No.

In the Supreme Court of the United States

SUNCOR ENERGY (U.S.A.) INC., ET AL., PETITIONERS

v.

BOARD OF COUNTY COMMISSIONERS
OF BOULDER COUNTY, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether federal common law necessarily and exclusively governs claims seeking redress for injuries allegedly caused by the effect of interstate greenhouse-gas emissions on the global climate.

2. Whether a federal district court has jurisdiction under 28 U.S.C. 1331 over claims necessarily and exclusively governed by federal common law but labeled as arising under state law.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners are Suncor Energy (U.S.A.) Inc.; Suncor Energy Sales Inc.; Suncor Energy Inc.; and Exxon Mobil Corporation.

Petitioner Suncor Energy Sales Inc. is wholly owned by petitioner Suncor Energy (U.S.A.) Inc., which is wholly owned by Suncor Energy (U.S.A.) Holdings Inc., which is wholly owned by petitioner Suncor Energy Inc. Suncor Energy Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

Petitioner Exxon Mobil Corporation has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondents are the Board of County Commissioners of Boulder County; the Board of County Commissioners of San Miguel County; and the City of Boulder.

RELATED PROCEEDINGS

United States District Court (D. Colo.):

Board of County Commissioners of Boulder County, et al. v. *Suncor Energy (U.S.A.) Inc., et al.*, Civ. No. 18-1672 (Sept. 5, 2019)

United States Court of Appeals (10th Cir.):

Board of County Commissioners of Boulder County, et al. v. *Suncor Energy (U.S.A.) Inc., et al.*, No. 19-1330 (July 7, 2020) (vacated judgment)

Board of County Commissioners of Boulder County, et al. v. *Suncor Energy (U.S.A.) Inc., et al.*, No. 19-1330 (Feb. 8, 2022) (final judgment)

United States Supreme Court:

Suncor Energy (U.S.A.) Inc., et al. v. *Board of County Commissioners of Boulder County, et al.*, No. 19A428 (Oct. 22, 2019)

Suncor Energy (U.S.A.) Inc., et al. v. *Board of County Commissioners of Boulder County, et al.*, No. 20-783 (June 25, 2021)

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 2
Statutory provision involved 2
Statement 2
A. Background 5
B. Facts and procedural history 7
Reasons for granting the petition 11
A. The decision below implicates a conflict among the courts of appeals on the first question presented 11
B. The decision below deepens a conflict among the courts of appeals on the second question presented 17
C. The decision below is incorrect 24
D. The questions presented are important and warrant the Court's review in this case 29
Conclusion 32
Appendix A 1a
Appendix B 60a

TABLE OF AUTHORITIES

Cases:

American Electric Power Co. v. *Connecticut*, 564 U.S. 410 (2011) ..... *passim*
Arbaugh v. *Y&H Corp.*, 546 U.S. 501 (2006) 26
BP p.l.c. v. *Mayor & City Council of Baltimore*, 141 S. Ct. 1532 (2021) ..... *passim*
Caterpillar Inc. v. *Williams*, 482 U.S. 386 (1987) 11, 20, 28
Caudill v. *Blue Cross & Blue Shield of North Carolina*, 999 F.2d 74 (4th Cir. 1993) 23

Page

Cases—continued:

City of Milwaukee v. *Illinois*,
451 U.S. 304 (1981) 13, 26, 30
City of New York v. *Chevron Corp.*,
993 F.3d 81 (2d Cir. 2021) ..... *passim*
City of Oakland v. *BP plc*:
Civ. No. 17-6011, 2018 WL 1064293
(S.D. Cal. Feb. 27, 2018) 22
969 F.3d 895 (9th Cir. 2020),
cert. denied, 141 S. Ct. 2776 (2021) 21, 22, 31
County of San Mateo v. *Chevron Corp.*,
32 F.4th 733 (9th Cir. 2022) 8, 22
Devils Lake Indian Sioux Tribe v. *North Dakota Public Service Commission*,
896 F. Supp. 955 (D.N.D. 1995) 18
Erie Railroad Co. v. *Tompkins*, 304 U.S. 64 (1938) 6, 27
Federated Department Stores, Inc. v. *Moitie*,
452 U.S. 394 (1981) 6
Franchise Tax Board v. *Construction Laborers Vacation Trust*, 463 U.S. 1 (1983) 6, 20, 28
Grable & Sons Metal Products, Inc. v. *Darue Engineering & Manufacturing*,
545 U.S. 308 (2005) 21, 22, 29
Home Depot U.S.A., Inc. v. *Jackson*,
139 S. Ct. 1743 (2019) 5
Illinois v. *City of Milwaukee*, 406 U.S. 91 (1972) ..... *passim*
International Paper Co. v. *Ouellette*,
479 U.S. 481 (1987) 24, 25
Mayor & City Council of Baltimore v. *BP p.l.c.*,
31 F.4th 178 (4th Cir. 2022) ..... *passim*
National Farmers Union Insurance Cos. v. *Crow Tribe of Indians*,
471 U.S. 845 (1985) 6, 19, 27
Native Village of Kivalina v. *ExxonMobil Corp.*,
696 F.3d 849 (9th Cir. 2012) 14

Page

Cases—continued:

North Carolina Department of Administration v. *Alcoa Power Generating, Inc.*, 853 F.3d 140 (4th Cir. 2017) 23
Oneida Indian Nation v. *County of Oneida*, 414 U.S. 661 (1974) 26
Otter Tail Power Co., *In re*, 116 F.3d 1207 (8th Cir. 1997) 18, 19
Rhode Island v. *Shell Oil Products Co.*, Civ. No. 19-1818, 2022 WL 1617206 (1st Cir. May 23, 2022) 8, 16, 17
Sam L. Majors Jewelers v. *ABX, Inc.*, 117 F.3d 922 (5th Cir. 1997) 19, 20
Tennessee v. *Davis*, 100 U.S. 257 (1879) 29
Texas Industries, Inc. v. *Radcliff Materials, Inc.*, 451 U.S. 630 (1981) 6, 7, 24, 26
Torres v. *Southern Peru Copper Corp.*, 113 F.3d 540 (5th Cir. 1997) 20
United States v. *Lara*, 541 U.S. 193 (2004) 18
United States v. *Standard Oil Co.*, 332 U.S. 301 (1947) 6, 26
Vaden v. *Discover Bank*, 556 U.S. 49 (2009) 6

Constitution, statutes, and rule:

