No. 23-168

In the
Supreme Court of the United States

AMERICAN PETROLEUM INSTITUTE, ET AL.,
Petitioners,

v.

MINNESOTA,
Respondent.

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

BRIEF OF AMERICAN FREE ENTERPRISE CHAMBER OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Formed in 2022, the American Free Enterprise Chamber of Commerce ("AmFree") is a 501(c)(6) organization that represents hard-working entrepreneurs and businesses across all sectors. AmFree's members are vitally interested in U.S energy security and the continued viability of our commercial republic.

AmFree recently launched the Center for Legal Action ("CLA") to represent these interests in court. CLA is spearheaded by two-time former U.S. Attorney General Bill Barr. Under Attorney General Barr's leadership, the Department of Justice argued that federal common law governs attempts to impose a global carbon tax through litigation. Minnesota's contrary view is not just wrong, it gravely threatens the energy security of the United States, and therefore, our national sovereignty.

SUMMARY OF ARGUMENT

"There is no hiding the obvious, and Minnesota does not even try: it seeks a global remedy for a global issue." *Minnesota v. Am. Petrol. Inst.*, 63 F.4th 703, 717 (8th Cir. 2023) (Stras, J., concurring). Minnesota alleges that Petitioners, by selling fossil fuels, have changed "the Earth's energy balance." Complaint ¶ 53. This has, it says, made Minnesota's climate

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[1] *Amicus curiae* provided timely notice of intent to file this brief to all parties. No party's counsel authored this brief in whole or in part, and no person or entity other than *amicus* or its counsel made a monetary contribution intended to fund its preparation or submission.

warmer, especially during the winter. *Id.* ¶ 139. Minnesota alleges the warmer climate and other effects have harmed the state and its citizens, and that Minnesota has paid for this harm, unjustly enriching Petitioners. *Id.* ¶¶ 197–98.[2] As a remedy, Minnesota seeks "restitution," among other things, and an order requiring Petitioners "to disgorge all profits made as a result of their [allegedly] unlawful conduct." *Id.* ¶¶ 248–49. In short, through this litigation, Minnesota wants to impose a global carbon tax on Petitioners' alleged "excess profits."

Amicus writes to make three critical points.

1. Minnesota's planetary power grab runs headlong into the exclusive federal law of transboundary air pollution. Minnesota argues that by displacing the federal common law, the Clean Air Act tacitly empowered states to enter a field they have never occupied, allowing them for the first time to regulate transboundary emissions fifty times over. The Second Circuit got it right: "Such an outcome is too strange to seriously contemplate." *City of New York v. Chevron Corp.*, 993 F.3d 81, 98–99 (2d Cir. 2021). Other courts, however, have blessed this extraordinary theory of implicit federal abdication to states. Pet. 17–21. The Court should grant certiorari to resolve this important split.

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[2] Minnesota alleges 60 heat-related deaths in the state from 2000 to 2017. Complaint ¶ 140. Minnesota omits that the number of cold-related deaths is nearly an order of magnitude higher. *Cold-Related Deaths*, Minnesota Dep't of Health, https://perma.cc/SK7C-5KCG (Sept. 12, 2023).

2. The well-pleaded complaint rule is no obstacle. Minnesota's complaint is a clear case of artful pleading, long recognized by this Court. To be sure, some dissenting Justices have criticized the artful pleading doctrine as an "act of jurisdictional alchemy." *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 14 (2003) (Scalia, J., dissenting). But the only thing that belongs in the *Occulta Jurisprudentia* is the well-pleaded complaint rule itself. As explained in detail below, the well-pleaded complaint rule rests on a seriously mistaken construction of the 1887 removal amendment. *See Tennessee v. Union & Planters' Bank*, 152 U.S. 454, 464–72 (1894) (Harlan, J., dissenting). It has no basis in law, and it makes no sense as policy. As Judge Stras rightly observed, "[t]here is no reason for the removal rules to operate in such a confounding way." *Minnesota*, 63 F.4th at 720 (Stras, J., concurring).

Petitioners' rule brings the Court closer to, not further from, the original meaning of the law. The Court should grant certiorari to make clear that Petitioners' reading of the law is correct or, in the alternative, it should grant certiorari to overrule the well-pleaded complaint rule.

