EXHIBIT 11

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

THEODORE NICKEL,	)	
	)	
Plaintiff-Appellee	)	
	)	
v.	)	**No. 11-1158**
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant-Appellant	)	

JURISDICTIONAL MEMORANDUM

The United States has appealed from the Opinion and Order of the United States District Court for the Western District of Wisconsin (Judge Barbara B. Crabb) remanding the instant case to the Circuit Court for Dane County, Wisconsin. (Doc. 36.)[1] On January 20, 2011, this Court ordered the Government to file this Jurisdictional Memorandum on the issue whether 28 U.S.C. § 1447(d) deprives the Court of appellate jurisdiction over the Government's appeal.[2]

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[1] References in this memorandum are to the documents filed in the District Court, as numbered by its Clerk.

[2] The United States' Docketing Statement, filed January 25, 2011, has a complete statement of jurisdiction, reserving comment only on the question addressed in this memorandum. We respectfully invite the Court's attention to the Docketing Statement for its discussion of the jurisdictional aspects of this case not subject to the Court's order.

STATEMENT

Ambac Assurance Corporation (Ambac) is a Wisconsin subsidiary of Ambac Financial Group, Inc. (AFGI), a holding company headquartered in New York. (Doc. 36 at 2–3.) AFGI filed consolidated federal income tax returns for itself and its subsidiaries, including Ambac. (*Id.* at 3.) Under the Treasury Regulations governing such returns, all members of the consolidated group are severally liable to the United States for the tax liabilities of the entire group, regardless of how the members might divide the liability among themselves. 26 C.F.R. §§ 1.1502-6(a), (c), 1.1502-78(b)(2). After Ambac experienced financial difficulties, it, with the approval of the Wisconsin Insurance Commissioner, assigned its troubled policies to a "segregated account." (*Id.* at 3–4.) The remainder of Ambac's policies (as well as most of the assets) remained in its "general account." (*Id.* at 4–5.) On March 24, 2010, the insurance commissioner asked the Circuit Court for Dane County, Wisconsin, to rehabilitate the segregated account. (*Id.* at 5.)

The United States' interest in the proceedings arises out of a tentative federal tax refund paid to the parent company, AFGI, in the approximate amount of $700 million and arising out of net operating loss carrybacks claimed by AFGI. (Doc. 36 at 6.) The refund is

"tentative" because Section 6411 of the Internal Revenue Code (26 U.S.C.) effectively requires the Internal Revenue Service (IRS) to issue such refunds within 90 days, but the IRS retains the right to conduct a later audit and to recapture any erroneously paid funds. (*Id.* at 6.) AFGI allocated the tentative federal tax refund to Ambac and transferred the $700 million to it. (*Ibid.*)

On October 28, 2010, the IRS sent AFGI an information document request about the tentative refund, including asking whether AFGI had received advance consent from the IRS before changing its accounting method for credit default swap contracts and, if not, for an explanation of the legal basis for the unconsented change in accounting method. (Doc. 2 at 22; Doc. 36 at 6; *see also* 26 U.S.C. § 446(e) (requiring IRS consent before changing accounting method).) On November 7, 2010, Ambac purported[3] to allocate to its segregated account just the liability that it might have to repay the $700 million tentative federal tax refund (and any other federal tax liabilities it might have through December 31, 2009), supposedly freeing its other assets of that liability. (*Ibid.*) On November 8, 2010, the insurance commissioner approved that "allocation," filed a notice with the Dane County court, obtained an

[3] This allocation was not permissible under the consolidated return regulations. *See* page 2, *supra*.

ex parte injunction from the Dane County court prohibiting the United States, *inter alia*, from attempting to recover the tentative refund from Ambac, and served the notice and the injunction on the United States.[4] (*Id.* at 7.) The injunction is broadly worded and appears to enjoin collecting the tax not only from the segregated account to which the liability is allocated (and which does not appear to be sufficient to assure its eventual payment should the IRS assess a deficiency in the amount of the tentative refund), but also from other assets of Ambac and from other entities in the consolidated group. It enjoins all forms of collection, including the filing of notices of federal tax lien, and arguably even the assessment of tax and the sending of notice and demand that create the statutory lien under 26 U.S.C. § 6321 and § 6322.[5] (Doc. 2 at 30–31.) Thus, the injunction is an action against the

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[4] Also on November 8, 2010, AFGI, Ambac's parent company, filed for Chapter 11 bankruptcy in the United States District Court for the Southern District of New York. (Doc. 36 at 6.) Shortly thereafter, AFGI filed an adversary proceeding seeking a determination of its tax liability. (*Ibid.*) In general, the bankruptcy stay only stays collection against the debtor parent in bankruptcy and its bankruptcy estate, which includes the stock in its subsidiaries but not their assets. *See* 11 U.S.C. § 362(a).

