No. 20-1089

IN THE
Supreme Court of the United States

CHEVRON CORPORATION, *et al.*,
Petitioners,

v.

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

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

PETITIONERS' REPLY BRIEF

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The circuits are now split on both aspects of the jurisdictional question. Since the petition, the Second Circuit has held that "nuisance suit[s] seeking to recover damages for the harms caused by global greenhouse gas emissions" "must be brought under federal common law," and that statutory displacement does not change that result. *City of New York* v. *Chevron Corp.*, 993 F.3d 81, 91–95, 98 (2d Cir. 2021). And as the petition showed, multiple circuits hold that claims governed by federal common law are removable.

Respondents try to avoid the conflict with *New York*—and this Court's repeated rulings that federal common law governs interstate-pollution claims, see *Am. Elec. Power Co.* v. *Connecticut*, 564 U.S. 410, 421 (2011)—by recharacterizing their claims as targeting "deceptive marketing." Opp. 2. But they conceded below that they attack fossil-fuel production and sales; deceptive marketing is just a "plus factor." App. 32a. In any event, focusing on marketing "does not change the substance" of the claims, which depend in all respects on global greenhouse-gas emissions. *New York*, 993 F.3d at 97. Federal common law thus governs.

Nor can Respondents avoid the conflicts on the second question presented. They declined the district court's offer of an interlocutory appeal, instead voluntarily amending their complaints to add federal claims and litigating to judgment. Those strategic choices would preclude appealing removal in some circuits, but not others.

Respondents cannot brush aside this case's importance. On their theory, fossil-fuel producers could

avoid massive liability only by "ceas[ing] global production altogether." *New York*, 993 F.3d at 93. And nearly two dozen similar cases are already pending across the country, including several cases moving forward in state court after remand. Although this Court declined to resolve the federal-question-removal issue in *BP p.l.c.* v. *Mayor & City Council of Baltimore* so the court of appeals could do so in the first instance, No. 19-1189, 2021 WL 1951777, at *8 (May 17, 2021), no such obstacle exists here. Nor is there any reason to wait for other circuits to consider this question; however they rule, the conflicts presented here will require resolution. Immediate review will conserve judicial resources and address the uncertainty these cases create for energy policy and the economy.

I. The jurisdictional conflict warrants review.

A. Federal common law governs here.

Respondents say their claims fall outside the federal common law governing "interstate and international pollution." Opp. 7. But *New York* held that substantively identical claims went "beyond the limits of state law." 993 F.3d at 92. That was true even though the claims did "not seek[] to directly penalize emitters": The plaintiff sought relief "precisely because fossil fuels emit greenhouse gases," "which collectively 'exacerbate global warming.'" *Id.* at 91. Thus, these claims, "if successful, would operate as a *de facto* regulation on greenhouse gas emissions." *Id.* at 96. And a suit based on "the cumulative impact of conduct occurring simultaneously across just about every jurisdiction on the planet … is an interstate matter." *Id.* at 92. Indeed, any steps fossil-fuel producers take "to mitigate their liability … must undoubtedly take effect across every state (and country)," no matter what "the laws of those other states

(or countries) require." *Id.* Such claims "pose[] the quintessential example of when federal common law is most needed," *id.*, and so "must be brought under federal common law," *id.* at 95. Even though they were labeled as state-law claims and filed under diversity jurisdiction, they are "federal claims." *Id.* at 94–95.

Respondents contend that *New York*—and this Court's many interstate-pollution cases—are inapposite because the claims here challenge "deceptive marketing," not fossil-fuel production or emissions. Opp. 2. But Respondents admitted below that allegedly "misleading promotion[]" is merely a "plus factor[]" on their theory. D. Ct. ECF 265 at 63–64. The "primary conduct giving rise to liability," they admitted, is "production and sale of fossil fuels." *Id.* at 60–61. Respondents' claims thus target the "nuisance of global warming-induced sea level rise" caused by "production and sale of fossil fuel products." ER 282. And Respondents do not assert that their legal theory requires deception—just *some* "affirmative conduct." Opp. 8. So, as the district court recognized, Respondents attack "otherwise lawful and everyday sales of fossil fuels." App. 32a.

Nor would focusing on deception change the analysis. Respondents' only alleged harm flows from "the inevitable emissions of greenhouse gases from the fossil fuels" each Petitioner "produces." ER 330. The alleged deception was downplaying these effects. ER 295. And Respondents seek "an abatement fund" to address "global warming impacts"—for example, to pay to build seawalls—not compensation for consumer deception. ER 331; App. 48a. So their theory of liability, alleged harm, and requested relief all depend on greenhouse-gas emissions.

