No. 21-1223

IN THE

Supreme Court of the United States

OHANA MILITARY COMMUNITIES, LLC, ET AL.,
Petitioners,

v.

KENNETH LAKE, ET AL.,
Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Under the Hawaii Admission Act, Hawaii and the United States possess concurrent legislative authority over federal enclaves in Hawaii. In the decision below, the Ninth Circuit held that federal-question jurisdiction does not lie over Respondents' Hawaii-law claims against the companies that own and manage the housing they leased on Marine Corps Base Hawaii (MCBH), one of those enclaves. The court explained that where the United States has *exclusive* legislative jurisdiction over an enclave, state laws within the enclave lose their character as state law and become federal law that can serve as the basis for federal-question jurisdiction. Where a state has concurrent legislative jurisdiction over an enclave, however, state laws retain their character as state law, and claims arising under those laws do not arise under federal law for the purpose of federal-question jurisdiction.

The court also rejected Petitioners' argument that federal-question jurisdiction lies over the claims under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 314 (2005), because Petitioners did not show that the claims "necessarily raise" a federal issue.

The questions presented are:

1. Whether federal-question jurisdiction lies over all Hawaii-law claims that arise on MCBH despite Hawaii's concurrent legislative jurisdiction over the enclave.

2. Whether federal-question jurisdiction lies over state-law claims that do not necessarily raise any question of federal law.

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INTRODUCTION

Under the Enclave Clause, U.S. Const. Art. I, § 8, cl. 17, the United States has the power to "exercise exclusive Legislation" over lands purchased with consent from a state for certain purposes. When the United States exercises exclusive legislative jurisdiction over a federal enclave, the laws of the state generally remain in force until abrogated. *James Stewart & Co. v. Sadrakula*, 309 U.S. 94, 99–100 (1940). Because the state no longer has legislative authority, however, these carried-over laws lose their character as state law and "remain[] effective" as laws "of the United States." *Id.* at 97. Because these laws become federal law, courts have recognized federal-question jurisdiction over claims arising under them. *See*, *e.g.*, *Mater v. Holley*, 200 F.2d 123, 125 (5th Cir. 1952).

In certain circumstances, a state possesses concurrent legislative jurisdiction over a federal enclave. *See*, *e.g.*, *Offutt Hous. Co. v. Sarpy Cty.*, 351 U.S. 253, 260–61 (1956); *James v. Dravo Contracting Co.*, 302 U.S. 134, 148–49 (1937). In that situation, "there is no reason to treat the resulting state laws as … federal law." Pet. App. 13; *see also Pratt v. Kelly*, 585 F.2d 692, 695 (4th Cir. 1978). The "federalization of then-existing state-law rules upon the creation of a federal enclave rests on the premise that, precisely because Congress has excluded all exercise of state jurisdiction, the only laws that can apply are federal." Pet. App. 13. "This rationale has no application when … Congress has expressly allowed concurrent state legislative jurisdiction[.]" *Id*.

Respondents here are members of military families who leased residential housing at Marine Corps Base

Hawaii (MCBH), a federal enclave over which Hawaii has concurrent legislative jurisdiction. Respondents filed suit in Hawaii state court alleging Hawaii-law claims against the companies that own and manage housing at MCBH, based on the companies' failure to disclose pesticide contamination. Because Hawaii has concurrent legislative jurisdiction over MCBH, the court of appeals determined that the Hawaii law governing Respondents' claims was not transformed into federal law. And because the claims arise under Hawaii law rather than under federal law, the court held that the federal courts lack federal-question jurisdiction over them.

Petitioners seek review of this decision, contending that it creates a circuit split regarding federal jurisdiction over claims arising on federal enclaves. None of the circuit court cases on which Petitioners rely for their claim of a split, however, addresses federal jurisdiction over state-law claims that arise on enclaves over which a state exercises concurrent legislative jurisdiction. And the decision below agrees with those cases that federal-question jurisdiction lies over claims arising on enclaves over which the United States exercises *exclusive* legislative jurisdiction. The Ninth Circuit carefully analyzed whether the rationale for holding that federal courts have jurisdiction over claims arising on exclusive jurisdiction enclaves applies to concurrent jurisdiction enclaves and correctly determined that it does not. Its well-reasoned decision does not warrant review.

Review is likewise unwarranted of the court of appeals' determination that this case does not fall within the "'special and small category' of state law cases [that] may be brought in federal court." Pet.