[5] Thus the injunction issued by the Wisconsin Court is more restrictive than the statutory injunction effected on filing a bankruptcy petition, which permits the creation of a lien on any property that is not property of the bankruptcy estate. *See* 11 U.S.C. § 362(b)(9).

United States and the IRS within the meaning of 28 U.S.C. § 1442. The United States maintains that the Anti-Injunction Act (26 U.S.C. § 7421(a)) deprived the Wisconsin court of jurisdiction to enjoin the United States.

The United States timely removed the case to the District Court pursuant to 28 U.S.C. §§ 1441 and 1442. (Doc. 1.) The United States moved the District Court to dissolve the Wisconsin court's injunction (Doc. 10), and the insurance commissioner moved for a remand (Doc. 12).[6]

The District Court issued an opinion and order framing the issue as whether the McCarran-Ferguson Act (15 U.S.C. §§ 1011–1015) preempted 28 U.S.C. § 1442, which authorizes removals by federal agencies and officers.[7] (Doc. 36 at 2, 8.) The court answered that question in the affirmative, concluding that the McCarran-Ferguson

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[6] The government specifically asked the District Court to partially remand the case and retain jurisdiction only over the issues concerning federal tax collection. (Doc. 23 at 18–19.)

[7] Although the court commented on the United States' arguments against the injunction (Doc. 36 at 10–11), it explicitly declined to address the Government's motion to dissolve the injunction because it considered itself lacking jurisdiction to do so (*id.* at 2, 21). The District Court's comments, therefore, are not binding in later stages of this case. *Montana v. United States*, 440 U.S. 147, 153 (1979) (claim and issue preclusion applies only to rights, questions, or facts directly determined by court of competent jurisdiction).

Act preempted 28 U.S.C. § 1442(a), restricted the United States' right of removal, made the removal improper, and deprived it of jurisdiction. (*Id.* at 2, 8, 15, 21.) The court therefore remanded for lack of subject matter jurisdiction. (*Id.* at 21.) This appeal followed. (Doc. 38.)

DISCUSSION

A. Section 1447(d) of 28 U.S.C.

Ordinarily, 28 U.S.C. § 1292(a)(1) would give this Court jurisdiction over the District Court's interlocutory order effectively refusing to dissolve or modify the Wisconsin court's injunction. Section 1447(d) of 28 U.S.C., however, states that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . ."[8] The Supreme Court has limited the broad statutory language of § 1447(d) by holding that it must be read *in para materia* with 28 U.S.C. § 1447(c). *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 345–46 (1976). Section 1447(c) states, in pertinent part, "[i]f at any time before final judgment it appears that the district court lacks subject matter

[8] The only exception articulated in 28 U.S.C. § 1447(d) is that the remand of a suit removed under 28 U.S.C. § 1443 can be reviewed. Section 1443, which deals with civil rights cases, is not relevant to the instant appeal.

jurisdiction, the case shall be remanded."[9] Thus, "only remand orders issued under § 1447(c) and invoking the grounds specified therein . . . are immune from review under § 1447(d)." *Thermtron*, 423 U.S. at 346.

The Supreme Court has reserved the question whether a district court's mere invocation of subject matter jurisdiction should be given controlling significance. *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 233 (2007); *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 641 n.9 (2006). The Supreme Court has held, however, that appellate review is suitable only to the extent of confirming that the district court's invocation of jurisdiction was colorable, and it has cautioned against appellate disputes over whether an arguably jurisdictional ground is, in fact, jurisdictional. *Powerex*, 551 U.S. at 234. *See also Holmstrom v. Peterson*, 492 F.3d 833, 839–40 (7th Cir. 2007) (rejecting argument that district court had not interpreted 28 U.S.C. § 1441, but had judicially crafted reviewable exception thereto).

