No. 11-652

IN THE

Supreme Court of the United States

SID-MAR'S RESTAURANT & LOUNGE, INC.,

Petitioner,

v.

UNITED STATES,

Respondent.

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

REPLY BRIEF

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ARGUMENT

This case presents an important and recurring question of federalism: whether a federal court, after the United States brings suit to take someone's property, may enjoin an ongoing state court action involving the same property. For decades, the answer to that question was a resounding "no." Under the prior exclusive jurisdiction rule, "the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other." *United States v. Bank of New York & Trust Co.*, 296 U.S. 463, 477 (1936).

The Fifth Circuit, however, radically departed from this settled prohibition against federal interference with first-filed state court proceedings and improperly crafted a new and expansive exception that renders the prior exclusive jurisdiction rule either entirely meaningless or without any teeth. The Fifth Circuit's decision sharply splits with other circuits and creates a limitless exception that would effectively swallow the rule. This Court should grant certiorari and reverse.

I. This Court's Review Is Necessary to Resolve an Irreconcilable Conflict Over Whether the Prior Exclusive Jurisdiction Rule Bars "Offensive" Actions Brought by the United States

The United States asserts that the federal courts below properly ousted a state court's jurisdiction pursuant to an "exception" to the prior exclusive jurisdiction rule set forth in *Leiter Minerals, Inc. v. United States*, 352 U.S. 220 (1957). The government goes so far as to argue that the question presented here was "already answered" by *Leiter Minerals*. Opp. 9. That is demonstrably incorrect.

A. *Leiter Minerals* recognized a very narrow exception to the prior exclusive jurisdiction rule *only* where the federal government is acting defensively—*i.e.*, where the United States brings a federal suit to stop a state court action that seeks to strip the United States of *its* property. In *Leiter Minerals*, the action was "defensive" because the United States owned land and underlying mineral rights, it granted lessees the right to remove those minerals, and a company brought a state court action against the lessees—not the United States—to take the United States' title to the minerals. 352 U.S. at 221. *Leiter*

Minerals upheld a federal quiet title action brought by the United States that enjoined the state court action. *Id.* at 227-28. This Court reasoned that forcing the government to defend its title to property in state court would infringe its sovereign interests. *Id.* at 227.

The decision below turns *Leiter Minerals* on its head. The Fifth Circuit would permit federal court injunctions of state court suits not only where the United States is defending its ownership of property, but also (as in this case) where the federal government seeks to *take* property that it indisputably never owned. In the present case, the United States concedes that the Sid-Mar's land was commandeered by the State of Louisiana many years before the United States filed its federal action (Opp. 2) and that a federal agency had access to the land only through an "agreement" with the State granting "a right of entry." *Id*. The purpose of the federal eminent domain action was to acquire title to property the United States never owned. *Id*. at 3.

Leiter Minerals thus did not "answer[]" the question presented here. Quite to the contrary, the Fifth Circuit "sweepingly abrogate[d]" the prior exclusive jurisdiction doctrine by allowing federal courts to divest state courts of jurisdiction in a way never sanctioned by any court. App. 20a (Dennis, J., dissenting).

B. The United States, like the court below, asserts that the "defensive posture" in *Leiter Minerals* was one of a "variety of factors" used to determine whether a federal court may enjoin a first-filed state action involving the same property. Opp. 13, 15. The government argues that no circuit conflict exists because "*Certified Industries* looked not merely to

whether the United States' posture was 'defensive,' but instead to several factors, in determining whether an injunction was warranted." Opp. 17. Again, this is incorrect.

