No. 11-852

In the Supreme Court of the United States

CITY OF HUGO, OKLAHOMA, ET AL., PETITIONERS

v.

TOM BUCHANAN, ET AL.

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

REPLY BRIEF FOR PETITIONERS

JAMES C. HO
Counsel of Record
DANIEL L. GEYSER
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue,
Suite 1100
Dallas, TX 75201-6912
jho@gibsondunn.com
(214) 698-3264

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued: Page

Constitution:

Miscellaneous:

In the Supreme Court of the United States

No. 11-852

CITY OF HUGO, OKLAHOMA, ET AL., PETITIONERS

v.

TOM BUCHANAN, ET AL.

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

REPLY BRIEF FOR PETITIONERS

Respondents insist that review is unwarranted, but their opposition only underscores precisely why political-subdivision standing has generated such consistent and widespread confusion across multiple circuits and at every level of the judiciary. See Pet. 9-17. This issue is frequently recurring, is profoundly important to thousands of local governments, and was resolved incorrectly below—in a decision that says the dormant Commerce Clause is *not* a "structural" provision of the Constitution, and that the Supremacy Clause, counter-textually, protects federal *statutory* law more than it protects the *Constitution itself*. This Court's review is warranted.

1. Respondents say that the circuits "uniformly" apply this Court's precedent in this setting, and that any division reflects only "minor deviations" between

courts. Br. in Opp. 4-5. Yet respondents never once explain why apparently *none* of those courts view these deviations as the least bit insubstantial. On the contrary, as recounted in the petition, repeated sources have identified the "conflicting answers in the Courts of Appeals," *City of S. Lake Tahoe* v. *Cal. Tahoe Reg'l Planning Agency*, 449 U.S. 1039, 1042 (1980) (White, J., dissenting from denial of cert.); the "confusion surrounding this issue," *United States* v. *Alabama*, 791 F.2d 1450, 1455 n.2 (11th Cir. 1986); judicial "interpretation[s] at odds with at least three other circuits," *Palomar Pomerado Health Sys.* v. *Belshe*, 180 F.3d 1104, 1109 (9th Cir. 1999) (Hawkins, J., concurring); an "unsettled" legal landscape, *Star-Kist Foods, Inc.* v. *County of Los Angeles*, 42 Cal.3d 1, 7-9 (Cal. 1986); "unclear" law generating a "troublesome question," *City of Charleston* v. *P.U.C. of W. Va.*, 57 F.3d 385, 390 (4th Cir. 1995); "both * * * inter-circuit and intra-circuit conflict[s]," *Indian Oasis-Baboquivari Unified Sch. Dist. No. 40* v. *Kirk*, 91 F.3d 1240, 1245 (9th Cir. 1996) (Reinhardt, J., dissenting); "difficult" and "important" issues producing a "split," *City of New Bedford* v. *Woods Hole*, 2003 WL 21282212, at *1-*2 (D. Mass. May 23, 2003); and "fundamental disagreement" between courts leading to "much confusion" over this Court's decisions, Alexander Willscher, Comment, *The Justiciability of Municipal Preemption Challenges to State Laws*, 67 U. Chi. L. Rev. 243, 243-245 (2000). A division this stark and unsettled cannot be wished away under a label of "minor deviations" or the "clever parsing of dicta" (Br. in Opp. 5).

And while respondents refuse to acknowledge the stark and manifest confusion over political-subdivision standing, they have at least acknowl-

edged (Br. in Opp. 15-16)—if only, reluctantly, in passing—a particularly troubling aspect of the three-way split: that a *direct* conflict exists between the California Supreme Court and the Ninth Circuit on precisely the issue under review. See Pet. 14-15 (outlining the conflict). This direct split between a State's highest court and the regional circuit produces a conflict of the very worst kind—one that invites intolerable forum-shopping, between state and federal judiciaries, that only this Court's intervention can avoid.

2. This so-called "dicta," in any event, was *not* perceived as dicta by the courts announcing these decisions, or by other courts reviewing the doctrinal landscape and recognizing a "split." Pet. 9-17. The fact is that these panels announced the controlling rationale, inextricably bound up with the ultimate disposition, that stands as the law of each respective jurisdiction. If this case arose in the Fifth Circuit or the Eleventh Circuit, accordingly, petitioners would have standing to press their constitutional claims. See, *e.g.*, *Alabama*, 791 F.2d at 1455 ("In assessing the standing to sue of a state entity, we are bound by the Supreme Court's or our own Court's determination of whether any given constitutional provision"—not simply whether the *Supremacy Clause*—"protects the interests of the body in question."); see also, *e.g.*, *Rogers* v. *Brockette*, 588 F.2d 1057, 1070 (5th Cir. 1979); *City of Atlanta* v. *Spence*, 249 S.E.2d 554, 556 (Ga. 1978). If, however, this case arose in the Ninth Circuit, the outcome would depend on where the suit was filed: if in state court, petitioners would prevail; if in federal court, petitioners would instantly lose at the outset. Compare, *e.g.*, *Indian Oasis*, 91 F.3d at 1243 (rejecting claim), with *Star-Kist Foods, Inc.*, 42

