IN THE SUPREME COURT
OF THE STATE OF NEVADA

TEVA PARENTERAL MEDICINES, INC., fka SICOR, INC., BAXTER HEALTHCARE CORPORATION, and MCKESSON MEDICAL-SURGICAL INC.,

Petitioners,

v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; THE HONORABLE TREVOR ATKINS, DISTRICT JUDGE, DEPT. 8; THE HONORABLE NANCY ALLF, DEPT. 27; and THE HONORABLE JIM CROCKETT, DISTRICT JUDGE, DEPT. 24,

Respondents,

And concerning:

YVETTE ADAMS, *et al.*; and

SOSSY ABADJIAN, *et al.*; and

MAUREEN BRIDGES, *et al.*,

Real Parties in Interest.

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REPLY TO ANSWER BRIEF

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Petitioners Teva Parenteral Medicines, Inc.; Baxter Healthcare Corporation; and McKesson Medical-Surgical, Inc. respectfully submit this reply to the answer brief filed by Plaintiffs on June 2, 2020.

INTRODUCTION

Striving to defend the decisions below, Plaintiffs openly acknowledge that a claim seeking to force Petitioners to "'stop selling' [their] drug product 'altogether' to avoid liability" would be preempted by federal law, but then insist that their claims are not preempted because "[h]olding Defendants responsible for selling the arguably wrong-sized bottle to certain facilities is not the same as imposing a requirement upon them to stop selling 'altogether.'" Ans. Br. at 1-2 (emphasis omitted). As far as the United States Supreme Court's binding and unambiguous preemption jurisprudence is concerned, however, that is a distinction without a difference.

As the petition demonstrates, Plaintiffs' self-serving carveout cannot be squared with United States Supreme Court precedent because *every* preemption inquiry pre-supposes that parties will engage in the regulated conduct. And if Plaintiffs were right that preemption could be defeated by forcing a party to refrain from the regulated conduct, or even some claimed subset of that regulated conduct (*i.e.*, selling a certain product to certain

customers), then state law would prevail even when federal law expressly bars the regulated party from satisfying a state-law standard, leaving the Supremacy Clause toothless. Yet *Bartlett* and *Mensing* both pointedly refused to "read the Supremacy Clause to permit an approach to pre-emption that renders conflict pre-emption all but meaningless." *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 620-21 (2011); *Mutual Pharm. Co. v. Bartlett*, 570 U.S. 472, 489-90 (2013) ("Adopting the First Circuit's stop-selling rationale would mean that not only *PLIVA*, but also the vast majority—if not all—of the cases in which the Court has found impossibility pre-emption, were wrongly decided. Just as the prospect that a regulated actor could avoid liability under both state and federal law by simply leaving the market did not undermine the impossibility analysis in *PLIVA*, so it is irrelevant to our analysis here.").

That Plaintiffs now seek to limit their stop-selling theory to only a subset of Petitioners' customer base—rather than *all* of Petitioners' customers—changes nothing from a preemption perspective. Importantly, both *Bartlett* and *Mensing* turned on whether the generic pharmaceutical manufacturer-defendants could avoid the conflict between federal and state law by withdrawing from New Hampshire (*Bartlett*), Minnesota (*Mensing*), and Louisiana (*Demahy*). Properly understood, then, Plaintiffs' attempt to

limit the scope of their stop-selling theory to "ambulatory surgery clinics" in Nevada does not and cannot meaningfully distinguish this case from the stop-selling theory decisively rejected in *Bartlett* or *Mensing*, as the plaintiffs in those cases similarly claimed the defendants could leave the marketplace in those three states—not leave every marketplace in the nation. What this means, of course, is that the piecemeal withdrawal approach pressed by Plaintiffs has already been rejected *twice* by the United States Supreme Court, and Plaintiffs' attempt to navigate their way around it here must be rejected for the very same reason. *See Bartlett*, 570 U.S. at 488 ("The incoherence of the stop-selling theory becomes plain when viewed through the lens of our previous cases. In every instance in which the Court has found impossibility pre-emption, the 'direct conflict' between federal- and state-law duties could easily have been avoided if the regulated actor had simply ceased acting."); *Mensing*, 564 U.S. at 620 ("Accepting Mensing and Demahy's [stop-selling] argument would render conflict preemption largely meaningless because it would make most conflicts between state and federal law illusory.").

