No. 20-1089

IN THE
Supreme Court of the United States

CHEVRON CORPORATION, ET AL.,
Petitioners,

v.

CITY OF OAKLAND, CALIFORNIA, ET AL.,
Respondents.

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

BRIEF FOR THE AMERICAN PETROLEUM INSTITUTE AS AMICUS CURIAE SUPPORTING PETITIONERS

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INTEREST OF THE AMICUS CURIAE[1]

The American Petroleum Institute ("API") is a nationwide, non-profit trade association that represents approximately 600 companies involved in every aspect of the petroleum and natural gas industry. Its members range from the largest integrated companies to the smallest independent oil and gas producers. API's members include producers, refiners, suppliers, marketers, pipeline operators, and marine transporters, as well as service and supply companies that support the industry. API is also the worldwide leading body for establishing standards that govern the oil and natural gas industry.

This case is one of many that have been brought against the petroleum and natural gas industry, almost all by state and local governments suing in their home courts, many represented by the same outside plaintiffs' counsel. Although API is not a party to this specific case, governmental plaintiffs have named API as a defendant in several subsequent cases, seeking to impose tort liability for API's exercise of its First Amendment rights to advocate for its members and petition the government. API has been among the defendants removing these cases to federal court, relying in part on the federal common law that governs environmental tort claims of an interstate and international nature. *See, e.g.*, *Minnesota v. Am. Petroleum Inst.*, No. 20-cv-1636 (D. Minn. removed

[1] All parties have consented to the filing of this brief. *Amicus curiae* timely provided notice of intent to file this brief to all parties. No counsel for a party authored any part of this brief, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the brief's preparation or submission.

July 27, 2020); *Delaware ex rel. Jennings v. BP Am. Inc.*, No. 20-cv-1429 (D. Del. removed Oct. 23, 2020). Accordingly, API has a concrete stake in ensuring that claims that ought to be governed by federal law are heard in federal court.

API has extensive familiarity with the uniquely federal interests that this litigation implicates. This case, like the cases that similar plaintiffs and their outside counsel have brought against API, raises cross-border issues that have always been the subject of federal, not state, common law. Because these claims arise under federal law, plaintiffs cannot insist that they stay in state court.

SUMMARY OF ARGUMENT

I. The decisions below reflect a sharp divide regarding whether nuisance claims alleging localized harm from global climate change and worldwide emissions arise under federal law for jurisdictional purposes. The district court in this case said yes, applying the principle that, "[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law." *Am. Elec. Power Co. v. Connecticut ("AEP")*, 564 U.S. 410, 421 (2011) (citation omitted). The court of appeals said no, concluding that, even if federal common law provided a claim of public nuisance, the pleaded *state-law* claim would not "require resolution of a substantial question of federal law," and thus federal jurisdiction was lacking under *Grable & Sons Metal Products, Inc. v. Darue Engineering and Manufacturing*, 545 U.S. 308 (2005). Pet. App. 12a. By focusing on whether the state-law claim *incorporated* federal law, the Ninth Circuit failed to recognize that state law cannot apply here at all. It reasoned that the Clean Air Act is so comprehensive

that it displaces any federal common law—*yet may still leave room for state courts to fashion their own common law remedies*, with no avenue to remove to federal court. In so holding, it confused the availability of federal causes of action or remedies (which is what displacement addresses) with whether a case is federal in nature because only federal law can govern the alleged claims. These are two distinct questions under this Court's precedents. *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301, 307, 313-16 (1947).

Unless this Court acts now to answer the underlying question of federal jurisdiction, this divide will only get worse. Respondents' suits were one of 14 that governmental plaintiffs filed between 2017 and 2018. And there are at least six more suits working their way through the federal courts. Without this Court's immediate intervention, questions of tort liability for global climate change will be decided by federal courts in some instances, and, in others, by state courts that are being asked to apply different local laws to address an international problem. This Court has granted certiorari in a variety of cases in an interlocutory procedural posture. It should grant certiorari here to address an important jurisdictional question: whether federal courts have jurisdiction over suits that seek to address global climate change and develop appropriate solutions for them.