App. 23 (quoting *Gunn v. Minton*, 568 U.S. 251, 258 (2013)); *see generally Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005). The Ninth Circuit correctly concluded that, because "Defendants allege only that a policy interest … is implicated, and they point to no question of federal law," Pet. App. 24, "no federal issue was 'necessarily raised,'" as required for federal-question jurisdiction on this basis, *id*. at 8 (quoting *Gunn*, 568 U.S. at 258). Petitioners identify no circuit split on that issue, and the holding below is fully consistent with this Court's precedent.

Federal courts are courts of limited jurisdiction that have federal-question jurisdiction over cases exclusively raising state-law claims in only narrow circumstances. This case is not one of them, and the petition for certiorari should be denied.

STATEMENT OF THE CASE

A. In 1959, Hawaii was admitted into the Union as a state. *See* An Act to Provide for the Admission of the State of Hawaii into the Union, Pub. L. No. 86-3, 73 Stat. 4 ("Admission Act"). In the Admission Act, the United States reserved "the power of exclusive jurisdiction," as provided by the Enclave Clause, over land that was controlled or owned by the United States immediately prior to Hawaii's admission and that was held for Defense or Coast Guard purposes. Admission Act § 16(b).

This reservation of authority is subject to certain provisos. One of those provisos is that the reservation "shall not … prevent [Hawaii] from exercising over or upon such lands, concurrently with the United States, any jurisdiction whatsoever which it would have in the absence of such reservation of authority [by the federal government] and which is consistent with the

laws hereafter enacted by the Congress pursuant to such reservation of authority." *Id*. Hawaii thus exercises broad concurrent legislative jurisdiction over the enclaves discussed in section 16(b) of the Admission Act. *See* Pet. App. 10–12.

At the same time, the Act provides a means for the United States to exercise exclusive jurisdiction over a military installation when the United States believes it to be necessary: The Act states that "the United States shall continue to have sole and exclusive jurisdiction over such military installations as have been heretofore or hereafter determined to be critical areas as delineated by the President of the United States and/or the Secretary of Defense." Admission Act § 16(b).

MCBH was owned by the United States and used for military purposes at the time Hawaii became a state, and it has not been deemed a critical area by the President or Secretary of Defense. *See* Pet. App. 3–4, 9. Accordingly, as Petitioners agree, Pet. 5, Hawaii exercises concurrent legislative jurisdiction over the base. *See* Pet. App. 9.

B. Under the Military Housing Privatization Initiative (MHPI), the Navy may enter into contracts with private companies to own and operate on-base family housing. *See id*. at 4. Military servicemembers who do not receive government housing receive a housing allowance that they may use for private housing off base or privatized housing on base. *See id*.

In 2004, Hawai'i Military Communities, LLC (HMC) and the Navy formed Petitioner Ohana Military Communities, LLC as a public private venture over which HMC has exclusive management and control as the managing member. *See id*. at 5.

Ohana has a 50-year lease at MCBH, governed by agreements that convey ownership of the residential units and future improvements to Ohana for the lease term. *See id.* Petitioner Forest City Residential Management leases and manages residential housing at MCBH on Ohana's behalf. *See id.* at 32. Ohana's leases with its tenants provide that they are governed exclusively by Hawaii state law. *See id.* at 44.

Before Ohana and Forest City (collectively, Ohana) took over the residential housing at MCBH, they were informed that soil at MCBH had been found to be contaminated with pesticides, including chlordane and heptachlor, both of which have been classified as probable human carcinogens. *See* ER 153–154.[1] Ohana subsequently confirmed the presence of wide-spread pesticide contamination at MCBH and created a Pesticide Soils Management Plan that set acceptable exposure thresholds for residents, called for certain remedial actions to be taken, and required written notice to residents who may be exposed to pesticide-contaminated soil. *See id.* at 154–55.

Despite Ohana's knowledge of the pesticide contamination and its creation of a multi-year remediation plan, it did not tell potential or existing tenants about the contamination, the plan, or its remedial actions. *See* Pet. App. 5. The Residential Community Handbook given to tenants stated only generally that chlordane and other pesticides "may be found in soils under and around housing constructed in both military and civilian communities"—not that

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[1] "ER" refers to Plaintiffs-Appellants' Excerpts of Record in the court of appeals. "SER" refers to Defendants-Appellees' Supplemental Excerpts of Record in the court of appeals.

pesticides had been found at MCBH—and it originally told families that they "can safely work and play in their yards." *Id.*; ER 389. After lawsuits were brought, Ohana changed its recommendation to warn that children and pets should not be allowed to play in the yards near old house foundations and that families should not grow fruits and vegetables in the yards near old house foundations. *See* Pet. App. 6.