U.S. Const.:
Art. III, § 2 5
Art. III, § 2, cl. 1 5
Clean Air Act, 42 U.S.C. §§ 7401-7671q ..... *passim*
28 U.S.C. 1254(1) 2
28 U.S.C. 1331 ..... *passim*
28 U.S.C. 1441(a) ..... *passim*
28 U.S.C. 1442 8
28 U.S.C. 1447(d) 2, 10
Fed. R. Civ. P. 12(b)(6) 15

Miscellaneous:

Richard H. Fallon, Jr., et al., *Hart & Wechsler's Federal Courts and the Federal System* (7th ed. 2015)..... 28, 29
Charles Alan Wright et al., *Federal Practice and Procedure* (4th ed. 2018)..... 28

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PETITION FOR A WRIT OF CERTIORARI

Suncor Energy (U.S.A.) Inc.; Suncor Energy Sales Inc.; Suncor Energy Inc.; and Exxon Mobil Corporation respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-59a) is reported at 25 F.4th 1238. The opinion of the district court (App., *infra*, 60a-114a) is reported at 405 F. Supp. 3d 947. A prior opinion of the court of appeals is reported at 965 F.3d 792.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 2022. On April 29, 2022, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to and including June 8, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1331 of Title 28 of the United States Code provides:

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

Section 1441(a) of Title 28 of the United States Code 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.

STATEMENT

This case presents two questions the Court left open in *BP p.l.c.* v. *Mayor & City Council of Baltimore*, 141 S. Ct. 1532 (2021), involving claims seeking redress for injuries allegedly caused by the effect of interstate greenhouse-gas emissions on the global climate. In *BP*, the Court held that a court of appeals has jurisdiction under 28 U.S.C. 1447(d) to review all grounds for removal in a case where removal is premised in part on the federal-officer or civil-rights removal statutes. The Court declined

at the time to decide whether the district court had federal-question jurisdiction over such claims based on the Court's precedents applying federal rules of decision to common-law claims seeking redress for injuries allegedly caused by interstate pollution. In this case, after the Court vacated a prior decision of the court of appeals and remanded in light of *BP*, the court of appeals held that a district court lacked jurisdiction over such claims.

The questions presented in this case are, first, whether federal common law necessarily and exclusively governs claims seeking redress for injuries allegedly caused by the effect of interstate greenhouse-gas emissions on the global climate, and second, whether a federal district court has jurisdiction under 28 U.S.C. 1331 over claims necessarily and exclusively governed by federal common law but labeled as arising under state law. The circuits are in conflict on both questions.

Petitioners are energy companies that produce or sell fossil fuels; respondents are local governments in Colorado. Like a number of other state and local governments in similar cases across the country, respondents filed this action against petitioners in local state court, asserting claims purportedly arising under state law to recover for harms that they allege they have sustained and will sustain from petitioners' operations because of global climate change.

As in other similar cases, petitioners removed this case to federal district court, asserting federal subject-matter jurisdiction on multiple grounds. Among other grounds, petitioners contended that respondents' claims necessarily and exclusively arise under federal common law, and that removal was warranted under the federal-officer removal statute because respondents' complaint encompassed petitioners' exploration for and production

of fossil fuels at the direction of federal officers. The district court remanded the case to state court, and petitioners appealed.

The court of appeals affirmed. It initially held that it lacked jurisdiction to review any grounds for removal other than the federal-officer ground. It then rejected petitioners' arguments for removal on that ground. After this Court remanded for further consideration in light of *BP*, the court of appeals once again affirmed. It proceeded to reject all of petitioners' remaining grounds for removal, including removal on the basis of federal common law. The court reasoned that the federal common law of interstate emissions no longer exists because of statutory displacement by the Clean Air Act, allowing state law to govern claims concerning interstate pollution. The court further held that the well-pleaded complaint rule allows a plaintiff to avoid federal jurisdiction by affixing state-law labels to claims necessarily and exclusively governed by federal common law.

The court of appeals' decision was incorrect, and it implicates circuit conflicts on two important and recurring questions of federal law that have arisen with particular frequency in the numerous and materially identical climate-change cases pending in federal courts across the Nation. This case is an ideal vehicle for resolving those conflicts, particularly because it involves a smaller group of defendants than the cases arising from other circuits and is thus less likely than those cases to present recusal issues.

Given the stakes in the climate-change litigation, the questions presented here are some of the most consequential jurisdictional questions currently pending in the federal courts. The time to resolve those questions is now. The petition for a writ of certiorari should be granted.

A. Background

As the Court has long explained, "federal courts are courts of limited jurisdiction." *Home Depot U.S.A., Inc.* v. *Jackson*, 139 S. Ct. 1743, 1746 (2019) (citation and alteration omitted). Article III, Section 2, of the Constitution sets forth the categories of cases "over which federal judicial authority may extend." *Ibid.* (citation omitted). And the jurisdiction of lower federal courts is "further limited to those subjects encompassed within a statutory grant of jurisdiction." *Ibid.* (citation omitted). A federal district court thus "may not exercise jurisdiction absent a statutory basis" for doing so. *Ibid.* (citation omitted).

In addition to creating jurisdiction over certain actions originally filed in federal court, Congress also authorized the removal to federal court of certain cases initially filed in state court. Of particular relevance here, the general removal statute, 28 U.S.C. 1441(a), authorizes the removal of "any civil action brought in a [s]tate court of which the district courts of the United States have original jurisdiction." A defendant may thus remove a case to federal court if the plaintiff "could have filed its operative complaint in federal court" in the first instance. *Home Depot*, 139 S. Ct. at 1748.

One of the most familiar statutes conferring original jurisdiction on the district courts is the federal-question statute, 28 U.S.C. 1331. It provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Although the Constitution similarly authorizes federal jurisdiction over all cases "arising under this Constitution, the laws of the United States, and treaties made," Art. III, § 2, cl. 1, this Court has interpreted the jurisdictional grant in Section 1331 to stop short of constitutional limits. Instead, under the well-pleaded

complaint rule, an action arises under federal law for purposes of Section 1331 "only when the plaintiff's statement of his own cause of action shows that it is based upon federal law." *Vaden* v. *Discover Bank*, 556 U.S. 49, 60 (2009) (citation and alteration omitted). An "actual or anticipated defense" under federal law does not give rise to jurisdiction under Section 1331. *Ibid.* At the same time, an "independent corollary" to the well-pleaded complaint rule is that "a plaintiff may not defeat removal by omitting to plead necessary federal questions." *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 22 (1983). The well-pleaded complaint rule thus sometimes requires a federal court to "determine whether the real nature of the claim is federal, regardless of plaintiff's characterization." *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 397 n.2 (1981) (citation omitted).