Cal.3d at 7-9 (permitting claim). And, of course, in the Tenth Circuit, petitioners would have no "constitutional" claim at all, but would have a viable "statutory" claim if petitioners could identify any positive enactment reducing the dormant Commerce Clause to statutory form. See Pet. App. 9a.

This three-way split is accordingly real, meaningful, and exceptionally important to the subdivisions tasked with providing the vast majority of public services, on the front line, to thousands of communities across the country.

3. In an effort to minimize the conflict, respondents assert that "circuit courts uniformly apply [*City of Trenton* v. *New Jersey*, 262 U.S. 182 (1923)] and [*Williams* v. *Mayor & City Council of Balt.*, 289 U.S. 36 (1933)] to cases such as petitioners'" (Br. in Opp. 4), but that is demonstrably false. The Fifth Circuit, for example, did not "uniformly" embrace respondents' view of those early cases; on the contrary, that court recognized, as this Court did in *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960), that *Trenton* and *Williams* did not announce any categorical rule at all, but instead disposed of subdivision suits by adjudicating the specific constitutional claims at issue: "A party had standing or a 'right to sue' if it was correct in its claim on the merits that the statutory *or constitutional* provision in question protected its interests." *Rogers*, 588 F.2d at 1070 (emphasis added). (The Fifth Circuit, tellingly, did *not* limit the qualifying "constitutional provision" to the Supremacy Clause (contra, *e.g.*, Br. in Opp. 6-7 & n.3), which other courts, but not respondents, have understood, see, *e.g.*, *City of New Rochelle* v. *Town of Mamaroneck*, 111 F. Supp. 2d 353, 364 (S.D.N.Y. 2000) (reading *Rogers* to permit political subdivisions to "challenge

the *constitutionality* of state legislation on certain grounds and in certain circumstances") (emphasis added).)

Respondents now brush aside *Gomillion* as "dicta" (Br. in Opp. 21), but slapping that label on a precedent of this Court does nothing to undercut its correctness: *Trenton* and *Williams* were *not* categorical decisions, and there was no basis for making them categorical decisions. *Gomillion*, 364 U.S. at 344. As the petition explained, standing is established under the familiar Article III standard, see, *e.g.*, *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992); there is (and was) *jurisdiction* for the *Trenton* and *Williams* subdivisions to press their claims; those claims simply failed, substantively, because they impermissibly sought to interfere with lawful state discretion, see, *e.g.*, *Hunter* v. *City of Pittsburgh*, 207 U.S. 161, 178-179 (1907), rather than secure state compliance with federal law (constitutional or otherwise). See, *e.g.*, *Gomillion*, 364 U.S. at 344-345 ("Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution.").

Respondents' efforts to stress the importance of *Trenton* and *Williams* (while diminishing *Gomillion*) further explains why review is *necessary*, not why the petition should be denied. The confusion over the import of this Court's precedent (which different jurists read in very different ways) explains the source of the pervasive division infiltrating the lower courts. Only this Court can confirm the proper sweep of its own decisions on political-subdivision standing. See, *e.g.*, *City of S. Lake Tahoe*, 449 U.S. at 1042 (White, J.) (suggesting certiorari was appro-

priate "because the case raises a question of the continuing validity of our own precedent").

4. Respondents maintain that, if political subdivisions had a right to sue directly under the Constitution, that right would appear affirmatively and expressly in the Constitution itself. Br. in Opp. 18. Yet respondents are incorrect that the Constitution is "silen[t]" on this score. The Constitution, textually, provides all the authority that any subdivision needs for a federal suit: Article III provides the necessary standing, and the specific constitutional right at issue provides the substantive claim.

The true textual problem here is *respondents'*, not petitioners': the opposition fails to confront, in any principled fashion, the analytical defect in saying that the Supremacy Clause protects only statutory law, not constitutional law, even though the Clause itself draws no textual distinction of any kind between those two sources of federal authority. See U.S. Const., art. VI, § 2, cl. 2 (applying with equal strength to "[t]his Constitution" and "the Laws of the United States * * * made in Pursuance thereof").

