No. 08-871

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

BRIEF IN OPPOSITION OF RESPONDENTS TOM LUNDEEN, ET AL.

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April 8, 2009

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QUESTIONS PRESENTED

1. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), provides that courts must apply statutory amendments "in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly." *Id.* at 226. *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), explains that when a jurisdiction-stripping amendment is enacted while a case is pending, the amendment applies, even if "jurisdiction lay when the underlying conduct occurred or when the suit was filed." *Id.* at 274. The question presented here is: When a case is pending on direct appeal and Supreme Court review of a prior interlocutory decision regarding federal question jurisdiction is still available, must the court of appeals apply a new amendment providing that there is no federal question jurisdiction?

2. This Court has held that separation of powers concerns under *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), are not implicated when an amendment "set[s] out substantive legal standards for the Judiciary to apply, and in that sense changes the law (even if solely retroactively)." *Plaut*, 514 U.S. at 218. The question presented here is: Does an amendment that sets out substantive legal standards for the Judiciary to apply regarding whether a federal statute preempts certain state-law actions and confers federal question jurisdiction violate the *Klein* doctrine?

PARTIES TO THE PROCEEDINGS

Petitioners are as stated in the Petition, and are sometimes referred to herein collectively as "Canadian Pacific."

Of the Respondents named in the Petition, a number of them have reached a settlement with Petitioners and no longer have pending actions: Larry and Carol Crabbe; Leo and Denise Duchsherer; Leo Gleason; Ray Lakoduk; Tom and Nanette Lundeen, individually and on behalf of M.L. and M.L., minors; Bobby and Mary Smith; and Melissa Todd.

The following named Respondents still have pending actions: Mary Beth Gross, individually and on behalf of B.G., a minor; JoAnn Flick; and Rachelle Todosichuk. In addition, an action by Mark and Sandra Nisbet is currently pending, but the parties have reached a settlement agreement and have filed a stipulation of dismissal with the court.

The United States of America, having intervened in this action in the court of appeals to defend the constitutionality of the 2007 amendments to 49 U.S.C. § 20106, is a respondent in this Court pursuant to Rule 12.6.

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BRIEF IN OPPOSITION

Respondents respectfully request that the petition for a writ of certiorari be denied.

OPINIONS BELOW

In addition to the decisions identified in the Petition, Respondents refer the Court to the district court's prior decision of March 9, 2005, declining supplemental jurisdiction and remanding these cases back to state court. It was from this unreported decision, reproduced herein at Resp. App. 1, that Canadian Pacific appealed, leading to the *Lundeen I* decision.

Respondents also refer the Court to the district court's order of December 1, 2008, remanding the cases back to state court following issuance of the mandate from the *Lundeen II* decision that is the subject of the Petition. That order is also unreported and is reproduced at Resp. App. 12.

INTRODUCTION

While these cases were pending on direct appeal, Congress amended the statute at issue to state in plain language that there is no federal question jurisdiction in cases such as these. Although a prior interlocutory decision of the court of appeals had inferred federal question jurisdiction in the absence of

that language, that decision was not, by its very nature, final under *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), or any other authority. Amendments regarding jurisdiction are routinely applied to pending cases pursuant to well-settled law, including *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), and *Plaut,* which itself also explained that amendments setting substantive legal standards for the courts to apply do not conflict with this Court's decision in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871).

The court of appeals correctly held that the amendments to 49 U.S.C. § 20106 are constitutional. The court also correctly held that when a civil action is on appeal and Congress amends the law as to federal question jurisdiction applicable to that action, appellate courts must apply the law, as amended, to the case at hand. The decision below is consistent with this Court's precedent and decisions of the other courts of appeals. Further review is not warranted.

STATEMENT OF THE CASE

On January 18, 2002, a Canadian Pacific train catastrophically derailed near Minot, North Dakota, on track owned and maintained by Petitioner Soo Line Railroad Company ("Soo Line"), a wholly owned subsidiary of Petitioner Canadian Pacific Railway Company. More than 220,000 gallons of anhydrous ammonia were released from tank cars on the train,

forming a large toxic cloud that hung over the City of Minot. *Lundeen v. Canadian Pac. Ry. Co.*, 532 F.3d 682, 687 (8th Cir. 2008) ("*Lundeen II*") (Pet. App. 8a). Many people, including Respondents, were exposed to the anhydrous ammonia and, as a result, now suffer from serious and permanent respiratory diseases and eye damage. *Id.*

The complaints known as the "*Lundeen*" cases were filed on June 28, 2004, in Hennepin County state court, in Minneapolis, Minnesota, where Soo Line resides. Numerous other individual plaintiffs who were injured as a result of the derailment also filed actions in that court. *In re Soo Line R.R. Co. Derailment of Jan. 18, 2002*, 2006 WL 1153359, at *1 (Minn. D. Ct. Apr. 24, 2006).

Substantial litigation occurred in Hennepin County Court. Discovery proceeded, various pretrial motions and interlocutory appeals were decided, and certain cases were scheduled for trial. Shortly before each trial, Petitioners (collectively "Canadian Pacific") admitted liability for the cases to be tried, contesting only damages. *Id.* at *2-3. Some cases proceeded through trial to jury verdicts, others settled shortly before trial, and still others awaited their trial dates. *Id.*

Meanwhile, Canadian Pacific removed the *Lundeen* cases from Hennepin County Court to federal court. The federal district court found that, in making a reference to "United States law" while stating their claims, the *Lundeen* plaintiffs had alleged a federal

cause of action, thus creating federal question jurisdiction. *Lundeen v. Canadian Pac. Ry. Co.*, 342 F. Supp. 2d 826, 829-31 (D. Minn. 2004). Because the plaintiffs had not intended to plead a federal cause of action, they moved to amend their complaints to remove the reference to United States law. That motion was granted. *Lundeen v. Canadian Pac. Ry. Co.*, 2005 WL 563111, at *1 (D. Minn. Mar. 9, 2005) (Resp. App. 4).

