No. 22-523

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

## BRIEF FOR RESPONDENTS CITY AND COUNTY OF HONOLULU, ET AL.


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## QUESTIONS PRESENTED

1. Whether respondents can satisfy the "colorable federal defense" requirement of the federal-officer-removal statute, 28 U.S.C. § 1442, by asserting a defense that is unrelated to any actions that respondents purportedly took under the direction or control of a federal officer.

2. Whether the 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 where the common law on which petitioners purport to rely has been displaced by a federal statute and 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 & Manufacturing*, 545 U.S. 308 (2005).

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## INTRODUCTION

Respondents filed these two consolidated cases in state court under Hawai'i common law, alleging that petitioners for many years tortiously misled consumers and the public about the threats of climate change and their products' relationship to it, substantially worsening climatic injuries respondents have suffered and will continue to suffer. Applying settled legal principles, a unanimous panel of the Ninth Circuit (Nelson, J.) held that petitioners improperly removed the cases to federal court, because the district court lacked subject-matter jurisdiction under any of the eight removal theories petitioners asserted, including the federal officer removal statute, 28 U.S.C. § 1442(a)(1). Removal under Section 1442 requires petitioners to (1) show that they acted under federal officers; (2) raise a colorable federal defense that arises out of their official duties; and (3) demonstrate a nexus between their government-directed acts and respondents' claims. *See, e.g.*, Pet App. 9a. After carefully reviewing the "six ways" petitioners purportedly acted under federal officers, the panel concluded that none supported removal because two were foreclosed by recent circuit precedent, two did not satisfy the statute's "acting under" requirement, and two failed the "colorable federal defense" element. *Id.* 11a.

The decision below joins four other circuit courts and another Ninth Circuit panel that affirmed remand in closely analogous cases removed on identical grounds, including Section 1442.[1] Petitioners nonetheless con-

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[1] *See Rhode Island v. Shell Oil Prods. Co.*, 35 F.4th 44 (1st Cir. 2022), *cert. petition filed*, No. 22-524; *County of San Mateo v. Chevron Corp.*, 32 F.4th 733 (9th Cir. 2022), *cert. petition filed*, No. 22-495; *City of Hoboken v. Chevron Corp.*, 45 F.4th 699 (3d Cir. 2022); *Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178 (4th

tend that the Ninth Circuit created a conflict with the Third Circuit by ruling that Petitioners had not presented a colorable federal defense with respect to two of their six federal officer theories, whereas the Third Circuit affirmed remand in a materially similar case because those same theories did not "relat[e] to" the plaintiffs' state law claims. *Hoboken*, 45 F.4th at 712–13. As petitioners see it, by stating that a colorable federal defense under Section 1442 "must 'aris[e] out of [defendant's] official duties," Pet. App. 16a (quoting *Arizona v. Manypenny*, 451 U.S. 232, 241 (1981)), the Ninth Circuit below "functionally barred federal officer removal based on most constitutional or statutory preemption defenses," Pet. 10. If the Third Circuit had reached the colorable defense element in *Hoboken*, petitioners insist, it would have applied a different standard.

Petitioners' asserted conflict is illusory. The decision below did not explicitly or implicitly hold that a defendant can only present a colorable federal defense if it alleges it was "duty-bound" to act. Pet. 18. The court instead applied the statute's long-accepted construction requiring a defense that "arises out of" the federal authority under which the defendant purportedly acted, in the ordinary dictionary sense—that is, a defense that stems from, originates from, or results from that federal authority.[2] Contrary to petitioners' assertions,

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Cir. 2022), *cert. petition filed*, No. 22-361; *Bd. of Cnty. Commissioners of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238 (10th Cir. 2022), *cert. petition filed*, No. 21-1550.

[2] *See* ARISE, Black's Law Dictionary (11th ed. 2019); *Cf. Coregis Ins. Co. v. Am. Health Found., Inc.*, 241 F.3d 123, 128 (2d Cir. 2001) (Sotomayor, J.) ("To 'arise' out of means 'to originate from a specified source.' . . . The phrase 'arising out of' is usually interpreted as 'indicat[ing] a causal connection.'"); *John Wyeth & Bro. Ltd. v. CIGNA Int'l Corp.*, 119 F.3d 1070, 1074 (3d Cir. 1997) (Alito, J.) (equating term "arising under or out of" with "growing out of").

the Ninth Circuit has unsurprisingly approved federal-officer removal based on a colorable preemption defense, where that defense was available by virtue of the defendant's acting under a federal superior. *See, e.g.*, *Stirling v. Minasian*, 955 F.3d 795, 801 (9th Cir. 2020); *Goncalves v. Rady Children's Hosp. San Diego*, 865 F.3d 1237, 1249 (9th Cir. 2017); *People of State of Cal. v. H & H Ship Serv. Co.*, 68 F.3d 481 (9th Cir. 1995) (unpublished). It has rejected federal-officer jurisdiction where, as here, the asserted preemption or constitutional defenses have nothing to do with the government-directed conduct on which the defendant premises removal. *See* Pet. App. 17a. The Ninth Circuit's decisions are fully consistent with the precedent petitioners cite from the Third, Fifth, Sixth, and Eleventh Circuits, all of which involved defenses that arose out of a defendant's government-directed conduct.

The Ninth Circuit's application of the colorable-defense element is faithful to the statute's text, history, and purposes. The Court has explained that in 1866 Congress included the phrase "under color of office" in what later became Section 1442 to codify "the pre-existing requirement of a federal defense," as articulated in cases construing predecessor acts. *See Mesa v. California*, 489 U.S. 121, 134–35 (1989). That earlier case law recognized federal-officer jurisdiction only where the asserted defense stemmed from the defendant's official actions or duties. Petitioners identify no decision where this Court has held a colorable defense entirely unrelated to government-directed conduct nonetheless supports removal under Section 1442. The Court has instead repeatedly stated that "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*." *Manypenny*, 451 U.S. at 241 (emphasis added). *See also*

*Mesa*, 489 at 133 (section 1442 "cover[s] all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law" (quoting *Willingham v. Morgan*, 395 U.S. 402, 407 (1969)). The court below correctly applied the standard and arrived at the same result reached by every court that has considered federal officer removal in analogous cases.

