No. _____

In the
Supreme Court of the United States

MICHAEL J. DEMARTINI, ET AL.,

Petitioners,

v.

TIMOTHY P. DEMARTINI, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

28 U.S.C. § 1447(d) provides: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise."

28 U.S.C. § 1447(e) provides: "If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court." The questions presented are:

(1) Whether an antecedent court order amending a complaint to join a diversity-destroying defendant is separable from a § 1447(e) remand order and thus not barred from review by § 1447(d)?

(2) Whether § 1447(d) bars review of a § 1447(e) remand order based on an antecedent court order joining a party whose joinder does not destroy subject matter jurisdiction?

PARTIES TO THE PROCEEDINGS

Petitioners are Michael J. DeMartini and Renate DeMartini and were defendants/cross-complainants and appellants in the proceedings below.

Respondents are Timothy DeMartini and Margie DeMartini and were plaintiffs/cross-defendants and appellees in the proceeding below.

RULE 29.6 STATEMENT

There are no corporate parties in this case.

RELATED CASES

DeMartini v. DeMartini, No. CU14-080744, Superior Court of California, County of Nevada. Stayed.

DeMartini v. DeMartini, No. 2:14-cv-02722-JAM-CKD, U.S. District Court for the Eastern District of California. Amended Judgment entered May 4, 2018.

DeMartini v. DeMartini, No. 18-15882, U.S. Court of Appeals for the Ninth Circuit. Judgment entered July 6, 2020; modified and panel rehearing denied December 23, 2020.

DeMartini v. DeMartini, Nos. 19-16603 and 19-16940 (consolidated), U.S. Court of Appeals for the Ninth Circuit. Pending.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Michael and Renate DeMartini respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS AND ORDERS BELOW

The Ninth Circuit's opinion is reported at 964 F.3d 813 (9th Cir. 2020). App. 3b. The order denying petitioners' petition for rehearing is not reported. App. 1a. The district court's order adopting findings and recommendations (App. 38d) is not reported. App. 36e. The partial judgment is at App. 28c.

JURISDICTION

The Ninth Circuit's opinion issued July 6, 2020. Rehearing was denied December 23, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1447(c) provides: "A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall

be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case."

28 U.S.C. § 1447(d) provides: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise."

28 U.S.C. § 1447(e) provides: "If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court."

STATEMENT OF THE CASE

A. Factual Background

Michael and Timothy DeMartini are brothers, who along with their wives, jointly own adjacent commercial parties in Grass Valley, California. App. 4a. In 1978, Michael and Timothy, together with their father James Paul, formed a partnership, DeMartini & Sons, to acquire, develop and operate property at 12731 Loma Rica Drive. ER69.[1]

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[1] "ER" refers to excerpts of record filed in Ninth Circuit, Case No. 17-16400.

In 1982, James Paul formed a testamentary trust, naming Timothy and his brother James as co-trustees. In 1983, James Paul died, leaving Michael and Timothy sole partners of DeMartini & Sons, and Timothy and James as co-trustees of the family trust.

The nature of the brothers' joint ownership of the adjacent parcel, 12759 Loma Rica Drive, is contested. Michael and his wife Renate claim the property is held in partnership, but Timothy and his wife Margie claim the property is owned as tenants-in-common.

In 2014, a dispute between the brothers arose concerning the development and financing of 12759 Loma Rica Drive, and this litigation ensued.

B. Proceedings in the District Court

In September 2014, Timothy and Margie filed a lawsuit against Michael and Renate in the Superior Court of the State of California, Nevada County. Michael and Renate, appearing *pro se*, promptly removed the case to the U.S. District Court, Eastern District of California, on grounds of diversity jurisdiction. 28 U.S.C. §§ 1332(a), 1441(a).

The parties are completely diverse. Timothy and Margie are citizens of California; Michael and Renate are citizens of Nevada. App. 6a; ER246-47, 183.

Timothy and Margie opposed removal and unsuccessfully sought remand to Superior Court.

In September 2015, one year after removal, Timothy and Margie sought to amend their complaint, asserting three claims: (1) dissolution of the partnership, DeMartini & Sons, that owns 12731 Loma Rica Drive, (2) partition of the adjacent 12759

Loma Rica Drive parcel, and (3) breach of contract. *Id.* The partnership dissolution claim alleged that upon the death of James Paul in 1983, Timothy and Michael succeeded to their father's interest, and became sole partners, 50/50. ER246–49¶¶17–19.

Amendment was granted, and the district court entered a Rule 16(b) pre-trial scheduling order prohibiting any further amendments or joinder, except with leave of court upon a showing of good cause. ER53. Discovery cutoff was in February 2017.

In July 2016, responding to the new claim, Michael and Renate amended their pleading, asserting claims and defenses alleging that both Loma Rica Drive parcels were partnership properties and that the parties were partners. ER193–252.

In February 2017, five days before discovery cutoff, Timothy and Margie moved again to amend alleging on information and belief—contrary to the facts alleged in the first amendment—that the family trust acquired an interest in DeMartini & Sons when James Paul died in 1983. ER155¶19. The motion claimed Timothy learned about the trust's interest from a recently obtained litigation guaranty; the attorneys asserted on information and belief that the trust may have an interest in the partnership.[2] ER136–38, ER146¶¶3–4, ER145¶1, ER177¶1, ER178¶4. Timothy filed no declaration explaining the decades-late, contradictory alleged discovery.

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[2] The opinion states counsel had determined the trust retained an interest. App. 7a. In fact, counsel alleged only that the trust may have an interest. ER145-46.

Timothy sought to join the 1982 trust as a party. ER135. Amending the complaint to join the trust altered the substance of the partnership dissolution claim by asserting a 1/3 interest in 12731 Loma Rica Drive (thus diluting petitioners' 50% interest) and reviving a property interest that terminated in 1983.[3]

The motion to amend sought to join Timothy in his capacity as co-trustee as plaintiff, and James, a citizen of Colorado, as an additional defendant. The motion explicitly argued that the trust's interests were aligned with and had been represented by Timothy; thus, joinder would not affect any impending deadlines. ER115, ER136–51. The motion to amend did not request adding Timothy as an additional defendant (averse to himself); nor did it seek or mention remand for lack of diversity. Every substantive allegation in the second amended complaint alleged that Timothy, the individual, was joining Timothy, the trustee, as an additional plaintiff; there was no allegation that Timothy was averse to the trust, or to himself as trustee, or that subject matter jurisdiction was affected or eliminated.[4] ER152; ER155¶¶19–21; ER77 (disclaiming impact on diversity jurisdiction or joinder as nondiverse/averse defendant).

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[3] Under California law, a partnership terminates upon death of a partner and the cause of action accrues. *Estate of Peebles*, 27 Cal.App.3d 163, 167–68 (1972) (discussing Cal. Corp. Code §§ 15031, 15043); Cal. Code Civ. Proc. §§ 339(1), 343.

