No. 22-955

# 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**

## REPLY BRIEF OF PETITIONER

JACK WARREN FIANDER
*Counsel of Record*
TOWTNUK LAW OFFICES, LTD.
SACRED GROUND LEGAL SERVICES, INC.
5808A Summitview Avenue
Yakima, WA 98908
(509) 969-4436
towtnuklaw@msn.com

*Counsel for Petitioner*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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## INTRODUCTION

The Sauk-Suiattle Tribe ("Sauk-Suiattle") seeks review of the opinion of the United States Court of Appeals for the Ninth Circuit in this case. As Seattle's brief in opposition to the petition raises new points not raised in Sauk-Suiattle's petition, this reply brief shall address them.

## STATEMENT

In 1917, while the country was in the final stage of a World War, when power was needed to provide electricity for naval shipyards in the Pacific Northwest, construction was commenced upon a hydroelectricity generating facility on the Skagit River in the State of Washington. At that time, and presently, Washington State statutory and common law required that any dam on a salmon-bearing stream must provide a means for salmon to freely pass by the dam or, in lieu of providing such fish passage measures, construct a fish hatchery. Revised Code of Washington (RCW) 77.15.320. Violation is a gross misdemeanor.[1] Ever has it been in the State of Washington where fisheries are integral to the State's economy. *See*, *e.g.*, Washington Session Laws, Chapter CX (March 10, 1893):

> Any person or persons now owning or maintaining, or who owning or maintaining shall

[1] Gross misdemeanors in Washington state carry a maximum penalty of 364 days of imprisonment and a $5,000 fine for each violation.

> hereafter construct or maintain, any dam or other obstruction across any stream in the State in which any food fish are wont to ascend without providing a fish way or ladder determined and approved by the fish commissioner of this State and suitable to enable the fish to pass over, through or by said obstruction, upon construction thereof shall be guilty of a misdemeanor and punished by a fine of not less than one hundred (100) dollars nor more than two hundred and fifty (250) dollars, and said dam may, in the discretion of the court, be abated as a nuisance.

On June 10, 1920, just prior to completion of the dam, Congress enacted the Federal Power Act requiring a federal license for operation of such projects. The term of each license was fifty years. Just prior to expiration of that period in 1970, Seattle applied to renew its federal license, a process Seattle was able to delay for over twenty years.

In 1991, Seattle, Sauk-Suiattle, and other interested parties entered into an agreement (SER-103, 105) which, *inter alia*, established Seattle's "obligations relating to fishery resources affected by [Seattle's hydroelectric] project, including numerous provisions to protect resident and migratory fish species." SER-108. Although the Federal Energy Regulatory Commission (FERC) did not *require* City Light to construct a fishway at Gorge Dam, but reserved "authority to require fish passage in the future, should circumstances warrant" and "after notice and opportunity for hearing." SER-119.

Eight years after the parties' agreement, three species of salmon native to the Skagit River were designated as Threatened Species under the Endangered Species Act, 16 U.S.C. § 1531, *et seq*. 64 Fed. Reg. 58910 (Nov. 1, 1999). Washington State law continues to prohibit dams from blocking salmon migration past dams, making it a gross misdemeanor to do so (Brief of Respondent at 28).

Sauk-Suiattle sought a declaratory judgment from the Superior Court of the State of Washington for Skagit County that Seattle's operation of Gorge Dam was contrary to Washington State law. The subsequent procedural history of the litigation is set forth in petitioner's petition and the orders of the trial and appellate court set forth in the appendices thereto.

## PROCEDURAL HISTORY

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*. 28 U.S.C. § 1441 provides that "any civil action brought in a State court of which the *District* Courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the District Court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a) (emphasis added). Seattle removed Sauk-Suiattle's

complaint to the United States District Court for the Western District of Washington.

The District Court concluded that it lacked jurisdiction since the case was not one which could originally have been brought in the District Court. The District Court dismissed the case based upon the "futility doctrine" upon grounds that the State court would necessarily conclude that it, too, lacked jurisdiction. The Ninth Circuit affirmed the decision, 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 "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 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 (emphasis added). The Court of Appeals examined Sauk-Suiattle's amended complaint and determined that its "gravamen" was a direct attack on a FERC order. *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. Notwithstanding § 1447'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 to the State court that court would reach the same conclusion. "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). 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.

