SHER EDLING LLP
PROTECTING PEOPLE AND THE PLANET

April 3, 2023

Via ECF

The Honorable Stephanie A. Gallagher
United States District Judge
United States District Courthouse
101 W. Lombard Street
Baltimore, Maryland 21202

Re: *City of Annapolis, Maryland v. BP P.L.C., et al.*, and *Anne Arundel County, Maryland v. BP P.L.C., et al.*, Case Nos. 21-cv-00772-SAG and 21-cv-01323-SAG

Dear Judge Gallagher,

Your Honor's Memorandum Opinion on Defendants' Motion to Stay (*Annapolis*, Doc. 183; *Anne Arundel*, Doc. 160) instructs the parties "to keep this Court apprised of updates in the related cases pending before the Supreme Court." Pursuant to that directive, Plaintiff City of Annapolis and Plaintiff Anne Arundel County provide for Your Honor a copy of the Amicus Brief of the United States of America (**Ex. A**), submitted in response to the Supreme Court's request, concerning the petition pending in *Suncor Energy (U.S.A.) Inc. et al. v. Board of County Commissioners of Boulder County et al.*, No. 21-1550 ("*Boulder*"). Plaintiffs also provide a copy of the Eighth Circuit Court of Appeals' recent decision in *Minnesota v. American Petroleum Institute*, No. 21-1752, 2023 WL 2607545 (8th Cir. Mar. 23, 2023) ("*Minnesota*") **(Ex. B).**

The Solicitor General submitted the United States' Amicus Brief in response to the Supreme Court's request on March 16, 2023. The brief states that "[i]n the view of the United States, the petition for a writ of certiorari should be denied." Ex. A at 1. An empirical analysis cited in Defendants' opening brief in support of their motion to stay indicates that the Supreme Court follows the Solicitor General's recommendation concerning whether to grant certiorari "in the vast majority" of cases where the Court calls for the views of the United States. David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 Geo. Mason L. Rev. 237, 277 & 295 (2009); *see* Memorandum of Law in Support of Defendants' Motion to Stay Execution of Remand Order at 3 & n.2 (*Annapolis* Doc. 178-1; *Anne Arundel* Doc. 155-1). The Supreme Court's scheduling rules and published calendar for the current term indicate that, unless the Court orders otherwise, the *Boulder* briefs will be distributed to the Justices on April 5, 2023, and the Court will then consider the *Boulder* petition at its conference calendared for April 21, 2023.[1] The United States' brief strongly suggests that the Supreme Court is unlikely

[1] *See* Supreme Court of the United States, Office of the Clerk, *Memorandum Concerning the Deadlines for Cert Stage Pleadings and the Scheduling of Cases for Conference* at 4, https://www.supremecourt.gov/casehand/Guidance-on-Scheduling-2023.pdf (once Solicitor General's views are received, "the Clerk's Office will place the case on the next relevant conference list that is at least 14 days after the date that the last response is filed . . . ."); Supreme Court of the United States, *Case Distribution Schedule – October Term 2022*, at 4, https://www.supremecourt.gov/casedistribution/casedistributionschedule2022.pdf.

to grant a writ of certiorari in *Boulder*, which in turn strongly indicates that the Court will not grant Defendants' petition for review of the Fourth Circuit's decision affirming remand of a materially similar case in *Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178 (4th Cir. 2022) ("*Baltimore*").

The Eighth Circuit's opinion in *Minnesota* adds to the unanimous appellate authority holding that claims like Plaintiffs' are not removable to federal court. The Eighth Circuit note that the court's "sister circuits rejected [the appellants' jurisdictional arguments] in each case" in which they were raised, and concluded, "[t]oday, we join them." Ex. B at *1. This opinion further indicates that the Supreme Court is unlikely to grant any of the petitions for certiorari pending from decisions affirming remand of cases materially similar to Plaintiffs', including the Fourth Circuit's decision in *Baltimore*.

Respectfully submitted,

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cc: All Counsel of Record (via ECF)

EXHIBIT A

No. 21-1550

In the Supreme Court of the United States

SUNCOR ENERGY (U.S.A.) INC., ET AL.,
PETITIONERS

v.

BOARD OF COUNTY COMMISSIONERS OF
BOULDER COUNTY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether this suit may be removed to federal court on the ground that respondents' state-law claims should be recharacterized as claims arising under federal common law.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. "Federal courts are courts of limited jurisdiction." *Gunn* v. *Minton*, 568 U.S. 251, 256 (2013) (citation omitted). Congress has specified the types of suits that defendants may remove from state court to federal court. The general removal statute permits the removal of "any civil action brought in a State court of which the district courts of the United States have original jurisdiction." 28 U.S.C. 1441(a). Such cases include "all civil actions arising under the Constitution, laws, or treaties

of the United States." 28 U.S.C. 1331. Various specialized removal statutes—such as the federal-officer removal statute, 28 U.S.C. 1442, and the civil-rights removal statute, 28 U.S.C. 1443—permit the removal of other types of actions.

To "effect the removal" of a suit filed in state court, 28 U.S.C. 1446(d), a defendant must file in the appropriate federal district court "a notice of removal" that "contain[s] a short and plain statement of the grounds for removal," 28 U.S.C. 1446(a). The plaintiff then may file a motion to remand the case to state court, including for lack of federal subject-matter jurisdiction. 28 U.S.C. 1447(c). "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." *Ibid.* An order remanding a case "is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of [Title 28] shall be reviewable." 28 U.S.C. 1447(d).

2. Respondents are three local governmental entities in Colorado. Am. Compl. ¶ 1. Petitioners are four energy companies that engage in "fossil fuel activities"—*i.e.*, the production, promotion, refining, marketing, and sale of fossil fuels. *Id.* ¶ 14; see *id.* ¶ 2.

In 2018, respondents filed suit against petitioners in Colorado state court. D. Ct. Doc. 6 (June 29, 2018). Respondents' complaint alleges that petitioners' "fossil fuel activities" led to "use" of "fossil fuels," which in turn caused "greenhouse gas emissions" that contributed to climate change. Am. Compl. ¶ 15. Respondents further allege that petitioners "knew" about, but "affirmatively misrepresent[ed]," the "dangers of unchecked fossil fuel use." *Id.* ¶ 18. The complaint asserts six state-law causes of action—public nuisance, private nuisance, trespass,

unjust enrichment, violation of a Colorado consumer-protection statute, and civil conspiracy—and seeks damages for climate-change-related injuries to respondents' property and residents. *Id.* ¶¶ 444-541.

Petitioners removed the case to federal court pursuant to the general removal statute, the federal-officer removal statute, and other statutes. D. Ct. Doc. 1, at 1 (June 29, 2018). With respect to the general removal statute, petitioners asserted several grounds for concluding that respondents' suit "aris[es] under" federal law. 28 U.S.C. 1331; see D. Ct. Doc. 1, at 2-4. As relevant here, petitioners contended that respondents' claims "are governed by federal common law." D. Ct. Doc. 1, at 9. Petitioners also contended that respondents' claims "are completely preempted by" the Clean Air Act, 42 U.S.C. 7401 *et seq.*, which petitioners described as "provid[ing] the exclusive cause of action for challenging the regulation of nationwide emissions," D. Ct. Doc. 1, at 4, 13.

Respondents moved to remand the case for lack of federal subject-matter jurisdiction. D. Ct. Doc. 34, at 1 (July 30, 2018). The district court granted the motion and ordered the case remanded to state court. Pet. App. 60a-114a. The district court rejected each of petitioners' asserted grounds for removal, including under the general removal statute and under the federal-officer removal statute. *Id.* at 64a-114a. With respect to the general removal statute, the court observed that, under the 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' on federal law." *Id.* at 64a (citation omitted). The court found that removal of respondents' suit was inappropriate under that rule, explaining that respondents' complaint "on its

face pleads only state law claims," *id.* at 76a, none of which has "as an element any aspect of federal law," *id.* at 84a. In the court's view, petitioners' assertion that the "state law claims are governed by federal common law" raised only an "ordinary preemption" defense, which was insufficient to "render [the] state-law claim[s] removable to federal court." *Id.* at 79a; see *id.* at 98a (rejecting federal common law as a ground for "complete preemption"). The court also rejected petitioners' reliance on the Clean Air Act, explaining that because the Act "expressly preserves many state common law causes of action," "Congress did not intend the Act to provide exclusive remedies in these circumstances, or to be a basis for removal under the complete preemption doctrine." *Id.* at 91a.

