No. 99-1952

In the Supreme Court of the United States

STATE OF ALABAMA, ET AL., PETITIONERS

v.

DEPARTMENT OF ENERGY, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals lacked jurisdiction over petitioners' appeals.

2. Whether the court of appeals abused its discretion in denying petitioners' motion under 28 U.S.C. 1631 to transfer proceedings to the United States Court of Appeals for the Federal Circuit.

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DEPARTMENT OF ENERGY, ET AL.

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. A3-A18) is reported at 206 F.3d 1345.[1] The opinion of the district court (Pet. App. C1-C16) is unreported. The decision of the Department of Energy's Office of Hearings and Appeals is reported at 25 DOE (CCH) ¶ 82,506.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 2000. The petition for rehearing was denied

[1] The original opinion of the court of appeals (Pet. App. B1-B16) is unreported.

on March 6, 2000 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on June 5, 2000 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Between August 1973 and January 1981, the Economic Stabilization Act of 1970 (ESA), Pub. L. No. 91-379, 84 Stat. 799, and the Emergency Petroleum Allocation Act of 1973 (EPAA), Pub. L. No. 93-159, 87 Stat. 627, established a program of price and allocation controls over crude oil and refined petroleum products. Under those provisions, the Department of Energy (DOE) established a self-certifying Tertiary Incentive Program (TIP), which allowed crude oil sales at market prices, for oil produced from more costly tertiary recovery projects, in order to recoup the additional expense. Pet. App. A5 n.2. In 1992, the DOE's Economic Regulatory Administration (ERA) issued a Proposed Remedial Order (PRO) to respondent Chevron U.S.A. Inc., alleging that Chevron misrepresented its status under the TIP and that Chevron should therefore disgorge approximately $125 million, plus interest, that it had received under the program. *Id.* at A5-A6. Chevron challenged the PRO before DOE's Office of Hearings and Appeals (OHA), which dismissed the charges against Chevron, reasoning that "the ERA has failed to establish[] that Chevron was in fact unjustly enriched by its participation in the TIP as alleged in the PRO." *Id.* at A6.

2. a. In 1996, a group of private utilities and paper manufacturers, which claimed that they would have obtained additional funds from any recovery obtained by DOE from Chevron, filed suit in the United States District Court for the District of Columbia challenging

OHA's decision. Pet. App. A6. The district court dismissed the suit on the ground that the plaintiffs lacked standing to challenge the decision of the Department of Energy not to pursue enforcement proceedings against Chevron. The utilities and manufacturers appealed that dismissal to the Federal Circuit, which has exclusive jurisdiction of appeals under the ESA and EPAA. See 28 U.S.C. 1295(a)(11) and (12). The Federal Circuit affirmed. *Consolidated Edison Co. of N.Y., Inc.* v. *O'Leary*, 131 F.3d 1475 (Fed. Cir. 1997). The Federal Circuit reasoned that, under the EPAA and ESA, "the initiation of a public enforcement action * * * is committed to the discretion of the Secretary of Energy." *Id.* at 1479; see also *id.* at 1482 (concluding that review of OHA's decision was unreviewable under *Heckler* v. *Chaney*, 470 U.S. 821 (1985)). The Federal Circuit also rejected the argument that it could review OHA's decision because OHA had reversed the decision of the ERA. The court explained that, under Section 503 of the Department of Energy Organization Act (DOEOA), 42 U.S.C. 7193, which authorizes the Secretary of the DOE to issue remedial orders, the procedures the Secretary utilized for bringing enforcement actions were "all * * * part of the 'prosecutorial' function of the Secretary." 131 F.3d at 1481.

After the Federal Circuit's decision in *Consolidated Edison*, petitioners filed an amici curiae brief asserting that the Federal Circuit lacked jurisdiction because the court of appeals had construed Section 503 of the DOEOA, in addition to provisions of the ESA and EPAA. On March 25, 1998, the court of appeals issued an unpublished per curiam opinion rejecting petitioners' argument. The court observed that 28 U.S.C. 1295(a)(11) and (12) grant it exclusive jurisdiction over appeals from district court decisions "in cases and

controversies arising under" the ESA and EPAA. *Consolidated Edison* v. *Peña*, No. 97-1242, 1998 WL 133266, *1 (Fed. Cir. Mar. 25, 1998). The court noted that "[i]t is well settled that [the court's] jurisdiction over appeals in ESA/EPAA cases permits [the court] to construe other statutes when necessary to resolve the ESA/EPAA issue raised on appeal." *Id.* at *2. The court also explained that its decision in *Consolidated Edison* had "discussed section 503 of the DOEOA simply because that statutory provision helps provide an answer to the question whether third parties have rights to insist that public enforcement proceedings be brought to enforce the ESA/EPAA regulations, an issue that clearly arises under the ESA and the EPAA." *Ibid.*