Review is also unwarranted for two additional reasons. First, few cases if any will likely turn on the narrow question whether a colorable defense far removed from government-directed activity can satisfy the statute. Where a removing defendant can assert no defense connected to official authority, other elements necessary for federal officer removal will likely also be absent. This case illustrates the point—the four other circuits that have entertained petitioners' jurisdictional theories in analogous cases all found that petitioners failed to satisfy another of the statute's three requirements. Second and for related reasons, this petition is a poor vehicle for determining the categories of federal defenses that within the scope of the statute, because the question is likely not outcome dispositive, as to removal jurisdiction or any other issue. As noted, multiple other courts have held that nearly identical arguments from many of the same petitioners did not support federal-officer removal for reasons that are all apply here: (1) petitioners' asserted defenses are not colorable, (2) petitioners did not act under a federal officer, (3) petitioners' purported government-directed conduct is expressly disclaimed in respondents' complaints, or (4) respondents' claims are not "for or relating to" any official acts.

Petitioners' second Question Presented is equally unworthy of this Court's attention. Petitioners ask for a new exception to the well-pleaded complaint rule, for

state-law claims that are purportedly "governed by" federal common law that has been displaced by statute. Pet. 24–26. Five circuits have considered and rejected petitioners' "perplexing" jurisdictional theory, and none have embraced it. *See Baltimore*, 31 F.4th at 204.[3] That is for good reason. Adopting petitioners' theory would undermine this Court's efforts to bring "order to [the] unruly doctrine" that previously defined when a state law cause of action presents a federal question for purposes of federal subject-matter jurisdiction. *See Gunn v. Minton*, 568 U.S. 251, 258 (2013); 28 U.S.C. §§ 1331 & 1441. It would also represent a breathtaking expansion of federal common lawmaking power, with enormous substantive and jurisdictional consequences. The Court denied a request to consider an identical theory of federal-common-law removal two years ago, from many of the same petitioners. *See Chevron Corp. v. City of Oakland*, No. 20-1089, 141 S. Ct. 2776 (2021). It should do so again here. Nothing has changed in that time, except that four courts of appeal have now joined the Ninth Circuit in rejecting the same theory.

## STATEMENT

### I. Legal Background

"[T]he 'long history' of the federal officer removal statute," *Mesa*, 489 U.S. at 125, begins with a provision included in a customs act passed in the aftermath of the War of 1812 that "allowed federal officials involved in the enforcement of the customs statute to remove to the federal courts any suit or prosecution commenced because of any act done 'under colour' of the statute," *Willingham*, 395 U.S. at 405. Similar provisions arose

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[3] *See Rhode Island*, 35 F.4th at 54–55; *Hoboken*, 45 F.4th at 707–08; *Baltimore*, 31 F.4th at 199–208; *San Mateo*, 32 F.4th at 746–48; *Boulder*, 25 F.4th at 1257–62.

and expanded in other statutes over time, until in 1948 Congress extended a right of removal to all federal officers and persons acting thereunder. *Id.* at 405–06. Today, the statute states in relevant part that a defendant may remove to federal district court any civil action "against or directed to . . . any officer (or any person acting under that officer) of the United States or of any agency thereof, . . . for or relating to any act under color of such office." 28 U.S.C. § 1442(a)(1).

"The purpose of all these enactments," the Court has said, "is not hard to discern." *Willingham*, 395 U.S. at 406. "Federal jurisdiction rests on" the United States' "very basic interest in the enforcement of federal law through federal officials." *Id.*; *Watson v. Philip Morris Companies, Inc.*, 551 U.S. 142, 150 (2007) ("[T]he removal statute's 'basic' purpose is to protect the Federal Government from the interference with its 'operations.'"). Federal officer removal "ensure[s] a federal forum in any case where a federal official is entitled to raise a defense arising out of his official duties," to allow adjudication of state law claims "free from local interests or prejudice," and "enable[e] the defendant to have the validity of his immunity defense adjudicated, in a federal forum." *Manypenny*, 451 U.S. at 241. "[T]he policy favoring removal 'should not be frustrated by a narrow, grudging interpretation of § 1442(a)(1),'" *id.* at 242 (citation omitted), but the statute's "broad language is not limitless," and "a liberal construction nonetheless can find limits in [the] text's language, context, history, and purposes," *Watson*, 551 U.S. at 147.

When a private defendant takes advantage of Section 1442, the "statute permits removal only if" the defendant, "in carrying out the 'act[s]' that are the subject of the [plaintiff's] complaint, was 'acting under' any 'agency' or 'officer' of 'the United States.'" *Id.*

The defendant is also required to "raise a colorable federal defense." *Jefferson Cnty., Ala. v. Acker*, 527 U.S. 423, 431 (1999). Because Section 1442 "is a pure jurisdictional statute," it "cannot independently support Art. III 'arising under' jurisdiction." *Mesa*, 489 U.S. at 136. Therefore "the raising of a federal question" by way of defense "constitutes the federal law under which the action against the federal officer arises for Art. III purposes." *Ibid.* Congress expressed that constitutional underpinning by requiring that the removed action must be for, or relate to, an "act under color of" federal authority. *See id.* at 136–37.

## II. Facts and Procedural History

Respondents brought these two cases in Hawai'i state court, alleging that petitioners concealed and misrepresented the climate impacts of their fossil-fuel products, and misleadingly cast doubt on the science, causes, and effects of global warming. Petitioners removed both cases to federal court, asserting eight statutory bases for jurisdiction ranging from the Outer Continental Shelf Lands Act to bankruptcy jurisdiction. As relevant here, petitioners also removed under the federal officer removal statute, relying on six categories of relationships that one or more petitioner had with the federal government dating to the Second World War. The district court found none of those arguments meritorious, and granted respondents' motions to remand.

On appeal, the Ninth Circuit addressed each of petitioners' six federal officer removal theories. Two of those theories—based on mineral rights leased on the outer Continental Shelf and one petitioner's operation of the Elk Hills petroleum reserve in California—were foreclosed by the court's recent opinion in *County of San Mateo v. Chevron Corp.*, 32 F.4th 733 (9th Cir.

