No. 22-955

In The
Supreme Court of the United States

SAUK-SUIATTLE INDIAN TRIBE,

Petitioner,

v.

CITY OF SEATTLE; SEATTLE CITY LIGHT,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

If under federal law neither district courts nor state courts have jurisdiction to hear a case that has been removed to district court, may the district court dismiss the case rather than remand it to state court?

CORPORATE DISCLOSURE STATEMENT

The City of Seattle is a Washington municipal corporation. Seattle City Light is the name under which its City Light Department operates. Seattle City Light is not a separate entity but rather part of The City of Seattle.

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STATEMENT

A. Background

For more than a century, Seattle City Light ("City Light") has owned and operated Gorge Dam, part of the Skagit River Hydroelectric Project in Washington State (the "Project"). In 1927, the Federal Power Commission issued a 50-year license for the Project, including Gorge Dam.

Before the initial license expired, City Light applied to the Federal Energy Regulatory Commission ("FERC") for a new hydroelectric license. The Sauk-Suiattle Indian Tribe ("Sauk-Suiattle") intervened in those proceedings. In 1991, City Light, Sauk-Suiattle, and other interested parties entered into a Fisheries Settlement Agreement. SER-103, 105. The Fisheries Settlement Agreement established City Light's "obligations relating to fishery resources affected by the [P]roject, including numerous provisions to protect resident and migratory fish species." SER-108.

FERC incorporated the provisions of the Fisheries Settlement Agreement into its 1995 Relicensing Order, which authorized maintenance and operation of the Project for another 30 years. *See* SER-113–114, 126. For the duration of the license, the Fisheries Settlement Agreement "establishes [City Light's] obligations relating to fishery resources affected by the [P]roject." SER-108, 114.

Although the Secretaries of Commerce and the Interior could have required City Light to construct,

maintain, and operate fish passageways ("fishways") as part of the 1995 Relicensing Order, those agencies chose not to do that. Instead, they—along with the other settling parties, including Sauk-Suiattle—concurred that "all issues concerning environmental impacts from relicensing of the Project, as currently constructed, are satisfactorily resolved[.]" SER-119. Although FERC did not require City Light to construct and operate fishways at Gorge Dam, FERC reserved its "authority to require fish passage in the future, should circumstances warrant" and "after notice and opportunity for hearing." *Id*. Sauk-Suiattle, City Light, and the other parties to the Fisheries Settlement Agreement revised that agreement in 2011, but it continued not to require fishways. *See* SER-99.

The license provided in the 1995 Relicensing Order will expire in 2025. SER-126. Since early 2020, City Light has been engaged in an extensive FERC process to obtain a new license. Numerous federal and state resource agencies, affected Indian tribes (including Sauk-Suiattle), and other interested parties are actively involved in this process, which again has highlighted fisheries issues. *See* SER-85–95. In 2023, City Light agreed to provide fishways at Gorge Dam.[1]

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[1] "Sauk-Suiattle Tribe commends Seattle City Lights [sic] recent public position of providing fish passage at all three dams at the Skagit River Hydroelectric Project." Letter from Jack Fiander on behalf of the Chairman of the Sauk-Suiattle Indian Tribe to FERC Secretary Kimberly Bose, providing comments on P-553-235 Skagit River Hydroelectric Project, Updated Study Report (May 8, 2023) (Accession No. 20230508-5040, available in FERC eLibrary); *see also* FA-04 Fish Passage Technical Studies Program

B. Procedural History

In mid-2021, Sauk-Suiattle filed this lawsuit in Skagit County (Washington) Superior Court challenging City Light's operation of Gorge Dam. ER-25. Sauk-Suiattle's amended complaint sought a declaration that the "presence and operation" of Gorge Dam without fish passage violates the federal acts establishing Oregon Territory and Washington Territory, which allegedly prohibit the construction of dams without fishways, as well as the Supremacy Clause of the United States Constitution, Washington constitutional provisions, and Washington nuisance and common law. In addition to declaratory relief, the amended complaint sought an injunction to require fish passage or prohibit maintenance of Gorge Dam. ER-31–32.

City Light timely removed the case to the United States District Court for the Western District of Washington. ER-38. Sauk-Suiattle filed a motion to remand, arguing that removal was not proper because its claims arose "solely under Washington state law" and its amended complaint "purely involves only questions of *state* law." ER-52 (emphasis in original).

City Light opposed Sauk-Suiattle's motion to remand and separately filed a motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). ER-63. In response, Sauk-Suiattle argued that the fishway requirements of the federal acts establishing

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Report (Mar. 7, 2023) (Accession No. 20230307-5101, available in FERC eLibrary). This Court may take judicial notice of public filings in FERC proceedings.

Oregon Territory and Washington Territory were incorporated by reference into state law and still valid, and that its common-law claims did not amount to a collateral attack on City Light's FERC license. SER-69–75.

