No. 20-1089

In the Supreme Court of the United States

CHEVRON CORPORATION, *et al.*, PETITIONERS

v.

CITY OF OAKLAND, CALIFORNIA, *et al.*

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

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country.

[1] Pursuant to S. Ct. Rule 37.6, counsel for all parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part and no person or entity other than *amicus*, its members, or counsel made a monetary contribution to its preparation or submission.

One of the Chamber's important functions is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community. The Chamber filed amicus briefs at earlier stages in this case, as well as in several other cases raising similar issues about the respective roles of state and federal law and courts in this arena. See, *e.g.*, *BP P.L.C.* v. *Mayor & City Council of Balt.*, 952 F.3d 452 (4th Cir. 2020); *Bd. of Cty. Comm'rs of Boulder Cty.* v. *Suncor Energy (U.S.A.) Inc.*, 965 F.3d 792 (10th Cir. 2020); *Cty. of San Mateo* v. *Chevron Corp.*, 960 F.3d 586 (9th Cir. 2020), petition for cert. pending, No. 20-884 (filed Jan. 4, 2020); *North Dakota* v. *Heydinger*, 825 F.3d 912 (8th Cir. 2016).

This case presents two questions of federal jurisdiction that are important to the Nation's business community. First, businesses have a substantial interest in whether a plaintiff can evade federal jurisdiction over global nuisance tort suits like the ones at issue here, simply by asserting that the claim arises under state law even though only federal law could create such a cause of action. To be clear, the Chamber believes that the global climate is changing, that human activities contribute to those changes, and that climate change poses a serious long-term challenge that deserves serious solutions. Inaction is simply not an option. The Chamber also believes that businesses, through technology, innovation, and ingenuity, offer the best options for reducing greenhouse gas emissions and mitigating the impacts of climate change. Specifically, the Chamber supports a market-based approach to accelerate

greenhouse gas emissions reductions across the U.S. economy.

But greenhouse gasses and their effects do not stop at any one State's borders. The problem is inherently global. Accordingly, the Chamber believes that durable climate policy must be made by Congress. And that policy should encourage innovation and investment to ensure significant emissions reductions, while avoiding economic harm for businesses, consumers and disadvantaged communities. This policy should include well-designed market mechanisms that are transparent and nationwide. U.S. climate policy should recognize the urgent need for action, while maintaining the national and international competitiveness of U.S. industry and ensuring consistency with free enterprise and free trade principles.

By contrast, ad hoc and unpredictable decisions of individual state courts, seeking to hold a handful of cherrypicked defendants liable for the full costs of climate change, are not a sensible way to address this problem. That approach threatens the Nation's business community with a patchwork of overlapping and potentially conflicting rules, under which businesses could face unpredictable and potentially devastating liability for conduct that was entirely lawful when and where it occurred.

The Chamber also has a strong interest in the outcome of the second question presented. Businesses are often defendants in cases subject to removal. Yet under the Ninth Circuit's rule, a business that removes a case can be put into a heads-I-win, tails-you-lose position where the plaintiff can keep a final judgment if they win

but nonetheless vacate the judgment if they lose by challenging the initial removal as improper. That one-sided rule is manifestly unfair and damaging to important interests in finality and efficiency.

SUMMARY OF ARGUMENT

This case presents two important questions involving the relationship between the federal and state courts on matters that are important to the business community. This Court should grant certiorari on both.

1. This Court should grant certiorari to determine whether putative state-law tort claims seeking to recover for the local effects of worldwide contributions to global climate change are removable because such claims necessarily arise under federal common law. This case is one of many such suits across the country, which seek to hold a handful of individual businesses liable for the full costs of adapting to global climate change. In a thoughtful and measured decision, the district court held that respondents' "nuisance claims—which address the national and international geophysical phenomenon of global warming—are necessarily governed by federal common law" and therefore belong in federal court. Pet. App. 48a.

