No. 22-

IN THE

Supreme Court of the United States

JEANIE BISCONTE,

Petitioner,

v.

SANDIA NATIONAL LABORATORIES, JOHN MOUNHO, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, EDWARD SAUCIER, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Enclave Clause of the United States Constitution imposes limits on federal jurisdiction over federally owned land acquired from a state. *See* U.S. Const., art. I, § 8, cl. 17. A "federal enclave" is a building or geographical area within a state that is under the control of a branch of the federal government and over which the United States government has declared jurisdiction. The question presented here is:

Whether this Court should limit the reach of federal enclave jurisdiction in an employment discrimination case in which Petitioner and the individual Respondents did not work on the federal enclave and Petitioner did not suffer injury on the federal enclave.

RELATED PROCEEDINGS

Bisconte v. Sandia Nat'l Labs., No. 1:21-cv-00462, U. S. District Court for New Mexico. Judgment entered Oct. 21, 2021.

Bisconte v. Sandia Nat'l Labs., No. 21-2133, U.S. Court of Appeals for the Tenth Circuit. Judgment entered Aug. 31, 2022, petition for rehearing denied September 22, 2022.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Jeanie Bisconte, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's unpublished order in Ms. Bisconte's appeal is available at *Bisconte v. Sandia Nat'l Labs.*, No. 21-2133 (10th Cir. Aug. 31, 2022) and is included as Appendix A, 1a-13a. The Tenth Circuit's unpublished denial of Ms. Bisconte's Petition for Rehearing is available at *Bisconte v. Sandia Nat'l Labs.*, No. 21-2133 (10th Cir. September 21, 2022) and is included as Appendix C, 26a. The district court's unpublished memorandum and order can be found at *Bisconte v. Sandia Nat'l Labs.*, 1:21-cv-00462-KWR-KK (D.N.M. Oct. 21, 2021) and is included as Appendix B, 14a-25a.

JURISDICTION

The district court had jurisdiction in this matter under 28 U.S. Code § 1331. The Tenth Circuit had jurisdiction under 28 U.S.C. § 1291. The Tenth Circuit affirmed the district court's order of dismissal with prejudice on August 31, 2022 and denied Ms. Bisconte's Petition for Rehearing on September 21, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

Article I, Section 8, Clause 17 of the U.S. Constitution provides:

> Section 8. To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;–And

U.S. Const. art. I, § 8, cl. 17.

STATEMENT OF THE CASE

Over the last three decades, this Court has recognized the danger of unfettered federal power usurping the power of states and has acted to limit the power of the federal government and federal courts. In this case, the Tenth Circuit extended federal enclave jurisdiction to an employment discrimination lawsuit in which none of the injuries suffered by Ms. Bisconte occurred on the federal enclave, her supervisors did not work on the federal enclave, and none of the alleged discriminatory conduct occurred on the federal enclave. This Court should grant Ms. Bisconte's Petition to cabin the doctrine of federal enclave jurisdiction, consistent with its jurisprudence

limiting the federal court's jurisdiction over state law matters.

A. Proceedings Below

This case involves allegations of workplace discrimination and retaliation suffered by Ms. Bisconte. While employed by Respondents, Ms. Bisconte worked exclusively off the federal enclave. Ms. Bisconte either worked from home or at the Innovation Parkway Office Center. The Innovation Parkway Office Center is a building leased by Sandia National Laboratories and it is located outside the federal enclave. Significantly, Ms. Bisconte's supervisors also worked outside the federal enclave at the Innovation Parkway Office Center.

Prior to filing a lawsuit, Ms. Bisconte exhausted her administrative remedies before the New Mexico Human Rights Commission whereby the New Mexico Human Rights Commission denied Sandia National Laboratories' Motion to Dismiss based upon the federal enclave doctrine. Ms. Bisconte then filed her Complaint for Discrimination and Retaliation in the state district court of general jurisdiction in Bernalillo County, New Mexico, on March 15, 2021, against Respondents, including Sandia National Laboratories. Respondents removed the case to the federal district court on May 17, 2021, citing federal jurisdiction pursuant to 28 U.S.C. § 1331. On May 24, 2021, Respondents filed a motion to dismiss, arguing, *inter alia*, that Ms. Bisconte's state law claims were barred by federal enclave jurisdiction. On June 7, 2021, Ms. Bisconte filed a motion to remand the proceedings, arguing in relevant part that her state law claims were not barred by federal enclave jurisdiction because she worked from home and

from the Innovation Parkway Office Center, neither of which were on the federal enclave, and thus none of the harm suffered by Ms. Bisconte occurred on federal land.

The district court denied Ms. Bisconte's motion to remand on August 13, 2021, holding that the federal court had jurisdiction over the matter and that federal enclave jurisdiction applied to the case. Additionally, the district court converted the federal enclave portion of Respondents' motion to dismiss to a motion for summary judgment. The district court entered its Memorandum Opinion and Order and Judgment on September 27, 2021, found at Appendix B, holding that federal enclave jurisdiction applies in this case and dismissing all Ms. Bisconte's claims with prejudice.

Ms. Bisconte filed a timely appeal to the Tenth Circuit Appellate Court on December 22, 2021. On August 31, 2022, the Tenth Circuit affirmed the district court's ruling, in a sweeping decision that erroneously applied its recent case of *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.) Inc.*, 25 F.4th 1238 (10th Cir. 2022), creating a conflict between the two cases on the question of federal enclave jurisdiction. On September 14, 2022, Ms. Bisconte filed a Petition for Rehearing in the Tenth Circuit, which was denied on September 21, 2022.

This timely Petition follows.

