No. 05-85

IN THE
Supreme Court of the United States

POWEREX CORP.,
Petitioner,

v.

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

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

REPLY BRIEF FOR PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Petitioner's Statement pursuant to Rule 29.6 was set forth at page vii of the petition for a writ of certiorari, and there are no amendments to that Statement.

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Respondents (plaintiffs below) do not dispute two key facts: (1) the Ninth Circuit's approach to resolving claims under the FSIA conflicts with that of three other circuits; and (2) the issues involved in this case are critically important for foreign governments conducting business in the United States. Indeed, the governments of Canada and British Columbia have taken the unusual step of filing *amicus* briefs at the certiorari stage to support plenary review. Plaintiffs do not dispute that the Questions Presented warrant certiorari.

Instead, they merely protest that this case is not the proper vehicle for resolving them. Plaintiffs' principal contention is that this Court should deny review because the case is about to be mooted by settlements between the plaintiffs and the defendants (two of whom filed the cross-claims that brought Powerex into this case). Although one of those settlements remains subject to certain contingencies, if the Court agrees with plaintiffs about mootness, the appropriate disposition is not to deny the petition but to vacate the decisions below under *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950), which held that the mooting of a case should not deprive a party of its rights to obtain appellate review. Under *Munsingwear*, Powerex is entitled to vacatur of the decisions below because Powerex did not contribute in any way (as plaintiffs themselves note) to the case becoming moot.

If the Court does not perceive that this case is in fact moot at this time, an alternative disposition would be to hold this petition for *Powerex Corp. v. California ex rel. Lockyer*, No. 05-584 (U.S. filed Nov. 4, 2005), in which the exact same issues are presented and the State of California has waived response. The Court should call for a response in No. 05-584, as it did here, and hold this petition pending disposition of that case and the conclusion of the settlement process. That treatment would ensure that Powerex is not prejudiced by the parties' settlement in No. 05-85 and deprived of appellate review of its status as

a foreign sovereign, an issue the Ninth Circuit in No. 05-584 treated as settled law by dismissing Powerex's appeal.

I. THIS COURT HAS JURISDICTION TO DECIDE THE ISSUES PRESENTED BY THE PETITION

Plaintiffs assert the existence of three jurisdictional obstacles to review by this Court. None provides a basis for denying the petition. First, a live controversy in this case remains because one of the settlements has not yet taken effect, and events that might moot the case in the future are subject to contingencies. Second, this Court can remedy the district court's erroneous remand order, as it has done in prior cases. Third, the court of appeals correctly determined that it had appellate jurisdiction over this case.

A. The Settlement Agreements Have Not Mooted This Case

This petition arises out of consolidated actions originally filed in California state court by a class of plaintiffs (respondents here) against a number of defendants (also respondents here), including Reliant Energy Services, Inc. ("Reliant") and Duke Energy Trading and Marketing, LLC ("Duke"). Reliant and Duke brought cross-claims against Powerex and others. Plaintiffs' claims against Reliant and Duke have been compromised as part of global settlement agreements entered into by the two companies to resolve all of their potential liabilities arising out of their conduct during the California energy crisis. The Reliant settlement is under review by the state trial court and the Federal Energy Regulatory Commission ("FERC"), and plaintiffs' claims against Reliant remain pending in state court.[1] Reliant and the other cross-defendants, however, have agreed to the dismissal of

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[1] The Duke settlement has been approved by the state trial court and FERC. *See* Order on Settlement Agreement, *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs. into Markets Operated by the Cal. Indep. Sys. Operator & the Cal. Power Exch.*, 109 FERC ¶ 61,257 (2004).

Reliant's cross-complaint, subject to a significant qualification – that the cross-complaint will be reinstated if Reliant's global settlement is rejected by FERC or the state courts. Powerex has not joined the other cross-defendants in agreeing to the dismissal of the cross-complaint, and the cross-claims against Powerex have not been dismissed.

Although conceding (Opp. 3) that cross-claims against Powerex remain pending, plaintiffs nonetheless assert that this case is moot because all parties except Powerex are willing to have the cross-claims dismissed. But that contention ignores the significant contingencies to which the proposed dismissal would be subject – state court and FERC approval and affirmance on appeal if any objector appears. Neither the state courts nor FERC has approved the Reliant settlement.

