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 IN OPPOSITION

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QUESTION PRESENTED

Should this Court create a new exception to the well-pleaded complaint rule to allow removal of respondents' state law claims to federal court on the theory that they fall within a category of claims once governed by federal common law when: (1) that common law has been displaced by a federal statute; (2) the statute does not expressly authorize removal of the claims; and (3) petitioners cannot satisfy the test for complete preemption.

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BRIEF IN OPPOSITION

"[S]ince 1887 it has been settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption," 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. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 14 (1983). Under the venerable well-pleaded complaint rule, a state law claim that is preempted by federal law is a claim destined to be lost in state court, not a federal claim that can be removed to federal court.

Petitioners nonetheless ask this Court to hold that respondents' state law claims are removable to federal court because they are "necessarily and exclusively" federal common law claims. Pet. (I). They acknowledge that the complete preemption doctrine already establishes a test to determine whether a state law claim may be treated, for removal purposes, as a federal claim despite the requirements of the well-pleaded complaint rule. And they do not challenge the Tenth Circuit's holding that respondents' claims are not completely preempted.

Instead, petitioners ask the Court to recognize a new exception to the well-pleaded complaint rule for state law claims that are not completely preempted yet somehow qualify as "necessarily and exclusively" federal claims, based on some unidentified criteria that would seemingly sweep in at least every case in which a defendant claims that federal common law preempts a state law claim, and probably more. If that were not enough, petitioners would have the Court

declare that the state law claims in this case are "necessarily and exclusively" claims under a federal common law they acknowledge was extinguished by statute more than 50 years ago.

Predictably, this argument has been rejected by every court of appeals to consider it. This Court itself recently denied certiorari in another case seeking review of the same theory. *See Chevron Corp. v. City of Oakland*, 141 S. Ct. 2776 (2021) (No. 20-1089). Petitioners identify no reason for a different result here.

STATEMENT OF THE CASE

1. Respondents, two Colorado counties and a municipality, filed this suit in Colorado state court asserting exclusively state law claims and seeking monetary relief for local injuries they sustained as a result of petitioners' tortious conduct, which has caused, accelerated, an exacerbated the impacts of climate change. Among other things, they allege that petitioner fossil fuel companies "concealed and/or misrepresented the dangers associated with the burning of fossil fuels despite having been aware of those dangers for decades." Pet. App. 3a. That deception, respondents contend, contributed to excessive burning of fossil fuels, leading to increased levels of carbon dioxide in the atmosphere and making it necessary for respondents to spend significant additional sums on basic government services (such as maintaining roads and fighting forest fires) to mitigate the cascading effects of climate change. *Ibid*. Respondents "expressly do *not* seek to . . . enjoin any oil and gas operations or sales . . . or to enforce emissions controls of any kind." *Id.* at 6a (internal

quotation marks omitted). Instead, they ask that petitioners bear their fair portion of the costs their conduct has inflicted on respondents' taxpayers. *Ibid*.

Petitioners removed the case to federal court. In their notice of removal, petitioners asserted seven grounds for removal, ranging from the claim that "the Clean Air Act . . . completely preempted the state law claims," to arguments under the removal provision in the Bankruptcy Act and invocation of the Outer Continental Shelf Lands Act. Pet. App. 7a. Of most relevance here, however, petitioners argued that the case was removable because the suit, although pleading only state law claims, fell within the district court's federal question jurisdiction. That was so, petitioners argued, because those state law claims were really federal common law claims. *Ibid*.

The district court rejected that and all of petitioners' other removal arguments, then remanded the case to state court.

2. The Tenth Circuit affirmed.[1]

a. As relevant here, the court of appeals explained that a case may be removed to federal court only if it "originally could have been filed in federal court." Pet. App. 9a (quoting *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987)); *see* 28 U.S.C. § 1441(a). To decide whether a complaint provides a basis for original federal jurisdiction, courts apply the

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[1] The Tenth Circuit originally decided only that petitioners' federal officer removal claims lacked merit. Pet. App. 1a-2a. However, on remand from this Court's decision in *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532 (2021), the court rejected petitioners' remaining removal grounds as well. Pet. App. 2a-59a.

"well-pleaded complaint rule, which provides 'that the federal question must appear on the face of a well-pleaded complaint and may not enter in anticipation of a defense.'" Pet. App. 19a (quoting *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 494 (1983)). Accordingly, "a federal defense, including preemption, cannot support removal." *Id.* at 20a (citing *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 14 (1983)).

Under this regime, "the plaintiff is the 'master of the claim' and may 'avoid federal jurisdiction by exclusive reliance on state law.'" Pet. App. 19a (quoting *Caterpillar*, 482 U.S. at 392). The Tenth Circuit noted a "rare" exception to the general rule is found in the "[c]omplete preemption" doctrine, which has been applied by this Court "in just three statutory contexts." *Id.* at 22a (citations omitted); *id.* at 20a. "Complete preemption applies when 'the pre-emptive force of a statute is so extraordinary that it converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'" *Id.* at 21a (quoting *Caterpillar*, 482 U.S. at 393). A state claim is completely preempted when a federal statute both "preempts the state law relied on by the plaintiff" and conveys Congress's intent to permit removal through "provision of a federal cause of action" as a substitute for the preempted state law claim. *Id.* at 21a-22a (citation omitted).

b. Applying these principles, the Tenth Circuit held that none of petitioners' theories of federal question jurisdiction had any merit.