REASONS FOR GRANTING THE WRIT

I. The Tenth Circuit's Decision Unlawfully Expanded the Doctrine of Federal Enclave Jurisdiction.

The Tenth Circuit's decision in this case expanded federal enclave jurisdiction to an unprecedented result and rendered a decision in deep conflict with its own precedent from earlier this year in *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.) Inc.*, 25 F.4th 1238 (10th Cir. 2022).

Federal enclave jurisdiction derives from the Constitution's Enclave Clause, U.S. Const. art. I, § 8, cl. 17, which "empowers Congress to exclusively regulate properties acquired from state governments… Given this exclusive authority, these properties-known as federal enclaves-are typically governed by federal law." *Bisconte v. Sandia Nat'l Labs.*, No. 21-2133, at *5 (10th Cir., Aug 31, 2022) (internal citations omitted). Determining whether federal enclave jurisdiction "exists is a complex question, resting on such factors as whether federal government exercises exclusive, concurrent or proprietorial jurisdiction over property, when property became a federal enclave and what state law was at that time, whether that law is consistent with federal policy, and whether it has been altered by national legislation." *Celli v. Shoell*, 40 F.3d 324, 328 (10th Cir. 1994). Consistent with these limiting principles, "[i]f jurisdiction is challenged, the burden is on the party claiming jurisdiction to show it by a preponderance of the evidence." *Id.* at 327; *Bachman v. Fred Meyer Stores, Inc.*, 402 F. Supp. 2d 1342, 1347 (D. Utah 2005). The circuit courts have followed this Court's lead in finding that the jurisdiction of a federal court

depends on "the locus in which the claim arose." *Cnty. of San Mateo v. Chevron Corp.*, 32 F4th 733, 749 (9th Cir 2022) (internal citations omitted).

Here, the Tenth Circuit unjustifiably expanded the notion of federal enclave jurisdiction. Unlike cases in which injuries to plaintiffs occurred on the federal enclave, in this case, the injuries suffered by Ms. Bisconte occurred exclusively off of the federal enclave. *Accord Willis v. Craig*, 555 F.2d 724, 725 (9th Cir. 1977) (per curiam) (a civilian employee who was injured while working at a federal naval center brought a negligence action in federal court; federal jurisdiction was proper if the employee's accident occurred on property that qualified as a federal enclave); *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1250 (9th Cir. 2006) (federal courts would have federal question jurisdiction over an employee's claim arising from exposure to asbestos during his work on federal enclaves); *Cnty. of San Mateo v. Chevron Corp.*, 32 F.4th 733, 749 (9th Cir. 2022)

The starting point in the analysis as to whether federal jurisdiction is present is a presumption against jurisdiction. *Suncor* at 1250. This presumption is manifested in "the deeply felt and traditional reluctance of [this Court to expand the jurisdiction of the federal courts through a broad reading of jurisdictional statutes." *Id*. (internal citations omitted).

In *Suncor*, as was true in its companion cases throughout the circuits, consistent with these limiting principles, the Court clarified that "[t]he doctrine of federal enclave jurisdiction generally requires 'that all pertinent events t[ake] place on a federal enclave.'"

Suncor at 1271 (internal citations omitted). In *Suncor*, the defendant oil companies argued that because injury may have occurred to federal enclaves cited to in the plaintiffs' complaint. *Id.* However, "[t]he actual injury for which [the Municipalities] seek compensation [was] injury to 'their property' and 'their residents,' occurring 'within their respective jurisdictions' " and not within the federal enclaves. *Id.* (citing to the District Court decision). The Tenth Circuit's decision in *Suncor* is consistent with Circuits around the country who rejected, *inter alia*, oil company defendants' arguments that federal enclave jurisdiction foreclosed the bringing of state claims. *City of Honolulu v. Sunoco LP*, No. 21-15313, at *5 (9th Cir., July 7, 2022) (citing to First, Fourth, and Ninth Circuit opinions rejecting the contention that removal was proper under, inter alia, federal enclave jurisdiction).

In its order in this case, the Tenth Circuit created a fractured understanding of federal enclave jurisdiction, which will lead to an improper expansion of federal jurisdiction over state claims. The Tenth Circuit decision in this case flipped the *Suncor* test on its head, finding that even the sparsest connections to the federal enclave justified a finding of federal enclave jurisdiction. This is anathema to the Court's admonition to limit federal jurisdiction. This Court requires "all pertinent events" in a case take place on a federal enclave in order for federal enclave jurisdiction to exist. *Suncor* at 1271.

This case is an employment case. It is undisputed that Ms. Bisconte worked from home, outside the federal enclave. When she was discriminated against, retaliated against, and finally terminated, she suffered those injuries away from the federal enclave by individuals who

were not working on the federal enclave. Ms. Bisconte's actual injuries were inflicted on her and suffered by her at her residence or at the Innovation Parkway Office Center, both located off the federal enclave, as was true in *Suncor*. *Id.* at 1271- 72 ("The actual injury for which [the Municipalities] seek compensation [was] injury to 'their property' and 'their residents,' occurring 'within their respective jurisdictions' and not within the federal enclaves.").

II. This Issue is Extremely Important.

Review of the Tenth Circuit's decision is necessary because this issue is extremely important. Thousands of federal enclaves exist and the inconsistent holdings between this case and the *Suncor* decision will create natural confusion and an unprecedented expansion of federal jurisdiction.

III. This Case is an Excellent Vehicle.

This case is a natural vehicle for the Court to clarify and cabin the doctrine of federal enclave jurisdiction. It is clear that the "pertinent events" regarding Ms. Bisconte's injuries occurred outside the federal enclave. The issue of federal enclave jurisdiction and the factual underpinnings of the case are uncomplicated in nature. Thus, this case is an ideal vehicle for the Court to use to clarify federal enclave jurisdiction.

CONCLUSION

This Court should grant this Petition.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED AUGUST 31, 2022

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 21-2133 (D.C. No. 1:21-CV-00462-KWR-KK
(D.N.M.)