The Ninth Circuit, however, allowed respondents to send the case back to state court simply through an artifice of pleading—regardless of how strong the federal interests are or how lacking the state's authority to create such a nationwide (and indeed worldwide) tort. The Ninth Circuit thought the well-pleaded complaint rule barred removal simply because this case does not involve complete preemption by a federal statute and (it found) that it does not fit within the "special and small

category" under *Grable & Sons Metal Products, Inc.* v. *Darue Engineering & Manufacturing*, 545 U.S. 308 (2005), for state-law claims that nonetheless arise under federal law because they necessarily implicate a substantial federal question. Pet. App. 12a; see *id.* at 12a-16a.

The Ninth Circuit's cramped understanding of federal-question jurisdiction warrants this Court's review. For the reasons set forth in the petition and the district court's opinion, only federal law could create the kind of global nuisance tort claim asserted here. The claim "would effectively allow [respondents] to govern conduct and control energy policy on foreign soil," Pet. App. 39a, with the only connection to the state coming from the undifferentiated local manifestations of global climate change. That claim is inherently federal, regardless of the label the plaintiff attaches to it.

The Chamber submits this brief to emphasize three points. First, the rule the district court applied—that the plaintiff cannot unilaterally defeat federal jurisdiction over such an inherently federal cause of action simply by asserting that it arises under state law—is correctly grounded in the "artful pleading" doctrine, which is an important corollary to the well-pleaded complaint rule. Second, exercising jurisdiction over such an inherently federal claim advances the purposes of federal-question jurisdiction without undermining the purposes of the well-pleaded complaint rule.

Third, the right answer here is vital to the business community. Businesses frequently operate in multiple jurisdictions, across states and countries, and predictable rules are necessary for their continued operation. It would be untenable for businesses nationwide to be sub-

ject to a welter of overlapping and inconsistent laws potentially emanating from each of the 50 states. The upshot of the Ninth Circuit's opinion, however, is that California courts may decide in the first instance whether and how to regulate conduct in each of the other 49 states (and indeed worldwide). Enabling state-court control over the decision to fashion such a novel global tort unduly favors local concerns without adequately considering the broader national interest. The Chamber respectfully submits that federal courts, with their inherently national perspective, should make that weighty decision in the first instance.

2. This Court should also grant certiorari to determine whether a plaintiff may unwind a valid final judgment on appeal, simply by identifying a jurisdictional defect at the time of removal that the plaintiff has since cured. It is undisputed that, by the time the district court entered judgment, respondents had voluntarily amended their complaint to add a claim that expressly arose under federal law, thus eliminating any jurisdictional problem that could have existed at the time of removal. And in *Caterpillar Inc.* v. *Lewis*, 519 U.S. 61 (1996), this Court held "that a district court's error in failing to remand a case improperly removed is not fatal to the ensuing adjudication if federal jurisdictional requirements are met at the time judgment is entered." *Id.* at 64.

The Ninth Circuit nonetheless permitted respondents to vacate the final judgment because it found that the district court erred in failing initially to remand the case. That decision contravenes *Caterpillar's* stated rule and deepened existing circuit splits as to whether and when a plaintiff may dispute the propriety of removal

after voluntarily curing any potential jurisdictional defect. The Ninth Circuit's approach creates a situation in which a plaintiff can test the waters in federal court, yet still successfully dispute jurisdiction if they lose there on the merits, and thereafter get a second bite at the apple in state court. That rule is one-sided and causes serious harm to "considerations of finality, efficiency, and economy." *Caterpillar*, 519 U.S. at 76. It is also especially unfair where, as here, the district court certified for interlocutory appeal its order denying remand, yet the plaintiffs declined even to pursue the immediate appeal and instead added a federal claim to their complaint and litigated the case to final judgment. Respondents thus made a deliberate choice to move forward with a federal-law claim in federal court, but nonetheless obtained a do-over after they lost on the merits.

ARGUMENT

I. This Court Should Grant Certiorari To Determine Whether Federal Jurisdiction Extends To These Kinds Of Global Nuisance Suits

A. This Kind Of Global Nuisance Tort Claim Necessarily Arises Under Federal Law

The first question presented warrants this Court's review because of its exceptional importance. This Court has twice granted certiorari to decide issues of who has authority to address the problem of global climate change. See *Am. Elec. Power Co.* v. *Connecticut*, 564 U.S. 410, 421 (2011) (*AEP*); *Massachusetts* v. *EPA*, 549 U.S. 497 (2007). Here, the issue is whether the courts of a single State are empowered to set worldwide climate policy by tort.

