No. 22-_____

In The
Supreme Court of the United States

SAUK-SUIATTLE INDIAN TRIBE,

Petitioner,

v.

CITY OF SEATTLE,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the court-created "futility" doctrine, which allows a United States court to decide a case removed from state court even though it lacks jurisdiction, repugnant to Article III of the Constitution?

2. Does application of the so-called "futility" doctrine by a United States court to decide a case over which it lacks jurisdiction contravene 28 U.S.C. 1447(c), the plain language of which requires remand of the cause to the state court from which it was removed?

3. Should the Supreme Court grant *certiorari* to reconcile a conflict among the circuit courts of appeal regarding the validity of the futility doctrine?

PARTIES TO THE PROCEEDING

Petitioner Sauk-Suiattle Indian Tribe was the plaintiff in the district court proceeding, and appellant in the court of appeals proceeding. Respondent City of Seattle was the defendant in the district court proceeding, and appellee in the court of appeals proceeding.

CORPORATE DISCLOSURE STATEMENT

The Sauk-Suiattle Indian Tribe is an Indian tribe or nation with a governing body duly recognized by the Secretary of the United States Department of the Interior. It does not have a parent corporation, and no publicly held corporation holds stock in the Tribe.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of this Court's Rule 14.1(b)(iii): *Sauk-Suiattle Indian Tribe v. City of Seattle*, No. 2:21-cv-01014-BJR (W.D. Wash. Order dated December 2, 2021), and *Sauk-Suiattle Indian Tribe v. City of Seattle*, No. 22-35000, *decision issued* December 30, 2022, *petition for rehearing en banc denied* January 26, 2023.

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PETITION FOR WRIT OF CERTIORARI

The Sauk-Suiattle Indian Tribe ("Sauk-Suiattle") respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit is reproduced at App. 1-28. The opinion of the District Court for the Western District of Washington is unreported, and is reproduced at App. 29-47.

JURISDICTION

This Court possesses jurisdiction under 28 U.S.C. § 1254(1). The Ninth Circuit denied Sauk-Suiattle's petition for rehearing *en banc* on January 26, 2023.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1441 and 28 U.S.C. § 1447(c).[1]

[1] The full text of the statutory provisions involved is set forth in the Appendix.

STATEMENT OF THE CASE

The Sauk-Suiattle Indian Tribe filed a civil action in the Superior Court of the State of Washington for Skagit County alleging, *inter alia*, that the presence and operation a hydropower electricity generating facility owned by the City of Seattle violated proscriptions of Washington constitutional, common law, and statutory provisions enacted consistent with 1848 and 1853 Congressional Acts in effect at the time prohibiting blockages of fish-bearing streams in Washington and Oregon territories. Seattle removed the cause to the United States District Court for the Western District of Washington pursuant to 28 U.S.C. § 1441 and moved to dismiss the Tribe's complaint. The District Court, on December 2, 2021, concluded that it lacked jurisdiction over the tribe's claims and entered an order dismissing the removed cause. App. 29.

The Tribe timely appealed the order to the United States Court of Appeals for the Ninth Circuit. The assigned panel of the Ninth Circuit reluctantly affirmed the decision of the District Court on grounds that prior precedent of the Ninth Circuit known as the "futility doctrine" required them to rule that, notwithstanding that the District Court lacked jurisdiction over the Tribe's claim, application of the doctrine required dismissal since the State Court would reach the same conclusion.

At issue in the case is that Section 313 of the Federal Power Act, 16 U.S.C. § 8251, vests exclusive jurisdiction over challenges to provisions contained in

licenses issued by the Federal Energy Regulatory Commission in the United States Courts of Appeals. However, upon removal to the District Court by the City of Seattle of the Tribe's complaint, the District Court dismissed the case for lack of jurisdiction based upon the "futility doctrine." A panel of the Ninth Circuit affirmed the decision of the district court while at the same time questioning the continued validity of such a doctrine where the express language of a federal judicial statute requires remand.