JEANIE BISCONTE,

Plaintiff - Appellant,

v.

SANDIA NATIONAL LABORATORIES; JOHN MOUNHO, in his individual and official capacity; EDWARD SAUCIER, in his individual and official capacity,

Defendants - Appellees.

ORDER AND JUDGMENT*

Before PHILLIPS, MORITZ, and EID, Circuit Judges.

Jeanie Bisconte brought state-law claims for discrimination and retaliation against her former employer, Sandia National Laboratories, and two of

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. But it may be cited for its persuasive value. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

her managers, John Mounho and Edward Saucier.[1] The district court first determined that it could exercise federal subject-matter jurisdiction over those claims because they arose from events that occurred on a federal enclave. But as a result, the district court also granted summary judgment for Sandia under the federal-enclave doctrine because Bisconte's claims derived from state law adopted after the enclave's creation. Bisconte appeals the jurisdictional ruling and the disposition of her claims in the judgment. We affirm for the reasons below.

Background

Bisconte worked for Sandia, a national science and engineering laboratory, for over a decade as a software systems engineer. Sandia operates predominately on the Kirtland Air Force Base, a federal enclave acquired by the United States from New Mexico in 1954.[2] Sandia also maintains facilities at the Innovation Parkway Office Center, which is located outside the enclave. Under the terms of a telecommute agreement, Bisconte worked remotely at all times relevant to this suit, performing her duties either from her home or the Innovation Parkway Office Center.

During the initial years of her employment, Bisconte alleges that she "advanced greatly in role and

1. We refer to these three defendants collectively as "Sandia."

2. As explained more fully later, a federal enclave is property that a state has ceded to the federal government and that is subject to Congress's "exclusive legislative authority." *Allison v. Boeing Laser Tech. Servs.*, 689 F.3d 1234, 1237 (10th Cir. 2012).

responsibility" and received two promotions. App. 15. Bisconte asserts that shortly after her second promotion, however, Sandia began discriminating against her in various ways. According to Bisconte, she first raised concerns with her then-manager and with human resources that she was underpaid relative to her male peers, but human resources denied her request for a salary increase. Three years later, Bisconte filed another complaint with human resources, this time alleging that Mounho, her manager at the time, harassed and discriminated against her; she also generally asserted that Sandia failed to pay and promote women on par with men. Bisconte later filed multiple complaints, both internally and with New Mexico state agencies, alleging gender discrimination, disability discrimination, and retaliation.

While these complaints were pending, Bisconte met with a medical case manager on the base about her disability. According to the case manager's affidavit, Bisconte informed the case manager that she was unable to work because of her disability and thus "requested that she be separated from Sandia." *Id.* at 34. The case manager reported that during the meeting, Bisconte requested disability benefits before separation, and Sandia approved her request later that day. After about eight months on leave with disability benefits, Bisconte was formally separated from the company.[3]

3. The parties dispute whether Bisconte was terminated at this point or merely removed from payroll after exhausting her disability benefits. Because this dispute is not relevant to our disposition, we need not resolve it.

Bisconte then sued Sandia in state court, bringing state-law claims for violation of the New Mexico Human Rights Act, violation of the New Mexico Fair Pay for Women Act, and breach of implied contract. Sandia removed the case to federal court, alleging that Bisconte's claims were subject to federal subject-matter jurisdiction because they arose from events that occurred on a federal enclave (Kirtland Air Force Base). Repeating its assertion that federal-enclave jurisdiction applied, Sandia then moved to dismiss Bisconte's state-law claims as barred by the federal-enclave doctrine. *See Allison*, 689 F.3d at 1237 (explaining that this doctrine generally bars claims (1) arising from events on federal enclave and (2) based on state law adopted after enclave's creation). Bisconte responded by moving to remand and by opposing Sandia's motion to dismiss, arguing in both filings that the district court lacked federal-enclave jurisdiction because she worked outside the base.

Addressing the motion to remand first, the district court agreed with Sandia that federal-enclave jurisdiction was proper because Sandia's acts giving rise to Bisconte's claims occurred on the base. When denying Bisconte's remand motion, the district court also converted Sandia's motion to dismiss into one for summary judgment—because the parties' briefing cited evidence outside the complaint—and allowed the parties to submit additional materials on the federal-enclave issue.[4] Based on these

4. The district court did not convert the remainder of Sandia's motion to dismiss, which asserted alternative reasons for dismissal, into a motion for summary judgment. And given its ultimate ruling on the federal-enclave issue, the district court did not reach these alternative arguments.

new materials, the district court issued a summary-judgment order reconsidering whether federal-enclave jurisdiction existed. After concluding that it did, the district court held that Bisconte's state-law claims were barred by the federal-enclave doctrine because they were based on state-law causes of action recognized after the enclave's creation. The district court therefore granted summary judgment for Sandia and dismissed Bisconte's claims with prejudice. Bisconte appeals.

Analysis

Bisconte raises two issues on appeal. First, she challenges the district court's conclusion that her claims arose on the base and therefore triggered federal-enclave jurisdiction. Second, she argues that even if the district court properly asserted jurisdiction over her claims, it improperly disposed of those claims in the judgment. We consider those issues in turn.

I. Federal-Enclave Jurisdiction

Whether Bisconte's claims arose on the base is a jurisdictional issue.[5] *See Bd. of Cnty. Comm'rs v. Suncor*

5. We note that the district court addressed this jurisdictional issue twice, first in the order denying remand and then again in the summary-judgment order after Bisconte submitted additional materials on the issue. Although the district court did not explicitly state that it was reconsidering the earlier jurisdictional ruling in its summary-judgment order, the substance of the district court's analysis shows that it did just that—it assessed whether Bisconte's claims arose on the base, which is the focus of the parties' dispute on appeal. Thus, we treat the issue before us as jurisdictional, even though it comes to us in an appeal from a summary-judgment order.