3. The court of appeals affirmed. 965 F.3d 792. The court concluded that, under Section 1447(d), a district court's remand order is reviewable "only to the extent it addresses" the statutory grounds for removal "explicitly" referenced in Section 1447(d)—namely, Sections 1442 and 1443. *Id.* at 819. The court of appeals reviewed, and upheld, the district court's determination that petitioners had "failed to establish grounds for federal officer removal" under Section 1442. *Id.* at 798. Based on the court of appeals' determination that it lacked appellate jurisdiction to address petitioners' other proffered grounds for removal, the court dismissed the remainder of the appeal. *Id.* at 827.

Petitioners filed a petition for a writ of certiorari. While that petition was pending, this Court held that Section 1447(d) "permit[s] a court of appeals to review any issue in a district court order remanding a case to state court where the defendant premised removal in part on" Section 1442 or 1443. *BP p.l.c.* v. *Mayor & City*

Council of Baltimore, 141 S. Ct. 1532, 1536 (2021). The Court subsequently granted petitioners' certiorari petition, vacated the court of appeals' judgment, and remanded for further consideration in light of the decision in *BP*. 141 S. Ct. 2667.

4. On remand, the court of appeals again affirmed the district court's order. Pet. App. 1a-59a. The court recognized that, in light of *BP*, it had jurisdiction to review all "grounds of federal subject-matter jurisdiction advanced in support of removal on appeal." *Id.* at 2a. The court of appeals then determined that "the district court correctly rejected each ground." *Id.* at 9a.

As relevant here, the court of appeals rejected petitioners' contention that "there is federal-question jurisdiction over [respondents'] state-law claims because they are governed by federal common law." Pet. App. 24a. Relying on *American Electric Power Co.* v. *Connecticut*, 564 U.S. 410 (2011) (*AEP*), the court concluded that the Clean Air Act had displaced "the federal common law of interstate air pollution." Pet. App. 27a. The court held that "this case could 'not have been removed to federal court on the basis of federal common law that no longer exists.'" *Id.* at 30a (citation omitted).[1]

The court of appeals also rejected petitioners' contention that respondents had "artfully pleaded their state-

[1] The court of appeals noted that, "[e]ven if the pre-*AEP* federal common law of transboundary pollution remained viable," it was "unclear" whether this case would be "properly placed within that realm." Pet. App. 29a n.5. The court observed that it was an "open question" whether political subdivisions were "the type of parties" that could "bring a federal common law nuisance claim." *Ibid.* (brackets and citation omitted). The court further observed that it was "unsettled whether the federal common law of interstate pollution cover[ed] suits brought against product sellers rather than emitters." *Ibid.*

law claims" to conceal the claims' "federal nature" as "federal common law claims." Pet. App. 31a. The court stated that "[i]t is only when the merits of a defense based on 'complete preemption' are considered that the court is free to look behind the plaintiff's chosen claims to determine whether federal law has completely preempted the area." *Ibid.* The court further observed that "complete preemption requires congressional intent." *Id.* at 32a. It explained that, "[b]ecause federal common law is created by the judiciary—not Congress—Congress has not 'clearly manifested an intent' that the federal common law for transboundary pollution will completely preempt state law." *Ibid.* (citation omitted). The court of appeals also "affirm[ed] the district court's rejection of complete preemption by the [Clean Air Act] as a basis for federal jurisdiction," *id.* at 38a, explaining that the Act "does not provide an exclusive federal cause of action for suits against private polluters" or preempt "all state law in that area," *id.* at 35a.

DISCUSSION

Petitioners contend (Pet. 24-31) that this suit may be removed to federal court on the ground that respondents' state-law claims should be recharacterized as claims arising under federal common law. But the Clean Air Act has displaced any relevant federal common law in this area, and no exception to the well-pleaded complaint rule applies. The court of appeals therefore correctly declined to recharacterize respondents' state-law claims, and its decision does not conflict with any decision of another court of appeals.

In an amicus brief filed in *BP p.l.c.* v. *Mayor & City Council of Baltimore*, 141 S. Ct. 1532 (2021), the United States took the position that claims involving cross-boundary pollution "that seek to apply the law of an af-

fected State to conduct in another State" "may well be" thought to "arise under" federal law for "jurisdictional purposes," "even if such claims may be displaced by the Clean Air Act." U.S. Amicus Br. at 26, 27, *BP*, *supra* (No. 19-1189) (emphasis omitted). The Court's decision in *BP* did not address the proper resolution of that jurisdictional issue, but simply made clear that the court of appeals on remand could consider all potential arguments for removal. 141 S. Ct. at 1543. Since then, all five courts of appeals that have considered the issue have rejected the position that the government took in *BP*. See pp. 16-17, *infra*. After the change in Administration and in light of those intervening developments, the United States has reexamined its position and has concluded that state-law claims like those pleaded here should not be recharacterized as claims arising under federal common law.

The petition for a writ of certiorari should be denied.

A. The Court Of Appeals Correctly Declined To Recharacterize Respondents' State-Law Claims As Claims Arising Under Federal Common Law

Respondents brought this suit in state court, alleging only state-law claims. Under the well-pleaded complaint rule, respondents' claims do not present a federal question, and petitioners have identified no sound basis for recharacterizing those claims.

1. Under the well-pleaded complaint rule, respondents' claims do not present a federal question

a. Under the general removal statute, a defendant may remove to the appropriate federal district court "any civil action brought in a State court of which the district courts of the United States have original jurisdiction." 28 U.S.C. 1441(a). "The propriety of removal

thus depends on whether the case originally could have been filed in federal court." *City of Chicago* v. *International Coll. of Surgeons*, 522 U.S. 156, 163 (1997). "One category of cases over which the district courts have original jurisdiction are 'federal question' cases; that is, those cases 'arising under the Constitution, laws, or treaties of the United States.'" *Metropolitan Life Ins. Co.* v. *Taylor*, 481 U.S. 58, 63 (1987) (quoting 28 U.S.C. 1331).

"The presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule.'" *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 392 (1987). Under that rule, "a suit '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* v. *Discover Bank*, 556 U.S. 49, 60 (2009) (quoting *Louisville & Nashville R.R.* v. *Mottley*, 211 U.S. 149, 152 (1908)) (brackets omitted); see *Taylor* v. *Anderson*, 234 U.S. 74, 75 (1914) (explaining that whether a suit arises under federal law "must be determined from what necessarily appears in the plaintiff's statement of his own claim").

By focusing on what the plaintiff has chosen to plead, the well-pleaded complaint rule "makes the plaintiff the master of the claim." *Caterpillar*, 482 U.S. at 392. Absent some other ground of federal jurisdiction (such as diversity of citizenship), the "plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court." *Id.* at 399. And "a defendant cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law, thereby selecting the forum in which the claim shall be litigated." *Ibid.* (emphasis omitted). Thus, "a case may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if

the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue." *Id.* at 393.

b. This Court has articulated two tests for determining when a "plaintiff's statement of his own cause of action," *Mottley*, 211 U.S. at 152, presents a federal question. Neither test is satisfied here.

First, and most significantly, federal-question jurisdiction may exist if the plaintiff's own statement of the claim establishes that "federal law creates the cause of action asserted." *Gunn* v. *Minton*, 568 U.S. 251, 257 (2013); see *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 27-28 (1983) (similar). "As a rule of inclusion, this 'creation' test admits of only extremely rare exceptions and accounts for the vast bulk of suits that arise under federal law." *Gunn*, 568 U.S. at 257 (citation omitted). Here, the creation test is not satisfied because the complaint "on its face pleads only state law claims." Pet. App. 76a.

Second, even when "a claim finds its origins" in state law, *Gunn*, 568 U.S. at 258, federal-question jurisdiction may exist if a "federal issue" is "embedded" within the plaintiff's own statement of the claim, *Grable & Sons Metal Prods., Inc.* v. *Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005). In *Grable*, this Court described the relevant inquiry as whether "the state-law claim necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Ibid.*; see *Franchise Tax Bd.*, 463 U.S. at 27-28 (articulating the test as whether the "well-pleaded complaint establishes" that "the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law").

That test is not satisfied here because no federal issue is "embedded" within respondents' *own* articulation of their claims. *Grable*, 545 U.S. at 314. None of respondents' claims, as pleaded in the complaint, "rises or falls on [respondents'] ability to prove the violation of a federal duty." *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Manning*, 578 U.S. 374, 383 (2016). Nor do any of respondents' claims, as pleaded in the complaint, have "as an element any aspect of federal law." Pet. App. 84a. This case thus differs from *Grable*, in which "the meaning of [a] federal statute" was "an essential element" of the "quiet title claim" that the plaintiff had pleaded. 545 U.S. at 315. This case also differs from *Smith* v. *Kansas City Title & Trust Co.*, 255 U.S. 180 (1921), in which it "appear[ed] from the bill or statement of the plaintiff" that his state-law claim "depend[ed] upon the construction or application of the Constitution." *Id.* at 199; see *id.* at 201-202; *Grable*, 545 U.S. at 312-313.

