No. 22-495

IN THE

# Supreme Court of the United States

CHEVRON CORP., ET AL., *Petitioners,*

v.

COUNTY OF SAN MATEO, ET AL., *Respondents.*

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

## BRIEF FOR RESPONDENTS COUNTY OF SAN MATEO, ET AL.


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## QUESTION PRESENTED

Should this Court create a new exception to the well-pleaded complaint rule that confers federal question jurisdiction over respondents' state-law complaints based on petitioners' assertion that respondents' claims are "governed by" federal common law when: (1) the common law on which petitioners purport to rely has been displaced by a federal statute; (2) the statute does not completely preempt state law; and (3) petitioners cannot show that respondents' state-law claims necessarily present a substantial federal question that could be adjudicated in federal court without upsetting the federal-state division of judicial responsibility, as required by *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 545 U.S. 308 (2005).

## TABLE OF CONTENTS


| | Page |
|---|---|
| INTRODUCTION | 1 |
| STATEMENT | 4 |
| I. Legal Background | 4 |
| II. Facts and Procedural History | 6 |
| REASONS THE PETITION SHOULD BE DENIED | 7 |
| I. There Is No Circuit Conflict. | 7 |
| A. The decision below does not conflict with the pre-*Grable* cases cited by petitioners. | 8 |
| B. *City of New York* does not create any circuit split | 11 |
| II. The Decision Below Was Correct. | 15 |
| A. There is no third exception to the well-pleaded complaint rule for state-law claims that were formerly governed by congressionally displaced federal common law. | 15 |
| B. The Counties' state-law claims are not governed by congressionally displaced federal common law. | 20 |
| III. The Question Presented Has Minimal Practical Importance And This Case Is A Poor Vehicle For Addressing It. | 25 |
| CONCLUSION | 27 |

## TABLE OF AUTHORITIES

Page

**Cases**

*Am. Elec. Power Co. v. Connecticut*,
564 U.S. 410 (2011) ........................................ 19, 21

*Arbaugh v. Y&H Corp.*,
546 U.S. 500 (2006) ........................................ 19

*Atherton v. F.D.I.C.*,
519 U.S. 213 (1997) ........................................ 22

*Atl. Richfield Co. v. Christian*,
140 S. Ct. 1335 (2020) .................................... 16

*Banco Nacional de Cuba v. Sabbatino*,
376 U.S. 398 (1964) ........................................ 19

*Bd. of Cnty. Commissioners of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*,
25 F.4th 1238 (10th Cir. 2022) ............ 2, 8, 12, 21

*Beneficial Nat. Bank v. Anderson*,
539 U.S. 1 (2003) ............................................ 16

*Bernhard v. Whitney Nat. Bank*,
523 F.3d 546 (5th Cir. 2008) .......................... 10

*BMW of N. Am., Inc. v. Gore*,
517 U.S. 559 (1996) ........................................ 19

*BP P.L.C. v. Mayor & City Council of Baltimore*,
141 S. Ct. 1532 (2021) .................................... 1, 7

*California v. ARC Am. Corp.*,
490 U.S. 93 (1989) .......................................... 24

*California v. Rooney*,
483 U.S. 307 (1987) ........................................ 13

TABLE OF AUTHORITIES—Continued

Page

*Caterpillar Inc. v. Williams*,
482 U.S. 386 (1987) .......................... 3, 5, 6, 12, 15

*Chamber of Com. of U.S. v. Whiting*,
563 U.S. 582 (2011) .......................................... 24

*Chevron Corp. v. City of Oakland*,
141 S. Ct. 2776 (2021) ..................................... 2

*City of Hoboken v. Chevron Corp.*,
45 F.4th 699 (3d Cir. 2022) .................. 2, 8, 10, 12

*City of Milwaukee v. Illinois & Michigan*,
451 U.S. 304 (1981) .................................. 19, 22, 23

*City of New York v. Chevron Corp.*,
993 F.3d 81 (2d Cir. 2021) ........................ 2, 12, 14

*City of Oakland v. BP PLC*,
969 F.3d 895 (9th Cir. 2020) ....................... 2, 8, 24

*Cnty. of San Mateo v. Chevron Corp.*,
960 F.3d 586 (9th Cir. 2020) ........................... 7

*Connecticut v. Exxon Mobil Corp.*,
No. 3:20-CV-1555 (JCH),
2021 WL 2389739 (D. Conn. June 2, 2021) ... 13

*Edenfield v. Fane*,
507 U.S. 761 (1993) .......................................... 23

*Empire Healthchoice Assurance, Inc. v. McVeigh*,
547 U.S. 677 (2006) .......................................... 5

*Federated Department Stores, Inc. v. Moitie*,
452 U.S. 394 (1981) .......................................... 18

TABLE OF AUTHORITIES—Continued

Page

*Fla. Lime & Avocado Growers, Inc. v. Paul*,
373 U.S. 132 (1963) .......................................... 23

*Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.*,
463 U.S. 1 (1983) .......................................... 4, 5, 15

*Georgia v. Tenn. Copper Co.*,
206 U.S. 230 (1907) .......................................... 19

*Georgia v. Tenn. Copper Co.*,
240 U.S. 650 (1916) .......................................... 23

*Goepel v. Nat'l Postal Mail Handlers Union, a Div. of LIUNA*,
36 F.3d 306 (3d Cir. 1994) .............................. 17

*Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*,
545 U.S. 308 (2005) ...................................... 2, 5, 16

*Gully v. First Nat'l Bank*,
299 U.S. 109 (1936) .......................................... 5

*Gunn v. Minton*,
568 U.S. 251 (2013) ........................ 3-5, 8, 9, 11, 16

*Illinois v. City of Milwaukee*,
406 U.S. 91 (1972) .......................................... 19, 23

*In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*,
725 F.3d 65 (2d Cir. 2013) .............................. 24

*In re Otter Tail Power Co.*,
116 F.3d 1207 (8th Cir. 1997) .......................... 9

*Int'l Paper Co. v. Ouellette*,
479 U.S. 481 (1987) ................................ 19, 22, 23

TABLE OF AUTHORITIES—Continued

Page

*Jennings v. Rodriguez*,
138 S. Ct. 830 (2018) ........................................ 25

*Kansas v. Colorado*,
206 U.S. 46 (1907) ........................................ 19

