No. 19-1189

IN THE

Supreme Court of the United States

BP P.L.C., ET AL.,
Petitioners,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF BOULDER COUNTY, SAN MIGUEL COUNTY, AND THE CITY OF BOULDER, COLORADO, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

The text of 28 U.S.C. § 1447(d) allows appellate review of district court orders remanding cases to state courts only where removal was premised either on the federal-officer removal statute, 28 U.S.C. § 1442, or the civil-rights removal statute, 28 U.S.C. § 1443. In *Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.) Inc.*, 965 F.3d 792 (10th Cir. 2020), the Tenth Circuit ruled that this language "does not expressly contemplate the situation in which remand is granted regarding . . . mixed grounds for removal," *i.e.*, an appeal from *both* a Section 1442 or 1443 ground *and* another, non-enumerated ground. *Id.* at 805. Since the statute does not expressly address such appeals, the question presented is:

1. Does a party's mere assertion of 28 U.S.C. § 1442 or 1443 in a Notice of Removal entitle that party to appellate review of all asserted grounds for removal?

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae are three Colorado jurisdictions – Boulder County, San Miguel County, and the City of Boulder – which have been severely harmed by an altered climate. These communities have suffered, and will suffer, significant economic losses responding to climate impacts including heat waves, wildfires, droughts, floods, loss of snowpack, and destruction of forests by insects. Impacts such as these will only get worse as the Earth continues to warm – a scientifically certain outcome based on greenhouse gas emissions already in the atmosphere.[1]

In 2018, these communities filed suit against oil companies Suncor Energy, Inc., Exxon Mobil, Inc., and several Suncor subsidiaries, in Colorado state court. Their suit, *Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.), Inc.*, demands that the defendants bear their relative share of responsibility for their role in causing the harms these communities have incurred and will incur responding to the altered climate. While *amici* do not contend that the oil companies bear sole responsibility for climate change, they believe that they are entitled to have a Colorado jury determine the degree of responsibility that results from producing and selling enormous amounts of fossil fuels while knowingly misrepresenting their dangers. State law is well suited to adjudicate whether *amici*'s claims have merit. Their

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. The parties have filed blanket consents to the filing of any *amicus* brief.

suit, like others filed by cities, counties, and States, does not seek to regulate emissions of greenhouse gases in any way. And because their case involves injuries to Colorado property and public resources, suffered in Colorado, based on activities perpetrated by private corporations, and does not invoke or implicate any federal statutes, they are entitled to proceed in Colorado state court.

Amici are prejudiced by protracted fights over federal vs. state court jurisdiction. Already, their suit was delayed by a year and a half due to the defendants' removal to federal court – rejected as meritless by the federal district court, which remanded to state court. Allowing greater appealability of remand orders would increase the likelihood that removals are used as a delay tactic in a broad array of cases, potentially leading to years of litigation over federal jurisdiction before the merits of a case are considered – contrary to Congress' purpose.

Amici also have a direct stake in the outcome of this proceeding. The remand order in their case was appealed to the U.S. Court of Appeals for the Tenth Circuit; that court affirmed the remand, finding that appeal was limited to the federal-officer statute, 28 U.S.C. § 1442, and soundly rejecting the application of this statute. *Bd. of County Comm'rs of Boulder County v. Suncor Energy (U.S.A.) Inc.*, 965 F.3d 792 (10th Cir. 2020) (*"Boulder County"*). The defendants in this case have recently filed a petition for a writ of *certiorari*, *see* Pet. for Writ of Certiorari, No. 19-1330 (filed Dec. 8, 2020), arguing that the *Boulder County* case presents the same question as this proceeding, and should be disposed of accordingly.

INTRODUCTION AND SUMMARY OF ARGUMENT

Title 28 U.S.C. § 1447(d) only allows appeals from "[a]n order remanding a case to the State court from which it was removed" if the case was removed "pursuant to section 1442 or 1443 of this title." *Amici* agree with Respondent that the plain meaning of this language, interpreted in context, unambiguously indicates that only the Section 1442 or 1443 grounds should be reviewable on appeal. Resp. Br. 10-23. Because the language is clear and does not produce an absurd result, that should be the end of the inquiry.

If, however, the Court does not agree that this language, read in context, clearly indicates limited review, then Section 1447(d) must be considered ambiguous. The Tenth Circuit held in *Boulder County* that the statute "does not expressly contemplate the situation in which remand is granted regarding . . . mixed grounds for removal." 965 F.3d at 805. *Boulder County* noted that Section 1447(d) does not explain either whether review would be of the entire remand order or of the order relating to Section 1442 or 1443 nor does it explain whether a removal done pursuant to Section 1442 or 1443 *and* other grounds is considered "pursuant to section 1442 or 1443." *Id.* Thus, if the context does not conclusively indicate limited review, three possibilities are present: 1) such a mixed-ground removal is not considered a removal "pursuant to section 1442 or 1443," and thus not appealable; 2) such a mixed-ground removal is, in its entirety, considered a removal "pursuant to section 1442 or 1443"; or 3) such a mixed-ground removal is considered a removal "pursuant to section 1442 or 1443" only as to the portion of it that concerns Section

1442 or 1443, and thus appealable only as to that portion.