b. Meanwhile, in 1996, petitioners and a group of other States and territories (the Jurisdictions) had filed three suits in the United States District Court for the District of Kansas, contending that OHA's decision was inconsistent with the Department of Energy's obligations under a Final Settlement Agreement (FSA) that had resolved a dispute involving over $1 billion in overcharge funds collected by DOE under the ESA and the EPAA. Pet. App. A4-A5. The district court dismissed all three suits, holding that "OHA's dismissal of the proposed remedial order against Chevron was a part of DOE's prosecutorial function and as such, was unreviewable." *Id.* at A6-A7; see also *id.* at C12.[2] The

[2] Paragraph IV.A.2 of the FSA provides that nothing in that agreement, which concerns the distribution of overcharges that the Department of Energy collects under the ESA and EPAA, "shall be read or construed to limit or render reviewable the exercise of DOE's prosecutorial discretion" with respect to enforcement matters that would lead to the collection of overcharges in the first place. See Pet. App. A13.

district court also found that OHA's decision did not violate the terms of the FSA and that petitioners lacked standing to bring their claims. *Id.* at A7-A8.

3. Petitioners and the Jurisdictions appealed the district court's decisions to both the Tenth Circuit and the Federal Circuit. On April 27, 1999, petitioners filed a motion requesting the Federal Circuit to stay proceedings pending the outcome of their appeals to the Tenth Circuit. On May 7, 1999, the government opposed petitioners' motion, arguing that a stay would delay the Federal Circuit from exercising its exclusive jurisdiction over petitioners' appeals. On June 14, 1999, the Federal Circuit denied the motion and directed petitioners to file their opening briefs within 30 days. On July 22, 1999, the Federal Circuit denied petitioners' motion for reconsideration.

On August 11, 1999, petitioners submitted a letter to the Federal Circuit stating that they were withdrawing their appeals. The Federal Circuit treated petitioners' letters as motions and permitted the government and Chevron to respond. The government opposed dismissal, unless dismissal would be with prejudice to any further review by the Federal Circuit of the district court's decisions. The government explained that petitioners' proposed withdrawal was an attempt at forum shopping, as petitioners were attempting to avoid the precedential effect of the Federal Circuit's decision in *Consolidated Edison*. The government further explained that

> [i]f [petitioners'] identical Tenth Circuit appeal is dismissed for lack of appellate jurisdiction, for example, [petitioners] could ask that court, pursuant to 28 U.S.C. § 1631, to transfer that appeal to this Court. If the Tenth Circuit appeal were trans-

> ferred, [petitioners] undoubtedly would contend that they would still have the right to challenge the order which is the subject of the present appeal because the withdrawal, without more, would not have finality attached to it.

99-1356 Opposition of Federal Appellees to Appellant's Motion to Withdraw Appeal 3 (Fed. Cir. Aug. 25, 1999) (footnote omitted).

On August 31, 1999, the Federal Circuit issued an order observing that the Jurisdictions' appeal was proceeding and that the court of appeals had denied petitioners' motion for a stay and motion for reconsideration. The court of appeals therefore ordered that—

> any dismissal entered * * * will be with prejudice. As Chevron and DOE point out, if a dismissal is entered without prejudice, [petitioners] could, in the event of an adverse ruling by the 10th Circuit, seek to resurrect [their] appeal here by way of transfer. That would be an impermissible result, given our prior rulings and the fact that [the Jurisdictions' appeal] is proceeding in this court.

App. A, *infra*, 3a-4a. The Federal Circuit further ordered that, in the absence of any further objection by petitioners within 10 days, petitioners' motion to withdraw would be granted and the appeals dismissed "with prejudice." *Id.* at 4a. The Federal Circuit also ordered that, if petitioners proceeded with their appeals, their briefs were due in 14 days from the filing of the court's order. *Ibid.*

On September 1, 1999, petitioners wrote to the Federal Circuit, stating that they were

> in receipt of a copy of the non-precedential order * * * issued by the court on August 31, 1999. Paragraph "(1)" of the order provides that, "absent objection by [petitioners] within 10 days, the Court will grant [petitioners'] motion to withdraw its appeals and dismiss them with prejudice."
>
> Without forgoing any other rights or objections they may have in these or any other proceedings, [petitioners] have no objection to the entry forthwith of an order in the form specified in paragraph "(1)" of the August 31 order.

App. B, *infra*, 5a-6a.

