No. 22-524

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 Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR RESPONDENT STATE OF RHODE ISLAND

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QUESTION PRESENTED

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

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INTRODUCTION

Petitioners seek to remove Rhode Island's state-law claims to federal court based on a body of federal common law that no longer exists and an exception to the well-pleaded complaint rule that this Court has never recognized. All five circuit courts to consider petitioners' "perplexing" theory of removal jurisdiction have rejected it, including the First Circuit below. *Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178, 204 (4th Cir. 2022) ("*Baltimore*").[1] That is for good reason. Adopting such a theory would undermine this Court's recent efforts to bring "order to [the] unruly doctrine" of arising-under jurisdiction. *See Gunn v. Minton*, 568 U.S. 251, 258 (2013). It would also represent a breathtaking expansion in federal common law, elevating the lawmaking powers of federal judges above those of Congress. This Court has already declined to review a nearly identical petition filed two years ago. *See Chevron Corp. v. City of Oakland*, 141 S. Ct. 2776 (2021) (No. 20-1089). It should do so again here, because nothing has changed except that well-settled law has become even more firm: four more circuits have now rejected petitioners' novel theory of federal-common-law removal.

Like other climate-deception cases that have come before this Court, Rhode Island's lawsuit seeks to hold

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[1] *See also City of Oakland v. BP PLC*, 969 F.3d 895 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2776 (2021) ("*Oakland*"); *Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238 (10th Cir. 2022) ("*Boulder*"); *Cnty. of San Mateo v. Chevron Corp.*, 32 F.4th 733 (9th Cir. 2022), *reh'g denied*, Nos. 18-15499, 18-15502, 18-15503, 18-16376 (June 27, 2022) ("*San Mateo*"); *City of Hoboken v. Chevron Corp.*, 45 F.4th 699 (3d Cir. 2022), *reh'g denied*, Nos. 21-2728, 22-1096 (Sep. 30, 2022) ("*Hoboken*").

fossil-fuel companies liable "for promoting fossil fuels while allegedly concealing their environmental impacts" over many years. *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 1536 (2021). The State pleads claims exclusively under Rhode Island law, and as in other climate-deception cases, all of Rhode Island's claims "center[] on the [petitioners'] alleged failure to warn about the dangers of their products." *Id.* Applying settled legal principles, the First Circuit rejected petitioners' attempts to remove this state-law action to federal court based on arising-under jurisdiction, 28 U.S.C. §§ 1331, 1441(a). The court recognized that, under the well-pleaded complaint rule, arising-under jurisdiction ordinarily does not attach to cases that plead only state-law causes of action. And it concluded that Rhode Island's state-law claims do not fall into either of the two exceptions to the well-pleaded complaint rule that this Court has recognized: (1) the claims do not satisfy the requirements of *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005), because they do not necessarily raise a federal issue; and (2) the claims do not satisfy the requirements of complete preemption, because they are not encompassed by a federal cause of action that Congress intended to be exclusive. *See* Pet. App. 19a–24a.

Petitioners do not challenge any of those conclusions. Instead, they urge this Court to grant certiorari to upend *Grable* and create a third, standalone exception to the well-pleaded complaint rule for state-law claims that are purportedly "governed" by federal common law. The Court should decline that invitation for three main reasons.

First, petitioners identify no circuit conflict, much less one that warrants this Court's review. The First,

Third, Fourth, Ninth, and Tenth Circuits have all unanimously rejected identical attempts to remove climate-deception lawsuits on the basis of federal common law. No circuit court has reached a contrary result. Although petitioners rely heavily on *City of New York v. Chevron Corp.*, that decision expressly "reconciled" its analysis of an ordinary-preemption defense with "the parade of recent opinions holding that state-law claims for public nuisance brought against fossil fuel producers do not arise under federal law" for purposes of removal jurisdiction, thereby carefully avoiding conflict. 993 F.3d 81, 93 (2d Cir. 2021). Nor can petitioners create a split based on a handful of old appellate decisions that predate this Court's opinion in *Grable*. The results of those decisions are fully consistent with the decision below, even though they applied outdated jurisdictional tests that have since been superseded by *Grable*.

Second, petitioners' theory of federal-common-law removal cannot be reconciled with this Court's precedent. As petitioners necessarily concede, the Clean Air Act displaced any federal common law relating to greenhouse gas emissions, the very same body of judge-made law petitioners invoke as the basis for removal. *See* Pet. 25–26. And as this Court's cases make clear, federal common law—and its effect on state law—"disappears" entirely once it is displaced by statute. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 423 (2011) ("*AEP*"). In any event, even if the federal common law of interstate air pollution still existed, it would not encompass Rhode Island's state-law claims, which vindicate core state interests in protecting consumers and the public from deceptive marketing activities. And even if federal common law did somehow "govern" Rhode Island's state-law claims, that would not create arising-under jurisdiction because petition-

ers do not even try to argue that Rhode Island's suit satisfies the requirements of *Grable* or complete preemption, the only two exceptions to the well-pleaded complaint rule this Court has approved. There is no need to create a third exception specific to federal common law, because *Grable* already "provides ready answers to jurisdictional questions" and gives sufficient "guidance whenever borderline cases crop up." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 578 U.S. 374, 392 (2016).

Finally, the Petition does not raise an important and recurring question of law. Petitioners conflate subject-matter jurisdiction with the merits of their preemption defenses, but the only question decided below was whether petitioners properly removed Rhode Island's lawsuit to federal court. The answer to that jurisdictional question will not jeopardize national security, as petitioners suggest. Nor will it have broad implications for removal jurisdiction. Besides a handful of other climate-deception lawsuits, petitioners cannot identify a single case that would be affected by their theory of federal-common-law removal. Regardless, this case is a poor vehicle for reviewing the Question Presented, even if that question were worthy of certiorari review. The First Circuit did not decide whether to create a third exception to the well-pleaded complaint rule, and so this Court would need to act as a court of first view in order to reverse the judgment below.

