No. 20-1089

IN THE
Supreme Court of the United States

CHEVRON CORPORATION, *et al.*,

Petitioners,

v.

CITY OF OAKLAND, *et al.*,

Respondents.

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

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

BARBARA J. PARKER
MARIA BEE
ZOE M. SAVITSKY
MALIA MCPHERSON
CITY OF OAKLAND
One Frank Ogawa Plaza, 6th Fl.
Oakland, CA 94612

Counsel for the People of the State of California and City of Oakland

DENNIS J. HERRERA,
RONALD P. FLYNN
YVONNE R. MERÉ
MATTHEW D. GOLDBERG
ROBB W. KAPLA
CITY AND COUNTY OF SAN FRANCISCO
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102

Counsel for the People of the State of California and City & County of San Francisco

VICTOR M. SHER
Counsel of Record
MATTHEW K. EDLING
MICHAEL BURGER
MARTIN D. QUIÑONES
KATIE H. JONES
QUENTIN C. KARPILOW
SHER EDLING, LLP
100 Montgomery St., Ste. 1410
San Francisco, CA 94104
(628) 231-2500
vic@sheredling.com

MICHAEL RUBIN
CORINNE JOHNSON
BARBARA J. CHISHOLM
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108

Counsel for the People of the State of California, City of Oakland, and City & County of San Francisco

QUESTIONS PRESENTED

I. Whether a California state law public nuisance claim alleging wrongful and deceptive promotion of hazardous consumer goods "arises under" a congressionally displaced body of federal common law regarding interstate air pollution for purposes of removal jurisdiction.

II. Whether respondents waived their right to appeal an erroneously denied remand motion by filing an amended complaint to conform to that erroneous ruling while expressly preserving their appellate rights, and then opposing petitioners' motion to dismiss that amended complaint.

TABLE OF CONTENTS

INTRODUCTION 1

STATEMENT OF THE CASE 4

A. Background 4

B. Proceedings Below 5

REASONS FOR DENYING THE PETITION 7

I. No federal common law "governs" the People's claims. 7

II. Petitioners' federal-common-law theory of removal does not warrant review. 12

1. The Ninth Circuit's application of the well-pleaded complaint rule does not implicate any circuit split. 13

2. The Ninth Circuit correctly applied this Court's precedent. 18

III. The Ninth Circuit's application of *Caterpillar* does not warrant review. 26

IV. The Questions Presented have minimal practical importance, and this petition is a poor vehicle to review them. 33

CONCLUSION 35

TABLE OF AUTHORITIES

Page

CASES

Albert v. Smith's Food & Drug Centers, Inc.,
356 F.3d 1242 (10th Cir. 2004) 28
Altria Grp., Inc. v. Good,
555 U.S. 70 (2008) 9
Am. Elec. Power Co. v. Connecticut,
564 U.S. 410 (2011) .....*passim*
Armstrong v. Exceptional Child Ctr., Inc.,
575 U.S. 320 (2015) 22
Atherton v. F.D.I.C.,
519 U.S. 213 (1997) 25
Banco Nacional de Cuba v. Sabbatino,
376 U.S. 398 (1964) 21
Barbara v. N.Y. Stock Exch., Inc.,
99 F.3d 49 (2d Cir. 1996)..... 29
Battle v. Seibels Bruce Ins. Co.,
288 F.3d 596 (4th Cir. 2002) 16
Bd. of Cty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.,
405 F. Supp. 3d 947 (D. Colo. 2019)..... 18
Beneficial Nat'l Bank v. Anderson,
539 U.S. 1 (2003) 13, 20
Bernstein v. Lind-Waldock & Co.,
738 F.2d 179 (7th Cir. 1984) 29
Bond v. United States,
572 U.S. 844 (2014) 33
Brough v. United Steelworkers of Am., AFL-CIO,
437 F.2d 748 (1st Cir. 1971)..... 28
California v. ARC Am. Corp.,
490 U.S. 93 (1989) 9, 11
Caterpillar Inc. v. Lewis,
519 U.S. 61 (1996) .....*passim*

TABLE OF AUTHORITIES—continued

Page

Caterpillar Inc. v. Williams,
482 U.S. 386 (1987) 12, 13, 14
Caudill v. Blue Cross & Blue Shield of N.C.,
999 F.2d 74 (4th Cir. 1993) 17
Chamber of Com. of U.S. v. Whiting,
563 U.S. 582 (2011) 11
Cipollone v. Liggett Grp., Inc.,
505 U.S. 504 (1992) 22
Citizens for Odor Nuisance Abatement v. City of San Diego,
8 Cal.App.5th 350 (2017)..... 9
City of Milwaukee v. Illinois & Michigan,
451 U.S. 304 (1981) 21, 25, 26
City of Modesto Redev. Agency v. Superior Ct.,
119 Cal.App.4th 28 (2004)..... 8
City of New York v. Chevron Corp.,
993 F.3d 81 (2d Cir. 2021)..... 14, 15, 16
Cty. of San Mateo v. Chevron Corp.,
294 F. Supp. 3d 934 (N.D. Cal. 2018) 18, 20
Cty. of Santa Clara v. Atl. Richfield Co.,
137 Cal.App.4th 292 (2006)..... 5, 8
Earth Island Institute v. Crystal Geyser Water Co.,
__ F. Supp. 3d __, 2021 WL 684961 (N.D. Cal. Feb. 23, 2021)..... 18
Ellingsworth v. Vermeer Mfg. Co.,
949 F.3d 1097 (8th Cir. 2020) 30
Empire Healthchoice Assurance, Inc. v. McVeigh,
547 U.S. 677 (2006) 17
Fla. Lime & Avocado Growers, Inc. v. Paul,
373 U.S. 132 (1963) 9
Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.,
463 U.S. 1 (1983) 12, 23

TABLE OF AUTHORITIES—continued

Page

Georgia v. Tenn. Copper Co.,
240 U.S. 650 (1916) 10
Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.,
545 U.S. 308 (2005) .....*passim*
Grupo Dataflux v. Atlas Glob. Grp., L.P.,
541 U.S. 567 (2004) 33
Gunn v. Minton,
568 U.S. 251 (2013) 2, 12, 14, 15
Hinderlider v. La Plata River & Cherry Creek Ditch Co.,
304 U.S. 92 (1938) 21
Illinois v. City of Milwaukee, Wis.,
406 U.S. 91 (1972) 10
In re Otter Tail Power Co.,
116 F.3d 1207 (8th Cir. 1997) 16
Int'l Paper Co. v. Ouellette,
479 U.S. 481 (1987) .....*passim*
Kansas v. Colorado,
206 U.S. 46 (1907) 21
King v. Marriott Int'l Inc.,
337 F.3d 421 (4th Cir. 2003) 28
Kurns v. R.R. Friction Prods. Corp.,
565 U.S. 625 (2012) 21
Mayor & City Council of Baltimore v. BP P.L.C.,
388 F. Supp. 3d 538 (D. Md. 2019) 18
McKesson v. Doe,
141 S. Ct. 48 (2020) 34, 35
Merrell Dow Pharms. Inc. v. Thompson,
478 U.S. 804 (1986) 12
Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning,
136 S. Ct. 1562 (2016) 2, 3, 14, 22