Energy (U.S.A.) Inc., 25 F.4th 1238, 1271 (10th Cir. 2022) ("State-law 'actions which arise from incidents occurring in federal enclaves may be removed to federal district court as a part of federal[-]question jurisdiction.'" (quoting *Akin v. Ashland Chem. Co.*, 156 F.3d 1030, 1034 (10th Cir. 1998))), *petition for cert. filed* (U.S. June 8, 2022) (No. 21-1550). We review that issue de novo. *Id.* at 1250. To the extent Bisconte's argument on this jurisdictional issue requires us to assess the district court's summary-judgment decision, we also review that decision de novo. *See Edmonds-Radford v. Sw. Airlines Co.*, 17 F.4th 975, 984 (10th Cir. 2021). "Summary judgment is only appropriate 'if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Id.* (quoting Fed. R. Civ. P. 56(a)).

The jurisdictional issue at the heart of this appeal derives from the Constitution's Enclave Clause, U.S. Const. art. I, § 8, cl. 17, which "empowers Congress to exclusively regulate properties acquired from state governments." *Allison*, 689 F.3d at 1236. Given this exclusive authority, these properties—known as federal enclaves—are typically governed by federal law. *Id.* State law adopted before the enclave's creation also remains in force; but subject to certain exceptions not relevant here, state law adopted after the enclave's creation does not. *Id.* at 1236-37. In line with these principles, federal courts have jurisdiction to adjudicate claims that arise from incidents occurring on federal enclaves: this is known as federal-enclave *jurisdiction*. *See Suncor*, 25 F.4th at 1271; *City of Honolulu v. Sunoco LP*, 39 F.4th 1101, 1111 (9th Cir. 2022) (explaining that federal-enclave jurisdiction

exists when alleged injury "occurred on" or "stemmed from conduct on" enclave). And under such jurisdiction, any claims based on state-law causes of action recognized after the enclave's creation are typically barred: this is known as the federal-enclave *doctrine*. *Allison*, 689 F.3d at 1235.

Here, Bisconte does not dispute that Kirtland Air Force Base is a federal enclave and that the state laws underlying Bisconte's claims were not adopted until after Congress acquired the base in 1954—that is, she does not dispute that the federal-enclave *doctrine* would bar her claims. Instead, she argues only that her claims did not arise on the base, such that federal-enclave *jurisdiction* does not exist.

We recently considered and clarified the standard for whether a claim arose on a federal enclave in *Suncor*, 25 F.4th 1238. There, the plaintiffs asserted state-law claims against several fossil-fuel companies for their role in causing climate change. *Id.* at 1248. The companies argued that these claims qualified for federal jurisdiction because the plaintiffs alleged that the companies' worldwide fossil-fuel business caused environmental damage over a large geographic area, including property within a federal enclave. *Id.* at 1271. We rejected this "all-encompassing theory," explaining that federal-enclave jurisdiction generally requires that "'*all* pertinent events'" take place on a federal enclave.[6] *Id.* at 1271-72 (quoting *Rosseter v.*

6. In *Suncor*, we also cited authority for the proposition that federal-enclave jurisdiction is proper when "all or most" of the pertinent events occurred on the enclave. 25 F.4th at 1272 (quoting

Indus. Light & Magic, No. C 08-04545, 2009 U.S. Dist. LEXIS 5307, 2009 WL 210452, at *1 (N.D. Cal. Jan. 27, 2009)).

Without the benefit of our recent authority, the district court relied on several district-court opinions to conclude that the relevant inquiry is either the place where the harm occurred or, in employment cases, "the place where the adverse employment decisions were made." App. 124. Under either approach, the district court reasoned, Bisconte's state-law claims arose on the enclave. Specifically, the district court concluded that the alleged harm occurred on the federal enclave because Bisconte submitted her request for disability leave on the base, the computer servers hosting Bisconte's remote work were located on the base, and Bisconte was either terminated or resigned during a meeting on the base. And the district court concluded that all relevant decision-and policy-making occurred on the base.

Resisting this conclusion on appeal, Bisconte contends that the location of decision-making is only one factor to consider and urges this court to look to the place where she *experienced* the alleged harm—which she contends took place outside the enclave given that she worked

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Mayor of Balt. v. BP, P.L.C., 388 F. Supp. 3d 538, 565 (D. Md. 2019), *aff'd*, 952 F.3d 452 (4th Cir. 2020), *rev'd on other grounds*, 141 S. Ct. 1532, 209 L. Ed. 2d 631 (2021)). Here, we need not decide whether federal-enclave jurisdiction is also proper if "most" pertinent events occur on an enclave because we ultimately resolve this appeal based on the all-pertinent-events standard.

exclusively off base.[7] Bisconte also points to evidence that she signed a document terminating her security clearance off the base. Sandia, on the other hand, argues that the key inquiry is the location of decision-making and maintains that the district court correctly concluded that Sandia's key decisions and administration of relevant policies occurred on the base.

