenting) ("There was no disagreement in [*International College of Surgeons*], and there is none now, that . . . § 1367(a) is properly read to authorize the exercise of supplemental jurisdiction in removed cases.").

41. It is important to distinguish between supplemental claims that fall within § 1367(a) and are removable pursuant to § 1441(a) and claims that are removable pursuant to § 1441(c). To fall within § 1367(a), of course, a claim without an independent basis of jurisdiction must be part of the same Article III case or controversy as a claim with an independent basis of jurisdiction. 28 U.S.C. § 1367(a) ("[T]he 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."). If these requirements are satisfied and § 1367(b) does not withdraw jurisdiction over the supplemental claim, then the case is removable under § 1441(a) because it could have been filed in federal court originally.

In contrast, § 1441(c) provides for the removal of "otherwise non-removable claims or causes of

statute explicitly authorizes the remand of supplemental claims, there is no question that district courts may remand state law claims if they decline to exercise their supplemental jurisdiction under § 1367(c).[42]

B. § 1447(c) and (d)

1. Statutory History

Like the history of supplemental jurisdiction, the history of § 1447(c) and (d) is well documented[43] and is recounted here in pertinent part only. Congress first created the right of removal in the Judiciary Act of 1789,[44] and it has existed ever since.[45] In contrast, although lower courts have always remanded cases when they lacked subject matter jurisdiction,[46] it was not until 1875 that

action" that are joined with "a separate and independent claim or cause of action" that falls within §1331. *Id.* § 1441(c). As Professor Dodson has pointed out, "[t]here is no comparable statutory authorization of original jurisdiction because supplemental jurisdiction applies only to claims that are not separate and independent." Scott Dodson, *In Search of Removal Jurisdiction*, 102 NW. U. L. REV. 55, 62 (2008). Thus, unlike § 1441(a), § 1441(c) permits the removal of "case[s] that could not have been heard in federal court originally." *Id.* Furthermore, as many scholars have suggested, "[§] 1441(c) may be unconstitutional if it permits the removal of claims that bear no relation to any federal question and that are between nondiverse defendants." FRIEDENTHAL ET AL., *supra* note 20, at 66 & n.49; *see also* Joan Steinman, *Supplemental Jurisdiction in § 1441 Removed Cases: An Unsurveyed Frontier of Congress' Handiwork*, 35 ARIZ. L. REV. 305, 321–25 (1993) (discussing relationship between § 1367 and § 1441(c)).

42. *See Int'l Coll. of Surgeons*, 522 U.S. at 172–74 (indicating that district courts are not required to hear state law claims).

43. *E.g.*, Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 343–50 (1976), *overruled in part by* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 714–15 (1996); Snapper, Inc. v. Redan, 171 F.3d 1249, 1254–60 (11th Cir. 1999) (holding that § 1447(d) does not bar appellate review of case which has been removed on grounds not authorized by § 1447(c)); Joan Steinman, *Postremoval Changes in the Party Structure of Diversity Cases: The Old Law, the New Law, and Rule 19*, 38 U. KAN. L. REV. 863, 887–93 (1990) (discussing history of removal and remand statutes); Rhonda Wasserman, *Rethinking Review of Remands: Proposed Amendments to the Federal Removal Statute*, 43 EMORY L.J. 83, 87–108 (1994) (discussing history of statutory bar on appellate review of remand orders); David D. Siegel, *Commentary on 1988 Revision of Section 1447*, 28 U.S.C.A. § 1447 (2006) (noting changes to removal statute).

44. Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79–80 (repealed 1911) (authorizing removal "if a suit [were] commenced in any state court against an alien, or by a citizen of the state in which the suit is brought against a citizen of another state, and the matter in dispute exceeds the . . . sum or value of five hundred dollars, exclusive of costs").

45. Joan Steinman, *Removal, Remand, and Review in Pendent Claim and Pendent Party Cases*, 41 VAND. L. REV. 923, 926 (1988) (citing 1A J. MOORE & B. RINGLE, MOORE'S FEDERAL PRACTICE ¶ 0.156[1], at 13–14 (2d ed. 1987)); *see also* 28 U.S.C. § 1441(a) ("Except as otherwise expressly provided by . . . Congress, any civil action brought in a State court of which the district courts . . . have original jurisdiction, may be removed by the defendant or the defendants, to the district court . . . for the district and division embracing the place where such action is pending.").

46. Wasserman, *supra* note 43, at 89–90 (stating that although Judiciary Act of 1789 did not specifically authorize remands, circuit courts of time remanded cases due to lack of subject matter jurisdiction or because of defendant's failure to comply with statutory removal procedures).

Congress expressly authorized remand for lack of subject matter jurisdiction.[47] Congress did not prohibit appellate review of remand orders until 1887.[48]

47. *Id.* at 90, 92; Act of Mar. 3, 1875, ch. 137, § 5, 18 Stat. 470, 472 (current version at 28 U.S.C. § 1447(c) (2006)) ("[I]f, in any suit . . . removed . . . to a circuit court . . . it shall appear to the satisfaction of said circuit court, at any time after such suit has been . . . removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court . . . , the said circuit court shall proceed no further therein, but shall . . . remand it to the court from which it was removed as justice may require . . . .").

48. Wasserman, *supra* note 43, at 100; Act of Mar. 3, 1887, ch. 373, § 2, 24 Stat. 552, 553 (current version at 28 U.S.C. § 1447(d)) ("Whenever any cause shall be removed . . . , and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded . . . , such remand shall be immediately carried into execution, and no appeal or writ of error from the decision . . . so remanding such cause shall be allowed."). A few years after this provision was enacted, the Supreme Court held that it "precluded review of remand orders not only by writ of error and appeal, but also by writ of mandamus." Wasserman, *supra* note 43, at 102–03 (citing Mo. Pac. Ry. Co. v. Fitzgerald, 160 U.S. 556, 582 (1896); In re Pa. Co., 137 U.S. 451, 454 (1890)).

Interestingly, although the Judiciary Act of 1789 did not specifically authorize appellate review of remand orders, until 1875 "the Supreme Court reviewed remand orders entered by the circuit courts on writs of error or appeal" without statutory authorization. *Id.* at 90 (footnotes omitted). In 1875, when Congress authorized remand of actions for lack of jurisdiction, it also provided *for* appellate review of remand orders. Act of Mar. 3, 1875, ch. 137, § 5, 18 Stat. 470, 472 (current version at 28 U.S.C. § 1447(c)) ("[T]he order of [a] circuit court . . . remanding [a] cause to . . . State court shall be reviewable by the Supreme Court on writ of error or appeal . . . ."). According to Professor Wasserman, no legislative history for the appellate review provision has been found and therefore the reasons for its enactment are unclear. Wasserman, *supra* note 43, at 92.

Professor Wasserman has noted, however, that Congress expanded the removal jurisdiction of the circuit courts in 1875 by authorizing the removal of federal question cases. *Id.* (discussing Act of Mar. 3, 1875, ch. 137, § 2, 18 Stat. 470, 470–71). She has suggested that Congress added the appellate review provision to the removal statutes because "once Congress granted the federal courts removal jurisdiction of federal question cases, [it] wanted to ensure that any decisions that the circuit courts made interpreting the scope of federal question jurisdiction would be subject to review by the Supreme Court." *Id.* (emphasis omitted). Professor Wasserman has also suggested that another, "less likely" possibility is that "Congress may have enacted [the appellate review] section to legislatively overrule" a recent Supreme Court case which "had held that a circuit court order remanding a removed action to state court was not a final order from which a writ of error would lie." *Id.* at 93 (discussing Chicago & Alton R.R. v. Wiswall, 90 U.S. (23 Wall.) 507 (1875)).

In addition to expanding the removal jurisdiction of the circuit courts in 1875, Congress also significantly expanded the original jurisdiction of the circuit courts. *See id.* at 91–92 (citing Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470). The enlargement of the circuit courts' original and removal jurisdiction resulted in docket congestion in both the circuit courts and the Supreme Court. Wasserman, *supra* note 43, at 94–96. Thus, in 1887, Congress reversed direction and restricted the scope of the circuit courts' original and removal jurisdiction. *Id.* at 99–100 (citing Act of Mar. 3, 1887, ch. 373, §§ 1, 6, 24 Stat. 552, 552–53, 555). Congress also "repealed the provision authorizing appellate review of remand orders" and, for the first time, prohibited review of remand orders by appeal or writ of error. *Id.* at 100 (citing Act of Mar. 3, 1887, ch. 373, §§ 1, 6, 24 Stat. 552, 553, 555).

The precise reasons for the inclusion of the ban on appellate review in the 1887 statute are uncertain. *Id.* (stating that "[n]o legislative history exists to explain why the Senate included this provision" in bill that Congress eventually passed). At the time, however, the Supreme Court—rather than an intermediate appellate court—heard appeals from remand orders. *Id.* at 90 n.28 (citing Judiciary Act of 1789, ch. 20, §§ 13, 22, 1 Stat. 73, 81, 84 for proposition that "[t]he Supreme Court had appellate jurisdiction to review 'final judgments and decrees' of the circuit courts"). Thus, the "most likely" explanation is that "Congress . . . wanted to relieve the Supreme Court's overload directly, not merely indirectly, by reducing the circuit courts' docket." Wasserman, *supra* note 43, at 101.

Congress enacted the precursors to the current versions of § 1447(c) and (d) in 1948 and 1949, respectively.[49] The 1948 version of § 1447(c), which until 1949 was codified at subsection (e), provided for remand where a case was "removed improvidently and without jurisdiction."[50] In 1988, Congress deleted "improvident" removal as a basis for remand under § 1447(c) and provided instead that "[a] motion to remand the case on the basis of *any defect in removal procedure* must be made within 30 days after . . . removal."[51] The 1988 amendment also required remand "[i]f at *any time before final judgment* it appears that the district court *lacks subject matter jurisdiction*."[52] Congress last amended § 1447(c) in 1996,[53] and the statute currently states in pertinent part: "A motion to remand . . . on the basis of *any defect other than lack of subject matter jurisdiction* must be made within 30 days after . . . removal . . . . If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."[54] Legislative history indicates, and lower courts have concluded, that the primary purpose of the 1988 and 1996 amendments to § 1447(c) was to limit the amount of time a plaintiff had to file a remand motion on any basis other than for lack of subject matter jurisdiction.[55]

Professor Wasserman also has suggested two other possible explanations for the enactment of the ban on appellate review of remand orders. First, "Congress may have withdrawn appellate jurisdiction over remand orders to eliminate one of the most powerful weapons in the corporate arsenal: the ability of a corporation to exhaust a plaintiff's resources or stamina by appealing a remand order to the Supreme Court in distant Washington, D.C." *Id.* Second, the appellate bar was in the same paragraph of the statute that authorized remand "if some defendants would not face prejudice [in state court] or if the plaintiff's affidavit alleging local prejudice [in state court] was not well-founded." *Id.* Thus, Congress may have intended to help relieve the Supreme Court's docket congestion by limiting appellate review only in this narrow class of cases where "if the circuit court erred in remanding . . . , the parties opposing remand would face little prejudice." *Id.*

49. In 1948, Congress revised the Judicial Code and "consolidated and recodified" the removal statutes. Snapper, Inc. v. Redan, 171 F.3d 1249, 1254 (11th Cir. 1999) (citing Act of June 25, 1948, ch. 646, 62 Stat. 939 (1948)). The legislation, however, was replete with drafting errors. Wasserman, *supra* note 43, at 103 n.86. For example, Congress inadvertently omitted the provision barring appellate review of remand orders. *Id.* at 103 & n.86. In order to correct its mistakes, including its omission of the prohibition on appellate review of remand orders, Congress again amended the removal provisions in 1949. *Snapper*, 171 F.3d at 1254; Act of May 24, 1949, ch. 139, § 84, 63 Stat. 89, 102 (codified at 28 U.S.C. § 1447(d)). The legislative history of the 1949 Act indicates that the new § 1447(d) was added "to remove any doubt that the former law as to the finality of an order to remand to a State court is continued." H.R. REP. NO. 81-352, at 15 (1949), *reprinted in* 1949 U.S.C.C.A.N. 1248, 1268.

50. 28 U.S.C. § 1447(e) (Supp. III 1946) (current version at 28 U.S.C. § 1447(c)).

51. Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, Title X, § 1016(c), 102 Stat. 4642, 4670 (codified at 28 U.S.C. § 1447(c)) (emphasis added).

52. *Id.* (emphasis added).

53. United States District Court: Removal Procedure, Pub. L. No. 104-219, 110 Stat. 3022 (1996).

54. 28 U.S.C. § 1447(c) (emphasis added).

55. While the 1948 version of § 1447(c) joined the bases for remand—improvident removal and lack of subject matter jurisdiction—with the conjunction "and," the 1988 version explicitly provided for two separate bases of remand: defects in removal procedure and lack of subject matter jurisdiction. Snapper, Inc. v. Redan, 171 F.3d 1249, 1254 n.7, 1256 n.12 (11th Cir. 1999) (stating that 1988 amendment to § 1447(c) ratified lower courts' understanding that Congress intended phrase "improvidently and without jurisdiction" in 1948 statute to be read in disjunctive). The 1988 amendment also made explicit the lower courts' understanding that Congress intended remand based

The 1949 version of § 1447(d) read: "An order remanding a case . . . is not reviewable on appeal or otherwise."[56] Congress amended § 1447(d) once in 1964 to permit appellate review of remand orders in civil rights cases,[57] but otherwise has left § 1447(d) alone. The current version of the statute provides: "An order remanding a case . . . is not reviewable on appeal or otherwise, except that an order remanding a case . . . pursuant to section 1443 [(the removal provision for civil rights cases)] . . . shall be reviewable by appeal or otherwise."[58] According to the Supreme Court, the purpose of § 1447(d)'s ban on appellate review of remand orders is to prevent the delay caused by "protracted litigation of jurisdictional issues."[59]

on "improvident" removal to mean remand based on defects in removal procedure. *Id.* at 1254–56. Thus, the "primary change" effected by the 1988 amendment "was the imposition of the 30-day limitation on raising motions to remand based on procedural defects." *Id.* at 1256 n.13.

Congress apparently believed that the 1988 revision to § 1447(c) was ambiguous and had caused confusion in the lower courts. H.R. REP. NO. 104-799, at 1–2 (1996), *reprinted in* 1996 U.S.C.C.A.N. 3417, 3417–18. Thus, according to the House Report that accompanied the 1996 amendment, § 1447(c) was amended to "clarif[y] . . . the intent of Congress that [the] 30-day limit applies to any 'defect' other than the lack of subject matter jurisdiction." *Id.*; *see also* Hudson United Bank v. LiTenda Mortgage Corp., 142 F.3d 151, 156 n.8 (3d Cir. 1998) (stating that 1988 and 1996 amendments to § 1447(c) "focused on creating and clarifying time limits concerning when a plaintiff can seek a remand following removal from state court").

56. Act of May 24, 1949, ch. 139, § 84, 63 Stat. 89, 102 (codified at 28 U.S.C. § 1447(d)).

57. Civil Rights Act of 1964, Pub. L. No. 88-352, Title IX, § 901, 78 Stat. 241, 266. The amendment apparently "was designed to ensure that defendants in civil rights cases would have access to a federal forum, even if the district court erroneously remanded the suit to state court, and to ensure the development of a uniform federal law regarding civil rights removal jurisdiction." Wasserman, *supra* note 43, at 105 (footnote omitted); *see also id.* at 105–06 (stating that Congress members' discussion of 1964 amendment to § 1447(d) centered on providing civil rights defendants with federal forum and protecting them from "hostile state courts").

Congress has also expressly granted the United States the right to appeal remand orders in cases involving the property of Native Americans, *e.g.*, 25 U.S.C. § 487(d) (2006), and has granted both the Federal Deposit Insurance Corporation ("FDIC") and the Resolution Trust Corporation ("RTC") the right to appeal remand orders, 12 U.S.C. § 1819(b)(2)(C) (2006) (granting FDIC right to appeal); 12 U.S.C. § 1441a(l)(3)(C) (giving appeal rights to RTC). Most recently, Congress has granted appellate courts authority to review district court orders granting or denying remand motions in cases removed under the Class Action Fairness Act ("CAFA") as long as the notice of appeal is filed within the proper timeframe. 28 U.S.C. § 1453(c)(1); *see also* Morgan v. Gay, 466 F.3d 276, 278 (3d Cir. 2006) (stating that purpose of § 1453(c)(1) "'is to develop a body of appellate law interpreting [CAFA] without unduly delaying the litigation of class actions'" (quoting S. REP. NO. 109-14, at 49 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 46)).

58. 28 U.S.C. § 1447(d).

59. Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 351 (1976) (citing United States v. Rice, 327 U.S. 742, 751 (1946)), *overruled in part by* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 714–15 (1996); *see also* Powerex Corp. v. Reliant Energy Servs., Inc., 127 S. Ct. 2411, 2420 (2007) (stating that policy behind § 1447(d) is "avoiding prolonged litigation on threshold nonmerits questions"); Wasserman, *supra* note 43, at 130–40 (arguing that § 1447(d) does not serve purposes that historically were or currently are attributed to it); Wasserman, *supra* note 43, at 139–40, 150 (arguing that potential benefits of § 1447(d) do not serve as justification for bar on review of remand orders).

