No. 20-

IN THE
Supreme Court of the United States

CHEVRON CORPORATION, *et al.*,
Petitioners,

v.

CITY OF OAKLAND, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

KANNON K. SHANMUGAM
JUSTIN ANDERSON
WILLIAM T. MARKS
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
2001 K St. NW
Washington, DC 20006

THEODORE V. WELLS, JR.
DANIEL J. TOAL
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019

Counsel for Exxon Mobil Corporation

PETER D. KEISLER*
VIRGINIA A. SEITZ
C. FREDERICK BECKNER III
RYAN C. MORRIS
TOBIAS S. LOSS-EATON
SIDLEY AUSTIN LLP
1501 K St. NW
Washington, DC 20005
(202) 736-8000
pkeisler@sidley.com

THEODORE J. BOUTROUS, JR.
THOMAS G. HUNGAR
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave. NW
Washington, DC 20036

Counsel for Chevron Corporation

* Counsel of Record

January 8, 2021

[Additional Counsel Listed On Inside Cover]

M. RANDALL OPPENHEIMER
DAWN SESTITO
O'MELVENY & MYERS LLP
400 South Hope St.
Los Angeles, CA 90071

Counsel for Exxon Mobil Corporation

DAVID C. FREDERICK
BRENDAN J. CRIMMINS
DANIEL S. SEVERSON
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.
1615 M St. NW
Suite 400
Washington, DC 20036

Counsel for Royal Dutch Shell plc

SEAN C. GRIMSLEY
JAMESON R. JONES
DANIEL R. BRODY
BARTLIT BECK LLP
1801 Wewatta St.
Suite 1200
Denver, CO 80202

Counsel for ConocoPhillips

NANCY G. MILBURN
ARNOLD & PORTER KAYE SCHOLER LLP
250 West 55th St.
New York, NY 10019

JONATHAN W. HUGHES
MATTHEW T. HEARTNEY
JOHN D. LOMBARDO
ARNOLD & PORTER KAYE SCHOLER LLP
Three Embarcadero Center, 10th Floor
San Francisco, CA 94111

ETHAN G. SHENKMAN
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave. NW
Washington, DC 20001

Counsel for BP p.l.c.

QUESTIONS PRESENTED

Two coastal California cities brought this case in state court, seeking to hold five energy companies liable for an alleged state law "public nuisance"—global climate change—based on their production and sale of fossil fuels. The cities say this case is "about shifting the costs of abating sea level rise . . . back onto the companies." To date, over twenty state and local governments have brought similar cases in state courts across the country, each seeking to apply its own State's law to conduct in the other States and abroad. The energy companies removed this case to federal court, asserting that federal common law governs tort claims based on interstate or international pollution. The district court upheld removal, holding that such claims arise exclusively under federal law. After the cities amended their complaints to add federal claims, the court dismissed the case for failure to state a claim. But the Ninth Circuit held that removal was improper under the well-pleaded complaint rule because the claims were labeled as state-law claims, and the cities' amended complaints adding federal claims did not cure that defect.

The questions presented are:

I. Whether putative state-law tort claims alleging harm from global climate change are removable because they arise under federal law.

II. Whether a plaintiff is barred from challenging removal on appeal after curing any jurisdictional defect and litigating the case to final judgment in the district court.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are Chevron Corporation, BP p.l.c., ConocoPhillips, Exxon Mobil Corporation, and Royal Dutch Shell plc. No petitioner has a parent corporation, and no publicly held corporation owns 10% or more of any petitioner's stock.

Respondents are the City of Oakland, a Municipal Corporation, and the People of the State of California, acting by and through the Oakland City Attorney; and the City and County of San Francisco, a Municipal Corporation, and the People of the State of California, acting by and through the San Francisco City Attorney Dennis J. Herrera.

RULE 14.1(b)(iii) STATEMENT

This case directly relates to these proceedings:

People of the State of California v. *BP, P.L.C.*, No. CGC17561370, San Francisco County Superior Court (removed October 20, 2017);

People of the State of California v. *BP, P.L.C.*, No. RG17875889, Alameda County Superior Court (removed October 20, 2017);

City of Oakland v. *BP P.L.C.*, No. C 17-06011 WHA, U.S. District Court for the Northern District of California (judgment entered July 27, 2018);

City and County of San Francisco v. *BP P.L.C.*, No. C 17-06012 WHA, U.S. District Court for the Northern District of California (judgment entered July 27, 2018); and

City of Oakland v. *BP P.L.C.*, No. 18-16663, U.S. Court of Appeals for the Ninth Circuit (judgment entered May 26, 2020; opinion amended and rehearing denied August 12, 2020).

No other proceedings in state or federal trial or appellate courts, or in this Court, directly relate to this case.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 960 F.3d 570 and reproduced at App. 1a–23a. The order denying rehearing and amending the opinion is published at 969 F.3d 895 and reproduced at App. 58a–59a. The district court's dismissal opinion is reported at 325 F. Supp. 3d 1017 and reproduced at App. 24a–45a. The district court's opinion denying remand is available at 2018 WL 1064293 and reproduced at App. 46a–56a.

JURISDICTION

The Ninth Circuit issued its opinion on May 26, 2020 and its amended opinion and order denying rehearing on August 12, 2020. 28 U.S.C. § 1254(1) provides jurisdiction.

FEDERAL STATUTES INVOLVED

28 U.S.C. § 1331 provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1441(a) provides:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of

the United States for the district and division embracing the place where such action is pending.

INTRODUCTION

Plaintiffs across the country are asking state courts to regulate worldwide fossil-fuel production and sales through "public nuisance" suits seeking massive monetary judgments for the effects of global climate change. These claims, as this Court's decisions show, necessarily arise under federal law because the Constitution prohibits applying state law in certain narrow areas involving uniquely federal interests—including interstate and international pollution. The Ninth Circuit nonetheless rejected federal jurisdiction here. That rejection conflicts with this Court's rulings and with other circuits' decisions affirming removal of putative state-law claims that arise in exclusively federal areas. This case also raises a separate removal question that has split the circuits: Whether and when plaintiffs can contest removal on appeal after they cure any jurisdictional defect and litigate the case to judgment in federal court. As the United States explained in urging rehearing en banc below, both are "issue[s] of exceptional importance," U.S. Reh'g Br. 3, 13 (ECF 198)—especially given that these cases seek to fundamentally reorder or eliminate a vital sector of our economy.

Here, the Cities of San Francisco and Oakland seek to impose monetary liability on five energy companies for future harms they allege global climate change will cause, including "global warming-induced sea level rise." App. 3a. The cities sued under California "public nuisance" law, which would require a court to decide whether global fossil-fuel production and sales are "unreasonable"—and thus tortious—by weighing their value against their harms. State trial judges

and juries, constrained only by the "vague and indeterminate" standards of common-law public nuisance, *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 317 (1981), would thus resolve critical national and international policy issues—and potentially impose devastating extraterritorial liability for lawful conduct encouraged by Congress, other states, and foreign governments alike.

