No. 22-495

IN THE
Supreme Court of the United States

CHEVRON CORPORATION, ET AL.,
Petitioners,

v.

COUNTY OF SAN MATEO, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

The disclosure statement included in the petition remains accurate.

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INTRODUCTION

The decision below deepens a long-standing conflict on the question whether federal removal jurisdiction exists over claims that are necessarily and exclusively governed by federal law but have been pleaded under state law. It also implicates a second conflict concerning whether claims based on transboundary emissions are necessarily and exclusively governed by federal law. Both questions have arisen with particular frequency in the numerous and materially identical climate-change cases pending in courts across the Nation. The same questions are presented in the petition in *Suncor Energy (U.S.A.) Inc.* v. *Board of County Commissioners of Boulder County*, No. 21-1550, a case in which this Court, last October, invited the Solicitor General to file a brief expressing the views of the United States.

Respondents candidly acknowledge that this case is "nearly identical" to *Suncor* and raises the same issues. Opp. 4. It is thus unsurprising that respondents' arguments against review are nearly identical to those made by the respondents in *Suncor*. These arguments are no more persuasive here than they are there.

First, respondents spend much of their brief arguing the merits of the case, insisting that claims that are necessarily and exclusively governed by federal law cannot be removed to federal court so long as the plaintiff slaps on a state-law label. Respondents also contend, contrary to this Court's numerous holdings, that claims for injuries stemming from interstate and international emissions are not governed by federal law. Respondents are wrong on both counts, but, more

importantly, these merits arguments do nothing to undercut the need for this Court's plenary review.

Respondents also argue that the Ninth Circuit's decision below does not conflict with the decisions of any other circuits. But the Third Circuit, considering identical climate-change claims, expressly recognized the conflict among the circuits on the removability question and declined to "follow" "two circuit cases that relabeled state-common-law claims as federal." *City of Hoboken* v. *Chevron Corp.*, 45 F.4th 699, 708 (3d Cir. 2022).

Finally, respondents attempt to downplay the importance of the question presented. But identical claims are pending in dozens of lawsuits across the country, with more potentially on the way, so this Court's decision will have a dramatic effect on nationwide litigation concerning matters that implicate national and international policy. And respondents cannot dispute that the question of the proper response to climate change is one that the federal government, not the States, should have primary responsibility for resolving.

Given the overlap between this case and *Suncor*, the Court should hold the petition in this case pending a decision on the petition in *Suncor*. The petition in *Suncor* should be granted because the questions presented in these cases have divided the courts of appeals and will determine whether state courts have the power to impose the costs of global climate change on the energy industry. In the alternative, the petition in this case should be granted.

I. THE NINTH CIRCUIT'S DECISION IMPLICATES TWO CONFLICTS AMONG THE COURTS OF APPEALS.

Respondents contend that the decision below implicates no circuit conflicts, rehashing the same arguments made by the respondents in *Suncor*. But those arguments remain invalid.

First, respondents contend that no conflict exists over the scope of arising-under jurisdiction (Opp. 8–10) because *Sam L. Majors Jewelers* v. *ABX, Inc.*, 117 F.3d 922 (5th Cir. 1997), and *In re Otter Tail Power Co.*, 116 F.3d 1207 (8th Cir. 1997), were decided before this Court issued its decision in *Grable & Sons Metal Products, Inc.* v. *Darue Engineering & Manufacturing*, 545 U.S. 308 (2005). Respondents suggest that *Grable* synthesized the approaches of those two cases and thereby tacitly overruled them. That characterization of those decisions is incorrect.

The Fifth Circuit in *Sam L. Majors* did not cite any of the precursors to *Grable* in concluding that federal jurisdiction was present; rather, it relied on two of this Court's cases involving federal common law, *see* 117 F.3d at 926 (citing *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 100 (1972) ("*Milwaukee I*"), and *Nat'l Farmers Union Ins. Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845, 850 (1985)), the same cases that petitioners have relied on here, *see* Pet. 11, 18, 23, 24. The Fifth Circuit's decision thus stands apart from the *Grable* line of precedent and articulates an independent basis for federal jurisdiction. Moreover, in a recent decision involving identical climate-change claims, the Third Circuit expressly refused to "follow" *Sam L. Majors*, recognizing that the Fifth Circuit's decision conflicted

with its own. *Hoboken*, 45 F.4th at 708. Respondents' interpretation of the Fifth Circuit's decision as inapplicable to their claims is thus unsupportable.

