No. 22-361

IN THE

Supreme Court of the United States

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

v.

MAYOR & CITY COUNCIL OF BALTIMORE,
Respondent.

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

BRIEF FOR RESPONDENT MAYOR & CITY COUNCIL OF BALTIMORE

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QUESTION PRESENTED

Should this Court create a new exception to the well-pleaded complaint rule that confers federal question jurisdiction over respondent's state-law complaint based on petitioners' assertion that respondent's claims are "governed by" federal common law when: (1) the common law on which petitioners purport to rely has been displaced by a federal statute; (2) the statute does not completely preempt state law; and (3) petitioners cannot show that respondent's state-law claims necessarily present a substantial federal question that could be adjudicated in federal court without upsetting the federal-state division of judicial responsibility, as required by *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 545 U.S. 308 (2005).

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STATEMENT

This case is nearly identical, factually and procedurally, to *Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238 (10th Cir. 2022), *petition for cert. filed*, No. 21-1550 ("*Suncor*"), in which one of the petitioners here asserts the same Questions Presented. As in *Suncor*, this petition does not identify any true circuit conflict or any significant legal issue arising out of the uniform appellate decisions—now in five circuits—affirming district court remand orders in these improperly removed climate-deception cases.[1] Petitioners' extraordinary theory of removal asks the courts to 1) recognize a novel exception to the well-pleaded complaint rule that sidesteps this Court's subject-matter jurisdiction jurisprudence, and 2) apply that new exception to find that state law causes of action arise under federal common law, even where, as here, the federal common law has been displaced by statute. Because respondent's well-pleaded state court complaint alleges exclusively state-law statutory and common law tort claims, and because neither Question Presented has arisen or is likely to arise in any other group of cases, the petition for writ of certiorari should be denied.

As this Court recognized in its 2021 decision in this case, respondent Mayor & City Council of Baltimore ("Baltimore" or "City") filed the underlying lawsuit in Maryland state court against the 21 energy company petitioners "for promoting fossil fuels while allegedly

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[1] *See also Rhode Island v. Shell Oil Prods. Co.*, 35 F.4th 44 (1st Cir. 2022), *petition for cert. filed*, No. 22-524; *City of Hoboken v. Chevron Corp.*, 45 F.4th 699 (3d Cir. 2022); *Cty. of San Mateo v. Chevron Corp.*, 32 F.4th 733 (9th Cir. 2022), *petition for cert. filed*, No. 22-495; *City of Oakland v. BP PLC*, 969 F.3d 895 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2776 (2021).

concealing their environmental impacts" over many years. *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 1535 (2021). Baltimore pleaded exclusively state-law claims "centered on the defendants' alleged failure to warn about the dangers of their products—and the injuries the City says it suffered as a result." *Id.* The gist of the City's complaint is that petitioners wrongfully "employed a coordinated, multi-front effort to conceal and deny" the science of global warming, the known dangers of fossil fuels, and the catastrophic consequences of climate change, with the purpose and effect of inflating the market for their fossil fuel products. Pet. App. 3a.

The Fourth Circuit has twice held that the federal courts lack subject-matter jurisdiction over the City's state-law claims, and has rejected eight different theories of removal jurisdiction proffered by petitioners. In the ruling now at issue, the court of appeals held *inter alia* that the City's state-law claims for relief do not "arise under" federal common law for purposes of subject-matter jurisdiction. The court held both that Baltimore's claims did not implicate any question of federal common law, and that in any event neither the well-pleaded complaint rule nor its recognized exceptions permitted removal. *See* Pet. App. 11a–28a. The First, Third, Ninth, and Tenth Circuits have each reached the same result in similar cases. No circuit court has held otherwise, including in *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021). As discussed below, that case involved materially different substantive allegations, and was initiated in federal court in the first instance; federal subject-matter jurisdiction was never challenged or analyzed.

The appellate courts are uniform in holding that, even if federal common law might once have been ap-

plicable to the government plaintiffs' allegations in these climate-deception cases, all potentially relevant federal common law has been displaced by the Clean Air Act and cannot provide a basis for arising-under jurisdiction. The appellate courts are also uniform in "resoundingly" rejecting what the Fourth Circuit characterized as petitioners' "perplexing argument" that courts should create a new exception to the well-pleaded complaint rule that would allow removal of any state-law claim that could have been pleaded under federal common law—even after the federal common law has been displaced by statute. Pet. App. 12a, 20a.

Those unanimous holdings are correct applications of this Court's jurisprudence. On the first Question, the Court has squarely held that any federal common law nuisance claim relating to greenhouse gas emissions has been displaced by the Clean Air Act. *See Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011) ("*AEP*"). On the second Question, the Court has worked for nearly two decades to "bring some order to th[e] unruly doctrine" courts previously applied to determine whether a state-law claim presents a federal question for purposes of removal. *Gunn v. Minton*, 568 U.S. 251, 258 (2013); *see also Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005). Petitioners have not offered any compelling reason for this Court to create a new category of removable claims that bypasses the seminal *Grable* test, let alone to reconsider *Grable*, and the two cases petitioners principally rely on predate that decision. *See* Pet. 19–20.

