No. 20-152

IN THE

Supreme Court of the United States

ANASTASIA WULLSCHLEGER AND GERALDINE BREWER,

Petitioners,

v.

ROYAL CANIN U.S.A., INC. AND NESTLÉ PURINA PETCARE COMPANY,

Respondents.

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Eighth Circuit misapplied this Court's settled jurisprudence in finding federal-question subject-matter jurisdiction over this action, where the Eighth Circuit found that (i) Petitioners' "dependence on federal law permeates the [complaint's] allegations such that [certain of Petitioners' state-law claims] cannot be adjudicated without reliance on and explication of federal law" and (ii) Petitioners' "prayer for relief . . . seeks injunctive and declaratory relief that necessarily requires the interpretation and application of federal law."

RULE 29.6 DISCLOSURE STATEMENT

Nestlé Purina PetCare Company ("Purina") certifies that it is indirectly a wholly owned subsidiary of Nestlé S.A., a Swiss corporation traded publicly on the SIX Swiss Exchange and in the United States in the form of American Depository Receipts. No publicly held company owns 10% or more of Nestlé S.A.'s stock.

Royal Canin U.S.A., Inc. ("Royal Canin") certifies that it is a wholly owned subsidiary of Mars, Inc., a privately held corporate entity that has no parent company. No publicly held company owns 10% or more of Mars, Inc.'s stock.

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STATEMENT

Petitioners, plaintiffs below, contend that the Eighth Circuit misapplied settled law in determining that the face of their complaint gives rise to federal-question subject-matter jurisdiction. While Petitioners thus disagree with the Eighth Circuit's conclusion, the decision below is an unremarkable application of the settled law of this Court and presents no reason — much less a compelling one — for granting certiorari.

The Petition does not contend that this case creates, extends, or implicates any conflict among the circuits. Nor does the Petition contend that the supposed error by the Eighth Circuit is common or likely to recur. Instead, the Petition presents merely an asserted error in the application of properly stated rules of law. As such, the Petition falls squarely into a category of petitions for certiorari disfavored under Rule 10 of this Court's Rules.

Furthermore, the Petition's assertions of error are incorrect. In determining that federal-question jurisdiction lies over Petitioners' state-law claims, the Eighth Circuit *correctly* applied this Court's precedents. The crux of Petitioners' complaint is that Respondents, defendants below, supposedly violated the federal Food, Drug & Cosmetic Act ("FDCA") and the FDA's associated regulatory guidance in its Compliance Policy Guide ("CPG"). According to the complaint, these violations of federal law allegedly

make Respondents' products deceptive and supposedly motivated Respondents to form an antitrust conspiracy to conceal their alleged violations of the FDCA. In addition to alleging violations of federal law to support each of their state-law claims, Petitioners expressly seek a declaration that Respondents are violating federal law and an injunction preventing Respondents from continuing to violate federal law.

The Eighth Circuit properly interpreted the complaint to hold that Petitioners' "state-law claim[s] necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005); Pet. App. 6a.

1. Respondents Royal Canin and Purina manufacture and sell certain therapeutic pet foods that they require to be sold only by prescription issued by a veterinarian. Pet. App. 25a-26a, ¶ 1; Pet. App. 29a-31a, ¶¶ 11-12, 14. These therapeutic pet foods are formulated for a variety of specific health issues, and may not be well tolerated by all pets. Pet. App. 47a-48a, ¶ 57. To purchase this pet food, a purchaser must first consult with his or her veterinarian and obtain authorization from the veterinarian. Pet. App. 25a-26a, ¶ 1. The consumer may then purchase the food directly from his or her veterinarian, at a retail store, or online. Pet. App.

41a, ¶ 37. Prescription pet food has been sold to consumers since the 1960s. Pet. App. 34a-35a, ¶ 23.

