No. 23-677

IN THE

Supreme Court of the United States

ROYAL CANIN U.S.A., INC., *et al.*,

Petitioners,

v.

ANASTASIA WULLSCHLEGER, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF *AMICUS CURIAE* DRI–CENTER FOR LAW AND PUBLIC POLICY IN SUPPORT OF PETITIONERS NESTLÉ PURINA PETCARE COMPANY AND ROYAL CANIN U.S.A., INC.

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QUESTIONS PRESENTED

If, in an action properly removed to federal court pursuant to 28 U.S.C. § 1441(a) based on federal-question jurisdiction under 28 U.S.C. § 1331, a plaintiff amends the complaint post-removal by omitting federal questions to compel remand:

1. Whether the district court can continue to exercise supplemental jurisdiction over the plaintiff's remaining state-law claims under 28 U.S.C. § 1367.

2. Whether the district court retains federal question subject-matter jurisdiction.

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STATEMENT OF INTEREST[1]

Amicus curiae DRI–Center for Law and Public Policy is the policy arm of a more than 12,000-member international association of defense lawyers who represent individuals, corporations, and local governments involved in civil litigation. DRI and its Center for Law and Public Policy also work with affiliated state and local defense organizations in every state and in Canada. DRI has long advocated for procedural reforms that: (1) promote fairness in the civil justice system, (2) reduce the costs and burdens associated with litigation, and (3) advance predictability and efficiency in litigation.

This case concerns subject-matter jurisdiction, and specifically: 1) whether, following a post-removal amendment to the complaint to eliminate the federal questions, a district court may continue to exercise supplemental jurisdiction over the remaining state law claims, and 2) whether, following the post-removal amendment, the district court maintains federal question subject-matter jurisdiction. The Eighth Circuit's decision, which conflicts with opinions from every other circuit to have considered the question, as well as several opinions of this Court, holds that amending the complaint to eliminate federal questions destroys subject-matter jurisdiction and eliminates the district court's authority to exercise supplemental jurisdiction. Not only is the Eighth Circuit's

1. Under Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amicus curiae, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Petitioners and Respondents were given timely notice of *amicus curiae*'s intent to file this brief as required under Rule 37.

decision wrong, but it promotes gamesmanship by allowing plaintiffs to plead both state and federal claims in state court and wait and see if the defendant removes the action.

DRI's interest in this case stems from its members' representation of clients who routinely exercise their statutory right of removal under 28 U.S.C. § 1441. DRI's interest further stems from its members' need to protect their clients and to ensure that the right of access to federal courts provided by Congress is not subverted, thereby disrupting the orderly flow of litigation and wasting the time and resources of the judiciary and defendants.

SUMMARY OF ARGUMENT

DRI writes in support of Petitioners Nestlé Purina PetCare Company and Royal Canin U.S.A. Inc.'s position that a post-removal amendment does not preclude a district court from continuing to exercise supplemental jurisdiction and does not defeat federal question subject-matter jurisdiction. This position is supported by several opinions of this Court, including *Carnegie–Mellon Univ. v. Cohill*, 484 U.S. 343 (1988) and *Rockwell Int'l Corp. v. United States*, 549 U.S. 457 (2007).

This Court should reverse the Eighth Circuit's decision because it defies several opinions of this Court as well as precedent from every other circuit across the country. The opinion turns a blind eye to the discretion afforded to district courts under the supplemental jurisdiction statute, ignores principles of stare decisis, and subverts a defendant's statutory right of removal.

In *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343 (1988), this Court confirmed that a district court retains the discretion to exercise supplemental jurisdiction: "We conclude that a district court *has discretion* to remand to state court a removed case involving pendent claims[.]" *Id.* at 357 (emphasis added). Significantly, this Court added that when exercising that discretion, "[a] district court can consider whether the plaintiff has engaged in any manipulative tactics when it decides whether to remand a case." *Id.* And in *Rockwell Int'l Corp. v. United States*, 549 U.S. 457 (2007), this Court answered the second question in the affirmative, stating: "when a defendant removes a case to federal court based on the presence of a federal claim, an amendment eliminating the original basis for federal jurisdiction generally does not defeat jurisdiction." *Id.* at 474. Contrary to both *Cohill* and *Rockwell*, the Eighth Circuit's decision answers both questions in the negative without providing any room for discretion by the district court.