5. Respondents suggest that the Court should not review these claims, because granting subdivisions the right to sue parent states would generate more problems than it solves. This is wrong because a *valid* subdivision suit will not interfere with the *permissible* exercise of state discretion; suits based on policy disagreements, not rights, would be dismissed for failing to state a viable claim. The only permissible suits would be those that seek to constrain *unlawful* and *unconstitutional* state action. The State has the right to conduct its business as it sees fit—so long as it acts within the broad limits of its constitutional prerogatives. *Gomillion*, 364 U.S. at 347 ("When a

State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right."). But no State has any right to unlawfully discriminate against interstate commerce, and that rule does not disappear simply because the State has elected to conduct its discrimination via its own (unwilling) political subdivisions.

6. Contrary to respondents' contention (Br. in Opp. 6), the Supremacy Clause is not the only "structural" component of the Constitution. The fact that the Commerce Clause (and hence the corresponding dormant Commerce Clause) regulate the line between federal and state power is sufficient to establish it as a structural feature of the Constitution. *United Haulers Ass'n, Inc.* v. *Oneida-Herkimer Solid Wastes Mgmt. Auth.*, 550 U.S. 330, 338 (2007). Respondents' view (Br. in Opp. 23-24) that the Commerce Clause is not a "structural" right because the commerce power is invoked to regulate individuals misses the point entirely: it may well be true that Congress may regulate (or even protect) individuals via its commerce authority, but that does nothing to diminish the Commerce Clause's allocation of power (*i.e.*, to *regulate interstate commerce*) to the federal government and away from the States. This highlights a compelling reason why the Tenth Circuit's analysis is incorrect; it also establishes this as an appropriate vehicle for review—because the Commerce Clause power is so clearly structural in nature, the entire analysis turns on whether a political subdivision may enforce constitutional checks on its parent state's activity (and not whether the right in

question is instead a traditionally "individual" right exercised entirely subject to State discretion). See also p. 8, *infra* (explaining additional reasons why this particular vehicle is an ideal candidate for review).

7. Respondents, for their part, have at least candidly underscored the high stakes of this petition: if the decision below is allowed to stand, political subdivisions will always be powerless to sue their parent states in *any* constitutional case, no matter how serious, obvious, or otherwise unreviewable the constitutional error—yet the subdivision *may* sue, paradoxically, to enforce any statutory rights (even ones that simply reduce, *verbatim*, the constitutional standard to statutory form). This error reverses the constitutional order and unnecessarily insulates constitutional error; if only one set of a subdivision's "structural" claims are judiciable in federal court, the ruling below got it exactly backwards.

8. The substantial confusion and entrenched conflicts thus tell only part of the story; this issue is also frequently recurring and exceedingly important to the ability of thousands of local governments everywhere across the nation to protect their citizens from unconstitutional state action. This is why amici representing a variety of local interests have weighed in supporting a grant, explaining the urgent need to restore a "crucial check on state governmental power," Int'l Mun. Lawyers Ass'n Amicus Br. 2; identifying the doctrinal "disarray," Upper Trinity Reg'l Water Dist. Amicus Br. 16; and describing the "certain[ty]" that this deep conflict, if left unresolved, will "lead to unworkable results in light of the enormously important and entirely *independent* responsibilities

most political subdivisions have to large population bases," Tarrant Reg'l Water Dist. Amicus Br. 1-2.

9. Respondents, finally, maintain that this case is a poor vehicle for adjudicating a "Supremacy Clause" claim because petitioners have asserted only a *constitutional* claim. Br. in Opp. 25. This proves exactly the *opposite* point: the very fact that petitioners have limited their claims to a strict (and obviously *structural*) constitutional claim makes this an ideal vehicle for determining whether political subdivisions may ever assert structural constitutional claims against their parent states.

* * *

Respondents insist that those who have addressed this subject—every circuit, individual judge, district court, academic commentator, the majority below, and the dissent below (to say nothing of two Justices of this Court)—are simply mistaken in recognizing "widespread confusion" over this issue. Aside from acknowledging the direct conflict on this very issue between the California Supreme Court and the Ninth Circuit (Br. in Opp. 15-16), respondents refuse to credit any other part of the entrenched and intractable three-way split of authority. This issue is important, and the confusion will persist in the absence of this Court's guidance. Petitioners respectfully submit that review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JAMES C. HO
Counsel of Record
DANIEL L. GEYSER
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue,
Suite 1100
Dallas, TX 75201-6912
jho@gibsondunn.com
(214) 698-3264

FEBRUARY 2012