For the same reasons, Respondents cannot distinguish *New York*. They say the *New York* claims did not allege "deception, but instead sought to hold the defendants 'strict[ly] liab[le].'" Opp. 15 n.1 (alternations in original). But the plaintiff there made materially identical allegations, attacking "the production, promotion, and sale of fossil fuels." 993 F.3d at 91; see *id.* at 86–87; *City of New York* v. *BP P.L.C.*, 325 F. Supp. 3d 466, 469 (S.D.N.Y. 2018). Though the Second Circuit mentioned "strict liability" in describing the theory's practical *effect*, 993 F.3d at 93, the claim was (as here) "a nuisance suit" based on "the harms caused by global greenhouse gas emissions," *id.* at 91, and did "not seek any damages … that do not … stem[] from emissions," *id.* at 97. "Artful pleading cannot transform [either] complaint into anything other than a suit over global greenhouse gas emissions." 993 F.3d at 91. The Second Circuit held that such a suit cannot "proceed under state law." *Id.* at 93. The Ninth Circuit held the opposite. App. 16a.

Respondents also emphasize that *New York* was filed in federal court, so it addressed only "ordinary federal preemption," not "arising-under jurisdiction." Opp. 14–15. But while the Second Circuit said it was thus "free to consider the [Defendants'] "preemption defense," it also explained that "where federal common law exists, it is because state law cannot be used." 993 F.3d at 94, 98 (cleaned up). So the conclusion that "federal common law govern[s] this issue" necessarily means the claims arise under federal law, not state law. See *id.* at 98 (the reasons for "resorting to federal common law" mean "the state claiming injury cannot apply its own state law"); Pet. 19–22; *infra* § I.B.1.

Nor can Respondents avoid federal common law—or the conflict with *New York*—based on statutory

displacement. They argue, and the Ninth Circuit agreed, that "*congressionally displaced*" federal common law cannot "convert state-law claims into federal ones." Opp. 13, 23; App. 13a. But *New York* rejected this argument, explaining that "state law does not suddenly become presumptively competent to address issues that demand a unified federal standard simply because Congress saw fit to displace a federal court-made standard with a legislative one." 993 F.3d at 98; see *Illinois* v. *City of Milwaukee*, 731 F.2d 403, 406–11 (7th Cir. 1984) (rejecting the argument that if a statute "dissipate[s] federal common law, [state] law must again control"). As *New York* recognized, 993 F.3d at 100, Respondents' contrary examples approved claims under "the law of the *source* State." *AEP*, 564 U.S. at 429; *Int'l Paper Co.* v. *Ouellette*, 479 U.S. 481, 497 (1987). By contrast, Respondents seek to impose one state's nuisance standards on emissions "from all 50 states and the nations of the world." *New York*, 993 F.3d at 100; Pet. 16–18.

The decision below, allowing these claims to proceed in state court under state law, thus conflicts with *New York*—not to mention *AEP* and this Court's cases applying federal common law to "disputes involving interstate air or water pollution." *New York*, 993 F.3d at 91 & n.4. However other circuits decide this issue after *Baltimore*, this Court will need to decide whether federal common law governs these claims; the Ninth Circuit denied rehearing, App. 59a, and the *New York* rehearing deadline has passed. This conflict warrants review now.

B. Federal common law is grounds for removal.

1. Respondents say Petitioners' removal theory is "novel," Opp. 13, but the novelty is their own view that federal common law is merely "an ordinary

preemption defense," *id.* at 3. Ordinary preemption overrides "otherwise valid state laws." *North Dakota* v. *United States*, 495 U.S. 423, 442 (1990) (plurality). In contrast, federal common law applies only where the constitutional structure makes it "inappropriate for state law to control." *Tex. Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). No state law can exist in these areas, and the claim—however captioned—is necessarily federal. Respondents' arguments simply ignore federal common law's exclusive nature. See Pet. 15–17, 21. While Respondents emphasize that no federal statute completely preempts their claims, Opp. 13, they offer "[n]o plausible reason" to limit federal-question removal to statutory cases, see Richard H. Fallon, Jr. et al., *Hart & Wechsler's Federal Courts and the Federal System* 818 (7th ed. 2015).

