No.

IN THE

# Supreme Court of the United States

SUNOCO LP, ET AL.,

*Petitioners,*

v.

CITY AND COUNTY OF HONOLULU, ET AL.,

*Respondents.*

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

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

This case is one of numerous lawsuits filed in state courts seeking to hold energy companies liable for global climate change based on their worldwide oil and gas production activities dating back many decades. Petitioners removed this case to federal court on numerous grounds, including the federal officer removal statute, 28 U.S.C. § 1442, arguing that, under respondents' theory of harm, their alleged injuries resulted from petitioners' cumulative production and supply of oil and gas, a substantial portion of which occurred at the direction of federal officers. The Ninth Circuit, however, affirmed remand on the ground that the defenses petitioners intended to raise—including preemption and constitutional defenses—did not arise out of petitioners' official federal duties. In so holding, the Ninth Circuit created a circuit conflict with multiple courts including the Third Circuit, which has rejected that very argument.

The first question presented is:

**1.** Whether the court of appeals erred in holding that 28 U.S.C. § 1442 precludes removal by federal officers and persons acting under them unless the removing defendant's colorable federal defense arises out of the defendant's federal duty.

Additionally, this case presents a second question on which the Court has asked the Solicitor General to provide the United States's views in a similar case:

**2.** Whether a federal district court has jurisdiction under 28 U.S.C. § 1331 over nominally state law claims seeking redress for injuries allegedly caused by the effect of transboundary greenhouse gas emissions on the global climate, on the ground that federal law necessarily and exclusively governs such claims.

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are Chevron Corporation, Chevron U.S.A. Inc., Aloha Petroleum, Ltd., Aloha Petroleum LLC, BHP Group Ltd., BHP Group plc, BP plc, BP America Inc., ConocoPhillips, ConocoPhillips Company, Exxon Mobil Corporation, ExxonMobil Oil Corporation, Marathon Petroleum Corporation, Phillips 66, Phillips 66 Company, Shell plc (*f/k/a* Royal Dutch Shell plc), Shell USA, Inc. (*f/k/a* Shell Oil Company), Shell Oil Products Company LLC, Sunoco LP, and Woodside Energy Hawaii Inc. (*f/k/a* BHP Hawaii Inc.).

Petitioner Chevron Corporation is a publicly traded company. It does not have a parent corporation, and no publicly held company owns more than 10% of its stock.

Petitioner Chevron U.S.A. Inc. is an indirect subsidiary of Chevron Corporation. No publicly traded corporation owns 10% or more of Chevron U.S.A.'s stock.

Petitioner Aloha Petroleum, Ltd. is a wholly owned subsidiary of Sunoco LP. No other publicly held corporation owns 10% or more of its stock.

Petitioner Aloha Petroleum LLC is a wholly owned subsidiary of Sunoco LP. No other publicly held corporation owns 10% or more of its stock.

Petitioner BP plc is a publicly traded corporation organized under the laws of England and Wales. No publicly traded corporation owns 10% or more of its stock.

Petitioner BP America Inc. is a wholly owned indirect subsidiary of BP plc.

Petitioner ConocoPhillips is a publicly traded corporation incorporated under the laws of Delaware with its principal place of business in Texas. It does not have a parent corporation, and no publicly held company owns more than 10% of its stock.

Petitioner ConocoPhillips Company is wholly owned by ConocoPhillips.

Petitioner Exxon Mobil Corporation is a publicly traded corporation and has no corporate parent. No publicly held corporation owns 10% or more of Exxon Mobil Corporation's stock.

Petitioner ExxonMobil Oil Corporation's corporate parent is Mobil Corporation, which owns 100% of ExxonMobil Oil Corporation's stock. Mobil Corporation, in turn, is wholly owned by Exxon Mobil Corporation.

Petitioner Marathon Petroleum Corporation has no parent corporation. BlackRock, Inc., through itself or its subsidiaries, owns 10% or more of Marathon Petroleum Corporation's stock.

Petitioner Phillips 66 has no parent corporation. The Vanguard Group is the only shareholder owning 10% or more of Phillips 66.

Petitioner Phillips 66 Company is wholly owned by Phillips 66.

Petitioner Shell plc (*f/k/a* Royal Dutch Shell plc) has no parent corporation, and no publicly held company owns 10% or more of its stock.

Petitioner Shell USA, Inc. (*f/k/a* Shell Oil Company) is a wholly owned indirect subsidiary of petitioner Shell plc (*f/k/a* Royal Dutch Shell plc).

Petitioner Shell Oil Products Company LLC is a wholly owned indirect subsidiary of petitioner Shell plc (*f/k/a* Royal Dutch Shell plc).

Petitioner Sunoco LP is a publicly traded master limited partnership, currently listed on the New York Stock Exchange. Sunoco LP and its general partner, Sunoco GP LLC, are subsidiaries of Energy Transfer Operating, L.P. and Energy Transfer LP, which are publicly traded master limited partnerships listed on the New York Stock Exchange. No other publicly held corporation owns 10% or more of Sunoco LP's stock.

Petitioner Woodside Energy Hawaii Inc. (*f/k/a* BHP Hawaii Inc.) is a wholly but indirectly owned subsidiary of Woodside Energy Group Ltd., a publicly traded company. No other publicly held company owns more than 10% of the stock of Woodside Energy Group Ltd.*

Respondents are the City and County of Honolulu, the Honolulu Board of Water Supply, and the County of Maui.

* BHP Group Ltd. and BHP Group plc were defendants in the district court and appellants before the court of appeals. However, they do not have an interest in the outcome of this petition because they were dismissed for lack of personal jurisdiction by the Circuit Court for the First Circuit, State of Hawaii on April 7, 2022, in the case brought by the City and County of Honolulu and on May 24, 2022, in the case brought by the County of Maui.

## RULE 14.1(b)(iii) STATEMENT

This case directly relates to the following proceedings:

United States District Court (D. Haw.):

*City & Cnty. of Honolulu* v. *Sunoco LP*, *et al.*, No. 20-cv-163 (Feb. 12, 2021).