II. The Ninth Circuit erred by failing to recognize that federal common law provides a basis for federal jurisdiction and removal in this case. After expressing uncertainty as to whether federal common law applied at all, it suggested that (1) federal common law would be displaced by the Clean Air Act anyway, and (2) in light of that displacement, a state-law nuisance claim remained viable. Pet. App. 13a-14a. But respondents'

allegations are classic claims of transboundary pollution—the very sort of interstate claims for which this Court has unflinchingly held that federal common law must govern.

The court of appeals was also wrong about the effect of displacement. Holding that the Clean Air Act displaces the federal common law that would otherwise govern respondents' claims would only *strengthen* the case for federal jurisdiction. The reason federal common law governs interstate disputes is that applying a single state's law to interstate claims is antithetical to our constitutional structure, which gives federal courts jurisdiction over disputes crossing state lines. That is no less true when a federal common law remedy is displaced by statute. A congressional decision to displace federal common law in favor of a comprehensive federal regulatory scheme is not a grant of permission to 50 state courts to write their own common-law rules. Rather, statutory displacement means that Congress has occupied the field, and a plaintiff is left with only those causes of action or remedies (if any) that Congress expressly prescribes. And whatever those remedies, any claim in this area can only be a federal one.

ARGUMENT

I. This Court should grant certiorari now to consider whether federal common law allows claims of interstate pollution and nuisance to be removed to federal court.

"There is no federal *general* common law," *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (emphasis added), but federal courts may "fashion federal law" in limited areas "where federal rights are concerned." *Illinois v. City of Milwaukee (Milwaukee I)*, 406 U.S. 91,

103 (1972) (citation omitted). The air and water that cross state lines implicate just such federal rights: "When we deal with air and water in their ambient or interstate aspects, there is a federal common law." *Id.* (citing *Texas v. Pankey*, 441 F.2d 236 (10th Cir. 1971)); *accord AEP*, 564 U.S. at 421 (citation omitted). "Environmental protection" is, after all, "an area 'within national legislative power,'" and thus, it is appropriate for federal courts to "fill in 'statutory interstices,' and, if necessary, even 'fashion federal law.'" *AEP*, 564 U.S. at 421 (citation omitted). By contrast, allowing states to apply their own varying common-law rules to environmental concerns crossing state lines would mean "more conflicting disputes, increasing assertions and proliferating contentions" about the standards for adjudging claims of "improper impairment." *Milwaukee I*, 406 U.S. at 107 n.9 (quoting *Pankey*, 441 F.2d at 241).

Because of the "uniquely federal interests" at stake in claims of interstate pollution, "our federal system does not permit the controversy to be resolved under state law," as the "interstate or international nature of the controversy makes it inappropriate for state law to control." *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 & n.13 (1981); *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 855 (9th Cir. 2012) ("[F]ederal common law can apply to transboundary pollution suits. Most often . . . those suits are founded on a theory of public nuisance."). And where, as here, a claim falls within an area that is exclusively federal in nature, the case falls within federal jurisdiction. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 850, 852 (1985) ("Federal common law as articulated in rules that are fash-

ioned by court decisions are 'laws' as that term is used in § 1331."); Pet. 21-22.

The Ninth Circuit's holding—that claims nominally based on state law cannot be removed to federal court—will invite fragmentation in an area where a unified federal approach is essential: the very problem that federal common law is meant to avoid. If the decision is left to stand, and to be followed by other courts, there will no longer be a federal common law for "air . . . in [its] ambient or interstate aspects," but rather a patchwork of divergent judge-made local laws. Governmental plaintiffs like respondents here have brought a flurry of lawsuits claiming virtually the same thing—that petitioners are responsible for interstate and international emissions that have harmed the plaintiff states, counties, or cities. Instead of having a "uniform standard" of federal common law to address these claims of "improper impairment by sources outside [of the localities'] domain," *Milwaukee I*, 406 U.S. at 107 n.9 (citation omitted), environmental harm will be addressed by 50 state courts applying remedies provided by 50 sets of state laws. That is hardly appropriate for an issue that requires a uniform approach under our constitutional structure, which commits disputes that are interstate in nature to federal law.

This Court should intervene now and make clear that these cases must proceed in federal court. Neither petitioners nor the state courts should be put through the process of hashing out the content of 50 state-law rules. This Court can spare them that unnecessary task by holding, *now*, that these cases are federal in character and belong in federal court.