2022). *See* Pet. App. 13a–16a. The court held that two of petitioners' other theories—based on production of oil and gas pursuant to directives under the Defense Production Act and conduct related to the Strategic Petroleum Reserve—did not satisfy the statute's "acting under" requirement. *Id.* at 12a–13a.

Finally, as relevant here, the court held that petitioners had not presented a colorable federal defense related to the two theories not disposed of on "arising under" grounds, which concern production of fossil fuels during World War II and sales of "specialized fuels" to the military. The court held that most of petitioners' asserted defenses, sounding in the First Amendment, "due process, [the] Interstate and Foreign Commerce Clauses, [the] foreign affairs doctrine, and preemption," did not "arise from official duties" and therefore could not support jurisdiction under Section 1442. Pet. App. 17a. The court then held that the two remaining defenses petitioners press here—the government contractor defense and another form of immunity—fell below colorability because they rested solely on "conclusory statements and general propositions of law." *Id.* Petitioners did not seek panel rehearing or rehearing *en banc*, and the Ninth Circuit's mandate issued July 29, 2022.

## REASONS THE PETITION SHOULD BE DENIED

### I. The Ninth Circuit's Rejection of Federal-Officer Jurisdiction Does Not Warrant Certiorari Review.

There is no reason for this Court to review the Ninth Circuit's fact-specific analysis of the colorable-defense element. The results of that analysis are fully consistent with the decisions of other circuits, the precedent

of this Court, and the text, history, and purposes of Section 1442. Petitioners' first Question Presented is exceedingly narrow, moreover, implicating only cases where a defendant has raised federal defenses that are entirely unrelated to its purported federal duties. The question is not even outcome determinative here, because there remain multiple additional grounds for the Ninth Circuit to reject petitioners' theory of federal-officer removal. If history is any guide, petitioners' chances of overcoming those hurdles are close to zero—more than a dozen courts have held that materially similar cases are not removable.

### A. There Is No Circuit Split.

Courts of appeals in five circuits have now considered and uniformly rejected attempts to remove closely analogous cases from state courts on the basis of federal-officer jurisdiction, without dissent. Some of these courts found the "acting-under" element not satisfied, reasoning that petitioners' arms-length business transactions with the federal government do not create the "unusually close" relationship that Section 1442 demands. *E.g.*, *San Mateo*, 32 F.4th at 757–60. Some found the nexus element not satisfied, because there was no evidence of federal government involvement in any aspect of petitioners' climate-deception campaigns. *E.g.*, *Baltimore*, at 31 F.4th at 233–34. And some ruled based on the colorable-defense element, explaining that petitioners must do more than "simply assert a defense and the word 'colorable' in the same sentence." Pet. App. 17a. All of these courts, however, reached the same result: federal-officer jurisdiction is lacking over state-law claims like those at issue here, seeking to hold private fossil-fuel companies liable for deceiving consumers and the public about the climate impacts of their products.

Ignoring this judicial unanimity, petitioners insist that the court below departed from its sister circuits when it rejected federal-officer jurisdiction for petitioners' failure to satisfy the colorable-defense element. In their view, the Ninth Circuit's analysis "functionally bar[s] federal officer removal based on most constitutional or statutory preemption defenses." Pet. 10. And that functional bar, petitioners assert, conflicts with decisions from the Third, Fifth, Sixth, and Eleventh Circuits, which have held that preemption defenses can satisfy the colorable-defense element in certain cases. *See* Pet. 11–16. That purported conflict is illusory, however, for three main reasons.

1. The Ninth Circuit has never explicitly or implicitly prohibited a defendant from relying on preemption defenses to satisfy the colorable-defense element. In fact, the circuit court has repeatedly upheld federal-officer removal based on such defenses. The decision below did not overrule this past precedent *sub silentio*. The court merely held that the asserted defenses "must arise out of [a] defendant's official duties," Pet. App. 16a (cleaned up), in the sense that the defenses originate, stem, or result from the existence of the defendant's relationship to a federal superior.

Accordingly, the Ninth Circuit has found the colorable-defense element satisfied in cases where a defendant asserted a preemption defense that arose out of the defendant's government-directed conduct. In *Stirling*, for example, the court sustained federal-officer jurisdiction in a suit charging a National Guard JAG attorney with the unauthorized practice of law because the attorney was not barred in California. 955 F.3d at 797. The defendant offered evidence he was practicing law in a limited capacity permitted by federal regulation, "pursuant to his orders from federal superiors."

*Id.* at 801. He did not assert a federal duty to practice law as his defense in support of removal, however, but rather argued the "federal regulatory scheme preempts a claim by a private individual" to enforce an inconsistent state licensing requirement. *Id.* Because that preemption defense would not have existed but for the defendant's JAG position, it arose out of government-directed conduct. The same is true of the preemption defense in *Goncalves*; the plaintiff there challenged a subrogation clause in a Federal Employee Health Benefit Act ("FEHBA") health insurance plan, and the defendant insurer alleged it had acted under the federal government in enforcing the subrogation clause and that FEHBA preempted the plaintiff's state-law claims. 865 F.3d at 1242, 1249. As in *Stirling*, the asserted defense arose out the defendant's official acts and duties: if the defendant were not administering a FEHBA plan on behalf of the government, it could not have asserted its FEHBA preemption defense.

Here, by contrast, the Ninth Circuit found that "[m]ost [of petitioners'] defenses" lack any connection to government-directed conduct. "For instance," the court explained, petitioners "argue that they cannot be held liable consistent with the First Amendment for alleged roles in denialist campaigns to misinform and confuse the public." Pet. App. 17a (cleaned up). But because petitioners do not contend that the federal government was involved in any aspect of those deception campaigns, their purported First Amendment defense does not arise out of, stem from, or even relate to any government-directed conduct. The same is true of petitioners' "due process, Interstate and Foreign Commerce Clause, foreign affairs doctrine, and preemption defenses." Pet. App. 17a. All these defenses would be equally available to petitioners even if none of them ever had business ties to the federal government.

