Vol. 103
Northwestern University Law Review Colloquy

REMAND AND APPELLATE REVIEW ISSUES FACING THE SUPREME COURT IN *CARLSBAD TECHNOLOGY, INC. v. HIF BIO, INC.*

Deborah J. Challener[*] *& John B. Howell, III*[**]

Under 28 U.S.C. §§ 1447(c) and (d), remand orders in removed cases are immune from appellate review when they are based on a lack of subject matter jurisdiction.[1] Until recently, all appellate courts that had addressed the issue had concluded that when a district court declines to exercise supplemental jurisdiction under 28 U.S.C. § 1367(c)[2] and remands the supplemental claims to state court, the remand is not based on a lack of subject matter jurisdiction and is therefore reviewable on appeal.[3] In *HIF Bio, Inc. v. Yung Shin Pharmaceuticals Industrial Co.*,[4] however, the United States Court of Appeals for the Federal Circuit became the first circuit to hold that such remands, sometimes referred to as *Cohill* remands,[5] are based on a jurisdictional defect and therefore are not subject to appellate review.[6] On October 14, 2008, the Supreme Court granted *certiorari* in *HIF Bio* to re-

---

[*] Associate Professor, Mississippi College School of Law; B.A., Oberlin College, 1990; M.P.P., Vanderbilt University, 1995; J.D., University of Tennessee College of Law, 1998. A full-length version of this Essay will appear in Volume 81, Issue 4 of the *Temple Law Review*.

[**] Law Clerk, the Honorable Daniel A. Manion, U.S. Court of Appeals for the Seventh Circuit, 2008–10; Law Clerk, the Honorable David C. Bramlette, III, U.S. District Court for the Southern District of Mississippi, 2007–08; J.D., Mississippi College School of Law, 2007.

[1] 28 U.S.C. § 1447(c)–(d) (2006) (link).

[2] 28 U.S.C. § 1367(c) (2006) (link).

[3] *See, e.g.*, Trans Penn Wax Corp. v. McCandless, 50 F.3d 217, 221–25 (3d Cir. 1995) (citing precedents from several circuits) (link).

[4] 508 F.3d 659 (Fed. Cir. 2007) (link), *cert. granted sub nom.* Carlsbad Tech., Inc. v. HIF Bio, Inc., 129 S. Ct. 395 (2008) (link).

[5] A remand that occurs after a district court declines to exercise supplemental jurisdiction under § 1367(c) is sometimes referred to as a "*Cohill* remand" because the Supreme Court held in *Carnegie-Mellon University v. Cohill* that district courts could remand pendent claims in removed cases instead of dismissing them. 484 U.S. 343, 354 (1988) (link). At the time the Court decided *Cohill*, there was no statutory basis for the remand of pendent claims. Instead, the power to remand derived from the doctrine of pendent jurisdiction. *Id.* at 356. When the supplemental jurisdiction statute was enacted, it did not (and still does not) provide for the remand or dismissal of supplemental claims once a district court declines to exercise supplemental jurisdiction over them. *See* 28 U.S.C. § 1367(c). Because the district court's remand authority does not derive from § 1367, it (presumably) continues to derive from *Cohill*. Thus, this Essay refers to the remand of claims after a district court declines to exercise supplemental jurisdiction as a "*Cohill* remand."

[6] *See HIF Bio, Inc.*, 508 F.3d at 667.

solve the circuit split created by the Federal Circuit.[7] The Court heard oral argument in the case, now captioned *Carlsbad Technology, Inc. v. HIF Bio, Inc.*, on February 24, 2009.

This Essay provides a brief explanation of § 1367 and §§ 1447(c) and (d) and argues that the Supreme Court should reverse the Federal Circuit's decision in *HIF Bio*. We contend that the Federal Circuit erred in concluding that *Cohill* remands are subject-matter jurisdictional because a district court does not remand supplemental claims based on its lack of power over the claims. Instead, a district court remands supplemental claims based on its discretionary decision under § 1367(c) that a state court is a better forum in which to litigate them. After establishing that *Cohill* remands are not subject-matter jurisdictional and therefore are reviewable on appeal, we examine the district court's remand order and the Federal Circuit's opinion in *HIF Bio*. We assert that in reviewing the remand order in *HIF Bio* and deciding that *Cohill* remands fall within §§ 1447(c) and (d), the Federal Circuit incorrectly applied the Supreme Court's recent decision in *Powerex Corp. v. Reliant Energy Services, Inc*.[8] Finally, we offer a few comments about whether *Cohill* remands *should be* reviewable on appeal.