The court specifically rejected petitioners' argument that "there is federal-question jurisdiction over the Municipalities' state-law claims because they

are governed by federal common law." Pet. App. 24a. The court did not decide whether respondents' claims fell within the scope of the federal common law developed to resolve certain disputes over interstate air pollution. *Id.* at 29a n.5 (finding the answer "unclear" and doubtful). It made no difference, the court held, because the "federal common law . . . that formerly governed transboundary pollution suits *no longer exists* due to Congress's displacement of that law through the" Clean Air Act, 42 U.S.C. §§ 7401-7671q. Pet. App. 29a (citing *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011) (*AEP*)). The viability of respondents' state law claims therefore turned on Congress's preemptive intent in the Clean Air Act, not on whatever preemptive force the former federal common law once held. *Id.* at 30a ("[T]he availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act.") (quoting *AEP*, 564 U.S. at 429). And "because *ordinary* preemption can never serve as a basis for removal," respondents' case could be removed only under the "doctrine of *complete* preemption." *Ibid*.

In a portion of the ruling petitioners do not challenge, the court of appeals then held that respondents' claims were *not* completely preempted either by the federal common law the Clean Air Act displaced (Pet. App. 32a) or by the Clean Air Act itself (*id*. at 34a-38a). And because the claims were not completely preempted, the court rejected petitioners' argument that respondents were trying to "artfully plead" around removal that would otherwise be authorized. *Id.* at 31a.

REASONS FOR DENYING THE PETITION

Of the seven grounds for removal petitioners asserted below, they bring to this Court their most novel and least supportable. They insist that respondents' state law claims may be removed to federal court because they are *reall*y federal common law claims in disguise, even though the Tenth Circuit held, and petitioners do not dispute, that the federal common law they invoke was extinguished by statute decades ago and even though petitioners do not claim that this federal common law (when it existed) could completely preempt respondents' state law claims. As petitioners acknowledge, every circuit to consider their argument has rejected it in comprehensive, thoughtful opinions.[2] Indeed, of the 21 judges who have passed on petitioners' theory, only one judge has accepted it, and that district court ruling was unanimously overturned on appeal.[3] In this case,

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[2] *See* Pet. App. 24a-33a, 66a-81a; *Rhode Island v. Shell Oil Prods. Co.*, 35 F.4th 44, 53-56 (1st Cir. 2022), *reh'g denied*, No. 19-1818 (July 7, 2022); *County of San Mateo v. Chevron Corp.*, 32 F.4th 733, 746-48 (9th Cir. 2022), *reh'g denied*, Nos. 18-15499, 18-15502, 18-15503, 18-16376 (June 27, 2022); *Mayor & City Council of Balt. v. BP P.L.C.*, 31 F.4th 178, 199-208 (4th Cir. 2022), *reh'g denied*, No. 19-1644 (May 17, 2022); *City of Oakland v. BP PLC*, 969 F.3d 895, 906-07 (9th Cir. 2020), *reh'g denied*, No. 18-16663 (Aug. 12, 2020), *cert. denied*, 141 S. Ct. 2776 (2021).

[3] *See California v. BP P.L.C.*, 2018 WL 1064293 (N.D. Cal. Feb. 27, 2018), *rev'd*, 969 F.3d 895. For judges rejecting the theory *see supra* n.2; *City of Hoboken v. Exxon Mobil Corp*., 558 F. Supp. 3d 191, 201-03 (D.N.J. 2021); *Delaware ex rel. Jennings v. BP Am. Inc*., __ F. Supp. 3d __, 2022 WL 58484, at *4-6 (D. Del. Jan. 5, 2022), *appeal docketed*, No. 22-1096 (3d Cir. argued June 21, 2022); *Mayor & City Council of Balt. v. BP P.L.C.*, 388 F. Supp.

petitioners did not even bother trying to seek rehearing en banc, perhaps because every prior petition for rehearing in these cases has been denied without recorded dissent.[4]

If petitioners are ever able to convince a circuit to accept their position, this Court can decide whether to intervene at that time. Until then, the Court should do what it did when recently presented with a petition seeking review of the same removal theory and deny the petition. *See Chevron Corp. v. City of Oakland*, 141 S. Ct. 2776 (2021) (No. 20-1089).

I. There Is No Circuit Conflict On Either Of Petitioners' Questions Presented.

Unable to claim a circuit split on the straightforward question of whether state law claims like respondents' are removable, petitioners divide the removal question into two parts and insist that both halves independently implicate certworthy circuit conflicts on more broadly applicable questions. That tactic should not distract the Court from the unalterable fact that even if some circuits have accepted *pieces* of petitioners' argument (which is not,

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3d 538, 553-58 (D. Md. 2019), *aff'd*, 31 F.4th 178; *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142, 148-50 (D.R.I. 2019), *aff'd*, 979 F.3d 50 (1st Cir. 2020), *vacated*, 141 S. Ct. 2666 (2021); *County of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 937-38 (N.D. Cal. 2018), *aff'd*, 960 F.3d 586 (9th Cir. 2020), *vacated*, 141 S. Ct. 2666 (2021); *Minnesota v. Am. Petroleum Inst.*, 2021 WL 1215656, at *5-6 (D. Minn. Mar. 31, 2021), *appeal docketed*, No. 21-1752 (8th Cir. argued Mar. 15, 2022); *Connecticut v. Exxon Mobil Corp.*, 2021 WL 2389739, at *4-7 (D. Conn. June 2, 2021); *Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31, 41-44 (D. Mass. 2020).

