No. 21-1550

In The
Supreme Court of the United States

SUNCOR ENERGY (U.S.A.) INC., ET AL.,

Petitioners,

v.

BOARD OF COUNTY COMMISSIONERS
OF BOULDER COUNTY, ET AL.,

Respondents.

On Petition For A Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* SUPPORTING PETITIONERS

John M. Masslon II
Counsel of Record
Cory L. Andrews
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave. NW
Washington, DC 20036
(202) 588-0302
jmasslon@wlf.org

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QUESTIONS PRESENTED

1. Whether federal common law necessarily and exclusively governs claims seeking redress for injuries allegedly caused by the effect of interstate greenhouse-gas emissions on the global climate.

2. Whether a federal district court has jurisdiction under 28 U.S.C. § 1331 over claims necessarily and exclusively governed by federal common law but labeled as arising under state law.

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INTEREST OF *AMICUS CURIAE*[*]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as *amicus curiae* in cases about the regulation of greenhouse-gas emissions. *See, e.g.*, *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302 (2014); *Massachusetts v. EPA*, 549 U.S. 497 (2007).

WLF also regularly publishes, through its Legal Studies Division, articles by outside experts on climate-change lawsuits. *See, e.g.*, Lincoln Davis Wilson, *Flawed Federal Jurisdiction Ruling Grants State Court National Climate-Change Policymaking Power*, WLF LEGAL OPINION LETTER (Mar. 25, 2022); Peter Glaser & Lynne Rhode, *Three Federal Courts Reject Public Nuisance As Climate Change Control Tool*, WLF LEGAL OPINION LETTER (Nov. 16, 2007).

WLF does not deny the realities of climate change. But that does not mean that state courts have unlimited power to regulate greenhouse-gas emissions. For many reasons, the question of how America should respond to rising global temperatures is one solely for federal policymakers. WLF thus opposes state courts' efforts to regulate worldwide conduct based on oil companies' activities here and abroad.

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[*] No party's counsel authored any part of this brief. No person or entity, other than WLF and its counsel, paid for the brief's preparation or submission. After timely notice, all parties consented to WLF's filing this brief.

INTRODUCTION

A world that never had oil is not one that anyone wants to live in. The standard of living for all mankind skyrocketed when humans realized how to harness the power of oil. *See* John Majewski, *How the industrial revolution raised the quality of life for workers and their families*, Found. Econ. Educ. (July 1, 1986), https://bit.ly/3bjqcnK. Rather than have two options—live in overcrowded cities or on a farm—many people now enjoy suburban life. And rather than have to take a boat across the Atlantic for vacation or work, people can hop on a redeye flight and make the journey overnight.

These may be mere conveniences. But other things are matters of necessity. No longer must farmers rely on oxen when plowing their fields. Now, they can use gas-powered tractors to help produce more food, which leads to reduced food prices. This, of course, helps alleviate the scourge of hunger worldwide.

Oil has also increased life expectancies in other ways. It helped power the technological revolution. The increased economic activity lifted the standard of living and allowed more spending on healthcare. The overall effect was to almost double the life expectancy of Americans. *See* Aaron O'Neill, *Life expectancy (from birth) in the United States, from 1860 to 2020* (Feb. 3, 2021), https://bit.ly/3zSbZIp.

Rational people are happy that we have abundant oil at our disposal. Although prices now are unusually high, there is no risk that when you go to the gas station you will be unable to fill your tank.

But politicians are rarely rational. Some don't care that oil has made Americans' lives better. They believe it's advantageous for their political careers to press for de-development rather than allow oil to continue playing a critical role in our nation's development.

This placing of politics over sound policy explains why, as part of their climate-change crusade, many localities and States have brought public-nuisance lawsuits. There can be "no pretense," however, "that there is a nuisance" here "of the simple kind that was known to the older common law." *Missouri v. Illinois*, 200 U.S. 496, 522 (1906). These States and localities are not seeking to abate the sort of "minor offenses involving public morals or the public welfare" that public-nuisance law traditionally addressed. Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741, 800-01 (2003). Rather, they are pursuing purely political goals.

