No. 23-168

In the Supreme Court of the United States

AMERICAN PETROLEUM INSTITUTE, ET AL.,
Petitioners,

v.

STATE OF MINNESOTA
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND BRIEF OF ALABAMA AND 16 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Steve Marshall
Attorney General

Edmund G. LaCour Jr.
Solicitor General
Counsel of Record

Robert M. Overing*
Deputy Solicitor General

*Admitted to the California bar; supervised by members of the Alabama bar.

OFFICE OF THE ALABAMA ATTORNEY GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
Edmund.LaCour@AlabamaAG.gov

Counsel for *Amici* States
(additional counsel listed on signature page)

SEPTEMBER 21, 2023

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

Movants, the States of Alabama, Alaska, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, North Dakota, Oklahoma, South Carolina, Texas, and Wyoming respectfully request leave to file the accompanying brief as *amici curiae* in support of Petitioners' Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

IDENTITY AND INTERESTS OF MOVANTS

Movants are States of the United States of America. *Amici* States have historic and traditional powers within their borders to regulate the development of energy and fuel products and to abate any related air pollution or environmental hazards. Those powers are threatened by any one State's ability to force companies to defend against liability for interstate gas emissions in that State's courts under that State's laws.

REASONS TO GRANT THE MOTION

Rule 37.2 provides that an *amicus curiae* filing a brief at the petition stage must ensure that counsel of record for all parties receives notice of its intention to file at least 10 days prior to the due date. *Amici* States provided such notice 9 days prior and asked if counsel of record would oppose this motion for leave. Counsel did not object. *Amici* States thus respectfully move for leave to file the attached brief, notwithstanding the ten-day rule, for the following reasons.

1. *Amici* States believe their brief will aid the Court's disposition of the petition. The brief

stresses the importance to States of resolving disputes over interstate pollution through federal law. The States offer a unique public-policy perspective in addition to argument from history and precedent.

2. No party opposes the motion, and no party will be prejudiced. The Court has already granted to Respondent a 30-day extension of the time to respond, resulting in 39-days' notice before their deadline of the *Amici* States' intention to file a brief in support of the petition.

Amici States respectfully request the Court grant this motion for leave to file the accompanying brief.

Respectfully submitted,

Steve Marshall
Attorney General

Edmund G. LaCour Jr.
Solicitor General
Counsel of Record

Robert M. Overing*
Deputy Solicitor General

*Admitted to the California bar; supervised by members of the Alabama bar.

Counsel for *Amici* States

QUESTION PRESENTED

Whether a federal district court has removal jurisdiction under 28 U.S.C. 1331 and 1441 over putative state-law claims seeking redress for injuries allegedly caused by the effect of interstate greenhouse-gas emissions on the global climate.

TABLE OF CONTENTS

INTEREST OF *AMICI* STATES................................1

SUMMARY OF ARGUMENT....................................1

ARGUMENT..3

I. Federal Law Must Govern Claims Based on Interstate Gas Emissions.................3

A. The States are co-equal sovereigns with equal authority to regulate energy production and environmental protection within their respective borders...................4

B. Federalism requires federal resolution of cases involving interstate gas emissions....8

C. Traditionally, federal common law governs cases involving interstate gas emissions 11

II. Where Federal Law Governs, Artful Pleading Does Not Defeat Federal Jurisdiction 17

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Am. Elec. Power Co. v. Connecticut (*AEP*),
464 U.S. 410 (2011) 11, 14, 15

Anne Arundel County v. BP P.L.C.,
No. 22-2082 (4th Cir. calendared for oral
argument Dec. 2023) 10

Avco Corp. v. Aero Lodge No. 735,
390 U.S. 557 (1968) 18

Banco Nacional de Cuba v. Sabbatino,
376 U.S. 398 (1964) 12

BMW of N. Am., Inc. v. Gore,
517 U.S. 559 (1996) 7, 11

*Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor
Energy (U.S.A.) Inc.*,
25 F.4th 1238 (10th Cir. 2022), cert. denied,
143 S. Ct. 1795 (2023) 10, 15

Bonaparte v. Appeal Tax Ct. of Baltimore,
104 U.S. 592 (1881) 7

Boomer v. Atl. Cement Co.,
257 N.E.2d 870 (1970) 5

Boyle v. United States,
487 U.S. 500 (1998) 12, 16, 17

California ex rel. Bonta v. Exxon Mobil Corp.,
No. CGC23609134 (S.F. Super. Ct. filed
Sept. 15, 2023) 10

Caterpillar Inc. v. Williams,
482 U.S. 386 (1987) 18

Cent. Iowa Power Co-op. v. Midwest Indep. Transmission Sys. Operator, Inc., 561 F.3d 904 (8th Cir. 2009) 19

City & Cnty. of Honolulu v. Sunoco LP, 39 F.4th 1101 (9th Cir. 2022), cert. denied, 143 S. Ct. 1795 (2023) 10

City of Charleston v. Brabham Oil Co., No. 23-1802 (4th Cir.) 10

City of Hoboken v. Chevron Corp., 45 F.4th 699 (3d Cir. 2022), cert. denied, 143 S. Ct. 2483 (2023) 10

City of Milwaukee v. Illinois (*Milwaukee II*), 451 U.S. 304 (1981) 15

City of New York v. Chevron Corp., 993 F.3d 81 (2d Cir. 2021) 9, 10, 12, 16

City of Oakland v. BP P.L.C., 969 F.3d 895 (9th Cir. 2020), cert. denied, 141 S. Ct. 2776 (2021) 10

