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

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

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INTRODUCTION

The Ninth Circuit's holding that defendants may invoke the federal officer removal statute *only* if their asserted federal defense "arise[s] from official duties," App. 17a, is irreconcilable with the Third Circuit's decision that "duty-based defenses" are *not* "the only permissible ones," *In re Commonwealth's Motion*, 790 F.3d 457, 473 (3d Cir. 2015).

Respondents deny the existence of this manifest circuit conflict, but they misread both decisions. Contrary to respondents' contention, the Third Circuit expressly rejected the very argument that the Ninth Circuit adopted below. As a result, the two courts apply two very different standards in determining what constitutes a colorable federal defense. A federal officer facing suit in Pennsylvania can justify removal based on any federal constitutional or statutory defense. By contrast, a federal officer facing suit in California cannot remove—despite the existence of a federal defense—except in a subset of cases where that federal defense also "arises from" the defendant's federal duties. That inconsistency in federal officers' access to a federal forum is untenable.

This Court should grant review to resolve the conflict between the circuits and to reject the artificial constraints that the Ninth Circuit imposed on federal officer removal.

This case also presents the important and recurring question whether a federal court has jurisdiction over nominally state law claims seeking redress for injuries allegedly caused by the global effect of transboundary greenhouse gas emissions, given that federal law necessarily and exclusively governs such claims. Because this Court already called for the

views of the Solicitor General on that same issue in *Suncor Energy (U.S.A.) Inc.* v. *Board of County Commissioners of Boulder County*, No. 21-1550, the petition in this case should be held pending a decision on the petition in *Suncor*.

I. THIS COURT SHOULD GRANT REVIEW TO DETERMINE WHETHER A "COLORABLE FEDERAL DEFENSE" MUST ARISE FROM A REMOVING DEFENDANT'S OFFICIAL DUTIES.

A. The Decision Below Squarely Conflicts With The Rule In The Third Circuit.

Respondents claim that, in the Third Circuit's decision in *In re Commonwealth's Motion*, "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," and that the Third Circuit rejected only that narrow argument. Opp. 17 (citing First Step Brief for Appellant, *In re Commonwealth's Motion*, No. 13-3817, 2014 WL 785410, at *28–29 (3d Cir. Feb. 18, 2014)). Neither claim is true.

To the contrary, Pennsylvania's argument was *identical* to the position that the Ninth Circuit adopted below. The Commonwealth argued that "a defense must arise from a federal government duty." First Step Brief, 2014 WL 785410, at *11; *see also id.* at *30 ("the 'federal defense' must arise from that federal duty"); *id.* at *32 ("[defendants'] private right of action and preemption arguments . . . are not federal defenses" because "[t]hey do not arise out of any federal duty or obligation"); Third Step Brief for Appellant, *In re Commonwealth's Motion*, No. 13-3817, 2014

WL 1745238, at *18 (3d Cir. Apr. 24, 2014) ("a defense must arise from a federal government duty").

This is the rule of law that the Third Circuit confronted and squarely rejected. That court held that "[w]hat matters is that a defense raises a federal question, not that a federal duty forms the defense." *In re Commonwealth's Motion*, 790 F.3d at 473. A federal defense can satisfy federal officer removal even if it does not "coincide with an asserted federal duty." *Ibid.* For example, the asserted defense that "the Commonwealth lacks a cause of action to enforce" the statute at issue sufficed "to trigger removability" in the court's view. *Ibid.* This defense is a purely legal one, turning solely on the statutory text, with no connection to any federal duty. Accordingly, it would not qualify as a colorable federal defense in the Ninth Circuit, but it did in the Third Circuit.

The Third Circuit derived its rule from this Court's cases. The court reasoned that the defendant in *Cleveland, Columbus, Cincinnati & Indianapolis Railroad Co.* v. *McClung* faced a suit alleging that he had a duty under federal law to take a certain action, and the Court held that he could remove the case based on the defense that federal law imposed no such duty. 119 U.S. 454, 454–56, 462 (1886). As this Court later explained, *McClung* demonstrates that all that is necessary is that the defense be "based in federal law." *Mesa* v. *California*, 489 U.S. 121, 130 (1989). The Third Circuit relied on *Mesa* and *McClung* to reject Pennsylvania's argument that the defense must arise out of the federal duty, concluding that it was sufficient that the defendants' asserted defense "requires interpretation of federal statutes." *In re Commonwealth's Mot.*, 790 F.3d at 474.