3. If applied to deny jurisdiction here, the well-pleaded complaint rule would effectively deprive defendants of a neutral federal forum to adjudicate a federal defense. No federal system should tolerate that answer, and no law compels it.

The stakes of this litigation could not be higher. If Minnesota and like-minded states and localities succeed in imposing an unwieldy patchwork of *de facto* carbon taxes on private energy firms, then the United States would soon become dependent on

energy companies owned by foreign states to meet its energy needs, since those energy companies alone can claim sovereign immunity and are free to remove under 28 U.S.C. § 1441(d). Of course, many of those companies are controlled by countries hostile to the United States.

The Court's review is urgently needed to stop this grave threat to U.S energy security. The Court should not be "willing to stand on the dock and wave goodbye as [state courts] embark[ ] on this multiyear voyage of discovery." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 328 (2014).

REASONS FOR GRANTING THE PETITION

I. Federal Law Governs Minnesota's Attempt to Impose a Global Tax on Carbon.

This petition raises an important question of federal jurisdiction. Lurking beneath the jurisdictional surface, however, is an important dispute about the nature of federal common law, and its relationship to federal and state law. The artful pleading doctrine urged by Petitioners applies only if this dispute is inherently federal. We therefore turn first to that logically antecedent question.

A. The Federal Law of Transboundary Air Pollution Is Exclusive.

In *Erie Railroad Company v. Tompkins*, this Court held that Congress, and the federal courts, have "no power to declare substantive rules of common law applicable in a state." 304 U.S. 64, 78 (1938). On some accounts, by freeing states from general common law, *Erie* empowered states to compete for the "affection"

of mobile citizens in "the ordinary administration of . . . civil justice," The Federalist No. 17 (Alexander Hamilton), and "try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).[3]

Not long after *Erie*, the Court made clear that state forum law would also generally govern choice-of-law disputes, *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941), even when a state decision is "plainly unsound as a matter of normal conflicts law." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 324 (1981) (Stevens, J., concurring). That is so even though conflict-of-law "questions are essentially federal, in the sense that they involve, by hypothesis, more than one state." Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 514 (1954).

Taken too far, *Erie* and *Klaxon* would have turned every "interstate dispute into a race to the courthouse, with each federal court equally obliged to favor the state in which it sits." Stephen E. Sachs, Pennoyer *Was Right*, 95 Tex. L. Rev. 1249, 1259 (2017). That is "absurd." *Id.* And it is certainly not how *Erie* itself was originally understood. "On the same day that *Erie* declared '[t]here is no federal general common law,' the Supreme Court applied 'federal common law' in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.* to determine an interstate boundary and apportion water in an interstate

[3] For a less cheerful account of *Erie*, *see* Michael S. Greve, *The Upside-Down Constitution* 221–42 (2012); *see also* Caleb Nelson, *A Critical Guide to* Erie Railroad Co. v. Tompkins, 54 Wm. & Mary L. Rev. 921, 922 (2013) (criticizing *Erie*'s "shaky" legal reasoning).

stream." Bradford R. Clark & Anthony J. Bellia, *General Law in Federal Court*, 54 Wm. & Mary L. Rev. 655, 712 (2013).

From the day it was decided, then, *Erie*'s domain has never been unlimited. It does not include, and has never included, "matters essentially of federal character." *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301, 307 (1947). Instead, in such disputes, "'federal common law'" governs. *Id.* at 308.

Carved out of *Erie*'s domain are disputes that "deal with air and water in their ambient or interstate aspects." *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972). This is such a case. *City of New York*, 993 F.3d at 91–92; *Minnesota*, 63 F.4th at 718–19 (Stras, J., concurring).

Although narrow in breadth, federal common law is exhaustive in depth. It is a source of "arising under" jurisdiction and replaces state law. *City of Milwaukee*, 406 U.S. at 99–100; *City of New York*, 993 F.3d at 90. This clears the way for a "truly uniform" national law, "binding in every forum." Henry J. Friendly, *In Praise of* Erie—*And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 405 (1964). Minnesota's air pollution claims therefore arise, if at all, under federal law. The answer is "so beautifully simple, and so simply beautiful, that we must wonder why" federal courts are divided on this important question. *Id.* at 422; Pet. 17–21.

B. The Federal Law of Transboundary Air Pollution Is Still Exclusive.

Minnesota, the current Solicitor General, and several federal courts have a different take on federal

common law. It is neither simple nor beautiful. It is an *Erie* nightmare.

