No. 05-85

IN THE

Supreme Court of the United States

POWEREX CORP.,
Petitioner,

v.

RELIANT ENERGY SERVICES, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONSE OF PLAINTIFFS AND RESPONDENTS TO BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

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Plaintiffs and Respondents[1] (collectively, "Plaintiffs") respectfully submit this brief in response to the

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[1] Plaintiffs and Respondents are: People of the State of California *ex rel.* Dennis J. Herrera and John A. Russo; City and County of San Francisco; City of Oakland; County of Santa Clara; Valley Center Municipal Water District; Padre Dam Municipal Water District; Ramona Municipal Water District; Helix Water District; Vista Irrigation District; Yuima Municipal Water District; Fallbrook Public Utility District; Borrego Water District; Metropolitan Transit Development Board; San Diego Trolley, Inc.; San Diego Transit Corporation; Sweetwater Authority; Pamela R. Gordon; Ruth Hendricks; Oscar's Photo Lab; Mary L. Davis; Cruz Bustamante; and Barbara Mathews.

Brief for the United States as *Amicus Curiae* ("U.S. Brief").

I. THE PETITION IS MOOT

As set forth in the Brief of Plaintiffs and Respondents in Opposition to the Petition ("Plaintiffs' Brief") and the Supplemental Brief of Plaintiffs and Respondents in Opposition to the Petition, subsequent developments have rendered the Petition practically, if not technically, moot. Additional developments further underscore the futility of granting review in this case.

On December 14, 2005, the Superior Court of the State of California, County of San Diego (the "State Court"), entered a Judgment, Final Order, and Decree Granting Final Approval to [the] Class Action Settlement with Duke Energy Trading and Marketing, LLC and its corporate affiliates (collectively, "Duke"), one of the two groups of defendants that filed cross-complaints against Powerex. There were no objections to the $206 million settlement, and no appeals from the judgment approving the settlement were taken, rendering the settlement final 60 days later under California law (*see* Cal. Rules of Court, Rule 2(a)), and rendering Duke's cross-complaint for indemnity against Petitioner Powerex Corp. ("Powerex") a nullity.

On May 30, 2006, the State Court entered a Judgment, Final Order, and Decree Granting Final Approval to [the] Class Action Settlement with Reliant Energy Services, Inc. and its corporate affiliates (collectively, "Reliant"), the other group of defendants that had filed a cross-complaint against Powerex. Only one class member objected to the $512 million settlement, and his objections were utterly frivolous: that the class notice should have been translated into and published in multiple foreign languages, *which it was*; that the 54-page settlement agreement — which is barely comprehensible in English — and unspecified pleadings in the case should *also* have been

translated into multiple foreign languages, despite the absence of any authority whatsoever requiring it; and that a portion of the settlement consideration should have been set aside for *cy pres* relief instead of being distributed to the plaintiff class, despite the fact that *cy pres* relief is only appropriate when class action settlement funds are either unclaimed or cannot be distributed economically to the class (*see Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1305 (9th Cir. 1990)), neither of which was the case. Although this objector has appealed from the State Court's judgment approving the class action settlement with Reliant, his appeal is equally frivolous.[2]

Finally, Plaintiffs' appeal to the California Court of Appeal from the State Court's October 4, 2005 order dismissing Plaintiffs' claims against the non-settling defendants on federal preemption and filed-rate doctrine grounds is now fully briefed.

While counsel for Plaintiffs would relish the opportunity to argue a case before the Court, the policy underlying the doctrine of mootness counsels against a grant of review in this case. "The principal policy basis for the doctrine of mootness . . . is to insure that the judiciary will have the benefit of deciding legal questions in a truly

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[2] The State of Montana objected to a separate class action settlement, in a different case, between Reliant and the residents of Arizona, Idaho, Montana, Nevada, New Mexico, Oregon, Utah and Washington. Although it is not a member of the California class with standing to object to that settlement, and it did not object to the California settlement at the trial court level, Montana has nonetheless purported to appeal from the judgments entered in both actions. Plaintiffs are confident that Montana's appeal as to the California settlement will be dismissed for lack of standing. *See, e.g.*, *Rebney v. Wells Fargo Bank, N.A.*, 220 Cal. App. 3d 1117, 1134, 1137-38, 269 Cal. Rptr. 844 (1990).

adversary proceeding in which there is the 'impact of actuality,' and in which the contentiousness of the parties may be relied upon to bring to light all relevant considerations." *Parker v. Ellis*, 362 U.S. 574, 592 (1960) (citations omitted). If the Court were to grant review, and reverse the district court's finding that Powerex is not an "agency or instrumentality of a foreign state" (28 U.S.C. § 1603(b)) with removal power under the Foreign Sovereign Immunities Act ("FISA"), it would have no discernable effect on Plaintiffs.