2. Petitioners allege that Royal Canin and Purina (and their alleged co-conspirators, who are not named as defendants), through their sale of prescription pet food, have violated the FDCA, 21 U.S.C. §§ 321, 352, 360, and the FDA's regulatory guidance in the CPG. *See* Pet. App. 46a-59a, ¶¶ 55-74. Petitioners attempt to package their claims under state law, and assert six causes of action: violation of the Missouri Antitrust Law (Counts I-II), violation of the Missouri Merchandising Practices Act ("MMPA") (Counts III-IV), and common-law unjust enrichment (Counts V-VI). Pet. App. 71a-81a, ¶¶ 101-134.

As to the antitrust claims, Petitioners allege that Royal Canin and Purina must be engaged in an antitrust conspiracy because their alleged violations of the FDCA are otherwise "contrary to the independent economic self-interest of each of them." Pet. App. 58a, ¶ 73. The complaint contends that Royal Canin, Purina, and the alleged co-conspirators are "clearly not in compliance" with the FDA's CPG conditions under which FDA staff has discretion to withhold enforcement. Pet. App. 50a-51a, ¶¶ 62-63; Pet. App. 55a, ¶ 71. The complaint alleges: "In view of the Draft CPG and their non-compliance with the FD&C Act, Mars/Royal Canin, Purina, and Hill's were confronted with the choice of whether to continue marketing their Prescription Pet Food in violation of federal and state law, or to eliminate the prescription requirement and otherwise comply with law." Pet. App. 52a, ¶ 65. It concludes: "That all

three manufacturers decided to violate the Draft CPG and FD&C Act in the same way is explicable only as the result of a collective decision or agreement." Pet. App. 59a, ¶ 74.

Petitioners point to Royal Canin's and Purina's alleged violations of the FDCA and the CPG as the basis for the claimed deception and misrepresentation under the MMPA. Petitioners allege that, under the CPG, Royal Canin's and Purina's products "met the definition of drugs and food under the FD&C Act," but do not comport with applicable FDCA requirements, meaning they are "unsafe," "adulterated," and "misbranded" in violation of the FDCA. Pet. App. 48a-49a, ¶¶ 58-59. Additionally, the complaint alleges that Royal Canin and Purina make "disease treatment claims," but that their products lack review and approval by the FDA and do not comply with other FDCA requirements. Pet. App. 26a, ¶ 2; Pet. App. 47a-49a, ¶¶ 57-59. Based on these supposed violations of federal law, Petitioners allege that the marketing and sale of those products is deceptive and misleading. *See, e.g.*, Pet. App. 26a, ¶ 2; Pet. App. 41a-43a, ¶¶ 39-40, 44; Pet. App. 47a-49a, ¶¶ 57-59; Pet. App. 54a-55a, ¶¶ 70-71; Pet. App. 75a, ¶ 114; Pet. App. 77a, ¶ 120. Petitioners' unjust enrichment claims are based on the same alleged violations of federal law and guidance. *See* Pet. App. 26a, ¶ 2; Pet. App. 46a-49a, ¶¶ 55-59; Pet. App. 54a-55a, ¶ 70; Pet. App. 79a, ¶ 126; Pet. App. 80a, ¶ 131.

In their prayer for relief, Petitioners ask for a determination "that Defendants have engaged in the

violations of law alleged in this [complaint]" (Pet. App. 81a-82a, ¶ 136), namely, the alleged violations of the FDCA and the CPG (*see* Pet. App. 46a-59a, ¶¶ 55-74). Petitioners also seek to enjoin Royal Canin and Purina from "engaging in further such violations of law." Pet. App. 82a, ¶ 137. Petitioners then expressly request orders and a judgment "[e]stopping Defendants from denying Prescription Pet Food is a 'drug' and enjoining Defendants to comply with all *federal* and Missouri provisions applicable to the manufacture of such drugs." Pet. App. 82a, ¶ 138 (emphasis added).

3. A three-judge panel of the Eighth Circuit unanimously held that Petitioners' complaint "alleged that defendants' conduct amounted to a joint and coordinated violation of the Food Drug and Cosmetic Act (FDCA) and the FDA's regulatory guidance in the Compliance Policy Guide (CPG)" and that Petitioners' "dependence on federal law permeates the allegations" such that their claims "cannot be adjudicated without reliance on and explication of federal law." Pet. App. 3a, 5a-6a.