As to supplemental jurisdiction, precedent from every other circuit, as well as from this Court, is clear—a district court has discretion to decide whether to retain jurisdiction or to remand the action. *See*, *e.g.*, *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 639 (2009) ("A district court's decision whether to exercise that [supplemental] jurisdiction after dismissing every claim over which it had original jurisdiction is purely discretionary."). Yet the Eighth Circuit's decision strips district courts of their discretion and mandates remand in all cases where the federal claims are dismissed. That holding is directly contrary to the language in 28 U.S.C. § 1367, which derives from the "old soil" of cases that came before it—cases which emphasized that pendent

jurisdiction is a doctrine of discretion. By doing away with that discretion, the Eighth Circuit's decision robs district courts of the ability to guard against forum-shopping and gamesmanship tactics employed by plaintiffs. In fact, the Eighth Circuit's decision not only permits gamesmanship, but it *encourages* it, because it includes no recourse for plaintiffs who plead both state and federal claims but later decide, as part of a tactical effort to return to state court, to dismiss the federal claims at the expense of all involved.

As part of the gamesmanship, plaintiffs may strategically amend their complaints to deprive the federal court of jurisdiction on the eve of an adverse ruling or only days before a trial. This was not Congress' intent when it enacted both the removal statute and the supplemental jurisdiction statute. *See* 28 U.S.C. § 1441, 28 U.S.C. § 1367.

Not only does the Eighth Circuit's decision defy precedent, but it strips defendants of the statutory right of removal under 28 U.S.C. § 1441 by providing plaintiffs with an escape hatch back to state court. Plaintiffs who plead federal claims know that the action may be removed; if they wish to avoid removal, they can plead their claims appropriately. The Eighth Circuit's decision gives plaintiffs free rein to plead both state and federal claims with the assurance that they can drop the federal claims later and return to state court if the federal forum proves unfavorable.

If the Eighth Circuit's decision is allowed to stand, it will have far-reaching ramifications for DRI members and their clients across Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota and will impact those defendants' ability to exercise their right

to litigate major cases in federal court. The defendants will incur the brunt of tactical gamesmanship and forum-shopping at the whim of plaintiffs who maintain the assurance of a reliable escape hatch back to state court, even after the defendant exercises the statutory right of removal. The Eighth Circuit's decision not only runs roughshod over defendants' statutory right of removal, but condones manipulative tactics, undermines trust in the court system, and destabilizes litigation across the country. This jockeying back and forth from state court to federal court and back to state court forces DRI members and their clients to expend significantly more time and resources litigating matters and places an unnecessary strain on the state and federal judiciaries (and especially on the state court systems, which are already overburdened).

The blanket rule the Eighth Circuit's decision creates—that post-removal amendments destroy federal question subject-matter jurisdiction and preclude the exercise of supplemental jurisdiction in *all* cases—is particularly problematic for cases such as this one, where the parties expended significant time and resources litigating the action in federal court. If upheld, the Eighth Circuit's ruling here will wipe away the dismissal of Respondents' case for failure to state a claim, and permit Respondents to return to state court after losing on the merits in federal court. This tactic of delayed amendment to the complaint no doubt will be used by countless other plaintiffs if the Eighth Circuit's decision is permitted to stand.

For all of these reasons, the Eighth Circuit's decision should be reversed.

ARGUMENT

I. Congress Drafted 28 U.S.C. § 1367 to Prevent Precisely the Kind of Gamesmanship Respondents Engage in Here

A. The Plain Text of 28 U.S.C. § 1367 Confirms the District Court's Discretion to Continue its Exercise of Supplemental Jurisdiction After Elimination of Federal Claims

The plain text of 28 U.S.C. § 1367 confirms that a district court maintains the discretion to decide whether to retain state-law claims after an amendment deletes the federal law claims that were the predicate for removal. 28 U.S.C. § 1367 states, in relevant part:

> (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—
>
> . . .
>
> (3) the district court has dismissed all claims over which it has original jurisdiction
> . . .

28 U.S.C. § 1367(c)(3) (emphasis added). *See also City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 173 (1997) ("The supplemental jurisdiction statute . . . confirms the discretionary nature of supplemental jurisdiction by enumerating the circumstances in which district courts can refuse its exercise[.]").