In their reply brief, petitioners contend that the *Grable* test is satisfied here "because 'federal common law supplies the rule of decision for respondents' claims.'" Cert. Reply Br. 6 (brackets and citation omitted). But the court of appeals found that petitioners had "waived" any "'federal-common-law argument under the *Grable* framework,'" and it therefore "decline[d] to consider *Grable* jurisdiction as it relates to the federal common law" in this case. Pet. App. 33a n.6 (citation omitted). In any event, no issue of federal common law appears in respondents' *own* "statement" of their claims, as *Grable* and the well-pleaded complaint rule require. *Mottley*, 211 U.S. at 152; see *Grable*, 545 U.S. at 314 (requiring a "stated federal issue"); *id.* at 315 (noting that the resolution of a federal-law question was "an essential element of [the plaintiff's] quiet title claim"). Thus, even if

petitioners' *Grable* argument had been properly preserved, that argument lacks merit.

2. No exception to the well-pleaded complaint rule applies here

Because respondents' complaint does not present a federal question under the well-pleaded complaint rule, this case may be removed to federal court only if an "exception" to that rule applies. *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 207 (2004). A federal court "may uphold removal even though no federal question appears on the face of the plaintiff's complaint" if the court concludes that the plaintiff "has 'artfully pleaded' claims" by "'omitting to plead necessary federal questions.'" *Rivet* v. *Regions Bank of La.*, 522 U.S. 470, 475 (1998) (quoting *Franchise Tax Bd.*, 463 U.S. at 22). Petitioners contend that respondents have engaged in artful pleading here by putting a state-law label on claims that are "necessarily and exclusively governed by federal common law." Pet. 27; see Pet. 27-28. But far from providing the exclusive remedy for claims concerning climate change or greenhouse-gas emissions, any relevant federal common law has been displaced by the Clean Air Act. And even if the Act preempts particular state-law causes of action in this sphere, such preemption would simply be a federal defense that provides no basis for removal.

a. Far from "necessarily and exclusively govern[ing]" respondents' claims (Pet. 27), any federal common law with respect to those claims has been displaced by Congress. "Legislative displacement of federal common law does not require the 'same sort of evidence of a clear and manifest congressional purpose' demanded for preemption of state law." *American Elec. Power Co.* v. *Connecticut*, 564 U.S. 410, 423 (2011) (*AEP*) (brackets

and citation omitted). "The test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute 'speaks directly to the question' at issue." *Id.* at 424 (brackets and citation omitted). Applying that test in *AEP*, this Court held that "the Clean Air Act and the EPA actions it authorizes displace any federal common-law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired powerplants." *Ibid.*

Relying on *AEP*, the court of appeals in this case correctly held that the Clean Air Act likewise displaces any relevant federal common law here. See Pet. App. 24a-31a. Petitioners do not challenge that holding in this Court. See Pet. 26; Cert. Reply Br. 7. Indeed, petitioners below characterized respondents' claims as "based on interstate and international emissions of greenhouse gases," Pet. C.A. Br. 23, and argued that the Clean Air Act "outlines specific and exclusive procedures for parties—including state and local governments—to challenge nationwide emissions standards in federal court," *id.* at 35. See, *e.g.*, D. Ct. Doc. 1, at 4 (arguing that respondents' claims "are completely preempted by the Clean Air Act, which provides an exclusive federal remedy for plaintiffs seeking stricter regulation of the greenhouse gas emissions challenged in this action"); *id.* at 13 (arguing that "the Clean Air Act provides the exclusive cause of action for challenging the regulation of nationwide emissions").

Thus, as this case comes to the Court, the Clean Air Act's displacement of any relevant federal common law is a given. That displacement forecloses petitioners' current theory (Pet. 27) that federal common law "necessarily and exclusively govern[s]" respondents' claims. Petitioners' reliance on the artful-pleading doctrine rests

on the assertion that respondents' claims are "really" claims of federal common law, not of state law. *Franchise Tax Bd.*, 463 U.S. at 13. But respondents' claims cannot be federal-common-law claims "in substance" if Congress has displaced that body of federal law. *Id.* at 22; see *Merrell Dow Pharms. Inc.* v. *Thompson*, 478 U.S. 804, 814 (1986) (considering Congress's determination to "preclude" certain federal "remedies" in deciding whether a state-law claim arose under federal law).[2]

Petitioners further contend (Pet. 27) that the Clean Air Act's displacement of federal common law necessarily means that respondents' state-law claims are not "viable." But this Court has repeatedly distinguished the issue of "whether federal legislation has supplanted federal common law" from the issue of "whether state law is also available." *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 310 n.4 (1981) (*Milwaukee*); see *id.* at 319 n.14 (describing the issue before the Court in that water-pollution case as "which branch of the Federal Government is the source of federal law, not whether that law pre-empts state law"); *AEP*, 564 U.S. at 429 (distinguishing the Clean Air Act's "displace[ment]" of "federal common law" from the "availability *vel non* of a state lawsuit"); *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 489 (1987) (explaining that the Court in *Milwaukee* had "held that federal legislation now occupied the field, pre-

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[2] This Court's decision in *Oneida Indian Nation of New York* v. *County of Oneida*, 414 U.S. 661 (1974), is not to the contrary. The passage from that decision on which petitioners rely (Pet. 26; Cert. Reply Br. 7) stands only for the unremarkable proposition that a claim arising under federal law may fail on the merits. See *Oneida Indian Nation*, 414 U.S. at 675-676 (explaining that a "claim may fail at a later stage for a variety of reasons," even if it is based on a right "claimed to arise under federal law in the first instance").

empting all *federal* common law," but had left "open the question of whether injured parties still had a cause of action under *state* law"). Now that the Clean Air Act has displaced the prior federal-common-law regime, the determination whether respondents' state-law claims can go forward will turn at least in part on the Act's preemptive effect. But however that preemption issue is ultimately resolved, petitioners' assertion of an ordinary-preemption defense cannot provide a basis for removal of the suit to federal court. See *Caterpillar*, 482 U.S. at 393.

This Court's decision in *Ouellette* illustrates the application of ordinary-preemption principles in determining the viability of state-law claims following a federal statute's displacement of federal common law. The Court in *Ouellette* held that the Clean Water Act (CWA) preempted the application of Vermont common law when a New York point source discharged effluents into Lake Champlain, causing ultimate harm in Vermont. See 479 U.S. at 483-484, 491-494. The Court further concluded, however, that the CWA would not bar claims brought under the law of the *source* State. See *id.* at 497, 498-499. The Court explained that disputes concerning interstate water pollution had previously been governed by federal common law, but that the CWA had displaced that prior regime. See *id.* at 487-489. In addressing the extent to which *state* common-law claims were cognizable after the CWA's enactment, the *Ouellette* Court treated the issue before it as solely one of CWA preemption, to be addressed in light of CWA provisions that "specifically preserve[d] [certain] state actions" and "allow[ed] source States to impose stricter standards." *Id.* at 497, 499. The Court did not suggest that the prior federal-common-law regime had any bear-

ing on the extent to which state-law claims could go forward once that regime had been superseded by statute. The same approach is warranted here.[3]

b. In rare circumstances, "Congress may so completely pre-empt a particular area that any civil complaint raising" claims within that area "is necessarily federal in character." *Metropolitan Life*, 481 U.S. at 63-64. But petitioners do not and could not plausibly argue that federal common law completely preempts respondents' claims. "Complete preemption is ultimately a matter of [c]ongressional intent." Pet. App. 89a; see, *e.g.*, *Empire Healthchoice Assurance, Inc.* v. *McVeigh*, 547 U.S. 677, 698 (2006) ("If 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."); *Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1, 9 (2003) (holding that "Congress intended" 12 U.S.C. 86 "to provide the exclusive cause of action for usury claims against national banks"); *Metropolitan Life*, 481 U.S. at 66 (holding that "Congress has clearly manifested an intent to make causes of action" within the scope of 29 U.S.C. 1132(a) "exclusive"). As explained above, far 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.

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[3] Although the suit in *Ouellette* was filed in state court and then removed to federal court, see 479 U.S. at 484, removal was based on diversity of citizenship, see J.A. at 46, *Ouellette*, *supra* (No. 85-1233) (citing 28 U.S.C. 1332(a)), not on any purportedly federal character of the plaintiffs' claims.