In the same March 9, 2005, order, the district court further granted a motion to remand the *Lundeen* cases back to state court, where, as noted, other cases arising out of the same derailment were proceeding. *Id.* at 5-6. The court declined to exercise supplemental federal jurisdiction over these cases. *Id.* at 6-7.

Canadian Pacific appealed the district court's remand order, arguing forum shopping and urging that the district court abused its discretion in refusing to exercise supplemental jurisdiction.[1] Canadian Pacific did not raise "complete preemption" as a basis for federal question jurisdiction; it had in fact expressly argued to the district court that its removal was not based on the complete preemption doctrine. (Def.'s Opp'n to Mot. to Remand, p. 6.) After oral

[1] This Court heard oral arguments on February 24, 2009, in the matter of *Carlsbad Tech., Inc. v. HIF BIO*, No. 07-1437, on the issue of whether a remand order based on a declination of supplemental jurisdiction is subject to appeal. *See* 28 U.S.C. § 1447(c) and (d).

argument, however, the Eighth Circuit *sua sponte* raised the issue of potential federal jurisdiction under the "complete preemption" doctrine and requested additional briefing from the parties.

The Eighth Circuit ruled that there was implied federal question jurisdiction over at least one of the Lundeens' claims (a claim based on negligent inspection), based on the doctrine of "complete preemption." Specifically, the panel concluded that the Lundeens' negligent inspection claim was substantively preempted under 49 U.S.C. § 20106 of the Federal Railway Safety Act of 1970 ("FRSA"), and, because the regulations at issue did not contain a savings clause indicating the Federal Railway Agency meant to leave open a state-law cause of action, the panel determined that "absent en banc review we are bound by our decision in [*Peters v. Union Pac. R.R.*, 80 F.3d 257 (8th Cir. 1996)] to find complete, jurisdictional, preemption." *Lundeen v. Canadian Pac. Ry. Co.*, 447 F.3d 606, 614-15 (8th Cir. 2006) ("*Lundeen I*") (Pet. App. 78a). The cases were remanded to the federal district court for further proceedings on the basis of that jurisdiction. *Id.*

The Lundeens sought en banc review. While two of the three *Lundeen I* panel members, including the author of that decision, voted to grant the petition, it was ultimately denied. The Lundeens then petitioned this Court for a writ of certiorari, on the basis that *Lundeen I* was in conflict with the law of nine other circuits that have held that, regardless of how broad substantive preemption may or may not be, the

jurisdictional doctrine of "complete preemption" requires a determination that the federal statute creates a federal cause of action, which § 20106 does not. *See* Petition for Writ of Certiorari in *Lundeen v. Canadian Pacific Railway Company*, No. 06-528. That interlocutory petition was denied. Pet. App. 80a.

Following remand, Canadian Pacific moved the federal district court for entry of a final judgment on the pleadings under Fed. R. Civ. P. 12(c), arguing that all of the Lundeens' claims were preempted under § 20106 because of the track regulations found in 49 C.F.R. pt. 213. The Lundeens opposed, arguing that this Court has held that § 20106 displays "considerable solicitude for state law," courts must be "reluctant to find preemption" under § 20106, and preemption will not lie unless it is the "clear and manifest purpose of Congress." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663-65 (1993). Further, since this Court has held that to preempt a state-law standard, a regulation under the FRSA must "substantially subsume" the subject matter of the state requirement, *id.* at 664, the Lundeens argued that had not occurred here regarding the particular claims at issue.[2] The Lundeens also argued that even where

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[2] Contrary to Canadian Pacific's statement that *Lundeen I* was "in accord" with *Easterwood* and *Norfolk S. Ry. v. Shanklin*, 529 U.S. 344 (2000), (Pet. 18), it was not. Neither *Easterwood* nor *Shanklin* even dealt with federal jurisdiction based on complete preemption, and as to the substantive preemption defense, those decisions set forth and applied a narrow and

(Continued on following page)

federal standards do substantially subsume an area, a state-law action for damages based on violations of those federal standards is not preempted, citing, *inter alia*, *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 451-52 (2005). Nonetheless, following Canadian Pacific's argument that broad preemption under the FRSA is the law in the Eighth Circuit, the district court granted Canadian Pacific's motion and entered final judgment dismissing all claims. *Lundeen v. Canadian Pac. Ry. Co.*, 507 F. Supp. 2d 1006, 1017 (D. Minn. 2007). The Lundeens appealed.

While the briefing for the appeal was under way, Congress enacted and President Bush signed into law an amendment to § 20106, adding what is now codified as subsections (b) and (c) to the statute. The pre-amended § 20106 is now codified as subsection (a) of the statute. As amended, § 20106 now provides:

> **§ 20106. Preemption**
>
> (a) NATIONAL UNIFORMITY OF REGULATION. – (1) Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable.
>
> (2) A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary

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stringent standard under the FRSA. *See generally* 529 U.S. at 358-59; 507 U.S. at 673-75.

of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order –

> (A) is necessary to eliminate or reduce an essentially local safety or security hazard;
>
> (B) is not incompatible with a law, regulation, or order of the United States Government; and
>
> (C) does not unreasonably burden interstate commerce.

(b) CLARIFICATION REGARDING STATE LAW CAUSES OF ACTION. – (1) Nothing 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 –

> (A) has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), covering

> the subject matter as provided in subsection (a) of this section;
>
> (B) has failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or
>
> (C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2).
>
> (2) This subsection shall apply to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002.
>
> (c) JURISDICTION – Nothing 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.

Because § 20106, as amended in subsection (c), expressly provides that "[n]othing in this section . . . confers Federal question jurisdiction for such State law causes of action," the Lundeens filed a motion asking the court of appeals to apply the amended statute to these cases, find a lack of federal jurisdiction, and remand these cases with instructions that they be remanded back to state court. The Eighth Circuit ordered additional briefing from both parties on the effect of the amendment.

In that briefing, Canadian Pacific challenged the constitutionality of the new amendment on numerous

grounds, including Due Process, Equal Protection, Separation of Powers, and the Ex Post Facto Clause (only one of which – Separation of Powers – is urged in the Petition). The United States intervened and defended the constitutionality of Congress's amendment to § 20106, and the Lundeens also argued the amendment was constitutional and applies to these pending cases.

