No. 08-

IN THE
Supreme Court of the United States

CANADIAN PACIFIC RAILWAY COMPANY *et al.*,
Petitioners,

v.

TOM LUNDEEN *et al.*,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, consistent with *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) and related cases, Congress can overturn a final federal court of appeals judgment simply because other claims not addressed by that judgment remain pending on remand from the initial decision; and

2. Whether, consistent with *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1871) and related cases, Congress can employ a "clarification amendment" to direct a federal court to set aside prior statutory interpretation (including by this Court) to reach a particular, different result in a pending case.

PARTIES TO THE PROCEEDINGS

Petitioners are Canadian Pacific Railway Company, Canadian Pacific Railway Limited, and Soo Line Railroad Company. Canadian Pacific Railway Company is a wholly-owned subsidiary of Canadian Pacific Railway Limited; Soo Line Railroad Company is an indirect wholly-owned subsidiary of Canadian Pacific Railway Company. No other publicly held corporation owns 10% or more of any petitioner.

Respondents are Tom and Nanette Lundeen, individually and on behalf of M.L. and M.L., minors; Melissa Todd; Mary Beth Gross, individually and on behalf of B.G., a minor; Mark and Sandra Nesbit; Ray Lakoduk; JoAnn Flick; Bobby and Mary Smith; Leo Gleason; Denise Duchsherer and Leo Duchsherer; Larry and Carol Crabbe; and Rachelle Todosichuk.

The United States of America intervened in the court of appeals in support of respondents.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners ("Canadian Pacific") respectfully petition this Court for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The panel's decision below is reported at 532 F.3d 682 and is reproduced at Pet. App. 1a-41a. The Eighth Circuit's order denying panel and *en banc* rehearing (and Judge Beam's dissent) is unreported and is reproduced at Pet. App. 42a-60a. The district court's decision from which this appeal was brought is reported at 507 F. Supp. 2d 1006 and is reproduced at Pet. App. 81a-102a.

The Eighth Circuit's earlier decision in this case (holding negligent track inspection claims to be completely preempted) is reported at 447 F.3d 606 and is reproduced at Pet. App. 61a-78a. The Eighth Circuit denied panel and *en banc* rehearing of that decision in an unreported order that is reproduced at Pet. App. 79a. This Court's order denying respondents' petition for certiorari from that decision is reported at 127 S. Ct. 1149 and is reproduced at Pet. App. 80a.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 2008, and rehearing was denied on October 10, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Federal Railroad Safety Act of 1970 ("FRSA"), as amended, are reprinted at Pet. App. 103a-104a.

INTRODUCTION

Dissenting from the panel's decision in this case and the Eighth Circuit's denial of rehearing, Judge Beam stated that the court of appeals' holding "presents an insurmountable separation of powers problem" and expressed his "hope that the Supreme Court may find it appropriate to consider the untoward ramifications of this decision, assuming [Canadian Pacific] requests it to do so." Pet. App. 39a, 60a. Canadian Pacific now makes just that request. The panel majority read an eleventh-hour "clarification amendment" enacted by Congress and directed to this very case as requiring the court to reopen and set aside a prior decision that had been fully and finally litigated, to reinstate state law claims found to be completely preempted in that final decision, and to strip the court of federal jurisdiction over other pending claims. The decision below is contrary to this Court's decisions in *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), and *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1871), and conflicts with numerous decisions from other circuits faithfully applying those precedents in analogous contexts. A writ of certiorari should be granted.

STATEMENT OF THE CASE

On January 18, 2002, a Canadian Pacific train derailed near Minot, North Dakota and released a dangerous chemical, anhydrous ammonia, from several tank cars.

Hundreds of Minot residents, including respondents, filed negligence claims in Minnesota state court, seeking to recover personal injury and property damages. Canadian Pacific removed respondents' lawsuits to the United States District Court for the District of Minnesota, which remanded the cases to state court after first allowing respondents to amend their complaints to excise their express federal claims.

Canadian Pacific appealed to the Eighth Circuit, which reversed. *Lundeen* v. *Canadian Pac. Ry.*, 447 F.3d 606 (8th Cir. 2006) ("*Lundeen I*"), Pet. App. 61a-78a. The circuit court held that the Federal Railroad Safety Act of 1970 ("FRSA"), as amended, and the Act's implementing regulations completely preempted respondents' state law claim for negligent track inspection. *Id.* at 76a-78a.

FRSA establishes federal regulation of railroads and broadly preempts state law, including common law causes of action. The Secretary of Transportation "shall prescribe regulations and issue orders for every area of railroad safety." 49 U.S.C. § 20103(a). FRSA's preemption provision mandates that regulation "related to railroad safety . . . shall be nationally uniform to the extent practicable," subject to a narrow savings provision for state regulation that is "necessary" to address a "local safety or security hazard," but only to the extent such state law is not "incompatible" with federal regulation or a burden upon interstate commerce. *Id.* § 20106.[1]

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[1] This Court construed § 20106 to preempt state causes of action addressing "the same subject matter" as that "cover[ed]" by federal regulations and not within the scope of the savings provision. *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664-65 (1993); *see also Norfolk S. Ry.* v. *Shanklin*, 529 U.S. 344 (2000).

