No. 22-821

IN THE
Supreme Court of the United States

BP AMERICA INC., *et al.*, *Petitioners,*
v.
STATE OF DELAWARE, *Respondent.*

CHEVRON CORPORATION., *et al.*, *Petitioners,*
v.
CITY OF HOBOKEN, *Respondent.*

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

RESPONDENT STATE OF DELAWARE'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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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 federal common law which petitioners assert governs respondent's state-law claims has been displaced by a federal statute and would not apply to respondent's claims even if it remained operative; (2) the statute that displaced that common law 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)?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Statutes

Rules

STATEMENT

Respondent, the State of Delaware, brought this action in its own courts, under its own consumer protection statutes and common law, alleging that petitioners misled consumers and the public about their products within and outside Delaware, and that those misrepresentations will have severe consequences to the State and its citizens. The Third Circuit below noted that it was "in good company" affirming remand of Delaware's case to state court, because "so far, four other circuits have refused to allow the oil companies to remove similar state tort suits to federal court" without dissent. Pet. App. 21a. The Eighth Circuit recently affirmed remand in a case presenting exactly the same issues, and joined the First, Third, Fourth, Ninth, and Tenth Circuits in rejecting the arguments petitioners advance yet again here.[1] No court anywhere has accepted petitioners' arguments in support of federal subject-matter jurisdiction.

The Court called for the views of the United States on the materially similar petition pending in *Suncor Energy (U.S.A.) Inc. v. Board of County Commissioners of Boulder County*, No. 21-1550 ("*Suncor*"), which petitioners agree "presents the same issues" as this petition, Pet. 4. The United States has responded, stating that "[i]n the view of the United States, the petition for a writ of certiorari should be denied." *See*

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[1] *City of Oakland v. BP PLC*, 969 F.3d 895 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2776 (2021); *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238 (10th Cir. 2022); *Mayor & City Council of Balt. v. BP P.L.C.*, 31 F.4th 178 (4th Cir. 2022); *Cnty. of San Mateo v. Chevron Corp.*, 32 F.4th 733 (9th Cir. 2022); *Rhode Island v. Shell Oil Prods. Co.*, 35 F.4th 44 (1st Cir. 2022); *Minnesota ex rel. Ellison v. Am. Petroleum Inst.*, __ F.4th __, No. 21-1752, 2023 WL 2607545 (8th Cir. Mar. 23, 2023).

Brief for the United States as Amicus Curiae at 1, *Suncor*, No. 21-1550 (Mar. 16, 2023). The United States' brief explains that the *Suncor* plaintiffs' claims cannot be "removed to federal court on the ground that [their] state-law claims should be recharacterized as claims arising under federal common law," because "the Clean Air Act has displaced any relevant federal common law in this area, and no exception to the well-pleaded complaint rule applies." *Id.* at 6. That is in accord with the unanimous case authority, including the Third Circuit's opinion here, and applies equally to this petition.

There is no division among the circuits on the sole issue squarely raised in the petition. Six circuit courts have held that state law claims like Delaware's—that allege "oil companies knew how dangerous fossil fuels were for the environment" for years, but "said nothing about [those] dangers" and instead "labored to convince the public" falsely that fossil fuels do not contribute to climate change, Pet. App. 20a—are not removable to federal court on any basis. Petitioners' broad contention that "federal courts have [federal question] jurisdiction under [28 U.S.C. §] 1331 over claims artfully pleaded under state law but necessarily governed by federal law—specifically, federal common law," Pet. 12, is not the law in any circuit. The courts are unanimous that state-law causes of action only "arise under" federal law for purposes of statutory subject-matter jurisdiction when those claims either 1) are completely preempted by a federal statute, or 2) satisfy the four-part test this Court elucidated in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005). No court recognizes the unguided analysis petitioners advocate, whereby a district judge may squint at a state-court plaintiff's state-law claims, determine they are

"inherently and necessarily federal" based vaguely on "our constitutional structure," Pet. 3, and rest its own jurisdiction on that finding. There is no split on this issue, let alone an "entrenched" one requiring this Court's intervention. Pet. 17.

The Third Circuit's decision below is not in conflict with the Second Circuit's decision in *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021). Multiple circuits have held that opinion is "completely different" from the Third Circuit's decision below and the unanimous cases like it, both legally and factually. *See Baltimore*, 31 F.4th at 203. Legally, the cases are not in conflict because they resolved different questions in different postures. *City of New York* considered an appeal from an order dismissing a case *initiated in federal district court* for failure to state a claim. 993 F.3d at 88–89. The decisions of the First, Fourth, Eighth, Ninth, and Tenth Circuits, by contrast, and of the Third Circuit here, affirmed orders granting remand for lack of federal subject-matter jurisdiction, in cases *originally filed in state court*. *See Rhode Island*, 35 F.4th at 50–51; *Baltimore*, 31 F.4th at 195–96, 238; *Minnesota*, 2023 WL 2607545, at *1; *San Mateo*, 32 F.4th at 744; *Suncor*, 25 F.4th at 1246; *see also Oakland*, 969 F.3d at 902–03, 912 (vacating denial of remand). The Second Circuit itself expressly "reconcile[d]" its conclusions with the "parade of recent opinions" affirming remand in analogous cases concerning injuries from climate change, stating "their reasoning does not conflict with our holding." 993 F.3d at 93–94. Factually, *City of New York* is distinguishable because the complaint there would "effectively impose strict liability" on fossil fuel companies for injuries from climate change, *id.* at 93, while Delaware's case and those like it allege that petitioners wrongfully misled consumers and the public for mul-

tiple decades, and target that alleged deceptive conduct as the basis for liability. Thus even if *City of New York* had conducted the same analysis as the court of appeals here, it would not be instructive.