In the instant case, the District Court held that the McCarran-Ferguson Act preempted the federal removal statute (28 U.S.C.

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[9] Section 1447(c) also allows a party up to 30 days after removal to file a motion for remand based on procedural defects in the removal. Although the insurance commissioner alleged procedural defects in the United States' removal, the District Court did not base its decision on those grounds. (Doc. 36 at 8.)

§ 1442(a)), thereby making the United States' removal improper, depriving the court of subject matter jurisdiction, and precluding it from considering the Government's motion to dissolve the Wisconsin court's injunction. (Doc. 36 at 2, 8, 15, 21.) Although the District Court did not cite 28 U.S.C. § 1447(c), it purported to invoke a ground for remand stated therein. That is because the District Court's reasoning could be viewed as falling within the definition of subject matter jurisdiction, *viz.*, the authority to adjudicate a claim. *Powerex*, 551 U.S. at 233; *Kircher*, 547 U.S. at 644; *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004). As such, upon initial examination, it may appear that 28 U.S.C. § 1447(d) deprives this Court of jurisdiction over this appeal.

This case, however, implicates significant issues of federal statutory interpretation, federalism, and the sovereign prerogatives of the United States. The case, therefore, should be resolved by the federal courts in the first instance, not by the state courts. It also cannot be ignored that, in this and other areas, courts have, at times, allowed proceedings that would appear, on first impression, to be barred by clear statutory language. *See, e.g.*, *Thermtron*, 423 U.S. at 342–52 (limiting § 1447(d) to remands under § 1447(c)); *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 6–8 (1962) (creating

judicial exception to Anti-Injunction Act (26 U.S.C. § 7421(a)); *Leiter Minerals, Inc. v. United States*, 352 U.S. 220, 224–28 (1957) (United States, as sovereign, can obtain stay of state-court proceedings despite statute prohibiting such stays and lacking an express exception for United States).

Despite the difficulties presented by the current state of the law, we discuss in Part B, *infra*, a basis upon which the District Court's remand order should be subject to appellate review in the instant proceeding. In any event, we think it prudent to obtain a decision from the Court on this issue because we have not been able to find a case presenting these exact circumstances following the amendments to 28 U.S.C. § 1442(a). Additionally, the United States is considering whether it should seek relief by means of a suit brought under the District Court's original jurisdiction. This Court has held that, if a remand order is not reviewable on appeal, it does not bar a subsequent suit in the district court based upon its original jurisdiction. *Health Cost Controls of Ill. v. Washington*, 187 F.3d 703, 708–09 (7th Cir. 1999). *See also Blue Cross & Blue Shield of Ill. v. Cruz*, 396 F.3d 793, 796–97 (7th Cir. 2005), *vacated on other grounds*, 548 U.S. 901 (2006). Thus, a dismissal by this Court for lack of jurisdiction (if the Court

were to adopt that course) will prevent a possible whipsaw in a potential later suit, by precluding the state and private parties from arguing that the remand order was somehow reviewable now.

B. Federal court jurisdiction under 28 U.S.C. § 1442(a) as a matter of sovereign right

Courts have allowed appeals of remand orders that were beyond the District Court's authority. *E.g.*, *Osborne v. Haley*, 549 U.S. 225, 241–44 (2007) (Attorney General's employment certification, made conclusive by statute for removal purposes, leaves district court without authority to remand); *Thermtron*, 423 U.S. at 339–42, 351–52 (district court lacked authority to remand because of crowded docket); *In re Continental Cas. Co.*, 29 F.3d 292, 294–95 (7th Cir. 1994) (district court lacked authority to remand *sua sponte* for procedural defect in removal). Because this case squarely implicates the sovereign prerogatives of the United States, the Court could hold that it was beyond the District Court's authority to deny the United States a federal forum to resolve the important federal statutory questions presented by this dispute.[10]

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[10] We are not attempting to make the precluded arguments that the District Court's remand order is reviewable because it is wrong or because it has adverse consequences. *Powerex*, 551 U.S. at 237–39; *Kircher*, 547 U.S. at 642; *Thermtron*, 423 U.S. at 351. To the extent

(continued...)