TABLE OF AUTHORITIES—continued

Page

Miree v. DeKalb Cty., Ga.,
433 U.S. 25 (1977) 10, 11
Missouri v. Illinois,
180 U.S. 208 (1901) 10
Moffitt v. Residential Funding Co.,
604 F.3d 156 (4th Cir. 2010) 31, 33
Morgan Cty. War Mem'l Hosp. ex rel. Bd. of Directors of War Mem'l Hosp. v. Baker,
314 F. App'x 529 (4th Cir. 2008) 14, 22
Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians,
471 U.S. 845 (1985) 21
Negrón-Fuentes v. UPS Supply Chain, Sols.,
532 F.3d 1 (1st Cir. 2008) 27
New Jersey v. City of New York,
283 U.S. 473 (1931) 10
New Mexico ex rel. Balderas v. Monsanto Co.,
454 F. Supp. 3d 1132 (D.N.M. 2020) 18
Newton v. Capital Assurance Co.,
245 F.3d 1306 (11th Cir. 2001) 16
Nicodemus v. Union Pac. Corp.,
440 F.3d 1227 (10th Cir. 2006) 14, 19, 22
Nw. Airlines, Inc. v. Transp. Workers Union of Am., AFL-CIO,
451 U.S. 77 (1981) 25
O'Melveny & Myers v. F.D.I.C.,
512 U.S. 79 (1994) 10
Paros Props., LLC v. Colo. Cas. Ins. Co.,
835 F.3d 1264 (10th Cir. 2016) 30
People ex rel. Gallo v. Acuna,
14 Cal.4th 1090 (1997) 9, 10
People v. ConAgra Grocery Prods. Co.,
17 Cal.App.5th 51 (2017) 8, 9

TABLE OF AUTHORITIES—continued

Page
Provincial Gov't of Marinduque v. Placer Dome, Inc.,
582 F.3d 1083 (9th Cir. 2009) 14
Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.,
485 U.S. 495 (1988) 25
Quintero Cmty. Ass'n Inc. v. F.D.I.C.,
792 F.3d 1002 (8th Cir. 2015) 30
Republic of Philippines v. Marcos,
806 F.2d 344 (2d Cir. 1986)..... 16
Rhode Island v. Chevron Corp.,
393 F. Supp. 3d 142 (D.R.I. 2019)..... 18
Rodriguez v. F.D.I.C.,
140 S. Ct. 713 (2020) 10, 25
Sam L. Majors Jewelers v. ABX, Inc.,
117 F.3d 922 (5th Cir. 1997) 17
San Diego Gas & Elec. Co. v. Superior Ct.,
13 Cal.4th 893 (1996) 9
Sosa v. Alvarez-Machain,
542 U.S. 692 (2004) 21
Stewart v. U.S. Bancorp,
297 F.3d 953 (9th Cir. 2002) 6, 27, 32
Texas Indus., Inc. v. Radcliff Materials, Inc.,
451 U.S. 630 (1981) 21, 34
Torres v. S. Peru Copper Co.,
113 F.3d 540 (5th Cir. 1997) 16
Treiber & Straub, Inc. v. UPS, Inc.,
2005 WL 2108081 (E.D. Wis. Aug. 31, 2005)..... 16
Treiber & Straub, Inc. v. UPS, Inc.,
474 F.3d 379 (7th Cir. 2007) 15, 16
United States v. Standard Oil Co. of Cal.,
332 U.S. 301 (1947) 20
United States v. Swiss Am. Bank, Ltd.,
191 F.3d 30 (1st Cir. 1999)..... 20

TABLE OF AUTHORITIES—continued

Page

United States v. Swiss Am. Bank, Ltd.,
23 F. Supp. 2d 130 (D. Mass. 1998) 21
Va. Military Inst. v. United States,
508 U.S. 946 (1993) 35
Va. Uranium, Inc. v. Warren,
139 S. Ct. 1894 (2019) 11
Vaden v. Discover Bank,
556 U.S. 49 (2009) 12
Wallis v. Pan Am. Petroleum Corp.,
384 U.S. 63 (1966) 10
Waste Control Specialists, LLC v. Envirocare of Texas, Inc., 199 F.3d 781 (5th Cir. 2000)..... 28
Zschernig v. Miller,
389 U.S. 429 (1968) 11

STATUTES

28 U.S.C. § 1331 ..... 1, 6, 15, 18
28 U.S.C. § 1441(a) 1, 26, 31
Cal. Civ. Code §§ 3479, 3480, 3490..... 4, 10
Cal. Civ. Proc. Code § 731..... 4

OTHER AUTHORITIES

Restatement (Second) of Torts § 435..... 10
Restatement (Second) of Torts, §§ 826–31 10

INTRODUCTION

California's 150-year-old public nuisance statute authorizes city and county attorneys to bring representative public nuisance claims on behalf of the People of the State of California for the wrongful and deceptive promotion of consumer products. This case involves two such actions against five oil-and-gas companies. The People allege that those companies substantially contributed to the creation of a public nuisance affecting infrastructure in Oakland and San Francisco by conducting a decades-long campaign to discredit the science of global warming, misrepresent and conceal the dangers of fossil fuels, and downplay the catastrophic consequences of climate change—all for the purpose and with the effect of inflating the market for their products.

Applying settled legal principles, a unanimous Ninth Circuit panel (Ikuta, J.) rejected the companies' efforts to remove those state-law claims to federal court based on federal "arising-under" jurisdiction (28 U.S.C. §§ 1331, 1441(a)). The panel concluded that neither of "the two exceptions to the well-pleaded-complaint rule" applied: (1) the People's claims did not satisfy *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005), because they did not necessarily raise a substantial federal issue; and (2) those claims did not satisfy the complete-preemption doctrine, because they were not encompassed by a federal cause of action that Congress intended to be exclusive. Pet. App. 12a–16a.

Petitioners do not challenge either of those conclusions. Instead, they urge this Court to grant certiorari to create a third exception to the well-

pleaded complaint rule for cases in which federal common law purportedly "governs" the plaintiff's state-law claims but neither *Grable* nor complete preemption support removal. The Court should decline the invitation.

First, this Court could not even consider petitioners' proposed exception without creating an entirely new category of federal common law. Contrary to petitioners' mischaracterizations of the complaints and California law, the People seek neither to regulate emissions nor to set climate change policy, but simply to hold petitioners liable for conducting deceptive marketing tactics while knowingly misrepresenting the dangers of their products. The People's claims do not conflict with any uniquely federal interest, which federal common lawmaking demands. Instead, the claims fit squarely within the states' traditional authority to protect residents from the impacts of misleading marketing and related practices. Federalizing the People's claims would result in an unprecedented shift of lawmaking authority to federal judges.

Second, petitioners identify no circuit conflict that warrants review of their proposed third exception to the well-pleaded complaint rule. In *Grable*, this Court established a straightforward test for determining whether a state-law claim "arises under" federal law absent complete preemption. Petitioners rely on cases pre-dating *Grable*, when no "well-defined test" existed, *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1571 (2016), and the "canvas" of opinions "look[ed] like one that Jackson Pollock got to first," *Gunn v. Minton*, 568 U.S. 251, 258 (2013). *Grable* brought "order to this unruly doctrine," *Gunn*, 568 U.S. at 257, and appellate courts

have applied *Grable* to a range of federal issues since, including federal common law.

Third, the Ninth Circuit properly applied *Grable* to the facts of these cases, and petitioners offer no persuasive reason to return to the "muddled" pre-*Grable* era of jurisdictional uncertainty. *Manning*, 136 S. Ct. at 1571. Nor do they supply a principled basis for treating federal common law as anything more than an ordinary preemption defense that, under longstanding precedent, cannot create arising-under jurisdiction. Moreover, the Clean Air Act (CAA) displaced the body of federal common law that petitioners contend controls here. This Court has never held that *displaced* federal common law can render state-law claims removable, and long-settled precedent makes clear that it cannot. *See Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 488–89, 500 (1987); *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 423 (2011) (*AEP*).

As for petitioners' second Question Presented, the Ninth Circuit's fact-bound application of *Caterpillar Inc. v. Lewis*, 519 U.S. 61 (1996), is equally uncertworthy. The People did not waive their objections to removal by amending their complaints to conform to the district court's adverse remand ruling—as every circuit to consider analogous amendments has concluded. Nor did the panel hold that every case decided at the pleading stage must be remanded if the district court lacked jurisdiction at the time of removal. Instead, the panel appropriately declined to excuse the defects in petitioners' removal based on the particular circumstances of these cases, after considering the relevant *Caterpillar* factors.