The district court entered an order denying Sauk-Suiattle's motion to remand, ER-3–10, and then heard oral argument on City Light's motion to dismiss. *See* ER-89; *see also* SER-4–36. On December 2, 2021, the district court granted City Light's motion and ordered dismissal. The court held that it lacked subject matter jurisdiction over Sauk-Suiattle's claims because Section 313 of the Federal Power Act ("FPA"), 16 U.S.C. § 825l, grants federal appellate courts exclusive jurisdiction over challenges to FERC-issued licenses. Pet. App. at 46; *see also* ER-23–24. Sauk-Suiattle timely appealed.

Before the Ninth Circuit, Sauk-Suiattle argued the district court erred in (a) removing the case from state court, as Sauk-Suiattle's "complaint was entirely premised upon claims arising under state law and raised no federal questions which might provide the basis for removal," and (b) dismissing the amended complaint, as its common law claims did not amount to an impermissible collateral attack on City Light's license. Appellant's Opening Brief at 5–6, 34–37. After receiving Sauk-Suiattle's reply brief, the court ordered the parties to file supplemental briefs addressing the impact, if any, of 28 U.S.C. § 1447(c) on the district court's order granting City Light's motion to dismiss. Sauk-Suiattle argued that the district court should

have remanded the case because it presented no substantial federal question.

The court of appeals issued its opinion on December 30, 2022. Pet. App. at 1–28. The court held that Sauk-Suiattle's amended complaint raised substantial questions of federal law; these questions were necessarily raised, actually disputed, substantial, and susceptible to resolution in federal court without disrupting the federal-state balance approved by Congress. Pet. App. at 8–9 (citing *Gunn v. Minton*, 568 U.S. 251, 258 (2013)). The court also held that the district court properly exercised supplemental jurisdiction over Sauk-Suiattle's state-law claims because they were so closely related to the federal claims as to be part of the same case or controversy. Pet. App. at 12. The court therefore affirmed the district court's order denying remand.

The court of appeals also affirmed the district court's dismissal order, holding that Sauk-Suiattle's complaint is subject to section 313(b) of the FPA, which "vests exclusive jurisdiction in the federal courts of appeals over all objections to FERC orders by a party to a FERC proceeding, even objections based on state law." Pet. App. at 13. The court noted that Sauk-Suiattle was a party to the Gorge Dam relicensing proceedings. Pet. App. at 13 n.11. And as this Court held in *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958), objections to orders such as the 1995 Relicensing Order "*must be made in the Court of Appeals or not at all*." Pet. App. at 15 (quoting *City of Tacoma*, 357 U.S. at 336) (emphasis added by the Ninth Circuit).

The court of appeals examined Sauk-Suiattle's amended complaint and determined that its gravamen was a direct attack on FERC's decision not to require fishways. *See* Pet. App. at 17. Therefore, the court of appeals held, the district court was correct in determining that it lacked subject matter jurisdiction. *Id.*

The only remaining question was whether the district court properly dismissed the action in light of 28 U.S.C. § 1447(c). The court of appeals held that it was bound to apply the narrow futility exception recognized in *Global Rescue Jets, LLC v. Kaiser Foundation Health Plan, Inc.*, 30 F.4th 905, 920 n.6 (9th Cir. 2022), and *Polo v. Innoventions International, LLC*, 833 F.3d 1193, 1197–98 (9th Cir. 2016). Pet. App. at 18–19. Sauk-Suiattle "has not argued that the futility exception has been overruled, and we decline to consider the issue sua sponte." *Id.* at 20. The court added that Sauk-Suiattle "has also failed to argue, and thus we do not consider, whether our case law on the futility exception is conflicting." *Id.* at 20 n.16 (citing *Albingia Versicherungs A.G. v. Schenker Int'l Inc.*, 344 F.3d 931, 938 (9th Cir. 2003), and *Bruns v. Nat'l Credit Union Administration*, 122 F.3d 1251, 1257–58 (9th Cir. 1997), two cases holding that 28 U.S.C. § 1447(c) requires remand of a removed case if there is no federal subject matter jurisdiction).

"Remand here," the court of appeals held, "would be futile. A state court would lack jurisdiction for the same reason the district court lacked jurisdiction: section 313(b) of the FPA vests the federal courts of appeals with *exclusive* jurisdiction over [Sauk-Suiattle's]

action." Pet. App. at 20 (emphasis in original). Section 313(b) would, without any shadow of doubt, require the state court to dismiss the action after remand. *See id.* Hence, "it was proper for the district court to dismiss the case under the futility exception to § 1447(c)'s remand requirement." *Id.* at 21.

In a concurring opinion by Judge Bennett, joined by Chief Judge Murguia and Judge Fletcher, the panel expressed its view that the futility exception does not align with the plain text of 28 U.S.C. § 1447(c). In an "appropriate case," Judge Bennett stated, "our court should reconsider the futility exception en banc and abandon it." Pet. App. at 24.