28 U.S.C. § 1447 expressly states that "if at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c). 16 U.S.C. 8251 expressly states *inter alia* that:

> Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order *in the United States Court of Appeals*. . . . Upon the filing of such petition *such court shall have jurisdiction*, which upon the filing of the record with it *shall be exclusive*, to affirm, modify, or set aside such order in whole or in part.

16 U.S.C. § 8251(b) (emphasis added).[2] Notwithstanding § 8251's exclusive jurisdiction provision vesting jurisdiction in the United States Courts of Appeals, the District Court and Court of Appeals upheld dismissal of the Tribe's complaint by concluding that, if remanded

[2] Text set forth at App. 50, *et seq.*

to the state court, that court would necessarily reach the same conclusion.

The use of such a court-created doctrine to entertain then dismiss causes over which the United States courts lack jurisdiction is contrary to established principles of federalism and comity toward state courts. Nearly all Courts of Appeal which have considered the doctrine have rejected it. Unlike courts of the United States, which are courts of limited jurisdiction, the exercise of jurisdiction by state courts is not constrained by Article III of the United States Constitution.

It is time for the so-called Futility Doctrine to be retired to the dust bin, as its application—especially in cases where the express language of a statute requires remand—essentially results in federal courts "commandeering" cases from the capable hands of state judiciaries exercising their general jurisdiction.

Only the Fifth and Ninth Circuits remain reluctantly adhered to the doctrine, and the Ninth Circuit has now twice called into question its legitimacy. Granting *certiorari* is necessary to address this conflict within the Circuit Courts of Appeal. An additional reason for granting *certiorari* review is that the decision of the Ninth Circuit appears directly contrary to a decision of the United States Supreme Court. In *International Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72 (1991), the Supreme Court took note of:

> [T]he literal words of § 1447(c), which, on their face, give . . . no discretion to dismiss,

> rather than remand, an action. The statute declares that, where subject matter jurisdiction is lacking, the removed case "*shall* be remanded."

500 U.S. at 89 (internal citation omitted) (emphasis in original).

REASONS FOR GRANTING THE PETITION

The panel decision in this appeal appears to conflict with a decision of the United States Supreme Court in which the Court called into question the validity of application of the so-called Futility Doctrine to removed cases in which the plain text of a statute requires remand. *International Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72 (1991).

In *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958), the Supreme Court interpreted section 313(b) as vesting exclusive jurisdiction in the courts of appeals over all objections to FERC orders. As stated by the Ninth Circuit panel in this case, this Supreme Court in *City of Tacoma* stated:

> 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. Id.* at 336 (emphasis added) (footnote omitted). The Court did not distinguish between challenges to a FERC order based on federal law and challenges to a FERC order based on state law, and the broad language the Court used admits of none.

See App. 14-15 (*Per Curiam* opinion). The panel then "turn[ed] back to the substance of the Tribe's complaint." App. 17.

> The complaint does not expressly challenge the FERC Order, but the gravamen of the complaint—that the Gorge Dam must have fishways—is a direct attack on FERC's decision that no fishways were required.

Citing 28 U.S.C. § 1447(c), the panel acknowledged that the statute does expressly state that "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded [to state court]." App. 18. Nevertheless, the panel, citing inter alia *Polo Innoventions*,[3] said "our" precedent (meaning the Ninth Circuit) recognizes a "narrow 'futility' exception to this general [remand] rule permits the district court to dismiss an action rather than remand it if there is 'absolute certainty' that the state court would dismiss the action following remand."

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[3] *Polo v. Innoventions Int'l, LLC*, 833 F.3d 1193 (9th Cir. 2016).

Courts of the United States are courts of limited jurisdiction. Nowhere in Article III of the Constitution is there authority for them to commandeer cases from the hands of the State judiciary and decide them where jurisdiction is lacking upon mere grounds that the federal judiciary is so omniscient as to divine what a State judge not bound by Article III might with "certainty" decide. Doing so contravenes the very principles of federalism which is the foundation of our national government.

