No. 21-1550

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

SUPPLEMENTAL BRIEF FOR THE PETITIONERS

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Just two years ago, the United States told this Court that claims seeking redress for injuries allegedly caused by the effect of interstate greenhouse-gas emissions on the global climate are "inherently federal in nature," even when labeled as arising under state law. Oral Arg. Tr. at 31, *BP p.l.c.* v. *Mayor & City Council of Baltimore*, 141 S. Ct. 1532 (2021). The government explained that, despite the Clean Air Act's displacement of any remedy under federal common law, "[a]ny putative tort claims that seek to apply the law of an affected State to conduct in another State * * * continue to arise under federal, not state law, for jurisdictional purposes." U.S. Br. at 27, *BP*, *supra* (internal quotation marks, citation, and emphasis

omitted). The government added that the well-pleaded complaint rule presented no obstacle to removal. See *id.* at 28. And the government took the same position in the lower courts, explaining that it would be "irreconcilable" with the "structure of the Constitution" for state law, rather than federal law, to govern such claims. U.S. Br. at 3-12, *City of Oakland* v. *BP p.l.c.*, 969 F.3d 895 (9th Cir. 2020).

Now, the government has casually junked that position. With an all-too-familiar citation to the "change in Administration," it argues that the well-pleaded complaint rule precludes removal and that, in the wake of the Clean Air Act, federal law no longer exclusively governs claims alleging injury from interstate emissions. See Br. 7-16. Perhaps the current administration genuinely does have a different view on questions of federal jurisdiction than the last one. But given the federal government's institutional interest in taking a broad view of federal jurisdiction, it is hard to escape the conclusion that the change in position is being driven by the fact that the questions are arising in the context of climate-change lawsuits—and by a desire to signal virtue to political bedfellows who are behind these lawsuits.

Given that apparent motivation, it is difficult to take anything the government says here at face value. But even so, the government's arguments against review wilt under scrutiny. The government argues that no genuine circuit conflict exists, but it does so only by ignoring the Second Circuit's reasoning in *City of New York* v. *Chevron Corp.*, 993 F.3d 81 (2021), and the decisions of other circuits expressly rejecting that reasoning. On the merits, the government parrots respondents' arguments, yet it makes no effort to grapple with petitioners' responses. At a minimum, the very fact that the last two administrations

have taken contrary positions confirms that there are substantial legal arguments on both sides.

And for all of its flip-flopping on the merits, the government does not dispute that the questions presented here are exceedingly important ones worthy of this Court's review. There are now six petitions pending before the Court arising from similar climate-change cases that present the same basic questions. Nor does the government dispute that this case is an ideal vehicle for addressing those questions, particularly because it is less likely than the other pending cases to present recusal issues.

After the government filed its brief, a prominent judge wrote that cases such as this one should give rise to federal jurisdiction and urged the Court definitively to resolve whether they do. See *Minnesota* v. *American Petroleum Institute*, No. 21-1752, ___ F.4th ___, 2023 WL 2607545, at *8-*11 (8th Cir. Mar. 23, 2023) (Stras, J., concurring). It is preposterous to suggest that the fate of these cases—with their potentially enormous consequences for an entire sector of the global economy—should be left to handpicked state courts without a decision by this Court sanctioning that outcome. Given the importance of the questions presented, the circuit conflicts on each question, the substantial arguments on both sides, and the prudential reasons for review in this particular case, the petition for a writ of certiorari should be granted.

A. The Decision Below Implicates Conflicts Among The Courts Of Appeals On Both Questions Presented

The courts of appeals are divided on both questions presented: whether federal law necessarily and exclusively governs climate-change claims and whether a federal district court has federal-question jurisdiction over

such claims, even when the plaintiff labels them as arising under state law. See Pet. 11-24; Reply Br. 2-6. The government attempts to diminish those conflicts (Br. 16-22), but it merely regurgitates the arguments respondents made last summer in their brief in opposition. Those arguments are no more persuasive now than they were then.

1. On the first question presented: like respondents, the government addresses only the conflict between the decision below and the Second Circuit's decision in *City of New York*. See Br. 17-20. But two other circuits, the First and Fourth, *expressly rejected* the Second Circuit's holding that federal common law governs materially identical climate-change claims. See Pet. 16-17.

As for the decision below, the government's attempt to reconcile it with the Second Circuit's decision falls flat. The government understands the Second Circuit to have held only that "the prior applicability of federal common law [is] relevant in determining the post-Clean Air Act viability of state-law claims." Br. 19. But the Second Circuit expressly concluded that, although the plaintiff used state-law labels, it had brought "federal claims" that must arise "under federal common law"; indeed, the court viewed the case as "simply beyond the limits of state law." *City of New York*, 993 F.3d at 92, 95; see *Minnesota*, 2023 WL 2607545, at *9-*10 (Stras, J., concurring). The Second Circuit further held that the displacement of any remedy under federal common law did not affect the analysis, because state law is not "competent to address issues that demand a unified federal standard." 993 F.3d at 98.