[4] The opinion states Timothy sought to add the trust as a defendant; however, the motion and complaint allege Timothy as a diverse plaintiff and James as a diverse defendant.

The second amended complaint alleged diversity of citizenship under 28 U.S.C. § 1332(a), and that James was the only additional defendant. *Id.*

No motion to remand was made; no joinder of an additional nondiverse defendant was requested. However, the proposed complaint's caption listed the trust, and both co-trustees, as defendants. ER151.

Petitioners opposed amendment, disputing the litigation guaranty and asserting the trust's interest succeeded to the brothers upon James Paul's death, as the first amended complaint admitted. ER81–134.

The magistrate judge construed the motion under Rule 19, granting the motion to amend the complaint and joining the trust based on the assertion that it may have an interest in partnership property. App. 38a-41a. Without adjudicating contested facts, and despite the complaint's substantive allegations admitting diversity of citizenship and alignment of interests, the judge *sua sponte* found that joining Timothy as trustee would destroy diversity. The judge *sua sponte* invoked 28 U.S.C. § 1447(e), severed the partnership dissolution claim, and remanded it to state court. App. 42a-43a.

The magistrate made no factual findings on diversity of citizenship, alignment of interests, the validity of the trust's claim under the statute of limitations or partnership dissolution principles, or, significantly, whether California or federal law, including § 1447(e), authorizes joinder or remand where an existing plaintiff joins in his representative capacity and not as a new, additional defendant. *Id.* Nor did the judge make findings on whether any law

permits plaintiffs to sue themselves in their representative capacity thereby destroying diversity.

Nor, in applying Rule 19, did the judge apply the factors governing post-removal joinder of additional diversity-destroying defendants under § 1447(e). *Cf. Desert Empire Bank v. Ins. Co. of North Am.*, 623 F.2d 1371, 1375–76 (9th Cir. 1980); *Hensgens v. Deere & Co.*, 833 F.3d 1179, 1182–83 (5th Cir. 1987).

The district court adopted the findings and recommendations, granted the motion to amend, severed the third claim, and remanded it. App. 36a.

While the motion to amend was pending, respondents sought summary judgment on the counterclaims, asserting that no partnership exists.

The magistrate recommended summary judgment on all counterclaims in part because the only evidence of an existing partnership involved 12731 Loma Rica Drive, which had been remanded and thus could not be considered. ER28–42. The district court adopted the findings. ER26–27.

Respondents' claims were tried. Because the 12731 Loma Rica Drive partnership claim had been remanded and the 12759 Loma Rica Drive partnership counterclaims and defenses were summarily adjudicated, petitioners were precluded from offering evidence or argument of partnership.

The jury returned a verdict for respondents. ER8.

Respondents obtained partial judgment under FRCP 54(b). App. 28a.

C. Proceedings in the State Court

Timothy (defendant) answered the second amended complaint filed by Timothy (plaintiff), admitting all allegations of trust ownership in the partnership. Ninth Cir. Dkt. No. 28, Exh. 3.[5]

James obtained a stay pending resolution of the Ninth Circuit appeal. *Id.*, Exh. 5.

D. Proceedings in the Ninth Circuit

Petitioners appealed the district court's order granting the motion to amend the complaint and severing and remanding the partnership dissolution claim. ER58. After the court directed entry of partial judgment under Rule 54(b), petitioners appealed from the judgment, and again from the denial of their post-trial motion for judgment as a matter of law or a new trial. App. 9a (*DeMartini v. DeMartini*, No. 18-15882, Ninth Cir. Dkt. Nos. 348, 382).

On appeal, respondents shifted gears and argued that Timothy joined as a nondiverse defendant averse to himself as plaintiff, which destroyed diversity and barred review under § 1447(d).

The Ninth Circuit agreed and dismissed the appeal. App. 3a. Preliminarily, the Ninth Circuit found that the order amending, severing, and remanding the partnership dissolution claim was appealable under 28 U.S.C. § 1291 from the appeal of the Rule 54(b) partial judgment. App. 8a-9a.

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[5] Petitioners sought judicial notice of the Superior Court records (Dkt. No. 28), which the Ninth Circuit denied as moot.

Notwithstanding the partial judgment, the Ninth Circuit concluded that § 1447(d) categorically precluded review of the district court's order, including and the amendment and joinder orders.

First, the Ninth Circuit ruled that notwithstanding the inherently discretionary nature of the decision to amend a complaint and join a party, "§ 1447(d) deprives us of jurisdiction to review remand orders that were issued pursuant to § 1447(e) and that invoke the grounds specified in that subsection." App. 12a. The Ninth Circuit noted that § 1447(c) remands are mandatory "because once it appears that the district court lacks subject matter jurisdiction the court must remand." App. 14a. "But those under § 1447(e) are also mandatory, because once the diversity-destroying defendant has been joined under that subsection, the district court's only option is to remand." *Id.* The Ninth Circuit acknowledged: "Likewise, if the district court does not join the diversity-destroying defendant, § 1447(e) does not authorize remand." *Id.* Even so, the court held that "no matter whether the district court issued the remand pursuant to § 1447(c) or, as here, pursuant to § 1447(e), § 1447(d)'s bar applies." *Id.*

Second, the Ninth Circuit rejected petitioners' argument that the district court exceeded its authority under § 1447(e) because, as the court recognized, § 1447(e) does not authorize remands based on joinder of plaintiffs whose joinder would not destroy subject-matter jurisdiction. App. 15a-17a. By its terms, § 1447(e) applies where plaintiff joins "additional defendants" whose joinder would destroy subject matter jurisdiction. It does not apply where

plaintiff joins himself in a representative capacity *on behalf of* a fully aligned party whose representative is an *existing* plaintiff in the case. The Ninth Circuit declined to consider whether the district court exceeded its authority under § 1447(e), instead, limiting petitioners' challenge to one based on "legal error" and finding § 1447(d) precludes appellate jurisdiction to examine the basis of the district court's decision. App. 16a-17a. According to the Ninth Circuit, under its precedent and *Powerex Corp. v. Reliant Energy Sers., Inc.*, 551 U.S. 224, 234 (2007), and *Kircher v. Putnam Funds, Tr.*, 547 U.S. 633, 641–42 (2006), while the court of appeals has jurisdiction to determine its own jurisdiction—including whether the district court exceeded its authority—the reviewing court is limited to "taking note of the *grounds* upon which the district court professes to base its remand." App. 15a.