As for the Eighth Circuit's decision, while *Otter Tail* briefly mentioned jurisdiction based on the presence of a "substantial question of federal law," 116 F.3d at 1213, it ultimately relied on the same precedent from this Court involving federal common law, *see id*. at 1214 (citing *Nat'l Farmers Union*).

Moreover, respondents' characterization would not eliminate the conflict, because *Sam L. Majors* and *Otter Tail* would still permit removal of respondents' claims. After all, if respondents' claims are exclusively federal in nature, as petitioners maintain, then it follows that federal substantive law governs every element of respondents' claims, which means that each element presents a substantial question of federal law, thereby satisfying *Grable*. The same is true of the other cases on which petitioners rely that used a *Grable*-like analysis. *See* Pet. 13–14 (citing *Newton* v. *Capital Assurance Co*., 245 F.3d 1306 (11th Cir. 2001); *Torres* v. *S. Peru Copper Corp*., 113 F.3d 540 (5th Cir. 1997); *Republic of Philippines* v. *Marcos*, 806 F.2d 344 (2d Cir. 1986)). The Ninth Circuit held the exact opposite, and its conflict with those cases is patent. *See* Pet. App. 23a.

Second, respondents argue that no conflict exists over the question whether federal law necessarily and exclusively governs claims for injuries stemming from transboundary emissions (Opp. 11–14) because the Second Circuit's decision in *City of New York* v. *Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021), did not involve

a case removed from state to federal court. But as petitioners have explained (Pet. 21), that distinction is irrelevant because both cases squarely addressed the question whether federal law governs claims such as those asserted here. The fact that the Second Circuit did not need to consider the well-pleaded complaint rule does not eliminate the circuit split over the question regarding which substantive law governs these types of transboundary emissions claims.

Respondents also argue (Opp. 13–14) that their allegations here "rest on different factual allegations and target qualitatively different types of tortious conduct" than those in *City of New York*. That is not correct. The claims in *City of New York* are nearly identical to those here. The plaintiff in *City of New York*, as respondents do here, alleged that "Defendants have known for decades that their fossil fuel products pose risks of severe impacts on the global climate through the warnings of their own scientists," yet still "extensively promoted fossil fuels for pervasive use, while denying or downplaying these threats." *City of New York* v. *BP P.L.C.*, 325 F. Supp. 3d 466, 468–69 (S.D.N.Y. 2018), *aff'd*, 993 F.3d 81. The City of New York argued to the Second Circuit that the defendants were liable for "nuisance and trespass" because "for decades, Defendants promoted their fossil-fuel products by concealing and downplaying the harms of climate change [and] profited from the misconceptions they promoted." Br. for Appellant at 27, *City of New York* v. *BP P.L.C.*, No. 18-2188, 2018 WL 5905772 (2d Cir. Nov. 8, 2018).

The Second Circuit, however, saw through those allegations to the substance of the claims. As that court concluded, the City of New York's attempt to "focus on" one particular "moment in the global warming

lifecycle is merely artful pleading and does not change the substance of its claims." *City of New York*, 993 F.3d at 97 (internal quotation marks omitted). The Second Circuit held that the City could not deny that its "case hinges on the link between the release of greenhouse gases and the effect those emissions have on the environment generally," given that "the City does not seek any damages for the [defendants'] production or sale of fossil fuels that do not in turn depend on harms stemming from emissions." *Ibid.*

The Third Circuit, too, in examining climate claims of this kind, recognized that, although the plaintiffs "try to cast their suits as just about misrepresentations[,] … their own complaints belie that suggestion. They charge the oil companies with not just misrepresentations, but also trespasses and nuisances. Those are caused by burning fossil fuels and emitting carbon dioxide." *Hoboken*, 45 F.4th at 712. The same is true here: Plaintiffs' claims are attempts to collect damages based on injuries stemming from worldwide emissions.