*Cnty. of Maui* v. *Chevron U.S.A. Inc., et al.*, No. 20-cv-470 (Feb. 12, 2021).

United States Court of Appeals (9th Cir.):

*City & Cnty. of Honolulu* v. *Sunoco LP*, *et al.*, No. 21-15313 (July 7, 2022).

*Cnty. of Maui* v. *Chevron U.S.A. Inc., et al.*, No. 21-15318 (July 7, 2022).

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## PETITION FOR A WRIT OF CERTIORARI

Petitioners Chevron Corporation, Chevron U.S.A. Inc., Aloha Petroleum, Ltd., Aloha Petroleum LLC, BHP Group Ltd., BHP Group plc, BP plc, BP America Inc., ConocoPhillips, ConocoPhillips Company, Exxon Mobil Corporation, ExxonMobil Oil Corporation, Marathon Petroleum Corporation, Phillips 66, Phillips 66 Company, Shell plc (*f/k/a* Royal Dutch Shell plc), Shell USA, Inc. (*f/k/a* Shell Oil Company), Shell Oil Products Company LLC, Sunoco LP, and Woodside Energy Hawaii Inc. (*f/k/a* BHP Hawaii Inc.) respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The opinion of the Ninth Circuit is reported at 39 F.4th 1101. App. 1a–23a. The district court's order in *City and County of Honolulu* v. *Sunoco LP* is reported at 2021 WL 531237. App. 24a–45a.

## JURISDICTION

The Ninth Circuit issued its judgment on July 7, 2022. On September 21, 2022, Justice Kagan extended the time within which to file a petition for a writ of certiorari until December 4, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1331 provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

28 U.S.C. § 1441(a) provides: "[A]ny civil action brought in a State court of which the district courts of

the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

28 U.S.C. § 1442(a)(1) provides: "(a) A civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending: (1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue."

## INTRODUCTION

Congress empowered federal courts to hear any claim "for or relating to any act" taken under a federal officer's direction. 28 U.S.C. § 1442(a)(1). To qualify for federal officer removal, a defendant must establish that the suit is for or relating to "a[n] act under color of office," and must also "raise a colorable federal defense." *Jefferson Cnty.* v. *Acker*, 527 U.S. 423, 431 (1999) (alteration in original) (quoting 28 U.S.C. § 1442(a)(3)).

This case presents a recurring and important question regarding the "colorable federal defense" requirement that has divided the federal courts of appeals: whether the federal defense must arise from a defend-

ant's federal duties, or may encompass any federal defense. The Ninth Circuit here limited federal officer removal to those instances where the removing defendant's federal defense arises out of the defendant's federal duty. *See* App. 16a–17a. But other courts, like the Third Circuit, have rejected this position, holding that "[w]hat matters is that a defense raises a federal question, not that a federal duty forms the defense." *In re Commonwealth's Mot. to Appoint Counsel Against or Directed to Def. Ass'n of Phila.*, 790 F.3d 457, 473 (3d Cir. 2015).

Respondents are Hawaii political subdivisions that have asked Hawaii state courts to apply Hawaii state law to impose massive monetary liability on petitioners—a group of energy companies—for harms allegedly attributable to global climate change. This suit is one of nearly two dozen actions that have been filed in state courts across the country as part of a coordinated campaign to use novel and unprecedented constructions of state common law to hold a subset of the energy industry liable for global climate change.

Petitioners removed these cases to federal court, contending, among other grounds, that removal was appropriate under the federal officer removal statute because respondents' complaint encompassed petitioners' exploration for and production of fossil fuels at the direction of federal officers. The district court remanded the cases to state court, and petitioners appealed.

The Ninth Circuit affirmed, rejecting several of petitioners' bases for federal officer removal because it concluded that petitioners' federal defenses—including preemption and constitutional defenses—do not

arise from their federal duties. In so holding, the court's decision departed from the rule followed by other courts of appeals. Indeed, under the Ninth Circuit's holding, most constitutional and preemption defenses would never qualify as a colorable federal defense sufficient to support removal under Section 1442—a result that conflicts with the approach followed by several other circuits.

This case provides an ideal vehicle for addressing this important and recurring jurisdictional question. Respondents' claims expose the energy sector to vast, indeterminate monetary liability that will deter investment and damage employment in the industry and across the broader economy. And if these cases reach judgment in state courts around the country, they will inevitably create a patchwork of conflicting tort standards related to the interstate production and supply of oil and gas under the laws of multiple States. Before state courts around the nation begin issuing decisions on these matters, this Court should first decide whether these cases are governed by federal law and removable to federal court under the federal officer removal statute.

Additionally, this case implicates another question on which the Court has already requested the views of the United States. Petitioners argued below that respondents' claims are also removable under 28 U.S.C. § 1331(a) because they are necessarily and exclusively governed by federal law by virtue of the Constitution's structure. *See* Appellants' C.A. Br. 64–65. The same issue is presented in *Suncor Energy (U.S.A.) Inc.* v. *Board of County Commissioners of Boulder County*, No. 21-1550, in which the Court has called for the

views of the Solicitor General. Accordingly, this petition should be held pending the Court's disposition of *Suncor*. If the judgment in *Suncor* is not overturned, this petition should be granted.

## STATEMENT

### A. Background

The federal officer removal statute authorizes removal to federal court of any civil action against "any officer (or any person acting under that officer) of the United States . . . for or relating to any act under color of such office." 28 U.S.C. § 1442(a)(1). That statute allows those who help the federal government achieve federal objectives to defend actions taken under federal direction in federal court, rather than in state courts that "may reflect 'local prejudice.'" *Watson* v. *Philip Morris Cos.*, 551 U.S. 142, 150 (2007).