Even if petitioners could establish a need to expand the scope of the Court's longstanding removal jurisprudence, this case would be a poor vehicle for doing so. The quintessentially state-law claims pleaded in Baltimore's complaint have nothing to do

with any federal common law that has ever existed. Instead, the City's allegations seek to vindicate core police power interests and protect the public's vital "interest in ensuring the accuracy of commercial information in the marketplace." *Edenfield v. Fane*, 507 U.S. 761, 769 (1993). The allegations target misconduct that states have long regulated in such recognized areas as "protection of consumers," *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 150 (1963); "advertising," *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541–42 (2001); and "unfair business practices," *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989); and the complaint seeks statutory and tort remedies that are deeply rooted in "the state's historic powers to protect the health, safety, and property rights of its citizens." *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 725 F.3d 65, 96 (2d Cir. 2013).

The Court has repeatedly stated that "[t]he policy of Congress opposes 'interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed.'" *Kircher v. Putnam Funds Tr.*, 547 U.S. 633, 640 (2006) (quoting *United States v. Rice*, 327 U.S. 742, 751 (1946)). Petitioners have delayed merits litigation on Baltimore's claims through nearly a half-decade of jurisdictional wrangling. The issues raised in their petition have been rejected by every court to consider them, and there is no justifiable basis for further review. The petition should be denied.

Background

"Federal courts are courts of limited jurisdiction, possessing only that power authorized by Constitution and statute." *Gunn*, 568 U.S. at 256 (cleaned

up). Congress has granted federal district courts original subject-matter jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States," and such actions "may be removed by the defendant" from state to federal court. 28 U.S.C. §§ 1331, 1441.

"[U]nder the present statutory scheme as it has existed since 1887," the Court has applied a "powerful doctrine," known as the well-pleaded complaint rule, requiring jurisdiction under sections 1331 and 1441 to "be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration." *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 9–10 (1983) (citation omitted). For more than a century, that rule has been "the basic principle marking the boundaries of the federal question jurisdiction of the federal district courts." *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987). The rule "makes the plaintiff the master of the claim" such that "he or she may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). "Jurisdiction may not be sustained on a theory that the plaintiff has not advanced," *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 809 n.6 (1986), and cannot be "predicated on an actual or anticipated defense," *Vaden v. Discover Bank*, 556 U.S. 49, 60 (2009), "including the defense of pre-emption," *Franchise Tax Bd.*, 463 U.S. at 14. There are only two recognized exceptions to the well-pleaded complaint rule. Petitioners now press for a third.

The first exception is the doctrine of complete preemption, which applies only when "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*, 482 U.S. at 393 (quoting *Metro Life*, 481 U.S. at 65). The Court has been "reluctant to find that extraordinary pre-emptive power," and has identified only three statutes that have "complete preemption" effect, none of which are at issue here. *Metro. Life*, 481 U.S. at 65.

The second is *Grable* jurisdiction, a doctrine this Court developed to resolve the lower courts' long-standing difficulty in applying the well-pleaded complaint rule to cases in which "a question of federal law is lurking in the background" of a case pleaded under state law. *See Gully v. First Nat'l Bank*, 299 U.S. 109, 117 (1936); *see also Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 578 U.S. 374, 385 (2016) (quoting *Gunn*, 568 U.S. at 258) (describing the previous "caselaw construing § 1331" as "highly 'unruly'"). The *Grable* doctrine is applicable only to a "special and small category" of cases in which "federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn*, 568 at 258 (citing *Grable*, 545 U.S. at 314; *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 699 (2006)).

Petitioners do *not* contend in this Court that respondent's claims are either completely preempted or removable under *Grable*. Their petition instead asks the Court to grant review for the sole purpose of carving out a new exception to the well-pleaded complaint rule—previously unknown and unavailable—that in practice would be applicable only to the limited category of climate-deception cases cited in Pet. 8–9 n.1.

Facts and Procedural History

Respondent brought this action in Maryland state court in 2018, alleging exclusively state-law claims for relief, including public and private nuisance and failure to warn, based on petitioners' decades-long campaigns to promote fossil-fuel products while wrongfully concealing the destructive impacts on public infrastructure they knew would result from using those products as directed. *See* Pet. App. 3a–4a. As the Fourth Circuit noted, the City's complaint "seeks to challenge the promotion and sale of fossil fuel products without warning and abetted by a sophisticated disinformation campaign," *Id.* 77a; the complaint does "not seek to impose liability on Defendants for their direct emissions of greenhouse gases [or] to restrain Defendants from engaging in their business operations." *Id.* 4a. Although emissions are "necessary to establish the avenue of Baltimore's climate-change-related injuries, [they are] not the source of tort liability." *Id.* 77a.

Petitioners removed the case to the District of Maryland, asserting eight different theories of federal subject-matter jurisdiction. *See, e.g.*, Pet. App. 89a. The district court granted the City's motion to remand, rejecting all eight theories. *Id.* 137a. The Fourth Circuit affirmed the district court's ruling that it lacked subject-matter jurisdiction under the federal officer removal statute, 28 U.S.C. § 1442, and held that it lacked appellate jurisdiction to review any of the other rejected grounds for removal. *Mayor & City Council of Baltimore v. BP P.L.C.*, 952 F.3d 452 (4th Cir. 2020), *vacated and remanded*, 141 S. Ct. 1532 (2021). This Court granted certiorari and reversed, holding that courts of appeals have jurisdiction to consider all grounds for removal denied in a district court remand order if the defendant's removal petition relied on at

least one of the grounds exempted from 28 U.S.C. § 1447(d)'s bar on appellate review, which include federal officer removal as asserted here. *Baltimore*, 141 S. Ct. at 1543. The Court remanded for the Fourth Circuit to consider petitioners' remaining grounds for removal. After further briefing and argument, the Fourth Circuit again affirmed the district court's remand order, rejecting each of the remaining theories of removal and remanding the case to Maryland state court. *See* Pet. App. 1a–86a.