The reason no disjunction has developed between the circuits is that, ultimately, the consensus is correct and correctly applies this Court's precedent. This Court has acknowledged that its "caselaw construing § 1331 was for many decades . . . highly 'unruly,'" and has worked steadily for nearly two decades to synthesize "that muddled backdrop" into "what we now understand as the 'arising under' standard." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 578 U.S. 374, 385 (2016) (quoting *Gunn v. Minton*, 568 U.S. 251, 258 (2013)). Beginning with *Grable*, the Court "condensed [its] prior cases" into a straightforward test: a claim arises under federal law for statutory purposes where "federal law creates the cause of action asserted," or where a state law creates the cause of action, but a federal question 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 U.S. at 257–58. A narrow "corollary" is that "Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character." *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63–64 (1987). As the United States explained in *Suncor*, "[c]omplete preemption is ultimately a matter of congressional intent" to federalize an area of law. *Suncor*, U.S. Br. at 15. The court of appeals here, consistent with every other court to consider the issue, thus correctly declined to adopt the "new form of complete preemption" petitioners advocate, which "relies not on statutes but federal common law." *See* Pet. App. 24a.

Allowing federal judges to craft common law rules with "pre-emptive force . . . so extraordinary that it converts an ordinary state common-law complaint into one stating a federal claim" would introduce grave federalism and separation of powers problems. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987) (cleaned up).

Petitioners say that notwithstanding the limits of complete preemption, state law claims pertaining to certain subjects simply *are* claims under federal common law "as a matter of constitutional structure," *e.g.* Pet. 23, although they never explain which provision of the Constitution makes that so. Even if the broad consensus rejecting that position were ill-founded and there were good reason to expand this Court's "arising under" jurisprudence, Petitioners' theory could not apply in this case because the federal common law of pollution nuisance on which they rely no longer exists. This Court held twelve years ago that any federal common law that might once have been applicable here has been "displaced by the federal legislation authorizing EPA to regulate carbon-dioxide emissions," namely the Clean Air Act. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 423 (2011) ("*AEP*"); *see* 42 U.S.C. § 7401 *et seq*. When Congress displaces federal common law by statute, "the need for such an unusual exercise of law-making by federal courts disappears," and with it any substantive law crafted in that area by the courts. *AEP,* 564 U.S. at 423 (quoting *City of Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981)). "[F]ar from expressing an intent that federal common law be given complete-preemptive force with respect to the sorts of claims that respondents allege, Congress *displaced* any federal-common-law remedy that respondents might otherwise have invoked," and the judiciary's limited lawmaking authority has been extinguished. *Suncor*,

U.S. Br. at 15. "[B]efore federal judges may claim a *new* area for common lawmaking," moreover, "strict conditions must be satisfied," *Rodriguez v. F.D.I.C.*, 140 S. Ct. 713, 717 (2020) (emphasis added), and petitioners do not argue any of them are satisfied here.

Petitioners also assert that the Third Circuit "erred in rejecting petitioners' *Grable* argument" because it "misapprehended" petitioners' arguments. Pet. 26–27. But every court to consider the question has held that Petitioners' assertion of *Grable* jurisdiction is without merit because federal common law at most provides petitioners a federal preemption defense they may assert in state court. It does not form an affirmative element of any of Delaware's claims here. Even if the Third Circuit's holding were in doubt, petitioners' "asserted error" is the court of appeals' alleged "misapplication of a properly stated rule of law," which is "rarely" a basis for granting certiorari and does not merit the Court's attention here. *See* S. Ct. R. 10.

Finally, the petition should be denied because the Question Presented is neither important nor frequently recurring. Petitioners do not identify any class of cases impacted by the issues here other than ones to which they themselves are parties, and there is no confusion or ambiguity in jurisdictional analysis that could be relieved by the Court hearing this case. Petitioners argue that their own "vital role in ensuring a steady supply of oil and gas for domestic use and in support of the U.S. military" renders the jurisdictional question here important, Pet. 30; but petitioners' position as dominant competitors in the fossil fuel market does not manifest an important federal question. The United States did not address military readiness or civilian energy resources in its amicus brief in *Suncor*, moreover, tending to indicate that these con-

siderations are not meaningfully implicated by the Question Presented.

The petition should be denied. If the Court denies the petition in *Suncor*, which it should, it should do the same here. If the Court grants the petition in *Suncor*, Delaware respectfully requests that this petition also be granted and the cases be consolidated for argument so that the State may adequately present its position on the merits.