Sauk-Suiattle petitioned for rehearing en banc, urging the court of appeals to abandon the futility exception in this case. The court denied the petition. Its order stated: "Chief Judge Murguia and Judge Bennett have voted to deny the petition for rehearing en banc, and Judge Fletcher so recommends." Pet. App. at 48. The order added: "The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on whether to rehear the matter en banc." *Id.*

REASONS FOR DENYING THE WRIT

A. Sauk-Suiattle fails to raise an issue that merits this Court's consideration.

Sauk-Suiattle asserts that the court of appeals' decision in this case conflicts with *International Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72 (1991) ("*International Primate*"). Sauk-Suiattle also asserts that the court of appeals' decision reflects a circuit split, that the issue raised is exceptionally important, and that this issue implicates separation of powers. These assertions do not survive examination.

1. There is no conflict with *International Primate*.

The petitioners in *International Primate*, organizations and individuals seeking the humane treatment of animals, filed suit in Louisiana state court challenging the planned euthanasia of monkeys used in federally funded research. One of the defendants, the National Institutes of Health ("NIH"), removed the case to federal court pursuant to 28 U.S.C. § 1442(a)(1). This Court held that 28 U.S.C. § 1442(a)(1) authorizes removal only by federal officers, not federal agencies such as NIH.[2]

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[2] In response to the Court's decision in *International Primate*, Congress amended 28 U.S.C. § 1442 to permit removal by federal agencies. *See City of Cookeville, Tenn. v. Upper Cumberland Elec. Membership Corp.*, 484 F.3d 380, 389–90 (6th Cir. 2007).

Because "NIH lacked authority to remove petitioners' suit to federal court," 500 U.S. at 87, the Court next considered whether the case should be remanded to state court. NIH claimed a remand would be futile, reasoning that it was an indispensable party but could not be sued in state court. *Id.* at 87–88. NIH also suggested that, if an NIH official were substituted for the agency, that person could remove the case to federal court or, alternatively, another defendant (Tulane) could do so based on its status as a person acting under an NIH officer. *Id.* at 88. This Court held that there were too many uncertainties in these speculative scenarios to permit firm predictions. *Id.* at 89. Whether NIH or one of its officers would be deemed an indispensable party turned on a question of Louisiana law. *Id.* Whether Tulane would be found to be a person acting under NIH's director was a mixed question of law and fact, one that "should not be resolved in the first instance by this Court, least of all without an appropriate record." *Id.* "We also take note," the Court continued, that the literal words of § 1447(c) give no discretion to dismiss rather than remand an action. *Id.*

Sauk-Suiattle seizes upon this last point, arguing that 28 U.S.C. § 1447(c) requires remand rather than dismissal in all circumstances. But if that were true, it would have been unnecessary for this Court to consider the scenarios posited by NIH as support for its futility argument before deciding that "futility" was too uncertain to be used as a basis for dismissal in that case. The Court's citation of two grounds for its remand decision in *International Primate* can hardly be said to

establish that only the second one is legitimate. The correct inference, rather, is that both are: both the language of section 1447(c) and consideration of what could happen after remand deserve judicial attention.

Not only is this Court's decision requiring remand in *International Primate* compatible with the Ninth Circuit's opinion affirming dismissal here, but also there are key factual and procedural distinctions between the two cases. In *International Primate*, the Court held that NIH lacked authority to remove petitioners' suit to federal court. 500 U.S. at 87. Here, by contrast, both the district court and the court of appeals held that the federal questions underlying Sauk-Suiattle's lawsuit gave City Light a valid basis for removal. Those federal questions centered on the nineteenth-century statutes creating Oregon Territory and Washington Territory, which Sauk-Suiattle's complaint alleged prohibited damming any river without providing fish passage, as well as the Supremacy Clause, which Sauk-Suiattle said required that these federal statutes be given effect.

With the case properly before it, the district court was empowered—indeed, required—to apply the Federal Rules of Civil Procedure. Rule 12(b)(1) authorizes a defendant to raise a defense of lack of subject-matter jurisdiction by motion. City Light did so, citing the FPA. Rule 12(h)(3) provides as follows: "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." The district court did precisely that.

In addition to applying Rule 12(h)(3), the district court had to consider the impact of section 313(b) of the FPA, 16 U.S.C. § 825l(b), which states that any challenge to a FERC order must be brought in the federal court of appeals. Under federal law, neither state courts nor federal district courts have jurisdiction over such a challenge. This Court's holding in *City of Tacoma* is clear:

> Congress in [section] 313(b) prescribed the specific, complete and exclusive mode for judicial review of the Commission's orders. . . . It thereby necessarily precluded de novo litigation between the parties of all issues inhering in the controversy, and all other modes of judicial review. Hence, upon judicial review of the Commission's order, all objections to the order, to the license it directs to be issued, and to the legal competence of the licensee to execute its terms, must be made in the Court of Appeals or not at all.

357 U.S. at 336 (internal quotations and footnotes omitted).

Given the language of section 313(b) and the holding of *City of Tacoma*, the district court did not need to consider what might play out in state court after remand. Nor did it have to determine whether the outcomes of various scenarios would permit or require the conclusion that remand was futile. Here, as in any case raising a collateral challenge to a FERC order, a state court has no greater claim to subject matter jurisdiction than does a federal district court. Upholding the

jurisdictional command of section 313(b) means that the case must be dismissed.