But the Eighth Circuit's decision disregards the discretionary "may" language in the statute and replaces that language with its own contrary holding—that a district court *must not* exercise supplemental jurisdiction over remaining state-law claims. This exact point was made by the First Circuit in *Grispino v. New England Mut. Life Ins. Co.*, 358 F.3d 16 (1st Cir. 2004). In that case, the court explained:

> The Grispinos argue that the district court should have granted some form of a remand order because there was no federal subject matter jurisdiction once they amended the complaint to delete the federal RICO claim. *This argument is wrong*: *the dismissal of the only federal claim after removal of an action to federal court does not by itself deprive the federal court of jurisdiction over the remaining state claims*. See 28 U.S.C. § 1367(c) (the district court "*may* decline to exercise supplemental jurisdiction over a claim . . . if . . . the district court has dismissed all claims over which is has original jurisdiction" . . .).

Id. at 19 (emphasis added).

A blanket rule against exercising supplemental jurisdiction in every case where a plaintiff voluntarily abandons its federal claims post-removal is not what Congress intended when it enacted the supplemental jurisdiction statute. The Eighth Circuit's decision, in one fell swoop, eliminates district courts' discretion to retain jurisdiction in that context. (*See* Pet.App.12a: "[T]he possibility of supplemental jurisdiction vanished right alongside the once-present federal questions[.]").

Authority in support of district courts' discretion to exercise supplemental jurisdiction after a plaintiff abandons federal claims post-removal abounds. The Eighth Circuit's decision here contrasts with the discretionary approach taken by every other circuit across the nation (and even the Eighth Circuit before its opinion in this case). *See Grispino*, 358 F.3d at 19; *Roche v. John Hancock Mut. Life Ins. Co.*, 81 F.3d 249, 256–57 (1st Cir. 1996) ("In a federal-question case, the termination of the foundational federal claim does not divest the district court of power to exercise supplemental jurisdiction but, rather, sets the stage for an exercise of the court's informed discretion."); *Marcus v. AT&T Corp.*, 138 F.3d 46, 57 (2d Cir. 1998) ("Dismissal of the pendent state law claims is not, however, 'absolutely mandatory' even where the federal claims have been dismissed before trial."); *Coefield v. GPU*, 125 F. App'x 445, 448 n.3 (3d Cir. 2005) ("Following Appellant's amendment of his complaint (purging it of all claims implicating federal law), the District Court had the discretion to retain or remand the remaining state law claims."); *Savage v. W. Virginia Dep't of Health & Hum. Res.*, 523 F. App'x 249, 250 (4th Cir. 2013) ("Once the district court dismissed all the claims over which it had original jurisdiction, the district court had 'wide latitude in determining whether or not to retain jurisdiction over [the] state claims.'"); *Giles v. NYLCare Health Plans, Inc.*, 172 F.3d 332, 337 (5th Cir. 1999) ("Once the court has proper removal jurisdiction over a federal claim, it may exercise supplemental jurisdiction over state law claims, *see* 28 U.S.C. § 1367, even if it dismisses or otherwise disposes of the federal claim or claims."); *Harper v. AutoAlliance Int'l, Inc.*, 392 F.3d 195 (6th Cir. 2004) (holding that the district court did not abuse its discretion in retaining supplemental jurisdiction over

the plaintiff's state law claims which remained after elimination of the federal claim, reasoning that "the district court was familiar with the facts of the case and already had invested significant time in the litigation" and "[t]here also was evidence that Harper was attempting to engage in forum manipulation." *Id.* at 211–12); *Nightingale Home Healthcare, Inc. v. Anodyne Therapy, LLC*, 589 F.3d 881, 883 (7th Cir. 2009) ("A district court is not *required* to relinquish jurisdiction over supplemental state-law claims just because it has dismissed the federal claim before trial. The decision whether to relinquish or retain is committed to the district judge's discretion."); *Quinn v. Ocwen Fed. Bank FSB*, 470 F.3d 1240, 1249 (8th Cir. 2006) ("It is within the district court's discretion to exercise supplemental jurisdiction after dismissal of the federal claim."); *Harrell v. 20th Century Ins. Co.*, 934 F.2d 203, 205 (9th Cir. 1991) ("It is well settled ' 'that a federal court does have the power to hear claims that would not be independently removable even after the basis for removal jurisdiction is dropped from the proceedings.'"); *Henderson v. Nat'l R.R. Passenger Corp.*, 412 F. App'x 74, 79 (10th Cir. 2011) ("we must conclude that after granting Plaintiffs' motion to dismiss their only federal claim, the district court in this case retained subject matter jurisdiction over the remaining state-law claims . . . the district court possessed the discretion to either retain or remand those claims pursuant to § 1367(c)."); *Behlen v. Merrill Lynch*, 311 F.3d 1087, 1095 (11th Cir. 2002) ("The court had discretion to retain jurisdiction over the state law claims even after Behlen amended the complaint to remove any federal cause of action."); *Shekoyan v. Sibley Int'l*, 409 F.3d 414, 423 (D.C. Cir. 2005) ("A district court may choose to retain jurisdiction over, or dismiss, pendent state law claims after federal claims are dismissed.").