The Petition here is nearly identical to the one filed in the *Boulder* climate-deception case. Accordingly, if the Court grants review in *Boulder*, it should do the same here and consolidate the petitions for argument, thereby ensuring that the sovereign State of Rhode Island has adequate opportunity to present its position to the Court. Conversely, if the Court denies cer-

tiorari review of the *Boulder* petition, it should reach the same result here because the two petitions "present[] the same issues," as petitioners themselves acknowledge. Pet. 4.

STATEMENT

I. Legal background

"Federal courts are courts of limited jurisdiction, possessing only that power authorized by Constitution and statute." *Gunn*, 568 U.S. at 256 (cleaned up). Congress has, in turn, granted federal district courts original subject-matter jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States," and such actions "may be removed by the defendant" from state to federal court. 28 U.S.C. §§ 1331, 1441.

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

tual or anticipated defense," *Vaden v. Discover Bank*, 556 U.S. 49, 60 (2009), "including the defense of pre-emption," *Franchise Tax Bd.*, 463 U.S. at 14.

There are only two recognized exceptions to the well-pleaded complaint rule. The first is *Grable*, a doctrine this Court developed to resolve the lower courts' long-standing difficulty in applying the well-pleaded complaint rule where "a question of federal law is lurking in the background" of a case pleaded under state law. *See Gully v. First Nat'l Bank*, 299 U.S. 109, 117 (1936); *see also Manning*, 578 U.S. at 385 (describing the previous "caselaw construing § 1331" before *Grable* as "highly 'unruly'"). The *Grable* doctrine allows removal only in a "special and small category" of state-law actions in which "a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn*, 568 at 258.

The second is the doctrine of complete preemption, which applies only when "the pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'" *Caterpillar*, 482 U.S. at 393 (quoting *Metro. Life*, 481 U.S. at 65). To invoke this exception to the well-pleaded complaint rule, a defendant must show—at a minimum—that a plaintiff's state-law claim falls within the scope of a federal cause of action that "Congress intended . . . to be exclusive." *Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 9 & n.5 (2003). The Court has been "reluctant to find that extraordinary pre-emptive power," and it has identified only three statutes that have "complete preemption" effect, none of which are at issue here. *Metro. Life*, 481 U.S. at 65.

II. Facts and procedural history

In 2018, the State brought this action in Rhode Island state court, alleging exclusively state-law claims for relief, including nuisance, trespass, and failure to warn. *See* Ct. App. JA.137–62. As detailed in the Complaint, Rhode Island's theory of liability is straightforward. For decades, petitioners knowingly concealed and misrepresented the climate impacts of their fossil-fuel products, using sophisticated disinformation campaigns to cast doubt on the science, causes, and effects of global warming. *Id.* JA.23, 72–109. That deception inflated global consumption of fossil fuels, including within Rhode Island, which increased greenhouse gas emissions, exacerbated climate change, and created hazardous conditions in Rhode Island. *Id.* JA.95, 111–136. In this way, petitioners' failure to warn and deceptive promotion were substantial factors in bringing about Rhode Island's climate-related harms, which include damage to property and infrastructure from rising seas, stronger storm surges, and more frequent heat waves. *Id.* JA.119–136.

As the First Circuit correctly noted, this lawsuit does not seek to "regulate greenhouse-gas emissions." Pet. App. 18a n.8. Rather, it seeks to hold petitioners liable for "'deliberately and unnecessarily deceiv[ing]' consumers about the scientific consensus on climate change and its devastating effects." *Id.* (quoting Compl. ¶ 177, Ct. App. JA.108). As in other climate-deception cases, moreover, Rhode Island does "not seek to impose liability on [petitioners] for their direct emissions of greenhouse gases [or] to restrain [petitioners] from engaging in their business operations." *See Baltimore,* 31 F.4th at 195. Instead, the Complaint requests damages for harms caused by petitioners' deception campaigns and equitable relief to abate the local haz-

ards created by those campaigns—*e.g.*, infrastructure to protect Rhode Island from sea-level rise. Pet. App. 34a. The "source of tort liability" is therefore petitioners' "concealment and misrepresentation of the[ir] products' known dangers," not their lawful production and sale of fossil fuels. *Baltimore,* 31 F.4th at 233.

Petitioners removed the case to the District of Rhode Island, asserting numerous theories of federal subject-matter jurisdiction. *See* Pet. App. 7a. The district court granted Rhode Island's motion to remand. *Id.* 7a–8a. The First Circuit affirmed the district court's ruling as to federal-officer removal under 28 U.S.C. § 1442, and it held that it lacked appellate jurisdiction to review the other rejected grounds for removal. *Rhode Island v. Shell Oil Prod. Co.*, 979 F.3d 50 (1st Cir. 2020). After its decision in *Baltimore*, 141 S. Ct. 1532, this Court granted certiorari, vacated the First Circuit's decision, and then remanded the case for consideration of petitioners' remaining removal grounds. *Shell Oil Prod. Co. v. Rhode Island*, 141 S. Ct. 2666 (2021).

On remand, the First Circuit again affirmed the district court's remand order, rejecting all of petitioners' jurisdictional theories. *See* Pet. App. 9a. As relevant here, the court concluded that no body of federal common law governs this lawsuit. *Id.* 18a–19a. It explained that Rhode Island's state-law claims fall outside the federal common law of interstate pollution, as defined by this Court's caselaw. *Id.* 18a. In the alternative, the First Circuit held that the federal common law of interstate air pollution no longer exists, having been displaced by the Clean Air Act, and that petitioners failed to satisfy the preconditions for creating new federal common law. *Id.* 15a–19a. The court declined to address whether there exists a third exception to

the well-pleaded complaint rule for state-law claims that are purportedly governed by federal common law. *Id.* 14a–15a. In distinguishing *City of New York*, however, it reaffirmed that ordinary-preemption defenses cannot create arising-under jurisdiction in light of the well-pleaded complaint rule. *Id.* 17a–18a.