Respondents similarly err by assuming that a claim can be governed by federal common law without creating federal-question jurisdiction. For example, they say *United States* v. *Standard Oil Co.*, 332 U.S. 301 (1947), merely conducted "a choice-of-law analysis." Opp. 20. But if a claim is "founded upon federal common law"—as in *Standard Oil*, *New York*, or here—it falls within § 1331's "grant of jurisdiction." *Nat'l Farmers Union Ins. Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845, 850 (1985) (cleaned up). And "any civil action" within § 1331's jurisdictional grant "may be removed" under § 1441(a). So if "the dispositive issues stated in the complaint require the application of federal common law," *Illinois*, 406 U.S. at 100, the case is removable—even if the plaintiff tries to "disguise the inherently federal cause of action." 14C Wright & Miller, *Federal Practice & Procedure: Jurisdiction* § 3722.1 (rev. 4th ed. 2020). That is, if federal common law governs these claims, as *New York*

held, both plaintiffs and defendants are equally entitled to have a federal court decide them.

2. Respondents erroneously assert that *Grable & Sons Metal Products* v. *Darue Engineering & Manufacturing*, 545 U.S. 308 (2005), swept away the other circuits' federal-common-law removal cases, which supposedly applied superseded versions of *Grable*'s test. Opp. 13–17.

First, *Grable* solely addressed federal jurisdiction over "state-law claims that implicate significant federal issues." 545 U.S. at 312. It did not address claims that, though pleaded under state law, are actually federal. And it did not even mention federal common law. Respondents cite no case suggesting that *Grable* changed the standard for federal-common-law removal or abrogated the decisions the petition cited. Their only post-*Grable* example of a court treating federal common law as "an ordinary preemption defense," Opp. 14, is a Ninth Circuit decision holding merely that the act-of-state doctrine was only a defense in that specific case—while noting that federal common law can support removal if it is "the basis of a claim." *Provincial Gov't of Marinduque* v. *Placer Dome, Inc.*, 582 F.3d 1083, 1091 n.7 (2009).

Second, the cases central to the conflict did not apply a *Grable*-type analysis. The Fifth Circuit held a claim removable if a federal statute provides a cause of action, complete preemption applies, *or* "the cause of action arises under federal common law principles." *Sam L. Majors Jewelers* v. *ABX, Inc.*, 117 F.3d 922, 924 (1997). It did not apply a *Grable*-type federal-issue test or cite *Grable*'s forebears. It held, based on *Illinois* and *National Farmers Union*, that removal is proper if a claim pleaded under state law in fact "arises under federal common law." *Id.* at 926.

Though Respondents admit that *Majors Jewelers* was not a *Grable*-type case, they say a federal-common-law cause of action was "clearly established" there and had not been displaced. Opp. 16–17. But on Respondents' and the Ninth Circuit's view, that should not matter—they deny that federal common law is *ever* an independent ground to remove a putative state-law claim. *Id.* at 12–13; App. 6a–11a. The Fifth Circuit held the opposite. And if Respondents mean that removal requires a *viable* federal cause of action, *Standard Oil* shows otherwise, Pet. 22–23, and they offer no response.

The Seventh Circuit followed *Majors Jewelers* two years after *Grable*. It did not cite *Grable*, instead invoking *Illinois* to hold that the claim arose "under federal common law." *Treiber & Straub, Inc.* v. *UPS, Inc.*, 474 F.3d 379, 383–84 (2007). Respondents note that *Treiber* was filed in federal court, Opp. 15, but again, §§ 1331 and 1441(a) are coextensive. They also claim *Treiber* was "expressly pleaded" under federal common law, *id.* at 16, but that is wrong; the plaintiff "did not initially realize" federal common law governed, 474 F.3d at 383. Finally, they mistakenly claim *Treiber* "understood that federal common law merely raises an ordinary preemption defense." Opp. 16 n.2. Federal common law was the sole "basis for jurisdiction," 474 F.3d at 383, and *also* meant there was no "separate state [law] theory left," *id.* at 384, 386–87.

Nor can Respondents brush aside the Second, Fourth, and Eighth Circuit cases. Though *Republic of Philippines* v. *Marcos* held in the alternative that the case "at the least" involved a "federal issue in a state-created cause of action," it first concluded that applicable "federal common law" "displace[d] entirely any state cause of action." 806 F.2d 344, 354 (2d Cir.