Additionally, *certiorari* review is appropriate in that the issue for which review is sought is of exceptional importance in that the Ninth Circuit decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue and expressly *rejected* such a futility exception to the required remand of removed cases. *See generally Bromwell v. Michigan Mutual Insurance Co.*, 115 F.3d 208, 213 (3d Cir. 1997); *Roach v. West Va. Regional Jail & Correctional Facility*, 74 F.3d 46, 49 (4th Cir. 1996); *Smith v. Wisc. Dept of Agriculture*, 23 F.3d 1134, 1139 (7th Cir. 1994); *Jepsen v. Texaco, Inc.*, 68 F.3d 483 (10th Cir. 1995); *Maine Ass'n of Interdependent Neighborhoods v. Commissioner*, 876 F.2d 1051, 1055 (1st Cir. 1989); *Barbara v. N.Y. Stock Exchange*, 99 F.3d 49, 56 n. 4 (2d Cir. 1996).

Review is merited in that an issue in the cause, specifically, the applicability or continued validity of the "futility doctrine" which allows denial of remand and dismissal of a case removed to a United States District Court from a state court—even though a district

court lacks jurisdiction over the cause—if the court believes it is an absolute certainty that the state court would reach the same conclusion.[4]

The continued application in the Circuit Courts of Appeal of this court-created doctrine in cases where the "plain text" of a statute places a case or controversy *outside* a district court's original jurisdiction under Article III of the United States Constitution is: (a) inconsistent with established rules of statutory construction requiring that statutes, including jurisdictional statutes, shall be given their plain meaning; (b) conflicts with the opinions of other courts of appeal in other circuits; and (c) is of exceptional importance in that the doctrine results in the commandeering of judicial

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[4] It cannot be so easily prophesized by the Ninth Circuit that the State court would necessarily, or with "absolute certainty," arrive at a decision that it lacks jurisdiction because the Tribe's complaint appears to challenge Seattle's license issued under authority of the Federal Power Act. Section 17 of the 1986 amendments to the Federal Power Act, 16 U.S.C. § 797 note, provides that no provision therein shall affect the rights or jurisdiction of the States over any river or stream. Public Law 99-495, § 17, 10 Stat. 1259 (Oct. 16, 1986) (*see* appendix). As such, this cause may conceivably be perceived as one in which the federal district court *lacks* jurisdiction under *Article III* and in which the State judiciary *possesses* authority to exercise jurisdiction over by virtue of the *Tenth Amendment* and the express savings clause disclaimer in § 17. Seattle itself admitted at oral argument that lack of a fishway is a violation of Washington State law. *See* Revised Code of Washington § 77.57.030 (dam or other obstruction across or in a stream shall be provided with a durable and efficient fishway). Federal law has traditionally been a "floor" in the environmental area, mandating minimal federal protections but allowing states to adopt more stringent requirements.

authority from the state judiciary contrary to principles of comity and federalism.

The propriety of this doctrine should be reviewed as it results in the denial of remand of cases to highly capable State judiciaries based upon an "absolutely certain" belief that a State judge who is not constrained by Article III limitations will necessarily reach the same conclusion as the federal judiciary and dismiss a cause. Indeed, they *may*, but it is an integral aspect of State sovereignty guaranteed by the Tenth Amendment that such forum is entitled to make its own decisions.

Federal subject-matter jurisdiction is required by Article III of the Constitution. The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation or by prior action or consent of the parties. To permit a federal trial court to enter a judgment in a case removed without right from a state court where the federal court could *not* have had original jurisdiction of the suit even in the posture it had at the time of judgment, would by the act of the parties work a wrongful extension of federal jurisdiction and give district courts power the Congress has denied them. *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 17-18 (1951). Many cases can be cited for the proposition that if federal subject-matter jurisdiction over a removed case is doubtful, the case should be remanded to state court. *See, e.g., National Audubon Soc. v. Department of Water*, 869 F.2d 1196 (9th Cir. 1988).