Clearfield Tr. Co. v. United States, 318 U.S. 363 (1943) 9, 12

County of Maui v. Chevron U.S.A. Inc., 39 F.4th 1101 (9th Cir. 2022) 10

Connecticut v. Exxon Mobil Corp., No. 21-1446 (2d Cir. argued Sept. 23, 2022) 10

Connecticut v. Massachusetts, 282 U.S. 660 (1931) 14

County of Multnomah v. Exxon Mobil Corp., No. 23-CV25164 (Or. Cir. Ct. filed June 22, 2023) 10

County of San Mateo v. Chevron Corp.,
32 F.4th 733 (9th Cir. 2022), cert. denied,
143 S. Ct. 1797 (2023)....................................10

Coyle v. Smith,
221 U.S. 559 (1911)..8

Delaware ex rel. Jennings v. B.P. America, Inc.,
No. 22-1096 (3rd Cir. 2022) 10

District of Columbia v. Exxon Mobil Corp.,
No. 22-7163 (D.C. Cir. argued May 8, 2023).......10

Erie R.R. Co. v. Tompkins,
304 U.S. 64 (1938)..................................11, 13

Federated Dep't Stores, Inc. v. Moitie,
452 U.S. 394 (1981)..18

First Nat. Bank of Canton v. Williams,
252 U.S. 504 (1920)..18

Franchise Tax Bd. of Cal. v. Hyatt,
139 S. Ct. 1485 (2019)....................................3, 8

Franchise Tax Bd. v. Constr. Laborers Vacation Tr.,
463 U.S. 1 (1983)...................................18, 19

Georgia v. Tenn. Copper Co.,
206 U.S. 230 (1907)....................................5, 13

Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.,
545 U.S. 308 (2005)...................................18-20

Gully v. First Nat. Bank,
299 U.S. 109 (1936)..12

Healy v. Beer Inst.,
491 U.S. 324 (1989)..7

Hinderlider v. La Plata River & Cherry Creek Ditch Co.,
304 U.S. 92 (1938) 12

Hopkins v. Walker,
244 U.S. 486 (1917) 18

Hoyt v. Sprague,
103 U.S. 613 (1880) 4

Huron Portland Cement Co. v. City of Detroit,
362 U.S. 440 (1960) 5

Illinois v. City of Milwaukee (*Milwaukee I*),
406 U.S. 91 (1972) 8, 10, 13-15, 17

Int'l Paper Co. v. Ouellette,
479 U.S. 481 (1987) 9, 15, 17

Iowa v. Illinois,
147 U.S. 1 (1893) 14

Kansas v. Colorado,
206 U.S. 46 (1907) 3, 7

King County v. BP P.L.C.,
No. C18-758-RSL (W.D. Wash. 2018) 10

Lane County v. Oregon,
74 U.S. 71 (1868) 7

Lochner v. New York,
198 U.S. 45 (1905) 4

Marlett's Lessee v. Silk,
36 U.S. 1 (1837) 11

Martin v. Franklin Capital Corp.,
546 U.S. 132 (2005) 17

Martin v. Hunter's Lessee,
14 U.S. 304 (1816) 17

Mayor & City Council of Baltimore v. BP P.L.C.,
31 F.4th 178 (4th Cir. 2022), cert. denied,
143 S. Ct. 1795 (2023) 10

Missouri v. Illinois,
180 U.S. 208 (1901) 3

Missouri v. Illinois,
200 U.S. 496 (1906) 13

Municipalities of Puerto Rico v. Exxon Mobil,
No. 3:22-cv-01550 (D.P.R. 2022) 10

Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians,
471 U.S. 845 (1985) 17

Native Vill. of Kivalina v. ExxonMobil Corp.,
696 F.3d 849 (9th Cir. 2012) 17

New Jersey v. Exxon Mobil,
No. 22-cv-06733 (D.N.J. 2022) 10

New Jersey v. New York,
283 U.S. 336 (1931) 4

New State Ice Co. v. Liebmann,
285 U.S. 262 (1932) 4

Newton v. Capital Assur. Co.,
245 F.3d 1306 (11th Cir. 2001) 12

North Carolina ex rel. Cooper v. Tenn. Valley Auth.,
615 F.3d 291 (4th Cir. 2010) 9, 11

Nw. Laundry v. City of Des Moines,
239 U.S. 486 (1916) 5

Oneida Indian Nation of N.Y. v. Oneida County,
414 U.S. 661 (1974) 16, 17

Rhode Island v. Massachusetts,
37 U.S. 657 (1838) 3, 8

Rhode Island v. Shell Oil Prods. Co.,
35 F.4th 44 (1st Cir. 2022), cert. denied,
143 S. Ct. 1796 (2023) 10, 11

Rivet v. Regions Bank of La.,
522 U.S. 470 (1998) 18, 19

Sable Commc'ns of Cal., Inc. v. FCC,
492 U.S. 115 (1989) 4

San Diego Bldg. Trades Council v. Garmon,
359 U.S. 236 (1959) 11

Shelby County v. Holder,
570 U.S. 529 (2013) 8

Shoshone Mining Co. v. Rutter,
177 U.S. 505 (1900) 19

South Carolina ex rel. Tillman v. Coosaw Mining Co.,
45 F. 804 (C.C.D.S.C. 1891), *aff'd* 144 U.S.
50 (1892) 18, 20