The court below also rejected petitioners' invocation of *Grable* and their argument that the Clean Air Act completely preempts this lawsuit. *Id.* 19a–24a. It refused to find *Grable* jurisdiction because "none of Rhode Island's claims has as an element a violation of federal law; [petitioners] pinpoint no specific federal issue that must necessarily be decided for Rhode Island to win its case; and [petitioners'] speaking about federal law or federal concerns in the most generalized way is not enough for *Grable* purposes." *Id.* 21a. As for complete preemption, the court concluded the Clean Air Act meets none of that doctrine's requirements: the Act does not provide a federal cause of action that encompasses Rhode Island's claims, and in light of the Act's broad savings clauses, it does not evince clear congressional intent that federal law should exclusively govern. *Id.* 21a–24a.

REASONS THE PETITION SHOULD BE DENIED

I. There is no circuit conflict.

The circuit courts have uniformly rejected identical attempts to remove climate-deception cases based on a congressionally displaced body of federal common law that no longer exists. Those decisions do not conflict with *City of New York*, which presented no question of removal jurisdiction because the case was initiated in federal court on diversity grounds. Nor are they inconsistent with the pre-*Grable* decisions petitioners cite,

none of which addressed whether displaced federal common law could convert state-law claims into federal ones for purposes of arising-under jurisdiction.

A. The decision below does not conflict with *City of New York*.

City of New York cannot conflict with the decision below for two independent reasons. First, the decisions address entirely different questions: the First Circuit evaluated the existence of removal jurisdiction on appeal from an order granting the State's remand motion, whereas the Second Circuit analyzed the merits of a federal preemption defense on appeal from an order granting the defendants' motion to dismiss for failure to state a claim. Second, the two cases involve different factual allegations and different theories of liability, making the Second Circuit's ordinary-preemption analysis entirely inapplicable to Rhode Island's lawsuit.

1. In *City of New York*, the Second Circuit held that federal common law preempted certain state-law claims brought against several oil-and-gas companies. 993 F.3d 81. In affirming dismissal of those claims under Rule 12(b)(6), the court expressly "reconcile[d] [its] conclusion" with the Ninth Circuit's decision in *Oakland* and "the parade of [other] recent opinions holding that state-law claims for public nuisance brought against fossil fuel producers do not arise under federal law" for purposes of removal jurisdiction. *Id.* at 93. The Second Circuit acknowledged that, under the well-pleaded complaint rule, "the fact that a defendant might ultimately prove that a plaintiff's claims are pre-empted under federal law does not establish that they are removable to federal court." *Id.* at 94 (quoting *Caterpillar*, 482 U.S. at 398, in parenthetical) (cleaned up). But because New York City had "filed suit in federal court in the first instance," the

court determined that it was "free to consider the [defendants'] preemption defense on its own terms, not under the heightened standard unique to the removability inquiry." *Id.* at 94. For that reason, the Second Circuit concluded that its preemption finding did not conflict with "the fleet of [other] cases" holding that "anticipated defense[s]"—including defenses based on federal common law—could not "singlehandedly create federal-question jurisdiction under 28 U.S.C. § 1331 and the well-pleaded complaint rule." *Id.*

The First Circuit also did not discern any conflict between its rejection of arising-under jurisdiction and *City of New York*'s affirmance of an ordinary-preemption defense. *See* Pet. App. 17a–18a. Nor did the Third, Fourth, or Tenth Circuits, all of which have recently addressed *City of New York* in affirming orders granting remand in similar climate-deception cases. *See Hoboken*, 45 F.4th at 708; *Baltimore*, 31 F.4th at 203; *Boulder*, 25 F.4th at 1262. Like the Second Circuit, those courts distinguished *City of New York* based on its "completely different procedural posture." *E.g.*, *Baltimore*, 31 F.4th at 203. They acknowledged—as the Second Circuit did—that the well-pleaded complaint rule prohibits federal courts from exercising arising-under jurisdiction based on an ordinary-preemption defense. They recognized—as the Second Circuit did—that *City of New York* resolved an ordinary-preemption defense, not any question of federal subject-matter jurisdiction. And so, they concluded—as the Second Circuit did—that *City of New York*'s ordinary-preemption analysis sheds no light on the removability of state-law claims to federal courts.[2]

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[2] A federal district court in the Second Circuit reached the same conclusion, holding that *City of New York* did not control the removal of Connecticut's climate-deception lawsuit because

Unable to identify any conflict between the actual holdings of the decision below and *City of New York*, petitioners argue that "[t]he First Circuit's *approach* is irreconcilable with that of the Second Circuit." Pet. 15 (emphasis added). But this Court grants certiorari to resolve conflicts in the "results" of appellate decisions, not conflicts in their approaches or reasoning. *Yee v. City of Escondido*, 503 U.S. 519, 537–38 (1992); *California v. Rooney*, 483 U.S. 307, 311 (1987) ("This Court reviews judgments, not statements in opinions." (cleaned up)). And here, the preemption result of *City of New York* does not conflict in any way with the jurisdictional result of the decision below.

In any event, there is no conflict in rationale. The First and Second Circuits both recognized that *City of New York* addressed an ordinary-preemption defense, and they both acknowledged that an ordinary-preemption defense cannot create arising-under jurisdiction "in light of the well-pleaded complaint rule." Pet. App. 17a–18a (quoting *City of New York*, 993 F.3d at 94). Contrary to petitioners' assertion, then, the First Circuit did adequately "explain how th[e] difference in [procedural] posture" distinguished its decision from *City of New York*. *See* Pet. 15. And regardless, this Court does not grant certiorari to line edit the opinions of lower courts. *See Rooney*, 483 U.S. at 311 ("The fact that the Court of Appeal reached its decision through analysis different than this Court might have used does not make it appropriate for this Court to rewrite the California court's decision, or for the prevailing party to request us to review it.").

