No.

IN THE
Supreme Court of the United States

SHELL OIL PRODUCTS COMPANY LLC, ET AL.,
Petitioners,

v.

STATE OF RHODE ISLAND,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal district court has jurisdiction under 28 U.S.C. § 1331 over nominally state-law claims seeking redress for injuries allegedly caused by the effect of transboundary greenhouse gas emissions on the global climate, on the ground that federal law necessarily and exclusively governs such claims.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are Shell Oil Products Company LLC; BP plc; BP America Inc.; BP Products North America Inc.; Chevron Corporation; Chevron U.S.A. Inc.; CITGO Petroleum Corporation; ConocoPhillips; ConocoPhillips Company; Exxon Mobil Corporation; Hess Corporation; Marathon Oil Company; Marathon Oil Corporation; Marathon Petroleum Corporation; Marathon Petroleum Company LP; Motiva Enterprises LLC; Phillips 66; Shell plc (*f/k/a* Royal Dutch Shell plc); and Speedway LLC.

Petitioner BP p.l.c., a publicly traded corporation organized under the laws of England and Wales, has no parent corporation, and there is no publicly held corporation that owns 10% or more of BP p.l.c.'s stock.

Petitioner BP America Inc. is a 100% wholly owned indirect subsidiary of petitioner BP p.l.c., and no intermediate parent of BP America Inc. is a publicly traded corporation.

Petitioner BP Products North America Inc. is also a 100% wholly owned indirect subsidiary of petitioner BP p.l.c., and no intermediate parent of BP Products North America Inc. is a publicly traded corporation.

Petitioner Chevron Corporation has no parent corporation, and no publicly held company holds 10% or more of its stock.

Petitioner Chevron U.S.A. Inc. is a wholly owned subsidiary of petitioner Chevron Corporation.

Petitioner CITGO Petroleum Corporation is a wholly owned indirect subsidiary of Petróleos de Venezuela S.A., which is the national oil company of the

Bolivarian Republic of Venezuela. No publicly held company owns 10% or more of its stock.

Petitioner ConocoPhillips has no parent corporation, and no publicly held company holds 10% or more of its stock.

Petitioner ConocoPhillips Company is a wholly owned subsidiary of petitioner ConocoPhillips.

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

Petitioner Hess Corporation has no parent corporation, and no publicly held corporation holds 10% or more of its stock.

Petitioner Marathon Oil Corporation does not have a parent corporation and is a publicly traded entity. The Vanguard Group, Inc., an investment advisor that is not a publicly traded corporation, disclosed through a Schedule 13G/A filed with the SEC that it beneficially owns 10% or more of Marathon Oil Corporation's stock.

Petitioner Marathon Oil Company is a wholly owned direct subsidiary of petitioner Marathon Oil Corporation, a publicly traded entity.

Petitioner Marathon Petroleum Corporation is a publicly held corporation and does not have a parent corporation. BlackRock, Inc., through itself or its subsidiaries, owns 10% or more of Marathon Petroleum Corporation's stock.

Petitioner Marathon Petroleum Company LP is a limited partnership. Its limited partners are petitioner Marathon Petroleum Corporation and Giant Industries, Inc. Marathon Petroleum Corporation is a publicly traded corporation. Giant Industries, Inc.

is a wholly owned subsidiary of TTC Holdings LLC, the sole member of which is Western Refining, Inc. Western Refining, Inc. is a publicly traded corporation.

Petitioner Motiva Enterprises LLC is a wholly owned subsidiary of Saudi Refining, Inc. and Aramco Financial Services Company. No publicly held company owns 10% or more of its stock.

Petitioner Phillips 66 has no parent corporation. The Vanguard Group is the only shareholder owning 10% or more of Phillips 66.

Petitioner Shell plc (*f/k/a* Royal Dutch Shell plc) has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Petitioner Shell Oil Products Company LLC is a wholly owned indirect subsidiary of petitioner Shell plc (*f/k/a* Royal Dutch Shell plc).

Petitioner Speedway LLC is an indirect subsidiary of Seven & i Holdings, Co., Ltd. Seven & i Holdings Co., Ltd., through itself or its subsidiaries, owns more than 10% of Speedway LLC's stock.

Respondent is the State of Rhode Island.

RULE 14.1(b)(iii) STATEMENT

This case directly relates to the following proceedings:

United States District Court (D.R.I.):

Rhode Island v. *Chevron Corp., et al.*, No. 18-cv-00395 (July 22, 2019).

United States Court of Appeals (1st Cir.):

Rhode Island v. *Shell Oil Products Co. LLC, et al.*, No. 19-1818 (May 23, 2022).

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Petitioners Shell Oil Products Company LLC; BP plc; BP America Inc.; BP Products North America Inc.; Chevron Corporation; Chevron U.S.A. Inc.; CITGO Petroleum Corporation; ConocoPhillips; ConocoPhillips Company; Exxon Mobil Corporation; Hess Corporation; Marathon Oil Company; Marathon Oil Corporation; Marathon Petroleum Corporation; Marathon Petroleum Company LP; Motiva Enterprises LLC; Phillips 66; Shell plc (*f/k/a* Royal Dutch Shell plc); and Speedway LLC respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the First Circuit is reported at 35 F.4th 44. App. 1a–32a. The order denying petitioners' timely petition for panel rehearing or rehearing en banc is not reported. App. 47a–48a. The district court's order in *Rhode Island* v. *Chevron Corp.* is reported at 393 F. Supp. 3d 142. App. 33a–46a.