The State Court unquestionably had jurisdiction to approve the class action settlements between Plaintiffs and Duke, and between Plaintiffs and Reliant, and to dismiss Plaintiffs' claims against the non-settling defendants. *See* 28 U.S.C. § 1447(c) ("A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case."). Even if the Court were to reverse the district court's ruling, any such "reversal cannot affect the order of remand." *City of Waco v. United States Fid. & Guar. Co.*, 293 U.S. 140, 143 (1934). Accordingly, a reversal will not undo the State Court's orders approving the class action settlements with Duke and Reliant, or its order dismissing Plaintiffs' claims against the non-settling defendants, which have collectively terminated Plaintiffs' underlying action at the trial court level, rendering the cross-complaints for indemnity against Powerex moot.

The State Court's post-remand orders approving the settlement with Reliant, and dismissing Plaintiffs' claims against the non-settling defendants, remain on appeal to California's intermediate appellate court (although those appeals may well be decided before the Court rules on the merits of Powerex's appeal, should certiorari be granted). Even if, in derogation of *Waco*, the Court were to somehow return this litigation to the district court, the *Rooker-Feldman* doctrine would preclude the district court (or the Ninth

Circuit Court of Appeals, for that matter) from usurping the jurisdiction of the California Court of Appeal and reviewing the State Court's orders (*see Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 284 (2005)), leaving them intact, and the claims against Powerex moot.

In sum, if the Court wishes to take up the issues presented by Powerex's Petition, it should do so in No. 05-584, in which its decision may yet have some tangible effect.

II. THE REMAND ORDER IS UNREVIEWABLE

As set forth in Plaintiffs' Brief, the district court's remand order is unreviewable. *See* 28 U.S.C. § 1447(d) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise"). The *only* other decision on point so holds. *See Linton v. Airbus Industrie*, 30 F.3d 592 (5th Cir. 1994) (where defendant removed action under FSIA, and district court determined that removing parties did not qualify as instrumentalities of foreign state and remanded on that basis, Court of Appeals lacked jurisdiction to review district court's ruling on their status under FSIA).

The United States argues that the remand order is reviewable because the removals by cross-defendants British Columbia Hydro and Power Authority ("BC Hydro") under 28 U.S.C. § 1441(d) and the Bonneville Power Administration ("BPA") and the Western Area Power Administration ("WAPA") under 28 U.S.C. § 1442(a)(1) were proper. This grossly misrepresents over a century of settled law.

The district court remanded for lack of federal subject matter jurisdiction.[3] As the Court has consistently

[3] As the Court has explained, "[i]f one of the specified exceptions to sovereign immunity applies, a federal district

held, 28 U.S.C. § 1447(d) "prohibits review of all remand orders issued pursuant to § 1447(c) whether erroneous or not and whether review is sought by appeal or by extraordinary writ." *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 343 (1976) (citations omitted). *See also Hansen v. Blue Cross of Calif.*, 891 F.2d 1384, 1387 (9th Cir. 1989) ("Section 1447(d) precludes review of a district court's jurisdictional decision even if it was clearly wrong.") (citing *Thermtron*). Under this "established rule under § 1447(d) and its predecessors stretching back to 1887," it does not matter whether the action was properly removed; so long as the district judge "purports to remand a case" for lack of subject matter jurisdiction, the order is unreviewable, "whether erroneous or not." *Thermtron*, 423 U.S. at 343.

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court may exercise subject-matter jurisdiction under § 1330(a); but if the claim does not fall within one of the exceptions, federal courts lack subject-matter jurisdiction." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 489 (1983). The district court concluded that no such exception applied to BC Hydro. *See* 05-85 Pet. App. 21a-33a.

With respect to BPA and WAPA, agencies of the United States, the district court found that under the Federal Tort Claims Act, the federal courts have exclusive jurisdiction over the cross-claims asserted against BPA and WAPA, which "were improperly filed in state court, which lacked jurisdiction to hear them" (05-85 Pet. App. 41a), and that "under the derivative jurisdiction doctrine, [the district court] does not have jurisdiction over the cross-claims filed against the United States because the state court lacked jurisdiction to hear them in the first place." 05-85 Pet. App. 44a. No party appealed from this determination.

III. POWEREX'S QUARREL IS WITH THE APPLICATION OF THE RULE, NOT THE RULE ITSELF

As set forth in Plaintiffs' Brief, Powerex's description of the Ninth Circuit's straightforward *application* of a *correct* rule of law as something "new" or different warranting review is mere "spin." Equally unhappy with the result, the United States now joins in this exercise, quarrelling with the *weight* given the various factors by the Ninth Circuit in this particular case, but not with its articulation of the factors themselves. *See* U.S. Brief at 9 (complaining of "a critical divergence in the manner in which the various circuits *apply* their seemingly similar tests" (emphasis added)). This is not a valid basis for discretionary review by this Court, regardless of the number or identity of *amici* who urge it. *See* Supreme Court Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

CONCLUSION

Because the Petition is moot; the district court's remand order is unreviewable; and Petitioner does not assert a proper basis for review, the Petition should be denied.

NOVEMBER 27, 2006

RESPECTFULLY SUBMITTED,

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