2. The Relationship Between § 1447(c) and (d): *Thermtron Products, Inc. v. Hermansdorfer*

Although the plain language of § 1447(d) appears to immunize all remand orders (except those in civil rights cases) from appellate review, the Supreme Court has rejected such an interpretation of the statute.[60] In *Thermtron Products, Inc. v. Hermansdorfer*,[61] the district court remanded a case because its docket was congested, the case could not be tried in the near future, and the plaintiffs had a "right to a forum of their choice and . . . to a speedy decision on the merits."[62] The defendants petitioned the Sixth Circuit for a writ of mandamus or prohibition, but the court denied the petition after concluding that, under § 1447(d), it "had no jurisdiction to review [the remand] order or to issue mandamus."[63]

The Supreme Court reversed. The Court held that § 1447(c) and (d) "must be construed together."[64] This meant "that only remand orders issued under § 1447(c) and invoking the grounds specified therein . . . [were] immune from review under § 1447(d)."[65] Because the district court had not remanded the case on a § 1447(c) ground[66] but instead had remanded "a properly removed case on grounds that [it] had no authority to consider," § 1447(d) did not apply and the remand order was reviewable on appeal.[67] In reaching its conclusion, the Court not only interpreted § 1447(d) to bar appellate review of § 1447(c) remands, but also indicated that district courts had the power to issue remand orders *only* on the grounds specified in § 1447(c) and that remands on *any* other ground were impermissible.[68]

60. *Thermtron Prods., Inc.*, 423 U.S. at 337–53. In a case decided before *Thermtron*, the Supreme Court held that where a district court dismisses a third-party claim and then remands the case for lack of jurisdiction, the order of dismissal is reviewable on appeal because it precedes the remand order "in logic and in fact." Waco v. U.S. Fid. & Guar. Co., 293 U.S. 140, 142–44 (1934); *see also* Wasserman, *supra* note 43, at 112 (arguing that *Waco* Court did not create exception to bar on appellate review of remand orders, but did recognize review of merits decisions preceding remand orders).

61. 423 U.S. 336 (1976), *overruled in part by* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 714–15 (1996).

62. *Thermtron Prods., Inc.*, 423 U.S. at 339–41.

63. *Id.* at 341–42.

64. *Id.* at 345.

65. *Id.* at 346. The Court further held that a § 1447(c) remand order is immune from appellate review regardless of "whether or not that order might be deemed erroneous by an appellate court." *Id.* at 351; *see also* Gravitt v. Sw. Bell Tel. Co., 430 U.S. 723, 723–24 (1977) (per curiam) (holding § 1447(c) remand immune from appellate review).

66. Because *Thermtron* is a 1976 decision, it was decided under the 1948 version of § 1447(c). Thus, the *Thermtron* Court's conclusion that the case was not remanded under § 1447(c) meant that the case had not been "removed improvidently and without jurisdiction." *Thermtron Prods., Inc.*, 423 U.S. at 342, 351–52.

67. *Id.* at 351–52; *see also id.* at 344 (stating that district court's basis for remand was "plainly irrelevant to whether [it] would have had jurisdiction of the case had it been filed initially in that court, to the removability of a case from the state court under § 1441, and hence to the question whether [the] cause was [improperly] removed [under § 1447(c)]").

68. *Id.* at 352 ("[T]his Court has not yet construed [§ 1447(d)] so as to extinguish the power of an appellate court to correct a district court that has not merely erred in applying the requisite provision

Although the Court decided *Thermtron* under the 1948 version of § 1447(c) and that statute has been amended twice since the *Thermtron* decision, the Court has never indicated that the amendments affected *Thermtron*'s holding that § 1447(c) and (d) must be read together. Indeed, since *Thermtron* the Court has stated repeatedly (most recently in 2007) that only § 1447(c) remands are immune from appellate review under § 1447(d).[69] In contrast, however, the Court's suggestion in *Thermtron* that district courts have authority to remand only on the grounds set forth in § 1447(c) has not withstood the test of time.

for remand but has remanded a case on grounds not specified in [§ 1447(c)] and not touching the propriety of the removal."); *see also id.* at 351 ("[W]e are not convinced that Congress ever intended to extend carte blanche authority to the district courts to revise the federal statutes governing removal by remanding cases on grounds that seem justifiable to them but which are not recognized by [§1447(c)].").

The *Thermtron* Court also held that because "an order remanding a removed action does not represent a final judgment" that is appealable under 28 U.S.C. § 1291, "the writ of mandamus is an appropriate remedy to require the District Court to entertain [a] remanded action." *Thermtron Prods., Inc.*, 423 U.S. at 352–53. The Court later disavowed this holding in *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 714–15 (1996). See *infra* note 90 for a discussion of the *Quackenbush* opinion.

69. Powerex Corp. v. Reliant Energy Servs., Inc., 127 S. Ct. 2411, 2415–16 (2007); Osborn v. Haley, 549 U.S. 225, 240 (2007); Kircher v. Putnam Funds Trust, 547 U.S. 633, 640 (2006); *Quackenbush*, 517 U.S. at 711–12; Things Remembered, Inc. v. Petrarca, 516 U.S. 124, 127 (1995).

In *Powerex Corp.*, the Court addressed the question of how the 1988 and 1996 amendments to § 1447(c) affected *Thermtron*'s gloss on the statute. 127 S. Ct. at 2415–16. The Court recognized that under *Thermtron*, the application of § 1447(d) was limited to remands where a case had been removed "improvidently and without jurisdiction." *Id.* at 2415. The Court also recognized that when the 1988 version of § 1447(c) was in effect, it had "interpreted § 1447(d) to preclude review only of remands for lack of subject-matter jurisdiction and for defects in removal procedure." *Id.* at 2416 (citing *Quackenbush*, 517 U.S. at 711–12; *Things Remembered, Inc.*, 516 U.S. at 127–28). The Court then stated: "Although § 1447(c) was amended . . . again in 1996, we will assume . . . that the amendment was immaterial to *Thermtron*'s gloss on § 1447(d), so that the prohibition on appellate review remains limited to remands [for lack of subject matter jurisdiction and for defects in removal procedure]" under § 1447(c). *Id.*

The *Thermtron* decision, of course, has not been without its critics. Justice Rehnquist dissented in *Thermtron* primarily on the ground that the plain language of § 1447(d) bars appellate review of all remand orders, including the one at issue in *Thermtron*, except those issued in cases removed under § 1443. He argued that "characterizing the bar to review [in § 1447(d)] as limited to only those remand orders entered pursuant to . . . § 1447(c)" ignored the purpose behind § 1447(d), *Thermtron Prods., Inc.*, 423 U.S. at 355–56 (Rehnquist, J., dissenting), which is "to prevent the additional delay which a removing party may achieve by seeking appellate reconsideration of an order of remand," *id.* at 354. Scholars have also criticized *Thermtron*. *See, e.g.*, Wasserman, *supra* note 43, at 115–19 (suggesting that *Thermtron* Court manipulated precedent to reach its conclusion that § 1447(d) applies only to remands under § 1447(c), arguing that *Thermtron* Court created "test for reviewability of remand orders" that is problematic for lower courts to apply, and contending that *Thermtron* is difficult to square with Supreme Court's later decision in *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343 (1988)).

C. The Supreme Court and Remand of Supplemental Claims

1. *Carnegie-Mellon University v. Cohill*

In *Carnegie-Mellon University v. Cohill*,[70] the Supreme Court held that district courts, once the anchor claim on which federal question jurisdiction was based has been eliminated, can exercise their discretion to remand pendent state law claims if they could have dismissed the claims under the same circumstances.[71] This conclusion appeared to be irreconcilable with *Thermtron* because nothing in the language of § 1447(c) indicated that district courts had the power to remand supplemental claims instead of dismissing them.[72]

The Court, however, distinguished *Thermtron* on the ground that it involved "a clearly impermissible remand" since the district court had jurisdiction over the case and had no authority to refuse to exercise its jurisdiction due to a crowded docket.[73] In contrast, the *Cohill* case involved pendent state law claims and the district court had "undoubted discretion" to decline to hear them under the doctrine of pendent jurisdiction set forth in *Gibbs*.[74] The only question was whether the district court could decline to exercise its pendent jurisdiction by remanding the state law claims instead of dismissing them, and the *Cohill* Court concluded that it could.[75] The Court reasoned that "[t]he discretion to remand enables district courts to deal with cases involving pendent claims in the manner that best serves the principles of economy, convenience, fairness, and comity which underlie the pendent jurisdiction doctrine."[76]

Of particular importance here, the Court emphasized in a footnote that the remand power it had recognized did not derive from § 1447(c), but instead "derive[d] from the doctrine of pendent jurisdiction and applie[d] only to cases involving pendent claims."[77] Thus, according to the Court, "the remand authority conferred by [§ 1447(c)] and the remand authority conferred by the doctrine of pendent jurisdiction overlap not at all."[78]

70. 484 U.S. 343 (1988).

71. *Cohill*, 484 U.S. at 354.

72. As one court cleverly explained: "*Thermtron* h[eld] that § 1447(d) does not mean what it says . . . . [t]hen . . . [*Cohill*] held that *Thermtron* does not mean what *it* says." *In re* Amoco Petroleum Additives Co., 964 F.2d 706, 708 (7th Cir. 1992).

73. *Cohill*, 484 U.S. at 355–56.

74. *Id.* at 356 ("[A]n entirely different situation is presented when the district court has clear power to decline to exercise jurisdiction. *Thermtron* therefore does not control the decision in this case.").

75. *Id.* at 356–57.

76. *Id.* at 357.

77. *Id.* at 355 n.11.

78. *Cohill*, 484 U.S. at 355 n.11.

2. Justice Kennedy's Concurrence in *Things Remembered, Inc. v. Petrarca*

In *Things Remembered, Inc. v. Petrarca*,[79] the petitioner filed a notice of removal pursuant to the bankruptcy removal statute, 28 U.S.C. § 1452(a), and the general removal statute, § 1441(a).[80] Although the bankruptcy court found that removal was proper under § 1441(a), on appeal the district court found that removal was untimely under both statutes and ultimately remanded the case to state court.[81] The Sixth Circuit held that both § 1447(d) and § 1452(b) insulated the remand order from appellate review and dismissed the appeal.[82] The question before the Court was whether § 1447(d) barred appellate review of "a district court order remanding a bankruptcy case to state court on grounds of untimely removal."[83] In a unanimous opinion, the Court held that because the district court "remanded this case on grounds of untimely removal, precisely the type of removal defect contemplated by § 1447(c)," § 1447(d) precluded appellate review of the court's remand order.[84] The Court also made it clear that "[§] 1447(d) applies 'not only to remand orders made in suits removed under [the general removal statute], but to orders of remand made in cases removed under *any other statutes*, as well.'"[85] Thus, under *Things Remembered*, § 1447(d) must be read in pari materia with all removal statutes.

Justice Kennedy wrote separately, however, to express his understanding that the Court's holding was "not intended to bear upon the reviewability of *Cohill* orders."[86] He apparently was concerned that appellate courts would understand *Things Remembered* to mean that remand orders based on statutory authority are immune from review under § 1447(d), but remand orders that lack statutory authorization—such as those permitted in *Cohill*—are not. Thus, Justice Kennedy emphasized that the *Cohill* Court "did not find it necessary to decide" whether § 1447(d) would bar review of *Cohill* remand orders,[87] but decided only that district courts could remand pendent claims rather than dismiss them. Although he recognized that appellate courts had "relied on *Thermtron* to hold that § 1447(d) bars appellate review of § 1447(c) remands but not remands

79. 516 U.S. 124 (1995).

80. *Things Remembered, Inc.*, 516 U.S. at 126.

81. *Id.* at 126–27 & n.2.

82. *Id.* at 127.

83. *Id.* at 125.

84. *Id.* at 128.

85. *Things Remembered, Inc.*, 516 U.S. at 128 (quoting United States v. Rice, 327 U.S. 742, 752 (1946)). The Court stated that "[a]bsent a clear statutory command to the contrary, [it] assume[s] that Congress is 'aware of the universality of th[e] practice' of denying appellate review of remand orders when Congress creates a new ground for removal." *Id.* (quoting *Rice*, 327 U.S. at 752). Because Congress did not expressly indicate in § 1452 that it "intended [the] statute to be the exclusive provision governing removals and remands in bankruptcy" and there was no "reason to infer from § 1447(d) that Congress intended to exclude bankruptcy cases from its coverage," § 1447(d) applied and the remand order at issue was not subject to appellate review. *Id.* at 129.

86. *Id.* at 129 (Kennedy, J., concurring).

87. *Id.* at 130.

ordered under *Cohill*,"[88] he ended his concurrence by stating: "The issues raised by those decisions are not before us."[89]

3. *Quackenbush v. Allstate Insurance Co.*

Despite Justice Kennedy's concurrence in *Things Remembered*, later in the same term the Court held in *Quackenbush v. Allstate Insurance Co.*[90] that § 1447(d) is inapplicable to abstention-based remands and therefore they are reviewable on appeal.[91] Significantly, abstention-based remands, like *Cohill* remands, are not expressly provided for in § 1447(c) or any other statute. Instead, the power to abstain derives from "the historic discretion exercised by federal courts 'sitting in equity'" to decline to exercise their jurisdiction.[92] Citing

88. *Things Remembered, Inc.*, 516 U.S. at 130.

89. *Id.*

90. 517 U.S. 706 (1996). In *Quackenbush*, the California insurance commissioner sued Allstate Insurance Company in state court "seeking contract and tort damages for Allstate's alleged breach of certain reinsurance agreements, as well as a general declaration of Allstate's obligations under those agreements." 517 U.S. at 709. Invoking diversity jurisdiction, Allstate removed the case and filed a motion to compel arbitration under the Federal Arbitration Act. *Id.* The commissioner then moved for remand, arguing that the district court should abstain under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) because its resolution of the case might interfere with California's regulation of the insurance industry. *Quackenbush*, 517 U.S. at 709. Specifically, the commissioner indicated that there was "a hotly disputed question of state law" involved in the case, and that this question was already "pending before the state courts." *Id.* The district court remanded the case primarily because it was concerned that the state and federal courts might rule differently on the disputed issue of state law and thereby produce inconsistent decisions. *Id.* at 709–10. The Ninth Circuit reversed, *id.* at 710, and the Supreme Court affirmed on different grounds, *id.* at 711. The Court recognized that it had long held in its abstention decisions that federal courts can dismiss cases where equitable relief is sought and exceptional circumstances are present. *Quackenbush*, 517 U.S. at 716–17. The Court also acknowledged that over time it had expanded the power of the federal courts to decline to extend their jurisdiction to all cases in which discretionary relief is sought and exceptional circumstances are present. *Id.* at 718. The Court pointed out, however, that in prior abstention cases where damages were sought, it had only permitted a federal court "to enter a stay order that *postpones* adjudication of the dispute, not to dismiss the federal suit altogether." *Id.* at 719 (citing La. Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 28–30 (1959)). The Court concluded that abstention-based remands or dismissals of *damages* actions are an improper use of the federal courts' discretionary power to decline to exercise their jurisdiction in exceptional circumstances. *Id.* at 721. Because the case at bar was an action for damages, "the District Court's remand order was an unwarranted application of the *Burford* [abstention] doctrine." *Id.* at 731.

91. *Quackenbush*, 517 U.S. at 711–12. The *Quackenbush* Court also held that remand orders that do not fall within § 1447(c) and (d) are appealable as final judgments under 28 U.S.C. § 1291. *Id.* at 712–15. Thus, *Quackenbush* disavowed the *Thermtron* Court's statement that "'an order remanding a removed action does not represent a final judgment reviewable by appeal'" and therefore can be reviewed only through a writ of mandamus. *Id.* at 714–15 (quoting Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 352–53 (1976)).

92. *Id.* at 718; *see also id.* at 717 (stating that "it has long been established that a federal court has the authority to decline to exercise its jurisdiction when it is asked to employ its historic powers as a court of equity" and concluding that "[t]his tradition . . . explains the development of our abstention doctrines" (internal quotation marks and citation omitted)). Federal courts abstain only in exceptional circumstances. *Quackenbush*, 517 U.S. at 716. They do so "out of deference to the paramount interests of another sovereign, and the concern is with principles of comity and federalism." *Id.* at 723. For a description of the relationship between courts' jurisdictional duties to hear cases and abstention

both *Thermtron* and *Things Remembered*, the *Quackenbush* Court reiterated that § 1447(c) and § 1447(d) must be read together "'so that only remands based on grounds specified in § 1447(c) are immune from review under § 1447(d).'"[93] Without additional explanation, the Court concluded that because abstention-based remands are not remands for lack of subject matter jurisdiction or a defect in removal procedure, § 1447(d) is inapplicable to them.[94]

4. *Powerex Corp. v. Reliant Energy Services, Inc.*

In 2007, the Court decided *Powerex Corp. v. Reliant Energy Services, Inc.*,[95]

doctrines, see generally Deborah J. Challener, *Distinguishing Certification from Abstention in Diversity Cases: Postponement Versus Abdication of the Duty to Exercise Jurisdiction*, 38 RUTGERS L.J. 847, 849–65 (2007).

93. 517 U.S. at 711–12 (quoting *Things Remembered, Inc.*, 516 U.S. at 127).

94. *Id.* at 712. At the time *Quackenbush* was decided, the 1988 version of § 1447(c) was in effect. Thus, the *Quackenbush* Court concluded that abstention-based remands are not based on lack of subject matter jurisdiction or a defect in removal procedure.

95. 127 S. Ct. 2411 (2007). In addition to *Powerex*, the Court also recently decided *Kircher v. Putnam Funds Trust*, 547 U.S. 633 (2006) and *Osborn v. Haley*, 549 U.S. 225 (2007).

In *Kircher*, the district court remanded several cases to state court on the ground that it lacked jurisdiction over them under the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"). 547 U.S. at 637–38. On appeal, the Seventh Circuit concluded that the district court's decision to remand was substantive, not jurisdictional, and therefore § 1447(d) did not prohibit it from reviewing the remand order. *Id.* at 638–39.

The Supreme Court vacated and remanded. *Id.* at 648. It noted that it has "relentlessly repeated that 'any remand order issued on the grounds specified in § 1447(c) [is immunized from all forms of appellate review], whether or not that order might be deemed erroneous by an appellate court." *Id.* at 640 (alteration in original) (quoting *Thermtron Prods., Inc.*, 423 U.S. at 351). Citing *Things Remembered*, the Court further stated that "[t]he bar of § 1447(d) applies equally to cases removed under the general removal statute, § 1441, and to those removed under other provisions, . . . and the force of the bar is not subject to any statutory exception that might cover this case." *Id.* at 641 (citation omitted). The district court "said that it was remanding for lack of jurisdiction, an unreviewable ground," and "look[ing] beyond the court's own label," the remand orders were "unmistakably premised" on the district court's view that it lacked subject matter jurisdiction. *Kircher*, 547 U.S. at 641. Thus, the Court concluded that the remand orders were issued pursuant to § 1447(c) and therefore were immune from appellate review under § 1447(d). *Id.*

In *Osborn*, the Court addressed the interaction of § 1447(c) and (d) with the Westfall Act. The Westfall Act "accords federal employees absolute immunity from common-law tort claims arising out of . . . their official duties." 549 U.S. at 229 (citing 28 U.S.C. § 2679(b)(1)). "When a federal employee is sued for wrongful or negligent conduct, the [Westfall] Act empowers the Attorney General to certify that the employee 'was acting within the scope of his office or employment at the time of the incident out of which the claim arose.'" *Id.* at 229–30 (quoting § 2679(d)(1), (2)). Once the certification occurs, "the United States is substituted as defendant in place of the employee," and "[t]he litigation is thereafter governed by the Federal Tort Claims Act." *Id.* at 230. If the action is filed in state court, the Westfall Act provides that it is to be removed to federal court and renders the Attorney General's certification "'conclusiv[e] . . . for purposes of removal.'" *Id.* (quoting § 2679(d)(2)).