[4] *See supra* n.2.

in fact, true), no circuit has agreed with them on the only question that matters for the outcome of this case—whether respondents' claims are removable.

Dividing the removal question up into constituent parts does not do petitioners any good anyway. The answer to the first question does not matter unless petitioners also prevail on the second, and the second question does not arise in this case unless petitioners prevail on the first. To make the case for certiorari, then, petitioners must establish that both questions are independently certworthy and that petitioners are likely to prevail on each.

This, petitioners cannot do. Even as alleged, the splits are shallow. Petitioners ultimately argue that the decision below conflicts with only three circuit court decisions. The first specifically disavows any conflict with the rule the Tenth Circuit adopted here. The other two are more than 25 years old, have never been cited for the propositions petitioners say they establish, and are inconsistent with later decisions from this Court. And even setting all that aside, there is nothing inconsistent with the decisions petitioners cite and the Tenth Circuit's decision in this case.

A. Petitioners' First Question Presented

The only purported conflict petitioners allege regarding their first question presented is with the Second Circuit's decision in *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021). *See* Pet. 12. The petitioners in *Oakland* asserted a conflict with the same decision, to no avail. *See Oakland* Reply 1-5.

To be clear, petitioners do not pretend that the Second Circuit reached a conflicting conclusion on the overall removal question—there was no removal issue

in *City of New York* because the "City filed suit in federal court in the first instance," asserting diversity jurisdiction. 993 F.3d at 94. Instead, the portion of the Second Circuit decision upon which petitioners rely was deciding a different question, namely the merits of the defendants' "preemption defense on its own terms, not under the heightened standard unique to the removability inquiry." *Ibid*. Because they were deciding materially different questions, both the Second and Tenth Circuits expressly disavowed any disagreement. *See ibid.* ("So even if this fleet of cases is correct that federal preemption does not give rise to a federal question for purposes of removal, their reasoning does not conflict with our holding" on preemption); Pet. App. 32a-33a (distinguishing *City of New York*: "Unlike in the removal context, the Second Circuit was permitted to consider the defendants' *ordinary* preemption defense when analyzing whether the city had failed to state a claim.").

Petitioners nonetheless insist that there is a certworthy conflict in the "reasoning" of the two opinions. Pet. 12. Specifically, petitioners assert that the Tenth Circuit concluded that climate-change claims "are no longer governed by federal common law because of displacement by the Clean Air Act," while the Second Circuit believed "that federal common law does govern those claims . . . even after statutory displacement." Pet. 11-12. Even if that were true, it would provide no basis for certiorari. This Court takes cases to resolve conflicts in holdings, not reasoning. And here, petitioners must establish not only that federal common law continues in some sense to "govern" claims like respondents', but also that it converts them *into* removable federal claims. *No* court

of appeals has accepted that proposition, and, hence, there is no need for this Court to decide that question either.

In any event, there is no conflict, even in rationale. To be sure, *City of New York* held that prior to enactment of the Clean Air Act, federal common law *used to* govern claims like respondents'. *See* 993 F.3d at 90-95. However, that is not the question upon which petitioners say the circuits are divided, presumably because the Tenth Circuit did not decide what law governed respondents' claims prior to the Clean Air Act. *See* Pet. App. 29a n.5. Instead, petitioners claim that there is a conflict over whether federal common law *continues* to "govern those claims . . . even *after* statutory displacement." Pet. 12 (emphasis added). But on that question, the Second Circuit agreed with the Tenth that "the Clean Air Act displaces federal common law claims concerned with domestic greenhouse gas emissions." 993 F.3d at 95.

The Second Circuit went on to hold that the City's state law claims were preempted, but not because it viewed them as disguised federal common law claims. Although the Second Circuit's rationale is not entirely clear, it appears that the court believed that state law was preempted by federal common law *before* the Clean Air Act was enacted, and that the Act did not thereafter "resuscitate" the previously preempted state law claims. 993 F.3d at 94-95, 98. *City of New York* thus held that the suit was not viable because state law claims simply did not exist after having once been governed and preempted by federal common law; it did not hold that federal common law *continues* to govern such claims *decades later*, even after

displacement by the Clean Air Act, as petitioners claim.[5]

The distinction between federal common law *once* governing claims like respondents', and federal common law *continuing* to govern such claims after the Clean Air Act, is critical not only to petitioners' claimed conflict in reasoning, but also to whether *City of New York* suggests that the Second Circuit would have allowed removal in this case. Because nothing in the decision suggests that the Second Circuit believes respondents' claims continue to be governed by federal common law today, there is no reason to predict a future circuit conflict on the real question presented here, even if such speculation were a basis for certiorari.