The Eighth Circuit held in *Lundeen II* that the amendment was constitutional. Applying the plain language of § 20106(c), the court held there was no federal question jurisdiction over these cases. Accordingly, it vacated its decision in *Lundeen I* and remanded the cases to the federal district court, with instructions to further remand the cases back to Minnesota state court, where they had originally been filed. Senior Judge C. Arlen Beam dissented.

Canadian Pacific filed a petition for rehearing and rehearing en banc, and the full court denied review. Although Senior Judge Beam again dissented, no active judge on the Eighth Circuit joined in the dissent.

Canadian Pacific filed a motion with the Eighth Circuit to stay the mandate pending a petition for writ of certiorari to this Court. The Eighth Circuit denied that motion, again with only Judge Beam dissenting. No motion was made to this Court for a stay, and the mandate issued.

Upon remand, the federal district court remanded the cases back to the Hennepin County state

court. After the nearly five-year detour in federal court, discovery is now proceeding, and the first trials are set for early 2010.[3]

In the time since the Eighth Circuit denied Canadian Pacific's petition for rehearing en banc, Canadian Pacific has settled with the plaintiffs in all but three of the *Lundeen* actions.[4]

REASONS FOR DENYING THE PETITION

As fully set forth below, the constitutional questions the Petition purports to raise have already been well-aired and conclusively decided by this Court. The Petition presents nothing new with regard to those questions, except to attempt to raise them again in a setting of very narrow application. Indeed, in order to appear new, the Petition resorts to a partial quote from this Court's *Plaut* decision, eliding crucial passages, and to simply ignoring well-settled aspects of this

[3] Additional cases that are not in the *Lundeen* group and are not the subject of the Petition, but which had been removed to federal court by Canadian Pacific based on the *Lundeen I* decision, were also remanded back to state court after the Eighth Circuit ruled in *Lundeen II*. *E.g.*, *Ahmann v. Canadian Pac. Ry. Co.*, No. 08-cv-89 (D. Minn. Dec. 1, 2008). Those remands for lack of subject matter jurisdiction are not subject to appeal. 28 U.S.C. § 1447(c) & (d); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711-12 (1996) ("[R]emands based on grounds specified in § 1447(c) are immune from review under § 1447(d).").

[4] *See* "Parties to the Proceedings," *supra*, p. ii.

Court's jurisdiction and practice. Beyond that, the Petition attempts to invoke a conflict around the edges of a unique decision made in 1871, *United States v. Klein*, that this Court has not held applicable to invalidate an act of Congress even once in the almost 140 years since then. The Petition attempts to do so, not by reference to any decision involving the Federal Railway Safety Act in question here, but instead by invoking inapposite cases ranging from AEDPA to Terri Schiavo.

The underlying controversy here involves an attempt by victims of a catastrophic railroad derailment to obtain some redress by asserting state-law claims for personal injury damages based on the violation of state-law negligence standards where no federal standard applies, and, where federally imposed standards do apply, based on the violation of those federal standards. Although the issue of whether the *Lundeen I* panel correctly decided that there was federal jurisdiction based on complete preemption under the old version of § 20106 is not directly at issue here (because *Lundeen II* applied the new amendment to these cases), a very brief word concerning that issue shows the background against which Congress and the court of appeals acted:

Congress passed the FRSA in 1970. *Easterwood*, 507 U.S. at 661. Despite all the cases interpreting the FRSA since then, including two by this Court,[5] no

[5] *Shanklin*, 529 U.S. 344; *Easterwood*, 507 U.S. 658.

appellate court – other than the Eighth Circuit – has ever held that the FRSA's preemption provision, 49 U.S.C. § 20106, creates federal question jurisdiction through the doctrine of "complete preemption." Indeed, this Court has only found three statutes that support complete preemption, and the FRSA is not one of them.[6] In its 2007 amendments to § 20106, Congress made clear that the FRSA is indeed not one of them, expressly providing that § 20106 creates no federal cause of action and no federal question jurisdiction. In light of that amendment, the Eighth Circuit then applied the law, as amended, to the cases pending before it. The result is that the law on "complete preemption" federal jurisdiction under the FRSA is now uniform across the circuits. The *Lundeen II* decision of the Eighth Circuit did not create any conflict; if anything, it eliminated one.

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[6] As a matter of settled law, "a case may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 (1987) (emphasis in original); *accord Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 12 (1983). When, however, a federal statute provides an "exclusive cause of action," a claim alleged under state law "necessarily arises under federal law and the case is removable" under the complete preemption doctrine. *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 9 (2003). This Court has identified only three federal statutes where such complete preemption exists: section 301 of the Labor Management Relations Act ("LMRA"), *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968); sections 85 and 86 of the National Bank Act, *Beneficial, supra*; and section 502 of the Employee Retirement Income Security Act ("ERISA"), *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 64-67 (1987).

I. THERE IS NO CONFLICT PRESENTED HERE

A. The *Lundeen II* decision creates no conflict regarding the amendment to § 20106.

Lundeen II applied the plain language of a 2007 amendment to the preemption provision of the FRSA, codified at 49 U.S.C. § 20106. As applicable here, that amendment added a provision regarding federal question jurisdiction, § 20106(c), which states in its entirety: "Nothing 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." There are no conflicting decisions concerning the application of that amendment, nor does the Petition cite to any such conflict.

B. The *Lundeen II* decision will not likely conflict in the future with the holdings of other courts of appeals as to the application of § 20106.

Lundeen II held that, if constitutional, § 20106(c), which states explicitly that § 20106 does not confer federal question jurisdiction, effectively overrules the court's prior interlocutory decision in *Lundeen I,* which had found federal question jurisdiction based on the language of what is now § 20106(a) when that language stood alone. Pet. App. 11a ("[I]f valid, subsection (c) of § 20106 effectively overrules our decision in *Lundeen I.*"). Finding that Congress did not violate

the Constitution in enacting this amendment, *Lundeen II* vacated *Lundeen I* and sent these pending cases back to district court with directions to remand them to the state court from whence they had been removed. *Id.* at 17a-18a.