In *Osborn*, "the United States Attorney, serving as the Attorney General's delegate, certified that [the defendant] was acting within the scope of his employment at the time of the conduct alleged" in the plaintiff's complaint and removed the case to a federal district court." *Id.* at 230–31. The district court rejected the Westfall Act certification, "denied the Government's motion to substitute the United States as [a] defendant," and remanded the case for lack of subject matter jurisdiction. *Osborn*, 549 U.S. at 231.

another § 1447(d) case. In *Powerex*, four third-party defendants removed the case.[96] Powerex and a corporation owned by British Columbia removed pursuant to 28 U.S.C. § 1441(d), which permits a "foreign state," as defined by the Foreign Sovereign Immunities Act ("FSIA"), to remove.[97] The other two third-party defendants were United States agencies;[98] they removed pursuant to 28 U.S.C. § 1442(a), which authorizes removal by federal agencies.[99]

The district court determined that sections 1441(d) and 1442(a) permit a defendant to remove the entire case and therefore concluded that the removal was proper.[100] Ultimately, however, the district court remanded all of the claims

One question on appeal was whether the district court had authority under the Westfall Act to remand the case. *See id.* (examining scope of appellate review permitted under Westfall Act). The Supreme Court held that "once certification and removal are effected, exclusive competence to adjudicate the case resides in the federal court, and that court may not remand the suit to the state court." *Id.* at 231.

A second question on appeal was whether § 1447(d) barred appellate review of the remand order in the case at bar even though it was improper. *See id.* at 231–32 (addressing whether appellate review of remand order was barred under § 1447(d)). The Court concluded that § 1447(d) was inapplicable and that the remand order was reviewable. *See id.* (holding § 1447(d) "does not displace § 2679(d)(2)"). The Court reasoned that in this case, "§ 1447(c) and (d) must be read together with the later enacted § 2679(d)(2). Both § 1447(d) and § 2679(d)(2) are antishuttling provisions. Each aims to prevent 'prolonged litigation of questions of jurisdiction of the district court to which the cause is removed.'" *Osborn*, 549 U.S. at 243 (quoting United States v. Rice, 327 U.S. 742, 751 (1946)). According to the Court, only one "of the two antishuttling commands" could prevail, and it held that "§ 2679(d)(2) controls." *Id.* at 244. The Court insisted that its decision "scarcely mean[t] that whenever the district court misconstrues a jurisdictional statute, appellate review of the remand is in order." *Id.* The Court acknowledged that "[s]uch an exception would . . . collide head on with § 1447(d), and with [its] precedent." *Id.* (citing *Things Remembered, Inc.*, 516 U.S. at 127–28). Thus, the Court emphasized that "[o]nly in the extraordinary case in which Congress has ordered the intercourt shuttle to travel just one way—from state to federal court—does [its] decision hold sway." *Id.*

96. 127 S. Ct. at 2414. The *Powerex* Court actually referred to the third-party defendants as "cross-defendants." *Id.* In the parlance of Federal Rule of Civil Procedure 14, however, they were third-party defendants because the original defendants joined them to the action in order to seek indemnification. *See id.* (noting that Powerex was joined by defendant "seeking indemnity"); FED. R. CIV. P. 14(a)(1) ("A defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it."); FED. R. CIV. P. 14(a)(2) (referring to "[t]he person served with the summons and third-party complaint" as "the 'third-party defendant'"). The *Powerex* Court presumably referred to the third-party defendants as cross-defendants because the case was originally filed in a California state court, *Powerex Corp.*, 127 S. Ct. at 2414, the third-party defendants were joined to the action in state court, *id.*, and the California Rules of Civil Procedure provide that an original defendant can join a party to the action by filing a "cross-complaint" against the nonparty, *see* CAL. CIV. P. CODE § 428.10(b) (West 2008) ("A party against whom a cause of action has been asserted in a complaint . . . may file a cross-complaint setting forth . . . [a]ny cause of action he has against a person alleged to be liable thereon, whether or not such person is already a party to the action . . . ."); Jack H. Friedenthal, *Joinder of Claims, Counterclaims, and Cross-Complaints: Suggested Revision of the California Provisions*, 23 STAN. L. REV. 1, 30–35 (1970) (discussing California state rules regarding mandatory and permissive cross-complaints against third parties).

97. *Powerex Corp*., 127 S. Ct. at 2414.

98. *Id.*

99. *Id.*

100. *Id.*

because it found that (1) Powerex did not qualify as a "foreign state" under the FSIA; (2) the British Columbian corporation was immune from suit in federal court under the FSIA; and (3) the federal agencies were immune from suit in state court, and therefore a federal court could not acquire jurisdiction over them upon removal.[101] After concluding that § 1447(d) did not prohibit appellate review of the remand order, the Ninth Circuit affirmed the district court but concluded that it should have dismissed the claims against the federal agencies instead of remanding them.[102]

Only Powerex appealed to the Supreme Court,[103] and the Court held that it did not have appellate jurisdiction to review the remand order.[104] The Court first rejected the argument that § 1447(d) bars appellate review of remand orders based on a lack of subject matter jurisdiction only if jurisdiction was absent at the time of removal.[105] Relying on the language of § 1447(c) and its history, the Court concluded that when a case is properly removed but the district court subsequently determines that it lacks jurisdiction, "the remand is covered by § 1447(c) and thus shielded from review by § 1447(d)."[106] The Court reasoned that "[n]othing in the text of § 1447(c) supports the proposition that a remand for lack of subject-matter jurisdiction is not covered so long as the case was properly removed in the first instance."[107] Indeed, while the language of the 1948 version of the statute provided for remand if the case "'*was removed* improvidently and without jurisdiction,'"[108] the 1988 version and the current version require remand "[i]f at *any time before final judgment* it appears that the district court lacks subject matter jurisdiction."[109]

Furthermore, the Court pointed out, the "same section of the public law that amended § 1447(c) to include the phrase 'subject matter jurisdiction' also created" the current version of 28 U.S.C. § 1447(e).[110] Section 1447(e) provides: "If after removal the plaintiff seeks to join additional defendants whose joinder would destroy *subject matter jurisdiction*, the court may deny joinder, or permit joinder and remand the action to State court."[111] According to the Court, § 1447(e) "unambiguously demonstrates that a case can be properly removed and yet suffer from a failing in *subject matter jurisdiction* that requires remand."[112] Because the phrase "subject matter jurisdiction" was inserted into § 1447(c) and

101. *Id.* at 2414–15.

102. *Powerex Corp*., 127 S. Ct. at 2415.

103. *Id.*

104. *Id.* at 2417.

105. *Id.* at 2416.

106. *Id.* at 2417.

107. *Powerex Corp*., 127 S. Ct. at 2416.

108. *Id.* at 2415 (emphasis added) (quoting Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 342 (1976)).

109. *Id.* at 2415–16 (emphasis added) (quoting Judicial Improvements and Access to Justice Act of 1988, Title X, § 1016(c)(1), 102 Stat. 4642, 4670 (codified at 28 U.S.C. § 1447(c) (2006))).

110. *Id.* at 2417 (citing § 1016(c), 102 Stat. at 4670).

111. 28 U.S.C. § 1447(e) (emphasis added).

112. *Powerex Corp*., 127 S. Ct. at 2417.

(e) at the same time, under principles of statutory construction it should be construed to have the same meaning in both subsections of the statute.[113] Thus, if removal is jurisdictionally proper but the district court later remands because subject matter jurisdiction has been destroyed, appellate review of the remand order is prohibited under § 1447(d).

The *Powerex* Court next addressed the question of whether the district court had remanded the case for lack of subject matter jurisdiction.[114] The Court first examined the remand order itself to determine how the district court had characterized the remand.[115] The Court concluded that the district court purported to remand on the ground that it lacked subject matter jurisdiction because (1) the heading of the remand order's "discussion section" was "entitled 'Subject Matter Jurisdiction Over the Removed Actions'"; (2) "the District Court explicitly stated that the remand 'issue hinge[d] . . . on the Court's jurisdictional authority to hear the removed claims'"; and (3) in its order denying a stay of the remand, the district court "repeatedly stated that a lack of subject-matter jurisdiction required remand pursuant to § 1447(c)."[116]

The *Powerex* Court then assumed without deciding "that § 1447(d) permits appellate courts to look behind the district court's characterization" of a remand order as jurisdictional.[117] The Court held, however, that "review of the District Court's characterization of its remand as resting upon lack of subject-matter jurisdiction, to the extent it is permissible at all, should be limited to confirming that that characterization was colorable."[118] After "looking behind" the district court's remand order, the Court concluded that the only "plausible" explanation for the remand was that the district court believed it lacked subject matter jurisdiction to adjudicate the claims against Powerex once it decided that Powerex was not a "foreign state" capable of independently removing the case and that the other defendants were immune from suit.[119]

The Court acknowledged that it had never decided whether subject matter jurisdiction exists over a removed claim when sovereign immunity bars the

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Powerex Corp.*, 127 S. Ct. at 2417. Writing for the majority in *Powerex*, Justice Scalia noted that the question of whether § 1447(d) permits appellate courts to look behind the district court's characterization was reserved in *Kircher v. Putnam Funds Trust* and that "[t]he Court's opinion in *Osborn v. Haley* . . . had nothing to say about the scope of review that is permissible under § 1447(d)." *Id.* at 2417–18 & n.2. At least for Justices Scalia and Thomas, the district court's characterization of the remand order in *Powerex* as jurisdictional was enough to bring it within § 1447(d). *Id.* (citing Osborn v. Haley, 549 U.S. 225, 264 (2007) (Scalia, J., joined by Thomas, J., dissenting)). However, "because (presumably) [Justice Scalia] could not convince a majority of the Justices to join him on this point" in *Powerex*, "he looked behind the district court's characterization" of the remand order. Posting of Scott Dodson to Civil Procedure Prof Blog, http://lawprofessors.typepad.com/civpro/2007/06/powerex_corp_v_.html (June 18, 2007).

118. *Powerex Corp.*, 127 S. Ct. at 2418.

119. *Id.* at 2417–18.

claims against the only parties capable of removing.[120] Because the point was "debatable," however, the district court's characterization of the remand as subject matter jurisdictional was colorable and the Court concluded that the remand was immune from appellate review under § 1447(d).[121] The Court reasoned that "[l]engthy appellate disputes about whether an arguable jurisdictional ground invoked by the district court was properly such would frustrate the purpose of § 1447(d)."[122]

The Court also rejected the defendant's argument that the remand order was based on the district court's discretionary decision not to exercise supplemental jurisdiction and therefore was reviewable on appeal.[123] The Court again looked at the remand order and again concluded that the district court "relied upon lack of subject-matter jurisdiction" as the basis for remand.[124] According to the *Powerex* Court, the district court "*never mentioned* the possibility of supplemental jurisdiction . . . in its original decision . . . []or in its order denying [Powerex's] motion to stay the remand pending appeal."[125] In addition, it did not appear that the defendant had ever made any argument to the district court "that supplemental jurisdiction was a basis for retaining the claims against it."[126] Thus, there was "no reason to believe that an unmentioned nonexercise of *Cohill* discretion was the basis for the remand."[127]

In reaching this conclusion, the Court assumed that supplemental jurisdiction was available in the circumstances of the case and that *Cohill* remands are reviewable on appeal.[128] Of crucial importance here, however, the Court stated: "It is far from clear . . . that when discretionary supplemental jurisdiction is declined the remand is not based on lack of subject-matter jurisdiction for purposes of § 1447(c) and § 1447(d)."[129] Echoing Justice Kennedy's concurrence in *Things Remembered*, the Court further emphasized that it has "never passed on whether *Cohill* remands are subject-matter jurisdictional for purposes of post-1988 versions of § 1447(c) and § 1447(d)."[130]

120. *Id.* at 2418.

121. *Id.* In the *Powerex* case itself, it appears that removal was "proper" (or at least the Court assumed it was) in that it satisfied the statutory requirements of §§ 1441(d) and 1442(a). Jurisdiction, however, was lacking (based on the district court's analysis) even at the time of removal. There was no postremoval event that destroyed subject matter jurisdiction because it never existed in the first place. Thus, it is not clear that the *Powerex* Court needed to reach the question of whether, when removal is jurisdictionally proper, a postremoval event that gives rise to a defect in jurisdiction can result in a remand that is immune from appellate review.

122. *Id.*

123. *Powerex Corp.*, 127 S. Ct. at 2418–19.

124. *Id.* at 2419.

125. *Id.* (citation omitted).

126. *Id.*

127. *Id.*

128. *See Powerex Corp.*, 127 S. Ct. at 2418–19 (assuming decline of supplemental jurisdiction precludes remand for lack of subject matter jurisdiction).

129. *Id.*

130. *Id.* at 2419 n.4 (citing Things Remembered, Inc. v. Petrarca, 516 U.S. 124, 129–30 (1995) (Kennedy, J., concurring); Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 355 n.11 (1988)). Before

D. Appellate Courts and Remand of Supplemental Claims

1. Pre-*Powerex* Decisions

Prior to *Powerex*, the courts of appeals relied on *Thermtron* and *Cohill* to uniformly conclude that *Cohill* remands *are not* made pursuant to § 1447(c) and therefore § 1447(d) is inapplicable to them.[131] More specifically, these courts

concluding its opinion, the Court rejected two additional arguments made by the defendant as to why the remand order was reviewable. First, the defendant contended that "§ 1447(d) does not preclude review of a district court's merits determinations that precede . . . remand." *Id.* at 2419. The Court recognized that it held in *Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140 (1934) that orders which precede remand are reviewable on appeal. *Powerex Corp.*, 127 S. Ct. at 2419. In the case at bar, however, there was no district court order "separate from the remand" and therefore *Waco* did not permit appellate review. *Id.* Second, the defendant argued that § 1447(d) was inapplicable because the case was removed under the FSIA and "Congress could not have intended to grant district judges irrevocable authority to decide questions with such sensitive foreign-relations implications." *Id.* at 2419–20. The Court rejected this argument because Congress has not authorized appellate review of FSIA remands, and the Court would not "ignore [§ 1447(d)] in reliance upon supposition of what Congress *really* wanted." *Id.* at 2420. Moreover, the defendant's "divination of congressional intent [was] flatly refuted by longstanding precedent." *Id.* at 2420 (citing *Things Remembered, Inc.*, 516 U.S. at 128; United States v. Rice, 327 U.S. 742, 752 (1946)).

131. For examples of various circuit courts applying the principle that § 1447(d) only bars appellate review where the remand was based on § 1447(c), see Regan v. Starcraft Marine, LLC, 524 F.3d 627, 631 (5th Cir. 2008); Certain Underwriters at Lloyd's v. Warrantech Corp., 461 F.3d 568, 571–72 (5th Cir. 2006); Connolly v. H.D. Goodall Hosp., Inc., 427 F.3d 127, 128 (1st Cir. 2005); Ali v. Ramsdell, 423 F.3d 810, 812–13 (8th Cir. 2005); DaWalt v. Purdue Pharma, L.P., 397 F.3d 392, 396–402 (6th Cir. 2005); Baker v. Kingsley, 387 F.3d 649, 653–57 (7th Cir. 2004); Bryan v. Bellsouth Commc'ns, Inc., 377 F.3d 424, 428 (4th Cir. 2004); Adkins v. Ill. Cent. R.R. Co., 326 F.3d 828, 830–34 (7th Cir. 2003); Lindsey v. Dillard's, Inc., 306 F.3d 596, 598–99 (8th Cir. 2002); First Nat'l Bank of Pulaski v. Curry, 301 F.3d 456, 460 (6th Cir. 2002); Green v. Ameritrade, Inc., 279 F.3d 590, 594–95 (8th Cir. 2002); Hinson v. Norwest Fin. S.C., Inc., 239 F.3d 611, 614–15 (4th Cir. 2001); Long v. Bando Mfg., Inc., 201 F.3d 754, 758 (6th Cir. 2000); Giles v. NYLCare Health Plans, Inc., 172 F.3d 332, 336 (5th Cir. 1999); Engelhardt v. Paul Revere Life Ins. Co., 139 F.3d 1346, 1350–51 (11th Cir. 1998); Hudson United Bank v. LiTenda Mortgage Corp., 142 F.3d 151, 155, 157–58 (3d Cir. 1998); St. John v. Int'l Ass'n of Machinists & Aerospace Workers, 139 F.3d 1214, 1216–17 (8th Cir. 1998); First Union Nat'l Bank of Fla. v. Hall, 123 F.3d 1374, 1377–78 (11th Cir. 1997); Pa. Nurses Ass'n v. Pa. State Educ. Ass'n, 90 F.3d 797, 801 (3d Cir. 1996); Gaming Corp. of Am. v. Dorsey & Whitney, 88 F.3d 536, 541–42 (8th Cir. 1996); Mangold v. Analytic Servs., Inc., 77 F.3d 1442, 1450–53 (4th Cir. 1996); Trans Penn Wax Corp. v. McCandless, 50 F.3d 217, 221–25 (3d Cir. 1995); Thomas v. LTV Corp., 39 F.3d 611, 615–16 (5th Cir. 1994); Hook v. Morrison Milling Co., 38 F.3d 776, 780 (5th Cir. 1994); Bogle v. Phillips Petroleum Co., 24 F.3d 758, 761–62 (5th Cir. 1994); Executive Software N. Am., Inc. v. U.S. Dist. Court, 24 F.3d 1545, 1549 (9th Cir. 1994), *overruled by* Cal. Dep't of Water Res. v. Powerex Corp., 533 F.3d 1087 (9th Cir. 2008); *In re* Prairie Island Dakota Sioux, 21 F.3d 302, 304 (8th Cir. 1994); Burks v. Amerada Hess Corp., 8 F.3d 301, 303–04 (5th Cir. 1993); Westinghouse Credit Corp. v. Thompson, 987 F.2d 682, 684 (10th Cir. 1993); *In re* Glass, Molders, Pottery, Plastics & Allied Workers Int'l Union, 983 F.2d 725, 727 (6th Cir. 1993); Albertson's, Inc. v. Carrigan, 982 F.2d 1478, 1479–80 (10th Cir. 1993); Sever v. Alaska Pulp Corp., 978 F.2d 1529, 1539 (9th Cir. 1992); In re Surinam Airways Holding Co., 974 F.2d 1255, 1257 (11th Cir. 1992); In re Amoco Petroleum Additives Co., 964 F.2d 706, 708 (7th Cir. 1992); J.O. v. Alton Cmty. Unit Sch. Dist. 11, 909 F.2d 267, 269–70 (7th Cir. 1990); Hansen v. Blue Cross of Cal., 891 F.2d 1384, 1390 (9th Cir. 1989); Baker, Watts & Co. v. Miles & Stockbridge, 876 F.2d 1101, 1106 n.4 (4th Cir. 1989); *In re* Life Ins. Co. of N. Am., 857 F.2d 1190, 1193 n.1 (8th Cir. 1988);

concluded that where a federal claim is eliminated from a removed case and a district court remands any remaining state law claims, the remand order is reviewable.[132]

Many of these courts reasoned that § 1447(c) authorizes the remand of only those cases in which removal is improper (1) due to a defect in removal procedure or (2) because jurisdiction is lacking at the time of removal. According to these courts, *Cohill* remands are not based on § 1447(c) because in those cases there is no question that jurisdiction exists at the time of removal: the federal claim provides an independent basis for subject matter jurisdiction in federal court and either pendent jurisdiction or § 1367(a)—depending on when the case was decided—provides supplemental jurisdiction over the state law claims. Thus, unless there is a defect in removal procedure,[133] the removal is

Price v. PSA, Inc., 829 F.2d 871, 874 (9th Cir. 1987); Scott v. Machinists Auto. Trades Dist. Lodge No. 190, 827 F.2d 589, 592 (9th Cir. 1987); *In re* Romulus Cmty. Schs., 729 F.2d 431, 434–35 (6th Cir. 1984).