In finding that § 1447(d) categorically bars review of the validity of remand orders, the Ninth Circuit clarified that while appellate courts "may peek at the remand order as part of our 'jurisdiction to determine our own jurisdiction,'" (App. 15a (quoting *Lively*, 456 F.3d at 937)), review is limited to determining whether the district court's justification was colorably characterized as being based on subject matter jurisdiction. "When the district court characterizes its remand as 'resting upon a lack of subject-matter jurisdiction'—as all § 1447(e) remands must—the appellate court's review, 'to the extent it is permissible at all, should be limited to confirming that the characterization was colorable.'" *Id.* (quoting *Powerex*, 551 U.S. at 234).

The Ninth Circuit explicitly rejected petitioners' argument that § 1447(d) permits some review of a remand as necessary to determine if it was, in fact, colorably based on a lack of subject matter jurisdiction, or instead, in excess of authority or based on other, non-jurisdictional or discretionary grounds. Rather, the court held under *Powerex* that appellate inquiry is limited to whether the district court's *characterization* is colorably jurisdictional, not whether the grounds for remand actually were based on lack of subject-matter jurisdiction: "Once the appellate court determined that 'the District Court relied upon a ground that is colorably characterized as subject-matter jurisdiction, appellate review is barred by § 1447(d).'" *Id.* (quoting *Powerex*, 551 U.S. at 234). The court distinguished cases permitting review of remand orders where the "'district court exceeded the scope of its § 1447(c) authority by issuing the remand order in the first place'" (App. 16a (quoting *Lively*, 456 F.3d at 938, citing cases)), because those precedents were "not even ostensibly grounded in lack of subject-matter jurisdiction." *Id.* Thus, the Ninth Circuit concluded that where the district court "characterized the remand as compelled by grounds specified in § 1447(e), "'review is unavailable no matter how plain the legal error in ordering the remand.'" App. 17a (quoting *Kircher*, 547 U.S. at 641–42).

Third, the Ninth Circuit rejected petitioners' argument that § 1447(d) does not categorically bar appellate review of the district court's discretionary orders to amend the complaint and join new parties. Under *City of Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140 (1934), a separable order

that precedes remand "in logic and in fact" and which "if not reversed or set aside, is conclusive upon the petitioner," may be reviewed and reversed, even if the remand order remains intact. *Id.* at 142-44. Petitioners argued § 1447(d) does not categorically preclude review of antecedent orders to amend, join, and sever, which are purely discretionary, non-jurisdictional, and external to the jurisdictional inquiry. The Ninth Circuit rejected this construction, questioning the continuing vitality of this Court's separability doctrine in what the Ninth Circuit described as this Court's "terse, cryptic, and now-controversial opinion" in *Waco*. App. 18a (citing *Kircher*, 547 U.S. at 645 n.13 ("[R]ecently casting doubt on the 'continued vitality' of the limited appellate review [*Waco*] allows"), *C & M Props., L.L.C. v. Burbidge (In re C & M Props., L.L.C.)*, 563 F.3d 1156, 1164 (10th Cir. 2009) (Gorsuch, J.).)

On the first, prong, the Ninth Circuit found that while amendment/joinder orders precede remand in logic, it was unclear whether such antecedent orders precede § 1447(e) remands in fact because § 1447(e) requires either denial of joinder or "join-and-remand," which, contemplates a single step. Even so, the Ninth Circuit found such orders separable.

However, the Ninth Circuit found that such antecedent orders amending a complaint and joining diversity-destroying defendants are not reviewable because they are not conclusive on the issue decided—that is "'functionally unreviewable in the state court.'" App. 19a (quoting *Stevens v. Brink's Home Sec. Inc.*, 378 F.3d 944, 946 (9th Cir. 2004)). Adopting the Fourth Circuit's standard in

Washington Suburban Sanitary Comm'n v. CRS/Sirrine, Inc., 917 F.2d 834, 836 n.4 (4th Cir. 1990), the Ninth Circuit held that *Waco* applies only to antecedent rulings which are simultaneously unreviewable in federal court and "preclusive in state court." Put another way, "a separable order 'result[s] in substantive issues being later barred." App. 21a (quoting *Washington Suburban Sanitary Comm'n*, 917 F.2d at 834 n.4). The Ninth Circuit held that under *Kircher*, because state courts are free to dismiss the diversity-destroying defendants after remand, their joinder is not conclusive under *Waco*, and review is categorically barred by § 1447(d).

The court further held that reversing antecedent amendment/joinder orders is impossible without impermissibly reversing the remand, or alternatively results in impermissible advisory opinions. App. 22a (quoting *Powerex*, 551 U.S. at 236).

The court concluded: "In holding that the joinder of a diversity-destroying party is not separable from a § 1447(e) remand order and is therefore unreviewable, we join the Fourth Circuit." *Id.*

In so doing, the Ninth Circuit expressly recognized that its opinion deviated from two other circuits—the Fifth Circuit and the Third Circuit—which hold that "an order amending a complaint to add a diversity-destroying defendant *is* separable from a remand order." App. 24a-26a. Specifically, the Fifth Circuit in *Doleac ex rel. Doleac v. Michalson*, 264 F.3d 470, 489 (5th Cir. 2001), and the Third Circuit in *Powers v. Southland Corp.*, 4 F.3d 223, 228 (3d Cir. 1993), hold that antecedent joinder orders are separable under *Waco* and reviewable.

The Ninth Circuit rejected *Doleac*, finding it "equivocal" and based on a faulty premise because § 1447(e) requires join-and-remand as a single step and which is not separable from remand. App. 20a, 24a-25a. The Ninth Circuit rejected the Third Circuit's reasoning on grounds that *Powers* involved a substantive amendment (not simply joinder) and application of the relation-back doctrine which "'clearly affected significant substantive rights"—*i.e.*, the joined defendant would lose the benefit of the expiration of the statute of limitations." App. 25a. *Powers* was different, the Ninth Circuit held, because the joinder involved two steps—amendment and joinder—and substantive rights (not just forum selection) were affected.

The court dismissed the appeal for lack of jurisdiction without examining the bases underlying the district court's discretionary joinder. Concurrently, the court filed a memorandum disposition in *DeMartini v. DeMartini*, 819 Fed. Appx. 497 (9th Cir. July 6, 2020) (No. 18-15882), reversing summary judgment and the jury verdict.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's Decision Creates a Circuit Split on Reviewability of Separate Joinder Orders Under *Waco* and § 1447(d).

The Ninth Circuit's decision directly contradicts decisions from the Third and Fifth Circuits holding that antecedent orders amending a complaint to join additional parties, including diversity-destroying defendants, are separable, reviewable orders. Contrary to the Ninth Circuit's holding that § 1447(d)

categorically precludes review of orders joining diversity-destroying defendants preceding § 1447(e) remands, the Third and Fifth Circuits recognize such orders as separable under *Waco*.