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that decision only concerned an ordinary-preemption defense. *Connecticut v. Exxon Mobil Corp.*, No. 3:20-CV-1555 (JCH), 2021 WL 2389739, at *7 n.7 (D. Conn. June 2, 2021), *appeal pending*, No. 21-1446 (2d Cir.).

2. Even if *City of New York*'s ordinary-preemption analysis were relevant to the question of removal jurisdiction, it would not apply to the specific claims pleaded by Rhode Island, all of which rest on different factual allegations and target qualitatively different types of tortious conduct.

In *City of New York*, the plaintiff sought to hold fossil-fuel companies "strict[ly] liab[le]" for climate impacts caused by their "lawful commercial activity," namely: their *lawful* production, promotion, and sale of fossil fuels. 993 F.3d at 87, 93 (cleaned up). As the Second Circuit observed, the complaint did not "concern itself with aspects of fossil fuel production and sale that [were] unrelated to emissions." *Id.* at 97. Based on that understanding, the court concluded that the plaintiff's "lawsuit would regulate cross-border emissions" because the defendants would need to "cease global [fossil-fuel] production" if they "want[ed] to avoid all liability." *Id.* at 93.

By contrast, the First Circuit concluded that Rhode Island's state-law claims do not seek to "regulate greenhouse-gas emissions," but rather to hold petitioners liable for "deliberately and unnecessarily deceiv[ing] consumers about the scientific consensus on climate change and its devastating effects, and about the starring role their products play in causing it." Pet. App. 18a n.8 (cleaned up). As in other climate-deception cases, the "source of tort liability" here is petitioners' "concealment and misrepresentation of [their] products' known dangers," not their lawful production and sale of fossil fuels. *Baltimore*, 31 F.4th at 233. And so, unlike the defendants in *City of New York*, petitioners here would not need to "cease global [fossil-fuel] production" under Rhode Island's Complaint to avoid future liability. *City of New York*, 993

F.3d at 93. Indeed, so long as they adequately warn of their products' climate impacts and stop spreading climate disinformation, petitioners can produce and sell as much fossil fuel as they are able without fear of incurring any "ongoing liability." *Id.*

Unsurprisingly, the First and Second Circuits reached different conclusions when they applied the same test for federal common law to different facts and different claims. Because New York City sought to hold fossil-fuel companies strictly liable for the discharge of greenhouse gas emissions, the Second Circuit viewed the lawsuit as "no different" from prior cases in which this Court has applied the federal common law of interstate pollution abatement. *Id.* at 92. But because Rhode Island seeks to hold petitioners liable for harms "caused by deliberately misrepresenting the dangers [of fossil fuels]," the First Circuit concluded that the same cases cited by *City of New York* "d[o] not address the types of acts Rhode Island seeks redress for." Pet. App. 16a, 18a & n.8. Far from demonstrating an "intractable conflict," Pet. 11, *City of New York* and the decision below simply illustrate that the same test for federal common law yields different results when applied to different facts in different cases with different theories of liability—as it should. *See United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979) (federal common law "depend[s] upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law").

Resisting that conclusion, petitioners suggest that the First and Second Circuits used different tests to determine whether federal common law "govern[ed]" the plaintiffs' claims. Pet. 13–14. That is incorrect. Both courts applied the same two-part test for fash-

ioning new federal common law. *Compare* Pet. App. 15a–17a (requiring (1) a uniquely federal interest and (2) a conflict between the federal interest and the use of state law), *with City of New York*, 993 F.3d at 90 (similar). And both courts evaluated whether the plaintiffs' state-law claims were encompassed by the Court's prior "cases that once (or possibly) recognized federal common law in the context of interstate pollution and greenhouse-gas emissions." Pet. App. 18a. In reality, then, "the thrust of [petitioners'] claim is that a lower court simply erred in applying a settled rule of law to the facts of a particular case." *Salazar-Limon v. City of Houston*, 137 S. Ct. 1277, 1278 (2017) (Alito, J., concurring in denial of certiorari). That case-specific claim of error does not warrant this Court's review, even if it were true. *See id.*; *see also Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 122 (1994) ("achiev[ing] justice in [a] particular case . . . is ordinarily not sufficient reason for our granting certiorari").

Petitioners also insist that the First Circuit departed from *City of New York* when it concluded that statutorily displaced federal common law cannot convert state-law claims into federal ones for purposes of subject-matter jurisdiction. *See* Pet. 15. But again, *City of New York* did not address any question of jurisdiction because none was before the court, and so that decision says nothing about the jurisdictional effects of displaced federal common law. In any event, the First Circuit's decision below expressly identified statutory displacement as an alternative ground for rejecting petitioners' theory of federal-common-law removal. Pet. App. at 18a ("Even accepting the [petitioners'] description of Rhode Island's claims as being 'transboundary pollution' claims (again, just for argument's sake), ..."). As explained above, the First Circuit also rejected petitioners' theory because no

federal common law governs Rhode Island's claims and because ordinary-preemption defenses cannot create arising-under jurisdiction. Because those two grounds "present[] no clear conflict" with *City of New York*, certiorari review is not warranted, even if there is some tension between the First and Second Circuit's conclusions regarding the jurisdictional effects of statutorily displaced federal common law. *Lawson v. Murray*, 515 U.S. 1110, 1116 (1995) (Scalia, J., concurring in denial of certiorari).