2. There is no circuit split on the precise issue that this case presents.

Sauk-Suiattle next argues that the circuit courts are divided on the issue raised here and that this Court should intervene to resolve the split. Like the Ninth Circuit, Sauk-Suiattle focuses on the "futility exception" to 28 U.S.C. § 1447(c). But that shorthand phrase obscures more than it illuminates. When courts have discussed but refused to apply the "futility exception," they have done so in the context of claims that involve a question of state law, as to which state courts have the final word, or a question of federal law that a state court might decide differently than a federal court. Neither kind of claim exists here.

No state court has jurisdiction to entertain Sauk-Suiattle's collateral attack on City Light's FERC license, because federal law—section 313 of the FPA—strips state courts of jurisdiction over all such claims. In circumstances such as these, where federal law precludes state courts from hearing a case, no circuit, including those that abjure the "futility exception," tells district courts that they should remand rather than dismiss the case. To the contrary, the courts of appeals uniformly require dismissal of such lawsuits. And this only makes sense: every federal court must uphold the jurisdictional limits that Congress has established in its statutes, including the FPA. Remand to a state

court that the federal court has already determined lacks subject matter jurisdiction would be inconsistent with that responsibility.

In addition, Congress should not be presumed to have directed courts to commit a useless act. The premise underlying section 1447(c) is that the state court can actually do something after a case is remanded.[3] A state court that, under federal law, is forbidden to exercise jurisdiction over a case can do nothing but dismiss it. *See United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 543–44 (1940) ("When [plain] meaning has led to absurd or futile results, . . . this Court as looked beyond the words to the purpose of the act.").

Furthermore, efficiency merits judicial support. *See Caterpillar Inc. v. Lewis*, 519 U.S. 61, 75 (1996) ("considerations of finality, efficiency, and economy" can trump an objection to improper removal, later cured); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585–88 (1999) (judicial economy may warrant addressing personal jurisdiction before subject matter jurisdiction after a case is removed, especially if personal jurisdiction rests on federal constitutional issues). Efficiency may not outweigh every other consideration. But neither should it be ignored.

Federal courts have jurisdiction to determine their own jurisdiction. *See United States v. Ruiz*, 536 U.S.

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[3] "A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. *The State court may thereupon proceed with such case*." 28 U.S.C. § 1447(c) (emphasis added).

622, 628 (2002). Where, as here, the basis for the district court's jurisdictional holding is equally applicable to state courts, the district court may apply that holding without infringing on the state court's prerogatives or its right to interpret and apply state law.

Courts of appeals have recognized and applied these principles in numerous cases raising the same kind of issue that this case raises—namely, how a district court should respond if federal law bars the exercise of state-court jurisdiction. Consider, for example, *Estate of West v. U.S. Department of Veterans Affairs*, 895 F.3d 432 (6th Cir. 2018). The court held there that the entitlement of a veteran's estate to disability benefits can be reviewed only as provided in the Veterans' Judicial Review Act (the "Review Act"). *Id.* at 433. The Review Act establishes a special appeals process after the Secretary of Veterans Affairs makes a decision: a veteran may appeal to the Board of Veterans' Appeals, thence to the Court of Appeals for Veterans Claims, and thence to the Federal Circuit. *Id.* at 434. Apart from this process (with exceptions not relevant here), the Secretary's determination "may not be reviewed by any other official or by any court." *Id.* (quoting 38 U.S.C. § 511(a)). And for that reason, the court of appeals held, neither the district court nor the state court had jurisdiction to consider the dispute. *Id.*

The court of appeals reversed the district court's remand of the dispute to the state court. "Rather than remand the case," the court stated, "the district court should have bowed out—by means of a dismissal on jurisdictional grounds—to allow the Estate to challenge

the Secretary's determination, if the Estate so chose, under the exclusive process set forth in the Review Act." *Id.* The court rejected applying the remand directive in 28 U.S.C. § 1447(c). First, "that section plainly assumes that the state court actually has jurisdiction to decide the case." *Id.* at 436. Second, "as an interpretive matter, statutory text must always be read in context." *Id.* The court of appeals determined that the relevant context in *Estate of West* included the jurisdictional provision in the Review Act, which bars the state court from revisiting the Secretary's determination. And because that federal statute "speaks to the state court's jurisdiction on that point much more specifically" than section 1447(c), it controls. *Id*. (citing *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012)).[4]

In *Perna v. Health One Credit Union*, 983 F.3d 258 (6th Cir. 2020), the Sixth Circuit considered a removed claim brought against a credit union. The Federal Credit Union Act establishes procedures to be followed in processing claims against defunct, federally insured credit unions. *See* 12 U.S.C. § 1787(b). Apart from these procedures, "no court shall have jurisdiction over . . . any claim or action for payment from . . . the assets of any credit union for which the [National Credit Union Administration] Board has been appointed liquidating agent, . . . or any claim relating to any act or omission

[4] *See also Morton v. Mancari*, 417 U.S. 535, 550–51 (1974) (absent clear contrary intent, "a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment").

of such credit union or the Board as liquidating agent." 12 U.S.C. § 1787(b)(13)(D). The court of appeals held that this provision deprived not just the district court but also state courts of jurisdiction to hear the plaintiff's claim and that, notwithstanding 28 U.S.C. § 1447(c), the proper remedy was dismissal rather than remand. *Perna*, 983 F.3d at 273.