What is more, the Second Circuit concluded that federal common law is "still require[d]" to govern extraterritorial aspects of claims challenging undifferentiated global emissions, because the Clean Air Act "does not regulate foreign emissions." 993 F.3d at 95 n.7; see *id.* at 101. *City of New York* can thus only be understood to hold that

federal law continues to govern in this area, even after the enactment of the Clean Air Act.

The Second Circuit's reliance on the Seventh Circuit's decision in *Illinois* v. *City of Milwaukee*, 731 F.2d 403 (1984), confirms that understanding. There, the Seventh Circuit considered the question whether state law could govern claims for interstate water pollution after the Clean Water Act displaced any remedy available under federal common law. See *id.* at 406.

The Seventh Circuit held that state law remained unavailable. See 731 F.3d at 406-411. The court reasoned that "[t]he very reasons th[is] Court gave for resorting to federal common law" in cases involving interstate pollution are "the same reasons why the [S]tate claiming injury cannot apply its own state law to out-of-state discharges now." *Id.* at 410. The court explained that the statutory displacement of any remedy under federal common law "did nothing to undermine that result"; the pollution of interstate waters remained a "problem of uniquely federal dimensions requiring the application of uniform federal standards." *Id.* at 410-411. The Seventh Circuit thus concluded that "federal law must govern in this situation except to the extent that [Congress] authorizes resort to state law." *Id.* at 411.

In *City of New York*, the Second Circuit similarly held that federal law continues to govern claims founded on interstate emissions even after the statutory displacement of any *remedy* under federal common law. See 993 F.3d at 98. And while the court below may not have addressed the merits question "whether the Clean Air Act authorized or preempted respondents' claims," U.S. Br. 19, it did squarely hold that the Clean Air Act's displacement of any federal-common-law remedy allows a plaintiff to assert "only state-law claims" in this area. Pet. App. 30a. That

holding is irreconcilable with *City of New York*, and the resulting conflict warrants this Court's review.

2. On the second question presented: the government attempts to distinguish *In re Otter Tail Power Co.*, 116 F.3d 1207 (8th Cir. 1997), and *Sam L. Majors Jewelers* v. *ABX, Inc.*, 117 F.3d 922 (5th Cir. 1997). See Br. 20-22. That effort also fails.

The government first argues that *Otter Tail* "rested not on the artful-pleading doctrine" but instead on the fact that "the allegations actually set forth in the plaintiff's complaint" demonstrated the presence of a substantial federal question. Br. 20. But the government has no explanation for the Eighth Circuit's statement that "[a] plaintiff's characterization of a claim as based solely on state law is not dispositive of whether federal question jurisdiction exists." 116 F.3d at 1213 (citation omitted). More broadly, the complaint in *Otter Tail* sought to enforce a right under state law, see *id.* at 1211; the need to apply federal common law was evident because the complaint itself discussed an earlier federal judgment concerning principles of tribal sovereignty, see *id.* at 1213-1214.

The complaint here similarly alleges facts that demonstrate the need to apply federal law: namely, the allegations of injury caused by the effect of interstate greenhouse-gas emissions on the global climate. See Pet. 24-25. Even analyzed as a case involving the "substantial federal question" doctrine, therefore, *Otter Tail* supports removal. See Reply Br. 5.[*]

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[*] The government notes that the court below stated that petitioners had "waived" any argument that federal common law provided a basis for removal under the "substantial federal question" doctrine. See Br. 10, 20-21. Petitioners have already explained why that is incorrect. See Reply Br. 5. In addition, it would be particularly odd for

The government's attempt to distinguish *Sam L. Majors* is similarly flawed. See Br. 21. Regardless of whether the Fifth Circuit "framed its ruling" as an application of the "well-pleaded complaint rule" as opposed to the "artful-pleading doctrine," *ibid.*, the court upheld the removal of putative state-law claims on the ground that they were governed by federal common law. See 117 F.3d at 924. The government also argues that Congress "preserv[ed]" the relevant common law in *Sam L. Majors*, whereas Congress "displaced" it here. Br. 21-22. But that is a distinction without a difference, because several courts of appeals have held that federal common law is never an independent ground to remove a putative state-law claim. See Pet. 20-23.

Notably, in one of the other climate-change cases now pending before this Court, the Third Circuit acknowledged that *Sam L. Majors* supports removal and expressly declined to follow it. See *City of Hoboken* v. *Chevron Corp.*, 45 F.4th 699, 708 (2022), pet. for cert. filed, No. 22-821 (Feb. 27, 2023). The Court's guidance is badly needed to resolve the conflicts on both questions presented.

B. The Decision Below Is Incorrect

The government devotes much of its brief to the merits (Br. 7-16), repudiating its previous position that claims such as respondents' "arise under federal, not state law for jurisdictional purposes" and "may be removable under 28 U.S.C. 1441(a) on the ground that, although nominally

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the Court to ignore the "substantial federal question" doctrine if it granted review here, when the petitioners in some of the other climate-change cases now pending before this Court (which may present recusal issues not present here) indisputably made that argument. See, *e.g.*, *Chevron Corp.* v. *City of Hoboken*, No. 22-821; *Sunoco LP* v. *City & County of Honolulu*, No. 22-523.

couched as state-law claims, they are inherently and necessarily federal in nature." U.S. Br. at 26, 27, *BP*, *supra*. The government's previous position was right; its current position is wrong.