The issue regarding the effect of § 20106(c) on pending cases[7] is extremely unlikely to arise again in any court, for two reasons: (1) at the time the amendment was enacted, there appear to have been no other federal circuits where a pending action for damages alleged under state law had been removed to federal court based on alleged federal question jurisdiction under § 20106;[8] and (2) all the pending

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[7] The Petition presents no question regarding the application of § 20106(c) to cases filed after its enactment.

[8] Indeed, the Eighth Circuit's *Lundeen I* decision was unique among the circuits in holding that a federal statute such as § 20106, which creates no federal cause of action, could provide the basis for federal question jurisdiction under the "complete preemption" doctrine. *See, e.g., Sullivan v. Am. Airlines*, 424 F.3d 267, 273-76 (2d Cir. 2005) (state-law claim not removable because no federal cause of action replacing plaintiff's state claims); *Lontz v. Tharp*, 413 F.3d 435, 442 (4th Cir. 2005) ("[T]he sine qua non of complete preemption is a pre-existing *federal* cause of action that can be brought in the district courts.") (emphasis in original); *Felix v. Lucent Techs., Inc.*, 387 F.3d 1146, 1157 n.9 (10th Cir. 2004) ("a vital feature of complete preemption is the existence of a federal cause of action that replaces the preempted cause of action") (quotations and citation omitted); *Rogers v. Tyson Foods, Inc.*, 308 F.3d 785, 788 (7th Cir. 2002) ("Logically, complete preemption would not be appropriate if a federal remedy did not exist in the alternative.") (internal quotes and cites omitted). *See also* Pet. for Cert. in *Lundeen I*, No. 06-528, and additional cases cited therein.

cases arising from the Minot Derailment were filed within the Eighth Circuit. Of the plaintiffs in the *Lundeen* actions themselves, Canadian Pacific has now settled with all but three. *See* n.4, *supra*.

C. The *Lundeen II* decision creates no conflict with *Plaut* or the cases that have followed *Plaut*.

1. There is no conflict with this Court's decision in *Plaut*.

The alleged conflict with *Plaut* offered by Canadian Pacific is based on a false premise: that the decision of *Lundeen I* inferring the existence of federal question jurisdiction through the doctrine of "complete preemption" was a "final" decision within the meaning of *Plaut*. That argument ignores both what this Court actually held in *Plaut* and this Court's standard practice regarding the exercise of its certiorari jurisdiction.

With regard to *Plaut*, the ellipses tell the tale: When Canadian Pacific provides the Court an extended quote from *Plaut* at pages 10-11 of the Petition, it elides the crucial language. Below is the full quote from *Plaut*, with the words of this Court that Canadian Pacific excluded from the Petition presented in underscoring:

> [A] distinction between judgments from which all appeals have been forgone or completed, and judgments that remain on appeal (or subject to being appealed), is implicit in

> what Article III creates: not a batch of unconnected courts, but a judicial *department* composed of "inferior Courts" and "one supreme Court." Within that hierarchy, the decision of an inferior court is not (unless the time for appeal has expired) the final word of the department as a whole. It is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress's latest enactment, even when that has the effect of overturning the judgment of an inferior court, since each court, at every level, must "decide according to existing laws." *Schooner Peggy, supra*, at 109. Having achieved finality, however, 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.

Plaut, 514 U.S. at 227 (underscoring added) (italics in original).

Thus, "finality" in the *Plaut* sense occurs only when "a judicial decision becomes the last word of the judicial department with regard to a particular case." The "judicial department" is "composed of inferior Courts and one supreme Court," and the decision of an inferior court that is still subject to being appealed to the Supreme Court "is not . . . the final word of the department as a whole." *Id.*; *see also Miller v. French*, 530 U.S. 327, 347 (2000) (holding that a remedial injunction subject to continuing supervisory

jurisdiction of the courts was not "the last word of the judicial department" under *Plaut*, even if appeals have been exhausted, because the judicial department was still involved).

As its omission of the critical language in *Plaut* reveals, Canadian Pacific understands that its entire argument falls apart unless it can convince this Court that the *Lundeen I* decision of the court of appeals was "the final word of the department as a whole." It plainly was not, either in general or with regard to the question of "complete preemption" jurisdiction.

Lundeen I was an interlocutory decision. The court of appeals inferred federal question jurisdiction through § 20106 and remanded the case back to federal district court. The federal district court on remand then held that all claims were preempted, and entered a judgment of dismissal. That decision was *pending* before the Eighth Circuit on a *direct appeal* when President Bush signed the amendments to § 20106 into law, including § 20106(c). Thus, these cases were "pending" and *Lundeen I* was not a "final" decision.

It is of course the duty of all federal courts, including federal appellate courts, to address a lack of subject matter jurisdiction and to deny jurisdiction where it is not supported. *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). When a jurisdiction-stripping amendment is enacted while a case is pending, the amended statute applies, even if "jurisdiction lay when the underlying

conduct occurred or when the suit was filed." *Landgraf*, 511 U.S. at 274. The Eighth Circuit thus acted properly and in accord with well-settled law when it vacated its earlier decision, which had found jurisdiction in these cases, and remanded the cases with instructions that the cases be further remanded to state court. *Plaut,* 514 U.S. at 226-27; *Landgraf*, 511 U.S. at 274. The Petition ignores that general law, under which there is no conflict with *Plaut*.

The Petition also ignores both this Court's jurisdiction and its regular practice with regard to whether *Lundeen I* was the "final word of the judicial department as a whole" concerning the specific question of "complete preemption" jurisdiction in this case.