*Lorillard Tobacco Co. v. Reilly*,
533 U.S. 525 (2001) ........................................ 24

*Louisville & Nashville R. Co. v. Mottley*,
211 U.S. 149 (1908) ........................................ 15

*Mayor & City Council of Baltimore v. BP P.L.C.*,
31 F.4th 178 (4th Cir. 2022) ......... 2, 6, 8, 11-14, 20

*McKesson v. Doe*,
141 S. Ct. 48 (2020) ........................................ 4, 26

*Merrell Dow Pharms. Inc. v. Thompson*,
478 U.S. 804 (1986) ........................................ 5, 15

*Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*,
578 U.S. 374 (2016) ................... 5, 8, 16, 17, 19, 26

*Metro. Life Ins. Co. v. Taylor*,
481 U.S. 58 (1987) ........................................ 5, 6, 17

*Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*,
453 U.S. 1 (1981) ........................................ 21

*Miree v. DeKalb Cnty., Ga.*,
433 U.S. 25 (1977) ........................................ 24

*Missouri v. Illinois*,
180 U.S. 208 (1901) ........................................ 20, 23

TABLE OF AUTHORITIES—Continued

Page

*Mitchell v. Advanced HCS, L.L.C.*,
28 F.4th 580 (5th Cir. 2022) .......................... 8

*Morgan Cty. War Mem'l Hosp. ex rel. Bd. of Dirs. of War Mem'l Hosp. v. Baker*,
314 F. App'x 529 (4th Cir. 2008) .................... 8, 17

*Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*,
471 U.S. 845 (1985) ........................................ 19

*New Jersey v. City of New York*,
283 U.S. 473 (1931) ........................................ 21, 23

*Newton v. Capital Assurance Co.*,
245 F.3d 1306 (11th Cir. 2001) ...................... 10

*Nicodemus v. Union Pac. Corp.*,
440 F.3d 1227 (10th Cir. 2006) ...................... 8, 17

*Oneida Indian Nation v. Cnty. of Oneida*,
414 U.S. 661 (1974) ........................................ 18

*Provincial Gov't of Marinduque v. Placer Dome, Inc.*,
582 F.3d 1083 (9th Cir. 2009) ........................ 17

*Republic of Philippines v. Marcos*,
806 F.2d 344 (2d Cir. 1986) ............................ 10

*Rhode Island v. Shell Oil Prods. Co.*,
35 F.4th 44 (1st Cir. 2022) .................... 2, 8, 12, 14

*Rivet v. Regions Bank of Louisiana*,
522 U.S. 470 (1998) ........................................ 17-19

*Rodriguez v. F.D.I.C.*,
140 S. Ct. 713 (2020) ...................................... 24

TABLE OF AUTHORITIES—Continued

Page

*Sam L. Majors Jewelers v. ABX, Inc.*,
117 F.3d 922 (5th Cir. 1997) .......... 10, 11

*Tennessee v. Davis*,
100 U.S. 257 (1879) .......... 20

*Texas Indus., Inc. v. Radcliff Materials, Inc.*,
451 U.S. 630 (1981) .......... 19, 26

*Torres v. S. Peru Copper Co.*,
113 F.3d 540 (5th Cir. 1997) .......... 10

*United States v. Standard Oil Co. of California*,
332 U.S. 301 (1947) .......... 18

*Va. Uranium, Inc. v. Warren*,
139 S. Ct. 1894 (2019) .......... 24

*Vaden v. Discover Bank*,
556 U.S. 49 (2009) .......... 5, 15

*Zschernig v. Miller*,
389 U.S. 429 (1968) .......... 24

**Statutes**

28 U.S.C. § 1331 .......... 1, 4, 5, 12

28 U.S.C. § 1345 .......... 18

28 U.S.C. § 1441 .......... 1, 4

28 U.S.C. § 1442 .......... 7

**Other Authorities**

14C Wright & Miller, Fed. Prac. & Proc. Juris.
§ 3722.1 (4th ed.) .......... 19

## INTRODUCTION

More than five years ago, six California counties and cities ("respondents" or "the Counties") filed suit in state court against several major fossil-fuel companies ("petitioners"). As in other climate-deception cases that have come before this Court, the Counties' lawsuits seek to hold petitioners liable "for promoting fossil fuels while allegedly concealing their environmental impacts" over many years. *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 1535 (2021). Although the Counties plead their claims exclusively under California state law, petitioners removed the cases to federal court on the grounds that those state-law claims actually "arise under" federal law for jurisdictional purposes, 28 U.S.C. §§ 1331, 1441. The Ninth Circuit (Ikuta, J.) rejected those removal grounds, concluding that the Counties' state-law claims did not satisfy the requirements of the *Grable* doctrine or the complete-preemption doctrine—the only two exceptions to the well-pleaded complaint rule that this Court has ever recognized. Pet. App. 20a–24a.

Petitioners do not challenge either of those conclusions. Instead, they ask this Court to create a third, standalone exception to the well-pleaded complaint rule for state-law claims that are purportedly "governed" by federal common law. Petitioners acknowledge that the Clean Air Act displaced the federal common law of interstate pollution—the same body of judge-made law upon which they predicate removal. *See* Pet. 26–29. Nevertheless, their Petition insists that congressionally displaced federal common law has the power to convert state-law claims into federal ones for purposes of subject-matter jurisdiction. *See id.* This Court already denied a nearly identical petition filed in

analogous climate-deception cases brought by other California cities. *See Chevron Corp. v. City of Oakland*, 141 S. Ct. 2776 (2021) (No. 20-1089). The Court should do so again here for three principal reasons.

*First*, the decision below does not implicate any circuit split. To the contrary, all five circuit courts to consider petitioners' novel theory of federal-common-law removal have rejected it.[1] Petitioners' citations to a handful of decisions that predate this Court's opinion in *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005), do not show any tension between the circuits. Those cases applied outdated jurisdictional tests that have since been clarified and synthesized into the *Grable* test, and their judgements are in any event fully consistent with the decision below. Nor is there any conflict between the Ninth Circuit's jurisdictional analysis in the Counties' cases and the Second Circuit's preemption analysis in *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021). As the First, Second, Third, Fourth, and Tenth Circuits have all explained, *City of New York* did not address any questions of subject-matter jurisdiction and so cannot say anything about the removability of climate-deception cases to federal court.