In another case, the Sixth Circuit reversed a district court's remand of state-law claims and ordered the district court to dismiss the claims for lack of subject matter jurisdiction because they were precluded by the exclusive remedy in Title IV of the Labor Management Reporting and Disclosures Act ("LMRDA"), 29 U.S.C. §§ 481–83. *Davis v. International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW)*, 392 F.3d 834 (6th Cir. 2004), *overruled in part by Blackburn v. Oaktree Capital Management, LLC*, 511 F.3d 633 (6th Cir. 2008). The *Davis* court found that the plaintiff's state-law claims hinged on whether he was lawfully elected consistent with Title IV of the LMRDA, and "Title IV of the LMRDA mandates that challenges to a previously conducted union election may only be brought by the Secretary of Labor." *Id*. at 838–39. Accordingly, the plaintiff's claims for union "postelection relief are relegated to the exclusive jurisdiction of the Secretary of Labor by the LMRDA" and should be dismissed for lack of subject matter jurisdiction. *Id*. at 839.

The Seventh Circuit considered a removed claim against the FDIC and the jurisdictional bar established by the Financial Institutions Reform, Recovery, and

Enforcement Act ("FIRREA"), 12 U.S.C. § 1821(d)(13), in *Seaway Bank & Trust Co. v. J&A Series I, LLC*, 962 F.3d 926 (7th Cir. 2020). The court affirmed the dismissal of the claim for lack of subject matter jurisdiction. "Remand to the state court would have been improper because section 1821(d)(13) provides that, in the absence of exhaustion of that process, 'no court shall have jurisdiction over' a claim." *Id.* at 932. "That includes state courts." *Id.*

The Seventh Circuit has also considered claims subject to the Review Act. In *Evans v. Greenfield Banking Co.*, 774 F.3d 1117 (7th Cir. 2014), a veteran's family brought claims of breach of fiduciary duty and conversion in state court against a bank that had been appointed as federal fiduciary for the veteran. *Id.* at 1118. The Secretary of Veterans Affairs intervened, removed the case to federal district court, and filed a motion to dismiss the action for lack of jurisdiction. *Id.* at 1118–19. The Secretary argued that federal law not only gave the Secretary the power to appoint a federal fiduciary to receive and disburse the veteran's benefits, but also cabined judicial review of the Secretary's appointment under the Review Act. *Id.* at 1119.

Agreeing, the district court dismissed the case, and the court of appeals affirmed. *Id.* The Seventh Circuit concluded that the veteran's family's state-court claims were "really a challenge to a federal fiduciary appointment and to veteran benefits distribution and as such, [it] lack[ed] jurisdiction" over the challenge. *Id.* at 1124. "Decisions made by the Secretary regarding benefits about which the [family] take[s] issue can

be challenged in accordance with the statutorily prescribed process." *Id.* Hence, the district court "was right to grant the motion to dismiss the case." *Id.*

In *Edwards v. U.S. Department of Justice*, 43 F.3d 312 (7th Cir. 1994), the Seventh Circuit determined that dismissal was warranted when the state court had no jurisdiction to order the requested relief. In that case, a state court had ordered the U.S. Department of Justice ("DOJ") to show cause for refusing to produce Federal Bureau of Investigation surveillance reports. *Id.* at 314. DOJ removed the case to federal district court and moved to quash the state-court subpoenas, arguing that plaintiff's action should have been an Administrative Procedure Act ("APA") claim against DOJ regulations. *Id.* Recognizing that "[t]he proper method for judicial review of an agency decision pursuant to valid agency regulations is through the [APA]," the Seventh Circuit affirmed the federal district court's dismissal of the plaintiff's claim without remand. *Id.* at 315.

The Sixth and Seventh Circuits are hardly alone in directing dismissal rather than remand in cases like this. The First Circuit applied section 1821(d)(13) of FIRREA to a removed claim in *Acosta-Ramirez v. Banco Popular de Puerto Rico*, 712 F.3d 14 (1st Cir. 2013), holding that the claim should have been dismissed for lack of subject-matter jurisdiction (albeit without addressing the possibility of remand under 28 U.S.C. § 1447(c)). *Id.* at 16, 21.