Background

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

"[U]nder the present statutory scheme as it has existed since 1887," the Court has applied a "powerful doctrine," known as the well-pleaded complaint rule, requiring that jurisdiction under sections 1331 and 1441 "be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration." *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 9–10 (1983) (citation omitted). For more than a century, that rule has been "the basic principle marking the boundaries of the federal question jurisdiction of the federal district courts." *Metro. Life*, 481 U.S. at 63. 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*, 482 U.S.

at 392. "Jurisdiction may not be sustained on a theory that the plaintiff has not advanced," *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 809 n.6 (1986), and cannot be "predicated on an actual or anticipated defense," *Vaden v. Discover Bank*, 556 U.S. 49, 60 (2009) (citation omitted), "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 the doctrine of complete preemption, which applies only when "the pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'" *Caterpillar*, 482 U.S. at 393 (quoting *Metro. Life*, 481 U.S. at 65). The "proper inquiry focuses on whether Congress intended the federal cause of action to be exclusive rather than on whether Congress intended that the cause of action be removable," *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 9 n.5 (2003), and "[i]f Congress intends a preemption instruction completely to displace ordinarily applicable state law, and to confer federal jurisdiction thereby, it may be expected to make that atypical intention clear," *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 698 (2006). The Court has been "reluctant to find that extraordinary pre-emptive power" because it necessarily impinges on the states' sovereign lawmaking powers, *Metro. Life*, 481 U.S. at 65, and has identified only three statutes that exert the "complete pre-emption" effect, none of which are at issue here. *See Beneficial Nat'l Bank*, 539 U.S. at 2.

The second recognized exception is *Grable* jurisdiction, a doctrine this Court developed to resolve lower courts' longstanding difficulty applying the well-pleaded complaint rule in cases where "a question of

federal law is lurking in the background" of a complaint pleaded under state law. *See Gully v. First Nat'l Bank*, 299 U.S. 109, 117 (1936). The *Grable* doctrine is applicable only to a "special and small category" of cases in which "federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn*, 568 at 258 (citing *Empire Healthchoice*, 547 U.S. at 699; *Grable*, 545 U.S. at 314).

Petitioners do not contend in this Court that Delaware's claims are completely preempted. Their petition instead asks the Court to grant review either to carve out a new, third exception to the well-pleaded complaint rule applicable only to cases "seeking redress for injuries allegedly caused by the effects of interstate and international greenhouse gas emissions," Pet. 10; or to relitigate whether they have satisfied *Grable* jurisdiction on the merits, Pet. 26–28.

Facts and Procedural History

Delaware alleges petitioners have known for decades that their oil, gas, and coal products create greenhouse gas pollution, which in turn changes Earth's climate, warms the oceans, and causes sea levels to rise. Ct. App. JA0316–50. Starting as early as the 1950s, petitioners researched the link between fossil fuel consumption and global warming, and over time amassed a nuanced, comprehensive understanding of the adverse climate impacts their fossil fuel products cause. *Id.* Beginning in the 1980s, however, petitioners embarked on a strategy of misrepresenting their own understanding of climate change and their products' relationship to it, and misleadingly advertising and promoting those products. *Id.* JA0350–78.

Delaware brought this case in Delaware Superior Court, asserting state-law claims for (1) negligent failure to warn, (2) trespass, (3) nuisance, and (4) violations of the Delaware Consumer Fraud Act, Del. Code Ann. tit. 6, § 2511, *et seq*. Ct. App. JA0444–62. Petitioners removed on seven theories of federal jurisdiction, namely (1) federal common law, (2) *Grable* jurisdiction, (3) complete preemption by the Clean Air Act, (4) federal enclave jurisdiction, (5) the federal officer removal statute, 28 U.S.C. § 1442, (6) the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331, *et seq.,* and (7) the Class Action Fairness Act, 28 U.S.C. § 1453, all but the first two of which have since been abandoned. *See* Pet. App. 77a.

The district court granted Delaware's motion to remand. The court first held in relevant part that Delaware's claims "are not completely preempted by federal common law" because the complaint "only asserts state-law causes of action" and there is not "any indication that Congress has intended for federal common law to provide the exclusive cause of action for the claims asserted in the complaint." Pet. App. 81a. The court further held that petitioners' "repeated refrains that federal common law 'governs' or 'exclusively governs' the issues underlying [Delaware]'s state-law claims are simply veiled—and non-meritorious, for purposes of removal—preemption arguments," which "d[o] not provide a basis for establishing federal jurisdiction." *Id.* 82a. And in turn, the court found no support for petitioners' proposition "that a complaint expressly asserting state-law claims that happen to implicate federal common law can create an additional exception to the well-pleaded complaint rule and confer removal jurisdiction on federal courts." *Id.* As to *Grable*, the court found that the petitioners' arguments sounding in foreign affairs, federal greenhouse

gas regulation, and the First Amendment were not necessarily presented in Delaware's complaint and thus could not support removal. *See id.* 86a–92a.

The Third Circuit affirmed. It first noted that because Delaware's claims were pleaded "all under state law," the well-pleaded complaint rule would permit removal on federal question grounds only if petitioners could "show either that these state claims are completely preempted by federal law or that some substantial federal issue must be resolved" within the meaning of *Grable*. *Id.* 22a–23a. The court explained that while "[o]rdinary preemption is a defense" that can "defeat the plaintiff's state-law claims" when "incompatible federal and state laws regulate the same actions," the separate doctrine of "[c]omplete pre-emption is a potent jurisdictional fiction" that "lets courts recast a state-law claim as a federal one" for purposes of federal question jurisdiction. *Id.* 23a. "Ordinary preemption defenses cannot work this alchemy." *Id.* The court held petitioners' reliance on federal common law was "fatal[ly] flaw[ed]," because the precedent they cited came from "garden-variety preemption" decisions determining the validity of an ordinary pre-emption defense, "not the complete preemption they need" to establish jurisdiction. *Id.* 24a. The court expressly declined to recognize a "new form of complete preemption, one that relies not on statutes but federal common law," because "complete preemption is rare" and can apply only when Congress clearly so intends. *See id.* 23a–24a.