REASONS THE PETITION SHOULD BE DENIED

First, the decision below does not conflict with any decision of any court of appeals, on any issue. Petitioners contend that the court of appeals' decision conflicts with *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021), on the first Question, whether federal common law "necessarily and exclusively governs" the state-law claims at issue. But *City of New York* involved materially different allegations in a case that was filed in federal court on diversity grounds, not removed from state court on a theory of arising-under jurisdiction. The Second Circuit addressed the defendants' "preemption defense on its own terms, not under the heightened standard unique to the removability inquiry," because it reviewed an order granting a motion to dismiss for failure to state a claim. 993 F.3d at 94.

On the second Question, the Fourth Circuit properly applied this Court's modern jurisprudence establishing the standards for removability under 28 U.S.C. §§ 1331 and 1441. The court of appeals' holding that respondent's claims neither invoke nor require resolution of federal common law is consistent with the rul-

ings of every district and circuit court to consider the question in the context of these climate-deception cases. No court has held in any context, moreover, that a statutorily displaced federal common law cause of action can serve as a basis for federal question jurisdiction "without resort to the doctrine of *Grable*." Pet. 22. Every court to consider the question has held just the opposite. *See, e.g.*, *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 853 (9th Cir. 2012) ("If a federal common law cause of action has been extinguished by Congressional displacement, it would be incongruous to allow it to be revived in another form."). The two purportedly conflicting decisions petitioners identify both predate *Grable*, and would be analyzed under the *Grable* framework today. There is no circuit conflict.

Second, the decision below is correct. The court of appeals correctly concluded that this Court's *Grable* line of cases provides the only existing method for finding that a cause of action pleaded under state law nonetheless arises under federal common law for subject-matter jurisdiction purposes. If a federal cause of action does not appear on the face of the complaint, the case is only removable on federal question grounds if the four-element *Grable* test is satisfied, or if the asserted state-law claim is completely preempted by a federal statute. And because complete preemption requires clear direction from Congress, federal-question jurisdiction based on federal common law is appropriately analyzed through *Grable*.

There is no additional exception to the well-pleaded complaint rule for state claims that purportedly implicate federal common law—let alone federal common law that has since been displaced by statutory enactment—but do not satisfy *Grable* and are not completely preempted by statute. Petitioners neither identify

any compelling need for their proposed new rule nor any case authority supporting removal based "on federal common law even when the federal common law claim has been deemed displaced, extinguished, and rendered null" by congressional action. Pet. App. 24a. No such case exists, nor should it.

There is no circuit conflict on the first Question Presented because the cases petitioners rely upon resolved different issues in materially different cases.

The first Question Presented is not squarely raised and would not be the subject of a circuit split even if it were. Petitioners contend that the Second Circuit's decision in *City of New York*, 993 F.3d 81, conflicts with the portion of the Fourth Circuit's ruling rejecting their argument that respondent's claims are "necessarily and exclusively governed by federal common law." *See, e.g.*, Pet. 3, 13. That purported conflict is illusory for at least two reasons. First, the two courts addressed and decided entirely separate issues in completely different procedural postures—one jurisdictional and one on the merits of a federal preemption defense—as both courts expressly recognized.[2] Second, the two cases rest upon materially different factual allegations and theories of liability, making the Second Circuit's reasoning entirely inapplicable to this case.

1. The decision below does not conflict with *City of New York* for the principal reason that the cases re-

[2] A district court in the Second Circuit has in fact adopted the same reasoning as the Fourth Circuit below, remanding a different climate-deception case after concluding that *City of New York* was not controlling. *Connecticut v. Exxon Mobil Corp.*, No. 3:20-CV-1555 (JCH), 2021 WL 2389739, at *4–7 & n.7 (D. Conn. June 2, 2021), *appeal pending*, No. 21-1446 (2d Cir.).

solved different questions. The issue in this case is whether federal common law provides a basis for removal, even though Baltimore's well-pleaded state-law complaint neither asserts a federal common law claim for relief nor could have asserted such a claim. The issue in the Second Circuit case, which was filed initially in federal court and thus raised no issue of removability, was whether the plaintiff's substantive allegations, as pleaded, failed to state a claim for relief because they were preempted by federal common law. The Second Circuit resolved the defendants' preemption defenses on the merits and did not consider any question of federal subject-matter jurisdiction. Both courts acknowledged as much and expressly stated that their holdings were not in conflict.