A. Courts are uncertain about whether federal common law or state law governs climate change cases involving global emissions, and that uncertainty will only get worse if this Court fails to consider the question now.

In 2017 and 2018, 13 state and local governments, including respondents, filed lawsuits in their respective home state courts against petitioners, alleging that petitioners created both a public and a private nuisance under state law through their "production, marketing, and sale of fossil fuels."[2] C.A. E.R. 160 ¶ 94(c). The alleged conduct is international and interstate in scope. Here, respondents allege that the fossil fuels traceable to petitioners cause, or at least contribute to, a rise in the sea level induced by global warming. C.A. E.R. 161 ¶ 94(e)-(f). Respondents seek to impose liability for fossil fuels consumed "worldwide from the mid Nineteenth

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[2] *Rhode Island v. Chevron Corp.*, No. PC-2018-4716 (R.I. Super. Ct. July 2, 2018); *King Cty. v. BP p.l.c.*, No. 18-2-11859-0 (Wash. Super. Ct. May 9, 2018); *Bd. of Cty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, No. 2018CV030349 (Colo. Dist. Ct. Apr. 17, 2018) (on behalf of Boulder County, San Miguel County, and the City of Boulder); *City of Richmond v. Chevron Corp.*, No. C18-00055 (Cal. Super. Ct. Jan. 22, 2018); *Mayor & City Council of Balt. v. BP p.l.c.*, No. 24-C-18-004219 (Md. Cir. Ct. July 20, 2018); *City of Imperial Beach v. Chevron Corp.*, No. C17-01227 (Cal. Super. Ct. July 17, 2017); *Cty. of Marin v. Chevron Corp.*, No. CIV1702586 (Cal. Super. Ct. July 17, 2017); *Cty. of San Mateo v. Chevron Corp.*, No. 17CIV03222 (Cal. Super. Ct. July 17, 2017); *City of Santa Cruz v. Chevron Corp.*, No. 17CV03243 (Cal. Super. Ct. Dec. 20, 2017); *Cty. of Santa Cruz v. Chevron Corp.*, No. 17CV03242 (Cal. Super. Ct. Dec. 20, 2017); *Cal. ex rel. Herrera v. BP p.l.c.*, No. CGC-17-561370 (Cal. Super. Ct. Sept. 19, 2017) (San Francisco); *Cal. ex rel. Oakland City Att'y v. BP p.l.c.*, No. RG17875889 (Cal. Super. Ct. Sept. 19, 2017) (Oakland).

Century to present," particularly for "the usage of . . . fuels [that] has accumulated in the atmosphere since 1980." C.A. E.R. 160 ¶ 94(b)-(c), E.R. 297. Respondents do not (and could not) assert that the emissions occurred exclusively or even substantially within their municipal borders. Rather, a defendant's connection to the locality usually consists of little more than a retail presence, and perhaps a refinery or a terminal—operations that are not alleged to have any significant effect on global warming at all. *See, e.g.*, C.A. E.R. 138-141 ¶¶ 32-37. Governmental plaintiffs like respondents seek to tie petitioners to the plaintiffs' locales by pointing to the injuries allegedly caused by global emissions from fossil fuels—specifically, the use and combustion of those fuels. Put simply, respondents claim that a global problem is a local nuisance.

Petitioners removed to federal court because the international and interstate nature of the governmental plaintiffs' claims meant that any common-law rule can only be federal in nature. But courts are splintered on whether federal common law applies. Some federal courts addressing the issue and exercising federal jurisdiction, including the district court here, have determined that tort claims like petitioners' are "exactly the type of 'transboundary pollution suit' to which federal common law should apply." *City of N.Y. v. BP P.L.C.*, 325 F. Supp. 3d 466, 471 (S.D.N.Y. 2018) (citation omitted), *appeal docketed*, No. 18-2188 (2d Cir. July 26, 2018); Pet App. 51a. These courts reason that, however a particular plaintiff's claims are framed, it is ultimately "seeking damages for global-warming related injuries resulting from greenhouse gas emissions, and not only the production of . . . fossil fuels." *City of N.Y.*, 325 F. Supp. 3d at 471-72. And because these

claims are "ultimately based on the 'transboundary' emission of greenhouse gases," courts applying federal law have determined that the claims should be decided "under federal common law and require a uniform standard of decision." *Id.* at 472.