I. BACKGROUND

A. Section 1367

28 U.S.C. § 1367,[9] the supplemental jurisdiction statute, codifies the common law doctrines of pendent and ancillary jurisdiction.[10] Section 1367(a) states that when a federal court has "original jurisdiction" over at least one claim in an action, it "shall have" supplemental jurisdiction over additional claims that are part of the same Article III case or controversy but do not by themselves fall within the court's original jurisdiction.[11] The Supreme Court has said that supplemental jurisdiction "'is a doctrine of discretion, not of plaintiff's right,'"[12] and § 1367(c) "confirms [its] discretionary nature . . . by enumerating the circumstances in which district courts can refuse its exercise."[13] Specifically, § 1367(c) provides that "a district

---

[7] *Carlsbad Tech., Inc.*, 129 S. Ct. 395 (mem.) (link).

[8] 127 S. Ct. 2411 (2007) (link).

[9] 28 U.S.C. § 1367 (2006).

[10] City of Chicago v. Int'l Coll. of Surgeons, 522 U.S. 156, 164–65 (1997) (link).

[11] 28 U.S.C. § 1367(a) (2006); Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 558 (2005) (link); *see also Int'l Coll. of Surgeons*, 522 U.S. at 167 ("The whole point of supplemental jurisdiction is to allow the district courts to exercise . . . jurisdiction over claims as to which original jurisdiction is lacking.").

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

[13] *Id.* at 173.

court may decline to exercise supplemental jurisdiction over a claim under subsection (a)" where:

> (1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.[14]

According to the Supreme Court, § 1367(c) "reflects the understanding that, when deciding whether to exercise supplemental jurisdiction, 'a federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity.'"[15]

B. Section 1447

28 U.S.C. § 1447(c) identifies two grounds for the remand of cases that are removed from state to federal court. First, a plaintiff can move in federal court to remand a case on the basis of a defect in removal procedure as long as the remand motion is filed "within 30 days after . . . removal."[16] Second, a district court must remand the case "[i]f at any time before final judgment it appears that the . . . court lacks subject matter jurisdiction."[17] Federal courts are not limited to remanding cases based on the grounds listed in § 1447(c). They can also remand cases based on, for example, abstention[18] or a forum selection clause.[19] Federal courts, however, are not permitted to remand cases or claims on grounds that they have "no authority to consider,"[20] such as docket congestion.[21]

---

[14] 28 U.S.C. § 1367(c) (2006); *see also Int'l Coll. of Surgeons*, 522 U.S. at 173 ("Depending on a host of factors, then—including the circumstances of the particular case, the nature of the state law claims, the character of the governing state law, and the relationship between the state and federal claims—district courts may decline to exercise jurisdiction over supplemental state law claims.").

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

[16] 28 U.S.C. § 1447(c) (2006). Section 1447(c) states: "A motion to remand on the basis of *any defect other than the lack of subject matter jurisdiction* must be made within 30 days after . . . removal." *Id.* (emphasis added). Federal appellate courts have interpreted this portion of § 1447(c) to apply only to defects in removal procedure. *See, e.g.*, Autoridad de Energia Electrica de P.R. v. Ericsson Inc., 201 F.3d 15, 16–17 (1st Cir. 2000) (link); Snapper, Inc. v. Redan, 171 F.3d 1249, 1252–60 (11th Cir. 1999) (link); Hudson United Bank v. LiTenda Mortgage Corp., 142 F.3d 151, 156 (3d Cir. 1998) (link).

[17] 28 U.S.C. § 1447(c).

[18] *See* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 716–19 (1996) (link).