As this Court has long held, when its review is sought from a final judgment, it can correct errors made in a previous lower court decision in the same case, even if the Court previously denied certiorari review of that very decision. The leading treatise puts it this way, citing several of this Court's cases:

> Supreme Court review of a final judgment opens up the entire case, including all relevant interlocutory orders that may have been entered by the court of appeals or the district court. The Court can reach back and correct errors in the interlocutory proceedings below, even though no attempt was made at the time to secure review of the interlocutory decree or even though such an attempt was made without success. *See* . . . *Toledo Scale*

> *Co. v. Computing Scale Co.*, 261 U.S. 399, 418 (1923); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 257-58 (1916); *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 488 n.6 (1968); *Mercer v. Theriot*, 377 U.S. 152, 153-54 (1964); *see also United States v. Virginia*, 518 U.S. 515, 526, 558 (1996); *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504 (2001).

E. Gressman, et al., *Supreme Court Practice* 82-83 (9th ed. 2007). A prior denial of certiorari in this context does "not establish the law of the case or amount to res judicata on the points raised." *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365 n.1 (1973). Indeed, the Court has often noted that "[w]e generally await final judgment in the lower courts before exercising our certiorari jurisdiction." *Va. Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., opinion respecting denial). "Our action [denying a petition for writ of certiorari] does not, of course, preclude [a party] from raising the same issues in a later petition, after final judgment has been rendered." *Id.*

Thus, under this Court's normal practice and understanding of its jurisdiction, its denial of certiorari in *Lundeen I* was not the final word of the judicial department as a whole, even with regard to

the question of complete preemption jurisdiction at issue there.[9] No conflict with *Plaut* is presented.

To support its flawed argument of a conflict with *Plaut*, Canadian Pacific erroneously cites cases that involve subsequent collateral attacks to jurisdictional determinations in prior, closed litigation. *See Ins. Corp. of Ir., Ltd.*, 456 U.S. at 702 n.9 (noting that while courts, including appellate courts, must address a lack of subject matter jurisdiction in existing litigation, the principles of *res judicata* prevent a collateral attack to reopen the question after that litigation has closed); *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 524-26 (1931) (holding that a party cannot collaterally attack a final judgment, contesting personal jurisdiction, in a new, second lawsuit). These cases do not address the finality of an earlier subject matter jurisdiction determination in a still-pending lawsuit, and they are inapposite here.[10]

When *Plaut* is read in full, and when this Court's normal certiorari practice and the law regarding subject matter jurisdiction are considered, it is clear

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[9] Indeed, if certiorari is granted here in *Lundeen II*, Respondents will urge as alternative grounds for affirmance the arguments they made in their petition in No. 06-528, that *Lundeen I* was wrongly decided, and that § 20106(a), even standing alone as it did then, does not provide "complete preemption" federal jurisdiction.

[10] Similarly, none of the cases cited in footnote 3 on page 12 of the Petition concerns the effect of a subject matter jurisdiction determination when a case is still pending on direct appeal.

the decision below does not raise a separation of powers concern under *Plaut*, and that no conflict with *Plaut* is presented.

Indeed, Congress carefully followed the law of this Court in amending § 20106. For example, Congress limited its retroactive amendment in subsection (b), a substantive provision regarding the defense of preemption, to *pending* state-law causes of action, thus following *Plaut*. 49 U.S.C. § 20106(b)(2); *see Plaut*, 514 U.S. at 225-27. Likewise, Congress expressly stated its intent regarding the retroactivity of that substantive provision, thus following *Landgraf*. 49 U.S.C. § 20106(b)(2); *see Landgraf*, 511 U.S. at 272-73. While Congress did not state anything regarding the temporal application of subsection (c), the jurisdictional provision, such language is not necessary where, as here, only one jurisdictional provision is involved. *See, e.g., Hamdan v. Rumsfeld*, 548 U.S. 557, 576-77 (2006) (explaining the presumption that intervening statutes ousting jurisdiction apply to pending cases);[11] *Landgraf*, 511 U.S. at 274 ("We have

[11] After reconfirming the general rule, the Court in *Hamdan* declined to apply it in the unique circumstances of that case, where Congress had made changes to three sequential jurisdictional provisions regarding habeas claims made by detainees at Guantanamo Bay, explicitly providing for two of the provisions to apply to pending cases but remaining silent as to the effect of the third. The Court drew a "negative inference" from Congress's silence on the third provision because of the inclusion of explicit language in the other two jurisdictional provisions. 548 U.S. at 578-84.

(Continued on following page)

regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed."). As this Court explained in *Landgraf*, the application of a jurisdictional amendment to pending cases is proper, "[e]ven absent specific legislative authorization." 511 U.S. at 273. "Present law normally governs in such situations because jurisdictional statutes speak to the power of the court rather than to the rights or obligations of the parties." *Id.* at 274 (internal quotation and citation omitted); *see also Bruner v. United States*, 343 U.S. 112, 116-17 (1952) (distinguishing application of jurisdictional amendments to pending cases from retroactive application of substantive provisions, and applying an amendment ousting jurisdiction to pending cases).

Thus, Congress followed the directives of this Court in enacting the amendments to 49 U.S.C.

The unique circumstances of *Hamdan* are not present here. Section 20106 contains only one jurisdictional provision, § 20106(c); there is no other jurisdictional provision from which to draw a negative inference contrary to the general rule. Canadian Pacific argued below that the explicit reference to pending cases in § 20106(b) provides the conflicting language, but that argument is incorrect. Section 20106(b) is a substantive provision subject to different standards regarding the need for express retroactive language, *see Landgraf*, 511 U.S. at 272-74, and thus is not comparable to 20106(c). Further, § 20106(b) actually provides an additional reason that complete preemption, as previously analyzed by the Eighth Circuit, fails, because it expressly eliminates the defense of preemption for claims such as these.

§ 20106, and the Eighth Circuit properly applied the new subsection (c) of that statute to these pending cases, in accordance with *Plaut* and *Landgraf*.

2. There is no conflict with other circuits on *Plaut* either.

Nor does *Lundeen II* create a conflict with other circuits regarding *Plaut*. Canadian Pacific erroneously argues that other circuits have held "that *Plaut* applies to *judgments*, not entire cases." (Pet. 13.) The cases Canadian Pacific cites do not support its characterization of a split in the circuits.