Several decisions from this Court also confirm the discretion afforded to district courts in this context. In *Cohill*, 484 U.S. 343 (1988), this Court addressed the issue of "whether a district court has discretion to remand a removed case to state court when all federal-law claims have dropped out of the action and only pendent state-law claims remain." *Id.* at 348. On that issue, this Court confirmed that district courts retain discretion: "We conclude that a district court *has discretion* to remand to state court a removed case involving pendent claims upon a proper determination that retaining jurisdiction over the case would be inappropriate." *Id.* at 357 (emphasis added). And later, in *City of Chicago*, 522 U.S. 156 (1997), this Court confirmed that "[o]ur decisions have established that pendent jurisdiction 'is a doctrine of discretion . . . '" *Id.* at 172.

This Court's recent opinions have continued to emphasize the purely discretionary nature of a district court's exercise of supplemental jurisdiction in this context. *See Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635 (2009) ("A district court's decision whether to exercise that jurisdiction [supplemental jurisdiction] after dismissing every claim over which it had original jurisdiction is purely discretionary."); *Osborn v. Haley*, 549 U.S. 225, 245 (2007) ("Even if only state-law claims remained after resolution of the federal question, the District Court would have discretion, consistent with Article III, to retain jurisdiction."); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 502 (2006) ("when a court grants a motion to dismiss for failure to state a federal claim, the court generally retains discretion to exercise supplemental jurisdiction, pursuant to § 1367, over pendent state-law claims.").

Thus, the proper rule in this context, applied by this Court and in every other circuit, provides district courts with discretion to determine whether to continue to exercise supplemental jurisdiction after the federal claims have been eliminated. This exercise of discretion is practical and workable for both the parties and the courts. As explained by this Court in *Cohill*, the discretion afforded to district courts "enables district courts to deal with cases involving pendent claims in the manner that best serves the principles of economy, convenience, fairness, and comity which underlie the pendent jurisdiction doctrine." *Cohill*, 484 U.S. at 357. And significantly, in exercising its discretion, "[a] district court can consider whether the plaintiff has engaged in any manipulative tactics when it decides whether to remand a case." *Id.*

In sharp contrast, the Eighth Circuit's decision here institutes a blanket rule mandating remand in *all* cases where the federal claims are eliminated post-removal. Such a blanket rule condones the manipulative tactics considered in *Cohill* by assuring plaintiffs that they can return to state court after the case is removed if they determine that they do not like how things are playing out in the federal forum. In other words, rather than giving district courts the discretion to guard against such gamesmanship, the Eighth Circuit's decision gives a district court no other option than to allow the plaintiff 's manipulative tactics to succeed.

This is not what Congress intended when it drafted the discretionary "may" language within the supplemental jurisdiction statute. Congress drafted 28 U.S.C. § 1367 to prevent precisely the type of gamesmanship that Respondents engage in here.