Neither of Plaintiffs' additional arguments fares any better. Plaintiffs first assert that this Court should deny review because Petitioners

supposedly are "confirmed wrongdoers," and that we know that because of three jury verdicts handed down in Nevada state courts in 2010 and 2011 (*Chanin*, *Sacks*, and *Washington*) and a subsequent global settlement. Ans. Br. at 9-11. But all three of those verdicts came years before the U.S. Supreme Court categorically rejected the stop-selling theory in *Bartlett*, and all three are impossible to square with *Bartlett* or *Mensing* as a doctrinal matter. More troubling, though, is the fact that Plaintiffs apparently believe it is appropriate to continue to cite and rely on those verdicts—despite the fact that all three have since been vacated and thus retain no precedential value whatsoever.

Finally, Plaintiffs insist that review is unwarranted because Petitioners' conflict-preemption arguments supposedly were "rejected by the federal judges who previously presided over these cases" post-removal, and were also denied by the three trial courts below. Ans. Br. at 1, 5-7. But neither of those claims is persuasive. For one thing, even a casual review of the three federal court orders granting Plaintiffs' motions to remand shows that none of those courts even considered, much less decided, the conflict-preemption questions presented here. For another, Plaintiffs in those federal court removal proceedings never even responded to Petitioners' motions to

dismiss, and those motions were never ruled on by those courts, because the cases were each remanded first. And for yet another, the fact that the three state courts below held that Plaintiffs' claims are not preempted by federal law—rulings on a purely legal question that conflict with multiple binding decisions from the U.S. Supreme Court—hardly compels the conclusion that review in this Court is unwarranted.

This Court should grant the petition and either reverse or set the case for plenary review.

ARGUMENT

A. Each of Plaintiffs' Claims Directly Conflicts With, And Thus Is Preempted By, Federal Law, And Their "Stop-Selling" Theory Does Not Avoid The Conflict.

Plaintiffs contend that the courts below correctly denied Petitioners' motions to dismiss because their claims are not preempted. This is so, Plaintiffs say, because they are not arguing that Petitioners should have altered the design or labeling of generic propofol, but instead are pressing "narrow and precise strict liability design defect and negligent design claims" supported by allegations that "do not offend these generic drug manufacturers' duties of sameness or allege that they should have stopped selling propofol." *Id.* at 12-13. Plaintiffs are wrong on multiple levels.

First of all, Plaintiffs are wrong in suggesting that their claims do not offend the federal duty of sameness. Their theory of liability is and always has been that 50 mL vials of propofol are susceptible to a risk of improper reuse in the endoscopy setting—both because the product's size and 50 mL dosage form is susceptible to misuse, and because the warnings provided with the product are insufficient to dissuade medical professionals from misusing it. *See, e.g.*, I App. 27 (*Abadjian* Compl. at ¶ 52) ("Negligence …. As a result of Defendants['] negligent packaging, marketing, and distribution, Defendants breached their duty to Plaintiffs by failing to protect Plaintiffs from foreseeable harm, resulting in the subject Clinics['] use of the vials of propofol on multiple patients and Plaintiffs' corresponding risk of exposure to infectious diseases."), *id.* at 24-25 (*Id.* at ¶¶ 38, 40 (similar for strict-products liability claim)).