Thus, all parties retain "a continuing interest" in this litigation. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 192 (2000). Reliant retains the right to pursue its pending cross-claims against Powerex if the global settlements are invalidated and plaintiffs pursue their claims against Duke and Reliant. Plaintiffs therefore overstate the situation in asserting that the case is now moot.

If the global settlements are approved and this petition formally becomes moot, Powerex, through no conduct of its own, will have lost the opportunity to seek this Court's review of the court of appeals' judgment denying its right to remove the case as a foreign sovereign under the FSIA. Consequently, the proper disposition would be to grant this petition, vacate that part of the court of appeals' judgment that is the subject of Powerex's appeal to this Court – the Ninth Circuit's decision that Powerex is not a foreign sovereign – and remand with instructions to vacate the lower courts' rulings that Powerex is not a foreign sovereign. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 71-75, 80 (1997); *Munsingwear*, 340 U.S. at

39.[2] Because Powerex has not participated in the settlements or the proposals to dismiss the cross-complaints, there is no basis for permitting the lower courts' judgments to stand under the rule that those who voluntarily forfeit review through settlement are not entitled to vacatur. *See U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994).

Significantly, the Ninth Circuit panel that denied Powerex's FSIA claim in this case lacked the benefit of the *amicus curiae* briefs that Canada and the Province of British Columbia have filed urging this Court to grant certiorari and to reverse the Ninth Circuit. Issuing a *Munsingwear* order in this case is crucial to provide the Ninth Circuit an opportunity to re-evaluate Powerex's FSIA claims in light of those foreign sovereigns' attestations to Powerex's sovereign status. If this Court instead allows the court of appeals' decision in this case to stand by denying certiorari in this case and in No. 05-584, Powerex will never have another opportunity to assert its FSIA rights in the United States judicial circuit in which it does the bulk of its business.[3]

The Ninth Circuit made that clear when it summarily dismissed an appeal by Powerex on the evident authority of its decision in this case. Powerex has sought this Court's review of that decision as well, and its petition in No. 05-584 raises the same two important questions that are presented here.[4] As things stand, plenary review by

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[2] In other cases, this Court has issued such partial vacaturs for mootness. *See*, *e.g.*, *Deakins v. Monaghan*, 484 U.S. 193, 195 (1988). That disposition is appropriate given that no other party is challenging any other aspect of the Ninth Circuit's decision, such as its correct holding that BC Hydro is a foreign sovereign.

[3] In addition, there is also the possibility that a plaintiff could claim that issue preclusion prevents Powerex from re-litigating in a different circuit the question whether it is a foreign sovereign under the FSIA.

[4] If the Court determines that this case is moot and properly issues a *Munsingwear* order, it should also vacate the Ninth Circuit's judgment in No. 05-584 – which depends on that court's decision in this

this Court is Powerex's only remaining avenue for obtaining appellate consideration of its FSIA claims unless the Court issues a *Munsingwear* order. Denial of that review would force Powerex to defend itself against multiple suits in state court, stripped of the jurisdictional and procedural protections guaranteed it by Congress in the FSIA.

B. The District Court's Entry Of An Order Of Remand Did Not Moot This Case

Plaintiffs advance the remarkable position that the district court's order remanding this case to state court stripped this Court of the power to review the court of appeals' judgment. The Court's cases refute that contention. In *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706 (1996), this Court held that a district court erred in remanding a case, and it affirmed the court of appeals' judgment vacating the remand order and directing that the case be sent to arbitration. *See id.* at 710, 731. In doing so, this Court gave no indication that the court of appeals had lacked the power to vacate the district court's order of remand, even though that order had not been stayed. *See id.* at 710. Similarly, in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), this Court reversed the court of appeals' affirmance of a remand order, holding that the district court had exceeded its authority in remanding. *See id.* at 345, 353. Again, the opinion contained no indication that this Court lacked jurisdiction to undo the remand order, and nothing in the opinion suggested that the remand order had been stayed.

Plaintiffs contend, however, that this Court's decision in *City of Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140 (1934), stands for the proposition that a remand order, once effectuated, cannot be undone. But *City of Waco* held no such thing. There, the remand order had not been appealed. *See id.* at 142. Thus, in observing

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case – and remand that case for further consideration, thereby providing the Ninth Circuit a chance to consider Powerex's FSIA claim in light of the *amicus* briefs of Canada and British Columbia.

that "[a] reversal cannot affect the order of remand," *id.* at 143, the Court was simply acknowledging that an appellate court lacks the power to reverse or vacate an order that has not been appealed. Nothing in *City of Waco* suggests that a remand order is *always* functionally unreviewable because it cannot be undone if a reviewing court concludes that it was erroneous.