The Solicitor General, like Minnesota, weaves an intentionally complicated statutory narrative, arguing that although federal common law may have once foreclosed Minnesota's claims, that is no longer so. Because Congress displaced federal common law with the Clean Air Act, *see Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 423 (2011) ("*AEP*"), the Solicitor General argues it has also tacitly empowered fifty state courts to retroactively impose a carbon tax on sales in other jurisdictions, all over the globe. *See* Brief for the United States as *Amicus Curiae* at 11–16, *Suncor Energy (U.S.A.) Inc. v. Bd. of Cnty. Commissioners of Boulder Cnty* (No. 21-1550). The Clean Air Act, on this account, silently delegated extraordinary power to state courts, far beyond *Erie*'s domain. *City of New York*, 993 F.3d at 99.

"Such an outcome is too strange to seriously contemplate." *Id.* at 98–99. Empowering state courts to govern fossil fuel sales and emissions on a planetary scale does not advance state competition without risk to the country. Instead, it advances a race to the courthouse, pervasive interstate exploitation, and "a hydra in government, from which nothing but contradiction and confusion can proceed." The Federalist No. 80 (Alexander Hamilton).

The Solicitor General's argument to the contrary is squarely foreclosed by the federalism canon, which "requires Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power." *Sackett v. EPA*, 598 U.S. 651, 679 (2023) (cleaned up). Anything implied, by definition, cannot satisfy this standard. Therefore,

if an issue was beyond the authority of Minnesota before the Clean Air Act, it remains out of reach now. The Clean Air Act could not implicitly empower states to regulate in this domain.

A different question would arise if Minnesota sought damages for hydrocarbon sales solely within Minnesota. In such a case, the question may be whether the Clean Air Act preempts the law of Minnesota. *See AEP*, 564 U.S. at 429. Because Minnesota's complaint seeks to effectively tax fossil fuel sales and emissions worldwide, however, references to Clean Air Act preemption fall flat. This case is not about the Clean Air Act's preemptive scope. It is about the inherently federal nature of transboundary emissions, and the Clean Air Act's failure to delegate extravagant extraterritorial power to Minnesota.

This question is worthy of certiorari.

II. Minnesota's Suit Belongs in Federal Court.

Having answered the antecedent question, we turn to the jurisdictional issue. The question is whether state litigants may relegate federal claims to their preferred state tribunals by using state-law labels.

The answer should be no. Whether a complaint is well-pleaded does not turn on labels. As this Court has noted, federal courts have jurisdiction when a claim, "even if pleaded in terms of state law, is in reality based on federal law." *Beneficial Nat'l Bank*, 539 U.S. at 8. "The office of pleading is to state facts, not conclusions of law. It is the duty of the court to declare the conclusions, and of the parties to state the premises." *Little York Gold Washing & Water Co. v. Keyes*, 96 U.S. 199, 202 (1877). A complaint that uses state-

law labels to describe a claim inherently governed by federal law is not well-pleaded.

Some dissenting Justices, to be sure, have criticized the artful pleading doctrine as an "act of jurisdictional alchemy." *Beneficial Nat'l Bank*, 539 U.S. at 14 (Scalia, J., dissenting). This criticism is misplaced. As explained next, the well-pleaded complaint rule rests on a seriously mistaken interpretation of the 1887 amendment to the removal statute that guts the core purpose of removal: ensuring "the defendant" has "equal rights" to a federal forum when raising a federal defense. *Martin v. Hunter's Lessee*, 14 U.S. 304, 348–49 (1816).

A. Petitioners' Jurisdictional Argument Is Consistent With the Original Meaning of § 1331.

The Court has based the well-pleaded complaint rule on the 1887 amendment to the 1875 removal law. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 392–93 (1987). But the Court's interpretation of the 1887 amendment was badly mistaken. To explain why, we need to go back to 1875.

The 1875 Act. The 1875 grant of original federal question jurisdiction, from which § 1331 descends, extended the jurisdiction of federal circuit courts to "all suits of a civil nature at common law or in equity . . . arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority," as long as the disputed amount exceeded $500. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470.