Considering petitioners' *Grable* arguments, the court held that "neither of the federal issues" petitioners maintained on appeal could justify removal. *Id.* 26a. Petitioners argued that "emissions claims arise in an area governed exclusively by federal law," such that

"every element of [Delaware's] claims is necessarily federal." *Id.* The Third Circuit held that this contention simply "rehash[ed] [petitioners'] common-law preemption argument" and was "the same wolf in a different sheep's clothing," because "whether federal common law governs these claims" is at most an ordinary preemption defense on the merits. *Id.* The court also rejected petitioners' contention that the First Amendment infused affirmative federal elements into Delaware's state-law claims; "[s]tate courts routinely hear libel, slander, and misrepresentation cases involving matters of public concern," the court reasoned, and the limitations placed on certain speech-related causes of action by the Constitution "do not extend federal jurisdiction to every such claim." *Id.* 27a.

Petitioners requested rehearing *en banc*, which the Third Circuit denied. *Id.* 111a. This petition followed.

REASONS THE PETITION SHOULD BE DENIED

The petition should be denied because the court of appeals' decision does not conflict with any circuit concerning the removability of state-law claims on federal question grounds or any other issue; the Second Circuit's decision in *City of New York* is legally and factually inapposite; the judicial consensus reflected in the opinion below is correct; and the issues here are neither important nor frequently recurring.

There is no circuit conflict concerning the application of the well-pleaded complaint rule and its narrow exceptions.

1. Petitioners' lead contention, that the circuits are divided in answering whether "federal courts have jurisdiction under Section 1331 over claims artfully

pleaded under state law but necessarily governed by federal law," Pet. 12, is not accurate. Starting with *Grable* in 2005, this Court has simplified and clarified the principles governing the removability of state-law claims for relief under 28 U.S.C. §§ 1331 & 1441. The lower courts have uniformly applied those standards, and petitioners have neither identified any circuit conflict nor articulated any pressing need for the Court to revisit its previous decisions.

Before *Grable*, no "well-defined test" existed to guide lower courts in determining when a district court may exercise federal question jurisdiction over a case pleading only state-law claims for relief. *Manning*, 578 U.S. at 385. The "canvas" of opinions across the judiciary addressing the question in fact "look[ed] like one that Jackson Pollock got to first." *Gunn*, 568 U.S. at 258. *Grable* established a straightforward, four-part test to resolve the lower courts' confusion. *See id.* at 258. The courts of appeals have consistently and effectively applied that test in a broad range of cases, including those in which the plaintiff 's state-law claims purportedly implicated federal common law. *See, e.g.*, *Mitchell v. Advanced HCS, L.L.C.*, 28 F.4th 580, 588–89 (5th Cir. 2022); *Morgan Cnty. War Mem'l Hosp. ex rel. Bd. of Dirs. of War Mem'l Hosp. v. Baker*, 314 F. App'x 529, 533–37 (4th Cir. 2008); *Nicodemus v. Union Pac. Corp.*, 440 F.3d 1227, 1234–37 (10th Cir. 2006). Unsurprisingly, the cases petitioners cite as evidence of a conflict all *pre-date* the *Grable* decision, and are either narrow outlier opinions or apply an earlier formulation of the test this Court has since "condensed" into *Grable*. *See Gunn*, 568 U.S. at 258.

2. The court of appeals below was correct that *Sam L. Majors Jewelers v. ABX, Inc.*, is "not good law" today to the extent it holds state law causes of action

can arise under federal law even if neither the *Grable* nor complete preemption tests are satisfied. *See* Pet. App. 25a. In *Majors*, the Fifth Circuit held that a negligence action against an air carrier over lost cargo arose under federal common law, "rely[ing] upon the historical availability of this common law remedy" for lost or damaged goods, "and the statutory preservation of the remedy" through a savings clause in the Airline Deregulation Act of 1978. 117 F.3d 922, 925, 928, 929 & n.16 (5th Cir. 1997); 49 U.S.C. § 40120(c). The court went out of its way to clarify that its decision was "a difficult one," "heavily influence[d] by the policy consideration" to avoid circuit splits, and its "narrow holding" was "necessarily limited." 117 F.3d at 929 nn.15–16. Even in that specific context, moreover, this Court held two years prior that it was not "plausible that Congress meant to channel into federal courts . . . pursuant to judicially fashioned federal common law, the range of contract claims relating to airline rates, routes, or services." *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 232 (1995). It is thus not clear that *Majors* is correct on its own terms, because when Congress intends a federal cause of action to be exclusive and to abrogate state law within its scope, "it may be expected to make that atypical intention clear." *Empire Healthchoice*, 547 U.S. at 698.

The Fifth Circuit has in any event abandoned any prior endorsement of a separate federal common law path to removal, and has held instead that state-law causes of action arise under federal law "only if: (1) the state law claims necessarily raise a federal issue or (2) the state law claims are completely preempted by federal law." *Bernhard v. Whitney Nat'l Bank*, 523 F.3d 546, 551 (5th Cir. 2008). Post-*Grable*, the Fifth Circuit has never cited *Majors* for any jurisdictional holdings, and it has never suggested federal common

law creates a third exception to the well-pleaded complaint rule. The United States is correct in its *Suncor* brief that "there is no sound reason to believe [based on *Majors*] that the Fifth Circuit would reach a different conclusion than the Tenth Circuit in the circumstances of that case," *Suncor*, U.S. Br. at 22, and that statement is equally applicable here.