1. In the instant case, the District Court deprived the United States of a federal forum for resolving interrelationship of the McCarran-Ferguson Act (15 U.S.C. §§ 1011–1015) with both the United States' right of removal codified at 28 U.S.C. § 1442(a)(1), and the United States' right to collect its lawful revenue without undue judicial interference, as protected by the Anti-Injunction Act (26 U.S.C. § 7421(a)).

There is, at a minimum, a presumption that cases involving both the United States and the interpretation of federal statutes should be heard in the federal courts. The Supreme Court in, *International Primate Protection League v. Tulane*, 500 U.S. 72 (1991), held that the then-current version of 28 U.S.C. § 1442(a) granted only federal officers (not federal agencies) a right of removal, thus limiting the United States' ability to remove to those cases otherwise removable under 28 U.S.C. § 1441. Congress amended § 1442(a) to overrule that result. In so doing, the Senate committee explained that a federal forum is important in cases against federal agencies and officers because "state court actions against Federal agencies and officers often involve

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[10](...continued)
that we might note error or consequences, it is only to highlight how the remand order impacts the United States' sovereignty.

complex Federal issues and Federal-State conflicts." S. Rep. No. 104-366, at 30–31 (1996), *reprinted in*, 1996 U.S.C.C.A.N. 4202, 4210. The committee further stated that the amendments to § 1442 "fulfill[ed] Congress' intent that questions concerning the exercise of Federal authority, the scope of Federal immunity and Federal-State conflicts be adjudicated in Federal court." *Ibid.* The House Report contains similar language and adds that "[t]he result of these decisions has been that federal agencies have had to defend themselves in state court, despite important and complex federal issues such as preemption and sovereign immunity." H.R. Rep. No. 104-798 at 19–20 (1996). Preemption and sovereign immunity are precisely the issues the United States sought to remove to the federal court here.

In light of the above, an argument can be made that — just as 28 U.S.C. § 1345 gives the district courts original jurisdiction over all civil actions commenced by the United States (unless Congress otherwise provides) — the post-amendment 28 U.S.C. § 1442(a) grants jurisdiction to the district courts when a civil action, commenced against the United States in state court, is removed by the United States to the district court. It follows that, when the United States removes such an action to the district court, the district court cannot

thereafter "lack jurisdiction" within the meaning of 28 U.S.C. § 1447(c). If, as a matter of law, the district court had jurisdiction within the meaning of 28 U.S.C. § 1447(c), then it could not remand under 28 U.S.C. § 1447(c) for lack of jurisdiction, making 28 U.S.C. § 1447(d) inapplicable. Indeed, if a certification by the Attorney General that a defendant employee was acting within the scope of his federal employment "shall conclusively establish scope of office or employment for purposes of removal" (28 U.S.C. § 2679(d); *see also Osborne*, 549 U.S. at 241–44), then, *a fortiori*, the United States should be accorded the same treatment, especially (as here) where it is acting in its sovereign capacity.

In *Shives v. CSX Transp. Inc.*, 151 F.3d 164 (4th Cir. 1998), the Fourth Circuit faced a similar situation regarding which federal law governed. An injured dockyard worker filed a tort action in state court under the Federal Employers' Liability Act (FELA),[11] and also filed a protective claim with the Department of Labor under the Longshore and Harbor Workers Compensation Act (LHWCA) (a workers' compensation statute). *Shives*, 151 F.3d at 166. At issue was whether

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[11] The FELA gives state and federal courts concurrent jurisdiction over FELA claims, but 28 U.S.C. § 1445(a) forbids the removal of FELA claims filed in state court. *Shives*, 151 F.3d at 167.

the worker was engaged in maritime employment. If he was, then his only remedy was under the LHWCA; if he was not, then the non-removal provisions of 28 U.S.C. § 1445(a) would require a remand to the state court. *Ibid.* The district court found that the worker was not engaged in maritime employment when he was injured, and it remanded the case to the state court. *Ibid.* CSX appealed. *Ibid.*