JURISDICTION

The First Circuit issued its judgment on May 23, 2022, and denied panel rehearing and rehearing en banc on July 7, 2022. On September 16, 2022, the Chief Justice extended the time within which to file a petition for a writ of certiorari until December 4, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1331 provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

28 U.S.C. § 1441(a) provides: "[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

INTRODUCTION

Respondent, the State of Rhode Island, has asked a Rhode Island state court to apply Rhode Island state law, including common-law trespass and public-nuisance claims, to impose massive monetary liability on petitioners—a group of 19 energy companies—for harms allegedly attributable to global climate change. This suit is just one of nearly two dozen actions that have been filed in state courts across the country, from Rhode Island to Hawaii, as part of a coordinated campaign to use state common law to hold some but not all of the energy industry liable for global climate change—a phenomenon that, on respondent's own theory, is the cumulative result of billions of individual decisions stretching back more than a century. If respondent's unprecedented effort to transform state courts into global climate-change regulators succeeds, every state court in the Nation will be empowered to use state law to unilaterally impose its own view of energy and environmental policy nationwide and, indeed, worldwide.

Under our constitutional structure, however, these claims necessarily arise under federal law alone. As this Court has repeatedly held, a State cannot use its own law to obtain relief for harms allegedly caused by out-of-state emissions. Rather, claims concerning interstate and international emissions are inherently federal in nature and, accordingly, are governed exclusively by federal law, even when they are nominally pleaded under state law.

This case presents the question whether these inherently federal claims can be removed to federal court. The First Circuit held that they could not. In so holding, the court deepened a conflict by diverging from the Second Circuit, as well as a long line of this Court's decisions, and aligning with the Fourth and Tenth Circuits regarding whether federal law governs claims seeking relief for the effects of transboundary emissions.

Not only are the circuits divided over this question, but this Court also recently invited the Solicitor General to file a brief expressing the views of the United States on this question in *Suncor Energy (U.S.A.) Inc.* v. *Board of County Commissioners of Boulder County*, No. 21-1550. The United States has previously taken the position that cases concerning transboundary emissions are necessarily governed exclusively by federal law and, accordingly, are removable.

The significance of this case supports immediate review. Respondent's claims expose the energy sector to vast, indeterminate monetary relief that will deter investment and employment across the industry and the broader economy, and cause disruption to the

global economy. This case will also disrupt and impede the political branches' international climate-change initiatives and negotiations. And this case threatens to impose a patchwork of conflicting tort standards applicable to global production, marketing, and emissions under the laws of multiple States. This Court should decide whether this case is governed by federal law and, in turn, removable to federal court.

Because this petition presents the same issues as those presented in *Suncor*, it should be held pending the Court's disposition of that case. If the Court does not grant review in *Suncor*, this petition should be granted.

STATEMENT OF THE CASE

A. The State's public-nuisance suit

This case is another in a long series of climate change-related nuisance actions that "seek[] to impose liability and damages on a scale unlike any prior environmental pollution case." *Native Vill. of Kivalina* v. *ExxonMobil Corp.*, 663 F. Supp. 2d 863, 876 (N.D. Cal. 2009). For nearly two decades, state and local governments, working with private plaintiffs' lawyers, have tried to use novel tort claims in an attempt to regulate global greenhouse gas emissions by imposing massive civil liability on a selection of energy and other companies that produce goods and services essential to modern life.

The first wave of such lawsuits asserted nuisance claims against automobile companies for alleged contributions to climate change. *See California* v. *Gen. Motors Corp.*, 2007 WL 2726871 (N.D. Cal. Sept. 17,

2007) (dismissing state and federal common-law nuisance claims against automakers based on emissions for failing to state a claim and because claims were not justiciable).

The next round of litigation attempted to use federal common law to enjoin emissions from power plants. In July 2004, a group of private and public entities sought to enjoin emissions from five power companies on the ground that their "carbon-dioxide emissions created a substantial and unreasonable interference with public rights, in violation of the federal common law of interstate nuisance, or, in the alternative, of state tort law." *Am. Elec. Power Co.* v. *Connecticut*, 564 U.S. 410, 418 (2011) ("*AEP*") (internal quotation marks omitted). This Court stated that such claims were "meet for federal law governance" and that "borrowing the law of a particular State would be inappropriate." *Id.* at 422. Turning to the merits, the Court held that federal common law did not provide a remedy because "the Clean Air Act and the EPA actions it authorizes displace any federal common-law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired powerplants." *Id.* at 424.

The third wave of litigation again invoked federal common law, but this time in actions seeking damages for harms allegedly attributable to global climate change rather than an injunction against emissions. In *Native Village of Kivalina* v. *ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012), the plaintiffs "s[ought] damages under a federal common law claim of public nuisance" allegedly for harm caused by climate change to a coastal community in Alaska, *id.* at 853. Although

"[t]his case present[ed] the question in a slightly different context" than *AEP*, the *Kivalina* court found this distinction immaterial because this "Court has instructed that the type of remedy asserted is not relevant to the applicability of the doctrine of displacement." *Id.* at 857.

In response to these repeated failures, state and local governments opened a fourth front in their campaign to use the courts to remedy harms allegedly attributable to greenhouse gas emissions, by launching a series of lawsuits in *state* court seeking to hold energy companies liable for global climate change under *state* common law. Nearly two dozen actions have been brought under this theory against scores of defendants in state courts across the country, including in Honolulu, Maui, San Francisco, Seattle, Boulder, New York City, and Baltimore.[*]

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[*] *See*, *e.g.*, *Cnty. of San Mateo* v. *Chevron*, No. 17-3222 (Cal. Super. Ct. San Mateo Cnty.); *City of Imperial Beach* v. *Chevron*, No. 17-1227 (Cal. Super. Ct. Contra Costa Cnty.); *Cnty. of Marin* v. *Chevron*, No. 17-2586 (Cal. Super. Ct. Marin Cnty.); *City of Richmond* v. *Chevron*, No. 18-55 (Cal. Super. Ct. Contra Costa Cnty.); *Cnty. of Santa Cruz* v. *Chevron*, No. 17-3242 (Cal. Super. Ct. Santa Cruz Cnty.); *City of Santa Cruz* v. *Chevron*, No. 17-3243 (Cal. Super. Ct. Santa Cruz Cnty.); *City of Oakland* v. *BP P.L.C.*, No. RG17875889 (Cal. Super. Ct. Alameda Cnty.); *City & Cnty. of San Francisco* v. *B.P. P.L.C.*, No. CGC-17-561370 (Cal. Super. Ct. S.F. Cnty.); *Mayor & City Council of Baltimore* v. *BP P.L.C.*, No. 18-4219 (Balt. Cir. Ct.); *Pac. Coast Fed'n of Fishermen's Ass'ns, Inc.* v. *Chevron*, No. CGC-18-571285 (Cal. Super. Ct. S.F. Cnty.); *King Cnty.* v. *BP P.L.C.*, No. 18-2-11859-0 (Wash. Super. Ct. King Cnty.); *State* v. *Chevron*, No. PC-2018-4716 (R.I. Super. Ct.); *Bd. of Cnty. Comm'rs of Boulder Cnty.* v. *Suncor Energy (U.S.A.)*, No. 2018-CV-030349 (Colo. Dist. Ct.); *City & Cnty. of*