The district court rightly described this theory as "breathtaking" in scope. App. 32a. And the theory is not limited to these plaintiffs and defendants, or even the parties in the many similar cases pending elsewhere. On the cities' view, any party affected by climate change could sue—in state court, under state law—"anyone who supplied fossil fuels with knowledge of" climate change. *Id.* A patchwork of conflicting state-law tort rules would inevitably result. And while this particular case was filed in California, it seeks recovery based not only on the companies' production and sales there, but on *all* production and sales across the nation and "worldwide." CA9 Excerpts of Record (ER) 297 (ECF 29-1). California's courts would thus use California law to make energy policy for, and impose liability for conduct occurring in, the other 49 States and many foreign nations.

The district court correctly upheld removal because these claims necessarily arise under federal law. It then dismissed them on the merits. The Ninth Circuit, however, rejected federal jurisdiction. It held that it was "not clear" that these claims implicate any federal-law questions, and that, in any event, the well-pleaded complaint rule barred the district court from looking past the complaints' state-law labels. See App. 10a–12a. Both aspects of that ruling clash

with this Court's decisions, and the second also conflicts with rulings from other circuits.

The cities' claims, based on the effects of global climate change, arise in an area "undoubtedly" governed by federal law, where state law cannot reach: "When we deal with air and water in their ambient or interstate aspects, there is a federal common law." *Am. Elec. Power Co.* v. *Connecticut*, 564 U.S. 410, 421 (2011) (*AEP*); *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 103 (1972). This is not the general federal common law that ended with *Erie Railroad* v. *Tompkins*, 304 U.S. 64 (1938), but a limited and specialized body of law that arises from the constitutional structure, see *AEP*, 564 U.S. at 421. The Constitution's allocation of sovereignty between the States and the federal government, and among the States themselves, precludes applying state law in certain narrow areas whose inherently interstate nature requires uniform *national* rules of decision. Just as "state courts [are] not left free to develop their own doctrines" of foreign relations, *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 426 (1964), or to decide disputes with neighboring states, *e.g.*, *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938), neither can they make rules that govern interstate or international pollution. In these areas, "there is an overriding federal interest in the need for a uniform rule of decision," *Illinois*, 406 U.S. at 105 n.6, so the "federal judicial power" must supply any rules necessary "to deal with common-law problems," *United States* v. *Standard Oil Co. of Cal.*, 332 U.S. 301, 307 (1947).

In turn, when a plaintiff brings a claim in one of these exclusively federal areas, that claim necessarily arises under federal law, creating federal jurisdiction. That is true even if the claim is couched in state-law

terms, because no state law exists for the plaintiff to invoke. The Ninth Circuit's contrary ruling is, as the United States explained below, "irreconcilable with the constitutional commitment of such matters to the national government and the relative rights and obligations of the national government and States under the structure of the Constitution." U.S. Reh'g Br. 12. Nor does it matter whether the claim is ultimately cognizable under federal law; this Court made clear in *Standard Oil* and reiterated in *AEP* that whether a federal court has jurisdiction over such a claim does not depend on whether that claim is viable.

The ruling below also conflicts with other circuits' view that a "putative state-law claim is . . . removable if alleged in a field that is properly governed by federal common law such that a cause of action, if any, is necessarily federal in character." U.S. Reh'g Br. 2, 5. In these areas, the "uniquely federal interest [is] so important that the 'federal common law' supplants state law." *Caudill* v. *Blue Cross & Blue Shield of N.C.*, 999 F.2d 74, 77 (4th Cir. 1993). Thus, a "plaintiff's characterization of a claim as based solely on state law is not dispositive." *In re Otter Tail Power Co.*, 116 F.3d 1207, 1213 (8th Cir. 1997); see also *Sam L. Majors Jewelers* v. *ABX, Inc.*, 117 F.3d 922, 923 (5th Cir. 1997).

The Ninth Circuit also erred—and deepened a separate circuit split—by rejecting an alternative basis to affirm the district court's exercise of jurisdiction. The district court certified its order denying remand for interlocutory review, but the cities declined to appeal. Instead, they amended their complaints to assert federal claims, added new plaintiffs, and litigated the case to judgment. The Ninth Circuit recognized that the amendment "cured any subject-matter jurisdiction defect," but it still allowed the cities to

challenge removal because the case ended with a motion to dismiss, not a trial. App. 16a–19a. That ruling implicates circuit splits on whether and when (a) filing an amended complaint creating federal jurisdiction waives the right to dispute removal and (b) a challenge to removal is mooted when the federal court enters final judgment without a trial.

The importance of these cases supports review now. They cast a shadow over the entire energy sector that will lengthen if they are allowed to run their long, slow course in state court, where they do not belong. The accompanying exposure to vast, indeterminate monetary relief will deter investment and employment across the industry and the broader economy. This "economic disruption" and the resulting effect on "our Nation's energy needs" warrant prompt intervention. See *AEP*, 564 U.S. at 427.

These cases will also disrupt and impede the political branches' international climate-change initiatives and negotiations. And if they reach judgment, they will inevitably produce a patchwork of conflicting tort standards asserting control over global production and emissions under the laws of multiple States. Allowing state-court judges and juries to regulate production and the resulting emissions based on state common-law nuisance standards, "whose content must await the uncertain twists and turns of litigation[,] will leave whole states and industries at sea and potentially expose them to a welter of conflicting court orders across the country." *North Carolina ex rel. Cooper* v. *Tenn. Valley Auth.*, 615 F.3d 291, 301 (4th Cir. 2010).

Before state courts across the nation set about deciding whether worldwide fossil-fuel production is unlawful—and thus whether a vital sector of the economy must be shuttered or remade—this Court should

first decide whether these cases are in the right forum and governed by the right law. This Court has twice granted certiorari to address which governmental bodies have the authority to address global climate change, noting the "unusual importance" of the issue. *Massachusetts* v. *EPA*, 549 U.S. 497, 506 (2007); see *AEP*, 564 U.S. at 420. And petitioners in a pending merits case have asked this Court to decide whether tort claims like these necessarily arise under federal law. See Br. for Petitioners 38–45, *BP p.l.c.* v. *Mayor & City Council of Baltimore*, No. 19-1189. The Court should make clear—if not in *Baltimore*, then here—that this issue "demands to be governed by as universal a rule . . . as is available," which in our system means federal law. App. 56a.

STATEMENT OF THE CASE

A. The cities' public nuisance theory.

Over twenty governmental bodies, including five States and the District of Columbia, have brought suits like this one against a handful of energy companies. These suits seek to compel the companies to pay to climate-change-proof five entire States, at least seven large coastal cities, and many other municipalities. The theory pressed here could be asserted by anyone who can allege climate change will eventually affect them. The total damages available under this theory are thus incalculable.