As these decisions demonstrate, the Ninth Circuit has not "functionally barred" defendants from relying on preemption defenses to satisfy the colorable-defense element. Pet. 10. Instead, it has permitted such reliance when the asserted defense originates from or flows from the defendant's acting-under relationship with the federal government. The decision below is consistent with this rule, and if petitioners thought otherwise, they should have requested a rehearing *en banc* before seeking certiorari review, which they did not. This Court is not in the business of "clean[ing] up intra-circuit divisions." *Joseph v. United States*, 135 S. Ct. 705, 707 (2014) (Kagan, J., respecting denial of certiorari).

2. Because the Ninth Circuit has never imposed a functional bar on preemption defenses, its precedent is fully consistent with petitioners' cited cases from the Third, Fifth, Sixth, and Eleventh Circuits. Those decisions found federal-officer jurisdiction in cases where—as in *Stirling* and *Goncalves*—asserted preemption defenses plainly arose out of a defendants' government-directed conduct. None hold that federal-officer removal may rest on a federal defense with no relationship whatsoever to the federal government.

Petitioners lean most heavily on the Third Circuit's decision in *In re Commonwealth's Motion to Appoint Couns. Against or Directed to Def. Ass'n of Philadelphia*, 790 F.3d 457, 473 (3d Cir. 2015) ("*Defender Association*"). They neglect to mention, however, that within the last year the Third Circuit rejected an attempt to remove to materially similar cases to federal court on federal-officer grounds in an appeal involving many petitioners here. In *Hoboken*, the Third Circuit (Bibas, J.) considered the same six theories of federal-officer removal that petitioners advance in respon-

dents' cases. *Compare* Pet. 15, *with Hoboken*, 45 F.4th at 712–13. The panel unanimously reached the same conclusion as the Ninth Circuit: no federal-officer jurisdiction exists. *See Hoboken*, 45 F.4th at 713. The two courts used different reasoning to arrive at the same outcome, but this Court grants certiorari to resolve conflicts in the "results" of appellate decisions, not to reconcile differences in analysis. *Yee v. City of Escondido*, 503 U.S. 519, 537–38 (1992); *California v. Rooney*, 483 U.S. 307, 311 (1987) ("This Court reviews judgments, not statements in opinions." (cleaned up)). In any event, there is no true conflict in the courts' rationale. The Third Circuit disposed of petitioners' theories of federal-officer jurisdiction based on the acting-under element and a disclaimer of certain liability, similar to disclaimers present in respondents' complaints. *See Hoboken*, 45 F.4th at 712–13.

But even if *Hoboken* were not on the books, *Defender Association* would not present a certworthy conflict because all the federal defenses asserted there arose out of government-directed conduct. In *Defender Association*, Pennsylvania and some of its counties sued a nonprofit Community Defender Organization for allegedly "misus[ing] federal grant funds to appear in state proceedings." 790 F.3d at 461. Under the Criminal Justice Act ("CJA"), the Defender was granted authority and funding to represent certain indigent defendants, subject to the supervision of the Administrative Office of the United States Courts (the "AO"). *Id.* at 469. In support of federal-officer removal, the Defender argued it acted under the AO when spending the contested grant money, and alleged three federal defenses that plainly arose out of the Defender's duty "to provide representation under the CJA." *See id.* at 469–70, 472–74. First, the Defender argued its use of federal funds did not violate any CJA provisions or any

terms of "its contract with the AO." *Id.* at 473–74. Second, the Defender asserted Pennsylvania's claims were preempted because they impermissibly "interfere[d] in the relationship between the [Defender] and the AO." *Id.* at 474. Finally, the Defender maintained that Pennsylvania lacked "a private right of action to enforce [the CJA] and the terms of the [Defender's] grant with the AO." *Id.* On their face, all three defenses flowed from, and were only available because of, the Defender's actions under federal authority. Indeed, none of those defenses would have existed but for the relationship between the Defenders and the AO. If *Defender Association* came before the Ninth Circuit, the court would have reached the same conclusion as the Third Circuit, namely that the asserted defenses arose out of the defendant's federal duties.

For similar reasons, there is no conflict between the decision below and the decisions in *Butler v. Coast Electric Power Association*, 926 F.3d 190 (5th Cir. 2019), and *Caver v. Cent. Alabama Elec. Coop.*, 845 F.3d 1135 (11th Cir. 2017). In both, the plaintiffs sued electric power cooperatives, alleging that the cooperatives violated state law by failing to pay out excess revenues to their members. *See Butler*, 926 F.3d at 192; *Caver*, 845 F.3d at 1137–38. Both defendants removed on federal-officer grounds, arguing that such payouts were prohibited by their loan agreements with the Rural Utilities Service (the "RUS")—a federal agency created by the Rural Electrification Act of 1936. *See Butler*, 926 F.3d at 194; *Caver*, 845 F.3d at 1139–40. As with *Defender Association*, the defenses asserted in *Butler* and *Caver* would not have existed but for the defendants' "unusually close and detailed regulatory and contractual relationship with [a federal agency]." *Caver*, 845 F.3d at 1146. Neither decision holds that defenses entirely unrelated to acts

taken at the direction of a federal officer will always support removal under Section 1442.

Nor did the Sixth Circuit in *City of Cookeville, Tenn. v. Upper Cumberland Elec. Membership Corp.*, 484 F.3d 380 (6th Cir. 2007), another case involving an electric power cooperative. There, a municipal agency sought to condemn property owned by a cooperative, and it added RUS as a defendant in the eminent domain proceeding because RUS held mortgages on the condemned property. The Sixth Circuit concluded that, as a federal agency, RUS could invoke federal-officer removal without asserting a colorable defense. *See id.* at 389. But "even if a colorable federal defense were required," the court continued, RUS satisfied that requirement by arguing that the plaintiff's claims were preempted because "the condemnation frustrated the purposes of the Rural Electrification Act of 1936." *Id.* at 391. In other words, the RUS's preemption defense rested on the same statute that empowered RUS to enter mortgages at the subject property. As a result, its preemption defense clearly arose out of the agency's official acts.