3. The Eighth Circuit's decision in *In re Otter Tail Power Co.*, 116 F.3d 1207 (8th Cir. 1997), likewise does not stand for a separate shortcut around the well-pleaded complaint rule, and does not conflict with the court of appeals' decision below. *See* Pet. 12–13. The Eighth Circuit said as much in its recent *Minnesota* decision: "The Energy Companies argue that artful pleading is a separate exception to the well-pleaded complaint rule. We have never applied the doctrine as a standalone exception, so we decline to do so here." 2023 WL 2607545, at *2 n.4 (citing *In re Otter Tail*).

In any event, the court in *In re Otter Tail* court stated that federal question jurisdiction exists over cases "in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." 116 F.3d at 1213 (citation omitted). That is exactly the rule this Court synthesized into *Grable* eight years later: "For statutory purposes, a case can 'aris[e] under' federal law in two ways," namely where "federal law creates the cause of action asserted," and in the "'special and small category' of cases" that satisfy *Grable*'s four-part test. *Gunn*, 568 at 257–58; *see also Suncor*, U.S. Br. at 20 (Eighth Circuit in *In re Otter Tail* applied a test "that this Court later clarified in *Grable*"). As the United States explained in its brief in *Suncor*, "the Eighth Circuit's determination that

those particular allegations satisfied the pre-*Grable* test does not conflict with the [Tenth Circuit's] decision below," and the same is true of the Third Circuit's decision here. *Suncor*, U.S. Br. at 20. The Eighth Circuit today would resolve *In re Otter Tail* by applying *Grable*, and would likely reach the same result.

The other cases Petitioners cite as performing a "*Grable*-type analysis," Pet. 13, are in the same category as *In re Otter Tail*. Each asked whether the plaintiff's complaint necessarily presented a substantial issue of federal law, and today each would be resolved under *Grable*.[2] They do not stand for the vague, limitless, free-floating rule petitioners derive, whereby state law claims "in an area governed exclusively by federal law arise under federal law . . . however they are pleaded, and whatever approach to federal jurisdiction applies." Pet. 14. None of petitioners' cases conflict with the court of appeals' decision here.

4. Petitioners ultimately say the decision below conflicts with decisions of the Second, Fifth, Eighth, and Eleventh Circuits because it "skip[ped] the threshold question" of "whether respondents engaged in artful pleading by framing their claims in state-law terms." Pet. 15. That is wrong on its own terms.

The other courts, like the Third Circuit, have recognized that "artful pleading" is another name for complete preemption. The Second Circuit has held, for example, that "[t]he artful pleading rule applies when Congress has either (1) so completely preempted, or entirely substituted, a federal law cause of action for a

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[2] *Newton v. Capital Assurance Co.*, 245 F.3d 1306, 1308–09 (11th Cir. 2001); *Torres v. S. Peru Copper Co.*, 113 F.3d 540, 542–43 (5th Cir. 1997); *Republic of Philippines v. Marcos*, 806 F.2d 344, 352, 354 (2d Cir. 1986).

state one . . . or (2) expressly provided for the removal of particular actions asserting state law claims in state court." *Romano v. Kazacos*, 609 F.3d 512, 519 (2d Cir. 2010) (citing *Beneficial Nat'l Bank*, 539 U.S. at 6). "Bringing only a state law claim does not constitute artful pleading, as a plaintiff is free to ignore the federal question and pitch his claim on the state ground to defeat removal." *Russell v. Legal Aid Soc'y of N.Y.*, 200 F. App'x 37, 38 (2d Cir. 2006) (cleaned up).

The Fifth Circuit has likewise held that "[w]ithout complete preemption, the artful pleading doctrine does not apply." *Waste Control Specialists, LLC v. Envirocare of Texas, Inc.*, 199 F.3d 781, 783 (5th Cir. 2000); *see also Bernhard*, 523 at 551 ("[W]e have said that the artful pleading doctrine applies *only* where state law is subject to complete preemption."). The Eleventh Circuit does not appear to have ever invoked the artful pleading doctrine outside the context of complete preemption, and has at least twice declined to extend the doctrine to other bases for jurisdiction. *See DeRoy v. Carnival Corp.*, 963 F.3d 1302, 1310 n.11 (11th Cir. 2020) (admiralty jurisdiction); *Scimone v. Carnival Corp.*, 720 F.3d 876, 885 (11th Cir. 2013) (diversity jurisdiction under the Class Action Fairness Act). Finally, as already stated, the Eighth Circuit has "never applied the doctrine as a standalone exception" to the well-pleaded complaint rule, and expressly declined to do so in *Minnesota*. 2023 WL 2607545, at *2 n.4. There is simply no disagreement between any of these courts on the well-pleaded complaint rule's application.

The court of appeals' decision here does not conflict with *City of New York v. Chevron Corp.*

The decision below is also not in conflict with the Second Circuit's decision in *City of New York* for two separate reasons, one procedural and one substantive.

First, the Second Circuit affirmed an order granting a motion to dismiss for failure to state a claim based on an ordinary preemption defense, in a case filed in federal court on diversity jurisdiction grounds. The court of appeals below, as well as the Second Circuit itself in *City of New York*, expressly acknowledged that the decisions addressed different issues and were not in conflict. Second, the complaints and theories of liability under state law in the two cases are materially different, and *City of New York*'s analysis would not apply to Delaware's claims even if that case was correctly decided, which Delaware does not concede.