B. Petitioners' Second Question Presented

Petitioners' second question presented asks whether a claim that is "necessarily and exclusively governed by federal common law" can give rise to

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[5] Alternatively, the Second Circuit may have decided that the state law claims were preempted by the Clean Air Act itself, a ground that also would not support petitioners' claim that the court views such claims as presently governed by federal common law. In considering the Clean Air Act's effect on the City's state law claims, the Second Circuit rejected the City's argument that it should "engage in a *traditional* statutory preemption analysis" under which courts apply a strong presumption against preemption. 993 F.3d at 98 (emphasis added). But it nonetheless asked whether the state law claims were permitted under the Act, in what could be viewed as a statutory preemption analysis proceeding under a presumption in favor of preemption. *Id*. at 98-99 (explaining that because "federal common law governed this issue in the first place," the court would find state claims permitted only if "the Clean Air Act . . . authorize[d]" them).

removal jurisdiction even though "labeled as arising under state law." Pet. (I). The petitioners in *Oakland* asked this Court to decide the same "artful pleading" question, asserting the same circuit split. *See Oakland* Pet. 5, 24-25. Petitioners' redux of those arguments is no more convincing. In fact, neither of the two cases petitioners cite as conflicting with the decision below adopts the removal rule petitioners advance. And both rely on an outdated conception of federal removal jurisdiction that did not survive this Court's intervening decision in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005). No wonder, then, that neither decision has been cited as authorizing removal of putatively federal common law claims in the 25 years since they were decided.

1. Petitioners' first case, *In re Otter Tail Power Co*., 116 F.3d 1207 (8th Cir. 1997), has nothing to do with the question presented here, but rather applied the "substantial federal question" theory of removal this Court later modified in *Grable*.

The plaintiff in *Otter Tail* filed suit in state court seeking to enforce a prior federal court order delimiting the boundary between tribal and state regulatory authority with respect to electric utilities serving tribal lands. 116 F.3d at 1213. The Eighth Circuit explained that under the circuit precedent of the time, the case could be removed to federal court if the "well-pleaded complaint establishe[d] either that [1] federal law creates the cause of action or [2] that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law."

Ibid. (citation omitted).[6] The court concluded that this second prong was satisfied because the plaintiff's complaint was "specifically premised on [an] alleged deviation by Otter Tail from the terms of the district court's previous order," which in turn was "attempt[ing] to more precisely draw the line of Tribal regulatory authority" based on an interpretation of "treaty rights, acts of Congress, [and] inherent tribal sovereignty." *Id*. at 1213-14 (internal quotation marks omitted).

Thus, contrary to petitioners' contention, the Eighth Circuit did not hold that federal jurisdiction was present because the plaintiff was bringing claims that were "governed by federal common law." Pet. 18. Instead, the court permitted removal because it found that *determination* of the claims (whatever their source) required a "resolution of a substantial *question* of federal law." 116 F.3d at 1213 (emphasis added, citation omitted). In so doing, the court relied on a branch of removal jurisdiction that permits removal even of state law claims so long as resolving those claims required deciding a substantial federal question—a branch this Court later clarified and significantly restricted in *Grable*. *See ibid.* (casting "substantial question of federal law" removal as an *alternative* to removal based on existence of a federal cause of action); *Great Lakes Gas Transmission Ltd. P'ship v. Essar Steel Minn. LLC*, 843 F.3d 325, 329, 331 (8th Cir. 2016) (reciting same "substantial

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[6] Although no one contested jurisdiction or removal, the Eighth Circuit considered the question *sua sponte*. *See* 116 F.3d at 1214 & n.6. The court also identified two other likely sources of federal question jurisdiction. *Id*. at 1214 n.6.

question of federal law" standard, then applying the *Grable* test).

Otter Tail's precedential authority is doubtful after *Grable*, which now requires considerably more than the existence of a "substantial question of federal law" in the case. *Otter Tail*, 116 F.3d at 1213 (citation omitted); *see Grable*, 545 U.S. at 314 ("Instead, the question is, does a state-law claim 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.").[7] But regardless, even if *Otter Tail* were apt authority in a case seeking review of some question under *Grable*, it has no relevance here. Petitioners raised a separate *Grable* claim below and do not challenge the Tenth Circuit's rejection of it here. *See* Pet. App. 39a-49a.

2. Petitioners similarly claim that the Fifth Circuit allows removal of "putative state-law claims" when they are "governed by federal common law." Pet. 19. But they cite (Pet. 19-20) only one decision for that proposition, *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922 (5th Cir. 1997). And the passage petitioners cite to is, itself, unclear and cites no authority. *See id*. at 929 (quoted at Pet. 20). Moreover, as far as respondents can tell, no court has ever cited *Majors* as establishing petitioners' claimed rule in the quarter-

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[7] *See also Gunn v. Minton*, 568 U.S. 251, 258 (2013) (explaining that pre-*Grable*, substantial federal question removal doctrine resembled a "canvas . . . that Jackson Pollock got to" and that *Grable* was intended to "bring some order to this unruly doctrine").

century since it was decided. *See* Pet. 19-22 (citing no such examples). And during that time, the Fifth Circuit has repeatedly catalogued the lawful bases for removing state law claims to federal court without ever citing *Majors* or mentioning "governed by federal common law" as a ground for removal. *See, e.g.*, *Mitchel v. Bailey*, 982 F.3d 937, 940 (5th Cir. 2020); *Venable v. La. Workers' Comp. Corp.*, 740 F.3d 937, 941 (5th Cir. 2013); *Bernhard v. Whitney Nat'l Bank*, 523 F.3d 546, 551 (5th Cir. 2008).