C. Respondents are members of military families that leased housing at MCBH after 2006. In 2016, they filed this action in Hawaii state court based on Ohana's failure to disclose the pesticide contamination. The complaint alleged eleven causes of action under Hawaii state law, including breach of contract, breach of the implied warranty of habitability, violation of the Hawaii Landlord Tenant Code, unfair and deceptive trade practices, fraud, infliction of emotional distress, negligent misrepresentation, unfair competition, trespass, and nuisance. *See id*. at 6.

Ohana removed the case to federal court, contending that the claims presented a federal question under 28 U.S.C. § 1331 because they arose on a federal enclave. *See* Pet. App. 31; SER 409. Ohana also argued that removal was proper under 28 U.S.C. § 1442(a)(1) because it was a United States agency or was acting under a federal officer. *See* Pet. App. 31.

The district court denied the families' motion to remand, holding that federal-question jurisdiction lies over state-law claims arising on a federal enclave, including a concurrent legislative jurisdiction enclave, if the claims involve "substantial federal interests." *Id*. at. 62. The district court subsequently dismissed or granted summary judgment to Ohana on all of the families' claims as they related to pesticides, leaving

only claims related to construction dust. *See id*. at 6; ER 146. The parties stipulated to dismissal of those dust claims, and the families appealed. *See* Pet. App. 6.

D. The court of appeals reversed the district court's order denying the motion to remand, vacated all subsequent district court decisions for lack of jurisdiction, and remanded to the district court with instructions to remand the case to state court. *Id*. at 24.

The court explained that when "the United States acquires exclusive jurisdiction under the Enclave Clause and does not permit any exercise of state concurrent jurisdiction," state laws that governed at the time of the transfer of sovereignty will generally continue to govern on the enclave. *Id*. at 12. "In such circumstances," the court continued, "'those state laws which are effective within the enclave 'lose their character as laws of the state and become laws of the Union.'" *Id*. at 12–13 (quoting *Celli v. Shoell*, 40 F.3d 324, 328 n.4 (10th Cir. 1994) (quoting *Stokes v. Adair*, 265 F.2d 662, 665 (4th Cir. 1959))). This "federalization" of state law "rests on the premise" that, "because Congress has excluded all exercise of state jurisdiction" on the enclave, "the only laws that can apply are federal." *Id*. at 13.

In contrast, the court explained, "when, as here, Congress has expressly allowed concurrent state legislative jurisdiction," "there is no reason to treat the resulting state laws as if they were assimilated into federal law." *Id*. "Hawaii's concurrent jurisdiction means state law governing Plaintiffs' state claims is still Hawaii law—not federal law." *Id*. Because the claims arose under state law and that state law was

not "transmut[ed] … into federal law," *id.*, the court held that "federal question jurisdiction is lacking." *Id.* at 14.

The court rejected the district court's "novel ground for subject matter jurisdiction," *id.* at 8, explaining that it was based on a misreading of Ninth Circuit precedent, which "only found federal question jurisdiction in enclaves in which Congress has not permitted concurrent jurisdiction" and had "not extended that rule to federal land that is subject to broad state concurrent jurisdiction," *id.* at 14–15.[2]

Finally, the court of appeals held that this case does not fall within the "'special and small category' of state law cases [that] may be brought in federal court." *Id.* at 23 (quoting *Gunn*, 568 U.S. at 258). The court of appeals explained that, in *Gunn*, this Court clarified that "federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Id.* (quoting *Gunn*, 568 U.S. at 258). The court of appeals concluded that the state-law claims in this case do not meet the first prong of the *Gunn* test. The court rejected Ohana's arguments that federal jurisdiction requires only a "substantial federal interest" and that a "federal issue is necessarily raised because Plaintiffs' causes of action turn on the safety of military housing." *Id.* "For jurisdiction to exist under the *Gunn* test," the court explained, a "right or immunity created by the Constitution or laws of the

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[2] The court also rejected Ohana's argument that federal officer or agency jurisdiction existed. Pet. App. 16–23. Ohana does not raise those issues in this Court.

United States must be an element, and an essential one, of the plaintiff's cause of action." *Id*. (citation omitted). Ohana, however, alleged "only that a policy interest—the safety of military housing—is implicated, and [it] point[ed] to no question of federal law." *Id*.

Ohana filed a petition for rehearing en banc, which was denied without any judge requesting a vote. *Id*. at 63.