[19] *Autoridad de Energia Electrica de P.R.*, 201 F.3d at 16–17; *Snapper, Inc.*, 171 F.3d at 1252–60.

[20] Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 351–52 (1976) (link), *overruled in part by Quackenbush*, 517 U.S. at 714–15.

[21] *Id.* at 344.

Section 1447(d) provides that remand orders are "not reviewable on appeal or otherwise" except in civil rights cases.[22] According to the Supreme Court, the purpose of § 1447(d)'s review bar is to prevent the delay caused by "protracted litigation of jurisdictional issues."[23] Although the plain language of § 1447(d) appears to implicate all remand orders regardless of whether they are made pursuant to § 1447(c), the Supreme Court rejected such an interpretation of the statute in *Thermtron Products, Inc. v. Hermansdorfer*.[24] The *Thermtron* Court held that §§ 1447(c) and (d) "must be construed together,"[25] and therefore "only remand orders issued under § 1447(c) and invoking the grounds specified therein . . . are immune from review under § 1447(d)."[26] Thus, under *Thermtron*, only remands based on a defect in removal procedure or lack of subject matter jurisdiction fall within § 1447(d)'s review bar. Other types of remands, such as those based on abstention[27] or a forum selection clause,[28] remain reviewable on appeal. Since *Thermtron*, the Court has stated repeatedly that only § 1447(c) remands are immune from appellate review under § 1447(d).[29]

II. POWER VERSUS DISCRETION: WHY *COHILL* REMANDS ARE NOT BASED ON A LACK OF SUBJECT MATTER JURISDICTION AND THEREFORE ARE REVIEWABLE ON APPEAL

This Part argues that there is a crucial distinction between the existence of judicial power—*i.e.*, subject matter jurisdiction—and the exercise of that power. The existence of judicial power is a yes-or-no question. The decision whether to exercise that power, on the other hand, is discretionary if certain criteria are satisfied.[30] When a district court remands supplemental

---

[22] 28 U.S.C. § 1447(d) (2006). *See* 28 U.S.C. § 1443 (2006) (link).

[23] *Thermtron Prods., Inc.*, 423 U.S. at 351; *see also* Powerex Corp. v. Reliant Energy Servs., Inc., 127 S. Ct. 2411, 2420 (2007) (stating that the policy behind § 1447(d) is "avoiding prolonged litigation on threshold nonmerits questions").

[24] 423 U.S. 336.

[25] *Id.* at 345.

[26] *Id.* at 346. The Court further held that a § 1447(c) remand order is immune from appellate review regardless of "whether or not that order might be deemed erroneous by an appellate court." *Id.* at 351; *see also* Gravitt v. Sw. Bell Tel. Co., 430 U.S. 723, 723–24 (1977) (per curiam) ("The District Court's remand order was plainly within the bounds of § 1447(c) and hence was unreviewable by the Court of Appeals, by mandamus or otherwise.") (link).

[27] Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 711–12 (1996).

[28] Autoridad de Energia Electrica de P.R. v. Ericsson Inc., 201 F.3d 15, 16–17 (1st Cir. 2000); Snapper, Inc. v. Redan, 171 F.3d 1249, 1252–60 (11th Cir. 1999).

[29] Powerex Corp. v. Reliant Energy Servs., Inc., 127 S. Ct. 2411, 2415–16 (2007) (assuming "that the prohibition on appellate review remains limited to remands [for lack of subject matter jurisdiction and for defects in removal procedure]" under § 1447(c)); Osborn v. Haley, 127 S. Ct. 881, 893 (2007) (link); Kircher v. Putnam Funds Trust, 126 S. Ct. 2145, 2152–54 (2006) (link); *Quackenbush*, 517 U.S. at 711–12; Things Remembered, Inc. v. Petrarca, 516 U.S. 124, 127 (1995) (link).

[30] Joan Steinman, *Removal, Remand, and Review in Pendent Claim and Pendent Party Cases*, 41 VAND. L. REV. 923, 962 (1988) (discussing Rosado v. Wyman, 397 U.S. 397 (1970), and explaining that

claims, it does not do so because it lacks power to adjudicate them. A district court remands supplemental claims because it has made a discretionary decision not to exercise existing judicial power. Thus, *Cohill* remands are not based on a lack of subject matter jurisdiction and therefore are reviewable on appeal.