This case is part of that campaign. It was filed by the State of Rhode Island, asserting Rhode Island state tort law claims in Rhode Island state court, including common-law claims for public nuisance and trespass. Respondent seeks compensatory damages and an injunction requiring oil-and-gas companies to abate "the nuisance[] [caused by sea level rise]" related to "global warming," for which respondent claims petitioners are "actually and proximately" responsible due to their "production, promotion, and marketing of fossil fuel products." Ct. App. JA.26, 162. Respondent's theory is global, alleging that the "dramatic increase in atmospheric CO_2 and other greenhouse gases is the main driver of the gravely dangerous changes occurring to the global climate" and that "Defendants are directly responsible . . . because of the consumption of their fossil fuel products." Ct. App. JA.24, 26. And respondent seeks to hold petitioners liable for the "cascading social and economic impacts . . . aris[ing] out of localized climate change-related conditions," including "higher tides," "intensified wave and storm surge events," and "aggravated wave impacts" leading to "erosion, damage, and destruction of built structures and infrastructure." Ct. App. JA.28.

Honolulu v. *Sunoco*, No. 20-380 (1st Cir. Haw.); *District of Columbia* v. *Exxon*, No. 2020 CA 002892 B (D.C. Super. Ct.); *Cnty. of Maui* v. *Sunoco LP*, No. 2CCV-20-0000283 (2d Cir. Haw.); *State* v. *BP Am. Inc.*, No. N20C-09-097 (Del. Super. Ct.); *City of Charleston* v. *Brabham Oil Co.*, No. 2020-CP-10 (S.C. Ct. Com. Pl.); *City of Hoboken* v. *Exxon Mobil Corp.*, No. HUD-L-003179-20 (N.J. Super. Ct. Hudson Cnty.); *City of Annapolis* v. *BP P.L.C.*, No. C-02-CV-21-000250 (Md. Cir. Ct. Anne Arundel Cnty.); *Anne Arundel Cnty.* v. *BP P.L.C.*, No. C-02-CV-21-000565 (Md. Cir. Ct. Anne Arundel Cnty.); *State* v. *Exxon Mobil Corp.*, No. MER-L-001797-22 (N.J. Super. Ct. Mercer Cnty.).

B. Proceedings in the district court

Respondent filed this action against petitioners in Rhode Island state court, alleging that "Defendants bear a dominant responsibility for global warming generally, and for [Rhode Island's] injuries in particular," due to their "extracting, refining, processing, producing, promoting, and marketing fossil fuel products." Ct. App. JA.29. Respondent seeks to hold petitioners liable for the "severe impacts" of "global warming," including "sea level rise," "disruption of the hydrologic cycle," "more frequent and more intense drought," "more frequent and more extreme precipitation," and "more frequent and more intense heatwaves." Ct. App. JA.24. Asserting numerous causes of action under Rhode Island tort law, including for public nuisance and trespass, respondent demands compensatory and punitive damages, disgorgement of profits, abatement of the alleged nuisances, and other relief. Ct. App. JA.162.

Petitioners removed the action to the U.S. District Court for the District of Rhode Island. App. 7a. The notice of removal asserted various bases for federal jurisdiction, including that respondent's claims are necessarily governed by and thus arise under federal law, and involve conduct undertaken at the direction of federal officers under 28 U.S.C. § 1442(a)(1). App. 7a.

The district court granted respondent's motion to remand the case to state court. App. 7a–8a.

C. Proceedings in the First Circuit and this Court

The First Circuit affirmed the remand order, but considered only the federal-officer removal argument, concluding that it did not have appellate jurisdiction under 28 U.S.C. § 1447(d) to review any other basis for removal. *Rhode Island* v. *Shell Oil Prods. Co.*, 979 F.3d 50, 58–59 (1st Cir. 2020).

This Court disagreed, holding that, when a party seeks appellate review of an order remanding a "case . . . removed pursuant to section 1442 or 1443," "the whole of [that] order bec[omes] reviewable on appeal." *BP P.L.C.* v. *Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 1538 (2021). Accordingly, the Court vacated the First Circuit's judgment and remanded for further proceedings. *See Shell Oil Prods. Co.* v. *Rhode Island*, 141 S. Ct. 2666 (2021).

On remand, the First Circuit again affirmed the district court's remand order. App. 9a. In relevant part, the court concluded that "we cannot rule that any federal common law controls Rhode Island's claims" because the Clean Water Act and the Clean Air Act "'have statutorily displaced any federal common law that previously existed'" with respect to interstate pollution and emissions. App. 18a–19a. According to the court, petitioners "cannot premise removal on a federal common law that no longer exists." App. 15a. In so holding, the First Circuit explicitly avoided considering "the parties' artful pleading-based arguments," App. 15a, by concluding that federal law had no role to play at all in Rhode Island's nominal state-law claims.

The consequence of this decision is that lawsuits in the First Circuit involving transboundary emissions will be subjected to varying rules of decisions of different state courts, in clear contradiction of our constitutional structure and numerous precedents of this Court.