It has been settled law for more than a century that the availability of even a meritorious federal preemption defense is not a sufficient basis for removing state-law claims to federal court. *See, e.g.*, *Gully*, 299 U.S. at 116 ("By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby."). In this case, the Fourth Circuit held that Baltimore's claims do not "arise under" federal common law for removal purposes, because petitioners "[a]t most" presented "an ordinary preemption argument" that cannot support federal question jurisdiction under the well-pleaded complaint rule. Pet. App. 28a. Because the court was "only concerned with removal jurisdiction" it had no "need . . . to delve into these defenses at Defendants' disposal." *Id.* 10a n.2. The court acknowledged the *City of New York* decision and noted that it arose "in a completely different procedural posture," "because New York City initially filed suit in federal court as opposed to state court" and "the Second Circuit confined itself to Rule 12(b)(6) and

never addressed its own subject-matter jurisdiction." *Id.* 18a. For that reason, it concluded that *City of New York* "d[id] not pertain to the issues before [the court]." *Id.* Two other recent court of appeals decisions expressly distinguished *City of New York* on that identical basis. *See Suncor*, 25 F.4th at 1262; *Rhode Island*, 35 F.4th at 55.

The Second Circuit itself recognized the material procedural differences between these cases, which is why it expressly "reconcile[d]" its analysis with "the parade of recent opinions" affirming remand orders in this case and others. *City of New York*, 993 F.3d at 93. The Second Circuit noted that the energy company defendants "sought to remove those cases to federal court, arguing that they anticipated raising federal preemption defenses," and "[t]he single issue before each of those federal courts was thus whether the defendants' anticipated defenses could singlehandedly create federal-question jurisdiction." *Id.* at 94. By contrast, the plaintiff in *City of New York* "filed suit in federal court in the first instance" on diversity grounds, and both the district court and Second Circuit were "thus free to consider the [defendants]' preemption defense on its own terms, not under the heightened standard unique to the removability inquiry." *Id.* That is why the Second Circuit was able to conclude that the "fleet of cases" finding that "federal preemption does not give rise to a federal question for purposes of removal . . . does not conflict with our holding." *Id.* The cases addressed entirely different issues.

Because of this fundamental difference, the Second Circuit and Fourth Circuit's opinions are not in conflict, and not mutually exclusive. The decision below would not preclude a district court in the Fourth Circuit from holding that a claim identical to New York

City's, filed in federal court, would be preempted by federal law. Likewise, *City of New York* does not preclude district courts in the Second Circuit from holding that state-law claims like Baltimore's do not arise under federal common law for jurisdictional purposes.[3]

Petitioners acknowledge the procedural differences between this case and *City of New York* but assert that those differences "do[] not eliminate the conflict on the first question presented," because the jurisdictional question (whether the complaint arises under federal law) is "logically subsequent" to the merits question (whether federal common law "govern[s]"). Pet. 16. That gets the analysis exactly backward—"[t]he requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998) (quoting *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884)). The court of appeals, like the First, Third, Ninth, and Tenth Circuit courts in *Rhode Island*, *Hoboken*, *San Mateo*, and *Suncor*, respectively, correctly held that "even if" petitioners could establish that federal common law preempted Baltimore's claims, as *City of New York* held based on the allegations in that case, "the well-pleaded complaint rule

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[3] The District of Connecticut did just that in *Connecticut*, 2021 WL 2389739, at *4–7 & n.7. The State of Connecticut there brought statutory consumer protection claims alleging that fossil fuel companies misled consumers in the state about climate change, and the defendants argued those state-law claims were "necessarily and exclusively govern[ed]" by federal common law. *Id.* at *7. The district court, like the court of appeals here, held that federal common law did not provide a basis for federal removal jurisdiction. *See id.* ("ExxonMobil has not shown that federal common law justifies removal of this case.").

would still forbid the removal" because ordinary preemption is a federal defense that cannot confer jurisdiction. Pet. App. 20a.

The Fourth Circuit and those other courts in fact could have affirmed the district courts' remand orders without considering the existence or scope of any applicable federal common law, which is precisely what the Ninth Circuit did in the *Oakland* case. The district court there held that "it had federal-question jurisdiction under 28 U.S.C. § 1331 because the Cities' claim was 'necessarily governed by federal common law.'" *See Oakland*, 969 F.3d at 902. Writing for the circuit panel, Judge Ikuta observed that 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." *Id.* at 906 (citing *AEP*, 564 U.S. at 423). The court held that federal common law could not provide jurisdiction over the case regardless because *Grable* was not satisfied: "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.* The courts of appeals are uniform that petitioners' argument here presents at most a preemption defense and does not confer jurisdiction.

2. The Fourth Circuit's decision also does not conflict with *City of New York* because the allegations in the two cases are materially different. In *City of New York*, the plaintiff "acknowledge[d]" that the conduct on which it premised liability was "lawful commercial activity," and the Second Circuit understood that the City's claims would "effectively impose strict liability

for the damages caused by fossil fuel emissions," requiring the defendants to "cease global production altogether" to avoid ongoing liability. 993 F.3d at 87, 93 (cleaned up). Here, by contrast, the court of appeals recognized that Baltimore "clearly seeks to challenge the promotion and sale of fossil-fuel products without warning and abetted by a sophisticated disinformation campaign," and the tortious conduct is petitioners' alleged "concealment and misrepresentation of the products' known dangers." Pet. App. 77a. Baltimore's claims thus do not "launch the State upon a prohibited voyage into a domain of exclusively federal competence," *Zschernig v. Miller*, 389 U.S. 429, 442 (1968) (Stewart, J., concurring), because there has never been any federal common law pertaining to any of these subjects. Whether or not the considerations discussed in *City of New York* warrant the recognition or application of a federal common law, Baltimore's allegations do not.

There is no circuit conflict on the second Question Presented, because this Court has carefully elucidated the application of "arising under" jurisdiction to removed state law causes of action and the circuits are in accord.