Oakland and San Francisco each asserted a public-nuisance claim in California state court, seeking to require the energy companies "to abate the global warming-induced sea level rise nuisance to which they have contributed by funding an abatement program." *E.g.*, ER 297. Their theory is global—it depends on "worldwide" greenhouse gas emissions since the Nineteenth Century. See *id.* They seek to hold

five energy companies liable for "accelerated sea level rise," "causing flooding of low-lying areas . . . , increased shoreline erosion, and salt water impacts." *Id.* at 293.

A public nuisance is generally "an unreasonable interference with a right common to the general public." Restatement (Second) of Torts § 821B (1979). This formulation requires "weighing . . . the gravity of the harm against the utility of the conduct." *Id.* cmt. e. And the cities urge a more aggressive test, arguing that California public-nuisance law does not even "require proof that the harms caused by the use of Defendants' fossil-fuel products outweigh the benefits of that use." CA9 Reply Br. 21 (ECF 118). In their view, they need only show "a hazardous condition that substantially and unreasonably interferes with a public right." *Id.* at 14. And while they recognize that climate change necessarily flows from the cumulative emissions of all global sources over decades, they claim these five energy companies are "jointly and severally liable" for all its effects. ER 297.

B. The district court's denial of remand.

The energy companies removed the cases to the district court, which addressed them together. Among other grounds for removal, the companies argued that the cities' claims arise under federal law because they "implicate[ ] uniquely federal interests" and thus can only be "governed by federal common law, and not state common law." ER 206–07.

Judge Alsup agreed that these claims "are necessarily governed by federal common law" and denied remand. App. 48a. District courts have original jurisdiction over "claims brought under federal common law." *Id.* And federal common law applies if "a federal rule of decision is 'necessary to protect uniquely

federal interests.'" *Id.* at 49a. Under *AEP* and *Illinois*, that "includes the general subject of environmental law and specifically includes ambient or interstate air and water pollution." *Id.* at 49a–50a.

The court explained that the cities' claims fall in such an exclusively federal area: "If ever a problem cried out for a uniform and comprehensive solution, it is the geophysical problem" of global climate change. App. 51a. "Taking the complaints at face value, the scope of the worldwide predicament demands the most comprehensive view available, which in our American court system means our federal courts and our federal common law." *Id.* And for similar reasons, a "patchwork of fifty different answers to the same fundamental global issue would be unworkable." *Id.* Climate change also "necessarily involves the relationships between the United States and all other nations." *Id.* at 55a–56a. Thus, "Plaintiffs' claims for public nuisance, though pled as state-law claims," arise under federal law. *Id.* at 55a.

Addressing the cities' counterarguments, the court held that "the well-pleaded complaint rule does not bar removal" because "a claim 'arises under' federal law if the dispositive issues stated in the complaint require the application of federal common law." App. 55a (quoting *Illinois*, 406 U.S. at 100). And jurisdiction does not depend on whether the claims have merit: Whether "plaintiffs' claims, if any, are governed by federal common law" is a separate question from "whether (or not) plaintiffs have stated claims for relief." *Id.* at 56a.

Although the district court certified its order for immediate interlocutory appeal, App. 56a, the cities declined that option, instead amending their complaints to add new plaintiffs and "to plead a separate

claim for public nuisance under federal common law," *id.* at 31a.

C. The district court's dismissal opinion.

Having resolved the "threshold issue" of "whether federal common law should govern," the district court turned to whether the cities' allegations stated a claim. App. 30a–31a. Its answer was no. The issue, the court explained, "is not over science," but whether plaintiffs stated a cognizable federal-common-law claim based on the theory "that defendants' sale of fossil fuels leads to their eventual combustion, which leads to more carbon dioxide in the atmosphere, which leads to more global warming and consequent ocean rise." *Id.* at 31a.

This theory is "breathtaking": "It would reach the sale of fossil fuels anywhere in the world, including all past and otherwise lawful sales, where the seller knew that the combustion of fossil fuels contributed to the phenomenon of global warming." App. 32a. As a result, "anyone who supplied fossil fuels with knowledge of the problem would be liable." *Id.* And since the cities "seek billions of dollars each," it seemed to the district court "a near certainty" that success for these and similarly situated plaintiffs "would make the continuation of defendants' fossil fuel production 'not feasible.'" *Id.* at 42a–43a.

The court concluded that federal common law does not confer a cause of action. App. 37a. Rather, the necessary "balancing" is "best left to Congress (or diplomacy)." *Id.* at 41a. These claims raise "questions of how to appropriately balance [climate change's] worldwide negatives against the worldwide positives of the energy itself, and of how to allocate the pluses and minuses among the nations of the world." *Id.* at 40a. The claims thus "demand the expertise of our

environmental agencies, our diplomats, our Executive, and at least the Senate." *Id.* "Nuisance suits in various United States judicial districts regarding conduct worldwide are far less likely to solve the problem and, indeed, could interfere with reaching a worldwide consensus." *Id.*

In particular, the global scope of the cities' theory counseled against recognizing a cause of action: The theory rests on "production and sale of fossil fuels worldwide," even though that activity is "lawful in every nation"—and indeed is "actively support[ed]" by "many foreign governments." App. 39a. "Nevertheless, plaintiffs would have a single judge or jury in California impose an abatement fund as a result of such overseas behavior," which "would effectively allow plaintiffs to govern conduct and control energy policy on foreign soil." *Id.* The court thus dismissed the case for failure to state a claim (and dismissed the claims against four defendants for lack of personal jurisdiction).

D. The Ninth Circuit's ruling.

The cities appealed, arguing that the well-pleaded complaint rule precluded removal. On their view, "the correct order of analysis" is "to determine, first, whether a particular federal cause of action is available, and only then to determine whether Congress intended that federal law to completely preempt the state law claim." CA9 Opening Br. 12 (ECF 30).

The Ninth Circuit agreed, vacating both the denial of remand and the dismissal. It started from the premise that, under the well-pleaded complaint rule, "a civil action arises under federal law for purposes of § 1331 when a federal question appears on the face of the complaint." App. 7a. The panel saw only two "exceptions": (i) "state-law claims that arise under

federal law for purposes of § 1331 'because federal law is 'a necessary element of the . . . claim for relief,'" exemplified by *Grable & Sons Metal Products, Inc.* v. *Darue Engineering & Manufacturing*, 545 U.S. 308 (2005), see App. 7a; and (ii) statutory complete preemption, which occurs when "the pre-emptive force of [a federal] statute is so 'extraordinary' that it converts an ordinary state common-law complaint into one stating a federal claim," App. 10a.