Here, as in *City of New York*, respondents allege that petitioners "continued to sell massive quantities of fossil fuels" despite knowing about the alleged effect that the combustion of those fuels by third parties would have on the global climate. 993 F.3d at 86–87. And, as did the plaintiff in *City of New York*, respondents seek damages for the alleged effects of global climate change allegedly caused by consumers' emissions from the combustion of petitioners' products. *See* Ct. App. 3-ER-310. In all material respects, the plaintiff's claims in *City of New York* mirror respondents' claims here. The Ninth Circuit's decision thus squarely conflicts with the Second Circuit's decision.

II. THE DECISION BELOW IS INCORRECT.

Tellingly, respondents devote most of their brief in opposition to arguing the merits of the case, repeating the same fundamental errors as the respondents in *Suncor*. Respondents' arguments all fail.

First, respondents argue that petitioners seek to "create a new exception" to the well-pleaded complaint rule. Opp. i. Not so. This Court need only apply familiar jurisdictional principles to decide the case in petitioners' favor. The Court has already held that an "independent corollary" of the well-pleaded complaint rule is that a plaintiff "may not defeat removal" through artful pleading; that is, by "omitting to plead necessary federal questions in a complaint." *Franchise Tax Bd.* v. *Constr. Laborers Vacation Tr.*, 463 U.S. 1, 22 (1983). A federal question is "necessary" under that corollary where, as here, the constitutional structure mandates the application of federal law.

Federal questions are necessary to the resolution of this case because federal law exclusively governs when a claim "involv[es] interstate air … pollution," *City of New York*, 993 F.3d at 91, or "'deal[s] with air'" in its "'interstate aspects,'" *Am. Elec. Power Co.* v. *Connecticut*, 564 U.S. 410, 421 (2011) (quoting *Milwaukee I*, 406 U.S. at 103). The "basic interests of federalism … demand[]" this result. *Milwaukee I*, 406 U.S. at 105 n.6. Thus, under our federal system, "state law cannot be used" at all to resolve a controversy of this kind. *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 313 n.7 (1981). Rather, the "rule of decision [must] be[] federal," and the claims thus necessarily "arise[] under federal law." *Milwaukee I*, 406 U.S. at 100, 108 n.10 (internal quotation marks omitted).

Next, respondents argue (Opp. 16) that the artful-pleading doctrine is limited to the context of statutory complete preemption. But the Court has never limited the artful-pleading doctrine in this way. *See* Pet. 25–26. Indeed, the Court has already recognized that federal common law can function in the same way as completely preemptive statutes, holding that a "state-law complaint that alleges a present right to possession of Indian tribal lands" was necessarily governed by federal law and "is thus completely pre-empted and arises under federal law." *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 393 n.8 (1987) (citing *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 675 (1974)). The same principle applies here, where the constitutional structure requires the exclusive application of federal law to respondents' claims. *See* Pet. 21–23.

Respondents err in contending (Opp. 18–19) that this Court overruled its previous holding that "courts will not permit plaintiff to use artful pleading to close off defendant's right to a federal forum and occasionally the removal court will seek to determine whether the real nature of the claim is federal, regardless of plaintiff's characterization." *Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394, 397 n.2 (1981) (cleaned up). In fact, *Rivet* v. *Regions Bank of Louisiana*, 522 U.S. 470, 478 (1998), narrowed only the separate point made in *Moitie*'s second footnote, which concerned whether removal could rest on the preclusive effect of a prior federal judgment. *See ibid*. Indeed, *Rivet* expressly confirmed the broader principle of removal jurisprudence articulated in *Moitie*: "If a court concludes that a plaintiff has 'artfully pleaded' claims in this fashion, it may uphold removal even though no federal

question appears on the face of the plaintiff's complaint." *Id*. at 475.

Respondents further argue (Opp. 20) that removal is improper because "Congress displaced the federal common law of interstate pollution" with the Clean Air Act. But the question whether a party can obtain a remedy under federal common law on the merits is distinct from whether the claim arises under federal law for jurisdictional purposes. The Court made this point in *Oneida Indian Nation*, explaining that a claim governed by federal common law arises under federal law for "jurisdictional purposes" even if the claim "may fail at a later stage for a variety of reasons." 414 U.S. at 675. *Cf. United States* v. *Standard Oil Co. of Cal.*, 332 U.S. 301, 305 (1947).

