No. 21-1223

In The Supreme Court of the United States

OHANA MILITARY COMMUNITIES, LLC, et al.,

Petitioners,

vs.

KENNETH LAKE, et al.,

Respondents.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

COX FRICKE LLP
A LIMITED LIABILITY LAW PARTNERSHIP
RANDALL C. WHATTOFF
Counsel of Record
rwhattoff@cfhawaii.com
ROBERT K. FRICKE
rfricke@cfhawaii.com
KAMALA S. HAAKE
khaake@cfhawaii.com
CHRISTINE A. TERADA
cterada@cfhawaii.com
800 Bethel Street, Suite 600
Honolulu, Hawaii 96813
Telephone: (808) 585-9440

Attorneys for Petitioners Ohana Military Communities, LLC and Forest City Residential Management, LLC

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

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI 1

I. INTRODUCTION 1

II. ARGUMENT 3

A. This Court Should Grant Certiorari to Resolve the Issue of Whether Concurrent Legislative Jurisdiction Divests Federal Courts of Jurisdiction Over Cases Arising on Federal Enclaves 3

1. The *Lake* Decision Does Not "Agree" With Prior Case Law 3

2. Recent Decisions From the Fourth Circuit and Ninth Circuit Confirm the Need for Clarification on the Role of the Enclave Clause 6

3. The Question Presented Requires This Court's Attention, and Will Provide Much Needed Guidance for *All* Federal Enclaves 9

B. This Court Should Grant Certiorari to Resolve the Divide Over the Standard for Federal Question Jurisdiction 10

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Akin v. Ashland Chem. Co., 156 F.3d 1030 (10th Cir. 1998) 4, 8

Allison v. Boeing Laser Technical Services, 689 F.3d 1234 (10th Cir. 2012).....8

Alvares v. Erickson, 514 F.2d 156 (9th Cir. 1975) 6, 7

Carney v. City of San Diego, Case No. 21cv392, 2021 WL 2886049 (S.D. Cal. July 9, 2021) 10

Celli v. Shoell, 40 F.3d 324 (10th Cir. 1994).....5

Community Housing Partnership v. Byrd, Case No. 13-3031 JSC, 2013 WL 6087350 (N.D. Cal. 2013) 9

County of San Mateo v. Chevron Corp., ___ F.4th ___, 2022 WL 1151275 (9th Cir. Apr. 19, 2022) 1, 2, 6, 7

Durham v. Lockheed Martin Corp., 445 F.3d 1247 (9th Cir. 2006).....4, 7, 8

Federico v. Lincoln Military Housing, 901 F. Supp. 2d 654 (E.D. Va. 2012) 5, 9

Garcia v. Mid-Atlantic Military Family Cmtys. LLC, Action No. 2:20cv308, 2021 WL 1429474 (E.D. Va. Mar. 4, 2021).....10

Grable & Sons Metal Products, Inc. v. Darue Engineering and Manufacturing, 545 U.S. 308 (2005)..... 2, 3, 11, 12

Gunn v. Minton, 568 U.S. 251 (2013) 11, 12

TABLE OF AUTHORITIES – Continued

Page

In re Roundup Prods. Liability Litig., Case No. 16-md-02741-VC, 2019 WL 4744683 (N.D. Cal. Sept. 11, 2019) 10

Mater v. Holley, 200 F.2d 123 (5th Cir. 1952) 4, 6, 7, 8

Mayor & City Council of Baltimore v. BP P.L.C., 31 F.4th 178 (4th Cir. 2022) 1, 8

One & Ken Valley Hous. Group v. Maine State Hous. Auth., 716 F.3d 218 (1st Cir. 2013) 12

United States v. Burton, 888 F.2d 682 (10th Cir. 1989) 4, 5

Willis v. Craig, 555 F.2d 724 (9th Cir. 1977) 3, 4, 7

CONSTITUTIONAL PROVISIONS

Enclave Clause, U.S. Const. art. I, § 8, cl. 17 .....*passim*

STATUTES

28 U.S.C. § 1331 ..... 4, 6, 10

Protection of Public Property Act, § 318 5

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

I. INTRODUCTION

The Ninth Circuit broke with precedent—both its own and that of other circuit courts—when it held that the federal courts were divested of federal enclave jurisdiction where a state exercises concurrent legislative jurisdiction. Prior to *Lake*, the weight of authority held that the relevant inquiry under the Enclave Clause turned on whether the alleged injury took place on a federal enclave. *Lake* invented a new and previously unrecognized distinction, which will prevent the district courts from ruling on many cases with important federal impacts like this one.