There is also no circuit conflict on the second Question Presented, pertaining to petitioners' proposed new exception to the well-pleaded complaint rule. Starting with *Grable* in 2005, this Court has simplified and clarified the principles governing the removability under 28 U.S.C. §§ 1331 & 1441 of state-law claims for relief that necessarily raise issues of federal law. The lower courts have uniformly applied those standards, and petitioners have neither identified any circuit conflict nor articulated any pressing need for the Court to revisit its previous decisions.

Before *Grable*, no "well-defined test" existed to guide the lower courts in this area, *Manning*, 578 U.S. at 385, and the "canvas" of opinions across the judiciary "look[ed] like one that Jackson Pollock got to first." *Gunn*, 568 U.S. at 258. *Grable* established a straightforward, four-part test for determining when a district court may exercise federal question jurisdiction over a case pleading only state-law claims for relief, *see id.* at 258, and the courts of appeals have consistently and effectively applied that test in a broad range of cases, including those in which the plaintiff's state-law claims allegedly implicate federal common law. *See, e.g.*, *Mitchell v. Advanced HCS, L.L.C.*, 28 F.4th 580, 588–89 (5th Cir. 2022); *Morgan Cty. War Mem'l Hosp. ex rel. Bd. of Dirs. of War Mem'l Hosp. v. Baker*, 314 F. App'x 529, 533–37 (4th Cir. 2008); *Nicodemus v. Union Pac. Corp.*, 440 F.3d 1227, 1235–37 (10th Cir. 2006). Petitioners' insistence that removal of entirely state-law complaints should be "permissible without resort to the doctrine of *Grable*" or complete preemption, Pet. 22, is an extreme outlier position that no court has adopted.

The two cases petitioners cite as evidence of a circuit split predate *Grable*, and "most courts recognize that these cases are not good law" to the extent they are inconsistent with it. *Hoboken*, 45 F.4th at 708. In *In re Otter Tail Power Co.*, 116 F.3d 1207, 1213–14 (8th Cir. 1997), the plaintiff brought a suit for injunctive relief in state court, alleging that the defendant power company failed to comply with a federal district court order regarding its authority to provide electrical utility services to a tribal reservation. The defendant successfully removed the case, based on the federal district court's and Eighth Circuit's conclusion that "the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law"

insofar as "the extent of an Indian Tribe's authority to regulate nonmembers on a reservation . . . is manifestly a federal question" because "tribal sovereignty is dependent on, and subordinate to, only the Federal Government." *Id.* (cleaned up). Today, the same question would be resolved by reference to the *Grable* test, of which a substantial federal question is one—but not the only—element. The court in *Otter Tail* agreed that questions of Federal Indian Law were necessarily raised, substantial, and actually disputed, and the outcome of the case today would depend on whether the issue could be adjudicated without upsetting any state-federal divisions of judicial authority approved by Congress. *Gunn*, 568 U.S. at 258. Nothing in the Eighth Circuit's reasoning conflicts with the court of appeals' analysis or holdings here.

The Fifth Circuit's decision in *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922 (5th Cir. 1997), is by its own terms narrow and limited. The court there held that a plaintiff's claims relating to jewelry lost by an airline arose under federal common law because there was a long-recognized, "clearly established federal common law cause of action against air carriers for lost shipments," which Congress had affirmatively "preserv[ed]" in the Airline Deregulation Act of 1978. *Id.* at 928. The court expressly stated that "[b]ecause we rely upon the historical availability of this common law remedy, and the statutory preservation of the remedy, our holding today is necessarily limited." *Id.* at 929 n.16. As discussed in greater detail below, the circumstances here are exactly the opposite; if a federal common law cause of action ever existed that could have encompassed Baltimore's claims, it has been displaced by the Clean Air Act. There is no basis to conclude Baltimore's case would be decided differently under the Fifth Circuit's former jurisprudence,

or that the Fourth Circuit would reach a different conclusion on the facts of *Sam L. Majors* today.

To the extent petitioners' pre-*Grable* cases stand for the anomalous proposition that "a district court has jurisdiction under Section 1331 over claims artfully pleaded under state law but necessarily governed by federal common law," Pet. 18, "without resort to the doctrine of *Grable*," Pet. 22, it is because this Court's "caselaw construing § 1331 was for many decades . . . highly 'unruly'" and lower courts struggled to apply it. *Manning*, 578 U.S. at 385 (quoting *Gunn*, 568 U.S. at 258). The Court has since provided clear guidance to which the circuits have unanimously conformed.

The decision below was correct, both as to the displacement of the federal common law of interstate pollution nuisance and as to the removability analysis.

The decision below correctly follows this Court's guidance on how to determine whether state-law claims are removable and how to determine whether a state-law public-nuisance or other tort claim that in some manner pertains to interstate pollution is a disguised claim under federal common law. As to the first issue, the court of appeals properly decided that petitioners failed to establish an exception to the well-pleaded complaint rule, because the underlying claims were neither completely preempted by federal statute nor removable under *Grable*. As to the second, the court of appeals properly concluded that the City's claims were *not* disguised federal common law claims, and that in any event, the federal common law that petitioners rely upon was displaced by the Clean Water Act and Clean Air Act and could not support arising-under jurisdiction for that reason as well.

