NO.

IN THE

Supreme Court of the United States

EMIL NOTTI, ET AL.,

Petitioners,

v.

COOK INLET REGION, INC.,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioning shareholders in an Alaska business corporation for profit sued their corporation in state court because the respondent corporation was paying discriminatory dividends in violation of a state law requiring equal treatment of all shares of the same class of stock.

Respondent corporation removed to federal court on the ground that state corporate law has incorporated a federal law that purportedly allows these discriminatory payments. The district court denied remand and dismissed on the merits; the Ninth Circuit affirmed.

The ultimate issue is whether the incorporation of a federal law by state law allows the removal under 28 U.S.C. § 1441 to federal court of a state corporate law claim for breach of the corporate contract, and the subsequent finding of federal question jurisdiction under § 1331.

Should this Court resolve the issues it left open in *Merrell Dow:*

1. Can the adoption of federal law by a state statute give rise to § 1331 federal question jurisdiction when the federal law does not occupy the field, does not entirely displace state law, does not create a federal cause of action, and does not contain a federal remedy?
2. Should this Court adopt a bright line rule requiring the existence of a private cause of action and remedy under federal law before it will allow § 1331 jurisdiction?
3. Should this Court adopt a bright line rule that a federal law that provides no private remedy cannot supply a "jurisdiction-triggering federal question"† and thus cannot give rise to § 1331 jurisdiction?

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† *Merrell Dow Pharmaceuticals v. Thompson*, 478 U.S. 804, 817 & n.15 (1986).

LIST OF PARTIES ‡

Petitioners, Shareholder Plaintiffs-Appellants:

EMIL NOTTI

JAMES GROTHA

GLEN KERR

SAM PEDRO

ELLA RING

All are shareholders of CIRI and are residents of Alaska.

Respondent, Corporate Defendant-Appellee:

COOK INLET REGION, INC. [CIRI]

An Alaska business corporation for profit with its headquarters in Anchorage, Alaska.

‡ Pursuant to Supreme Court Rule 29.6, petitioners state that Cook Inlet Region, Inc. [CIRI] has no parent company.

Because initial ownership of CIRI's stock was restricted to Alaska Natives and because the stock is subject to alienability restrictions, there is no "publicly held company owning 10% or more of the corporation's stock."

The alienability restrictions are found in the Alaska Native Claims Settlement Act, ANCSA § 7(h)(1)(B) and (C) [43 U.S.C. § 1606(h)(1)(B) and (C)].

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The petitioners, Emil Notti and four of his fellow shareholders, who are the five named plaintiffs in this suit against their Alaska business corporation, request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit that was entered in this case on 22 March 2002.

OPINIONS BELOW

The memoranda opinions and orders of the United States District Court for the District of Alaska (John Sedwick, J.) have not been reported. There are three such memoranda, the first two (issued on 8 November 2000 and on 5 December 2000) denying the plaintiff-shareholders' motion to remand and the third (issued on 1 May 2001) granting the respondent-corporation's motion for summary judgment. All three memoranda are reprinted in the appendix, below, at pages 1a, 16a, and 21a.

The opinion of the Court of Appeals for the Ninth Circuit, which was entered on 22 March 2002, is reprinted at 31 Fed.Appx. 586 (9th Cir. 2002). The opinion is set out in the appendix, below, at 27a.

The order denying the petition for rehearing was entered on 19 April 2002, and also is included in the appendix at 30a. The mandate issued on 29 April 2002.

JURISDICTION

This lawsuit was filed in a state court and later removed to federal court. It was filed in the Superior Court of the State of Alaska at Petersburg on 22 June 2000, and was removed to the District Court for the District of Alaska by a notice of removal that was filed on 11 August 2000.

The plaintiff shareholders, Notti et al., who are the petitioners here in this Court, protested the jurisdiction of the federal court and they moved to remand to state court. The district court denied remand in a pair of orders issued in late 2000, denied the shareholders' request for leave to file an interlocutory appeal on the remand issue, then granted CIRI's motion for summary judgment, and dismissed the case by order signed on 1 May 2001. The

district court entered its final judgment of dismissal with prejudice on 2 May 2001, and denied reconsideration on 11 May 2001. The shareholders noted their appeal to the Court of Appeals for the Ninth Circuit on 31 May 2001.

The appeal was decided by a panel of three judges: Circuit Judge Alarcon from Los Angeles, Circuit Judge Silverman from Phoenix, and District Judge Brewster from San Diego.