That leaves *St. Charles Surgical Hosp., L.L.C. v. Louisiana Health Serv. & Indem. Co.*, 935 F.3d 352, 355 (5th Cir. 2019), another FEHBA case in which the defendant insurance company allegedly violated state law by "paying benefits directly to patients rather than to [the plaintiff hospital]." The defendant insurer argued its contract with the federal government prevented it from paying the hospital directly, and it premised federal-officer removal on a provision of FEHBA that expressly preempts any state law "relat[ing] to [FEHBA] health insurance or plans." *Id.* at 357 (cleaned up). As in *Goncalves*, then, the defendant's preemption defense in *St. Charles* arose from acts taken under color of fed-

eral office. The outcome in *St. Charles* is fully consistent with Ninth Circuit precedent, as the Fifth Circuit itself recognized. *See id.* at 355–56 ( "We join our sister circuits in allowing Blue Cross to remove," including the Ninth Circuit's decision in *Goncalves*).

3. Petitioners' purported split boils down to minor phrasing differences in circuit's articulations of the colorable-defense element, but this Court does not take certiorari to line edit the lower court opinion. *See Rooney*, 483 U.S. at 311 ("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 . . . .").

In any event, the Ninth Circuit's articulation of the colorable-defense element is entirely consistent with the wording used by the Third, Fifth, Sixth, and Eleventh Circuits. All those circuit courts have recognized that the purpose of the "colorability requirement" is "to ensure a federal forum in any case where a federal official is entitled to raise a defense *arising out of his official duties*." *Bennett v. MIS Corp.*, 607 F.3d 1076, 1090 (6th Cir. 2010) (cleaned up) (emphasis added); *Lovell Mfg., a Div. of Patterson-Erie Corp. v. Exp.-Imp. Bank of the U.S.*, 843 F.2d 725, 734 n.13 (3d Cir. 1988) ("[T]he purpose of § 1442 removal is to protect federal officials from unfriendly state forums, to allow the official to raise defenses (such as immunity) *arising out of his official duties*, and to insure an impartial setting 'free from local interests or prejudice.'" (emphasis added)); *Bell v. Thornburg*, 743 F.3d 84, 90 (5th Cir. 2014) (A "primary purpos[e] of the removal statute was to have colorable defenses *arising out of federal officers' duty to enforce federal law* litigated in the federal courts." (cleaned up) (emphasis added)); *Magnin*

*v. Teledyne Cont'l Motors*, 91 F.3d 1424, 1427 (11th Cir. 1996) ("the defendant must advance a colorable defense *arising out of his duty to enforce federal law*" (cleaned up) (emphasis added)). None of them have said—much less held—that federal-officer jurisdiction may rest on a colorable defense that has no connection whatsoever to a defendant's official duties.

In arguing otherwise, petitioners misconstrue the Third Circuit's analysis in *Defender Association*. There, Pennsylvania sought to cabin federal-officer removal to cases where the federal duty *is* the federal defense—*i.e.*, defenses that claim immunity on the grounds that the government made the defendant do the harmful conduct. *See, e.g.*, First Step Brief for Appellant, *Defender Association*, Case No. 13-3817, 2014 WL 785410, at 28–29 (3d Cir. Feb. 18, 2014) ("The removing party must clearly plead that his defense was that in doing the acts charged he was doing no more than his duty under federal law." (cleaned up)). The Third Circuit rejected that proposed limitation, explaining that a defendant's federal duty need not "coincide with" or "form[]" the federal defense. 790 F.3d at 473. That rejection does not conflict with anything the Ninth Circuit has said. After all, "the government made me do it" defenses are not the only defenses that can arise out of the discharge of federal duties, as *Goncalves* and *Stirling* demonstrate. And contrary to petitioners' suggestions, *Defender Association* did not go so far as to say that *any* colorable federal defense can support federal-officer removal. That decision and the decision below coexist easily in their results, their reasoning, and their choice of words.

### B. The Decision Below Is Correct.

The circuit court's decision below is consistent with the language of the statute and this Court's precedent

interpreting it. The Court has never held that Section 1442 allows private defendants to assert a federal defense totally unrelated to the federal authority under which the defendant purportedly acted. The Court has held, to the contrary, that when Congress introduced the phrase "under color of" to the statute more than 150 years ago, it incorporated established jurisprudence permitting removal where the defendant raised a federal defense that flowed directly or indirectly from an asserted federal duty.

1. As the Court explained in *Mesa*, the colorable-defense element derives from "[t]he critical phrase 'under color of office,'" which first appeared in the federal-officer-removal statute in 1866 and has remained since. 489 U.S. at 134. Congress included that phrase to codify "the pre-existing requirement of a federal defense," articulated in cases construing earlier temporary statutes permitting removal by certain classes of federal officers. *Id.* That prior case law recognized federal-officer jurisdiction only in cases where a defendant could assert a federal defense that arose out of the government-directed conduct at issue in the suit. In *Salem & L R Co v. Bos. & L R Co*, for example, Justice Curtis riding circuit wrote that an 1833 manifestation of the federal-officer-removal statute "granted the right of removal in a case where the act complained of was done under or by color of the revenue laws of the United States, in other words, wherein there is a question to be tried whether a justification or excuse can be made out *under those laws*." 21 F. Cas. 229, 229 (C.C.D. Mass. 1857) (emphasis added); *see also, e.g.*, *Wood v. Matthews*, 23 Vt. 735 (C.C.D. Vt. 1852) (trespass action removable where defendant's asserted defense was that the trespass occurred "in the exercise of his functions and performance of his duty as an officer of the customs under the revenue laws").