REASONS FOR DENYING THE WRIT

I. The First Question Presented Does Not Warrant Review.

A. There is no circuit split concerning federal-question jurisdiction over state-law claims arising on a federal enclave over which a state exercises concurrent legislative jurisdiction.

Ohana bases its petition primarily on the assertion that the decision below created a circuit split over the "[i]mportance of the Enclave Clause" on federal courts' jurisdiction. Pet. 17. No such circuit split exists. None of the decisions on which Ohana's claim of a circuit split relies addresses the issue decided by the court below: whether courts have federal-question jurisdiction over state-law claims that arise on enclaves over which the United States and a state exercise *concurrent* legislative jurisdiction. And the Ninth Circuit agrees with those courts on the issue that they do address: federal-question jurisdiction over claims arising on federal enclaves over which the United States exercises *exclusive* legislative jurisdiction.

Ohana first claims that the decision below conflicts with *Mater v. Holley*, 200 F.2d 123 (5th Cir. 1952),

which arose out of conduct occurring on Fort McPherson in Georgia. Fort McPherson was a federal enclave over which the United States had exclusive legislative jurisdiction, with Georgia retaining concurrent jurisdiction only for the service of state process and the regulation of public utilities. *Id.* at 123. Stating that exclusive legislation meant exclusive sovereignty, the Fifth Circuit found it "indubitable that any law existing in territory over which the United States has 'exclusive' sovereignty must derive its authority and force from the United States and is for that reason federal law, even though having its origin in the law of the state within the exterior boundaries of which the federal area is situate[d]." *Id.* at 124. Because "Georgia law as such" ceased to exist when the United States' sovereignty over the land became exclusive, and the law at issue only "remained operative as federal law," *id.*, the court held that the action arose "under the laws of the United States, within the meaning of 28 U.S.C.A. § 1331," *id.* at 125.

Thus, the Fifth Circuit's holding was based on the fact that the United States' legislative jurisdiction over Fort McPherson was exclusive, with only very limited exceptions. The Fifth Circuit did not address enclaves over which a state exercises legislative authority concurrently with the United States, and its reasoning would not apply to claims arising on such enclaves. Below, the Ninth Circuit agreed that, in circumstances such as those in *Mater*, in which federal legislative jurisdiction is exclusive, "state laws which are effective within the enclave lose their character as laws of the state and become laws of the Union," and federal courts may exercise federal-question jurisdiction over claims arising under them. Pet. App. 13

(internal quotation marks and citation omitted); *see also Cty. of San Mateo v. Chevron Corp.*, __ F.4th __, 2022 WL 1151275, at *7 & nn.3, 4 (9th Cir. Apr. 19, 2022) (Ninth Circuit decision post-dating the decision below, citing *Mater* as having the best reasoning on federal enclave jurisdiction and explaining that, where a state does not have concurrent legislative jurisdiction, laws existing on an enclave are federal law and federal-question jurisdiction lies over claims arising under them).

Ohana notes that *Mater* stated that "[e]xisting federal jurisdiction is not affected by concurrent jurisdiction in state courts." 200 F.2d at 125. Concurrent jurisdiction by federal and state *courts*, however, is different from concurrent *legislative* jurisdiction by the United States and a state. *See* Pet. App. 9 (noting that it "is important not to 'confuse[] the *political* jurisdiction of a State with its *judicial* jurisdiction'" (quoting *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 482 (1981))). Accordingly, the Fifth Circuit's statement that concurrent jurisdiction in state courts does not affect federal jurisdiction does not speak to whether federal courts would have had jurisdiction if Georgia had exercised concurrent *legislative* jurisdiction over Fort McPherson. In short, *Mater* and the decision below are fully consistent.

The decision below is likewise consistent with the Tenth Circuit's caselaw. Ohana relies on *Akin v. Ashland Chemical Co.*, 156 F.3d 1030 (10th Cir. 1998), but that case, like *Mater*, addressed only federal enclaves "within which the United States has exclusive jurisdiction." *Id.* at 1034. Citing *Mater*, the court stated that the power to exercise exclusive legislation "has been construed to mean exclusive

jurisdiction under 28 U.S.C. § 1331" and that federal courts should have jurisdiction where "the United States has exclusive sovereignty." *Id.* at 1034 n.1 (citing *Mater*, 200 F.3d at 124–25).

