No. 23-168

In the Supreme Court of the United States

AMERICAN PETROLEUM INSTITUTE, ET AL.,
PETITIONERS

v.

STATE OF MINNESOTA

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

REPLY BRIEF FOR THE PETITIONERS

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The decision below deepens an existing conflict on the exceedingly important question of whether federal removal jurisdiction exists over claims necessarily and exclusively governed by federal common law but labeled as arising under state law. Since the Court had the opportunity to address that question last Term, the need for the Court's review has only grown: the conflict has not abated, the question continues to arise as new climate-change cases are filed, and climate-change cases are now proceeding full speed ahead in state courts across the country.

Respondent's attempts to whittle away the conflict fall woefully short. Respondent cannot reconcile the Fifth Circuit's decision in *Sam L. Majors Jewelers* v. *ABX, Inc.*, 117 F.3d 922 (1997), with the decisions of other circuits affirming the remand of climate-change cases similar to this one. Indeed, the Third Circuit recognized that the Fifth Circuit's decision supports the removal of climate-change claims and expressly declined to follow it. See *City of Hoboken* v. *Chevron Corp.*, 45 F.4th 699, 708 (2022), cert. denied, 143 S. Ct. 2483 (2023). And although the Second Circuit recently indicated in *Connecticut* v. *Exxon Mobil Corp.*, 83 F.4th 122 (2023), that the decision in *City of New York* v. *Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021), recognized only a preemption defense in this context, the decision in *Connecticut* did not address whether the well-pleaded complaint rule permits petitioners' specific ground for removal here.

Respondent's arguments on the merits fare no better. As Judge Stras recognized in his concurrence below, respondent's purported state claims are a blatant "attempt to set national energy policy through its own consumer-protection laws[,] * * * effectively overrid[ing] the policy choices made by the federal government and other states." Pet. App. 24a (internal quotation marks, citation, and alteration omitted). Those claims are exclusively governed by federal common law and thus removable to federal court—as the United States recognized before it switched positions after a change in presidential administration.

Only this Court can provide much-needed clarity on the important jurisdictional question presented here. Absent the Court's intervention, plaintiffs will continue to pursue claims for climate-change-related injuries in state court, and questions of jurisdiction over these lawsuits

will continue to proliferate. The Court's review is warranted.

A. The Decision Below Implicates A Conflict Among The Courts Of Appeals

The courts of appeals remain divided on the question of how the well-pleaded complaint rule applies to claims necessarily and exclusively governed by federal common law. See Pet. 12-17. Respondent's attempts to wave away that conflict do not withstand scrutiny.

1. Respondent primarily argues (Br. in Opp. 14-16) that no conflict exists concerning the well-pleaded complaint rule because the decisions cited by petitioners were early applications of the "substantial federal question" doctrine that this Court subsequently synthesized in *Grable & Sons Metal Products, Inc.* v. *Darue Engineering & Manufacturing*, 545 U.S. 308 (2005). But as respondent recognizes (Br. in Opp. 14-15), in *Sam L. Majors*, the Fifth Circuit did not cite any of the precursors to *Grable* when concluding that federal jurisdiction was present. Rather, it relied on two of this Court's cases involving federal common law on which petitioners also rely. See 117 F.3d at 926 (citing *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 100 (1972), and *National Farmers Union Insurance Cos.* v. *Crow Tribe*, 471 U.S. 845, 850 (1972)); see Pet. 25, 27.

In any event, even if respondent's characterization of the court of appeals cases were correct, it is merely a matter of labeling; it would not eliminate the conflict. Either way, those cases would still permit removal of respondent's claims. After all, another way to characterize petitioners' argument that respondent's claims are federal in nature is to say that federal substantive law governs every element of respondent's claims, such that each element presents a substantial question of federal law. And in the

proceedings below, petitioners consistently argued that respondent's claims present a "substantial federal question" because they are necessarily and exclusively governed by federal common law. See Pet. C.A. Br. 35; Pet. C.A. Reply Br. 13-14.