Having framed the issue that way, the court rejected the district court's jurisdictional analysis without further discussion. It then addressed the federal-common-law issue as part of the *Grable* inquiry, asking whether the cities' claims "require resolution of a substantial question of federal law." App. 12a. The court's answer was no: "Even assuming that the Cities' allegations could give rise to a cognizable claim for public nuisance under federal common law, the district court did not have jurisdiction under § 1331 because the state-law claim for public nuisance fails to raise a substantial federal question." *Id.* (citation omitted). In the Ninth Circuit's view, it was "not clear that the claim requires an interpretation or application of federal law at all, because the Supreme Court has not yet determined that there is a federal common law of public nuisance relating to interstate pollution, and we have held that federal public-nuisance claims aimed at imposing liability on energy producers . . . are displaced by the Clean Air Act." *Id.* at 13a (citation omitted). The court also rejected removal based on complete preemption under the Clean Air Act. *Id.* at 14a–16a.

Finally, the Ninth Circuit acknowledged that "the Cities cured any subject-matter jurisdiction defect by amending their complaints to assert a claim under federal common law" after the denial of remand, and

that they then litigated the case to judgment. App. 16a–17a. But the court held that "considerations of finality, efficiency, and economy" do not outweigh a plaintiff's challenge to removal when a case is resolved by a motion to dismiss, rather than after summary judgment or trial. *Id.* at 19a.

The Ninth Circuit thus vacated the district court's judgment and remanded the case "to determine whether there was an alternative basis for jurisdiction," emphasizing that "if there was not subject-matter jurisdiction at the time of removal, the cases must proceed in state court." App. 22a–23a. The companies sought rehearing, supported by the United States, which emphasized that the panel's "jurisdictional rulings" clashed with other circuits' decisions on issues "of exceptional importance." U.S. Reh'g Br. 2. The court denied rehearing.

E. The pending *Baltimore* case.

The City of Baltimore brought one of the other climate-change nuisance cases in Maryland court. As here, the defendants removed on several grounds, including federal common law. But the district court remanded and the Fourth Circuit affirmed, reading 28 U.S.C. § 1447(d) to restrict appellate review to the issue authorizing the appeal (there, federal-officer removal). This Court granted certiorari and scheduled oral argument in January 2021. Petitioners there ask the Court to hold that (i) § 1447(d) allows an appellate court to review the district court's entire remand order and (ii) the case was properly removed because Baltimore's claims necessarily arise under federal common law. See Br. for Petitioners 16–45, No. 19-1189.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's rejection of federal-common-law jurisdiction warrants review.

The Ninth Circuit's jurisdictional ruling contradicts this Court's precedent in two respects and conflicts with other circuits' decisions. First, the court concluded that the cities' tort claims alleging harm from interstate and global pollution implicated no substantial federal-law questions. But as this Court has explained, the Constitution's federal structure requires that claims in a few narrow areas be governed exclusively by uniform federal rules of decision. And interstate pollution is "undoubtedly" such an area. *AEP*, 564 U.S. at 421. Second, the Ninth Circuit held that, in any event, putative state-law claims are removable under 28 U.S.C. §§ 1331 and 1441 only if they satisfy *Grable* or are completely preempted by federal statute. But this Court's decisions establish another path for removal: Because federal law *exclusively* governs interstate-pollution claims, such a claim necessarily arises under federal law and is removable to federal court—even if the claim is framed under state law, and even if federal law does not ultimately provide a cause of action that would allow the claim to proceed. Other circuits have properly recognized these principles in various contexts. Review is warranted to resolve this lopsided conflict.

A. The Ninth Circuit's conclusion that federal common law does not govern interstate-pollution claims conflicts with this Court's decisions.

The Ninth Circuit believed it was "not clear" that the cities' claims implicated any federal-law issues, "because the Supreme Court has not yet determined that there is a federal common law of public nuisance

relating to interstate pollution." App. 13a. But this Court has made *very* clear that interstate pollution is one of the few areas that, given the constitutional structure, must be governed by federal law to the exclusion of state law. The Ninth Circuit thus "disregarded a longstanding line of Supreme Court cases holding that claims involving interstate air and water pollution arise directly under federal common law." U.S. Reh'g Br. 2. The cities' claims do not just implicate federal-law issues—they *are* federal claims.

After *Erie*, there "is no federal general common law." 304 U.S. at 78. But *Erie* did not question federal authority over "matters . . . so vitally affecting interests, powers and relations of the Federal Government as to require uniform national disposition rather than diversified state rulings." *Standard Oil*, 332 U.S. at 307. The "federal judicial power to deal with common-law problems" thus "remain[s] unimpaired for dealing independently, wherever necessary or appropriate, with essentially federal matters, even though Congress has not acted affirmatively about the specific question." *Id.* In these specialized areas, "where there is an overriding federal interest in the need for a uniform rule of decision," *Illinois*, 406 U.S. at 105 n.6, "state law cannot be used," *Milwaukee*, 451 U.S. at 313 n.7.

Interstate pollution is such an area. *Illinois* held, and *AEP* reiterated, that claims based on ambient, cross-border pollution arise under federal common law. "Environmental protection is undoubtedly an area . . . in which federal courts may . . . 'fashion federal law.'" *AEP*, 564 U.S. at 421. In particular, "[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law." *Id.* (quoting *Illinois*, 406 U.S. at 103). Likewise, "the regulation of interstate water pollution is a matter of

federal, not state, law." *Int'l Paper Co.* v. *Ouellette*, 479 U.S. 481, 488 (1987). And "the various federal environmental protection statutes will not necessarily mark the outer bounds of the federal common law" in this area. *Illinois*, 406 U.S. at 103 n.5. So as *Illinois* explained: "Federal common law and not the varying common law of the individual States is . . . necessary to be recognized as a basis for dealing in uniform standard with the environmental rights of a State against improper impairment by sources outside its domain." *Id.* at 107 n.9. Such claims thus "aris[e] under the laws of the United States." *Id.* at 100.

The conclusion that federal law must apply here, and state law cannot, flows directly from the constitutional structure. As the Court explained on the same day it decided *Erie*, an interstate environmental dispute necessarily presents "a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive." *Hinderlider*, 304 U.S. at 110 (citing, *e.g.*, *Kansas* v. *Colorado*, 206 U.S. 46, 97 (1907)). Allowing state law to govern such claims would permit one state to "impose its own legislation on . . . the others," violating the "cardinal" principle that "[e]ach State stands on the same level with all the rest." *Kansas*, 206 U.S. at 97; see also Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. Pa. L. Rev. 1245, 1322–24 (1996) (federal-common-law rules governing interstate claims "implement the constitutional equality of the states"). As several States recently told this Court in *Baltimore*, "each State is afforded regulatory autonomy because *other* States' policy prerogatives stop at the state line." Br. of Indiana *et al.* as *Amici Curiae* 25, No. 19-1189. Thus, courts in a single State cannot make a "one-size-fits-all policy"

for the whole Nation. *Id.* In turn, as the United States explained, "putative tort claims that seek to apply the law of an affected State to conduct in *another* State . . . arise under 'federal, not state, law.'" Br. for the United States as *Amicus Curiae* 27, No. 19-1189.