We need not delve too deeply into the nuances of this dispute because it is clear from our review of the record that all *pertinent* events occurred on the Kirtland Air Force Base. *See Suncor*, 25 F.4th at 1271. And here, in this employment case, the pertinent events are Sandia's alleged acts of misconduct that gave rise to Bisconte's claims. *See Allison*, 689 F.3d at 1235 (noting that plaintiff's employment retaliation claims "arose from *conduct* on

7. In support, Bisconte relies on a New Mexico choice-of-law doctrine, *lex loci delicti commissi*—in English, "[t]he law of the place where the tort or other wrong was committed." *Lex loci delicti*, Black's Law Dictionary (11th ed. 2019). In the tort-law context, this doctrine looks to the place where the wrong occurred, which is the "location of the last act necessary to complete the injury." *Torres v. New Mexico*, 1995- NMSC 025, 119 N.M. 609, 894 P.2d 386, 390 (N.M. 1995) (quoting *Wittkowski v. New Mexico*, 1985 NMCA 066, 103 N.M. 526, 710 P.2d 93, 95 (N.M. Ct. App. 1985)). We question whether it is appropriate to apply a state choice-of-law doctrine in this context, especially given that the federal-enclave doctrine itself operates as a choice-of-law doctrine. *Allison*, 689 F.3d at 1235 ("Federal[-] enclave doctrine operates as a choice[-]of[-]law doctrine that dictates which law applies to causes of action arising on [federal enclaves]."). In any event, we need not decide the relevancy of state choice-of-law doctrines in the federal-enclave context because, as we will explain, our recent precedent provides sufficient guidance to resolve this appeal.

Kirtland Air Force Base" (emphasis added)); *Sunoco*, 39 F.4th at 1111 (explaining that federal-enclave jurisdiction exists when plaintiff's alleged injury "occurred on" or "stemmed from *conduct* on a federal enclave" (emphasis added)). Specifically, Bisconte's complaint confirms that the alleged misconduct that gave rise to her injury is Sandia's failure to pay and promote women on par with men, retaliation for reporting misconduct, discrimination and termination based on gender and disability, and breach of internal policies designed to protect employees from discrimination and retaliation. As the district court determined, these alleged acts of misconduct occurred on a federal enclave because they involved actions taken, decisions made, and policies developed by Sandia's managers and executives who worked on the Kirtland Air Force Base.[8]

We emphasize that our inquiry centers on the location of all *pertinent* events. *See Suncor*, 25 F.4th at 1271. Thus, we do not consider minor facts that are tangential to Bisconte's claims, such as the location of computer servers, the location where Bisconte surrendered her security clearance, or the location of any other stray event. Simply put, these facts are not pertinent because they do not relate to conduct that gave rise to Bisconte's employment-law claims. *See Allison*, 689 F.3d at 1235. Nor is it pertinent that Bisconte experienced her injury outside the base. Rather, the pertinent event here is the conduct

8. Although the district court did not have the benefit of *Suncor*, the district court's analysis shows that it considered the location of all pertinent events—that is, the location where Sandia's alleged acts of misconduct giving rise to Bisconte's claims occurred.

from which those injuries allegedly stemmed—conduct that occurred on the base. *See id.*; *Sunoco*, 39 F.4th at 1111. For these reasons, we hold that the district court properly exercised federal-enclave jurisdiction over Bisconte's state-law claims. And because those claims undisputedly depend on state law adopted after the enclave's formation, the federal-enclave doctrine bars them.[9] *See Allison*, 689 F.3d at 1235.

II. Disposition of Bisconte's Claims

Bisconte next argues that the district court erred by not expressly limiting its judgment to her state-law claims. Bisconte acknowledges that the district court's summary-judgment order includes such a limitation, but she contends that the accompanying judgment does not similarly limit the scope of dismissal. Specifically, Bisconte observes that the judgment dismisses "all claims" against Sandia, and she asserts that such broad language bars her from asserting potentially viable federal claims in the future. App. 131.

This argument is unpersuasive. As Bisconte herself observes, the district court's opinion expressly limits dismissal to her state-law claims, and the judgment

9. In her reply brief, Bisconte notes that Sandia cites New Mexico law in its policies and procedures, which she asserts should foreclose application of the federal-enclave doctrine. Bisconte waived this argument by failing to raise it in her opening brief. *See Singh v. Cordle*, 936 F.3d 1022, 1041 n.6 (10th Cir. 2019). Even if we considered this argument, however, we would not deem it relevant to our analysis for the reasons explained above.

merely effects such disposition. Indeed, the judgment specifically references the district court's opinion and limits disposition to all claims asserted in "this action." *Id.* Because Bisconte asserted only state-law claims in this action, which were the only claims addressed in the district court's decision, the judgment does not dispose of unasserted federal claims.[10] Thus, we see no error in the district court's judgment.[11]

Relatedly, and as a final matter, Bisconte maintains that the district court's failure to limit the judgment to her state-law claims may prevent her from asserting federal claims in the future on the grounds of issue or claim preclusion. But to the extent Bisconte seeks a decision from this court as to whether issue or claim preclusion would bar her potential federal claims, that question is not ripe for review because it is contingent on Bisconte asserting federal claims in the future and a court dismissing them on preclusion grounds. *See Wyoming v. Zinke*, 871 F.3d 1133, 1142 (10th Cir. 2017) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not

10. Because Bisconte's argument fails on the merits, we need not address Sandia's alternative argument that Bisconte waived this argument by not raising it in the district court.

11. In her opening brief, Bisconte also argued that dismissal with prejudice violated her due-process and equal-protection rights. But in her reply brief, she conceded that this argument "is not properly before the [c]ourt for appeal." Rep. Br. 6. We therefore treat this issue as abandoned and do not address it. *See Helm v. Kansas*, 656 F.3d 1277, 1287 n.8 (10th Cir. 2011) (refusing to consider claim that party abandoned on appeal).

occur at all." (quoting *Farrell-Cooper Mining Co. v. U.S. Dep't of Interior*, 728 F.3d 1229, 1238 (10th Cir. 2013))).

Conclusion

Because all pertinent events giving rise to Bisconte's state-law claims occurred on the Kirtland Air Force Base, the district court properly exercised federal-enclave jurisdiction. And because those claims rely on state law adopted after the enclave was created, they are barred by the federal-enclave doctrine. For this reason, we affirm the district court's decision granting summary judgment to Sandia. We also conclude that the district court properly disposed of Bisconte's state-law claims.