As their own allegations show, Plaintiffs' claim is that Petitioners should be held liable as a matter of Nevada law because their 50 mL vials of propofol were defective—either in the manner in which they were designed, or the manner in which they were labeled, or due to their size or dosing form, or in some combination of all those things. Yet those are precisely the sorts

of claims that conflict with, and thus are preempted by, federal law. As the U.S. Supreme Court put it in *Bartlett*:

> [W]ere Mutual to change the composition of its sulindac, the altered chemical would be a new drug that would require its own [New Drug Application] to be marketed in interstate commerce. … Given the impossibility of redesigning sulindac, the only way for Mutual to ameliorate the drug's 'risk-utility' profile—and thus escape liability—was to strengthen 'the presence and efficacy of sulindac's warning' in such a way that the warning 'avoided an unreasonable risk of harm from hidden dangers or from foreseeable uses.' … [But] federal law prevents generic drug manufacturers from changing their labels. Thus, federal law prohibited Mutual from taking the remedial action required to avoid liability under [state] law.

570 U.S. at 483-86 (citations omitted) (alterations in original incorporated); *see also Mensing*, 564 U.S. at 618 ("If the Manufacturers had independently changed their labels to satisfy their state-law duty, they would have violated federal law.… Thus, it was impossible for the Manufacturers to comply with both their state-law duty to change the label and their federal-law duty to keep the label the same.").

Presumably recognizing this problem, Plaintiffs seek to avoid the normal operation of the Supremacy Clause by claiming that their theory of liability does not seek to require Petitioners to change the propofol design, labeling, or dosage form, but instead is premised on the claim that

Petitioners should "simply [have] utilized the FDA-approved design that was available to them and branded manufacturers, i.e., single-dose vials." Ans. Br. at 14. And Plaintiffs insist that there is no preemption problem with that theory because there supposedly is a difference between asking a company to "stopping selling *altogether*" and asking that company "merely not [to] sell[] inappropriately large bottles of a product to types of facilities known to Defendants to have abused those products by double-dipping." Ans. Br. at 15-16 (emphasis in original; other emphases omitted); *id.* at 16 ("Plaintiffs' contention that [Petitioners] are liable for selling inappropriately large (50 ml) bottles to ambulatory surgery clinics is a far cry from the contention that [Petitioners] should have stopped selling propofol—or even 50 ml bottles—altogether."). This argument is meritless for several reasons.

First, Plaintiffs are wrong as a factual matter because the 50 mL vials that Plaintiffs assert were unreasonably dangerous were decidedly *not* "multi-use vials." Instead, and as the petition sets forth at length, the 50 mL vials (as with every other vial size sold by Petitioners) are conspicuously, and repeatedly, labeled for "single patient use." I App. 235. The outside of the boxes in which propofol was distributed include several clear statements, including as relevant here, that the product was for "single

patient use." I App. 235-38. The package insert clearly stated that "strict aseptic technique must always be maintained," and that "propofol injective emulsion is a single-use parenteral product," I App. 215—and that same warning was repeated in no less than five different locations on the package insert, *id.* at 217, 218, 220, 223, and 225. And, of course, all of this labeling was strictly regulated and required by the FDA, and Petitioners had no power to unilaterally change it consistent with federal law. Plaintiffs' suggestions to the contrary are therefore flatly contradicted by the record.

Putting those facts aside, Plaintiffs are also wrong because their attempt to limit the reach of their stop-selling theory to only "ambulatory surgery clinics" like those operated by Dr. Desai—rather than *all* of Petitioners' customers—does not change the preemption analysis whatsoever. The regulated conduct at issue here is Petitioners' decision to sell 50 mL vials of propofol to endoscopy clinics, and the question is whether selling those sized vials—with the labeling and product design specifically required by the FDA for sale to outpatient clinics—violates the duties imposed by Nevada law. The preemption problem with that theory, of course, is that it is impossible for Petitioners to avoid state-law liability without violating federal law. That is a textbook impossibility conflict. And