Finally, these questions are of minimal practical importance. This Court's precedent already supplies clear answers to both, and petitioners' proposed departures from that precedent would affect at most a small number of cases. Even if the Court were inclined to create a new exception to the well-pleaded complaint rule or revisit its decision in *Caterpillar*, these cases would be a poor vehicle for doing so. The petition addresses only one potential ground for removal, and four other fully briefed grounds for removal await adjudication by the district court.

STATEMENT OF THE CASE

A. Background

City Attorneys for the City of Oakland and the City and County of San Francisco brought these two public nuisance actions in California state court under California's representative public nuisance law, on behalf of the People of the State of California. Cal. Civ. Code §§ 3479, 3480, 3490; Cal. Civ. Proc. Code § 731. The complaints allege that petitioners have, for at least thirty years, "engaged in large-scale, sophisticated advertising and public relations campaigns to promote pervasive fossil fuel usage and to portray fossil fuels as environmentally responsible and essential to human well-being," "even in the face of overwhelming scientific evidence that fossil fuels are altering the climate and that global warming has become an existential threat to modern life." CA9 Excerpts of Record (ER) 295, 362 (ECF 29). The People allege that petitioners' wrongful campaign "to deny and discredit the mainstream scientific consensus on global warming" was designed to expand the market for products petitioners knew were harmful. *Id.*

Under California's public nuisance statutes, the People must show that petitioners knowingly promoted and marketed their products for a use they knew was dangerous. *Cty. of Santa Clara v. Atl. Richfield Co.*, 137 Cal.App.4th 292, 309 (2006) ("Liability is not based merely on production of a product or failure to warn," but on "far more egregious" promotion activities akin "to instructing the purchaser to use the product in a hazardous manner"). Meeting that burden will entitle the People to an equitable abatement order requiring petitioners to ameliorate the public nuisance (*e.g.*, to reinforce local infrastructure to improve resiliency to rising sea levels). *See, e.g.*, ER 296–97, 331, 363–64, 398. The People's complaints do not seek to stop global warming by regulating or enjoining emissions, but to mitigate the local nuisance impacts through discrete abatement measures.

Although petitioners now acknowledge that fossil-fuel products "have led to global warming and ocean rise and will continue to do so," Pet. App. 31a, they asserted the exact opposite throughout most of the period covered by these lawsuits, despite knowing the truth. The principal liability issues in these cases are whether petitioners misled the public about that knowledge, and whether their misrepresentations substantially contributed to the creation of a public nuisance as defined by California law. To the extent federal law may come into play at all, it will only be in connection with a potential affirmative defense of ordinary preemption.

B. Proceedings Below

The People's state-court complaints each alleged a single claim under California's representative public

nuisance statute. After petitioners removed, the People timely moved to remand, but the district court ruled that their claim arose under federal law and could only be pursued as a federal-common-law claim. Pet. App. 56a. In compliance with *Stewart v. U.S. Bancorp*, 297 F.3d 953, 959 (9th Cir. 2002), the People amended their complaints "to conform to the Court's ruling" by adding a claim for public nuisance under federal common law, while "reserv[ing] all rights with respect to whether jurisdiction is proper in federal court." ER 63, 115, 134, 180. Shortly thereafter, the district court granted petitioners' Rule 12(b)(6) motions, concluding that although federal common law "governed" the People's claims, it provided no rights or remedies. Pet. App. 45a.

The Ninth Circuit rejected the district court's analysis and vacated the order denying remand, holding that the People's "state-law claim for public nuisance does not arise under federal law for purposes of 28 U.S.C. § 1331." Pet. App. 2a. The panel further held that the People had not waived their challenge to subject-matter jurisdiction by amending their complaints to conform to the district court's ruling while expressly preserving their appellate rights, and that considerations of finality, efficiency, and economy did not excuse the jurisdictional defect at the time of removal because the cases had been pending for "just over eight months" at the time of dismissal and "there had been no discovery." *Id.* 17a–18a, 22a. The court remanded for the district court to adjudicate other asserted grounds for removal that the district court had not yet addressed. *Id.* 22a–23a. Those alternative grounds for federal subject-matter jurisdiction remain pending.

REASONS FOR DENYING THE PETITION

I. No federal common law "governs" the People's claims.

1. Petitioners' first Question Presented rests upon the mistaken premise that the People's representative public nuisance claims seek to regulate cross-border air pollution. Petitioners argue that those claims "require a court to decide whether global fossil-fuel production and sales are 'unreasonable'—and thus tortious," which they assert can only be decided under the federal common law of "interstate and international pollution." Pet. 2, 4. That assertion misrepresents the allegations in the People's complaints, misunderstands the standard for liability under California's representative public nuisance statute, and mischaracterizes the available remedies.

The People's complaints charge that petitioners wrongfully "engaged in large-scale, sophisticated advertising and public relations campaigns" "to deny and discredit the mainstream scientific consensus on global warming, downplay the risks of global warming," and "mislea[d] the public about global warming"—even as petitioners' internal research confirmed that climate change was an inevitable and growing danger and that their products are a primary cause of that danger. ER 295, 315, 420–21, 439. The People's claims invoke core state responsibilities rather than uniquely federal interests. No federal common law has ever encompassed claims of wrongful promotion and deceptive business practices, which are within the states' traditional authority to regulate—especially where, as here, the defendants' conduct poses severe harms to public health and

safety. Whatever application federal common law might have when a plaintiff seeks to impose liability for "interstate pollution," neither petitioners' emissions nor anyone else's are the claimed basis for liability here. Consequently, the Court could not reach petitioners' first Question Presented without creating a new category of federal common law, never before recognized, to "govern" the People's wrongful-promotion claims.

2. The People's representative public nuisance claims under California law do not rest on allegations that a defendant "simply fail[ed] to warn of a defective product" or engaged in the "manufacture and distribution" of a hazardous product. *People v. ConAgra Grocery Prods. Co.*, 17 Cal.App.5th 51, 84 (2017), *reh'g denied* (Dec. 6, 2017), *rev. denied* (Feb. 14, 2018), *cert. denied*, 139 S. Ct. 377 (2018). Rather, the People allege "affirmative promotion [of the product] for a use [petitioners] knew to be hazardous." *Id.*; *see also City of Modesto Redev. Agency v. Superior Ct.*, 119 Cal.App.4th 28, 37–43 (2004). That additional "affirmative conduct that assisted in the creation of a hazardous condition" is essential to the People's public nuisance claims. *Cty. of Santa Clara*, 137 Cal.App.4th at 309.

While the scope of an equitable abatement remedy may reflect the extent to which petitioners' wrongful conduct was a proximate cause of damage to local infrastructure, petitioners' *liability* in these cases rests upon proof that they conducted advertising and communications campaigns to promote the use of their products at levels they falsely claimed were safe and environmentally responsible, while deliberately concealing their risks. *See* ER 294–95, 315–23, 420–

21, 439–46; Pet. App. 12a. Remedying public nuisances and protecting consumers from deceptive business practices are core state responsibilities within the purview of state court systems. *See, e.g.*, *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989); *Altria Grp., Inc. v. Good*, 555 U.S. 70, 91 (2008) (state deceptive practices claims were not preempted by federal law); *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 150 (1963).