This case is just one of many global nuisance tort suits brought by States and municipalities in state courts across the country against defendants in the energy industry, seeking to hold a handful of companies liable for the local financial costs of adapting to global climate change. As the district court observed, the tort theory in these cases has a "breathtaking" reach. Pet. App. 32a. Because emissions intermix in the atmosphere, and rising sea levels and other effects of global climate change are felt worldwide, the tort is inherently global. It would "reach the sale of fossil fuels anywhere in the world, including past and otherwise lawful sales, where the seller knew that combustion of fossil fuels contributed to the phenomenon of global warming." *Ibid.*

The theory thus would extend beyond state and national borders and be indifferent to the legality of the conduct in the place where it occurred. "[A]nyone who supplied fossil fuels with knowledge of the problem would be liable," including if their conduct was "*outside* the United States." Pet. App. 32a. And liability would extend to those who simply contributed to undifferentiated ill effects within the state or localities. *Id.* at 36a. Because the effects of climate change are felt long after emissions themselves, see *id.* at 28a, liability would be retroactive, reaching conduct that contributed to emissions decades ago. And plaintiffs could seek "joint[] and several[]" liability, Resps. C.A. E.R. 297, which would expose businesses to potentially crippling liability.

As the district court explained, such global nuisance claims "are necessarily governed by federal common law" and create federal jurisdiction. Pet. App. 48a. Alt-

hough there is no general federal common law, "[e]nvironmental protection is undoubtedly an area 'within national legislative power,' one in which federal courts may fill in 'statutory interstices,' and, if necessary, even 'fashion federal law.'" *AEP*, 564 U.S. at 421 (quoting Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 421-422 (1964)); see also Pet. App. 49a-50a ("Federal common law includes the general subject of environmental law and specifically includes ambient or interstate air and water pollution.").

In *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972), this Court applied federal common law to a nuisance claim challenging the local effects of pollution from out-of-state sources. The Court explained that:

> Federal common law and not the varying common law of the individual States is … entitled and necessary to be recognized as a basis for dealing in uniform standard with the environmental rights of a State against improper impairment by sources outside its domain. The more would this seem to be imperative in the present era of growing concern on the part of a State about its ecological conditions and impairments of them. In the outside sources of such impairment, more conflicting disputes, increasing assertions and proliferating contentions would seem to be inevitable. Until the field has been made the subject of comprehensive legislation or authorized administrative standards, only a federal common law basis can provide an adequate means for dealing with such claims as alleged federal rights.

Id. at 107 n.9.

In *AEP*, this Court further held that because the Clean Air Act, 42 U.S.C. 7401 *et seq.*, regulates carbon dioxide emissions from stationary sources, Congress had displaced any right under federal common law to seek abatement of such emissions because of their contribution to climate change. 564 U.S. at 424-425. But Congress's choice to adopt that federal regulatory scheme does not diminish the need for a uniform federal rule or make the tort claims here any less federal in nature. See Pet. 19. Rather, Congress's action further underscores the importance of having a single, clear nationwide regulatory scheme. See Pet. App. 37a (respondents' claims "require a balancing of policy concerns," and "[t]hrough the Clean Air Act, Congress entrusted such complex balancing to the EPA in the first instance, in combination with state regulators" (citation omitted)).

There is accordingly "no inconsistency" between determining that these cases necessarily arise under federal common law yet may fail on the merits. Pet. App. 45a. Federal statutes displaced the role of federal courts in fashioning the rule of decision, but they did not vest the state courts with novel authority to fashion extraterritorial regulatory policy that states have never possessed. Climate change "crie[s] out" for a "uniform and comprehensive solution." *Id.* at 51a. Everybody in this case accepts the science of climate change and recognizes its dangers. But global climate change is, by definition, a global phenomenon. Respondents' claims focusing solely on the local manifestations of that worldwide phenomenon thus necessarily implicate the interests of all 50 States, as well as the United States' relationships with all other nations. See *id.* at 49a-50a. Any liability

rule for such a claim in turn must be governed by nationwide rule, not a multiplicity of different and overlapping state laws. After all, a single State cannot "impos[e] its regulatory policies on the entire Nation," *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 571, 585 (1996), much less the entire planet.