it is no solution to say, as Plaintiffs now do, that the conflict can be avoided simply by banning sales to certain customers: "Indeed, if the option of ceasing to act defeated a claim of impossibility, impossibility pre-emption would be 'all but meaningless.' … In every instance in which the Court has found impossibility pre-emption, the 'direct conflict' between federal- and state-law duties could easily have been avoided if the regulated actor had simply ceased acting.'" *Bartlett*, 570 U.S. at 488 (citation omitted). Plaintiffs' attempt to limit the bounds of their stop-selling theory to "ambulatory surgery clinics" in Nevada thus does not and cannot meaningfully distinguish this case from *Bartlett* or *Mensing*, as the plaintiffs in those cases *also* claimed that the defendants could have avoided the conflict between the state and federal law by ceasing to sell their products within New Hampshire, Minnesota, and Louisiana.

In any event, the reality here is that under Plaintiffs' theory, Petitioners had two options for avoiding liability under Nevada law: Either (1) alter the 50 mL product or its labeling to satisfy state law, and thereby violate federal law; or (2) stop selling to Nevada endoscopy clinics altogether given the dilemma posed by these directly conflicting standards. That is a classic impossibility conflict, and the U.S. Supreme Court, as well as dozens of other

state and federal courts across the country, repeatedly have confirmed that it is no solution to say that the conflict can be avoided by banning sales to certain customers: "Indeed, if the option of ceasing to act defeated a claim of impossibility, impossibility pre-emption would be 'all but meaningless. … In every instance in which the Court has found impossibility pre-emption, the 'direct conflict' between federal- and state-law duties could easily have been avoided if the regulated actor had simply ceased acting.'" *Bartlett*, 570 U.S. at 488 (quoting *Mensing*, 564 U.S. at 621).

Plaintiffs thus err in contending that their "just-withdraw-from-the-endoscopy-clinic-marketplace" approach solves the preemption problem. The preemption inquiry pre-supposes that parties engage in the regulated conduct, which is why many preemption cases arise from *pre-enforcement litigation* to enjoin state laws or regulations. *See, e.g., Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60, 62, 64-68 (2008) (upholding pre-enforcement preemption challenge to California statutes "prohibit[ing] several classes of employers that receive state funds from using the funds 'to assist, promote, or deter union organizing'" as "pre-empted under *Machinists* [*v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976)]") (citation omitted); *United States v. Locke*, 529 U.S. 89, 97 (2000) (upholding pre-enforcement

preemption challenge to Washington environmental regulations on grounds that regulations "invaded areas long occupied by the Federal Government and imposed unique requirements in an area where national uniformity was mandated"); *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 91, 93-94, 102 (1992) (plurality opinion) (upholding pre-enforcement preemption challenge to Illinois job-safety statutes as "pre-empted by the federal Occupational Safety and Health Act of 1970 … and the standards promulgated thereunder by the Occupational Safety and Health Administration (OSHA)."); *Douglas v. Seacoast Prods., Inc.*, 431 U.S. 265, 270-71 (1977) (upholding pre-enforcement challenge to Virginia statute prohibiting federally licensed vessels owned by non-Virginia residents from fishing in the Chesapeake Bay as preempted by the Federal Enrollment and Licensing Act). If preemption ceases to exist simply because a party can refrain from the regulated conduct, all of those cases would have been either dismissed or been resolved the other way. State law would prevail even when federal law expressly bars the regulated party from satisfying state standards; the Supremacy Clause would become a dead letter. *In re Darvocet*, No. 11-md-2226, 2012 WL 718618, at *3 (E.D. Ky. Mar. 5, 2012) ("[T]he idea that [the generic defendants] should have simply stopped selling

propoxyphene is an oversimplified solution that could apply anytime the issue of impossibility preemption arises: avoid a conflict between state and federal law by withdrawing from the regulated conduct.").