3. Adjudicating these cases under California law will not require courts to "balance" or "weigh[]" the value of fossil-fuel production against its harms. Pet. 2, 8, 10. Petitioners' contrary argument reflects their continuing mischaracterization of the People's complaints. While petitioners assert that the People must establish "*fossil-fuel production and sales* are 'unreasonable,'" Pet. 2 (emphasis added), the issue under California law is whether the *interference with a public right* caused by petitioners' wrongful promotion is "substantial and unreasonable," *People ex rel. Gallo v. Acuna*, 14 Cal.4th 1090, 1105 (1997); Cal. Civ. Code §§ 3479, 3480. Liability follows upon proof that petitioners' affirmative and deceptive conduct was a "substantial factor in bringing about" the nuisance. *ConAgra*, 17 Cal.App.5th at 101; *see, e.g.*, *Citizens for Odor Nuisance Abatement v. City of San Diego*, 8 Cal.App.5th 350, 359 (2017); Restatement (Second) of Torts § 435. To the extent any "balancing" is required, the court will balance the social utility of petitioners' tortious *deception* against its benefits. *See, e.g.*, *San Diego Gas & Elec. Co. v. Superior Ct.*, 13 Cal.4th 893, 938 (1996) (citing Restatement (Second) of Torts, §§ 826–31); *Acuna*, 14 Cal.4th at 1105.

4. The People's legal and factual allegations are qualitatively different from any this Court has held can give rise to federal common law. "The cases in which federal courts may engage in common lawmaking are few and far between." *Rodriguez v. F.D.I.C.*, 140 S. Ct. 713, 716 (2020). "[B]efore federal judges may claim a new area for common lawmaking, strict conditions must be satisfied," *id.* at 717, the most basic being a "specific," "concrete," and "significant conflict" between a uniquely federal interest and the use of state law, *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 88 (1994); *see also Miree v. DeKalb Cty., Ga.*, 433 U.S. 25, 31 (1977); *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 69–71 (1966).

In the nuisance context, the Court has recognized a federal common law only where a State plaintiff's cause of action had the purpose and effect of regulating releases of contaminants from a specific out-of-state source. *See Illinois v. City of Milwaukee, Wis.*, 406 U.S. 91, 107 (1972) (*Milwaukee I*); *New Jersey v. City of New York*, 283 U.S. 473, 477, 481–483 (1931); *Georgia v. Tenn. Copper Co.*, 240 U.S. 650 (1916); *Missouri v. Illinois*, 180 U.S. 208, 241–43 (1901); *see also Ouellette*, 479 U.S. at 488. The People's allegations here, the elements of a California public nuisance action, and the relief they seek—all of which sound in consumer and public deception—do not fit that mold.

The Ninth Circuit correctly held that petitioners have not "identif[ied] a legal issue" requiring federal adjudication that could satisfy *Grable*, and that petitioners' invocation of generic "federal interests" was insufficient to support removal jurisdiction. Pet. App. 13a. Yet, petitioners' arguments here rest on

their same "suggest[ion] that the [People's] state-law claim implicates a variety of 'federal interests,'" broadly construed. Pet. App. 13a. Even traditional conflict preemption analysis (which cannot support removal) does not countenance a "freewheeling judicial inquiry into whether a state statute is in tension with federal objectives," because "such an endeavor would undercut the principle that it is Congress rather than the courts that pre-empts state law." *Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582, 607 (2011) (cleaned up); *see, e.g.*, *Miree*, 433 U.S. at 29. "Invoking some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption of a state law." *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019).

Petitioners ignore those bedrock principles of federalism and separation of powers when they ask this Court to create a new category of federal common law encompassing the People's deception-based claims. Holding petitioners liable for knowing and deceitful corporate conduct does not implicate—much less conflict with—any uniquely federal interest. *See e.g.*, *California v. ARC Am. Corp.*, 490 U.S. at 101. Nor does combatting such conduct impermissibly "launch the State upon a prohibited voyage into a domain of exclusively federal competence." *Zschernig v. Miller*, 389 U.S. 429, 442 (1968) (Stewart, J., concurring). Petitioners urge the Court to conclude that arising-under jurisdiction applies to a public entity's state-law efforts "to regulate interstate and international greenhouse-gas emissions," Pet. 20, but the People's complaints do nothing of the kind.

II. Petitioners' federal-common-law theory of removal does not warrant review.

Even if the Court were inclined to create a new category of federal common law to encompass the People's deception-based claims, the Ninth Circuit's application of the well-pleaded complaint rule would not warrant review.

A case arises under federal law (and is therefore removable) "only when the plaintiff's statement of his own cause of action shows that it is based upon federal law." *Vaden v. Discover Bank*, 556 U.S. 49, 60 (2009) (brackets omitted). Federal "[j]urisdiction may not be sustained on a theory that the plaintiff has not advanced." *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 809 n.6 (1986). Nor can it rest on "a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case." *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 14 (1983). As masters of their complaints, plaintiffs "may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987).

This Court has recognized only two narrow exceptions to the well-pleaded complaint rule: (1) the "special and small category" of state-law actions that, under *Grable*, "necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities," *Gunn*, 568 U.S. at 258 (quotations omitted); and (2) cases that are

completely preempted by a federal statute that creates a cause of action that "Congress intended … to be exclusive," *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 9 n.5 (2003).

Petitioners do not challenge the Ninth Circuit's application of these two longstanding exceptions. Nor could they. The People's state-law complaints neither refer to nor require resolution of any federal issue, except as one of petitioners' defenses, which cannot provide jurisdiction. *See Williams*, 482 U.S. at 392. Nor are the People's claims encompassed by any federal cause of action, much less one intended to be exclusive.

Petitioners argue that the Ninth Circuit should have created "another path for removal" for claims "exclusively govern[ed]" by federal common law but *not* removable under *Grable* or as a matter of complete preemption. Pet. 14. No appellate court has recognized such an exception post-*Grable*. And no court has adopted petitioners' radical theory that a *congressionally displaced* body of federal common law can convert state-law claims into federal ones for purposes of removal jurisdiction.

1. The Ninth Circuit's application of the well-pleaded complaint rule does not implicate any circuit split.

Petitioners wrongly assert that the Ninth Circuit created a circuit split by failing to adopt their novel third "path for remov[ing]" state-law actions that are "exclusively governed by" federal common law. *See* Pet. 14, 23–27.

1. All but one of petitioners' appellate cases predate *Grable*'s synthesis of earlier jurisprudence for determining when state-law claims arise under

federal law in the absence of complete preemption. Before *Grable*, the standard was not "well-defined." *Manning*, 136 S. Ct. at 1571. In *Grable*, the Court "condens[ed] [its] prior cases" into a test that every circuit has since followed. *Gunn*, 568 U.S. at 258.

Lower courts have applied *Grable* in cases involving federal common law, approving or rejecting jurisdiction as appropriate. *See, e.g.*, *Provincial Gov't of Marinduque v. Placer Dome, Inc.*, 582 F.3d 1083, 1090–92 (9th Cir. 2009); *Nicodemus v. Union Pac. Corp.*, 440 F.3d 1227, 1235–36 (10th Cir. 2006); *Morgan Cty. War Mem'l Hosp. ex rel. Bd. of Directors of War Mem'l Hosp. v. Baker*, 314 F. App'x 529, 533, 535–36 (4th Cir. 2008). Except where a complaint necessarily raises a substantial and disputed issue of federal common law, and thus satisfies *Grable*, lower courts have uniformly treated the potential application of federal common law as simply raising an ordinary preemption defense, which is not a basis for removal and must instead "be addressed in the first instance by the state court in which [plaintiffs] filed their claims." *Williams*, 482 U.S. at 392, 398 n.13; *see also, e.g.*, *Provincial Gov't of Marinduque*, 582 F.3d at 1086, 1092 ("act of state doctrine of the federal common law" provided at most "defense to the [plaintiff's] claims" that "cannot support removal jurisdiction").