Despite the apparent bar of 28 U.S.C. § 1447(d), the Fourth Circuit (albeit with "some delicacy") concluded that it had jurisdiction over the remand order. *Shives*, 151 F.3d at 166–68. Before it could remand, the district court first had to decide whether the FELA or the LHWCA applied to the worker. The Fourth Circuit thus considered that choice-of-law question to be a "conceptual antecedent" to the remand question. *Id.* at 167; *see also City of Waco v. United States Fid. & Guar. Corp.*, 293 U.S. 140 (1934) (separate order doctrine). The Fourth Circuit then described the question as "whether the LHWCA applies to a work-related injury is exclusively a federal question which Congress never intended for state courts to resolve." *Shives*, 151 F.3d at 167. To dismiss the appeal would leave in place a remand order committing to the state court "the decision of whether the LHWCA provided coverage to the employee. To follow that course would thus

deprive the federal courts of their proper role in resolving this important issue and would circumvent Congress' intent that LHWCA coverage issues be resolved in the first instance by the Department of Labor and ultimately in the federal courts of appeals." *Ibid.*

It could be argued that the district court in *Shives* based its remand on the choice-of-forum provisions of 28 U.S.C. § 1445(a) (not on 28 U.S.C. § 1447(c)), and that the preemption decision in the instant case was not so clearly a "conceptual antecedent" to the District Court's remand. *See In re Blackwater Sec. Consulting, LLC*, 460 F.3d 576, 586–92 (4th Cir. 2006) (interpreting *Shives*). But the Third Circuit squarely faced and rejected similar concerns in *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 838–48 (3d Cir. 1991).

The district court in *TMI* acknowledged that a federal statute gave it jurisdiction, but it concluded that the jurisdiction-conferring statute itself was unconstitutional. *TMI*, 940 F.2d at 835–36. It therefore stayed its remand order and certified the constitutional question to the Third Circuit under 28 U.S.C. § 1292(b). *Ibid.* The Third Circuit accepted jurisdiction, despite recognizing that the district court's constitutional analysis was inseparable from its jurisdictional analysis, and that the remand order, therefore, required consideration

of 28 U.S.C. § 1447(d). *Id.* at 838, 843–44. The Third Circuit concluded that the district court's constitutional ruling, despite its jurisdictional component, was "not the type of determination routinely and regularly made pursuant to section 1447(c)." *Id.* at 844. It was not a garden-variety "threshold question," like diversity (or, we would add, federal question), that could generally be readily resolved by reference to a well-established body of law establishing whether or not the removal was authorized under the removal statutes passed by Congress. *Id.* at 844–45.

Instead, the district court had made the consequential ruling that Congress had exceeded its constitutional powers in enacting the removal statute at issue. *TMI*, 940 F.2d at 844. The Third Circuit was "confident that the jurisdictional determination of the district court, resting as it did upon the conclusion that the entire statutory scheme authorizing removal is unconstitutional, was not the type of federal subject matter jurisdictional decision intended to be governed by the terms of or the policy underlying section 1447(c)." *Id.* at 845. In sum, "[s]uch constitutional determinations could not have been intended by Congress to fall within the category of routine subject matter jurisdiction determinations contemplated by section 1447(c) and,

consequently, are not immune from review under section 1447(d)." *Id.* at 848.

The instant case likewise does not involve the kind of subject matter jurisdiction inquiry normally raised under 28 U.S.C. § 1447(c), but instead raises the important, and inherently federal, question whether the McCarran-Ferguson Act renders inapplicable the removal provisions of the Judicial Code. Moreover, it applies that ruling to one of the most fundamental of federal functions — the collection of federal tax. As matters now stand, allowing the District Court's remand order to stand as unreviewable would force the United States either to seek relief in the District Court under its original jurisdiction, or to defend its position in a state court, with a petition for certiorari to the Supreme Court being the only possibility for federal review. 28 U.S.C. § 1257(a). This case also has the added element that the United States is being restricted, by a state court, in the exercise of its sovereign prerogatives.

2. The District Court's remand order thus has the effect of leaving in place the Wisconsin court's injunction. That injunction allows Ambac to hold the $700 million tentative refund that AFGI received from the IRS, and it supports Ambac's efforts to protect itself

from having to return any part of that refund. It limits the assets and entities from which the tax might be collected, although the Treasury Regulations governing consolidated returns clearly provide otherwise. It prevents tax liens from arising or being perfected to secure the government's priority against other creditors, who may not be policy holders. And it may even preclude assessment of the tax.