That is not the law. The Supremacy Clause's plain terms do not distinguish between categories of customers for preemption purposes; they instead make federal law "the supreme Law of the Land … *any Thing* in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI cl. 2 (emphasis added). It is untenable to suggest that "the People" understood those broad, unqualified terms as drawing fine distinctions between particular theories of liability or particular customers when assessing federal law's primacy over conflicting state law. Indeed, the term "thing" historically referenced "[a] matter brought before a court of law; a legal process; a charge brought, a suit or cause pleaded before a court." 11 OXFORD ENGLISH DICTIONARY 308 (1st ed. reprinted 1970). In that sense, the Constitution's unqualified reference to "any Thing" included *all* legal claims brought with respect to *all* regulated conduct, and that well explains why *Bartlett* and *Mensing* pointedly refused to embrace "an approach to pre-emption that renders conflict pre-emption all but meaningless." *Mensing*, 564 U.S. at 621; *Bartlett* 570 U.S. at 488 ("Indeed, if the option of ceasing to

act defeated a claim of impossibility, impossibility pre-emption would be 'all but meaningless.' … In every instance in which the Court has found impossibility pre-emption, the 'direct conflict' between federal- and state-law duties could easily have been avoided if the regulated actor had simply ceased acting.'") (citation omitted).

Nor was the rule laid down in *Bartlett* and *Mensing* novel. To the contrary, the U.S. Supreme Court has explained for decades that the radical stop-selling theory does not resolve the direct conflict between state and federal law; rather, it perversely ensures that state law reigns supreme, by conditioning the right to engage in interstate commerce with respect to certain customers free from state-law liability on conduct that would violate federal law. The Supremacy Clause forbids that approach. The U.S. Supreme Court long ago held that state law "is pre-empted by direct operation of the Supremacy Clause" where it "interferes with the exercise of … federally protected rights." *Brown v. Hotel & Rest. Employees & Bartenders Int'l Union Local 54*, 468 U.S. 491, 501 (1984). And it repeatedly has recognized that state tort law directly and thus impermissibly conflicts with federal law even though it remains possible for the manufacturer of a federally regulated product to both comply with federal law and pay damages to state tort

plaintiffs who later demonstrate that the manufacturer's compliance with federal standards violated state law. *See, e.g., Riegel v. Medtronic, Inc.*, 552 U.S. 312, 324-25 (2008); *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 521-22 (1992) (plurality) & *id.* at 548-49 (Scalia, J., concurring in relevant part); *see also MacDonald v. Monsanto Co.*, 27 F.3d 1021, 1025 (5th Cir. 1994); *Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 370 (7th Cir. 1993); *Palmer v. Liggett Grp., Inc.*, 825 F.2d 620, 627 (1st Cir. 1987). No less than in those cases, Plaintiffs' newly-minted "stop-selling-to-endoscopy-clinics" theory cannot and does not reconcile the direct conflict between the state and federal standards at issue here. Instead, it only highlights that it was impossible for Petitioners to comply simultaneously with Hatch-Waxman's federal sameness requirements and with Plaintiffs' interpretation of Nevada's contrary labeling and design requirements. That is what impossibility means: that a person cannot comply simultaneously with both state and federal standards, and thus must cease acting at all within the relevant marketplace.

Nor is this limited to sales of generic propofol. Accepting Plaintiffs' theory would also foreclose ordinary conflict preemption of state tort claims involving any federally regulated product. Because every manufacturer can in theory "choose" to stop making a given product, or "choose" to stop

selling a given product to a certain subset of customers, no federal requirement could ever generate a direct preemptive conflict. *Bartlett*, 570 U.S. at 488 ("The incoherence of the stop-selling theory becomes plain when viewed through the lens of our previous cases. In every instance in which the Court has found impossibility pre-emption, the 'direct conflict' between federal- and state-law duties could easily have been avoided if the regulated actor had simply ceased acting."); *Mensing*, 564 U.S. at 620 ("Accepting Mensing and Demahy's [stop-selling] argument would render conflict preemption largely meaningless because it would make most conflicts between state and federal law illusory."); *see also* Pet. at 29-31 & n.13 (collecting cases). That cannot be, and is not, the law. Because Plaintiffs' stop-selling-to-endoscopy-clinics theory is no different from theories rejected in *Bartlett* and *Mensing*, it should meet the exact same fate. The decisions below must therefore be reversed.