REASONS FOR GRANTING THE PETITION

The First Circuit's decision deepens an existing circuit conflict on the question whether federal law necessarily and exclusively governs claims seeking redress for the alleged effects of interstate and international greenhouse gas emissions. The decision also implicates an existing conflict on the question whether federal jurisdiction under 28 U.S.C. § 1331 exists over claims necessarily and exclusively governed by federal law but pleaded under state law.

This petition should be held pending the Court's disposition of *Suncor*. If the Court denies review in *Suncor*, this petition should be granted.

I. WHETHER CLAIMS NECESSARILY AND EXCLUSIVELY GOVERNED BY FEDERAL LAW ARE REMOVABLE TO FEDERAL COURT IS AN IMPORTANT AND RECURRING ISSUE THAT HAS DIVIDED THE CIRCUITS.

Congress has authorized removal to federal court of any case brought in state court over which federal district courts "have original jurisdiction," 28 U.S.C. § 1441(a), thereby allowing removal of claims when the plaintiff could have "filed its operative complaint in federal court" in the first instance, *Home Depot U.S.A., Inc.* v. *Jackson*, 139 S. Ct. 1743, 1748 (2019). And a long line of precedents from this Court has

made clear that claims for damages based on interstate emissions must be governed by federal law alone, and therefore can arise only under federal law, not state law. *See Illinois* v. *City of Milwaukee*, 406 U.S. 91, 105 n.6, 108 n.10 (1972) ("*Milwaukee I*") ("basic interests of federalism . . . demand[]" that, in disputes concerning interstate and international emissions, "[t]he rule of decision [must] be[] federal"). Yet the First Circuit held that such transboundary-emissions-related claims are not necessarily governed by federal law. That erroneous decision deepens one circuit conflict and implicates another.

A. This Case Deepens A Conflict Among The Courts Of Appeals Over Whether Federal Law Necessarily And Exclusively Governs Claims Based On Transboundary Emissions.

The First Circuit's decision deepens a conflict among the courts of appeals regarding whether claims seeking relief for the alleged effects of transboundary emissions are necessarily governed by federal law. The Second Circuit has explained, based on this Court's precedents, that claims centered on transboundary emissions "demand the existence of federal common law" because those emissions span state and even national boundaries, and "a federal rule of decision is necessary to protect uniquely federal interests." *City of New York* v. *Chevron Corp.*, 993 F.3d 81, 90 (2d Cir. 2021). Three other courts of appeals—including the First Circuit here—have rejected that conclusion. Granting certiorari in this case would enable the Court to resolve this intractable conflict.

1. In *City of New York*, plaintiff, New York City, alleged that the defendant energy companies (including some of petitioners here) were liable under state law for injuries caused by the effects of interstate greenhouse gas emissions on global climate change. 993 F.3d at 88. The Second Circuit described the question before it as "whether municipalities may utilize state tort law to hold multinational oil companies liable for the damages caused by global greenhouse gas emissions." *Id.* at 85. The court unanimously held that "the answer is 'no'"; New York City's "sprawling" claims, which—like respondent's—sought "damages for the cumulative impact of conduct occurring simultaneously across just about every jurisdiction on the planet," were "simply beyond the limits of state law" and thus necessarily were "federal claims" that "must be brought under federal common law." *Id.* at 85, 92, 95.

In reaching this conclusion, the Second Circuit emphasized that, "[f]or over a century, a mostly unbroken string of [this Court's] cases has applied federal law to disputes involving interstate air or water pollution." *City of New York*, 993 F.3d at 91. Such "quarrels often implicate two federal interests that are incompatible with the application of state law," namely, the "overriding need for a uniform rule of decision" on matters influencing national energy and environmental policy, and "basic interests of federalism." *Id.* at 91–92 (internal quotation marks and alteration omitted) (quoting *Milwaukee I*, 406 U.S. at 105 n.6).

The court explained that application of state law to the City's claims would "risk upsetting the careful balance that has been struck between the prevention of global warming, a project that necessarily requires

national standards and global participation, on the one hand, and energy production, economic growth, foreign policy, and national security, on the other." *City of New York*, 993 F.3d at 93.

The Second Circuit also rejected the plaintiff's argument that displacement by the Clean Air Act of any remedy under federal common law allows state law to "snap back into action." *City of New York*, 993 F.3d at 98. Although the Clean Air Act displaces any *remedy* under federal common law, it does not displace the entire *source* of law altogether. *See id.* at 95 & n.7; *accord United States* v. *Swiss Am. Bank, Ltd.*, 191 F.3d 30, 43 (1st Cir. 1999) (explaining that *United States* v. *Standard Oil Co. of Cal.*, 332 U.S. 301 (1947), established a two-step analysis that first asks whether "the source of the controlling law [should] be federal or state" and next considers the separate question whether that federal law provides for a remedy). The court explained that the City's contrary position was "difficult to square with the fact that federal common law governed this issue in the first place," because, "where 'federal common law exists, . . . state law cannot be used.'" *City of New York*, 993 F.3d at 98 (quoting *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 313 n.7 (1981) ("*Milwaukee II*")). In the Second Circuit's view, "state law does not suddenly become presumptively competent to address issues that demand a unified federal standard simply because Congress saw fit to displace a federal court-made standard with a legislative one." *Ibid.* Such an outcome would be "too strange to seriously contemplate." *Id.* at 98–99.

2. The First Circuit's decision squarely conflicts with the holding in *City of New York* in two important ways. First, the First Circuit concluded that federal

common law did not govern respondent's claims. Relying (erroneously) on the test for fashioning a *new* rule of federal common law, the First Circuit noted that it did not see "how any significant conflict exists between these federal interests and the state-law claims" because respondent "seek[s] to hold [petitioners] liable for the climate change-related harms they caused by [their] deliberate[] misrepresent[ations]." App. 16a (cleaned up). The First Circuit thus glossed over the sprawling global scope of respondent's claims, which seek remedies for the cumulative effects of interstate and international emissions. In so doing, the First Circuit departed from the Second Circuit, which concluded that claims nearly identical to respondent's "would regulate cross-border emissions in an indirect and roundabout manner" and are "simply beyond the limits of state law." *City of New York*, 993 F.3d at 92–93.