Canadian Pacific highlights the First Circuit's opinion in *United States v. Vazquez-Rivera*, 135 F.3d 172 (1st Cir. 1998), as its lead case. But *Vazquez-Rivera* is an Ex Post Facto Clause case. At the heart of *Vazquez-Rivera* was whether an Ex Post Facto challenge to a change in criminal law could be defeated by labeling the amendment as a clarification. *See id.* at 177. The First Circuit held that, regardless of the label, the amendment did change the law, and to apply it retrospectively (on a remand for resentencing) would violate the Ex Post Facto Clause. *Id.* ("[T]here should be little doubt that the application of the provisions of the Carjacking Correction Act to appellant for the crime for which he was convicted violates the ex post facto clause of the Constitution."). The court simply cited *Plaut* in dicta, stating that it would not change its interpretation of the original criminal statute based on a subsequent "clarification"

that had in fact changed the law. *Id.* Because of the limitations of the Ex Post Facto Clause, the court applied the pre-amendment version of the statute, as originally interpreted by the court. *Id.* Significantly, the court never cited *Plaut* to argue, as Canadian Pacific does here, that the amendment itself was unconstitutional under the separation of powers doctrine. *Vazquez-Rivera* is plainly inapposite to *Lundeen II*.

Canadian Pacific also cites to the Fifth Circuit opinion in *Hernandez-Rodriguez v. Pasquarell*, 118 F.3d 1034 (5th Cir. 1997), where the court denied a motion to reopen a final decision of the Board of Immigration Appeals in a habeas proceeding. *Id.* at 1038, 1042-43. *Plaut's* applicability to a collateral review on a habeas petition is a completely different legal issue than whether the "final word of the judicial department" has been rendered when a civil action is still pending on direct appeal. Indeed, the court in *Hernandez-Rodriguez* articulated this distinction, stating:

> [U]nquestionably the judiciary must generally apply changes in the law to cases pending on appeal, and "[w]hen a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted and must alter the outcome accordingly," . . .

Id. at 1042 (quoting *Plaut*, 514 U.S. at 226, and citing *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429,

439-41 (1992) and *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801)).

Next, Canadian Pacific cites a Fourth Circuit decision, *Plyler v. Moore*, 100 F.3d 365 (4th Cir. 1996). There, the court found that a consent decree subject to the ongoing supervision of the district court "remains subject to subsequent changes in the law." *Id.* at 371. The *Plyler* decision is consistent with this Court's teachings, *see Plaut,* 514 U.S. at 225-27; *Miller*, 530 U.S. at 347, and presents no conflict with *Lundeen II.*

Similarly, the Tenth Circuit cases that Canadian Pacific cites apply *Plaut* in a manner consistent with the other circuits' application and *Lundeen II. See United States v. Enjady*, 134 F.3d 1427, 1429-30 (10th Cir. 1998) (holding that a new evidentiary rule applied to a pending trial because "[r]ules of pleading and proof can [] be altered after the cause of action arises, and even, if the statute clearly so requires, after they have been applied in a case but before final judgment has been entered") (quoting *Plaut* and citing *Landgraf*); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1223 (10th Cir. 1996) (explaining that because the case had not "completed [its] journey through the federal courts" at the time an amendment was enacted, there had been no "final" judgment under *Plaut*).

In short, the decisions that Canadian Pacific cites are consistent with each other in recognizing that cases still subject to direct judicial review or still under court supervision are "pending" for purposes of

separation of powers analysis under *Plaut*. These decisions do not conflict with each other or with *Lundeen II*.

D. The *Lundeen II* decision creates no conflict with *Klein*, or with other circuit cases concerning *Klein*.

1. There is no conflict with *Klein*.

Next, Canadian Pacific seeks review under *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). In *Klein*, "the executor [Klein] of the estate of a Confederate sympathizer[ ] sought to recover the value of property seized by the United States during the Civil War, which by statute was recoverable if Klein could demonstrate that the decedent had not given aid or comfort to the rebellion." *Miller*, 530 U.S. at 348. This Court had held in *United States v. Padelford*, 76 U.S. (9 Wall.) 531 (1869), that a presidential pardon satisfied the statutory burden of proof that no aid had been given. Congress then passed a statute requiring courts to consider such a pardon to be conclusive proof of *dis*loyalty, and so to rule for the government. The Court held that "it is clear that the legislature cannot change the effect of such a pardon any more than the executive can change a law. Yet this is attempted by the provision under consideration." *Klein*, 80 U.S. at 148. It also rejected the attempt by Congress to make the courts complicit in that endeavor, noting that "[w]e are directed to dismiss the appeal, if we find that the judgment must be affirmed, because of a pardon granted," *id.* at 146, and stating that whether Congress can so direct a

court "because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor" is a "question [which] seems to us to answer itself," *id.* at 147.[12]

This Court has already made clear that there is no conflict with *Klein* in the circumstances present here. "Whatever the precise scope of *Klein,* . . . later decisions have made clear that its prohibition does not take hold when Congress 'amend[s] applicable law'" as opposed to merely directing the disposition of a case under existing law. *Plaut*, 514 U.S. at 218 (citing *Robertson*, 503 U.S. at 441, which held that even when a statutory amendment is directed to particular pending cases, it does not violate separation of powers principles if Congress leaves the application of that amendment to the courts).[13] Thus, in *Plaut,* where an amendment was enacted to overrule a judicial statutory interpretation, this Court recognized that the legislation "indisputably does set out substantive legal standards for the Judiciary to

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[12] As this Court has since explained, "the fact that Congress was attempting to decide the controversy at issue in the Government's own favor" was "of obvious importance to the *Klein* holding." *United States v. Sioux Nation*, 448 U.S. 371, 405 (1980).