B. The decision below does not conflict with any of the pre-*Grable* cases cited by petitioners.

Petitioners also try to manufacture a circuit split based on a handful of circuit decisions that predate this Court's opinion in *Grable*. *See* Pet. 17–19. They insist that these pre-*Grable* cases recognized a stand-alone exception to the well-pleaded complaint rule for claims that are exclusively pleaded under state law, but that are actually federal-common-law claims in disguise. That effort fails for at least four independent reasons.

1. As petitioners concede, the First Circuit never addressed their novel re-imagining of the "artful-pleading doctrine." Pet. 20; Pet. App. 14a–15a. Instead, the court below rejected their theory of removal on the grounds that (1) no federal common law governs Rhode Island's state-law claims, and (2) ordinary-preemption defenses—like the one raised in *City of New York*—cannot create arising-under jurisdiction in light of the well-pleaded complaint rule. Pet. App. 15a–19a. Those two grounds raise no conflict with any of the pre-*Grable* decisions cited by petitioners. To the contrary, all of those decisions concluded that the plaintiffs' claims implicated existing

federal common law, and none of those decisions contradicted the time-honored rule that an ordinary-preemption defense cannot create arising-under jurisdiction. *See, e.g.*, *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 925 (5th Cir. 1997).

2. In addition, there is no circuit split because none of petitioners' pre-*Grable* decisions involved *congressionally displaced* federal common law. Petitioners do not dispute that the Clean Air Act has "displaced the federal common law of interstate air pollution," the very same body of judge-made law upon which they predicate removal. Pet. 25–27 (cleaned up). Yet they fail to identify a single appellate decision holding that statutorily displaced federal common law somehow retains the power to convert state-law claims into federal ones for purposes of arising-under jurisdiction. That is because every court to consider that jurisdictional question has concluded that a defendant "cannot premise removal on a federal common law that no longer exists." *See* Pet. App. 15a; *see also Baltimore*, 31 F.4th at 204–07; *San Mateo*, 32 F.4th at 747; *Oakland*, 969 F.3d at 906; *Boulder*, 25 F.4th at 1260.

3. Even if Congress had not displaced the federal common law invoked by petitioners, the results of the decision below would be fully consistent with the pre-*Grable* cases cited in the Petition.

In all but one of those cases, the appellate courts applied a precursor of the *Grable* test, finding jurisdiction only because the state-law claims necessarily raised "a substantial question of federal law."[3] That

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[3] *Newton v. Capital Assurance Co.*, 245 F.3d 1306, 1308–09 (11th Cir. 2001); *In re Otter Tail Power Co.*, 116 F.3d 1207, 1213–14 (8th Cir. 1997); *Torres v. S. Peru Copper Co.*, 113 F.3d 540,

"substantial question" standard was later incorporated into the *Grable* test, which clarified that arising-under jurisdiction exists when a state-law claim necessarily raises federal issues that are substantial, actually disputed, and capable of resolution in federal court without disrupting the federal-state balance approved by Congress. *Gunn*, 568 U.S. at 258. In its decision below, the First Circuit applied *Grable*'s controlling test for arising-under jurisdiction, and it concluded that Rhode Island's state-law claims do not "necessarily raise a federal issue." Pet App. 20a ("We begin and end at prong (1), the necessarily-raised prong [of *Grable*]."). Had the panel applied the substantial-question standard from earlier cases, it would have reached the same conclusion. Petitioners' disagreement is therefore with the First Circuit's application of law to facts, not its articulation of any governing legal principles.

That leaves *Sam L. Majors*, 117 F.3d 922. But as "most courts recognize," that Fifth Circuit decision is "not good law" to the extent it endorsed a third exception to the well-pleaded complaint rule for federal common law. *Hoboken*, 45 F.4th at 708. Indeed, the Fifth Circuit has clearly abandoned any such endorsement in the aftermath of *Grable*, holding instead that arising-under jurisdiction encompasses a state-law claim "only if" the claim satisfies the requirements of *Grable* or complete preemption. *Bernhard v. Whitney Nat. Bank*, 523 F.3d 546, 551 (5th Cir. 2008). Post-*Grable*, the Fifth Circuit has never cited *Sam L. Majors* for any jurisdictional holdings, and it has never suggested that federal common law creates a third exception to the well-pleaded com-

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542–43 (5th Cir. 1997); *Republic of Philippines v. Marcos*, 806 F.2d 344, 352, 354 (2d Cir. 1986).

plaint rule—separate and apart from *Grable* and complete preemption.

In any event, the Fifth Circuit's jurisdictional analysis in *Sam L. Majors* turned on two conditions plainly not present here: (1) the plaintiff had a "clearly established federal common law cause of action against air carriers for lost shipments" (the subject of its lawsuit), and (2) Congress affirmatively "preserv[ed]" that cause of action through the Airline Deregulation Act of 1978. 117 F.3d at 928. Petitioners identify no federal-common-law cause of action that gives Rhode Island a right to sue petitioners for the deceptive and wrongful promotion of their products. And Congress displaced the one body of federal common law that, according to petitioners, governs the State's claims. As a result, there is no reason to believe that this case would be decided differently under the Fifth Circuit's former jurisprudence in *Sam L. Majors*.

4. Finally, even if there were some tension between petitioners' pre-*Grable* cases and the decision below, that tension would merely highlight *Grable*'s success at cleaning up a "muddled" jurisprudence on arising-under jurisdiction. *Manning*, 578 U.S. at 385. Before *Grable*, the test for arising-under jurisdiction was not "well-defined," *id.*, and the "canvas" of opinions on this subject "look[ed] like one that Jackson Pollock got to first," *Gunn*, 568 U.S. at 258. In *Grable*, the Court endeavored to "bring some order to this unruly doctrine." *Gunn*, 568 U.S. at 258. It succeeded. Courts in every circuit now use *Grable* to determine whether, in the absence of complete preemption, a state-law claim arises under federal law for jurisdictional purposes. To the extent, then, that a circuit split once existed over petitioners' proposed

third exception to the well-pleaded complaint rule, *Grable* ended any disunity.