Respondents assert that there is no circuit split concerning the impact of concurrent legislative jurisdiction on federal enclave jurisdiction. But to the extent there could be any doubt, recent rulings from the Fourth and Ninth Circuits confirm the need for clarification. In *Mayor & City Council of Baltimore v. BP P.L.C.*, the Fourth Circuit conducted a detailed analysis of federal enclave jurisdiction, which turned wholly on the location where the injury occurred. *See* 31 F.4th 178, 217–19 (4th Cir. 2022). The Fourth Circuit did not place any relevance on the existence of concurrent legislative jurisdiction, and its analysis was simply based on "whether the injury itself was sustained within the federal enclave." *Id.* at 218. In *County of San Mateo v. Chevron Corp*., the Ninth Circuit recognized the role of federalized state law, but its analysis nevertheless

turned on the location where the alleged injury occurred. *See* ___ F.4th ___, 2022 WL 1151275, *6–8 (9th Cir. Apr. 19, 2022). The instant case allows the Court to resolve the issue of whether the Enclave Clause has any independent relevance to the jurisdictional analysis, or whether—as the Ninth Circuit decided in *Lake*—the analysis is the same as any other federal question case.

This case also presents an important federal question regarding the extent of federal question jurisdiction following *Grable & Sons Metal Products, Inc. v. Darue Engineering and Manufacturing* and its progeny, in which the Court recognized that "federal-question jurisdiction will lie over state-law claims that implicate significant federal issues." 545 U.S. 308, 312 (2005). In their opposition, Respondents do not deny "*Grable*'s observation that the Court had long recognized federal-question jurisdiction over some cases implicating significant federal issues." Br. in Opp. 21. Respondents also do not deny the complexity of the term "federal issue," but instead attempt to characterize the Court's deliberate choice of words as "shorthand." *Id*. Addressing these conflicting views of federal question jurisdiction will resolve an important and frequently recurring question of federal law.

The federal government has a substantial interest in ensuring a federal forum to hear mass tort claims that arise on key military installations. The Court should therefore grant certiorari to resolve the relevance of the Enclave Clause to this analysis, and to

address whether such critical federal issues are sufficient to trigger federal question jurisdiction under *Grable*.

II. ARGUMENT

A. This Court Should Grant Certiorari to Resolve the Issue of Whether Concurrent Legislative Jurisdiction Divests Federal Courts of Jurisdiction Over Cases Arising on Federal Enclaves

1. The *Lake* Decision Does Not "Agree" With Prior Case Law

Respondents attempt to paint over the clear intra- and inter-circuit split that *Lake* created by suggesting that the Ninth Circuit's opinion "agrees" with earlier precedent. In doing so, Respondents have read into prior opinions a distinction based on concurrent jurisdiction that simply does not exist.

Before the Ninth Circuit's decision in *Lake*, the determination of whether the exercise of federal jurisdiction was proper under the Enclave Clause turned on whether the injury occurred on a federal enclave. For instance, in *Willis v. Craig*, the Ninth Circuit remanded to the district court for a determination regarding whether the incident occurred on a federal enclave. 555 F.2d 724, 726 (9th Cir. 1977). In doing so, the Ninth Circuit noted: "Willis' accident either occurred on property 'purchased' for one of the enumerated uses, or it occurred on other property. If it occurred on the former, enclave jurisdiction is proper. If

it did not, the district court lacks subject matter jurisdiction." *Id*.; *see also Durham v. Lockheed Martin Corp*., 445 F.3d 1247, 1250 (9th Cir. 2006) ("Federal courts have federal question jurisdiction over tort claims that arise on 'federal enclaves.'") (citing 28 U.S.C. § 1331; *Willis*, 555 F.2d at 726 n.4; *Mater v. Holley*, 200 F.2d 123, 125 (5th Cir. 1952)). As the Ninth Circuit explained in *Willis*, "[w]e have no quarrel with the propriety of enclave jurisdiction in this case (if the facts support it), *even though the state courts may have concurrent jurisdiction*." 555 F.2d at 726 n.4 (emphasis added).