The court acknowledged that *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986), "forecloses the removal of state law claims that merely include a violation of federal law as an element of the offense, without other reliance on federal law," but distinguished Petitioners' claims as going well beyond the claims at issue in *Merrell Dow* and being fundamentally "premise[d] . . . on violations and interpretations of federal law." Pet. App. 4a, 5a. For example, "[a]s evidence of

coordination and conspiracy, plaintiffs explicitly claim that defendants violated the FDCA, were non-compliant with FDA guidance, and that their refusal to submit the prescription pet food to FDA review was improper." Pet. App. 5a. Accordingly, the court held, Petitioners' claims arise under federal law. Pet. App. 6a (citing *Gunn v. Minton*, 568 U.S. 251, 258 (2013)).

The Eighth Circuit further held that:

> plaintiffs' prayer for relief invokes federal jurisdiction because it seeks injunctive and declaratory relief that necessarily requires the interpretation and application of federal law. After alleging violations of the FDCA throughout the complaint, plaintiffs request judgment: (1) "[f]inding, adjudging, and decreeing" that defendants have violated federal law; (2) enjoining defendants from engaging in further violations of federal law; and (3) estopping defendants from denying that prescription pet food is a "drug" and "enjoining Defendants to comply with all federal and Missouri provisions applicable to the manufacture of such drugs. . . ."

Pet. App. 6a (alteration in original) (quoting Pet. App. 81a-82a, ¶¶ 136-138). The court rejected Petitioners' arguments against federal-question jurisdiction, stating: "plaintiffs' isolated focus on their alleged state law claims is nothing more than an apparent veil to avoid federal jurisdiction." *Id.* The Eighth Circuit subsequently denied Petitioners' petition for rehearing or rehearing *en banc*. Pet. App. 23a.

REASONS FOR DENYING THE PETITION

I. The Petition Presents No Circuit Split or Other Compelling Reason for Granting Certiorari

Petitioners do not contend the Eighth Circuit's decision conflicts with the decision of another court of appeals. Nor do they claim the Eighth Circuit decided an important federal question in a way that conflicts with a decision by a state court of last resort, or seriously departed from the accepted and usual course of judicial proceedings. Petitioners also do not argue the Eighth Circuit decided an important, but unsettled, question of federal law. To the contrary, Petitioners characterize this Court's arising-under jurisprudence, applied by the Eighth Circuit below, as "coherent" (Pet. 16, 17, 22, 29). Instead, Petitioners ask this Court to correct the Eighth Circuit's supposed "misapplication of a properly stated rule of law." Sup. Ct. R. 10. Setting aside that the Eighth Circuit properly decided the issue of federal subject-matter jurisdiction by faithfully applying this Court's precedents, *see infra* Section II, this is not the "rare[]" case where such an alleged error warrants certiorari review. Sup. Ct. R. 10.

Petitioners are incorrect in their assertion that the Eighth Circuit decided an important federal question in a way that conflicts with relevant decisions of this Court. *See* Pet. 17, 29. As explained below, it is Petitioners who chose to inject federal issues into this case by premising their state-law claims and their requested relief on supposed violations of federal law. The federal issues are

present on the face of Petitioners' complaint and are not merely pleaded in anticipation of a federal defense. Consequently, the Eight Circuit's opinion is fully consistent with *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987).

Petitioners are also incorrect in asserting that the Eighth Circuit misapplied *Merrell Dow* and its progeny, *Grable* and *Gunn*. *See* Pet. 29. Indeed, the Eighth Circuit expressly considered *Merrell Dow*'s applicability in acknowledging that Petitioners' MMPA claims standing alone "might not depend on federal law if the defendants' failure to submit the prescription pet food for FDA review arguably could be sufficient to prove deception under the MMPA." Pet. App. 4a. The court correctly recognized, however, that the "case consists of more than the MMPA claims" and determined that Petitioners' antitrust and unjust enrichment claims "cannot be adjudicated without reliance on and explication of federal law." Pet. App. 5a-6a. The Eighth Circuit also cautioned that "plaintiffs' isolated focus on their alleged state law claims" — to the exclusion of their prayer for relief — "is nothing more than an apparent veil to avoid federal jurisdiction." Pet. App. 6a.