Other courts have remanded cases like this one, offering a variety of reasons for doing so. At least two courts have questioned whether, in the words of the court of appeals here, "there is a federal common law of public nuisance relating to interstate pollution." Pet. App. 13a; *Bd. of Cty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.), Inc.*, 405 F. Supp. 3d 947, 962 (D. Colo. 2019) (application of federal common law is "questionable and not settled under controlling law"), *aff'd in part, appeal dismissed in part*, 965 F.3d 792 (10th Cir. 2020), *petition for cert. pending*, No. 20-783 (filed Dec. 4, 2020). Instead of addressing whether federal common law applies, these courts focus on whether the complaints overtly make federal policies an ingredient in the claims, such that federal jurisdiction is appropriate under *Grable*. By focusing only on the importance of the federal interests in "energy policy, environmental protection, and foreign affairs," *Suncor*, 405 F. Supp. 3d at 957, and not the role of federal common law, these courts provide an opening for governmental plaintiffs to plead around federal law. *E.g.*, Pet. App. 13a-14a. And despite this Court's holding in *AEP*, one court has gone so far as to conclude that federal common law governing interstate pollution has been "displaced" by the Clean Air Act; that it thus "no longer exists"; and that state law fills the gap. *Cty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 937 (N.D. Cal. 2018), *aff'd in part, appeal dismissed in part*, 960

F.3d 586 (9th Cir. 2020), *petition for cert. pending*, No. 20-884 (filed Dec. 30, 2020).

Federal courts are thus left with no clear direction on whether federal common law or the individual laws of the 50 states should govern what are, at bottom, claims of interstate and international pollution. And courts need guidance: at least one district court has stayed its proceedings for further clarity on whether federal common law applies to claims like respondents'. *See King Cty. v. BP P.L.C.*, No. 18-cv-758, ECF No. 138 (W.D. Wash. Oct. 17, 2018).

The divide will only get worse. In the last two years, at least six governmental entities have filed similar lawsuits that have been removed to federal court. Two are now on appeal, and the others have remand motions under submission. Order Granting Motion to Remand, *Cty. of Maui v. Sunoco LP*, No. 20-cv-470 (D. Haw. Feb. 12, 2021), ECF No. 99, *appeal docketed*, No. 21-15318 (9th Cir. Feb. 23, 2021); Order Granting Motion to Remand, *City & Cty. of Honolulu v. Sunoco LP*, No. 20-cv-163 (D. Haw. Feb. 12, 2021), ECF No. 128, *appeal docketed*, No. 21-15313 (9th Cir. Feb. 23, 2021); *Minnesota v. Am. Petroleum Institute*, No. 20-cv-1636 (D. Minn.); *City of Charleston v. Brabham Oil Co.*, No. 20-cv-3579 (D.S.C.); *City of Hoboken v. Exxon Mobil Corp.*, No. 20-cv-14243 (D.N.J.); *Delaware v. BP Am., Inc.*, No. 20-cv-1429 (D. Del.). The trend is likely to continue,[3] especially within the Ninth Circuit, whose rejection of federal jurisdiction in this case is likely to prompt more filings in the many state courts within that circuit.

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[3] New cases continue to be filed. *E.g.*, *City of Annapolis v. BP PLC*, No. C-02-CV-21-000250 (Md. Cir. Ct. filed Feb. 22, 2021).

Unless this Court intervenes and grants certiorari to address whether claims of alleged harm caused by the effects of global emissions are subject to federal common law (and thus removable to federal court), how these claims will be resolved may be left entirely at the mercy of the district court to which a case is removed, especially if there is no other basis for removal. Some courts will retain federal jurisdiction based on the unique federal interests that this Court recognized in *AEP* and *Milwaukee I*. Others will remand the cases back to the original state court, leaving claims of interstate and international pollution to be decided by the laws of a single state. Unless this Court takes *this* opportunity to grant review, the inconsistency will persist.

B. The question presented should be resolved now, before—not after—this case and others make their way through the state courts.