Respondents' discussion of the Tenth Circuit's holdings acknowledges this position. Significantly, Respondents admit that "*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.'" Br. in Opp. 12 (first emphasis added; citing *Akin v. Ashland Chem. Co*., 156 F.3d 1030 (10th Cir. 1998)). In other words, *Akin* holds that federal enclave jurisdiction exists even where there is concurrent legislative jurisdiction, in direct conflict with *Lake*.

Attempting to minimize the import of *Akin*, Respondents assert that the Tenth Circuit "has recognized elsewhere . . . that the United States and a state can exercise *concurrent* legislative jurisdiction over a federal enclave." *Id*. (citing *United States v. Burton*, 888 F.2d 682, 684 & n.3 (10th Cir. 1989)). But no one disputes that fact. The Tenth Circuit in *Burton*

simply noted that "[t]he federal government can obtain concurrent or exclusive legislative jurisdiction over specific property" and did not reach Respondents' assertion that concurrent jurisdiction destroys federal enclave jurisdiction. 888 F.2d at 684.[1]

The other Tenth Circuit case relied upon by Respondents, *Celli v. Shoell*, further demonstrates the need for resolution by this Court. *See* Br. in Opp. 12. In *Celli*, the Tenth Circuit noted that "one or more of the events in question occurred at Hill Air Force Base," "which presumably qualifies, at least in part, as a federal enclave, thus affecting the question of federal court jurisdiction." 40 F.3d 324, 328 (10th Cir. 1994). The Tenth Circuit further explained that whether federal enclave jurisdiction exists rests on "such factors as whether the federal government exercises exclusive, concurrent or proprietorial jurisdiction over the property," among other factors. *Id*. The Tenth Circuit, however, did not distinguish between the three types of jurisdiction or even address whether one or *all three* types of jurisdiction may provide federal enclave jurisdiction. If anything, *Celli* supports a factor-based analysis like the one used by the court in *Federico v. Lincoln Military Housing*, 901 F. Supp. 2d 654 (E.D. Va. 2012). In any event, this factor-based analysis conflicts with the Ninth Circuit's holding in *Lake*, and

[1] Further, in *Burton*, the Tenth Circuit noted that Section 318 of the Protection of Public Property Act provided for jurisdiction to federal property over which the United States has acquired exclusive *or* concurrent jurisdiction. *Id*.

further shows the need for this Court's intervention on the issue of federal enclave jurisdiction.

2. Recent Decisions From the Fourth Circuit and Ninth Circuit Confirm the Need for Clarification on the Role of the Enclave Clause

Recent post-*Lake* decisions have not followed *Lake*'s application of a distinction between exclusive and concurrent jurisdiction when addressing federal enclaves. For instance, Respondents cite to *County of San Mateo v. Chevron Corp*., decided after *Lake*, which generally supports Petitioners' position that the location of the injury is controlling: "In sum, because conduct on a federal enclave is generally subject to federal law, a claim based on injuries stemming from such conduct arises under federal law, and a court has jurisdiction over such a claim under § 1331." 2022 WL 1151275, at *7. Indeed, the Ninth Circuit in *San Mateo* did not address any distinction between concurrent and exclusive jurisdiction or between concurrent judicial and legislative jurisdiction. Rather, the Ninth Circuit explained that in applying *Mater*, "federal jurisdiction was proper if the employee's accident occurred on property that qualified as a federal enclave." *Id*. (citing *Mater*, 555 F.2d at 726). The Ninth Circuit also noted its prior decision in *Alvares v. Erickson*, where it explained that "in federal enclave cases, the jurisdiction of a federal court depends on the 'locus in which the claim arose[.]'" *Id*. (quoting *Alvares*, 514 F.2d 156, 160 (9th Cir. 1975)). Accordingly, the Ninth Circuit

in *San Mateo*—applying *Mater*, *Willis*, *Durham*, and *Alvares*, but not *Lake*—proceeded to analyze whether the counties alleged "that their claims are based on torts taking place on a federal enclave." *Id*.