If any body of federal law could plausibly be thought to have complete-preemptive effect with respect to respondents' claims, it would be the federal law that *currently* governs greenhouse-gas emissions—principally, the Clean Air Act. But the court of appeals correctly held that the Act "does not completely preempt th[e] type of climate change action" brought by respondents in this case, Pet. App. 38a, and petitioners do not challenge that holding. If the *applicable* federal law in this area does not completely preempt respondents' claims, *superseded* federal law cannot plausibly be thought to have that effect.[4]

B. The Decision Below Does Not Conflict With Any Decision Of Another Court Of Appeals

1. All five courts of appeals that have considered the question have held that state-law actions like respondents' are not removable to federal court. See Pet. App. 2a; *Rhode Island* v. *Shell Oil Prods. Co.*, 35 F.4th 44, 50-51 (1st Cir. 2022), petition for cert. pending, No. 22-524 (filed Dec. 2, 2022); *City of Hoboken* v. *Chevron Corp.*, 45 F.4th 699, 706 (3d Cir. 2022), petition for cert. pend-

[4] The court of appeals in this case did not resolve whether respondents' claims would have been encompassed by the "pre-*AEP* federal common law of transboundary pollution" if that body of law had not been displaced by the Clean Air Act. Pet. App. 29a n.5. In that regard, the court identified two issues that this Court's precedents had left "unsettled": (1) whether local governmental entities like respondents may invoke the federal common law of transboundary pollution; and (2) whether that body of federal common law "covers suits brought against product sellers rather than emitters." *Ibid.* (citing *AEP*, 564 U.S. at 421-422); see p. 5 n.1, *supra*. Given the Clean Air Act's displacement of any relevant federal common law, it would be incongruous for the removability or viability of respondents' claims to depend on the resolution of such "academic" questions. *AEP*, 564 U.S. at 423.

ing, No. 22-821 (filed Feb. 27, 2023); *Mayor & City Council of Baltimore* v. *BP p.l.c.*, 31 F.4th 178, 195 (4th Cir. 2022), petition for cert. pending, No. 22-361 (filed Oct. 14, 2022); *City & County of Honolulu* v. *Sunoco LP*, 39 F.4th 1101, 1106 (9th Cir. 2022), petition for cert. pending, No. 22-523 (filed Dec. 2, 2022); *County of San Mateo* v. *Chevron Corp.*, 32 F.4th 733, 744 (9th Cir. 2022), petition for cert. pending, No. 22-495 (filed Nov. 22, 2022); *City of Oakland* v. *BP PLC*, 969 F.3d 895, 901 (9th Cir. 2020), cert. denied, 141 S. Ct. 2776 (2021).

Like the Tenth Circuit in this case, the First, Third, Fourth, and Ninth Circuits have specifically rejected the contention that federal common law provides a basis for removal. See Pet. App. 24a-33a; *Rhode Island*, 35 F.4th at 53-56; *Hoboken*, 45 F.4th at 707-709; *Baltimore*, 31 F.4th at 199-208; *San Mateo*, 32 F.4th at 746-748; *Oakland*, 969 F.3d at 906-908.

2. Petitioners contend (Pet. 11-24) that the decision below conflicts with decisions of the Second, Fifth, and Eighth Circuits. That argument is mistaken.

a. *City of New York* v. *Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021), involved a district-court suit brought by the City of New York against various energy companies. *Id.* at 88. The City alleged only state-law claims but invoked the district court's diversity jurisdiction under 28 U.S.C. 1332. See Am. Compl. ¶¶ 48, 132-153, *City of New York* v. *BP p.l.c.*, 325 F. Supp. 3d 466 (S.D.N.Y. 2018) (No. 18-cv-182). The district court dismissed the City's claims, and the Second Circuit affirmed. See *New York*, 993 F.3d at 86. Contrary to petitioners' contentions (*e.g.*, Pet. 14), nothing in the Second Circuit's decision conflicts with the court of appeals' decision in this case.

i. The Second Circuit expressed no view on the question whether the purportedly federal character of claims like respondents' could provide a basis for removal to federal court. That question was not presented in *New York* because (as noted above) the suit was commenced in federal court and diversity of citizenship provided an independent basis for federal jurisdiction. See Pet. 14-15. The Second Circuit explained that its affirmance of the district court's order dismissing the state-law claims on the merits reflected its consideration of the defendants' "preemption defense on its own terms, not under the heightened standard unique to the removability inquiry." *New York*, 993 F.3d at 94. The court specifically reserved judgment on whether "federal preemption [would] give rise to a federal question for purposes of removal." *Ibid.* The court of appeals' decision in this case, by contrast, arose "in the removal context" and did not address any matter of "*ordinary* preemption." Pet. App. 33a.

ii. Petitioners allege (Pet. 14) a conflict between the Tenth Circuit's statement that federal common law "no longer exists" in this area, Pet. App. 29a (emphasis omitted), and the Second Circuit's statement that "the City's claims must be brought under federal common law," *New York*, 993 F.3d at 95. But 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." *Ibid.* (footnote omitted); see *id.* at 99 (describing the domestic-emissions issue as "a question previously governed by federal common law"). Petitioners therefore are wrong in asserting (Cert. Reply Br. 2) that the cir-

cuits are divided on whether "federal common law necessarily and exclusively governs claims seeking redress for [climate-change-related] injuries."

iii. Although the Second Circuit recognized that claims premised on domestic emissions are no longer *governed* by federal common law, the court viewed the *prior* applicability of federal common law as relevant in determining the post-Clean Air Act viability of state-law claims. See *New York*, 993 F.3d at 95 n.7 (noting the City's argument that "some residual state-law claims remain" cognizable, and stating that "the extent to which that is true hinges, at least in part, on whether federal common law would govern the [domestic-emissions] issue in the absence of the Clean Air Act"); *id.* at 99. But nothing in the Tenth Circuit's decision here conflicts with that analysis, since the Tenth Circuit did not address whether the Clean Air Act authorized or preempted respondents' claims. Indeed, it would have been inappropriate for the Tenth 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. Rather, the Tenth Circuit addressed the Clean Air Act only in discussing federal-common-law displacement and complete preemption. See Pet. App. 27a-31a, 34a-38a.

iv. The Second Circuit's decision thus does not conflict with the decision below. Indeed, both the Second Circuit and the court of appeals in this case have disclaimed the existence of any conflict, based on the distinction between removability and ordinary preemption. See *New York*, 993 F.3d at 93-94; Pet. App. 32a-33a. And other circuits that have rejected attempts to remove similar state-law actions likewise see no conflict with the Second Circuit's decision. See *Rhode Island*,

35 F.4th at 55; *Hoboken*, 45 F.4th at 708; *Baltimore*, 31 F.4th at 203.

b. Petitioners are likewise wrong in asserting (Pet. 18-19) that the court of appeals' decision in this case conflicts with the Eighth Circuit's decision in *In re Otter Tail Power Co.*, 116 F.3d 1207 (1997). The Eighth Circuit stated that federal-question jurisdiction exists when "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." *Id.* at 1213 (citation omitted). The second of those two tests is the one that this Court later clarified in *Grable*. See p. 9, *supra*. The Eighth Circuit found that test satisfied in *Otter Tail*, explaining that the plaintiff's complaint was "specifically premised" on the defendant's "alleged deviation" from a previous court order, 116 F.3d at 1213, which in turn had resolved a "federal question" concerning "Tribal regulatory authority," *id.* at 1214.

Petitioners assert (Pet. 18) that the Eighth Circuit "squarely held that a district court has jurisdiction under Section 1331 over claims artfully pleaded under state law but necessarily governed by federal common law." But that characterization of the Eighth Circuit's rationale finds no support in the decision itself. The Eighth Circuit's decision rested not on the artful-pleading doctrine, but on the allegations actually set forth in the plaintiff's complaint. See *Otter Tail*, 116 F.3d at 1213 (identifying the "well-pleaded complaint" rule as the governing legal principle); *id.* at 1214 (concluding that the complaint in that case "necessarily present[ed] a federal question"). And the Eighth Circuit's determination that those particular allegations satisfied the pre-*Grable* test does not conflict with the decision below,

which found that petitioners had "waived" any "'federal-common-law argument under the *Grable* framework.'" Pet. App. 33a n.6 (citation omitted).

c. Petitioners' reliance (Pet. 19-20) on the Fifth Circuit's decision in *Sam L. Majors Jewelers* v. *ABX, Inc.*, 117 F.3d 922 (1997), is also misplaced. That case involved a suit against an airline for the value of packages that the airline had lost. *Id.* at 923. The Fifth Circuit recognized that "[f]ederal jurisdiction exists when a federal question is presented on the face of a plaintiff's properly pleaded complaint." *Id.* at 924. The Fifth Circuit held that the plaintiff's "claim raise[d] federal question jurisdiction based on the federal common law that controls an action seeking to recover damages against an airline for lost or damaged shipments." *Id.* at 923. The court further observed that, although "the airline industry ha[d] been substantially deregulated" through federal legislation, one such deregulatory statute had "include[d] a provision * * * preserving federal common law actions." *Id.* at 928-929.