The Third Circuit reached the same conclusion in *Wujick v. Dale & Dale, Inc.*, 43 F.3d 790 (3d Cir. 1994), and *Tellado v. IndyMac Mortgage Services*, 707 F.3d 275 (3d Cir. 2013), two cases that had been removed from state court to federal court. In *Wujick*, the court stated: "Congress expressly withdrew jurisdiction from all courts over any claim to a failed bank's assets made outside the procedures set forth in section 1821." 43 F.3d at 793 (quoting *Fed. Dep. Ins. Corp. v. Shain, Schaffer & Rafanello*, 994 F.2d 129, 132 (3d Cir. 1991)). The court of appeals directed the district court to dismiss the FIRREA claims because "the state court also lacked subject matter jurisdiction for the same reason," so "a remand by the district court would be a vacuous act." *Id*. at 794.

The Fourth Circuit held similarly in *Tillman v. IndyMac Mortgage Services*, 37 F.3d 1032 (4th Cir. 1994), when it affirmed dismissal rather than ordering remand of claims that had been removed to federal court. The court of appeals noted that "the elaborate administrative scheme established in [FIRREA] would be rendered meaningless through improvident judicial review." *Id.* at 1036.

In short, if federal law bars judicial review of a removed claim by a state court as well as by a federal district court, the proper remedy is dismissal.

3. The cases Sauk-Suiattle cites can be readily distinguished.

In every case Sauk-Suiattle cites for the proposition that the "futility exception" should be rejected, a state court had at least arguable authority to consider the matter after remand. None of the cases considered federal statutes that preclude state courts from exercising jurisdiction over the claims pleaded.

In *Bromwell v. Michigan Mutual Insurance Co.*, 115 F.3d 208 (3d Cir. 1997), the claim filed in state court sought declaratory relief related to the meaning of the term "accident" in an insurance policy. The district court had held earlier that it lacked subject matter jurisdiction over an identical claim. *Id.* at 212. Nevertheless, it accepted removal and issued an order of dismissal, ruling that a Pennsylvania court would lack subject matter jurisdiction to issue a declaratory judgment. *Id.* This was error, the Third Circuit held. Given the district court's earlier jurisdictional holding, principles of res judicata precluded the court from exercising jurisdiction after the case was removed. *See id.* at 213. Furthermore, section 1447(c) required the district court to remand the case to state court. *See id.* at 213–14. "Whether the matter is justiciable under state law is a matter for the state court to decide." *Id.* at 214.

In *Roach v. West Virginia Regional Jail & Correctional Facility Authority*, 74 F.3d 46 (4th Cir. 1996), the plaintiff brought an action for civil rights violations in state court. *Id.* at 47. After removal, the plaintiff

conceded that the Eleventh Amendment barred federal courts from exercising jurisdiction over his claims. *Id.* at 47–48. But that bar does not apply in state court. The court of appeals held that it was error to dismiss his claims rather than remand them to state court. *Id.* at 48. It was also error for the district court to reach the merits of the claims. *Id.* at 49. In addition to noting that there was no futility exception to section 1447(c), the court of appeals pointed out that even if the state court decided that the defendant was not amenable to suit under section 1983, "that ruling would not be dispositive of the state-law claims." *Id*.

In *Smith v. Wisconsin Department of Agriculture*, 23 F.3d 1134 (7th Cir. 1994), the court considered a claim, initially filed in but removed from state court, that procedures followed by state officials in enforcing state dairy regulations violated the plaintiffs' due process rights. *Id.* at 1138. The district court found that the defendant state agency enjoyed sovereign immunity under the Eleventh Amendment and dismissed the complaint. *Id.* at 1140. The court of appeals held that the district court should instead have remanded the matter to state court under section 1447(c). "Just as in [*International Primate*], whether a Wisconsin court would entertain Smith's suit . . . 'turns on a question of [Wisconsin] law, and we decline to speculate on the proper result.'" *Id.* at 1139 (quoting *International Primate*, 500 U.S. at 89). The court of appeals also noted that "the fact that [a court] believe[s] a certain result *unlikely*, as a matter of state law, is not sufficient grounds for reading an exception into the absolute

statutory words 'shall be remanded.'" *Smith*, 23 F.3d at 1139 (citing *Maine Ass'n of Interdependent Neighborhoods v. Commissioner, Me. Dep't of Human Servs.*, 876 F.2d 1051, 1055 (1st Cir. 1989)) (emphasis carried over from First Circuit's opinion in *Maine Ass'n of Interdependent Neighborhoods*).[5]

In *Jepsen v. Texaco, Inc.*, No. 94-6429, 1995 WL 607630 (10th Cir. Oct. 16, 1995) (unpublished decision), the plaintiff sued Texaco in Oklahoma state court for breach of contract, unjust enrichment, breach of fiduciary duty, account, constructive fraud, and tortious/bad faith breach of contract. *Id.* at *1. The court of appeals held that the plaintiff lacked Article III standing and that, under section 1447(c), the absence of federal subject matter jurisdiction required that his case be remanded rather than adjudicated by the district court. *Id.* at *2. The court rejected Texaco's attempt to invoke futility, as the judicial discretion that argument presumes is not to be found in section 1447(c) and "would require this court to speculate on the result of an application of state law, an endeavor we decline." *Id.* at *3.