Seattle's quotes a footnote in the *per curiam* opinion stating that Sauk-Suiattle failed to argue "whether our case law on the futility exception is conflicting." Seattle brief, at 6. Such is easily explainable. As noted by counsel for Sauk-Suiattle at argument:

> COUNSEL: The panel has taken up all my time by asking questions, I really haven't been able to make the presentation I intended to so what's your pleasure? Shall I continue for a couple minutes?
>
> MURGUIA, C.J: No. No, I think I—we understand what's your main argument. I'll give you a minute or two for rebuttal.

Lack of subject matter jurisdiction is never waived, and may be raised at any stage of a proceeding—even for the first time on appeal, whether or not it had been argued below. *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998).

In a concurring opinion by Judge Bennett, joined by Chief Judge Murguia and Judge Fletcher, the panel expressed 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 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.

Seattle attempts to portray the order as a lack of interest by any of the Circuit judges in visiting the issue. However, so adamantly did the panel question the continued validity of the futility doctrine, one can just as easily speculate that the panel's denial of rehearing was motivated by desire to expedite review by this Court of the doctrine and knowledge that not all colleagues who might participate *en banc* may share the

panel's discomfort with continuing to adhere to the doctrine.

## SEATTLE'S REASONS FOR DENYING THE WRIT

Seattle argues that the panel decision in this cause does not conflict with *International Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72 (1991), arguing that this court's opinion was to the effect that dismissal of a case removed improperly from State court was nevertheless appropriate if considering all circumstances there was a "certainty" that, upon remand, the State court would reach the same conclusion. To accept Seattle's argument would render meaningless this Court's statement that "the literal words of 1447 (c) give no discretion to dismiss rather than remand an action." 500 U.S. at 89.

Seattle relies for denial of review on the panel turning to the "substance" of Sauk-Suiattle's complaint and stating:

> 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.

The basis for removal must be evident from the face of a plaintiff's complaint, not from divining its "gravamen." Nowhere therein is it expressed or

implied that Sauk-Suiattle's complaint was premised upon objection to the terms of Seattle's federal license. It was premised upon Seattle's operation of its dam being out of conformity with Washington State law. Essentially, Seattle's argument is that Washington's criminal statute is preempted by the Federal Power Act or that it is a collateral attack upon Seattle's license. Neither federal preemption nor collateral estoppel are *bases* for removal. Rather, they are *defenses* to be raised in State court in support of dismissal. It cannot be so easily prophesized that the State court would arrive at a decision that it similarly lacks jurisdiction.

Seattle asserts that Sections 18 and 10 of the Federal Power Act give the Secretaries of Commerce and Interior exclusive power to determine whether or not fish passage is required. No such reference to "exclusivity" appears in the plain language of either section. Seattle's effort to insert words in the Act which are not there should not be countenanced any more than they were by Circuit Judge Fletcher:

> Arguing against remand in its briefing to our court, Seattle omitted the language italicized above when it paraphrased § 1441(a), thereby suggesting, incorrectly, that removal to District Court is proper if *any* federal court would have subject matter jurisdiction.

App. at 23 (emphasis in original). The colloquy was:

> FLETCHER, J: Let me start out with a question that's troubled me. You prevailed in the District Court on the ground that the District Court did not have subject matter jurisdiction, that is to say it's an attack on FERC. Well, how is the case then properly removed, because 1441 (a) specifies that a suit may be removed from State to federal District Court in a case over which the District Court has jurisdiction and your argument is the District Court never had jurisdiction—and I noticed in your brief to us you don't quote 1441, you paraphrase 1441 and you say a suit may be removed from State court to federal court. You don't specify District Court. What's going on here?

Not satisfied with the answer, his inquiry continued:

> FLETCHER, J: I noticed in the papers you filed originally in the District Court at the time of removal that you quote 1441 accurately, that is to say you say "to the District Court" but when it comes to us you're not quoting it accurately. What I am wondering is, now that we have a determination by the District Court that it did not have jurisdiction and that jurisdiction lay not in the District Court but in the Court of Appeals, why shouldn't we remand, because the District Court never had jurisdiction. I mean, that's what the District Court held.

