No. 24-512

In the Supreme Court of the United States

GHASSAN KORBAN, in his official capacity as Executive Director of the Sewerage and Water Board of New Orleans,

Petitioner,

v.

WATSON MEMORIAL SPIRITUAL TEMPLE OF CHRIST, D/B/A WATSON MEMORIAL TEACHING MINISTRIES, CHARLOTTE BRANCAFORTE, ELIO BRANCAFORTE, BENITO BRANCAFORTE, JOSEPHINE BROWN, ROBERT PARKE, NANCY ELLIS, MARK HAMRICK, ROBERT LINK, CHARLOTTE LINK, ROSS MCDIARMID, LAUREL MCDIARMID, JERRY OSBORNE, JACK STOLIER, and WILLIAM TAYLOR,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Louisiana

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Focusing on the wrong question, Respondents leave much unchallenged. They do not dispute that the federal district court would have had supplemental jurisdiction over their state claims or claim that exercising such jurisdiction would have been an abuse of discretion. And they concede that under Petitioner's "no-speculation" rule, those claims would have been *res judicata*.

Respondents instead raise straw men, misread citations to Comment *e* of the Restatement (Second) of Judgments § 25 (1982) as agreements on its legal interpretation, and pretend that different outcomes are mere fact-based variations. But that narrative ignores the conflicting legal standards applied by the two sides of the split. At least six States and three federal courts interpret Comment *e* to *require* a plaintiff to raise all state claims in an earlier federal action to avoid federal *res judicata*. Eight others (including Louisiana) do not, attempting to divine how the federal court would have exercised its discretion regarding any unraised state claims. That split warrants review.

Respondents' other arguments go not to certworthiness, but to the merits. While they are wrong there as well, even if they had a point, that would confirm the need for review because one side of the split should be corrected. This Court should grant certiorari to unify the standards for *res judicata* regarding supplemental state claims not raised in a prior federal action.

I. The Opposition Confirms a Nationwide Split.

Respondents dodge the clear split by recasting (at 10) the question presented then claiming that every State "follows the Restatement's rule." But as Petitioner noted (at 13), while "[b]oth lines of cases" in the split cite to and "purport to be interpreting" Comment *e*, they diverge on subsidiary legal questions, belying the preposterous claim of a "consensus." This Court regularly grants certiorari to resolve splits over a rule's proper interpretation. *F. Hoffmann-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 160 (2004); *Mont* v. *United States*, 587 U.S. 514, 520 (2019); *Thompson* v. *Clark*, 596 U.S. 36, 41 (2022).

1. Respondents ignore that the split has been *repeatedly* acknowledged by the courts.

In *Gilles* v. *Ware*, the court rejected "[o]ne line of cases" that "interpret * * * [C]omment *e* * * * to" allow avoidance of *res judicata* "if the federal action is decided on summary judgment, even if a pendent state claim was never filed," instead following "[m]ore persuasive case authority" that was not "based on pure speculation" and "unworkable." 615 A.2d 533, 540-541 (D.C. 1992) (per curiam).[1] Under the second line of authority, "plaintiff is *obliged* to file the pendent claim and force the federal court to exercise its discretion to keep or decline jurisdiction; otherwise, the plaintiff will confront a *res judicata* bar." *Id.* at 540 (emphasis

[1] This portion of *Gilles*—though captioned as Judge Ferren's partial concurrence—is the opinion of the court. 615 A.2d at 534.

added). And that obligation persists, regardless whether the federal court would "most likely * * * dismiss a state law claim." *Id.* at 542.

Jensen v. *Champion Window of Omaha, LLC*, 900 N.W.2d 590 (Neb. Ct. App. 2017), which Respondents concede (at 13) conflicts with Louisiana's rule, also acknowledges the split, recognizing that "[s]ome courts" allow unraised state claims to proceed because "a federal court will typically not exercise supplemental jurisdiction over state law claims once it has disposed of the federal claims pretrial." 900 N.W.2d at 593-594. But it joined *other* courts that "clearly disfavor attempting to divine or speculate what the federal court would have done[.]" *Id.* at 594.

This Court has not hesitated to resolve splits that included intermediate state courts. See, *e.g.*, *Lange* v. *California*, 594 U.S. 295, 300-301 (2021). And Respondents' attempted distinction that the court declined jurisdiction over other state claims just sharpens the split: *Jensen* refused to speculate or excuse forfeiture even in the face of such a choice on those other claims.