A. Judicial Power

"[S]ubject-matter jurisdiction" is a court's "statutory or constitutional *power* to adjudicate [a] case."[31] It is axiomatic that a federal district court has subject matter jurisdiction over a claim only when both the U.S. Constitution and a federal statute provide the court with power to adjudicate the claim. For example, a claim falls within the federal question jurisdiction of a federal court only when both Article III of the Constitution and § 1331 authorize the court to adjudicate the claim. Similarly, a claim falls within the supplemental jurisdiction of a federal court only when both Article III and § 1367(a) authorize adjudication.[32] When a civil action is filed in or removed to federal court, the constitutional and statutory requirements for subject matter jurisdiction either are satisfied or they are not, and judicial power either exists or it does not.

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

Generally, when the jurisdiction of a federal court is properly invoked, the court has a "strict duty" to adjudicate the controversy.[33] This duty derives from the "undisputed constitutional principle that Congress, and not the Judiciary, defines the scope of federal jurisdiction within the constitutionally permissible bounds."[34] Nevertheless, the federal courts' obligation to decide cases is not "absolute."[35] The Supreme Court has long held that

---

the "existence of judicial power" is a "'yes or no' question as to whether jurisdiction exists," whereas "the exercise of that power" is "merely a matter of discretion"); *see also* Wachovia Bank v. Schmidt, 546 U.S. 303, 316 (2006) (stating that subject matter jurisdiction "poses a 'whether,' not a 'where' question: Has the Legislature empowered the court to hear cases of a certain genre?") (link); *Kircher v. Putnam Funds Trust*, 373 F.3d 847, 850 (7th Cir. 2004) (opinion of Easterbrook, J.) (stating that it is important to "distinguish between a decision that '[a] court lacks adjudicatory competence' and a decision that '[a] court has been authorized to do X and having done so should bow out'" because "[t]he former implies lack of subject-matter jurisdiction" whereas "the latter implies the presence of jurisdiction") (link), *rev'd on other grounds by* 126 S. Ct. 2145 (2006).

[31] Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998) (link); *see also Powerex Corp.*, 127 S. Ct. at 2418 (emphasis in original) (stating that "subject-matter jurisdiction" is the "*power* to adjudicate . . . claims").

[32] *Cf.* 28 U.S.C. § 1441(c) (2006) ("Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 . . . is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed . . . .") (link).

[33] *Quackenbush*, 517 U.S. at 716.

[34] New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 359 (1989) (link).

[35] *Quackenbush*, 517 U.S. at 716.

federal courts may abstain in certain cases.[36] Under the abstention doctrines, federal courts "may decline to exercise their jurisdiction, in otherwise exceptional circumstances, where denying a federal forum would clearly serve an important countervailing interest."[37] The Supreme Court has "located the power to abstain in the historic *discretion* exercised by federal courts sitting in equity."[38] Furthermore, the Court has held that abstention-based remands are reviewable on appeal because they are not based on a lack of subject matter jurisdiction and thus are not subject to §§ 1447(c) and (d).[39]

Similarly, the decision whether to exercise the supplemental jurisdiction that exists under § 1367(a) is discretionary once a court has determined that § 1367(c) is satisfied. Section 1367(a) states: "Except as provided in subsections (b) and (c) or as otherwise expressly provided by Federal statute," the district courts "*shall* have supplemental jurisdiction" when the statute is properly invoked. The mandatory language in § 1367(a)—"shall have supplemental jurisdiction"—indicates that the court has a duty to adjudicate the supplemental claims before it. Section 1367(a) makes it clear, however, that the court's duty is not absolute.[40] Subsection (b) provides that in diversity cases, the district courts "*shall not* have supplemental jurisdiction under subsection (a)" over particular claims. Thus, in certain cases subsection (b) specifically withdraws the jurisdiction granted under subsection (a).[41]

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

---

[36] *See, e.g.*, Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814–17 (1976) (discussing the different categories of abstention and citing many cases in which the Supreme Court has approved of abstention) (link).