Any such ambiguity can, however, easily be resolved by reference to the purpose of the statute, supported by the fact that Congress, in adding a reference to Section 1442 in the Removal Clarification Act, ratified the then-universal approach of the federal courts of appeals. That approach was, and is, to allow appeal only of the portion of the remand order concerning Section 1442 or 1443. Indeed, allowing review of the entire remand order would create a strong incentive to invoke a baseless Section 1442 or 1443 argument in order to open the door to a time-consuming appeal.

Petitioners' brief starkly illustrates the problem with their argument. While they claim that their invocation of federal-officer removal jurisdiction opens the door to their appeal, they do not even bother to argue that removal is proper under the federal-officer statute – nor did they even present this question to this Court. Thus they effectively concede that jurisdiction is *not* warranted under the federal-officer statute. Instead, they argue that federal jurisdiction is actually proper because the Respondent's claims arise under federal common law. Nearly half their *amici* echo this argument. None of them makes more than a cursory argument that federal-officer jurisdiction is actually proper here.

Instead, it is clear that Petitioners' real goal is for the Court to consider their radical arguments regarding removal based on federal common law. To entertain such arguments would require this Court to determine whether broad swathes of law can be

federalized on the basis of vague "federal interests" advanced by Petitioners. It would also require this Court to consider, for the first time, whether federal common law provides a basis for "complete preemption," rather than ordinary preemption that does not allow removal. And it would require this Court to make either an unprecedented ruling that complete preemption is possible even where a federal cause of action is not present, or decide whether a federal cause of action is actually available here – which in turn requires resolving several novel questions left open by *American Electric Power v. Connecticut ("AEP")*, 564 U.S. 410 (2011).

None of Petitioners' arguments on these points is sound. Regardless of their merit, however, even if the Court were to agree with Petitioners that appellate jurisdiction lies over all removal arguments, it should not decide whether federal common law creates jurisdiction here. Petitioners themselves previously argued *against* the application of federal common law in this context, demonstrating that – at a minimum – that question raises novel, complex issues of law that should not be decided without the benefit of consideration by the lower courts and full briefing by the parties in response to a clearly-articulated question presented.

ARGUMENT

I. The Tenth Circuit found Section 1447(d) to be ambiguous – and any ambiguity is best resolved in favor of limited appellate review.

Petitioners' argument is premised on the flawed notion that the "plain text" of Section 1447(d) provides

that, whenever Section 1442 or 1443 is asserted in a Notice of Removal alongside other grounds for removal, any resulting remand order is – in its entirety – "an order remanding a case" which was "removed pursuant to section 1442 or 1443" and thus entirely reviewable on appeal. Petr. Br. 16-20. *Amici* agree with Respondent that this language, interpreted in context, unambiguously *restricts* appellate review to Section 1442 or 1443. Resp. Br. 10-23. But if it does not, Section 1447(d) must be considered ambiguous, as the Tenth Circuit found in *Boulder County*. Assuming this ambiguity, the meaning of this provision can only be resolved by reference to the statute's structure, Congress' purpose, and the context in which it was enacted.

This Court has repeatedly determined that "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (finding that "employees" was ambiguous in the context of the statute); *see also Yates v. United States*, 574 U.S. 528, 537-38 (2015) (listing cases). A word or phrase is unambiguous when it has "a clearly accepted meaning in both legislative and judicial practice," *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991), while a word or phrase is ambiguous when it is "capable of being understood in two or more possible senses or ways." *Chickasaw Nation v. United States*, 534 U.S. 84, 90 (2001) (quoting Webster's Ninth New Collegiate Dictionary 77 (1985)).

When a word or phrase is ambiguous, the Court then looks to the statute's "purposes and origins." *Pub.*

Citizen v. United States Dep't of Justice, 491 U.S. 440, 454-55 (1989); *see also, e.g.*, *McCarthy v. Bronson*, 500 U.S. 136, 142-43 (1991) (interpreting ambiguity by looking at the policy behind the statute); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 482 (1992) (interpreting ambiguity through the "purposes and structure" of the statute). As Respondent outlines, and as the Tenth Circuit found, the structure, history, and policy behind Section 1447(d) show that only the portion of the order that addresses the question of removal pursuant to Section 1442 or Section 1443 is reviewable.

A. The Tenth Circuit found the language of the "except" clause to be ambiguous.

The Tenth Circuit in *Boulder County* found that Section 1447(d)'s "except" clause was ambiguous, because it "does not expressly contemplate the situation in which remand is granted regarding . . . mixed grounds for removal." 965 F.3d at 805; *see also Rhode Island v. Shell Oil Prods. Co.*, 979 F.3d 50, 57 (1st Cir. 2020) (endorsing this interpretation). In particular, the Tenth Circuit held that the word "order" viewed in the context of the "except" clause is ambiguous as to whether the review extends to grounds other than federal officer or civil rights. *Boulder County*, 965 F.3d at 804-05; *see also Rhode Island*, 979 F.3d at 57. Instead, Section 1447(d), on its face, assumes that a case was either "removed pursuant to section 1442 or 1443" or not. In either of those circumstances, the result is clear; but in a case such as the one at bar, where removal was done on multiple grounds, the Tenth Circuit held that Section 1447(d) is ambiguous. *Boulder County*, 965 F.3d at 805.