132. When appellate courts reviewed *Cohill* remands prior to the Supreme Court's decision in *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706 (1996), they did so by mandamus rather than appeal. See *supra* note 68 for an example of the Supreme Court finding that a writ of mandamus, not appeal, was the appropriate remedy. After the *Quackenbush* Court held that non-§ 1447(c) remands are appealable as final judgments, appellate courts reviewed *Cohill* remands by appeal. See *supra* notes 90–92 for an additional discussion of the *Quackenbush* holding.

133. There does not appear to be any question that *Cohill* remands are not based on a defect in removal procedure. Under the 1948 version of § 1447(c), courts generally interpreted the phrase "improvident removal" to mean that district courts could remand for "errors in the removal process." Snapper, Inc. v. Redan, 171 F.3d 1249, 1254–55 (11th Cir. 1999); *see also* Steinman, *supra* note 45, at 961–62 (citing various cases and noting that *Cohill* Court did not "utilize the language of improvidence" but instead "found . . . that the case had been properly removed, and had remained properly removed"). Thus, in addition to holding that *Cohill* remands were not based on lack of subject matter jurisdiction, lower courts consistently held that such remands were not based on improvident removal and therefore § 1447(d) was inapplicable to them. *See Snapper*, 171 F.3d at 1255 & n.10 (citing multiple cases); Steinman, *supra* note 45, at 962 (stating that there was "no justification for concluding that [the 1948 version of] section 1447(c) authorize[d] the remand of pendent claims on the theory that they were removed 'without jurisdiction'").

When § 1447(c) was amended in 1988, the legislative history specifically stated that the amendment was "written in terms of a defect in 'removal procedure' in order to avoid any implication that remand is unavailable after disposition of all federal questions leaves only State law questions that might be decided as a matter of . . . pendent jurisdiction or that instead might be remanded." H.R. REP. NO. 100-889, at 72 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5982, 6033; *see also Snapper*, 171 F.3d at 1256 n.13 (stating that change in language from "removed improvidently" to "any defect in removal procedure" is "best understood as a congressional ratification of . . . consistent judicial practice in order to preclude any misapplication of the new [thirty-day] time limit" on filing remand motions based on defect in removal procedure); Siegel, *supra* note 43 (stating that "dropping out" of claim on which original jurisdiction is based is not defect in removal procedure "that would trigger the 30-day rule"). In keeping with the legislative history, after the 1988 amendment lower courts continued to conclude that *Cohill* remands were not based on a defect in removal procedure and therefore § 1447(d) was inapplicable to them on that ground. *Snapper*, 171 F.3d at 1256–57 & n.17; *see also id.* at 1257 (stating that with regard to *Cohill* remands, this result made sense because it is unlikely that *Cohill* remand order would be "ripe" within thirty days of removal).

When § 1447(c) was again amended in 1996, a question arose as to how expansively the phrase "any defect other than lack of subject matter jurisdiction" should be interpreted. Specifically, lower courts began to address whether "any defect" referred only to defects in removal procedure or if, instead, it meant that motions to remand on *any* ground other than lack of subject matter jurisdiction

proper and any remand of state law claims is not pursuant to § 1447(c). Instead, the district court's power to remand derives from either the doctrine of pendent or supplemental jurisdiction and the Supreme Court's decision in *Cohill*. Accordingly, these courts concluded that § 1447(d) is inapplicable to *Cohill* remands.[134]

were now covered by § 1447(c)'s thirty-day time limit and therefore immune from appellate review under § 1447(d). *E.g.*, Autoridad de Energía Eléctrica de Puerto Rico v. Ericsson Inc., 201 F.3d 15, 16–17 (1st Cir. 2000) (finding that § 1447(d) does not bar review of remand based on forum selection clause); *Snapper*, 171 F.3d at 1252–60 (same); *Hudson United Bank*, 142 F.3d at 157 (finding that § 1447(d) does not bar review of remand order because it was issued under § 1367(c), not § 1447(c)); *see also* David D. Siegel, *Commentary on 1996 Revision of Section 1447(c)*, 28 U.S.C.A. § 1447 (2006) (stating that the "other than lack of subject matter jurisdiction" language is "like a residuary clause" and could include *Cohill* remands within its reach).

Ultimately, the lower courts have concluded that the 1996 amendment applies to defects in removal procedure only, and therefore it did not make remands on *any* ground—including *Cohill* remands—subject to the thirty-day limit or expand the types of remands covered by § 1447(c) and (d). *See, e.g.*, *Autoridad de Energía Eléctrica de Puerto Rico*, 201 F.3d at 16–17 (concluding that § 1447(d) does not bar review of remand order based on forum selection clause because order was not issued pursuant to § 1447(c)); *Snapper*, 171 F.3d at 1252–60 (same); *Hudson United Bank*, 142 F.3d at 157–58 (concluding that § 1447(d) did not bar review of order remanding supplemental state claims after federal claims had been dismissed because order was not issued pursuant to § 1447(c)); *see also Hudson United Bank*, 142 F.3d at 156 n.8 (stating that rather than understanding the 1996 amendment "as a wholesale rejection of *Thermtron* and a dramatic expansion of § 1447(d)," court would "assume that Congress did not mean to upset the *Thermtron* limits on § 1447(d), and that they remain in effect unchanged by the intervening textual modifications to § 1447(c)"). Moreover, the *Powerex* Court stated that it would assume that the 1996 amendment "was immaterial to *Thermtron*'s gloss on § 1447(d), so that the prohibition on appellate review remains limited to remands based on [lack of subject matter jurisdiction and defects in removal procedure]." *Powerex Corp.*, 127 S. Ct. at 2416.

134. *See, e.g.*, *First Nat'l Bank*, 301 F.3d at 460 (finding that district court's remand order was reviewable because district court could not have concluded that it had supplemental jurisdiction over state law claims and declined to exercise that jurisdiction "had it determined that it *never* had subject-matter jurisdiction over the removed case"); *Hudson United Bank*, 142 F.3d at 157–58 (distinguishing § 1447(c) and *Cohill* remands on ground that "§1447(c) remands are warranted only when a federal court has no rightful authority to adjudicate a state case that has been removed from state court," whereas *Cohill* remands "may be entered only when federal subject matter jurisdiction has been affirmatively established, via [§1367(a)] and . . . . [therefore] does not imply that the case was improperly filed in federal court"); *Trans Penn Wax Corp.*, 50 F.3d at 223 ("[A] remand only falls under § 1447(c) if the removal itself was jurisdictionally improper, not if the defect arose after removal."); *Bogle*, 24 F.3d at 761–62 (stating that "critical distinction" between nonreviewable § 1447(c) remand and reviewable [*Cohill*] remand is that "[i]n a Section 1447(c) remand, federal jurisdiction *never* existed, and in a non-Section 1447(c) remand, federal jurisdiction *did exist* at some point in the litigation, but the federal claims were either settled or dismissed"); *Executive Software N. Am., Inc.*, 24 F.3d at 1549 (stating that discretionary remand of supplemental claims is not done pursuant to §1447(c) because in supplemental claim cases district court has asserted original jurisdiction over at least one claim); *Sever*, 978 F.2d at 1539 (finding that remand of state claims was reviewable because original removal was proper); *cf. DaWalt*, 397 F.3d at 400–02 (recognizing that § 1447(c) "on its face prohibits appellate review of subject-matter-jurisdiction remands that the district judge makes 'at any time,'" including those based on postremoval events, but concluding that discretionary remands of pendent state law claims are exception to § 1447(c) and (d)); *Adkins*, 326 F.3d at 832–34 (stating that "*any* remand based on a conclusion that jurisdiction was lacking at the time of removal is covered by § 1447(c) [and (d)], no matter when that fact becomes apparent," but further stating that if remand is based on "discretionary exercise of the power to decline supplemental jurisdiction," then remand is reviewable on appeal).

Moreover, some courts further reason that the district court does not lose jurisdiction over the state law claims postremoval. They note that it is undisputed that a federal court has the power to adjudicate the supplemental claims even after the federal claim has been eliminated or, alternatively, the district court can remand the state law claims. Because the decision whether to hear or remand the state law claims is discretionary, these courts conclude that the remand is not for lack of subject matter jurisdiction under § 1447(c) and § 1447(d) therefore is inapplicable.[135]

2. Post-*Powerex*: *HIF Bio, Inc. v. Yung Shin Pharmaceuticals Industrial Co.*

In *HIF Bio, Inc. v. Yung Shin Pharmaceuticals Industrial Co.*,[136] the Federal Circuit became the first appellate court to hold that *Cohill* remands fall within § 1447(c) and thus are immune from appellate review under § 1447(d).[137]

135. *See, e.g.*, *Lindsey*, 306 F.3d at 599 (stating that *Cohill* remand is not remand for lack of subject matter jurisdiction because district court "is not required to remand state law claims when the only federal claim has been dismissed," but instead "maintains discretion to either remand the state law claims or keep them in federal court"); *Long*, 201 F.3d at 758 ("Here, the district court did not remand because it lacked subject matter jurisdiction; on the contrary, the district court explicitly stated that it had subject matter jurisdiction when the case was removed and noted that it had not been divested of that jurisdiction by the dismissal of the plaintiff's federal claims."); *First Union Nat'l Bank*, 123 F.3d at 1377–78 (finding that remand order was reviewable because district court never stated that it lacked subject matter jurisdiction, "believed it had supplemental jurisdiction to hear the [state law claim] under section 1367," and based its remand order on its decision not to exercise its discretion to hear supplemental claim); *Gaming Corp.*, 88 F.3d at 542 ("Because the district court never lacked subject matter jurisdiction and remanded under § 1367, neither § 1447(d) nor any other statutory bar exists to [appellate review of the remand order]."); *In re Glass, Molders, Pottery, Plastics & Allied Workers Int'l Union*, 983 F.2d at 727 (finding that order remanding state law claims after federal claims had been dismissed was reviewable because remand was "discretionary" and "did not stem from lack of subject matter jurisdiction over the remaining claims"); *In re Surinam Airways Holding Co.*, 974 F.2d at 1257 (concluding that *Cohill* remand is reviewable on appeal because it is not "premised on either a defect in removal procedure or a lack of jurisdiction" under § 1447(c), but instead "is a discretionary decision declining the exercise of *expressly acknowledged jurisdiction*"); *Baker, Watts & Co.*, 876 F.2d at 1106 n.4 (stating that because "[t]he district court did not believe that plaintiff's common law claims were improvidently removed and clearly recognized that it had the jurisdictional power to resolve them on the merits even after dismissal of the federal claims," discretionary decision to remand them was "not jurisdictional" and therefore was reviewable on appeal); *Price*, 829 F.2d at 874 (finding that remand order was reviewable because removal was proper and district court's decision to remand remaining state claims was discretionary rather than mandatory); *Scott*, 827 F.2d at 592 (finding that remand order was reviewable because state law claims were within district court's supplemental jurisdiction, district court retained power to hear them after federal claims were dismissed, and district court remanded them in its discretion, not because removal itself was improper).

136. 508 F.3d 659 (Fed. Cir. 2007), *cert. granted sub nom*. Carlsbad Tech., Inc. v. HIF Bio, Inc., 129 S. Ct. 395 (Oct. 14, 2008) (No. 07-1437).

137. *HIF Bio, Inc.*, 508 F.3d at 667. At least three circuits have already declined to follow *HIF Bio*. Brookshire Bros. Holding, Inc. v. Dayco Prods., Inc., 554 F.3d 595, 600–01 (5th Cir. 2009); Cal. Dep't of Water Res. v. Powerex Corp., 533 F.3d 1087, 1091–92 (9th Cir. 2008); *see also* Bates v. Mo. & N. Ark. R.R. Co., 548 F.3d 634, 636 n.2 (8th Cir. 2008) (noting that district court's remand order was reviewable on appeal because it was based on "refusal to exercise supplemental jurisdiction" rather

a. The District Court's Remand Order

The plaintiffs in *HIF Bio* brought suit in a California state court, and the defendants removed the case.[138] After the defendants removed, the plaintiffs filed their first amended complaint ("FAC") and asserted multiple claims.[139] According to the district court, the plaintiffs first asserted two claims for declaratory relief "with respect to ownership and inventorship" of an anticancer agent.[140] Second, the plaintiffs alleged violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961–1968 (2000).[141] Third, the plaintiffs asserted several state law claims: "slander, conversion, actual and constructive fraud, intentional and negligent interference with contractual relations and prospective economic advantage, breach of implied contract, unfair competition and fraudulent business practices, unjust enrichment and constructive trust."[142] Finally, the plaintiffs sought "a permanent injunction restraining the Defendants from representing themselves as the inventors" of the anticancer agent.[143]

One of the defendants, Carlsbad Technology, Inc. ("CTI"), then filed a motion to dismiss the FAC for lack of subject matter jurisdiction and for failure to state a claim.[144] The district court issued an order granting the motion to dismiss and remanding the case. Part B of the order's "Discussion Section" was labeled "Analysis," and subsection 1 of Part B was entitled "State Claims."[145] In that subsection, the district court stated in toto:

> As a preliminary matter, the Court declines to exercise supplemental jurisdiction over the state claims in the FAC. The FAC contains twelve causes of action, eleven of which are state claims. The state claims clearly predominate over the federal RICO claim. The preponderance of state law issues means that a state court is the proper venue to try the state law claims.[146]

Subsection 2 of the district court's "Analysis" was labeled "Declaratory Judgment Claims."[147] In that subsection, the district court examined "the Plaintiffs' first two claims for declaratory judgment to determine whether they [were] within the Court's jurisdiction."[148] The district court rejected CTI's argument "that these two causes of action should be considered federal because

than "determination that it lacked subject matter jurisdiction," but citing *HIF Bio* as contrary authority).

138. *HIF Bio, Inc.*, 508 F.3d at 661.

139. *Id.* at 661–62.

140. HIF Bio, Inc. v. Yung Shin Pharm. Indus. Co., No. CV 05-07976 DDP, 2006 WL 6086295, at *1, *2, *4 (C.D. Cal. June 9, 2006).

141. *Id.* at *2.

142. *Id.*

143. *Id.*

144. *Id.*

145. *HIF Bio, Inc.*, 2006 WL 6086295, at *3.

146. *Id.*

147. *Id.*

148. *Id.* at *4.

they arise from the Patent Act, an area of exclusive federal jurisdiction."[149] Instead, the court concluded that the declaratory judgment claims were "valid state law claims" and that it "[did] not have jurisdiction over" them.[150] The district court then stated that it was remanding the declaratory judgment claims "along with the other state law claims."[151]

In subsection 3 of the remand order's analysis section, the district court concluded that the plaintiffs had failed to state a RICO claim.[152] In its conclusion, the district court dismissed the RICO claim and again stated that it was remanding the state claims.[153]

b. The Federal Circuit's Opinion

CTI appealed, and the Federal Circuit concluded that § 1447(d) prohibited it from exercising appellate jurisdiction to review the remand order.[154] In describing the district court's order, the Federal Circuit stated that the lower court "remanded all of the non-RICO causes of action . . . based on declining supplemental jurisdiction."[155] The Federal Circuit acknowledged that the district court held that it did not have an independent basis of subject matter jurisdiction over the plaintiffs' declaratory judgment claims.[156] The appellate court reasoned, however, that "the district court did have federal question jurisdiction over the plaintiffs' alleged RICO claim."[157] Thus, the Federal Circuit concluded that the "RICO claim was the basis for the district court's § 1367(a) supplemental jurisdiction over the inventorship and ownership claims, as well as the remaining nine state claims," and § 1367(c) was the basis on which the district court remanded all of the state claims.[158]

The Federal Circuit then proceeded to analyze whether *Cohill* remands are subject matter jurisdictional and therefore immune from appellate review. The court first recognized that many other appellate courts have held that these types of remands are reviewable on appeal.[159] Nevertheless, the court interpreted *Powerex* "to reopen the question of whether § 1367(c) remands are barred from review under §§ 1447(c) and (d)."[160] Relying on *Powerex*, the court held that because a *Cohill* remand "can be colorably characterized as a remand based on

149. *Id.*

150. *HIF Bio, Inc.*, 2006 WL 6086295, at *4.