[37] *Quackenbush*, 517 U.S. at 716 (internal quotation marks and citations omitted).

[38] *Id.* at 718 (emphasis added) (internal quotation marks and citations omitted). In the past, it has been unclear whether, for example, "*Pullman* abstention is mandatory or discretionary." ERWIN CHEMERINSKY, FEDERAL JURISDICTION 795 (5th ed. 2007). In other words, it has been uncertain whether a court is obligated to abstain if the requirements for abstention are satisfied or whether a court can decide to exercise jurisdiction even if the requirements for abstention are satisfied. According to Dean Chemerinsky, the "preferable approach is to treat abstention as discretionary and allow federal courts to hear the case, even if the *Pullman* criteria are met, provided substantial reasons for avoiding abstention are present." *Id.* As noted above, the Court stated in *Quackenbush*, its most recent abstention decision, that abstention is "derived from 'discretion historically enjoyed by courts of equity.'" 517 U.S. at 728; *see also* Burford v. Sun Oil Co., 319 U.S. 315, 318 (1943) (describing the court's choice of whether to abstain as a matter of discretion) (link). Thus, the better conclusion is that the decision whether to abstain is a discretionary one.

[39] *Quackenbush*, 517 U.S. at 711–12.

[40] *See* John B. Oakley, *Prospectus for the American Law Institute's Federal Judicial Code Revision Project*, 31 U.C. DAVIS L. REV. 855, 938–39 (1998) ("Subsection 1367(a) begins with a sweeping grant of supplemental jurisdiction. . . . The drafters elected to phrase this grant in mandatory language, subject only to the exceptions expressly provided by other federal statutes or set out in subsections (b) and (c) of section 1367.").

[41] *See id.* at 940–43.

the criteria enumerated in subsection (c) is satisfied.[42] Subsection (c), unlike subsection (b), does not withdraw the jurisdiction granted in subsection (a).[43] Instead, subsection (c) authorizes a district court to decline to exercise the power that it has under subsection (a) if subsection (c) is satisfied *and* the court chooses not to exercise its power. The court *may*, but is not obligated to, decline to exercise its supplemental power.[44] Thus, the plain language of subsection (c) demonstrates that it is not an express statutory exception to subsection (a). Instead, when a court declines to exercise its supplemental jurisdiction under § 1367(c), as when it abstains, the court is making a discretionary decision not to exercise existing judicial power.[45] The court has both constitutional and statutory authority to adjudicate the claim but chooses not to use its power.

Furthermore, the Supreme Court has said that § 1367(c) "confirms the *discretionary nature* of supplemental jurisdiction by enumerating the circumstances in which district courts *can* refuse its exercise."[46] The Court has also acknowledged that although "the terms of § 1367(a) authorize the district courts to exercise supplemental jurisdiction over state law claims," that "does not mean that the jurisdiction *must* be exercised in all cases."[47] Thus, the Court has never suggested that the decision whether to exercise supplemental jurisdiction is anything other than discretionary once § 1367(c) is satisfied.

Finally, jurisdiction does not evaporate at the moment a court declines to exercise its supplemental power.[48] Once a court has determined that § 1367(c) is applicable and that it will exercise its discretion not to adjudicate a supplemental claim, there is nothing left for the court to do except remand or dismiss the claim. The remand does not result from a lack of jurisdiction

---

[42] 28 U.S.C. § 1367(c) (2006) (emphasis added). Section 1367(c) specifically provides that a court may decline to exercise supplemental jurisdiction when "(1) the claim raises a novel or complex issues of State law," (2) "the claim substantially predominates over the claim or claims" within the court's original jurisdiction, (3) "the district court has dismissed all claims over which it has original jurisdiction," or (4) "in exceptional circumstances." 28 U.S.C. § 1367(c)(1)–(4).

[43] Oakley, *supra* note 40, at 943 ("[S]ubsection 1367(c) further qualifies the mandatory nature of . . . subsection (a)," but "[u]nlike subsection 1367(b) . . . does not withdraw the jurisdiction granted by subsection 1367(a). Subsection 1367(c) seeks instead to resurrect the element of judicial discretion in the exercise of supplemental jurisdiction that the mandatory phrasing of subsection 1367(a) needlessly extinguished.").