1. More than a decade ago, this Court made clear that to the extent any federal common law of interstate pollution previously existed, it was extinguished by Congress's enactment of the Clean Air Act in 1963. While this Court once "recognized public nuisance as a federal common law claim" in the context of "disputes involving [pollution in] interstate and navigable waters," the scope of that federal law was narrowly circumscribed. Pet. App. 21a (citing *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972)). For example, although the Court held that "*States* were permitted to sue to challenge activity harmful to their citizens' health and welfare" under a federal common law of interstate pollution,[4] it never had occasion to "decide[] whether private citizens . . . or political subdivisions . . . may invoke the federal common law of nuisance to abate out-of-state pollution." *AEP*, 564 U.S. at 422 (emphasis added). That is because Congress amended the Clean Water Act and displaced any such claim (as this Court acknowledged in *Milwaukee v. Illinois*, 451 U.S. 304 (1981) ("*Milwaukee II*")) before any case arose in which a private party alleged a claim for public nuisance under federal common law based on interstate water pollution. *See also Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 21–22 (1981) ("[W]e need not decide whether a cause of action may be brought under federal common law by a private plaintiff, seeking damages" because "the federal common law of nuisance in the area of water pollution is entirely pre-empted by the more comprehensive scope of" the Clean Water Act.).

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[4] *See, e.g.*, *Tennessee v. Davis*, 100 U.S. 257 (1879); *Missouri v. Illinois*, 180 U.S. 208 (1901); *Georgia v. Tenn. Copper Co.*, 240 U.S. 650 (1916); *New Jersey v. City of New York*, 283 U.S. 473 (1931); *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972).

Three decades later in *AEP*, the Court concluded that nuisance claims based on interstate *air* pollution were displaced by the Clean Air Act. *See Suncor*, 25 F.4th at 1259 ("What *Milwaukee II* did to the federal common law of interstate water pollution, *AEP* did to the federal common law of interstate air pollution."). Importantly, the Court did not hold, as petitioners contend, that "'the basic scheme of the Constitution' requires the application of a federal rule of decision" in such cases, Pet. 26, or that "federal common law continues to govern in this area" despite being displaced by statute, Pet. 16. To the contrary, the Court expressly declined to consider the "academic question whether, in the absence of the Clean Air Act . . . , the plaintiffs could state a federal common-law claim for curtailment of greenhouse gas emissions," because "[a]ny such claim would be displaced by the federal legislation authorizing EPA to regulate carbon-dioxide emissions." *AEP*, 564 U.S. at 423. The Court further held that because the Clean Air Act displaced any relevant federal common law, "the availability *vel non* of a state lawsuit depends, *inter alia,* on the preemptive effect of the federal Act," not whatever vestigial preemptive force the federal common law might once have held. *Id.* at 429. The Fourth Circuit here was therefore correct that "federal common law in this area ceases to exist due to statutory displacement," Pet. App. 21a, because this Court exactly so held in *AEP*.

The Ninth Circuit's *Kivalina* decision, on which petitioners rely, confirms that any relevant federal common law was entirely extinguished by the Clean Air Act, not merely stripped of its available remedies. The plaintiffs in *Kivalina* brought federal common law nuisance damages claims against oil companies and utilities, alleging that the defendants' "massive greenhouse gas emissions" caused climate-change-related

damages to their village. 696 F.3d at 853. Relying on *AEP*, the court of appeals held that "the field has been made the subject of comprehensive legislation by Congress," and that "[w]hen Congress has acted to occupy the entire field, that *action* displaces any previously available federal common law *action*," and "the type of remedy asserted is not relevant to the applicability of the doctrine of displacement." *Id.* at 857 (emphases added) (cleaned up). Stated differently, "displacement of a federal common law right of action means displacement of remedies," because "[j]udicial power can afford no remedy unless a right that is subject to that power is present"; when the federal common law has been displaced, a claim under that law implicates no justiciable right. *Id.* Importantly, the court of appeals did not affirm a dismissal on the merits for failure to state a claim. Rather, it affirmed dismissal for lack of subject-matter jurisdiction because the federal common law claim was plainly unsubstantial. *See id.* at 855, 858; *see also Hagans v. Lavine*, 415 U.S. 528, 536–37 (1974). That is the same holding reached by the court below: "Public nuisance claims involving interstate pollution . . . are nonexistent under federal common law because they are statutorily displaced," and "since those claims are defunct, . . . a federal court cannot exercise federal-question jurisdiction on that basis." Pet. App. 24a–25a.

In light of the limited scope of federal common law nuisance that once existed concerning interstate pollution, and its displacement by the Clean Air Act and Clean Water Act, the court of appeals was correct to conclude that there was no basis for creating a *new* category of federal common law encompassing the traditional state-law tort and statutory claims the City has alleged. The court was equally correct in holding that petitioners had not shown any conflict between

Maryland law and any uniquely federal interest, a strict prerequisite for federal common lawmaking.