151. *Id.*

152. *Id.* at *4–*5.

153. *Id.* at *6.

154. HIF Bio, Inc. v. Yung Shin Pharm. Indus. Co., 508 F.3d 659, 663 (Fed. Cir. 2007), *cert. granted sub nom*. Carlsbad Tech., Inc. v. HIF Bio, Inc., 129 S. Ct. 395 (Oct. 14, 2008) (No. 07-1437).

155. *Id.* at 664.

156. *See id.* (stating that district court found it lacked jurisdiction over state "inventorship and ownership" claims).

157. *Id.*

158. *Id.*

159. *HIF Bio, Inc.*, 508 F.3d at 665.

160. *Id.* at 666.

lack of subject matter jurisdiction" under § 1447(c), it is "barred from appellate review by § 1447(d)."[161]

The court reasoned that supplemental state law claims by definition lack an independent basis of jurisdiction and therefore a court has power over them only if they fall within § 1367(a).[162] According to the Federal Circuit, however, "[t]he text of § 1367(a) indicates [that] § 1367(c) constitutes an express statutory exception to the authorization of jurisdiction granted by § 1367(a)."[163] Thus, "when declining supplemental jurisdiction over state claims, a district court strips the claims of the only basis on which they are within the jurisdiction of the court."[164] Absent the "cloak of supplemental jurisdiction, [the] state claims must be remanded for lack of subject matter jurisdiction."[165]

In reaching its conclusion, the court rejected the argument that *Cohill* remands are similar to abstention-based remands and therefore, like abstention-based remands, are subject to appellate review.[166] The Federal Circuit recognized that courts abstain and decline supplemental jurisdiction for similar reasons and that both abstention and supplemental jurisdiction "are discretionary doctrines that allow a district court to decline jurisdiction."[167]

The court believed, however, that there is a "fundamental difference" between abstention-based remands and *Cohill* remands, which "compels a different result when applying the jurisdictional bar of § 1447(d)."[168] It explained that when a court abstains, it declines to hear "claims over which it has an *independent* basis of subject matter jurisdiction, whether it be federal question . . . or diversity jurisdiction."[169] Thus, "a remand premised on abstention cannot be colorably characterized as a remand based on lack of jurisdiction."[170] According to the Federal Circuit, *Cohill* remands are distinguishable because the only basis for jurisdiction over supplemental claims is § 1367(a).[171] And because the court believed that § 1367(c) is an exception to § 1367(a), it reasoned that once a court declines to exercise its supplemental jurisdiction the state law claims no longer fall within § 1367(a) and therefore are without any jurisdictional basis.[172] At that point, the Federal Circuit concluded, the district court must remand the state claims for lack of subject matter jurisdiction, and § 1447(c) and (d) bar appellate review of the remand order.[173]

161. *Id.* at 667.

162. *See id.* (noting that unless courts grant supplemental jurisdiction, state claims must be remanded for lack of subject matter jurisdiction).

163. *Id.* (quoting Voda v. Cordis Corp., 476 F.3d 887, 898 (Fed. Cir. 2007)).

164. *HIF Bio, Inc.*, 508 F.3d at 667.

165. *Id.*

166. *Id.* at 666–67.

167. *Id.* at 666.

168. *Id.* at 666–67.

169. *HIF Bio, Inc.*, 508 F.3d at 667 (citing Burford v. Sun Oil Co., 319 U.S. 315, 317–18 (1943)).

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

III. *COHILL* REMANDS AND SUBJECT MATTER JURISDICTION

This Part contends that the Supreme Court should reverse the Federal Circuit's decision in *HIF Bio v. Yung Shin Pharmaceuticals Industrial Co.*[174] that *Cohill* remands are based on a lack of subject matter jurisdiction under § 1447(c)—or at least can be colorably characterized as such—and therefore are immune from appellate review under § 1447(d). Part III.A examines the *Powerex* Court's conclusion that postremoval events can result in remands for lack of subject matter jurisdiction and how this conclusion relates to *Cohill* remands and *HIF Bio*.

Part III.B argues that the Federal Circuit's analysis in *HIF Bio* is flawed for two reasons. First, the court incorrectly concluded that *Cohill* remands are subject matter jurisdictional because it confused the existence of judicial power with the discretionary decision whether to exercise that power. Second, the court failed to apply the *Powerex* test properly to determine whether the district court's characterization of the remand order in *HIF Bio* was jurisdictional and, if so, whether that characterization was colorable. Part III.B concludes that the Supreme Court should reverse the Federal Circuit's holding that it lacked jurisdiction to review the district court's remand order because the district court did not characterize its remand as subject matter jurisdictional. Part III.B further concludes that the Supreme Court should hold that *Cohill* remands are not subject matter jurisdictional and any characterization of them as such is not colorable.

Part III.C asserts that even if the Supreme Court ultimately determines that *Cohill* remands are subject matter jurisdictional, they do not fall within § 1447(c) because § 1447(c) is applicable only where a court determines that it lacks subject matter jurisdiction over a "case" and remands the entire case. Finally, Part III.D argues that in reaching a decision in *HIF Bio*, the Supreme Court should take into account the consequences of any conclusion that *Cohill* remands are covered by § 1447(c) and (d)—consequences that the Federal Circuit failed to consider.

A. Postremoval Events

The 1948 version of § 1447(c), which until 1949 was codified at subsection (e), provided for remand where a case was "*removed* improvidently and without jurisdiction."[175] In *Carnegie-Mellon University v. Cohill*,[176] a case decided under the 1948 statute, the Court held that where a pendent claim case is properly removed and the federal claim is eliminated postremoval, a district court can

174. 508 F.3d 659 (Fed. Cir. 2007), *cert. granted sub nom*. Carlsbad Tech., Inc. v. HIF Bio, Inc., 129 S. Ct. 395 (Oct. 14, 2008) (No. 07-1437).

175. 28 U.S.C. § 1447(e) (Supp. III 1946) (current version at 28 U.S.C. § 1447(c) (2006)). See *supra* note 49 for a description of the 1948 and 1949 revisions of the Judicial Code.

176. 484 U.S. 343 (1988).

remand the pendent claims instead of dismissing them.[177] The Court said that the authority to remand did not derive from § 1447(c)—i.e., the case had not been *removed* improvidently and without jurisdiction—or any other part of "the removal statute."[178]

Instead, the power to remand "derive[d] from the doctrine of pendent jurisdiction"[179] and the courts' inherent authority "to deal with cases involving pendent claims in the manner that best serves the principles of economy, convenience, fairness, and comity which underlie the pendent jurisdiction doctrine."[180] The *Cohill* Court thus concluded that the "remand authority conferred by the removal statute and the remand authority conferred by the doctrine of pendent jurisdiction overlap not at all."[181] Relying on *Cohill*, appellate courts reasoned that pendent claim remands were not subject to the review bar of § 1447(d) as long as removal was jurisdictionally proper.[182] Even if a postremoval event deprived the court of jurisdiction, that event did not bring the case within § 1447(c) and (d).

The current version of § 1447(c) states (and the 1988 version stated) in pertinent part: "If at any time *before final judgment* it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."[183] Although the "general rule" is "that postremoval events do not deprive federal courts of subject-matter jurisdiction,"[184] the *Powerex* Court nevertheless concluded that when removal is jurisdictionally proper but a postremoval event gives rise to a jurisdictional defect, "remand is authorized by § 1447(c) and appellate review is barred by § 1447(d)."[185] As the *Powerex* Court explained, both the language of § 1447(c) and its history support this reasoning.[186] Furthermore, § 1447(e)—which

177. *See Cohill*, 484 U.S. at 354–55 (reasoning that although removal statute does not address it, other evidence suggests Congress would have authorized remand).

178. *See id.* at 355 n.11 (explaining authorization for remand under pendent jurisdiction is entirely independent of that under sections 1441(c) and 1447(c)).

179. *Id.*

180. *Id.* at 357. As the *Cohill* majority noted, *id.* at 355 n.11, even the three dissenting justices recognized that the authority for the remand of the pendent claims did not come from § 1447(c): "The Court today discovers an inherent power in the federal judiciary to remand properly removed cases to state court . . . . Because I continue to believe that *cases may be remanded only for reasons authorized by statute* . . . I dissent." *Cohill*, 484 U.S. at 358 (White, J., dissenting) (emphasis added); *see also id.* at 364 ("[B]ecause I believe that any authority to remand properly removed pendent claims must come from Congress, I respectfully dissent.").

181. *Id.* at 355 n.11.

182. See *supra* Part II.D.1 for a discussion of interpretations of *Cohill*.

183. 28 U.S.C. § 1447(c) (2006) (emphasis added). The 1988 version of the statute also contained this language. For a comparison of the language in the 1948, 1988, and 1996 versions of § 1447(c), see *supra* Part II.B.1.

184. Powerex Corp. v. Reliant Energy Servs., Inc., 127 S. Ct. 2411, 2417 n.1 (2007) (citing Wis. Dep't of Corr. v. Schacht, 524 U.S. 381, 391 (1998)); *accord* St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 292–93 (1938) (noting that events occurring after removal do not invalidate district court's jurisdiction once it attaches); *see also* Steinman, *supra* note 43, at 886 (noting Court often has supported preservation of federal jurisdiction once it has been acquired).

185. *Powerex Corp.*, 127 S. Ct. at 2417 n.1.

186. See *supra* Part II.C.4 for additional discussion of the *Powerex* opinion.

provides for remand of the case if the district court permits joinder of a nondiverse defendant after removal—"unambiguously demonstrates that a case can be properly removed and yet suffer from a failing in subject matter jurisdiction that requires remand."[187]

Thus, under *Powerex*, appellate courts can no longer simply determine that a case was properly removed and conclude on that basis that the remand of supplemental claims is not a remand pursuant to § 1447(c). The *HIF Bio* court acknowledged this in a footnote when it said: "[F]rom a temporal perspective at least, § 1367(c) remands are now potentially within the class of remands described in § 1447(c) and thus subject to the jurisdictional bar of § 1447(d)."[188] The question remains, however, whether the remand of claims over which the district court has declined to exercise supplemental jurisdiction is required due to a jurisdictional defect. As the Court pointed out in *Powerex*, it has "never passed on whether *Cohill* remands are subject-matter jurisdictional for purposes of *post-1988* versions of § 1447(c)."[189] Part III.B argues that they are not and that the Federal Circuit misapplied *Powerex* to the remand order in *HIF Bio*.

B. Power Versus Discretion and the Remand Order in HIF Bio

1. Why *Cohill* Remands Are Not "Subject Matter Jurisdictional" Under § 1447(c)

Before *Powerex*, appellate courts reasoned that *Cohill* remands are not based on a lack of subject matter jurisdiction because they are discretionary, not mandatory.[190] The *HIF Bio* court effectively rejected this reasoning by concluding that the decision not to exercise supplemental jurisdiction constitutes a loss of judicial power and therefore requires remand for lack of subject matter jurisdiction.[191] In reaching its conclusion, the court emphasized the fact that every *Cohill* "remand necessarily involves a predicate finding that the claims at issue lack an independent basis of . . . jurisdiction."[192] In addition, the Federal Circuit distinguished abstention from the choice not to exercise supplemental jurisdiction on the ground that a court abstains from hearing claims over which it

187. *Powerex Corp.*, 127 S. Ct. at 2417 (emphasis omitted). See *supra* Part II.C.4 for a discussion of this component of the *Powerex* holding.

188. HIF Bio, Inc. v. Yung Shin Pharm. Indus. Co., 508 F.3d 659, 666 n.3 (Fed. Cir. 2007), *cert. granted sub nom*. Carlsbad Tech., Inc. v. HIF Bio, Inc., 129 S. Ct. 395 (Oct. 14, 2008) (No. 07-1437).

189. *Powerex Corp.*, 127 S. Ct. at 2419 n.4 (emphasis added).

190. See *supra* Part II.D.1 for an analysis of pre-*Powerex* decisions. Both prior to and after the enactment of the supplemental jurisdiction statute, scholars took the position that *Cohill* remands were discretionary and not based on a lack of subject matter jurisdiction. *See, e.g.*, Siegel, *supra* note 43 (noting remand of second claim depending on dropped first claim is not result of lack of subject matter jurisdiction); Steinman, *supra* note 45, at 962 ("[A] remand ordered as a matter of discretion not to exercise conceded judicial power is *not* a remand predicated on a lack of jurisdiction."); Steinman, *supra* note 41, at 318 (noting § 1447(c) is inapplicable when courts, in their discretion, decline to exercise jurisdiction, because such action does not indicate that jurisdiction is lacking).

191. See *supra* Part II.D.2 for a discussion of the *HIF Bio* opinion.

192. *HIF Bio, Inc.*, 508 F.3d at 667.

has an independent basis of jurisdiction, while a court by definition does not have an independent basis of jurisdiction over the claims it declines to adjudicate under § 1367(c).[193] According to the *HIF Bio* court, this difference in the two doctrines compels disparate treatment under § 1447(c) and (d).[194]

The *HIF Bio* court, of course, is correct that supplemental claims by definition do not have an independent basis of jurisdiction—e.g., federal question or diversity. Furthermore, assuming that the Federal Circuit is correct that courts abstain only from deciding claims with an independent basis of subject matter jurisdiction,[195] the court has undoubtedly identified a real

193. See *supra* Part II.D.2 for further elaboration on the *HIF Bio* decision.

194. *HIF Bio, Inc.*, 508 F.3d at 667.

195. The exact nature of the relationship between abstention and § 1367(c) is unclear at best. Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CAL. L. REV. 1409, 1421 & n.52 (1999) (noting relationship's ambiguity and cataloging various positions taken by courts and scholars). If anything, comments by scholars, lower federal courts, and the Supreme Court have suggested that courts can abstain under § 1367(c). If this is true, then the *HIF Bio* court is incorrect that federal courts abstain only from deciding claims over which they have an independent basis of subject matter jurisdiction.

For example, in his commentary on the 1990 adoption of the supplemental jurisdiction statute, Professor David D. Siegel stated that § 1367(c)(1) and (2) are "analogous" to *Pullman* and *Burford* abstention, "if not overlapping or duplicative" bases for declining jurisdiction. David D. Siegel, *Commentary on 1988 Revision of Section 1367*, 28 U.S.C.A. § 1367 (2006) (noting changes to removal statute); *see also* David D. Siegel, *Changes in Federal Jurisdiction and Practice Under the New (Dec. 1, 1990) Judicial Improvements Act*, 133 F.R.D. 61, 67 (1991) (recognizing redundancy between § 1367(c)(1) and (2) and abstention). Other scholars and some courts have taken a similar position. *See* White v. County of Newberry, 985 F.2d 168, 172 (4th Cir. 1993) (treating § 1367(c) question as abstention issue); Brown v. Woodland Joint Unified Sch. Dist., No. S-91-0032WBS/PAN, 1992 WL 361696, at *5 (E.D. Cal. Apr. 2, 1992) ("[I]f it is not appropriate to abstain it is likewise not appropriate to decline the court's supplemental jurisdiction over the state law claims."); Patrick D. Murphy, *A Federal Practitioner's Guide to Supplemental Jurisdiction Under 28 U.S.C. § 1367*, 78 MARQ. L. REV. 973, 1024–25, 1028 n.288 (1995) (stating that § 1367(c)(1) is analogous to *Pullman* abstention, that declining supplemental jurisdiction under § 1367(c)(2) can be analogized to abstention under *Burford*, and that § 1367(c)(4) bears resemblance to *Colorado River* abstention); John B. Oakley, *Recent Statutory Changes in the Law of Federal Jurisdiction and Venue: The Judicial Improvements Acts of 1988 and 1990*, 24 U.C. DAVIS L. REV. 735, 766–68 (1991) (noting § 1367(a) and (c) incorporate abstention doctrine language and appear to limit discretion to decline to exercise jurisdiction); Robert A. Schapiro, *Interjurisdictional Enforcement of Rights in a Post-*Erie *World*, 46 WM. & MARY L. REV. 1399, 1416 n.55 (2005) (noting resemblance between aims of § 1367(c)(1) and *Pullman* abstention); Joan Steinman, *Section 1367—Another Party Heard From*, 41 EMORY L.J. 85, 92 (1992) (stating that § 1367(c)(1) "is redolent of language used in abstention cases").

In 1997, the Supreme Court suggested in *City of Chicago v. International College of Surgeons* that *some* relationship does indeed exist between abstention doctrines and § 1367(c). 522 U.S. 156, 173–74 (1997). Specifically, the Court stated:

> In addition to their discretion under § 1367(c), district courts may be obligated not to decide state law claims (or to stay their adjudication) where one of the abstention doctrines articulated by this Court applies. Those doctrines embody the general notion that "federal courts may decline to exercise their jurisdiction, in otherwise exceptional circumstances, where denying a federal forum would clearly serve an important countervailing interest . . . ."

Id. at 174 (quoting Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 716 (1996)).