Starin v. City of New York,
115 U.S. 248 (1885) 18

State Farm Mut. Auto. Ins. Co. v. Campbell,
538 U.S. 408 (2003) 4

Texas Indus., Inc. v. Radcliff Materials, Inc.,
451 U.S. 630 (1981) 16

Torres v. S. Peru Copper Co.,
113 F.3d 540 (5th Cir. 1997) 12

Train v. Nat. Res. Def. Council,
421 U.S. 60 (1975) 6

United States v. Little Lake Misere Land Co.,
412 U.S. 580 (1973) 18

United States v. Standard Oil Co.,
332 U.S. 301 (1947) 11, 16

Vermont v. Exxon Mobil,
No. 2:221-cv-00260 (D. Vt. 2021) 10

Virginia v. Tennessee,
148 U.S. 503 (1893) 14

Wisconsin Dept. of Ind. v. Gould Inc.,
475 U.S. 282 (1986) 9

Statutory Provisions

28 U.S.C. § 1331 ....i, 14, 17

28 U.S.C. § 1441 i

42 U.S.C. § 7401, *et seq.* 5, 6, 12, 15

Ala. Code § 6-5-127...6

Ala. Code § 9-1-6...7

Ala. Code § 9-2-2...6

Ala. Code § 9-17-1, *et seq.*..6

Ala. Code § 22-23-47..6

Ala. Code § 22-28-3..6

Cal. Gov't Code § 7513.75(a)(3)..................................7

Cal. Pub. Res. Code § 25000.5(a) 7

Tex. Water Code Ann. § 7.257 6

Utah Code Ann. § 78B-4-515 6

Other Authorities

The Federalist No. 80 (C. Rossiter ed. 1961).............3

Henry J. Friendly, *In Praise of* Erie—*And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383 (1964)..11

Stephen E. Sachs, *Finding Law*, 107 Cal. L. Rev. 527 (2019)..................................13

A. Dan Tarlock, *Environmental Law: Then and Now*, 32 Wash. U. J. L. & Pol'y 1 (2010).........................6

INTEREST OF *AMICI*[*]

The States of Alabama, Alaska, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, North Dakota, Oklahoma, South Carolina, Texas, and Wyoming respectfully submit this brief as *amici curiae* in support of the petitioners. In this case, one State seeks billions in damages against energy companies for allegedly causing a global "climate-change crisis." Whether that State can force the companies to defend against liability for interstate gas emissions in that State's courts under that State's laws is of significant interest to *Amici* States.

SUMMARY OF ARGUMENT

Each State has the historic power to regulate the development of energy and fuel products within its borders. Some States may promote the development of oil and gas; others, solar and wind. Second, each State has the traditional authority to abate air pollution and other environmental hazards within its borders. Some States may enact aggressive cap-and-trade programs to reduce carbon-dioxide emissions; others may be more focused on acute sources of high lead levels in tap water. While federal regulation plays a major role in both energy production and environmental

[*] *Amici* substantially complied with Supreme Court Rule 37 by providing notice to counsel for all parties of *amici*'s intention to file this brief nine days prior to its due date. But because *amici* did not provide ten days' notice, a motion for leave to file has been submitted with this brief.

protection, they remain objects of tremendous State concern, prompting unique policy solutions across the country.

The ruling below upends the sovereign power of each State to set energy and environmental policy within its borders. It permits one State to set the national agenda by litigating in its courts an issue that "is, in effect, an interstate dispute." App.21a (Stras, J., concurring). Worse, it portends chaos and ruin for traditional energy companies, which must comply with an unknowable number of vague and conflicting State laws carrying billion-dollar penalties. Basic principles of federalism and federal jurisdiction must be applied to avoid such disaster.

Because this case involves claims based on interstate emissions, federal law must govern. Minnesota's attempts to disguise the federal aspects of its global climate-change suit do not change the fact that its claims are controlled by federal substantive law and belong in federal court.

ARGUMENT

I. Federal Law Must Govern Claims Based on Interstate Gas Emissions

Upon declaring independence, the American Colonies laid claim "to all the rights and powers of sovereign states." *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1493 (2019). "A sovereign decides by his own will, which is the supreme law within his own boundary." *Rhode Island v. Massachusetts*, 37 U.S. 657, 737 (1838). Disputes among independent sovereigns may be settled by treaty or war, but by joining the Union, the States "surrendered to congress, and its appointed Court, the right and power of settling their mutual controversies." *Id.*; *see also id.* at 743-44; *Missouri v. Illinois*, 180 U.S. 208, 241 (1901).

Because the States are not "absolutely independent nations," no State "can enforce its own policy upon the other[s]," and it falls on the federal government to resolve interstate conflicts. *Kansas v. Colorado*, 206 U.S. 46, 95, 98 (1907). Consequently, "[w]hatever practices may have a tendency to disturb the harmony between the States are proper objects of federal superintendence and control." The Federalist No. 80, p. 476 (C. Rossiter ed. 1961). A dispute over territorial borders may be the quintessential example, but there are many kinds of cases that by their nature demand federal resolution. *Id.* at 475-77.

The question of this case is whether claims based on interstate gas emissions are among those that demand resolution by the federal government. An affirmative answer follows from basic principles of

federalism and this Court's precedents. "This is, in effect, an interstate dispute." App.21a (Stras, J., concurring).