After oral argument in Seattle on 5 March 2002, the Court of Appeals affirmed the district court's decision in an opinion issued on 22 March 2000. Rehearing was denied on 19 April 2002.

Petitioners submitted a timely application to extend the time for filing this petition for writ of certiorari, and the application was granted by order of Circuit Justice O'Connor on 8 July 2002. That action extended the deadline for filing this petition to and including 19 August 2002, the date upon which it is being filed.

The jurisdiction of the Supreme Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes principally involved in this case are parts of the Alaska Corporations Code, AS 10.06 [ACC], primarily AS 10.06.305(b) and AS 10.06.408; *and* the Alaska Native Claims Settlement Act [ANCSA]: ANCSA § 7(h)(1)(A), which is codified at 43 U.S.C. § 1606(h)(1)(A); *and* ANCSA § 7(r) [43 U.S.C. § 1606(r)]. These and other relevant provisions of state and federal law are included below in the Appendix.

The shareholders relied upon the state law prohibition against setting a retroactive record date, found in AS 10.06.408, and the requirement of equal treatment of shares found in AS 10.06.305(b) and -.313 ("shares of the same class shall be identical"):

AS 10.06.305. Creation, classes, and issuance of shares.

(b) All shares of a class shall have the same voting, conversion, and redemption rights and other rights, preferences, privileges, and restrictions, unless the class is divided into series. If a class is divided into series, all the shares of a series shall have the same voting, conversion, and redemption rights and other rights, preferences, privileges, and restrictions. (§ 1 ch 166 SLA 1988).

The district court relied in part upon an Alaska statute, AS 10.06.960(f), for the proposition that Alaska law incorporates a federal law (ANCSA):

AS 10.06.960. Corporations organized under ANCSA.

(f) Notwithstanding the other provisions of this chapter, a corporation organized under the act is governed by the act to the extent the act is inconsistent with this chapter, and the corporation may take any action, including amendment of its articles, authorized by the act, and the action is considered to be approved and adopted if approved under the act.

The federal law that was held by the lower courts to be incorporated into the plaintiffs' cause of action is ANCSA § 7(r) [43 U.S.C. § 1606(r)], which CIRI argued has preempted the Alaska Corporations Code and which allows CIRI to pay a discriminatory to

dividend only to its original shareholders who are over the age of 65 years:

ANCSA § 7(r) [43 U.S.C. § 1606(r)]

(r) BENEFITS FOR SHAREHOLDERS OR IMMEDIATE FAMILIES.

The authority of a Native Corporation to provide benefits to its shareholders who are Natives or descendants of Natives or to its shareholders' immediate family members who are Natives or descendants of Natives to promote the health, education, or welfare of such shareholders or family members is expressly authorized and confirmed. Eligibility for such benefits need not be based on share ownership in the Native Corporation and such benefits may be provided on a basis other than pro rata based on share ownership.

The petitioning shareholders rely upon ANCSA § 7(h)(1)(A), which says that Alaska Native corporations are chartered and governed according to Alaska law unless state law is expressly preempted by a specific provision of federal law:

ANCSA § 7(h)(1)(A) [43 U.S.C. § 1606(h)(1)(A)] RIGHTS AND RESTRICTIONS.—

(A) Except as otherwise expressly provided in this Act, Settlement Common Stock of a Regional Corporation shall—

(i) carry a right to vote in elections for the board of directors and on such other questions as properly may be presented to shareholders;

(ii) permit the holder to receive dividends or other distributions from the corporation; and

(iii) *vest in the holder all rights of a shareholder in a business corporation organized under the laws of the State.*

(emphasis added). Statements that these corporations are defined, created, and governed by state law are found elsewhere in ANCSA, such as in §§ 3(g), 3(t), and 39.

The complete text of these statutes is set out in the appendix, below at pgs. 31a - 39a.

STATEMENT OF THE CASE

This is a state-law contract dispute between Alaska shareholders and their corporation; it is about corporate discrimination in the payment of dividends: Cook Inlet Region, Inc. [CIRI] pays extra dividends to some shares but not to others of the same class of stock. Only *original* shareholders *over the age of 65 years* are paid the extra dividend of $450.00 per quarter.

The first discrimination (paid only to *original* shareholders) violates AS 10.06.408 because it sets a retroactive record date and employs "snapshot eligibility," the forbidden practice of using an old picture of the shareholders to determine present eligibility.

The second discrimination (paid only to *older* shareholders) violates AS 10.06.305(b), -.313, and -.542 because discriminates among holders of the same class.