As the dissent explained, the majority opinion irreconcilably "splits" with the Second Circuit. App. 30a, 47a, 50a (Dennis, J., dissenting). In *United States v. Certified Industries, Inc.*, 361 F.2d 857 (1966), the Second Circuit (with Friendly, J., on the panel) held that *Leiter Minerals* applies only where the government's suit is defensive. "The Supreme Court in [*Leiter Minerals*] indicated that where the United States' position is 'defensive' it should be able to choose its forum." *Id.* at 861; *accord id.* at 860 n.2. The Second Circuit observed that *Leiter Minerals* was only a narrow exception to the rule of *Bank of New York*, which held that a federal court may not enjoin first-filed state court proceedings where the "object of the [federal] suit[] is to *take the property* from [third parties] . . . and to *vest* the property in the United States . . . ." 296 U.S. at 478 (emphasis added). *Certified Industries* thus reversed a federal injunction of a first-filed state action for precisely that reason: "[t]he position of the United States in this action is not . . . a defensive one." 361 F.2d at 860 n.2.

The decision below cannot be reconciled with *Certified Industries*. "[T]he Second Circuit considered essentially the same question presented by" this petition, App. 50a (dissent), and reached the opposite conclusion. That is the *sine qua non* of a circuit conflict. The government notes that *Certified Industries* was decided in 1966. Opp. 19. That fact, however, only underscores that it has long been settled that federal courts may *not* oust state courts of jurisdic-

tion in offensive cases. Until the Fifth Circuit's decision, courts long had understood that the prior exclusive jurisdiction rule applies absent defensive actions brought by the United States. The passage of time has not rendered *Certified Industries* bad law; indeed, the Second Circuit cited *Certified Industries* favorably in 2010. *See* Pet. 15.

Moreover, an "aggregation of . . . factors" test (Opp. 8, 15) is relevant only to protect the United States' asserted preexisting title to property. In defensive cases, if the United States is not a party to the state action involving property of the United States, an injunction may be appropriate. Opp. 10. But that is only because the United States is an indispensible party in the state court proceeding and enjoys presumptive immunity from suit in state court. *Leiter Minerals*, 352 U.S. at 226-27. In offensive cases where the government seeks to take another's property, however, "[t]here is no merit in the suggestion that the United States, in presenting its claim in the state proceedings, would be compelled to take the position of a defendant—being sued without its consent." *Bank of New York*, 296 U.S. at 480. Thus, this Court's review is warranted to make clear that a federal court cannot enter an injunction against a first-filed state court proceeding whenever the property at issue is not owned by the federal government.

The government also argues that an injunction is proper if the state court cannot resolve "the United States' rights with respect to the disputed property" (Opp. 12) or if the state proceedings "'might conflict with the ultimate federal court judgment.'" Opp. 13 (quoting *Leiter Minerals*, 352 U.S. at 228). But those considerations are *per se* irrelevant in an offensive case. Those factors are always present when the

United States brings a condemnation action, even when it does so years after the state court has exercised jurisdiction over the same land. "The 'sovereign dignity' concept does not, however, call for protection of the United States from its own mistake" in not seeking title to land in federal court before jurisdiction already had been exercised by a state court. *Certified Indus.*, 361 F.2d at 862.

This case dramatically illustrates the breathtaking expansion of federal jurisdiction created by the Fifth Circuit. The state court exercised jurisdiction over the Sid-Mar's site for three years while the United States sat on the sidelines. The government's non-participation was hardly surprising since it did not own the land. Nonetheless, on the eve of summary judgment and two weeks before trial in the state court, a federal court took the remarkable step of enjoining the state action. App. 3a, 13a. Any conflict created by that later-filed action cannot properly justify ouster of the state court's prior jurisdiction. Otherwise, the prior exclusive jurisdiction rule would be meaningless.

Likewise, the inability of the state court to resolve the government's newly asserted interest in the property is equally irrelevant. For three years the government had *no* ownership interest in the property. Under the prior exclusive jurisdiction rule, the federal court was required to stay its hand until the conclusion of the state court action. But under the Fifth Circuit's decision, the state court lost jurisdiction after expending three years adjudicating the property dispute between Sid-Mar's and the State. The government's multi-factor test neither reconciles the circuit conflict nor is a proper basis for federal ouster of state court jurisdiction.