After canvassing the federal regulations addressing track inspections, the Eighth Circuit applied § 20106 and concluded that the regulations completely preempted respondents' negligent track inspection cause of action. Pet. App. 73a-78a. Federal jurisdiction therefore extended over respondents' claim. *Id.* at 78a.

Respondents unsuccessfully sought rehearing and rehearing *en banc*, see Pet. App. 79a, and thereafter the Eighth Circuit's mandate issued. Respondents then petitioned this Court for certiorari, which was denied. *Id.* at 80a.

On remand, the district court held that FRSA preempted all of respondents' tort claims. The court noted that the Eighth Circuit had resolved the negligent inspection claim and, applying FRSA § 20106, held that other federal regulations preempted respondents' state law claims asserting negligent construction and maintenance, negligent hiring and supervision of personnel, and negligent operation of the train. Pet. App. 87a-96a. The court ultimately determined that federal law and regulations precluded any judicial remedy, and dismissed the complaints. *Id.* at 96a-100a.

While respondents' appeal of the district court's dismissal order was pending, Congress enacted a "clarification amendment" to § 20106 in the form of a provision attached to unrelated counterterrorism legislation. See Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 1528, 121 Stat. 266, 453. Congress preserved § 20106, without alteration, as § 20106(a), and engrafted a new § 20106(b), entitled "clarification regarding State law causes of action."

Subsection 20106(b) provides that "[n]othing in this section shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party" has (i) failed to comply with "the Federal standard of care established by regulation or order . . . covering the subject matter as provided in subsection (a) of this section;" (ii) failed to comply with a plan created pursuant to federal order; or (iii) failed to comply with a state requirement that is "not inconsistent" with § 20106(a). 49 U.S.C. § 20106(b)(1). Subsection (b) applied "to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002," the date of the Minot derailment. *Id.* § 20106(b)(2). A new subsection (c) provided that "[n]othing in this section creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action." *Id.* § 20106(c).

The Conference Report accompanying the bill confirmed that § 20106(a) "contains the exact text of 49 U.S.C. § 20106 as it existed prior to enactment of this act" and that the preexisting provision was "restructured for clarification purposes; however, the restructuring is not intended to indicate any substantive change in the meaning of the provision." H.R. Conf. Rep. No. 110-259, at 351 (2007), *reprinted in* 2007 U.S.C.C.A.N. 119, 183. The sole purpose of the legislation was to "clarify the intent and interpretations of the existing preemption statute and to rectify the Federal court decisions related to the Minot, North Dakota accident that are in conflict with precedent." *Id.* Floor statements confirmed that goal. See 153 Cong. Rec. H3083, H3109-10 (daily ed. Mar. 27, 2007) (statement of Rep. Oberstar) ("The bill does not change any of the current law, but only adds

to it to clarify the meaning of what is already in public law. . . . The situation needing remedy is the misinterpretation of the statute by some courts. That is precisely what this clarifying language is intended to accomplish."); *Id.* at H3109 (statements of Rep. Pomeroy) (same, and noting that the dismissal of respondents' claims was the reason for the clarification).

In a 2-to-1 decision, a panel of the Eighth Circuit applied the new provisions to the pending appeal and held that federal regulations no longer preempted respondents' state law causes of action and that § 20106 no longer afforded federal subject matter jurisdiction over respondents' claims. The majority acknowledged that the new provisions of § 20106 were a "clarifying amendment," but held that § 20106(b)(1) reflected "Congress's disagreement with the manner in which the courts, including our own in *Lundeen I*, had interpreted § 20106 to preempt state law causes of action whenever a federal regulation covered the same subject matter as the allegations of negligence in a state court lawsuit." Pet. App. 10a. And even though § 20106(c) contains no effective date, the majority construed that subsection to apply retroactively to remove federal jurisdiction over respondents' claims. *Id.* at 12a-13a.

The majority rejected constitutional challenges to the retrospective application and reinterpretation of § 20106. The legislation was deemed not to be an instance "when Congress tries to apply new law to cases which have already reached a final judgment." Pet. App. 12a (citing *Plaut*, 514 U.S. 211). The separation of powers was not violated because aspects of the case were still "pending" on appeal when Congress passed the "clarifying" legislation, even

though *Lundeen I*'s complete preemption decision had been fully litigated. *Id.* at 12a-13a.

In addition, despite "Congress's reference to the amendment as a '[c]larification' of existing law rather than a substantive change to existing law," the majority concluded that the "statute's clear language indicates state law causes of action are no longer preempted under § 20106." Pet. App. 13a. In rejecting due process and equal protection challenges to the amendment's provision for retroactive application of the clarification to the exact day of the events underlying respondents' complaints, the majority held that Congress' choice of the effective date was not irrational and did not impinge upon a fundamental right—and was thus constitutional.

The panel majority concluded that the revised § 20106 "effectively overrules our decision in *Lundeen I*," and determined that "we must now enforce [§ 20106] by vacating *Lundeen I*" and "remand[ing] these cases to the district court with directions to further remand them to state court." Pet. App. 11a, 17a.