No court has ever approved a discriminatory dividend. Centuries of corporate law require that a

corporation pay its dividends in a uniform and pro rata manner to all shares of the same class of stock.[1] But the lower courts have approved a discriminatory dividend — and opened the door to a tidal wave of corporate discrimination—doing so on the most slender reed: an *implied preemption* of a monolithic rule of state law by a weak, amorphous federal statute.

A third flaw in CIRI's discriminatory dividend is that all of its directors are *original shareholders*, so they voted themselves a special financial benefit that was not

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[1] When a corporation makes distributions and pays dividends to shareholders, it must do so on a pro rata basis and without discrimination. Victor Brudney, *Equal Treatment of Shareholders in Corporate Distributions and Reorganizations*, 71 CALIF.L.REV. 1072, 1076-78 (1983) ("Dividends among shareholders of the same class generally must be distributed on a pro rata basis without discrimination or preference."). *See also*, Richard M. Buxbaum, *Preferred Stock — Law and Draftsmanship*, 42 CALIF.L.REV. 243, 247 (1954) ("Dividend rights of shareholders are contractual." "Equal shares receive equal dividends."); FLETCHER, 11 CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS, § 5352 (1995 rev'd. vol.) ("Dividends among shareholders of the same class generally must be distributed on a pro rata basis without discrimination or preference. In other words, the board of directors cannot pay dividends only to certain shareholders to the exclusion of others of the same class"). *See generally*, CLARK, CORPORATE LAW, §1.2, 13 (1986) (shares of common stock possess rights, including "the right to share pro rata (that is, the same amount for each share) in dividend payments"); HENN AND ALEXANDER, LAWS OF CORPORATIONS, §324 (3d ed. 1983) ("The basic dividend rule is that all shareholders participate ratably in dividends"); 18B AMJUR2D, *Corporations*, §1220 (1985) ("Directors have no authority to declare a dividend on any other principle").

approved by disinterested directors and that was not approved by the general rank-and-file shareholder population, as required by AS 10.06.478(a)(1) and (2). The special dividend was poisoned by the directors' conflict of interest.

The plaintiffs' complaint meticulously stated only state corporate law causes of action. On its face it contained no federal law claims, only the statutory and parallel common law claims under the state corporations code.

CIRI was successful in persuading the district court that a purely state law claim is really a federal law claim because AS 10.06.960(f) incorporates ANCSA by reference. Here is the central passage in the district court's decision, which explains the heart and soul of this jurisdictional battle:

> Here, for reasons already discussed, ANCSA is an integral part of the state provisions in question. The substantive scope of state law is defined by reference to federal law. The federal question does not arise as a defense; instead, it defines the nature of state law. Under these circumstances — admittedly somewhat unique — federal law is a "necessary element" of the state claim. It seems probable to this court that federal question jurisdiction exists.
>
> Notti raises another argument which is less easily dismissed. Citing Third and Fifth Circuit precedent, Notti contends that a federal claim subsumed within a state cause of action creates a federal question only when the federal law creates a cause of action. There is some support for this argument. Indeed, perhaps the leading contemporary scholar, Professor Erwin Chemerinsky, writes:
>
> > The decisions interpreting § 1331 can be best summarized by the following principle: A case arises under federal law if it is apparent from the face of the plaintiff's complaint either that the plaintiffs cause of action was created by federal law; or, if the plaintiffs cause of action is based on state law, a federal law that creates a cause of action is an essential component of the plaintiff's claim. [Erwin CHEMERINSKY, FEDERAL JURISDICTION, § 5.2.3 at 274 (3rd ed. 1999)[2]]

> However, the Ninth Circuit has not adopted this test. Furthermore, the test adopted by the Ninth Circuit (discussed above) appears to apply a different standard. Moreover, even Professor Chemerinsky concedes that United States Supreme Court precedent is "inconsistent" and that "the Court has never formulated a clear test for deciding when a case 'arises under' federal law for purposes of § 1331. In analyzing whether a federal claim subsumed within a state cause of action may create a federal question, Professor Chemerinsky emphasizes that "[u]nfortunately, the Supreme Court has not formulated a clear test to determine when the presence of a federal law in a state law action constitutes a federal question." Professor Chemerinsky additionally observes that, under the United States Supreme Court's decision in *Franchise Tax Board v. Construction Laborers Vacation Trust,* federal question jurisdiction exists if the "federal law creates the cause of action or . . . [if] the plaintiffs right to relief necessarily depends on resolution of a substantial question of federal law." This alternate

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[2] The district court should have turned the page and read Professor Chemerinsky's following subsection, entitled *Federal statute must itself create a cause of action* in order to understand why ANCSA does not give rise to § 1331 jurisdiction. *See id.*, § 5.2.3 at pgs. 284-85. *See also, id.* at 280 -83, discussing *Smith* jurisdiction and the *Merrell Dow* case.

formulation suggests that the federal law need not create a cause of action to support federal question jurisdiction.