This distinction between arising-under jurisdiction and ordinary federal preemption is illustrated by *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021). There, the Second Circuit held that federal common law preempted state-law claims for public nuisance and trespass brought against several oil-and-gas companies. Because the City "filed suit in federal court in the first instance," the court

considered "the [defendant companies'] preemption defense on its own terms, not under the heightened standard unique to the removability inquiry." *Id.* at 94. The court emphasized, moreover, that its ordinary preemption analysis was *consistent* with the Ninth Circuit's decision here, as well as with "the fleet of [other] cases" holding that "anticipated defense[s]"—including those based on federal common law—could not "singlehandedly create federal-question jurisdiction under 28 U.S.C. § 1331 and the well-pleaded complaint rule." *Id.* The Second Circuit correctly recognized that removability demands a "heightened standard" compared to ordinary federal preemption, which (unlike complete preemption) cannot create arising-under jurisdiction. *Id.*[1]

Any perceived tension between petitioners' pre-*Grable* cases and the Ninth Circuit's analysis merely highlights *Grable*'s success at cleaning up an "unruly doctrine." *Gunn*, 568 U.S. at 258. And petitioners' only post-*Grable* case, *Treiber & Straub, Inc. v. UPS, Inc.*, 474 F.3d 379, 386–87 (7th Cir. 2007) (*Treiber II*), had nothing to do with removal, as the plaintiff sued in federal court and argued that its case arose under federal common law. *See Treiber & Straub, Inc. v.*

---

[1] The People do not concede that *City of New York* was correctly decided, but the ordinary preemption issue it addressed is not pertinent to this petition, which concerns removal jurisdiction. That case is also distinguishable because the claims before the Second Circuit did not rest on allegations of wrongful promotion, misrepresentation, or deception, but instead sought to hold the defendants "strict[ly] liab[le]" for the mere production and sale of fossil fuels. 993 F.3d at 93.

UPS, Inc., 2005 WL 2108081, at *1 (E.D. Wis. Aug. 31, 2005). *Treiber II* simply stands for the uncontroversial proposition that federal courts have jurisdiction over claims expressly pleaded in federal court under federal common law.[2]

2. Even if petitioners' pre-*Grable* appellate cases remained good law in their respective circuits, the results in those cases are fully consistent with the Ninth Circuit's holding here.

In all but two of those cases, the appellate courts applied a precursor of the *Grable* test, finding federal jurisdiction only because the state-law claims necessarily raised "a substantial question of federal law."[3] Here, the Ninth Circuit applied the controlling version of that test as set forth in *Grable* and concluded that the People's "state-law claim for public nuisance fails to raise a substantial federal question." Pet. App. 12a. Had the panel applied the framework from earlier cases, it would have reached the same conclusion. Petitioners' disagreement is with the Ninth Circuit's application of law to facts, not its articulation of governing legal principles.

---

[2] The Seventh Circuit, like the Second Circuit in *City of New York*, also understood that federal common law merely raises an ordinary preemption defense. *See Treiber II*, 474 F.3d at 386–87.

[3] *See Battle v. Seibels Bruce Ins. Co.*, 288 F.3d 596, 607–08 (4th Cir. 2002); *Newton v. Capital Assurance Co.*, 245 F.3d 1306, 1309 (11th Cir. 2001); *In re Otter Tail Power Co.*, 116 F.3d 1207, 1214 (8th Cir. 1997); *Torres v. S. Peru Copper Co.*, 113 F.3d 540, 543 (5th Cir. 1997); *Republic of Philippines v. Marcos*, 806 F.2d 344, 354 (2d Cir. 1986).

That leaves *Caudill v. Blue Cross & Blue Shield of N.C.*, 999 F.2d 74 (4th Cir. 1993), and *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922 (5th Cir. 1997). But *Caudill* was expressly abrogated by *Empire Healthchoice Assurance, Inc. v. McVeigh*, which held that federal common law did not provide "a basis for federal jurisdiction" over reimbursement claims related to certain health insurance plans. 547 U.S. 677, 690–93 (2006). And *Majors Jewelers* turned on two conditions plainly not present here: (1) the plaintiff had a "clearly established federal common law cause of action against air carriers for lost shipments" (the subject of its lawsuit), and (2) Congress affirmatively "preserv[ed]" that cause of action through the Airline Deregulation Act of 1978. 117 F.3d at 928. Petitioners identify no federal-common-law cause of action that gives the People a right to sue petitioners for the deceptive and wrongful promotion at issue here; and Congress displaced the one body of federal common law that, according to petitioners, governs the People's claims. *Compare* Pet. 20 *with AEP*, 564 U.S. at 423.

3. Even if petitioners' cases could be read as acknowledging a third path for removing state-law claims governed by federal common law, there would still be no circuit split because none of them based jurisdiction on a *congressionally displaced* body of federal common law.

As petitioners note, the CAA displaced "the federal common law governing greenhouse-gas emissions," the very body of judge-made law upon which they predicate removal. Pet. 19. Nonetheless, they insist that this defunct common law transforms the People's state-law claims into federal claims for removal purposes. *Id.* 19–20.

No circuit has ever adopted that remarkable theory of removal jurisdiction. Indeed, congressional displacement was not raised in any of petitioners' appellate decisions finding jurisdiction based on federal common law. Every court to consider this question, moreover, has rejected petitioners' argument that displaced federal common law can create statutory arising-under jurisdiction over claims pleaded exclusively under state law. *See, e.g.*, *Earth Island Institute v. Crystal Geyser Water Co.*, __ F. Supp. 3d __, 2021 WL 684961 (N.D. Cal. Feb. 23, 2021); *New Mexico ex rel. Balderas v. Monsanto Co.*, 454 F. Supp. 3d 1132 (D.N.M. 2020); *Bd. of Cty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, 405 F. Supp. 3d 947 (D. Colo. 2019); *Mayor & City Council of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538 (D. Md. 2019); *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142 (D.R.I. 2019); *Cty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934 (N.D. Cal. 2018); *see also* Pet. App. 53a ("presum[ing] that when congressional action displaces federal common law, state law becomes available to the extent it is not preempted by statute").

2. The Ninth Circuit correctly applied this Court's precedent.

The Ninth Circuit correctly applied *Grable* and the complete-preemption doctrine to conclude that the People's state-law claims do not arise under federal law within the meaning of 28 U.S.C. § 1331. Petitioners do not identify any decision recognizing their third path for removing claims "governed" by federal common law, and they offer no persuasive reason for creating this novel exception to the well-pleaded complaint rule. To the contrary, their theory

undermines this Court's efforts in *Grable* to bring clarity and order to the arising-under framework.

1. Petitioners do not contend that the Ninth Circuit misapplied *Grable* or the complete-preemption doctrine. Nor could they.

The Ninth Circuit correctly rejected petitioners' federal-common-law theory of removal, reasoning that the People's "fact-bound and situation-specific" state-law claims did not satisfy *Grable*. Pet. App. 14a. The panel held that the People's claims did not necessarily raise a federal question, let alone one that would be "controlling in numerous other cases," because the CAA displaced the body of federal common law upon which petitioners predicated removal. *Id.* 13a. The panel also rejected petitioners' attempts to manufacture a substantial federal question by arguing the state-law claim "implicates a variety of 'federal interests,' including energy policy, national security, and foreign policy." *Id.* As the Ninth Circuit's analysis confirms, these cases are distinct from others where federal common law supplies removal jurisdiction over a state-law claim. *See, e.g.*, *Nicodemus*, 440 F.3d at 1236 (construction of federal land grant "appears to be the only legal or factual issue contested"); *supra* note 3.