A. The States are co-equal sovereigns with equal authority to regulate energy production and environmental protection within their respective borders.

It is axiomatic that "each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003). At the heart of State sovereignty is the police power to enact legislation "designed and calculated to promote the general welfare, or to guard the public health, the public morals, or the public safety." *Lochner v. New York*, 198 U.S. 45, 67 (1905) (Harlan, J., dissenting). But States may exercise their police powers only "upon persons and property within the limits of its own territory." *Hoyt v. Sprague*, 103 U.S. 613, 630 (1880). Thus, the genius of American federalism is that it allows "different communities" to live "with different local standards" according to local preferences. *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). Acting within its proper domain, a State may "serve as a laboratory[] and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

The regulation of energy production and environmental protection lies well within a State's traditional police powers. Undoubtedly, each State has "real and substantial interests" in the natural environment, *New Jersey v. New York*, 283 U.S. 336, 342 (1931),

including "all the earth and air within its domain." *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907). Accordingly, States have long enacted regulations on in-state pollution—whether related to the development and use of energy and fuel products or otherwise.

States exercise such authority through a variety of legal mechanisms ranging from local ordinances to private-law nuisance suits. For example, in 1916, this Court considered a Des Moines ordinance that limited the smoke permitted from furnaces, "requir[ing] the remodeling of practically all furnaces" in the city. *Nw. Laundry v. City of Des Moines*, 239 U.S. 486, 490 (1916). The Court had "no doubt" that "such emission of smoke [was] within the regulatory power of the state." *Id.* at 491-92. In a case that became famous for its remedy, New York courts awarded continuing and permanent nuisance damages against a plant for emissions of smoke, dirt, and vibration. *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870 (1970). States may choose different means to "free from pollution the very air that people breathe," but as a general matter, such regulation "clearly falls within the exercise of even the most traditional concept of … the police power." *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960).

States have retained their traditional powers to regulate energy and to protect the environment, notwithstanding the substantial federal intervention of the Clean Air Act (CAA), 42 U.S.C. § 7401, *et seq*. In fact, the CAA provides that States and local governments have "the primary responsibility" of "air pollution prevention … and air pollution control *at its source*." *Id*. § 7401(a)(3) (emphasis added); *see also id*.

§ 7410(a)(1) (providing that each State establish plans for the implementation and enforcement of EPA standards "within such State"). The CAA's scheme exemplifies cooperative federalism, which this Court famously described as "taking a stick to the states." *Train v. Nat. Res. Def. Council*, 421 U.S. 60, 64 (1975). The CAA's cooperative two-step approach provides that (1) the federal government sets a floor for environmental regulation, and (2) States are primarily responsible for administering consistent regulatory regimes within their borders. *See, e.g.*, A. Dan Tarlock, *Environmental Law: Then and Now*, 32 Wash. U. J. L. & Pol'y 1, 23-25 (2010).

Thus, a State may wield the CAA's "stick" more or less aggressively depending on its own prerogatives. Some States have largely eliminated state-law claims arising from certain emissions. *See, e.g.*, Utah Code Ann. § 78B-4-515 (West) (limiting liability for "greenhouse gas emissions"); Tex. Water Code Ann. § 7.257 (West) (providing affirmative defenses to torts allegedly "arising from greenhouse gas emissions").

For its part, Alabama has enacted air-quality laws pursuant to its public policy "to achieve and maintain such levels of air quality as will protect human health and safety and, to the greatest degree practicable, prevent injury to plant and animal life." Ala. Code § 22-28-3; *see, e.g.*, *id.* § 9-2-2 (wildlife conservation); *id.* §§ 6-5-127, 22-23-47 (water pollution). At the same time, Alabama highly values the production and use of traditional energy sources. *See, e.g.*, *id.* § 9-17-1, *et seq.* (conservation and production of oil and gas). It is Alabama's policy "that the extraction of coal provides a major present and future source of energy and is an essential and necessary activity which contributes to

the economic and material well-being of the state." *Id.* § 9-1-6(a). Other States may feel differently. *See, e.g.*, Cal. Gov't Code § 7513.75(a)(3) (West) (noting "the state's broad[] efforts to decarbonize"); Cal. Pub. Res. Code § 25000.5(a) (West) (declaring "overdependence on … petroleum based fuels" to be "a threat").

Our federal system allows the several States to pursue divergent policies with respect to energy production and environmental protection. But those regulatory powers stop at the state line: A State "can impose its own legislation on no one of the other[] [States], and is bound to yield its own views to none." *Kansas*, 206 U.S. at 97; *see also Bonaparte v. Appeal Tax Ct. of Baltimore*, 104 U.S. 592, 594 (1881) ("No State can legislate except with reference to its own jurisdiction."). Indeed, the Court has made abundantly clear that no single State can overpower the others, foisting "its own policy choice on neighboring States." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571 (1996); *see also Healy v. Beer Inst.*, 491 U.S. 324, 335-36 (1989) ("[T]he Constitution[] [has] special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres." (footnote omitted)). The Constitution commits to the States "nearly the whole charge of interior regulation," but only "within their proper spheres." *Lane County v. Oregon*, 74 U.S. 71, 76 (1868).