Rather than establishing a broad new exception to the well-pleaded complaint rule—without acknowledgement, analysis, or citation to authority—it is more likely that the panel in *Majors* upheld removal based on the same understanding of pre-*Grable* removal law as the Eight Circuit in *Otter Tail*, believing that the simple existence of a substantial federal question in the case (such as the relationship between the plaintiff's claims, federal common law, and the Airline Deregulation Act) supported removal of the state law claims before it. Petitioners themselves suggest as much. They cite *Torres v. Southern Peru Copper Corp.*, 113 F.3d 540 (5th Cir. 1997), as applying the same rule as *Majors* and describe that rule as "permitting removal where a state-law claim raised 'substantial questions of federal common law.'" Pet. 20 (quoting *Torres*, 113 F.3d at 542-43). But as discussed, if that was the rationale for the ruling, the decision has nothing to do with the second question presented, does not conflict with the Tenth Circuit's decision in this case, and is no longer good law after *Grable*.

Even if *Majors* permitted removal because it viewed the plaintiff's suit as effectively raising federal claims, those claims were materially different than the

ones asserted here. The Fifth Circuit explained that the relevant federal common law had developed after Congress "totally preempted state regulation of the liability of common carriers," 117 F.3d at 926, and had then been expressly ratified by statute, *id*. at 926-29. The court stressed that "[b]ecause we rely upon the historical availability of this common law remedy, *and the statutory preservation of the remedy*, our holding today is necessarily limited." *Id*. at 929 n.16 (emphasis added). Indeed, the opinion is clear that the court would have reached the opposite conclusion if, as in this case, the federal statute had *displaced* the relevant federal common law rather than *ratified* it. *Id*. at 928-29 (holding case was removable because statutory "savings clause had the effect of preserving the clearly established federal common law cause of action against air carriers for lost shipments").

At bottom, the precise removal theory applied by *Majors* is uncertain, but the Fifth Circuit itself has never treated it as creating a new category of removal for state law claims governed by federal common law. If the second question presented is as recurring and important as petitioners claim, the Fifth Circuit will no doubt clarify the decision in due course. Until then, certiorari would be premature.

II. Petitioners' Questions Presented Are Not Recurringly Important.

Denying review is also appropriate because petitioners' questions presented have no recurring importance. This case presents an exceedingly narrow and unusual question: whether defendants can remove state law claims that were supposedly once governed by a body of federal common law that was

later displaced by a federal statute, when the new statute provides no basis for removal and the defendant cannot satisfy the requirements for complete preemption. Other than the handful of cases like respondents' in which the issue has recently been litigated, petitioners identify no other situation in which this question has ever arisen or ever likely will.

Petitioners say the present litigation against energy companies is reason enough to grant review. But *Oakland* was one of those cases, and this Court was aware of the others petitioners cite when it denied certiorari in *Oakland*. The Court either decided that the question was insufficiently important to warrant certiorari or that review should await emergence of a circuit conflict. Since then, no split has emerged, and petitioners identify no reason why the question is more important now than it was last summer.

Petitioners try to argue that by dividing the removal question into two parts, and casting the second question in broader terms, this case has implications beyond the climate change suits. *See* Pet. 29. But that assertion goes unsubstantiated, as petitioners must stretch to find even a couple of dated and disputable instances outside the climate context in which the question has ever even arguably been litigated, even though the question could have arisen at any point in the long history of removal and federal common law. *See* Pet. 18-20, 29.

III. This Case Is A Poor Vehicle.

Even if petitioners' questions presented warranted review in some case, this one is a poor vehicle for deciding either one.

1. The premise of both questions is that respondents' claim falls within the scope of the federal common law of interstate air pollution that existed prior to the Clean Air Act. *See* Pet. (I). As discussed below, that premise is incorrect. *See infra* 20-21. The more important point for certiorari, however, is that the panel below expressly did not decide that foundational question. Pet. App. 29 n.5. The closest it came was expressing substantial skepticism of petitioners' position. *Ibid*.

Even if deciding the contours of an extinct branch of federal common law were worth this Court's time in an appropriate case, this Court is "a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). The Court can and should await a case in which all aspects of the questions presented have been passed on below.

2. Relatedly, the answer to petitioners' first question (whether federal common law necessarily governs respondents' claims) makes no difference to the outcome of this case unless the Court also grants certiorari and reverses on their second (holding that such claims are removable even when the plaintiff pleads only state law causes of action). The Court thus risks devoting substantial resources to deciding the first question only to ultimately hold the answer does not matter. Or the Court might consider the artful pleading question first, resolve it against petitioners, and therefore never reach the first question. If the two questions are independently certworthy, they should present themselves more cleanly in future cases.

3. The case also is a poor vehicle because although petitioners suggest that their removal theory may be supportable as a species of *Grable* removal, *see*

Pet. 29, the Tenth Circuit held that argument waived below because petitioners raised it for the first time in a supplemental brief. *See* Pet. App. 33a n.6.