B. When Congress Legislates Against the Backdrop of Longstanding Precedent, it "Brings the Old Soil With It"

This Court decided *Cohill* in 1988. In that case, after the action was removed to federal court, the plaintiffs waited six months to amend their complaint, alleging that various claims were "not tenable." *Cohill*, 484 U.S. at 346. At the same time, the plaintiffs filed a motion, conditional upon amendment of the complaint, requesting remand to state court. *Id.* The plaintiffs "noted that the amendment would eliminate their sole federal-law claim, which had provided the basis for removal of the case, and argued that a remand to state court was appropriate in these circumstances." *Id.* The district court granted the motion to amend and remanded the remaining claims to state court. *Id.*

On grant of certiorari, this Court affirmed the district court's discretionary decision to remand. *Id.* at 357. In doing so, this Court cited to *Mine Workers v. Gibbs*, 383 U.S. 715 (1966), explaining: "*Gibbs* emphasized that 'pendent jurisdiction is a doctrine of discretion, not of plaintiff's right.'" *Cohill*, 484 U.S. at 350. Under this discretionary approach, this Court also explained that "[a]s articulated by *Gibbs*, the doctrine of pendent jurisdiction thus is a doctrine of flexibility, designed to allow courts to deal with cases involving pendent claims in the manner that most sensibly accommodates a range of concerns and values." *Cohill*, 484 U.S. at 350.

Two years after *Cohill*, Congress enacted the supplemental jurisdiction statute. 28 U.S.C. § 1367. The text of the statute indicates that it was drafted

to codify this Court's existing precedent at that time, including *Cohill*. Subsection (c) of the statute outlines the circumstances under which a court may decline to exercise supplemental jurisdiction. The statute's language tracks the holding of *Cohill*—that a district court may (but need not), i.e. "has discretion to[,]" remand to state court a removed case involving pendent claims where the federal claim has been eliminated. The language of 28 U.S.C. § 1367(c)(3) states: "The district courts *may* decline to exercise supplemental jurisdiction over a claim under subsection (a) if . . . the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3) (emphasis added). Compare also the language in *Gibbs*, 383 U.S. at 726–27 ("if it appears that the state issues substantially predominate . . . the state claims may be dismissed without prejudice and left for resolution to state tribunals") with the language in 28 U.S.C. § 1367(c)(2) (stating that a district court "may" decline to exercise supplemental jurisdiction if "the claim substantially predominates over the claim or claims over which the district court has original jurisdiction[.]").

The precise language included in 28 U.S.C. § 1367 illustrates the rule that "[w]hen a statutory term is obviously transplanted from another legal source, it brings the old soil with it." *Taggart v. Lorenzen*, 587 U.S. 554, 560 (2019) (internal quotation marks omitted). Under the facts of *Taggart*, this Court explained that the statutes specifying that a discharge order "'operates as an injunction,' . . . and that a court may issue any 'order' or 'judgment' that is 'necessary or appropriate' to 'carry out' other bankruptcy provisions, . . . bring with them the 'old soil' that has long governed how courts enforce injunctions." *Id.* at 560.

The point of the "old soil" principle is that "when Congress employs a term of art, that usage itself suffices to adop[t] the cluster of ideas that were attached to each borrowed word in the absence of indication to the contrary." *George v. McDonough*, 596 U.S. 740, 753 (2022). Here, application of the old soil principle confirms that the discretionary language included by Congress within 28 U.S.C. § 1367(c) adopts the discretionary principles applied by this Court in the preceding *Cohill* and *Gibbs* opinions. Just like in *Taggart*, where the language of the bankruptcy statutes "br[ought] with them the 'old soil' that has long governed how courts enforce injunctions[,]" *Taggart*, 587 U.S. at 560, the language of the supplemental jurisdiction statute brings with it the pre-1990 cases (the "old soil") that have long provided district courts with discretion in their exercise of supplemental jurisdiction.

Yet the Eighth Circuit's decision defies the discretion afforded under both the "old soil" and the supplemental jurisdiction statute by requiring district courts to remand without considering the surrounding circumstances. For that reason (among the many others discussed herein), the Eighth Circuit's decision must be reversed.

II. The Principle of Stare Decisis Must be Applied Here to Prevent Destabilized Litigation and Ensure Uniform Nationwide Application of Jurisdictional Rules

The federal removal statutes and decisions of this Court on removal are intended to have uniform nationwide application. *Grubbs v. Gen. Elec. Credit Corp.*, 405 U.S. 699, 705 (1972). In line with this preference for uniform nationwide application is the principle of stare decisis.

Stare decisis, the idea that today's Court should stand by yesterday's decisions, "is 'a foundation stone of the rule of law.'" *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455 (2015). Application of the doctrine "'is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014). Stare decisis also decreases incentives to challenged settled precedents, which saves both the parties and the courts the "expense of endless relitigation." *Kimble*, 576 U.S. at 455.