Judge Beam dissented. He argued that the majority had construed § 20106(b)(1) and (c) too broadly, with the effect of "essentially repealing subsection (a) of the amended Act and stripping federal jurisdiction from both versions of the legislation." Pet. App. 28a. He viewed § 20106(b) as a limited "clarification" intended, as the language of § 20106(b)(1) indicates, to preserve state law causes of action that asserted violations of federal standards, but also—consistent with Congress' reaffirmance of the preexisting standard in § 20106(a)—to ensure the continued preemption of state law causes of action premised on standards different from those set forth in federal regulations. Because "railroad ser-

vice . . . is entitled to be delivered free of state requirements that differ from the federal regime," and because respondents' state law claims departed from the federal standards, Judge Beam concluded that respondents' claims were preempted even under the newly clarified statutory standard. *Id.* at 35a-36a.

Judge Beam also explained that the majority erred in giving retroactive effect to the newly amended § 20106 so as to set aside *Lundeen I*. Invoking *Plaut*, he emphasized that "the jurisdictional finding [in *Lundeen I*] was a final judgment that cannot constitutionally be reopened or reversed by Congress or this court." Pet. App. 37a-38a. He agreed that § 20106(b) and (c) could bear on the case, but "only to the instant appeal—a review of Judge Rosenbaum's order of dismissal." *Id.* at 38a. Yet the panel majority had read the "clarification" (even without a substantive change in law) to require the court to reach back and undo prior decisions in the case; such a result, Judge Beam concluded, "presents an insurmountable separation of powers problem" and "is not subject to congressional disposition." *Id.* at 39a-40a.

Judge Beam expanded his analysis in his dissent from the denial of Canadian Pacific's petition for rehearing. He stressed that Rule 3 of the Federal Rules of Appellate Procedure limited appellate jurisdiction to review of the 2007 district court order dismissing respondents' remaining claims and thus barred review of "the jurisdictional issues fully and finally litigated" in *Lundeen I*. Nor could § 20106(c)'s restriction on federal question jurisdiction remove the federal courts' jurisdiction over respondents' claims, because that subsection addressed pending claims supported by diversity jurisdiction.

Judge Beam also argued that the majority's due process analysis was flawed: because § 20106(b) and (c) were a "retroactive adjustment of private burdens and benefits," which are "'generally unjust,'" the court was compelled to apply a heightened standard of review. Pet. App. 58a (citing *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 547 (1998) (Kennedy, J., concurring and dissenting)). Judge Beam pointed out that this Court's assessment of other jurisdiction-stripping provisions similarly called for heightened review and would invalidate any Congressional directive that courts resolve respondents' claims in a particular manner. *Id.* at 59a (citing *Boumediene* v. *Bush*, 128 S. Ct. 2229 (2008)). Judge Beam closed his dissent by expressing his "hope that the Supreme Court may find it appropriate to consider the untoward ramifications of [the panel's] decision." *Id.* at 60a.

REASONS FOR GRANTING THE PETITION

I. THE EIGHTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *PLAUT* AND WITH DECISIONS OF SEVERAL OTHER COURTS OF APPEALS.

The Eighth Circuit held that Congress' "clarification" of FRSA § 20106 required the court to reopen a decision confirming the existence of federal jurisdiction, which had already been fully and finally litigated (including through an unsuccessful petition for certiorari to this Court), and to reinstate state law claims that the federal judiciary had conclusively determined to be completely preempted. Compare Pet. App. 12a-13a, with *id.* at 76a-78a. That decision contravenes *Plaut* and conflicts with other circuits' applications of that precedent. The decision below creates a square conflict with the First Circuit (which reached the opposite conclusion on closely analogous

facts) and contradicts the finality principles recognized by the Fourth, Fifth, and Tenth Circuits. The Eighth Circuit has permitted Congressional interference with final judgments in a manner that *Plaut* forecloses and that would not be permitted by other courts of appeals. This Court should review that decision.

A. The decision below is contrary to *Plaut*. In *Plaut*, this Court struck down Congress' attempt to resurrect securities fraud lawsuits that federal courts had finally determined to be time-barred. Because "[t]he Framers of our Constitution lived among the ruins of a system of intermingled legislative and judicial powers," they ensured that Congress "'cannot reverse a determination once made, in a particular case; though it may prescribe a new rule for future cases.'" *Plaut*, 514 U.S. at 219, 222 (quoting *The Federalist* No. 81, at 545 (Alexander Hamilton) (J. Cooke ed. 1961)).

The division between permissible legislation and legislation that impermissibly invades the judicial realm rests on the finality of judicial judgments. The touchstone of finality is whether a judgment can be appealed:

> [A] distinction between judgments from which all appeals have been foregone or completed, and judgments that remain on appeal (or subject to being appealed), is implicit in what Article III creates . . . . It is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress's latest enactment, [but] [h]aving achieved finality . . . a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable *to that very*

> *case* was something other than what the courts said it was.

Id. at 227. *Plaut*, therefore, unambiguously precludes legislative attempts to reopen judgments that are no longer subject to direct appeal.

Just as unambiguously, the decision below contravenes *Plaut*'s command by reading § 20106, as "clarified," to vacate the final judgment in *Lundeen I* and to overturn its holding that respondents' negligent track inspection claims were completely preempted, foreclosing such state causes of action.[2] The complete preemption determination in *Lundeen I* was "final" within the meaning of *Plaut*.