The grant of jurisdiction in Section 1331 covers not only constitutional or statutory claims, but also those "founded upon federal common law." *National Farmers Union Insurance Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845, 850 (1985). Despite this Court's familiar pronouncement in *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 78 (1938), that "[t]here is no federal general common law," the "federal judicial power to deal with common law problems" remains "unimpaired for dealing independently, wherever necessary or appropriate, with essentially federal matters, even though Congress has not acted affirmatively about the specific question," *United States* v. *Standard Oil Co.*, 332 U.S. 301, 307 (1947). Of particular relevance here, federal law necessarily supplies the rule of decision for certain narrow categories of claims that implicate "uniquely federal interests," including where "the interstate or international nature of the controversy makes it inappropriate for state law to control." *Texas*

Industries, Inc. v. *Radcliff Materials, Inc.*, 451 U.S. 630, 640-641 (1981) (citation omitted).

One category of claims governed by federal common law is claims seeking redress for injuries allegedly caused by interstate pollution. Indeed, "[f]or over a century, a mostly unbroken string of cases has applied federal law to disputes involving" such claims. *City of New York* v. *Chevron Corp.*, 993 F.3d 81, 91 (2d Cir. 2021) (collecting cases); see, *e.g.*, *American Electric Power Co.* v. *Connecticut*, 564 U.S. 410, 420-423 (2011); *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 103 (1972) (*Milwaukee I*). As the Court has explained, federal common law must govern such controversies because they "touch[] basic interests of federalism" and implicate the "overriding federal interest in the need for a uniform rule of decision." *Milwaukee I*, 406 U.S. at 105 n.6. The "basic scheme of the Constitution" requires the application of a federal rule of decision, because "borrowing the law of a particular State would be inappropriate" to resolve such interstate disputes. *American Electric Power*, 564 U.S. at 421, 422.

B. Facts And Procedural History

1. In 2017, a number of state and local governments began filing lawsuits in state courts against various energy companies, most of them nonresidents of the forum States. The plaintiffs alleged that the companies' worldwide production, sale, and promotion of fossil fuels led to the emission of greenhouse gases and thereby contributed to global climate change. The plaintiffs have primarily asserted that the production, sale, and promotion of fossil fuels violate various state-law duties, including common-law nuisance; they have sought compensatory and punitive damages as well as equitable relief.

The defendants removed those lawsuits to federal court. They asserted multiple bases for federal jurisdiction, including that the plaintiffs' climate-change claims necessarily and exclusively arise under federal common law and that the allegations in the complaints pertain to actions the defendants took at the direction of federal officers, see 28 U.S.C. 1442. As of the filing of this petition, 23 related cases are pending in federal courts nationwide in which the parties are actively litigating the question of removal, either in district court or on appeal.[*]

2. Respondents in this action are the Board of County Commissioners of Boulder County, the Board of County Commissioners of San Miguel County, and the City of Boulder. Petitioners are Suncor Energy (U.S.A.) Inc.; Suncor Energy Sales Inc.; Suncor Energy Inc.; and Exxon Mobil Corporation.

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[*] See *Mayor & City Council of Baltimore* v. *BP p.l.c.*, 31 F.4th 178 (4th Cir. 2022); *County of San Mateo* v. *Chevron Corp.*, 32 F.4th 733 (9th Cir. 2022) (appeal consolidating six actions); *Rhode Island* v. *Shell Oil Products Co.*, Civ. No. 19-1818, 2022 WL 1617206 (1st Cir. May 23, 2022); *City & County of Honolulu* v. *Sunoco LP*, No. 21-15313 (9th Cir.) (argued Feb. 17, 2022) (consolidating two actions); *Minnesota* v. *American Petroleum Institute*, No. 21-1752 (8th Cir.) (argued Mar. 15, 2022); *City of Hoboken* v. *Exxon Mobil Corp.*, No. 21-2728 (3d Cir.) (oral argument scheduled for June 21, 2022); *Delaware* v. *BP America Inc.*, No. 22-1096 (3d Cir.) (oral argument scheduled for June 21, 2022); *Connecticut* v. *Exxon Mobil Corp.*, No. 21-1446 (2d Cir.) (oral argument to be scheduled); *Anne Arundel County* v. *BP p.l.c.*, Civ. No. 21-1423 (D. Md.); *City of Annapolis* v. *BP p.l.c.*, Civ. No. 21-772 (D. Md.); *City of New York* v. *Exxon Mobil Corp.*, Civ. No. 21-4807 (S.D.N.Y.); *City of Oakland* v. *BP p.l.c.*, Civ. No. 17-6011 (N.D. Cal.) (consolidating two actions); *County of Charleston* v. *Brabham Oil Co.*, Civ. No. 20-3579 (D.S.C.); *District of Columbia* v. *Exxon Mobil Corp.*, Civ. No. 20-1932 (D.D.C.); *Pacific Coast Federation of Fishermen's Associations, Inc.* v. *Chevron Corp.*, Civ. No. 18-7477 (N.D. Cal.); *Vermont* v. *Exxon Mobil Corp.*, Civ. No. 21-260 (D. Vt.).

In 2018, respondents filed a complaint in Colorado state court against petitioners, alleging that petitioners had caused or will cause harms by contributing to global climate change. Respondents seek damages for the effect of global climate change on public health, property, infrastructure, and agriculture, under theories of public nuisance, private nuisance, trespass, unjust enrichment, civil conspiracy, and consumer protection. App., *infra*, 5a-6a, 61a-62a.

Petitioners removed this action to the United States District Court for the District of Colorado. In their notice of removal, petitioners raised many of the same bases for federal jurisdiction as have the defendants in other climate-change lawsuits, including that respondents' climate-change claims necessarily and exclusively arise under federal common law and that removal was permissible under the federal-officer removal statute. App., *infra*, 6a-7a.

The district court remanded the case to state court based on a lack of subject-matter jurisdiction. App., *infra*, 60a-114a. With respect to federal common law as a basis for removal, the district court reasoned that, "[w]hile [petitioners] argue that the [c]omplaint raises inherently federal questions about energy, the environment, and national security, removal is not appropriate under the well-pleaded complaint rule because these federal issues are not raised or at issue in [respondents'] claims." *Id.* at 76a. The district court also rejected petitioners' other grounds for removal, including removal under the federal-officer removal statute. *Id.* at 81a-114a.