After the Court's decision in *College of Surgeons*, scholars began to argue that § 1367(c)(4)

distinction between the two doctrines. This distinction, however, is immaterial. Instead, the crucial distinction is the difference between the existence of judicial power—*i.e.*, subject matter jurisdiction—and the exercise of that power. The existence of judicial power is a yes or no question. The decision whether to exercise that power, on the other hand, is discretionary in both the abstention and supplemental jurisdiction contexts once certain criteria are satisfied.[196]

codifies abstention principles. For example, in interpreting the Court's statement in *College of Surgeons*, Professor Oakley focused on the Court's quotation of the "exceptional circumstance"/"important countervailing interest" test for abstention and the similarity between this test and a court's discretion to decline jurisdiction under § 1367(c)(4) where "in exceptional circumstances, there are . . . compelling reasons for declining jurisdiction." 28 U.S.C. § 1367(c) (2006); THE AM. LAW INST., FEDERAL JUDICIAL CODE REVISION PROJECT 93 (Tentative Draft No. 2, 1998). According to Professor Oakley, it appears that the "exceptional circumstances/compelling reasons" standard of "present § 1367(c)(4) . . . would permit supplemental jurisdiction to be declined as to any claim that absent such statutory discretion would be eligible for abstention under the virtually indistinguishable 'exceptional circumstances/important countervailing interest' test for when abstention is proper." THE AM. LAW INST., *supra*, at 93. Other scholars and observers have made arguments similar to Professor Oakley's. *See, e.g.*, Georgene M. Vairo, *Problems in Federal Forum Selection and Concurrent Federal State Jurisdiction: Supplemental Jurisdiction; Diversity Jurisdiction; Removal; Preemption; Venue; Transfer of Venue; Persona* [sic] *Jurisdiction; Abstention and the All Writs Act*, SL081 ALI-ABA Course of Study Materials (2006) (stating that § 1367(c)(4) "would seem to include the following abstention formulas: cases where state law claims may be unclear – *Pullman*; cases involving state criminal proceedings – *Younger*; and, cases where the same parties are litigating the same issues in state court – *Colorado River*"); *see also* SST Global Tech., LLC v. Chapman, 270 F. Supp. 2d 444, 465–67 (S.D.N.Y. 2003) (finding supplemental jurisdiction proper where forum was not inconvenient, abstention would not avoid piecemeal litigation, proceedings in federal forum would not be duplicative, state proceeding progressed further than federal proceeding, and where state forum provided sufficient protection for plaintiff's interests); *SST Global Tech., LLC*, 270 F. Supp. 2d at 462–63 (discussing Hays County Guardian v. Supple, 969 F.2d 111 (5th Cir. 1992), *cert. denied*, 506 U.S. 1087 (1993)); Joseph N. Akrotirianakis, Comment, *Learning to Follow Directions: When District Courts Should Decline to Exercise Supplemental Jurisdiction under 28 U.S.C. § 1367(c)*, 31 LOY. L.A. L. REV. 995, 1026–27, 1029 (1998) (acknowledging legal scholars have argued that § 1367(c)(4) codifies *Pullman*, *Burford*, and *Younger* abstention and contending that *Colorado River* also permits courts to decline jurisdiction under § 1367(c)(4)). *But see* U.S. Fin. Corp. v. Warfield, 839 F. Supp. 684, 691 (D. Ariz. 1993) (explaining that court-formulated abstention doctrines do not trump statutory language of § 1367(c)(4) requiring compelling reasons for declining jurisdiction).

196. *See* Wachovia Bank, N.A. v. Schmidt, 546 U.S. 303, 316 (2006) (stating that subject matter jurisdiction "poses a 'whether,' not a 'where' question: Has the Legislature empowered the court to hear cases of a certain genre?"); Rosado v. Wyman, 397 U.S. 397, 403–05 (1970). In *Rosado*, the Supreme Court found that it had jurisdiction over the plaintiff's state law claims even after the plaintiff's federal claim became moot. 397 U.S. at 401–04. The *Rosado* Court "adhered to the position that when a federal court has power to adjudicate a state claim, the decision whether to exercise that jurisdiction is a matter of discretion." Steinman, *supra* note 45, at 962 (discussing *Rosado*, 397 U.S. at 403–05). Thus, the Court

> distinguished between the existence of judicial power and the exercise of that power. The first is a "yes or no" question as to whether jurisdiction exists; the second is merely a matter of discretion. Where there is power, a decision not to hear the state claim is purely a discretionary decision not to exercise that power. Hence, a remand ordered as a matter of discretion not to exercise conceded judicial power is *not* a remand predicated on a lack of jurisdiction.

Id.; *see also* Kircher v. Putnam Funds Trust, 373 F.3d 847, 850 (7th Cir. 2004) (opinion of Easterbrook, J.) (stating that it is important to "distinguish between a decision that '[a] court lacks adjudicatory

a. Judicial Power

"[S]ubject matter jurisdiction" is a court's "statutory or constitutional *power* to adjudicate [a] case."[197] It is axiomatic that a federal court has subject matter jurisdiction over a claim only when both the U.S. Constitution and a federal statute provide the court with power to adjudicate the claim. For example, a claim falls within the federal question jurisdiction of a federal court only when both Article III of the Constitution and § 1331 authorize the court to adjudicate the claim. Similarly, a claim falls within the supplemental jurisdiction of a federal court only when both Article III and § 1367(a) authorize adjudication.[198] When a civil action is filed in or removed to federal court, the constitutional and statutory requirements for subject matter jurisdiction either are satisfied or they are not, and judicial power either exists or it does not.

b. The Discretionary Decision Whether to Exercise Judicial Power: Abstention and Supplemental Jurisdiction

Generally, when the jurisdiction of a federal court is properly invoked, the court has a "strict duty" to adjudicate the controversy.[199] This "duty" derives from the "undisputed constitutional principle that Congress, and not the Judiciary, defines the scope of federal jurisdiction within the constitutionally permissible bounds."[200] Nevertheless, the federal courts' obligation to decide cases is not "absolute."[201] The Supreme Court has long held that federal courts have the power to abstain in certain cases.[202] Under the abstention doctrines,

competence' and a decision that '[a] court has been authorized to do X and having done so should bow out'" because "[t]he former implies lack of subject-matter jurisdiction . . .; the latter implies the presence of jurisdiction"), *rev'd on other grounds*, 547 U.S. 633 (2006); *Kircher*, 373 F.3d at 850 (stating that "a suit under federal law with a state-law claim supported by . . . supplemental jurisdiction" is "good example" of category in which court has adjudicatory competence but is authorized to decline to exercise its power and "having done so should bow out"); Mark Herrmann, Thermtron *Revisited: When and How Federal Trial Court Remand Orders Are Reviewable*, 19 ARIZ. ST. L.J. 395, 420–21 (1987) (arguing that it is inaccurate to describe pendent jurisdiction as discretionary and that it is preferable to describe federal courts as having jurisdiction over claims which they may decline to adjudicate).

197. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998); *see also* Powerex Corp. v. Reliant Energy Servs., Inc., 127 S. Ct. 2411, 2418 (2007) (stating that "subject matter jurisdiction" is the "power to adjudicate . . . claims"); Dodson, *supra* note 41, at 59 (defining jurisdiction as court's authority "to issue legitimate, binding, and enforceable orders").

198. *Cf.* 28 U.S.C. § 1441(c). See *supra* note 41 for a discussion of requirements for falling within the ambit of § 1367(a).

199. *Quackenbush*, 517 U.S. at 716; *see also* Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976) (stating that federal courts have "virtually unflagging obligation . . . to exercise the jurisdiction given them"); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.").

200. New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 359 (1989) (citing Kline v. Burke Constr. Co., 260 U.S. 226, 234 (1922)).

201. *Quackenbush*, 517 U.S. at 716.

202. *See, e.g.*, *Colo. River*, 424 U.S. at 813–17 (discussing different categories of abstention and citing many cases in which Supreme Court has approved of abstention).

"federal courts may decline to exercise their jurisdiction, in otherwise exceptional circumstances, where denying a federal forum would clearly serve an important countervailing interest."[203] The Supreme Court has "located the power to abstain in the historic *discretion* exercised by federal courts sitting in equity," but it has also "recognized that the authority of a federal court to abstain from exercising its jurisdiction extends to all cases in which the court has *discretion* to grant or deny relief."[204]

Similarly, the decision whether to exercise supplemental jurisdiction that exists under § 1367(a) is discretionary once a court has determined that § 1367(c) is satisfied. Section 1367(a) states: "Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute," the district courts "*shall* have supplemental jurisdiction" when the statute is properly invoked.[205] The mandatory language in § 1367(a)—"shall have supplemental jurisdiction"—indicates that the court has a duty to adjudicate the supplemental claims before it. Section 1367(a) makes it clear, however, that the court's duty is not absolute.[206] Subsection (b) provides that in diversity cases, the district courts "*shall not* have supplemental jurisdiction under subsection (a)" over particular claims. Thus, in certain cases subsection (b) specifically withdraws the jurisdiction granted under subsection (a).[207]

In contrast, under subsection (c) a district court "*may* decline to exercise supplemental jurisdiction over a claim under subsection (a)" if one of the criteria

203. *Quackenbush*, 517 U.S. at 716 (internal quotation marks omitted). When a federal court abstains, it either: (1) declines to exercise its jurisdiction altogether by remanding a removed case to state court or dismissing the case outright, or (2) "postpones" the exercise of its jurisdiction by staying the federal proceedings and remitting the parties to a state court. *See, e.g.*, *id.* at 731 ("[F]ederal courts have the power to dismiss or remand cases based on abstention principles only where the relief being sought is equitable or otherwise discretionary."); La. Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 30–31 (1959) (affirming district court's stay of proceedings on abstention grounds); Burford v. Sun Oil Co., 319 U.S. 315, 333–36 (1943) (affirming district court's dismissal of complaint on abstention grounds).

204. *Quackenbush*, 517 U.S. at 718 (emphasis added) (internal quotation marks omitted). In the past, it has been unclear whether, for example, "*Pullman* abstention is mandatory or discretionary." ERWIN CHEMERINSKY, FEDERAL JURISDICTION 795 (5th ed. 2007). In other words, it has been uncertain whether a court is obligated to abstain if the requirements for abstention are satisfied or whether a court can decide to exercise jurisdiction even if the requirements for abstention are satisfied. According to Dean Chemerinsky, "[t]he preferable approach is to treat abstention as discretionary and to allow federal courts to hear the case, even if the *Pullman* criteria are met, provided substantial reasons for avoiding abstention are present." *Id.* As noted above, the Court stated in *Quackenbush*, its most recent abstention decision, that abstention is "derive[d] from the discretion historically enjoyed by courts of equity." 517 U.S. at 728; *see also Burford*, 319 U.S. at 317–18 (describing court's choice of whether to abstain as matter of discretion). Thus, the better conclusion is that the decision whether to abstain is a discretionary one.

205. 28 U.S.C. § 1367(a) (2006) (emphasis added).

206. *See* John B. Oakley, *Prospectus for the American Law Institute's Federal Judicial Code Revision Project*, 31 U.C. DAVIS L. REV. 855, 938–39 (1998) (arguing that § 1367(a)'s language granting liberal supplemental jurisdiction is meant to be limited only by exceptions enumerated in other federal statutes or subsections (b) and (c) of § 1367).

207. *See id.* at 943 (distinguishing § 1367(b) from § 1367(c) by noting that § 1367(b) serves to withdraw jurisdiction authorized by § 1367(a)).

enumerated in subsection (c) is satisfied.[208] Subsection (c), unlike subsection (b), does not withdraw the jurisdiction granted in subsection (a).[209] Instead, subsection (c) authorizes a district court to decline to exercise the power that it has under subsection (a) if subsection (c) is satisfied *and* the court chooses not to exercise its power. The court *may*, but is not obligated to, decline to exercise its supplemental power.[210] Thus, contrary to the *HIF Bio* court's conclusion, the plain language of subsection (c) demonstrates that it is not an express statutory exception to subsection (a). Instead, when a court declines to exercise its supplemental jurisdiction under § 1367(c), as when it abstains, the court is making a discretionary decision not to exercise existing judicial power.[211] The court has both constitutional and statutory authority to adjudicate the claim but chooses not to use its power.

Furthermore, jurisdiction does not evaporate at the moment a court declines to exercise its supplemental power.[212] Once a court has determined that

208. 28 U.S.C. § 1367(c) (emphasis added). Section 1367(c) specifically provides that a court may decline to exercise supplemental jurisdiction when "(1) the claim raises a novel or complex issues of State law, (2) the claim substantially predominates over the claim or claims" within the court's original jurisdiction, "(3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances." *Id.*

The circuits are divided regarding whether § 1367(c) codifies the broad discretionary approach under *Gibbs* or is limited to only the criteria listed therein. *Compare, e.g.*, Borough of W. Mifflin v. Lancaster, 45 F.3d 780, 788 (3d Cir. 1995) (finding that district court can decline to exercise its supplemental jurisdiction under § 1367(c) for reasons of convenience, fairness, judicial economy, and comity, as set forth in *Gibbs*), *with* Executive Software N. Am., Inc. v. U.S. Dist. Court, 24 F.3d 1545, 1556 (9th Cir. 1994) (finding that district court can decline to exercise its supplemental jurisdiction under § 1367(c) only for reasons listed in statute), *overruled by* Cal. Dep't of Water Res. v. Powerex Corp., 533 F.3d 1087 (9th Cir. 2008). In *City of Chicago v. International College of Surgeons*, a case decided after Congress enacted the supplemental jurisdiction statute, the Supreme Court suggested that the *Gibbs* approach is the proper one when it stated: "[Section 1367] . . . reflects the understanding that, when deciding whether to exercise supplemental jurisdiction, 'a federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity.'" 522 U.S. 156, 173 (1997) (quoting Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 (1988)). *See generally* Rachel Ellen Hinkle, Comment, *The Revision of 28 U.S.C. § 1367(c) and the Debate over the District Court's Discretion to Decline Supplemental Jurisdiction*, 69 TENN. L. REV. 111, 120–36 (2001) (discussing circuit split).

209. Oakley, *supra* note 204, at 943 (arguing that § 1367(c) "seeks . . . to resurrect the element of judicial discretion in the exercise of supplemental jurisdiction that the mandatory phrasing of subsection 1367(a) needlessly extinguished").

210. *See Int'l Coll. of Surgeons*, 522 U.S. at 172 ("Of course, to say that the terms of § 1367(a) authorize the district courts to exercise supplemental jurisdiction over state law claims . . . does not mean that the jurisdiction *must* be exercised in all cases.").

211. *See* Doughty v. Underwriters at Lloyd's, 6 F.3d 856, 860 (1st Cir. 1993) ("Because abstention, by definition, assumes the existence of subject matter jurisdiction in the abstaining court—after all, one must have . . . subject matter jurisdiction in order to decline the exercise of it—section 1447(c) does not apply to an abstention-driven remand."), *rejected by* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 712–15 (1996); Siegel, *supra* note 132 (stating that decision whether to remand supplemental claim after main claim has been disposed of on merits is, like abstention, discretionary).

212. This argument is derived from *Kircher v. Putnam Funds Trust*, 373 F.3d 847, 849–50 (7th Cir. 2004) (opinion of Easterbrook, J.), *rev'd on other grounds*, 547 U.S. 633 (2006). In *Kircher*, the plaintiffs sued an investment fund and its adviser in state court for misconduct under state law. 373

§ 1367(c) is applicable and that it will exercise its discretion not to adjudicate a supplemental claim, there is nothing left for the court to do except remand or dismiss the claim. The remand does not result from a lack of jurisdiction but instead from the court's decision not to exercise its existing judicial authority. Accordingly, remands under § 1367(c), like abstention-based remands, are not subject matter jurisdictional.

Finally, the Supreme Court has stated that the decision whether to decline to exercise pendent or supplemental jurisdiction is discretionary. Prior to the enactment of the supplemental jurisdiction statute, the *Gibbs* Court said that pendent jurisdiction "need not be exercised in every case in which it is found to exist. It . . . is a doctrine of discretion, not of plaintiff's right."[213] After *Gibbs*, the *Cohill* Court held that a district court had the *discretion* to remand pendent claims once the federal claim was eliminated, not that the court was required to

F.3d at 847. The defendants removed the suit under the Securities Litigation Uniform Standards Act of 1998. *Id.* at 848.

The district court remanded the case for lack of jurisdiction. *Id.* Nevertheless, the Seventh Circuit concluded that § 1447(c) and (d) did not insulate the remand order from appellate review because the removal itself was jurisdictionally proper and no postremoval events "undercut the propriety of the removal." *Id.* at 851. Instead, according to the Seventh Circuit, the "only pertinent development" postremoval was that the district court made a "substantive decision" under SLUSA that remand was appropriate for nonjurisdictional reasons. *Id.* at 849, 851. The appellate court reasoned that once the district court made its substantive decision, it "had nothing else to do: dismissal and remand [were] the only options." *Kircher*, 373 F.3d at 849–50.

The court recognized that it was possible to conclude "that jurisdiction evaporated at that juncture," but rejected this conclusion. *Id.* at 850. The court emphasized the distinction between the decision that "'[a] court lacks adjudicatory competence' and a decision that '[a] court has been authorized to do X and having done so should bow out.'" *Id.* In the latter situation, the court has "no adjudicatory competence to do more," but it "is not the 'lack of subject-matter jurisdiction' that authorizes a remand. Otherwise every federal suit, having been decided on the merits, would be dismissed 'for lack of jurisdiction' because the court's job was finished." *Id.*

According to the court, remands under § 1367(c) are a "good example" of the second category: a court has adjudicatory competence under § 1367(a), but once it decides not to exercise its supplemental jurisdiction under subsection (c), it should bow out. *Id.* The remand, however, is not for lack of subject matter jurisdiction simply because the court's job is finished. *Kircher*, 373 F.3d at 850. Similarly, the Seventh Circuit concluded that once the district court in *Kircher* made the substantive decision that remand was appropriate, its only options were remand and dismissal. *Id.* at 849–50. That did not mean, however, that the remand was for lack of subject matter jurisdiction just because the court had finished its work. *Id.* at 850.

On certiorari, the Supreme Court held that the district court's remand order was, in fact, based on a lack of jurisdiction and therefore it was immune from appellate review under § 1447(c) and (d). Kircher v. Putnam Funds Trust, 547 U.S. 633, 642–44 (2006). The Court noted that the only adjudicatory competence the district court had was the power to determine if it actually had jurisdiction to proceed with the case. *Id.* at 644. Because the Court concluded that judicial power never existed in *Kircher*, once the district court decided that it lacked subject matter jurisdiction, the remand order necessarily fell within § 1447(c) and (d). *Id.* at 645–48. Although the Supreme Court overruled the Seventh Circuit's holding that the remand order was reviewable on appeal, the Court neither called into question nor even addressed the Seventh Circuit's reasoning that there is a distinction between the existence of judicial power and the decision whether to exercise it. The Court simply did not reach this issue because it concluded that judicial power never existed. *Id.* at 646–48.