The Court carried that interpretation forward after the 1866 codification. In the seminal *Tennessee v. Davis* case, the Court sustained federal-officer jurisdiction because the asserted defense would not have arisen but for the defendant's duties as a federal tax collector. There, the defendant was indicted for murder in state court and removed, asserting that the killing "was performed in his own necessary self-defence while engaged in the discharge of his duties as deputy collector" of federal taxes. 100 U.S. 257, 258 (1879). Importantly, the Court in *Davis* distinguished actions under color of federal office from the narrower set of actions affirmatively authorized or mandated by an officer's duties. The Court stated there was "no room for reasonable doubt" removal was proper, because the defendant asserted he killed his attacker "not merely *under color of* his office as a revenue collector, . . . but that it was done *under and by right of* his office," while "attempting to discharge his official duty." 100 U.S. at 261 (emphasis added). The *Davis* defendant asserted that his federal duty, to borrow the Third Circuit's words, "coincide[d] with" or "form[ed]" his asserted defense—i.e., the killing was *by right of* his office. *See* 790 F.3d at 473. It would have been sufficient—and is sufficient today—to make the lesser assertion of a defense that "ar[o]se out of," i.e. *under color of* his office. *See* Pet. 16a.

In *Gay v. Ruff*, by contrast, 292 U.S. 25, 27 (1934), the Court observed that federal-officer jurisdiction will not lie in cases where the asserted defense bears no relationship to a federal duty. In that case, survivors of a child killed by the allegedly negligent operation of a train sued a receiver appointed over the railroad by the district court. The receiver removed, and this Court held remand was necessary. While the receiver was "an officer of the court operating the railroad pursuant to the order appointing him" and "[t]he

operation of trains through his employees [was] a duty imposed upon the receiver," removal was improper because, tellingly, there was no "reason to assume that he will in this case rest his defense on his duty to cause the train to be operated." *Id.* at 39. The Court in *Mesa* discussed *Gay* approvingly, as "point[ing] more definitively to our continuing understanding that federal-officer removal must be predicated on a federal defense." 489 U.S. at 130.

More recently, the Court has repeatedly reinforced this interpretation of Section 1442 as requiring a federal defense that arises out of official conduct. "In *Willingham*, [the Court] 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*.'" *Mesa*, 489 U.S. at 137 (quoting *Willingham*, 395 U.S. at 405) (emphasis added). In *Manypenny*, the Court explained 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*." 451 U.S. at 241 (emphasis added). And in *Mesa*, the Court "held that the 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*.'" 489 U.S. at 133 (quoting *Willingham*, 395 U.S. at 406–07) (emphasis).

The Ninth Circuit followed these settled articulations of the colorable-defense requirement. And consistent with the text, history, and longstanding interpretation of Section 1442, it properly concluded that several of petitioners' defenses did not support federal-officer removal because they did not arise out of their asserted federal duties.

2. Petitioners offer several objections to the reasoning above, all of which fail. First, they claim "the statutory text says nothing about a colorable federal defense," so any defense that arises under federal law within the meaning of Article III will suffice. Pet. 20. But as explained above, the Court in *Mesa* rejected that very same argument, explaining the requirement flows from the statutory text: "under color of office." 489 U.S. at 133–34. The United States argued there that "§ 1442(a)(1) permits removal without the assertion of a federal defense," "based on the plain language of the removal statute and on the substantial federal interests" in allowing federal officers to litigate claims arising from their official duties in federal court. *Id.* The United States reasoned that because Section 1442(a)(3) permits removal of cases against officers of federal courts for or relating to "any act under color of office or in the performance of his duties," the two halves of that disjunction must have different meanings, and one must permit removal absent a federal defense. *Id.* at 134–35. The Court disagreed, holding that "'in the performance of his duties' meant no more than 'under color of office,' and that Congress meant by both expressions to preserve the pre-existing requirement of a federal defense for removal." *Id.* at 135. The colorable-defense requirement is not extra-textual; it was included in the statute because "Congress would not have 'expand[ed] the jurisdiction of the federal courts beyond the bounds established by the Constitution.'" *Id.* at 136 (citation omitted).

Second, petitioners contend that although "federal officer removal is appropriate only when the dispute concerns a defendant's official duties," the statute "already covers" that limitation by permitting removal of cases "*for or relating to* any act under color of such office," so a federal defense arising from those duties

is "unnecessary." Pet. 19–20; 28 U.S.C. § 1442(a)(1) (emphasis added). That argument conflates two phrases that perform different tasks. *Acker* explains that in addition to presenting a colorable defense, the removing defendant must "establish that the suit is '*for* a[n] act under color of office,'" meaning "the officer must show a nexus, a 'causal connection' between the charged conduct and asserted official authority.'" 527 U.S. at 431 (emphasis in original). As currently drafted, the statute's words "for or relating to" thus describe the necessary connection between the defendant's allegedly wrongful conduct—i.e. the basis for liability—and federal authority. The words that follow, "any act under color of such office," describe the necessary connection between the asserted *defense* and federal authority, as the Court explained in *Mesa*. It is consistent with the language of the statute and with the case law it codified that both the plaintiff's claims and the defendant's asserted defense must have some association with federal authority.

Petitioners also misinterpret this Court's statement from *Willingham* that Section 1442 is "at the very least . . . 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. The Court did not hold that a defense arising out of a federal duty is "the floor" in some hierarchy of available defenses, *see* Pet. 19, but rather that the statute permits removal where such a defense is "at the very least . . . *colorable*," 395 U.S. at 406–07 (emphasis added). That is clear two sentences later, when the Court critiques "[t]he position of the court below," which "would have the anomalous result of allowing removal only when the officers had a *clearly sustainable* defense." *Id.* at 407 (emphasis added). The Court held that Congress could not have intended the plead-

ing standard for a removing federal officer's defense to be more demanding than proving the defense itself, because "one of the most important reasons for removal is to have the validity of the defense of official immunity tried in a federal court." *Id.* at 407; *see also Mesa*, 489 U.S. at 133 (describing *Willingham* as "delimiting the pleading requirements for establishing a colorable defense of that nature").

Finally, *Acker* did not—as petitioners suggest—allow federal-officer removal based on "a defense not related to . . . [official] duties." Pet. 13. In that case, an Alabama county sought to collect occupational taxes from two federal judges. *Acker*, 527 U.S. at 427. Invoking Section 1442, the judges removed the collection action to federal court, arguing that the county's "tax f[ell] on the performance of federal judicial duties in [the county] and risk[ed] interfering with the operation of the federal judiciary in violation of the intergovernmental tax immunity doctrine." *Id.* at 431 (cleaned up). On its face, then, the asserted immunity defense was available only by virtue of the judges' "federal judicial duties." *Id.* And so "even though the judges were not duty-bound to oppose the tax," Pet. 18, their defense nonetheless arose out of their federal office.