The First Circuit ignored that this Court has *already* held that federal law necessarily governs claims that deal with interstate or international emissions, and, therefore, there was no need to apply the test for *expanding* federal common law. Federal common law *already* applies, as the Second Circuit recognized in noting that a "mostly unbroken string of cases has applied federal law to disputes involving interstate air or water pollution." *City of New York*, 993 F.3d at 91. The First Circuit thus departed from both *City of New York* and a long line of precedent in which this Court has already recognized that federal law alone necessarily governs interstate pollution claims like the ones at issue in this case. *See ibid.*

Second, the First Circuit's holding conflicts with the Second Circuit's conclusion that statutory displacement of federal common law does not make state law "presumptively competent to address issues that demand a unified federal standard." *City of New York*, 993 F.3d at 98. By contrast, the First Circuit held that, because the Clean Water Act and the Clean Air Act "have statutorily displaced any federal common law that previously existed," state law governs claims in this area. *Rhode Island*, 35 F.4th at 55–56 (internal quotation marks omitted).

The First Circuit's approach is irreconcilable with that of the Second Circuit. The First Circuit attempted to distinguish *City of New York* by highlighting that it was originally filed in federal court, "so the court considered the fossil-fuel [companies'] preemption defense on its own terms, not under the heightened standard unique to the removability inquiry." App. 17a (internal quotation marks omitted). But the First Circuit did not explain how this difference in posture affects the answer to the distinct question whether there is federal subject matter jurisdiction on the ground that federal law necessarily governs the claims at issue, a substantive question of federal law that requires the same answer regardless of the court in which a plaintiff chooses to file suit. Indeed, federal common law is not merely a defense to the claims alleging injury from interstate and international emissions because respondent's claims do not merely implicate federal-law issues; they inherently *are* federal claims, arising under federal law. No state law exists in this area for respondent to invoke.

3. Two other courts of appeals have also parted ways with the approach taken in *City of New York*. In

Mayor & City Council of Baltimore v. *BP P.L.C.*, a similar climate-change case, the Fourth Circuit also failed to recognize the federal nature of respondent's sprawling claims and declined to "follow *City of New York*," opining that the Second Circuit had "fail[ed] to explain a significant conflict between the state-law claims before it and the federal interests at stake." 31 F.4th 178, 202–03 (4th Cir. 2022), *cert. pet. filed*, No. 22-361 (U.S. Oct. 14, 2022).

Additionally, both the Fourth and the Tenth Circuits have explicitly disagreed with the Second Circuit's holding that the Clean Air Act's displacement of a federal common-law remedy does not "give birth to new state law claims." *City of New York*, 993 F.3d at 98; *see also ibid.* (explaining that "where 'federal common law exists, it is because state law cannot be used'" (quoting *Milkwaukee II*, 451 U.S. at 313 n.7)). In *Suncor*, the Tenth Circuit held the opposite, reasoning that federal jurisdiction was not present because, after statutory displacement by the Clean Air Act, the otherwise-applicable federal common law "no longer exists." *Bd. of Cnty. Comm'rs of Boulder Cnty.* v. *Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238, 1260 (10th Cir. 2022) (emphasis omitted), *cert. pet. filed*, No. 21-1550 (U.S. June 8, 2022). The Fourth Circuit similarly departed from the Second Circuit's holding, rejecting the view "that any federal common law controls Baltimore's state-law claims" on the ground that "federal common law in this area ceases to exist due to statutory displacement." *Baltimore*, 31 F.4th at 204.

B. The First Circuit's Decision Also Implicates A Circuit Conflict Over When Nominally State-Law Claims May Be Removed.

The decision below also implicates an existing conflict among the courts of appeals concerning whether and when a claim pleaded under state law arises under federal law for purposes of establishing removal jurisdiction.

1. Several courts of appeals have expressly held that federal courts have jurisdiction under Section 1331 over claims artfully pleaded under state law but necessarily governed by federal law—specifically, federal common law.

In *Sam L. Majors Jewelers* v. *ABX, Inc.*, 117 F.3d 922 (5th Cir. 1997), a shipper sued a carrier in state court to recover the value of goods that had been lost in transit, "alleging breach of contract, negligence, and violations of the Texas deceptive trade practice law." *Id.* at 924. The court noted that, under Section 1441(a), "only actions that originally could have been filed in federal court can be removed to federal court." *Ibid*. The court then reasoned that there were "*three* theories that might support federal question jurisdiction" in the case: where "the complaint raises an express or implied cause of action that exists under a federal statute"; where the relevant "area of law is completely preempted by the federal regulatory regime"; and where "*the cause of action arises under federal common law principles*." *Ibid*. (emphases added). Citing a long tradition in which, "applying federal common law, federal courts found that civil actions against air carriers for lost or damaged goods arose under federal law," *id.* at 927–28, the Fifth Circuit

held that the shipper's ostensibly state-law "negligence action . . . arises under federal common law," *id.* at 929. As a result, the court concluded that "[it] ha[d] jurisdiction over this action." *Ibid.*

Similarly, the Eighth Circuit has found federal jurisdiction over a removed state-court complaint that raised putative state-law claims. *In re Otter Tail Power Co.*, 116 F.3d 1207, 1213–15 (8th Cir. 1997). The complaint "raise[d] important questions of federal law requiring interpretation of treaties, federal statutes, and the *federal common law* of inherent tribal sovereignty." *Id.* at 1215 (emphasis added). In that situation, the "plaintiff's characterization of a claim as based solely on state law is not dispositive" because the complaint "necessarily presents a federal question," and removal is proper. *Id*. at 1213–14 (internal quotation marks omitted).