A. The Ninth Circuit's Decision Conflicts with Third and Fifth Circuit Decisions.

The Fifth Circuit, while holding that § 1447(d) precludes review of orders remanding cases for lack of subject matter jurisdiction under § 1447(e), has recognized that "joinder is an issue separable from the remand order for § 1447(d) purposes." *Fontenot v. Watson Pharmaceuticals, Inc.*, 718 F.3d 518, 521 (5th Cir. 2013) (citing *Doleac*, 264 F.3d at 485–89). In *Fontenot*, the Fifth Circuit unequivocally reaffirmed its holding in *Doleac* that joinder rulings which precede remand are "both conclusive and collateral to the rights asserted in the action" rendering them separable and reviewable despite § 1447(d).[6] *Id.*; *see also Heaton v. Monogram Credit Card Bank of Georgia*, 297 F.3d 416, 420–22 (5th Cir. 2002) ("Our precedent holds than decisions on joinder of a party are 'separable' and, therefore, conclusive, for City of *Waco* purposes."). Indeed, the Fifth Circuit broadly follows *Waco*: "Under the *City of Waco* rule, 'we may review any aspect of a judgment containing a remand order that is "distinct and separable for the remand proper"' even if this court lacks jurisdiction to review the remand order." *Id.* at 420–21 (quoting *First Nat'l*

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[6] Nevertheless, *Fontenot* found jurisdiction lacking because no final judgment had been entered and the joinder order failed to satisfy the collateral order doctrine. Here, as the Ninth Circuit found, the Rule 54(b) judgment satisfies finality.

Bank v. Genina Marine Servs., Inc., 136 F.3d 391, 394 (5th Cir. 1998)).

"According to *City of Waco*, certain 'separable' orders that (1) logically precede a remand order and (2) are conclusive, in the sense of being functionally unreviewable in state courts, can be reviewed on appeal even when a remand order cannot be." *Id.* at 421. These orders must also be independently reviewable by means of such devices as the collateral order doctrine." *Id.* Thus, the denial of intervention preceding a remand decision is reviewable because it is "indistinguishable from a joinder decision" where the "remand decision was necessarily predicated on the court's refusal to consider the jurisdictional significance of the motion to intervene." *Id.* at 421–22; *Arnold v. State Farm and Cas. Co.*, 277 F.3d 772, 776 (5th Cir. 2001) (following *Doleac* and finding order refusing to recognize class action separable); *Mitchell v. Carlson*, 896 F.2d 128, 132–33 (5th Cir. 1990) (finding jurisdiction to review portion of order vacating substitution and resubstituting defendant "separable from the remand portion").

While the continued vitality of *Waco* may be questionable, the reasoning underlying the separability doctrine remains sound. As the Fifth Circuit explains, § 1447(d) does not bar review of distinct orders preceding remand that are separable—external to the jurisdictional analysis governing remand—because they are made while the district court still had control of the cause *and* subject matter jurisdiction. *Mitchell*, 896 F.2d at 132–33; *see Waco*, 293 U.S. at 143 (dismissal order was separable because it preceded remand in logic and in fact while

district court had control of the cause). While jurisdictional findings made *for the purpose of determining lack of subject matter jurisdiction* (*see Powers*, 4 F.3d at 228), are not conclusive where the district court determines subject matter jurisdiction was lacking at the time the findings were made, orders made prior to the remand decision while subject-matter jurisdiction exists may be subject to review. *Mitchell*, 896 F.2d at 132–33 ("Thus, the resubstitution order being prior to and separable from the remand order, § 1447(d) does not bar us from review of the resubstitution order."). The Fifth Circuit defines conclusiveness in terms of whether the order was "'substantive or jurisdictional'; if a decision is simply jurisdictional it is not conclusive.'" *Dahiya v. Talmidge Int'l Ltd.*, 371 F.3d 207, 210 (5th Cir. 2004) (quoting *Doleac*, 264 F.3d at 486)). Thus, unlike separable rulings adjudicating substantive rights, pre-remand rulings on ERISA preemption and foreign sovereign immunity, for example, resulting in remand of the entire case for lack of subject matter jurisdiction are jurisdictional and not conclusive because they can be decided *in the first instance* after remand. *Id.* at 210–11 (citing cases and finding refusal to compel arbitration and stay proceedings barred by § 1447(d)).

The Third Circuit following *Waco* similarly holds that "we have embraced the principle that a district court cannot prevent appellate review of a *final* collateral order by contemporaneously remanding a case to state court." *Carr v. American Red Cross*, 17 F.3d 671, 674–75 (3d Cir. 1994). Appellate review of orders preceding remand are not barred by § 1447(d) if they are separable and satisfy finality under 28

U.S.C. § 1291. *Id.* (finding dismissal order having "independent relevance" in adjudging the parties' rights was "separable from subsequent order of remand and reviewable as final collateral order); *Aliota v. Graham*, 984 F.2d 1350, 1353 (3d Cir. 1993) (holding question of resubstitution separate from remand question; thus, reviewable on appeal). Thus, in *Powers*, the Third Circuit held that an order granting leave to amend a complaint and joining a diversity-destroying defendant rendered prior to remand was separable and subject to review if it was sufficiently final. 4 F.3d at 228–31. In determining that the portion of the order permitting relation-back and joinder was separable from the remand the Third Circuit held that if the district court looks to the issue "for the purpose of determining subject matter jurisdiction" the issue is not separable because it cannot be said to have preceded the remand decision 'in logic and in fact." *Id.* at 228 (quoting *City of Waco*, 293 U.S. at 143). If, however, "the issue has independent relevance in adjudging the rights of the parties (*i.e.*, relevance beyond determining the existence of federal subject matter jurisdiction), the decision is separable and falls within the reasoning of *City of Waco*—even if it also happens to have an incidental effect on the court's jurisdiction." *Id.*

In holding that the order permitting amendment and joinder was separable from the remand because it had "significant ramifications" affecting the parties' substantive rights (*i.e.*, reviving a time-barred claim) beyond determining the existence of jurisdiction, the Third Circuit found the Fourth Circuit's decision in *Washington Suburban* "easily distinguishable" as the only question there was

whether remand was proper under § 1447(e). *Id.* at 229. In *Washington Suburban*, there was no challenge to the propriety or citizenship of the joined parties and no order resulting in "substantive issues being later barred." 917 F.2d at 836 nn. 4–5. In contrast, as the Third Circuit noted, *Powers* involved not merely a challenge to remand, but whether the court properly allowed amendment joining new parties when the statute had expired—having "important ramifications beyond simply determining whether the suit will be tried in federal or state court."[7] *Id.* at 229 (decision amending and joining additional parties severable thus "appellate review of that portion of the order is not barred by 28 U.S.C. § 1447(d)"); *accord Aliota*, 984 F.2d at 1353 (§ 1447(d) does not bar review of resubstitution order "unless the question of resubstitution is viewed as somehow inextricably linked to the question of remand").