Similarly, using parallel jurisdictional text, the statute provided for removal of the same cases from

state court by "either party." *Id.* § 2. Except for the phrase "suits of a civil nature," clearly meant to keep criminal cases in state court, the text tracked the constitutional grant of "arising under" jurisdiction. U.S. Const. art. III, § 2, cl. 1.

When a legal phrase is "obviously transplanted from another legal source . . . it brings the old soil with it." *Stokeling v. United States*, 139 S. Ct. 544, 551 (2019) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)). The text of the 1875 law was transplanted from Article III, so it vested circuit courts with "arising under" jurisdiction to the maximum extent provided by the Constitution, excepting criminal cases and disputes involving $500 or less. That is how this Court contemporaneously interpreted the law in case after case. *See, e.g.*, *Little York Gold Washing & Water Co.,* 96 U.S. at 201; *Railroad Co. v. Mississippi*, 102 U.S. 135, 140 (1880); *Ames v. Kansas*, 111 U.S. 449, 462–63 (1884); *see also* 2 Cong. Rec. 4986, 4987 (1874) (statement of Sen. Carpenter) ("This bill gives precisely the power which the Constitution confers—nothing more, nothing less.").

The 1875 law included one other restriction. Federal courts had to dismiss a suit if "such suit does not really and substantially involve a dispute or controversy properly within the" court's jurisdiction. § 5, 18 Stat. at 472. Thus, a defendant could not use federal law labels to remove a state-law case from state court. *Little York Gold Washing & Water Co.,* 96 U.S. at 201. But a defendant could remove a case to federal court by raising a federal question in an answer or the petition for removal, so long as the answer or petition satisfied the requirements of "good pleading." *Id.* at

203 (quoting 1 Joseph Chitty, *A Treatise on Pleading* 213 (13th ed. 1859)).

Soon after, in an opinion by Justice Harlan, the Court confirmed that a federal defense provided a basis for removal. *Railroad Co.*, 102 U.S. at 135–36. Mississippi filed suit in state court, seeking to compel a railroad to remove a bridge. *Id.* at 137–38. The railroad answered by asserting a federal defense and seeking removal. *Id.* at 138–39.

The Court held this was "plainly a case which, in the sense of the Constitution, and the statute of 1875, arises under the laws of the United States." *Id.* at 140 (emphasis omitted). As the Court observed, suits arise under the laws of the United States even if the federal "right or privilege" is raised as a "defence of the party." *Id.* at 141.

Justice Miller dissented. In his view, the use of "suit of a civil nature" instead of "cases" in the 1875 law meant that removal was limited to a "cause of action" that "is founded on" federal law. *Railroad Co.*, 102 U.S. at 143–44 (emphasis omitted). No other Justice joined his dissent.

For good reason. Justice Miller's view rested on a thin reed. The phrase "all suits of a civil nature" evidently sought to prevent the removal of criminal cases to federal court, not to impose a novel "cause of action" test. The word "suit" meant "[a]n action." *Suit*, 2 John Bouiver, *A Law Dictionary* 683 (15th ed. 1883). And in "common use," an action included "all the formal proceedings in a court of justice attendant upon the demand of a right," including "the answer of the defendant." *Action*, 1 John Bouiver, *A Law Dictionary* 111–12. A restrictive reading of "suit" also

did not make sense of the removal statute's operation, which also authorized *plaintiffs* to remove. § 2, 18 Stat. at 470–71. "The only logical explanation is that plaintiffs were given removal power in the event that the answer or reply raised a federal question." Donald L. Doernberg, *There's No Reason for It; It's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction*, 38 Hastings L.J. 597, 602 (1987).

In sum, under the 1875 law, a defendant had equal rights to a federal forum when raising a federal defense, consistent with the purpose of removal. *Minnesota*, 63 F.4th at 720 (Stras, J., concurring). In fact, a properly pleaded federal defense even allowed the plaintiff to invoke federal jurisdiction. § 2, 18 Stat. at 470–71.

The 1887 Act. In 1887, Congress amended the removal provision as follows:

> That any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, . . . may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district.

Act of Mar. 3, 1887, ch. 373, § 2, 24 Stat. 552, 553, *as amended by* Act of Aug. 13, 1888, ch. 866, 25 Stat. 433. This amendment included two notable changes. First, plaintiffs could no longer remove to federal court. Second, jurisdiction was limited by the "preceding section" granting original jurisdiction, which required

more than $2000 in controversy. Otherwise, Congress recodified the jurisdictional text unchanged, showing it did not mean to depart from "firmly established" precedent. *Railroad Co.*, 102 U.S. at 141.