In accordance with that overarching purpose, the statute extends its protection not only to federal officers, but also to "any person acting under" a federal officer. 28 U.S.C. § 1442(a)(1). Thus, the right to removal encompasses private individuals enlisted to support federal efforts. *See Watson*, 551 U.S. at 150. As this Court has recognized, "[t]he words 'acting under' are broad," and their scope in Section 1442(a) "must be 'liberally construed'" to further the statute's basic purpose: to provide federal officers, and those acting under their direction, with a federal forum in which to defend their actions. *Id*. at 147 (citation omitted). This Court has long cautioned that, absent such protection, federal officers and those acting under them could be harassed and their work frustrated "at any time" "for an alleged offense against the law of the State, yet warranted by the Federal authority

they possess." *Willingham* v. *Morgan*, 395 U.S. 402, 406 (1969) (internal quotation marks omitted).

Generally, actions may be removed to federal court only if a federal district court would have original jurisdiction over the suit. *See* 28 U.S.C. § 1441(a). Thus, for most cases, removal is viable only if the federal question appears on the face of the complaint. *See*, *e.g.*, *Louisville & Nashville R.R. Co.* v. *Mottley*, 211 U.S. 149, 152 (1908). But the federal officer removal statute is different. Because such cases implicate important interests of the federal government, Congress granted broad rights of removal for cases against federal officers and those acting at their behest. Therefore, "suits against federal officers may be removed despite the nonfederal cast of the complaint; the federal-question element is met if the defense depends on federal law." *Jefferson Cnty.*, 527 U.S. at 431.

Accordingly, this Court has recognized two requirements for federal officer removal: a defendant must establish that the suit is for or relating to "a[n] act under color of office," and must "raise a colorable federal defense." *Jefferson Cnty.*, 527 U.S. at 431 (alteration in original).

The text of the federal officer removal statute does not include any requirement of a colorable federal defense. Rather, this Court has inferred that requirement as the necessary predicate for federal jurisdiction. *See Mesa* v. *California*, 489 U.S. 121, 136 (1989) ("[I]t is the raising of a federal question in the officer's removal petition that constitutes the federal law under which the action against the federal officer arises for Art. III purposes."). Thus, for more than a century, this Court has allowed federal officer removal as long as "a Federal question or a claim to a Federal right is

raised in the case, and must be decided therein." *Tennessee* v. *Davis*, 100 U.S. 257, 262 (1880).

### B. Facts and procedural history

**1.** Beginning in 2017, state and local governments have filed lawsuits in state courts across the country against a handful of energy companies, alleging that the companies' worldwide extraction, production, promotion, and sale of fossil fuels has contributed to global climate change and thereby caused injury. Nearly two dozen actions have been brought under this theory against scores of defendants in state courts across the country, including in Honolulu, Maui, San Francisco, Seattle, Boulder, New York City, and Baltimore.*

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* *See*, *e.g.*, *Cnty. of San Mateo* v. *Chevron*, No. 17-3222 (Cal. Super. Ct. San Mateo Cnty.); *City of Imperial Beach* v. *Chevron*, No. 17-1227 (Cal. Super. Ct. Contra Costa Cnty.); *Cnty. of Marin* v. *Chevron*, No. 17-2586 (Cal. Super. Ct. Marin Cnty.); *City of Richmond* v. *Chevron*, No. 18-55 (Cal. Super. Ct. Contra Costa Cnty.); *Cnty. of Santa Cruz* v. *Chevron*, No. 17-3242 (Cal. Super. Ct. Santa Cruz Cnty.); *City of Santa Cruz* v. *Chevron*, No. 17-3243 (Cal. Super. Ct. Santa Cruz Cnty.); *City of Oakland* v. *BP P.L.C.*, No. RG17875889 (Cal. Super. Ct. Alameda Cnty.); *City & Cnty. of San Francisco* v. *BP P.L.C.*, No. CGC-17-561370 (Cal. Super. Ct. S.F. Cnty.); *Mayor & City Council of Balt.* v. *BP P.L.C.*, No. 18-4219 (Balt. Cir. Ct.); *Pac. Coast Fed'n of Fishermen's Ass'ns, Inc.* v. *Chevron*, No. CGC-18-571285 (Cal. Super. Ct. S.F. Cnty.); *King Cnty.* v. *BP P.L.C.*, No. 18-2-11859-0 (Wash. Super. Ct. King Cnty.); *State* v. *Chevron*, No. PC-2018-4716 (R.I. Super. Ct.); *Bd. of Cnty. Comm'rs of Boulder Cnty.* v. *Suncor Energy (U.S.A.)*, No. 2018-CV-030349 (Colo. Dist. Ct.); *City & Cnty. of Honolulu* v. *Sunoco*, No. 20-380 (1st Cir. Haw.); *District of Columbia* v. *Exxon*, No. 2020 CA 002892 B (D.C. Super. Ct.); *Cnty. of Maui* v. *Sunoco LP*, No. 2CCV-20-0000283 (2d Cir. Haw.); *State* v. *BP Am. Inc.*, No. N20C-09-097 (Del. Super. Ct.); *City of Charleston* v. *Brabham Oil Co.*, No. 2020-CP-10 (S.C. Ct. Com. Pl.); *City of*

**2.** The cases at issue here are part of this coordinated campaign. The City and County of Honolulu, the Honolulu Board of Water Supply, and the County of Maui each asserted various state tort law claims in Hawaii state court, seeking damages arising from "anthropogenic global warming." C.A. 8-ER-1533, -1642. Respondents contend that "pollution from [petitioners'] fossil fuel products plays a direct and substantial role in the unprecedented rise in emissions of greenhouse gas pollution," which "is the main driver of" global climate change, which respondents allege caused their injuries. C.A. 4-ER-480.

Respondents' theory is global—it depends on "worldwide" greenhouse gas emissions since at least the 1950s. *See* C.A. 8-ER-1531–32. And respondents seek to hold petitioners—20 energy companies—liable for "sea level rise" and "more frequent and intense extreme precipitation events," "flooding," "heat waves," and "droughts" allegedly resulting from the normal production, promotion, and sale of fossil fuels. C.A. 8-ER-1531. Asserting numerous causes of action nominally under Hawaii state tort law, including for public and private nuisance, trespass, and failure to warn, respondents demand compensatory and punitive damages, disgorgement of profits, abatement of the alleged nuisances, and other relief. C.A. 8-ER-1628–35, -1640–42.