In *Maine Association of Interdependent Neighborhoods*, the district court decided after removal that the

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[5] The Seventh Circuit did not cite *Smith* in *Edwards*, *Evans*, or *Seaway*, all later decisions in which the court affirmed the dismissal of removed claims. Those three cases, unlike *Smith*, considered federal statutes that preclude state courts from exercising jurisdiction over the claims at issue. They, and not *Smith*, are appropriate analogues to Sauk-Suiattle's collateral attack on City Light's FERC license.

plaintiff lacked Article III standing. 876 F.2d at 1053. Rather than remand the case, however, the district court dismissed it under the fiction that it had been removed by a federal officer. *Id.* The district court predicted that a federal officer who had been joined would in fact seek to remove the case. *Id.* The court of appeals reversed: it was unwilling to read such discretion into section 1447(c) in that case "because we cannot say with absolute certainty that remand would prove futile. It is conceivable, though unlikely, that [the plaintiff] will succeed in finding a state forum for its claims." *Id.* at 1054. After considering possible scenarios, the court concluded that "Maine procedural law is a matter for the Maine state courts to decide." *Id.* at 1055.

The final case Sauk-Suiattle cites for its "circuit conflict" argument is *Barbara v. New York Stock Exchange, Inc.*, 99 F.3d 49 (2d Cir. 1996), *abrogated by Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 578 U.S. 374 (2016). In that case, the circuit court held that the district court properly exercised jurisdiction over the plaintiff's amended complaint, so it had "no need to decide whether remand might otherwise be inappropriate because it would be futile." *Id*. at 56 n.4.

In sum, there is no conflict between any of the decisions Sauk-Suiattle cites and the dismissal of its complaint by the district court. Those decisions stand for the proposition that district courts should not presume to guess what might happen after remand or try to predict how state courts will resolve issues of state law. None of the cited cases consider the obligation of a district court to uphold a federal statute that removes

jurisdiction from state courts and district courts alike. None of Sauk-Suiattle's cases, in other words, would require a different outcome in this case than that which the court of appeals affirmed: dismissal of Sauk-Suiattle's lawsuit.

4. The issue raised in this case is unimportant, and the court of appeals' decision does not threaten separation of powers.

"A petition for a writ of certiorari will be granted only for compelling reasons." Rule 10. It is not sufficient to show a conflict between decisions by different courts of appeals; rather, the conflict must involve "the same important matter." Rule 10(a); *see also* Rule 10(c) (the court whose decision is challenged must have "decided an important question of federal law that has not been, but should be, settled by this Court"). The issue Sauk-Suiattle seeks to raise falls far short of this standard.

First, the alleged circuit conflict presented in Sauk-Suiattle's petition does not even involve the same matter. Rather, it involves two different sorts of claims: those that state courts presumptively have jurisdiction to consider, and those that federal law categorically bars state courts from considering. This fundamental difference in circumstances explains the divergence in outcomes.

Second, even if this difference could be ignored, the issue raised here is not "an important question of

federal law." To the contrary, it matters very little whether a case such as this is dismissed or remanded. The remand of a case that, under federal law, may not be prosecuted in the state court where it was filed just adds one administrative step and some delay before the inevitable result of dismissal.[6] A federal court's prompt termination of such a case, on the other hand, works no injustice and reflects no disregard of any state court.

Third, even if this case were thought to raise some broader issue about the "futility exception," there is no need for this Court to expend its limited resources to resolve the alleged circuit conflict. The Ninth Circuit has signaled its desire to reconsider this exception, en banc, "in an appropriate case"—presumably, a case in which the state court is *not* barred by federal law from exercising jurisdiction. Pet. App. at 28. And the Ninth Circuit has, through the opinions in this case, given prospective litigants the building blocks for the argument it hopes to hear. Hence, the concept of a "futility exception" to section 1447(c) outside the circumstances of this case may well disappear without this Court's intervention. At a minimum, the framing of that issue

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[6] To posit that remand rather than dismissal might make a difference in ultimate outcome in a case such as this requires assuming both that the state court will err in refusing to recognize that federal law bars it from considering the plaintiff's claim and that this error will remain uncorrected on appeal. Even if such an uncorrected error is possible, that possibility cannot justify a grant of certiorari.

can be sharpened by further consideration at the circuit-court level.

Meanwhile, this Court need not be concerned by hyperbole about threats to separation of powers or attacks on the rights of state-court judges. On the contrary, the district court's decision here, like the dismissal of claims in other cases that are similarly barred by the jurisdictional mandates of specific federal statutes, reflects faithful attention, and appropriate deference, to congressional mandates.

B. This case is a poor vehicle to examine the issue Sauk-Suiattle tries to raise.

Even if the Court believes that the "futility exception" raises an important question requiring the Court's intervention, this is not a good case to consider that question.