As shown, the Ninth Circuit's decision conflicts with Fifth and Third Circuit decisions finding antecedent amendment and joinder decisions separable and reviewable despite § 1447(d) where, as here, such decisions have independent relevance affecting substantive rights external to the determination of existing subject-matter jurisdiction. Conceptually antecedent rulings on substantive issues that are not determined *for the purpose of*

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[7] The Third Circuit ultimately found jurisdiction lacking because while review was not barred by § 1447(d), the order was not final under § 1291. *Id.* at 229–34 (interlocutory decision to amend failed collateral order test because state court could revisit relation back theory). Here, there is a judgment.

establishing jurisdiction are not barred by § 1447(d) because they were made while the court had subject-matter jurisdiction over the cause, and not—as with findings made for the purpose for determining jurisdiction (*i.e.*, preemption, immunity)—during the time the court lacked jurisdiction. Orders made on antecedent substantive issues are conclusive because they remain in-tact after remand; whereas findings made for the purpose of determining that jurisdiction was lacking are not conclusive precisely because the court lacked jurisdiction to make any findings at all.

Here, there is a square split. In the Third Circuit, amending and joining the trust is reviewable because it did not simply affect a choice of forum—it altered substantive rights by asserting a new property interest and reviving a time-barred claim.[8] In the Fifth Circuit, these decisions are conclusive (thus reviewable) because they are substantive, not jurisdictional, and remain in-tact post-remand. Both circuits construe such antecedent orders as separable and *external* to the process of determining subject-matter jurisdiction. In contrast, the Ninth Circuit holds that pre-remand amendment and joinder orders categorically are unreviewable because they are *one step in the remand process*, inseparable from § 1447(e)'s "join-and-remand" mandate.

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[8] *See*, *supra*, n.3.

B. The Ninth Circuit's Decision Conflicts with Fourth Circuit Decisions, Despite *Washington Suburban*

As the Third Circuit noted, *Washington Suburban* does not support categorically precluding review of antecedent amendment and joinder rulings—as no antecedent separable order was at issue there. The Ninth Circuit's extension of *Washington Suburban* to preclude review of all amendment and joinder orders preceding § 1447(e) remands was wrong and effectively nullifies *Waco's* separability doctrine. Nor does it find support in § 1447(d)'s text which bars review of "[a]n order remanding a case"—not orders amending a complaint, orders joining a party, or orders appealable from a judgment. *Aliota*, 984 F.2d at 1353 (§ 1447(d) governs remand orders and "says nothing about orders directing resubstitution of parties").

Indeed, the Fourth Circuit has long applied *Waco*'s separability doctrine to find that § 1447(d) does not bar review of decisions that are a "conceptual antecedent" to a remand order, even when such rulings are part of an unreviewable remand order. Like the Third Circuit, the Fourth Circuit follows *Waco* and holds that "an otherwise reviewable ruling is not shielded from review merely because it is a constituent aspect of a remand order that would itself be insulated from review by § 1447(d)." *Borneman v. United States*, 213 F.3d 819, 825 (4th Cir. 2000). The Fourth Circuit holds: "We may review a conceptual antecedent ruling even if it was an essential precursor to a remand order that is itself un-reviewable under § 1447(d)." *Ellenberg v.*

Spartan Motors Chassis, Inc., 519 F.3d 192, 197–98 (4th Cir. 2008) (district court's "selection and application of a legal standard" resulting in remand is reviewable as "conceptual antecedent'" to remand).

Truly separate antecedent orders which can be "disaggregated" from the remand order can be reviewed where such orders have a "'conclusive effect upon the parties' substantive rights'"—namely, a "binding decision on the merits and not a mere finding of the district court that may be relitigated in the state court upon remand." *Palmer v. City Nat. Bank*, 498 F.3d 236, 241–42, 243–44 (4th Cir. 2007) (finding district court's application of derivative jurisdiction to dismiss third-party complaint "reviewable order wholly separate from the remand order" and not barred by § 1447(d)). By requiring logical and factual severability, disaggregation mandates that the antecedent ruling "was actually prior to the remand order and was a legally discrete conclusion." *Id.* at 242. This "ensures that the appealable decision was truly distinct from the remand decision and not 'merely a subsidiary legal step[] on the way to [the district court's] determination that the case was not properly removed.'" *Id.* (citing *Nutter v. Monogahela Power Co.*, 4 F.3d 319, 322 (4th Cir. 1993)); *In re CSX Transp., Inc.*, 151 F.3d 164, 167 (4th Cir. 1998) (coverage question as conceptual antecedent to remand not barred by § 1447(d)); *Jamison v. Wiley*, 14 F.3d 222, 233 (4th Cir. 1984) (following Fifth Circuit finding resubstitution order reviewable).

The Ninth Circuit's adoption of the 31-year-old decision in *Washington Suburban* to create a *per se*

rule nullifying separability and barring review of pre-remand joinder orders under § 1447(e)—causing a clear circuit split—contravenes Fourth Circuit law.[9]

C. Other Circuits Follow *City of Waco* and the Third and Fifth Circuit Decisions Above.

Other circuit courts of appeals have followed the decisions above to apply the separability doctrine to permit review of substantive antecedent rulings made in conjunction with remand despite § 1447(d).

For example, the D.C. Circuit, following the Third and Fifth Circuits holds that "§ 1447(d) does not bar appellate review of an order made in conjunction with a remand to state court, even one that was the basis for the decision to remand." *Kimbro v. Velten*, 30 F.3d 1501, 1503 (D.C. Cir. 1994) (pre-remand resubstitution order reviewable.)

The Eleventh Circuit joins the Third, Fourth, Fifth and D.C. Circuits in finding denial of substitution reviewable "despite the fact that the case has been remanded to state court." *Flohr v. Mackovjak*, 84 F.3d 386, 389 (11th Cir. 1996); *see also Aquamar, S.A., v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1285–89 (11th Cir. 1999) (reviewing dismissal order which, like *Waco*, "altered the contours of the remanded state court action").

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[9] *Cf. E.D. ex rel. Darcy v. Pfizer, Inc.*, 722 F.3d 574 (4th Cir. 2013) (finding unreviewable decision denying fraudulent joinder challenge to diversity-destroying party where joinder analysis was "undertaken solely for the resolution of subject matter jurisdiction" which was found lacking).