The States' and localities' lawsuits raise legal and policy questions of national and international import. Fifty separate sovereigns cannot regulate untraceable emissions that travel across state and international borders. This petition is thus critical both to our country's and our world's future. The Court should grant the petition so that life-tenured federal judges—not politically vulnerable state-court judges—can properly apply federal law and resolve these disputes.

STATEMENT

I. OIL IN AMERICA

In the early 1800s the world was a dark place, just as it had always been. The main source of artificial light, candlelight, was both expensive and weak. Candles "were also dangerous: forget to snuff your candle and you could be incinerated in a ball of fire." Alan Greenspan & Adrian Wooldridge, *Capitalism in America: A History* 432 (2018). "Productivity improvements" at that time were "limited by the speed that horses could run or ships could sail." *Id.* at 18. Even by the mid-nineteenth century, "the country still bore the traces of the old world of subsistence. Cities contained as many animals as people, not just horses but also cows, pigs, and chickens." *Id.* at 91.

Then, in the second half of the 1800s, the Industrial Revolution accelerated. Key to this transformation was oil. America's "rise was propelled, in no small way, by its immense natural-resource wealth"—"starting with oil." Bhu Srinivasan, *Americana: A 400-Year History of American Capitalism* 151 (2017).

Oil lit the darkness. The development in the 1860s of "viable [oil] drilling technique[s]" made "basic, cheap lighting possible for millions of Americans." Srinivasan at 151. "From 1880 to 1920," therefore, "the amount of oil refined every year jumped from 26 million barrels to 442 million." Greenspan & Woodridge at 102. This led to "an astonishing decline in the price of kerosene paid by consumers from 1860 to 1900." *Id.* "Unlike the

spermaceti candles of decades prior * * * cheap tin cans filled with kerosene now allowed the common man to light his home." Srinivasan at 161.

The United States illuminated not just itself but also the world. Much of the kerosene Standard Oil produced in the late nineteenth century was exported. In Europe, light went from something precious to something ubiquitous. In Britain, for example, the cost of a million lumen hours of light dropped from around £9,400 in 1800 to around £230 in 1900. Max Roser, *Light, Our World in Data* (2019), https://perma.cc/4BVV-P4QZ.

And oil provided much more than light. It "became the nation's primary source of energy: as gasoline and diesel for cars, fuel oil for industry, heating oil for homes." Greenspan & Woodridge at 102-03. This energy helped drive "America's takeoff into self-reinforcing [economic] growth." *Id.* at 92. Economic growth, in turn, opened the way for better lives for millions of people. Oil enabled Americans to "live in far-flung suburbs because filling their cars was cheap." *Id.* at 103. It empowered average people to leave multi-tenant buildings and move into their own houses, to "choose space over proximity." *Id.*

"More than any other country," in short, "America was built on cheap oil." Greenspan & Wooldridge, at 103. Oil "laid the foundations of the age of the common man: an age in which almost every aspect of life for ordinary people became massively—and sometimes unrecognizably—better." *Id.* at 427.

The United States remains a leading innovator of oil and natural gas production. In the development

of fracking, for instance, the "oil industry saw one of the most surprising revolutions of the second half of the twentieth century." Greenspan & Wooldridge at 356-57. "Shale beds now produce more than half of America's natural gas and oil * * * compared with just 1 percent in 2000." *Id.* at 357. Thanks to fracking, the United States recently became a net energy exporter for the first time in more than sixty years. *U.S. energy facts explained*, U.S. Energy Info. Admin. (June 10, 2022), https://bit.ly/3AeZtmK.