B. A Plaintiff Cannot Unilaterally Defeat Federal Jurisdiction Over Such A Claim Simply Through Artful Pleading

Respondents cannot evade federal jurisdiction over such an inherently national cause of action simply by asserting that their global nuisance claim arises under state law. "Allied as an 'independent corollary' to the well-pleaded complaint rule" is the so-called "artful pleading doctrine," under which "'a plaintiff may not defeat removal by omitting necessary federal questions.'" *Rivet* v. *Regions Bank of La.*, 522 U.S. 470, 475 (1998) (Ginsburg, J.) (citation omitted). "[A] plaintiff cannot frustrate a defendant's right to remove by pleading a case without reference to any federal law when the plaintiff's claim is necessarily federal." 14C Wright & Miller, *Federal Practice & Procedure* § 3722.1 (rev. 4th ed. 2020).

Although artful pleading typically involves complete preemption by federal statute, there is "no plausible reason" why "the appropriateness of a need for a federal forum should turn on whether the claim arose under a federal statute or under federal common law." Richard H. Fallon Jr., et al., *Hart & Wechsler's Federal Courts and the Federal System* 818 (7th ed. 2015). The artful pleading doctrine thus also applies when a plaintiff seeks to evade federal jurisdiction over claims necessarily arising under federal common law. Otherwise,

simply by asserting that a tort arises under "state common law," a plaintiff could unilaterally prevent federal court involvement, no matter how clear it is that the national or international nature of the claim leaves no room for state law.

The whole point of the artful pleading doctrine is to prevent that kind of superficial circumvention of federal authority. As other circuits recognize, a "plaintiff's characterization of a claim as based solely on state law" therefore "is not dispositive." *In re Otter Tail Power Co.*, 116 F.3d 1207, 1213 (8th Cir. 1997); see also *Sam L. Majors Jewelers* v. *ABX, Inc.*, 117 F.3d 922, 923 (5th Cir. 1997). If a cause of action could arise only under federal common law, then it is inherently federal in nature, making it removable regardless of whether the plaintiff asserts (incorrectly) that it arises under state law.

Allowing removal of a claim that necessarily arises under federal law would advance the purposes of federal-question jurisdiction without undermining the purposes undergirding the well-pleaded complaint rule. "[F]ederal question jurisdiction is granted to provide a federal trial forum for the vindication of federally-created rights" and to "'resort to the experience, solicitude, and hope of uniformity' of the federal trial court for the interpretation of federal law." 13D Wright & Miller, *Federal Practice & Procedure* § 3562 (3d ed. 2020 update) (quoting *Grable*, 545 U.S. at 312); see *Boys Mkts., Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235, 246 n.13 (1970) (it "protect[s] federal rights" and "provide[s] a forum that could more accurately interpret federal law"). Here, there is a strong need for uniformity and a nationwide (rather than local) perspective: Global climate change "demands to be governed by as universal a

rule of apportioning responsibility as is available." Pet. App. 56a. It is "inappropriate for state law to control" where the "nature of the controversy" includes "interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations." *Id.* at 49a (quoting *Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981)).

Conversely, allowing cases like this to proceed in state court would not meaningfully advance the purposes of the well-pleaded complaint rule. The "longstanding policies" underlying the rule are (1) to make the plaintiff the "master of the complaint," enabling the plaintiff "to have the cause heard in state court" by "eschewing claims based on federal law"; (2) to avoid "radically expand[ing] the class of removable cases, contrary to the '[d]ue regard for the rightful independence of state governments'"; and (3) to provide a "quick rule of thumb." *Holmes Grp., Inc.* v. *Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831-832 (2002) (citations omitted).

But the Ninth Circuit's approach does not meaningfully advance the interest in making the plaintiff the "master of the complaint." *Holmes Grp.,* 535 U.S. at 831. A plaintiff that chooses to advance a tort only federal common law could create has not actually "eschew[ed]" a federal claim. *Ibid.* Rather, the plaintiff has chosen to plead a federal common law claim the defendant has a right to remove, notwithstanding a disclaimer to the contrary. As such, the Ninth Circuit approach advances gamesmanship over substance.