The Second Circuit follows the Third Circuit and will review separable decisions that have relevance independent of the court's determination that it lacked subject matter jurisdiction. *See Excimer Assocs., Inc. v. LCA Visions, Inc.*, 292 F.3d 134, 138–39 (2d Cir. 2002).[10] The Seventh Circuit, pre-*Powerex*, found § 1447(d) did not bar review of pre-remand decisions adjudicating substantive claims. *J.O. v. Alton Cmty. Unit Sch. Dist. 11*, 909 F.2d 267, 271 (7th Cir. 1990) (reviewing dismissal order). In *Allen v. Ferguson*, 791 F.2d 611, 613–14 (2d Cir. 1986), the Second Circuit followed *Waco* and its progeny to hold that § 1447(d) did not bar review of an order dismissing a party, which resulted in remand, because such order was final and reviewable, even though the remand order was not.

No other circuit holds that antecedent amendment and joinder orders adjudicating substantive rights are *per se* inseparable from § 1447(e) remands or that § 1447(e) mandates "join-and-remand" as a unified step, thus categorically precluding separability and review. The Ninth Circuit's decision stands alone in conflict.

D. Some Courts Reach Different Results, Undercutting Without Rejecting *Waco*

Some courts may find separability, but bar review based on lack of finality or conflate conclusiveness with the collateral order doctrine.

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[10] *Excimer* applied *Powers* to find unreviewable the district court's necessary and indispensable party determination because it was made for the purpose of determining lack of subject-matter jurisdiction and had no independent relevance.

Linder v. Union Pac. R. Co., 762 F.3d 568, 571–72 (7th Cir. 2014) (applying *Waco* but finding decision to join parties was neither final, nor reviewable as collateral order); *Price v. J & H Marsh & McLennan, Inc.*, 493 F.3d 55, 57–59 (2d Cir. 2007) (finding joinder decision may satisfy separability because it was not considered for purpose of assessing subject matter jurisdiction but declining to decide because order not reviewable as collateral order).

Others apply § 1447(d) to bar review of amendment and/or joinder orders without expressly considering and rejecting *Waco* or separability. *See*, *e.g.*, *Blackburn v. Oaktree Capital Mgmt., LLC*, 511 F.3d 633, 637–38 (6th Cir. 2008) (declining to review amendment adding diversity-destroying defendants where order was not explicitly appealed and rejecting the "collateral issue doctrine" because the "grant of the motion to amend . . . and . . . subsequent remand . . . are all part of the same jurisdictional decision"); *Alvarez v. Uniroyal Tire Co.*, 508 F.3d 639, 640–41 & n.3 (11th Cir. 2007) (finding § 1447(d) barred review of a § 1447(e) remand without assessing separability of challenge to underling amendment/joinder); *Matter of Florida Wire & Cable Co.*, 102 F.3d 866, 868–69 (7th Cir. 1996) (following *Washington Suburban* to bar review of § 1447(e) remand order under § 1447(d); no mention of *Waco*/separability).

Most recently, the Tenth Circuit followed the Ninth Circuit's decision to hold that § 1447(d) applies to remands issued under § 1447(e)—but the court did not assess *Waco*/separability nor any challenge to the propriety of joinder, which the court explicitly noted was not at issue. *Elite Oil Field Enters. v. Reed*, 979

F.3d 857, 865 (10th Cir. 2020) ("Notably, appellants do not dispute that the district court's [amendment] destroyed the district court's subject matter jurisdiction over the action.").

II. The Ninth Circuit's *Per Se* Rule Contravenes This Court's Decisions and Plain Statutory Text

The Ninth Circuit's decision is irreconcilable with the cases above, contravenes the text of § 1447, and creates an unprecedented *per se* rule barring review of separable discretionary court orders preceding § 1447(e) remands contrary to *Waco*, and other decisions of this Court.

While most circuits find § 1447(e) remands are subject to § 1447(d), that does not end the inquiry. *Powerex* held that post-removal deprivation of jurisdiction triggers mandatory remand subject to § 1447(c)—it did not hold that separable discretionary *orders* are categorically unreviewable. Nor did it overrule *Waco*, *Thermtron*, or any other exceptions.

A. Statute Governs Orders Remanding Case

First, the text of § 1447(d) does not bar review. It provides: "An *order remanding a case* to the State court from which it was removed is not reviewable on appeal or otherwise." *Id.* (emphasis added). It does not expressly bar review of a separate order amending a complaint or orders joining a party. Such an order is not "'[a]n order remanding a case to the State court from which it was removed,' so by its own terms, § 1447(d) does not apply to review of that decision." *Osborn v. Haley*, 549 U.S. 225, 254 & n.2 (2007) (finding pre-remand order resubstituting defendant not an "order remanding a case" under §

1447(d)) (Souter, J., concurring in part and dissenting in part). The only order requested here was to amend and join, and it issued. Even if no recognized exception to § 1447(d) applies, the statutory text applies only to orders of remand—not separate collateral orders. *Cf. BP P.L.C. v. Mayor and City Counsel of Baltimore*, 593 U.S. ___, ___ (2021) (slip. op., at 4–5, 12 & n.1). That the district court *sua sponte* included *additional* orders severing and remanding a claim does not render the antecedent joinder order unreviewable under § 1447(d). District courts often include several orders in a single document—construing § 1447(d) to bar review of all orders issued in conjunction with a remand is not supported by the statutory text.

B. Discretionary Orders Not Barred

Second, while *Powerex* recognized that § 1447(e) remands are subject to § 1447(d), *Powerex* did not hold that review is automatically (or always) barred. Nor did it overrule recognized exceptions to § 1447(d). The text of § 1447(e) does not mandate remand; it expressly contemplates judicial discretion—giving the district court the choice to retain or relinquish its vested jurisdiction by denying *or* permitting joinder. Section 1447(e) provides: "***If*** after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, *the court* ***may*** *deny joinder* ***or*** *permit joinder and remand* the action to the State court." *Id.* (emphasis added). Even if remand is mandatory, joinder is purely discretionary—not jurisdictional. *Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 90 (2005). Unlike mandatory remands under § 1447(c), where the court determines

that existing facts and law render jurisdiction lacking in the first instance, § 1447(e) remands arise strictly as a result of the court's exercise of a discretionary *choice* to alter the contours of the case in a manner resulting in destruction of jurisdiction.

Once vested with subject matter jurisdiction, district courts are obligated to exercise it. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) ("We have often acknowledged that federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress.") Congress has conferred such jurisdiction over actions "between citizens of different States." 28 U.S.C. § 1332(a)(1). Courts "shall have original jurisdiction" in cases between diverse citizens which, if established at the commencement of the case, must be exercised "'[w]here there is *no* change of party.'" *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 570, 574 (2004) (quoting *Conolly v. Taylor*, 2 Pet. 556, 565 (1829)). In short, courts are obligated to exercise diversity jurisdiction existing when the case is filed and have no discretion to relinquish it. *See Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 355–56 (1988) (noting court in *Thermtron* had "no authority to decline to hear the removed case [because] the court had diversity jurisdiction over the case, which is not discretionary").