The Mistake. This Court thought otherwise. In *Tennessee v. Union & Planters' Bank*, the Court held that the 1887 amendment codified "Mr. Justice Miller['s]" dissenting view. 152 U.S. at 462. The Court offered two reasons.

First, the Court relied on the "general policy" of the law "to contract the jurisdiction" of federal courts. *Id*. But zeitgeist, real or not, does not amend the law.

Second, the Court read the use of "preceding section" in § 2 as doing more—far more—than incorporating the amount in controversy from § 1. The Court read this phrase to mean removal was now limited to cases that could have been brought by a plaintiff in federal court. *Id*. at 461–62. And, because a plaintiff in an action at law could not seek federal jurisdiction by *anticipating* a federal defense, *id.* at 460–61, federal jurisdiction premised on a defense was out. This elevated a pleading rule for plaintiffs into a novel jurisdictional rule for defendants seeking removal, eviscerating the core purpose of federal removal along the way.

Justice Harlan, joined by Justice Field, dissented from this construction of the statute, which had not been "suggested at the bar" or "before suggested in any case." *Id.* at 469. No wonder. Why would Congress permit removal but then make such a strange "discrimination against a defendant"? *Id.* at 471. Under the majority opinion, Justice Harlan observed, defendants could sometimes obtain jurisdiction by

raising an anticipatory defense in a bill of equity, but not by raising a defense in an action at law. *Id.* at 471–72. This made little sense. Instead, the logical reading of the removal law's cross-reference is that it sought to incorporate the amount in controversy from § 1, not to radically alter removal. *Id.*

The Court's contrary view rested on a confused reading of § 1. The grant of original jurisdiction in § 1 was also co-extensive with the Constitution, just like § 2. So it made no sense to say that a reference to § 1 restricted § 2.

To be sure, plaintiffs suing directly in federal court could not invoke jurisdiction under § 1 by anticipating a federal defense. *Metcalf v. City of Watertown*, 128 U.S. 586, 589 (1888) (Harlan, J.). But that is because defendants, like plaintiffs, get to make their own arguments. Therefore, a plaintiff suing in federal court could not present a properly pleaded federal defense "at the time the jurisdiction of the circuit court of the United States attached." *Id.* Defendants, however, could do precisely that by including a federal defense when filing a petition for removal in state court. Under § 3 of the 1887 law, defendants were permitted to delay removing a case until the deadline for filing an answer, and a petition for removal was filed in state court. 25 Stat. at 435. And under § 3, once the state record was transferred to federal court, "the cause shall then proceed . . . as if it had been originally commenced" in federal court. 25 Stat. at 435. Because the record would contain a properly raised federal question when jurisdiction attached in federal court, there was no reason to deny federal jurisdiction.

In short, *Union & Planters' Bank* transmogrified a rule of pleading for plaintiffs into a novel jurisdictional rule that discriminates against defendants and defeats the core purpose of removal to federal court: protecting the equal federal rights of the defendant.

* * *

Justice Harlan was right. *Union & Planters' Bank* was wrong. For those who place less weight on *stare decisis,* the solution is simple: Enforce "the original meaning of § 1331's text." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 320 (2005) (Thomas, J., concurring). The jurisdictional rule would be "clear," and all federal defenses would get jurisdiction. *Id.* at 321. It is not too late to get the law right. *See* Transcript of Oral Argument at 38:7–10, *United States. v. Texas*, 143 S. Ct. 1964 (2023) (22-58) ("I don't think it's ever too late for this Court to give the statute its proper construction when you actually look at its text, context, and history.").

For those who place strong weight on *stare decisis*, however, the artful pleading doctrine urged by Petitioners at least brings the Court closer to the original meaning of the law, not further away from it. The Court should therefore grant certiorari to embrace the modest artful pleading rule urged by Petitioners. *See Minnesota*, 63 F.4th at 720 (Stras, J., concurring). Failure to do so, as explained next, would deprive Petitioners of a neutral forum.