Petitioners characterize (Pet. 18) the Fifth Circuit's decision as "squarely" holding that a district court has jurisdiction "over claims artfully pleaded under state law but necessarily governed by federal law." But the Fifth Circuit framed its ruling as an application of the well-pleaded complaint rule, not of the artful-pleading doctrine. *Majors*, 117 F.3d at 924. The court also emphasized that its "holding" was "necessarily limited" by the circumstances of that case—namely, "the historical availability" of a federal-common-law remedy against interstate air carriers for lost or damaged goods and "the statutory preservation of the remedy." *Id.* at 929 n.16. The Fifth Circuit's reliance on "the statutory preservation of the" applicable federal-common-law remedy, *ibid.*,

further distinguishes *Majors* from this case, in which the Tenth Circuit emphasized that the Clean Air Act has displaced any relevant federal common law but has preserved certain state-law claims, Pet. App. 27a-30a, 35a. Accordingly, there is no sound reason to believe that the Fifth Circuit would reach a different conclusion than the Tenth Circuit in the circumstances of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2023

EXHIBIT B

2023 WL 2607545
Only the Westlaw citation is currently available.
United States Court of Appeals, Eighth Circuit.

State of MINNESOTA, BY its Attorney General Keith ELLISON, Plaintiff - Appellee

v.

AMERICAN PETROLEUM INSTITUTE; Exxon Mobil Corporation; ExxonMobil Oil Corporation; Koch Industries; Flint Hills Resources LP; Flint Hills Resources Pine Bend, Defendants - Appellants

Energy Policy Advocates,
Amicus on Behalf of Appellant(s)

National League of Cities; United States Conference of Mayors; International Municipal Lawyers Association; Scholars of Foreign Relations and Federal Courts; State of Washington; State of California; State of Connecticut; State of Delaware; State of Hawaii; State of Illinois; State of Maine; State of Maryland; State of Massachusetts; State of Michigan; State of New Mexico; State of New York; State of Oregon; State of Pennsylvania; State of Vermont; State of Wisconsin; District of Columbia; Public Citizen; Robert Brulle; Center for Climate Integrity; Justin Farrell; Benjamin Franta; Fresh Energy; Stephan Lewandowsky; MN350; Minnesota Center for Environmental Advocacy; Naomi Oreskes; Geoffrey Supran; Union of Concerned Scientists; Natural Resources Defense Council, Amici on Behalf of Appellee(s)

American Petroleum Institute; Exxon Mobil Corporation; ExxonMobil Oil Corporation; Koch Industries; Flint Hills Resources LP; Flint Hills Resources Pine Bend, Petitioners

v.

State of Minnesota, Respondent

No. 21-1752, No. 21-8005
|
Submitted: March 15, 2022
|
Filed: March 23, 2023

Synopsis

Background: State brought action in state court against fossil fuel producers alleging common law fraud and violations of state's consumer protection statutes. After removal, the United States District Court for the District of Minnesota, John R. Tunheim, J., 2021 WL 1215656, granted state's motion to remand, and producers appealed.

Holdings: The Court of Appeals, Kobes, Circuit Judge, held that:

federal common law on transboundary pollution did not completely preempt state's claims;

removal on basis of federal question jurisdiction was not warranted;

removal was not warranted on basis of Outer Continental Shelf Lands Act (OCSLA);

removal pursuant to federal officer removal statute was not warranted; and

action was not removable pursuant to Class Action Fairness Act (CAFA).

Affirmed.

Stras, Circuit Judge, concurred and filed opinion.

Procedural Posture(s): On Appeal; Motion for Remand.

Appeal from United States District Court for the District of Minnesota

Attorneys and Law Firms

Counsel who presented argument on behalf of the appellants/petitioners and appeared on the brief was Kannon K. Shanmugam, of Washington, DC. The following attorney(s) also appeared on the appellants'/petitioners' brief; Thomas Henry Boyd, of Minneapolis, MN, Andrew M. Luger, of Minneapolis, MN, Jerry W. Blackwell, of Minneapolis, MN, Todd Noteboom, of Minneapolis, MN, Stephen Andrew Swedlow, of Chicago, IL, Andrew Gerald McBride, formerly of Washington, DC, Peter Joseph Schwingler, of Minneapolis, MN, Andrew William Davis, of Minneapolis, MN, Brian David Schmalzbach, of Richmond, VA, Eric F. Swanson, of Minneapolis, MN, Daniel J. Toal, of New York, NY, Gurdip Singh Atwal, of Minneapolis, MN, Justin Anderson, of Washington, DC, Theodore V. Wells, Jr., of New York, NY, Debra Rose Belott, of Washington, DC, William Anthony

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The following attorney(s) appeared on the amicus brief of Energy Policy Advocates in support of appellants/petitioners; Matthew Hardin, of Washington, DC.

The following attorney(s) appeared on the amicus brief of the National League of Cities, The U.S. Conference of Mayors, and The International Municipal Lawyers Association in support of appellee/respondent; Robert S. Peck, of Washington, DC, William A. Rossbach, of Missoula, MT.

The following attorney(s) appeared on the amicus brief of Foreign Relations and Federal Court in support of appellee/respondent; Zachary Clopton, of Chicago, IL.

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The following attorney(s) appeared on the amicus brief of Public Citizen in support of appellee/respondent; Scott Lawrence Nelson, of Washington, DC, Adam R. Pulver, of Washington, DC.

The following attorney(s) appeared on the amicus brief of Robert Brulle, Center for Climate Integrity, Justin Farrell, Benjamin Franta, Fresh Energy, Stephan Lewandowsky, MN350, Minnesota Center for Environmental Advocacy, Naomi Oreskes, Geoffrey Supran and the Union of Concerned Scientists in support of appellee/respondent; Benjamin Gould, of Seattle, WA, Daniel P. Mensher, of Seattle, WA, Alison S. Gaffney, of Seattle, WA.

The following attorney(s) appeared on the amicus brief of Natural Resources Defense Council in support of appellee/respondent; Peter Huffman, of Washington, DC.

Before GRASZ, STRAS, and KOBES, Circuit Judges.

Opinion

KOBES, Circuit Judge.

***1** Minnesota sued a litany of fossil fuel producers [1] (together, the Energy Companies) in state court for common law fraud and violations of Minnesota's consumer protection statutes. In doing so, it joined the growing list of states and municipalities trying to hold fossil fuel producers responsible for alleged misrepresentations about the effects fossil fuels have had on the environment. The Energy Companies removed to federal court. The district court [2] granted Minnesota's motion to remand, and the Energy Companies appealed. We affirm.

I.

Minnesota claims that the Energy Companies have known for decades that the production and use of fossil fuels damages the environment. Instead of owning up to these harmful effects, Minnesota alleges the Energy Companies engaged in a misinformation campaign to deceive consumers and suppress the truth about climate change. Minnesota claims that this deception resulted in more fossil fuel being sold, accelerating climate change and causing wide-ranging harm to Minnesota, its citizens, and fossil fuel consumers.

Minnesota sued the Energy Companies in state court. It alleged exclusively state law claims—common law fraud and violations of various Minnesota consumer protection statutes. [3] The Energy Companies removed the case under the general removal statute, 28 U.S.C. § 1441, and the federal officer removal statute, 28 U.S.C. § 1442. Minnesota filed a motion to remand, which the district court granted. The court reasoned that it lacked original jurisdiction and that the claims didn't have sufficient connection to the Energy Companies' purported federally directed activities. The Energy Companies appeal, maintaining that federal original jurisdiction exists and that the case is otherwise removable under § 1442.

Minnesota is not the first state or local government to file this type of climate change litigation. Nor is this the first time that the Energy Companies, or their oil-producing peers, have made these jurisdictional arguments. But our sister circuits rejected them in each case. *See, e.g.*, *Rhode Island v. Shell Oil Prods. Co., L.L.C.* (*Shell Oil III*), 35 F.4th 44 (1st Cir. 2022); *City of Hoboken v. Chevron Corp.*, 45 F.4th 699 (3d Cir. 2022); *Mayor & City Council of Balt. v. BP P.L.C.* (*Baltimore III*), 31 F.4th 178 (4th Cir. 2022); *Cnty. of San Mateo v. Chevron Corp.* (*San Mateo III*), 32 F.4th 733 (9th Cir. 2022); *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.* (*Boulder III*), 25 F.4th 1238 (10th Cir. 2022). *But cf.* *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021). Today, we join them.

II.