Petitioners removed both actions to the U.S. District Court for the District of Hawaii. App. 9a. The

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*Hoboken* v. *Exxon Mobil Corp.*, No. HUD-L-003179-20 (N.J. Super. Ct. Hudson Cnty.); *City of Annapolis* v. *BP P.L.C.*, No. C-02-CV-21-000250 (Md. Cir. Ct. Anne Arundel Cnty.); *Anne Arundel Cnty.* v. *BP P.L.C.*, No. C-02-CV-21-000565 (Md. Cir. Ct. Anne Arundel Cnty.); *State* v. *Exxon Mobil Corp.*, No. MER-L-001797-22 (N.J. Super. Ct. Mercer Cnty.).

notices of removal asserted numerous bases for federal jurisdiction, including that respondents' claims involve conduct undertaken at the direction of federal officers under 28 U.S.C. § 1442(a)(1), and that respondents' claims necessarily and exclusively arise under federal law by virtue of constitutional structure. In particular, petitioners explained that they acted under federal officers by producing and supplying highly specialized, non-commercial grade fuels for the military, and by producing and supplying a steady supply of fuels under government control and guidance during World War II. App. 34a–35a. Petitioners also argued that they acted under federal officers by producing oil and gas during the Korean War and under the Defense Production Act in the 1970s, by operating the Strategic Petroleum Reserve, by conducting offshore oil operations via federal leases pursuant to the Outer Continental Shelf Lands Act, and by operating the federal Elk Hills oil reserve under the Navy's supervision. App. 12a.

The district court rejected petitioners' bases for removal and remanded the cases to state court. App. 36a–39a, 44a–45a.

**3.** Petitioners appealed to the Ninth Circuit, which affirmed the remand orders. App. 8a.

Relevant here, the Ninth Circuit rejected federal officer removal based on petitioners' provision of specialized fuels to the military and support for wartime efforts without determining whether those actions constituted "act[ions] under" a federal officer. App. 11a–12a. Instead, the court held that petitioners' asserted federal defenses "must arise out of defendant[s'] official duties," and found that most of petitioners' "defenses do not flow from official duties," such as petitioners' defenses based on "the First Amendment,"

"due process, Interstate and Foreign Commerce Clauses, foreign affairs doctrine, and preemption." App. 16a–17a (cleaned up). In other words, the Ninth Circuit held that these legal defenses, even if valid, could not support removal because the defenses did not arise directly from federal duties. In so holding, the Ninth Circuit functionally barred federal officer removal based on most constitutional or statutory preemption defenses.

For the two duty-related defenses that petitioners did raise—official immunity and federal contractor defenses—the Ninth Circuit concluded that petitioners did not plead sufficient facts to make their defenses "colorable." App. 17a–18a. Notably, however, the Ninth Circuit did not express that view with respect to petitioners' other proffered defenses, such as preemption.

The Ninth Circuit thus concluded that none of petitioners' defenses qualified as a "colorable federal defense." App. 12a.

## REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision creates a conflict among the courts of appeals on the important question whether a defendant's "colorable federal defense" must arise from its official duties in order to qualify for federal officer removal. It also presents another question that has divided the circuits: whether claims that necessarily and exclusively are governed by federal law under the Constitution's structure are removable under 28 U.S.C. § 1441(a).

## I. THE NINTH CIRCUIT'S HOLDING CREATES A CIRCUIT CONFLICT OVER WHETHER THE "COLORABLE FEDERAL DEFENSE" MUST ARISE FROM A REMOVING DEFENDANT'S OFFICIAL DUTIES.

The Ninth Circuit's decision creates a circuit conflict concerning whether the "colorable federal defense" that is necessary for federal officer removal under 28 U.S.C. § 1442(a) must itself arise from the defendant's federal duties. That decision squarely conflicts with the rule of law announced by the Third Circuit in *In re Commonwealth's Motion to Appoint Counsel Against or Directed to Defender Association of Philadelphia*, 790 F.3d 457 (3d Cir. 2015). Moreover, several other circuits have held that federal preemption defenses satisfy the colorable federal defense requirement, without regard to whether they arise from a federal duty. The Ninth Circuit's decision is thus inconsistent with the holdings of other courts of appeals. That conflict warrants the Court's resolution.

**1.** In *In re Commonwealth's Motion*, the Third Circuit rejected the argument that the colorable federal defense must arise from the defendant's federal duties, holding instead that "[w]hat matters is that *a defense raises a federal question, not that a federal duty forms the defense*." 790 F.3d at 473 (emphasis added).

There, the Commonwealth of Pennsylvania sought to disqualify attorneys working for the Federal Community Defender Organization for the Eastern District of Pennsylvania ("Federal Community Defender") from representing clients in state post-conviction proceedings. *In re Commonwealth's Motion*, 790

F.3d at 461. The Commonwealth sued in Pennsylvania state court, and the Federal Community Defender removed to federal court. *Id.* at 465.

The Third Circuit concluded that jurisdiction was proper under the federal officer removal statute. The court of appeals first noted that the Federal Community Defender satisfied the "acting under" requirement for federal officer removal because the entire non-profit organization was "created through the Criminal Justice Act [('CJA')]" and was "delegated the authority to provide representation under the CJA and [18 U.S.C.] § 3599." 790 F.3d at 469.

The Third Circuit then concluded that the Federal Community Defender had raised a "colorable federal defense" to the Commonwealth's claims. The court noted that, "[s]ince at least 1880, the Supreme Court has required that federal officer removal be allowed if, and only if, 'it appears that a Federal question or a claim to a Federal right is raised in the case, and must be decided therein.'" 790 F.3d at 472–73 (quoting *Mesa*, 489 U.S. at 126–27 (quoting *Davis*, 100 U.S. at 262)). Such a requirement ensures that "federal courts have Article III jurisdiction over federal officer removal cases." *Id.* at 473. Accordingly, the Third Circuit concluded that removal was proper because the Federal Community Defender had raised three colorable federal defenses—two rooted in preemption and one rooted in the lack of a private right of action. *See id.* at 473–75.