C. The Court Of Appeals Had Jurisdiction Over Powerex's Appeal

Plaintiffs also incorrectly assert (Opp. 4) that this Court cannot review the FSIA rulings in this case because they accompanied an order of remand. The Ninth Circuit correctly concluded (Pet. App. 9a-10a) that 28 U.S.C. § 1447(d) does not prevent appellate review of a district court's resolution of a removing party's claim to foreign-state status under the FSIA. Under this Court's decision in *City of Waco*, legal determinations that "precede[]" an order of remand "in logic and in fact" and that are "conclusive" can be reviewed on appeal. 293 U.S. at 143. A conclusion that a foreign entity is not an "instrumentality of a foreign state" under the FSIA fits those criteria for two reasons. First, the rejection of an FSIA claim has "independent relevance in adjudging the rights of the parties," *Powers v. Southland Corp.*, 4 F.3d 223, 227-28 (3d Cir. 1993) – and therefore "precede[s]" the decision to remand – because the FSIA confers "particularized procedural" rights on foreign sovereigns beyond jurisdiction, including extended time to answer a complaint, protections against default, limitations on remedies, special venue rules, and the right to a non-jury trial before a federal judge. *See USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 207 (3d Cir. 2003), *cert. denied*, 541 U.S. 903 (2004); 28 U.S.C. §§ 1391(f), 1441(d), 1608(d)-(e), 1609. Second, denial of foreign-state status under the FSIA is "functionally unreviewable in state court[]," *Stevens v. Brink's Home Sec., Inc.*, 378 F.3d 944, 946 (9th Cir. 2004) (internal quotation marks omitted) – and thus "conclusive" – because the state court on remand is not empowered to

afford a foreign entity any of the procedural and jurisdictional protections to which it is entitled under the FSIA. Thus, the rejection of an FSIA claim is a conclusive legal ruling preceding the decision to remand that can be reviewed on appeal consistent with § 1447(d).

More importantly for the Court's consideration of this petition, the existence of that issue of appellate jurisdiction does not provide a reason for denying certiorari. If anything, it provides an additional reason to grant this petition, because the question independently merits this Court's review. As plaintiffs note (Opp. 4), the courts of appeals are in conflict regarding the appealability of remand orders rejecting removal under the FSIA. *Compare* Pet. App. 9a-10a *with Linton v. Airbus Indus.*, 30 F.3d 592 (5th Cir. 1994). The issue is an important one: the way in which federal courts treat FSIA claims has a significant impact on this country's foreign trade and international relations. The lack of a uniform national rule permitting foreign entities that are denied the right to remove under the FSIA to obtain appellate review threatens international comity. A single federal district judge should not have unreviewable discretion to deny a foreign entity its right to a bench trial in federal court and to subject that entity to a jury trial in state court, particularly where a plaintiff in a subsequent suit against that entity might contend that that judge's ruling should be given issue-preclusive effect. In addition, this case and No. 05-584 provide the Court an excellent opportunity to clarify the appealability of remand orders generally; this Court recently recognized the importance of providing that clarity by inviting the Solicitor General to file a brief expressing the views of the United States in a case raising a question regarding the appealability of remand orders. *See* Order, *Davis v. International Union, UAW*, No. 05-107 (U.S. Dec. 5, 2005).

II. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE MULTI-CIRCUIT CONFLICT ON THE PROPER TEST FOR DETERMINING WHETHER AN ENTITY IS AN "ORGAN" OF A FOREIGN STATE UNDER THE FSIA