Similarly, the Third Circuit relied on *Jefferson County* v. *Acker*, 527 U.S. 423 (1999), to conclude that "the federal defense [need not] coincide with an asserted federal duty." 790 F.3d at 473. To the contrary, "the Supreme Court concluded that the defendant-judges' defense—that they enjoyed intergovernmental tax immunity—brought them within the removal statute, notwithstanding the fact that the judges' duties did not require them to resist the tax." *Ibid*. As the Court explained, "the fact that duty-based defenses are the most common defenses does not make them the only permissible ones." *Ibid.* Indeed, the only reason for the colorable federal defense requirement is to "assure that federal courts have Article III jurisdiction over federal officer removal cases." *Ibid.* (citing *Mesa*, 489 U.S. at 136). *Any* federal defense meets that requirement.[1]

Thus, respondents' attempt to obscure the conflict between the Third and Ninth Circuits fails. Contrary to the Third Circuit's rule, the Ninth Circuit deemed petitioners' constitutional defenses insufficient to allow federal officer removal because they "do not arise from official duties." App. 17a. Indeed, respondents never dispute that, in the Ninth Circuit, federal officers and those acting under them cannot remove cases based on myriad federal defenses, including most constitutional defenses and many statutory preemption defenses.

Instead, respondents raise a non sequitur. They point out that the Ninth Circuit allows removal in

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[1] Respondents also point to the Third Circuit's rejection of federal officer removal in *City of Hoboken* v. *Chevron Corp.*, 45 F.4th 699 (3d Cir. 2022), another climate-change case. But *Hoboken* resolved the federal officer removal issue on other grounds and never reached the colorable federal defense prong. *Id.* at 713.

cases where the federal preemption defense *does* arise from the defendant's federal duties. *See* Opp. 10–11 (citing *Stirling* v. *Minasian*, 955 F.3d 795, 801 (9th Cir. 2020); *Goncalves ex rel. Goncalves* v. *Rady Children's Hospital San Diego*, 865 F.3d 1237, 1247, 1250 (9th Cir. 2017)). That proves nothing; all circuits agree that a preemption defense arising from a federal duty qualifies as a colorable federal defense. The question is what happens when the federal defense does *not* arise from the defendant's official duties. In that circumstance, the Third Circuit allows removal, but the Ninth Circuit does not. That is an undeniable circuit conflict, which calls out for this Court's intervention.

Respondents also contend that the other cases that accept preemption defenses are consistent with the Ninth Circuit's decision because the asserted defenses in those cases "arose out of the defendant's federal duties." Opp. 14–15. But the courts in those cases never considered the relationship between the defenses and the defendants' federal duties. Rather—consistent with the Third Circuit's approach and in contrast to the Ninth Circuit's approach—those cases considered only the "surface-level analysis" of whether the defense was "federal" and whether it was "colorable." *Butler* v. *Coast Elec. Power Ass'n*, 926 F.3d 190, 199–200 (5th Cir. 2019); *see also St. Charles Surgical Hosp., L.L.C.* v. *Louisiana Health Serv. & Indem. Co.*, 935 F.3d 352, 357 (5th Cir. 2019) (requiring only that the "federal defense" be "material and nonfrivolous"); *City of Cookeville* v. *Upper Cumberland Elec. Membership Corp.*, 484 F.3d 380, 391 (6th Cir. 2007) (requiring only that the defense be "federal" and "colorable"); Pet. 13–14. Unlike the Ninth Circuit, those courts did not impose any additional, extra-textual requirements on the colorable federal defense

prong. Instead, they recognized that the goal of the requirement "is to give federal officers and those acting under them a federal forum in which to assert federal defenses," *Butler*, 926 F.3d at 195; *see also Caver* v. *Cent. Ala. Elec. Coop.*, 845 F.3d 1135, 1145 (11th Cir. 2017) ("[A] core purpose of federal officer removal is to have the validity of the federal defense tried in federal court."), a goal which is satisfied by *any* federal defense.

B. The Decision Below Is Incorrect.

Respondents' arguments on the merits also fail. As a leading treatise explains: "The federal defense need not coincide with an asserted federal duty. It is enough that the defense raises a federal question." 16 *Moore's Federal Practice* § 107.259 (3d ed. 2022).

