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

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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SUPPLEMENTAL BRIEF FOR RESPONDENTS

The United States cogently explains why the petition in this case meets none of the Court's criteria for review. There is no circuit conflict on whether climate-change cases may be removed to federal court. U.S. Br. 16-17. Indeed, petitioners have never claimed there is. *See* Petr. Supp. Br. 3-4. Instead, petitioners attempt to avoid this obvious defect in their petition by artificially dividing the question presented into two abstract sub-parts. *Ibid.* But the United States rightly explains that there is no circuit conflict on the sub-questions either. U.S. Br. 17-22. Petitioners insist that the question is of such importance, and the decision below is so obviously wrong, the Court should grant certiorari anyway. Petr. Supp. Br. 3. But the United States refutes those claims as well. *See* U.S. Br. 7-16.

Petitioners' initial response is to attack the Solicitor General's integrity, accusing the Government of basing its brief on political considerations rather than its honest assessment of the petition. Petr. Supp. Br. 2. When they finally address the substance of the Government's brief, petitioners merely reiterate their strained reading of three circuit cases in an attempt to gin up a circuit conflict, then repeat merits arguments that have failed to persuade even a single one of the now 20 court of appeals judges who have passed on them. The petition should be denied.

1. There is no basis for petitioners' contention that the United States' brief represents a "cynical change in position" driven by craven political considerations. Petr. Supp. Br. 2, 11.

To start, in both this Administration and the last, the Government has consistently declined to support

defendants' request that the Court review their federal common law removal theory. The question arose for the last Administration during the briefing and oral argument in *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532 (2021), when the petitioners urged the Court to decide the merits of their removal theory in the course of resolving the question presented in that case. When asked at oral argument whether the Government believed the Court should address the question, counsel responded, "we haven't taken a position on whether the Court should use its discretion to decide it here." Oral Arg. Tr. 28-29. Accordingly, on the central question the Court faces now—whether to grant review—the United States' position has remained consistent across administrations.

Petitioners' complaint, instead, is with the United States' view of the merits, which they say "is being driven by the fact that the questions are arising in the context of climate-change lawsuits—and by a desire to signal virtue to political bedfellows who are behind these lawsuits." Petr. Supp. Br. 2. This is a serious charge which one would expect responsible parties before this Court to support with substantial evidence. Instead, petitioners offer only this speculation: "given the federal government's institutional interest in taking a broad view of federal jurisdiction," the Government would have continued to side with petitioners unless derailed by political considerations. *Ibid*. But petitioners provide no basis for their assertion that the United States has a sweeping institutional interest in maximizing federal jurisdiction, much less that the Solicitor General should be expected to support any legal theory that advances that interest, no matter how thoroughly

debunked in the courts of appeals. Congress has provided the United States its own removal right in any case affecting its institutional interests. *See* 28 U.S.C. § 1442. And under the leadership of Solicitors General appointed by Presidents of both parties, the United States has resisted calls to expand federal jurisdiction in ways that are inconsistent with the well-pleaded-complaint rule or founded in a distrust of state courts. For example, the brief for the United States in *Watson v. Philip Morris Cos.*, 551 U.S. 142 (2007), filed by then-Solicitor General Paul Clement, opposed a proposed expansion of federal officer removal jurisdiction. *See* U.S. Br. 19-46, *Watson*, *supra* (No. 05-1284).[1] Among other things, the brief explained that "Congress ordinarily intends to respect the interest of the States in providing state forums for the vindication of state-law claims against private parties, even if they possess a substantial federal law defense." *Id*. 19.

Perhaps petitioners' attack on the United States' integrity would be colorable if their position were so obviously right that no reasonable observer could disagree with it. But the opposite is true—petitioners have presented their removal theory to more than two dozen trial and appellate judges and only a single district court judge thought it had merit. *See* BIO 6-7 nn. 2-3 (noting district court was promptly reversed); *infra* p. 4.[2] There is nothing wrong or suspicious about the United States reassessing its position in light of that significant body of case law, all of which

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[1] *Available at* 2007 WL 621847.

[2] In prior litigation, even petitioner Exxon agreed that federal common law did not apply to climate change disputes between parties other than States. *See* BIO 20.

developed after the change in administrations. *See* U.S. Br. 6-7.

2. While this petition has been pending, the consensus against petitioners' position has continued to grow.

In a decision for a unanimous Third Circuit panel rejecting removal in a similar climate case, Judge Bibas explained that "[o]ur federal system trusts state courts to hear most cases—even big, important ones that raise federal defenses." *City of Hoboken v. Chevron Corp.*, 45 F.4th 699, 705 (3d Cir. 2022). Reviewing the same theories petitioners have advanced in this case, the court held there was "no federal hook" for removal. *See id*. at 706-09.