Entered for the Court

Nancy L. Moritz
Circuit Judge

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO, FILED OCTOBER 28, 2021

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Case No. 1:21-cv-00462-KWR-KK

JEANIE BISCONTE,

Plaintiff,

v.

SANDIA NATIONAL LABORATORIES *et al.*,

Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court upon Defendants' Motion to Dismiss **(Doc. 6)**. Because the parties submitted evidence with their briefing on the motion to dismiss, the Court converted the motion to dismiss to a motion for summary judgment and gave the parties notice. **Doc. 30; Fed. R. Civ. P. 12(d)**. The Court now considers the briefing along with the parties' supplemental filings. Having considered the parties' filings and arguments, the Court finds that Defendants' motion is **WELL-TAKEN** and, therefore, is **GRANTED**. Plaintiff's claims are **DISMISSED** and a separate judgment closing this case will issue.

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BACKGROUND

Plaintiff asserts New Mexico employment law claims against her former employer Defendant Sandia National Laboratories, an entity that operates predominantly on a federal enclave (Kirtland Air Force Base). Plaintiff worked as a Software Systems Engineer. Plaintiff worked remotely and worked outside of the federal enclave. Defendants Mounho and Saucier were her managers.

Plaintiff alleges that she was discriminated against because of her gender, compensated less than her male colleagues, and denied advancement which her male colleagues received. She also asserts that she was discriminated or retaliated against for her disability and her protected activities. In July 2018 she was placed on medical leave for approximately 8 months through March 5, 2019, when her paid leave benefits were exhausted and she was removed from Sandia's payroll.

Plaintiff filed various employment discrimination and retaliation claims through the New Mexico Human Rights commission and the federal Equal Employment Opportunity Commission.

Plaintiff asserts three New Mexico state law claims:

> Count I: Gender Discrimination and Retaliation under the New Mexico Human Rights Act;
>
> Count II: Violation of the New Mexico Fair Pay for Women Act, NMSA § 28-23-1; and

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Count III: Breach of Implied Employment Contract.

This case was filed in New Mexico state Court on March 15, 2021 and removed to this Court on May 17, 2021 on the basis of federal question jurisdiction under the federal enclave doctrine.

DISCUSSION

Defendants moved to dismiss this case, asserting that the federal enclave doctrine applies to Plaintiff's claims, and that they should be dismissed. The Court agrees with Defendants and dismisses Plaintiff's claims.

I. The federal enclave doctrine applies to this case.

"A federal enclave is created when a state cedes jurisdiction over land within its borders to the federal government and Congress accepts that cession. These enclaves include numerous military bases, federal facilities, and even some national forests and parks." *Allison v. Boeing Laser Tech. Servs.*, 689 F.3d 1234, 1235 (10th Cir. 2012). "Under a body of constitutional law applicable to federal enclaves, U.S. Const. art. I, § 8, cl. 17, state law that is adopted after the creation of the enclave generally does not apply on the enclave." *Id.* Thus, when "the United States acquires with the consent of the state legislature land within the borders of that State ... the jurisdiction of the Federal Government becomes exclusive." *Allison*, 689 F.3d at 1236

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Plaintiff does not dispute that Defendant Sandia National Labs is located on Kirtland Air Force Base, a federal enclave. *Allison v. Boeing Laser Tech. Servs.*, 689 F.3d 1234, 1235 (10th Cir. 2012) (Kirtland Air Force Base is a federal enclave established in 1954). The Court previously concluded that the federal enclave doctrine applies to Sandia National Labs, because it is predominantly located on Kirtland Air Force base. *See, e.g., Benavidez v. Sandia Nat'l Lab'ys*, 212 F. Supp. 3d 1039, 1094 (D.N.M. 2016); *Smelser v. Sandia Corp.*, No. CV 17-388 SCY/KK, 2018 U.S. Dist. LEXIS 54037, 2018 WL 1627214, at *7 (D.N.M. Mar. 30, 2018); *Marquez v. Nat'l Tech. & Eng'g Sols. of Sandia, LLC*, No. CV 20-46 KG/SCY, 2020 U.S. Dist. LEXIS 206147, 2020 WL 6484996, at *1 (D.N.M. Nov. 4, 2020) (federal enclave doctrine barred New Mexico implied employment contract claim).

Plaintiff asserts that because she was a teleworker who did not work on Kirtland Air Force Base, the place of harm was outside of the boundaries of Kirtland Air Force base. Defendants assert that the federal enclave doctrine applies because the "place of harm" was on the federal enclave, and alternatively, Plaintiff was harmed by policies and decisions that occurred on the Kirtland Air Force Base. The Court agrees that the federal enclave doctrine applies because (1) the place where the wrong occurred was on Kirtland Air Force Base, and alternatively, (2) the employer's decision making and policies occurred on Kirtland Air Force Base.

In deciding whether the federal enclave doctrine applies to claims, courts generally look to (1) the place

the harm occurred, or (2) in wrongful termination or compensation employment cases, the place where the adverse employment decisions were made. *Camargo v. Gino Morena Enterprises, L.L.C.*, No. EP-10-CV-242-KC, 2010 U.S. Dist. LEXIS 91753, 2010 WL 3516186, at *2 (W.D. Tex. Sept. 2, 2010) ("for federal enclave jurisdiction to apply, in employment discrimination cases, the adverse employment decision must have been made on federal territory, because the locus of decision-making is where such a tort arises"); *Kennicott v. Sandia Corp.*, 314 F. Supp. 3d 1142, 1172 n.22 (D.N.M. 2018)(reasoning that federal enclave doctrine applies in cases of remote applicants or workers where tortious employment decision were made on federal enclave); *Meadows v. Northrop Grumman Innovation Sys., Inc.*, 436 F. Supp. 3d 879, 888 (W.D. Va. 2020) (for wrongful termination claim, place of harm is where company made termination decision, not the employee's home where employee received termination letter).; *Lawler v. Miratek Corp.*, No. EP-09-CV-252-KC, 2010 U.S. Dist. LEXIS 18478, 2010 WL 743925, at *3 (W.D. Tex. Mar. 2, 2010) ("The cause of action follows the place where the decisions were made, not the place where the employee was or is found—even if it was work that sent the employee to that other location.").