II. The decision below is correct.

The First Circuit correctly rejected petitioners' novel third exception to the well-pleaded complaint rule for state-law claims that are purportedly "governed" by congressionally displaced federal common law. As this Court's precedent makes clear, Rhode Island's claims for deceptive marketing do not fall within the boundaries that once defined the federal common law of interstate pollution, which—in any event—no longer exists following the passage of the Clean Air Act. This Court has, moreover, only recognized two exceptions to the well-pleaded complaint rule (*Grable* and complete preemption), and petitioners offer no basis for creating a third exception. To the contrary, accepting their theory of removal would not only expand federal common lawmaking in unprecedented ways, but also undermine the success of *Grable* at bringing clarity to arising-under jurisdiction.

A. Rhode Island's claims are not "governed" by the congressionally displaced federal common law of interstate pollution.

Petitioners' theory of removal assumes that the federal common law of interstate pollution "governs" Rhode Island's state-law claims. That assumption is fatally flawed for at least two reasons. First, the federal common law of interstate pollution no longer exists, having been displaced by the Clean Air Act. Second, even if that body of judge-made law still existed, it would not encompass Rhode Island's state-law claims, which seek to vindicate core state interests in ensuring that companies do not conceal and misrepresent the dangers of their products.

1. Petitioners concede—as they must—that the Clean Air Act displaced the federal common law upon which they premise removal. Pet. 25–26. They nevertheless insist that congressionally displaced judge-made law retains the power to convert Rhode Island's state-law claims into federal ones for purposes of arising-under jurisdiction. *See id.*

That striking proposition cannot be reconciled with this Court's analysis in *AEP* and *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987). In *Ouellette*, the Court considered a preemption challenge to state-law public nuisance claims formerly governed by the federal common law of interstate water pollution. 479 U.S. at 484, 487. Because the Clean Water Act had displaced that body of federal judge-made law, the Court framed the relevant inquiry as whether the Act preempted the plaintiff's state-law claims—a question it answered by conducting a traditional statutory preemption analysis. *See id.* at 491–500. Twenty years later, this Court gave the same instructions when discussing the displacement of federal common law as it related to greenhouse gas emissions—the same body of judge-made law that petitioners invoke here. *AEP*, 564 U.S. at 429. After holding that the Clean Air Act displaced the plaintiffs' federal-common-law claims, the Court remanded their state-law claims for further consideration by the lower courts, noting that "the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act." *Id.*

As these decisions make clear, "federal common law ceases to exist" after it has been displaced by a federal statute, leaving the federal statute as the sole basis for preempting or "control[ling]" a plaintiff's state-law claims. *Baltimore*, 31 F.4th at 204–05. To conclude otherwise would be incompatible with this Court's "com-

mitment to the separation of powers"—a commitment that is "too fundamental" to permit "rel[iance] on federal common law" after Congress has spoken. *Milwaukee v. Illinois*, 451 U.S. 304, 315 (1981) ("*Milwaukee II*"). Accordingly, the First Circuit did not err in rejecting petitioners' attempts to "premise removal on a federal common law that no longer exists." Pet. App. 15a.

2. Nor did it err in concluding that Rhode Island's state-law claims have nothing to do with any federal common law that has ever existed. This Court has only ever applied the federal common law of interstate pollution in nuisance cases where a sovereign State sought to regulate the amount of pollution released from a specific out-of-state source. *AEP*, 564 U.S. at 421 ("Decisions of this Court . . . have approved federal common-law suits brought by one State to abate pollution emanating from another State.").[4] And notwithstanding petitioners' mischaracterizations of the Complaint, Rhode Island does not seek to "regulate greenhouse-gas emissions" or otherwise set climate-change policy. Pet. App. 18a n.8. Instead, as the First Circuit rightly concluded, this lawsuit seeks to hold petitioners liable for "'deliberately and unnecessarily deceiv[ing]' consumers about the

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[4] *See also Illinois v. City of Milwaukee, Wis.*, 406 U.S. 91, 107 (1972) ("*Milwaukee I*"); *New Jersey v. City of New York*, 283 U.S. 473, 477, 481–483 (1931) (seeking "an injunction" that would "restrain[] the city from dumping garbage into the ocean or waters of the United States off the coast of New Jersey and from otherwise polluting its waters and beaches"); *Georgia v. Tenn. Copper Co.*, 240 U.S. 650 (1916) (seeking to enjoin defendant copper companies from discharging noxious gas); *Missouri v. Illinois*, 180 U.S. 208, 241–43, 248 (1901) (seeking to restrain the discharge of sewage); *see also Ouellette*, 479 U.S. at 488 ("The Court's opinion in [*Milwaukee I*] affirmed the view that the regulation of interstate water pollution is a matter of federal, not state, law. . . .").

scientific consensus on climate change and its devastating effects." *Id.* (quoting Compl. ¶ 177, Ct. App. JA.108). This Court's cases on the federal common law of interstate pollution simply do "not address the type of acts Rhode Island seeks judicial redress for." *Id.* 18a; *see also Boulder*, 25 F.4th at 1261 n.5 ("It is also unsettled whether the federal common law of interstate pollution covers suits brought against product sellers rather than emitters—suits in which out-of-state third-party emitters are only steps in the causal chain." (cleaned up)); *Oakland*, 969 F.3d at 906 (expressing doubt as to whether federal common law applied to climate-deception claims).