B. The Decision Below Deprives Petitioners of a Neutral Forum.

The Framers knew "it would be natural that [state] judges, as men, should feel a strong predilection to the claims of their own government." The Federalist No. 80 (Alexander Hamilton). Therefore, the Constitution extends jurisdiction over a range of cases to federal courts, "which, having no local attachments, will be likely to be impartial between the different States and their citizens, and which, owing [their] official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which [they are] founded." *Id.*

Human nature has not changed since 1789, and incentives still matter. Federal judges are still appointed by a President and confirmed by the Senate, both of which represent the Nation. U.S. Const. art. II, § 2, cl. 2. Federal judges still hold office during good behavior and receive a fixed salary from Congress. U.S. Const. art. III, § 1. Because Minnesota does not control the appointment, tenure, removal, budget, or salary of federal judges, they are unlikely to be partial to the state. Erin A. O'Hara & Larry E. Ribstein, *The Law Market* 69 (2009). But state judges still answer to *their* states. The problem of bias therefore persists. *See Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 827 n.6 (1986) (Brennan, J., dissenting).

It has arguably gotten worse. "[A]t the time of the Founding, no state judges were elected; they were all appointed by public officials like federal judges." Brian T. Fitzpatrick, *The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure*, 98 Va. L. Rev.

839, 841 (2012). Beginning in the mid-nineteenth century, however, many state judges have been elected, including in Minnesota. "Since Minnesota's admission to the Union in 1858, the State's Constitution has provided for the selection of all state judges by popular election." *Republican Party of Minn. v. White*, 536 U.S. 765, 768 (2002) (quoting Minn. Const. art. VI, § 7).

All state judges, but particularly elected ones, have incentives to deliver for their states. "Elected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects." *Id.* at 789 (O'Connor, J., concurring). Some state judges even say the quiet part out loud:

> As long as I am allowed to redistribute wealth from out-of-state companies to in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because the in-state plaintiffs, their families and their friends will re-elect me.

Richard Neely, Justice, West Virginia Supreme Court, *The Product Liability Mess: How Business Can Be Rescued from the Politics of State Courts* 4 (1988); *see also* Alexander T. Tabarrok & Eric A. Helland, *The Effect of Electoral Institutions on Tort Awards*, 4 Am. L. & Econ. Rev. 341 (2002) (analyzing 75,000 tort cases and finding elected judges systematically redistribute wealth from out-of-state defendants (non-voters) to in-state plaintiffs (voters)).

Although particularly acute in suits (such as this one) involving out-of-state defendants, these incentives remain whenever the state has an overt interest

in the outcome of a case or its constituents stand to score big at the expense of a few. Minnesota knows this, and so do like-minded states and localities bringing these suits. That is why they are struggling mightily to keep cases before *their* judges.[4]

Minnesota's complaint does not bury the lede. It emphasizes just how profitable these out-of-state energy companies are, and what those profits could do for the good people of Minnesota, if only the state judge cooperates. *See* Complaint ¶¶ 17, 28, 197.

The Court is "'not required to exhibit a naiveté from which ordinary citizens are free.'" *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019). It should not do so here. The well-pleaded complaint rule, as applied by the court below, leaves the federally protected rights of defendants at the mercy of hostile state judges.

The slim possibility of Supreme Court review on certiorari—many years, if not a decade later—provides no light at the end of the tunnel. The Supreme Court, as Justice Brennan noted, is not institutionally equipped to do the job of supervising state courts. *Merrell Dow Pharms. Inc.*, 478 U.S. at 827 n.6 (Brennan, J., dissenting). Nor can defendants risk their financial viability by awaiting the Court's intercession. When the Court decided *Union & Planters'*

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[4] The only case brought in federal court so far suffered an ignominious end, and the plaintiff, New York City, chose not to seek review from this Court. Instead, New York City immediately refiled *in state court*, after joining a nominal in-state defendant to the lawsuit in a transparent attempt to evade federal diversity jurisdiction. *See* Jennifer Hiller, *New York City Sues Exxon, BP, Shell, in State Court Over Climate Change*, Reuters (Apr. 22, 2021).

Bank, the Court at least had broad mandatory jurisdiction, so federal review was guaranteed. Today, review by this Court on certiorari is far from certain: it is extremely unlikely. *See* Judiciary Act of 1925, Pub. L. No. 68-415, 43 Stat. 936. And as difficult as it is to obtain this Court's review of a federal judgment, it is even more difficult to get this Court's review of a state judgment. *See* Jeffrey S. Sutton & Brittany Jones, *The Certiorari Process and State Court Decisions*, 131 Harv. L. Rev. F. 167 (2018).