Akin seems to assume that the United States has exclusive jurisdiction over *all* federal enclaves, indeed, over all places purchased by the government "for the erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings." *Id.* at 1034 (quoting the Enclave Clause). The Tenth Circuit has recognized elsewhere, however, that the United States and a state can exercise *concurrent* legislative jurisdiction over a federal enclave. *See*, *e.g.*, *United States v. Burton*, 888 F.2d 682, 684 & n.3 (10th Cir. 1989). *Akin* does not address whether federal courts have jurisdiction where the United States and a state exercise such concurrent jurisdiction.

Moreover, the Tenth Circuit has recognized that whether "federal enclave jurisdiction, a form of federal question jurisdiction, exists … rest[s] on such factors as whether the federal government exercises exclusive, concurrent or proprietarial jurisdiction over the property." *Celli*, 40 F.3d at 328 (expressing no opinion over whether enclave jurisdiction applied over the claims at issue, even though "at least some of the incidents complained of appear[ed] to have taken place within a federal enclave"). *Celli*'s statement that "federal enclave jurisdiction" depends on factors such as whether the federal government exercises exclusive or concurrent jurisdiction disproves Ohana's contention that the Tenth Circuit looks only at whether the events giving rise to the action occurred on a federal enclave "regardless of concurrent state legislative jurisdiction." Pet. 17 (capitalizations removed).

Finally, Ohana is incorrect in suggesting that the decision below creates an *intra*-circuit conflict with the Ninth Circuit's decisions in *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247 (9th Cir. 2006), and *Willis v. Craig*, 555 F.2d 724 (9th Cir. 1977). Below, the court of appeals directly addressed both of those cases and explained that they both "dealt with exclusive jurisdiction federal enclaves." Pet. App. 15. "[T]he broad concurrent legislative jurisdiction over MCBH distinguishes this case," the court explained. *Id.* "We have only found federal question jurisdiction in enclaves in which Congress has not permitted concurrent jurisdiction, and we have not extended that rule to federal land that is subject to broad state concurrent jurisdiction." *Id.* Although Ohana challenges the Ninth Circuit's interpretation of *Durham* and *Willis*, that court is in the best position to interpret its own precedent. And the fact that no judge requested a vote on Ohana's petition for rehearing en banc, which made this argument, confirms the lack of an intra-circuit conflict. *See id.* at 63.

In short, there is no disagreement among the courts of appeals over whether federal courts have federal-question jurisdiction over state-law claims that arise on enclaves over which a state exercises concurrent legislative jurisdiction, such as Hawaii exercises over MCBH.

B. The Ninth Circuit correctly rejected the argument that federal-question jurisdiction lies over state-law claims whenever the claims arise on a federal enclave over which a state exercises concurrent legislative jurisdiction.

The court of appeals correctly rejected the argument that federal-question jurisdiction lies over all Hawaii-law claims that arise on MCBH. As the court explained, the "federalization of then-existing state-law rules upon the creation of a federal enclave rests on the premise that, precisely because Congress has excluded all exercise of state jurisdiction, the only laws that can apply are federal." Pet. App. 13. "This rationale has no application when, as here, Congress has expressly allowed concurrent state legislative jurisdiction subject to Congress's reservation of ultimate authority." *Id.* Because Hawaii has concurrent legislative jurisdiction over MCBH, the court of appeals correctly concluded that "state law governing Plaintiffs' state law claims is still Hawaii law—not federal law." *Id.* And because the claims arise under Hawaii law rather than under federal law, the court of appeals correctly held that federal courts do not have federal-question jurisdiction.

Ohana criticizes the court for tying the question whether federal courts have federal-question jurisdiction over claims that arise on federal enclaves to the question whether the claims can be "said to have arisen under federal law." Pet. 22. According to Ohana, "[e]nclave jurisdiction" exists "separate and apart from the federal question jurisdiction that is otherwise applicable." *Id.* at 21. But Ohana removed the case to federal court based on federal-question

jurisdiction, *see* Pet. App. 6; SER 409, and the requirement for such jurisdiction is that the claims arise "under the Constitution, laws, or treaties of the United States," 28 U.S.C. § 1331. Accordingly, the court of appeals was correct in asking whether Respondents' claims arose under federal law. And its approach is consistent with court of appeals precedent on federal jurisdiction over cases arising on federal enclaves. *See*, *e.g.*, *Celli*, 40 F.3d at 328 n.4 ("[I]f federal enclave jurisdiction applies, it is by virtue of the fact that those state laws which are effective within the enclave 'lose their character as laws of the state and become laws of the Union.'" (quoting *Stokes*, 265 F.2d at 665)); *Mater*, 200 F.2d at 125 (holding that federal courts had jurisdiction over action that arose on an exclusive jurisdiction enclave because it arose "under the laws of the United States, within the meaning of 28 U.S.C.A. § 1331").