3. Furthermore, the First Circuit rightly refused to expand federal common law to encompass Rhode Island's state-law claims. "[B]efore federal judges may claim a new area for common lawmaking, strict conditions must be satisfied." *Rodriguez v. F.D.I.C.*, 140 S. Ct. 713, 717 (2020). Among others, the party invoking federal common law must identify a "specific," "concrete," and "significant conflict" between a uniquely federal interest and the use of state law. *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 87–88 (1994); *see also Miree v. DeKalb Cty.*, 433 U.S. 25, 31 (1977); *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68–72 (1966). "The cases in which federal courts may engage in common lawmaking are few and far between," and this Court has "underscore[d] the care federal courts should exercise before taking up an invitation to try their hand at common lawmaking," lest they "ma[k]e the mistake of moving too quickly past important threshold questions at the heart of our separation of powers." *Rodriguez*, 140 S. Ct. at 716, 718.

Far from raising a uniquely federal interest, Rhode Island's claims rests firmly on longstanding state in-

terests. This lawsuit vindicates a core state "interest in ensuring the accuracy of commercial information in the marketplace." *Edenfield v. Fane*, 507 U.S. 761, 769 (1993). It targets misconduct that has traditionally been regulated by the States. *See, e.g.*, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541–42 (2001) (identifying "advertising" as "a field of traditional state regulation" (cleaned up)); *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989) (identifying "unfair business practices" as "an area traditionally regulated by the States"); *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 150 (1963) (underscoring the States' "traditional power to enforce otherwise valid regulations designed for the protection of consumers"). It pursues state tort remedies that are rooted in "the state's historic powers to protect the health, safety, and property rights of its citizens." *In re MTBE Prod. Liab. Litig.*, 725 F.3d 65, 96 (2d Cir. 2013). And it redresses injuries that "the states have a legitimate interest in combating," namely: "the adverse effects of climate change." *Am. Fuel & Petrochemical Mfrs. v. O'Keeffe*, 903 F.3d 903, 913 (9th Cir. 2018). To the extent, then, that the federal government has an interest in the resolution of this case, it is shared with the states, rather than uniquely federal.

As the First Circuit correctly concluded, moreover, petitioners failed to identify a "significant conflict" between any concrete federal interest and Rhode Island's "state-law claims, which (again) seek to hold [petitioners] liable for the climate change-related harms they caused by deliberately misrepresenting the dangers they knew would arise from their deceptive hyping of fossil fuels." Pet. App. 16a (cleaned up). "[T]he existence of such a conflict [is] a precondition for recognition of a federal [common law] rule of decision." *O'Melveny*, 512 U.S. at 87. And for good reason:

It safeguards against "the runaway tendencies of 'federal common law' untethered to a genuinely identifiable (as opposed to judicially constructed) federal policy." *Id.* at 89. Here, petitioners wave vaguely at "the basic scheme of the Constitution" and "our federal system" to justify their proposed expansion of federal common law. Pet. 24–25. But "[i]nvoking some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption of a state law." *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019) (lead opinion).

In short, there is no existing federal common law that could apply to Rhode Island's claims and no justification for creating new federal common law in this area. The court below was correct and no further review by this Court is warranted.

B. There is no third exception to the well-pleaded complaint rule for state-law claims that were formerly governed by a now-displaced body of federal common law.

Even if federal common law did somehow encompass Rhode Island's state-law claims for the deceptive promotion of a dangerous consumer product, petitioners' theory of removal would still fail in light of the well-pleaded complaint rule. This Court has only ever recognized two exceptions to the well-pleaded complaint rule (*Grable* and complete preemption), and petitioners do not challenge the First Circuit's determination that neither of those exceptions applies here. Nor do they offer this Court any basis for creating a bespoke third exception that applies only to state-law claims that are purportedly governed by judge-made federal law.

1. Under the century-old well-pleaded complaint rule, a case arises under federal law "only when the plaintiff's statement of his own cause of action shows that it is based upon federal law." *Vaden*, 556 U.S. at 60 (brackets omitted). In the "vast bulk of suits," then, "a case arises under federal law when federal law creates the cause of action asserted." *Gunn*, 568 U.S. at 257. This Court has recognized only two narrow exceptions where a case arises under federal law even though it pleads claims exclusively under state law. The first encompasses the "special and small category" of state-law claims that satisfy *Grable*. *Id*. at 258. The second consists of state-law claims that are completely preempted by a federal statutory cause of action that "Congress intended . . . to be exclusive." *Beneficial Nat'l Bank*, 539 U.S. at 9 n.5. This Court has never recognized a standalone third exception for state-law claims that are purportedly governed by federal common law.

In suggesting otherwise, petitioners lean on *United States v. Standard Oil Co. of California*, 332 U.S. 301 (1947). In that case, however, subject-matter jurisdiction undisputedly existed because the United States was the plaintiff. *Id.* at 303. The Court therefore did not consider any questions of arising-under jurisdiction, much less address whether federal common law can convert state-law claims into federal ones for jurisdictional purposes. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974), is equally unhelpful to petitioners. In that case, the plaintiffs expressly pleaded a federal cause of action, alleging that the defendants had interfered with "a current right to possession conferred [on them] by federal law." *Id.* at 666. As a result, *Oneida* says nothing about when a claim pleaded under state law arises under federal law for purposes of subject-matter jurisdiction. Nor do any of

petitioners' other citations to this Court's case law. In fact, most of those cases do not even address subject-matter jurisdiction.[5] The remainder either concern jurisdictional disputes that have nothing to do with arising-under jurisdiction,[6] or cases where—as in *Oneida*—the plaintiff expressly pleaded a federal cause of action.[7] None of them addressed the removability of claims pleaded exclusively under state law.

2. There is no reason for this Court to grant petitioners' request to create a custom-made jurisdictional test for cases "governed by" a displaced body of federal common law. In fact, doing so would undo the progress this Court achieved in *Grable* in clarifying the arising-under doctrine.