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.

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 a fictional "certainty" that a State judge unconstrained by Article III will necessarily reach the same conclusion as the federal judiciary. 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. Just as the Circuit judge apparently knew Sauk-Suiattle's oral argument without it being made, the futility doctrine apparently bestowed the ability to predict what the State court would decide without that court even having had the opportunity to consider the case.



## ARGUMENT

### The cases Seattle cites are inapposite.

Seattle argues that "there is no circuit split on the precise issue that this case presents" (Seattle Brief at 12) by citing a series of opinions of decisions of Circuit courts which did not involve the precise issue in

this case. The statute barring exercise of State court jurisdiction involved in *Estate of West v. Department of Veterans Affairs*, 895 F. 3d 432 (6th Cir. 2018), for example, expressly provided a special appeals process set forth in 38 U.S.C. § 511 (a) that "may not be reviewed by any other official or by *any* court." Other cases relied on by Seattle such as *Perna v. Health One Credit Union*, 983 F. 3d 258 (6th Cir. 2020), similarly involved statutes such as 12 U.S.C. § 1787 expressly foreclosing exercises of State court adjudications ("*no court* shall have jurisdiction" over claims arising under the Act) (emphasis added), as does the Labor Management Reporting and Disclosures Act, the Financial Institutions Reform, Recovery, and Enforcement Act, each of which such Acts detail an extensive administrative process to be exhausted *and which expressly excludes the exercise of jurisdiction by any other official or court.* Nowhere in the Federal Power Act, however, is there similar express language foreclosing a State court from entertaining an issue of whether State statutory, common law, or constitutional provisions adopted pursuant to its police power reserved by the Tenth Amendment to protect a fishery so critical to the State's economy.

**The issue raised in this case is exceptionally important, and the Court of Appeals' decision does threaten 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. Seattle

itself states that "every federal court must uphold the jurisdictional limits that Congress has established in its statutes" (Seattle Brief at 12) while at the same time, ignoring the clear words that Congress placed in 28 U.S.C. § 1447(c) expressly placing a jurisdictional limit upon the United States District Courts in cases involving removals from State courts. By imputing into the Judiciary Act a futility exception which does not appear therein, the Circuit courts are, in essence, legislating language not in the statute—which implicates separation of powers. As stated in the Constitution:

> 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.

U.S. Const., Art. I, § 1. Only Congress can amend a statute to include exceptions not contained in its plain language. As to whether "the issue raised in this case is unimportant," one need merely to review the extensive discussions of the respective authority of the State courts of general jurisdiction and the limited authority of courts of the United States during the Constitutional Convention.

### Seattle's argument that Gorge Dam will have fish passage renders the case moot is incorrect.

Seattle's argument that the merits of Sauk-Suiattle's case is moot or merely theoretical misses the point. The issue raised by Sauk-Suiattle's petition goes to the

issue of the limited subject matter jurisdiction bestowed by Article III and Congress upon U.S. courts.

Specifically, the propriety under Constitutional principles of federalism and comity and deference to the general jurisdiction of State judiciaries reserved to exercise their police powers, notwithstanding imputation into a federal jurisdictional statute that in certain circumstances the federal judiciary may divine what the judgment of a duly qualified State judge might be and there conclude that members of the federal judiciary know best.

The Constitution does not contemplate such treatment of State judicial officials as less competent than those in the federal judiciary. Seattle is correct in stating that courts always have jurisdiction to determine their own jurisdiction (Seattle Brief at 13). Such a principle applies equally to the courts of a State. The Superior Court of the State of Washington for Skagit County may indeed achieve the same conclusion as was made by the United States court, but that decision is its to make on its own under our system of federalism, without having the decision made for it by the court of a foreign jurisdiction less familiar with the nuances of that State's laws and jurisdictional limits which—unlike courts of the central government—are not constrained by Article III.

## CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

*Sauk-Suiattle Indian Tribe*

By:

JACK WARREN FIANDER
TOWTNUK LAW OFFICES, LTD.
SACRED GROUND LEGAL SERVICES, INC.
5808A Summitview #93
Yakima, WA 98908
(509) 969-4436
towtnuklaw@msn.com