2. Respondents' cursory treatment of the "no-speculation" cases omits that each *requires* state claims to be raised, and acknowledged discretion exercised, for there to be the needed clarity to trigger Comment *e*'s exception to *res judicata*.[2]

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[2] Binding circuit precedent that would forbid retaining pendent jurisdiction also would provide the required clarity. The split here involves the hypothetical exercise of *permissible* discretion, not the abuse of discretion.

Consider *Anderson* v. *Phoenix Investment Counsel of Boston, Inc.*, 440 N.E.2d 1164 (Mass. 1982), which Respondents (at 11) give the most airtime. Like *Gilles*, *Anderson* applied *res judicata* to previously unraised state claims, rejecting "prognosticative futility" over what the district court would have done. 440 N.E.2d at 1168. Refusing to "countenance a plaintiff's action in failing to plead a theory in a Federal court with the hope of later litigating the theory in a State court," it required plaintiffs to "plead [their] State claim in the Federal court" even if it was "probable[] that the Federal court would have declined to exercise its pendent jurisdiction." *Id.* at 1169.

In discussing *Asarco LLC* v. *Atlantic Richfield Co.*, 369 P.3d 1019, 1027 (Mont. 2016), Respondents (at 12) irrelevantly note its quoting of the Restatement but ignore that the court "decline[d] to speculate" and applied federal *res judicata* to the unraised state claims that plaintiff "could have brought" "because the federal district court was not given the opportunity to decide for itself whether to retain jurisdiction over [the party's] state-law claims." *Asarco,* 369 P.3d at 1027.

Respondents (at 11) make the same error when discussing *Penn* v. *Iowa State Board of Regents*, 577 N.W.2d 393, 401 (Iowa 1998) (per curiam), ignoring the court's *holding* that "claim preclusion applies * * * because [the plaintiff] should have raised [his state claims] in the federal action and requested the federal court to exercise supplemental jurisdiction." The court further held, *id.* at 400, that the case was "controlled by" its decision in *Shumaker* v. *Iowa Department of Transportation*, 541 N.W.2d 850 (Iowa 1995), which applied *res judicata* because plaintiff "at the worst,

abandoned her state claim in federal court" and "[a]t best," "failed to seek an adjudication of it under the court's pendent jurisdiction," *id.* at 854. That the *Penn* court was bound by precedent and refused to speculate refutes the suggestion that *Penn* is merely a fact-bound variation of Comment *e*.

Respondents (at 12) also fail to negate Illinois as a conflicting jurisdiction. In *River Park, Inc.* v. *City of Highland Park*, the Illinois Supreme Court refused to speculate about how the district court would have exercised jurisdictional discretion regarding unraised state claims. 703 N.E.2d 883, 896 (Ill. 1998). And even though "the federal courts directed [the plaintiffs] to seek relief in state court," "any 'Catch-22' situation was created by plaintiffs themselves." *Ibid.* *River Park* thus addressed district court comments nearly identical to those here and still applied federal *res judicata.*[3]

In short, Respondents fail to rebut that—on the same facts—the current case would have come out differently in the six "no-speculation" States. Pet.17-21.

3. As to the federal "no-speculation" cases, Respondents ignore the Seventh Circuit's no-

[3] Respondents oddly note (at 12 n.2) that they "assert[ed] a state-law theory (contract) in their claim for declaratory judgment in federal court." That undermines their attempt to distinguish *Jensen*, and their attempt to claim virtue for *not* raising their state claims. And that attempt to bootstrap a federal declaratory claim was dismissed for *lack of jurisdiction*, App.8a, involved no discretion, and thus differs from state claims where the district court *does* have jurisdictional discretion that Respondents failed to invoke.

speculation approach in *Lee* v. *Village of River Forest*, 936 F.2d 976 (7th Cir. 1991). And they downplay (at 13) *Nwosun* v. *General Mills Restaurants, Inc.*, 124 F.3d 1255, 1258 (10th Cir. 1997), where the Tenth Circuit recognized the split presented here, joined *Brown* v. *Federated Department Stores, Inc.*, 653 F.2d 1266, 1267 (9th Cir. 1981), and *Lee* on the "no-speculation" side, and rejected the speculative approach in *Jones* v. *Holvey,* 29 F.3d 828, 832 (3d Cir. 1994). Because pendent jurisdiction is discretionary, *Nwosun* declined to engage in "speculative gymnastics"—even if unraised state claims would have been "ripe for dismissal." 124 F.3d at 1258.