President Biden recently said that "this moment is 'a stark reminder' that the U.S. needs to be energy independent." Michael McAdams, *Biden called for US energy independence — advanced biofuels can propel us*, The Hill (Apr. 2, 2022), https://bit.ly/3xWjU4Q. The modern oil and natural-gas renaissance has therefore enjoyed bipartisan political support. A report issued by the Obama administration, for example, applauded the fact that the recent increase in oil and natural-gas production has "made a significant contribution to GDP growth and job creation." *New Report: The All-of-the-Above Energy Strategy as a Path to Sustainable Economic Growth*, The White House (May 29, 2014), https://perma.cc/KR8M-2NYN. "Increased domestic oil production," the report noted, "reduce[s] the vulnerability of the U.S. economy to oil price shocks stemming from international supply disruptions." *Id.*

II. STATES AND LOCALITIES IGNORE REALITY

In 2017, many local and state governments sued energy companies in state court. *See* Jeremy Hodges et al., *Climate Change Warriors' Latest Weapon of Choice is Litigation*, Bloomberg (May 24,

2018), https://bloom.bg/3fczCz8. Those suits alleged that the defendant energy companies contributed to global warming by extracting, producing, and selling fossil fuels. *See*, *e.g.*, *id.* Although energy companies provided vast benefits to these governments and their citizens, the governments thought it was time to pounce.

Inspired by this flood of lawsuits, in 2018 Respondents sued Suncor and Exxon in Colorado state court. *See* Pet. App. 60a. Respondents claim that Suncor and Exxon contributed to climate change by producing, promoting, and (misleadingly) marketing fossil fuel products long after their dangers became apparent. *See id.*

Suncor and Exxon removed the suit to the District of Colorado. *See* Pet. App. 60a-61a. They argued that the District Court had jurisdiction because, among other reasons, (1) they acted at the direction of federal officers, *see* 28 U.S.C. § 1442(a); (2) removal was proper under 28 U.S.C. §§ 1331 and 1441(a) because (i) Respondents' claims arise under federal common law and (ii) the federal interest at stake in the litigation suffices for federal-question jurisdiction.

Respondents moved to remand the case to state court, arguing that the District Court lacked subject-matter jurisdiction over the claims. *See* Pet. App. 60a. Finding that removal was improper, the District Court granted the motion. *See* Pet. App. 114a. Maintaining that removal was appropriate for the reasons outlined above, Suncor and Exxon appealed that decision.

The Tenth Circuit held that removal was improper under Section 1442. *Bd. of Cnty. Commissioners of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 965 F.3d 792, 819-27 (10th Cir. 2020). But it declined to address Exxon's and Suncor's other grounds for removal. *Id.* at 800-19. This Court vacated that decision because it conflicted with *BP p.l.c. v. Mayor and City Council of Baltimore*, 141 S. Ct. 1532 (2021). *See Suncor Energy (U.S.A.) Inc. v. Bd. of Cnty. Commissioners of Boulder Cnty.*, 141 S. Ct. 2667, 2667 (2021) (*per curiam*).

On remand, the Tenth Circuit rejected all of Suncor's and Exxon's other grounds for removal. *See* Pet. App. 10a-59a. Because that decision deepens two circuit splits, they now seek this Court's review.

SUMMARY OF ARGUMENT

I.A. For the past century, federal common law has continued to shrink. But that does not mean it is a dead letter. There are several issues governed by active federal common law. Three examples are interstate water disputes, tribal sovereignty, and lost airline luggage. This case involves a fourth area of federal common law—interstate and international air emissions. These four issues share many similarities. It thus makes sense to categorize Respondents' claims as arising under federal common law. So federal courts have original jurisdiction over the claims.

B. This case is immensely important for our nation's economy and the well-being of all Americans. If the Tenth Circuit's decision stands, dozens of lawsuits from around the country will proceed in state courts. The massive potential liability could cause oil

companies to exit the American market. Or the price of oil products could spike. Either way, all Americans will be worse off if the Court denies review.

II. The Tenth Circuit's holding that plaintiffs can avoid federal jurisdiction over federal claims by artful pleading is illogical. Many federal claims can be pled as arising under state law when they in fact arise under federal law. This Court should put substance over form when deciding whether federal courts have jurisdiction over federal claims. This tracks with the practice of examining whether a red paperclip is worth $75,000.01 for diversity-jurisdiction purposes. The circuit split that Suncor and Exxon identify on this question thus has far-reaching effects and deserves the Court's immediate attention.