*Second*, the decision below is correct. Under the century-old well-pleaded complaint rule, arising-under ju-

[1] *See Rhode Island v. Shell Oil Prods. Co.*, 35 F.4th 44, 53–56 (1st Cir. 2022), *petition for cert. filed*, No. 22-524; *City of Hoboken v. Chevron Corp.*, 45 F.4th 699, 707–08 (3d Cir. 2022); *Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178, 201–08 (4th Cir. 2022), *petition for cert. filed*, No. 22-361; *City of Oakland v. BP PLC*, 969 F.3d 895, 906 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2776 (2021); *Bd. of Cnty. Commissioners of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238, 1257–61 (10th Cir. 2022), *petition for cert. filed*, No. 21-1550.

risdiction generally does not attach to claims pleaded exclusively under state law. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). This Court has only ever recognized two narrow exceptions to the rule, and the Ninth Circuit properly applied them here. There is no arising-under jurisdiction because (1) the Counties' state-law claims do not necessarily raise a substantial federal issue, as required by *Grable*; and (2) the Counties' claims are not completely preempted by federal law, as they are not wholly encompassed by a federal statutory cause of action that Congress intended to be exclusive. Pet. App. 20a–24a. This Court has never recognized a third exception for state-law claims that are purportedly "governed by" federal common law. Nor should it. Accepting petitioners' theory would undermine *Grable*'s success at bringing "order to [the] unruly doctrine" of arising-under jurisdiction. *See Gunn v. Minton*, 568 U.S. 251, 258 (2013). It would also result in an unprecedented expansion in the lawmaking powers of the Federal Judiciary, requiring this Court to hold for the first time that a nonexistent body of *congressionally displaced* federal common law can transmogrify state-law claims into federal ones for purposes of arising-under jurisdiction.

*Finally*, the Petition does not raise any important or recurring questions of law that warrant this Court's review. Except for a handful of other climate-deception lawsuits, petitioners cannot identify a single case that would be affected by their bespoke theory of removing state-law claims based on congressionally displaced federal common law. And contrary to petitioners' suggestions, neither national security nor national energy policy will be jeopardized if these climate-deception cases proceed in state court rather than in federal court. After all, "[o]ur system of 'cooperative judicial federalism' presumes federal and state courts

alike are competent to apply federal and state law." *McKesson v. Doe*, 141 S. Ct. 48, 51 (2020).

The Petition here is nearly identical to the one filed in the *Boulder* climate-deception case. Accordingly, if the Court grants review in *Boulder*, it should do the same here and consolidate the petitions for argument, thereby ensuring that the Counties have adequate opportunity to present their position to the Court. Conversely, if the Court denies certiorari review of the *Boulder* petition, it should reach the same result here because the two petitions "present[] the same issues," as petitioners themselves acknowledge. Pet. 4.

## STATEMENT

### I. Legal Background

"Federal courts are courts of limited jurisdiction, possessing only that power authorized by Constitution and statute." *Gunn*, 568 U.S. at 256 (cleaned up). Congress has, in turn, granted federal district courts original subject-matter jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States," and such actions "may be removed by the defendant" from state to federal court. 28 U.S.C. §§ 1331, 1441.

"[U]nder the present statutory scheme as it has existed since 1887," the Court has applied a "powerful doctrine," known as the well-pleaded complaint rule, which requires jurisdiction under Sections 1331 and 1441 to "be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration." *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 9–10 (1983) (citation omitted). For more than a century, that rule has been "the basic principle marking the boundaries of the federal question jurisdiction of the

federal district courts." *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987). The rule "makes the plaintiff the master of the claim" such that "he or she may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar*, 482 U.S. at 392. "Jurisdiction may not be sustained on a theory that the plaintiff has not advanced," *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 809 n.6 (1986), and cannot be "predicated on an actual or anticipated defense," *Vaden v. Discover Bank*, 556 U.S. 49, 60 (2009), "including the defense of pre-emption," *Franchise Tax Bd.*, 463 U.S. at 14.

There are only two recognized exceptions to the well-pleaded complaint rule. The first is *Grable* jurisdiction, a doctrine this Court developed to resolve the lower courts' long-standing difficulty in applying the well-pleaded complaint rule where "a question of federal law is lurking in the background" of a case pleaded under state law. *See Gully v. First Nat'l Bank*, 299 U.S. 109, 117 (1936); *see also Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 578 U.S. 374, 385 (2016) (describing the previous "caselaw construing § 1331" as "highly 'unruly'"). The *Grable* doctrine is applicable only to a "special and small category" of cases in which "federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn*, 568 U.S. at 258 (citing *Grable*, 545 U.S. at 314; *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 699 (2006)).

The second exception is the doctrine of complete preemption, which applies only 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.'" *Caterpillar*, 482 U.S. at 393 (quoting *Metro. Life*, 481 U.S. at 65). The Court has been "reluctant to find that extraordinary pre-emptive power," and has identified only three statutes that have "complete preemption" effect, none of which are at issue here. *Metro. Life*, 481 U.S. at 65.

## II. Facts and Procedural History

Respondents in this action filed six separate lawsuits in California state court in 2017 and 2018, alleging exclusively state-law claims for nuisance, trespass, and products liability. *See, e.g.*, Compl. ¶¶ 179–268, *Cnty. of San Mateo v. Chevron Corp.*, No. 17-CIV-03222 (San Mateo Cnty. Super. Ct. filed July 17, 2017); Pet. App. 15a–16a. As the Ninth Circuit correctly noted, "the Counties' claims focus on the defective nature of [petitioners'] fossil fuel products, [petitioners'] knowledge and awareness of the harmful effects of those products, and [petitioners'] 'concerted campaign' to prevent the public from recognizing those dangers." Pet. App. 36a. As in other climate-deception cases, the Counties' lawsuits do "not seek to impose liability on [petitioners] for their direct emissions of greenhouse gases [or] to restrain [petitioners] from engaging in their business operations." *Baltimore,* 31 F.4 at 195. Instead, the complaints request damages for harms caused by petitioners' deception campaigns and equitable relief to abate the local hazards created by those campaigns—*e.g.*, infrastructure to protect the Counties from sea-level rise. Pet. App. 16a. The "source of tort liability" is therefore petitioners' "concealment and misrepresentation of the[ir] products' known dangers," not their lawful production and sale of fossil fuels. *Baltimore,* 31 F.4th at 233.