Petitioners' leading case, the Seventh Circuit's

opinion in *Lu Junhong v. Boeing Co.*, 792 F.3d 805 (7th Cir. 2015), effectively concedes this point. As *Boulder County* notes, *Lu Junhong* holds that Section 1447(d) "authorizes review of the remand order, because the case was removed (in part) pursuant to §1442." 792 F.3d at 811. But the need for this parenthetical addition undermines the argument for an unambiguous plain-text interpretation:

> [T]o convey its point that the plain language of § 1447(d) creates plenary review of a remand order upon invocation of a federal officer removal basis, the Seventh Circuit was forced to modify that language with a clarifying parenthetical entirely absent from the statutory text.

Boulder County, 965 F.3d at 805. Similarly, Petitioners quote *Lu Junhong* stating that "the *whole* order" is removable, again showing the need to add qualifying language that the statute's plain text does not contain. Petr. Br. 17 (quoting *Lu Junhong*, 792 F.3d at 811).

Petitioners reject any textual ambiguity in Section 1447(d), simply asserting that "pursuant to" cannot be read to mean "pursuant only to." Petr. Br. 20. This is so, they claim, because the alternative would "prove too much: whenever a defendant raises alternative bases for removal, even the federal-officer or civil-rights ground would become unreviewable." *Id.* Their own argument, of course, has a similar flaw: whenever a defendant raises a federal-officer or civil-rights ground, even alternative bases for removal become reviewable.

Indeed, it is Petitioners' own argument that proves too much. Their objection to the "pursuant only to" interpretation can only be understood as an appeal to

Congress' purpose in allowing appellate review of Section 1442 and 1443 grounds. But by urging consideration of Congress' purpose, Petitioners effectively concede that the statute does not unambiguously support their position. Looking to the policy behind a statute is typically only necessary to resolve ambiguity. *E.g.*, *Pub. Citizen*, 491 U.S. at 454-55; *McCarthy*, 500 U.S. at 142-43.

Divorced from its context, the language of Section 1447(d)'s "except" clause admits at least three possibilities. First, that clause could be read to mean "except that an order remanding a case to the State court from which it was removed [only] pursuant to section 1442 or 1443 of this title shall be reviewable by appeal." Second, it could be read to mean "except that an order remanding a case to the State court from which it was removed [in part] pursuant to section 1442 or 1443 of this title shall be reviewable by appeal [in its entirety]." Third, it could be read to mean "except that an order remanding a case to the State court from which it was removed [in part] pursuant to section 1442 or 1443 of this title shall be reviewable by appeal [with respect to the section 1442 or 1443 issue]." The statutory context clearly points to the latter interpretation; if any ambiguity remains, however, then the Court should proceed to consider other tools of statutory interpretation.

B. If there is any ambiguity in the statute, canons of construction confirm limited appellate review.

When the plain text of a statute is ambiguous, canons of construction suggest reference to the structure and purpose of the statute, as well as any

underlying presumptions and congressional actions. *Estate of Cowart*, 505 U.S. at 477-82 (interpreting statutory text based on the structure, purpose, and congressional actions regarding the statute); *see also Smith v. United States*, 507 U.S. 197, 203-04 (1993) (applying presumptions as part of the canons of statutory construction).

As noted above, Petitioners themselves appeal to Congress' purpose by arguing that the first interpretation – providing *no* review in mixed-ground cases – is absurd. Petr. Br. 20. But Petitioners then reject any further consideration of Congress' purpose or the other aids that guide this Court in determining the meaning of a statute. They assert that the second interpretation – plenary review in mixed-ground cases – must follow if the first is rejected, claiming that they are engaged in a plain-text interpretation when they have already departed from that approach in order to resolve statutory ambiguity. Petitioners are correct to look beyond the statutory text to reject the first interpretation, but mistaken to ignore additional aids to decide between the remaining alternatives.

After finding ambiguity in the text of Section 1447(d), the Tenth Circuit found that "the 'except' clause must be narrowly construed" to fulfill Congress's purpose of maintaining only limited, enumerated removal grounds that are reviewable. *Boulder County*, 965 F.3d at 805-07; *Rhode Island*, 979 F.3d at 57-59. When viewing "order" in the context of the statute as a whole, the structure and purpose is to limit review of remand orders to only the explicitly excepted grounds. Resp. Br. 16; *Things Remembered v. Petrarca*, 516 U.S. 124, 127 (1995).