Consequently, although one might read authority from other circuits to support Notti's position that the federal law subsumed within a state claim must create a cause of action before a federal question will exist, this principle does not appear to be as clear as Notti contends.

District court's PRELIMINARY ORDER, 8 November 2000. Complete text in Appendix, infra, at 6a - 7a.

The district court veered off the road because it failed to observe the quintessential features of CIRI's statute, ANCSA § 7(r), which:

- Does not create a cause of action — because it is a purely permissive statute; it is passive, does not command or prohibit any conduct. Therefore it cannot be violated. Neither a corporation or a shareholder could sue to enforce this law because there is nothing to enforce.
- Does not contain a remedy — no enforcement provision or mechanism and nothing to enforce.
- Does not displace state law — because it is merely passive and permissive.
- Does not contain a jurisdictional grant — on the contrary, Congress said ANCSA does not confer jurisdiction. ANCSA § 2(f) [43 U.S.C. § 1601(f)] ("no provision of this Act shall be construed to constitute a jurisdictional act, to confer jurisdiction to sue, nor . . .").

REASONS FOR GRANTING THE WRIT

I. THERE IS A CONFLICT AMONG THE CIRCUITS — THEY ARE SPLIT ON FEDERAL QUESTION JURISDICTION OVER STATE LAW CLAIMS

Either by serendipity or by petitioners' unalloyed good fortune, the most recent issue of the HARVARD LAW REVIEW bears an article that explains it all.[3]

The central question is when, and under what circumstances, does a federal court have jurisdiction to decide claims that arose under state law? When one body of law incorporates the other? (Usually it is state law that incorporates federal law, but sometimes the converse situation is presented.)

The origin of the debate and continued uncertainty about this topic can be traced at least as far back as this Court's decision in *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921). In *Smith*, Justice Holmes dissented and adhered to his rule (known as the

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[3] Matthew S. Hellman, *Mr.* Smith *Goes to Federal Court: Federal Question Jurisdiction over State Law Claims Post-*Merrell Dow, 115 HARV.L.REV. 2272, 2279-82 & especially nn. 49-52 (2002) ("the circuits have split nearly evenly, and sometimes within themselves, on the status and scope of *Merrell Dow's* private right of action requirement") [hereinafter: *Mr.* Smith *Goes to Federal Court*].

"Holmes Test") that "a suit arises under the law that creates the cause of action."[4]

After Justice Holmes retired, this issue resurfaced in the *Moore* case[5], which has become the antipode of *Smith*.

The *Smith* and *Moore* cases have taken opposite views about when a case arises under federal law where the initial claim or cause of action is a state law claim. This issue arose again in *Merrell Dow Pharmaceuticals v. Thompson*, 478 U.S. 804 (1986), which might seem to approve of *Smith* while expressing a narrower — though *vague* in critical respects — view of permissible federal interests.

As Mr. Hellman explains in his current article, there is not merely confusion and uncertainty in this area of law, but there is outright *conflict between the circuits*[6]:

> In light of this conflicting language and the Court's subsequent silence, the circuits have split nearly evenly, and sometimes within themselves, on the status and scope of *Merrell Dow's* private

[4] *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) (Holmes, J.).

[5] *Moore v. Chesapeake & Ohio Ry. Co.*, 291 U.S. 205 (1934).

[6] There is also intra-circuit conflict within the Ninth Circuit. *Mr.* Smith *Goes to Federal Court*, 115 HARV. L.REV. at 2281 & n. 50 (2002). This petition focuses on the inter-circuit conflict, which poses an issue of nation-wide importance. The Ninth Circuit's woes also can be resolved if this Court will grant review and fashion a workable rule.

> on the status and scope of *Merrell Dow's* private right of action requirement. The crux of the disagreement is whether the presence of a private right of action is the only road to *Smith* jurisdiction after *Merrell Dow* or whether *Smith* jurisdiction remains open for state law claims that present federal issues that a federal court should decide. As a result of the nearly even split among the appellate courts, litigants will find it difficult to predict whether a court will take jurisdiction over their *Smith* claims in the absence of a federal cause of action.