### C. The First Question Presented Is Neither Important Nor Cleanly Raised.

Denying review is also appropriate because petitioners' first Question Presented is not recurring, not important, and not well presented here.

1. Petitioners do not argue that the first Question Presented is frequently recurring or broadly applicable. In fact, they argue the opposite, urging the Court "to clarify a uniform removal right for energy compa-

nies sued on international emissions-related grounds." Pet. 23. Petitioners concede, moreover, that "the most common defenses" raised in federal-officer removals bear some causal or logical relationship to an asserted federal duty. Pet. 13. Indeed, besides a handful of other climate-deception cases, petitioners identify no case where a defendant premised federal-officer removal on a defense that was entirely unrelated to government-directed conduct. And even the other climate-deception cases will not be affected by the first Question Presented because the courts in those cases have rejected federal-officer jurisdiction for failing to satisfy the acting-under or nexus requirements, not for failing to satisfy the colorable-defense requirement. In effect, then, petitioners present this Court with a question that is custom-made for respondents' cases—and those cases only.

2. That question does not become "important" or otherwise certworthy simply because petitioners are in the business of selling oil and gas. Pet. 22–23. Federal-officer jurisdiction "rests on a 'federal interest in the matter,'" *Willingham*, 395 U.S. at 406, and there is *de minimis* federal interest in a private defendant's preemption or constitutional defense unrelated to any government-directed conduct. In any event, denying certiorari will not—as petitioners vaguely speculate—"undermin[e]" U.S. energy security. Pet. 23. The question raised in this Petition is whether respondents' cases should proceed in state court or federal court. And 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 v. Doe*, 141 S. Ct. 48, 51 (2020) ("Our system of 'cooperative judicial federalism' presumes federal and state courts alike are competent to apply federal and state law.").

3. Even if the first Question Presented were cert-worthy, this Petition would be a poor vehicle to consider it because the Ninth Circuit could and likely would avoid the colorable-defense element entirely on remand, and affirm remand on different grounds—just as the Third Circuit did in the *Hoboken* case.

Petitioners argue that this is "an excellent vehicle" because "the resolution of the [colorable federal defense] issue *could* prove case-dispositive." Pet. 24 (emphasis added). It is not *necessarily* case dispositive because, as petitioners acknowledge, the court of appeals "did not consider" whether petitioners were "acting under" a federal officer in their fuel sales to the military and war-time oil production, Pet. 15, or whether respondents' claims are "for or relating to" those activities. The district court below held that respondents' claims "target [petitioners'] alleged failure to warn and/or disseminate accurate information about the use of fossil fuels," and "have nothing to do with the supply of specialized fuels to . . . the federal government during World War II, . . . or the supply of specialized jet fuels for the Department of Defense." Pet. App. 41a & n.13. *See also Hoboken* 45 F.4th at 713 (plaintiffs' claims did not relate to defendants' World War II activities or military fuel sales). Worse still, the district court here found that *none* of petitioners' asserted defenses were colorable, because their removal notice "never t[ook] the time to set forth the elements of any of the cited defenses, let alone attempt to explain why the defenses [were] colorable." Pet. App. 42a. The Ninth Circuit affirmed with respect to petitioners' "government contractor and immunity defenses" on that basis. Pet. App. 17a–18a. It is highly doubtful that the result below would change on remand, and it is not even guaranteed that the Ninth Circuit would apply any new or clarified standard articulated by the Court.

4. Eliding all these complications, petitioners resort to the truism that jurisdictional rules should be clear. It is, of course, true as a general maxim that "administrative simplicity is a major virtue in a jurisdictional statute," *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010), and boundaries between state and federal jurisdiction should be clear and predictable. Petitioners do not get beyond aphorisms in urging review, however, because there is no "conflicting and uncertain jurisdictional rul[e]" troubling the lower courts. Pet. 22. As discussed above, moreover, the Ninth Circuit and Third Circuit have at most described the colorable-defense requirement using different words, without reaching conflicting results. "This Court, however, reviews judgments, not statements in opinions." *Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956); *Rooney*, 483 U.S. at 311 (same). And in turn, the Court's "power is to correct wrong judgments, not to revise opinions." *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945). To the extent, then, that petitioners have identified any minor difference in language, those differences do not present an important issue requiring the Court's attention.

## II. Petitioners' Theory of Federal-Common-Law Removal Does Not Warrant Certiorari Review.

In their second Question Presented, petitioners contend that a congressionally displaced body of federal common law converts respondents' state-law claims into federal ones for purposes of federal-question jurisdiction. 28 U.S.C. §§ 1331, 1441(a). This Court has already declined to review that novel theory of federal-common-law removal. *See Chevron*, 141 S. Ct. 2776. It should do so again because petitioners' theory has been uniformly rejected by the circuit courts, finds no

support in this Court's precedent, and does not raise any important or recurring questions of law that warrant certiorari review.

1. Under the century-old well-pleaded complaint rule, federal-question jurisdiction generally will not attach to claims pleaded exclusively under state law, even if all parties agree that a federal defense will be at issue. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). This Court has only ever recognized two narrow exceptions to the rule. The first is the *Grable* doctrine, which applies when a state-law claim necessarily raises a federal issue that is actually disputed, substantial, and capable of resolution in federal court without disrupting the federal-state balance approved by Congress. *Gunn*, 568 at 258. The second is the complete-preemption doctrine, which applies only to state-law claims that fall within the scope of a federal statutory cause of action that "Congress intended . . . to be exclusive." *Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 9 & n.5 (2003).

2. Petitioners do not argue that respondents' state-law claims fall within either of these two exceptions to the well-pleaded complaint rule. Instead, they insist that these claims are removable to federal court because they are purportedly "governed" by a body of federal common law concerning interstate pollution. Pet. 26. All five circuits to consider that theory have rejected it in analogous climate-deception cases—and for good reasons. *See Rhode Island*, 35 F.4th at 54–55; *Hoboken*, 45 F.4th at 707–08; *Baltimore*, 31 F.4th at 199–208; *San Mateo*, 32 F.4th at 746–48; *Boulder*, 25 F.4th at 1257–62.