The requirements for creating new categories of federal common law are, and should be, demanding; "[j]udicial lawmaking in the form of federal common law plays a necessarily modest role under a Constitution that vests the federal government's 'legislative Powers' in Congress and reserves most other regulatory authority to the States." *Rodriguez v. F.D.I.C.*, 140 S. Ct. 713, 717 (2020) (quoting U.S. Const. art. I, § 1). "[B]efore federal judges may claim a new area for common lawmaking, strict conditions must be satisfied," *id.*, the most basic being: a "specific," "concrete," and "significant conflict" between a uniquely federal interest and the use of state law, *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 87–88 (1994); *see also Miree v. DeKalb Cty.*, 433 U.S. 25, 31 (1977); *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68–72 (1966). "The cases in which federal courts may engage in common lawmaking are few and far between," and this Court has "underscore[d] the care federal courts should exercise before taking up an invitation to try their hand at common lawmaking," lest they "ma[k]e the mistake of moving too quickly past important threshold questions at the heart of our separation of powers." *Rodriguez*, 140 S. Ct. at 716, 718.

Petitioners "never establish[ed] a significant conflict between Baltimore's state-law claims . . . and any federal interests" below, Pet. App. 16a, and they do not identify any specific conflict or government interest in their petition here. Petitioners assert that "the basic scheme of the Constitution" requires federal law to "govern" any claim "for injuries allegedly caused by" climate change, no matter how those claims are pleaded or by whom, and that it would be "inconsistent with our con-

stitutional structure" to allow a municipality to bring a state-law claim like Baltimore's against a private defendant. Pet. 3, 7, 28 (citation omitted). But even traditional conflict preemption analysis does not countenance a "freewheeling judicial inquiry into whether a state statute is in tension with federal objectives," because "such an endeavor would undercut the principle that it is Congress rather than the courts that pre-empts state law." *Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582, 607 (2011) (cleaned up); *see, e.g.*, *Miree*, 433 U.S. at 32. This Court has recently reiterated, moreover, that "[i]nvoking some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption of a state law" and instead "a litigant must point specifically to a constitutional text or a federal statute that does the displacing or conflicts with state law." *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019) (cleaned up). Petitioners have not even done that much. Their arguments would be insufficient to establish that federal law preempts Baltimore's claims, let alone that Baltimore's state-law claims for relief so intrude on a uniquely federal interest that the Court should *make new common law* to wrest lawmaking power from the State of Maryland.

At bottom, there is no existing federal common law that could apply to Baltimore's claims, and petitioners have not come close to showing that new federal common law should be crafted. The court of appeals was correct and no further review by this Court is warranted.

2. The Fourth Circuit's determination that federal common law cannot provide a basis for overcoming the well-pleaded complaint rule unless complete preemption or *Grable* are satisfied also correctly applies this Court's instructions on the scope of arising-under ju-

risdiction. A case arises under federal law "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) (quoting *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152 (1908)). Federal "[j]urisdiction may not be sustained on a theory that the plaintiff has not advanced." *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 12 (2003) (Scalia, J., dissenting) (quoting *Merrell Dow Pharms.*, 478 U.S. at 809 n.6). Jurisdiction also may not rest on "a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case." *Franchise Tax Bd.*, 463 U.S. at 14. As masters of their complaints, plaintiffs "may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar*, 482 U.S. at 392.

This Court has recognized under the well-pleaded complaint rule only two types of state-law claims that arise under federal law: (1) the "special and small category" of state-law actions that satisfy *Grable*, *see, e.g.*, *Gunn*, 568 U.S. at 258 (citation omitted); and (2) cases completely preempted by a federal statute that itself creates a cause of action "Congress intended . . . to be exclusive," *e.g.*, *Beneficial Nat'l Bank*, 539 U.S. at 9 n.5. The Court has recently reiterated that it "would not expect Congress to take [the] extraordinary step" of "stripping state courts of jurisdiction to hear their own *state* claims" "by implication," and that only "[e]xplicit, unmistakable, and clear" congressional directives will justify such an intrusion on federalism and state sovereignty. *Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335, 1351 (2020).

Petitioners assert that Baltimore's state-law claims for relief "inherently *are* federal [common law] claims"

and that the artful pleading doctrine "prohibits" Baltimore from "dressing them in state-law garb." Pet. 30. Petitioners cite no case where a court has used federal common law and the artful pleading doctrine together in this way because no court has done so. This Court has explained that the "corollary of the well-pleaded complaint rule" embodied in the artful pleading doctrine is that "*Congress* may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character," *Metro. Life*, 481 U.S. at 63–64 (emphasis added), because then and only then "such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action" in absence of the statute. *Franchise Tax Bd.*, 463 U.S. at 22–23. Even before *Grable*, therefore, courts recognized that "the only state claims that are 'really' federal claims and thus removable to federal court, . . . are those that are preempted completely by federal law," because artful pleading and complete preemption are two sides of the same coin. *Goepel v. Nat'l Postal Mail Handlers Union, a Div. of LIUNA*, 36 F.3d 306, 311–12 (3d Cir. 1994). Petitioners say "[t]here is no plausible reason why" complete preemption and the artful pleading doctrine should be limited to statutes. Pet. 30 (citation omitted). But the reason for that limitation is obvious. Complete preemption requires "extraordinary preemptive power," which this Court has been "reluctant to find" even in federal legislation, *Metro Life*, 481 U.S. at 65, because it implicates severe federalism concerns.

Petitioners rely on the second footnote in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n.2 (1981), for its statement that courts faced with a motion to remand should "seek to determine whether the real nature of the claim is federal, regardless of plaintiff's characterization." Pet. 6. This Court explained

more than 20 years ago that the "marginal comment" in "*Moitie*'s enigmatic footnote" "caused considerable confusion in the circuit courts" and "will not bear the heavy weight lower courts have placed on it." *Rivet v. Regions Bank of La.*, 522 U.S. 470, 477–78 (1998). The Court thus expressly limited *Moitie* to its "case-specific context." *Id.* at 477. The Court clarified in the same opinion: "The artful pleading doctrine allows removal where federal law completely preempts a plaintiff's state-law claim." *Id.* at 475. This Court has never held that federal common law may completely preempt state law and has never applied the artful pleading doctrine outside the complete preemption context.