On September 13, 1999, the Federal Circuit dismissed petitioners' appeals with prejudice.[3]

4. The Tenth Circuit thereafter dismissed the appeals of petitioners and the Jurisdictions on jurisdictional grounds. Pet. App. A1-A18. The court first observed that the Federal Circuit has exclusive jurisdiction over disputes arising under the ESA and the EPAA, the crude oil price control provisions of which "formed the basis for the controversy resolved by the FSA." *Id.* at A8. The court also noted that, although the Jurisdictions acknowledged that their claims were based on the FSA, petitioners had "carefully phrased the issues presented * * * to avoid any mention of the FSA" and instead had asked the court to address whether OHA's decision was an unreviewable act of prosecutorial discretion under the DOEOA. *Id.* at A11.

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[3] As to the Jurisdictions' appeal, on March 10, 2000, the Federal Circuit affirmed the decision of the district court in an unpublished per curiam decision. *In re DOE Stripper Well Exemption Litigation*, No. 99-1327, 2000 WL 274298 (Fed. Cir. Mar. 10, 2000).

The court concluded, however, that "notwithstanding [petitioners'] careful semantics," "determining whether the OHA's decision in this case is properly reviewable would require this court to consider issues arising both under the ESA and EPAA directly and under the FSA." *Id.* at A11, A12. The court therefore "decline[d] to participate in the fiction that this dispute does not turn squarely on the ESA, the EPAA, and the FSA." *Id.* at A13.

The Tenth Circuit also denied petitioners' motion to transfer their appeals to the Federal Circuit under 28 U.S.C. 1631, which authorizes the transfer to another court "in which the action or appeal could have been brought," if the transferor court finds that transfer "is in the interest of justice." The court observed that petitioners had withdrawn their appeals to the Federal Circuit with the understanding that that court would dismiss their appeal with prejudice. Pet. App. A17. The court further observed that, "[i]n the order directing [petitioners] to proceed with the appeals or face dismissal, the Federal Circuit anticipated that [petitioners] might request that [the Tenth Circuit] transfer the actions back to the Federal Circuit." *Ibid.* The court therefore concluded that, "[i]n light of th[e] unequivocal declaration by the Federal Circuit that it intended to finally dispose of [petitioners'] appeals, and in light of [petitioners'] ample opportunity to pursue these cases in the proper forum," the court could not "say that justice would be served by transfer to the Federal Circuit." *Id.* at A17-A18.

ARGUMENT

1. Petitioners contend (Pet. 12-19) that the court of appeals had subject matter jurisdiction to decide whether the district court erred in relying on Section

503 of the DOEOA, 42 U.S.C. 7193, as a basis for ruling that OHA's decision not to issue a remedial order against Chevron is unreviewable. The court of appeals correctly rejected that contention, explaining that "determining whether the OHA's decision in this case is properly reviewable would require this court to consider issues arising both under the ESA and EPAA directly and under the FSA." Pet. App. A12. Petitioners do not contest that those matters are within the Federal Circuit's exclusive jurisdiction. See 28 U.S.C. 1295(a)(11) and (12). As the court of appeals further explained, the district court had based its holding that OHA's decision was unreviewable on the Federal Circuit's decision in *Consolidated Edison*, which "relied heavily on interpretation of ESA/EPAA issues to reach its result." Pet. App. A12. The court of appeals reasoned, moreover, that it could not adjudicate the merits of petitioners' appeals "without reference" to "the agreement underlying this dispute," the FSA, upon which both the government and Chevron relied as a defense to petitioners' suits. *Id.* at A13.[4] Thus, in explaining that it would "decline[] to participate in the fiction that this dispute does not turn squarely on the ESA, the EPAA, and the FSA," the court stated:

> In order to grant the relief sought by [petitioners], we would have to conduct inquiries specifically committed to the expertise of the Federal Circuit. Specifically, we would have to reject a Federal Circuit decision explicitly resting on those statutes, interpret and distinguish a paragraph of the FSA

[4] Petitioners themselves repeatedly recognize that "[t]his case involves the effort of [petitioners] to enforce [the FSA]." Pet. 1; see also Pet. 11 (petitioners "have asked a federal court to enforce a massive settlement agreement."); accord Pet. 26.

> directly on point, and consider a defense implicating the FSA.

Id. at A13-A14. In those circumstances, the court of appeals properly rejected petitioners' attempt to characterize their claims as not arising under statutes within the Federal Circuit's exclusive jurisdiction.[5]

Finally, the court of appeals' jurisdictional holding raises no issue of continuing importance. This dispute arises out of a 1986 agreement that settled a controversy under the now defunct price control program established under the ESA and EPAA.[6] We are not aware of any other pending enforcement litigation arising out of the ESA and EPAA, much less the settlement agreement at issue in this case. Further review of the court of appeals' jurisdictional ruling is therefore unwarranted.