"Federal courts are courts of limited jurisdiction, possessing only that power authorized by Constitution and statute." *Gunn v. Minton*, 568 U.S. 251, 256, 133 S.Ct. 1059, 185 L.Ed.2d 72 (2013) (quotation omitted). 28 U.S.C. § 1441 allows the defendants in state court civil actions to remove the case to federal court if the case "originally could have been filed there." *Baker v. Martin Marietta Materials, Inc.*, 745 F.3d 919, 923 (8th Cir. 2014) (quotation omitted). In other words, the federal court must have original jurisdiction over the case. Removal is permitted as long as at least one claim falls within the original jurisdiction of the federal court. *See In re Pre-Filled Propane Tank Antitrust Litig.*, 893 F.3d 1047, 1059–60 (8th Cir. 2018); 28 U.S.C. § 1367(a). We review the district court's decision to remand *de novo*. *See* *Bell v. Hershey Co.*, 557 F.3d 953, 956 (8th Cir. 2009).

A.

***2** 28 U.S.C. § 1331 establishes that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." In addition to cases arising under federal positive law, federal courts also have jurisdiction over "claims founded upon federal common law." *Illinois v. City of Milwaukee*, 406 U.S. 91, 100, 92 S.Ct. 1385, 31 L.Ed.2d 712 (1972), *recognized as superseded by statute on other grounds*, *Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 419, 131 S.Ct. 2527, 180 L.Ed.2d 435 (2011). This is known as federal question jurisdiction. Generally, "federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. The rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987) (citation omitted). However, the potential applicability of a defense arising under federal law doesn't create jurisdiction. *Aetna Health Inc. v. Davila*, 542 U.S. 200, 207, 124 S.Ct. 2488, 159 L.Ed.2d 312 (2004). We call this pair of principles the well-pleaded complaint rule.

But "a plaintiff may not defeat removal by omitting to plead necessary federal questions." *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 22, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983). [4] There are two important exceptions to the well-pleaded complaint rule: when the state-law claims (1) are completely preempted by federal law or (2) necessarily raise a substantial, disputed federal question. *Shell Oil III*, 35 F.4th at 51–52. If either exception is met, the case is removable although no federal question appears on the face of the complaint.

Although Minnesota's complaint pleads exclusively state-law torts, the Energy Companies insist that both exceptions apply because federal common law governing transboundary pollution provides the rule of decision for Minnesota's claims. We address each exception in turn.

i.

Complete preemption applies 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, 107 S.Ct. 2425 (quotation omitted). Complete preemption "exists only where federal preemption is so strong that 'there is no such thing as a state-law claim.' " *Johnson v. MFA Petroleum Co.*, 701 F.3d 243, 248 (8th Cir. 2012) (quoting *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 11, 123 S.Ct. 2058, 156 L.Ed.2d 1

(2003)) (cleaned up). When federal law completely preempts state law, the cause of action is removable even if it's based entirely in state law. *Franchise Tax Bd.*, 463 U.S. at 23, 103 S.Ct. 2841. But less aggressive forms of preemption, such as ordinary preemption, do not provide a basis for removal. *See Johnson*, 701 F.3d at 248 ("Ordinary preemption is a federal defense that exists where a federal law has superseded a state law claim.").

To determine whether a state-law claim is completely preempted, we ask whether Congress intended a federal statute to provide "the exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action." *Beneficial Nat'l Bank*, 539 U.S. at 8, 123 S.Ct. 2058. Because "[t]he lack of a substitute federal [cause of] action would make it doubtful that Congress intended" to preempt state-law claims, "without a federal cause of action which in effect replaces a state law claim, there is an exceptionally strong presumption against complete preemption." *Johnson*, 701 F.3d at 252. Complete preemption is very rare. The Supreme Court has applied it to only three statutes: § 301 of the Labor Management Relations Act, *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 560–61, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1968); § 502(a) of ERISA, *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 66, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987); and §§ 85 and 86 of the National Bank Act, *Beneficial Nat'l Bank*, 539 U.S. at 10–11, 123 S.Ct. 2058.

***3** Contrary to the Energy Companies' insistence, federal common law on transboundary pollution does not completely preempt Minnesota's claims. At several points in our nation's history, courts have applied federal common law to public nuisance claims involving transboundary air or water pollution. *Boulder III*, 25 F.4th at 1258–61 (detailing the history of federal common law in pollution cases); *City of New York v. Chevron Corp.*, 993 F.3d 81, 91 (2d Cir. 2021) (collecting cases). And the Second Circuit recently held that federal common law still provides a defense—ordinary preemption—to state-law public nuisance. *New York*, 993 F.3d at 94–95. Though, there is a serious question about whether, and to what extent, this area of federal common law survived subsequent federal environmental legislation. [5]

Even if federal common law still exists in this space and provides a cause of action to govern transboundary pollution cases, that remedy doesn't occupy the same substantive realm as state-law fraud, negligence, products liability, or consumer protection claims. There is no substitute federal cause of action for the state-law causes of action Minnesota brings, which means we apply the strong presumption against complete preemption. And more importantly, the federal law at issue is common law, not statutory. Because Congress has not acted, the presence of federal common law here does not express Congressional intent of any kind—much less intent to completely displace any particular state-law claim. *Boulder III*, 25 F.4th at 1262.

Because Congress has not acted to displace the state-law claims, and federal common law does not supply a substitute cause of action, the state-law claims are not completely preempted.

ii.

The second exception to the well-pleaded complaint rule is when the complaint includes "claims recognized under state law that nonetheless turn on substantial questions of federal law." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312, 125 S.Ct. 2363, 162 L.Ed.2d 257 (2005). When that's true, we treat the claims as arising under federal law even though state law creates the cause of action. *Franchise Tax Bd.*, 463 U.S. at 13, 103 S.Ct. 2841. This is because "there is a 'serious federal interest in claiming the advantages thought to be inherent in a federal forum,' which can be vindicated without disrupting Congress's intended division of labor between state and federal courts." *Gunn*, 568 U.S. at 258, 133 S.Ct. 1059 (citation omitted). The *Grable* doctrine, as we call it, applies to a "special and small category" of cases. *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 699, 126 S.Ct. 2121, 165 L.Ed.2d 131 (2006). Under *Grable*, federal question jurisdiction exists "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 U.S. at 258, 133 S.Ct. 1059.

The best example is *Grable* itself. In that case, the IRS seized and sold Grable's property to satisfy his tax liability.

Grable, 545 U.S. at 310, 125 S.Ct. 2363. Grable tried to invalidate the sale by filing a quiet title claim in state court, arguing that the buyer's title was invalid because the IRS did not follow the notice requirements prescribed by federal law. *Id.* at 311, 125 S.Ct. 2363. The buyer promptly removed to federal court. *Id.* Although Grable pled a purely state-law claim, the dispositive issue of whether the IRS had valid title over the property depended entirely on whether the IRS followed those federal notice requirements. *Id.* at 315–16, 125 S.Ct. 2363. Because the dispositive state-law issue ultimately depended on the resolution of a federal-law issue—the notice requirements—the Supreme Court held that the quiet-title claim arose under federal law. *Id.* In other words, while state law provided the mechanism for the lawsuit, the legal questions central to the case were exclusively federal.

***4** A federal issue is necessarily raised when it "is a *necessary* element of one of the well-pleaded state claims" in the plaintiff's complaint. *Franchise Tax Bd.*, 463 U.S. at 13, 103 S.Ct. 2841 (emphasis added); *see also* *Boulder III*, 25 F.4th at 1266 ("To determine whether an issue is 'necessarily' raised, the Supreme Court has focused on whether the issue is an 'essential element' of a plaintiff's claim." (citation omitted)). "This inquiry demands precision." *Cent. Iowa Power Coop. v. Midwest Indep. Transmission Sys. Oper., Inc.*, 561 F.3d 904, 914 (8th Cir. 2009). A removing defendant "should be able to point to the specific elements of [the plaintiff's] state law claims" that require proof under federal law. *Id.*

The Energy Companies argue that Minnesota's claims "necessarily raise issues governed by federal common law and amount to a collateral attack on cost-benefit analyses committed to, and already performed by, the federal government." App. Br. at 34. To date, none of our sister circuits have found that argument persuasive. *See, e.g.*, *Shell Oil III*, 35 F.4th at 57 ("[F]aced with comparable arguments, cases akin to this one flatly reject the idea that federal law is an essential element to the kind of classic state-law claims [the State] raises." (emphasis omitted) (citing *San Mateo III*, 32 F.4th at 747–48; *Baltimore III*, 31 F.4th at 208–15)). We agree with them.

Although the Energy Companies list a variety of federal interests potentially impacted should a court hold them liable, they fail to identify which specific elements of Minnesota's claims require the court to either interpret and apply federal common law or second-guess Congress's cost-benefit rationales in allowing the production and sale of fossil fuels. [6] Unlike *Grable*, where deciding ownership of the property under state law required the court to determine whether the IRS properly followed federal notice requirements, resolving only the *merits* of Minnesota's claims does not require the court to resolve any questions governed by federal law.