The federal-versus-state issue is squarely presented in this case. Without review by this Court, the federal case is over; the litigation would then proceed through the three levels of the state judiciary—pointlessly, if petitioners are right about the jurisdictional question presented. This Court has regularly granted review of appellate decisions ordering a case back to state court. It should do the same here.

This Court has often granted certiorari to answer questions of federal jurisdiction presented in cases in a similar posture, *i.e.*, after the district court finds federal jurisdiction but the court of appeals orders the case remanded to state court. *E.g.*, *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1567

(2016) (whether section 27 of the Exchange Act applies only to those claims that would satisfy the "arising under" standard of the federal question statute); *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 4-5 (2003) (whether state-law usury claims against a national bank are completely preempted by the National Bank Act, such that removal is appropriate); *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 693 (2003) (whether the Fair Labor Standards Act bars removal of a state court action to federal court); *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347-48 (1999) (whether service of process is required to start the 30-day removal period under 28 U.S.C. § 1446(b)); *Am. Nat'l Red Cross v. S.G.*, 505 U.S. 247, 254, 259 (1992) (whether the "sue or be sued" provision in the Red Cross's charter confers a basis for federal jurisdiction). That posture presents the jurisdictional question squarely, because the answer determines whether the case will proceed in federal or state court. As in those cases, the petition here presents an excellent vehicle for considering the jurisdictional question presented.

In theory, in any one of those cases, this Court could have waited for the case to be litigated all the way up through the state court system. That is not what the Court did. Rather, in case after case, it answered the key question—state or federal court? It should do the same here.

II. The Ninth Circuit's decision is contrary to this Court's treatment of interstate pollution and nuisance claims.

The court of appeals determined that the district court should have remanded respondents' suits back to

California state court because the suits implicated only federal policies, not a "substantial federal issue." Pet. App. 14a. In so holding, the Ninth Circuit concluded that the Clean Air Act displaced federal public nuisance claims based on emissions contributing to global warming. Pet. App. 13a. The Ninth Circuit therefore treated these claims as pure state-law claims.

That determination was wrong for two reasons. First, notwithstanding the Ninth Circuit's equivocation, the only body of law that governs nuisance claims based on interstate pollution is federal law. Second, even if the court of appeals were correct in observing that the Clean Air Act displaces federal common law claims of nuisance in this case, that does not mean respondents' suits lost their federal character and could proceed under state law. Displacement means that federal common law provides neither a remedy nor a cause of action, but it does not mean that plaintiffs are free to litigate under state law. In other words, displacement addresses the merits of a claim; it does not surrender jurisdiction to consider the claim.

A. Climate change is an international and interstate phenomenon. As alleged by respondents here, climate change requires a confluence of different events by different actors to occur all around the world. *See* Pet. App. 29a (noting allegation that petitioners are "collectively responsible for over eleven percent of all carbon dioxide and methane pollution that has accumulated in the atmosphere since the Industrial Revolution"); *see also City of N.Y.*, 325 F. Supp. 3d at 472. The emissions at the center of respondents' suits are the subject of international treaties and a host of federal laws. Pet. 15-18. Respondents' claims are thus not only about "air and water in their ambient or inter-

state aspects," a quality that "undoubtedly" calls for the application of federal common law, *AEP*, 564 U.S. at 421 (citation omitted); *Milwaukee I*, 406 U.S. at 103; they also implicate foreign policy and the United States' sovereign interests, which, too, call out for federal common law. *Tex. Indus.*, 451 U.S. at 641 (identifying instances where "our federal system does not permit [a] controversy to be resolved under state law, . . . because the interstate or international nature of the controversy makes it inappropriate for state law to control").

The state and local governments bringing climate change suits like respondents' can hardly be said to have a unique geographic tie to the events giving rise to *global* climate change. These plaintiffs may allege that some commercial activity occurs within their jurisdictions, but that activity is not the basis of their claims, which are by no means local. Moreover, that limited activity hardly justifies allowing the law of one state to decide a sweeping claim concerning emissions that cross interstate and international lines. And none of the plaintiffs alleges that emissions in their particular locality caused the alleged harms of *global* warming. They could not credibly do so; as this Court explained in *AEP*, "emissions in New Jersey may contribute no more to flooding in New York than emissions in China." 564 U.S. at 422.