Other cases have upheld federal jurisdiction over claims implicating federal common law using a *Grable*-type analysis, because the complaint necessarily raises a substantial question of federal law. For example, in *Newton* v. *Capital Assurance Co.*, 245 F.3d 1306 (11th Cir. 2001), the Eleventh Circuit considered whether a state-court breach-of-contract claim brought by the plaintiff against his flood insurer had been properly removed to federal court. *Id.* at 1308. The court answered in the affirmative, holding that the complaint "satisfie[d] § 1331 by raising a substantial federal question on its face" because the contract was a federally subsidized Standard Flood Insurance Policy ("SFIP"), and "SFIP contracts are interpreted using principles of federal common law rather than state contract law." *Id.* at 1309.

In addition, the Fifth Circuit has affirmed the removal of "state-law tort claims" against a foreign company—despite the plaintiffs' invocation of "the well-pleaded complaint rule"—because the case "raise[d] substantial questions of federal common law by implicating important foreign policy concerns." *Torres* v. *S. Peru Copper Corp.*, 113 F.3d 540, 542–43 (5th Cir. 1997).

Likewise, the Second Circuit has upheld federal jurisdiction over claims governed by the federal common law of foreign relations under a *Grable*-like theory. In *Republic of Philippines* v. *Marcos*, 806 F.2d 344 (2d Cir. 1986), the Philippine government sought an injunction in state court against its former president's transfer of properties. *Id.* at 346. Although "the face of the complaint" asserted a claim "more nearly akin to a state cause of action for conversion," the Second Circuit indicated that removal would be proper on the ground that the case "arises under federal common law because of the necessary implications of such an action for United States foreign relations." *Id.* at 352–54. In any event, the court held that removal was proper "because the claim raise[d], as a necessary element," a "federal question to be decided with uniformity as a matter of federal law, and not separately in each state." *Id.* at 354.

Each of these circuits recognizes that claims asserted in an area governed exclusively by federal law arise under federal law and create federal jurisdiction—however they are pleaded, and whatever approach to federal jurisdiction applies.

2. In the decision below, the First Circuit did not resolve this question regarding the well-pleaded complaint rule because the court erroneously determined that federal law does not govern respondent's claims. But petitioners argued below that the artful-pleading doctrine permits removal of claims (like those at issue here) that are necessarily and exclusively federal as a matter of constitutional structure. C.A. Suppl. Br. 12–18. Accordingly, the issue is properly presented here. *See*, *e.g.*, *United States* v. *Williams*, 504 U.S. 36, 41 (1992) ("Our traditional rule . . . precludes a grant of certiorari only when 'the question presented was not pressed or passed upon below.' . . . [T]his rule operates (as it is phrased) in the disjunctive . . . ."). Moreover, the circuits are divided on that issue, and its consideration is necessary to resolve the ultimate jurisdictional question presented by this case. And the Court has invited the views of the United States on this same issue in *Suncor*. *See Suncor Energy (U.S.A.) Inc.* v. *Bd. of Cnty. Comm'rs of Boulder Cnty.*, No. 21-1550, 2022 WL 4651143, at *1 (U.S. Oct. 3, 2022).

Four other courts of appeals examining similar climate-change suits have held that Section 1331 does not permit the exercise of jurisdiction over claims necessarily governed by federal law but nominally pleaded under state law.

In *Baltimore*, the Fourth Circuit held that, under the well-pleaded complaint rule, federal common law cannot provide a basis for jurisdiction under Section 1331, and removal is thus improper where the plaintiff omits any reference to federal law in the complaint. 31 F.4th at 200.

In *Suncor*, another climate-change case, the Tenth Circuit likewise rejected the premise that federal common law provides a basis for removal of claims artfully pleaded under state law. 25 F.4th at 1261. The court concluded that the artful-pleading doctrine does not exist outside of the context of complete statutory preemption, a doctrine that allows the removal of a state-law claim where "the pre-emptive force of a statute is so extraordinary that it converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." *Id.* at 1256 (internal quotation marks and citation omitted). The court held that, because the defendants did not argue that a "statute" governed the claims, the artful-pleading doctrine was inapplicable. *Id.* at 1262.

In *County of San Mateo* v. *Chevron Corp.*, 32 F.4th 733 (9th Cir. 2022), *cert. pet. filed*, No. 22-495 (U.S. Nov. 22, 2022), yet another climate-change suit, the Ninth Circuit held that there are only two exceptions to the well-pleaded complaint rule: the *Grable* doctrine, which permits the removal of state-law claims that necessarily raise substantial and disputed federal issues, and the doctrine of complete statutory preemption. *Id.* at 746. The court thus rejected the idea that a nominally state-law claim that necessarily is governed by *non-statutory* federal law—such as by federal common law—can be removed to federal court. The Ninth Circuit failed to ask the threshold question whether the plaintiffs engaged in artful-pleading by framing their claims in state-law terms even though they are inherently federal in nature. *See ibid.* Under the Ninth Circuit's logic, even in a case where federal law necessarily and exclusively governs the issues

pleaded on the face of the complaint, a district court is bound by the plaintiffs' labels.

Finally, the Third Circuit reached the same conclusion in *City of Hoboken* v. *Chevron Corp.*, 45 F.4th 699 (3d Cir. 2022), another climate-change case. Like the Tenth Circuit, it held that a federal court can "recharacterize a state law claim as a federal claim removable to federal court . . . only when some federal statute completely preempts state law." *Id.* at 707 (cleaned up). The Third Circuit further concluded that federal common law cannot provide a basis for removal of claims artfully pleaded under state law because federal common law provides only a "garden-variety preemption" defense in that circumstance. *Id.* at 708.

* * *

Thus, the decision below implicates a widespread conflict of federal law among the courts of appeals. Four courts of appeals have squarely held that 28 U.S.C. § 1331 provides a basis for federal jurisdiction over claims necessarily and exclusively governed by federal law but labeled as arising under state law, while four other courts of appeals have reached the opposite conclusion. That conflict is developed and entrenched, and the Court's intervention is necessary.

II. THE DECISION BELOW IS INCORRECT.

In addition to exacerbating these circuit conflicts, the First Circuit erred in remanding the case to state court. Respondent's claims are necessarily and exclusively governed by federal law and, accordingly, this case is removable to federal court.