[13] Indeed, the *Klein* Court itself had foreshadowed that clarification, distinguishing a situation in which an act had changed the law "but the court was left to apply its ordinary rules to the new circumstances created by the act." 80 U.S. at 146-47.

apply" and therefore "changes the law (even if solely retroactively)." *Id.*

The amendments here clearly set out substantive legal standards that were not previously part of the text of the law. Congress added section 20106(b), which sets out the standard to apply in deciding whether § 20106 preempts certain state-law actions for damages. The law previously did not contain that explicit standard. Congress thought (and said) it was clarifying what should have been implicit in the previous text of § 20106(a) alone, but there is no doubt that Congress changed the law by providing an explicit standard for the judiciary to apply as to state-law actions for damages. And, as noted above, Congress carefully followed this Court's decision in *Plaut* by expressly making that standard applicable only to pending and future cases; it did not try to change the law with regard to cases that had already been decided by the final word of the judicial department. Congress also added subsection (c), explicitly stating, for the first time, that nothing in the entirety of § 20106 creates a federal cause of action or confers any federal question jurisdiction. Congress thus gave the judiciary explicit standards to use when deciding questions of preemption, of implied federal causes of action, and of implied federal question jurisdiction, all of which turn on the judiciary's reading of the intent of Congress, which Congress here made explicit by amending the text of the law.

Thus, as in *Plaut* and *Robertson*, Congress here clearly amended the law and left the application of that law to the courts. There is no conflict with *Klein*.

2. There is no conflict as to the application of *Klein*.

Canadian Pacific's attempt to create the impression of a circuit split as to the application of the *Klein* doctrine also fails. Canadian Pacific erroneously argues that *Lundeen II* and decisions by the Ninth, Second, Tenth, and D.C. Circuits hold that "Congress can direct the outcome of particular pending cases as long as that result is achieved through legislative enactment." (Pet. 19-20.) Neither *Lundeen II* nor the other circuits Canadian Pacific lists stand for that proposition.

In fact, the cases Canadian Pacific cites do nothing more than reiterate this Court's holdings in *Robertson* and *Plaut* that the separation of powers doctrine at issue in *Klein* is not offended when Congress amends applicable law. *See Apache Survival Coalition v. United States*, 21 F.3d 895, 904 (9th Cir. 1994) (rejecting a *Klein* argument and holding that the statutory amendment at issue "compel[s] changes in law, not findings or results under old law"); *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 396 (2d Cir. 2008), *cert. denied*, 77 U.S.L.W. 3267 (U.S. Mar. 9, 2009) (No. 08-530) (finding that *Klein* did not render a statutory amendment unconstitutional because the amendment "changes the applicable law");

Biodiversity Assocs. v. Cables, 357 F.3d 1152, 1164 & n.8 (10th Cir. 2004) (reasoning that because Congress had changed the law, the court "need not decide whether directing specific actions without changing the law would be an unconstitutional attempt by Congress to usurp the Executive's role in interpreting the law"); *Nat'l Coal. to Save Our Mall v. Norton*, 269 F.3d 1092, 1097 (D.C. Cir. 2001) (rejecting a *Klein* argument because, as in *Robertson*, the statute at issue "amends the applicable substantive law").

The circuits that Canadian Pacific alleges represent the "other side," (Pet. 20-21) – the Fourth and Seventh Circuits – actually use the same reasoning as the cases cited above. *Green v. French*, 143 F.3d 865, 874 (4th Cir. 1998) (explaining that separation of powers was not implicated by amendment because it did not "dictate[] the judiciary's interpretation of governing law" and did not "mandate[] a particular result in any pending case"), *abrogated in part on other grounds by Williams v. Taylor*, 529 U.S. 362 (2000); *Lindh v. Murphy*, 96 F.3d 856, 872 (7th Cir. 1996) (explaining that separation of powers is not offended under *Klein* when Congress makes rules that affect an entire class of cases).[14] If there were any

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[14] In describing *Lindh v. Murphy*, Canadian Pacific again employs the tactic of elision. The full quote from this decision clearly reflects that the Seventh Circuit is in accord with the remaining circuits' view that the Constitution is not offended under *Klein* when Congress amends a law. Below is the entire passage, with the language that Canadian Pacific omits underscored:

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doubt about the law of these circuits, additional decisions plainly demonstrate their understanding that when an amendment changes the law, *Klein* is not implicated. *See City of Chicago v. United States Dep't of Treasury, Bureau of Alcohol, Tobacco & Firearms*, 423 F.3d 777, 783-84 (7th Cir. 2005) (finding it "unnecessary to address the City's *Klein* challenge" because the amendment at issue had changed the law); *Plyler*, 100 F.3d at 372 (Fourth Circuit explaining that because Congress amended the law in limiting the district court's authority to award relief, the amendment did not violate the *Klein* doctrine).

Notably, in every case cited by Canadian Pacific, the legislation at issue was deemed constitutional and not in violation of the *Klein* separation of powers doctrine. Likewise, the amendment at issue in *Lundeen II* was found constitutional; it changed the applicable law by setting forth Congress's express

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> Congress cannot tell courts how to decide a particular case, but it may make rules that affect classes of cases. Congress cannot say that a court must award Jones $35,000 for being run over by a postal truck, but it may prescribe maximum damages for categories of cases, or provide that victims of torts by federal employees cannot receive punitive damages. It may establish that if the driver was acting within the scope of his employment, the United States must be substituted as a party and the driver dismissed – even if that turns out to deprive the victim of compensation.

Lindh, 96 F.3d at 872 (internal citations omitted). In any event, this Court later reversed the Seventh Circuit's decision, on other grounds. 521 U.S. 320 (1997).

intent regarding federal question jurisdiction and preemption, and left the application of that changed law to the courts. In short, there is no circuit conflict at issue here regarding *Klein*.

3. If there is any conflict in the circuits regarding the weight of clarification amendments, this case is not part of that conflict.

Recognizing that separation of powers concerns under *Klein* are not offended when "Congress . . . change[s] substantive law so as to affect pending cases," (Pet. 17-18), Canadian Pacific attempts to argue that the amendments did not substantively change the meaning of the statute, because subsection (b) of § 20106 is entitled "Clarification Regarding State Law Causes of Action."