The Commonwealth objected to this conclusion, arguing that "the federal defense must coincide with an asserted federal duty." 790 F.3d at 473. But the Third Circuit rejected this argument, explaining that "[w]hat matters is that a defense raises a federal question, not that a federal duty forms the defense." *Ibid.*

Indeed, although many federal officer removal cases involve duty-based defenses, like official immunity or federal contractor defenses, "the fact that duty-based defenses are the most common defenses does not make them the *only* permissible ones." *Ibid.* (emphasis added). In reaching that conclusion, the Third Circuit relied on *Jefferson County*, in which this Court allowed federal judges to remove a state case based on the judges' assertion of an intergovernmental-tax-immunity defense (*i.e.*, a defense not related to their judicial duties). *See ibid.* ("[T]he judges' duties did not require them to resist the tax." (citing *Jefferson Cnty.*, 527 U.S. at 437)). Thus, the Third Circuit held that defenses rooted in, for example, preemption—which typically raises a purely legal question not related to specific federal duties—satisfied the "colorable federal defense" requirement. *See also Baker* v. *Atl. Richfield Co.*, 962 F.3d 937, 942 n.1 (7th Cir. 2020) (quoting approvingly the Third Circuit's statement that "[w]hat matters is that a defense raises a federal question, not that a federal duty forms the defense," and "the fact that duty-based defenses are the most common defenses does not make them the only permissible ones").

**2.** Several other courts of appeals have also followed this understanding of the "colorable federal defense" requirement in holding that federal preemption defenses satisfy the requirement without regard to whether they arise from the asserted federal duty.

The Fifth Circuit in *Butler* v. *Coast Electric Power Association*, 926 F.3d 190 (5th Cir. 2019), found removal proper where defendants asserted a "federal preemption defense"—specifically, that the Mississippi statute under which the plaintiffs claimed they were owed a refund of excess patronage capital was

preempted by federal loan agreements. *Id.* at 192, 198–99. Similarly, in *St. Charles Surgical Hospital, L.L.C.* v. *Louisiana Health Service & Indemnity Co.*, the Fifth Circuit concluded that the defendants' "preemption defense" was "sufficient for purposes of the federal officer removal statute." 935 F.3d 352, 357–58 (5th Cir. 2019). In neither case did the court require that the preemption defense arise from a federal duty.

Likewise, the Eleventh Circuit has concluded that a defendant raised a "colorable federal defense" by arguing that federal regulations "concerning equity levels and distribution of patronage capital" preempted an Alabama state law upon which the plaintiff based its claims. *Caver* v. *Cent. Ala. Elec. Coop.*, 845 F.3d 1135, 1146 (11th Cir. 2017). That defense did not arise out of the federal duty, which was to "bring[] electricity to rural areas." *Id*. at 1144. In setting forth the standard for a "colorable federal defense," moreover, the Eleventh Circuit emphasized that it gives "'a broad reading'" to § 1442(a) and allows for removal "if the defense depends on federal law" because "a core purpose of federal officer removal is to have the validity of the federal defense tried in federal court." *Id.* at 1145 (citations omitted).

Likewise, the Sixth Circuit has held that the "colorable federal defense" prong is satisfied when a defendant argues that federal law preempted the plaintiff's condemnation action under Tennessee law "because the condemnation frustrated the purposes of the Rural Electrification Act of 1936." *City of Cookeville* v. *Upper Cumberland Elec. Membership Corp.*, 484 F.3d 380, 391 (6th Cir. 2007). The court did not require any showing that the defense arose out of a federal duty.

**3.** The Ninth Circuit's holding conflicts with the Third Circuit's decision in *In re Commonwealth's Motion* and sits in serious tension with the approach to the "colorable federal defense" prong applied by the Fifth, Sixth, and Eleventh Circuits.

To demonstrate that they had "act[ed] under" a federal officer, petitioners raised six categories of activities they had undertaken at the direction, supervision, and control of federal officers: (1) the sale of specialized fuels to the U.S. military; (2) the production of vast quantities of oil and gas for the federal government during World War II; (3) the production of oil and gas for the U.S. military during the Korean War and under the Defense Production Act; (4) the operation of the Strategic Petroleum Reserve; (5) offshore oil operations pursuant to the Outer Continental Shelf Lands Act; and (6) operating the federal Elk Hills oil reserve under the Navy's supervision. App. 11a–16a. Petitioners also raised several "colorable federal defenses," including preemption and constitutional protections under the Interstate and Foreign Commerce Clauses, the Due Process Clause, and the First Amendment.

The Ninth Circuit rejected the last four categories of federal officer removal, holding that petitioners failed to satisfy the first prong of federal officer removal because they did not qualify as "act[s] under color of office." *Jefferson Cnty.*, 527 U.S. at 431.

The court did not consider, however, whether the first two bases for federal officer removal—petitioners' sale of specialized fuels to the U.S. military and their production of vast quantities of oil and gas for the federal government during World War II—satisfied the "acting under" requirement. Instead, the court re-

jected those bases for removal on the ground that petitioners had failed to make out a "colorable federal defense." App. 11a–12a. Although petitioners had raised numerous federal defenses, the Ninth Circuit held that all but the government contractor and official immunity defenses were insufficient to support removal because they "do not flow from official duties." App. 17a. The panel announced that a qualifying "defense must arise out of [a] defendant's official duties." App. 16a (cleaned up; citation omitted). Accordingly, the panel rejected petitioners' "First Amendment . . . , due process, Interstate and Foreign Commerce Clauses, foreign affairs doctrine, and preemption defenses" on that basis. App. 17a.

The Ninth Circuit's holding squarely conflicts with the Third Circuit's decision in *In re Commonwealth's Motion*. The Third Circuit rejected any requirement that the "colorable federal defense" must "coincide with an asserted federal duty," 790 F.3d at 473, directly contrary to the approach taken by the court below. And because the Ninth Circuit's holding denies federal officer removal for non-duty-based defenses, which includes most preemption defenses, its reasoning is inconsistent with the approach followed in the Fifth, Sixth, and Eleventh Circuits as well. This Court's review is therefore necessary.