II. This Court's Review Is Necessary to Resolve a Conflict Over Whether "Possession" of Property Is Sufficient to Override the Prior Exclusive Jurisdiction Rule

The government also asserts that "the United States . . . acted 'essentially defensively' within the meaning of *Leiter Minerals* by proceeding 'to protect [its] possession'" of the Sid-Mar's site three years into the state court proceeding. Opp. 14 (quoting *Leiter Minerals*, 352 U.S. at 228). Jurisdiction, however, is established at the outset of the case. The rule adopted by the decision below permits a federal court injunction any time the federal government asserts a possessory interest in property that it does not own and that is already within a state court's jurisdiction. As this case well illustrates, that rule creates the very tension and friction between federal and state courts that the prior exclusive jurisdiction rule is designed to prevent. *See* Pet. 12. For that reason, the "possession" test has been explicitly rejected by the Seventh and Ninth Circuits.

A. The subject matter jurisdiction of a court does not turn on disputes over when a *party* obtained "possession" of the property at issue. Rather, jurisdiction is determined when a *court* first exercises control over the property. Pet. 17-18. The virtue of the first-assuming-jurisdiction rule is that it provides clear and easily administrable guidance and avoids unseemly conflicts between state and federal courts. *See Penn Gen. Cas. Co. v. Pennsylvania*, 294 U.S. 189, 196 (1935). The Fifth Circuit's possession test, in contrast, "substitute[s] a rule of force for the principle of mutual respect embodied in the prior exclusive jurisdiction doctrine." *United States v. One 1985 Cadillac Seville*, 866 F.2d 1142, 1146 (9th Cir. 1989)

(quotation source omitted). Thus, "it is self evident that possession of the property by an executive branch agency of the federal government is not equivalent to a federal court having jurisdiction over the property for the prior exclusive jurisdiction doctrine." App. 62a (Dennis, J., dissenting).

B. The government argues that the Fifth Circuit's possession test is consistent with the Second Circuit's decision in *Certified Industries*, stating that the court there "focused on the government's lack of *possession* of the property at issue in the state court suit" when the state suit was filed. Opp. 16 (quoting App. 11a) (emphasis added). That is incorrect. The Second Circuit explicitly focused on the government's offensive attempt to *acquire* title belonging to someone else, not whether the United States merely possessed property it did not own. The Second Circuit thus squarely held that *Leiter Minerals*' exception was "inapplicable" (App. 11a) because "[t]he Supreme Court in that case indicated that where the United States' position is 'defensive' it should be able to choose its forum." 361 F.2d at 861. Similarly, *Certified Industries* did not turn, as the majority suggested, on whether the federal government had a "prior assertion of control" of property. Opp. 7 (quoting App. 12a). *Certified Industries* never discussed, much less held, that the government's "control" of the disputed *res* might permit a federal court to trump the state court's prior exclusive jurisdiction.

C. Beyond its flawed description of *Certified Industries*, the government does not contest that the Seventh and Ninth Circuits explicitly have rejected a "possession" test like the one adopted by the Fifth Circuit below. *Compare* Pet. 16 (second paragraph), *with* Opp. 17 (addressing only the offensive/defensive

analysis); *see also* App. 59a-61a (Dennis, J., dissenting) (citing Seventh and Ninth Circuits as in conflict with majority; "it is clear that possession alone does not bring this case within the exception identified in *Leiter Minerals*").

The government does not dispute these holdings, but asserts only that asset-forfeiture cases are "too dissimilar from this one" to matter. Opp. 18. The government notes, for instance, that the forfeiture decisions did not cite *Leiter Minerals*. Opp. 17. The government misses the point. The Fifth Circuit's decision is fundamentally incompatible with *Leiter Minerals*, and so it is no surprise that the government apparently did not invoke *Leiter Minerals* in asset-forfeiture suits, which by their nature are "offensive."