In *Minnesota v. American Petroleum Institute*, -- F.4th --, 2023 WL 2607545 (8th Cir. Mar. 23, 2023), the Eighth Circuit recently followed suit, unanimously rejecting the argument that removal should be permitted "because federal common law governing transboundary pollution provides the rule of decision for [the plaintiff's] claims." *Id*. at *2. Petitioners claim that Judge Stras "wrote that cases such as this one should give rise to federal jurisdiction." Petr. Supp. Br. 3. But in fact, Judge Stras joined his colleagues in rejecting the defendants' removal claims root and branch. *See* 2023 WL 2607545, at *11 (Stras, J., concurring) ("[E]ven the strongest arguments for removal don't work here.").

To be sure, Judge Stras wrote separately to note his personal doubts about the wisdom of that settled law. *Id*. at *10-11. But in so doing, he said out loud what petitioners have tried their best to obscure: that petitioners' removal claims require a radical revision to the well-pleaded-complaint rule and the removal

statute. *See id*. at *11. Indeed, as this Court has held, Congress amended the removal statute specifically to bar removal based on federal defenses like preemption. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392-93 (1987); *Tennessee v. Union & Planters' Bank*, 152 U.S. 454, 460-62 (1894). Even if it were open to this Court (rather than Congress) to rewrite the removal statute and alter a "statutory scheme [that] has existed since 1887," *Franchise Tax Bd. v. Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 10 (1983), this case presents no vehicle to do so—petitioners do not ask this Court to reconsider the well-pleaded complaint rule or overrule any of its precedents.

3. Petitioners' attempts to shore up their claims of a circuit conflict are unconvincing.

a. Regarding their first question presented, petitioners claim (for the first time) that a passing citation to *Illinois v. City of Milwaukee*, 731 F.2d 403 (7th Cir. 1984), in the Second Circuit's *City of New York* decision, "confirms" petitioners' understanding of the Second Circuit's holding. *See* Petr. Supp. Br. 5 (citing *City of New York v. Chevron Corp*., 993 F.3d 81 (2d Cir. 2021)). But that citation only bolsters the United States' contrary reading of Second Circuit precedent.

In *City of Milwaukee*, the Seventh Circuit described how federal common law had occupied the field of interstate water pollution until it was displaced by a federal statute. *See* 731 F.2d at 406-11. The court recognized that the statute now dictated whether state law on the subject was preempted. *Id*. at 411. But the Seventh Circuit concluded that because Congress was acting against the backdrop of

federal common law's traditional displacement of all state regulation over the subject matter, "we think federal law must govern in this situation except to the extent that the 1972 FWPCA (the governing federal law created by Congress) authorizes resort to state law." *Ibid*.

The Second Circuit's citation to this decision is entirely consistent with the United States' observation that "[a]lthough the Second Circuit recognized that claims premised on domestic emissions are no longer *governed* by federal common law, the court viewed the *prior* applicability of federal common law as relevant in determining the post-Clean Air Act viability of state-law claims." U.S. Br. 19. Neither court held that some apparition of the displaced federal common law lingered on the field, preempting state law of its own accord. Instead, both courts seemingly relied on the history of federal common law preemption in construing the preemptive scope of the statute. *See City of New York*, 993 F.3d at 99 ("'[R]esort[ing] to state law' on a question previously governed by federal common law is permissible only to the extent 'authorize[d]' by federal statute.") (quoting *City of Milwaukee*, 731 F.2d at 411); *City of Milwaukee*, 731 F.3d at 411. As the United States explains, "nothing in the Tenth Circuit's decision here conflicts with that analysis, since the Tenth Circuit did not address whether the Clean Air Act authorized or preempted respondents' claims." U.S. Br. 19.[3]

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[3] To the extent the Court thinks there is any ambiguity in *City of New York*, that question will be resolved by the Second Circuit's impending decision in *Connecticut v. Exxon Mobil Corp*., No. 21-1446 (2d Cir. argued Sept. 23, 2022), in which the removal

b. On the second question presented, the United States correctly explains that neither of the decades-old opinions petitioners cite conflicts with the Tenth Circuit's decision here. U.S. Br. 20-22.