Respondent attempts to distinguish *Sam L. Majors* on the ground that the claims there were "clearly established" under federal common law. Br. in Opp. 16. But the same is true here where, as a matter of constitutional structure, federal law necessarily and exclusively governs. See Pet. Br. 24-26. Under *Sam L. Majors*, this case "arises under federal common law" and thus belongs in federal court. 117 F.3d at 929.

Respondent's fallback position (Br. in Opp. 15) is that *Sam L. Majors* is no longer good law. But the Fifth Circuit precedent respondent cites in support of that argument did not involve federal common law or discuss *Sam L. Majors*. See *Bernhard* v. *Whitney National Bank*, 523 F.3d 546 (2008). It is also irrelevant that *Sam L. Majors* and the other decisions on which petitioners rely did not "involve[] *congressionally displaced* federal common law." Br. in Opp. 13. That is a distinction without a difference, and a conflict would remain in any event because several courts of appeals, including the court below, have held that federal common law cannot constitute an independent ground to remove a putative state-law claim. See Pet. 14-17.

2. Respondent heavily relies on the Second Circuit's recent decision in *Connecticut* to argue that there is no conflict on the question presented. See Br. in Opp. 17-19. But that decision did not "reject[] the exact arguments petitioners advance" here, as respondent suggests. *Id.* at 17.

In *Connecticut*, the court determined that the appellant (petitioner Exxon Mobil Corporation) had failed to preserve the argument that federal common law can have

the same effect as a completely preemptive federal statute. See 83 F.4th at 138 n.4. In this case, however, petitioners have unquestionably argued that federal common law entirely displaces state law and thus permits the exercise of federal jurisdiction, even where the "federal-common-law cause of action [is] concealed by state-law labels." Pet. C.A. Reply Br. 10; see Pet. C.A. Br. 27-30; Pet. 28, 30. That is the very same effect that a completely preemptive federal statute has. See *Beneficial National Bank* v. *Anderson*, 539 U.S. 1, 8 (2003).

In addition, the Second Circuit recognized that, "[i]f taken at face value," the Fifth Circuit's decision in *Sam L. Majors* would "provide support for [the] view" that putative state-law actions "governed by federal common law" are removable on federal-question grounds. *Connecticut*, 83 F.4th at 137 (citations omitted). But the Second Circuit declined to take the decision at face value, because the Fifth Circuit emphasized that its holding was limited to claims against an interstate air carrier for property lost or damaged in shipping. See *ibid.* The Fifth Circuit made those statements, however, in the context of answering the question whether federal common law governed—not the discrete question whether federal jurisdiction would lie if it did. See *Sam L. Majors*, 117 F.3d at 929.

The Second Circuit's decision in *Connecticut* also did not disturb that court's earlier holding in *City of New York* that claims seeking redress for injuries caused by global greenhouse-gas emissions "must be brought under federal common law." 993 F.3d at 92, 95. To be sure, the Second Circuit interpreted *City of New York* to decide that question only as a matter of "*ordinary* preemption," *Connecticut*, 83 F.4th at 138 n.4, accepting the position taken by other courts of appeals that *City of New York* does not address the question of federal jurisdiction. See

Pet. 19-21. But that does not eliminate the conflict concerning the well-pleaded complaint rule, because the court did not foreclose petitioners' specific theory of removal. See p. 5, *supra*.

B. The Decision Below Is Incorrect

The court of appeals erred by declining to permit removal. Respondent's contrary arguments (Br. in Opp. 20-29) lack merit.

1. Respondent focuses first on the issue of whether federal common law governs its claims. Respondent argues that this Court's decisions in *International Paper Co.* v. *Ouellette*, 479 U.S. 481 (1987), and *American Electric Power Co.* v. *Connecticut*, 564 U.S. 410 (2011), "make clear that federal common law ceases to exist after it has been displaced by a statute, leaving the statute as the sole basis for preempting or control[ling] a plaintiff's state-law claims." Br. in Opp. 21 (internal quotation marks and citation omitted). That is incorrect.