Not only does stare decisis "protect[ ] the interests of those who have taken action in reliance on a past decision[ ]," *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 263 (2022), but it also "fosters 'evenhanded' decisionmaking by requiring that like cases be decided in a like manner." *Id.* at 263–64. Stare decisis also contributes to the actual and perceived integrity of the judicial process and restrains judicial hubris, "remind[ing] us to respect the judgment of those who have grappled with important questions in the past." *Id.* at 264.

A. Case Law from Every Other Circuit Supports Nestlé's Position that a Post-Removal Amendment Does Not Destroy Federal-Question Subject-Matter Jurisdiction

The Eighth Circuit's decision here turns a blind eye to the abundance of precedent from every other circuit supporting Petitioners' position that a post-removal amendment to the complaint does not destroy federal

question subject-matter jurisdiction.[2] *See*, *e.g.*, *Ching v. Mitre Corp.*, 921 F.2d 11, 13 (1st Cir. 1990) ("An amendment to a complaint after removal designed to eliminate the federal claim will not defeat federal jurisdiction"); *In Touch Concepts, Inc. v. Cellco P'ship*, 788 F.3d 98, 101 (2d Cir. 2015) ("a post-removal amendment does not defeat federal jurisdiction premised on a federal question"); *Collura v. City of Philadelphia*, 590 F. App'x 180, 184 (3d Cir. 2014) ("federal jurisdiction cannot be defeated by amending a complaint to eliminate federal claims after removal"); *Brown v. E. States Corp.*, 181 F.2d 26, 28 (4th Cir. 1950) ("The case was properly removable . . . to the federal court. . . . And the fact that plaintiff subsequently amended his complaint in an attempt to eliminate the federal question did not make remand proper"); *Spear Mktg., Inc. v. BancorpSouth Bank*, 791 F.3d 586, 592 (5th Cir. 2015) ("It is this court's established precedent that once a case is properly removed, the district court retains jurisdiction *even if* the federal claims are later dropped or dismissed"); *Rogers v. Wal-Mart Stores, Inc.*, 230 F.3d 868, 872 (6th Cir. 2000) ("jurisdiction is determined as of

2. This Court has recognized that cases involving removal implicate different concerns than cases filed in federal court in the first instance. "[W]hen a plaintiff files a complaint in federal court and then voluntarily amends the complaint, courts look to the amended complaint to determine jurisdiction." *Rockwell*, 549 US at 473–74. But in cases such as this one, where the plaintiff initiates the action in state court and the action is removed by the defendant to federal court, such removal cases "raise forum-manipulation concerns that simply do not exist when it is the *plaintiff* who chooses a federal forum and then pleads away jurisdiction through amendment." *Id.* at 474 n.6. Taking into account these forum manipulation concerns, the rule in removal cases is that an amendment generally does not defeat jurisdiction. *See id.*

the time of removal . . . . If plaintiffs were able to defeat jurisdiction by way of a post-removal stipulation, they could unfairly manipulate proceedings merely because their federal case begins to look unfavorable"); *Hammond v. Terminal R.R. Ass'n of St. Louis*, 848 F.2d 95, 97 (7th Cir. 1988) ("The defendant's right to remove a case from state to federal court depends on the complaint filed by the plaintiff in state court. If that complaint states a claim that is removable . . . removal is not defeated by the fact that, after the case is removed, the plaintiff files a new complaint, deleting the federal claim or stating a claim that is not removable"); *Fochtman v. Hendren Plastics, Inc.*, 47 F.4th 638, 643 (8th Cir. 2022) ("'jurisdiction is determined at the time of removal, even though subsequent events may remove from the case the facts on which jurisdiction was predicated'"); *Broadway Grill, Inc. v. Visa Inc.*, 856 F.3d 1274, 1278 (9th Cir. 2017) ("We have not found any other circuit decisions permitting post-removal amendment of the complaint to affect the existence of federal jurisdiction . . . "); *Pfeiffer v. Hartford Fire Ins. Co.*, 929 F.2d 1484, 1488 (10th Cir. 1991) ("The error of this argument is its assumption that a party may force remand of an action after its removal from state court by amending the complaint to destroy the federal court's jurisdiction over the action. Instead, the propriety of removal is judged on the complaint as it stands at the time of the removal"); *Connecticut State Dental Ass'n v. Anthem Health Plans, Inc.*, 591 F.3d 1337, 1351 (11th Cir. 2009) ("Although Plaintiffs reference their amended complaints in their briefs, we consider the original complaints because removal jurisdiction is determined at the time of removal, and 'events occurring after removal . . . do not oust the district court's jurisdiction'"); *Bronner on Behalf of Am. Stud. Ass'n v. Duggan*, 962 F.3d 596, 604 (D.C. Cir. 2020)

("in a removal case we look to the plaintiff's original complaint, not post-removal amendments.").