III. This Case Is Extraordinarily Important.

The petition makes a convincing case for certiorari. *Amicus* writes to further elaborate on the "energy production, economic growth, foreign policy, and national security" consequences of this case, and the many other coordinated cases around the country. *City of New York*, 993 F.3d at 93.

There is a pattern to these cases. All involve suits against private energy companies. None involve suits against energy companies owned by foreign states. These companies, however, account for the "majority of the world's oil and gas, pumping out an estimated 85 million barrels of oil equivalent per day." Patrick R. P. Heller & David Mihalyi, Nat'l Resource Governance Inst., *Massive and Misunderstood: Data Driven Insights into National Oil Companies* 6 (Apr. 2019). They also control "up to 90 percent of global reserves." *Id.* And their market influence is growing. Clifford Krauss, *As Western Oil Giants Cut Production, State-Owned Companies Step Up*, N.Y. Times (Oct. 14, 2021).

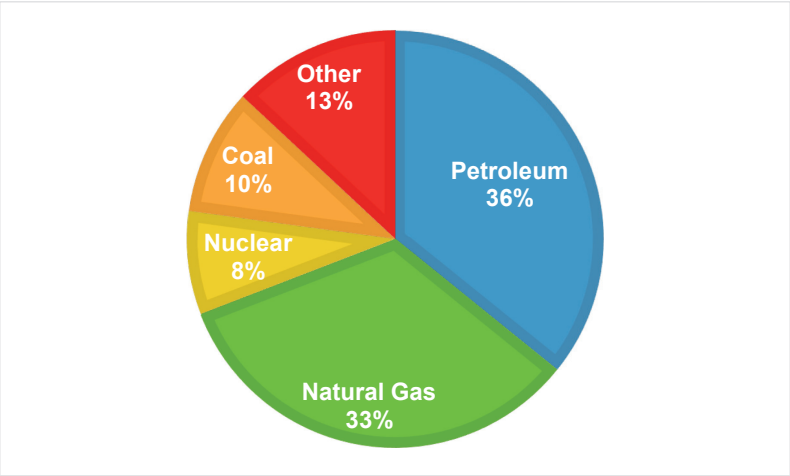
Energy companies owned by foreign states, therefore, account for an enormous quantity of greenhouse

gases resulting from the eventual burning of their products downstream. Saudi Aramco alone is responsible for an estimated 1.6 billion metric tons of greenhouse gases, more than Chevron, BP, and Shell combined. David Fickling & Elaine He, *The Biggest Polluters Are Hiding in Plain Sight*, Bloomberg (Sept. 30, 2020). According to the data used in Minnesota's complaint, Saudi Aramco has contributed to an estimated 4.38% of global carbon since 1965, more than any private energy firm. *See* Climate Accountability Inst., Carbon Majors: Update of Top Twenty Companies 1965–2017, https://perma.cc/95YV-RY97. Several other firms owned by foreign states make the top twenty list. *Id.* These companies are therefore a big part of the alleged problem.

They are not, however, part of Minnesota's litigation-driven solution. The reason is obvious. Apart from personal jurisdiction hurdles, companies owned by foreign sovereigns could remove the cases to federal court. 28 U.S.C. § 1441(d). They are also presumably immune from suit. *Id.* § 1604.

If successful, the suits brought by Minnesota and other like-minded states and localities would therefore create a perverse two-tiered *de facto* tax system: a patchwork of judge-made carbon taxes for private energy companies, many of them domestic, and no carbon taxes for energy companies owned by foreign sovereigns, many of them hostile.

The result would be disastrous. Demand for oil and gas will not go away. Oil and gas account for over two-thirds of primary energy consumption in the United States. Despite political platitudes, this will not change any time soon, nor will this litigation change consumer demand.



Energy Info. Admin., *Monthly Energy Review*, Table 1.3, U.S. Primary Energy Consumption By Source (2022).

But our sources of supply could change—if these lawsuits move forward. By biasing the market against private firms, and toward unaccountable companies owned by foreign states, the suits brought by Minnesota and other states and localities would make the U.S. captive to foreign countries, many of them hostile to U.S. interests, threatening our national security. The grave energy security implications of these suits alone warrant this Court's immediate review.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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