Contrary to Ohana's contentions, the Ninth Circuit did not render the Enclave Clause "of virtually no relevance to judicial jurisdiction," Pet. 15, or hold that federal courts only have jurisdiction over claims arising on federal enclaves if they would have had jurisdiction over the claims if they "had not arisen from events which occurred on a federal enclave," *id.* at 22 (citation omitted). The court of appeals simply recognized that the fact that the events took place on an enclave does not end the analysis. Rather, for federal courts to have federal-question jurisdiction, the nature of the United States' and state's authority over the enclave must be such that the claims can be said to arise "under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

Raising an MCBH-specific argument, Ohana asserts that decision below is incorrect because "the area that would become MCBH appears to have been made the exclusive jurisdiction of the United States" in 1918 by Executive Order 2900—an order that Ohana did not cite below and cannot locate. Pet. 23 & n.3. As an initial matter, although Ohana's discussion of Hawaii history indicates that "MCBH was both owned by the United States and used for military purposes" prior to the Admission Act, Pet. App. 3–4, it does not demonstrate that the federal government had exclusive legislative jurisdiction over the land at that time. *See* Pet. 23 n.3. Even assuming that the federal government had exclusive legislative jurisdiction prior to the Admission Act, however, Ohana's argument does not affect the correctness of the decision below. Ohana concedes that Hawaii and the United States have exercised concurrent legislative authority over MCBH since Hawaii was admitted into the Union in 1959. *See*, *e.g.*, Pet. 5 (stating that, "as a result of the Admission Act," the United States and Hawaii exercise "concurrent legislative jurisdiction" over the base); SER 412. A Hawaii state law that Hawaii was permissibly applying to MCBH at the time of the events in question is not transformed into a federal law simply because the federal government *used to* exercise sole legislative authority over the land.[3]

Ohana contends that its position is in line with the Enclave Clause's purpose of ensuring that public

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[3] Given Ohana's concessions about concurrent legislative jurisdiction over MCBH, Respondents do not understand Ohana to be arguing that Hawaii does not in fact have such concurrent legislative jurisdiction. To the extent that Ohana is making that argument, its concessions about concurrent legislative jurisdiction make this case an inappropriate vehicle for considering it.

lands are "exempt from the authority of the particular state." Pet. 24 (quoting *Ft. Leavenworth R. Co. v. Lowe*, 114 U.S. 525, 530 (1885)). In enacting the Admission Act, however, the United States and Hawaii determined that Hawaii would exercise authority over the enclaves discussed in section 16(b) of the Act in the form of concurrent jurisdiction. The decision below reflects and respects that determination. And if the United States determines that concurrent jurisdiction is no longer acceptable and that the United States needs to assert "sole and exclusive jurisdiction" over MCBH, it can designate MCBH as a "critical area[]." Admission Act § 16(b); *see* Pet. App. 9 (explaining that the Admission Act "reserv[ed] the United States' right to exercise exclusive jurisdiction over areas it designates as critical"). The United States has not done so. *See id.*

Finally, Ohana suggests that Hawaii courts may be too busy to properly decide cases on the merits. This Court, however, has "full faith in the ability of state courts" to handle even federal-law cases and has recognized that, if anything, state courts "have greater expertise" than federal courts in applying state law. *Tafflin v. Levitt*, 493 U.S. 455, 465 (1990). The Hawaii state courts can competently resolve the Hawaii-law claims at issue here, and the court of appeals correctly concluded that the fact that the underlying events occurred on MCBH did not give the district court federal-question jurisdiction.

C. The question of federal-question jurisdiction over state-law claims arising on concurrent legislative jurisdiction enclaves does not require this Court's attention.

Ohana claims that the Court should grant review because the "application of enclave jurisdiction in the *district courts* has been inconsistent." Pet. 32 (emphasis added). The majority of the district court cases Ohana cites, however, are from courts within the Ninth Circuit. The decision below provides binding direction to those courts. If a disagreement among the courts of appeals develops, this Court can then consider whether that disagreement requires resolution. That the Ninth Circuit's decision does not agree with every district court decision that predated it, however, is not a reason to grant review.