## II. THE DECISION BELOW CONTRADICTS THIS COURT'S PRECEDENTS AND IS INCORRECT.

The Ninth Circuit's holding that a "colorable federal defense" "must arise out of defendant's official duties," App. 16a (cleaned up), in addition to creating a circuit conflict, also contradicts a long line of this Court's precedents and incorrectly narrows the scope of federal officer removal under 28 U.S.C. § 1442(a).

For almost 150 years, this Court has recognized the importance of providing a federal forum to adjudicate disputes involving federal officers' actions challenged under state law. In *Davis*, this Court explained that, because the federal government "can act only through its officers and agents, and they must act within the States," the United States must have the power to protect its officers through removal to federal court, lest state governments harass them with "unfriendly" civil and criminal prosecutions. 100 U.S. at 262–63. "For this very basic reason, the right of removal under § 1442(a)(1) is made absolute whenever a suit in a state court is for any act 'under color' of federal office, regardless of whether the suit could originally have been brought in a federal court." *Willingham*, 395 U.S. at 406. Jurisdiction in such cases "rests on a 'federal interest in the matter'"—specifically, "the very basic interest in the enforcement of federal law through federal officials." *Ibid.* (citation omitted).

Congress codified this right of removal for federal officers in 28 U.S.C. § 1442(a). As this Court explained in *Mesa*, however, § 1442(a) is a "pure jurisdictional statute[]," meaning that it provides for a federal forum "over a particular class of cases," but it "cannot independently support [Article] III 'arising under' jurisdiction." 489 U.S. at 136 (quoting *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 496 (1983)). Rather, "it is the raising of a federal question in the officer's removal petition that constitutes the federal law under which the action against the federal officer arises for [Article] III purposes." *Ibid.*

For this reason, the Court has long required the presence of a federal question to allow federal officer

removal. As the Court stated in *Davis*, federal jurisdiction exists so long as "a Federal question or a claim to a Federal right is raised in the case, and must be decided therein." 100 U.S. at 262. Thus, the Court has made clear that the "colorable federal defense" prong is necessary simply to ensure that a federal court is properly exercising jurisdiction over a federal question. *Mesa*, 489 U.S. at 136. *Any* colorable federal defense, regardless of whether it arises out of the federal duty, suffices to fulfill that rationale.

Accordingly, the Court has never required that the federal defense arise out of the defendant's official duties. Rather, the Court has permitted removal even in cases that are not grounded in a duty-based defense. For example, in *Jefferson County*, the Court allowed federal judges to remove a state case based on their asserted defense of "intergovernmental tax immunity," even though the judges were not duty-bound to oppose the tax. 527 U.S. at 437.

The Ninth Circuit came to its erroneous conclusion based on this Court's statement in *Arizona* v. *Manypenny*, 451 U.S. 232 (1981), that "[h]istorically, removal under § 1442(a)(1) and its predecessor statutes was meant to ensure a federal forum in any case where a federal official is entitled to raise a defense arising out of his official duties." *Id*. at 241. The Ninth Circuit converted this passing observation into a requirement by adding the word "must." *See* App. 16a (holding that the defense "*must* 'arise out of defendant's official duties'" (quoting *Manypenny*, 451 U.S. at 241) (cleaned up; emphasis added)). But nothing in *Manypenny* stated or held that the federal defense "must" arise out of a federal duty; this Court simply noted that the historical background generally involved defenses that did so, which is unsurprising,

given that federal immunity has long been the first line of defense against hostile state prosecutions of federal officers.

Indeed, one of the cases on which *Manypenny* relies made clear that federal defenses arising from federal duties are the *floor*, not the ceiling, of federal officer removal. *See Manypenny*, 451 U.S. at 242 (citing *Willingham*, 395 U.S. at 407). In *Willingham*, the Court made clear that, "[*a*]*t the very least*, [the federal officer removal statute] is broad enough to cover all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law." 395 U.S. at 406–07 (emphasis added). In other words, the Court in no way limited removal to situations where the defense arises from the official federal duty; rather, it contemplated that removal would *not* be so limited. And this conclusion was consistent with the Court's emphasis that "[t]he federal officer removal statute is not 'narrow' or 'limited'"; rather, "the right of removal under [the federal officer removal statute] is made absolute whenever a suit in a state court is for any act 'under color' of federal office, regardless of whether the suit could originally have been brought in a federal court." *Id.* at 406.

The Ninth Circuit's approach also makes little sense logically. To be sure, federal officer removal is appropriate only when the dispute concerns a defendant's official duties. *See* 28 U.S.C. § 1442(a)(1) (permitting removal of an action "for or relating to any act under color of such office"). But the panel itself acknowledged that a separate prong of the federal officer removal test already covers that requirement: "To establish federal jurisdiction, a defendant must show" a "nexus between its actions, taken pursuant to a federal officer's directions, and [the] plaintiff's

claims." App. 10a. Grafting an additional federal duty requirement onto the "colorable federal defense" prong is thus unnecessary and inappropriate within the statute's broader framework. After all, the statutory text says nothing about a colorable federal defense; that element's sole justification, as explained by this Court in *Mesa*, is to ensure federal question jurisdiction under Article III. 489 U.S. at 136. *Any* "colorable federal defense" achieves that goal.

Moreover, whereas the Ninth Circuit rejected petitioners' government contractor and official immunity defenses on the basis that they were not "colorable," *see* App. 17a, the court did *not* hold that petitioners' preemption and constitutional defenses were not "colorable." Nor could it. As the Second Circuit has held, "sprawling" climate change claims of this sort—which seek "damages for the cumulative impact of conduct occurring simultaneously across just about every jurisdiction on the planet"—are "simply beyond the limits of state law" and thus necessarily are "federal claims" that "must be brought under federal common law." *City of New York* v. *Chevron Corp.*, 993 F.3d 81, 92, 95 (2d Cir. 2021).