1. The government heavily relies on the well-pleaded complaint rule (Br. 9-11), but its understanding of the rule is internally incoherent. The government initially argues that, under the rule, federal jurisdiction depends on the "plaintiff's own statement" of the cause of action. Br. 9. The government apparently means that the complaint must expressly invoke federal law, either as creating the cause of action or as governing a particular issue. See *ibid.* Federal jurisdiction would thus turn on a magic-words requirement: did the plaintiff expressly invoke federal law in the complaint?

Two pages later, however, the government acknowledges that "[a] federal court may uphold removal even though no federal question appears on the face of the plaintiff's complaint if the court concludes that the plaintiff has artfully pleaded claims by omitting to plead necessary federal questions." Br. 11 (internal quotation marks and citation omitted). But the artful-pleading doctrine is the opposite of a magic-words approach: it requires consideration of the substance of the allegations in the complaint in order to determine the presence of federal jurisdiction.

"Artful pleading comes in many forms," and "[t]his is one of them." *Minnesota*, 2023 WL 2607545, at *8 (Stras, J., concurring). And analyzing the substance of the complaint, rather than the mere labels used by the plaintiff, comports with this Court's precedent. When the Court has stated that a "plaintiff's statement of his own cause of action" must show that it is "based upon federal law," it has contrasted such a case with one in which federal law

is relevant only because of an "actual or anticipated defense." *Vaden* v. *Discover Bank*, 556 U.S. 49, 60 (2009) (citation omitted). Where, as here, the facts pleaded in support of the plaintiff's claim demonstrate that it is necessarily and exclusively governed by federal law, the federal character of the suit arises from the asserted cause of action, not from any federal defense.

The exercise of federal jurisdiction over such cases is thus consistent with a proper understanding of the well-pleaded complaint rule. Were it otherwise, a plaintiff could confine an inherently federal cause of action to state court simply by labeling the claim a state-law claim. "There is no reason for the removal rules to operate in such a confounding way." *Minnesota*, 2023 WL 2607545, at *11 (Stras, J., concurring).

2. The government further argues (Br. 11-15) that federal common law does not necessarily and exclusively govern respondents' claims because any such common law has been "displaced" by the Clean Air Act. That argument conflates the jurisdictional question (whether a claim arises under federal law) with the merits question (whether the claimant has a valid cause of action under federal law)—questions this Court has made clear are distinct. See, *e.g.*, *American Electric Power Co.* v. *Connecticut*, 564 U.S. 410, 422 (2011).

In so arguing, the government fundamentally mischaracterizes petitioners' position. This Court's precedents establish that the structure of the Constitution itself precludes the application of state law to claims seeking redress for harms allegedly caused by interstate pollution. In such disputes, "[t]he rule of decision [must] be[] federal," *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 108 n.10 (1972), and "state law cannot be used" at all, *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 313 n.7 (1981).

The fact that Congress acted to displace any remedy otherwise available under federal common law does nothing to alter the exclusively federal nature of this area of law. As the Second Circuit explained, "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." *City of New York*, 993 F.3d at 98.

The government reads this Court's decision in *International Paper Co.* v. *Ouellette*, 479 U.S. 481 (1987), as demonstrating that, "[n]ow that the Clean Air Act has displaced the prior federal-common-law regime," "ordinary-preemption principles" apply to determine "the viability of state-law claims" in this area. Br. 14. That is incorrect.

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

Even if the *Ouellette* Court framed its analysis in terms of ordinary preemption, therefore, it expressly re-

lied not only on the displacing statute but also on the inherently federal character of suits concerning interstate pollution. *Ouellette* is thus consistent with the principle that federal law continues exclusively to govern actions concerning interstate pollution, even after a statute has displaced any remedy under federal common law.

* * * * *

Rarely has this Court seen a more cynical change in position. The current administration's view of this case is shot through with flaws. The well-pleaded complaint rule does not allow a plaintiff to block federal courts from adjudicating a cause of action necessarily and exclusively governed by federal law. And the statutory displacement of any remedy previously available under federal common law does not alter the inherently federal character of such a cause of action. Those questions have now divided the courts of appeals, as well as two consecutive administrations. And the answer to them will dictate whether the numerous climate-change lawsuits pending in courts across the country—lawsuits that "seek[] a global remedy for a global issue," *Minnesota*, 2023 WL 2607545, at *9 (Stras, J., concurring)—should proceed in federal or state court. As one judge recently wrote, "only * * * [this] Court gets to make that call." *Id.* at *11. Given the consequential questions presented and the enormous stakes, no objective observer could dispute that the Court's guidance is urgently needed.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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