This territorial limitation on State power dovetails with "equality of right"—the "cardinal rule" of federalism that "[e]ach state stands on the same level with all the rest." *Kansas*, 206 U.S. at 97. Our Nation "was and is a union of States, equal in power, dignity and

authority." *Shelby County v. Holder*, 570 U.S. 529, 544 (2013) (quoting *Coyle v. Smith*, 221 U.S. 559, 567 (1911)). And "the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized." *Id.* (quoting *Coyle*, 221 U.S. at 580).

B. Federalism requires federal resolution of cases involving interstate gas emissions.

In light of the principles of State sovereignty and equality, certain cases require resolution by a federal mechanism, rather than a State one. Otherwise, one State could use its judicial system to impose its will on another, violating the "cardinal rule." Over two centuries, this Court has steadfastly protected the States by applying federal rules of decision to controversies among the States. In "an interstate dispute" such as this one, "[t]he rule of decision … has *always* been 'known and settled principles of national or municipal jurisprudence'—what we now know as the federal common law." App.21a-22a (Stras, J., concurring) (quoting *Rhode Island*, 37 U.S. at 657). "State law is no substitute," *id.*, in "disputes implicating [States'] conflicting rights." *Franchise Tax Bd.*, 139 S. Ct. at 1498.

In *Illinois v. City of Milwaukee* (*Milwaukee I*), this Court clearly defined two circumstances requiring federal resolution: (1) "where there is an overriding federal interest in the need for a uniform rule or decision" and (2) "where the controversy touches basic interests of federalism." 406 U.S. 91, 105 n.6 (1972). *Milwaukee I* itself involved interstate pollution, making the subject matter of this case an exemplar for the supersedure of federal law.

The interstate emission of alleged pollutants presents an overriding need for a uniform rule of decision and touches basic interests of federalism. Uniformity is necessary where the application of conflicting state law "would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of several states." *Clearfield Tr. Co. v. United States*, 318 U.S. 363, 367 (1943). To describe the effect of the ruling below as permitting a "diversity of results" would be putting it lightly: Because the gas emissions at issue here are national and global, the ruling below would mean that energy companies (and other emitters) could be subjected to every State's regulatory and enforcement regime simultaneously, resulting in unpredictable and irreconcilable duties.

The result is the "balkanization of clean air regulations and a confused patchwork of standards, to the detriment of industry and the environment alike." *North Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 296 (4th Cir. 2010); *see also City of New York v. Chevron Corp.*, 993 F.3d 81, 91 (2d Cir. 2021); *Wisconsin Dept. of Ind. v. Gould Inc.*, 475 U.S. 282, 286 (1986) ("Conflict is imminent whenever two separate remedies are brought to bear on the same activity." (cleaned up)). The application of many different State laws to the same conduct creates "vagueness" and "uncertainty" for energy companies and risks "chaotic confrontation between sovereign states." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 496 (1987).

Unfortunately, such chaos is already unfolding, as dozens of States and localities have brought enforcement actions like this one under the aegis of their

laws,[1] rather than under federal statutory law or "interstate common law." *Milwaukee I*, 406 U.S. at 105-06. This lack of uniformity will continue to breed confusion and potentially ruinous liability for traditional energy companies.

Moreover, as the States have (increasingly) divergent energy policies and environmental prerogatives, *see supra* at 6-7, these suits imperil their sovereign interests as well. Imposing its own laws on out-of-state emissions, one State could unilaterally "scuttle the

---

[1] *See, e.g.*, *California ex rel. Bonta v. Exxon Mobil Corp.*, No. CGC23609134 (S.F. Super. Ct. filed Sept. 15, 2023); *City of Charleston v. Brabham Oil Co.*, No. 23-1802 (4th Cir.); *County of Multnomah v. Exxon Mobil Corp.,* No. 23-CV25164 (Or. Cir. Ct. filed June 22, 2023); *Anne Arundel County v. BP P.L.C.*, No. 22-2082 (4th Cir. calendared for oral argument Dec. 2023); *District of Columbia v. Exxon Mobil Corp.*, No. 22-7163 (D.C. Cir. argued May 8, 2023); *Connecticut v. Exxon Mobil Corp.*, No. 21-1446 (2d Cir. argued Sept. 23, 2022); *Rhode Island v. Shell Oil Prods. Co.*, 35 F.4th 44 (1st Cir. 2022), cert. denied, 143 S. Ct. 1796 (2023); *City of Hoboken v. Chevron Corp.*, 45 F.4th 699 (3d Cir. 2022), cert. denied, 143 S. Ct. 2483 (2023) (consolidated with *Delaware ex rel. Jennings v. B.P. America, Inc.*, No. 22-1096 (3rd Cir. 2022)); *City & Cnty. of Honolulu v. Sunoco LP*, 39 F.4th 1101 (9th Cir. 2022), cert. denied, 143 S. Ct. 1795 (2023) (consolidated with *County of Maui v. Chevron U.S.A. Inc.*, 39 F.4th 1101 (9th Cir. 2022)); *County of San Mateo v. Chevron Corp.*, 32 F.4th 733 (9th Cir. 2022), cert. denied, 143 S. Ct. 1797 (2023); *Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178 (4th Cir. 2022), cert. denied, 143 S. Ct. 1795 (2023); *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238 (10th Cir. 2022), cert. denied, 143 S. Ct. 1795 (2023); *New Jersey v. Exxon Mobil*, No. 22-cv-06733 (D.N.J. 2022); *Municipalities of Puerto Rico v. Exxon Mobil*, No. 3:22-cv-01550 (D.P.R. 2022); *City of Oakland v. BP P.L.C.,* 969 F.3d 895 (9th Cir. 2020), cert. denied, 141 S. Ct. 2776 (2021); *Vermont v. Exxon Mobil*, No. 2:221-cv-00260 (D. Vt. 2021); *City of New York*, 993 F.3d 81; *King County v. BP P.L.C.*, No. C18-758-RSL (W.D. Wash. 2018).