To be fair, allowing the State to recover damages for injuries caused by climate change may have the practical effect of impacting the Energy Companies' ability to produce and sell fossil fuels, thereby affecting any federal interest that relies in part on the availability and affordability of energy. But, as the Tenth Circuit reasoned, "any implied conflict between the ... state-law claims and federal cost-benefit determinations speaks to a potential defense on the merits of those claims, specifically a preemption defense, rather than to the jurisdictional issue." *Boulder III*, 25 F.4th at 1266. Because federal law is not a necessary element to any of Minnesota's claims, the complaint doesn't "necessarily raise" a federal issue.

Because the "necessarily raised" element is not satisfied, the *Grable* exception to the well-pleaded complaint rule does not apply to Minnesota's claims.

B.

The Energy Companies also argue that federal question jurisdiction exists under the Outer Continental Shelf Lands Act (OCSLA). The OCSLA gives federal courts original jurisdiction over "cases and controversies arising out of, or in connection with (A) any operation conducted on the [O]uter Continental Shelf ..., or which involves rights to such minerals, or (B) the cancellation, suspension, or termination of a lease or permit under this subchapter." 43 U.S.C. § 1349(b)(1). To determine whether there is jurisdiction, we consider "whether (1) the activities that caused the injury constituted an 'operation' 'conducted on the [OCS]' that involved the exploration and production of minerals, and (2) the case 'arises out of, or in connection with' the operation." *In re Deepwater Horizon*, 745 F.3d 157, 163

(5th Cir. 2014). Some of our sister circuits have interpreted the second element to require "a but-for connection." *See id.* (quotation omitted). Others have held that a causal connection is not required and only a "close link" is necessary. *See Hoboken*, 45 F.4th at 709. Although either approach allows broad jurisdiction, "the statute must stop somewhere." *Id.* at 710; *see Boulder III*, 25 F.4th at 1273 (quotation omitted) ("[A] blind application ... would result in federal court jurisdiction over all state law claims even tangentially related to offshore oil production on the OCS.").

***5** Neither requirement is met here. Contrary to the Energy Companies' argument, the activity causing injury in this case is not the mere production of fossil fuels—some of which occurred on OCS leases—but rather the alleged "misinformation campaign" carried out via false advertising and misrepresentations in Minnesota. Because there is no indication that the Energy Companies' marketing activities are an "operation" under § 1349(b)(1) or were conducted on the OCS, the first prong of OCSLA jurisdiction isn't met.

Even if the relevant activity was an OCSLA operation, the nexus to Minnesota's claims is lacking under the "but-for" or "close link" approach. Minnesota's challenge to the Energy Companies' marketing activities has no connection to their OCS-based fossil fuel production. Even if they hadn't conducted operations on the OCS, the Energy Companies still would have marketed and sold fossil fuels in Minnesota—because the OCS is just one of many sites the companies produce fossil fuels from.[7] As a result, there is no connection, causal or otherwise, between Minnesota's claims and the OCSLA operations.

Precedent from the Fifth Circuit, which has taken the lead in interpreting OCSLA jurisdiction, supports our conclusion. The Fifth Circuit has found federal jurisdiction under § 1349 only in cases involving close connections to fossil fuel operations on the outer continental shelf—"[t]hey each feature either claims with a direct physical connection to an OCS operation (collision, death, personal injury, loss of wildlife, toxic exposure) or a contract or property dispute directly related to an OCS operation."[8] *Boulder III*, 25 F.4th at 1273 (collecting cases); *see also Hoboken*, 45 F.4th at 712 (describing four buckets of § 1349 cases: "disputes about who may operate on the Shelf[,] [c]ases about transporting oil or gas from the Shelf[,] [d]isputes over first-order contracts to buy oil or gas produced on the Shelf[,] [a]nd tort suits about accidents on the Shelf." (citation omitted) (collecting cases)). But claims "one step removed from the actual transfer of minerals to shore" are not sufficiently connected, such as "a contractual dispute over the control of an entity which operates a gas pipeline." *United Offshore Co. v. S. Deepwater Pipeline Co.*, 899 F.2d 405, 407 (5th Cir. 1990). The connection between the Energy Companies' marketing activities and their OCS operations is even more attenuated. Because neither requirement is met, there is no federal jurisdiction under § 1349.

III.

***6** Next, the Energy Companies argue the case is removable under 28 U.S.C. § 1442, the federal officer removal statute. That statute authorizes removal of civil and criminal cases "against or directed to ... any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office." § 1442(a). The federal officer removal statute's basic purpose is:

> to protect the Federal Government from the interference with its operations that would ensue were a State able, for example, to arrest and bring to trial in a State court for an alleged offense against the law of the State, officers and agents of the Federal Government acting within the scope of their authority.

Watson v. Philip Morris Cos., Inc., 551 U.S. 142, 150, 127 S.Ct. 2301, 168 L.Ed.2d 42 (2007) (quotation omitted) (cleaned up). To effectuate that purpose, § 1442 "grants independent jurisdictional grounds over cases involving federal officers where a district court otherwise would not have jurisdiction." *Jacks v. Meridian Res. Co., LLC*, 701 F.3d 1224, 1230 (8th Cir. 2012) (quotation omitted), *abrogated on other grounds by BP P.L.C. v. Mayor and City Council of Balt.*, —— U.S. ——, 141 S. Ct. 1532, 1538,

209 L.Ed.2d 631 (2021). Unlike general removal, § 1442 is liberally construed and not constrained by the well-pleaded complaint rule. *Buljic v. Tyson Foods, Inc.*, 22 F.4th 730, 738 (8th Cir. 2021).

Section 1442(a)(1) removal applies to private parties "who lawfully assist" federal officers "in the performance of [their] official dut[ies]." *Davis v. South Carolina*, 107 U.S. 597, 600, 2 S.Ct. 636, 27 L.Ed. 574 (1883). This requires the private party to be "authorized to act with or for federal officers or agents in affirmatively executing duties under federal law." *Watson*, 551 U.S. at 151, 127 S.Ct. 2301 (citation omitted) (cleaned up). This applies to private corporations as well. *Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 136 (2d Cir. 2008). To remove the case, a private defendant must establish that (1) it acted under the direction of a federal officer, (2) there is a connection between the claims and the official authority, (3) the defendant has a colorable federal defense to the plaintiffs' claims, and (4) the defendant is a "person," within the meaning of the statute. *Buljic*, 22 F.4th at 738. [9]

Even if the Energy Companies have acted under a federal officer, those activities must have sufficient connection to Minnesota's claims. *Graves v. 3M Co.*, 17 F.4th 764, 769 (8th Cir. 2021). We have historically required a "causal connection" to the conduct charged in the complaint. *Watson v. Philip Morris Cos., Inc.*, 420 F.3d 852, 861 (8th Cir. 2005), *rev'd on other grounds*, 551 U.S. 142, 127 S.Ct. 2301, 168 L.Ed.2d 42 (2007). That standard required "that the acts that form the basis for the state civil or criminal suit were performed pursuant to an officer's direct orders or to comprehensive and detailed regulations." *Id.* (citation omitted).

Congress later passed the Removal Clarification Act of 2011, which added the words "or relating to" into § 1442(a)(1). Pub. L. No. 112-51, sec. 2(b)(1)(A), 125 Stat. 545 (2011). [10] Some of our sister circuits have recognized that this amendment changed the requirement to a lower "relates to" standard. *Moore v. Elec. Boat Corp.*, 25 F.4th 30, 35 (1st Cir. 2022); *In re Commonwealth's Motion to Appoint Couns. Against or Directed to Def. Ass'n of Phila.*, 790 F.3d 457, 471 (3d Cir. 2015); *Baltimore III*, 31 F.4th at 233; *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286, 296 (5th Cir. 2020) (en banc); *Baker v. Atl. Richfield Co.*, 962 F.3d 937, 944 (7th Cir. 2020); *see also Ohio State Chiropractic Ass'n v. Humana Health Plan Inc.*, 647 F. App'x 619, 624 (6th Cir. 2016) (recognizing that the Removal Clarification Act was "intended to broaden the universe of acts that enable Federal officers to remove to Federal court." (quotation omitted)); *Boulder III*, 25 F.4th at 1251 (citing and incorporating the Fourth and Fifth Circuits' standard); Under this standard, the requirement is met if the charged conduct has a "connection" or "association" with the federal action. *Baltimore III*, 31 F.4th at 233.

***7** Though we have continued to describe the standard in terms of "causal connection," *see Buljic*, 22 F.4th at 738; *Graves*, 17 F.4th at 769, the causal connection required by § 1442(a)(1) is for the activity in question to relate to a federal office. *See Caver v. Cent. Ala. Elec. Coop.*, 845 F.3d 1135, 1144 (11th Cir. 2017) (using what it called a "causal connection" standard that is identical to the "relates to" standard described by the other circuits).