3. In its initial opinion in this case, the court of appeals affirmed, addressing only the district court's conclusion that federal jurisdiction did not lie under the federal-officer removal statute. 20-783 Pet. App. 1a-58a. The court of appeals did not review the portions of the district

court's remand order rejecting petitioners' other grounds for removal, reasoning that 28 U.S.C. 1447(d) deprived it of appellate jurisdiction over those grounds. *Id.* at 42a. Petitioners filed a petition for a writ of certiorari with this Court, presenting the question whether the court of appeals' jurisdiction was so limited. See 20-783 Pet. i.

While the petition was pending, this Court held in *BP* that Section 1447(d) permits appellate review of all grounds for removal in a case removed in part on federal-officer grounds. See 141 S. Ct. at 1538. The Court then vacated the court of appeals' judgment in this case and remanded for further consideration in light of *BP*. See 141 S. Ct. 2667 (2021).

4. On remand, the court of appeals once again affirmed the district court's remand order. App., *infra*, 1a-59a. As is relevant here, the court of appeals held that respondents' claims do not arise under federal common law because, under this Court's decision in *American Electric Power*, *supra*, the Clean Air Act has displaced any such law. *Id.* at 24a-31a. The court reasoned that such displacement meant that "the federal common law of nuisance that formerly governed transboundary pollution suits *no longer exists*." *Id.* at 29a.

From that premise, the court of appeals concluded that the only remaining question was "whether the federal act that displaced the federal common law preempted the state-law claims"—and "ordinary preemption can never serve as a basis for removal." App., *infra*, 30a (emphasis omitted). In the absence of preemption, the court indicated, respondents "may pursue whatever remedies [they] may have under state law." *Ibid.* (citation omitted).

The court of appeals further held that the well-pleaded complaint rule prevents the removal of claims necessarily and exclusively governed by federal common law but artfully pleaded under state law to avoid federal jurisdiction.

App., *infra*, 31a-33a. In the court's view, jurisdiction turned entirely on whether the "face of the complaint" demonstrates that the plaintiff expressly "advanced a federal claim." *Id.* at 31a. The only exception to the rule, the court reasoned, was the doctrine of complete preemption, under which the preemptive force of a statute is sufficiently strong so as to convert a claim arising under state law into a federal claim for purposes of the well-pleaded complaint rule. *Ibid.*; see *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 392 (1987). The court concluded that federal common law cannot have the same effect. App., *infra*, 32a.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision implicates a circuit conflict on the question whether federal common law necessarily and exclusively governs claims seeking redress for injuries allegedly caused by the effect of interstate greenhouse-gas emissions on the global climate. The decision also deepens an existing conflict on the question whether federal district courts have jurisdiction under 28 U.S.C. 1331 over claims necessarily and exclusively governed by federal common law but labeled as arising under state law. The court of appeals reached the incorrect conclusion on both questions. Those questions are important and frequently recurring in the ongoing climate-change litigation, and this case presents an ideal vehicle for deciding them. The petition for a writ of certiorari should be granted.

A. The Decision Below Implicates A Conflict Among The Courts Of Appeals On The First Question Presented

In the decision below, the court of appeals held that district courts lack jurisdiction under 28 U.S.C. 1331 over claims seeking redress for injuries allegedly caused by the effect of interstate greenhouse-gas emissions on the global climate, on the ground that such claims are no

longer governed by federal common law because of displacement by the Clean Air Act. That reasoning conflicts with the Second Circuit's reasoning in *City of New York* v. *Chevron Corp.*, 993 F.3d 81 (2021), which held that federal common law does govern those claims and that state law cannot, even after statutory displacement. And since the decision below, the First and Fourth Circuits—in similar climate-change cases on remand from this Court—also declined to permit removal based on federal common law, expressly rejecting the Second Circuit's reasoning. Review of this important question—currently pending in nearly two dozen climate-change lawsuits—is plainly warranted.

1. In *City of New York*, the municipal government of New York City filed suit in federal court based on diversity jurisdiction, alleging that the defendant energy companies (including Exxon Mobil Corporation, a petitioner here) were liable for injuries allegedly caused by the contribution of interstate greenhouse-gas emissions to global climate change. As do respondents here, the plaintiff asserted claims for public nuisance, private nuisance, and trespass under state law. See 993 F.3d at 88.

The question before the Second Circuit was "whether municipalities may utilize state tort law to hold multinational oil companies liable for the damages caused by global greenhouse gas emissions." 993 F.3d at 85. The Second Circuit unanimously held that "the answer is 'no'" and that claims seeking redress for global climate change presented "the quintessential example of when federal common law is most needed." *Id.* at 92.

The Second Circuit began its analysis by noting that, "[f]or over a century, a mostly unbroken string of cases has applied federal law to disputes involving interstate air or water pollution." 993 F.3d at 91. That is because, the Second Circuit explained, "such quarrels often implicate

two federal interests that are incompatible with the application of state law": the "overriding need for a uniform rule of decision" on matters influencing national energy and environmental policy, and "basic interests of federalism." *Ibid.* (internal quotation marks and alterations omitted) (quoting *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 105 n.6 (1972)).

And in the Second Circuit's view, claims seeking to hold defendants liable for injuries arising from "the cumulative impact of conduct occurring simultaneously across just about every jurisdiction on the planet" are far too "sprawling" for state law to govern. 993 F.3d at 91. The court explained that application of state law to the city's claims would "risk upsetting the careful balance that has been struck between the prevention of global warming, a project that necessarily requires national standards and global participation, on the one hand, and energy production, economic growth, foreign policy, and national security, on the other." *Id.* at 93.

The Second Circuit rejected the plaintiffs' argument that displacement by the Clean Air Act of any remedy under federal common law allows state law to "snap back into action." 993 F.3d at 98. That "position is difficult to square with the fact that federal common law governed this issue in the first place," the court reasoned, because "where 'federal common law exists, it is because state law cannot be used.'" *Ibid.* (quoting *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 313 n.7 (1981)). In the court's view, "state law does not suddenly become presumptively competent to address issues that demand a unified federal standard simply because Congress saw fit to displace a federal court-made standard with a legislative one." *Ibid.* Such an outcome, the Second Circuit concluded, is "too strange to seriously contemplate." *Id.* at 98-99.