Lundeen I held that respondents' negligent inspection claims (asserted under North Dakota law) were completely preempted by the FRSA and that such preemptive force gave rise to federal court jurisdiction. Pet. App. 76a-78a. As this Court has recognized, a finding of complete preemption means that "there is, in short, no such thing as a state-law claim." *Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1, 11 (2003). Instead, federal law "wholly displaces the state-law cause of action," and "the exclusive cause of action for the claim asserted" must be found in federal law, if at all. *Id.* at 8. *Lundeen I* thus conclusively rejected respondents' claims for negligent inspection under state law. Respondents unsuccessfully petitioned to have this judgment reheard by the panel or by the Eighth Circuit *en banc*. Pet. App. 79a. This Court denied the petition for a writ of certiorari. *Id.* at 80a.

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[2] As Judge Beam noted in his dissent, Pet. App. 35a-36a, these constitutional concerns could be avoided by construing the statute narrowly.

Once respondents' appeals were exhausted, *Lundeen I*'s judgment concerning FRSA's displacement of state law negligent inspection claims, as well as its jurisdictional determination, became final and exempt from relitigation. *Ins. Corp. of Ir., Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982); *Baldwin* v. *Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 524-25 (1931) (once a party has "had its day in court with respect to jurisdiction" and further appeal is unavailable, the "matter[ ] ... shall be considered forever settled as between the parties").[3] *Lundeen I* "bec[ame] the last word of the judicial department with regard to" complete preemption and the preclusion of a state law negligent inspection claim. *Plaut*, 514 U.S. at 227. Those judgments were final, unreviewable, and could not be relitigated. As a result, "Congress [could] not declare by retroactive legislation that the law applicable [to this case] was something other than what the courts said it was." *Id.*[4]

B. The decision below also conflicts with the decisions of other courts of appeals that have applied *Plaut* when a final decision of a court of appeals is followed by pending proceedings on remand.

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[3] Numerous circuit courts have held likewise. *See, e.g.*, *Fafel* v. *DiPaola*, 399 F.3d 403, 410 (1st Cir. 2005) (citing cases); *Bromwell* v. *Mich. Mut. Ins. Co.*, 115 F.3d 208, 212-13 (3d Cir. 1997); *Am. Telecom Co.* v. *Republic of Leb.*, 501 F.3d 534, 539 n.1 (6th Cir.), *cert. denied*, 128 S. Ct. 1472 (2007); *Okoro* v. *Bohman*, 164 F.3d 1059, 1063 (7th Cir. 1999) (Posner, C.J.); *Kendall* v. *Overseas Dev. Corp.*, 700 F.2d 536, 537-38 (9th Cir. 1983); *Int'l Air Response* v. *United States*, 324 F.3d 1376, 1380 (Fed. Cir. 2003).

[4] *Lundeen I* was decided on May 16, 2006. The decision became the final word of the judicial department on January 22, 2007, when this Court denied the petition for certiorari. Congress enacted its § 20106 "[c]larification" on August 3, 2007.

The *Lundeen II* majority concluded that *Plaut* did not apply because the Minot lawsuits "were on appeal and had not reached final judgments" at the time Congress clarified § 20106. Pet App. 13a. In other words, because *other* claims not resolved in *Lundeen I* were "pending" when Congress acted, the court believed itself obliged to reopen the *entire* case, including the final judgment in *Lundeen I* that could no longer be appealed. *Id.* at 12a-13a, 17a-18a. This conclusion creates a significant conflict with other circuits.

Several courts of appeals have confirmed that *Plaut* applies to *judgments*, not entire cases, and thus the pendency of other aspects of a case after a final judgment is entered on a particular legal controversy does not diminish the prohibition against legislative encroachment upon that final judgment. In a procedurally similar case, the First Circuit held that Congress' attempt to "'clarif[y]'" the federal carjacking statute in response to the that court's earlier decision in the case was "legally irrelevant," even though the case had been remanded and was pending in the district court when the amendment took effect. *United States* v. *Vazquez-Rivera*, 135 F.3d 172, 177 (1st Cir. 1998). The First Circuit concluded that, "[i]n the first appeal of this case, this court decided what Congress's intention was when it enacted the original statute;" that judgment was final and, under *Plaut*, could not be revised by "post hoc statements" in a later clarification amendment regardless of whether aspects of the case remained unresolved before the courts. *Id.*

Other circuits have likewise noted that once a discrete legal controversy is no longer subject to *direct* appeal, Congress lacks power to change the result even if collateral proceedings persist. See, *e.g.*,