Thus, a patchwork of state nuisance laws governing largely out-of-state emissions would only hinder efforts to address climate change; this Court has recognized that state nuisance laws are poor apparatuses for "regulat[ing] the conduct of out-of-state sources." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 495 (1987); *id.* at 495-96 (noting that the "[a]pplication of an affected

State's law to an out-of-state source also would undermine the important goals of efficiency and predictability in the [Clean Water Act's] permit system"); *see also* Jonathan H. Adler, *A Tale of Two Climate Cases*, 121 Yale L.J. Online 109, 112 (2011) ("[T]he application of variable state standards to matters of a global, interjurisdictional concern could further frustrate the development of a coherent climate change policy.").

Respondents will doubtless claim that there is no basis for applying federal common law because their claims are not about transboundary pollution, but rather about how fossil fuels were marketed and promoted to the public. But their claim is one of public nuisance, *i.e.*, harm to the enjoyment of life or property by a community at large. *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 604 (Cal. 1997). As the district court aptly observed, harm is not alleged to occur because of the marketing and promotion of oil and natural gas products. Rather, respondents here conceded that the promotion is "merely a 'plus factor,'" and the real cause of the harm, as alleged, is the *production and use* of fossil fuels. Pet. App. 32a; *see also* Pet. App. 47a ("Plaintiffs allege that the combustion (by others) of fossil fuels produced by defendants has increased atmospheric levels of carbon dioxide . . . ."); C.A. E.R. 59 ¶ 3 (alleging that "[m]ost of the carbon dioxide now in the atmosphere as a result of combustion of Defendants' fossil fuels is likely attributable to their recent production").

Leaving claims of global and interstate emissions to be decided by disparate state laws on public nuisance will lead to fragmentation of judicial decisionmaking that will hamper an effective federal response to climate change. That fragmentation is inevitable given

that public nuisance is a longstanding but amorphous cause of action, "often vague and indeterminate." *City of Milwaukee v. Illinois ("Milwaukee II")*, 451 U.S. 304, 317 (1981).

Even if every state were to follow a uniform standard of public nuisance—which is extremely unlikely—state courts can still disagree as to what the articulated standard requires, and how to account for the State's sovereign interests. As a result, if state courts were to rely on "the vagaries of public nuisance doctrine" to decide cases involving interstate emissions, "it would be increasingly difficult for anyone to determine what standards govern." *North Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 298 (4th Cir. 2010).

And those courts would be charged with implementing remedies that would have national and international consequences, with only the limited toolbox of a state court applying state law; that would, in turn, leave state courts in the unenviable position of serving as global environmental regulators. Phil Goldberg et al., *The Liability Engine That Could Not: Why the Decades-Long Litigation Pursuit of Natural Resource Suppliers Should Grind to a Halt*, 12 J.L. Econ. & Pol'y 47, 74 (2016) (explaining that courts using public nuisance laws "to address risks associated with natural resources" would "effectively be regulating how these resources can be extracted and used," and that, "courts do not have the tools to do this job"). "Energy policy cannot be set, and the environment cannot prosper, in this way." *Cooper*, 615 F.3d at 298.

B. The Ninth Circuit erred in concluding that, because the Clean Air Act displaced the federal common

law that applies to respondents' nuisance claims, those claims could not justify removal jurisdiction. Pet. App. 13a-14a. In so holding, the court of appeals conflated two distinct inquiries—(1) whether federal common law governs plaintiffs' claims to the exclusion of state law, and (2) whether a federal statute displaces any causes of action or remedies that might have been available under federal common law.

When a federal court concludes that a claim is governed only by federal common law, that conclusion leaves no room for the application of state law. *Milwaukee II*, 451 U.S. at 313 n.7 ("[I]f federal common law exists, it is because state law cannot be used."). In those cases, federal common law applies because the dispute is of such an international and interstate nature that a single state's law is incapable of fairly or adequately deciding it. *Tex. Indus.*, 451 U.S. at 641 (federal common law applies where "our federal system does not permit [a] controversy to be resolved under state law" because of its "interstate or international nature"); *Milwaukee I*, 406 U.S. at 107 n.9 (observing that the application of state law to interstate environmental disputes would lead to "more conflicting disputes, increasing assertions and proliferating contentions" about the governing standards (quoting *Pankey*, 441 F.2d at 241)).