[44] *See* City of Chicago v. Int'l Coll. of Surgeons, 522 U.S. 156, 172 (1997) (emphasis in original) ("Of course, to say that the terms of § 1367(a) authorize the district courts to exercise supplemental jurisdiction over state law claims . . . does not mean that the jurisdiction *must* be exercised in all cases.").

[45] David D. Siegel, *Commentary on 1996 Revision of Section 1447(c)*, *in* 28 U.S.C.A. § 1447(c) (West 2006) (stating that the decision whether to remand a supplemental claim after the main claim has been disposed of on the merits is "not a question of subject matter jurisdiction," but "[l]ike . . . abstention . . . it's one of discretion").

[46] *Int'l Coll. of Surgeons*, 522 U.S. at 173 (emphasis added).

[47] *Id.* at 172 (emphasis in original).

[48] This argument is derived from Kircher v. Putnam Funds Trust, 373 F.3d 847, 849–50 (7th Cir. 2004) (opinion of Easterbrook, J.), *rev'd on other grounds by* 126 S. Ct. 2145 (2006).

but instead from the court's decision not to exercise its existing judicial authority. Accordingly, remands under § 1367(c), like abstention-based remands, are not subject-matter jurisdictional and therefore are reviewable on appeal.

III. *HIF BIO V. YUNG SHIN PHARMACEUTICALS INDUSTRIAL CO.*

A. The Remand Order and the Federal Circuit's Opinion

The plaintiffs in *HIF Bio* brought suit in a California state court to resolve a dispute over the rights to anti-cancer medical research.[49] The defendants removed the case to federal court.[50] In their First Amended Complaint, the plaintiffs asserted a claim under the federal Racketeer Influenced and Corrupt Organizations Act ("RICO") and several claims under state law.[51] The district court dismissed the RICO claim and remanded the state claims.[52] In its remand order, the court stated: "[T]he Court declines to exercise supplemental jurisdiction over the state claims. . . . The state claims clearly predominate over the federal RICO claim. The preponderance of state law issues means that a state court is the proper venue to try the state law claims."[53] One of the defendants, Carlsbad Technology, Inc., then appealed.

The Federal Circuit held that it lacked jurisdiction over the appeal because *Cohill* remands "can be colorably characterized as [] remand[s] based on lack of subject matter jurisdiction" under § 1447(c) and therefore are "barred from appellate review under § 1447(d)."[54] The court reasoned that supplemental state law claims by definition lack an independent basis of jurisdiction and therefore a court has power over them only if they fall within § 1367(a).[55] According to the Federal Circuit, "'[t]he text of § 1367(a) indicates [that] § 1367(c) constitutes an express statutory exception to the authorization of jurisdiction granted by § 1367(a).'"[56] Thus, "when declining supplemental jurisdiction over state claims, a district court strips the claims of the only basis on which they are within the jurisdiction of the court."[57]

---

[49] HIF Bio, Inc. v. Yung Shin Pharms. Indus. Co., 508 F.3d 659, 660–61 (Fed. Cir. 2007), *cert. granted sub nom.* Carlsbad Tech., Inc. v. HIF Bio, Inc., 129 S. Ct. 395 (2008).

[50] *Id.* at 661.

[51] *See* HIF Bio, Inc. v. Yung Shin Pharms. Indus. Co., No. CV 05-07976 DDP, 2006 WL 6086295, at *1–2 (C.D. Cal. June 9, 2006).

[52] *See id.* at *6.

[53] *Id.* at *3.

[54] *HIF Bio, Inc.*, 508 F.3d at 667.