Petitioners removed the Counties' cases to federal court, asserting various theories of federal subject-mat-

ter jurisdiction. *See* Pet. App. 58a–63a. The district court granted the Counties' motions to remand. *Id.* 57a–64a. The Ninth Circuit affirmed the district court's ruling as to federal officer removal under 28 U.S.C. § 1442, and held that it lacked appellate jurisdiction to review the other rejected grounds for removal. *Cnty. of San Mateo v. Chevron Corp.*, 960 F.3d 586, 598–603 (9th Cir. 2020). After its decision in *Baltimore*, 141 S. Ct. 1532, this Court granted certiorari and vacated the Ninth Circuit's decision, remanding for consideration of petitioners' remaining grounds for removal.

On remand, the Ninth Circuit again affirmed the district court's remand order, rejecting each of petitioners' remaining theories of removal. *See* Pet. App. 15a–56a. As relevant here, the court concluded that the Counties' claims do not arise under federal law for purposes of subject-matter jurisdiction, relying on its earlier decision in *Oakland*. *Id.* 19a–23a. The court recognized that there are only two exceptions to the well-pleaded complaint rule, neither of which supports removal of the Counties' cases. *Grable* does not apply, the panel explained, because the Counties' state-law claims "do not require resolution of a substantial question of federal law," even assuming that those claims might have once been governed by federal common law. *Id.* 23a (cleaned up). And the complete-preemption exception does not apply, the court continued, because neither the Clean Air Act nor any of the other federal laws cited by petitioners satisfies the exception's "two requirements." *Id.* 24a.

## REASONS THE PETITION SHOULD BE DENIED

### I. There Is No Circuit Conflict.

The circuit courts have unanimously rejected identical attempts to remove climate-deception cases

based on a congressionally displaced body of federal common law that no longer exists. *See Rhode Island*, 35 F.4th at 53–56; *Hoboken*, 45 F.4th at 707–08; *Baltimore*, 31 F.4th at 201–208; *Oakland*, 969 F.3d at 906; *Boulder*, 25 F.4th at 1257–1261. Those decisions do not conflict with any of the pre-*Grable* cases cited by petitioners, all of which applied outdated jurisdictional tests that have since been superseded by *Grable*. Nor do they create any friction with *City of New York*, which—by its own terms—did not address any questions of removal jurisdiction.

### A. The decision below does not conflict with the pre-*Grable* cases cited by petitioners.

Before *Grable*, there was no "well-defined test" for arising-under jurisdiction, *Manning*, 578 U.S. at 385, and the "canvas" of opinions across the judiciary "look[ed] like one that Jackson Pollock got to first," *Gunn*, 568 U.S. at 258. *Grable* established a straightforward, four-part test for determining when a district court may exercise arising-under jurisdiction over a case that pleads only state-law claims for relief. *See id.* The courts of appeals have consistently and effectively applied that test in a broad range of cases, including those in which the plaintiff's state-law claims allegedly implicate federal common law. *See, e.g.*, *Mitchell v. Advanced HCS, L.L.C.*, 28 F.4th 580, 588–89 (5th Cir. 2022); *Morgan Cty. War Mem'l Hosp. ex rel. Bd. of Dirs. of War Mem'l Hosp. v. Baker*, 314 F. App'x 529, 533–37 (4th Cir. 2008); *Nicodemus v. Union Pac. Corp.*, 440 F.3d 1227, 1235–37 (10th Cir. 2006).

Although *Grable* is binding on the circuit courts, petitioners take the perplexing position that the Ninth Circuit erred when it applied *Grable* and "refused to follow the approach adopted by [certain] other cir-

cuits" in decisions predating *Grable*. Pet. 14. The cases petitioners cite do not evidence any circuit split because those cases would be decided under the *Grable* doctrine today and, in any event, do not conflict with the decision below.

In *In re Otter Tail Power Co.*, 116 F.3d 1207, 1213–14 (8th Cir. 1997), the plaintiff brought a suit for injunctive relief in state court, alleging that the defendant power company failed to comply with a federal district court order regarding its authority to provide electrical utility services to a tribal reservation. The defendant successfully removed the case, based on the Eighth Circuit's conclusion that "the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law" insofar as "the extent of an Indian Tribe's authority to regulate nonmembers on a reservation . . . is manifestly a federal question" because "tribal sovereignty is dependent on, and subordinate to, only the Federal Government." *Id.* (cleaned up). Today, the same question would be resolved by reference to the *Grable* test, of which a substantial federal question is one of four elements. The court in *Otter Tail* agreed that questions of Federal Indian Law were necessarily raised, substantial, and actually disputed, and the outcome of the case today would depend on whether the issue could be adjudicated without upsetting any state-federal divisions of judicial authority approved by Congress. *Gunn*, 568 U.S. at 258. Nothing in the Eighth Circuit's reasoning conflicts with the Ninth Circuit's analysis here.

The other cases petitioners cite as using a "*Grable*-type analysis," Pet. 13, are similarly consistent with the Ninth Circuit's decision below. In those cases, the appellate courts applied a precursor of the *Grable* test, finding federal jurisdiction only because the state-law

claims necessarily raised "a substantial question of federal law." *See Newton v. Capital Assurance Co.*, 245 F.3d 1306, 1308–09 (11th Cir. 2001); *Torres v. S. Peru Copper Co.*, 113 F.3d 540, 542–43 (5th Cir. 1997); *Republic of Philippines v. Marcos*, 806 F.2d 344, 352, 354 (2d Cir. 1986). None of the legal principles articulated in those cases conflicts with the panel's decision here, which similarly concluded that the Counties' claims "do not 'raise a substantial question of federal law.'" Pet. App. 23a.

That leaves *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922 (5th Cir. 1997). But as "most courts recognize," that Fifth Circuit decision is "not good law" to the extent it endorsed a third exception to the well-pleaded complaint rule for federal common law. *Hoboken*, 45 F.4th at 708. Indeed, the Fifth Circuit has clearly abandoned any such endorsement in the aftermath of *Grable*, holding instead that arising-under jurisdiction encompasses a state-law claim "only if" the claim satisfies the requirements of *Grable* or complete preemption. *Bernhard v. Whitney Nat. Bank*, 523 F.3d 546, 551 (5th Cir. 2008). Post-*Grable*, the Fifth Circuit has never cited *Sam L. Majors* for any jurisdictional holding, and it has never suggested that federal common law creates a third exception to the well-pleaded complaint rule—separate and apart from *Grable* and complete preemption.