In *Ouellette*, the question was whether a suit for injury allegedly caused by interstate water pollution could proceed under the law of the State of injury, rather than the law of the source State, after the Clean Water Act displaced the remedy previously available under federal common law. See 479 U.S. at 483-484. The Court held that the suit could not proceed under the law of the State of injury. See *id.* at 497. The Court noted that, while the Act sought to "establish an all-encompassing program of water pollution regulation," it contained a saving clause that "negate[d] the inference that Congress left no room for state causes of action." *Id.* at 492 (internal quotation marks and citation omitted). At the same time, the Court concluded that Congress's "pervasive regulation" of interstate water pollution, *and* "the fact that the control of interstate pollution is primarily a matter of federal law,"

meant that "the only state suits that remain available are those specifically preserved by the Act." *Ibid.* *Ouellette* is thus consistent with the principle that federal law continues exclusively to govern actions concerning interstate pollution, even after a statute has displaced any remedy under federal common law.

American Electric Power reinforced *Ouellette's* conclusion with respect to nuisance claims alleging injury from greenhouse-gas emissions. See 564 U.S. at 418. Writing for a unanimous Court, Justice Ginsburg reiterated that federal common law "undoubtedly" governs claims involving "air and water in their ambient or interstate aspects." *Id.* at 421 (citation omitted). Later in the opinion, the Court stated that, "[i]n light of [its] holding that the Clean Air Act displaces federal common law, the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act." *Id.* at 429. But in support of that proposition, the Court cited *Ouellette*'s holding that "the Clean Water Act does not preclude aggrieved individuals from bringing a 'nuisance claim pursuant to the law of the source State.'" *Ibid.* (citation omitted). The decision in *American Electric Power* thus stands for the same proposition as *Ouellette*: federal law exclusively governs actions concerning interstate pollution, except where Congress has authorized state law to operate.

2. Respondent attempts to avoid the application of federal common law (Br. in Opp. 22) by characterizing its claims as garden-variety state-law tort and consumer-protection claims. But as Judge Stras rightly observed in his concurrence below, "[t]here is no hiding the obvious, and [respondent] does not even try: it seeks a global remedy for a global issue." Pet. App. 21a. As Judge Stras noted, the complaint alleges that "energy production has

'caused a substantial portion of global atmospheric greenhouse-gas concentrations,'" which in turn "ha[s] resulted in 'climate change'—a label that appears in the complaint over 200 times." *Ibid.*

The remedies respondent is seeking are also not limited to economic harm to consumers who would allegedly have purchased fewer fossil-fuel products in the absence of the alleged deception (as in the typical consumer-deception case). Instead, respondent is seeking redress for injuries alleged to have been caused by global climate change: for example, flooding, harm to forests and infrastructure, and personal injuries. Pet. C.A. App. 30-31, 75-85. Because respondent seeks relief for injuries allegedly caused by interstate emissions, federal common law governs its claims.

3. Respondent next argues (Br. in Opp. 23-26) that the artful-pleading principle is limited to the context of complete *statutory* preemption. Respondent is wrong again.

This Court has never limited the artful-pleading principle to the context of complete statutory preemption. And the Court has already recognized that federal common law can function in the same way as a completely preemptive statute, in the context of a "state-law complaint that alleges a present right to possession of Indian tribal lands." *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 393 n.8 (1987) (citing *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 675 (1974)). The same principle applies where, as here, the constitutional structure requires the exclusive application of federal law to respondent's claims. See Pet. 24-27.

Drawing a line between statutory claims and claims necessarily and exclusively governed by federal common law would lead to bizarre results. Because the latter would proceed in state court under the decision below,

state judges would be tasked with developing the substantive content of federal common law in the first instance, subject only to ultimate review by this Court. Through artful pleading and venue selection, plaintiffs could effectively prevent the federal judiciary from developing the federal common law in areas implicating "uniquely federal interests," including "interstate and international disputes implicating the conflicting rights of States." *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 640-641 (1981).