Federal law also exclusively governs claims that implicate the federal division of sovereignty between the States and the United States. Foreign affairs is the most obvious example, presenting "uniquely federal" questions. See *Sabbatino*, 376 U.S. at 424. Thus, "an issue concerned with . . . ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law." *Id.* at 425. In this area, "state courts [are] not left free to develop their own doctrines." *Id.* at 426; see 19 Wright & Miller, *Federal Practice and Procedure: Jurisdiction* § 4514 (3d ed. 2020). The Constitution's exclusive allocation of foreign affairs authority to the federal government "reflect[s] a concern for uniformity in this country's dealings with foreign nations and indicat[es] a desire to give matters of international significance to the jurisdiction of federal institutions." *Sabbatino*, 376 U.S. at 427 n.25.

These principles apply fully here. As the district court recognized, the "global" scope of the cities' claims "implicat[es] the conflicting rights of States [and] our relations with foreign nations." App. 49a–50a. By "seek[ing] to impose liability for conduct occurring on and impacting federal property and in other States," these claims attempt to impose California's law beyond its borders. See U.S. Reh'g Br. 11.

Beyond these structural limitations, the Ninth Circuit's approach would create significant policy con-

flicts, both domestically and internationally. State courts would inevitably reach differing answers in these cases, producing a "patchwork of fifty different answers to the same fundamental global issue." App. 51a; cf. Indiana *et al.* Reh'g Br. 18 (ECF 186) ("Each State's policy reflects a State-specific balancing of the costs and benefits of climate change regulation."). And by "bring[ing] claims against defendants for having put fossil fuels into the flow of international commerce," the cities "attack behavior worldwide": "While some of the fuel produced by defendants is certainly consumed in the United States . . . , greenhouse gases emanating from overseas sources are equally guilty (perhaps more so) of causing plaintiffs' harm." App. 54a. The cities' theory thus "would effectively allow plaintiffs to govern conduct and control energy policy on foreign soil." *Id.* at 39a. These claims therefore "involve[ ] the relationships between the United States and all other nations." *Id.* at 55a–56a.

Further, as the United States explained below, "the federal interests in the subject matter are acute": "federal law and policy" have long treated fossil fuels as "strategically important domestic resources." U.S. Reh'g Br. 10 (citing 42 U.S.C. § 15927(b)(1), (c)). The cities' attempt to end domestic production would make the United States dependent on foreign fossil fuels. What is more, the U.S. military "is the world's largest institutional user of petroleum and correspondingly, the single largest institutional producer of greenhouse gases." Neta C. Crawford, *Pentagon Fuel Use, Climate Change, and the Costs of War* 2, Watson Inst. Int'l & Pub. Affairs (rev. Nov. 13, 2019). The military would be severely impacted if domestic production were massively curtailed, as the cities seek.

For all these reasons, there is "an overriding federal interest in the need for a uniform rule of decision" here. See *Illinois*, 406 U.S. at 105 n.6; *City of New York* v. *BP P.L.C.*, 325 F. Supp. 3d 466, 471 (S.D.N.Y. 2018) (holding that materially identical claims are "exactly the type of 'transboundary pollution suit[ ]' to which federal common law should apply"), *appeal docketed*, No. 18-2188 (2d Cir. July 26, 2018).

The Ninth Circuit's contrary conclusion misunderstands the interaction between state and federal common law. The cities argued below that, because *AEP* and *Native Village of Kivalina* v. *ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012), held that "the federal common law governing greenhouse-gas emissions has been entirely displaced by the Clean Air Act" (CAA), state common law is available unless the CAA preempts it. CA9 Opening Br. 14, 17. The Ninth Circuit appeared to agree, suggesting that "a state-law nuisance claim" might be viable. App. 13a–14a. But in cases that involve "interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations," only federal law can apply because "our federal system does not permit the controversy to be resolved under state law" at all. *Tex. Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). Thus, whether the CAA would preempt state law is irrelevant—no state law exists here. See Br. for the United States as *Amicus Curiae* 27, No. 19-1189.

Nor can the cities avoid federal law by asserting claims nominally aimed at fossil-fuel production and "deceptive[ ]" marketing rather than emissions. App. 52a & n.2. The cities do not claim harm from production or sales alone. Rather, their alleged harms—the effects of global climate change—all flow from greenhouse-gas *emissions*. *Id.*; see *City of New York*, 325

F. Supp. 3d at 471–72. Indeed, their theory of harm depends on all these emissions, across the globe, since the industrial revolution. *E.g.*, ER 297. On this theory, production and sales alone would create no liability. And it does not matter that the cities seek monetary instead of injunctive relief; damages regulate conduct too, particularly in the amounts contemplated. *E.g.*, *Kurns* v. *R.R. Friction Prods. Corp.*, 565 U.S. 625, 637 (2012).

The cities thus seek to regulate interstate and international greenhouse-gas emissions—precisely the sort of claim federal law exclusively governs. The Ninth Circuit's contrary conclusion conflicts with this Court's decisions.

B. The Ninth Circuit's application of the well-pleaded complaint rule conflicts with decisions of this Court and other circuits.

The Ninth Circuit also erred by holding that the well-pleaded complaint rule bars removal of putative state-law claims unless they satisfy *Grable* or are completely preempted by federal statute. This Court's precedents show—and other circuits hold—that claims governed exclusively by federal common law are removable, however the plaintiff labels them and whether or not they are cognizable under federal law.

1. It is "well settled" that § 1331's "grant of 'jurisdiction will support claims founded upon federal common law.'" *Nat'l Farmers Union Ins. Cos.* v. *Crow Tribe*, 471 U.S. 845, 850 (1985). District courts thus have original jurisdiction whenever "the dispositive issues stated in the complaint require the application of federal common law." *Illinois*, 406 U.S. at 100; see also *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 745 n.*

(2004) (Scalia, J., concurring) (noting that a post-*Erie* "federal-common-law cause of action . . . 'arise[s] under' the laws of the United States, not only for purposes of Article III but also for purposes of *statutory* federal-question jurisdiction"). In turn, such cases are removable from state court. See 28 U.S.C. § 1441(a) (allowing removal of "any civil action" within the district courts' "original jurisdiction").

The Ninth Circuit failed to apply this rule because it misunderstood the relationship between state law and federal common law. To be sure, plaintiffs can usually avoid removal by pleading only state-law claims, even if federal claims are available. *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 392 (1987). But in an area that the Constitution instructs is governed *exclusively* by federal law, state law cannot apply. As just explained, "if federal common law exists, it is because state law cannot be used." *Milwaukee*, 451 U.S. at 313 n.7. In turn, a plaintiff asserting claims in one of these "narrow areas" cannot choose between state and federal law because *no state law exists*. See *Tex. Indus.*, 451 U.S. at 641. "As a matter of constitutional structure, any claims asserted in this area are inherently federal." U.S. Reh'g Br. 5.