Certiorari review is thus imperative.

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE PRECEDENT OF THIS COURT

The panel decision in this appeal appears to conflict with a decision of the United States Supreme Court in which the Court called into question the validity of application of the so-called Futility Doctrine to removed cases in which the plain text of a statute requires remand. *International Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72 (1991).

II. THE QUESTION PRESENTED IS OF EXCEPTIONAL IMPORTANCE

The Fifth Circuit has recognized a "futility exception" to 28 U.S.C. § 1447(c). *Asarco, Inc. v. Glenara, Ltd.*, 912 F.2d 784, 787 (5th Cir. 1990). *The Third, Fourth, Seventh, and Tenth Circuits, however, have explicitly rejected the existence of such an exception*. *Bromwell v. Mich. Mut. Ins. Co.*, 115 F.3d 208, 213 (3d Cir. 1997); *Roach v. W. Va. Reg'l Jail & Corr. Facility Auth.*, 74 F.3d 46, 49 (4th Cir. 1996); *Smith v. Wis. Dep't of Agric.*, 23 F.3d 1134, 1139 (7th Cir. 1994); *Jepsen v. Texaco, Inc.*, 68 F.3d 483 (10th Cir. 1995). In addition, the First and Second Circuits have *declined* to adopt such an exception. *Me. Ass'n of Interdependent Neighborhoods v. Comm'r, Me. Dep't of Human Servs.*, 876 F.2d 1051, 1055 (1st Cir. 1989); *Barbara v. N.Y. Stock Exch.*, 99 F.3d 49, 56 n. 4 (2d Cir. (1996). Because the doctrine conflicts with the decisions of other circuits, its continued reluctant application in cases such as that in this

appeal—where the plain text of a statute requires remand—affects the achievement of equal jurisprudence to citizens across the nation.

III. APPLICATION OF A FUTILITY EXCEPTION TO 28 U.S.C. § 1447(C) WHICH DOES NOT APPEAR IN THE STATUTE IMPLICATES CONSTITUTIONAL RESTRAINTS UPON SEPARATION OF POWERS

This cause merits a grant of *certiorari* as the subject matter is of major importance. The Ninth Circuit's departure from the plain language of 28 U.S.C. § 1447(c) is contrary to Separation of Powers.

Article I, Section 1, of the Constitution states that "all legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." As Chief Justice Marshall put it, this means that "important subjects . . . must be entirely regulated by the legislature itself[.]" *Wayman v. Southard*, 10 Wheat. 1, 42-43 (1825). *See West Virginia v. Environmental Protection Agency*, No. 20–1530 (June 30, 2022) (Gorsuch, J., concurring):

> [B]y vesting the lawmaking power in the people's elected representatives, the Constitution sought to ensure "not only that all power [w]ould be derived from the people," but also "that those [e]ntrusted with it should be kept in dependence on the people."

Id., quoting *The Federalist*, No. 37, at 227 (J. Madison, 1788). The language of § 1447(c) enacted by Congress is perfectly clear, unequivocal and permits of no exceptions. If a civil action is removed from State court over which a United States District Court lacks jurisdiction, it *shall* be remanded together with all pendent or ancillary State law claims. By reading into the statute an exception not apparent in its plain text, the District and Circuit Courts below essentially engaged in a lawmaking function exclusively within the power of Congress in Article I and *not* within the authority conferred upon the Judiciary in Article III of the Constitution.

CONCLUSION

The Court should not allow the Ninth Circuit's erroneous ruling to stand. This Court should therefore grant *certiorari* to correct the course the Ninth Circuit's decision charts for the relationship between courts of the United States which are constrained by Article III and those of the States which are not.

Respectfully submitted,

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