Petitioners cite *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), and *Alden v. Maine*, 527 U.S. 706 (1999), for the proposition that the Eighth Circuit's decision "[dis]respect[s]" the "judicial independence" of states and "undermines" the principle that "federal courts are courts of limited jurisdiction." Pet. 29-30. But *Erie* and *Alden* make clear that "[s]upervision over either the legislative or the judicial action of the

States is in no case permissible *except as to matters by the Constitution specifically authorized or delegated to the United States*." *Alden*, 527 U.S. at 754 (emphasis added) (quoting *Erie*, 304 U.S. at 79). Here, no federal court has purported to supervise state judicial action, and the Constitution expressly grants federal courts jurisdiction over claims, like Petitioners', that arise under federal law. U.S. Const. art. III, § 2.

Petitioners' characterization of the Eighth Circuit's straightforward application of this Court's precedent to the complaint's allegations as introducing "chaos" (Pet. 16, 29) also has no support. As an initial matter, there is no "single, precise, all-embracing test for jurisdiction over federal issues embedded in state-law claims between nondiverse parties." *Grable*, 545 U.S. at 314 (citation omitted). Whether a particular state-law claim gives rise to federal-question jurisdiction depends on the specific allegations set forth in a plaintiff's complaint, thus substantially cabining the capacity of any one case to introduce "chaos" or inadvertently "federalize an entire category of cases" (Pet. 28, 29). What Petitioners call "chaos" could at most be an (asserted) one-time error by a court of appeals in the application of settled law — a type of error that this Court generally does not invoke its discretion to address. In any event, there is no error: no court or commentator has expressed any concern with the unanimous panel's opinion, which represents a straightforward application of this Court's precedents to a complaint "permeate[d]" by allegations of federal-law violations and that expressly seeks equitable relief under

federal law. Pet. App. 5a. There is no "chaos" to rein in or conflict with this Court's precedents to correct.

II. The Eighth Circuit Properly Applied Settled Law to the Facts Alleged in Petitioners' Complaint

The Eighth Circuit properly applied this Court's arising-under federal-question subject-matter jurisdiction test set forth in *Merrell Dow* and explained in *Gunn* and *Grable* to the allegations on the face of Petitioners' complaint, in determining that the complaint necessarily raises substantial, disputed federal issues (both in its state-law claims and in its prayer for relief) and that exercising jurisdiction would not upset any congressionally approved division of judicial labor between state and federal courts.

A. The Eighth Circuit Correctly Held that Petitioners' Claims Necessarily Raise Substantial, Disputed Federal Issues that Are Appropriately Adjudicated in a Federal Forum

The Eighth Circuit correctly held that "plaintiffs rely explicitly on federal law throughout their pleadings." Pet. App. 4a. Petitioners' antitrust and unjust enrichment claims are "premise[d] . . . on violations and interpretations of federal law" to establish the existence of the alleged conspiracy. Pet. App. 5a; *see* Pet. App. 26a, ¶ 2; Pet. App. 46a-49a, ¶¶ 55-59; Pet. App. 50a-53a, ¶¶ 62-65; Pet. App. 54a-55a, ¶¶ 70-71; Pet. App. 58a-59a, ¶¶ 73-74; Pet. App. 73a-74a, ¶ 108; Pet. App. 79a, ¶ 126; Pet. App. 80a,

¶ 131. Similarly, Petitioners allege that the marketing and sale of Respondents' products is deceptive and misleading in violation of the MMPA *because* Respondents allegedly violated the FDCA and CPG guidance. *See* Pet. App. 26a, ¶ 2; Pet. App. 41a-43a, ¶¶ 39-40, 44; Pet. App. 47a-49a, ¶¶ 57-59; Pet. App. 54a-55a, ¶¶ 70-71; Pet. App. 75a, ¶ 114; Pet. App. 77a, ¶ 120. If that were not enough, "plaintiffs' prayer for relief invokes federal jurisdiction because it seeks injunctive and declaratory relief that necessarily requires the interpretation and application of federal law." Pet. App. 6a; *see* Pet. App. 81a-82a, ¶¶ 136-38.