The Ninth Circuit was thus wrong to hold that the well-pleaded complaint rule barred removal. App. 6a. An "independent corollary of the well-pleaded complaint rule" holds "that a plaintiff may not defeat removal by omitting to plead *necessary* federal questions." *Franchise Tax Bd.* v. *Constr. Laborers Vacation Tr.*, 463 U.S. 1, 22 (1983) (emphasis added). That is, "a plaintiff cannot frustrate a defendant's right to remove by pleading a case without reference to any federal law when the plaintiff's claim is necessarily federal." See 14C Wright & Miller, *Federal Practice and Procedure: Jurisdiction* § 3722.1 (rev.

4th ed. 2020). As a result, a federal court must sometimes "determine whether the real nature of the claim is federal, regardless of plaintiff's characterization." *Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394, 397 n.2 (1981). While the Court has applied this artful-pleading principle in complete-preemption cases involving federal statutes, there is "[n]o plausible reason" why "the appropriateness of and need for a federal forum should turn on whether the claim arose under a federal statute or under federal common law." Richard H. Fallon, Jr. et al., *Hart & Wechsler's the Federal Courts and the Federal System* 818 (7th ed. 2015); Br. for the United States as *Amicus Curiae* 28, No. 19-1189. The Ninth Circuit thus contradicted this Court's precedent by treating the cities' state-law label as dispositive.

The Ninth Circuit was also wrong to suggest that a claim cannot be removed unless a *viable* federal cause of action exists. App. 45a. The cities argued that federal jurisdiction is lacking "[w]hen a federal law arguably eliminates a state law claim without substituting rights and remedies of its own." CA9 Opening Br. 11. The Ninth Circuit apparently agreed, questioning whether "the Cities' allegations could give rise to a *cognizable* claim for public nuisance under federal common law." App. 12a (emphasis added). But the court of appeals "confused the question whether the subject matter of the claims asserted is governed by federal common law with the [question] whether federal law ultimately provides a cause of action on the merits." U.S. Reh'g Br. 8. These questions are distinct: "Recognition that a subject is meet for federal law governance . . . does not necessarily mean that federal courts should create the controlling law." *AEP*, 564 U.S. at 422.

Standard Oil shows the proper two-step analysis. At the first (jurisdictional) step, this Court held that federal common law, not state law, controlled the "essentially federal" question of whether the government could recover for the hospital costs and lost services of a soldier hurt in a traffic accident. 332 U.S. at 307. But that did not mean the government had a viable cause of action. At the second (merits) step, this Court emphasized its "modest" capacity "to create new common-law liabilities," and held that establishing the claim was a task for Congress, "not for any creative power of ours." *Id.* at 313–14, 316. The claim thus arose under federal common law even though no federal cause of action existed.

So, as the First Circuit has aptly summarized *Standard Oil*'s analysis: "As long as the source of the rule to be applied is federal, the . . . case is one 'arising under' federal law . . . regardless of what the . . . substance [of the federal rule] eventually may prove to be." *United States* v. *Swiss Am. Bank, Ltd.*, 191 F.3d 30, 45 (1st Cir. 1999). Indeed, in the statutory complete-preemption context, this Court has rejected the argument that "a case may not be removed to federal court . . . unless the federal cause of action relied upon provides the plaintiff with a remedy." *Williams*, 482 U.S. at 391 n.4. In turn, while the district court ultimately held—correctly, in Petitioners' view—that the cities lack a viable federal cause of action, that question is not relevant to the jurisdictional question this petition presents.

2. The decision below conflicts with decisions from other circuits. In several contexts involving uniquely federal interests, courts have recognized that claims asserted in an exclusively federal area arise under federal common law and create federal jurisdiction—no matter how they are pled.

The Fifth and Seventh Circuits have upheld "federal question jurisdiction based on the federal common law that controls an action seeking to recover damages against an airline for lost or damaged shipments." *Majors Jewelers*, 117 F.3d at 923. *Majors Jewelers* affirmed the removal of putative state-law claims filed in state court against an airline for lost luggage. The Fifth Circuit explained—contrary to the decision below, App. 7a—that a case is removable in *three* situations: (i) if there is a federal statutory cause of action; (ii) if the subject "is completely preempted"; *or* (iii) "if the cause of action arises under federal common law." 117 F.3d at 924. And the plaintiff's claims, while pled as state-law claims, see *id.*, "ar[ose] under federal common law," *id.* at 929. They were thus removable even though they did "not arise under a federal statute and . . . jurisdiction [was] not supported by complete preemption." *Id.* at 926.

The Seventh Circuit endorsed *Majors Jewelers* in another air-carrier case. *Treiber & Straub, Inc.* v. *UPS, Inc.*, 474 F.3d 379 (7th Cir. 2007). Although *Treiber & Straub* was filed in federal court, the plaintiff did not invoke federal common law, instead invoking jurisdiction under inapplicable federal statutes, and asserted state-law claims. *Id.* at 383. The court held that a claim in this area "arises under federal common law and thus falls within the district court's federal question jurisdiction." *Id.* at 384. And because the claim arose under federal common law, there was no "separate state [law] theory left." *Id.* at 384, 387.

The Fourth Circuit has affirmed removal of a state-court complaint alleging a putative "state law claim for breach of [a federal health] insurance contract." *Caudill*, 999 F.2d at 77. The court explained that "some areas involving 'uniquely federal interests' may

be so important to the federal government that a 'federal common law' related to those areas will supplant state law . . . regardless of whether Congress has shown any intent to preempt the area." *Id.* at 78. And the court held that this test was satisfied by the federal health-benefit contracts at issue. See *id.* at 78–79. While this Court later disagreed that uniform federal-common-law rules govern federal health-benefit contracts, see *Empire Healthchoice Assurance, Inc.* v. *McVeigh*, 547 U.S. 677, 693 (2006), it did not disturb *Caudill*'s independent holding that putative state-law claims are removable if they arise in an area implicating uniquely federal interests.

The Eighth Circuit has similarly found federal jurisdiction over a removed state-court complaint that raised putative state-law claims. *Otter Tail*, 116 F.3d at 1215. The complaint "raise[d] important questions of federal law requiring interpretation of treaties, federal statutes, and the federal common law of inherent tribal sovereignty." *Id.* In that situation, the "plaintiff's characterization of a claim as based solely on state law is not dispositive" because the complaint "necessarily presents a federal question," and removal is proper. *Id.* at 1213–14.

Likewise, the Second Circuit has upheld federal jurisdiction over claims governed by the federal common law of foreign relations. In *Republic of Philippines* v. *Marcos*, the Philippine government sought an injunction in state court against its former president's transfer of properties. 806 F.2d 344, 346 (2d Cir. 1986). Although "the face of the complaint" asserted a claim "akin to a state cause of action for conversion," the Second Circuit held that removal was proper: The "action arises under federal law" because it "necessarily require[s] determinations that will directly and significantly affect American foreign rela-

tions," see *id.* at 352–54. In such a case, "federal common law" should "displace a purely state cause of action," *id.* at 354, and "there is federal question jurisdiction," *id.* at 353. In any event, removal was proper because the claim raised "a federal question to be decided with uniformity as a matter of federal law, and not separately in each state." *Id.* at 354.