1986). Respondents admit that *Caudill* v. *Blue Cross & Blue Shield of North Carolina*, 999 F.2d 74 (4th Cir. 1993), is not a *Grable*-type case, but say it "was expressly abrogated" by *Empire Healthchoice Assurance, Inc.* v. *McVeigh*, 547 U.S. 677 (2006). Opp. 17. But they do not dispute that *Empire* only disagreed with *Caudill* on whether federal common law applied *there*—not whether it can be grounds for removal. Pet. 25. And while *In re Otter Tail* mentioned the *Grable*-type standard in passing, it ultimately relied on *National Farmers Union* to hold that a "plaintiff's characterization of a claim as based solely on state law is not dispositive" when "federal common law" governs. 116 F.3d 1207, 1213–14 (8th Cir. 1997).

But even the *Grable*-type cases conflict with the decision below. They hold that a plaintiff cannot avoid removal by pleading only state-law claims in an area governed by federal common law. Pet. 26–27. The Ninth Circuit permitted precisely that.

II. Allowing Respondents to contest removal on appeal exacerbates circuit conflicts.

1. Respondents say amending their complaints was involuntary—required by the court's order—and no circuit treats an *involuntary* amendment, adding a federal claim solely to avoid dismissal, as waiving removal defects. Opp. 27–28. But Respondents *rejected* the court's offer to certify the removal issue for interlocutory review, choosing instead to amend. Pet. 5. Their amendments were thus voluntary; yet the Ninth Circuit found no waiver.

The Fifth Circuit agrees that voluntary amendments are not waivers. Pet. 27–28. But three circuits disagree. *Id.* at 28. And allowing plaintiffs to litigate voluntarily in federal court and accept victory if they win, but challenge removal if they lose, wastes

resources and encourages gamesmanship. See *Bernstein* v. *Lind-Waldock & Co.*, 738 F.2d 179, 185–86 (7th Cir. 1984).

2. Respondents are also wrong that the circuits agree about when litigating a federal claim to judgment moots removal defects. Opp. 29–30. The cases reflect fundamentally different views of *Caterpillar Inc.* v. *Lewis*, 519 U.S. 62 (1996).

Caterpillar holds that an erroneous remand denial "is not fatal to the ensuing adjudication if federal jurisdictional requirements are met" upon judgment, *id.* at 64, and considerations of "finality, efficiency, and economy" can make remand inappropriate, *id.* at 75. Contrary to Respondents' argument (Opp. 30) and the decision below, some circuits hold that *Caterpillar* moots challenges to removal "not only after a trial," but also when the case ends "on a dispositive motion." *Paros Props. LLC* v. *Colo. Cas. Ins. Co.*, 835 F.3d 1264, 1273 (10th Cir. 2016); *Ellingsworth* v. *Vermeer Mfg. Co.*, 949 F.3d 1097, 1100 (8th Cir. 2020) (*Caterpillar* establishes "a categorical rule").

Respondents say *Ellingsworth* and *Paros* create no conflict because they involve summary-judgment motions, not motions to dismiss. But they deem the *Caterpillar* factors dispositive when a federal court enters judgment on a motion, while the Ninth Circuit and others find these interests controlling only after trial or extensive proceedings. Pet. 29–30.

Finally, Respondents say *Caterpillar*'s rule need not be a bright line because it is not jurisdictional. Opp. 33. But *Caterpillar* determines whether a case is heard in state or federal court and whether federal judicial resources are wasted. This Court should resolve these conflicts.

III. Immediate review is warranted.

Respondents' assertion of "minimal practical importance," Opp. 4, lacks merit. They admit a decision here would control the other pending climate-change nuisance suits, which are many and multiplying. *Id.* at 34. And they do not dispute that if their theory is viable, it could render continued fossil-fuel production "not feasible." App. 42a; *New York*, 993 F.3d at 93. Given the conflict between the Second and Ninth Circuits, there is no reason to delay review, allowing similar cases to move forward in state court and forcing other federal courts to grapple with the removal question. Unlike in *Baltimore*, federal-question jurisdiction was fully briefed and addressed in both courts below. With the benefit of those decisions and the thorough *New York* opinion, this Court should weigh in now. Doing so will conserve judicial resources and address the specter of liability hanging over the energy industry and the economy. Pet. 31–32.

Finally, Respondents note that other removal grounds remain pending below. Opp. 35. But the district court and the parties have agreed to wait for this petition's resolution. D. Ct. ECF 367 at 2. And this Court has often decided jurisdictional questions in the same posture. See API Amicus Br. 11–12.

CONCLUSION

The petition should be granted.

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