1. A different decision will not alter the outcome here.

Although Sauk-Suiattle argues that the Skagit County Superior Court might reach a different conclusion than the district court on its authority to hear this case, that argument is meritless. Sauk-Suiattle's petition misstates the savings clause in the FPA and mischaracterizes City Light's position.

According to Sauk-Suiattle, a 1986 amendment to the FPA provides that "no provision therein shall affect the rights or jurisdiction of the States over any river or

stream." Pet. at 8 n.4 (citing Pub. Law 99-495, § 17, 10 Stat. 1259 (Oct. 16, 1986), reproduced in Pet. App. at 53–54). But this savings clause is for *a different statute*: the Electric Consumers Protection Act of 1986 ("ECPA"). The FPA, enacted in 1935, has no such general savings clause. Although ECPA amended and thus is part of the FPA,[7] the language Sauk-Suiattle quotes is a savings clause for ECPA alone. It is not found in the FPA.

The FPA does reserve to the states some decisions relating to water rights and water supply:

> Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

16 U.S.C. § 821. But that reservation of authority is immaterial to this case, which is controlled by the FPA's broad preemption of state authority over FERC-licensed hydroelectric projects. *See City of Tacoma*, 357 U.S. at 336.

Sauk-Suiattle also mischaracterizes the record by claiming that "Seattle itself admitted at oral argument that lack of a fishway is a violation of Washington State law." Pet. at 8 n.4. Sauk-Suiattle is apparently

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[7] ECPA's amendment to the FPA primarily relates to Section 4(e) of the FPA, 16 U.S.C. § 797(e), which establishes standards and procedures for issuing licenses within a reservation.

referring to oral argument before the district court, where City Light's counsel explained the FPA's preemptive effect:

> Today, the Washington laws that make ownership or operation of certain dams without fish passage a gross misdemeanor or nuisance are part of the Revised Code of Washington. These laws, however, do not apply to FERC license [sic—FERC-licensed] dams because they are preempted by Section 18 and Section 10(a) of the Federal Power Act. Section 18 of the Federal Power Act gives . . . the Secretary of Commerce and the Secretary of the Interior exclusive jurisdiction to determine whether or not fish passage [should] be required in a FERC license.
>
> Section 10(a) also gives FERC the exclusive jurisdiction to determine the terms and conditions that should be included in a FERC license to provide protection, mitigation, and enhancement of fish and wildlife. These sections of the Federal Power Act result in field and conflict preemption of Washington's misdemeanor and nuisance statutes in the context of FERC-licensed dams.

SER-14–15. Counsel's statement remains correct.

2. Sauk-Suiattle failed to properly raise or brief the issue below.

At no point before the Ninth Circuit issued its opinion did Sauk-Suiattle address the issue that its

petition now raises. Instead, Sauk-Suiattle insisted that the district court was wrong to find a substantial federal question and that the case should be remanded on that basis. Indeed, Sauk-Suiattle argued that it was illegitimate to consider the preemptive effect of the FPA because that was a defense raised by City Light and not within the "well-pleaded complaint" rule.

Sauk-Suiattle never argued that this Court's decision in *International Primate* overruled the "futility exception" or that it required remand. *See* Pet. App. at 19–20. As the Ninth Circuit noted, Sauk-Suiattle "also failed to argue, and thus we do not consider, whether our case law on the futility exception is conflicting." Pet. App. at 20 n.16 (citing *Albingia Versicherungs A.G.*, 344 F.3d at 938, and *Bruns*, 122 F.3d at 1257–58). *See also Republic Silver State Disposal, Inc. v. Halloum*, No. 21-16230, 2022 WL 10310207 (9th Cir. Oct. 18, 2022) (absence of subject matter jurisdiction requires the district court to remand case under 28 U.S.C. § 1447(c)).

Only if the Ninth Circuit, after full briefing and en banc consideration of the topic, concludes that there is a general "futility exception" to section 1447(c) will that issue be ripe for consideration by this Court. This is not the right time or the right case to take up that question.

3. There is no longer a question about whether Gorge Dam will have fish passage.

Even if there were a cognizable basis for a state or a federal district court to entertain Sauk-Suiattle's collateral attack on the current FERC license for Gorge Dam, that license is set to expire in 2025. The new license will likely provide fish passage, as City Light has proposed in its recent Final License Application and Sauk-Suiattle's recent letter acknowledges—indeed, celebrates.[8] This raises a question about whether there remains, or soon will remain, any case or controversy subject to federal court review. In any event, this Court's resources should not be diverted to an inconsequential and purely theoretical dispute over which court should have the honor of dismissing Sauk-Suiattle's challenge to the absence of fishways at Gorge Dam under City Light's soon-to-expire FERC license.

* * *

The Ninth Circuit determined that this case was not the appropriate occasion to revisit the futility exception. It was absolutely correct to reach that conclusion. There is no intractable circuit split on an important federal issue requiring this Court's intervention. And this Court's resources should not be taken up adjudicating a case in which its decision cannot affect the outcome.

[8] *See* Note 1 above.

CONCLUSION

The Court should deny the petition for certiorari.

Respectfully submitted,

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