1. The First Circuit's decision departed from a long line of this Court's precedents making clear that, under our Constitution's structure, claims seeking relief for the effects of interstate emissions necessarily arise under federal law, not state law.

In our federal system, each State may make law within its own borders, but no State may "impos[e] its regulatory policies on the entire Nation," *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 585 (1996), or dictate our "relationships with other members of the international community," *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 425 (1964). The Constitution's allocation of sovereignty between the States and the federal government, and among the States themselves, precludes application of state law in certain areas that are inherently interstate in nature. Allowing state law to govern such claims would permit one State to "impose its own legislation on . . . the others," violating the "cardinal" principle that "[e]ach state stands on the same level with all the rest." *Kansas* v. *Colorado*, 206 U.S. 46, 97 (1907).

For this reason, the Court has made clear that claims seeking redress for out-of-state emissions must be governed by federal law alone, and therefore can arise only under federal law, not state law. When the States "by their union made the forcible abatement of outside nuisances impossible to each," they necessarily agreed that disputes of that sort would be governed by federal law. *Georgia* v. *Tenn. Copper Co.*, 206 U.S. 230, 237 (1907). Thus, in cases involving "interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations," "our federal system does not permit the controversy to be resolved under state law" "because the

interstate or international nature of the controversy makes it inappropriate for state law to control." *Tex. Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981).

Accordingly, this Court has long held unequivocally that, as a matter of constitutional structure, claims dealing with interstate and international emissions are necessarily governed exclusively by federal law. "[T]he basic scheme of the Constitution . . . demands" that "federal common law" govern disputes involving "air and water in their ambient or interstate aspects." *AEP*, 564 U.S. at 421; *see also Milwaukee I*, 406 U.S. at 105 n.6 ("basic interests of federalism . . . demand[]" this result). In disputes concerning interstate and international emissions, "[t]he rule of decision [must] be[] federal," *id.* at 108 n.10, and "state law cannot be used" at all, *Milwaukee II*, 451 U.S. at 313 n.7; *see also Int'l Paper Co.* v. *Ouellette*, 479 U.S. 481, 488 (1987) (interstate pollution "is a matter of federal, not state, law").

Applying these principles and precedents here, respondent's claims are necessarily governed by and "arise under" federal law because they seek damages based on interstate—and international—greenhouse gas emissions. Respondent seeks damages for injuries allegedly caused by the cumulative impact of emissions emanating from every State in the Nation and every country in the world, and the claims are therefore necessarily governed by federal law.

That remains true whether the plaintiff claims that defendants emitted greenhouse gases directly or instead claims that defendants contributed to green-

house gas emissions by producing and promoting fossil-fuel products. Whatever the allegedly tortious conduct, the alleged injury is the result of greenhouse gas emissions and their effect on the global climate.

The First Circuit nevertheless determined that it lacked jurisdiction because respondent's claims are governed solely by state common law. But the panel's narrow view of the scope of federal law would result in absurd consequences that are inconsistent with our federal system and defy common sense. Illinois could sue the City of Milwaukee in state court under Illinois state law for interstate water pollution, and Milwaukee would be denied a federal forum to address the interstate dispute. *Contra Milwaukee II*, 451 U.S. at 309–10. Connecticut could employ Connecticut law in Connecticut state court to impose liability on out-of-state defendants for failing to abate interstate air pollution. *Contra AEP*, 564 U.S. at 422. Or Georgia could subject a Tennessee company to Georgia law to enjoin it from discharging fumes across state lines. *Contra Tenn. Copper Co.*, 206 U.S. at 236. The holding of the panel is irreconcilable with this Court's rulings that these claims arise under federal law alone and thus are properly heard in federal court.

The First Circuit should have followed this Court's long line of precedent holding that claims of this sort necessarily arise under federal law alone.

2. The First Circuit also erred in holding that the effect of the Clean Air Act, having "displaced" the federal common law of interstate air pollution, was to eviscerate federal subject matter jurisdiction over interstate air pollution claims. App. 18a–19a. The First

Circuit was correct that displacement of federal common law means there is no common-law *remedy* available, but it was incorrect that the displacement of one federal law by another somehow erases federal jurisdiction.

The First Circuit's reasoning erroneously conflates the merits of respondent's claims with federal courts' jurisdiction over them, breaking from long-established precedent from this Court. As the Second Circuit made clear in *City of New York*, although the Clean Air Act displaces any *remedy* under federal common law, it does not displace the entire *source* of law altogether, which remains exclusively federal. 993 F.3d at 95 & n.7. Whether a party can obtain a remedy under federal common law is a *merits* question distinct from the *jurisdictional* question whether federal law must supply the rule of decision in the first instance.

Indeed, whether a claim arises under state or federal law for jurisdictional purposes turns on which law governs; it does not depend on whether the plaintiff has stated a *viable* claim under federal law. Under this Court's two-step analytical approach set forth in *Standard Oil*, 332 U.S. 301, courts must: (1) determine whether the source of law is federal or state based on the nature of the claims asserted and the issues at stake; and then (2) if federal law is the source, determine the substance of the federal law and decide whether the plaintiff has stated a viable federal claim for relief under federal law. *See Swiss Am. Bank*, 191 F.3d at 42–45 (citing *Standard Oil*, 332 U.S. at 305). Whether a claim "arises under" federal law "turns on the resolution of the source question," not the "substance question." *Id*. at 44. And, critically, that

"choice-of-law task is a federal task for federal courts." *Milwaukee II*, 451 U.S. at 349 (Blackmun, J., dissenting) (internal quotation marks omitted).