Moreover, as the Second Circuit explained in *City of New York*, displacement by the Clean Air Act of a remedy under federal common law does not "give birth to new state-law claims" in a field where state law had never been able to govern previously. 993 F.3d at 98. The Clean Air Act's displacement of a remedy under federal common law did not revive otherwise inoperable state law. *See Illinois* v. *City of Milwaukee*, 731 F.2d 403, 409–11 (7th Cir. 1984) (holding that a State "cannot apply its own state law to out-of-state discharges" even after statutory displacement of federal common law); *City of New York*, 993 F.3d at 98–99 ("state law does not suddenly become presumptively competent to address issues that demand a unified federal standard simply because Congress saw fit to displace a federal court-made standard with a legislative one"). Only federal law can apply in cases involving "interstate and international disputes implicating the conflicting rights of States," because "our federal

system does not permit the controversy to be resolved under state law." *Tex. Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981).

Finally, respondents argue that their claims "sound in consumer protection and public deception" and have "nothing to do with any federal common law that has ever existed," which they contend is limited to regulating the physical release of emissions. Opp. 23. But this is, at the very most, a partial and incomplete account of the pleaded complaint. Respondents' theory of causation, their alleged injuries, and their requested remedies all depend on worldwide atmospheric emissions producing global climate change, Pet. 6–7, and "a mostly unbroken string of cases has applied federal law to disputes involving interstate air or water pollution," *City of New York*, 993 F.3d at 91.

III. THE QUESTION PRESENTED IS IMPORTANT AND WARRANTS THE COURT'S REVIEW.

This case presents a straightforward vehicle for the Court to resolve two related conflicts about the scope of federal jurisdiction. Respondents argue (Opp. 25 (capitalization omitted)) that review is not warranted because these issues are not "well-presented" in this case and affect "only a single, discrete category of cases." Neither argument withstands scrutiny.

Respondents' assertion that this case has "minimal practical importance" (Opp. 25) is absurd. The question presented is of vital importance in the nearly two dozen climate-change cases—each of which seeks vast damages from the energy industry—currently pending in courts across the country, because it concerns the central question of where the cases will be litigated. *See* Pet. 6 & n.1. While respondents describe

these sprawling cases as a mere "fraction" of the cases remanded to state court each year, Opp. 26, a rule of decision foreclosing removal of cases concerning transboundary emissions would open the door to countless more suits brought by States and municipalities seeking to regulate climate change through state tort law, Pet. 25. Moreover, the question presented here could arise in *any* case in which federal common law provides the rule of decision but the plaintiff chooses to label its claims as arising under state law. And contrary to respondents' assertions otherwise, this case implicates vital national security concerns because of petitioners' central role in ensuring a steady supply of oil and gas for domestic use and in support of the U.S. military. Pet. 30–31; *see also Am. Elec.*, 564 U.S. at 427 ("regulat[ing]" the "greenhouse gas-producing sector" is a "question[] of national [and] international policy"); *see also Nat'l Rev., Inc.* v. *Mann*, 140 S. Ct. 344, 348 (2019) (Alito, J., dissenting from denial of certiorari) ("Climate change has staked a place at the very center of this Nation's public discourse.").

This case is also an excellent vehicle to resolve both conflicts among the courts of appeals. Although the Ninth Circuit did not squarely hold that state law can govern respondents' transboundary-emissions claims, the jurisdictional question presented necessarily encompasses that threshold issue, which has been fully briefed by the parties, Pet. 17; Opp. 20, and is the subject of a mature conflict, Pet. 17–21.

In sum, respondents offer no good reason why the Court should decline to review the exceedingly important jurisdictional questions presented both by this case and by *Suncor*. To the contrary, the Court's

review is urgently needed to bring clarity to these important questions regarding federal courts' removal jurisdiction.

CONCLUSION

The Court should hold this petition pending its disposition of *Suncor*, No. 21-1550. If the Court does not grant review in *Suncor*, this petition should be granted.

Respectfully submitted.

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