Other cases uphold federal jurisdiction over claims implicating federal common law using a *Grable*-type analysis. These cases ask, as the Ninth Circuit did, whether the complaint raises a "substantial question of federal law." But the outcome of these cases conflicts with the Ninth Circuit's view that plaintiffs can opt to plead only state-law claims, and thus avoid removal, in an area where federal common law exclusively governs.

For example, the Fourth Circuit reversed the remand of a homeowner's state-law claims against his flood insurer. *Battle* v. *Seibels Bruce Ins. Co.*, 288 F.3d 596, 598 (4th Cir. 2002). Although the complaint did not invoke federal law, federal jurisdiction existed because "federal common law *alone* governs the interpretation" of flood insurance policies. *Id.* at 607 & n.17; see also *Newton* v. *Capital Assurance Co.*, 245 F.3d 1306, 1309 (11th Cir. 2001) (similar). And the Fifth Circuit has affirmed removal of "state-law tort claims" against a foreign company—despite the plaintiffs' invocation of "the well-pleaded complaint rule"—because the case "raise[d] substantial questions of federal common law by implicating important foreign policy concerns." *Torres* v. *S. Peru Copper Corp.*, 113 F.3d 540, 542–43 (5th Cir. 1997).

Each of these other circuits recognizes that claims asserted in an area governed exclusively by federal common law arise under federal law and create fed-

eral jurisdiction—however they are pled, and whatever approach to federal jurisdiction applies.

II. The Ninth Circuit deepened a circuit split by letting the cities contest removal after amending their complaint to assert federal claims and litigating those claims to judgment.

The Ninth Circuit erred in a second, independent respect. After the district court denied remand, the cities "cured any subject-matter jurisdiction defect by amending their complaints to assert a claim under federal common law" and then litigated the case to final judgment. App. 16a–17a; see *id.* at 31a. Yet the court still let the cities contest removal on appeal. *Id.* at 16a–22a. That ruling conflicts with decisions of this Court and widens two independent circuit splits.

First, the circuits are divided on whether, and when, a post-removal amendment that establishes federal jurisdiction waives the plaintiff's right to keep challenging whether jurisdiction existed at the time of removal. *Second*, courts disagree about whether, and when, a plaintiff's challenge to removal is mooted if the case reaches final judgment in federal court, based mainly on differing readings of *Caterpillar, Inc.* v. *Lewis*, 519 U.S. 62 (1996). Both questions arise frequently; both have substantial implications for economy, efficiency, and fairness. Yet in an area related to jurisdiction, where clarity is vital, the circuits remain divided.

1. The decision below widened the split on waivers of challenges to removal. The Ninth Circuit held that the cities did *not* waive their removal challenge when they added federal claims and new plaintiffs. App. 16a–22a. That decision tracks the Fifth Circuit's

view. See *Camsoft Data Sys., Inc.* v. *S. Elecs. Supply, Inc.*, 756 F.3d 327, 338 (5th Cir. 2014).

Three other circuits disagree. For example, the Second Circuit has explained that "if a district court erroneously exercises removal jurisdiction over an action, and the plaintiff voluntarily amends the complaint to allege federal claims, we will not remand for want of jurisdiction." *Barbara* v. *N.Y. Stock Exch., Inc.*, 99 F.3d 49, 56 (2d Cir. 1996), *abrogated on other grounds by Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Manning*, 136 S. Ct. 1562 (2016). Likewise, the Seventh Circuit declined to remand an improperly removed case because the plaintiff added an "unmistakable federal cause of action," thus "thr[o]w[ing] in the towel" on jurisdiction. *Bernstein* v. *Lin-Waldock & Co.*, 738 F.2d 179, 185 (7th Cir. 1984). See also *Brough* v. *United Steelworkers of Am.*, 437 F.2d 748, 749–50 (1st Cir. 1971) ("Clearly plaintiff cannot be permitted to invoke the jurisdiction of the federal court, and then disclaim it when he loses.").[1]

The Ninth Circuit's rule—allowing plaintiffs to exploit the federal forum but return to state court if they lose on the merits—wastes resources and encourages gamesmanship. Under this rule, a plaintiff "would be in a position where if he won his case on the merits in federal court he could claim to have raised the federal question in his amended complaint voluntarily, and if he lost he could claim to have raised it involuntarily and to be entitled to start over

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[1] Some circuits do not find waiver if the amendment is "involuntary"—if, for example, the court orders the plaintiff to amend or face dismissal. *See In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 929 (8th Cir. 2005). No such argument applies here. Indeed, although the district court certified the remand order for immediate appeal, App. 56a, the cities declined and instead amended their complaint to add a federal claim.

in state court." *Bernstein*, 738 F.2d at 185. This Court should resolve the conflict and hold that voluntarily amending a complaint to add federal claims waives the right to challenge removal.

2. The decision below widened an entrenched split on whether plaintiffs may challenge removal on appeal even when federal jurisdiction indubitably exists at final judgment. This split reflects divergent readings of *Caterpillar*, which explained that "a district court's error in failing to remand a case improperly removed is not fatal to the ensuing adjudication if federal jurisdictional requirements are met at the time judgment is entered." 519 U.S. at 64. Here, the Ninth Circuit decided that, despite the district court's undisputed jurisdiction at final judgment, the cities' removal challenge was not moot because the case had been resolved on a motion to dismiss, not after trial or other extensive proceedings. App. 19a.

In doing so, the Ninth Circuit effectively joined the Fifth Circuit, which interprets *Caterpillar*'s teachings about the mootness of a removal challenge to apply *only* after trial. See *Camsoft*, 756 F.3d at 338. Similarly, the Sixth Circuit has found that *Caterpillar* had "its limits" and that a pretrial judgment may not be "weighty enough" to overcome a plaintiff's objection to improper removal. *Gentek Bldg. Prods., Inc.* v. *Sherwin-Williams Co.*, 491 F.3d 320, 327 (6th Cir. 2007). Following the Fifth Circuit, the Sixth Circuit reasoned that *Caterpillar* should not apply when the final judgment results from a motion to dismiss. *Id.* (*Caterpillar*'s application is "greatly influenced" by whether there is a "trial on the merits"); see also *Thermoset Corp.* v. *Bldg. Materials Corp.*, 849 F.3d 1313, 1321 (11th Cir. 2017) (finding summary judgment an insufficient basis to deny remand under *Caterpillar*).