To support their position, respondents offer a strained reading of the federal officer removal statute, contending that the statutory language "under color of office" itself requires that the defense arise from a federal duty. Opp. 21. Not so. The statute requires a connection between the *lawsuit* and an "act under color of [federal] office." 28 U.S.C. § 1442(a)(1). The colorable federal defense requirement, by contrast, does not appear on the face of the statute. Rather, this Court has inferred the requirement from the need to ensure Article III jurisdiction.

This point is clear from the Court's decision in *Mesa*, which confronted the question whether the colorable federal defense requirement remained viable at all. 489 U.S. at 134. *Mesa* confirmed the requirement, holding that the statute does not authorize removal of cases that involve "absolutely no federal question." *Id*. at 138. As *Mesa* explained, the federal officer re-

moval statute "preserve[d] the pre-existing requirement of a federal defense for removal," which itself arose from concern that the statute would exceed the bounds of Article III jurisdiction absent such a requirement. *See generally id.* at 125–39. Indeed, the cases on which *Mesa* relied make clear that *any* federal defense will suffice. *See Tennessee* v. *Davis*, 100 U.S. 257, 271 (1880) (confirming Congress's power to allow removal whenever "there arises a Federal question"); *Mayor & Aldermen of City of Nashville* v. *Cooper*, 73 U.S. (6 Wall.) 247, 252 (1868) (federal removal jurisdiction exists so long as "there [is] a single . . . ingredient" "of a Federal character").

This Court in *Acker* later confirmed that the requirement of "a nexus, a causal connection" to the federal duty was limited to "the latter requirement" "that the suit is for an act under color of officer," and not applicable to the "colorable federal defense" requirement. 527 U.S. at 431. Rather, the Court explicitly "rejected a narrow, grudging interpretation of" "the colorable federal defense requirement." *Id.* at 432.

Next, respondents claim that the defense in *Acker* arose from the defendants' federal duties. Opp. 23. But as the Third Circuit explained, in *Acker*, "the judges' duties did not require them to resist the tax." *In re Commonwealth's Motion*, 790 F.3d at 457. And all that this Court in *Acker* required for the federal defense was that it raise a federal issue—there, "the intergovernmental tax immunity doctrine." 527 U.S. at 431. *McClung*, too, held that the alleged absence of a federal duty is a colorable federal defense. 119 U.S. at 4; *see also Mesa*, 489 U.S. at 130. That no-duty defense plainly did not arise *out of* the defendant's fed-

eral duties or "result from" the defendant's "relationship to a federal superior," Opp. 10, yet removal was nonetheless proper.

Respondents also misread *Willingham* v. *Morgan*, 395 U.S. 402 (1969). That decision explained that federal defenses arising from federal duties are the floor, not the ceiling, of federal officer removal. *Id*. at 406–07 ("*At 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." (emphasis added)). Respondents contend that *Willingham* was speaking only to the colorability of the defense. Opp. 21. But the "context" informing the Court's analysis was that Congress made the right of removal "*absolute* whenever a suit in a state court is for any act 'under color' of federal office." *Willingham*, 395 U.S. at 406 (emphasis added). A rule that precludes removal in the broad swath of cases where the defendant's federal defense does not arise from a federal duty is incompatible with an "absolute" right to remove. And confirming that the defense need not arise from a federal duty, the Court noted that "the test for removal should be broader, not narrower, than the test for official immunity." *Ibid.*

Finally, respondents err in describing *Gay* v. *Ruff*, 292 U.S. 25 (1934), as holding that "federal-officer jurisdiction will not lie in cases where the asserted defense bears no relationship to a federal duty." Opp. 19. *Gay* held only that a state-court suit cannot be removed if it does not present "any federal question" at all. 292 U.S. at 34. That jurisdictional requirement is satisfied by *any* federal defense, not solely those arising from a federal duty.

C. The Question Presented Is Important, Presented Cleanly, and Warrants Plenary Review.

Respondents minimize the importance of the question presented, contending that it arises infrequently. Opp. 23–24. But defendants in federal officer removal cases frequently raise federal preemption and other constitutional defenses, and the decision below precludes removal based on any such defense not arising from the defendant's federal duty.