In any event, *Sam L. Majors* is by its own terms narrow, limited, and easily distinguishable from the Counties' cases. The court there held that a plaintiff's claims relating to jewelry lost by an airline arose under federal common law because there was a long-recognized, "clearly established federal common law cause of action against air carriers for lost shipments," which Congress had affirmatively "preserv[ed]" in the

Airline Deregulation Act of 1978. 117 F.3d at 928. The court expressly stated 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. As discussed in greater detail below, the circumstances here are exactly opposite: If a federal common law cause of action ever existed that could have encompassed the Counties' claims, it has been displaced by the Clean Air Act. There is no basis to conclude this case would be decided differently under the Fifth Circuit's former jurisprudence in *Sam L. Majors*, or that the Ninth Circuit would reach a different conclusion on the facts of *Sam L. Majors* today.

In short, any perceived tension between petitioners' pre-*Grable* cases and the Ninth Circuit's analysis only demonstrates *Grable*'s success at cleaning up an "unruly doctrine." *Gunn*, 568 U.S. at 258. Petitioners' pre-*Grable* cases do not establish any present-day circuit conflict because the Court has since provided clear guidance in *Grable* that the circuits have unanimously followed.

### B. *City of New York* does not create any circuit split.

There is also no tension between the Second Circuit's ordinary preemption analysis in *City of New York* and the First, Third, Fourth, Ninth, and Tenth Circuits' decisions affirming remand of climate-deception cases to state court. Instead, these decisions can be easily reconciled based on their "completely different procedural posture[s]," as every court to consider the question has concluded. *Baltimore*, 31 F.4th at 203.

In *City of New York*, the Second Circuit held that federal common law preempted certain state-law

claims brought against several oil-and-gas companies. 993 F.3d 81. In affirming dismissal of those claims under Rule 12(b)(6), the court expressly "reconcile[d] [its] conclusion" about preemption with the Ninth Circuit's decision in *Oakland* and "the parade of [other] recent opinions holding that state-law claims for public nuisance brought against fossil fuel producers do not arise under federal law" for purposes of removal jurisdiction. *Id.* at 93. The Second Circuit acknowledged that, under the well-pleaded complaint rule, "the fact that a defendant might ultimately prove that a plaintiff's claims are preempted under federal law does not establish that they are removable to federal court." *Id.* at 94 (quoting *Caterpillar*, 482 U.S. at 398, in parenthetical) (cleaned up). But because New York City had "filed suit in federal court in the first instance," the court determined that it was "free to consider the [defendants'] preemption defense on its own terms, not under the heightened standard unique to the removability inquiry." *Id.* For that reason, the Second Circuit concluded that its preemption finding did not conflict with "the fleet of [other] cases" holding that "anticipated defense[s]"—including defenses based on federal common law—could not "singlehandedly create federal-question jurisdiction under 28 U.S.C. § 1331 and the well-pleaded complaint rule." *Id.*

The First, Third, Fourth, and Tenth Circuits also did not discern any conflict between their rejection of petitioner's theory of federal-common-law removal and the Second Circuit's affirmance of an ordinary preemption defense in *City of New York*. *See Rhode Island*, 35 F.4th at 55; *Hoboken*, 45 F.4th at 708; *Baltimore*, 31 F.4th at 203; *Boulder*, 25 F.4th at 1262. Like the Second Circuit, those courts distinguished *City of New York* based on its "completely different

procedural posture." *E.g.*, *Baltimore*, 31 F.4th at 203. They acknowledged—as the Second Circuit did—that the well-pleaded complaint rule prohibits federal courts from exercising arising-under jurisdiction based on an ordinary preemption defense. They recognized—as the Second Circuit did—that *City of New York* resolved an ordinary preemption defense, not any question of federal subject-matter jurisdiction. And so they concluded—as the Second Circuit did—that *City of New York*'s ordinary preemption analysis sheds no light on the removability of state-law claims to federal courts.[2]

Contrary to petitioners' assertions, then, these circuit courts did adequately "explain how th[e] difference in [procedural] posture" distinguished *City of New York* from their rejection of petitioners' theory of federal-common-law removal. Pet. 21. And in any event, this Court does not grant certiorari to line edit the opinions of lower courts. *See California v. Rooney*, 483 U.S. 307, 311 (1987) ("The fact that the Court of Appeal reached its decision through analysis different than this Court might have used does not make it appropriate for this Court to rewrite the California court's decision, or for the prevailing party to request us to review it.").

Moreover, even if *City of New York*'s ordinary preemption analysis were relevant to the question of removal jurisdiction, it would not apply to the specific claims pleaded by the Counties, all of which rest

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[2] A federal district court in the Second Circuit reached the same conclusion, holding that *City of New York* did not control the removal of a climate-deception lawsuit because that decision only concerned an ordinary preemption defense. *Connecticut v. Exxon Mobil Corp.*, No. 3:20-CV-1555 (JCH), 2021 WL 2389739, at *7 n.7 (D. Conn. June 2, 2021), *appeal pending*, No. 21-1446 (2d Cir.).

on different factual allegations and target qualitatively different types of tortious conduct. In *City of New York*, the plaintiff "acknowledge[d]" that the conduct on which it premised liability was "lawful commercial activity," namely: the defendant's lawful production, promotion, and sale of fossil fuels. 993 F.3d at 87 (cleaned up). Accordingly, the Second Circuit concluded that the plaintiff's claims would "effectively impose strict liability for the damages caused by fossil fuel emissions," requiring the defendants to "cease global production altogether" to avoid ongoing liability. *Id.* at 93. Because the plaintiff's claims would "regulate cross-border emissions," the appellate panel viewed the lawsuit as "no different" from prior cases in which this Court has applied the federal common law of interstate pollution. *Id.* at 92, 93.