United States v. *Enjady*, 134 F.3d 1427, 1429-30 (10th Cir. 1998) (under *Plaut*, a court "must give effect to [a statutory] amendment" if the enactment "is the law at the time we decide defendant's *direct* appeal" (emphasis added)); *Hernandez-Rodriguez* v. *Pasquarell*, 118 F.3d 1034, 1041-42 (5th Cir. 1997) (*Plaut* teaches that "[a]pplication of a subsequent change in a statute or regulation to a final decision implicates concerns not present when the change occurs while the decision is pending before the initial tribunal or on *direct* appeal," even if other aspects of the case continue (emphasis added)); *Plyler* v. *Moore*, 100 F.3d 365, 371 (4th Cir. 1996) (statute considered in *Plaut* was unconstitutional because it "required courts to reopen securities fraud cases . . . regardless of the fact that the cases were no longer pending on *direct* review" (emphasis added)).[5] As the Tenth Circuit has explained, a matter is "pending" while it is subject to direct appeal, but when "'the availability of appeal is exhausted, and the time for a petition for certiorari has elapsed or the petition has been denied,'" the judicial department has spoken and that final decision may not be legislatively altered in that case. *Anixter* v. *Home-Stake Prod. Co.*, 77 F.3d 1215,

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[5] This conclusion is consistent with the rule applicable to intervening changes in governing precedent, which only affects matters pending on direct review at the time of the change. *See Harper* v. *Va. Dep't of Taxation*, 509 U.S. 86, 92 (1993). The rationale also accords with the law governing finality determinations under 28 U.S.C. § 1257, which treats decisions on legal questions as final if "later review of the federal issue cannot be had"—even if "further proceedings on the merits in the state courts [are still] to come." *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 481 (1975).

1223 (10th Cir. 1996) (quoting *Johnston* v. *Cigna Corp.*, 14 F.3d 486, 489 n.4 (10th Cir. 1993)).[6]

Lundeen II's interpretation of *Plaut*—that a judgment is still "pending" as long as any aspect of the case remains before the federal courts—starkly conflicts with these precedents. Had this case arisen in the First Circuit, the result would surely have been different: *Vazquez-Rivera*'s holding would have required that Congress' clarification be treated as "legally irrelevant" to the ongoing, unrelated proceedings in the case. 135 F.3d at 177. The same result would follow in any of the other circuits—the Fourth, Fifth, and Tenth—that read *Plaut* to proscribe Congressional interference with final judgments no longer pending on direct appeal. Yet under the Eighth Circuit's rule, no decision or judgment can achieve finality, and Congress can force a court to reopen any prior determination, as long as any part of a "case" is still pending before the judiciary. Other circuits have, correctly, concluded otherwise.

C. The Eighth Circuit reasoned that through its "[c]larification" of § 20106, Congress disagreed with *Lundeen I* and sought to reopen and reverse that final decision. See *supra* at 5-6 (citing legislative history). But, it hardly matters that "the legislature[ ] [has a] genuine conviction . . . that the judgment was wrong." *Plaut*, 514 U.S. at 228. What controls, as other courts of appeals have concluded, is whether the particular decision that Congress seeks

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[6] *See also Elramly* v. *INS*, 131 F.3d 1284, 1285 (9th Cir. 1997) (per curiam) (*Plaut* draws a "clear distinction" between judgments subject to appeal and those that are not); *Baker* v. *GTE N. Inc.*, 110 F.3d 28, 30 (7th Cir. 1997) (Easterbrook, J.) (*Plaut* forbids "the revision of a judgment that has become final," and a case is "not final [if] it was pending on appeal").

to overturn was pending on direct appeal when Congress acted. The issues decided in *Lundeen I* were not.

As Judge Beam noted in dissent, "*Lundeen I* and the prior jurisdictional rulings concerning the Lundeens' amended complaint [were] not pending" when Congress enacted the clarification; *Lundeen I* was "not a 'judgment[ ] still on appeal' in any sense contemplated by *Plaut*" or any rule of law that respects the judicial process. Pet. App. 38a-39a. Treating the *Lundeen I* judgment as subject to change by legislation "presents an insurmountable separation of powers problem." *Id.* at 39a. Judge Beam and the courts of appeals in accord are correct, and this Court's review is plainly warranted to give *Plaut* its proper due.

II. THE EIGHTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *KLEIN* AND DEEPENS EXISTING SPLITS AMONG THE COURTS OF APPEALS REGARDING THE APPLICATION OF *KLEIN*.

Lundeen I finally resolved the issue of respondents' negligent track inspection claims; it did not address other allegations of negligence. On remand, the district court held that respondents' claims for negligent construction and maintenance of track, negligent hiring and supervision of staff, and negligent operation of the train were likewise preempted. Pet. App. 94a-96a. Respondents' appeal from these district court determinations was "pending" on direct appeal when Congress attempted to clarify the meaning of § 20106, and the *Lundeen II* majority held that the clarification required reversal of the district court's preemption conclusions. This holding conflicts with the longstanding rule—

articulated in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1871), and its progeny—that Congress may not prescribe a rule of decision for a pending case without amending substantive law. *Lundeen II* also deepens two existing circuit splits regarding the meaning of *Klein* and the effect of "clarification amendments" like 49 U.S.C. § 20106(b) and (c), and poses serious due process concerns.

A. This Court has consistently enforced the Constitution's separation of powers to preclude Congress from "invest[ing] itself or its Members with either executive power or judicial power," *Metro. Wash. Airports Auth.* v. *Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 274 (1991) (quotation marks omitted), and has held it to be "the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments." *United States* v. *Brown*, 381 U.S. 437, 446 (1965) (quotation marks omitted).