Creating that third exception would undo the progress this Court achieved in clarifying the removability of state-law claims through the *Grable* line of cases.

Before *Grable*, the test for arising-under jurisdiction was "highly unruly," *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 578 U.S. 374, 385 (2016) (quotation omitted), and the "canvas" of opinions on this subject "look[ed] like one that Jackson Pollock got to first," *Gunn*, 568 U.S. at 258. In *Grable*, this Court endeavored to "bring some order" to the doctrine. *Ibid.* The petitioners in *Grable* (like petitioners here) asked the Court to create different jurisdictional tests for different sources of federal law (*e.g.*, Constitution, statute, common law), and the Court refused, seeing "no reason in [the] text [of Section 1331] or otherwise to draw such a rough line." *Grable*, 545 U.S. at 320 n.7. Instead, the Court developed a test that applies comfortably to any category of federal law, advancing the stated goal of providing "jurisdictional tests [that] are built for more than a single dispute." *Manning*, 578 U.S. at 393. Because *Grable* already "provides ready answers to jurisdictional questions" and already "gives guidance whenever borderline cases crop up," *id.* at 392, the lower courts have no need for petitioners' one-off test that applies only to judge-made federal law that does not appear on the face of the complaint.

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, the Clean Air Act displaced the federal common law of interstate pollution, making it—and its preemptive effects on state law—disappear entirely. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 429 (2011) ("*AEP*") (observing that "the availability *vel non* of a state lawsuit" for climate-related harms depended "on the preemptive effect of the federal Act"); *see also id.* at 423 ("When Congress addresses a question previously governed by a decision rested on federal common law, . . . the need

for such an unusual exercise of law-making by federal courts disappears." (cleaned up)). It would not only "def[y] logic" to allow petitioners to remove respondents' state-law claims based on a body of federal common law that no longer exists. *Baltimore*, 31 F.4th at 206. It would also contravene this Court's strong "commitment to the separation of powers"—a commitment that is "too fundamental" to permit "rel[iance] on federal common law" after Congress has spoken. *City of Milwaukee v. Illinois*, 451 U.S. 304, 315 (1981).

Second, even if the federal common law of interstate pollution still existed, it would not encompass respondents' climate-deception claims for failure to warn and tortious promotion. The Court has applied that body of judge-made federal law only in cases where a State brought a nuisance action to abate, restrict, or otherwise regulate the amount of pollution discharged from a specific out-of-state source.[4] But here, as in other climate-deception lawsuits, respondents' state-law claims do not seek to "regulate greenhouse-gas emissions." *Rhode Island*, 35 F.4th at 55 n.8. Nor could they. Because these claims seek relief only for harms "caused" by petitioners' "deception," Pet. App. 8a, petitioners can avoid ongoing liability merely by warning of the risks of their products and stopping their disinformation campaigns. They do not need to limit or stop their production or sale of fossil fuels, and this Court's cases on the federal common law of interstate pollution simply do "not address the type of acts Rhode Island seeks judicial redress for." *Rhode Island*, 35 F.4th at 55; *Boulder*, 25 F.4th at 1261 n.5

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[4] *See, e.g.*, *Missouri v. Illinois*, 180 U.S. 208 (1901); *Georgia v. Tenn. Copper Co.*, 240 U.S. 650 (1916); *New Jersey v. City of New York*, 283 U.S. 473 (1931); *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972).

("It is also unsettled whether the federal common law of interstate pollution covers suits brought against product sellers rather than emitters—suits in which out-of-state third-party emitters are only steps in the causal chain." (cleaned up)); *City of Oakland v. BP PLC*, 969 F.3d 895, 906 (9th Cir. 2020) (expressing doubt as to whether federal common law applied to climate-deception claims).

None of petitioners' cases support their theory of federal-common-law removal. Petitioners rely heavily on *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021), but that decision "was in a completely different procedural posture." *Baltimore*, 31 F.4th at 203. As the Second Circuit itself explained, *City of New York* addressed an ordinary-preemption defense raised on a Rule 12(b)(6) motion. 993 F.3d at 94. Because the plaintiff "filed suit in federal court in the first instance," the court did not address any questions of subject-matter jurisdiction and was not bound by the well-pleaded complaint rule—*i.e.*, "the heightened standard unique to the removability inquiry." *Ibid.* The panel was "free to consider the [defendants'] preemption defense on its own terms." *Ibid.* For that reason, the Second Circuit concluded that its ordinary-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." *Ibid*; *see also Rhode Island*, 35 F.4th at 54–55; *Hoboken*, 45 F.4th at 707–08; *Baltimore*, 31 F.4th at 199–208; *San Mateo*, 32 F.4th at 746–48; *Boulder*, 25 F.4th at 1257–62.

No case petitioners cite from this Court recognizes a third exception to the well-pleaded complaint rule for

state-law claims purportedly governed by congressionally displaced federal common law. In fact, most do not even address subject-matter jurisdiction, and the remainder concern jurisdictional disputes that have nothing to do with the issues presented here. *See* Pet. 25–26. None address the removability of claims pleaded exclusively under state law.

3. Denying certiorari is also appropriate because petitioners' theory of federal-common-law removal does not raise any questions of recurring importance. The cases that might be affected by this theory are necessarily few in number because federal common law applies in only a "few," "restricted" "areas." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981). 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 each year to state court. There is no need for the Court to address petitioners' exceedingly narrow and atypical question of subject-matter jurisdiction.

4. Petitioners' second Question Presented is nearly identical to the questions presented in the certiorari petition filed in the *Boulder* case. Accordingly, if the Court grants review in *Boulder*, it should do the same here and consolidate the petitions for argument to ensure all parties have adequate opportunity to present their position to the Court. Conversely, if the Court denies certiorari review of the *Boulder* petition, it should also decline to review petitioners' second Question Presented because it raises "[t]he same issue," as petitioners themselves acknowledge. Pet. 4.

## CONCLUSION

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

Respectfully Submitted,

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February 6, 2023