In furtherance of that obligation, courts retain broad discretion to dismiss parties or claims to preserve their jurisdiction and can restore lost jurisdiction to save their judgments. *Grupo*, 541 U.S. at 570–75; *Newman-Green, Inc., v. Alfonzo-Larrain*, 490 U.S. 826, 837–38 (1989); Fed. R. Civ. P. 21.

Orders amending complaints and joining new parties are purely discretionary. *Forman v. Davis*, 371 U.S. 178 (1962). As discussed, § 1447(d), by its terms, bars review of orders remanding a case—not discretionary orders amending to join parties or claims. Similarly, § 1447(e), by its terms, *permits* discretionary joinder—it does not mandate it.

This Court has recognized that analogous discretionary orders are not barred by § 1447(d), precisely because they are based on the exercise of judicial discretion to decline subject-matter jurisdiction and not based on an existing lack of subject-matter jurisdiction. *See Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635 (2009). In *Carlsbad*, this Court found that § 1447(d) does not bar review of orders remanding a case after declining to exercise supplemental jurisdiction over state law claims under 28 U.S.C. § 1367(c). This Court reasoned that because §§ 1367(a) and (c) "provide a basis for subject-matter jurisdiction over any properly removed claim," the district court's discretionary decision declining to exercise subject-matter jurisdiction and remand the case could not be "'colorably characterized as a lack of subject matter jurisdiction." *Id.* at 641 (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006)). In so doing, this Court distinguished remands based on *lack of subject-matter jurisdiction* from remands based on a discretionary decision *declining to exercise subject-matter jurisdiction*. *Id.* at 637–41. "This Court's precedent makes clear that whether a court has subject-matter jurisdiction over a claim is distinct from whether a court chooses to exercise that jurisdiction." *Id.* at 639 (citing *Quackenbush*, 517

U.S. at 712 (holding that abstention-based remand is not remand for "lack of subject matter jurisdiction" for purposes of §§ 1447(c) and (d)). Accordingly, a court's remand order, "which rest[s] on its decision declining to exercise supplemental jurisdiction over . . . state-law claims, is [not] a remand based on a 'lack of subject matter jurisdiction' for purposes of §§ 1447(c) and (d)." *Id.* at 638–39.

The reasoning in *Carlsbad* applies with equal force here. Subject-matter jurisdiction vested at the commencement of the suit when complete diversity existed, as it did at the time of removal. The decision to join an additional defendant whose citizenship would destroy subject matter jurisdiction is functionally indistinguishable from the exercise of discretion to decline jurisdiction in *Carlsbad*. A discretionary order joining a party (not as a matter of right under Rule 15, but by court order under Rule 19 or § 1447(e)) is an order choosing to *eliminate* (hence decline) subject-matter jurisdiction—it is not based on a *lack* of subject-matter jurisdiction.

The Ninth Circuit avoided *Carlsbad* by reading § 1447(e) as eliminating the exercise of any discretion and merging "join-and-remand" into a single step. But the plain text, which expressly contemplates a discretionary choice—to deny joinder to save jurisdiction *or* join and remand—does not support that reading. Nor can this construction be squared with common-sense definitions or federal rules, which plainly dictate that orders amending a complaint and joining a party pursuant to a motion to amend do not disappear into a subsequent remand.

Cf. BP P.L.C. v. Mayor and City Counsel of Baltimore, 593 U.S. at ___ (slip. op., at 4–5, 12 & n.1).

C. Remands in Excess of Authority Not Barred

Third, as *Carlsbad* further acknowledged, § 1447(d) is not absolute and "[t]his Court has consistently held that § 1447(d) must be read *pari materia* with § 1447(c), thus limiting the remands barred from appellate review by § 1447(d) to those that are based on a ground specified in § 1447(c)." 556 U.S. at 639 (citing cases). Further, a district court "exceed[s] its authority in remanding on grounds not permitted by the controlling statute." *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 343 (1976). Remands based on grounds not permitted by the controlling statute are not based on a lack of subject-matter jurisdiction; thus, they are not barred by § 1447(d). *Id.* at 343–46.

As discussed, districts are obligated by statute to exercise jurisdiction in cases between diverse citizens and have no discretion to relinquish it absent a change in parties whose joinder destroys diversity. The controlling statute here, § 1447(e), by its terms, authorizes remands where "after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction." The controlling statute does not authorize remands based on joinder of additional plaintiffs, joinder of parties whose citizenship does not destroy diversity, or the addition of an *existing* plaintiff in a new capacity. Jurisdiction vested at the time of removal controls *unless* a new nondiverse defendant is joined. Nothing in the controlling statute authorizes district

courts to remand a case based on an existing diverse plaintiff naming himself as a party in a new capacity.

In discharging their duty to exercise vested jurisdiction, district courts are obligated to determine independently whether diversity jurisdiction *actually exists*—jurisdiction may not be conferred or eliminated by the parties' own characterization of their interests. *See City of Indianapolis v. Chase Nat. Bank*, 314 U.S. 63, 69 (1941); *see also U.S. ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 935 (2009) (noting that the caption in a complaint "'is not determinative as to the identity of the parties to the action"') (quoting 5 A C. Wright & A. Miller, *Federal Practice and Procedure* § 1321, p. 388 (3d ed. 2004)).

Here, the district court failed to conduct any jurisdictional analysis at all and failed to establish or consider whether § 1447(e) applies—instead, declaring by fiat based on the caption alone (contrary to every substantive allegation in the complaint and moving papers) that diversity was destroyed. If, however, no additional defendant destroyed diversity then the court lacked power to divest itself of jurisdiction and exceeded its authority in remanding.

The Ninth Circuit refused to consider whether the remand exceeded the controlling statute by holding that it may only peek behind the order to determine if the remand was colorably characterized as based on subject-matter jurisdiction. In so doing the Ninth Circuit relied on the district court's characterization of its remand, instead of determining whether the remand was actually colorably based on lack of subject-matter jurisdiction.

This analysis turns *Thermtron* on its head, as courts are always empowered (indeed, obligated) to determine their own jurisdiction—an inquiry which necessarily requires some examination of the claims. *Kircher*, 547 U.S. at 545 (citing *United States v. Shipp*, 203 U.S. 563, 573 (1906)). If reviewing courts are prohibited from doing so, and instead must rely on the district court's own characterization, then *Thermtron* is meaningless. *Cf. Academy of Country Music v. Cont'l Cas. Co.*, 991 F.3d 1059, 1063–70 (9th Cir. 2021) (reviewing and vacating remand issued in excess of authority); *Lively v. Wild Oats Markets, Inc.*, 456 F.3d 933 (9th Cir. 2006). The Ninth Circuit's rule unduly constrains the permissible scope of review necessary to effectuate *Thermtron*.