Mr. Smith *Goes to Federal Court*, at 2281-82 (footnotes omitted).

Conclusion: This court should resolve the conflict among the circuits by adopting a bright line rule that allows § 1331 jurisdiction only when the federal law at issue both creates a private cause of action under federal law *and* also provides a remedy under federal law.

II. THE QUESTIONS LEFT UNANSWERED IN *MERRELL DOW* SHOULD NOW BE ANSWERED BY THIS COURT

This Court's decision in *Merrell Dow* has left a trail of uncertainty because that decision embraces conflicting rules about federal jurisdiction.

The uncertainty is the need, *vel non*, for a private right of action? And for a private remedy? [7]

Merrell Dow does say that "the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction," *id.*, 478 U.S. 813. However, the opinion confuses judges and practicing lawyers by failing to address the importance of an independent federal cause of action in the jurisdictional formula. Is it desirable but not necessary? Or is it a *sine qua non* for § 1331 jurisdiction? *See, id.*, 478 U.S. at 814 & n.12 (focusing on nature of the claim and interest balancing—not the stuff from which practical rules can be fashioned).

Again, Mr. Hellman's article informs the discussion. Part II of the article "argues that discretion is undesirable, as a policy matter, to the extent that it leads

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[7] The importance of both a private cause of action and a private remedy can be traced to the four-factor test of *Cort v. Ash*, 422 U.S. 66, 78 (1975), where Justice Brennan collected the four elements that must be considered when deciding whether there is a remedy to be found in a federal statute that does not expressly provide one.

Cort v. Ash is the first of several adoptions by this Court of the Internal Affairs Doctrine, which says that "state law will govern the internal affairs of the corporation." *Id.*, 422 U.S. at 84. *See also*, DOUGLAS M. BRANSON, CORPORATE GOVERNANCE, v (1993) ("state law is the heart and soul of United States corporation law"). *See generally*, Note, *The Internal Affairs Doctrine: Theoretical Justifications and Tentative Explanations for Its Continued Primacy*, 115 HARV.L.REV. 1480 (2002).

to a lack of clarity about jurisdictional rules." *Mr.* Smith *Goes to Federal Court*, at 2273, 2277-84.[8]

To clarify the law in the wake of *Merrell Dow*, this court should explain:

- Is a private cause of action under federal law a *sine qua non* for the existence of § 1331 jurisdiction?
- Can *Smith* jurisdiction exist in the absence of a private right of action?

Conclusion: This court should decide whether the doctrine of *Smith v. Kansas City Title & Trust Co.*, and its younger cousin, *Merrell Dow*, allow a federal court to find federal question jurisdiction in a suit presenting a state law claim, where the federal law incorporated by the state claim does not create a federal cause of action and does not provide a federal remedy.

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[8] Reliance upon a law review article to explain the need for a change in the law of federal jurisdiction has historic precedent in this Court. The famous example from legal history is the celebrated article by Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV.L.REV. 49, 84-88 (1923), which revealed the historical error in *Swift v. Tyson*, 16 Pet.1, 10 L.Ed. 865 (1842), and which lead to *Swift's* overruling in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

III. THE FRICTION BETWEEN *SMITH* AND *MOORE* SHOULD BE CURED AND PUT TO REST

Long enough. This problem has been with us since 1934. Even Mr. Justice Brennan thought the two cases were causing trouble:

> My own view is in accord with those commentators who view the results in *Smith* and *Moore* as irreconcilable.

Merrell Dow, 478 U.S. at 821-22, n. 1 (Brennan, J. dissenting).

The academic community agrees. Professor Currie devotes six pages of his little treatise to the *Smith - Moore* debate, concluding:

> It is not easy to reconcile these decisions. In *Moore* as well as *Smith* the result turned upon construction of federal law; in neither case did federal law provide a remedy.

DAVID P. CURRIE, FEDERAL JURISDICTION IN A NUTSHELL, 70 - 75 (4th ed. 1999). Professor Miller seems to agree. *See, e.g.*, Arthur Miller, *Artful Pleading: A Doctrine in Search of Definition*, 76 TEX.L.REV. 1781, 1786-93 (collecting cases that illustrate the confusion in the law on this topic).

Conclusion: This Court should resolve the apparent conflict between *Smith* and *Moore* by adopting a bright line rule that allows § 1331 jurisdiction only when the federal law at issue both creates a cause of action under federal law *and* also provides a remedy under federal law.