By contrast, climate-deception cases like the Counties' here "clearly seek[] to challenge the promotion and sale of fossil-fuel products without warning and abetted by a sophisticated disinformation campaign." *Baltimore*, 31 F.4th at 233. The tortious conduct is therefore petitioners' alleged "concealment and misrepresentation of [their] products' known dangers," not the lawful production and sale of fossil fuels. For that reason, courts that have considered the question have concluded that the federal common law of interstate pollution "does not address the types of acts" that climate-deception cases "seek[] redress for." *Rhode Island*, 35 F.4th at 55. Whether federal common law should have applied to the emissions-based claims in *City of New York* does not affect whether federal common law "governs" the deception-based claims brought by the Counties here, as a basis for subject-matter jurisdiction or otherwise.

## II. The Decision Below Was Correct.

The decision below correctly rejected petitioners' novel third exception to the well-pleaded complaint rule for state-law claims that are purportedly "governed" by congressionally displaced federal common law. This Court has only ever recognized two exceptions to the well-pleaded complaint rule (*Grable* and complete preemption), and petitioners offer no basis for creating a third exception. In any event, petitioners' theory of federal-common-law removal fails for a second, independent reason: it relies on a body of federal common law that has been displaced by Congress and that would not encompass the Counties' claims even if it still existed.

### A. There is no third exception to the well-pleaded complaint rule for state-law claims that were formerly governed by congressionally displaced federal common law.

A case arises under federal law "only when the plaintiff's statement of his own cause of action shows that it is based upon federal law." *Vaden*, 556 U.S. at 60 (quoting *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152 (1908)). Federal "[j]urisdiction may not be sustained on a theory that the plaintiff has not advanced." *Merrell Dow*, 478 U.S. at 809 n.6. Jurisdiction also may not rest on "a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case." *Franchise Tax Bd.*, 463 U.S. at 14. As masters of their complaints, plaintiffs "may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar*, 482 U.S. at 392.

This Court has recognized that, under the well-pleaded complaint rule, there are only two types of state-law claims that arise under federal law: (1) the "special and small category" of state-law actions that satisfy *Grable*, *see, e.g.*, *Gunn*, 568 U.S. at 258; and (2) cases completely preempted by a federal statute that itself creates a cause of action "Congress intended . . . to be exclusive," *e.g.*, *Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 9 n. 5 (2003). The Court has recently reiterated that it "would not expect Congress to take [the] extraordinary step" of "stripping state courts of jurisdiction to hear their own *state* claims" "by implication," and that only "[e]xplicit, unmistakable, and clear" congressional directives will justify such an intrusion on federalism and state sovereignty. *Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335, 1351 (2020).

There is no reason for this Court to grant petitioners' request for a bespoke jurisdictional test for cases "governed" by a displaced body of federal common law. Doing so would undo the progress this Court achieved in *Grable* in clarifying the arising-under doctrine. In fact, the Court rejected in *Grable* itself an analogous invitation to create different jurisdictional tests for different sources of federal law. *See Grable*, 545 U.S. at 320 n.7. The Court discerned "no reason in [the] text [of Section 1331] or otherwise to draw such a rough line." *Id.* And so rather than creating separate tests for different types of federal law (*e.g.*, Constitution, statute, common law), the Court developed a single test that applies comfortably to any category of federal law, thereby advancing the Court's stated goal of providing "jurisdictional tests [that] are built for more than a single dispute." *Manning*, 578 U.S. at 393.

The Court need not revisit that choice, as lower courts have applied *Grable* with no apparent difficulty,

including to cases involving federal common law. *See, e.g.*, *Provincial Gov't of Marinduque v. Placer Dome, Inc.*, 582 F.3d 1083, 1090–92 (9th Cir. 2009); *Nicodemus*, 440 F.3d at 1235–37, *Morgan*, 314 F. App'x at 533, 535–37. *Grable*'s success is not surprising because this flexible test "provides ready answers to jurisdictional questions" and already "gives guidance whenever borderline cases crop up." *Manning*, 578 U.S. at 392. The Court should not undermine that success by adopting the "untested approach" petitioners propose here, because "forcing courts to toggle back and forth between [that approach] and the 'arising under' standard would undermine consistency and predictability in litigation." *See Manning*, 578 U.S. at 392.

Nor should the Court dramatically expand the artful-pleading doctrine in the manner suggested by petitioners. Petitioners claim the Ninth Circuit "failed to ask the threshold question whether respondents engaged in artful pleading by framing their claims in state-law terms even though they are inherently federal in nature." Pet. 15. However, petitioners cite no case where a court has used federal common law and the artful-pleading doctrine together in this way because no court has done so. Instead, this Court has treated the artful-pleading doctrine as simply another name for complete preemption. *See Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 475 (1998) ("The artful pleading doctrine allows removal where federal law completely preempts a plaintiff's state-law claim."). And so even before *Grable*, courts recognized that "the only state claims that are 'really' federal claims and thus removable to federal court, . . . are those that are preempted completely by federal law," because artful pleading and complete preemption are two sides of the same coin. *Goepel v. Nat'l Postal Mail Handlers Union, a Div. of LIUNA*, 36 F.3d 306, 311–12 (3d Cir. 1994); *see also Metro. Life*, 481 U.S.

at 63–64 (explaining that complete preemption is so powerful that it renders state-law claims "necessarily federal in character"). This Court has never held that federal common law may completely preempt state law, and it has never applied the artful-pleading doctrine outside the complete-preemption context.

None of petitioners' cited cases call for a contrary conclusion. Petitioners lean heavily on *United States v. Standard Oil Co. of California*, 332 U.S. 301 (1947). In that case, however, subject-matter jurisdiction undisputedly existed because the United States was the plaintiff. *Id.* at 303; 28 U.S.C. § 1345. The Court therefore did not consider any questions of arising-under jurisdiction, much less address whether federal common law could convert state-law claims into federal ones for jurisdictional purposes. *Oneida Indian Nation v. Cnty. of Oneida*, 414 U.S. 661 (1974), is equally unhelpful to petitioners. In that case, the plaintiffs expressly pleaded a federal cause of action, alleging that the defendants had interfered with "a current right to possession conferred [on them] by federal law." *Id.* at 666. As a result, *Oneida* says nothing about whether and when a claim pleaded under state law arises under federal law for purposes of subject-matter jurisdiction.