These approaches appear to overlap. Courts have held that the federal enclave doctrine applies only when "the locus in which the claim arose is the federal enclave itself." *In re High-Tech Employee Antitrust Litigation*, 856 F. Supp. 2d 1103, 1125 (N.D. Cal. 2012). In making that determination, courts have looked to where the "substance and consummation of the claim occurred" as

well as where "all pertinent events occurred." *Smelser v. Sandia Corp.*, No. 17-CV 388 SCY/KK, 2018 U.S. Dist. LEXIS 54037, 2018 WL 1627214, at *8 (D.N.M. Mar. 30, 2018) (unreported) (internal citations and quotations omitted). For cases involving adverse employment decisions, "the locus of decision-making is where such a tort arises." *Camargo*, 2010 U.S. Dist. LEXIS 91753, 2010 WL 3516186, at *2 (citing *Lawler v. Miratek, Corp.*, 2010 U.S. Dist. LEXIS 18478, 2010 WL 743925, at *3-4), *quoted in Kennicott v. Sandia Corp.*, 314 F. Supp. 3d 1142, 1175 (D.N.M. 2018). "[T]he location where management made the illegal decision controls." *Id.*

Initially, Plaintiff notes that the New Mexico Human Rights Commission concluded that the federal enclave doctrine did not bar Plaintiff's state law claims. **Doc. 12 at 3, Ex. B**. Plaintiff has not explained how that order is binding on this Court, and its persuasive value is minimal because the order did not explain its reasoning.

The Court notes that most of the relevant facts are undisputed. Plaintiff's state employment law claims stem from her employment with Sandia, an entity which has its operations predominantly on Kirtland Air Force Base.

Plaintiff alleges the following harm. Defendants discriminated against her by failing to promote her, by alleging she had performance-related issues, and by terminating her due to her gender and disability status. She also alleged Defendants retaliated against her after she reported gender discrimination. She asserts that Sandia paid different wage rates to men and women.

She asserts that Defendants breached its policies and procedures to protect employees from retaliation and maintain a workplace free of discrimination.

This Court has previously stated that Sandia has "the bulk of its office and employees on a federal enclave." *Kennicott v. Sandia Corp.*, 314 F. Supp. 3d 1142, 1172 n.22 (D.N.M. 2018). It is undisputed in this case that the managers, executives, human resources and compensation staff made their policies and employment decisions on the Kirtland Air Force base.

All of the relevant adverse employment decisions, actions, or policies, occurred or were formed on Kirtland Air Force Base. The Defendant established the following facts. The computer servers Plaintiff worked on were located on Kirtland Air Force Base. **Doc. 1-2, Ex. B**. Sandia's pay policies that allegedly violate state law were made by Sandia executives or staff on Kirtland Air Force Base. **Doc. 1-2, Ex. D**. The compensation policies were administered by a department located on Kirtland Air Force Base. ***Id.*** The leadership team responsible for policy level compensation decisions met and made decision on Kirtland Air Force Base. ***Id.*** Plaintiff allegedly submitted her request to separate from Sandia employment through Sickness Absence Exhaustion to a medical clinic on the Kirtland Air Force base. *See* **doc. 20 at 2**. Plaintiff resigned or was terminated in a meeting on Kirtland Air Force Base with the Medical Director at Sandia's occupational health clinic on Kirtland Air Force Base. **Doc. 1-2, Ex. C**. Plaintiff does not dispute or contest these facts. Plaintiff has not rebutted this record or argued that

any of Defendants' employment law decisions were made outside of the federal enclave. Therefore, the record is clear that the harms in this case occurred on Kirtland Air Force Base.

Plaintiff argues that because she teleworked from home or worked in an office off Kirtland Air Force Base, the place of harm was outside the federal enclave.

The Court disagrees, for the reasons explained above. Plaintiff does not cite to any case stating that the cause of action arises from a remote worker's home. Rather, cases hold that the federal enclave doctrine may apply even in cases of remote workers. *See, e.g., Kennicott v. Sandia Corp.*, 314 F. Supp. 3d 1142, 1172 n.22 (D.N.M. 2018) (reasoning that federal enclave doctrine apply in cases of remote applicants or workers where tortious employment decisions were made on federal enclave); *Meadows v. Northrop Grumman Innovation Sys., Inc.*, 436 F. Supp. 3d 879, 888 (W.D. Va. 2020) (for wrongful termination claim, place of harm is where company made termination decision, not the employee's home where employee received termination letter); *Lawler v. Miratek Corp.*, No. EP-09-CV-252-KC, 2010 U.S. Dist. LEXIS 18478, 2010 WL 743925, at *3 (W.D. Tex. Mar. 2, 2010) (unlawful employment practice is committed at place where employer made the decision, not place where employee is located), *citing Ifill v. Potter*, No. 05-CV-2320, 2006 U.S. Dist. LEXIS 83833, 2006 WL 3349549, at *2 (D.D.C. Nov. 17, 2006); *Whipstock v. Raytheon Co.*, No. 2:07-CV-11137, 2007 U.S. Dist. LEXIS 58500, 2007 WL 2318745, at *3 (E.D.Mich. Aug. 10, 2007) (locus of

harm for unlawful employment action is place where the employer "made the decision", not the place where the "effects are felt."); *Osburn v. Morrison Knudsen Corp.*, 962 F. Supp. 1206, 1209 (E.D. Mo. 1997) ("Any cause of action arising under the MHRA [state law] occurred as a result of defendant's employment practices on the federal enclave,").