Or, the Court should disapprove or overrule *Smith* and either fashion a workable new rule or return to the Holmes Test [9](a "suit arises under the law that creates the cause of action").

IV. THIS CASE PRESENTS A RECURRING JURISDICTIONAL PROBLEM THAT IS OF BROAD INTEREST AND IMPORTANCE

The dispute about *Smith* jurisdiction and the need to resolve issues left open in *Merrell Dow* are issues of nation-wide importance. But this case is also important to Alaska because of the large number of Alaska Native corporations that are chartered and governed by state corporate law — but that law might give rise only to federal cases? If so, then the internal affairs of Alaska's corporations will no longer be decided by Alaska courts; the Supreme Court of Alaska will no longer be the law giver on matters of corporate law in this State.

This case is also of great importance to the State of Alaska, to its economy and to its Native peoples. More than 200 Alaska Native corporations will be affected by this case. A significant part of Alaska's residents are shareholders in Alaska corporations. CIRI alone has more than 7,000 shareholders. These corporations have received almost one billion dollars of federal money and title to an area the size of Missouri

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[9] *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) (Holmes, J.).

and Kentucky combined. ANCSA §§ 6, 9, 11-16 [43 U.S.C. §§ 1605, 1608, 1610 - 1615].

This Court has a grand tradition of granting review in cases that are of special importance to Alaska. *Alaska v. Arctic Maid,* 366 U.S. 199, 201-02, 6 L.Ed.2d 227, 81 S.Ct. 929 (1961)("The case is here on a petition for certiorari which we granted because of the importance of the ruling to the new State of Alaska."). Other cases of the genre include: *Territory of Alaska v. American Can Company,* 358 U.S. 224 (1959)(certiorari "granted in view of the fiscal importance of the question to Alaska"), *Zobel v. Williams,* 457 U.S. 55 (1982) (striking down state-wide dividend distributions that were based upon length of residency in Alaska), and *Alaska v. Native Village of Venetie Tribal Government,* 522 U.S. 520, 534 (1998) ("it is worth noting that Congress conveyed ANCSA lands to state-chartered and state-regulated private business corporations, hardly a choice that comports with a desire to retain *federal* superintendence over the land") (italics in original).

V. FEDERAL COURTS LACK SUBJECT MATTER JURISDICTION WHEN THE DEFENSE OF PREEMPTION IS RAISED TO REMOVE A CASE FROM STATE COURT

This case is a good candidate for summary reversal under Supreme Court Rule 16.1 ("The order may be a summary disposition on the merits.").

This case started in an Alaska State court as a purely Alaska case. The complaint alleged CIRI had breached its shareholder contract by paying dividends in

violation of Alaska corporations statutes and in violation of the Alaska common law of corporations.

CIRI removed the case on the reasoning that its federal statute, ANCSA § 7(r), has preempted the corporations law of Alaska. Indeed, the Ninth Circuit opinion found a preemption of Alaska law. *Notti v. CIRI,* 31 Fed.Appx. 586, 587 ("ANCSA expressly preempts Alaska law").

Implicit or explicit, neither form of preemption asserted by CIRI is sufficient to support removal from a state court.

> [I]t is now settled law that a case may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint and even if both parties concede that the federal defense is the only question truly at issue.

Caterpillar Tractor v. Williamson, 482 U.S. 386, 393, 96 L.Ed.2d 318, 327, 107 S.Ct. 2425 (1987) (italics in the original).

This is not a case where there is complete pre-emption. Contrary: ANCSA §§ 2(f), 3(g), 3(t), § 7(h)(1)(A), and 39 expressly adopt state law to define, create and govern these corporations and their programs.

CONCLUSION

We need a new rule. A bright line rule, not a fuzzy unworkable rule.

A final decision about the permissible dividends that can be paid by an Alaska corporation was made by three appellate judges whose chambers are in Phoenix, Los Angeles, and San Diego — thousands of miles from

CIRI's shareholders in Anchorage, Alaska. This is the harm done by the Ninth Circuit's far-reaching grab of subject matter jurisdiction.

The Petition for Certiorari should be granted *or* the Ninth Circuit's decision should be vacated with instructions to remand to State court.

In the alternative, this Court should summarily reverse the decision of the Court of Appeals. Supreme Court Rule 16.1.

Respectfully submitted this 19th day of August in 2002 at Petersburg, Alaska.

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PETITIONERS' APPENDIX

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