The Tenth Circuit additionally found that the presumption against jurisdiction further strengthened the narrow construction of the removal statute. *Boulder County*, 965 F.3d at 813-14. While this Court does not appear to have previously considered what presumption applies to statutes regarding appellate review of removal, two related presumptions provide guidance. This Court has recognized a presumption in favor of narrowly construing removal statutes, *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 32 (2002), and a narrow construction of statutes providing appeals as of right to this Court, *Key v. Doyle*, 434 U.S. 59, 65 (1977). Similar principles should extend to appellate review of removal decisions, as the Tenth Circuit correctly determined.

The Tenth Circuit again found that the expanded scope of jurisdiction Petitioners argue for would lead to "protracted litigation" and "prolong the interference" that the statue aimed to avoid. *Boulder County*, 965 F.3d at 816-18 (internal quotation marks omitted). The statutory purpose to avoid delays from over-litigating removal decisions further supports a narrow reading of Section 1447(d). Resp. Br. 35-37.

Finally, the narrow construction of Section 1447(d) best comports with the congressional ratification of existing jurisprudence that had narrowly understood the exception clause. Resp. Br. 31-35. As the Tenth Circuit stated, the "minor change evidence[d] Congress's intent to adopt the existing appellate consensus" that the appellate jurisdiction was only over the specific section "basis for removal, not the entire remand order." *Boulder County*, 965 F.3d at 815.

Indeed, Petitioners previously agreed that, when it

added Section 1442 to the "except" clause via the Removal Clarification Act of 2011, Pub. L. No. 112-51, § 2(d), 125 Stat. 545, Congress was aware of – and intending to incorporate – relevant jurisprudence. They claimed that Congress, in adding the words "1442 or" to the statute but not changing the word "order," intended to incorporate this Court's decision in *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996), interpreting "order" in 28 U.S.C. § 1292(b). *See* Appellants' Opening Br. 12, *Mayor & City Council of Balt. v. BP P.L.C.*, No. 19-1644 (4th Cir. filed July 29, 2019). Petitioners even raised this argument in their petition for *certiorari*, noting that the "the Removal Clarification Act of 2011 . . . added the provision permitting removals under the federal-officer removal statute to section 1447(d) without altering the subsection's reference to remand 'orders.'" Pet. 19. In this argument they relied on *Cannon v. University of Chicago*, 441 U.S. 667 (1979), which holds that it is "appropriate to assume" that Congress was "aware of prior interpretations" of the same language. *Id.* at 697-98.

Apparently realizing that Congress was more likely aware of, and intending to ratify, the then-unanimous judicial interpretation of the very provision they were amending, rather than intending to incorporate the interpretation of the same word from a very different statute, Petitioners now drop this argument entirely. They now argue that "the prior-construction canon has little force here" because, they claim, the meaning of Section 1447(d) was not "settled" in 2011. Petr. Br. 34. This rejection of the prior-construction canon is the opposite of what they argued previously and, as Respondent has amply demonstrated, it is obviously

incorrect. Resp. Br. 32-33.

If the statute is ambiguous, the structure, purpose, policy concerns, relevant presumptions, and congressional ratification all support a narrow construction of Section 1447(d) to only permit review of the removal bases under Section 1442 or Section 1443. Only that reading prevents parties from using meritless Section 1442 or 1443 arguments as a basis for reviewing other grounds, review that Congress intended to foreclose.

II. This Court should refuse Petitioners' invitation to create a new basis for removal and vastly expand the preemptive scope of federal common law.

Petitioners' invitation for this Court to consider their "arising under" federal common law argument illustrates exactly the problem with their favored interpretation of Section 1447(d). While they invoked Section 1442 to open the door to appellate review, they do not bother to argue that the Fourth Circuit's rejection of that basis for removal – the only basis the court below actually considered – was erroneous. Instead, they invite this Court to consider an entirely different ground for federal jurisdiction which is not encompassed by the question presented and was not addressed below. This Court should not adopt such a breathtaking expansion of federal removal jurisdiction, let alone do so where the issue is not within the question presented.

Amici do not attempt to fully address the errors in Petitioners' federal common law argument, which would require a far more exhaustive treatment than is possible or appropriate here. Instead, *amici* write to

expose the radical result of Petitioners' argument, and the complexity of the issue that makes it unsuitable for decision in this case. The rub of Petitioners' argument is that federal common law is vital enough to pull all climate cases out of State court based on "federal interests," but too moribund to provide a viable cause of action.

Petitioners' federal common law argument is setting up a game of three-card Monte, where they simply can never be sued. First, federal common law strips state law and state courts of all authority; then federal statutes displace federal common law; and when the last card is finally turned over, those federal statutes neither provide Respondent relief nor address the tortious conduct for which Petitioners were sued.

At every step, Petitioners' argument would require resolution of complex issues, often contrary to this Court's prior case law. This Court has never previously ruled that federal common law applies to a pollution dispute that does not involve one State attempting to enjoin actors in another State. It has never previously ruled that federal common law can provide any basis for removal to federal court. It has never previously ruled that the Clean Air Act displaces federal common law claims for damages based on production, sales, and deceptive marketing of fossil fuels. And it has never previously ruled that a claim may be considered inherently federal, and thus removable on that basis, where federal law provides no cause of action.