Along with the overwhelming precedent in Petitioners' favor from circuit courts across the nation, this Court has also confirmed its agreement with Petitioners' position. In *Rockwell Int'l Corp. v. United States*, 549 U.S. 457 (2007), this Court stated that "when a defendant removes a case to federal court based on the presence of a federal claim, an amendment eliminating the original basis for federal jurisdiction generally does not defeat jurisdiction." *Id.* at 474 n.6, citing *Carnegie–Mellon Univ. v. Cohill*, 484 U.S. 343, 346 (1988); *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 293 (1938). This Court also acknowledged the "forum-manipulation concerns" that exist in removal cases. *Rockwell*, 549 U.S. at 474 n.6.

One district court, in assessing a plaintiff's tactical dismissal of federal claims post-removal, explained the policy behind the rule that jurisdiction is determined at the time of removal as follows:

> An action, once removed, may be remanded only if there was no subject matter jurisdiction at the time removal was granted. . . . The policy behind this rule is obvious. When a plaintiff chooses a state forum, yet also elects to press federal claims, he runs the risk of removal. A federal forum for federal claims is certainly a defendant's right. If a state forum is more important to the plaintiff than his federal claims, he should have to make that assessment before the case is jockeyed from state court to federal court and back to state court. The

> jockeying is a drain on the resources of the state judiciary, the federal judiciary and the parties involved; tactical manipulation such as plaintiff has employed cannot be condoned.

Austwick v. Bd. of Educ. of Twp. High Sch. Dist. No. 113, Lake Cnty., 555 F. Supp. 840, 842 (N.D. Ill. 1983).

The Eighth Circuit's decision here promotes this type of gamesmanship. Under the Eighth Circuit's holding, a plaintiff can file an action in state court alleging both state and federal claims and wait to see if the defendant removes the action. If the action is removed, the plaintiff can amend the complaint and eliminate the federal claims to return to state court. In this case, the amendment to the complaint did not come until over a year and a half after the action was removed. Defendants, as well as the federal and state judiciaries, should not be made to suffer such an inordinate strain on their time and resources at the whim of a plaintiff engaging in forum-shopping. If a plaintiff wishes to remain in state court, that plaintiff should plead its complaint appropriately.

In other words, the Eighth Circuit's decision essentially provides plaintiffs with a jurisdictional "do-over" in any case where a defendant properly exercises its statutory right of removal. But the practical implications of the Eighth Circuit's decision must not be ignored. The decision condones start and stop litigation, which places an unnecessary burden on both state and federal courts. This burden is especially heightened in cases, such as this one, where a plaintiff does not decide to amend the complaint until the time and resources of the federal court have already been expended for an extended period of time.

Thus, the Eighth Circuit's approach—even setting aside the fact that it ignores the principles of stare decisis and the overwhelming precedent in favor of Petitioners' position—is simply not practical. Under the Eighth Circuit's decision, a plaintiff could voluntarily dismiss federal claims at any time, even only days before trial, resulting in remand to state court. This jurisdictional gamesmanship disrupts the entire flow of the litigation. The possibility that plaintiffs may delay the amendment after removal (as the Respondents did here) only adds to the negative implications of the gamesmanship.

Applying the uniform rule applied in all other circuits—a rule also recognized by this Court (*see Rockwell*, 549 U.S. at 474 n.6)—is not only proper under the principle of stare decisis, but also practical when the implications of the rule are considered from the perspective of practitioners, the parties, and the state and federal judiciaries. The Eighth Circuit's decision will burden already over-burdened state court systems as cases are jockeyed from state court, to federal court, and back to state court at the whim of the plaintiff. The decision will also lead to increased litigation in district courts regarding whether the action belongs in state or federal court. Application of a uniform rule prevents this.