A case that necessarily raises a substantial issue of federal common law and could be adequately adjudicated in federal court without disturbing any congressionally-approved federal-state balance could be removable under *Grable*. The corollary is equally true: There is no reason why a case like this, which bears at most a passing connection to an insubstantial and, even in petitioners' view, displaced issue of federal common law, must be heard in the federal courts if the four-part inquiry under *Grable* cannot otherwise be satisfied.

The *Grable* analysis, which this Court has taken pains to develop, "provides ready answers to jurisdictional questions" and "gives guidance whenever borderline cases crop up," including those implicating federal common law. *Manning*, 578 U.S. at 392. The Court applied exactly that "guidance" in *Manning*, stating that the *Grable* framework set forth the appropriate analysis for determining whether a state law cause of action arises under the federal Securities Exchange Act and is thus within the exclusive jurisdiction of the district courts pursuant to 15 U.S.C.

§ 78aa(a). *See Manning*, 578 U.S. at 383–84. The Court declined to adopt the "untested approach" advocated by the petitioner there, because "forcing courts to toggle back and forth between [that approach] and the 'arising under' standard, would undermine consistency and predictability in litigation." *Id.* at 392; *see also Hertz Corp. v. Friend*, 559 U.S. 77, 79 (2010) ("[A]dministrative simplicity is a major virtue in a jurisdictional statute."). Petitioners offer no justification for treating federal common law differently than any other body of federal law encompassed by *Grable,* because there is none. This Court's precedent is fully up to the task. If a substantial, disputed question of federal common law is necessarily raised in a state-law complaint and can be adjudicated in federal court without offending the federal-state balance approved by Congress, there is federal question jurisdiction under § 1331.

Petitioners suggest that district judges should analyze removal disputes "without resort to the doctrine of *Grable*" and complete preemption. Pet. 21–22. But that would return lower courts to the "unruly" and "muddled backdrop" of jurisprudence that *Grable* was intended to overcome. *Manning*, 578 U.S. at 385. Worse still, petitioners' proposed approach would massively expand the substantive and jurisdictional powers of federal judges and introduce grave separation of powers and federalism problems. Under petitioners' approach, a district judge could recognize a new area of federal common law, find that it extinguishes state law, and bootstrap its own jurisdiction over a state-law complaint onto those findings, all without any guidance from Congress. Understandably, no court has adopted this approach. The Fourth Circuit was correct to "resoundingly" reject it. Pet. App. 12a.

The Questions Presented have minimal practical importance and this case is a poor vehicle for addressing them.

The two Questions Presented do not warrant this Court's review for the additional reasons that they arise in only a single, discrete category of cases and are not well-presented in this petition.

1. The first Question does not warrant review because it raises an extremely narrow issue of federal common law and is not squarely presented in any event. Federal common law applies in only a "few," "restricted" "areas," *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (citation omitted), and the cases affected by petitioners' first Question would necessarily be few in number even if petitioners were correct that federal common law applies here. By its own terms, the Question is even further limited to state-law "claims seeking redress for injuries allegedly caused by the effect of interstate greenhouse-gas emissions on the global climate." Pet. I. The only potentially affected cases are other lawsuits targeting the fossil-fuel industry's alleged history of deceiving the public concerning climate change, a tiny fraction of the thousands of cases remanded each year to state court.

The first Question is also not squarely presented because, as discussed above, the court of appeals expressly declined to reach whether petitioners could raise an ordinary preemption defense to Baltimore's claims, leaving that for the state court on remand. *See, e.g.*, Pet. App. 10a n.2. The Maryland courts will resolve on the merits whether federal law "governs" to the exclusion of Maryland law. Petitioners' speculation that "our national energy policy may be decided by juries in state courts" absent review now, Pet. 32,

is baseless, because Baltimore's claims hinge on petitioners' alleged misrepresentations to consumers and the public. Neither Baltimore's theories of liability nor its requested relief implicates "national energy policy" as petitioners suggest.

2. The second Question is also of minimal practical importance, and petitioners do not seriously contend otherwise. The most they say is that federal common law's relationship to *Grable* and the well-pleaded complaint rule "is a significant jurisdictional question that arises in several contexts," from "foreign affairs to tribal relations." Pet. 31. Yet they provide no examples of cases where the Court's existing jurisprudence is inadequate to resolve the issue. *Grable* already "provides ready answers to jurisdictional questions" and "gives guidance whenever borderline cases crop up," *Manning*, 578 U.S. at 392, including the "few" "restricted" "areas" in which federal common law operates, *Texas Indus.*, 451 U.S. at 640. This narrowness of the displaced federal common law on which petitioners' argument is based also makes this case a poor vehicle to consider the second Question Presented. There is no need, and petitioners offer no justification, for granting review to consider whether to create a third exception to that rule that would govern *only* this case and similarly pleaded state-law climate-deception cases.

CONCLUSION

For the reasons stated the petition for writ of certiorari should be denied.

Respectfully submitted,

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