Beginning with *Klein*, this Court established that Congress violates the separation of powers by "prescrib[ing] rules of decision to the Judicial Department of the government in cases pending before it." 80 U.S. at 146. *Klein* invalidated a statute that directed courts to give particular effect to a Presidential pardon, contrary to this Court's precedents requiring a different result. *Id.* at 146-47. As this Court later explained, the principle animating *Klein* is Congress' lack of "constitutional authority to control the exercise of [this Court's] judicial power," including by requiring a lower court's judgment to be "set aside . . . by dismissing the suit." *Pope* v. *United States*, 323 U.S. 1, 8 (1944). While Congress is empowered to change substantive law so as to affect

pending cases, statutes may only "compel[ ] changes in law, not findings or results under old law." *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 438 (1992).

With the recent § 20106 legislation, Congress sought to achieve just this prohibited result. While disclaiming any intent to change the text or meaning of § 20106, Congress enacted a "[c]larification" that directed federal courts to alter their established interpretation of § 20106 as applied to this dispute. Compare § 20106 (pre-amendment), with § 20106(a) (same text); see Pet. App. 103a (§ 20106(b) entitled "Clarification regarding State law causes of action"); *Henning* v. *Union Pac. R.R.*, 530 F.3d 1206, 1216 (10th Cir. 2008) (§ 20106(b) was a "clarification amendment"); Pet. App. 9a-10a (same).

The Eighth Circuit in *Lundeen I* and the district court on remand had earlier construed § 20106 in accord with this Court's construction of that same provision in *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993), and *Norfolk Southern Railway* v. *Shanklin*, 529 U.S. 344 (2000). The "[c]larification" of § 20106 required retroactive application of a new rule as of the exact date of the Minot derailment. Congress targeted this litigation and directed that the same "old law" now set forth in § 20106(a) be given a new judicial interpretation—one requiring reversal of an earlier final adjudication and a disavowal of already-exercised federal jurisdiction over the suit. See H.R. Conf. Rep. No. 110-259, at 351, *reprinted in* 2007 U.S.C.C.A.N. at 183 (§ 20106(b) "is not intended to indicate any substantive change in the meaning of the provision," and is intended only to "clarify the intent and interpretations of the existing preemption statute and to rectify the Federal court decisions related to the Minot, North Dakota

accident"); see *supra* at 5-6. And, in giving effect to this Congressional directive to alter the established meaning of § 20106's text, the Eighth Circuit in *Lundeen II* unquestionably condoned Congressional power that exceeds the limitations recognized in *Klein* and its progeny.

B. The Eighth Circuit's decision in *Lundeen II* also deepens two longstanding divisions among the courts of appeals, thus further warranting this Court's review.

1. *Lundeen II* exacerbates a split among the circuits regarding the proper application of *Klein* to legislation enacted to direct the outcome of particular, ongoing litigation without substantively amending the law. This Court in *Robertson* identified this issue as unresolved, but declined to resolve it. See *Robertson*, 503 U.S. at 441. The courts of appeals, however, have reached divergent conclusions.

On one side of the split, now augmented by the Eighth Circuit, courts of appeals have seized on this Court's language indicating that Congress can "set out substantive legal standards for the Judiciary to apply," *Plaut*, 514 U.S. at 218, and have concluded that Congress can direct the outcome of particular pending cases as long as that result is achieved through legislative enactment. See *Lundeen II*, Pet. App. 12a (finding no separation of powers concern in FRSA § 20106(b) and (c) because the "[c]larification" "was a valid exercise of Congressional power, as it was implemented through the legislative process").

In *Apache Survival Coalition* v. *United States*, 21 F.3d 895 (9th Cir. 1994), for example, the Ninth Circuit concluded that a statute specifying that "the requirements of the Endangered Species Act shall be

deemed satisfied" if the Forest Service met certain conditions, merely "substituted preexisting legal standards . . . with . . . new standards," and thus presented no *Klein* concern. *Id.* at 900, 902. Other circuits have reached similar conclusions. See *City of New York* v. *Beretta U.S.A. Corp.*, 524 F.3d 384, 389, 395 (2d Cir. 2008) (legislation requiring pending lawsuits meeting statutory criteria to "be immediately dismissed" did not contravene *Klein* because the criteria "permissibly set[ ] forth a new legal standard to be applied to all actions"), *petition for cert. filed*, 77 U.S.L.W. 3267 (U.S. Oct. 20, 2008) (No. 08-530); *Biodiversity Assocs.* v. *Cables*, 357 F.3d 1152, 1164 (10th Cir. 2004) (statute that overrode a specific settlement agreement "effectively replac[ed] the old standards, in this one case, with new ones"); *Nat'l Coal. to Save Our Mall* v. *Norton*, 269 F.3d 1092, 1097 (D.C. Cir. 2001) (statute mandating the issuance of a special use permit to build a memorial, and forbidding judicial review of that permit, "impose[d] new substantive rules on [pending] suits," and thus survived *Klein*).