Plaintiff points to exhibits which she argues shows that she turned in her badge and signed her security clearance termination paperwork off the federal enclave. *See* **Docs. 31-6 to 31-8, Ex. F, G, H**. The Court finds that exhibits F and G do not indicate that she turned in her badge or completed an exit interview off of the federal enclave. However, Exhibit H indicates on the second line that she signed a document terminating her security clearance at a facility off of the federal enclave. Even so, this does not change the analysis above. These documents do not tend to show that the relevant decision making, offending policies, or locus of harm, occurred off the federal enclave.

Whether the Court applies the locus of harm analysis or the place of decision-making analysis, the Court concludes that the federal enclave doctrine applies.

II. Plaintiff's claims should be dismissed under the federal enclave doctrine.

Because the federal enclave doctrine applies here, it operates to bar Plaintiff's claims, which are all state law claims which were created after Kirtland Air Force Base became a federal enclave.

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When the federal enclave doctrine applies, it operates to bar state law claims which were not in effect at the time the land became a federal enclave. Under the federal enclave doctrine, "state law that is adopted after the creation of the enclave generally does not apply on the enclave." *Allison v. Boeing Laser Tech. Servs.*, 689 F.3d 1234, 1235 (10th Cir. 2012). Only state law existing at the time of the creation of the federal enclave "remains enforceable." *Id.* at 1237 (citation omitted). In this case, Kirtland Air Force Base was established as a federal enclave in 1954. *Id.* at 1235 (stating that "Kirtland Air Force Base, a federal enclave" was established in 1954). "Since that time the federal government has exercised exclusive jurisdiction within the boundaries of the [b]ase." *Id.* Because Plaintiff's lawsuit arises from conduct occurring during the course of her Sandia employment on Kirtland Air Force Base, it appears that the federal enclave doctrine bars any of Plaintiff's state claims that are based on New Mexico statutory or common law causes of action established after 1954. *See Benavidez*, 212 F. Supp. 3d at 1091-97 (dismissed plaintiff's NMHRA and state tort law claims against Sandia pursuant to the federal enclave doctrine); *Cf. Allison*, 689 F.3d at 1235-36 (holding that the federal enclave doctrine barred plaintiff's state employment and tort law claims against Boeing, a federal contractor located on Kirtland Air Force Base, for conduct that occurred on the base).

Plaintiff does not dispute that the relevant state law was created after Kirtland Air Force Base became a federal enclave. The New Mexico Legislature adopted the NMHRA and the NMFPWA after the Kirtland Air

Force Base became a federal enclave. *See, e.g., Benavidez v. Sandia Nat'l Lab'ys*, 212 F. Supp. 3d 1039, 1097 (D.N.M. 2016) ("NMHRA, which the New Mexico Legislature enacted in 1969, however, did not exist in 1954"); *Kennicott v. Sandia Corp.*, 314 F. Supp. 3d 1142, 1173 (D.N.M. 2018) (" the New Mexico Legislature enacted the NMFPWA in 2013"). Moreover, "New Mexico did not recognize an implied contract for employment arising from an employment manual until 1980." *Allison v. Boeing Laser Tech. Servs.*, 689 F.3d 1234, 1243 (10th Cir. 2012).

Therefore, the Court concludes that Plaintiff's claims must be dismissed under the federal enclave doctrine.

III. Dismissal is with prejudice.

Defendant suggested that the claims should be dismissed with prejudice, which implies dismissal with prejudice for failure to state a claim under Fed. R. Civ. P. 12(b)(6). **Doc. 6 at 5**. Because both parties cited to evidence in their briefing, the Court converted the motion to dismiss to summary judgment in an abundance of caution, gave the parties notice, and allowed them to submit additional evidence for the record. **Doc. 30**.

Generally, courts within this district have treated a motion to dismiss under the federal enclave doctrine as one under Fed. R. Civ. P. 12(b)(6) and dismissed claims with prejudice. *See, e.g., Smelser v. Sandia Corp.*, No. CV 17-388 SCY/KK, 2018 U.S. Dist. LEXIS 54037, 2018 WL 1627214, at *9 (D.N.M. Mar. 30, 2018); *see also Allison v. Boeing Laser Tech. Servs.*, No. CV 09-275 RHS/LFG,

2010 U.S. Dist. LEXIS 152175, 2010 WL 11590920, at *5 (D.N.M. Aug. 2, 2010) (dismissing with prejudice claims pursuant to federal enclave doctrine), *aff'd*, *Allison v. Boeing Laser Tech. Servs.*, 689 F.3d 1234 (10th Cir. 2012). The Court has subject matter jurisdiction over these claims, as explained in a prior order. **Doc. 30**. Therefore, the Court will dismiss the state law claims with prejudice.

CONCLUSION

The federal enclave doctrine applies in this case and it operates to bar Plaintiff's claims in this case, which are all state law causes of action created after Kirtland Air Force Base became a federal enclave.

IT IS THEREFORE ORDERED that the motion to dismiss **(Doc. 6)** is hereby **GRANTED** for the reasons described in this Memorandum Opinion and Order.

A separate judgment will issue.

IT IS SO ORDERED.

/s/ Kea W. Riggs
KEA W. RIGGS
UNITED STATES DISTRICT JUDGE

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED SEPTEMBER 21, 2022

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 21-2133
(D.C. No. 1:21-CV-00462-KWR-KK)
(D. N.M.)

JEANIE BISCONTE,

Plaintiff-Appellant,

v.

SANDIA NATIONAL LABORATORIES; JOHN MOUNHO, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; EDWARD SAUCIER, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY,

Defendants-Appellees.

ORDER

Before PHILLIPS, MORITZ, and EID, Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court

/s/ Christopher M. Wolpert
Christopher M. Wolpert, Clerk