Thus, sometimes—as here—federal law governs, even when the party has no *remedy* under federal law on the merits. When "the interstate or international nature of the controversy makes it inappropriate for state law to control," *Tex. Indus.*, 451 U.S. at 641, federal law necessarily governs for "jurisdictional purposes," even if that claim "may fail at a later stage," *Oneida Indian Nation* v. *Cnty. of Oneida*, 414 U.S. 661, 675 (1974); *see also City of New York*, 993 F.3d at 95. Courts must not "conflate[]" these distinct "jurisdiction" and "merits-related determination[s]." *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 511 (2006); *see also Al-Qarqani* v. *Chevron Corp.*, 8 F.4th 1018, 1025 (9th Cir. 2021) ("[I]t has long been understood that a claim can arise under federal law even if a court ultimately concludes that federal law does not provide a cause of action.").

Nor does the displacement of federal-law remedies mean that respondent can bring its claims under state law. As the Second Circuit explained, such an outcome "is difficult to square with the fact that federal common law governed this issue in the first place" because, "where federal common law exists, . . . state law cannot be used." *City of New York*, 993 F.3d at 98 (internal quotation marks omitted). "[S]tate law does not suddenly become presumptively competent to address issues that demand a unified federal standard simply because Congress saw fit to displace a federal court-made standard with a legislative one." *Ibid.* Accordingly, statutory displacement cannot "give birth

to new state-law claims," *ibid.*, because our constitutional structure "does not permit the controversy to be resolved under state law" ab initio, *Tex. Indus.*, 451 U.S. at 641. Indeed, such an outcome is "too strange to seriously contemplate." *City of New York*, 993 F.3d at 98–99. Regardless of displacement, our constitutional structure requires "a federal rule of decision" for such claims. *Id.* at 90.

The Seventh Circuit, too, reached this same conclusion after this Court held in *Milwaukee II* that the Clean Water Act displaced federal common law. On remand, the Seventh Circuit noted that this Court had "continue[d] to cite *Milwaukee I* for the inapplicability of state law" to interstate pollution disputes "despite the displacement of federal common law." *Illinois* v. *City of Milwaukee*, 731 F.2d 403, 409 (7th Cir. 1984) ("*Milwaukee III*"). "The very reasons [this] Court gave for resorting to federal common law in *Milwaukee I* are the same reasons why the state . . . cannot apply its own state law to out-of-state discharges now," and "*Milwaukee II* did nothing to undermine that result." *Id.* at 410. Notwithstanding displacement, the Seventh Circuit held that the interstate pollution claims were "a problem of uniquely federal dimensions requiring the application of uniform federal standards." *Id.* at 410–11.

The First Circuit's contrary conclusion here is incorrect and conflicts with established precedent of this Court and other courts of appeals.

III. This Case Raises An Important Question That Warrants The Court's Review.

This case presents a straightforward vehicle for the Court to resolve these persistent disagreements

concerning the scope of federal jurisdiction. As this Court's call for the views of the Solicitor General in *Suncor* suggests, this question is legally and practically important and merits the Court's review. Furthermore, petitioners' vital role in maintaining a dependable supply of oil and gas is a matter of national security, and a rule of decision on international-emissions-related suits that would open the energy industry to a patchwork of conflicting state laws and state lawsuits would undermine this important mission.

1. The question presented in this case concerns core principles of our federal system—specifically, the exclusive power of federal law over transboundary pollution cases and the inability of state law to adjudicate disputes in areas of unique federal importance, from interstate pollution to foreign affairs to tribal relations.

The Court has long recognized the "great importance" of maintaining clear and uniform rules on issues relating to removal. *Tennessee* v. *Davis*, 100 U.S. 257, 260 (1879); *see also Direct Mktg. Ass'n* v. *Brohl*, 575 U.S. 1, 14 (2015) ("jurisdictional rules should be clear" (internal quotation marks and brackets omitted)). "Clarity is to be desired in any statute, but in matters of jurisdiction it is especially important. Otherwise the courts and the parties must expend great energy, not on the merits of dispute settlement, but on simply deciding whether a court has the power to hear a case." *United States* v. *Sisson*, 399 U.S. 267, 307 (1970). Indeed, conflicting and uncertain jurisdictional rules "produce appeals and reversals, encourage gamesmanship, and, again, diminish the likelihood that results and settlements will reflect

a claim's legal and factual merits." *Hertz Corp*. v. *Friend*, 559 U.S. 77, 94 (2010).

The Court should take this opportunity to clarify the enduring role of federal law as the rule of decision for claims based on interstate and international emissions, and confirm the common-sense conclusion that claims necessarily and exclusively governed by federal law are removable to federal court.

2. The case is also important because of petitioners' vital role in ensuring a steady supply of oil and gas for domestic use and in support of the U.S. military. The United States has recently faced record-high gas prices, and just this past October, the White House called on energy companies to "invest in production right now" in order to "help[] . . . improve U.S. energy security and bring down energy prices that have been driven up" by the conflict in Ukraine. FACT SHEET: President Biden to Announce New Actions to Strengthen U.S. Energy Security, Encourage Production, and Bring Down Costs, White House Briefing Room (Oct. 18, 2022), https://tinyurl.com/2p8z6mee. Against this backdrop, this case presents a timely opportunity for this Court to clarify a uniform removal right for energy companies and others sued on interstate- and international-emissions-related grounds and to prevent a patchwork of lawsuits in state courts across the country from undermining this crucial work.

3. Finally, this case is a suitable vehicle for resolving the question presented. The question whether federal law necessarily governs suits involving transboundary emissions was pressed below and passed on by the First Circuit. App. 14a–19a. And the question

whether such federal claims are removable under 28 U.S.C. § 1331, despite respondent's use of state-law labels, was briefed by the parties and is inextricably intertwined with the ultimate jurisdictional question presented by this case. *See* C.A. Suppl. Br. 12–18. Petitioners also raised the relevant issues in their timely petition for rehearing en banc, which the First Circuit denied on the ground that it lacked a quorum of circuit judges "in regular active service who [were] not recused." App. 48a.

CONCLUSION

The Court should hold this petition for a writ of certiorari pending its disposition of *Suncor*, No. 21-1550. If the Court does not grant review in *Suncor*, this petition should be granted.

Respectfully submitted.

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