B. Plaintiffs' Reliance on Now-Vacated Jury Verdicts is Misplaced and Improper.

Plaintiffs also contend that this Court should deny review because Petitioners supposedly are "confirmed wrongdoers" who are not entitled to "absolute immunity" as a result of "[t]he bad acts of the Endoscopy Clinic

owners/operators," and that we know all of this because of three Nevada state-court jury verdicts handed down in 2010 and 2011 in the propofol personal-injury litigation (namely, in the *Chanin*, *Sacks*, and *Washington* cases). Ans. Br. at 9-11.

But Petitioners nowhere claimed to be entitled to "absolute immunity" because Dr. Desai and his associates were criminally tried and convicted for their deliberate and intentional re-use of single-use injection syringes, for their failure to adequately clean previously used colonoscopy and endoscopy scopes, or for their conscious choice to use single-patient anesthesia vials on multiple patients. Rather, Petitioners' point is and always has been that they had no involvement in those individuals' criminal actions, that those individuals' actions violated and disregarded the explicit FDA-approved warnings that accompanied Petitioners' propofol products, and that those individuals' actions pose serious causation problems for Plaintiffs' claims.

Even putting all that aside, the fact remains that each of those jury verdicts pre-dated *Bartlett*'s categorical rejection of the stop-selling evasion, and one of them pre-dated *Mensing*. That those three verdicts cannot be squared with *Bartlett* or *Mensing*, and contradict a post-*Mensing* and post-

Bartlett landscape of literally hundreds of other decisions from federal and state appellate and trial courts around the country, only confirms that those verdicts were legally unfounded.

Finally, Plaintiffs' continued reliance on these three verdicts is also, at best, highly questionable from an ethical perspective. After all, it is undisputed and indisputable that all three verdicts were vacated, *see* VII App. 1473-1483, and those vacaturs necessarily extinguished any precedential value (if any) those verdicts previously held. *See, e.g.*, *In re Miller*, 482 P.2d 326, 329 n.1 (Nev. 1971) ("[A lawyer] should not cite authorities he knows have been vacated … without making a full disclosure to the court and counsel."); *Nw. Res. Info. Ctr., Inc. v. Nw. Power Planning Council*, 35 F.3d 1371, 1385-86 (9th Cir. 1994) (holding that a court's reliance on a vacated judicial decision "if allowed, would undermine the validity and authoritativeness of final decisions."); *United States v. Walgren*, 885 F.2d 1417, 1423 (9th Cir. 1989) (recognizing that where earlier decision "has been vacated," "the decision is no longer of precedential value"); *Franklin Sav. Corp. v. United States*, 56 Fed. Cl. 720, 734 n.18 (2003) ("It does not take a prophet, however, to divine that a court would not, and could not, consider the contents of a vacated opinion."); *Faus Grp., Inc. v. United States*, 358 F.

Supp. 2d 1244, 1253 n. 17 (Ct. Int'l Trade 2004) ("Because the [relevant] portion of the decision was vacated, reliance [on] or citation thereto is precluded."); *Gilmore Steel Corp. v. United States*, 585 F. Supp. 670, 674 n. 3 (Ct. Int'l Trade 1984) (characterizing the plaintiff's reliance on a vacated opinion as "ill-founded since, having been vacated, it is no longer binding precedent"); *Lawrence v. United States*, 488 A.2d 923, 924 n.3 (D.C. 1985) (stating that a vacated opinion "cannot be cited as authority"); *Cash in Advance of Fla., Inc. v. Jolley*, 612 S.E.2d 101, 102 (Ga. Ct. App. 2005) ("[T]he trial court's reliance upon the vacated opinion is not well founded, as the opinion has no precedential value.").