2. The decision below is irreconcilable with *City of New York*. The court of appeals held that jurisdiction under Section 1331 was not present because, after statutory displacement by the Clean Air Act, the otherwise-applicable federal common law "no longer exists." App., *infra*, 29a (citation and emphasis omitted). In reaching that conclusion, the court of appeals relied on the reasoning of the concurring opinion in *Native Village of Kivalina* v. *ExxonMobil Corp.*, 696 F.3d 849, 865 (9th Cir. 2012) (Pro, J.)—a similar case involving claims of injury from climate change—to the effect that, "[o]nce federal common law is displaced, state nuisance law becomes an available option to the extent it is not preempted by federal law." App., *infra*, 30a. Based on that reasoning, the court of appeals held that the only analytical question remaining after statutory displacement is "whether the federal act that displaced the federal common law preempted the state-law claims." *Ibid.*

The Second Circuit reached the opposite conclusion. It squarely held that the plaintiff's state-law climate-change claims "must be brought under federal common law." 993 F.3d at 95. And it rejected the argument that federal common law no longer exists after statutory displacement, allowing state law to govern in a context in which it never before existed. In the Second Circuit's view, the applicability of federal common law determines whether any "residual state-law claims remain," such that "state law does not suddenly become presumptively competent to address issues that demand a unified federal standard simply because Congress saw fit to displace a federal court-made standard with a legislative one." *Id.* at 95 n.7, 99.

In this case, the court of appeals attempted to distinguish *City of New York* on the ground that the plaintiff

there filed its complaint in federal court based on diversity jurisdiction. See App., *infra*, 32a-33a. The effect of federal common law thus arose on a motion to dismiss for failure to state a claim. See *City of New York*, 993 F.3d at 88-89; Fed. R. Civ. P. 12(b)(6). The Second Circuit acknowledged that, unlike previous courts to address the question whether similar climate-change claims are removable on the basis of federal common law, it was not subject to the well-pleaded complaint rule. *City of New York*, 993 F.3d at 93-94.

But that difference does not eliminate the conflict on the first question presented. The court of appeals' conclusion that the federal common law of interstate emissions no longer exists has nothing to do with the well-pleaded complaint rule; instead, it concerns the effect of statutory displacement on the continued effect of federal common law. The court of appeals' conclusion on that question cannot be squared with the Second Circuit's.

3. Like the decision below, the Fourth Circuit, on remand from this Court, declined to hold that federal common law governs claims seeking redress for injuries allegedly caused by the effect of greenhouse-gas emissions on the global climate. See *Mayor & City Council of Baltimore* v. *BP p.l.c.*, 31 F.4th 178 (2022). It did so largely on the ground that defendants could not rely solely on this Court's longstanding precedent applying federal rules of decision to common-law claims relating to interstate pollution. Instead, the Fourth Circuit reasoned that the defendants were required to satisfy this Court's test for determining whether to create federal common law or extend it to a new area, which requires the presence of a "significant conflict between the state-law claims before it and the federal interests at stake." *Id.* at 200-201.

In so holding, the Fourth Circuit expressly declined to "follow *City of New York*." 31 F.4th at 203. The Fourth

Circuit reasoned that the Second Circuit's decision "fails to explain a significant conflict between the state-law claims before it and the federal interests at stake." *Ibid.* According to the Fourth Circuit, the Second Circuit had thereby "evad[ed] the careful analysis that the Supreme Court requires" to determine whether federal common law applies. *Id.* at 202. The Fourth Circuit further departed from the Second Circuit by holding that federal common law did not govern similar climate-change claims because the Clean Air Act displaced any federal-common-law remedy. See *id.* at 204.

As did the court of appeals below, the Fourth Circuit attempted to distinguish *City of New York* on the ground that the Second Circuit did not need to apply the well-pleaded complaint rule because "New York City initially filed suit in federal court." 31 F.4th at 203. But again, that distinction does not elide the conflict: the Fourth Circuit saw "no reason to fashion any federal common law for [d]efendants," *ibid.*, whereas the Second Circuit held that similar climate-change claims "must be brought under federal common law," *City of New York*, 993 F.3d at 92, 95.

4. In *Rhode Island* v. *Shell Oil Products Co.*, No. 19-1818, 2022 WL 1617206 (May 23, 2022), the First Circuit reached the same conclusion as the Fourth Circuit in another climate-change case previously before this Court. Expressly agreeing with the Fourth Circuit's reasoning, the First Circuit held that the district court lacked jurisdiction on the basis of federal common law, faulting the defendants for relying on this Court's precedents rather than describing "any significant conflict" between the "federal interests" at issue and the plaintiff's "state-law claims." *Id.* at *4.

The First Circuit expressly declined to rely on the Second Circuit's reasoning to find a conflict between the application of state law to climate-change claims, on the one hand, and the "rights of [S]tates" and "the federal government's relations with foreign countries," on the other. 2022 WL 1617206, at *5. It reasoned that *City of New York* was "distinguishable" because the complaint there was filed "in federal court in the first instance." *Ibid.* (emphasis omitted) (citing *Baltimore*, 31 F.4d at 203). Like the Fourth Circuit in *Baltimore*, the First Circuit did not explain how that fact related to the distinct question of whether federal common law governs the claims at issue.

The First Circuit next held that, even if such a conflict were present, removal based on federal common law would still have been improper. See 2022 WL 1617206, at *5. The First Circuit concluded that the displacement of federal common law by the Clean Air Act meant that no "federal common law controls [the plaintiff's] claims," even assuming that the claims implicated the type of "transboundary pollution" at issue in this Court's precedents. *Ibid.* The First Circuit's decision thus similarly conflicts with the Second Circuit's decision in *City of New York* on the question whether federal common law necessarily and exclusively governs claims seeking redress for injuries allegedly caused by the effect of interstate greenhouse-gas emissions on the global climate.

B. The Decision Below Deepens A Conflict Among The Courts Of Appeals On The Second Question Presented

The court of appeals further held that the well-pleaded complaint rule precludes federal jurisdiction under 28 U.S.C. 1331 over claims necessarily and exclusively governed by federal common law but labeled as arising under

state law. App., *infra*, 31a-33a. That holding deepens another existing circuit conflict among the courts of appeals and also warrants the Court's review.

1. Two courts of appeals have squarely held that a district court has jurisdiction under Section 1331 over claims artfully pleaded under state law but necessarily governed by federal common law.

a. In *In re Otter Tail Power Co.*, 116 F.3d 1207 (1997), the Eighth Circuit affirmed the removal of putative state-law claims because they were governed by federal common law. At issue in *Otter Tail* was the effect of a judgment in an earlier federal action concerning the scope of an Indian tribe's "inherent sovereignty," which is governed by federal common law. See *Otter Tail*, 116 F.3d at 1209-1210; *Devils Lake Indian Sioux Tribe* v. *North Dakota Public Service Commission*, 896 F. Supp. 955, 961 (D.N.D. 1995); see generally *United States* v. *Lara*, 541 U.S. 193, 207 (2004). After the first federal action ended, a party to the judgment filed a subsequent action against the tribe and other defendants in state court, seeking to enjoin the defendants from allegedly violating the earlier federal judgment. One of the defendants removed the case to federal court.