nation's carefully created system for accommodating the need for energy production and the need for clean air." *North Carolina*, 615 F.3d at 296. A State may disagree with balance struck by federal law or with the policy of another State, but it "may not impose economic sanctions on violators of its laws with the intent of changing … lawful conduct in other States." *BMW*, 517 U.S. at 572. Suits like this one are improperly "designed to … govern[] conduct and control[] policy" well beyond the plaintiff's borders. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959); *see also Ouellette*, 479 U.S. at 495. That one State might design state-law claims to intrude upon the policy choices of others is precisely why federal law must apply to protect the co-equal sovereignty of all States.

C. Traditionally, federal common law governs cases involving interstate gas emissions.

From the Founding, our constitutional order has operated against the backdrop of federal common law. *See e.g., Rhode Island*, 37 U.S. 657; *Marlett's Lessee v. Silk*, 36 U.S. 1, 22-23 (1837). While there "is no [longer] federal general common law," *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), "specialized federal common law" has survived. *Am. Elec. Power Co. v. Connecticut* (*AEP*), 564 U.S. 410, 421 (2011) (quoting Henry J. Friendly, *In Praise of* Erie—*And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 405 (1964)). Specialized federal common law "remain[s] unimpaired for dealing … with essentially federal matters," *United States v. Standard Oil Co.*, 332 U.S. 301, 307 (1947), *i.e.*, those implicating "uniquely federal interests … committed by the Constitution and

laws of the United States to federal control." *Boyle v. United States*, 487 U.S. 500, 504 (1998) (cleaned up).

Examples of the persistence of specialized federal common law abound. *See e.g., Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938) (apportionment between States of water from interstate stream); *Clearfield*, 318 U.S. at 366 (rights and duties arising from federally-issued commercial paper); *Boyle*, 487 U.S. at 508-13 (design-defect claims against federal military contractor); *see also Newton v. Capital Assur. Co.*, 245 F.3d 1306, 1309 (11th Cir. 2001) (FEMA-subsidized insurance policies); *Torres v. S. Peru Copper Co.*, 113 F.3d 540, 543 (5th Cir. 1997) (claims implicating "important foreign policy concerns"). Each of these "enclaves of federal judge-made law … bind[s] the States," whose courts are "not left free to develop their own doctrines." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964).

Cases involving interstate pollution of air and water are another enclave of specialized federal common law. The federal judiciary has long understood the need for federal resolution of these cases—even before statutory interventions like the Clean Air Act of 1963. "For over a century," this Court has "applied federal law to disputes involving interstate air or water pollution." *City of New York*, 993 F.3d at 91 (collecting cases). In this context, federal common law was never "lurking in the background" but arose from "plain necessity," thereby "extinguish[ing] the jurisdiction of the states." *Gully v. First Nat. Bank*, 299 U.S. 109, 117 (1936).

While this Court has not always labeled "specialized federal common law" as such,[2] the reports are full of interstate air and water pollution cases applying it. In *Missouri v. Illinois*, Missouri sued to enjoin the dumping of Chicago sewage into a river connected to the Mississippi River, which, the State alleged, deposited into Missouri riverbeds and poisoned Missouri water. 200 U.S. 496, 517 (1906). The Court found that Missouri had not established injury and causation, discerning whether principles "known to the older common law" might allow Missouri to recover. *Id*. at 522.

In *Georgia v. Tennessee Copper Co.*, the State of Georgia sought to enjoin a Tennessee copper manufacturer from "discharging noxious gas from their works in Tennessee over the plaintiff's territory." 206 U.S. at 236. Georgia tort law did not govern. Rather, the Court announced a rule of federal common law that a State's "quasi-sovereign[ty]" in "all the earth and air within its domain" "entitled [it] to specific relief" because "[i]t is not lightly to be required to give up quasi-sovereign rights for pay." *Id*. at 237-38. Whatever purchase that principle may have today, its application reflects the tradition of a federal equity jurisprudence governing interstate gas emissions.

Erie did not extinguish the federal common law applicable to controversies involving interstate emissions. In *Milwaukee I*, for example, this Court considered whether nuisance claims for "pollution of

---

[2] What today makes up "specialized federal common law" was simply a part of the "general law" before *Erie*. *See* Stephen E. Sachs, *Finding Law*, 107 Cal. L. Rev. 527, 558 (2019) ("Many rules of so-called federal common law are, in substance, just the old general-law doctrines in disguise.").

interstate or navigable waters" were governed by federal common law and whether such claims "ar[ose] under the 'laws' of the United States," creating a federal question. 406 U.S. at 99 (quoting 28 U.S.C. § 1331(a)). There, the State of Illinois had sued four Wisconsin cities to abate their alleged dumping into Lake Michigan, a "body of interstate water." *Id*. at 93. The Court could not have been clearer: claims implicating "the ecological rights of a State in the improper impairment of them from sources outside the State's territory" have their "basis and standard in federal common law." *Id*. at 100. Only federal common law, "not the varying common law of individual states," could serve as a "basis for dealing in uniform standard with the environmental rights" of each State. *Id*. at 108 n.9; *see also Iowa v. Illinois*, 147 U.S. 1, 7-8, 13 (1893) (rejecting the views of dueling state-courts in favor of "equality" in river rights); *Connecticut v. Massachusetts*, 282 U.S. 660, 669-70 (1931) (declining to apply "municipal law"); *Virginia v. Tennessee*, 148 U.S. 503, 523-24 (1893) (applying public law, international law, and moral law).