The argument is a red herring. As an initial matter, the subtitle regarding a "clarification" applies only to subsection (b), not to subsection (c), the jurisdictional provision that was actually applied in *Lundeen II*. Subsection (c) clearly makes new law in that it expressly addresses issues to which Congress had not spoken in the past, providing that § 20106 does not create a federal cause of action or confer federal question jurisdiction. Further, even as to

subsection (b) and regardless of its label,[15] Congress amended and changed § 20106 by stating, for the first time, its express intent as to the standard for determining whether state-law actions for damages are preempted. As this Court held in *Robertson* and *Plaut*, such amendments do not violate the separation of powers under *Klein*. *Plaut*, 514 U.S. at 218.

Because Congress changed the law in expressly setting forth new statutory standards, the alleged split heralded by Canadian Pacific regarding the amount of weight to accord clarification provisions is not at issue here. In fact, in *Lundeen II*, the Eighth Circuit explained *Plaut's* teachings that Congress has constitutional power to amend statutory law even if such amendments will affect pending cases, and that courts are obligated to apply the law, as amended, to the pending cases. This explanation and reliance on *Plaut* indicates the Eighth Circuit's understanding that the law had indeed changed under § 20106. Further, the court went on to address Canadian Pacific's other constitutional challenges to the amendments to 49 U.S.C. § 20106, an analysis it need not have undertaken if the court had believed the amendment was a clarification that did not change the law and, as such, did not implicate potential constitutional concerns. Thus, while Canadian Pacific makes much of the scholarly debate regarding the

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[15] "To be sure, a subchapter heading cannot substitute for the operative text of the statute." *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 128 S.Ct. 2326, 2336 (2008).

weight to give clarification amendments, such analysis is not implicated by either the Eighth Circuit's finding that changes to § 20106 do not violate *Klein* principles or the court's application of a new jurisdiction-stripping amendment to pending cases.

Notably, none of the cases Canadian Pacific cites regarding an alleged split on how much weight should be given to clarification amendments involves amendments conferring or stripping jurisdiction. That is because jurisdictional amendments apply to pending cases, and the question of whether they change the law or merely clarify it is a moot point. *See Landgraf*, 511 U.S. at 274 (citing *Bruner*, 343 U.S. at 116-17). Here, the specific amendment applied in *Lundeen II* was § 20106(c), a jurisdictional amendment. Accordingly, the question of how much weight to give clarification statutes is not at issue. Said another way, even if there is a split in the circuits, this case is not a good vehicle for determining the weight to give to clarification amendments.

II. IN ADDITION TO THE LACK OF ANY CONFLICT, OTHER CONSIDERATIONS ALSO COUNSEL AGAINST REVIEW

Finally, Canadian Pacific marshals a broad set of cases, dealing with everything from AEDPA to Terri Schiavo, to support an argument that this Court should explore and define the parameters of *Klein*, even alleging that *Klein* must be addressed because of due process concerns. Notably missing from the

Petition is any decision (other than *Lundeen II* itself) dealing with the 2007 amendments to § 20106 of the FRSA. While the theoretical edges of *Klein* may inspire an interesting debate, they are not at issue here, and *Lundeen II* would be a poor vehicle for exploring them.

Further, any potential due process concerns of retroactivity that Canadian Pacific alleges animate *Klein* (a separation of powers case), (Pet. 25), are not in play here. The amendment applied in *Lundeen II* is subsection (c), which states that § 20106 does not confer federal question jurisdiction. As this Court recently explained in *Hamdan v. Rumsfeld*, an amendment like subsection (c) that eliminates potential federal question jurisdiction "takes away no substantive right but simply changes the tribunal that is to hear the case." 548 U.S. at 577 (quoting *Hallowell v. Commons*, 239 U.S. 506, 508 (1916)). "[N]o retroactivity problem arises because the change in the law does not 'impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.'" *Id.* (quoting *Landgraf*, 511 U.S. at 280). Accordingly, *Lundeen II* does not implicate any potential due process concerns.[16]

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[16] Although the panel dissent speculates at length about the topic, the *Lundeen II* court did not rule on the merits of any defense of preemption under § 20106, as amended; it simply held that the federal courts lack subject matter jurisdiction, leaving the merits of any preemption defense to the state court on

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These cases involve plaintiffs who were seriously injured in a derailment on January 18, 2002, caused by what Canadian Pacific has admitted in other cases was its negligence. Their state court lawsuits were detoured by an interlocutory decision finding "complete preemption," which the Eighth Circuit inferred from the preemption clause of 49 U.S.C. § 20106. The decision in *Lundeen II* does nothing more than apply to pending cases the plain language of a statutory amendment stating there is no federal question jurisdiction in such actions for damages, and then return those cases back to state court, where they will now finally proceed on the merits.[17] *Lundeen II* is in

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remand. *See also Bates v. Missouri & N. Ark. R.R. Co.*, 548 F.3d 634, 637 (8th Cir. 2008) (noting that "*Lundeen II* makes clear that the FRSA does not convert a state law claim into a federal cause of action. . . . [a]bsent diversity, therefore, a state court is the proper forum for litigating . . . preemption defense[s]"). In vacating *Lundeen I*, the decision in *Lundeen II* mirrored the standard order given by appellate courts upon a finding that there is no federal jurisdiction. *Compare Lundeen II*, Pet. App. 17a-18a ("we vacate our decision in *Lundeen I* and remand these cases to the district court with instructions in turn to further remand them to state court"), *with, e.g., Franciscan Skemp Healthcare, Inc. v. Cent. States Joint Bd. Health & Welfare Trust Fund*, 538 F.3d 594, 601 (7th Cir. 2008) ("We reverse the denial of the motion to remand and vacate the order dismissing the claims as the trial court lacked jurisdiction to enter that order. Upon return of this case to the district court, it is to be remanded to the state court from which it was removed.").

[17] To the extent preemption is asserted in the state court litigation on the merits, this Court has explained that state courts are "equally competent" to make merits decisions on issues such as " 'a claim of federal pre-emption, [and] that decision may ultimately be reviewed on appeal by this Court.' "

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accordance with the settled law of this Court and other circuits, and is not a decision worthy of this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: April 8, 2009

Respectfully submitted,

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Kircher v. Putnam Funds Trust, 547 U.S. 633, 646, 648 (2006) (quoting *Franchise Tax Bd.*, 463 U.S. at 12 n.12).