1. The Second Circuit's decision is, by its own reckoning, entirely consistent with the many decisions ordering remand in climate-related tort and consumer protection cases. The plaintiff New York City there brought state law tort claims against oil and gas companies in federal district court for allegedly contributing to client change, and the district court ruled those claims were preempted. *See* 993 F.3d at 88–89. The Second Circuit affirmed dismissal under Fed. R. Civ. P. 12(b)(6), but went out of its way to "reconcile [its] conclusion" with with "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 preempted 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). Because New York City had "filed suit in federal court in the first instance," however, the court 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]" cannot "singlehandedly create federal-question jurisdiction under 28 U.S.C. § 1331 and the well-pleaded complaint rule." *Id.*

The Third Circuit took the *City of New York* opinion at its word, holding that the decision "involved another ordinary-preemption defense to a case first filed in federal court," "did not even try to check the boxes needed for complete preemption" that could have hypothetically rendered the case removable if it had been initiated in state court, and did not "suggest another way to get there." Pet. App. 24a. To the contrary, it "acknowledge[ed] that its preemption analysis might not satisfy the 'heightened standard unique to the removability inquiry,'" because that question was not before it. *See id.* (quoting *City of New York*, 993 F.3d at 93–94). The First, Fourth, and Tenth Circuits also recently addressed *City of New York* in affirming orders granting remand in similar cases and held that it was not in conflict. *See Rhode Island*, 35 F.4th at 55; *Baltimore*, 31 F.4th at 203; *Suncor*, 25 F.4th at 1262. Each of those courts held that *City of New York* was in a "completely different procedural posture" and not instructive on the jurisdictional questions at issue in those appeals. *Baltimore*, 31 F.4th at 203; *see also Rhode Island*, 35 F.4th at 55 (finding *City of New York* "distinguishable" because the plaintiff "filed suit in federal court in the first instance (relying on diversity jurisdiction)" (citation omitted)); *Suncor*, 25 F.4th at 1262 ("Importantly, [New York City] initiated the action in federal court, and thus, the issues before the district court and the circuit were not within the context of removal."); *Suncor*, U.S. Br. at 17 ("nothing in the Second Circuit's

decision conflicts with the court of appeals' decision" in that case). There is no conflict between the *City of New York* opinion and the unanimous holdings of six other circuits affirming remand.

2. Even if *City of New York*'s ordinary-preemption analysis were relevant to the question of removal jurisdiction, petitioners are still wrong that the circuits are divided over "whether claims seeking relief for harms allegedly caused by transboundary emissions are necessarily governed by federal law," Pet. 17, as the United States aptly explained in *Suncor*. *See* U.S. Br. at 18.

Petitioners assert that the Second Circuit held any claim "for injuries caused by the effects of interstate greenhouse gas emissions on global climate change," "'must be brought under federal common law.'" Pet. 18 (quoting *City of New York*, 993 F.3d at 95). But as the United States correctly explains, "while that language viewed in isolation might suggest that federal common law continues to govern in this area, the very next sentence of the Second Circuit's opinion recognized that 'the Clean Air Act displaces federal common law claims concerned with domestic greenhouse gas emissions.'" *Suncor*, U.S. Br. at 18 (quoting *City of New York*, 993 F.3d at 95). The Second Circuit further stated that "resorting to state law on a question previously governed by federal common law is permissible only to the extent 'authorize[d]' by federal statute," and held that "the Clean Air Act does not authorize the type of state-law claims the City seeks to prosecute." *City of New York*, 993 F.3d at 98–99. The court thus "recognized that claims premised on domestic emissions are no longer governed by federal common law," but nonetheless "viewed the prior applicability of federal common law as relevant in deter-

mining the post-Clean Air Act viability of state-law claims." *Suncor*, U.S. Br. at 19. It did not hold that federal common law still "governs" all civil cases involving air pollution, but rather viewed the defunct federal common law as informative to understanding the Clean Air Act's preemptive scope. "[N]othing in the [Third] Circuit's decision here conflicts with that analysis, since the [Third] Circuit did not address whether the Clean Air Act authorized or preempted respondents' claims." *Id.* The courts reached different results because they answered different questions to resolve different issues.

3. The *City of New York* decision also is not in conflict with the court of appeals' rulings here because Delaware's claims target qualitatively different tortious conduct than those before the Second Circuit. The plaintiff in *City of New York* sought to hold fossil-fuel companies "strict[ly] liab[le]" for climate impacts caused by their "lawful commercial activity," meaning the defendants' *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.

Unlike the defendants in *City of New York*, under Delaware's complaint petitioners would not need to "cease global [fossil-fuel] production" to avoid future liability. *City of New York*, 993 F.3d at 93. If petitioners sold the same quantum of oil and gas without misleading the public and consumers, that conduct would

not give rise to liability on Delaware's theory of the case. There is no conflict between the court of appeals opinion below and the Second Circuit's decision in *City of New York*, on any issue.

The decision below was correct.

The decision below correctly follows this Court's guidance on how to determine whether state-law claims are removable based on federal question jurisdiction. The court of appeals in turn correctly held that petitioners failed to satisfy any exception to the well-pleaded complaint rule, because Delaware's claims are neither completely preempted by federal statute nor removable under *Grable*.