More recently, this Court has maintained that "[e]nvironmental protection is undoubtedly an area" where "federal courts may … fashion federal law." *AEP*, 564 U.S. at 421. In *AEP*, State and private plaintiffs sued electric utilities, alleging that the defendants' gas emissions changed the climate and created a "substantial and unreasonable interference with public rights, in violation of the federal common law of interstate nuisance, or, in the alternative, of *state tort law*." *Id*. at 418 (emphasis added). The Court held that borrowing state law in a suit filed by a State, implicating the validity of another State's policy on emissions, would simply be "inappropriate." *Id*. at 422. The

AEP Court thus re-affirmed the foundational holding of *Milwaukee I*: "When we deal with air and water in their ambient or interstate aspects, there is a federal common law." *Id.* at 421 (quoting *Milwaukee I*, 406 U.S. at 103); *see also Ouellette*, 479 U.S. at 483.

If federal common law supplies the governing law, it precludes decision under state law in the same manner as a preemptive federal statute. *See, e.g.*, *Boyle*, 487 U.S. at 504 ("[S]tate law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts—so-called 'federal common law.'"); *AEP*, 564 U.S. at 429. In fact, "federal common law exists ... *because state law cannot be used*." *City of Milwaukee v. Illinois* (*Milwaukee II*), 451 U.S. 304, 313 n.7 (1981) (emphasis added); *see also Ouellette*, 479 U.S. at 487 (rejecting principle that "an interstate dispute between a State and a private company should be resolved by reference to state nuisance law"). Because this case "should be resolved by reference to federal common law," state law is "preempted." *Id.* at 488.

Some courts have resisted this conclusion, reasoning that federal common law governing interstate emissions is "obsolete" after the Clean Air Act and Clean Water Act. *Baltimore*, 31 F.4th at 206; *see also Boulder*, 25 F.4th at 1260. One circuit held that there can be no removal of "claims that have been displaced by federal statutes." 31 F.4th at 206. But that objection puts the cart before the horse; federal-question jurisdiction is determined by the subject matter, *see infra* § II, not by the "viability" of relief. 31 F.4th at 206. Almost by definition, federal common law occupies fields in which state law does not exist or cannot be used. Replacement of one federal rule (*e.g.*, common

law) by another (*e.g.*, a statute) has no effect on the propriety of using state law to govern areas it has not traditionally occupied. In other words, "state law does not suddenly become competent to address issues that demand a unified federal standard simply because Congress saw fit to displace a federal court-made standard with a legislative one." *City of New York*, 993 F.3d at 98. Whether federal law is governed by common law or statute, it remains equally "inappropriate for state law to control." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981).

The Court addressed this issue in *United States v. Standard Oil Co.*, where the United States sought to recover for expenses arising from the collision of a Standard Oil truck with a U.S. Army soldier. 332 U.S. 301, 302 (1947). The Court addressed the choice-of-law question at the outset, deciding that Standard Oil's liability was "not a matter to be determined by state law" because the matter "vitally affect[ed] [federal] interests, powers, and relations … as to require uniform national disposition rather than diversified state rulings." *Id.* at 305, 307. "The only question," then, was "which organ of the Government is to make the determination that liability exists." *Id.* at 316. Deciding that liability was best left "for the Congress, not for the courts," *id.* at 317, the Court did not then revisit its choice-of-law holding, which effectively barred a remedy.

Thus, when the area is one of unique federal concern, Congress *or* federal common law will supply the rule of decision. A claim traditionally governed by federal common law remains so, notwithstanding whether and how that "claim may fail at a later stage." *Oneida Indian Nation of N.Y. v. Oneida County*, 414

U.S. 661, 675 (1974); *see also Ouellette*, 479 U.S. at 499-500; *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 857 (9th Cir. 2012) ("[D]isplacement of a federal common law right of action" is a "displacement of remedies"). Here, because federal common law has traditionally governed cases involving interstate gas emissions, any displacement by federal statutes is irrelevant to whether the case can proceed under state law.

II. Where Federal Law Governs, Artful Pleading Does Not Defeat Federal Jurisdiction

Because this case involves claims based on interstate emissions, federal law must govern. And where federal law governs, "state law is pre-empted and replaced," *Boyle*, 487 U.S. at 504, and defendants are entitled to federal review. *See Martin v. Franklin Capital Corp.*, 546 U.S. 132, 137, (2005) (describing 28 U.S.C. § 1441 as "grant[ing] defendants a right to a federal forum"); *see also Martin v. Hunter's Lessee*, 14 U.S. 304, 348-49 (1816) (removal provides "protection," "security," and "equal rights"). "It is well settled that this statutory grant of 'jurisdiction will support claims founded upon federal common law as well as those of a statutory origin.' Federal common law as articulated in rules that are fashioned by court decisions are 'laws' as that term is used in § 1331." *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 850 (1985) (quoting *Milwaukee I*, 406 U.S. at 100).