> Specifically, the Ninth Circuit held:
>
> > Unlike in *Willis*, where the accident that resulted in the plaintiff's injury occurred on a federal enclave, or in *Durham*, where the exposure that resulted in the plaintiff's injury occurred on a federal enclave, the Energy Companies allege only that some of the defendants engaged in some conduct on federal enclaves that may have contributed to global warming, which allegedly caused the rising sea levels that resulted in the injuries that are the basis for the Counties' claims.

Id. at *8.

That said, the Ninth Circuit did note that "[t]he constitutional basis for federal enclave jurisdiction is Congress's power to exercise exclusive legislation over federal enclaves, U.S. Const. art. I, § 8, cl. 17, and we have no authority to extend federal enclave jurisdiction beyond such limitations." *Id*. at *8 n.7. There was no discussion in *San Mateo*, however, of how "exclusive legislation" is affected, if at all, by either concurrent judicial or legislative jurisdiction. Ultimately, *San Mateo* further underscores the need for this Court to resolve the Ninth Circuit's holding in *Lake* with conflicting decisions and standards within the circuit.

The Ninth Circuit's holding in *Lake* was also recently contradicted by the Fourth Circuit. In *Mayor & City Council of Baltimore v. BP P.L.C.*, another case decided after *Lake*, the Fourth Circuit relied on the same cases cited by Petitioners—*Mater*, *Durham*, and *Akin*—and held, just as Petitioners assert, that the relevant question is whether the purported injury was "sustained *within* an enclave's boundaries." 31 F.4th at 218. The Fourth Circuit even noted that "Defendants are correct that naval installations are generally considered federal enclaves," citing *Allison v. Boeing Laser Technical Services*, in which the Tenth Circuit observed that federal enclaves include "military bases, federal facilities, and even some national forests and parks[.]" *Id*. at 217 (quoting *Allison*, 689 F.3d 1234, 1235 (10th Cir. 2012)).

The Fourth Circuit's inquiry did not include a distinction between exclusive and concurrent jurisdiction, nor a distinction between concurrent legislative and concurrent judicial jurisdiction. Indeed, there was no such discussion. Rather, the Fourth Circuit simply looked to the allegations in the Complaint concerning where the alleged injuries took place and held that "[a]ll of Baltimore's harms are pleaded within the confines and boundaries of Baltimore City." *Id*. at 219. In short, the Fourth Circuit performed the same analysis advanced by Petitioners here.

3. The Question Presented Requires This Court's Attention, and Will Provide Much Needed Guidance for *All* Federal Enclaves

As the foregoing makes clear, the Ninth Circuit's holding in *Lake* is at odds with cases within the circuit—both predating and postdating *Lake*—as well as cases in other circuits. Respondents admit that "[i]f a disagreement among the courts of appeals develops, this Court can then consider whether that disagreement requires resolution." Br. in Opp. 18. Such a disagreement exists now.

Petitioners cited numerous district court cases that demonstrate just how this lack of clarity is causing discord in the trial courts across circuits, resulting in a variety of conflicting approaches to the issue of enclave jurisdiction. Respondents attempt to minimize this issue, asserting that "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." *Id*. To be clear, a number of the cases cited by Petitioners involved issues of concurrent jurisdiction similar to those here.[2] Moreover, to the extent that many of the

---

[2] *See*, *e.g.*, *Federico*, 901 F. Supp. 2d at 662 ("Both parties agree that the federal government and the Commonwealth of Virginia continue to share concurrent jurisdiction over Norwich Manor today."); *Community Housing Partnership v. Byrd*, Case No. 13-3031 JSC, 2013 WL 6087350, at *3–4 (N.D. Cal. 2013).

cases do not mention whether the federal enclave at issue had concurrent or exclusive jurisdiction, this merely demonstrates the *significant support* for Petitioners' position that this is not a relevant factor.[3]

Respondents are incorrect when they attempt to characterize this petition as presenting issues that are unique to Marine Corp Base Hawaii or some other small subset of bases. The issues presented by this petition include whether the Enclave Clause has any independent relevance to the jurisdictional analysis for federal enclaves, or whether the issue just comes down to a determination of whether a federal question exists. This is a matter that will resolve issues of significant disagreement across *all* federal enclaves.