Respondents' again irrelevant observation (at 12-13) that *Nwosun* and *Brown* quote the Restatement (or its predecessor) still begs the question by ignoring how those courts narrowly interpret Comment *e*. *Brown*, 653 F.2d at 1267, for example, cited Justice Blackmun's exceptionally strict approach—to a tentative draft of the Restatement—in *Federated Department Stores, Inc.* v. *Moitie*, which evaluates discretionary jurisdiction *ex ante*:

> Since there is no reason to believe that it was clear at the outset of this litigation that the District Court would have declined to exercise pendent jurisdiction over state claims, respondents were obligated to plead those claims if they wished to preserve them.

452 U.S. 394, 404 (1981) (Blackmun, J., concurring in the judgment). The Ninth Circuit's reliance on that strict approach belies any suggestion of a "consensus"

on how courts interpret Comment *e* and the standards they apply.

The Louisiana Supreme Court and other courts on its side each engage in counter-factual speculation about how a district court would have exercised its permissible discretion, regardless of how many evidentiary crumbs they require before guessing. The conflicting courts eschew such speculation, even in the face of equally suggestive evidence of what *might* have happened, instead requiring that each claim be raised and discretionary jurisdiction declined to avoid *res judicata*. That nationwide split warrants resolution.

II. This Case Is An Excellent Vehicle.

Respondents' vehicle attacks also lack merit.

1. This case is a clean vehicle. Respondents failed to raise their state claims in the federal action and concede those claims would have been barred by *res judicata* under the "no-speculation" rule advocated here.

2. Respondents are wrong (at 16) that the Petition attacks the Restatement rule "root and branch." Rather, Petitioner and the "no-speculation" courts reject interpreting Comment *e* as an invitation to speculate about the hypothetical exercise of admitted discretion. Resolving that split requires only cabining a discrete and ambiguous twig within a single comment of the Restatement, leaving the "root[s]" and "branch[es]" untouched.

3. Respondents next erroneously assert (at 16-17) that Petitioner forfeited his defense by citing Comment *e* and arguing within the confines of binding

Louisiana precedent. But as Respondents should well know, parties forfeit "claim[s]," as Respondents did in the district court, not "argument[s]." *Hemphill* v. *New York*, 595 U.S. 140, 149 (2022); see also Pet. Reply Br. at 5, *Snyder* v. *United States*, 603 U.S. 1 (2024) (No. 23-108) (scorning same argument made by Respondents here and citing *Hemphill*); Pet. Reply Br. at 5, *Royal* v. *Murphy*, 591 U.S. 977 (2020) (No. 17-1107) (if claim "remains the same," there is no barrier to later challenging binding precedent). To preserve a *claim*, Petitioners need only argue at "every level of [the state] proceedings" that federal *res judicata* barred the state claims. *Hemphill*, 595 U.S. at 148-149. Petitioner did that, and this Court can "consider any argument [he] raises in support of his claim[.]" *Id.* at 149.

4. Respondents suggest (at 17) that Louisiana's role in the split is "too narrow" for this Court's review. That Louisiana's legal standard may tolerate marginally less speculation than other speculating courts only makes this case a *better* vehicle. By offering a best-case example of the speculative approach, this petition presents a cleaner contrast between the two opposing interpretations.

5. Respondents cheekily argue (at 18-19) that it would be "particularly inappropriate" to resolve the split because it might impair the resulting state-law holding. But *Respondents* created that tension by first running to federal court with meritless federal claims and forfeiting what *they* deemed to be *entirely* meritless state claims. Pet.9. That Louisiana issued a

novel state-law ruling by first misconstruing federal law should not insulate it from review.[4]

III. The Decision Below Is Incorrect.

Respondents are also wrong that Louisiana's side of the split is the right one.

1. Respondents claim (at 20) that "Louisiana's rule is the Restatement's rule[.]" That again begs the question posed by conflicting interpretations of Comment *e*, and the clarity of the "no-speculation" interpretation is superior and should not turn on geography.

2. Respondents falsely assert (at 20) that they lacked a "full and fair opportunity to litigate" their state claims in federal court. Their speculation from hindsight raises no genuine due process concern. They presumably did not believe at filing that their federal claims were doomed to fail and do not dispute that *res judicata* would apply had such claims proceeded to trial. Their protestation (at 20-21) against being "punish[ed]" for "not raising claims that clearly belong in state court" merely repudiates the anti-claim-splitting foundation of federal *res judicata*. The district court criticized Respondents for their overreaching *federal* claims, App.6a-7a. and, having

[4] Nor would reversing on federal grounds necessarily undermine the state-law ruling as to future litigants. Other plaintiffs who sensibly remained in state court are seeking to enforce the same judgments. Intermediate courts in those cases are unlikely to ignore the substance of this case's unanimous state-law ruling. And, if they did, the Louisiana Supreme Court can easily re-affirm in a case not barred by federal *res judicata*.

already foisted such claims on the court, they cannot pretend virtue for splitting their claims while doing so.