The Eighth Circuit held that the district court had jurisdiction over the case under 28 U.S.C. 1331 and that removal was thus proper under 28 U.S.C. 1441(a). The court began its analysis by acknowledging that, under the well-pleaded complaint rule, removal based on federal-question jurisdiction is permitted only when the complaint establishes that "federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Otter Tail*, 116 F.3d at 1213 (citation omitted). It noted, however, that "[a] plaintiff's characterization of a claim as

based solely on state law is not dispositive of whether federal question jurisdiction exists." *Ibid.* (citation omitted).

Turning to the complaint before it, the Eighth Circuit concluded that removal based on federal-question jurisdiction was proper because the district court's order in the first action concerned "the extent of an Indian Tribe's authority to regulate nonmembers on a reservation," which is "manifestly a federal question." 116 F.3d at 1213-1214. In reaching that conclusion, the court cited the Supreme Court's decision in *National Farmers Union*, *supra*, which held that a claim concerning an Indian tribe's sovereign powers was governed by federal common law and thus gave rise to federal-question jurisdiction. See *ibid.*

b. In *Sam L. Majors Jewelers* v. *ABX, Inc.*, 117 F.3d 922 (1997), the Fifth Circuit similarly upheld the removal of putative state-law claims on the ground that they were governed by federal common law. There, the plaintiff filed claims in state court for breach of contract, negligence, and violations of a state statute, seeking damages from an airline that allegedly lost some of the plaintiff's goods. See *id.* at 924. The defendant removed the case to federal court.

In assessing whether removal was proper, the Fifth Circuit recognized that jurisdiction under Section 1331 exists only "when a federal question is presented on the face of a plaintiff's properly pleaded complaint." 117 F.3d at 924. The court further noted that, under Section 1441(a), "only actions that originally could have been filed in federal court can be removed to federal court." *Ibid.* The court then reasoned that there are "three theories that might support federal question jurisdiction" in the case: where "the complaint raises an express or implied cause of action that exists under a federal statute"; where the relevant "area of law is completely preempted by the

federal regulatory regime"; and where "the cause of action arises under federal common law principles." *Ibid.* The court concluded that removal was proper under the third theory, because an action against a common air carrier for lost or damaged goods "arises under federal common law." *Id.* at 929; see *Torres* v. *Southern Peru Copper Corp.*, 113 F.3d 540, 542-543 (5th Cir. 1997) (permitting removal where a state-law claim raised "substantial questions of federal common law").

2. In the decision below, the court of appeals held that, under the well-pleaded complaint rule, federal common law cannot provide a basis for jurisdiction under Section 1331, and removal is thus improper under Section 1441(a), where the plaintiff omits any reference to federal law in the complaint. App., *infra*, 31a-33a. The court of appeals acknowledged the principle established by this Court that "a plaintiff may not defeat removal by omitting to plead necessary federal questions." *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 22 (1983); see App., *infra*, 31a. But the court of appeals concluded that the so-called "artful pleading" doctrine is coextensive with the doctrine of complete preemption, which allows the removal of a state-law claim where "the pre-emptive force of a statute is so extraordinary that it converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 393 (1987); see App., *infra*, 31a.

The court of appeals next concluded that federal common law cannot have complete preemptive effect. See App., *infra*, 32a. It reasoned that complete preemption applies only where Congress intended to permit removal of state-law claims, and federal common law can evidence no such intent because it is "created by the judiciary." *Ibid.* The Court thus concluded that Congress "has not

clearly manifested an intent that the federal common law for transboundary pollution will completely preempt state law." *Ibid.* (internal quotation marks and citation omitted).

Under the court of appeals' logic, a district court is limited to assessing the labels the plaintiff applies to the claims in the complaint, even where federal common law necessarily and exclusively governs the issues pleaded on the face of the complaint. That conclusion conflicts with the decisions of the Fifth and Eighth Circuits permitting the removal of putative state-law claims necessarily and exclusively governed by federal common law.

3. In addition to the court below, two other courts of appeals have held—in the particular context of claims seeking redress for injuries allegedly caused by climate change—that Section 1331 does not permit the exercise of jurisdiction over claims necessarily governed by federal common law but labeled as arising under state law.

a. In *City of Oakland* v. *BP plc*, 969 F.3d 895 (2020), cert. denied, 141 S. Ct. 2776 (2021), the Ninth Circuit faced arguments similar to those raised here regarding the removal of climate-change claims on the basis of federal common law. In particular, the defendants argued that claims pleaded under state law but necessarily and exclusively governed by federal common law were subject to federal-question jurisdiction because they were, in fact, federal claims. See 20-1089 Pet. at 20-22. Defendants thus contended that removal of such claims was permissible without resort to the doctrine of *Grable & Sons Metal Products, Inc.* v. *Darue Engineering & Manufacturing*, 545 U.S. 308 (2005), which permits the removal of state-law claims that necessarily raise substantial and disputed federal issues. See *id.* at 314; 20-1089 Pet. at 20. The district court agreed with the defendants' approach and held that removal based on federal common law was proper.

See Civ. No. 17-6011, 2018 WL 1064293, at *2-*5 (N.D. Cal. Feb. 27, 2018).

The Ninth Circuit disagreed. 969 F.3d at 903-907. It started from the premise that, under the well-pleaded complaint rule, "a civil action arises under federal law for purposes of [Section] 1331 when a federal question appears on the face of the complaint." *Id.* at 903. The court saw only two "exceptions" to that rule: removal under *Grable* and complete preemption. See *id.* at 904-906. Having framed the issue that way, the Ninth Circuit rejected the district court's jurisdictional analysis without comment. See *id.* at 906.