The United States has made this same point in parallel climate change-related cases raising nearly identical claims: Only federal law, not state law, can govern these claims because they "seek to apply the law of an affected State to conduct in *another* State." U.S. *Amicus Curiae* Br. 27, *BP p.l.c.* v. *Mayor & City Council of Baltimore*, No. 19-1189 (U.S. Nov. 23, 2020). These inherently federal claims, however, have been displaced by the Clean Air Act. *Ibid.*

At oral argument in *Baltimore*, the United States confirmed its view that the plaintiff's claims were "inherently federal in nature." Tr. of Oral Arg. 31:4–5,

*Baltimore*, 2021 WL 197342 (U.S. Jan. 19, 2021). Although the plaintiff "tried to plead around" contrary precedent, "its case still depends on alleged injuries to [the plaintiff] caused by emissions from all over the world, and those emissions just can't be subjected to potentially conflicting regulations by every state and city." *Id.* at 31:7–13.

Similarly, as the United States explained to the Ninth Circuit, "[a]s a matter of constitutional structure, any claims asserted in this area are inherently federal," so "state law could never validly apply in the first place." U.S. *Amicus Curiae* Br. 5, *City of Oakland* v. *BP p.l.c.*, No. 18-16663, Dkt. 198 (9th Cir. Aug. 3, 2020). Only federal common law could apply, but the Clean Air Act "displaced federal common law" and did "not authorize States to impose their state tort law on [this] conduct." *Id.* at 7. Thus, respondents' claims based on interstate emissions are necessarily displaced by federal law. This defense is more than colorable; it is compelling.

The decision below is incorrect, and irreconcilable with this Court's holding in *Jefferson County* that federal officer removal was appropriate based on an asserted defense that did not arise out of the defendants' federal duties. 527 U.S. at 437. Further review is necessary.

## III. THIS CASE RAISES AN IMPORTANT QUESTION THAT WARRANTS THE COURT'S REVIEW.

This case presents a straightforward vehicle for the Court to resolve this important and persistent question concerning the "colorable federal defense" prong of federal officer removal.

**1.** The question presented in this case concerns core principles of our federal system—specifically, the

supremacy of federal law and "the very basic interest in the enforcement of federal law through federal officials." *Willingham*, 395 U.S. at 406. For more than five decades, this Court has "recognized that Congress' enactment of federal officer removal statutes since 1815 served 'to provide a federal forum for cases where federal officials must raise defenses arising from their official duties . . . [and] to protect federal officers from interference by hostile state courts.'" *Mesa*, 489 U.S. at 137 (alterations in original; citation omitted).

The Court has also long recognized the "great importance" of maintaining clear and uniform rules on issues relating to removal more generally. *Davis*, 100 U.S. at 260; *see also Direct Mktg. Ass'n* v. *Brohl*, 575 U.S. 1, 14 (2015) ("[J]urisdictional rules should be clear." (citation omitted)). "Clarity is to be desired in any statute, but in matters of jurisdiction it is especially important. Otherwise the courts and the parties must expend great energy, not on the merits of dispute settlement, but on simply deciding whether a court has the power to hear a case." *United States* v. *Sisson*, 399 U.S. 267, 307 (1970). Indeed, conflicting and uncertain jurisdictional rules "produce appeals and reversals, encourage gamesmanship, and, again, diminish the likelihood that results and settlements will reflect a claim's legal and factual merits." *Hertz Corp*. v. *Friend*, 559 U.S. 77, 94 (2010).

The Court should thus take this opportunity to clarify the vital importance of providing federal officials, and those acting under their direction, with a federal forum in which to defend their actions.

**2.** The question presented is also important because of petitioners' vital role in ensuring a steady supply of oil and gas for domestic use and supporting

the U.S. military. The United States recently experienced record high gas prices, and just this past October, the White House called on energy companies to "invest in production right now" in order to "help[] . . . improve U.S. energy security and bring down energy prices that have been driven up" by the conflict in Ukraine. FACT SHEET: President Biden to Announce New Actions to Strengthen U.S. Energy Security, Encourage Production, and Bring Down Costs, White House Briefing Room (Oct. 18, 2022), https://tinyurl.com/2p8z6mee. Against this backdrop, this case presents a timely opportunity for this Court to clarify a uniform removal right for energy companies sued on international emissions-related grounds and to prevent a patchwork of lawsuits in state courts across the country from undermining this crucial work.

The purpose of the federal officer removal statute is to ensure that those acting under federal officers are not haled into potentially hostile state courts, which could impede and frustrate the federal government's ability to accomplish important national objectives. *See Willingham*, 395 U.S. at 406. *Amicus* briefs submitted in similar cases vividly demonstrate that States have different approaches to and positions on these issues. *Compare*, *e.g.*, *Amicus* Br. of Indiana & 14 Other States, *City of New York* v. *Chevron Corp.*, No. 18-2188 (2d Cir. Feb. 14, 2019) (arguing for the non-justiciability and preemption of New York's climate change claims), *with Amicus* Br. of New York & 8 Other States, *City of New York* v. *Chevron Corp.*, No. 18-2188 (2d Cir. Nov. 16, 2018) (arguing the opposite). Allowing cases to proceed in different state courts

with different views would undermine the very purpose of the federal officer removal statute.

**3.** This case is an excellent vehicle for resolving the question presented because the resolution of the question could prove case-dispositive. The Ninth Circuit's holding on the "colorable federal defense" question led it to avoid addressing petitioners' compelling grounds for federal officer removal, especially petitioners' production of specialized, non-commercial fuels for the U.S. military and provision of fuels under government control and guidance during World War II.

The petition for a writ of certiorari thus provides the Court with an ideal opportunity to consider and resolve the question presented. That question is undeniably important, and the court of appeals' answer to the question cannot be defended. The Court should grant certiorari in this case and set aside the judgment below.