213. United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726 (1966).

do so because of a jurisdictional defect.[214] And this discretion "enable[d] district courts to deal with cases involving pendent claims in the manner that best serves the principles of economy, convenience, fairness, and comity which underlie the pendent jurisdiction doctrine."[215]

Then, in *International College of Surgeons*, a case interpreting the supplemental jurisdiction statute, the Court said that § 1367(c) "confirms the *discretionary nature* of supplemental jurisdiction by enumerating the circumstances in which district courts *can* refuse its exercise."[216] The Court quoted *Gibbs* for the proposition that "pendent jurisdiction 'is a doctrine of discretion, not of plaintiff's right.'"[217] The Court also acknowledged that although "the terms of § 1367(a) authorize the district courts to exercise supplemental jurisdiction over state law claims," that "does not mean that the jurisdiction *must* be exercised in all cases."[218] Finally, relying on *Cohill*, the *International College of Surgeons* Court concluded that § 1367(c) "reflects the understanding that, when deciding whether to exercise supplemental jurisdiction, 'a federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity.'"[219] Thus, although the Court has never directly "passed on" whether *Cohill* remands are subject matter jurisdictional, the Court has never suggested that the decision whether to exercise supplemental jurisdiction is anything other than discretionary once § 1367(c) is satisfied.

c. Application to HIF Bio[220]

In *HIF Bio*, the removal was jurisdictionally proper. Thus, judicial power existed for the federal court to adjudicate the claims before it. In its remand order, the district court decided that the two declaratory judgment claims were state rather than federal claims.[221] The district court also dismissed the federal RICO claim for failure to state a claim upon which relief can be granted.[222] At that point, there was no question that the district court retained jurisdiction to decide the supplemental state law claims.[223] The district court declined to exercise supplemental jurisdiction over the state claims under § 1367(c)(2),

214. Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 357 (1988).

215. *Id.*

216. City of Chicago v. Int'l Coll. of Surgeons, 522 U.S. 156, 173 (1997) (emphasis added).

217. *Id.* at 172 (quoting *Gibbs*, 383 U.S. at 726).

218. *Id.*

219. *Id.* at 173 (quoting *Cohill*, 484 U.S. at 350).

220. See *supra* Part II.D.2 for a detailed explanation of the district court's remand order and the Federal Circuit's opinion.

221. HIF Bio, Inc. v. Yung Shin Pharm. Indus. Co., 508 F.3d 659, 664 (Fed. Cir. 2007), *cert. granted sub nom*. Carlsbad Tech., Inc. v. HIF Bio, Inc., 129 S. Ct. 395 (Oct. 14, 2008) (No. 07-1437).

222. *Id.* at 662.

223. *E.g.*, Rosado v. Wyman, 397 U.S. 397, 403–05 (1970) (finding federal jurisdiction for supplemental state law claims proper where federal claim was dismissed); *see also* Steinman, *supra* note 45, at 963 (noting that federal courts retain jurisdiction to adjudicate supplemental state claims even after dismissal of federal question claims).

however, because they predominated over the federal claim and therefore belonged in state court.[224] Thus, the court decided in its discretion not to exercise supplemental jurisdiction over the claims and to remand them to state court.[225] There was no lack of subject matter jurisdiction—i.e., judicial power—requiring the court to remand. It declined to exercise supplemental jurisdiction under § 1367(c)(2)—a discretionary decision—given the circumstances of the case.

2. *Powerex* and the Remand Order in *HIF Bio*

Under *Powerex*, an appellate court should determine if a remand order is subject matter jurisdictional and therefore immune from appellate review by (1) examining the remand order to determine how the district court characterized the remand; and (2) if the district court characterized the remand as subject matter jurisdictional, looking behind the remand order to determine if that characterization is colorable.[226] This section explains how the Federal Circuit misapplied the *Powerex* test in *HIF Bio* and concludes that under *Powerex*, the Federal Circuit had appellate jurisdiction to review the district court's *Cohill* remand.

The first step under *Powerex* is to determine whether the district court in *HIF Bio* characterized the remand as subject matter jurisdictional, which in turn requires a careful examination of the remand order.[227] This task is complicated in *HIF Bio*, however, because the district court stated in subsection 1 of its Analysis that it was declining to exercise supplemental jurisdiction over all eleven state claims in the complaint, but then concluded in subsection 2 that it lacked subject matter jurisdiction over the two declaratory judgment claims.[228] The court stated that it was remanding all of the claims, but it did not clarify whether it was remanding the declaratory judgment claims because it lacked jurisdiction over them or because it had declined to exercise supplemental jurisdiction over them.[229]

One way to reconcile these statements is to conclude that the plaintiffs actually asserted thirteen state claims in the complaint.[230] If that is the case, then

224. See *supra* Part II.D.2 for a discussion of the district court's decision in *HIF Bio*. The district court also could have declined to exercise its supplemental jurisdiction under § 1367(c)(3) because the federal claim had been eliminated.

225. *HIF Bio, Inc.*, 508 F.3d at 664.

226. See *supra* Part II.C.4 for a discussion of the analysis used in *Powerex*.

227. Powerex Corp. v. Reliant Energy Servs., Inc., 127 S. Ct. 2411, 2420 (2007).

228. See *supra* notes 144–50 and accompanying text for a discussion of the district court's decision to decline exercise of supplemental jurisdiction over state claims and its conclusion that it lacked subject matter jurisdiction over the declaratory judgment claims.

229. See *supra* notes 146–52 and accompanying text for a discussion of the district court's decision to remand all claims without clarification about whether the court lacked or simply declined to exercise supplemental jurisdiction over the declaratory judgment claims.

230. The district court did not specifically count the state claims in the complaint. Instead, in the first part of its remand order it said that the plaintiffs sought "declaratory judgment with respect to ownership and inventorship" of the anticancer agent. HIF Bio, Inc. v. Yung Shin Pharm. Indus. Co., No. CV 05-07976, 2006 WL 6086295, at *2, *4 (C.D. Cal. June 9, 2006). It also stated that the plaintiffs

the district court remanded the two declaratory judgment claims for lack of subject matter jurisdiction, but remanded the eleven other state claims after deciding not to exercise supplemental jurisdiction over them. Another possibility is that the plaintiffs asserted only eleven state claims in the complaint (including the two for declaratory relief), and the district court remanded all of the claims after deciding not to exercise supplemental jurisdiction over any of them. If that is the case, then the district court must have concluded that, although the two claims for declaratory relief did not have an independent basis of jurisdiction, they were supplemental to the RICO claim under § 1367(a), just like the nine other state claims, and it could decline to exercise supplemental jurisdiction over them as well. There does not seem to be any doubt that the declaratory judgment claims were supplemental to the RICO claim, but the district court never said so explicitly or clearly stated that it was remanding them based on its decision not to exercise supplemental jurisdiction over them.

The Federal Circuit concluded that the latter interpretation of the district court's remand order was correct and characterized the district court as "declining supplemental jurisdiction" over all of the state claims in *HIF Bio*.[231] The court does not appear to have analyzed whether the district court actually characterized the remand order as subject matter jurisdictional. Nevertheless, the court "looked behind" the remand order to determine whether *Cohill*

had asserted a RICO claim and claims for "slander, conversion, actual and constructive fraud, intentional and negligent interference with contractual relations and prospective economic advantage, breach of implied contract, unfair competition and fraudulent business practices, unjust enrichment and constructive trust." *Id.* at *2. The district court then noted that the plaintiffs also sought a permanent injunction. *Id.* In subsection 1 of its Analysis, the district court referred to the complaint as containing "twelve causes of action, eleven of which are state claims." *Id.* at *3.

The Federal Circuit concluded that the complaint contained eleven causes of action by counting them as follows:

> The first and second causes of action seek a declaratory judgment for ownership and inventorship . . . . The third cause of action asserts violations of [RICO]. The remaining nine causes of action are based respectively on slander of title; conversion; actual and constructive fraud; intentional interference with contractual relations and prospective economic advantage; negligent interference with contractual relations and prospective economic advantage; breach of implied contract; unfair competition and fraudulent business practices; unjust enrichment-constructive trust; and permanent injunction.

HIF Bio, Inc., 508 F.3d at 662 (citations omitted).

It is possible to conclude that there were thirteen claims or causes of action by counting them as follows: (1) declaratory judgment for ownership, (2) declaratory judgment for inventorship, (3) slander, (4) conversion, (5) actual fraud, (6) constructive fraud, (7) intentional interference with contractual relations and prospective economic advantage, (8) negligent interference with contractual relations and prospective economic advantage, (9) breach of implied contract, (10) unfair competition and fraudulent business practices, (11) unjust enrichment, (12) constructive trust, and (13) request for permanent injunction. *Id.* Alternatively, the unfair competition and fraudulent business practices "claim" could be counted as two separate claims and the request for a permanent injunction could be viewed as a remedy and not a cause of action. Yet another possibility is that unfair competition and fraudulent business practices can be counted as two claims, but unjust enrichment and constructive trust should be counted as one claim and the request for a permanent injunction should also be counted as a claim. Under any of these scenarios, the plaintiffs actually asserted thirteen claims.

231. 508 F.3d at 664.

remands are based on a defect in subject matter jurisdiction or can be "colorably characterized" as such and therefore fall within the class of remands barred from appellate review.[232] After the Federal Circuit concluded (incorrectly) that *Cohill* remands fall within § 1447(c) and (d), it held that it lacked jurisdiction over CTI's appeal.[233] As explained below, the Federal Circuit incorrectly applied the *Powerex* test to the *Cohill* remand in *HIF Bio* and erred in concluding that it lacked jurisdiction to review the remand order.[234]

232. See *supra* notes 154–57 and accompanying text for a discussion of the *HIF Bio* court's process for determining the nature of the district court's decision to remand the claims.

233. See *supra* notes 158–72 and accompanying text for a discussion of the Federal Circuit's holding.

234. This conclusion and the subsequent analysis assume that the district court in *HIF Bio* remanded all of the state law claims pursuant to § 1367(c). The district court, however, did not clearly state the basis for its remand of the declaratory judgment claims; it simply stated that it was remanding them. Based on the district court's statement in subsection 1 of its Analysis that it was declining to exercise supplemental jurisdiction over "all" of the state claims, it seems most likely that the district court remanded the declaratory judgment claims on that basis. If that is the case, then as explained above the entire remand order in *HIF Bio* is reviewable on appeal.

It is possible to argue, however, that the district court remanded the declaratory judgment claims for lack of subject matter jurisdiction—or at least the remand order can be characterized in that way—and therefore they are unreviewable on appeal. The resolution of this issue matters because the defendant argued that the declaratory judgment claims arose under patent law and the federal court therefore had exclusive jurisdiction over them. *HIF Bio, Inc.*, 2006 WL 6086295, at *4. If the remand of these claims is reviewable on appeal, then the Federal Circuit may agree with the defendant and conclude that these claims belong in federal court. On the other hand, if the remand of these claims is unreviewable, a state court will try them even if a federal court is the only court that is competent to hear them.

Powerex does not address the circumstance where the basis for the remand is unclear. In *Powerex*, there was no question that the district court was purporting to remand because it believed it lacked subject matter jurisdiction over the claims against Powerex once it concluded that the other third-party defendants were immune from suit. Powerex Corp. v. Reliant Energy Servs., 127 S. Ct. 2411, 2414–15 (2007). The Court had never actually decided whether a remand in these circumstances was required due to a defect in subject matter jurisdiction. *Id.* at 2418. The point was "debatable," however, and thus the district court's characterization of the remand as subject matter jurisdictional was colorable. *Id.* In contrast, in *HIF Bio* it is unclear whether the district court was purporting to remand the declaratory judgment claims under § 1367(c) or for lack of subject matter jurisdiction. There is no question, however, that the district court could have remanded the declaratory judgment claims for lack of subject matter jurisdiction once it concluded that they did not arise under patent law. In other words, *if* the district court characterized the remand of the declaratory judgment claims as subject matter jurisdictional, then that characterization is certainly colorable.

Although *Powerex* itself does not resolve the question of whether the remand of the declaratory judgment claims in *HIF Bio* is reviewable on appeal, the *Powerex* Court's rationale may provide some guidance. The *Powerex* Court reasoned that "[l]engthy appellate disputes about whether an arguable jurisdictional ground invoked by the district court was properly such would frustrate the purpose of § 1447(d)." *Id.* Thus, the Court adopted the "colorably characterized" test because it believed that it would limit litigation regarding appellate review of remand orders.

Applying the *Powerex* rationale to the remand of the declaratory judgment claims in *HIF Bio* leads to the conclusion that because the district court arguably characterized the basis for its remand of those claims as subject matter jurisdictional and because that basis is colorable, the remand of the declaratory judgment claims should be immune from appellate review. This solution, in effect, would amend the *Powerex* test to ask (1) whether the district court *arguably* characterized its remand as subject matter jurisdictional; and (2) if so, whether that characterization is colorable. Under the

The initial question under *Powerex* is whether the district court characterized the remand as subject matter jurisdictional. In answering this question, the Federal Circuit simply stated that the district court declined supplemental jurisdiction over all of the state claims in *HIF Bio*.[235] The court did not carefully examine the remand order, as required under *Powerex*,[236] to determine if the district court actually characterized the remand as subject matter jurisdictional.

First, contrary to the Federal Circuit's contention, the district court did *not* say that it was "declining supplemental jurisdiction" over the state claims.[237] Instead, in subsection 1 of its Analysis, the district court specifically said that it was "declin[ing] *to exercise* supplemental jurisdiction" over the eleven state claims in the complaint.[238] Section 1367(c) provides that a district court "may decline *to exercise* supplemental jurisdiction" if § 1367(c) is satisfied. A court cannot "decline supplemental jurisdiction" under § 1367(c) because the existence of supplemental jurisdiction under § 1367(a)—i.e., judicial power—is a yes or no question.[239] The decision whether to exercise that power, however, is discretionary.[240] The remand order in *HIF Bio* was based on the district court's discretionary decision to decline to exercise supplemental jurisdiction because the state law claims predominated over the federal claim.[241] It was not based on the decision to "decline jurisdiction," a decision that the district court was without power to make since the claims fell within its § 1367(a) jurisdiction.

Second, the remand order in *Powerex* stated that "the remand 'issue hinge[d] . . . on the Court's jurisdictional authority to hear the removed claims,'" and the district court "repeatedly stated" in its order denying a stay of remand that "a lack of subject matter jurisdiction required remand pursuant to § 1447(c)."[242] In contrast, the remand order in *HIF Bio* did not indicate that the district court was declining to exercise supplemental jurisdiction because it

Powerex rationale, this revised test should avoid lengthy appellate disputes about both whether the district court characterized its remand order as subject matter jurisdictional and whether an arguable jurisdictional ground is properly such. And under this revised test, the remand of the declaratory judgment claims in *HIF Bio* is not subject to appellate review.

235. *HIF Bio, Inc.*, 508 F.3d at 662.

236. *Powerex Corp.*, 127 S. Ct. at 2417.

237. The *HIF Bio* court repeatedly and incorrectly used the phrase "declining supplemental jurisdiction." *E.g.*, 508 F.3d at 664 ("In this case, the district court's remand order is based on declining supplemental jurisdiction."); *id.* at 665 ("[W]e are faced with an issue of first impression for this court: whether a remand based on declining supplemental jurisdiction under § 1367(c) is within the class of remands described in § 1447(c)."); *id.* at 667 ("[A] remand based on declining supplemental jurisdiction can be colorably characterized as a remand based on lack of subject matter jurisdiction.").

238. *HIF Bio, Inc.*, 2006 WL 6086295, at *3 (emphasis added).

239. See *supra* Part III.B.1 for a discussion of the relation between subject matter jurisdiction and supplemental claims.

240. See *supra* Part III.B.1 for a discussion of the discretionary nature of supplemental jurisdiction.

241. *HIF Bio, Inc.*, 508 F.3d at 664.

242. Powerex Corp. v. Reliant Energy Servs., 127 S. Ct. 2411, 2417 (2007).

lacked power over the state law claims.[243] Instead, the district court made it clear that it was declining to exercise supplemental jurisdiction because the state claims predominated over the federal RICO claim and therefore state court was the proper forum in which to litigate them.[244] Thus, the district court in *HIF Bio* in no way characterized the *Cohill* remand as subject matter jurisdictional.

Under *Powerex*, because the district court did not characterize the *Cohill* remand in *HIF Bio* as based on a defect in subject matter jurisdiction, the Federal Circuit should not have "looked behind" the remand order (step two of the *Powerex* analysis)[245] to determine whether *Cohill* remands are subject matter jurisdictional. Instead, the Federal Circuit should have concluded that the remand did not fall within § 1447(c) and that the review bar of § 1447(d) therefore did not apply. At that point, the Federal Circuit should have turned to the merits of the appeal.

If the district court in *HIF Bio* had actually characterized the remand of the state claims under § 1367(c) as subject matter jurisdictional, then it would have been appropriate for the Federal Circuit to proceed to the question of whether such a characterization is colorable. In *Powerex*, it was debatable whether there was actually a defect in subject matter jurisdiction that required remand, but that was enough for the Court to conclude that the district court's characterization of its remand as subject matter jurisdictional was colorable. In contrast, if a district court were to characterize or attempt to characterize a *Cohill* remand as based on a lack of subject matter jurisdiction, the characterization would not be colorable because, although the Supreme Court has not yet decided whether *Cohill* remands are subject matter jurisdictional, the issue is not debatable.

As explained in Part III.B.1 above, both the language of the supplemental jurisdiction statute and Supreme Court precedent demonstrate that the decision whether to exercise supplemental power that exists under § 1367(a) is discretionary once § 1367(c) is satisfied. And if a court declines to exercise supplemental jurisdiction and remands the claims, the remand is based on the court's use of its discretion, not a jurisdictional defect. Jurisdiction does not evaporate at the moment a court decides not exercise its supplemental jurisdiction. Thus, the Supreme Court should reverse the Federal Circuit and hold that the appellate court has jurisdiction to review the *Cohill* remand in *HIF Bio*. More broadly, the Court should hold that any characterization of *Cohill* remands as subject matter jurisdictional under § 1447(c) is not colorable, and therefore such remands are reviewable on appeal under the Court's current interpretation of § 1447(c) and (d).

243. *HIF Bio, Inc.*, 508 F.3d at 662.