The Ninth Circuit instead addressed removal on the basis of federal common law as part of the *Grable* inquiry. See 969 F.3d at 906. And it held that, "[e]ven assuming that the [plaintiffs'] allegations could give rise to a cognizable claim for public nuisance under federal common law, the district court did not have jurisdiction under [Section] 1331 because the state-law claim for public nuisance fails to raise a substantial federal question." *Ibid.* (citation omitted). The Ninth Circuit reached that conclusion on the basis that the plaintiffs' claim neither "require[d] an interpretation of a federal statute nor challenge[d] a federal statute's constitutionality." *Ibid.* (citations omitted). The Ninth Circuit thus declined to permit the removal of a claim pleaded under state law but necessarily governed by federal common law. See *ibid.* (opining that it was "not clear that the claim require[d] an interpretation or application of federal law at all," because it was unclear whether "there is a federal common law of public nuisance relating to interstate pollution" and because the Clean Air Act might displace any such claim); see also *County of San Mateo* v. *Chevron Corp.*, 32 F.4th 733, 747-748 (9th Cir. 2022) (following *City of Oakland* in similar

climate-change cases), pet. for rehearing pending, No. 18-15499 (filed May 17, 2022).

b. In *Baltimore*, *supra*, the Fourth Circuit likewise rejected the premise that federal common law provides a basis for removal of claims artfully pleaded under state law. Before "nevertheless consider[ing]" whether federal common law governed the climate-change claims at issue, the Fourth Circuit explained that the complaint "never alleges an existing federal common law claim" and "only brings claims originating under [state] law." 31 F.4th at 200. The court concluded that "subject-matter jurisdiction via federal common law" does not exist where the complaint did not "clearly seek recovery under federal law." *Ibid.* (citation omitted). In reaching that conclusion, the Fourth Circuit distinguished two of its earlier decisions, which it recognized permitted the removal of claims necessarily and exclusively governed by federal common law but artfully pleaded under state law. See *id.* at 207-208 (discussing *Caudill* v. *Blue Cross & Blue Shield of North Carolina*, 999 F.2d 74 (1993), and *North Carolina Department of Administration* v. *Alcoa Power Generating, Inc.*, 853 F.3d 140 (2017)).

* * * * *

In sum, the decision below implicates two conflicts of federal law among the courts of appeals. As matters currently stand, one court of appeals has held that federal common law necessarily and exclusively governs claims seeking redress for injuries allegedly caused by the effect of interstate greenhouse-gas emissions on the global climate; three other courts of appeals, including the court below, have rejected that conclusion. Two courts of appeals have held that 28 U.S.C. 1331 provides a basis for jurisdiction over claims necessarily and exclusively governed by federal common law but labeled as arising under

state law; three other courts of appeals, including the court below, have reached the opposite conclusion. Those conflicts are developed and entrenched, and the Court's intervention is necessary.

C. The Decision Below Is Incorrect

The court of appeals rejected petitioners' arguments on both questions presented and held that this case was not removable to federal court. That decision was erroneous.

1. The court of appeals erred by holding that federal common law does not necessarily and exclusively govern respondents' claims, which allege that the combustion of petitioners' fossil-fuel products led to greenhouse-gas emissions, which contributed to global climate change, which caused harms within their jurisdictions.

a. Federal common law supplies the rule of decision for certain narrow categories of claims that implicate "uniquely federal interests," including where "the interstate or international nature of the controversy makes it inappropriate for state law to control." *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 640-641 (1981) (citation omitted). For over a century, this Court has applied uniform federal common-law rules of decision to claims seeking redress for interstate pollution. See *City of New York*, 993 F.3d at 91 (collecting cases). For example, in *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972) (*Milwaukee I*), the Court reasoned that "[f]ederal 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 108 n.9 (citation omitted). In *International Paper Co.* v. *Ouellette*, 479 U.S. 481 (1987), the Court unambiguously reaffirmed that "the regulation

of interstate water pollution is a matter of federal, not state, law." *Id.* at 488 (citation omitted); see *id.* at 492. And in *American Electric Power Co.* v. *Connecticut*, 564 U.S. 410 (2011)—a case involving similar claims alleging injury from the contribution of greenhouse-gas emissions to global climate change—the Court reiterated that federal common law "undoubtedly" governs claims involving "air and water in their ambient or interstate aspects." *Id.* at 421 (citation omitted).

As those precedents explain, the Constitution dictates that federal law must govern controversies over interstate pollution, because those controversies "touch[] basic interests of federalism" and implicate the "overriding federal interest in the need for a uniform rule of decision." *Milwaukee I*, 406 U.S. at 103 n.6. The Constitution prohibits States from "regulat[ing] the conduct of out-of-state sources" of pollution. *Ouellette*, 479 U.S. at 495. Because "borrowing the law of a particular State would be inappropriate" to resolve such interstate disputes, "the basic scheme of the Constitution" requires the application of a federal rule of decision. *American Electric Power*, 564 U.S. at 421, 422.

Applying the foregoing precedents here leads to a straightforward result: respondents' climate-change claims necessarily arise under federal, not state, law. Through those claims, respondents are seeking damages based on the interstate—and indeed international—emissions of greenhouse gases over many decades, allegedly resulting in part from the use of fossil-fuel products produced or sold by defendants and consumed throughout the world. See App., *infra*, 61a. Those claims fall squarely within the long line of cases holding that federal common law governs claims seeking redress for interstate air and water pollution.

b. In the decision below, the court of appeals concluded that, because the Clean Air Act has displaced the remedy for federal-common-law claims involving interstate emissions, federal common law "no longer exists" in this context, and state law can fill the void. App., *infra*, 29a (emphasis omitted). That reasoning impermissibly "conflate[s]" "jurisdiction" and "merits-related determinations." *Arbaugh* v. *Y&H Corp.*, 546 U.S. 501, 511 (2006) (citation omitted). Whether a party can obtain a remedy under federal common law is a distinct question from whether federal common law applies in the first instance. Indeed, a claim governed by federal common law arises under federal law for "jurisdictional purposes" even if that claim "may fail at a later stage for a variety of reasons." *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 675 (1974); see also *United States* v. *Standard Oil Co.*, 332 U.S. 301, 307, 313, 316 (1947) (deciding first whether federal common law governed and only then whether a remedy under federal common law exists).

More fundamentally, the court of appeals misunderstood the relationship between state law and federal common law. 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. *Texas Industries*, 451 U.S. at 641. In other words, where federal common law applies, "state law cannot be used." *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 313 n.7 (1981) (*Milwaukee II*).

Accordingly, there is no state law for the Clean Air Act (or any other federal statute) to resurrect: state law did not govern interstate emissions before Congress acted, and the application of state law to interstate-pollution

claims remains inconsistent with our constitutional structure after the statutory displacement, even if federal law provides no remedy for the particular claim alleged. As the United States explained in its amicus brief in *BP*, "[a]lthough the enactment of the Clean Air Act displace[d] federal common law" in the area of interstate emissions, "that alone does not mean the door was opened for tort claims based on common law of an affected State targeting conduct in another State." U.S. Br. at 27 (No. 19-1189) (internal quotation marks and citation omitted).