This Court has recognized for over "100 years that in certain cases federal-question jurisdiction will lie over state-law claims that implicate significant federal issues." *Grable & Sons Metal Prods., Inc. v. Darue*

Eng'g & Mfg., 545 U.S. 308, 312 (2005) (citing *Hopkins v. Walker*, 244 U.S. 486, 490-91 (1917)); *see also United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 592–93 (1973). Because the removal right stems from nature of the case, not particularities of the pleadings, plaintiffs cannot block access to federal review by so-called artful pleading. *See Starin v. City of New York*, 115 U.S. 248, 257 (1885) ("The character of a case is determined by the questions involved."); *South Carolina ex rel. Tillman v. Coosaw Mining Co.*, 45 F. 804, 811 (C.C.D.S.C. 1891), *aff'd* 144 U.S. 50 (1892) (removal depends on the matter's "nature and essence" "notwithstanding the skillful statements and omissions of the plaintiff").

The artful-pleading doctrine appreciates that a case may raise "necessary federal questions" despite their absence from the face of a complaint. *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 22 (1983). "Artful pleading comes in many forms." App.20a (Stras, J., concurring). At least where a claim is "controlled by federal substantive law," it may be removed to federal court, notwithstanding the plaintiff's attempts to disguise its federal aspects. *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 560 (1968); *see also Rivet v. Regions Bank of La.*, 522 U.S. 470, 475-76 (1998); *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 n.2 (1981). What matters is whether "an appropriate statement by the plaintiff" would have disclosed that the case "really and substantially involves a dispute or controversy" over a federal issue. *First Nat. Bank of Canton v. Williams*, 252 U.S. 504, 512 (1920); *see also Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987); *Hopkins*, 244 U.S. at 489.

Because liability for interstate gas emissions raises a disputed and substantial federal issue, not "simply a determination of local rules and customs," this case is removable. *Cf. Shoshone Mining Co. v. Rutter*, 177 U.S. 505, 508 (1900). Interstate gas emissions cannot be properly considered an "area of state law" for the many reasons stated *supra*. *Rivet*, 522 U.S. at 476. But the court of appeals erred in applying the artful-pleading rule to defeat removal. In the main, the court imposed its own requirement that the federal issue must be an "element" of the plaintiff's state claims. App.9a (quoting *Franchise Tax Bd.*, 463 U.S. at 13). On its view, even claims "governed by federal common law" are not removable unless defendants can "identify which specific elements" require the court to "apply federal common law." App.9a.

The court below not only relied on the idiosyncratic phrasing of *Franchise Tax Board*, it also omitted half the test that case applied: "[whether] federal law is a necessary element … *or* that one [of the] claim[s] is 'really' one of federal law." 463 U.S. at 13 (emphasis added). And while *Grable* relied on "an essential element" of the state-law claim, it stopped short of *requiring* one for removal jurisdiction. 545 U.S. at 315. Circuit precedent embracing that misreading of *Grable* is also wrong. App.9a (citing *Cent. Iowa Power Co-op. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 561 F.3d 904, 914 (8th Cir. 2009)). *Grable* does not support the view that unless a specific element requires application of federal law, "any … conflict" with federal law "speaks to a potential defense, rather than to … jurisdiction[]." App.10a. Regardless of their label and their

elements, the State claims here implicate and conflict with the federal law of interstate gas emissions.

Particularly where the plaintiff is a sovereign with the power to define its own causes of action, the lower court's element-based approach inadequately polices artful pleading. "If the court can look only into the complaint," defendants would be unfairly "remanded to the encounter of [State] attachments, prejudices, jealousies, and interests, dependent upon the want of skill or the grace of his adversary." *South Carolina ex rel. Tillman*, 45 F. at 810. The lower court's acquiescence thus denies defendants the "advantages … inherent in a federal forum" and denies the Nation "the experience, solicitude, and hope of uniformity that a federal forum offers" on a quintessential federal issue. *Grable*, 545 U.S. at 312-13.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Steve Marshall
Attorney General

Edmund G. LaCour Jr.
Solicitor General
Counsel of Record

Robert M. Overing*
Deputy Solicitor General

*Admitted to the California bar; supervised by members of the Alabama bar.

OFFICE OF THE ALABAMA ATTORNEY GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
Edmund.LaCour@AlabamaAG.gov

Counsel for *Amici* States

ADDITIONAL COUNSEL

TREG TAYLOR
Attorney General
State of Alaska

TIM GRIFFIN
Attorney General
State of Arkansas

CHRISTOPHER M. CARR
Attorney General
State of Georgia

RAÚL R. LABRADOR
Attorney General
State of Idaho

THEODORE E. ROKITA
Attorney General
State of Indiana

KRIS KOBACH
Attorney General
State of Kansas

DANIEL CAMERON
Attorney General
Commonwealth of
Kentucky

JEFF LANDRY
Attorney General
State of Louisiana

LYNN FITCH
Attorney General
State of Mississippi

ANDREW BAILEY
Attorney General
State of Missouri

AUSTIN KNUDSEN
Attorney General
State of Montana

DREW WRIGLEY
Attorney General
State of North Dakota

GENTNER DRUMMOND
Attorney General
State of Oklahoma

ALAN WILSON
Attorney General
State of South Carolina

KEN PAXTON
Attorney General
State of Texas

BRIDGET HILL
Attorney General
State of Wyoming