Second, denying federal jurisdiction would not meaningfully protect the size of the federal docket, nor the rightful independence of the States. The artful pleading

doctrine only comes into play in this context when, by definition, a state lacks the independence in the first place to create the tort because only federal law could do so. Furthermore, federal common law jurisdiction exists only for the few "'subjects within national legislative power where Congress has so directed' or where the basic scheme of the Constitution so demands." *AEP*, 564 U.S. at 421 (citation omitted). Thus, no federalism concern exists, because no State ever had the right to impose its will on the others.

Third, although the well-pleaded complaint rule creates a "quick rule of thumb," applying the artful pleading doctrine to claims that could only arise under federal common law would have, at most, a minimal impact on that goal. The Court has made clear that federal common law is limited to narrow contexts where federal interests predominate or where State law simply cannot apply. See, *e.g.*, *AEP*, 564 U.S. at 422. This class of cases, where the Constitution itself demands that only federal law could supply the rule of decision, is thus particularly small and circumscribed. Applying the artful pleading doctrine thus will not meaningfully undermine the well-pleaded complaint rule's general "rule of thumb."

C. This Issue Is Exceptionally Important To The Business Community

The business community has a strong interest in ensuring that the federal courts, not numerous different state courts, will decide whether such an inherently national (and indeed global) tort may proceed. Businesses frequently operate in multiple states and countries, necessitating predictable rules for their smooth operation. Cf. *Hertz Corp.* v. *Friend*, 559 U.S. 77, 94 (2010) ("Predictability is valuable to corporations making business

and investment decisions."). The prospect of individual state courts fashioning a novel nuisance tort to set national (and international) regulatory policy for other states and countries would sharply undermine that predictability and potentially subject businesses to a welter of overlapping and inconsistent legal obligations. See, *e.g.*, *Int'l Paper Co.* v. *Ouellette*, 479 U.S. 481, 497 (1987) (allowing a non-source state to regulate out-of-state discharges via tort would make it "virtually impossible to predict the standard for a lawful discharge into an interstate body of water" (citation omitted)). As the district court put it, subjecting businesses to overlapping and potentially inconsistent laws from each of the 50 States—all effectively governing the same conduct elsewhere in the nation or the world—would be "unworkable." Pet. App. 51a.

The prospect of a state court creating such a global nuisance tort would be particularly damaging to business interests because virtually any business could be haled into state court and threatened with liability. Virtually all economic activity can be linked to greenhouse gas emissions, and awareness of climate change has long been widespread. See Pet. App. 27a-28a (observing that "alarm bells over climate change" began to sound decades ago).

Although respondents chose to sue a handful of large energy companies, they advance a legal theory under which "anyone who supplied fossil fuels with knowledge of the problem would be liable." Pet. App. 32a. A municipality thus could equally sue the operator of a local gas station in Corpus Christie, Texas, so long as the operator knew that its conduct (selling gas) contributes to greenhouse gas emissions and the plaintiff asserted

that the claim arises under state law. And because respondents have offered no basis to limit their "universal" theory to domestic sales, see *ibid.*, the operator of a local gas station in Kathmandu, Nepal, would be liable as well. Indeed, respondents below disclaimed any effort to cabin the theory, describing their allegations of promotion of faulty science as a mere "plus factor" rather than an element of their claim. *Ibid.*

Respondents have sought to analogize this case to one involving the state's traditional police power. In particular, they have compared (Resps. C.A. Br. 12) their novel theory to public nuisance claims against manufacturers of lead paint used in residential housing in California, see *People* v. *ConAgra Grocery Prods. Co.*, 17 Cal. App. 5th 51 (Dist. Ct. App. 2017), or producers of drycleaning chemicals that were used in California and then leached into the groundwater, see *City of Modesto* v. *Dow Chem. Co.*, 19 Cal. App. 5th 130 (Dist. Ct. App. 2018). Whatever the merits of those actions, the global nuisance theory underlying this suit is different in kind. The alleged nuisance in those cases "was caused by a product's use *in California*." Pet. App. 52a n.2. Respondents, by contrast, disclaim any such territorial limit. See *ibid.* Instead, their theory "rests on the sweeping proposition that otherwise lawful and everyday sales of fossil fuels" anywhere in the world, "combined with an awareness that greenhouse gas emissions lead to increased global temperatures, constitute a public nuisance" in California. *Id.* at 32a.