The Ninth Circuit also correctly rejected petitioners' argument that the CAA completely preempted the People's state-law claim, because that argument could not be reconciled with the CAA's savings clauses. *See* Pet. App. 14a–16a.[4]

---

[4] Petitioners never argued that *federal common law* completely preempted the People's claims. Nor could

2. Unable to identify any error in the Ninth Circuit's analysis under *Grable* or the complete-preemption doctrine, petitioners purport to have identified a third class of state-law claims exempted from the well-pleaded complaint rule: claims "governed" by federal common law. Pet. 14. Yet as petitioners' own cases demonstrate, this Court has never considered—much less endorsed—their proposed third "path for removal." *Id.*

Petitioners lean heavily on *United States* v. *Standard Oil Co. of California*, but subject-matter jurisdiction undisputedly existed there because the United States was the plaintiff. 332 U.S. 301, 303 (1947). The Court therefore had no reason to consider whether federal common law could convert state-law claims into federal ones for jurisdictional purposes. Instead, the Court applied a choice-of-law analysis to evaluate whether the defendant's "liability" to the government should "be determined by federal or state law." *Id.*; *see also id.* at 310 (holding that "state law should not be selected as the federal rule for governing the matter in issue").[5]

---

they. As *Beneficial National Bank* made clear, complete preemption requires, at a minimum, clear congressional intent to make a federal remedy exclusive. 539 U.S. at 8, 9 n.5. That doctrine does not apply to judge-made federal common law, much less a displaced common law that does not provide plaintiffs any rights or remedies.

[5] Petitioners' reliance on *United States v. Swiss American Bank, Ltd.*, 191 F.3d 30 (1st Cir. 1999), is similarly misplaced. The United States brought that

Petitioners' other cases are equally inapposite. Most do not even address or resolve issues of federal subject-matter jurisdiction, which existed for reasons unrelated to federal common law. *See Ouellette*, 479 U.S. at 483–84, 500 (diversity jurisdiction); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421 n.20 (1964) (diversity jurisdiction); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 632 (1981) (asserting claims under a federal statute); *Kurns v. R.R. Friction Prods. Co.*, 565 U.S. 625, 628 (2012) (diversity jurisdiction). The remainder either concern jurisdictional disputes having nothing to do with Section 1331 jurisdiction, *e.g.*, *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 100–01 (1938); *Kansas v. Colorado*, 206 U.S. 46, 97 (1907), or plaintiffs' complaints expressly pleaded a federal-common-law cause of action, *e.g.*, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 697 (2004); *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 310 (1981) (*Milwaukee II*); *AEP*, 564 U.S. at 418; *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 848 (1985). None addressed removal jurisdiction over state-law claims.

3. Nor is there any reason for this Court to break new ground and create a bespoke jurisdictional test for cases "governed" by a displaced body of federal common law. Doing so would undo the progress this Court achieved in *Grable* in clarifying the arising-under doctrine.

---

case in federal court, and affirmatively argued that its claims arose under federal common law. *See id.* at 39, 44–45; *see also United States v. Swiss Am. Bank, Ltd.*, 23 F. Supp. 2d 130, 135 (D. Mass. 1998).

The petitioner in *Grable*, like petitioners here, asked the Court to create different jurisdictional tests for different sources of federal law. *See Grable*, 545 U.S. at 320 n.7. The Court declined that invitation, observing that there is "no reason in [the] text [of Section 1331] or otherwise to draw such a rough line." *Id.* Instead, it developed a test that applies comfortably to any category of federal law, thereby advancing the Court's stated goal of providing "jurisdictional tests [that] are built for more than a single dispute." *Manning*, 136 S. Ct. at 1575. The Court has no reason to revisit that choice, as lower courts have applied *Grable* with no apparent difficulty to determine whether a plaintiff's state-law claims necessarily raise issues of federal common law that are substantial enough to trigger federal subject-matter jurisdiction. *See, e.g.*, *Nicodemus*, 440 F.3d at 1235–36; *Baker*, 314 F. App'x at 533, 536–37.

4. Petitioners also offer no limiting principle to distinguish between a garden variety federal defense that cannot supply subject-matter jurisdiction and a "controlling" federal issue that supposedly can outside of *Grable*.

Petitioners argue that federal common law can transform state-law claims into federal ones for jurisdictional purposes because "the Constitution prohibits applying state law" in areas purportedly governed by federal common law. Pet. 2, 15. But the Supremacy Clause also prohibits applying state law to claims that are preempted by federal statute. *See Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992); *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324 (2015). Under petitioners' reasoning, federal subject-matter jurisdiction would exist whenever a defendant asserts that a federal statute

preempts a plaintiff's state-law claim. Indeed, petitioners' logic suggests that *any* constitutional defense (*e.g.*, the dormant Commerce Clause) would create federal jurisdiction because any such defense, if applicable, would extinguish conflicting state law. Petitioners' unbounded theory would eviscerate the century-old rule that federal-law defenses do not vest federal courts with subject-matter jurisdiction over claims pleaded under state law. *See Franchise Tax Bd.*, 463 U.S. at 14.

5. Finally, petitioners' theory of removal would not only undermine the success of *Grable*, but would expand federal common lawmaking in unprecedented ways. Because petitioners acknowledge that the CAA displaced the body of federal common law upon which they premise removal, they are forced to contend that *congressionally displaced* judge-made law retains the power to convert state-law claims into federal ones for purposes of arising-under jurisdiction. *See* Pet. 19–20. That striking proposition cannot be reconciled with this Court's analysis in *Ouellette* and *AEP*, or with its longstanding admonition to federal courts that lawmaking is best left to Congress and the States.

In *Ouellette*, the Court considered a preemption challenge to state-law public nuisance claims formerly governed by the federal common law of interstate water pollution. 479 U.S. at 484, 487. Because the Clean Water Act had displaced that body of federal judge-made law, the Court framed the relevant inquiry as whether the Act preempted the plaintiff's state-law claims—a question it answered by conducting a traditional statutory preemption analysis. *See id.* at 491–500. Twenty years later, this Court gave the same instructions when discussing the

displacement of federal common law as it related to greenhouse gas emissions—the same body of judge-made law that petitioners invoke here. *AEP*, 564 U.S. at 429. After holding that the CAA displaced the plaintiffs' federal-common-law claims, the Court remanded their state-law claims for further consideration by the lower courts, noting that "the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal [CAA]." *Id.*

Ouellette and *AEP* make clear that the preemptive effects of federal common law disappear once displaced by an act of Congress, leaving the new statute as the sole basis for preemption analysis. Those cases also preclude petitioners' argument that "the Constitution prohibits applying state law in certain narrow areas involving uniquely federal interests—including interstate and international pollution." Pet. 2. After all, if petitioners were right, this Court in *Ouellette* could not have held that state-law nuisance claims for interstate water pollution could be brought "pursuant to the law of the source State," 479 U.S. at 497, and the Court in *AEP* could not have concluded that "the availability *vel non* of a state lawsuit" for interstate air pollution depended "on the preemptive effect of the federal [CAA]," 564 U.S. at 429.

Far from "flow[ing] directly from the constitutional structure," Pet. 16, petitioners' theory would rework the constitutional ordering by elevating judicial lawmaking above the powers of Congress. This Court has "always recognized that federal common law is subject to the paramount authority of Congress," and it has repeatedly emphasized that "[t]he decision whether to displace state law … is

generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress." *Milwaukee II*, 451 U.S. at 313; *see also Atherton v. F.D.I.C.*, 519 U.S. 213, 218 (1997).

That is because "[j]udicial lawmaking in the form of federal common law plays a necessarily modest role under a Constitution that vests the federal government's 'legislative powers' in Congress and reserves most other regulatory authority to the States." *Rodriguez*, 140 S. Ct. at 717. Even in areas "where the federal judiciary's lawmaking power [is] at its strongest, it is [the courts'] duty to respect the will of Congress." *Nw. Airlines, Inc. v. Transp. Workers Union of Am., AFL-CIO*, 451 U.S. 77, 96 (1981). Once Congress displaces a body of federal common law, "the need for such an unusual exercise of lawmaking by federal courts disappears," *Milwaukee II*, 451 U.S. at 314, and "the task of the federal courts" becomes "interpret[ing] and apply[ing] statutory law," not "creat[ing] common law," *Nw. Airlines*, 451 U.S. at 95 n.34.