It is well established that "taxes are the lifeblood of government, and their prompt and certain availability an imperious need." *Bull v. United States*, 295 U.S. 247, 259 (1935). To facilitate that availability, some version of the Anti-Injunction Act has been in force since 1867. *Bob Jones Univ. v. Simon*, 416 U.S. 725, 731 & n.6 (1974). The Anti-Injunction Act states that (except for statutory exceptions not relevant here) "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. § 7421(a). The Anti-Injunction Act exists "to withdraw jurisdiction from the state and federal courts to entertain suits seeking injunctions prohibiting the collection of federal taxes" and "to permit the United States to assess and collect taxes alleged to be due without judicial intervention" so that "the United States is assured

of prompt collection of its lawful revenue." *Williams Packing*, 370 U.S. at 5, 7; *see also Bob Jones Univ.*, 416 U.S. at 736–37.

It has also been well established, in cases involving failures to pay over taxes withheld from employee wages, that the United States cannot be made "an involuntary and unwilling creditor" of a private business, and that private businesses "cannot be permitted to self-execute a government loan." *Brewery, Inc. v. United States*, 33 F.3d 589, 593 (6th Cir. 1994); *First Nat'l Bank in Palm Beach v. United States*, 591 F.2d 1143, 1149–50 (5th Cir. 1979). This Court has endorsed the statement of the Sixth Circuit that the government cannot be made "'an unwilling partner in a floundering business.'" *United States v. Kim*, 111 F.3d 1351, 1361 n.11 (7th Cir. 1997) (quoting *Collins v. United States*, 848 F.2d 740, 741–42 (6th Cir. 1988)); *see also Thibodeau v. United States*, 828 F.2d 1499, 1506 (11th Cir. 1987).

This case presents an even more compelling scenario than the wage-withholding cases. It does not involve just a failure to collect and pay over taxes arising out of employee wages. Instead, AFGI affirmatively obtained from the United States a tentative refund of $700 million under the quick-refund procedures of 26 U.S.C. § 6411, which essentially require the IRS to pay first and audit later. (Doc. 36

at 6.) Then, when the IRS sent an information document request asking whether AFGI had made an authorized change in its accounting method, AFGI quickly declared bankruptcy. (*Id.* at 6–7.) Ambac and the insurance commissioner also responded by making an "allocation" of only the potential liability for the tentative refund to the protected segregated account, and obtaining an *ex parte* injunction against the IRS from the Wisconsin court. (*Id.* at 6–7.) Article I, Section 8 of the Constitution gives the spending power to Congress. But if the McCarran-Ferguson Act does, in fact, preempt the portions of the Internal Revenue Code not directly dealing with insurance, then there is a risk that insurance companies in financial trouble could follow the path laid out here to make the Federal Government an "unwilling partner" in their struggling businesses.

This case appears to be unique — we have been unable to find any case in which the sovereign rights of the United States were so squarely affected.[12] Under these circumstances, we respectfully submit that the Court should find that the sovereign rights of the United

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[12] The three cases cited in the Court's January 20, 2011 Order all involve private parties. *Rubel v. Pfizer, Inc.*, 361 F.3d 1016 (7th Cir. 2004) (diversity removal); *Phoenix Container, L.P. v. Sokoloff*, 235 F.3d 352 (7th Cir. 2000) (diversity removal); *In re Continental Cas. Co.*, 29 F.3d at 293 (remand procedure).

States under the Constitution mandate a federal forum for this dispute. As a consequence, the District Court should not have declined to exercise jurisdiction over the Government's challenge to the Wisconsin court's injunction order, and this Court can accept jurisdiction over this appeal.

CONCLUSION

The United States respectfully requests that this Court accept jurisdiction over this appeal.

Respectfully submitted,

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Dated: This 1st day of February, 2011.

CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2011, I served the foregoing document on the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by sending him a copy thereof in a properly addressed envelope via FedEx for overnight delivery. I further certify that I have served the foregoing document on counsel for all other parties by sending to each of them a copy thereof via FedEx or Express Mail for overnight delivery in envelopes addressed as follows:

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