These suits thus "seek to fundamentally reorder or eliminate a vital sector of our economy." Pet. 2. This Court's review is warranted now before state courts pursue such a dramatic innovation in American law.

II. This Court Should Grant Certiorari To Determine Whether A Plaintiff May Challenge A Removal Even After Curing Any Possible Jurisdictional Defect

This Court should also grant certiorari to determine whether a plaintiff may challenge the propriety of a removal even after voluntarily curing any jurisdictional defect and litigating the case to final judgment.

A. The Ninth Circuit's Decision Deepens Two Existing Circuit Splits

The Ninth Circuit's decision deepened two existing circuit conflicts. First, it deepened an existing circuit split over whether a voluntary amendment that establishes federal jurisdiction waives the right to dispute an earlier decision denying a remand. Compare *Barbara* v. *N.Y. Stock Exch., Inc.*, 99 F.3d 49, 56 (2d Cir. 1996) (voluntary amendment waived prior objection), abrogated on other grounds by *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Manning*, 136 S. Ct. 1562 (2016); *Bernstein* v. *Lin-Waldock & Co.*, 738 F.2d 179, 185 (7th Cir. 1984) (same); *Brough* v. *United Steelworkers of Am.*, 437 F.2d 748, 749 (1st Cir. 1971) (same), with Pet. App. 17a (no waiver); *Camsoft Data Sys., Inc.* v. *S. Elecs. Supply, Inc.*, 756 F.3d 327, 338 (5th Cir. 2014) (same).

Second, the Ninth Circuit's decision deepened an existing circuit conflict over whether an appellate court may ever unwind a valid final judgment on the ground that an earlier removal was erroneous, when the jurisdictional defect was cured before the time of judgment. Compare *Hallingby* v. *Hallingby*, 574 F.3d 51, 56 (2d Cir. 2009) (erroneous removal cannot provide basis for unwinding final judgment entered after jurisdictional defect was cured); *Briarpatch Ltd.* v. *Phoenix Pictures, Inc.*, 373 F.3d 296, 301 (2d Cir. 2004) (same); *Buffets,*

Inc. v. *Leischow*, 732 F.3d 889, 898 (8th Cir. 2013) (same); *Paros Props., LLC* v. *Colorado Cas. Ins. Co.*, 835 F.3d 1264, 1273 (10th Cir. 2016) (same); *Huffman* v. *Saul Holdings Ltd.*, 194 F.3d 1072, 1080 (10th Cir. 1999) (same); *Moffitt* v. *Res. Funding Co.*, 604 F.3d 156, 159 (4th Cir. 2010) (same, even on interlocutory appeal), with Pet. App. 19a (may unwind a valid final judgment if it was entered on motion to dismiss for failure to state a claim); *Camsoft*, 756 F.3d at 337-338 (same); *Gentek Bldg. Prods., Inc.* v. *Sherwin-Williams Co.*, 491 F.3d 320, 327 (6th Cir. 2007) (may unwind depending on whether considerations of finality are "weighty enough"); *Thermoset Corp.* v. *Bldg. Materials Corp.*, 849 F.3d 1313, 1320-1321 (11th Cir. 2017) (similar).

The Ninth Circuit's approach is doubly wrong. First, a voluntary amendment that cures the prior alleged jurisdictional defect is properly taken to waive a prior statutory objection that the case should have been remanded. As the Seventh Circuit explained, if a plaintiff is "convinced that the original action was not removable," he can "st[i]ck by his guns" and obtain plenary review on appeal. *Bernstein*, 738 F.2d at 185. "But once he decided to take advantage of his involuntary presence in federal court to add a federal claim to his complaint he was bound to remain there." *Ibid.* "Otherwise he would be in a position where if he won his case on the merits in federal court he could claim to have raised the federal question in his amended complaint voluntarily, and if he lost he could claim to have raised it involuntarily and to be entitled to start over in state court." *Ibid.*

Second, the Ninth Circuit's position conflicts with this Court's stated rule in *Caterpillar*. *Caterpillar* was a diversity case in which complete diversity was lacking

at the time of removal but cured before trial by the dismissal of the non-diverse defendant. See 519 U.S. at 66-67. The question presented was whether a plaintiff that timely objected to the (improper) denial of remand could obtain reversal even after entry of the (valid) judgment. See *id.* at 64. Justice Ginsburg, writing for a unanimous Court, concluded that the answer was no: "We hold that a district court's error in failing to remand a case improperly removed is not fatal to the ensuing adjudication if federal jurisdictional requirements are met at the time judgment is entered." *Ibid.* That rule controls here.