244. HIF Bio, Inc. v. Yung Shin Pharm. Indus. Co., No. CV 05-07976, 2006 WL 6086295, at *3 (C.D. Cal. June 9, 2006). The district court did not actually cite § 1367(c) as the basis for its decision not to exercise supplemental jurisdiction; however, § 1367(c)(2) permits a district court to decline to exercise supplemental jurisdiction where the state law claims "substantially predominate[] over the claim or claims over which the district court has [an independent basis of jurisdiction]." 28 U.S.C. § 1367 (c)(2) (2006). Thus, § 1367(c)(2) obviously was the basis for the district court's decision not to exercise supplemental jurisdiction.

245. *Powerex Corp.*, 127 S. Ct. at 2417.

C. The Remand of Claims and Cases Under § 1447(c)

After concluding that *Cohill* remands are based on a lack of subject matter jurisdiction, the *HIF Bio* court automatically assumed that they therefore fall "within the class of remands described in § 1447(c), and thus barred from appellate review by § 1447(d)."[246] Even if the Supreme Court ultimately concludes that *Cohill* remands can be colorably characterized as remands for lack of subject matter jurisdiction, however, they will not necessarily fall within § 1447(c). Section 1447(c) can be interpreted to encompass only those remands that are based on lack of subject matter over an entire *case*, and not remands, like those under § 1367(c), that involve remand of only a *claim* or *claims*.

Section 1447(c) states in pertinent part: "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."[247] Noticeably absent from § 1447(c) is the definition of precisely *what* it must appear that the district court lacks subject matter jurisdiction over before the case must be remanded. Two options logically present themselves. The first is that if the district court appears to lack jurisdiction over a "claim," then the court must remand the whole case. The second is that if the district court appears to lack jurisdiction over the "case," then the court must remand the whole case.

A "civil action" or "case" is commonly understood to "encompass . . . only the claims that are [both] permitted by the governing Rules [of Civil Procedure to be brought within a single litigation] and . . . supported either by an independent basis of subject-matter jurisdiction . . . or by supplemental jurisdiction."[248] Thus, the term "case" refers to all of the claims properly asserted in a single action, while the term "claim" refers to one part of a case.[249] There is no doubt that should a court determine that it does not have an independent basis of jurisdiction over even a single claim in a complaint, the entire case must be remanded and the remand order would fall within § 1447(c).[250] If § 1447(c) is interpreted to apply where a court has an independent basis of jurisdiction over one claim but remands one or more other claims for lack of jurisdiction, however, then the plain language of § 1447(c) requires the court to remand the entire "case" in these circumstances, too.

In the context of *Cohill* remands, this interpretation of § 1447(c) is quite problematic. First, the plain language of § 1367(c) itself permits a court to decline to exercise supplemental jurisdiction over *supplemental* claims, but it

246. *HIF Bio, Inc.*, 508 F.3d at 667.

247. 28 U.S.C. § 1447(c).

248. Joan Steinman, *Claims, Civil Actions, Congress & the Court: Limiting the Reasoning of Cases Construing Poorly Drawn Statutes*, 65 WASH. & LEE L. REV. 1593, 1605 (2008).

249. *See id.* at 1607–08 (illustrating many different contexts in which courts distinguish between claim and civil action). Of course, "a single claim *can* constitute a civil action [or case] and does so when it is the sole claim asserted between the parties" and has an independent basis of subject matter jurisdiction. *Id.* at 1609.

250. *See* Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006) (stating federal court is required to dismiss complaint entirely upon concluding that it lacks subject matter jurisdiction).

does not authorize a court to decline to exercise jurisdiction over claims with independent bases of jurisdiction.[251] Second, with regard to remands under § 1367(c)(1), (2), and (4), this interpretation of § 1447(c) would require a court to remand claims with independent bases of jurisdiction. For example, if a district court declined to exercise its supplemental jurisdiction over a state law claim under § 1367(c)(1)—because "the claim raises a novel or complex issue of State law"—and treated this remand as one for lack of jurisdiction, then § 1447(c) would mandate that the district court remand the whole case, including the claims over which the district court had independent bases of jurisdiction. The same analysis would apply if the district court declined to exercise its supplemental jurisdiction under § 1367(c)(2) or (c)(4). Such results would certainly flout the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them."[252]

If a district court declined to exercise its supplemental jurisdiction over a state law claim under § 1367(c)(3) because it had "dismissed all claims over which it ha[d] original jurisdiction," then § 1447(c) would still mandate remand of the entire case. In this circumstance, however, all that would remain of the "case" would be the state law claim, and the district court would not be required to remand claims with independent bases of jurisdiction in order to remand the "case." Thus, it is conceivable that the Supreme Court will conclude that only remands pursuant to § 1367(c)(3)—and not remands under § 1367(c)(1), (2), and (4)—constitute remands for lack of subject matter jurisdiction that fall within § 1447(c) and (d). However, such a conclusion would conflict with the *HIF Bio* court's reasoning that a court loses jurisdiction over the supplemental claims when it declines to exercise supplemental jurisdiction because § 1367(c) is an express statutory exception to § 1367(a).[253] Under *HIF Bio*, the reason for a district court's decision not to exercise supplemental jurisdiction is irrelevant.[254] Once the district court makes the decision, it loses jurisdiction over the claim.

The more plausible interpretation of § 1447(c) is that it requires a district court to remand a "case" only when it appears that it lacks subject matter jurisdiction over the whole case, and not just a claim. If a "case" is understood to comprise all of the claims in a lawsuit,[255] then only if the court determines that it is without jurisdiction over *all claims* in the suit must the entire case be

251. *See, e.g.*, Steinman, *supra* note 41, at 318 (noting while § 1447(c) requires remand of entire case, § 1367(c) allows court to refuse jurisdiction for only those claims encompassed by supplemental jurisdiction, not those with independent basis for federal court's jurisdiction).

252. Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976). See *supra* notes 203–09 and accompanying text for a discussion of the discretionary nature of this exercise of jurisdiction.

253. HIF Bio, Inc. v. Yung Shin Pharm. Indus. Co., 508 F.3d 659, 667 (Fed. Cir. 2007), *cert. granted sub nom*. Carlsbad Tech., Inc. v. HIF Bio, Inc., 129 S. Ct. 395 (Oct. 14, 2008) (No. 07-1437).

254. *See id.* at 662–63 (noting district court may validly decline to exercise supplemental jurisdiction for any number of reasons).

255. *See* Joan Steinman, *Crosscurrents: Supplemental Jurisdiction, Removal, and the ALI Revision Project*, 74 IND. L.J. 75, 87 (1998) (discussing distinction between claims and actions, namely, that single action may include several claims asserted by same or different parties). See *supra* notes 247–48 and accompanying text for an analysis of the term "case."

remanded. For example, if a court discovers before final judgment that it never had an independent basis of jurisdiction over any claim, then removal was improper under § 1441(a) and § 1447(c) requires remand of the entire case for lack of subject matter jurisdiction.

This interpretation of § 1447(c) not only prevents a district court from having to remand claims with an independent basis of jurisdiction under § 1447(c), it is also consistent with *Powerex*. The *Powerex* Court said that even if removal is proper, postremoval events can result in a remand for lack of subject matter jurisdiction.[256] The Court did not define the type of postremoval events that can result in a § 1447(c) remand, but it did rely on 28 U.S.C. § 1447(e) in reaching its conclusion.[257] Under § 1447(e), if joinder of a party postremoval would destroy complete diversity and thereby deprive the court of jurisdiction over the *case*, then the court must either refuse to join the party or "remand *the action*."[258] As the *Powerex* Court said, § 1447(e) "unambiguously demonstrates that *a case* can be properly removed and yet suffer from a failing in *subject-matter jurisdiction* that requires remand."[259] The *Powerex* Court also made it clear that § 1447(e) remands are immune from appellate review.[260] Consequently, § 1447(e) demonstrates that it is possible to interpret § 1447(c) to require a court to lack jurisdiction over a case before the remand falls within § 1447(c) and reconcile that interpretation with *Powerex*.

Under this more plausible interpretation of § 1447(c), even if the Court concludes that *Cohill* remands are remands for lack of subject matter jurisdiction, they would not fall within § 1447(c) because the court would lack jurisdiction over only a claim or claims and not the whole case. Furthermore, because § 1447(c) and (d) must be read together under *Thermtron* and its progeny,[261] if § 1447(c) does not cover *Cohill* remands (even if they are based on lack of subject matter jurisdiction), then § 1447(d) would be inapplicable and *Cohill* remands would remain reviewable on appeal.

D. Consequences

The enactment of § 1447(d) and the Supreme Court's continued reading of § 1447(c) and (d) together have led to a "strange concatenation of results."[262] If the Court concludes that *Cohill* remands are immune from appellate review, this decision will produce additional strange results. Furthermore, there would be significant systemic consequences to a determination that remands under § 1367(c), a traditionally nonjurisdictional basis for remand, are now jurisdictional.

256. Powerex Corp. v. Reliant Energy Servs., Inc., 127 S. Ct. 2411, 2416–17 (2007).

257. *Id.*

258. 28 U.S.C. § 1447(e) (2006) (emphasis added).

259. *Powerex Corp.*, 127 S. Ct. at 2417 (first emphasis added).

260. *Id.*

261. See *supra* Part II.B.2 for a discussion of *Thermtron* and its progeny.

262. *See* Steinman, *supra* note 43, at 953 (arguing that federal court's ability to grant appellate review to some state claims dismissed for lack of jurisdiction but not others creates "oddity").

Currently, if a district court *dismisses* a claim for lack of subject matter jurisdiction, it is reviewable on appeal de novo. If a district court *remands* a claim for lack of subject matter jurisdiction, however, it is unreviewable. There is no apparent reason for this dichotomy. According to the Court, the goal of § 1447(d) is to prevent litigation over which of two competent court systems will resolve a dispute. If this is a worthwhile goal, then it is unclear why Congress has not enacted a ban on appellate review of dismissals for lack of subject matter jurisdiction, at least where a state forum is available to the plaintiff.

Furthermore, at least until *HIF Bio* was decided, all circuits that had addressed the issue held that *Cohill* remands are reviewable on appeal.[263] This led to the odd circumstance that discretionary remands are subject to appellate review (except now in the Federal Circuit) while remands for lack of subject matter jurisdiction are not. This is a "perverse" result "because discretionary decisions, by their very nature, are such that different judges may reasonably come to different conclusions."[264] Appellate review of discretionary decisions "therefore would seem less essential than review of nondiscretionary conclusions as to jurisdiction, based upon holdings of law."[265]

If the Supreme Court decides that *Cohill* remands are immune from appellate review, it will eliminate the dichotomy created by permitting review of discretionary remands and banning review of nondiscretionary remands, but the Court will create additional anomalies. First, *Cohill remands* will no longer be subject to appellate review, but § 1367(c) *dismissals* will remain reviewable on appeal.[266] Second, if *Cohill* remands are based on a lack of subject matter jurisdiction, then courts presumably will consider § 1367(c) dismissals to be based on a lack of jurisdiction as well. As a result, § 1367(c) dismissals will become reviewable on appeal de novo, while *Cohill* remands will receive no appellate scrutiny whatsoever.

263. See *supra* Part II.D.1 for further discussion of these decisions.

264. Steinman, *supra* note 45, at 1007.

265. *Id.*; *see also* Steinman, *supra* note 41, at 320 ("[A] set of rules that allows appellate courts to review remands based on technical defects in removal procedure or ordered in the exercise of discretion but denies them the ability to review remands based on the fundamental question of federal jurisdiction is most peculiar. It is hard to fathom that Congress would have intended such a scheme. The system is perverse, and ought to be fixed." (footnote omitted)).

266. Steinman, *supra* note 45, at 1004 (noting consequences of making "discretionary remands of pendent state law claims" unreviewable). According to Professor Steinman, the law would be in a "problematic state" if discretionary remands of supplemental claims were not reviewable on appeal but discretionary dismissals were. *Id.* She notes that district courts could "dismiss when they welcomed appellate review of a 'hard' decision," but "remand when appellate review would accomplish little." *Id.* at 1005. "In addition, such a system could work less benignly, allowing district judges to avoid reversal by remanding." *Id.* Furthermore,

> the choice between remand and dismissal often will be driven by statute of limitations or other considerations that have no bearing on the value of appellate review in a particular case. To the extent that this is true, it is anomalous for remand and dismissal to have different appellate consequences.

Id.

In addition, as Professor Dodson has pointed out,[267] the classification of something as jurisdictional can have costly systemic consequences:

> Questions of subject matter jurisdiction in federal court . . . can be raised by any party or the court sua sponte; may not be consented to by the parties; are not subject to principles of estoppel, forfeiture, or waiver; and may be raised at any time, including for the first time on appeal.[268]

Thus, jurisdictional defects can be "discovered well into trial" or even on appeal and "cause[] disruption, unfairness, and tremendous waste of time and resources."[269]

To date, several circuits have concluded that because the decision whether to exercise supplemental jurisdiction is discretionary, (1) neither a district court nor an appellate court is obligated to raise the applicability of § 1367(c) sua sponte, and (2) if the parties fail to raise the issue in the district court they cannot raise it on appeal.[270] If the Supreme Court decides that *Cohill* remands (and therefore presumably dismissals) are subject matter jurisdictional, then all of the attributes and attendant costs of a jurisdictional classification will apply to them. The Federal Circuit did not consider these implications of its decision in *HIF Bio*.[271] Given the systemic costs of classifying *Cohill* remands as subject matter jurisdictional, however, the Supreme Court should at least take these considerations into account.[272]

IV. CONCLUSION

This Article has argued primarily that *Cohill* remands are discretionary, not subject matter jurisdictional, and therefore are not subject to the appellate

267. Dodson, *supra* note 41, at 56, 66.

268. *Id.* at 56.

269. *Id.* at 66 (describing "heavy costs on the litigants and legal system" resulting from characterization of something as jurisdictional).

270. *See, e.g.*, Alternate Fuels, Inc. v. Cabanas, 435 F.3d 855, 857 n.2 (8th Cir. 2006) (stating that where neither party nor the magistrate judge raised issue, court is not required to determine sua sponte whether magistrate's exercise of supplemental jurisdiction was abuse of discretion); Int'l Coll. of Surgeons v. City of Chicago, 153 F.3d 356, 366 (7th Cir. 1998) (on remand from Supreme Court) (finding that where litigants do not challenge district court's decision to exercise jurisdiction over supplemental claims under § 1367(c), they cannot raise argument on appeal); Lucero v. Trosch, 121 F.3d 591, 598 (11th Cir. 1997) (same); Acri v. Varian Assocs., Inc., 114 F.3d 999, 1000 (9th Cir. 1997) (en banc) (holding that "when there is power to hear the case under § 1367(a)," district court can exercise supplemental jurisdiction "without *sua sponte* addressing whether it should be declined under § 1367(c)" and appellate court is "not required, *sua sponte*, to decide whether the district court abused its discretion under § 1367(c) when neither party has raised the issue"); Fein *ex rel.* Doe v. Dist. of Columbia, 93 F.3d 861, 871 (D.C. Cir. 1996) (finding that while court must raise Article III jurisdiction sua sponte because it "goes to the foundation of the court's power to resolve a case," district court's decision whether to exercise supplemental jurisdiction under § 1367(c) is discretionary and therefore, absent exceptional circumstances, any objection to district court's decision to exercise supplemental jurisdiction is waived if not raised in district court).

271. See *supra* notes 249–54 and accompanying text for a discussion of these implications.

272. Dodson, *supra* note 41, at 77 (arguing that in deciding whether to characterize removal provision as jurisdictional or procedural, courts should "consider a wide range of implications").

review bar created by § 1447(c) and (d) and Supreme Court precedent. To conclude that *Cohill* remands *are* reviewable on appeal, however, does not mean that *Cohill* remands *should be* reviewable on appeal. According to the Supreme Court, the goal of § 1447(d) is to avoid litigation about which of two competent court systems will try remanded claims.[273] Thus, the conclusion that *Cohill* remands are unreviewable on appeal would serve the purpose of § 1447(d) in any case where there was no question about whether a state court was competent to try the remanded claims.

Assuming that the goal of decreasing litigation over "nonmerits" issues is worthwhile, the question becomes how best to achieve it. The first option is for the Court and Congress to maintain the status quo. As things stand now, the Court has insisted that § 1447(c) and (d) must be read together and Congress has not indicated that it disapproves of the Court's interpretation of the statutes. If *Thermtron* and its progeny (from both the Supreme Court and the lower courts) are any indication, however, the status quo has not accomplished the goal of limiting "nonmerits" litigation.[274] A second option is for the Court to read § 1447(d) as it was written, and allow appellate review of remands only in civil rights cases or in other cases where Congress has specifically provided for review. This approach would reduce litigation, but of course *Thermtron* and its progeny stand squarely in the way of this option. A third option would be for Congress to redraft § 1447(d) and clarify the types of remands that fall within the appellate review bar. The problem with this option, however, is that the redrafting of statutes often leads to litigation and even the relatively clear language of the current version of § 1447(d) did not prevent the Court from interpreting it contrary to its plain language.

A fourth option is for Congress to repeal § 1447(d) and permit appellate review of remand orders without restriction. This approach obviously would generate litigation, but it would also end litigation over whether a particular remand order falls within § 1447(c) and (d). The resources that litigants and the courts now expend on litigating whether a remand order is reviewable could be spent on litigating the merits of the remand. This approach would also end the anomalies created by the Court's current approach, such as permitting the review of discretionary remands but banning the review of jurisdictional remands. In addition, regardless of whether a claim was dismissed or remanded, the availability of appeal and the level of review would be the same for all litigants. Thus, although the repeal of § 1447(d) might result in a net increase in litigation, it could also result in a better use of judicial and litigant resources and promote fairness. For these reasons, Congress should consider repealing § 1447(d).

In the meantime, however, the Supreme Court should not conclude that *Cohill* remands are subject matter jurisdictional and therefore cannot be reviewed on appeal in order to reduce litigation over where the claims will be

273. See *supra* note 121 and accompanying text for the *Powerex* Court's reasoning.

274. See *supra* Part II.B for a discussion of this doctrinal line.

tried. Instead, the Court should reverse the Federal Circuit and hold that *Cohill* remands are not subject matter jurisdictional for purposes of § 1447(c) and (d).