1. The Third Circuit's determination that federal common law cannot provide a basis for overcoming the well-pleaded complaint rule unless complete preemption or *Grable* is satisfied flows from this Court's instructions on the scope of arising-under jurisdiction. It has been true for more than a century under the well-pleaded complaint rule that 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. "It does not suffice that the facts alleged in support of an asserted state-law claim would *also* support a federal claim." *Beneficial Nat'l Bank*, 539 U.S. at 12 (Scalia, J., dissenting). "Nor does it even suffice that the facts alleged in support of an asserted state-law claim *do not support* a state-law claim and would *only* support a federal claim," because "[j]urisdiction may not be sustained on a theory that the plaintiff has not advanced.'" *Id.* (quoting *Merrell Dow Pharms.*, 478 U.S. at 809 n.6). That is true even if federal law expressly preempts the asserted state law cause of action; as early as 1936, the Court found "[b]y unimpeachable authority"

that "a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby." *Gully*, 299 U.S. at 116.

Petitioners' contention that Delaware's claims "are governed by federal law [and] could have been filed in federal court in the first instance" because they are "based on the alleged harms to respondents arising from global climate change," and are only "artful[ly] plead[ed]" under state law, is wrong for multiple reasons. First, as the court below correctly observed, courts may "'recharacteriz[e] a state law claim as a federal claim removable to [federal] court' . . . only when some federal *statute* completely preempts state law." Pet. App. 23a (emphasis added) (quoting *Goepel v. Nat'l Postal Mail Handlers Union*, 36 F.3d 306, 312 (3d Cir. 1994)). That is so because only "*Congress* may so completely pre-empt a particular area that any civil complaint raising" claims within that area "is necessarily federal in character." *Metro. Life*, 481 U.S. at 63–64. This Court has held that "[i]f Congress intends a preemption instruction completely to displace ordinarily applicable state law, and to confer federal jurisdiction thereby, it may be expected to make that atypical intention clear," *Empire Healthchoice*, 547 U.S. at 698, and has been "reluctant to find that extraordinary pre-emptive power" even within federal statutory schemes that are expansive, detailed, and national in scope, *see Metro. Life*, 481 U.S. at 65. Judge-made law should not and cannot have the same force.

Petitioners say "[t]here is no plausible reason why" only federal statutes and not federal common law should be capable of carrying complete preemptive force, Pet. 30 (citation omitted), but the reasons for that limitation are obvious. Petitioners' theory would

allow district judges to craft new substantive federal law, then determine that the newly minted law preempts all state law within its field *and* that civil claims within its scope are subject to exclusive federal jurisdiction, all with no guidance from Congress. The court of appeals correctly declined to accept petitioners "new form of complete preemption" that "relies not on statutes but federal common law." Pet. App. 24a. The problems that theory would engender as to both federal separation of powers and federalism principles are self-evident and enormous.

2. The court of appeals also correctly rejected petitioners' *Grable* arguments, because no element of Delaware's state law claims turns on a question of federal law. Petitioners do not identify, or even purport to identify, any specific element of any of Delaware's causes of action that require proof on an issue of federal law, and did not do so below. The First, Fourth, Ninth, and Tenth Circuits, in addition to the court of appeals here, have all held that claims like Delaware's are not removable under *Grable*. *See Suncor*, 25 F.4th at 1265–71; *Rhode Island*, 35 F.4th at 56–57; *San Mateo*, 32 F.4th at 746–48; *Baltimore*, at 208–15; *Oakland*, 969 F.3d at 906–07.

A federal issue is "necessarily raised" by a state cause of action within the meaning of *Grable* only when a "question of federal law is a necessary element of one of the well-pleaded state claims." *Franchise Tax Bd.*, 463 U.S. at 13. An "element" is a "constituent part of a claim that must be proved for the claim to succeed." Black's Law Dictionary, *Element* (11th ed. 2019). In *Gunn*, for example, the plaintiff brought a legal malpractice claim under Texas law, for which the plaintiff was required to "establish four elements" time-honored at common law: duty, breach, causation,

and damages. 568 U.S. at 259. "[T]he causation element in turn required a 'case within a case' analysis of whether, had [a certain] argument been made, the outcome of the earlier litigation would have been different." *Id.* (citation omitted). The underlying "earlier litigation" was a federal patent infringement case, and thus the plaintiff had to prevail on specific issues of federal patent law, and show that he would have prevailed on them in the prior litigation, as a *prima facie* element of his Texas malpractice claim. *See id.* In *Empire Healthchoice*, by contrast, the Court acknowledged the United States' "overwhelming interest in attracting able workers to the federal workforce," but held that interest did not interpose a federal law element in "state-court-initiated tort litigation" by a health insurer for reimbursement from one if its insureds who was a federal employee. 547 U.S. at 701. Here, petitioners say this case broadly implicates federal interests because it alleges widespread environmental harms, but they do not point to a specific element of Delaware's claims that require proof on a federal issue, because none exists. *See also Oakland*, 969 F.3d at 906 (no substantial federal issue raised where "[r]ather than identify a legal issue, the [defendants] suggest[ed] that the Cities' state-law claim implicates a variety of 'federal interests'").