ARGUMENT

I. THE COURT SHOULD RESOLVE THE CIRCUIT SPLIT ON WHETHER RESPONDENTS' CLAIMS SOUND IN FEDERAL COMMON LAW.

As described in the petition (at 11-17), the Tenth Circuit's decision deepens an acknowledged circuit split on an important question: Do Respondents' claims about cross-border pollution necessarily arise under federal law?

A. Respondents' Claims Are Governed By Federal Common Law.

1. Since *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), the role of federal common law has been restricted. *See Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1015 (2020)

(citing *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001)). Rather than the province of the federal courts, common law now is generally left to state courts.

But that does not mean that federal common law no longer exists. There are several issues that still are governed by federal common law. For example, this Court has created a federal common law governing interstate water disputes. *See Arkansas v. Oklahoma*, 503 U.S. 91, 98-99 (1992); *Illinois v. City of Milwaukee*, 406 U.S. 91, 106 (1972). The federal nature of interstate water law makes sense. It would be illogical to have Texas common law govern the State's water disputes with Oklahoma. The Texas courts would create rules that would ensure victory over Oklahoma. The same is true of applying Oklahoma law.

Another factor that makes federal common law appropriate for interstate water disputes is that it is impossible to link water that flows between two States to only one of those States. For example, water from Texas and Oklahoma flows into the Red River from both tributaries and runoff. The calculations to determine what each State is entitled to thus cannot be governed by state law.

The same is true for air pollution. When carbon dioxide enters the atmosphere from a power plant in West Virginia, it is impossible to track every molecule to see if it is resting above Colorado and increasing temperatures there. So too for gasoline used to power cars in Western Mexico or Canada. It makes no sense to have one State's common law govern emissions that emanate from across state or international borders.

Yet that is what the Tenth Circuit blessed here. In its view, just because Respondents framed this case as one arising under state common law, the federal courts cannot exercise their proper authority to apply federal common law.

2. Federal common law also governs certain Indian issues. For example, questions about "inherent tribal sovereignty" are governed by federal common law. *See In re Otter Tail Power Co.*, 116 F.3d 1207, 1214 (8th Cir. 1997). This makes sense because "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." *Washington v. Confederated Tribes of Colville Indian Rsrv.*, 447 U.S. 134, 154 (1980). In other words, States lack power over tribal governance. *See* U.S. Const. art. I, § 8, cl. 3.

A similar situation is present here. Besides having sole authority to regulate tribal governance, the federal government also has sole power to regulate interstate and international commerce. *See* U.S. Const. art. I, § 8, cl. 3. It makes no sense to have state common law govern an area of law that the Constitution assigns to Congress. But that is what the Tenth Circuit's decision here permits.

3. Both rationales above support applying federal common law to lost airline luggage. *See Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 929 (5th Cir. 1997). As the luggage is lost, you don't know if the loss occurred in the State of departure, the State of arrival, or somewhere in between. And as airline travel typically involves interstate travel, the

Constitution gives the federal government power to regulate this type of commerce.

As described above, both rationales for applying federal common law also apply here. First, air pollution does not recognize state and international borders. Second, the Constitution grants the federal government the sole power to regulate interstate and international commerce. Thus, like these other issues, federal common law governs Respondents' claims, and federal courts have original jurisdiction over those claims. The Tenth Circuit's contrary holding is wrong.

B. Declining To Resolve The Circuit Split Will Have Devastating Effects.

1. The signs above gas stations nationwide tell a sobering story. In October 2020, regular gasoline averaged $2.17 per gallon. Nancy Yamaguchi, *EIA Gasoline and Diesel Retail Prices Update, Oct. 20, 2020*, Fuel Market News (Oct. 21, 2020), https://bit.ly/3bhDykd. This month, gas topped $5.00 per gallon. AAA, National Average Gas Prices (last visited July 10, 2022), https://gasprices.aaa.com/. That is a 130% increase in under two years.