Indeed, the court of appeals' approach would turn the rule of *Erie* on its head. For any remedy under federal common law to be displaced, Congress must have spoken "directly to the question at issue." *American Electric Power*, 564 U.S. at 424. It is "too strange to seriously contemplate" that Congress's decision to address an issue by statute so directly as to displace *federal* common-law remedies would result in *state* common-law remedies suddenly becoming viable. *City of New York*, 993 F.3d at 98-99.

2. The court of appeals also erred by concluding that the grant of federal-question jurisdiction in 28 U.S.C. 1331 does not extend to claims necessarily and exclusively governed by federal common law but labeled as arising under state law, with the result that removal under 28 U.S.C. 1441(a) was improper.

Under Section 1331, federal district courts "have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." That includes claims "founded upon federal common law as well as those of a statutory origin." *National Farmers Union*, 471 U.S. at 850 (citation omitted). As a result, if the "dispositive issues stated in the complaint require the application" of a uniform rule of federal law, the action "arises

under" federal law for purposes of Section 1331, *Milwaukee I*, 406 U.S. at 100, and the case is removable to federal court, see 28 U.S.C. 1441(a).

The court of appeals declined to permit removal on the basis of federal common law because respondents did not expressly plead any claims under federal common law, and it viewed petitioners' invocation of federal common law as raising an ordinary preemption defense. App., *infra*, 30a, 32a. But federal common law is not merely a defense to respondents' claims alleging injury from interstate and international air pollution. For the reasons explained above, see pp. 24-27, respondents' claims do not just implicate federal-law issues; they inherently *are* federal claims, arising under federal law. No state law exists in this area for respondents to invoke.

The well-pleaded complaint rule thus does not bar removal here. That rule provides that federal-question jurisdiction exists only when "a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar*, 482 U.S. at 392. An "independent corollary" of the rule, however, is that "a plaintiff may not defeat removal by omitting to plead necessary federal questions." *Construction Laborers Vacation Trust*, 463 U.S. at 22. Put another way, a plaintiff cannot "block removal" by artfully pleading its claims in an effort to "disguise [an] inherently federal cause of action." 14C Charles Alan Wright et al., *Federal Practice and Procedure* § 3722.1, at 131-132 (4th ed. 2018).

The court of appeals held that the artful-pleading principle applies only in complete-preemption cases involving federal statutes. App., *infra*, 20a-21a, 32a. But this Court has never so held. And 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 Federal Courts and the Federal System* 818 (7th ed. 2015). Whether one views a putative state-law claim governed by federal common law as a disguised federal claim or as a state-law claim the elements of which each raise substantial federal questions, see *Grable*, 545 U.S. at 314, such a claim is properly understood to arise under federal law.

Accordingly, district courts have federal-question jurisdiction under 28 U.S.C. 1331, and thus removal jurisdiction under 28 U.S.C. 1441(a), over claims necessarily and exclusively governed by federal common law but labeled as arising under state law. The court of appeals erred by reaching a contrary conclusion, and its decision to remand this case to state court warrants further review.

D. The Questions Presented Are Important And Warrant The Court's Review In This Case

The questions presented in this case are recurring and have substantial legal and practical importance. This case, which cleanly presents the questions, is an optimal vehicle for the Court's review.

1. As a preliminary matter, the questions presented squarely implicate the longstanding principle that federal law alone necessarily governs disputes related to interstate pollution. As the Second Circuit recognized, a "mostly unbroken string of cases" spanning a century has applied federal law to such disputes. *City of New York*, 993 F.3d at 91. More broadly, whether a putative state-law claim is removable because it arises necessarily and exclusively under federal common law is a significant jurisdictional question that arises in several contexts of unique federal importance, from interstate pollution to foreign affairs to tribal relations. The Court has long recognized the "great importance" of maintaining clear and

uniform rules on issues relating to removal more generally. *Tennessee* v. *Davis*, 100 U.S. 257, 260 (1879).

The decision below creates particularly problematic results in light of those precedents. Under the court of appeals' understanding of the operation of federal common law and federal-question jurisdiction, a claim for interstate pollution could never be removed to federal court. The State of Illinois could thus sue the City of Milwaukee in Illinois state court under Illinois law for interstate water pollution, and Milwaukee would be denied a federal forum in which to defend itself. Cf. *Milwaukee II*, 451 U.S. 304. Similarly, the State of Connecticut could bring suit in its own state courts under its own laws against an out-of-state defendant to abate interstate air pollution, and the defendant could not remove to federal court. Cf. *American Electric Power*, 564 U.S. at 418-419. Such outcomes cannot be squared with this Court's decisions holding that claims seeking redress for interstate air and water pollution arise under federal law alone and thus are properly heard in federal court.

The decision below also opens the door to countless potentially conflicting state-court lawsuits applying state nuisance law to claims seeking redress for the global phenomenon of climate change. Such a result would "upset[] the careful balance that has been struck between the prevention of global warming," on the one hand, and "energy production, economic growth, foreign policy, and national security," on the other. *City of New York*, 993 F.3d at 93.

Resolution of the questions presented is especially important in the context of the nationwide climate-change litigation brought by state and local governments against energy companies. The jurisdictional questions presented here affect numerous cases currently pending in federal courts. See p. 8 n.*, *supra*. The forum in which those cases will proceed must be determined first, before

resolution of the merits of the claims, which defendants are prepared to defend against at the appropriate time and in the appropriate court.

While the Court declined to consider similar questions in *City of Oakland*, *supra*, in the immediate aftermath of *BP*, three additional courts of appeals—all of which rejected removal before *BP* based on an improperly narrow view of their jurisdiction—have weighed in again since *BP* and declined to follow the Second Circuit's reasoning in *City of New York*. Given the number of climate-change cases pending and the significant stakes for the parties, the questions presented here will continue to bedevil the lower courts until this Court intervenes. And it will affirmatively disserve the interests of judicial economy if cases are allowed to proceed in what turns out to be the wrong forum.

2. This case is an optimal vehicle for resolution of the questions presented. Those questions were pressed below, fully briefed by the parties, and passed on by the court of appeals. And notably, this case involves a smaller group of defendants than the cases arising from other circuits and is thus less likely to present recusal issues (such as were present in *BP*, which was decided by an eight-Justice Court).

For that reason, the Court may never have a better opportunity to consider and resolve the questions presented here. Those questions are undeniably important; they have divided the courts of appeals; and the decision of the court of appeals was erroneous. The Court should grant certiorari and provide clarity as to whether the climate-change cases should proceed in federal or state court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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