Most state claims indeed belong in state court but may be brought together with related federal claims. 28 U.S.C. § 1367(a). And when state claims *can* be brought alongside federal claims, federal *res judicata requires* them to be brought or forfeited. *New Hampshire* v. *Maine*, 532 U.S. 742, 748-749 (2001). Respondents could have brought *all* their claims in either federal or state court in the first instance. That they chose a divided strategy is no defense to *res judicata*.

Nor were Respondents' state claims "federally futile" as they speculate (at 21) from hindsight. Non-frivolous federal claims are not predictably doomed when filed. And had the federal claims *proceeded* to trial, no court would refuse to apply *res judicata* to unraised state claims. That Respondents' federal claims proved meritless does not negate their *ex ante opportunity* to litigate pendent state claims. Rather, Respondents deprived the district court of the opportunity to exercise *its* judgment whether to resolve or decline any such claims.

Even dismissing meritless federal claims does not inexorably render supplemental state claims "federally futile."[5] Federal appellate courts regularly

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[5] Respondents are wrong (at 21-22) that requiring plaintiffs to raise state claims would require federal courts to engage in "needless make-work." 28 U.S.C. § 1367(c) lists permissive reasons to decline pendent jurisdiction. If the district court invokes those reasons, the analysis need not go further than saying so. See *Arroyo* v. *Rosas*, 19 F.4th 1202, 1210 (9th Cir. 2021); *Hedges* v. *Musco*, 204 F.3d 109, 123 (3d Cir. 2000). And any

endorse district court discretion to retain pendent jurisdiction after dismissing the federal claims. See *Sarpolis* v. *Tereshko*, 625 F. App'x 594, 601 (3d Cir. 2016) ("[I]t is simply not the case that most courts accept that the proper course is to remand whenever all federal claims are dismissed."); *Puleo* v. *Masonic Med. Rsch. Inst.*, No. 23-7589, 2025 WL 45393, at *4 (2d Cir. Jan. 8, 2025). That general point remains true even for novel state claims. See *Bailey* v. *City of Chicago*, 779 F.3d 689, 696 (7th Cir. 2015).

Respondents erroneously deny (at 22) that their rule "encourage[s] inefficient claim splitting." But it plainly did so here, where they could have raised *all* their claims in either state or federal court, but chose not to. That they now (at 22) defend having split those claims because they imagine, in hindsight, that it is "truly obvious" the district court would have declined pendent jurisdiction given its hostility to their federal claims could not have been their reason *ex ante*. More likely, they worried the federal court would have concluded, along with Respondents themselves, Pet.9, that it was "truly obvious" their state claims lacked merit and hence dismissed them on the merits rather than foisting them on the state courts.[6]

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needless make-work stems from plaintiffs' filing meritless federal claims in cases that belong in state court to begin with.

[6] That the Louisiana Supreme Court's novel and unexpected decision breathed life into a claim even Respondents believed and represented to be meritless does not alter the potential perspective of a federal court considering how to resolve seemingly frivolous claims.

3. Finally, Respondents erroneously claim (at 23-24) that predicting a court's exercise of jurisdictional discretion is as easy as identifying an "abuse of discretion." But they never claim that it would have been an abuse of discretion had the district court exercised supplemental jurisdiction here. The guesswork thus goes not to the legal limits on discretion, but to inherently subjective exercises of *permissible* discretion. Just as "lower federal courts possess no power whatever to sit in direct review of state court decisions," *District of Columbia Ct. of Appeals* v. *Feldman*, 460 U.S. 462, 482 n.16 (1983) (citations omitted), state courts have no power to issue advisory opinions evaluating hypothetical discretionary actions of federal courts.

Respondents thus are wrong (at 23) that making an "*Erie* guess" or a "reasoned prediction" of state law is analogous to the speculation here. Courts interpret the law. They do not impute their own discretionary choices to other judges or opine on how another judge would have exercised her own discretion. And regardless whether Respondents (at 23-24) are correct that, in Louisiana, at least, "[c]lose calls result in preclusion," that is a red herring. Whether a hypothetical discretionary choice would be "close" or "clear" only moves the line for speculation, it does not eliminate it. In courts that refuse to speculate, there are no close calls—unraised state claims are barred. The "far easier" rule is the bright-line rule comparing claims in a prior complaint against claims later raised in state court.

CONCLUSION

The question presented regarding the standards for federal *res judicata* involves an important and outcome-determinative split that this Court should resolve.

Respectfully submitted,

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