Even while members of this Court have questioned the continuing viability of prior cases like *Thermtron*, *Carlsbad*, and *Waco*, those cases remain binding Supreme Court law, and the lower courts are not empowered to disregard them. *Cf. Osborne*, 549 U.S. at 239–40 (citing *Thermtron* and finding pre-remand resubstitution order not barred by § 1447(d)). *Powerex* did not reject *Thermtron*; it held that § 1447(c) applies to remands based on lack of subject matter jurisdiction even if the case was properly removed in the first instance. 551 U.S. at 230–31. This means that § 1447(c) may be applied to § 1447(e) remands. But *Powerex* did not eliminate the rule in *Thermtron* that only remands based on lack of subject matter jurisdiction are barred. Regarding colorability, *Powerex* explicitly rejected the contention that reviewing courts must defer to the district court's "purported" ground for remand. *Id.* at 233 (declining to follow rule barring review under §

1447(d) based solely on district court's "purported" ground for remand for lack of jurisdiction); *cf. Kircher*, 547 U.S. at 641–42 & n.9 (reserving the question). This Court examined the basis of the district court's conclusion that it lacked subject matter jurisdiction, finding the asserted legal ground was "plausible" and the reasoning "debatable."

The Ninth Circuit's rule prohibits such inquiry.

The district court's discretion to join a defendant whose citizenship destroys complete diversity must be examined in light of the court's unflagging obligation to exercise its subject matter jurisdiction. The controlling statutes here §§ 1447(e) and 1332(a), read together, require courts to exercise their jurisdiction and authorize remand only when that jurisdiction is in fact destroyed. Unlike claims arising under federal law, or certain defenses, which are subject to the district court's interpretation of existing law and facts, and which may or may not be "colorable," diversity jurisdiction, if it exists, must be exercised—there is no discretion to decline to do so.

These statutory mandates are fundamentally undermined if appellate courts are prohibited from examining the validity of the district court's opinion that its vested subject matter-jurisdiction has been destroyed, or lawfully relinquished, by its choice.

D. Separable, Conclusive Orders Not Barred

As discussed, petitioners respectfully submit that the circuit split outlined above warrants review in this Court. Petitioners submit that the Third and Fifth Circuits employ the correct analysis, and the

Ninth Circuit's contrary rule merging "join-and-remand" into a single mandatory step and eliminating the right to challenge an otherwise appealable discretionary court order simply because that order is rendered in conjunction with a remand order is wrong and should not be permitted to stand.

While *Waco* has been called into question, it has not been overruled and as shown above courts across the nation continue to apply it. *See Osborne*, 549 U.S. at 254 (noting *Waco* supported "disaggregation of a remand order from a substantive determination about substitution that preceded it") (Souter, J., concurring in part and dissenting in part). It seems clear that while jurisdictional *findings* rendered in the process of determining whether subject-matter jurisdiction exists, or is lacking, are not conclusive or separable, court *orders* issued upon adjudication of a motion brought pursuant to federal rules, are separable from a subsequent remand. This distinction between jurisdictional findings or judicial reasoning and separate antecedent court orders is significant—particularly, where such orders are appealable, or where judgment has been entered.

The Ninth Circuit here however overlooked these distinctions finding that the pre-remand orders were barred by § 1447(d) because they were not conclusive. The reasoning was circular: the orders are not final because they can be revisited in the state court and because they can be revisited in the state court, they are not conclusive. The Ninth Circuit's reasoning is flawed and contravenes the decisions of this Court.

This Court in *Kircher* distinguished, but did not disavow, *Waco*, on grounds that the dismissal order

in *Waco* could be disaggregated from the remand order, the dismissal order was being appealed, not the remand order, and the dismissal could be reversed without necessarily reversing the remand. *Kircher*, 547 U.S. at 644 n.13. The findings in the remand orders challenged in *Kircher* could not be disaggregated from the remand orders (and thus could not be reversed without reversing remands) because they were predicate findings rendered in the process of determining whether subject-matter jurisdiction was lacking. *Id.* at 640–48. These jurisdictional findings were intrinsic to the remand—not separate court orders granting collateral relief.

Critically, in *Kircher*, the district court did not issue any orders granting substantive relief, altering claims or parties, or adjudicating rights under federal law. The district court decided only that the claims were not covered under the governing statute and thus not removable. The only impact of that finding was a choice in forum, as the defendant could enlist the state court to revisit the issue and determine that the statute applies. *Kircher* noted then that while the remand could not be challenged, the state court was free to reject the reasoning for the remand. *Id.*

In contrast, court orders adding substantive claims and joining new parties under federal rules affect more than just choice of forum—they fundamentally alter the contours of the case. Unlike *reasoning* or jurisdictional findings, such federal court *orders* are binding on the state courts. *See In re Life Ins. Co. of North Am.*, 857 F.2d 1190, 1193 (8th Cir. 1988). That the state court *may* grant some relief from the effects of those orders (*i.e.*, by granting

a motion to dismiss) under governing state law does not render them nonbinding in the first instance; nor does it mean that the state appellate courts are empowered to reverse federal court orders issued while the district court had control of the case. Such orders are conclusive precisely because they remain intact after remand—unlike the district court's reasoning or predicate findings made for the purpose of determining the lack of subject-matter jurisdiction.

The Ninth Circuit failed to distinguish between reasoning and orders and thus contravened *Waco*—and ignored the significance of the partial judgment.

The Ninth Circuit's construction of *Powerex* was similarly flawed. This Court in *Powerex* declined to apply *Waco* because there was "no *order* separate from the unreviewable remand order." 551 U.S. at 236 ("Here, petitioner can point to no District Court order, separate from the remand, to which he objects and to which the issue of its foreign sovereign status is material."). Absent a separate order, petitioner's invocation of *Waco* amounted to "a request for one of two impermissible outcomes: an advisory opinion as to its FSIA status that will not affect any order of the District Court, or a reversal of the remand order." *Id.* That problem does not apply where separate orders were issued and may be reversed without necessarily reversing the subsequent remand order. *Cf. Barlow v. Colgate Palmolive Co.*, 772 F.3d 1001, 1010–11 (4th Cir. 2014) (en banc) (finding § 1447(d) prohibits "reviewing" but not "vacating" order); *Acquamar*, 179 F.3d at 1288 (citing *U.S. Bancorp. Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 22–23 (1994)).

CONCLUSION

Clarity in matters of jurisdiction is "especially important." *Direct Mktg. Ass'n v. Brohl*, 575 U.S. 1, 14 (2015); *United States v. Sisson*, 399 U.S. 267, 307 (1970). Yet, courts and litigants nationwide continue to invoke *Waco* with disparate and unsettled results. This Court should grant the petition to resolve the circuit split, confirm the continued vitality of *Waco*, and clarify the standards governing reviewability of diversity-destroying joinder orders under § 1447(e).

Respectfully submitted,

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