## IV. THIS CASE PRESENTS ANOTHER IMPORTANT QUESTION WARRANTING REVIEW: WHETHER CLAIMS SEEKING REDRESS FOR INJURIES ALLEGEDLY CAUSED BY TRANSBOUNDARY EMISSIONS ARE REMOVABLE BECAUSE THEY ARE GOVERNED NECESSARILY AND EXCLUSIVELY BY FEDERAL LAW.

This case also presents another question that has divided the circuits and on which the Court is awaiting the views of the Solicitor General: whether claims necessarily and exclusively governed by federal law under the Constitution's structure are removable under 28 U.S.C. § 1441(a).

In our federal system, each State may make law within its own borders, but no State may "impos[e] its regulatory policies on the entire Nation," *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 585 (1996), or dictate our "relationships with other members of the international community," *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 425 (1964). The Constitution's allocation of sovereignty between the States and the federal government, and among the States themselves, precludes application of state law in certain areas that are inherently interstate in nature. Allowing state law to govern such claims would permit one State to "impose its own legislation on . . . the others," violating the "cardinal" principle that "[e]ach state stands on the same level with all the rest." *Kansas* v. *Colorado*, 206 U.S. 46, 97 (1907).

For this reason, the Court has made clear that claims seeking redress for out-of-state emissions must be governed by federal law alone, and therefore can arise only under federal law, not state law. When the States "by their union made the forcible abatement of outside nuisances impossible to each," they necessarily agreed that disputes of that sort would be governed by federal law. *Georgia* v. *Tenn. Copper Co.*, 206 U.S. 230, 237 (1907). Thus, in cases involving "interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations," "our federal system does not permit the controversy to be resolved under state law" "because the interstate or international nature of the controversy makes it inappropriate for state law to control." *Tex. Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981).

Accordingly, this Court has long held unequivocally that, as a matter of constitutional structure, claims based on interstate and international emissions necessarily are governed exclusively by federal law. "[T]he basic scheme of the Constitution . . . demands" that "'federal common law'" govern disputes involving "'air and water in their ambient or interstate aspects.'" *Am. Elec. Power Co.* v. *Connecticut*, 564 U.S. 410, 421 (2011) (citation omitted); *see also Illinois* v. *City of Milwaukee*, 406 U.S. 91, 105 n.6 (1972) ("*Milwaukee I*") ("basic interests of federalism . . . demand[]" this result). In disputes concerning interstate and international emissions, "the rule of decision [must] be[] federal," *id.* at 108 n.10, and "state law cannot be used" at all, *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 313 n.7 (1981) ("*Milwaukee II*"); *see also Int'l Paper Co.* v. *Ouellette*, 479 U.S. 481, 488 (1987) (interstate pollution "is a matter of federal, not state, law").

Applying these principles and precedents here, respondents' claims are necessarily governed by and "arise under" federal law because they seek damages based on interstate—and international—greenhouse gas emissions. Respondents seek damages for injuries allegedly caused by the cumulative impact of emissions emanating from every State in the Nation and every country in the world. The claims are therefore necessarily governed by federal law.

Thus, the Second Circuit has explained that claims that are centered on transboundary emissions—like respondents'—"demand the existence of federal common law" because those emissions span state and even national boundaries, and "a federal rule of decision is necessary to protect uniquely federal interests." *City*

*of New York*, 993 F.3d at 90. In *City of New York*, the plaintiff, New York City, alleged that the defendant energy companies (including some of petitioners here) were liable under state law for injuries caused by the effects of interstate greenhouse gas emissions on global climate change. *Id.* at 88. The Second Circuit described the question before it as "whether municipalities may utilize state tort law to hold multinational oil companies liable for the damages caused by global greenhouse gas emissions." *Id.* at 85. The court unanimously held that "the answer is 'no'"; New York City's "sprawling" claims, which—like respondents'—sought "damages for the cumulative impact of conduct occurring simultaneously across just about every jurisdiction on the planet," were "simply beyond the limits of state law" and thus necessarily were "federal claims" that "must be brought under federal common law." *Id.* at 85, 92, 95.

In reaching this conclusion, the Second Circuit emphasized that, "[f]or over a century, a mostly unbroken string of [this Court's] cases has applied federal law to disputes involving interstate air or water pollution." *City of New York*, 993 F.3d at 91. Such "quarrels often implicate two federal interests that are incompatible with the application of state law," namely, the "overriding need for a uniform rule of decision" on matters influencing national energy and environmental policy, and "basic interests of federalism." *Id.* at 91–92 (internal quotation marks and alteration omitted) (quoting *Milwaukee I*, 406 U.S. at 105 n.6). The court explained that application of state law to the city's claims would "risk upsetting the careful balance that has been struck between the prevention of global warming, a project that necessarily requires national

standards and global participation, on the one hand, and energy production, economic growth, foreign policy, and national security, on the other." *Id.* at 93.

The court below did not address this argument because it was foreclosed by prior circuit precedent. *See Cnty. of San Mateo* v. *Chevron Corp.*, 32 F.4th 733, 750 (9th Cir. 2022), *cert. pet. filed*, No. 22-495 (U.S. Nov. 22, 2022); *City of Oakland* v. *BP PLC*, 969 F.3d 895, 906 (9th Cir. 2020). But petitioners preserved the argument for further review. Appellants' C.A. Br. 64–65.

This Court recently invited the Solicitor General to file a brief expressing the views of the United States on this question in *Suncor Energy (U.S.A.) Inc.* v. *Board of County Commissioners of Boulder County*, No. 21-1550. The United States has previously taken the position that climate change claims of this sort are removable because they are inherently and necessarily federal in nature. The Court thus should hold this petition pending its disposition of *Suncor*, No. 21-1550. If the Court does not overturn the judgment in *Suncor*, this petition should be granted.

## CONCLUSION

The Court should hold this petition for a writ of certiorari pending its resolution of *Suncor Energy (U.S.A.) Inc.* v. *Board of County Commissioners of Boulder County*, No. 21-1550, and then either grant this petition and vacate and remand for further proceedings in light of its decision in *Suncor* or grant this petition and set the case for plenary consideration.

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