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[5] Contrary to petitioners' suggestion (Pet. 17), the court of appeals' ruling does not conflict with *Atlantic Richfield Co.* v. *United States Department of Energy*, 769 F.2d 771 (D.C. Cir. 1984). That decision simply held that the D.C. Circuit had jurisdiction to review a discovery order that OHA issued "exclusively" under the DOEOA, *id.* at 780, and that the Secretary of Energy could adjudicate remedial orders, *id.* at 785-796. By contrast, there is no dispute in this case that the settlement agreement that petitioners seek to enforce arises under the EPAA and ESA. Pet. App. A8. Moreover, in holding that the Secretary can adjudicate remedial orders, the D.C. Circuit's decision in no way suggests that the Secretary's decision *not* to initiate enforcement proceedings is reviewable. See 769 F.2d at 798 ("Indubitably, the Secretary has been given full procedural discretion in the issuance of remedial orders."); accord *Consolidated Edison*, 131 F.3d at 1478-1482 (holding that private parties have no right to judicial review of Secretary's decision not to issue a remedial order).

[6] The ESA expired on June 30, 1982. 12 U.S.C. 1910 (note). The EPAA expired on September 30, 1981. 15 U.S.C. 760g (note).

2. Petitioners further argue (Pet. 23-26) that the court of appeals improperly declined to transfer their appeals to the Federal Circuit under 28 U.S.C. 1631. That factbound contention lacks merit. The decision whether to transfer a proceeding under 28 U.S.C. 1631 is committed to the discretion of the transferor court. See, *e.g.*, *Friedman* v. *Daley*, 156 F.3d 1358, 1360 (Fed. Cir. 1998); *Hays* v. *Postmaster Gen. of the United States*, 868 F.2d 328, 331 (9th Cir. 1989) (per curiam). The Tenth Circuit was well within its discretion in concluding that a transfer of petitioners' appeals was not in the interest of justice.

Petitioners originally appealed the district court's decisions to the Federal Circuit. After the Federal Circuit denied petitioners' request to stay their appeals pending the Tenth Circuit's disposition in this case, petitioners voluntarily sought to withdraw their notice of appeal. The government, accurately predicting both that the Tenth Circuit would find that it lacked jurisdiction over petitioners' appeals and that petitioners would then seek under 28 U.S.C. 1631 to transfer their appeals to the Federal Circuit, opposed petitioners' attempt to withdraw their appeals unless the Federal Circuit dismissed the appeals with prejudice. See pp. 5-6, *supra*. Moreover, the Federal Circuit, which also anticipated that petitioners would request a transfer back to the Federal Circuit, specifically advised petitioners that if they did not proceed with their appeals, dismissal would be with prejudice. Pet. App. A17.[7] Despite those considerations, petitioners volun-

[7] Petitioners also were aware not only that the Federal Circuit in *Consolidated Edison* had rejected their claims on the merits but also that the Federal Circuit considered petitioners'

tarily withdrew their appeals. The court of appeals therefore properly found that, "[i]n light of th[e] unequivocal declaration by the Federal Circuit that it intended to finally dispose of [petitioners'] appeals, and in light of [petitioners'] ample opportunity to pursue these cases in the proper forum," transfer was not in the interest of justice. *Id.* at A17-A18.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

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Assistant Attorney General

BARBARA C. BIDDLE
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AUGUST 2000

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claims under the DOEOA to be within the Federal Circuit's exclusive jurisdiction. See *Consolidated Edison* v. *Peña*, *supra*.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

99-1327, -1328

IN RE THE DEPARTMENT OF ENERGY
STRIPPER WELL EXEMPTION LITIGATION

STATE OF DELAWARE, STATE OF HAWAII,
STATE OF ILLINOIS, STATE OF KANSAS,
STATE OF NEBRASKA, STATE OF NEVADA,
STATE OF NORTH CAROLINA,
STATE OF RHODE ISLAND,
STATE OF WEST VIRGINIA, TERRITORY OF GUAM,
AND THE VIRGIN ISLANDS,
MOVANTS-APPELLANTS

AND

STATE OF ALABAMA, STATE OF CONNECTICUT,
STATE OF IDAHO, STATE OF INDIANA,
STATE OF MARYLAND, STATE OF MICHIGAN,
STATE OF MISSISSIPPI, STATE OF MONTANA,
STATE OF OHIO, STATE OF SOUTH DAKOTA,
STATE OF VERMONT, STATE OF WISCONSIN,
AND STATE OF WYOMING,
MOVANTS-APPELLANTS

AND

STATE OF CALIFORNIA, MOVANT-APPELLANT

v.