[55] *See id.*

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

[57] *Id.*

Absent the "cloak of supplemental jurisdiction, [the] state claims must be remanded for lack of subject matter jurisdiction."[58]

In reaching its conclusion, the court rejected the argument that *Cohill* remands are similar to abstention-based remands and therefore, like abstention-based remands, are subject to appellate review.[59] The Federal Circuit explained that when a court abstains, it declines to hear "claims over which it has an *independent* basis of subject matter jurisdiction."[60] Thus, "a remand premised on abstention cannot be colorably characterized as a remand based on lack of jurisdiction . . . ."[61] According to the Federal Circuit, *Cohill* remands are distinguishable because the only basis for jurisdiction over supplemental claims is § 1367(a).[62] Because the court believed that § 1367(c) is an exception to § 1367(a), it reasoned that once a court declines to exercise its supplemental jurisdiction, the state law claims no longer fall within § 1367(a) and therefore are without any jurisdictional basis.[63] At that point, the Federal Circuit concluded, the district court must remand the state claims for lack of subject matter jurisdiction, and §§ 1447(c) and (d) bar appellate review.[64]

B. The Federal Circuit's Misapplication of Powerex Corp. v. Reliant Energy Services, Inc. *to the Remand Order in* HIF Bio

According to the Court's most recent guidance in *Powerex Corp. v. Reliant Energy Services, Inc.*, an appellate court should determine if a remand order is based on a jurisdictional defect and therefore immune from appellate review by first examining the remand order itself to determine if the district court characterized the remand as subject-matter jurisdictional.[65] For example, the *Powerex* Court concluded that the district court in that case purported to remand on the ground that it lacked subject matter jurisdiction because (1) the heading of the remand order's "discussion section" was "entitled 'Subject Matter Jurisdiction Over the Removed Actions,'" (2) "the District Court explicitly stated that the remand 'issue hinge[d] . . . on the Court's jurisdictional authority to hear the removed claims,'" and (3) in its order denying a stay of the remand, the district court "repeatedly stated that a lack of subject-matter jurisdiction required remand pursuant to § 1447(c)."[66]

---

[58] *Id.*
[59] *Id.* at 666–67.
[60] *Id.* at 667 (emphasis in original).
[61] *Id.*
[62] *Id.*
[63] *See id.*
[64] *Id.*
[65] *See* Powerex Corp. v. Reliant Energy Servs., Inc., 127 S. Ct. 2411, 2417 (2007).
[66] *Id.*

Unlike the *Powerex* Court, the *HIF Bio* court did not carefully examine the remand order to determine if the district court actually characterized the remand as subject-matter jurisdictional. The Federal Circuit simply stated that the district court remanded the state claims "based on declining supplemental jurisdiction."[67] Review of the remand order in *HIF Bio*, however, reveals that in contrast to the district court in *Powerex*, the district court in *HIF Bio* did not characterize the remand as one that was based on a lack of subject matter jurisdiction. Instead, the district court made it clear that it was *declining to exercise* supplemental jurisdiction because the state claims predominated over the RICO claim and therefore state court was the proper forum in which to litigate them.[68]

According to *Powerex*, once an appellate court concludes that a district court characterized a remand as subject-matter jurisdictional, then the appellate court is permitted to "look behind" the remand order to determine if that characterization is colorable.[69] If the characterization is colorable, then appellate review is barred. Because the district court in *HIF Bio* did not characterize the remand in that case as subject-matter jurisdictional, the Federal Circuit should not have "looked behind" the remand order to determine whether *Cohill* remands are based on a defect in subject matter jurisdiction. Instead, the court should have concluded that the remand did not fall within § 1447(c) and that the review bar of § 1447(d) therefore did not apply. At that point, the court should have turned to the merits of the appeal.

If the district court in *HIF Bio* had actually characterized the remand of the state claims under § 1367(c) as subject-matter jurisdictional, however, then it would have been appropriate for the Federal Circuit to proceed to the question of whether such a characterization is colorable. In *Powerex*, it was debatable whether there was actually a defect in subject matter jurisdiction that required remand, but that was enough for the Court to conclude that the district court's characterization of its remand as subject-matter jurisdictional was colorable and that appellate review was barred.[70] In contrast, if a dis-

---

[67] *HIF Bio, Inc.*, 508 F.3d at 664.