The petitioner in *Grable*, like petitioners here, asked the Court to create different jurisdictional tests for different sources of federal law. *See* 545 U.S. at 320 n.7. The Court declined that invitation, observing that there is "no reason in [the] text [of Section 1331] or otherwise to draw such a rough line." *Id.* Instead, it developed a test that applies comfortably to any category of federal law, thereby advancing the Court's stated goal of providing "[j]urisdictional tests [that] are built for more than a single dispute." *Manning*, 578 U.S. at 393. The Court has no reason to revisit that choice, as lower courts have applied *Grable* with

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[5] *See, e.g.*, *Ouellette*, 479 U.S. 483; *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907).

[6] *Kansas v. Colorado*, 206 U.S. 46, 97 (1907); *Milwaukee I*, 406 U.S. at 93.

[7] *Milwaukee II*, 451 U.S. at 310; *AEP*, 564 U.S. at 418; *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 503–04 (2006); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 632 (1981).

no apparent difficulty, including to cases involving federal common law. *See, e.g.*, *Provincial Gov't of Marinduque v. Placer Dome, Inc.*, 582 F.3d 1083, 1090–92 (9th Cir. 2009); *Nicodemus v. Union Pac. Corp.*, 440 F.3d 1227, 1235–36 (10th Cir. 2006); *Morgan Cty. War Mem'l Hosp. ex rel. Bd. of Directors of War Mem'l Hosp. v. Baker*, 314 F. App'x 529, 533, 535–36 (4th Cir. 2008). The Court should not adopt the "untested approach" proposed by petitioners here, because "forcing courts to toggle back and forth between [that approach] and the 'arising under' standard, would undermine consistency and predictability in litigation." *Manning*, 578 U.S. at 383–84.

Nor should this Court dramatically expand the artful pleading doctrine to encompass preemption by federal common law. *See* Pet. 17–22. As this Court has explained, the artful pleading doctrine is simply another name for complete preemption. *See Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 475 (1998) ("The artful pleading doctrine allows removal where federal law completely preempts a plaintiff's state-law claim." (citations omitted)). And complete preemption exists only when a state-law claim is wholly subsumed by a federal statutory cause of action that Congress intended to be exclusive. *Beneficial Nat'l Bank*, 539 U.S. at 9 & n.5. This Court has been "reluctant" to expand the scope of the complete preemption doctrine, recognizing that doing so raises significant federalism concerns. *See Metro Life*, 481 U.S. at 65. Indeed, it has only ever identified three federal statutes that have the "extraordinary pre-emptive power" necessary to "convert[] an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." *Aetna Health Inc. v. Davila*, 542 U.S. 200, 209 (2004) (cleaned up); *San Mateo*, 32 F.4th at 748 (identifying those three statutes).

The Court should not endow judge-made federal law with that sort of extraordinary preemptive force. If it did, a federal judge could expand its own subject-matter jurisdiction simply by making new federal common law, contrary to the foundational axiom that the "limited jurisdiction" of the federal courts "is not to be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

III. The Question Presented is neither important nor cleanly raised in this case.

The Question Presented does not warrant this Court's review for the additional reasons that it is not well-presented in this Petition and arises in only a single, discrete category of cases.

1. This case is a poor vehicle for addressing petitioners' theory of federal-common-law removal, even assuming that novel theory warranted certiorari review. To reverse the judgment below, this Court would need to (1) conclude that a congressionally displaced body of federal common law governs Rhode Island's state-law claims, and then (2) create a new exception to the well-pleaded complaint rule that stands separate and apart from both *Grable* and complete preemption. But as petitioners necessarily concede, the First Circuit never addressed the second step of their theory. Pet. 20. As a result, this Court would need to function as a court of "first view," not "a court of review," if it were to grant certiorari in this case. *Jennings v. Rodriguez*, 138 S. Ct. 830, 851 (2018) (citation omitted).

2. Denying certiorari is also appropriate because the Petition does not present any questions of recurring importance. To the contrary, petitioners present an exceedingly narrow and atypical question of subject-matter jurisdiction: whether defendants can re-

move state-law claims to federal court based on congressionally displaced federal common law, even though they fail to satisfy the requirements of *Grable* and complete preemption. The cases affected by the Question Presented are necessarily few in number because federal common law applies only in "limited areas" that are "few and restricted." *Texas Indus.*, 451 U.S. at 640 (cleaned up). Indeed, the only potentially affected cases that petitioners identify are other lawsuits targeting the fossil-fuel industry's climate deception, a vanishingly small fraction of the thousands of cases remanded each year to state court.

Contrary to petitioners' vague speculations, moreover, denying certiorari would not "undermine" "national security" or interfere with the "dependable supply of oil and gas." Pet. 29. Again, the only question raised in this Petition is whether Rhode Island's lawsuit should proceed in state court or federal court. Petitioners cannot seriously argue that the nation's "energy security" will be jeopardized if a state court rules on the merits of Rhode Island's claims, rather than a federal court. Pet. 30. As this Court has reaffirmed time and again, state courts are perfectly capable of applying federal law and adjudicating federal defenses. *See, e.g.*, *McKesson v. Doe*, 141 S. Ct. 48, 51 (2020) ("Our system of 'cooperative judicial federalism' presumes federal and state courts alike are competent to apply federal and state law.").

Finally, petitioners invoke the need for clarity in jurisdictional rules as a reason for granting certiorari review. Pet. 30. But it is petitioners who seek to undo the progress that this Court has made in clarifying the "muddled backdrop" of jurisdictional rules that existed prior to *Grable*. *Manning*, 578 U.S. at 385. Courts have no need for a one-off jurisdictional test that ap-

plies only to judge-made federal law, because *Grable* already "provides ready answers to jurisdictional questions" and already "gives guidance whenever borderline cases crop up." *Id.* at 392.

CONCLUSION

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

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