Despite the Ninth Circuit's suggestion to the contrary, Pet. App. 13a, statutory displacement does not change the federal character of respondents' claims. Even if the Ninth Circuit were correct in concluding that the federal common law is displaced by the Clean Air Act in this case, that displacement does not extinguish federal jurisdiction. This Court has always recognized that the question whether subject matter is ex-

clusively federal is *distinct* from whether particular federal causes of action or remedies are available for particular plaintiffs to pursue. *E.g.*, *Standard Oil*, 332 U.S. at 307, 313-16. Even if the answer to the second question is no, the case retains its federal character. *See id.*; *AEP*, 564 U.S. at 422 (noting that the fact that "a subject is meet for federal law governance . . . does not necessarily mean that federal courts should create the controlling law"). While federal common law must always yield to Congress's express statutory intent, as it is for "Congress . . . to articulate the appropriate standards to be applied as a matter of federal law," *Milwaukee II*, 451 U.S. at 317, it does not follow that displacement requires yielding to *state law*, unless Congress so directs.

When a federal statute displaces federal common law, it merely eliminates the causes of action or remedies that might have been available under the common law—it does not permit state-law claims into an area that is exclusively federal in character. In *AEP*, this Court explained that the scope of the displacement was determined by the "reach of remedial provisions" available in the displacing statute. 564 U.S. at 425 (citing *Cty. of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 236, 237-39 (1985)). Similarly, in *Milwaukee II*, this Court observed that Congress's changes to the Clean Water Act meant "no federal common-law remedy was available." 451 U.S. at 332. The courts of appeals have likewise understood statutory displacement as the displacement of causes of action or remedies, not of federal jurisdiction. *E.g.*, *Kivalina*, 696 F.3d at 856 (displacement means federal common law "does not provide a remedy"); *id.* at 857 ("displacement of a federal common law right of action means displacement of

remedies"); *Illinois v. Outboard Marine Corp.*, 680 F.2d 473, 476 (7th Cir. 1982) (considering whether amendments to the Federal Water Pollution Control Act "displaced the federal common law remedy for nuisances resulting from the discharge of pollutants"); *Cleveland v. Beltman N. Am. Co.*, 30 F.3d 373, 381 (2d Cir. 1994) (noting that, due to the Carmack Amendment, "a federal common law cause of action—even assuming such exists—is displaced by the Act that has established those remedies Congress deems appropriate in the field").

Displacement means that a plaintiff is left with only the statutory causes of action or remedies that Congress has prescribed in the statutory and regulatory scheme that it has selected for the field. *See Milwaukee II*, 451 U.S. at 324 ("The question is whether the field has been occupied, not whether it has been occupied in a particular manner."). When a state law claim is impermissible because of the federal nature of the interests at stake, and federal common law is displaced by a federal statute, the case continues to arise under federal law and establish federal jurisdiction.

The Ninth Circuit's version of displacement is unrecognizable, not just unfaithful to this Court's cases. The court thought that (1) a federal statute does not specifically address an interstate problem that could have been addressed by federal common law, and thus (2) state law causes of action should fill the gap, and jurisdiction should be returned back to the state courts. That reasoning looks nothing like displacement by Congress; it is replacement of Congress—by state courts. *See Standard Oil*, 332 U.S. at 316 ("[E]xercise of judicial power to establish the new liability not only would be intruding within a field properly within Con-

gress's control and as to a matter concerning which it has seen fit to take no action."). After all, the ill-fitting and inadequate nature of state law to address an interstate problem is what justifies the invocation of federal common law in the first place. *Tex. Indus.*, 451 U.S. at 641; *Milwaukee I*, 406 U.S. at 107 n.9.

* * * * *

Plaintiffs' claims are disruptive because they ask judges—state judges—to take over climate policy from the national legislature. The Ninth Circuit's reasoning is even more disturbing: it treats Congress's action, precluding federal district judges from formulating federal common law in this area, as permitting 50 state courts' judges to do the same thing. That reasoning cannot stand; the Court should act to keep this case, and those like it, in federal court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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