Plaintiffs refuse to acknowledge (Opp. 6-8) that the Ninth Circuit has developed a new, categorical approach to resolving FSIA claims that departs from Congress's desire for a fact-sensitive review of each case. They assert that the court of appeals here considered *sub silentio* both the circumstances surrounding the creation of Powerex and the employment policies and responsibilities of Powerex because the court cited a page from its prior decision in *Patrickson v. Dole Food Co.*, 251 F.3d 795 (9th Cir. 2001), *aff'd in part*, 538 U.S. 468 (2003). But plaintiffs ignore the sentence immediately preceding the court of appeals' citation of *Dole Food*. In that sentence, the Ninth Circuit articulated the test that it would apply to Powerex's FSIA claim, omitting any mention of circumstances of creation and employment practices: "[W]e look to the purposes of an entity's activities, the entity's independence from government, the level of financial support received from the government, and the entity's privileges and obligations under the law." Pet. App. 15a (citing *Dole Food*, 251 F.3d at 807). The Ninth Circuit's citation to its prior decision in *Dole Food* does not change the fact that it failed completely to consider Powerex's genesis as a wholly owned subsidiary of a Canadian Crown Corporation that is the Province's agent by statute, Powerex's adherence to Provincial guidelines for its operations (including employment policies), and the Province's guarantees of pension benefits for Powerex's employees. *See id.* at 14a-16a.[5]

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[5] Although the Ninth Circuit in *Dole Food* recited the factors that the panel below failed to consider here, the *Dole Food* panel ultimately truncated the proper inquiry by refusing to acknowledge the significance of Israel's creation of the entities at issue there for the public purpose of exploiting governmental resources. *See* 251 F.3d at 808.

In any event, plaintiffs have not disputed the reality that the categorical standard applied by the panel in this case conflicts with the totality-of-the-circumstances approach that prevails in the Second, Third, and Fifth Circuits. *See Filler v. Hanvit Bank*, 378 F.3d 213, 217 (2d Cir.), *cert. denied*, 125 S. Ct. 677 (2004); *USX*, 345 F.3d at 206, 209; *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 846-47 (5th Cir. 2000). Nor do they contest the fact that the current lack of uniformity in interpretation of the FSIA affects an immense amount of commerce flowing through states composing the Ninth Circuit. *See* Pet. 24-25. This Court's review is needed to assure foreign entities engaged in business in this country that they will not be denied their jurisdictional and procedural rights under the FSIA by courts that fail to take into account all of the factors that bear on their sovereign status.

III. THE NINTH CIRCUIT MISUNDERSTOOD THIS COURT'S DECISION IN *DOLE FOOD*

Plaintiffs err in contending (Opp. 8-9) that Powerex is not an "instrumentality of a foreign state" "a majority of whose shares . . . is owned by a foreign state," 28 U.S.C. § 1603(b)(2), because Powerex is wholly owned by BC Hydro rather than by the Province. Powerex is, in fact, directly and wholly owned by the Province, through its statutory agent, BC Hydro. Thus, Powerex does not advance the contention, rejected by this Court in *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474-75 (2003), that tiered or indirect ownership by a foreign sovereign suffices to establish foreign-state status under the FSIA. *Dole Food* casts no doubt on the traditional common-law rule that an agent (BC Hydro) can own property (Powerex) on behalf of its principal (the Province). This Court should grant review to correct the Ninth Circuit's misinterpretation of *Dole Food*.

IV. THIS COURT SHOULD CALL FOR A RESPONSE TO THE PETITION IN NO. 05-584 AND HOLD THIS PETITION PENDING THAT RESPONSE

Powerex's petitions in this case and No. 05-584 would serve as ideal companion cases for this Court's review of the questions presented in the petitions. No. 05-584 does not raise the mootness issues presented in this case, and this case is a direct appeal from the decision being used as precedent in the judgment underlying the decision being appealed in No. 05-584. California has waived response in No. 05-584. This Court should call for a response in that case, as it did here, and hold this petition pending that response. The Court should then grant both petitions, or the petition in No. 05-584 only, if this petition has been mooted in the interim. The court of appeals in No. 05-584 summarily dismissed Powerex's appeal based on the erroneous view that Powerex is not a foreign sovereign, which was the underlying holding of the court's decision here. Declining to hold this petition pending the response in No. 05-584 would leave this Court, if it subsequently granted certiorari in No. 05-584, in the anomalous position of reviewing a judgment in one case (No. 05-584) when the underlying substantive opinion was issued in another case (this one). Additionally, in light of the importance of the issues presented in these two petitions to international relations and commerce between the United States and Canada, this nation's largest trading partner, this Court should consider inviting the Solicitor General to file a brief expressing the views of the United States on these cases.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted. Alternatively, the petition should be granted, and that part of the decision below addressing the sovereign status of Powerex should be vacated under *Munsingwear*, or held pending disposition of the petition in No. 05-584.

Respectfully submitted,

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