Petitioners characterize their allegations as merely "anticipating an affirmative defense based on federal law." Pet. 20. Coordination and conspiracy, however, are in no sense affirmative defenses. *See* Mo. Rev. Stat. § 416.031. Accordingly, the rule set forth in *Caterpillar*, that "a defendant cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law," 482 U.S. at 399 (emphasis omitted), simply does not apply. *See* Pet. 20-21.

Petitioners suggest that the Eighth Circuit's finding of federal-question jurisdiction rested solely on the allegation that Respondents "failed to seek FDA approval" of their prescription pet food. Pet. 16, 22; *see also id.* at 26, 27. But as discussed, the complaint alleges numerous violations of the FDCA and CPG beyond this alleged omission — as the Eighth Circuit expressly acknowledged. *See* Pet.

App. 4a-5a; Pet. App. 49a, ¶ 59; Pet. App. 50a-51a, ¶¶ 62-63; Pet. App. 52a-53a, ¶ 65; Pet. App. 54a, ¶ 69; Pet. App. 54a-55a, ¶ 70-71; Pet. App. 58a-59a, ¶ 73.

Petitioners misstate the record in asserting that Respondents have "admitted[]" to a violation of the FDCA (Pet. 16; *see id.* at 18-19, 22, 26, 27) — a contention for which Petitioners cite nothing. In any event, the existence of any FDA approval requirement applicable to Respondents' pet food can be determined only by interpreting federal food and drug law. Petitioners effectively admit as much by engaging in their own interpretation of federal law in their Petition. *See* Pet. 27-28. Petitioners' state-law claims are not mere allegations of "antecedent circumstance[s]," nor are they "just the backdrop" (Pet. 17, 28). Instead, as the Eighth Circuit found, the complaint's dependence on federal law "permeates" Petitioners' state-law claims. Pet. App. 5a-6a.

B. As the Eighth Circuit Found, the Complaint's Prayer for Relief Provides an Independent Basis for Jurisdiction Because It Seeks a Declaration and Injunction Arising Directly Under Federal Law

If there were any doubt that the complaint necessarily raises federal issues, it is laid to rest by Petitioners' express request for "Orders and Judgment" "enjoining Defendants to comply with all federal . . . provisions applicable to the manufacture of . . . drugs" and "[f]inding, adjudging, and decreeing that Defendants have engaged in the violations of [such provisions of] law alleged in th[e] [complaint]."

Pet. App. 81a-82a, ¶¶ 136-38. The court cannot declare that Respondents have violated the FDCA and the CPG ("violations" that Petitioners repeatedly allege in the complaint), or enjoin Petitioners from further (alleged) violations, without interpreting that federal law and guidance and determining whether Respondents' conduct violates it.

Nowhere in Petitioners' argument in the Petition do they so much as acknowledge — much less challenge — the Eighth Circuit's holding that federal subject-matter jurisdiction independently exists based on Petitioners' prayer for relief. *See* Pet. App. 6a. This independent basis alone is sufficient to establish federal-question jurisdiction, and the Eighth Circuit properly so held, in accordance with the decisions of that circuit and other courts of appeals. *See, e.g.*, *Cnty. of St. Charles v. Mo. Family Health Council*, 107 F.3d 682, 684 (8th Cir. 1997); *Mitskovski v. Buffalo & Fort Erie Pub. Bridge Auth.*, 435 F.3d 127, 135 (2d Cir. 2006).

CONCLUSION

The Court should deny the Petition.

Respectfully submitted,

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