On the other side of the divide are courts of appeals that hold that Congress cannot, even through legislation purporting to establish a new standard, direct the outcome of particular cases. The Fourth Circuit has explained that *Klein* prevents Congress from "dictat[ing] the judiciary's interpretation of governing law and [thereby] mandat[ing] a particular result in any pending case." *Green* v. *French*, 143 F.3d 865, 874 (4th Cir. 1998) (Luttig, J.), *abrogated in part on other grounds*, *Williams* v. *Taylor*, 529 U.S. 362 (2000). It concluded that the provision of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) limiting the source of "clearly established" law to Supreme Court decisions does not offend *Klein*,

but only because the statute "simply adopt[s] a choice of law rule" that does not interpret the law or require the courts to reach a particular result. *Id.*

The Seventh Circuit employed the same analysis in *Lindh* v. *Murphy*, 96 F.3d 856 (7th Cir. 1996) (Easterbrook, J.) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997). Interpreting the same AEDPA provision at issue in *Green*, the Seventh Circuit explained that *Klein* precludes Congress from "limiting the interpretive power of the courts," meaning that lawmakers "cannot tell courts how to decide a particular case . . . . Congress cannot say that a court must award Jones $35,000 for being run over by a postal truck." *Id.* at 872. Had the Fourth Circuit or the Seventh Circuit been presented with the issues in *Lundeen II*, the result would have been different: those circuits would have declined to apply the "clarification" of § 20106(b) and (c) because the legislation directed courts to reach a result different from that required by settled precedent in interpreting § 20106(a) and thereby "mandate[d] a particular result in a[ ] pending case." *Green*, 143 F.3d at 874.

2. The Eighth Circuit's decision also provides an unusually good vehicle to resolve the related circuit split concerning the "binding" effect on federal courts of subsequent statutory "clarifications" of earlier legislation, such as the "[c]larification" set forth in § 20106(b).

The Eighth Circuit regarded the § 20106 "[c]larification" as binding alterations of the law, even to the extent of displacing controlling Supreme Court interpretations of the "clarified" statute. See *Lundeen II*, Pet. App. 13a ("[W]e reject [Canadian Pacific's] argument [that] Congress's reference to the amendment as a '[c]larification' of existing law rather

than a substantive change to existing law somehow alters our analysis. We are obliged to apply the amendment to pending cases regardless of the label Congress attached to it.").

Other circuits treat such clarifying amendments as persuasive, but not binding. See, *e.g.*, *Brown* v. *Thompson*, 374 F.3d 253, 259-60 (4th Cir. 2004) (when Congress enacts a statute "purely to make what was intended all along even more unmistakably clear," the views of the subsequent Congress regarding the meaning of a statute enacted by a prior Congress are not binding, but rather are entitled to "great weight") (quotation marks omitted); *Suiter* v. *Mitchell Motor Coach Sales, Inc.*, 151 F.3d 1275, 1281 n.7 (10th Cir. 1998) (clarification amendment is "evidence of [a subsequent] Congress' view of [the] original statute's meaning," but it "may not override [the] plain language of [the] statute") (citing *United States* v. *Papia*, 910 F.2d 1357, 1362 (7th Cir. 1990)); *Whalen* v. *United States*, 826 F.2d 668, 670-71 (7th Cir. 1987) (statutory clarifications "are not necessarily binding, [but] they may provide persuasive evidence" of statutory intent); *cf. United States* v. *Cabrera-Polo*, 376 F.3d 29, 32 (1st Cir. 2004) (in the context of the Sentencing Guidelines, clarifying amendments are "purely expository"); *Burke* v. *United States*, 152 F.3d 1329, 1332 (11th Cir. 1998) ("Clarifying amendments do not effect a substantive change, but provide persuasive evidence of how the Sentencing Commission originally envisioned application of the relevant guideline.").

This Court's review would bring clarity to these important questions of statutory interpretation. The Seventh Circuit (per Judge Posner) has explained that the non-binding nature of clarifying amendments "is not easy to reconcile . . . with the

[*Klein*] principle that Congress cannot direct the outcome of a pending case without changing the law applicable to that case," and has observed that courts "would welcome clarification from the Supreme Court" on this issue. *Paramount Health Sys., Inc.* v. *Wright*, 138 F.3d 706, 710-11 (7th Cir. 1998). "Otherwise," the court noted, "a disappointed litigant in a statutory case in a federal district court could scurry to Congress while the case was on appeal and request a 'clarifying' amendment that would reverse the interpretation that the district judge had given to the statute, even if that meaning was crystal clear." *Id.* at 710. That is precisely what happened in this case.

C. The scope and import of *Klein* continue to bedevil the courts of appeals in important cases, further justifying this Court's review. *Klein* is "a notoriously difficult decision to interpret," *Biodiversity Assocs.*, 357 F.3d at 1170 (10th Cir.) (McConnell, J.), and the distinction drawn by Klein and related cases between "validly leading the court to reach a different outcome as a result of a change in the underlying law or ... unconstitutionally imposing a different outcome under the previous law" is a "vexed question," *Benjamin* v. *Jacobson*, 124 F.3d 162, 174 (2d Cir. 1997) (Calabresi, J.), *vacated on other grounds*, 172 F.3d 144 (2d Cir. 1999) (en banc). See also William D. Araiza, *The Trouble With* Robertson*: Equal Protection, The Separation of Powers, and the Line Between Statutory Amendment and Statutory Interpretation*, 48 Cath. U. L. Rev. 1055, 1074 (1999) (noting "the difficulty courts have had with the *Klein* decision"); *Hart & Wechsler's The Federal Courts and the Federal System* 99-100 & nn.4-5 (5th ed. 2003) (outlining the varying interpretations of *Klein*).