Ohana also contends that this Court's guidance is needed in light of the MHPI's privatization of military housing. But the MHPI was established more than 25 years ago, and Ohana has shown no "proliferat[ion]" of cases involving concurrent jurisdiction federal enclaves. Pet. 35. Moreover, although Ohana emphasizes the extent to which military family housing has been privatized, it provides no information about how much of that housing is located on a federal enclave over which a state exercises concurrent legislative jurisdiction similar to that exercised by Hawaii over MCBH. Likewise, Ohana provides no information about whether any such other enclaves are subject to provisions similar to the one in the Admission Act that allows the President or Secretary of Defense to "revoke Hawaii's concurrent jurisdiction" if they deem it necessary. Pet. App. 10.

Federal courts are courts of limited jurisdiction that generally do not have federal-question jurisdiction over state-law claims, such as the Hawaii-law claims at issue here. The Ninth Circuit's determination that federal-question jurisdiction does not lie over all state-law claims based on events occurring at MCBH does not require this Court's review.

II. The Second Question Presented Does Not Warrant Review.

Review is also unwarranted of the Ninth Circuit's holding that this case does not fall within the "special and small category" of cases in which federal courts have federal-question jurisdiction over state-law claims. *Gunn*, 568 U.S. at 258 (citation omitted). Under the test set out in *Grable*, claims fall within that small category "if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn*, 568 U.S. at 258 (citing *Grable*, 545 U.S. at 313–14). Below, the court of appeals explained that, to meet the first prong of this test, a "right or immunity created by the Constitution or laws of the United States must be an [essential] element … of the plaintiff's cause of action." *Gully v. First Nat'l Bank in Meridian*, 299 U.S. 109, 112 (1936); *see also*, *e.g.*, *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 376 & n.6 (2004). Because Ohana "allege[d] only that a policy interest … is implicated" and pointed "to no question of federal law," the Ninth Circuit held that Ohana had not met its burden to

demonstrate that the state-law claims "necessarily raised" a federal issue. Pet. App. 24.

The decision below is fully consistent with this Court's precedent. This Court has explained that a "case 'aris[es] under' federal law within the meaning of § 1331 … if 'a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.'" *Empire Health Care Assur., Inc. v. McVeigh*, 547 U.S. 677, 690 (2006) (quoting *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 27–28 (1983)). Because federal law does not create the claims at issue here, the court of appeals properly followed this Court's lead in considering whether the claims necessarily depend on the resolution of substantial issues of federal law.

Grable and *Gunn* did not replace the requirement that the claim depend on the resolution of a question of federal law with a standard requiring that the claims only "implicate significant federal issues." Pet. 16 (emphases removed). Ohana takes this language from a sentence in *Grable* noting that the Court had "recognized for nearly 100 years that in *certain* cases federal-question jurisdiction will lie over state-law claims that implicate significant federal issues." 545 U.S. at 312 (emphasis added). *Grable* then explained that, as "early as 1912, this Court had confined federal-question jurisdiction over state-law claims to those that 'really and substantially involv[e] a dispute or controversy respecting the validity, construction or effect of [federal] law.'" *Id*. at 313 (quoting *Shulthis v. McDougal*, 225 U.S. 561, 569 (1912); alterations in *Grable*); *see also id*. at 312 ("The doctrine captures the

commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law[.]"). Neither *Grable*'s observation that the Court had long recognized federal-question jurisdiction over some cases implicating significant federal issues, nor its general use of the term "federal issue" as shorthand, overturned the longstanding requirement that the federal issue be a question of federal *law*. *See*, *e.g.*, *Gunn*, 568 U.S. at 259 (finding that state-law claim met first two parts of *Grable* test where it involved "just the sort of dispute respecting the effect of federal law that *Grable* envisioned" (internal quotation marks, citation, and alterations omitted)); *Grable*, 545 U.S. at 315 (holding that federal-question jurisdiction existed over a state-law quiet-title claim where whether the plaintiff "was given notice within the meaning of [a] federal statute" was "an essential element" of the claim, and explaining that its holding would not disrupt the division of labor between federal and state courts because "it will be the rare state title case that raises a contested matter of federal law"). Likewise, *Grable* did not hold that federal-question jurisdiction lies whenever a significant federal interest might be "implicated." The state-law claim must "necessarily raise" the federal issue. *Grable*, 545 U.S. at 314.

Thus, after *Grable*, federal-question jurisdiction continues to "require[] resolution of significant issues of federal law." *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 379 n.9 (2012) (citing *Grable*, 545 U.S. at 312). Here, although Ohana contends that Respondents' state-law claims implicate various federal interests, it points to no issue of federal law that is necessarily raised by those claims.