More generally, petitioners do not ask this Court to review the *Grable* claim they *did* make, or to decide whether this case qualifies for removal under the traditional complete preemption doctrine. By selectively pressing only their most novel theory in this Court, petitioners would put this Court in the awkward position of having to decide whether to create a substantial new exception to the well-pleaded complaint rule without being able to consider whether such an innovation is even necessary. At the very least, the Court should await a case in which it is presented the full menu of possible options for deciding the removability of climate-change-related cases.

IV. The Decision Below Is Correct.

Certiorari is further unwarranted because the uniform conclusion of the courts of appeals is correct. Petitioners' contrary arguments are little more than wordplay designed to circumvent the well-established rule that preemption defenses provide no basis for removal. *See, e.g.*, *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 12 (1983).

1. Petitioners' argument proceeds in three steps. First, they say, "[f]ederal common law supplies the rule of decision" for cases "that implicate 'uniquely federal interests,'" including, supposedly, the kinds of claims brought in this case for local harms arising out of petitioners' deception and other contributions to climate change. Pet. 24. Second, for that reason, "the Constitution dictates that federal law must govern

controversies over inter-state pollution." Pet. 25. Putting these two points together, they insist, "leads to a straightforward result: respondents' climate-change claims necessarily arise under federal, not state, law." *Ibid*.

As noted earlier, petitioners' initial premise that this case falls within the body of federal common law developed to decide certain interstate pollution cases was not decided below. And although it argues otherwise in this case, petitioner Exxon has insisted elsewhere that claims like respondents' would fall *outside* the scope of the federal common law of transboundary air pollution. *See* Answering Br. for Defendants-Appellees at 56-61, *Native Vill. of Kivalina v. ExxonMobil Corp*., 696 F.3d 849 (9th Cir. 2012) (No. 09-17490).

Exxon was right before and is wrong now. *See Rhode Island v. Shell Oil Prods. Co.*, 35 F.4th 44, 54-56 (1st Cir. 2022); *Mayor & City Council of Balt. v. BP P.L.C.*, 31 F.4th 178, 202-04 (4th Cir. 2022). "The cases in which federal courts may engage in common lawmaking are few and far between." *Rodriguez v. FDIC*, 140 S. Ct. 713, 716 (2020). This Court has never recognized a sweeping federal common law governing every action touching upon interstate pollution. *Contra* Pet. 24. To the contrary, the Court has applied federal common law only to "suits brought by one State to abate pollution emanating from another State." *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 421-22 (2011) (*AEP*); *see also* Pet. App. 29a n.5. Applying federal common law to the claims in this case would require significant extensions of prior cases along multiple dimensions. *See AEP*, 564 U.S. at 422 (noting Court has "not yet decided whether private citizens . . .

or political subdivisions . . . of a State may invoke the federal common law of nuisance to abate out-of-state pollution"); *ibid*. ("Nor have we ever held that a State may sue to abate any and all manner of pollution originating outside its borders."); Pet. App. 29a n.5 (noting it is "also unsettled whether the federal common law of interstate pollution covers suits brought against product sellers rather than emitters"); *Rhode Island*, 35 F.4th at 54 (rejecting defendants' bid to extend federal common law to claims for "climate change-related harms . . . caused by deliberately misrepresenting the dangers they knew would arise from their deceptive hyping of fossil fuels"). Petitioners cannot demonstrate that such extensions are necessary, particularly when Congress is able to provide any needed federal regulation or preemption in this area.

But even setting that aside, petitioners' leap from the premise that federal law must govern a particular claim to the conclusion that any state law claim addressing the same topic *is* a federal claim is a complete non sequitur. The same could be said of just about *any* state law claim that is preempted by federal law. After all, the Constitution dictates that state law cannot apply when preempted by any kind of federal law. *See* U.S. Const. art. VI, cl. 2 (Supremacy Clause). And with state law preempted, the only possible source of claims is federal law. One could say that this means that any preempted state law claim really *is* a federal law claim. But that would mean that *any* preemption defense justifies removal even though the Court has held the opposite since the late 1800s.

Of course, petitioners are right that there is a narrow class of state law claims that are not simply

doomed to fall to a preemption defense, but rather "inherently *are* federal claims, arising under federal law." Pet. 28. They are state law claims that meet this Court's strict requirement for "complete pre-emption." *See, e.g.*, *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987). But petitioners are not arguing that respondents' state law claims are completely preempted by federal common law or anything else. The Tenth Circuit rejected that possibility below, in part because petitioners cannot meet the basic requirement that the federal law with preemptive force provide a substitute cause of action vindicating the same interest as the state law claim. *See* Pet. App. 32a, 34a-38a. Instead of challenging that conclusion, or asking that the Court revise the rules for complete preemption, petitioners insist that there is another class of state law claims that "inherently *are* federal claims," Pet. 28, even if they do not satisfy the Court's test for complete preemption.