The Ninth Circuit observed that *Caterpillar* involved an appeal after a trial, and understood *Caterpillar* to establish a sliding-scale balancing test that depended on how long and complex the proceedings were in federal court before entry of final judgment. See Pet. App. 17a-19a. But *Caterpillar* states a bright-line rule with no such qualification: What matters is that "federal jurisdictional requirements are met at the time judgment is entered." *Caterpillar*, 519 U.S. at 64. The Ninth Circuit's approach also overlooks *Caterpillar*'s focus on the "exorbitant cost on our dual court system" of "wip[ing] out [an] adjudication *postjudgment*"—not post-trial. *Id.* at 77 (emphasis added). And the Ninth Circuit overlooked this Court's description of Congress's scheme for obtaining review of erroneous orders denying a remand: They may be reviewed after final judgment "if, at the end of the day and case, a jurisdictional defect *remains uncured*." *Id.* at 76-77 (emphasis added). Here, however, respondents themselves cured any possible jurisdictional defect, so there is no remaining defect to reverse after entry of judgment. Cf. *Ortiz* v. *Jordan*, 562 U.S.

180 (2011) (improper denial of summary judgment is unreviewable after entry of valid final judgment).

B. Ensuring Certainty After Curing A Jurisdictional Defect Is Important To The Business Community

The business community has a significant interest in the proper resolution of the cure question. Businesses are often defendants and frequently seek to remove cases to federal court. See Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 Am. U. L. Rev. 369, 391 (1992). And it is particularly important for businesses that "[j]urisdictional rules should be clear." *Direct Mktg. Ass'n* v. *Brohl*, 575 U.S. 1, 14 (2015) (citation omitted). Yet the Ninth Circuit's approach undermines the clarity of *Caterpillar*'s stated holding and would replace it with an uncertain scheme under which an improper remand order can be reviewed sometimes (but not others) after the jurisdictional defect is cured.

The Ninth Circuit's rule is also harmful to business interests because it creates a heads-I-win, tails-you-lose problem. After a disputed removal, plaintiffs could amend their complaints to clearly establish federal jurisdiction and thereby stay in federal court if they prevail—but if they lose on the merits, they could thereafter argue that jurisdiction was not proper at the outset and thereby get a second bite at the apple in state court. Such a rule would encourage gamesmanship and seriously undermine the "considerations of finality, efficiency, and economy" this Court emphasized in *Caterpillar*, 519 U.S. at 75. In particular, businesses could be forced to expend time and money successfully defending a case all the way to final judgment in federal court, yet be forced to litigate that very same case a second time

in state court even though there was no jurisdictional error in the federal court's judgment.

This case is a particularly glaring example. The district court certified its decision for interlocutory appeal under 28 U.S.C. 1292(b), thus providing a path for immediate appellate review. See Pet. App. 56a. Yet respondents declined to pursue the certification. Respondents also declined to litigate the case in its original form and then to appeal the final judgment, as *Caterpillar* contemplated. See 519 U.S. at 76-77. Instead, they voluntarily amended their complaint to add a claim that expressly arises under federal law and thereby cured any conceivable jurisdictional defect. They then litigated the case until final judgment, but ultimately lost on the merits. The Ninth Circuit, however, unfairly enabled respondents to get a complete do-over in state court, taking away the petitioners' favorable judgment and transforming all of the effort by the parties and the district court into a complete waste of time. The Ninth Circuit thus disregarded *Caterpillar*'s stated rule and caused the very harms that this Court in *Caterpillar* sought to avoid.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari and reverse.

Respectfully submitted.

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