The error petitioners purport to identify in the Third Circuit's *Grable* analysis is difficult to interpret, but it appears circular. Instead of pinpointing a substantial federal issue, they repeat their "central contention" that Delaware's "claims necessarily sound in, and thus must proceed under, federal law." Pet. 27. And therefore, they say, presumably *every* element of Delaware's "nominally state-law tort claims" requires "favorable resolution of a question of federal law." *Id.* 28. And therefore because elements of the claims are fed-

eral, *Grable* is satisfied and Delaware's claims arise under federal law. *Id.* Restated more straightforwardly, petitioners' logic appears to be as follows: 1) Delaware's claims arise under federal law because *Grable* is satisfied. 2) *Grable* is satisfied because each element of Delaware's claims is federal. 3) Each element of Delaware's claims is federal because the claims arise under, or "necessarily sound in," federal law. That chain of reasoning just begs the question of whether the case is removable, and the Third Circuit correctly rejected it.

The Question Presented is minimally important and this case is a poor vehicle for addressing it.

The Question Presented has minimal importance both practically and legally. The legal questions at issue are extremely narrow and can arise only in a tiny sliver of cases, and the limited jurisdictional issues that are raised are unlikely to have significant impacts outside this case and those cases like it, discussed above. This petition is a poor vehicle to address many of the arguments petitioners press, moreover, because they were not decided by the Third Circuit below and are not before the Court.

First, the questions decided below are not broadly applicable or common, and petitioners do not seriously contend otherwise. Petitioners essentially concede the point, saying the Court should "clarify a uniform removal right for energy companies sued on interstate- and international-emissions-related grounds," and "clarify the enduring role of federal [common] law as the rule of decision for claims based on interstate and international emissions." Pet. 30. On its own terms, those are questions specific to this case and materially similar cases. Petitioners identify no other circumstances in which the Question Presented makes a dif-

ference; they do not point to decisions in which it has arisen, or even generally describe how it might impact defendants other than themselves. But the special treatment they seek would disrupt an established and indeed foundational rule of federal jurisdiction, to the detriment of other litigants and the judicial system as a whole. The Court should not grant the petition to consider a tailor-made jurisdictional rule for a single category of claims against a single category of defendants, at the expense of well-understood standards the Court has taken pains to enunciate.

Petitioners are correct as a general policy principal that "administrative simplicity is a major virtue in a jurisdictional statute," *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010), and the boundaries between state and federal jurisdiction should be clear. They identify no specific "conflicting and uncertain jurisdictional rules" plaguing litigants or the lower courts, however, *see* Pet. 29, precisely because this Court has through the *Grable* line of cases simplified and clarified the circumstances under which a state-law cause of action arises under federal law for purposes of removal. The Court's precedent "provides ready answers to jurisdictional questions" and "gives guidance whenever borderline cases crop up," *Manning*, 578 U.S. at 392, including in this case and cases like it. There is no problem for the Court to resolve. Adopting the jurisdictional rule petitioners seek would complicate the removal analysis, not simplify it.

Petitioners' separate contention that the Third Circuit "misapprehended the point" of petitioners' *Grable* argument and erred in holding that the potential "applicability of federal common law merely gives rise to an 'ordinary preemption . . . *defense*,'" Pet. 27 (quoting Pet. App. 26a), is both an incorrect assessment of the

Third Circuit's analysis and plainly does not present an important or frequently recurring question. This Court's rules make clear that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law," S. Ct. R. 10, and that is the most petitioners say about the *Grable* holding below. "This Court will intervene only in what ought to be the rare instances where the standard appears to have been misapprehended or grossly misapplied," and petitioners at most find fault with the Third Circuit's application of the correctly stated *Grable* rule. *See Mobil Oil Corp. v. FPC*, 417 U.S. 283, 310 (1974). Even if petitioners were correct that the Third Circuit reached the wrong result, and the unanimous weight of authority shows that it did not, "[t]he Court does not sit simply to correct such errors." Shapiro, S. Ct. Practice, § 4 (2021 ed.).

Second, petitioners' contention that this case is 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," Pet. 30, is at best highly generalized and is not supported by the United States' brief in *Suncor*. Petitioners assert that "[t]he United States has recently faced record high gas prices" and that "the conflict in Ukraine" has made oil and gas resources more important, both for civilians and for the military. *See id.* But the United States as amicus in *Suncor* did not discuss any of these concerns, did not point to any other reasons the Question Presented is nationally important, and recommended that the petition should be denied. *See, e.g.*, *Suncor*, U.S. Br. at 1. The United States does not appear to believe the Question Presented is important outside the confines of this case. Moreover, petitioners have not shown how liability for past deceptive marketing practices would affect oil and gas supply and production going

forward. There is a disconnect between their request for special treatment and Delaware's asserted claims—Petitioners may wish to litigate the "strict liability" claims that the Second Circuit held were preempted in *City of New York*, but those are not the claims Delaware brought.

Finally, this petition is a poor vehicle to consider the keystone of petitioners' arguments—that Delaware's claims "are necessarily and exclusively governed by federal law as a matter of constitutional structure," Pet. 10—because that issue was not decided below. The Third Circuit did not hold, one way or the other, whether federal common law "governs" Delaware's claims. As discussed above, the Third Circuit did not directly contradict *City of New York*'s holding that a "climate-change suit had to be decided under federal, not state, law," but rather held that *City of New York* was inapposite because it "involved another ordinary-preemption defense to a case first filed in federal court." Pet. App. 24a. Just as in *Suncor*, the Third Circuit "did not address whether the Clean Air Act authorized or preempted respondents' claims," and "it would have been inappropriate for the [Third] Circuit to opine on the proper way of conducting that merits inquiry in a case where that court held that the district court lacked subject-matter jurisdiction." *See Suncor*, U.S. Br. at 19. The issue is not before the Court on this petition.

CONCLUSION

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

Respectfully Submitted,

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