Petitioners also mistakenly rely on the second footnote in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n.2 (1981), to argue that courts evaluating a motion to remand should "determine whether the real nature of the claim is federal, regardless of plaintiff's characterization." Pet. 25. As this Court explained more than 20 years ago, the "marginal comment" in "*Moitie*'s enigmatic footnote" "caused considerable confusion in the circuit courts" and "will not bear the heavy weight lower courts have placed on it." *Rivet*, 522 U.S. at 477–78. The Court thus expressly

limited *Moitie* to its "case-specific context," *id.* at 477, and it reaffirmed that the artful-pleading doctrine is synonymous with the complete-preemption doctrine, *id.* at 475; *see also* 14C Wright & Miller, Fed. Prac. & Proc. Juris. § 3722.1 (4th ed.) (describing how *Rivet* delivered "the coup de grace" to "the *Moitie* footnote").

Petitioners' remaining citations to this Court's case law fare no better. In fact, most do not even address subject-matter jurisdiction.[3] Those that do either concern jurisdictional disputes that have nothing to do with arising-under jurisdiction,[4] or involve complaints that—as in *Oneida*—expressly pleaded a federal cause of action.[5] None of them address the removability of claims pleaded exclusively under state law.

In summary, petitioners' novel theory of federal-common-law removal would undermine *Grable* and the artful-pleading doctrine and return lower courts to the "unruly" and "muddled backdrop" of jurisprudence that *Grable* was intended to overcome. *Manning*, 578 U.S. at 385 (cleaned up). Worse still, petitioners' proposed approach would massively expand the substantive and jurisdictional powers of federal judges and introduce grave separation-of-powers and

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[3] *See, e.g.*, *Int'l Paper Co. v. Ouellette*, 479 U.S. 481 (1987); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907).

[4] *Kansas v. Colorado*, 206 U.S. 46, 80 (1907); *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972) ("*Milwaukee I*").

[5] *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 310 (1981) ("*Milwaukee II*"); *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 418 (2011) ("*AEP*"); *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 848 (1985); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 503–04 (2006); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 632 (1981).

federalism problems. That is because, under petitioners' theory, a federal court could recognize a new area of federal common law, find that it extinguishes state law, and then bootstrap its own jurisdiction over a state-law complaint based on those findings—all without any guidance from Congress. Understandably, no court has adopted this approach.

### B. The Counties' state-law claims are not governed by congressionally displaced federal common law.

Even if this Court were inclined to create a third exception to the well-pleaded complaint rule, petitioners' theory of federal-common-law removal would fail for two additional reasons. First, Congress displaced the federal common law of interstate pollution—the very same body of federal common law on which petitioners predicate removal. Second, even if that body of judge-made law still existed, it would not encompass the Counties' state-law claims for failure to warn and deceptive promotion.

More than a decade ago, this Court made clear that to the extent any federal common law of interstate pollution previously existed, it was extinguished by Congress's enactment of the Clean Air Act in 1963. While this Court once "recognized public nuisance as a federal common law claim" in the context of "disputes involving [pollution in] interstate and navigable waters," the scope of that federal law was narrowly circumscribed. *Baltimore*, 31 F.4th at 204. For example, although the Court held that "*States* were permitted to sue to challenge activity harmful to their citizens' health and welfare" under a federal common law of interstate pollution,[6]

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[6] *See, e.g.*, *Tennessee v. Davis*, 100 U.S. 257 (1879); *Missouri v. Illinois*, 180 U.S. 208 (1901); *Georgia v. Tenn. Copper Co.*, 240

it never had occasion to "decide[] whether private citizens . . . or political subdivisions . . . may invoke the federal common law of nuisance to abate out-of-state pollution." *AEP*, 564 U.S. at 422 (emphasis added). That is because Congress amended the Clean Water Act and displaced any such claim (as this Court acknowledged in *Milwaukee II*) before any case arose in which a private party alleged a claim for public nuisance under federal common law based on interstate water pollution. *See also Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 21–22 (1981) ("[W]e need not decide whether a cause of action may be brought under federal common law by a private plaintiff" because "the federal common law of nuisance in the area of water pollution is entirely pre-empted by the more comprehensive scope of" the Clean Water Act.).

Three decades later in *AEP*, the Court concluded that nuisance claims based on interstate *air* pollution were displaced by the Clean Air Act. *See Boulder*, 25 F.4th at 1259 ("What *Milwaukee II* did to the federal common law of interstate water pollution, *AEP* did to the federal common law of interstate air pollution."). Importantly, the Court did not hold, as petitioners contend, that "the basic scheme of the Constitution" requires the application of a federal rule of decision to claims based on interstate and international emissions. *See* Pet. 23. To the contrary, the Court expressly declined to consider the "academic question whether, in the absence of the Clean Air Act . . . , the plaintiffs could state a federal common-law claim for curtailment of greenhouse gas emissions," because "[a]ny such claim would be displaced by the federal legislation authorizing EPA to regulate carbon-dioxide emissions." *AEP*, 564 U.S. at 423.

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U.S. 650 (1916); *New Jersey v. City of New York*, 283 U.S. 473 (1931); *Milwaukee I*, 406 U.S. 91.

Further, the Court has made clear that the preemptive effects of federal common law disappear once displaced by an act of Congress, leaving the new statute as the sole basis for any preemption analysis. The Court in *AEP* held that because the Clean Air Act displaced any relevant federal common law, "the availability *vel non* of a state lawsuit depends, *inter alia,* on the preemptive effect of the federal Act," not whatever vestigial preemptive force the federal common law might once have held. *Id.* at 429. In *Ouellette*, the Court considered a preemption challenge to state-law public nuisance claims formerly governed by the federal common law of interstate water pollution. 479 U.S. at 484, 487. Because the Clean Water Act had displaced that body of federal judge-made law, the Court framed the relevant inquiry as whether the Act preempted the plaintiff's state-law claims—a question it answered by conducting a traditional statutory preemption analysis. *See id.* at 491–500.