Respondent takes issue with the notion that federal courts would have authority to "craft common law rules with complete preemption's extraordinary pre-emptive power." Br. in Opp. 25 (internal quotation marks and citation omitted). But petitioners are not arguing that federal judges have the independent authority to create completely preemptive common-law rules. Instead, the *constitutional structure* already prohibits the application of state law in certain contexts, such that any claim asserted in such a context is necessarily and exclusively federal in nature. See Pet. 24-27. Respondent denigrates reliance on constitutional structure (Br. in Opp. 26), but, as this Court reaffirmed as recently as earlier this year, it "has long consulted original and historical understandings of the Constitution's structure and the principles of 'sovereignty and comity' it embraces" in order to "resolve disputes about the reach" of state law. *National Pork Producers Council* v. *Ross*, 598 U.S. 356, 376 (2023) (citation omitted).

Respondent is thus incorrect that allowing removal here would "radically expand federal courts' substantive and jurisdictional lawmaking authority." Br. in Opp. 26. Both sides agree that federal common law plays only a "modest role" in our constitutional scheme, *id.* at 25 (cita-

tion omitted), and it applies only to certain narrow categories of claims that implicate "uniquely federal interests." *Texas Industries*, 451 U.S. at 640-641 (citation omitted). It just so happens that claims seeking redress for interstate pollution have long been one such category of claims. See Pet. 24-25.

4. Finally with respect to the merits, respondent goes to great lengths to defend the propriety of the well-pleaded complaint rule. See Br. in Opp. 26-29. But as just explained, the Court does not need to jettison that rule in order to permit removal in this case. Instead, the Court need only hold that federal jurisdiction exists over the narrow category of claims necessarily and exclusively governed by federal common law, and that the artful-pleading principle does not permit a plaintiff to avoid federal jurisdiction over such claims by dressing them in state-law garb.

C. The Question Presented Is Important And Warrants The Court's Review In This Case

The question presented is recurring and exceptionally important, and this case is a suitable vehicle for the Court's review. See Pet. 31-33. Respondent's contrary arguments ring hollow.

1. Respondent contends that the petition is not worthy of review because it "does not present any questions of recurring importance." Br. in Opp. 29. Not so. The question presented is of vital importance in the nearly two dozen climate-change cases—seeking sweeping relief from the energy industry—currently pending in courts across the country. It is likewise critically important to the economic growth, energy independence, and national security of the United States.

Respondent notes (Br. in Opp. 2) that this Court denied review on similar questions presented in petitions

filed last Term, after the United States changed positions on the question in response to this Court's call for the views of the Solicitor General. Of course, that change in position itself demonstrates the need for clarity from this Court. See Pet. 21-23. In addition, new cases seeking relief for injuries allegedly caused by the contribution of greenhouse-gas emissions to global climate change continue to be filed. See *California* v. *Exxon Mobil Corp.*, No. CGC-23-609134 (Cal. Super. Ct. filed Sept. 15, 2023); *County of Multnomah* v. *Exxon Mobil Corp.*, No. 23-CV25164 (Or. Cir. Ct. filed June 22, 2023). Absent this Court's intervention, the question of federal jurisdiction over such actions will continue to arise.

In the meantime, state courts are galloping ahead with these lawsuits. For example, the Hawaii Supreme Court recently held that federal law did not displace or preempt the plaintiffs' climate-change claims, in the process rejecting the federal decisions in *City of New York* and *Illinois* v. *City of Milwaukee*, 731 F.2d 403 (7th Cir. 1984). See *City & County of Honolulu* v. *Sunoco LP*, No. SCAP-22-429, 2023 WL 7151875, at *19 n.9, *21-*22 (Haw. Oct. 31, 2023). This Court's guidance is thus urgently needed on the question whether federal common law governs climate-change claims, and this case presents the Court with an opportunity to provide that guidance.

2. Respondent separately argues (Br. in Opp. 32) that this case is a poor vehicle for deciding the question presented because the court of appeals did not decide whether federal common law governs respondent's claims. But this Court would not be acting as a court of "first view" if it addressed that question. *Id.* (citation omitted). Several courts of appeals have addressed that issue. And should the Court grant review, it would also have the option of addressing only the issue concerning the well-pleaded complaint rule and remanding for the

court of appeals to decide in the first instance whether federal common law governs respondent's claims.

In sum, respondent offers no good reason why the Court should decline to review the exceedingly important jurisdictional question presented by this case. To the contrary, the Court's review is amply warranted.

* * * * *

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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