Asking the Court to create a new exception to the well-pleaded complaint rule that sounds a lot like complete preemption but is not subject to that doctrine's requirements would be difficult enough to justify on its own. The Court has strictly adhered to the well-pleaded complaint rule for more than a century,[8] and when it has recognized exceptions, it has kept them exceedingly narrow. *See, e.g.*, *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 699 (2006); *Caterpillar*, 482 U.S. at 393-94. Indeed, in modern times, rather than add new exceptions, the

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[8] *See, e.g.*, *Rivet v. Regions Bank of La.*, 522 U.S. 470, 475 (1998) (citing *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908)).

Court has focused on narrowing those that exist. *See, e.g.*, *Grable*, 545 U.S. at 312-13. That reticence is particularly appropriate because Congress is fully equipped to decide for itself when to authorize additional exceptions and has done so on several occasions. *See* 28 U.S.C. § 1442(a); 42 U.S.C. § 2014(hh).

Petitioners' new proposed exception is anything but narrow. At a minimum, petitioners seem to think the category includes every instance in which federal common law preempts state law, given federal common law is always founded in "basic interests of federalism" and the "overriding federal interest in the need for a uniform rule of decision." Pet. 25 (citation omitted). Even that is an immensely broader exception than anything this Court has ever recognized. But petitioners offer no reason why concerns about uniformity and federalism should not also create removal jurisdiction when Congress (rather than a judge) decides that federalism interests and the need for national uniformity justify preempting state law.

If petitioners have a limiting principle for distinguishing between completely preempted claims, preempted but unremovable claims, and claims that are not completely preempted but nonetheless "inherently *are* federal claims," they have yet to unveil it. That petitioners offer "no idea how a court would make that judgment" is "one more good reason to reject" their proposal. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 578 U.S. 374, 393 (2016).

2. For these reasons, petitioners' arguments would be hard to swallow if the federal common law they invoke actually existed. But as every court to

have considered the question has rightly concluded, it does not. *See supra* n.2.

So what is the point of removal, then? Ordinarily, removal is allowed to provide the defendant a federal forum for adjudicating the plaintiff's federal claims, whether those claims are expressly pleaded as federal claims or are rendered federal claims through complete preemption. But here, petitioners acknowledge—indeed, insist—that there is no federal common law claim to adjudicate. Consequently, neither petitioners nor the complaint ask any court—state or federal—to decide any federal claim in this case. As masters of their complaint, respondents have elected to put all their eggs in a state law basket. If a court finds those claims preempted, the complaint will be dismissed. The only federal question this case poses, then, is whether federal law preempts those state law claims. And it has been established for generations that a defendant's fervent desire to present a preemption defense to a federal court is no ground for removal. *Franchise Tax Bd.*, 463 U.S. at 12.

3. All these contortions to avoid this Court's settled removal rules are particularly pointless because petitioners' preemption argument is incoherent, simultaneously insisting that state law is preempted by federal common law and arguing Congress displaced that judge-made law decades before this suit was filed. Petitioners try to untangle this knot of illogic in two ways, but fail on each attempt.

First, they suggest that after enactment of the Clean Air Act, the relevant federal common law is just *mostly* dead. They say the Act extinguished the

federal common law's "remed[ies]," but not its power to preempt state law. Pet. 26. Nonsense. As this Court has held in a parallel context, the repeal of a statute that previously preempted state law does not "leave behind a pre-emptive grin without a statutory cat." *P.R. Dep't of Consumer Affs. v. Isla Petroleum Corp.*, 485 U.S. 495, 504 (1988). Once "Congress addresses a question previously governed" by "federal common law," the "need for such an unusual exercise of law-making by federal courts disappears." *AEP*, 564 U.S. at 423 (citation omitted). That includes the need for judges to decide whether there remains an "overriding federal interest in the need for a uniform rule of decision" or otherwise good policy reasons to preclude (or permit) a degree of state regulation or litigation in the field. Pet. 25 (citation omitted). *AEP* thus made it perfectly clear that after the Court's "holding that the Clean Air Act displaces federal common law, the availability *vel non* of a state lawsuit depends" on the "preemptive effect of the federal Act." 564 U.S. at 429.

Second, petitioners suggest that once federal judges decide that federal common law, rather than state law, should govern a subject, that judicial decision forever extinguishes state law, even after Congress abrogates the preempting federal common law. Pet. 26. Indeed, petitioners go so far as to claim that the Constitution bars state law from applying to interstate pollution claims. Pet. 26-27. Consequently, they argue, "there is no state law for the Clean Air Act . . . to resurrect." Pet. 26. None of that is correct.

This Court has never held federal preemption of state law extinguishes that law forever, as if federal judges had the power to repeal state laws and require

states to re-enact them once the federal barrier to its enforcement is removed (a particularly implausible suggestion when, as here, the state law at issue is itself common law). *Cf. Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1486 (2018) (Thomas, J., concurring) ("[C]ourts do not have the power to 'excise' or 'strike down' statutes," but rather decline to enforce them when inconsistent with higher authority) (citation omitted).