B. This Court Should Grant Certiorari to Resolve the Divide Over the Standard for Federal Question Jurisdiction

The petition should also be granted because jurisdiction in this case alternatively exists under 28 U.S.C. § 1331, which provides that the federal courts have original jurisdiction over all civil actions "arising under the Constitution, laws, or treaties of the United States." As addressed in the petition, this provision does not require a pure question of federal law. Rather,

---

[3] *See*, *e.g.*, *Garcia v. Mid-Atlantic Military Family Cmtys. LLC*, Action No. 2:20cv308, 2021 WL 1429474, at *1–2 (E.D. Va. Mar. 4, 2021); *In re Roundup Prods. Liability Litig.*, Case No. 16-md-02741-VC, 2019 WL 4744683, at *1 (N.D. Cal. Sept. 11, 2019); *Carney v. City of San Diego*, Case No. 21cv392, 2021 WL 2886049, at *3 (S.D. Cal. July 9, 2021).

the Court in *Grable* noted that it 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. The applicable test was clarified in *Gunn v. Minton*, where the Court held 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." 568 U.S. 251, 258 (2013).

Respondents' argument that federal question jurisdiction requires "that the claim depend on the resolution of a question of federal law," Br. in Opp. 20, demonstrates that there is a square conflict regarding an essential element of the *Grable* and *Gunn* analysis—the interpretation of what constitutes a "federal issue" that is "necessarily raised." Respondents even admit that the Court in *Grable* observed that it "had long recognized federal-question jurisdiction over some cases implicating significant federal issues[.]" *Id*. at 21. Moreover, Respondents' assertion that this Court in *Grable* merely made "general use of the term 'federal issue' as short-hand," *id*., is unsupported by subsequent case law. Review is therefore warranted to determine whether a question of federal law is required, or whether the presence of significant federal issues—such as those involved in this case—are sufficient to establish federal question jurisdiction.

Further, with respect to Respondents' argument that the federal interests asserted by Petitioners

"would not be sufficient for the First and Seventh Circuits to find federal-question jurisdiction," *id*. at 22, such hypothetical argument does not change the fact that the various circuit courts are applying different standards that should be reconciled by this petition. *See*, *e.g*., *One & Ken Valley Hous. Group v. Maine State Hous. Auth*., 716 F.3d 218, 224 (1st Cir. 2013) (noting that "the scope of federal ingredient jurisdiction is determined by the totality of the circumstances, not by a single-factor test" and that federal question jurisdiction therefore existed where the dispute involved a federal contractor's implementation of a federal program; the contracts at issue were drafted and approved by a federal agency and signed by a federal official; and the plaintiffs alleged that the contractor was in breach of the agreement by following a guideline promulgated by a federal agency pursuant to a federal statute); *see also id*. at 225 ("The issue is potentially so important to the success of the [Section 8] program—since on its resolution may turn the amount of lower-income housing actually provided—that we believe that Congress, had it thought about the matter, would have wanted the question to be decided by federal courts applying a uniform principle.") (citations omitted). The Court should therefore grant the petition to resolve the discrepancies among the circuit courts regarding the application of *Grable* and *Gunn*.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant certiorari to review the United States Court of Appeals for the Ninth Circuit's Opinion entered September 27, 2021, reverse or vacate the Opinion, and grant such other relief as justice requires.

DATED: Honolulu, Hawaii, May 19, 2022.

Respectfully submitted,

COX FRICKE LLP
A LIMITED LIABILITY LAW PARTNERSHIP
RANDALL C. WHATTOFF
Counsel of Record
rwhattoff@cfhawaii.com
ROBERT K. FRICKE
rfricke@cfhawaii.com
KAMALA S. HAAKE
khaake@cfhawaii.com
CHRISTINE A. TERADA
cterada@cfhawaii.com
800 Bethel Street, Suite 600
Honolulu, Hawaii 96813
Telephone: (808) 585-9440

Attorneys for Petitioners
Ohana Military Communities, LLC
and Forest City Residential
Management, LLC