C. Plaintiffs' Claim That Three Federal District Court Orders in Nevada Have Rejected Petitioners' Conflict-Preemption Argument is Wrong.

Plaintiffs also claim that this Court should deny review because the three federal district judges who decided Plaintiffs' motions to remand supposedly "felt compelled to address [Petitioners'] multiple efforts to argue that 'impossibility' preemption not only justified federal jurisdiction, but the outright dismissal of Plaintiffs' Complaint[s]." Ans. Br. at 5-7. This is demonstrably incorrect.

Although it is true that Petitioners argued that the federal courts had subject-matter jurisdiction under *Grable & Sons Metal Products, Inc. v. Darue Engineering and Manufacturing*, 545 U.S. 308 (2005), because Plaintiffs' claims turned on substantial questions of federal law, none of the orders granting Plaintiffs' motions to remand actually considered, much less decided, whether Plaintiffs' claims are conflict preempted on the merits. Instead, in each of those orders—and as the block quotation in Plaintiffs' own Answer Brief itself makes clear, *see* Ans. Br. at 6—the federal courts, as courts of limited jurisdiction, only addressed whether they had subject-matter jurisdiction on the basis that the Federal Food, Drug & Cosmetics Act as a whole so completely subsumes state law. *See* V App. 1105-06 (*Bridges*), 1151-52 (*Abadjian*), 1161-66 (*Adams*). This concept, called "complete preemption," is *jurisdictional* in nature; it asks whether "[a] complaint purporting to rest on state law … can be recharacterized as one 'arising under' federal law if the law governing the complaint is exclusively federal.… Under this so-called 'complete preemption doctrine,' a plaintiff's 'state cause of action [may be recast] as a federal claim for relief, making [its] removal [by the defendant] proper on the basis of federal question jurisdiction.'" *Vaden v.*

Discover Bank, 556 U.S. 49, 61 (2009) (citing *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003) & 14B WRIGHT & MILLER § 3722.1, p. 511).

What those courts did *not* do, however, is "reject[]" "Defendants[']" [conflict] preemption arguments." Ans. Br. at 1.[1] Plaintiffs' attempt to rewrite jurisdictional rulings into substantive preemption rulings is facially incorrect, and provides no basis for denying review of the important and fundamental constitutional questions presented in the petition.

CONCLUSION

For these reasons, as well as those set forth in the petition, this Court should grant the petition for writ of mandamus and these lawsuits should be dismissed in their entirety.

[1] In fact, although Plaintiffs rely heavily on the remand order from Judge James Mahan in claiming Petitioner's conflict-preemption arguments were somehow rejected, they conspicuously decline to mention that Judge Mahan has previously heard and *dismissed* on conflict-preemption grounds materially indistinguishable claims in a case brought against a generic drug manufacturer and over which subject-matter jurisdiction was present due to complete diversity between plaintiff and defendant. *See Moretti v. PLIVA, Inc.*, No. 08-cv-396, 2012 WL 628502, at *4-6 (D. Nev. Feb. 27, 2012).

Respectfully submitted this 30th day of June 2020.

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CERTIFICATE OF COMPLIANCE WITH NRAP 28 AND 32

I certify that this brief complies with the formatting requirements of NRAP 32(c)(2), the typeface requirements of NRAP 32(a)(5), and the type-style requirements of NRAP 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Book Antiqua 14-point font with double spacing. The brief contains approximately 4,345 words. I also certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, NRAP 21(a)(3). I understand that I may be subject to sanctions if this brief does not conform to the requirements of the Nevada Rules of Appellate Procedure.

Respectfully submitted this 30th day of June 2020.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 30th day of June, 2020, a true and correct copy of ***Reply to Answer Brief*** was electronically filed via the Nevada Supreme Court's E-filing system and served upon on all registered participants.

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