Petitioners remarkably continue to argue (Br. 6) that the Eighth Circuit's decision in *In re Otter Tail Power Co.*, 116 F.3d 1207 (8th Cir. 1997), "supports removal," even though the Eighth Circuit's recent decision in *Minnesota* considered and rejected petitioners' removal argument. *See* 2023 WL 2607545, at *1-4. In their brief to the Eighth Circuit, the defendants in *Minnesota* discussed *Otter Tail* at length, insisting that it stood for the proposition that "claims necessarily governed by federal common law are removable to federal court, even if the plaintiff purports to assert only state-law claims." Brief of Appellants at *29-30, *Minnesota*, *supra*.[4] The Eighth Circuit not only rejected that position, but cited *Otter Tail* as contrary authority. *See* 2023 WL 2607545, at *2 n.4 (acknowledging defendants' "artful pleading" argument, but holding that "[w]e have never applied the doctrine as a standalone exception, so we decline to do so here") (citing *Otter Tail*); *compare* U.S. Br. 20 (arguing that *Otter Tail* did not "rest on the artful-pleading doctrine").

Petitioners say that the Third Circuit recently "acknowledged" that *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922 (5th Cir. 1997), "supports removal

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question is squarely presented. If that panel (which includes the author of the *City of New York* opinion) agrees with petitioners' interpretation of circuit authority and parts ways with the circuit consensus against removal, the Court can decide whether to grant certiorari in that case or a subsequent one.

[4] *Available at* 2021 WL 2604711.

and expressly declined to follow it." Petr. Supp. Br. 7 (citing *City of Hoboken*, 45 F.4th at 708). Not so. The Third Circuit made clear that *Sam L. Majors* would *not* support removal in the Fifth Circuit today because "most courts recognize" that the decision is "not good law." *City of Hoboken*, 45 F.4th at 708. As the opposition explained, *Majors* is best understood as an application of an outdated version of the substantial federal question doctrine that did not survive this Court's decision in *Grable*. BIO 15. Petitioners do not dispute that since *Majors* was decided in 1997, no court has ever cited it as authorizing removal of state law claims on the ground that they are governed by federal common law. BIO 14-15. The Fifth Circuit has, instead, repeatedly listed the permissible grounds for removal without ever mentioning "really governed by federal common law" as among them. *See id.* 15. "Accordingly, there is no sound reason to believe that the Fifth Circuit would reach a different conclusion than the Tenth Circuit in the circumstances of this case." U.S. Br. 22.

4. Little need be said in response to petitioners' third recitation of their argument on the merits. As Judge Stras recognized, the theory that purely state law claims can be removed to federal court on the ground that they are *really* federal common law claims is simply an attempt to evade a hundred years of removal precedent. *See Minnesota*, 2023 WL 2607545, at *11 (Stras, J., concurring); BIO 19-23.

The assertion that such state law suits can be removed because they are really claims under a federal common law that Congress displaced more than 50 years ago is even more absurd. As the United States explains, this Court's decisions in *American*

Electric Power Co. v. Connecticut, 564 U.S. 410 (2011), and *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), make clear that once Congress stepped into the void temporarily filled by judge-made law, preemption became governed by the Clean Air Act, not the federal common law it extinguished. U.S. Br. 13-14; *see also* BIO 24-27. Indeed, petitioners seemingly acknowledge that in *Ouellette*, the Court decided "whether a suit for injury allegedly caused by interstate water pollution could proceed under the law of the State of injury" through an "ordinary preemption" analysis of the statute. Petr. Supp. Br. 10. Petitioners say that the Court "also" relied "on the inherently federal character of suits concerning interstate pollution." *Id*. 11. But what the Court said was that "[i]n light of this pervasive regulation" under the statute "and the fact that the control of interstate pollution is primarily a matter of federal law, it is clear that the only state suits that remain available are those specifically preserved by the Act." *Ouellette*, 479 U.S. at 492 (citation omitted). In noting that interstate pollution is "primarily a matter of federal law," *ibid.*, the Court was not suggesting that statutory displacement was only partial, eliminating everything about the common law regime except its "pre-emptive grin," *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp*., 485 U.S. 495, 504 (1988); *see* BIO 24-27. At most, the Court took the history of federal common law regulation as relevant context in assessing the preemptive scope of the statute.

* * *

The real question in this case—whether defendants can remove state law claims on the premise that they are really claims under a federal

common law long ago displaced by statute—has only ever arisen in the handful of cases like respondents' and there is no indication it will ever arise anywhere else. In this limited context, the circuits have considered that question with care and provided a uniform answer. That answer determines only which courts, state or federal, will decide petitioners' inevitable preemption defenses, subject to ultimate review by this Court. That Congress has elected not to provide defendants a right of removal in these circumstances is not a crisis—it is the ordinary operation of our federal system. There is no need for further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 10, 2023