Petitioners' theory of removal flips these well-settled principles on their head, insulating federal common law from the legislative authority of Congress. In petitioners' view, Congress is powerless to revive state law where a judge concludes federal common law should govern. But not even validly enacted federal statutes have that kind of irreversible preemptive force. *See Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988) (Scalia, J.) ("[R]epeal of EPAA regulation did not leave behind a pre-emptive grin without a statutory cat."). Under petitioners' approach, a judge

could override a congressional preemption choice by invoking federal common law. But that result is incompatible with this Court's "commitment to the separation of powers"—a commitment that "is too fundamental" to permit courts to rely on federal common law after "Congress has addressed the problem." *Milwaukee II*, 451 U.S. at 315 (quotations omitted).

III. The Ninth Circuit's application of *Caterpillar* does not warrant review.

In their second Question Presented, petitioners contend the Ninth Circuit should have excused the absence of subject-matter jurisdiction at the time of removal because that defect was cured when the People later added a federal-common-law claim to conform their complaints to the district court's order denying remand. This argument misreads *Caterpillar*.

The People's post-removal amendment did *not* cure the "statutory flaw" in petitioners' removal, namely: petitioners' "failure to meet the § 1441(a) requirement that the case be fit for federal adjudication *at the time the removal petition is filed*." *Caterpillar*, 519 U.S. at 73 (emphasis added). These kinds of defects "remain in the unerasable history of the case," and generally require remand *unless* (1) the plaintiff did not adequately preserve its objection to removal, or (2) "considerations of finality, efficiency, and economy" demonstrate that remand "would impose an exorbitant cost on our dual system, a cost incompatible with the fair and unprotracted administration of justice." *Id.* at 75, 77.

The Ninth Circuit's straightforward application of *Caterpillar* does not warrant review. It does not

create a circuit split; it involved a set of facts that rarely arises; it faithfully follows this Court's precedent; and it does not implicate any of petitioners' policy-based concerns, which are, in any event, meritless.

1. *There is no split of appellate authority.*

1. Petitioners contend that the Ninth Circuit split from other circuits by finding that the People did not waive their objections to removal by amending their complaints. *See* Pet. 27–29. But none of petitioners' cases involved an amendment that merely conformed the complaint to a district's court's order denying remand.

Here, the district court's order declared categorically that the People's claims were "governed by" and "necessarily ar[o]se under federal common law." Pet. App. 55a, 56a. Because the court "recharacterized the [People's] claims as federal," the People had the "burden" to amend their complaints or face dismissal. *Stewart*, 297 F.3d at 959. The People added the federal-common-law claim to satisfy that obligation, expressly stating they did so only "to conform to the district court's ruling and that they reserved all rights with respect to whether jurisdiction is proper in federal court." Pet. App. 5a. (cleaned up); ER 63, 115, 134, 180.

Appellate courts uniformly agree that such conforming amendments do not constitute waiver. The cases distinguish between amendments that (1) add a new, "distinct federal claim[]," and (2) add a federal claim "only to conform to a determination … already reached by the district court," *e.g.*, when the district court rules that a plaintiff's state-law claim is completely preempted and is thus "a federal claim in

disguise." *Negrón-Fuentes v. UPS Supply Chain Sols.*, 532 F.3d 1, 6 (1st Cir. 2008); *see also Waste Control Specialists, LLC v. Envirocare of Texas, Inc.*, 199 F.3d 781, 787 n.5 (5th Cir. 2000), *opinion withdrawn and superseded in part on other grounds reh'g sub nom. Waste Control Specialists v. Envirocare of Texas, Inc.*, 207 F.3d 225 (5th Cir. 2000); *King v. Marriott Int'l Inc.*, 337 F.3d 421, 426 (4th Cir. 2003); *Albert v. Smith's Food & Drug Centers, Inc.*, 356 F.3d 1242, 1248 (10th Cir. 2004).

Amending to add a new and distinct federal claim might constitute waiver because it reflects "a studied decision to take advantage of the [federal] forum once there." *Waste Control*, 199 F.3d at 787 n.5. But an amendment that merely conforms the pleadings to the district court's ruling has "no effect" on the original theory of the case and "confer[s] no benefit on [the plaintiff]." *Negrón-Fuentes*, 532 F.3d at 6. It merely "make[s] explicit what [a] district court held" in denying remand by restating a plaintiff's state-law claim as a federal one. *King*, 337 F.3d at 426. Treating this type of "conforming amendment" as waiver would force the plaintiff to make a Hobson's choice: either "forego his objection [to remand] or face dismissal and then a res judicata bar if that objection failed on appeal." *Negrón-Fuentes*, 532 F.3d at 6.

None of petitioners' cases diverge from this consensus view because none involved conforming amendments. Rather, they all concerned plaintiffs who—unlike the People here—deviated from their "original theory of the case" by adding federal claims that were wholly distinct from those asserted in their state-court pleadings. *See, e.g.*, *Brough v. United Steelworkers of Am., AFL-CIO*, 437 F.2d 748, 749–50 (1st Cir. 1971) (adding a federal-law claim that union

breached duty of fair representation after removal of state-law negligence action); *Bernstein v. Lind-Waldock & Co.*, 738 F.2d 179, 185 (7th Cir. 1984) (adding federal due process claim after removal of state-law surety claims); *Barbara v. N.Y. Stock Exch., Inc.*, 99 F.3d 49, 52–53, 55 (2d Cir. 1996) (adding federal due process claims after uncontested removal of state-law contract claims).

2. Petitioners also cannot manufacture an appellate conflict based on how the Ninth Circuit weighed considerations of finality, efficiency, and economy.

Petitioners' claimed circuit split mischaracterizes the opinion below. The court noted that the weight of *Caterpillar's* finality, efficiency, and economy factors "depends on the stage of the underlying proceeding" at which judgment is entered. Pet. App. 19a. The court explained that those factors "generally" weigh in favor of remand when a case terminates at the pleading stage, but not after summary judgment or trial. *Id.* 20a. The court then applied that "general[]" approach to the particular facts presented. *Id.* It highlighted the limited time the cases spent in the district court—"just over eight months" from removal to dismissal. *Id.* 22a. It documented the minimal investment of party resources in merits litigation, noting that while the litigants had "engaged in motion practice under Rule 12," they had not yet begun discovery. *Id.* And it considered the "relatively modest use of judicial resources," observing that the court did little more than hold an informal "tutorial on global warming" before dismissing the People's claims. *Id.* Based on these facts, the Ninth Circuit reasonably determined that "considerations of finality, efficiency,

and economy" were "far from overwhelming" and did not justify ignoring the original defects in removal. *Id.*

Contrary to petitioners' suggestion, the Ninth Circuit did not hold that removal defects to which plaintiffs have objected can only be excused when the district court enters final judgment "after trial." Pet. 29; *see* Pet. App. 20a (noting that remand is typically inappropriate in cases resolved by summary judgment). Nor did the court adopt a bright-line rule applicable to Rule 12(b)(6) dismissals. *See* Pet. 29. It simply observed that considerations of finality, efficiency, and economy "generally" weigh in favor of remand when the case is dismissed at the pleading stage, and it made a fact-sensitive determination based on the circumstances and equities of these particular cases. Pet. App. 20a.

The Ninth Circuit's ruling also does not conflict with decisions from the Fourth, Eighth, or Tenth Circuits. The latter two have only excused removal defects in cases that terminated on or after summary judgment, consistent with the Ninth Circuit's decision here. *See, e.g.*, *Quintero Cmty. Ass'n Inc. v. F.D.I.C.*, 792 F.3d 1002, 1008 (8th Cir. 2015); *Ellingsworth v. Vermeer Mfg. Co.*, 949 F.3d 1097, 1100 (8th Cir. 2020); *Paros Props., LLC v. Colo. Cas. Ins. Co.*, 835 F.3d 1264, 1273 (10th Cir. 2016). Neither circuit has excused a removal defect in a case dismissed under Rule 12(b)(6).