Petitioners' contrary position cannot be squared with this Court's decision in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987). There, the Court explained that prior to the 1972 amendments to the Clean Water Act, interstate disputes over water pollution were "resolved by reference to federal common law," the "implicit corollary" of which was "that state common law was pre-empted." *Id*. at 488. This Court subsequently held that the amended Clean Water Act "occupied the field, pre-empting all *federal* common law." *Id*. at 489. On petitioners' logic, that should have meant that there was "no state law for the [Clean Water Act] to resurrect." Pet. 26. Yet, in *Ouellette*, this Court acted on the opposite understanding, carefully considering whether state common law—whose continued existence the Court took for granted—was preempted by the Clean Water Act. *See* 479 U.S. at 491 ("With this regulatory framework in mind, we turn to the question presented: whether the *Act* pre-empts Vermont common law to the extent that law may impose liability on a New York point source."). And while the Court found Vermont's law preempted to the extent it might apply to an out-of-state polluter, it held that a source State's

common law remained available to address interstate pollution. *Id*. at 497-99.

Congress obviously shared this Court's understanding that state common law survived an interim period of preemption by federal common law. In both the Clean Water Act and the Clean Air Act, Congress enacted savings clauses preserving aspects of the state law petitioners insist either never existed or were long ago extinguished by federal common law. *See* 42 U.S.C. § 7416; 33 U.S.C. § 1365(e).[9]

Contrary to petitioners' remarkable suggestion, nothing in the "*Constitution* dictates that federal law must govern controversies" judges once thought best dealt with exclusively by federal common law. Pet. 25 (emphasis added). If taken seriously, that assertion would call into question whether Congress could ever allow state law a role in governing interstate pollution or any other topic judges saw fit to regulate for a time through federal common law. There is no basis for that suggestion. What the "Constitution dictates" is judicial subservience to Congress's legislative judgment on such questions, including on matters of preemption. *See AEP*, 564 U.S. at 429; *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981) ("[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.").

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[9] *See also, e.g.*, *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 13 n.7 (1987) (describing how "Congress amended ERISA to exempt from pre-emption certain provisions of the Hawaii Act in place before the enactment of ERISA").

4. Petitioners' invocation of the rule against "artful pleading" adds nothing to the case. Respondents would agree that if their claims really are federal claims under the complete preemption test, they could not artfully plead around removal. But petitioners cite no authority holding that the artful pleading doctrine expands the universe of removable claims. It is a "corollary" to the substantive removal rules, not an independent source of removal authority. *Franchise Tax Bd.*, 463 U.S. at 22.

Petitioners dispute the Tenth Circuit's holding that the artful pleading doctrine is limited to complete preemption cases. Pet. 28. But the Tenth Circuit was simply following this Court's lead, and petitioners cite no case from any court holding otherwise. *See Rivet v. Regions Bank of La.*, 522 U.S. 470, 475 (1998) ("The artful pleading doctrine allows removal where federal law completely preempts a plaintiff's state-law claim."); Pet. 28-29.

The prevailing understanding makes perfect sense. It is only when the preemption is complete that removal provides a forum for something beyond an ordinary preemption defense, allowing a federal court to decide not only whether state law persists but also whether the plaintiff has a claim under the substitute federal cause of action. Put another way, outside cases of complete preemption, pleading a preempted state claim instead of a potentially viable federal cause of action is not artfully evading anything—the state law claim will be dismissed as preempted, and the potential federal claim will never be adjudicated because it was never presented.

At the very least, even if the artful pleading doctrine applied to attempts to avoid other forms of

removal (say, under *Grable*), it surely was never intended to be an end-run around the fundamental rule against removal based on ordinary preemption defenses. The only artful pleading in this case was in petitioners' removal papers.

5. Finally, petitioners' policy objections to the current removal rules have no merit.

Petitioners say that unless this Court accepts their new removal theory, "a claim for interstate pollution could never be removed to federal court." Pet. 30. That is not necessarily so—rejecting petitioners' novel theory does not preclude removal in appropriate cases based on diversity or other established grounds. *See, e.g.*, *City of New York*, 993 F.3d at 94 (jurisdiction founded on diversity). But more importantly, there is nothing problematic about state courts adjudicating federal preemption defenses. *See, e.g.*, *Vaden v. Discover Bank*, 556 U.S. 49, 61 n.12 (2009). They do it all the time. Indeed, the presumption that state courts can and will properly apply federal preemption doctrines is precisely why the well-pleaded complaint doctrine does not permit removal based on a federal preemption defense.

Petitioners complain that without a right to remove, defendants may be subject to "potentially conflicting state-court lawsuits." Pet. 30. That is certainly not true in this case, where respondents seek only monetary relief, not any injunction or other remedy that would subject petitioners to conflicting directions regarding how to conduct their businesses. *See supra* 2-3. State courts routinely adjudicate cases where a company's deceptive marketing and sales of a dangerous product have caused harm within the

State; that is not normally a reason for a uniform federal rule.

In any event, the prospect of conflicting lawsuits is an argument in favor of federal preemption, not an argument about which court should decide the preemption question. *See Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 816 (1986). If the preemption defense has merit, there is no reason to think that state courts are more likely than federal courts to wrongly allow the suits to go forward. *See, e.g.*, *Manning*, 578 U.S. at 390-91. And whether the preemption defenses are litigated in state or federal court, this Court will retain jurisdiction to ensure that the federal preemption rules are properly applied. *See Franchise Tax Bd.*, 463 U.S. at 12 n.12. If more is needed, Congress stands ready to adjust removal rules as appropriate. *See, e.g.*, Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 5, 119 Stat. 4, 12-13 (expanding removal rights in certain mass litigation cases).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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