Contrary to Ohana's claims, the federal interests it asserts would not be sufficient for the First and Seventh Circuits to find federal-question jurisdiction. *See* Pet. 28. Ohana first cites to *One & Ken Valley Housing Group v. Maine State Housing Authority*, 716 F.3d 218 (1st Cir. 2013), in which the First Circuit held that federal-question jurisdiction existed over certain breach of contract claims related to Section 8 housing. There, the First Circuit explained that, although the general rule is that federal courts do not have jurisdiction over state-law contract claims between non-diverse parties, an exception exists "in the rare instance" in which "a federal issue is decisive to the dispute and the federal ingredient ... is sufficiently substantial to confer the arising under jurisdiction." *Id*. at 224 (internal quotation marks and citation omitted). Ohana quotes statements later in the opinion that "the federal ingredients of the case predominate" and that although each of the "federal ingredients" the court identified would be insufficient on its own to establish jurisdiction, "the scope of federal ingredient jurisdiction is determined by the totality of the circumstances." *Id*. But those statements, which go to whether the federal ingredient is sufficiently substantial, do not erase the requirement that the federal issue be "decisive." *Id*. Thus, in a later case, the First Circuit explained that, to determine whether a court has federal-question jurisdiction over state-law claims, the court "must inquire into whether some element of the [plaintiff's] claim depends on the resolution of a substantial, disputed question of federal law." *Ortiz-Bonilla v. Federacion de Ajedrez de Puerto Rico, Inc.*, 734 F.3d 28, 34 (1st Cir. 2013) (citation omitted); *see id*. at 34–35 (equating this standard with the one in *One & Ken*). *Ortiz-Bonilla*

belies Ohana's contention that the First Circuit has eliminated the requirement that, for federal-question jurisdiction to lie over state-law claims, the "state-law cause of action [must] necessarily turn[] on some construction of federal law." *Id.* at 34.

Ohana is likewise incorrect that this case would meet the Seventh Circuit's standards for federal-question jurisdiction. For that proposition, Ohana relies on *Evergreen Square of Cudahy v. Wisconsin Housing & Economic Development Authority*, 776 F.3d 463 (7th Cir. 2015), a case involving claims similar to those at issue in *One & Ken*. In holding that federal-question jurisdiction existed there, the Seventh Circuit determined that the "resolution of th[e] case turns on issues of federal law" and that those issues were "necessarily raised, actually disputed, and substantial." *Id.* at 467; *see also id.* ("While state law may create the breach-of-contract causes of action, the only disputed issues involve the proper interpretation of Section 8 and HUD's implementing guidance."). Ohana quotes *Evergreen*'s statement that cases like that one, in the aggregate, "have the potential to substantially influence the scope and success of the Section 8 program" such that "the federal government has a strong interest in these issues being decided according to uniform principles." Pet. 28 (quoting *Evergreen*, 776 F.3d at 468). That statement, however, was part of the Seventh Circuit's explanation of why the issues in *Evergreen* were "capable of resolution in federal court without disrupting the federal-state balance approved by Congress," that is, why they met the fourth prong of the *Grable*/*Gunn* test. 776 F.3d at 467 (quoting *Gunn*, 568 U.S. at 258). It did not eliminate the requirement that the case raise a question of federal law. *See Webb v. Fin. Indus. Regul.*

Auth., Inc., 889 F.3d 853, 860 (7th Cir. 2018) (holding that case did not "make it past the first factor" of the *Grable* test where the removing defendant "fail[ed] to identify a single provision of federal law that [the court] would have to interpret to resolve th[e] case").

Finally, Ohana devotes significant space to arguing that the federal interests implicated here are similar to those that were implicated in a 2012 district court decision, *Federico v. Lincoln Military Housing*, 901 F. Supp. 2d 654 (E.D. Va. 2012). The decision in *Federico*, however, was not based on the doctrine described in *Grable* and *Gunn*, but on the fact that the case arose on an enclave. *See id.* at 663 n.2. And to the extent that *Federico* held that federal-question jurisdiction exists where federal law does not create the cause of action and the state-law claim does not meet the test described in *Grable* and *Gunn*, that decision conflicts with this Court's precedents. *See Gunn*, 568 U.S. at 257.

As this Court has emphasized, it "takes more than a federal element 'to open the 'arising under' door.'" *Empire Healthcare*, 547 U.S. at 701 (quoting *Grable*, 545 U.S. at 313). The court of appeals correctly concluded that this case does not fall within the "slim category" of cases in which federal-question jurisdiction lies over state-law claims, and this Court's review is unwarranted. *Gunn*, 568 U.S. at 258.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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