Although the Fourth Circuit once excused a removal defect in an interlocutory appeal, it did so only after applying the same case-specific approach to weighing "considerations of finality, efficiency, and economy" that was used by the court below. In *Moffitt v. Residential Funding Co.*, the plaintiff moved to

remand despite having "expressed no intent to abandon" post-removal amendments that indisputably gave rise to federal jurisdiction. 604 F.3d 156, 160 (4th Cir. 2010). The Fourth Circuit concluded that "larger considerations of judicial economy" outweighed the absence of "finality" in that case, reasoning that remand would be "a pointless exercise" because defendants would "almost certainly remove the case back to federal court" based on the amended complaint. *Id.* Those facts are not presented here.

Petitioners' cases simply illustrate that applying a multi-factor test to different facts yields different results in different cases—as it should.

2. *The Ninth Circuit's decision is correct.*

1. Petitioners also fail to identify any conflict between this Court's precedent and the Ninth Circuit's analysis.

Caterpillar instructs that a plaintiff does "all that [is] required to preserve [its] objection to removal" when it "timely move[s] for remand." 519 U.S. at 74. An appellate court may disregard an adequately preserved objection only if "considerations of finality, efficiency, and economy become overwhelming." *Id.* at 75.

Here, *Caterpillar's* requirements were fully satisfied. There was no federal jurisdiction at the time of removal; the People preserved their objections to removal by timely moving to remand (and expressly reserving their right to seek appellate review); and considerations of finality, efficiency, and economy on the facts of these cases were "far from 'overwhelming,'" especially compared to the six-day jury trial and three years of litigation that led this

Court in *Caterpillar* to excuse a Section 1441(a) violation. Pet. App. 22a.

2. Petitioners urge the Court to create a new rule that would excuse removal defects whenever federal jurisdiction exists at the time of final judgment, contending that the current test "wastes resources and encourages gamesmanship," and "allow[s] plaintiffs to exploit the federal forum but return to state court if they lose on the merits." Pet. 28. Petitioners' proposed rule would be unnecessary, inequitable, and unsound.

No time or resources would be saved by excusing petitioners' removal violations in these cases because the district court's rulings erroneously treated the People's claims as federal-common-law claims. Whether these state-law cases proceed in state court (as they should), or federal (as petitioners urge), the trial court will need to start from scratch because no court has adjudicated the People's *California* representative public nuisance claims.

Petitioners' concern about "gamesmanship" is overblown. Once the district court ruled that the People had to pursue their public nuisance claims under federal common law or not at all, the People had no choice but to amend to conform to that ruling or face dismissal of their state-law claims as preempted. *Stewart*, 297 F.3d at 959. The People are indeed "entitled to start over in state court," Pet. 28–29, because *no* court has adjudicated their state-law claims.

Petitioners also urge that jurisdictional "[l]ines … should be bright," asserting (without explanation or evidence) that the Ninth Circuit's application of *Caterpillar* "yields unpredictable and arbitrary

results." Pet. 30. But *Caterpillar* did not establish a bright-line jurisdictional rule either; instead, it established a rule for determining when "a *statutory* defect"—"namely, failure to comply with the requirements of the removal statute"—may be excused. *Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567, 574 (2004) (emphasis added). Moreover, the bright-line rule proposed by petitioners has two significant problems. It would require federal courts to disregard removal defects, thereby undermining the "usual constitutional balance of federal and state powers." *Bond v. United States*, 572 U.S. 844, 858 (2014). And it would cause grave inequity to plaintiffs who merely conformed their pleadings to a district court's erroneous ruling.

The Ninth Circuit's approach is clear and predictable. Where a plaintiff amends its complaint to conform to a district court's erroneous remand ruling, an appellate court should generally remand the action to state court if the complaint is dismissed at the pleading stage, but not if the case proceeds to discovery and later adjudication on the merits. This rule admits exceptions in atypical cases, *see, e.g.*, *Moffitt*, 604 F.3d at 160, while providing guideposts sensibly rooted in considerations of finality, efficiency, and economy.

IV. The Questions Presented have minimal practical importance, and this petition is a poor vehicle to review them.

The Questions Presented are also not certworthy for two additional reasons: (1) they arise in only a tiny category of cases; and (2) there has been no final determination on the jurisdictional issue that petitioners raise.

1. As to the first Question, federal common law applies in only a "few," "restricted" "areas," *Texas Indus.*, 451 U.S. at 640, and the cases affected by petitioners' first Question are thus necessarily few in number. Indeed, the only potentially affected cases that petitioners identify are other lawsuits targeting the fossil-fuel industry's climate deception, a vanishingly small fraction of the thousands of cases remanded each year to state court. Moreover, petitioners cite no case or category of cases in which *Grable* is inadequate for determining whether a particular claim arises under federal common law for purposes of removal jurisdiction.

As to the second Question, the number of cases potentially affected is even smaller. Petitioners' argument for a new approach to *Caterpillar*'s test would apply only to cases in which: (1) the district court arguably erred in denying remand; (2) the plaintiff later cured the claimed jurisdictional defect by amending its complaint to conform to the order denying remand; and (3) after that cure and regardless of the circumstances giving rise to it, the district court dismissed the case on the pleadings. Petitioners have not cited a single other case that would be affected by their proposed new rule, and the People have not found any either.

Nor should the Court give any weight to petitioners' vague speculation that denying certiorari would "cast a shadow over the entire energy sector" and cause "economic disruption." Pet. 6. It would do no such thing. The petition concerns a narrow, jurisdictional issue: whether the People's claims will proceed in state or federal court. The Questions Presented do not resolve the merits of this litigation, and state courts are perfectly capable of adjudicating

any federal defenses that petitioners might raise. *See McKesson v. Doe*, 141 S. Ct. 48, 51 (2020) ("Our system of 'cooperative judicial federalism' presumes federal and state courts alike are competent to apply federal and state law.").

2. Finally, this case is a poor vehicle for resolving the Questions Presented because the district court has not yet ruled on petitioners' other pending grounds for removal.

Petitioners raised seven theories of federal subject-matter jurisdiction, only three of which the Ninth Circuit considered in its ruling: complete preemption, *Grable* jurisdiction, and petitioners' novel federal-common-law theory. Because the district court "did not address the alternative bases for removal," the Ninth Circuit remanded to the district court "to determine whether there was an alternative basis for jurisdiction." Pet. App. 23a. The People's renewed remand motion is now briefed and awaiting oral argument in the district court. The pendency of those alternative grounds for removal provides another reason the Court should decline to exercise its certiorari jurisdiction here. *Va. Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of certiorari) (Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction").

CONCLUSION

The Court should deny the petition for certiorari.

Respectfully submitted,

BARBARA J. PARKER
MARIA BEE
ZOE M. SAVITSKY
MALIA MCPHERSON
CITY OF OAKLAND
One Frank Ogawa Plaza,
6th Fl.
Oakland, CA 94612

Counsel for the People of the State of California and City of Oakland

DENNIS J. HERRERA,
RONALD P. FLYNN
YVONNE R. MERÉ
MATTHEW D. GOLDBERG
ROBB W. KAPLA
CITY AND COUNTY OF SAN FRANCISCO
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102

Counsel for the People of the State of California and City & County of San Francisco

VICTOR M. SHER
Counsel of Record
MATTHEW K. EDLING
MICHAEL BURGER
MARTY D. QUIÑONES
KATIE H. JONES
QUENTIN C. KARPILOW
SHER EDLING, LLP
100 Montgomery St., Ste. 1410
San Francisco, CA 94104
(628) 231-2500
vic@sheredling.com

MICHAEL RUBIN
CORINNE JOHNSON
BARBARA J. CHISHOLM
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108

Counsel for the People of the State of California, City of Oakland, and City & County of San Francisco

May 10, 2021