This helps explain why President Biden has asked companies like Suncor and Exxon to sell their product below cost. *See* Francesca Chambers, *With gas prices at $5 a gallon, Biden tells oil companies to cut costs for Americans*, USA Today (June 15, 2022), https://bit.ly/3Obk6UV. If this Court denies review, there is little chance that gas prices will go down anytime soon. Rather, consumers should be prepared

to fork over even more when they fill up the tank to get to work.

An order denying certiorari would send a strong message to federal and state courts around the nation: These suits can stay in state court. There is a reason that Respondents are fighting to keep this case in state court rather than federal court. They understand that state courts give them an unfair advantage over the oil companies.

"State judges, holding their offices during pleasure, or from year to year, [are] too little independent to be relied upon for an inflexible execution of the national laws." The Federalist No. 81, 486 (Alexander Hamilton) (Clinton Rossiter ed. 1961). And "some of the most important and avowed purposes of" our federal government would disappear if "the judiciary authority of the Union may be eluded at the pleasure of every plaintiff or prosecutor." The Federalist No. 82 at 494 (Alexander Hamilton); *see* Felix Frankfurter & James Landis, *The Business of the Supreme Court*, 38 Harv. L. Rev. 1005, 1014 (1925) (federal jurisdiction is necessary to protect "against the obstructions and prejudices of local authorities").

Imagine an elected state court judge that has the power to make "Big Oil" pay billions of dollars to a State or locality. Taxpayers would see lower taxes and more amenities. And most taxpayers are voters. So the state court judges are motivated not to faithfully apply basic legal principles.

The pressure is even stronger given the number and variety of similar suits throughout the

country. Each of these suits seeks billions of dollars for harm that cannot be traced to one actor—much less one actor in one jurisdiction. A few outsized, unsupported verdicts for States or localities could cause some oil companies to declare bankruptcy. If that were to happen, Americans could forget driving to the beach for July 4th or flying to Europe for vacation. In short, our nation might return to the pre-Industrial Revolution days. The ensuing decrease in quality of life would be stunning.

But even if oil companies don't go bankrupt, the effects will be felt by all Americans. Some oil companies may back out of selling oil products in America. Again, that would cause America's energy progress to reverse as it falls behind countries like China and India that allow unlimited emissions.

If oil companies don't leave the country, consumers will still feel the effects of an explosion in state-court climate litigation. It may cost $200 to fill your tank with gas if the oil companies must factor in uncapped state-law liability for their actions around the world. Again, there is no limit to the potential damages that state courts could award if this Court does not grant review and reverse the Tenth Circuit's decision. The first question presented therefore warrants this Court's immediate review.

II. THE TENTH CIRCUIT'S APPLICATION OF THE WELL-PLEADED COMPLAINT RULE IGNORES THE RULE'S COROLLARY.

A. Federal "courts have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

Although this grant of statutory authority mirrors the Constitution's grant of jurisdiction, this Court has interpreted the statutory grant of jurisdiction more narrowly. A claim arises under federal law for purposes of Section 1331 "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) (cleaned up). This means that a defendant's raising a federal-law defense does not invoke the federal courts' statutory jurisdiction. *See id.*

This well-pleaded complaint rule makes sense. *Cf. Kircher v. Putnam Funds Tr.*, 547 U.S. 633, 644 n.12 (2006) ("a defendant may not remove a case to federal court unless the plaintiff's complaint establishes that the case 'arises under' federal law." (quoting *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 10 (1983))). The rule ensures that defendants don't remove state-law claims to federal court by raising frivolous federal defenses.

All claims filed in state court are, to some extent, governed by federal law; state courts must meet the federal due-process floor. An example shows how the rule is properly applied.

A company was sued for alleged fraud-by-omission. One defense was that the federal Medicaid statute foreclosed the plaintiff's fraud theory. The court held that this federal-law defense did not allow for removal to federal court. *See In re Oxycontin Antitrust Litig.*, 821 F. Supp. 2d 591, 598 (S.D.N.Y.