[68] *Id.*

[69] *Powerex Corp.*, 127 S. Ct. at 2417–18. Writing for the majority in *Powerex*, Justice Scalia noted that the question of whether § 1447(d) permits appellate courts to look behind the district court's characterization was reserved in *Kircher v. Putnam Funds Trust*, 126 S. Ct. 2145, 2153 n.9 (2006), and that "[t]he Court's opinion in *Osborn v. Haley* . . . had nothing to say about the scope of review that is permissible under § 1447(d)." *Powerex Corp.*, 127 S. Ct. at 2417, 2418 n.2. At least for Justices Scalia and Thomas, the district court's characterization of the remand order in *Powerex* as jurisdictional was enough to bring it within § 1447(d). *See id.* at 2417 (citing Osborn v. Haley, 127 S. Ct. 881, 907–08 (2007) (Scalia, J., joined by Thomas, J., dissenting)). However, "because (presumably) [Justice Scalia] could not convince a majority of the Justices to join him on this point" in *Powerex*, "he looked behind the district court's characterization" of the remand order. Posting of Scott Dodson to Civil Procedure Prof Blog, http://lawprofessors.typepad.com/civpro/2007/06/powerex_corp_v_.html (June 18, 2007) (link).

[70] *See Powerex Corp.*, 127 S. Ct. at 2417–18.

trict court were to characterize or attempt to characterize a *Cohill* remand as based on a lack of subject matter jurisdiction, that characterization would not be colorable because, although the Supreme Court has not yet decided whether *Cohill* remands are subject-matter jurisdictional, the issue is not debatable.

The *HIF Bio* court concluded that *Cohill* remands are based on a lack of subject matter jurisdiction because supplemental claims do not have an independent basis of jurisdiction. Therefore, once a district court declines to hear the claims they lose their jurisdictional basis under § 1367(a) and must be remanded. In addition, the court distinguished *Cohill* remands from abstention-based remands on the ground that federal courts only abstain from hearing claims with an independent basis of jurisdiction and therefore abstention-based remands cannot be colorably characterized as subject-matter jurisdictional.

The *HIF Bio* court is correct, of course, that supplemental claims by definition do not have an independent basis of jurisdiction. Furthermore, assuming that the Federal Circuit is correct that courts abstain only from deciding claims with an independent basis of subject matter jurisdiction, the court has undoubtedly identified a real distinction between the two doctrines. This distinction, however, is immaterial. The crucial distinction is between the existence of judicial power and the exercise of that power.

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

IV. SHOULD *COHILL* REMANDS BE SUBJECT TO APPELLATE REVIEW?

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

Assuming that the goal of decreasing litigation over "nonmerits" issues is worthwhile, the question becomes how best to achieve it. One option is

for the Court and Congress to maintain the status quo. As things stand now, the Court has insisted that §§ 1447(c) and (d) must be read together and Congress has not indicated that it disapproves of that interpretation. If *Thermtron* and its progeny (from both the Supreme Court and the lower courts) are any indication, however, the status quo has not accomplished the goal of limiting "nonmerits" litigation.

A second option is for the Court to read § 1447(d) as it was written and allow appellate review of remands only in civil rights cases or in other cases where Congress has specifically provided for review. This approach would reduce litigation, but of course *Thermtron* and its progeny stand squarely in the way of this option. A third option is for Congress to re-draft § 1447(d) and clarify the types of remands that fall within the appellate review bar. The problem with this option, however, is that the re-drafting of statutes often leads to litigation, and even the relatively clear language of the current version of § 1447(d) did not prevent the Court from interpreting it contrary to its plain language.

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

CONCLUSION

If the Supreme Court wants to avoid litigation about which of two competent court systems will try supplemental claims, it may be tempted to find that *Cohill* remands are based on a lack of subject matter jurisdiction and therefore cannot be reviewed on appeal. The Court should resist that temptation, however, because the plain language of § 1367, the distinction between the existence of judicial power and its discretionary exercise, and the proper application of *Powerex* to the remand order in *HIF Bio* all demonstrate that the Federal Circuit incorrectly concluded that *Cohill* remands are subject-matter jurisdictional for purposes of §§ 1447(c) and (d). Thus, the Supreme Court should reverse the Federal Circuit and hold that *Cohill* remands are reviewable on appeal.