Klein has been at issue, for example, in recent appellate reviews of challenges to AEDPA,[7] the Protection of Lawful Commerce in Arms Act,[8] the Prison Litigation Reform Act,[9] payments to users of the Trans Alaska Pipeline System,[10] and Congress' efforts to legislate the fate of Terri Schiavo.[11] These cases have often resulted in deeply divided panels and patently different approaches to issues implicating *Klein*. See, *e.g.*, *Evans* v. *Thompson*, 524 F.3d 1, 2 (1st Cir.) (Lipez, J., joined by Torruella, J., dissenting from denial of rehearing en banc), *cert. denied*, 129 S. Ct. 255 (2008); *Crater* v. *Galaza*, 508 F.3d 1261, 1264 (9th Cir. 2007) (Reinhardt, J., joined by Pregerson, Gould, Paez, and Berzon, JJ., dissenting from denial of rehearing en banc), *cert. denied*, 128 S. Ct. 2961 (2008); *Davis* v. *Straub*, 445 F.3d 908, 911 (6th Cir. 2006) (Martin, J., joined by Daughtrey, Moore, Cole, and Clay, JJ., dissenting

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[7] *See Evans* v. *Thompson*, 518 F.3d 1, 9 (1st Cir.), *cert. denied*, 129 S. Ct. 255 (2008); *Crater* v. *Galaza*, 491 F.3d 1119, 1128 (9th Cir. 2007), *cert. denied*, 128 S. Ct. 2961 (2008); *Green*, 143 F.3d at 874; *Lindh*, 96 F.3d at 872.

[8] *See Beretta U.S.A.*, 524 F.3d at 395; *Dist. of Columbia* v. *Beretta U.S.A. Corp.*, 940 A.2d 163, 172-73 (D.C. 2008), *petition for cert. filed*, 77 U.S.L.W. 3267 (U.S. Oct. 23, 2008) (No. 08-545).

[9] *See Imprisoned Citizens Union* v. *Ridge*, 169 F.3d 178, 187-88 (3d Cir. 1999) (Alito, J.); *Benjamin*, 124 F.3d at 174; *Taylor* v. *United States*, 181 F.3d 1017, 1039-40 (9th Cir. 1999) (en banc) (Wardlaw, J., joined by Thompson, Kleinfeld, Silverman, and Graber, JJ., dissenting);

[10] *See Petro Star, Inc.* v. *FERC*, 268 F. App'x 7 (D.C. Cir. 2008), *petition for cert. filed sub nom. Exxon Mobil Corp.* v. *FERC*, 77 U.S.L.W. 3105 (U.S. Aug. 18, 2008) (No. 08-212).

[11] *See Schiavo ex rel. Schindler* v. *Schiavo*, 404 F.3d 1270, 1274 (11th Cir. 2005) (Birch, J., concurring with denial of rehearing en banc).

from denial of rehearing en banc), *cert. denied*, 549 U.S. 1110 (2007); *Schiavo ex rel. Schindler* v. *Schiavo*, 404 F.3d 1270, 1274 (11th Cir. 2005) (Birch, J., concurring with denial of rehearing en banc); *id.* at 1281-82 (Tjoflat, J., dissenting from denial of rehearing en banc).

Simply stated, this case presents the opportunity and demonstrates the need for this Court to resolve the meaning and scope of *Klein*. If that decision is to be interred, that undertaking is for this Court, not through repeated equivocations by the courts of appeals. If *Klein* has continuing viability as a check on Congress and a shield against the risks of abuse inherent when legislatures assume the judicial role, then this Court should act in this case to protect the Constitution's separation of powers.

This case also highlights the due process concerns that animate *Klein*. When a statute seeks to dictate the outcome in a particular case through a retroactive "clarification," without changing the underlying substantive law, the legislature significantly harms due process interests that adjudication before an impartial court is designed to protect. See *Klein*, 80 U.S. at 145-46. "Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions." *Gen. Motors Corp.* v. *Romein*, 503 U.S. 181, 191 (1992). As Justice Kennedy emphasized in *Eastern Enterprises*, 524 U.S. 498, retroactive legislation of this sort "'neither accord[s] with sound legislation nor with the fundamental principles of the social compact,'" and accordingly, this Court has historically treated such laws with "distrust" and due process challenges to such laws as "serious and meritorious." *Id.* at 547-48 (Kennedy, J.,

concurring and dissenting) (quoting 2 Joseph Story, *Commentaries on the Constitution* § 1398 (5th ed. 1891)).

Such distrust is particularly well placed when, as in this case, Congress' retroactive "clarification" of an existing statute purports to instruct the courts to relinquish jurisdiction and to deny litigants defenses that the courts had already found to be well established in existing law. As noted in Judge Beam's dissent from the denial of rehearing, "when jurisdiction stripping is coupled with dissipation of substantive rights, as, for instance, when established preemption defenses are taken away from a railroad, due process protections demand a different outcome." Pet. App. 59a. Those compelling concerns provide ample justification for this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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