Indeed, Petitioners' argument turns this Court's prior federal common law decisions on their head. Those cases recognized that federal common law is necessary in some inter-state pollution disputes because,

otherwise, an injured State might be unable to enjoin an out-of-state nuisance without also sacrificing its sovereignty by submitting to the jurisdiction of a neighboring State. Petitioners' federal common law, in contrast, forecloses damages remedies that state law can amply provide, and offers no relief to injured parties in return. While Petitioners are surely entitled to contest their liability on the merits and raise federal defenses, the federal common-law rule they press does not resolve a controversy involving conflicting States' rights – it just shuts it down.

A. Petitioners previously argued that federal common law cannot apply to a case such as this.

Petitioners suggest that their federal common law argument is so undisputable it would "break little new ground" to endorse it, despite its absence from the question presented here. Petr. Br. 37. Regardless of whether their argument is *correct* (it is not), however, it is clearly not *obvious* – and this is shown most clearly by the fact that many of the same Petitioners previously argued exactly the opposite.

In *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012), seven of the present Petitioners[2] argued that federal common law could *not* apply to nuisance claims for damages from climate change. Answering Br. for Defs.-Appellees 56-61, *Kivalina*, No. 09-17490 (9th Cir. filed June 30, 2010) ("*Kivalina* Br."). They argued that "a federal common

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[2] BP America, Inc.; BP Products North America, Inc.; Chevron Corp.; Chevron U.S.A., Inc.; ConocoPhillips Company; Exxon Mobil Corp.; and Shell Oil Co.

law nuisance claim cannot seek damages." *Id.* at 56. This distinguishes claims such as those at bar from the Court's decision in *AEP*, which concerned injunctive relief against out-of-state actors. 564 U.S. at 418-19.

Petitioners also previously argued that state sovereignty, which local governments such as Respondent do not possess, "is the *sine qua non* of access to the federal common law of public nuisance," *Kivalina* Br. 61.

> The Supreme Court has made clear that the basis for States' access to a federal common law remedy of abatement of a nuisance rests on the States' relinquishment, in exchange for entering the Union and receiving statehood, of sovereign warmaking powers that would otherwise be used to redress infringements on their territory. *See, e.g. Missouri v. Illinois*, 200 U.S. 496, 520-21 (1906).

Id. at 60-61. Petitioners specifically rejected the idea that damages claims, not brought by States, "raise 'uniquely federal interests' *of the type that justify applying federal common law.*" *Id.* at 57 n.23.

This Court should not reject Petitioners' own prior arguments in a case where the issue has neither been addressed by the opinion below nor included in the questions presented.

B. Petitioners cannot remove a case to federal court based on unpled federal common law that affords Respondent no cause of action.

Respondent filed its case in state court and pled no federal claims. Petitioners were only entitled to remove it to federal court if Respondent could have filed it there originally. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). If federal law merely precludes liability by preempting state law, it does not provide jurisdiction or a basis for removal. *Id.* at 393. Rather than breaking little new ground, to hold otherwise would be a substantial departure from Congress' and this Court's approach to removal jurisdiction. It would also contravene the decisions of every court to consider the question in the context of climate change litigation. *See City of Oakland v. BP PLC*, 969 F.3d 895, 906-08 (9th Cir. 2020); *see also Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31, 39-41 (D. Mass. 2020) (collecting cases).

Here, Petitioners' argument that this case "arises under" unpled federal common law is both wrong as to the scope of federal common law, and wrong as a matter of removal doctrine. Even if they were correct that federal common law governs these claims and precludes liability – and they are not – that would not be a basis for removal. Their elaborate chain of reasoning – that federal common law exclusively governs these claims, yet is displaced by a federal statute that provides no cause of action – results in the end to simply arguing that federal law preempts state law.

1. Federal removal jurisdiction "raises significant federalism concerns," and is therefore construed

narrowly. *Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d 362, 365-66 (5th Cir. 1995); *see also Pinney v. Nokia, Inc.*, 402 F.3d 430, 442 (4th Cir. 2005); *Russell Corp. v. Am. Home Assur. Co.*, 264 F.3d 1040, 1049 (11th Cir. 2001). Two primary aspects of removal doctrine guard against expansive removal jurisdiction.

First, the plaintiff is "master of the claim" and "may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar*, 482 U.S. at 392. Under this "well pleaded complaint" rule, courts do not look behind the face of the complaint, and a defendant cannot re-write the allegations or claims to manufacture a federal case. *Id.* at 396-97 (holding that defendant cannot "ignor[e] the set of facts . . . presented by respondents, along with their legal characterization of those facts, and argu[e] that there are different facts respondents might have alleged that would have constituted a federal claim"); *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 809 n.6 (1986) ("Jurisdiction may not be sustained on a theory that the plaintiff has not advanced.").