DEPARTMENT OF ENERGY, RESPONDENT-APPELLEE

AND

CHEVRON U.S.A. INC., RESPONDENT-APPELLEE

99-1356

STATE OF ALABAMA,
STATE OF CONNECTICUT,
STATE OF IDAHO, STATE OF INDIANA,
STATE OF MARYLAND, STATE OF MICHIGAN,
STATE OF MISSISSIPPI, STATE OF MONTANA,
STATE OF OHIO, STATE OF SOUTH DAKOTA,
STATE OF VERMONT, STATE OF WISCONSIN,
AND STATE OF WYOMING, PLAINTIFFS-APPELLANTS

AND

STATE OF CALIFORNIA, PLAINTIFF-APPELLANT

v.

DEPARTMENT OF ENERGY, BILL RICHARDSON,
SECRETARY OF ENERGY, OFFICE OF HEARINGS
AND APPEALS, GEORGE B. BREZNAY, DIRECTOR,
OFFICE OF HEARINGS AND APPEALS,
DEPARTMENT OF ENERGY, DEFENDANTS-APPELLEES

AND

CHEVRON U.S.A. INC., DEFENDANT-APPELLEE

[Filed: Aug. 31, 1999]

ON MOTION

Before: CLEVENGER, Circuit Judge.

ORDER

The States of Alabama, California, Connecticut, Idaho, Indiana, Maryland, Michigan, Mississippi, Montana, Ohio, South Dakota, Vermont, Wisconsin, and Wyoming (Alabama) move to voluntarily withdraw appeal nos. 99-1328 and 99-1356. Chevron U.S.A. Inc. and the Department of Energy (DOE) oppose the motion unless the dismissal is "with prejudice." Chevron moves to dismiss appeal nos. 99-1328 and 99-1356 with prejudice due to Alabama's failure to file a brief.

This court earlier denied Alabama's motion for a stay of proceedings in this court pending completion of proceedings in the United States Court of Appeals for the 10th Circuit, and also denied Alabama's motion for reconsideration of that order. We note that the State of Delaware et al.'s appeal in no. 99-1327, consolidated with Alabama's appeal no. 99-1328, is proceeding.

In light of these circumstances, any dismissal entered in appeal nos. 99-1328 and 99-1356 will be with prejudice. As Chevron and DOE point out, if a dismissal is entered without prejudice, Alabama could, in the event of an adverse ruling by the 10th Circuit, seek to resurrect its appeal here by way of transfer. That would

be an impermissible result, given our prior rulings and the fact that appeal no. 99-1327 is proceeding in this court.

Accordingly,

IT IS ORDERED THAT:

(1) Absent objection by Alabama within 10 days, the court will grant Alabama's motion to withdraw its appeals and dismiss them with prejudice.

(2) Chevron's motion to dismiss nos. 99-1328 and 99-1356 due to Alabama's failure to file briefs is denied.

(3) If Alabama decides to proceed with these appeals, its briefs in nos. 99-1328 and 99-1356 are due within 14 days from the date of filing of this order. No further extension should be anticipated.

8/31/99 /s/ RAYMOND C. CLEVENGER, III
Date RAYMOND C. CLEVENGER, III
Circuit Judge

cc: Bernard Nash, Esq.
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APPENDIX B

[Law firm text omitted from letterhead]

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September 1, 1999

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717 Madison Place, Suite 401
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Re: Alabama v. Energy, Cases No. 99-1328; 99-1356

Dear Mr. Horbaly:

Appellants, the States of Alabama, California, Connecticut, Idaho, Indiana, Maryland, Michigan, Mississippi, Montana, Ohio, South Dakota, Vermont, Wisconsin, and Wyoming ("the States" or "Alabama") are in receipt of a copy of the non-precedential order in the

above numbered cases issued by the court on August 31, 1999. Paragraph "(1)" of the order provides that, "absent objection by Alabama within 10 days, the court will grant Alabama's motion to withdraw its appeals and dismiss them with prejudice."

Without forgoing any other rights or objections they may have in these or any order proceedings, the States have no objection to the entry forthwith of an order in the form specified in paragraph "(1)" of the August 31 order.

Respectfully submitted,

/s/ JAMES F. FLUG
JAMES F. FLUG

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And on behalf of Yeoryios Apallas, Attorney for California

cc: Paul Michael, Attorney for DOE
Robert Westberg, Attorney for Chevron
Bernard Nash, Attorney for Delaware, et al.