Indeed, this approach—looking to operative statutory law rather than displaced common law—upholds the constitutional structure. This Court has "always recognized that federal common law is subject to the paramount authority of Congress," and it has repeatedly emphasized that "[t]he decision whether to displace state law . . . is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress." *Milwaukee II*, 451 U.S. at 313; *see also Atherton v. F.D.I.C.*, 519 U.S. 213, 218 (1997). Under petitioners' theory, however, a body of federal common law continues to extinguish state law *even after* it has been displaced by a federal statute and *even if* Congress included a savings clause in the federal statute that expressly preserves state-law claims, as Congress did in the Clean Air Act. As a re-

sult, accepting petitioners' theory would render Congress powerless to reverse a judicial declaration that state-law claims are "governed" by federal common law. That result cannot be reconciled with this Court's "commitment to the separation of powers"—a commitment that is "too fundamental" to permit "rel[iance] on federal common law" after Congress has spoken. *Milwaukee II*, 451 U.S. at 315.

In any event, even if congressionally displaced federal common law had the power to preempt state law, the state-law claims pleaded in the Counties' complaints have nothing to do with any federal common law that has ever existed. In the nuisance context, the Court has recognized a federal common law only where a State plaintiff's cause of action had the purpose and effect of regulating releases of contaminants from a specific out-of-state source. *See Milwaukee I*, 406 U.S. at 107; *New Jersey*, 283 U.S. at 477; *Georgia*, 240 U.S. at 650; *Missouri*, 180 U.S. at 241–43; *see also Ouellette*, 479 U.S. at 488. The Counties' allegations here and the relief they seek—all of which sound in consumer protection and public deception—do not fit that mold.

Contrary to petitioners' mischaracterizations of the complaints, the Counties seek neither to regulate interstate emissions nor to set climate change policy, but rather to hold petitioners liable for conducting deceptive marketing tactics while knowingly misrepresenting the dangers of their products. The Counties' claims seek to vindicate a well-recognized state "interest in ensuring the accuracy of commercial information in the marketplace." *Edenfield v. Fane*, 507 U.S. 761, 769 (1993). The allegations target misconduct that states have long regulated in such recognized areas as "protection of consumers," *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 150 (1963); "ad-

vertising," *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541–42 (2001); and "unfair business practices," *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989). The complaints also seek statutory and tort remedies that are deeply rooted in "the state's historic powers to protect the health, safety, and property rights of its citizens." *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 725 F.3d 65, 96 (2d Cir. 2013).

As a result, holding petitioners liable for knowing and deceitful corporate conduct does not implicate—much less conflict with—any uniquely federal interest, a precondition for applying federal common law. *See Rodriguez v. F.D.I.C.*, 140 S. Ct. 713, 716 (2020). Nor does combatting such conduct impermissibly "launch the State upon a prohibited voyage into a domain of exclusively federal competence." *Zschernig v. Miller*, 389 U.S. 429, 442 (1968) (Stewart, J., concurring). Petitioners' arguments here rest on a vague "variety of 'federal interests,'" broadly construed. Pet. App. 22a (citing *Oakland*, 969 F.3d at 906–07). But even traditional conflict preemption analysis (which cannot support removal) does not countenance a "freewheeling judicial inquiry into whether a state statute is in tension with federal objectives," because "such an endeavor would undercut the principle that it is Congress rather than the courts that pre-empts state law." *Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582, 607 (2011) (cleaned up); *see, e.g.*, *Miree v. DeKalb Cnty., Ga.*, 433 U.S. 25, 29 (1977). "Invoking some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption of a state law." *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019) (leading opinion).

At bottom, there is no existing federal common law that could apply to the Counties' claims. The Ninth

Circuit was therefore correct and no further review by this Court is warranted.

### III. The Question Presented Has Minimal Practical Importance And This Case Is A Poor Vehicle For Addressing It.

The Question Presented does not warrant this Court's review for the additional reasons that it is not well-presented in this Petition and arises in only a single, discrete category of cases.

This case is a poor vehicle for addressing petitioners' theory of federal-common-law removal, even assuming that novel theory warranted certiorari review. To reverse the judgment below, this Court would need to (1) conclude that a congressionally displaced body of federal common law governed the Counties' state-law claims, and then (2) create a new exception to the well-pleaded complaint rule that stands separate and apart from both *Grable* and complete preemption. But the Ninth Circuit never addressed the first step of petitioners' theory, holding instead that the well-pleaded complaint rule precluded arising-under jurisdiction "even if" the Counties' claims were governed by the displaced federal common law of interstate pollution. Pet. App. 23a. As a result, this Court would need to function as a court of "first view," not "a court of review," if it were to grant certiorari here. *Jennings v. Rodriguez*, 138 S. Ct. 830, 851 (2018) (cleaned up).

Denying certiorari is also appropriate because the Petition does not present any questions of recurring importance. To the contrary, petitioners present an exceedingly narrow and atypical question of subject-matter jurisdiction: whether defendants can remove state-law claims to federal court based on congressionally displaced federal common law, even though they

fail to satisfy the requirements of *Grable* and complete preemption. The cases affected by the Question Presented are necessarily few in number because federal common law applies in only a "few," "restricted" "areas." *Texas Indus.*, 451 U.S. at 640. Indeed, the only potentially affected cases that petitioners identify are other lawsuits targeting the fossil-fuel industry's climate deception, a vanishingly small fraction of the thousands of cases remanded to state court each year.

Contrary to petitioners' vague speculations, moreover, denying certiorari would not "undermine" "national security" or interfere with the "dependable supply of oil and gas." Pet. 29. Again, the only question raised in this Petition is whether the Counties' lawsuits should proceed in state court or federal court. Petitioners cannot seriously argue that the nation's energy security will be jeopardized if a state court rules on the merits of the Counties' claims, rather than a federal court. As this Court has reaffirmed time and again, state courts are perfectly capable of applying federal law and adjudicating federal defenses. *See, e.g.*, *McKesson*, 141 S. Ct. at 51 ("Our system of 'cooperative judicial federalism' presumes federal and state courts alike are competent to apply federal and state law.").

Finally, petitioners invoke the need for clarity in jurisdictional rules as a reason for granting certiorari review. Pet. 29–30. But it is petitioners who seek to undo the progress that this Court has made in clarifying the "muddled backdrop" of jurisdictional rules that existed prior to *Grable*. *Manning*, 578 U.S. at 385. Courts have no need for a one-off jurisdictional test that applies only to judge-made federal law, because *Grable* already "provides ready answers to jurisdictional questions" and already "gives guidance whenever borderline cases crop up." *Id.* at 392.

## CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

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