Second, federal defenses do not create federal question jurisdiction. While state courts are bound under the Supremacy Clause to apply federal law, the fact that federal law preempts or bars liability under state law is not a cause for federal jurisdiction. *See Caterpillar*, 482 U.S. at 392-93. Thus, the fact that Respondents did not plead a federal claim ends the matter, even if their state law claims are ultimately preempted.

This Court has recognized but two rare exceptions where claims pled under state law nevertheless arise under federal law and can be removed, but neither applies here. The first is where an essential element of

the state law claim turns on a substantial and disputed question of federal law. *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 13-14 (1983). Consistent with the "well pleaded complaint rule," the disputed federal issue must be invoked by the *plaintiff* as a necessary component of their right to relief; an obstacle raised by the *defendant* will not suffice. *Id.*

The second is where a "federal statute completely pre-empts the state-law cause of action." *Ben. Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003). This too is exceedingly rare. A court must find that Congress intended to create an exclusive cause of action for the complained-of conduct; and then that the state law claims falls squarely within that preempted field. *Id.*at 8-9 & n.5. This Court has only found such extraordinary congressional intent in three statutes. *Avco Corp. v. Machinists,* 390 U.S. 557, 560–61 (1968) (§ 301 of the Labor Management Relations Act of 1947); *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-67 (1987) (§ 502 of the Employee Retirement Income Security Act of 1974), *Ben. Nat'l Bank*, 539 U.S. at 10–11 (actions for usury against national banks under the National Bank Act). And even there, it has been loath to broadly construe the scope of the preempted field covered by the federal cause of action. *See Caterpillar*, 482 U.S. at 394-98 (holding that collective bargaining agreement governed exclusively under federal law did not preclude claim under state law for rights under individual contract).

2. Petitioners' "arising under" federal common law argument does not fall within either exception. Moreover, the contention that federal common law supplants the state law pled in this dispute is an ordinary preemption defense, and not a basis for federal jurisdiction. *See Int'l Paper Co. v. Ouellette*, 479 U.S.

481, 488 (1987) (if a case "should be resolved by reference to federal common law" then "state common law [is] preempted"); *accord Empire Healthchoice Assurance, Inc. v. McVeigh*, 396 F.3d 136, 142 (2d Cir. 2005) (if state law "conflicts with federal interests and requires the application of federal common law," this is "insufficient to confer federal jurisdiction"). The words that Petitioners use to make their argument – such as that "federal law necessarily supplies the exclusive source of law governing th[e] claims," Petr. Br. 44 (emphasis omitted) – do not change the substance of their contention.

Petitioners repeatedly cite the *Milwaukee* line of cases for the proposition that these claims "necessarily arise under federal law," Petr. Br. 39, because "if federal common law exists, it is because state law cannot be used." *Milwaukee v. Ill.*, 451 U.S. 304, 313 n.7 (1981). But these decisions say nothing about the scope of *removal* based on *unpled* federal common law, because "*Milwaukee* was . . . filed in federal court and invoked federal jurisdiction such that the well-pleaded complaint rule was not at issue." *Bd. of County Comm'rs of Boulder County v. Suncor Energy (U.S.A.), Inc.*, 405 F. Supp. 3d 947, 961-62 (D. Colo. 2019). Even if Petitioners were right about the scope of federal common law, the proposition that "state law cannot be used" provides, at most, an ordinary preemption defense in state court.

Petitioners allude to the doctrine of complete preemption by suggesting that Respondent was "artfully pleading" by omitting a federal common-law cause of action. *See* Petr. Br. 44. Petitioners admit that this Court "has applied the artful-pleading principle primarily in complete-preemption cases involving

federal statutes," but they assert there is no reason not to extend it to common-law claims. *Id.* In fact, this Court has *exclusively* applied this doctrine in statutory complete preemption cases, and extending it to federal common law would not be a trivial matter. There is a world of difference between finding that Congress intended to simultaneously preempt state law and strip State courts of jurisdiction – intent this Court has rarely found – and empowering federal courts to do so on their own accord.

Congress, not the courts, should set the proper balance between federal and state authority. *See Atherton v. FDIC*, 519 U.S. 213, 218 (1997) ("Whether latent federal power should be exercised to displace state law is primarily a decision for Congress, not the federal courts." (internal quotation marks omitted)); *Merrell Dow Pharm.*, 478 U.S. at 810 ("We have consistently emphasized that, in exploring the outer reaches of § 1331, determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system."). And even when performing the judicial function of deciphering statutes, this Court has looked for clear signs of congressional intent to displace state law. *E.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991).

The exception Petitioners propose runs counter to this restrained role and would authorize federal courts to assume jurisdiction and alter the balance between federal and state courts with zero guidance from Congress. It would be a substantial and novel expansion of federal removal doctrine which is unwarranted under any circumstances and doubly so in this posture.

3. Even if this Court were to hold that federal common law could completely preempt state law and create federal jurisdiction, Petitioners' argument would also require expanding existing law in other ways. Complete preemption applies only where Congress intended federal law to provide an "exclusive cause of action . . . and remedies governing that cause of action." *Ben. Nat'l Bank*, 539 U.S. at 8. Thus the Court would either need to find that federal common law provides remedies for Respondent's injuries, or it would need to hold for the first time that unpled federal law can preempt even where it provides no relief, as Respondents urge.