The government also deems the asset-forfeiture cases irrelevant because they did not involve disputes over real property occupied by the United States. Opp. 17-18. But "an abundance of federal decisional law, including an impressive array of Supreme Court decisions, makes it clear that in *all* cases involving a specific piece of property, *real or personal* (including various forms of intangible property), the federal court's jurisdiction is qualified by . . . the doctrine of prior exclusive jurisdiction." 13F Charles A. Wright et al., *Federal Practice & Procedure* § 3631, pp. 271-72 (3d ed. 2009) (emphasis added); *id*. ("A typical case would be one involving the actual seizure of property . . . but the principle is not limited to cases of seizure.").

The Fifth Circuit's rule would permit federal courts to strip jurisdiction from state courts in all offensive property actions. Pet. 19-20. The Court should grant review to resolve the conflict and restore the longstanding rule that the United States' possession of property is insufficient to confer federal jurisdiction at the expense of a first-filed state court action.

III. This Case Presents an Ideal Vehicle to Resolve an Important Issue Involving the Proper Administration of Our Dual System

A. The decision below is not "fact-bound." Opp. 9. Whether the exception exists only in "defensive" cases brought by the government is a purely *legal* question. Last term, this Court addressed an analogous question concerning the legal standard applicable when a party invokes an exception to the prohibition of federal injunctions of state court actions under the Anti-Injunction Act. *See Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011). The Court looked to the circumstances underlying the parallel litigations to address the proper legal standard for the exception. *See id.* at 2373-74. That did not render *Smith* too "fact-bound" to be unworthy of review. The same is true here.

B. The importance of the question presented extends beyond the circumstances of this case. This Court long has recognized the "especial importance" of the prior exclusive jurisdiction rule "in its application to Federal and state courts." *Farmers' Loan & Trust Co. v. Lake St. Elevated R. Co.*, 177 U.S. 51, 61 (1900). "This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons." *Id*.

Yet, under the Fifth Circuit's multi-factor test, the prior exclusive jurisdiction rule will not serve any of these interests. The test is amorphous and, as reflected by the decisions below, requires federal courts to slog through murky "factors" that do not fit offensive suits.

"[C]ourts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case." *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1193 (2010). Determining whether an offensive suit meets the government's multi-factor jurisdictional test—or determining whether the requisite amount of "possession" is present—is "at war with administrative simplicity." *Id*. at 1192. "Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims." *Id*.

The Fifth Circuit's balancing test fails to protect the jurisdiction of state courts. When improperly applied in an offensive case, this test always assures victory to the federal government. The United States would be able to enjoin virtually any pending state court action by taking possession of property—or simply stating its "intent" (App. 55a) to acquire property in the future—and then filing a federal action, the combination of which inevitably would satisfy the multi-factor test. As noted, in "offensive" cases, the government presumably would never be a party in the state case (because the state litigants would have no reason to sue someone who does not own the property) and the filing of the federal case would always present potential conflicts with the state court proceedings. The test illegitimately stacks the deck in the government's favor and

undermines the very purpose of the prior exclusive jurisdiction rule.

C. Finally, the government suggests that review is unwarranted because the district court "may" at some point exercise its discretion and decide to lift the injunction. Opp. 19. A district court cannot ignore jurisdictional limitations simply because it might later voluntarily abstain. Further, more than six years have passed since Louisiana took land owned by private citizens and petitioner has yet to have the claims heard on the merits. The federal court's injunction already has had a tremendous "practical effect" on petitioner and its owners who have yet to receive compensation for the taking of the property after Hurricane Katrina destroyed their once thriving business. And the government's position ignores the adverse effects caused by a rule that stripped a state court of jurisdiction after three years of litigation.

This Court's intervention is needed to reverse the Fifth Circuit's newly minted exception to the prior exclusive jurisdiction rule that would allow federal courts so easily to intrude on state court jurisdiction and, in turn, undermine the proper administration of our dual system.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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