B. The Eighth Circuit's Decision Subverts a Defendant's Statutory Right of Removal

Yet another consequence of the Eighth Circuit's decision is that it gives plaintiffs a roadmap to subvert a defendant's statutory right of removal under 28 U.S.C. § 1441. The need to safeguard a defendant's right of removal under these circumstances must not go unnoticed.

> [S]afeguarding the defendant's removal right[,] federal courts often refuse to permit a plaintiff to precipitate a remand to state court by amending the complaint to eliminate the federal claim that was the basis for the removal. The courts may permit the amendment, but they will retain jurisdiction.

§ 3722 Removal Based on Federal-Question Jurisdiction, 14C Fed. Prac. & Proc. Juris. § 3722 (Rev. 4th ed.).

But the Eighth Circuit's decision essentially wipes out a defendant's right to remove an action by allowing plaintiffs to send the action right back to state court. This is not what Congress intended when it enacted the removal statute.

As the "master of his complaint," a plaintiff knows that if he raises federal claims, the action may be removed by the defendant. If a plaintiff wishes to avoid federal court, the solution is simple—avoid pleading a federal claim. *See Salzer v. SSM Health Care of Oklahoma Inc.*, 762 F.3d 1130, 1134 (10th Cir. 2014) ("as a general matter, the plaintiff 'may prevent removal to federal court by choosing not to plead a federal claim even if one is available.'"); *Blab T.V. of Mobile, Inc. v. Comcast Cable Commc'ns, Inc.*, 182 F.3d 851, 854 (11th Cir. 1999) ("the plaintiff is the 'master of the claim' and may prevent removal by choosing not to plead an available federal claim."). But the Eighth Circuit's decision allows a plaintiff to plead both state and federal claims in state court and wait to see if the defendant removes the action. If there is a removal, no harm no foul for the plaintiff—he can simply dismiss his federal claims and return to state court. But the implications of

that strategy must not go unrecognized—unnecessary jockeying from court to court, added burdens on both the state and federal judiciaries, increased expenses for the parties and the courts, *and the stripping of the defendant's right to remove the action to federal court.*

As this Court has recognized, "forum manipulation concerns are legitimate and serious." *Cohill*, 484 U.S. at 356 n.12. And as one district court aptly recognized, "forum manipulation improperly subjects the defendant's statutory right of removal to the plaintiff's caprice." *Parker v. Exterior Restorations, Inc.*, 601 F. Supp. 3d 1221, 1232 (S.D. Ala. 2022).

The improper nature of efforts to subvert the removal statute have been recognized in other contexts as well. *See, e.g.*, *Davis Int'l, LLC v. New Start Grp. Corp.*, 488 F.3d 597, 605 (3d Cir. 2007) ("Courts considering the question have unanimously held that a plaintiff's fraudulent attempt to subvert the removal statute implicates the 'expressly authorized' exception to the Anti–Injunction Act and may warrant the granting of an anti-suit injunction"); *Fulford v. Transp. Serv. Co.*, No. CIV.A. 03-2472, 2004 WL 1801335, at *2 (E.D. La. Aug. 10, 2004) ("The express statutory authorization of § 1446(d) prohibits continuation not only of the state court suit which was removed to federal court but also continuation of a secondary state court suit when such a suit is an attempt to subvert the purposes of the removal statute"); *Frith v. Blazon-Flexible Flyer, Inc.*, 512 F.2d 899, 901 (5th Cir. 1975) ("where a district court finds that a second suit filed in state court is an attempt to subvert the purposes of the removal statute, it is justified and authorized by [§] 1446(e) in enjoining the proceedings in the state court"); *Lou v. Belzberg*, 834 F.2d 730, 741 (9th

Cir. 1987) ("where a second state court suit is fraudulently filed in an attempt to subvert the removal of a prior case, a federal court may enter an injunction.").

The difference is, in the above cases, the courts recognized the need to *prohibit* efforts to subvert the removal statute (efforts which consisted of, for example, filing a parallel action in state court to undermine removal). But here, the Eighth Circuit's decision, holding that an amendment to the complaint eliminating the federal questions destroys subject matter-jurisdiction, *supports* the undermining of the removal statute. Such a decision must not be allowed to stand.

CONCLUSION

Amicus Curiae DRI–Center for Law and Public Policy respectfully requests that this Court reverse the decision of the Eighth Circuit Court of Appeals.

Respectfully submitted,

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