Although *amici* believe that federal common law does not apply here, it necessarily could only apply if it supplies a cause of action. It cannot be "artful pleading" for Respondent to omit pleading a federal common-law claim that does not exist – and that Petitioners themselves previously agreed did not exist. Resolving this issue would require answering several questions left open in *AEP*, which held only that "the Clean Air Act . . . displace[s] any federal common-law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired powerplants." 564 U.S. at 424.[3] The Court

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[3] Below, Respondent argued that, under *AEP*, "any federal common law that might have been available to govern Plaintiff's claims in these cases was displaced by Congress's enactment of the Clean Air Act." Pls.-Appellees' Resp. Br. 3, *Mayor & City Council of Balt. v. BP P.L.C.*, No. 19-1644 (4th Cir. filed Aug. 27, 2019). *Amici* agree that federal common law does not extend to the claims here, *infra* Part II(C), and that *if* any federal common law claims here were displaced by the Clean Air Act – as

expressly left open the question of "the availability of a claim under state nuisance law." *Id.* at 429; *see also Bell v. Cheswick Generating Station*, 734 F.3d 188, 197 (3d Cir. 2013) (holding that "the Clean Air Act does not preempt state common law claims"). Nor did the Court consider whether actions for *damages*, rather than *abatement of emissions*, would similarly be displaced, let alone preempted. Even if the complete preemption doctrine could theoretically be extended to federal common law, the Court would need to answer these questions in order to determine whether the claims here could be preempted by an exclusive cause of action under federal common law.

In order to avoid this inquiry, Petitioners seek to alter the law in yet another way: they would permit removal even if federal common law provides no viable cause of action. Petr. Br. 44 n.6. They rely on *Avco Corp.*, *AEP*, and *United States v. Standard Oil Co.*, 332 U.S. 301 (1947), but none of those decisions supports them.

Avco addressed Section 301 of the Labor Management Relations Act, a statute that completely preempts suits arising out of collective bargaining agreements. Petitioners are presumably relying on the Court's statement that the "nature of the relief available after jurisdiction attaches" is distinct from the question of federal jurisdiction. 390 U.S. at 561. But although "[t]he relief in § 301 cases varies," the Court

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Petitioners argue – then federal common law cannot provide a basis for federal jurisdiction. *Amici* do not agree, however, that if federal common law does provide the exclusive claim to remedy the injuries here, the Clean Air Act would necessarily displace it.

did not question that some relief was available after removal. *Id.* And the Court's more recent statements of the complete-preemption doctrine make clear that a federal cause of action is required. *E.g.*, *Metro. Life Ins. Co.*, 481 U.S. at 65 (noting that complete preemption "converts an ordinary state common law complaint into one stating a federal claim"); *Ben. Nat'l Bank*, 539 U.S. at 8; *Vaden v. Discover Bank*, 556 U.S. 49, 61 (2009) (noting that under complete preemption "a plaintiff's 'state cause of action [may be recast] as a federal claim for relief'" (quoting 14B Wright & Miller § 3722.1, p. 511) (alteration in original)).

Neither *AEP* nor *Standard Oil* was a removal case, and thus cannot support Petitioners argument that unpled federal common law can wrest jurisdiction from a state court.[4] Thus there is no support for Petitioners' argument that complete preemption can create federal jurisdiction and bar a state claim in the absence of a federal claim. Even if federal common law could provide a basis for complete preemption, it could only do so if this Court were to conclude that it provides a cause of action for Petitioners' claims.

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Federal judges should not be authorized to use their common-law lawmaking function to strip state courts of jurisdiction to hear disputes. State courts can be trusted

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[4] In *AEP*, the plaintiffs invoked federal jurisdiction and pled federal common law and the Supreme Court held that federal common law was displaced by statute. 564 U.S. at 423-29. In *Standard Oil*, the United States brought claims under federal common law. 332 U.S. at 308, 314.

to apply federal law; they have been doing so properly for decades. If their jurisdiction is to be diminished, Congress must act.

This would be a particularly poor case through which to recognize the authority Petitioners claim because this Court would also need to determine whether federal common law provides remedies for Petitioners' claims. If there is no federal common-law claim for Petitioner to bring, then it cannot be a basis for removal.

C. This dispute is not governed by the federal common law of interstate pollution.

As Petitioners previously argued, this Court has only recognized federal common law in the narrow category of interstate pollution disputes where an injured State sought an injunction to shut down an out-of-state source of pollution. This case contains none of those elements, and creating federal common law out of the vague "federal interests" now asserted by Petitioners would vastly expand the scope of the doctrine.