In contrast, several circuits hold that "*Caterpillar* applies not only after a trial but also when 'judgment is based on . . . a district court's ruling on a dispositive motion.'" *Paros Props., LLC* v. *Colo. Cas. Ins. Co.*, 835 F.3d 1264, 1273 (10th Cir. 2016). Indeed, the Eighth Circuit reads *Caterpillar* to state "a categorical rule" that a case should not be remanded if the court had jurisdiction at final judgment, "not a case-by-case inquiry into how much time was spent litigating." *Ellingsworth* v. *Vermeer Mfg. Co.*, 949 F.3d 1097, 1100 (8th Cir. 2020). And the Fourth Circuit reads *Caterpillar* to moot challenges to remand *even before* judgment, because "[r]equiring pointless movement between state and federal court before a case is tried on the merits can likewise impose significant costs on both courts and litigants." *Moffitt* v. *Residential Funding Co.*, 604 F.3d 156, 160 (4th Cir. 2010).

The erroneous approach embraced by the Fifth, Sixth, Ninth, and Eleventh Circuits—that a final judgment granting a motion to dismiss does not trigger the *Caterpillar* rule—yields unpredictable and arbitrary results. Lines that determine jurisdiction should be bright and incorporate appropriate incentives. See *Direct Mktg. Ass'n* v. *Brohl*, 135 S. Ct. 1124, 1133 (2015). *Caterpillar* decided that removal defects are "not fatal . . . if federal jurisdictional requirements are met at the time judgment is entered." 519 U.S. at 64. And while this Court cited efficiency and economy considerations, it also emphasized finality: "To wipe out the adjudication postjudgment, and return to state court a case now satisfying all federal jurisdictional requirements, would impose an exorbitant cost on our dual court system, a cost incompatible with the fair and unprotracted administration of justice." *Id.* at 77.

This Court should confirm the bright-line rule that, where federal jurisdiction exists at final judgment, challenges to removal are moot. Pointless movement between federal and state courts is inefficient for courts and parties. Under the proper rule, the Ninth Circuit erred by allowing the cities to dispute jurisdiction on appeal.

* * *

The Court should grant review to resolve these conflicts and, on these independent grounds, hold that the cities waived their challenges to removal or that those challenges were moot.

III. The questions presented are important, and this case is an excellent vehicle.

1. The questions presented are important and recurring. Climate change is a serious issue, and addressing that issue is one of the most pressing public policy challenges today. But neither governing law nor common sense supports resolving this complex, difficult issue through potentially countless and conflicting state-court nuisance actions. As the United States argued in *AEP*, "[t]he confluence in this case of several factors—including countless potential plaintiffs and defendants, the lack of judicial manageability, and the unusually broad range of underlying policy judgments that would need to be made—demonstrates that plaintiffs' concerns about climate change should be resolved by the representative Branches." Br. for TVA as Resp't Supporting Pet'rs 20, No. 10-174. The decision below "would encourage courts to use vague public nuisance standards to scuttle the nation's carefully created system for accommodating the need for energy production and the need for clean air," leading to "a confused patchwork of standards, to the detriment of industry and the en-

vironment alike." *North Carolina*, 615 F.3d at 296. In fact, the district court concluded that, if the cities' theory were viable, the resulting mess of litigation and conflicting state-court rules could render continued fossil-fuel production "not feasible." App. 42a. The potential impact of this litigation thus favors immediate review.

Indeed, as the *Baltimore* petitioners explained, the Court should hold that Baltimore's claims were properly removed because (as here) they necessarily arise under federal law. But if the Court does not reach that question in *Baltimore*, it should do so here.

More broadly, whether a purported state-law claim is removable because it arises exclusively under federal common law is a significant jurisdictional question that warrants review—especially given the Ninth Circuit's departure from the rule so many other circuits apply. This issue arises in several contexts of unique federal importance, from interstate pollution to foreign affairs to tribal relations. Likewise, questions of whether and when a plaintiff can challenge removal on appeal after the removal defect has been cured arise often and have split the circuits. This Court has reviewed "many cases" "involving federal jurisdiction," including removal jurisdiction. Eugene Gressman et al., *Supreme Court Practice* § 4.15 (9th ed. 2007). It should do so here too.

2. This case is an excellent vehicle to resolve the questions presented. Both questions are squarely presented, and both were pressed and passed upon below. The Court should not wait for a state trial court to decide a public nuisance claim based on global climate change and then for the state appellate courts to review its judgment before determining whether these many cases belong in federal or state court. Throughout that process, the specter of liabil-

ity and the harm caused by persistent uncertainty will hang over the energy industry and the economy. And the political branches' ongoing international climate-change efforts will be disrupted or stymied. Nor is a trial needed to see that this issue is not fit for regulation-by-litigation, let alone under multiple, varying state tort standards. Climate change calls for uniform national and international standards. This Court granted review in *AEP* in a similar posture.

CONCLUSION

The Court should hold this petition for *Baltimore*, No. 19-1189. If that case does not decide the first question presented here in petitioners' favor, the Court should grant this petition.

Respectfully submitted,

KANNON K. SHANMUGAM
JUSTIN ANDERSON
WILLIAM T. MARKS
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
2001 K St. NW
Washington, DC 20006

THEODORE V. WELLS, JR.
DANIEL J. TOAL
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019

M. RANDALL OPPENHEIMER
DAWN SESTITO
O'MELVENY & MYERS LLP
400 South Hope St.
Los Angeles, CA 90071

Counsel for Exxon Mobil Corporation

DAVID C. FREDERICK
BRENDAN J. CRIMMINS
DANIEL S. SEVERSON
KELLOGG, HANSEN,
TODD, FIGEL &
FREDERICK, P.L.L.C.
1615 M St. NW
Suite 400
Washington, DC 20036

Counsel for Royal Dutch Shell plc

PETER D. KEISLER*
VIRGINIA A. SEITZ
C. FREDERICK BECKNER III
RYAN C. MORRIS
TOBIAS S. LOSS-EATON
SIDLEY AUSTIN LLP
1501 K St. NW
Washington, DC 20005
(202) 736-8000
pkeisler@sidley.com

THEODORE J. BOUTROUS, JR.
THOMAS G. HUNGAR
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave. NW
Washington, DC 20036

Counsel for Chevron Corporation

SEAN C. GRIMSLEY
JAMESON R. JONES
DANIEL R. BRODY
BARTLIT BECK LLP
1801 Wewatta St.
Suite 1200
Denver, CO 80202

Counsel for ConocoPhillips

NANCY G. MILBURN
ARNOLD & PORTER KAYE
SCHOLER LLP
250 West 55th St.
New York, NY 10019

JONATHAN W. HUGHES
MATTHEW T. HEARTNEY
JOHN D. LOMBARDO
ARNOLD & PORTER KAYE
SCHOLER LLP

Three Embarcadero Center,
10th Floor
San Francisco, CA 94111

ETHAN G. SHENKMAN
ARNOLD & PORTER KAYE
SCHOLER LLP
601 Massachusetts Ave. NW
Washington, DC 20001

Counsel for BP p.l.c.

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* Counsel of Record