2011). Defendants cannot remove cases to federal court merely by citing a federal statute as a defense.

The well-pleaded complaint rule also ensures that the federal courts remain courts of limited jurisdiction—not general jurisdiction. *See Badgerow v. Walters*, 142 S. Ct. 1310, 1315 (2022) (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)).

Respondents labeled their assertions as only state-law public-nuisance claims. There is no allegation that Suncor and Exxon are liable under a federal statute or federal common law. But the face of the complaint shows that they raised federal claims. So the Tenth Circuit erred at the first step of the inquiry.

B. Even if the face of the complaint only raised state-law claims, the well-pleaded complaint rule has an important corollary. The Tenth Circuit's misunderstanding of this corollary is another place where the court went astray.

Although Congress has decided that federal courts should not have jurisdiction over cases that merely include a federal-law defense, it has made a different decision for federal-law claims. When a party pleads a federal claim in its complaint, federal courts have original jurisdiction over the suit. 28 U.S.C. § 1331. And because a party may remove a case to federal court when it could have originally been filed in federal court, 28 U.S.C. § 1441(a), defendants may remove cases raising federal claims to federal court.

Wary that plaintiffs might try to game the system by pleading federal claims in state-law clothing, the Court has explained that "an independent corollary to the well-pleaded complaint rule is the further principle that a plaintiff may not defeat removal by omitting to plead necessary federal questions." *Rivet v. Regions Bank of La.*, 522 U.S. 470, 475 (1998) (cleaned up). So sometimes federal courts must "determine whether the real nature of the claim is federal, regardless of plaintiff's characterization." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n.2 (1981) (citation omitted).

This is a critical safeguard ensuring that plaintiffs cannot plead around federal-court jurisdiction over federal claims. If district courts are prohibited from examining a complaint to see if it raises a substantive federal-law claim, then defendants will lose the ability to have federal courts decide federal questions. Plaintiffs will easily find ways to have state courts adjudicate federal claims that Congress says belong in federal court.

Respondents' likely retort to this argument is that many cases could still be removed under the Tenth Circuit's opinion because it recognized the well-pleaded complaint rule's corollary. But a closer examination of the decision shows that the Tenth Circuit has read this Court's precedent too narrowly.

The Tenth Circuit's decision suggests that there are only four statutes that "completely preempt" state law and around which plaintiffs cannot artfully plead. *See* Pet. App. 22a. The opinion thus rules out "complete preemption" under statutes like the Fair Credit Reporting Act or Federal Employers Liability

Act. This means that there is no stopping district courts from remanding these cases to state courts if the Court declines to review the Tenth Circuit's incorrect decision.

As explained in the petition (at 18-20), some courts of appeals apply the corollary when a party seeks to assert a federal common-law claim veiled as a state common-law claim. For example, the plaintiffs' complaint purported to raise state-law claims in *Otter Tail*. The Eighth Circuit, however, correctly looked beyond the label the plaintiffs assigned to the claims and to their substance. *See* 116 F.3d at 1213. Looking at the substance, the Eighth Circuit held that the claims arose under federal common law. *See id.* at 1213-14.

The Eighth Circuit is not alone in recognizing that a federal common-law claim can sometimes be disguised as a state-law claim. The plaintiffs in *Sam L. Majors Jewelers* sued after airlines lost their luggage. Again, the complaint purported to assert purely state-law claims. But the Fifth Circuit looked deeper and held that the claims were federal common-law claims. *See* 117 F.3d at 929.

The Tenth Circuit's decision thus allows plaintiffs to avoid litigating a broad array of federal claims in federal court. The Constitution, however, provides federal courts with constitutional jurisdiction over such claims, and Congress has given district courts statutory jurisdiction. The possibility of artful pleading under the Tenth Circuit's rule alone warrants granting the petition and resolving the important circuit split on the well-pleaded complaint rule.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

John M. Masslon II
Counsel of Record
Cory L. Andrews
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave. NW
Washington, DC 20036
(202) 588-0302
jmasslon@wlf.org

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