1. Federal common law does not govern all interstate disputes. Assuming they have personal jurisdiction, States can generally hold out-of-state actors liable under their own law for "injurious consequences" suffered within their borders. *Young v. Masci*, 289 U.S. 253, 258-59 (1933); *Calder v. Jones*, 465 U.S. 783, 789 (1984). The ubiquity of such cases – even where there are substantial federal interests or involvement in the dispute – cannot be overstated. *See In re "Agent Orange" Prod. Liab. Litig.*, 635 F.2d 987 (2d

Cir. 1980); *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314 (5th Cir. 1985); *In re Nat'l Prescription Opiate Litig.*, 440 F. Supp. 3d 773, 799 (N.D. Ohio 2020); *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 725 F.3d 65 (2d Cir. 2013); *City of N.Y. v. Bob Moates' Sports Shop,* 253 F.R.D. 237, 242-43 (E.D.N.Y. 2008); *People v. ConAgra Grocery Prods. Co.,* 227 Cal. Rptr. 3d 499 (Cal. Ct. App. 2017).

2. This Court has recognized a class of interstate disputes where conflicts between sovereign States would arise if one State's law were conclusive. In such cases, a sufficient federal interest exists in mediating the controversy to justify the creation of federal common law. The quintessential examples would be border disputes between States, *Rhode Island v. Massachusetts,* 37 U.S. 657 (1838), and conflicts over a shared resource, *Hinderlider v. La Plata River & Cherry Creek Ditch Co.,* 304 U.S. 92 (1938).

This class of interstate disputes does encompass some pollution cases. But as Petitioners previously argued, those cases had two essential elements that are missing here: they were actions by States, and they sought injunctive relief intruding into the territory of another State. As the Ninth Circuit observed: "It appears that the Court considers only those interstate controversies which involve a state suing sources outside of its own territory because they are causing pollution within the state to be . . . subject to resolution according to federal common law." *Nat'l Audubon Soc. v. Dep't of Water,* 869 F.2d 1196, 1205 (9th Cir. 1988). And this Court has expressly not recognized a federal common-law claim for damages for interstate pollution. *See Middlesex Cty. Sewerage Auth. v. Nat'l Sea*

Clammers Ass'n, 453 U.S. 1, 21 (1981). Federal common law simply does not apply here.

3. Federal common law can preempt state law, but the scope of that displacement must be tied to a conflict between the application of state law and the unique federal interest that justifies the creation of a federal rule in the first instance. *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87-88 (1994). "Invoking some brooding federal interest . . . should never be enough to win preemption of a state law; a litigant must point specifically to 'a constitutional text or a federal statute' that does the displacing or conflicts with state law." *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019) (Gorsuch, J., three-justice opinion). While this dispute involves different parties, different tortious conduct, and different relief, Petitioners pretend that this case raises the same issues presented in *Milwaukee* and *AEP*, where States sued to enjoin or cap out-of-state point sources of pollution. It does not.

In *Milwaukee*, the State of Illinois was seeking to enjoin polluting emanating from Wisconsin. If decided under state law, this would give the laws and orders of Illinois extraterritorial effect – effectively extending its governance into another State. Similarly, in *AEP*, the remedies sought were cross-border injunctions to abate emissions.

Conversely, state law routinely applies to questions of liability for damages for cross-border marketing and selling products, which do not implicate the same concerns. For example, governmental lawsuits against tobacco and opioid companies for deceptive business practices – that caused public health crises – were and are not regulation of smokers and opioid *users*. *See, e.g.*,

City & Cty. of San Francisco v. Purdue Pharma L.P., No. 3:18-cv-07591, 2020 U.S. Dist. LEXIS 181274, at *91-107 (N.D. Cal. Sept. 30, 2020) (rejecting federal preemption of opioid nuisance litigation); *In re Tobacco II Cases*, 207 P.3d 20 (Cal. 2009). Federal common law has never supplied a cause of action against a product seller. Rather, courts have consistently refused to recognize an expansive federal common law that covers such conduct, even when national security is involved. *See In re "Agent Orange" Prod. Liab. Litig.*, 635 F.2d at 993-95.

The kinds of "federal interests" invoked by Petitioners here are present in all manner of disputes that have never previously been governed by federal common law. Instead, federal common law preempts state law only where absolutely necessary. This is not such a case.

CONCLUSION

The language of Section 1447(d), read in context, plainly restricts appellate review to removal arguments under Section 1442 and 1443. If it does not, the statute is ambiguous, and the Tenth Circuit correctly resolved any ambiguity in favor of limited appellate review. Allowing review of other grounds would encourage frivolous invocations of Section 1442 and 1443 solely for the purpose of opening the door to an appeal.

This proceeding demonstrates the danger of Petitioners' approach; they have jettisoned their Section 1442 argument in favor of a misguided federal common law theory. These are the kinds of arguments that will saddle the Courts of Appeal if the scope of review of remand orders is expanded beyond

Congress' careful design, further delaying resolution of cases on their merits. But even if review of other grounds for removal is permitted, this Court should not entertain Petitioners' baseless federal common law argument, which was neither addressed by the court below nor included in the question presented, and which Petitioners themselves previously argued against.

Respectfully submitted,

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