Respondents admit that "jurisdictional rules should be clear." Opp. 26. This principle is doubly important here. Federal officer removal is key to maintaining the supremacy of federal law. *See Davis*, 100 U.S. at 262–63 (allowing federal officer removal "when it appears that a Federal question or a claim to a Federal right is raised in the case" prevents state governments from undermining the federal government's "exercise of its constitutional powers"). And beyond federal officers, the scope of the federal officer removal statute affects vast swaths of American industry, from military contractors to nonprofit legal aid groups. *See* Br. of Chamber of Commerce 9–11. Private contractors undertake vital tasks at the behest of the federal government secure in the knowledge that litigation arising from that work can be conducted in federal courts, rather than in state courts that "may reflect local prejudice." *Watson* v. *Philip Morris Cos.*, 551 U.S. 142, 150 (2007). The decision below limits that protection and, in turn, risks discouraging public-private partnerships on these vital federal projects.

Respondents next contend that the question presented might not be outcome determinative. Opp. 25. But the Ninth Circuit's holding on the "colorable federal defense" question was dispositive below because

it led the court to avoid addressing petitioners' compelling grounds for federal officer removal. Petitioners' evidence showed that, for decades, they have produced and supplied large quantities of highly specialized fuels in conformity with precise governmental specifications to meet the unique requirements of the military. App. Ct. 8-ER-1478–79. If not for petitioners, the U.S. government "itself would have had to [produce]" those specialized fuels, *Watson*, 551 U.S. at 154, thereby justifying removal.

This production is neither incidental nor marginal. The Department of Defense annually is the largest consumer of energy in the United States, and one of the world's largest users of petroleum fuel. App. Ct. 3-ER-373, 7-ER-1408. Petitioners' production of specialized fuels for the military thus comprises a significant portion of the fuel contributing, under respondents' theory, to their indivisible injuries arising from climate change. Indeed, the district court below "assume[d] that Defendants acted under a federal officer" by supplying the federal government with specialized military fuels. App. Ct. 1-ER-13. By basing its ruling on colorable federal defenses, the Ninth Circuit avoided confronting one of petitioners' most crucial bases for federal office removal.

This important question was essential to the judgment below and warrants this Court's review.

II. THIS COURT SHOULD ALSO DETERMINE WHETHER CLAIMS SEEKING REDRESS FOR INJURIES ALLEGEDLY CAUSED BY TRANSBOUNDARY EMISSIONS ARE REMOVABLE BECAUSE THEY ARE NECESSARILY AND EXCLUSIVELY GOVERNED BY FEDERAL LAW.

As for the federal common law issue, respondents rehash the same arguments made by the respondents in *Suncor*. Those arguments fare no better here.

Respondents assert that there is no circuit conflict over the removability of cases that are necessarily and exclusively governed by federal law. Opp. 26–27. But the Ninth Circuit's precedents holding that federal common law does not provide a basis for federal question jurisdiction conflict with decisions from the Fifth and Eighth Circuits. *Compare City of Oakland* v. *BP PLC*, 969 F.3d 895, 906 (9th Cir. 2020), *with Sam L. Majors Jewelers* v. *ABX, Inc.*, 117 F.3d 922, 923–24, 926–29, 931 (5th Cir. 1997), *and In re Otter Tail Power Co.*, 116 F.3d 1207, 1213 (8th Cir. 1997). The Third Circuit recently acknowledged this conflict. *See Hoboken*, 45 F.4th at 708 (refusing to "follow" *Sam L. Majors* on this point).

Respondents also contend that petitioners seek to create a new exception to the well-pleaded complaint rule. Opp. 27–28. That is not correct. This Court has already held that an "independent corollary" of the well-pleaded complaint rule is that a plaintiff "may not defeat removal" by "omitting to plead necessary federal questions." *Franchise Tax Bd.* v. *Constr. Laborers Vacation Tr.*, 463 U.S. 1, 22 (1983).

A federal question is "necessary" for purposes of this corollary where, as here, the constitutional structure mandates the application of federal law. Federal

law alone governs when a claim "involv[es] interstate air … pollution," *City of New York v. Chevron Corp.*, 993 F.3d at 91 (2d Cir. 2021), or "'deal[s] with air'" in its "'interstate aspects,'" *Am. Elec. Power Co.* v. *Connecticut*, 564 U.S. 410, 421 (2011); *see also* Pet. 26–27. The Ninth Circuit's contrary rule contradicts this Court's cases, which have recognized crucial limits on state power by virtue of our constitutional structure.

CONCLUSION

The Court should hold this petition pending 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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