Despite this lower, post-amendment standard, the connection between Minnesota's claims and military fuel production, OCS operations, or participation in the strategic petroleum infrastructure is still too remote. Again, Minnesota alleges that the Energy Companies fraudulently marketed their products and misinformed their customers about the dangers of fossil fuel use, thereby enhancing both their sales and their contribution to climate change. Although the "relating to" requirement presents a low bar, the Energy Companies fall short of that threshold. As the district court explained, the Energy Companies "do not claim that any federal officer directed their respective marketing or sales activities, consumer-facing outreach, or even their climate-related data collection." *Minnesota v. Am. Petroleum Inst.*, 20-CV-1636-JRT, 2021 WL 1215656, at *9 (D. Minn. March 31, 2021). The Energy Companies' production of military-grade fuel, operation of federal oil leases, and participation in strategic energy infrastructure, even if done at federal direction, bears little to no relationship with how they conducted their marketing activities to the general public. At most, those activities relate to the general production of fossil fuels. But none of Minnesota's claims try to hold the Energy Companies liable for production activities—only marketing. [11] *See Baltimore III*, 31 F.4th at 233–34. As a

result, the relationship between Minnesota's claims and "any federal authority over a portion of [the Energy Companies'] production and sale of fossil-fuel products is too tenuous to support removal under § 1442." *Id.* at 234. Because the claims do not satisfy all four requirements, the Energy Companies cannot remove under § 1442. [12]

IV.

Finally, the Energy Companies argue that the Class Action Fairness Act (CAFA) provides a basis for removal. Although this is a novel argument, we are not persuaded.

CAFA allows the defendant in a civil class action to remove a case if (1) more than $5 million is in controversy and (2) the parties are minimally diverse. 28 U.S.C. § 1332(d)(2). The statute defines "class action" as "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." § 1332(d)(1)(B). Here, Minnesota exercised its authority under Minn. Stat. § 8.31, which allows the State's Attorney General to file civil actions to enforce state law and distribute any recovery to injured consumers. The Energy Companies argue that § 8.31 is a "similar State statute" under CAFA because it allows Minnesota to represent a larger class of affected, but unnamed, individuals—similar to the named plaintiffs in a Rule 23 class action.

***8** But a State's exercise of *parens patriae* [13] authority is not the same as a class action, even when the State seeks recovery for and on behalf of its citizens' injuries. The Supreme Court has held that civil suits filed by a state executive to enforce consumer protection laws are not "mass actions" under § 1332(d)(11)(B)(i)—a category of civil cases that try common issues of law or fact for at least 100 plaintiffs and classify as a "class action" for CAFA removal purposes. *Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 164, 134 S.Ct. 736, 187 L.Ed.2d 654 (2014). And at least half of our sister circuits have held that state-led civil enforcement actions likewise don't quality as "class actions" under the statute. *See* *Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 212–20 (2d Cir. 2013); *West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.* 646 F.3d 169, 176 (4th Cir. 2011); *Mississippi ex rel. Hood v. AU Optronics Corp.*, 701 F.3d 796, 799 (5th Cir. 2012), *rev'd on other grounds*, 571 U.S. 161, 134 S.Ct. 736, 187 L.Ed.2d 654 (2014); *Nessel ex rel. Mich. v. AmeriGas Partners, L.P.*, 954 F.3d 831, 838 (6th Cir. 2020); *LG Display Co. v. Madigan*, 665 F.3d 768, 770–72 (7th Cir. 2011); *Washington v. Chimei Innolux Corp.*, 659 F.3d 842, 847–49 (9th Cir. 2011).

We reach the same conclusion here. Though § 8.31 authorizes Minnesota to file claims and recover for injuries felt by Minnesotans, it bears little similarity to Rule 23. As we have previously explained, "Rule 23(a) of the Federal Rules of Civil Procedure establishes four prerequisites to the maintenance of a class action." *Paxton v. Union Nat. Bank*, 688 F.2d 552, 559 (8th Cir. 1982). First, "the class must be 'so numerous that joinder of all members is impracticable.' " *Id.* (quoting Fed. R. Civ. P. 23(a)(1)). Next, there must be "questions of law or fact common to the class," and "the claims or defenses of the class representative must be 'typical of the claims or defenses of the class.' " *Id.* (quoting Fed. R. Civ. P. 23(a)(2)–(3)). And finally, the representative party must be able to "fairly and adequately protect the interests of the class." *Id.* (quoting Fed. R. Civ. P. 23(a)(4)). "The Rule's four requirements—numerosity, commonality, typicality, and adequate representation" are the defining characteristics of Rule 23. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011); *see also* *Paxton*, 688 F.2d at 559.

Minn. Stat. § 8.31 has no such requirements. Neither the State nor the Attorney General needs to suffer a sufficiently common injury—or any injury for that matter—to pursue claims on behalf of Minnesota residents. Nor does the State's exercise of this authority bar Minnesota residents from pursuing these claims, to the extent a private cause of action exists, on their own. We conclude that § 8.31 does not provide a similar mechanism to Rule 23, which means this lawsuit is not a removable "class action" under CAFA.

V.

For the foregoing reasons, we hold that Minnesota's claims are not removable under the general removal statute, the federal officer removal statute, the Outer Continental Shelf Lands Act, or the Class Action Fairness Act. The district court was correct to remand the case, so we affirm. Accordingly, we deny as moot the petition for permission to appeal in case 21-8005.

STRAS, Circuit Judge, concurring.

Artful pleading comes in many forms. This is one of them. Minnesota purports to bring state-law consumer-protection claims against a group of energy companies. But its lawsuit takes aim at the production and sale of fossil fuels worldwide. I agree with the court that, as the law stands now, the suit does not "aris[e] under" federal law. 28 U.S.C. § 1331. I write separately, however, to explain why it *should*.

I.

***9** There is no hiding the obvious, and Minnesota does not even try: it seeks a global remedy for a global issue. According to the complaint, energy production has "caused a substantial portion of global atmospheric greenhouse-gas concentrations." Those gases, the argument goes, have resulted in "climate change"—a label that appears in the complaint over 200 times. The relief sought is ambitious too: a far-reaching injunction, restitution, and disgorgement of "all profits made as a result of [the companies'] unlawful conduct." The case, in other words, presents "a clash over regulating worldwide greenhouse gas emissions and slowing global climate change." *City of New York v. Chevron Corp.*, 993 F.3d 81, 91 (2d Cir. 2021).

A.

Minnesota has strong views about how to deal with the issue. Other states do too. *See* Brief of Indiana et al. as Amici Curiae in Support of Petitioners at 1, *Suncor Energy (U.S.A.) Inc. v. Bd. of Cnty. Comm'rs*, No. 21-1550 (U.S. July 11, 2022). They do not believe that "one or two" individual states like Minnesota should be able to "dictate environmental policy for other sovereign States." *Id.* at 7. This is, in effect, an interstate dispute.

Not surprisingly, disputes between states are as old as the country itself. *See, e.g.*, Charles Warren, *The Supreme Court and Sovereign States* 38–44 (1924) (listing examples); *see also* Thomas Paine, *Common Sense* 69–70 (1776) (discussing a "difference between Pennsylvania and Connecticut, respecting some unlocated lands"); Don Faber, *The Toledo War: The First Michigan-Ohio Rivalry* (2008) (describing a boundary dispute over the Toledo Strip). Interstate disputes were so common and complicated, in fact, that the Framers specifically vested original jurisdiction over them in the Supreme Court. *See* U.S. Const. art. III, § 2 (giving the Supreme Court original jurisdiction over "all Cases ... in which a State shall be Party"); *Delaware v. New York*, 507 U.S. 490, 500, 113 S.Ct. 1550, 123 L.Ed.2d 211 (1993); Warren, *supra*, at 65–67. The rule of decision in these cases has always been "known and settled principles of national or municipal jurisprudence"—what we now know as the federal common law. *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 737, 9 L.Ed. 1233 (1838); *Lessee of Marlatt v. Silk*, 36 U.S. (11 Pet.) 1, 22–23, 9 L.Ed. 609 (1837) (explaining that "the rule of decision" in cases involving interstate compacts "is not to be collected from the decisions of either state, but is one, if we may so speak, of an international character").

State law is no substitute. *See Connecticut v. Massachusetts*, 282 U.S. 660, 670, 51 S.Ct. 286, 75 L.Ed. 602 (1931) (rejecting reliance on "the same rules of law that are applied in such States for the solution of similar questions of private right"); *see also Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110, 58 S.Ct. 803, 82 L.Ed. 1202 (1938) (noting that "neither the statutes nor the decisions of either State can be conclusive" of their respective water rights). When it comes to "outside nuisances" like this one, courts have long looked to common-law principles like "considerations [of] equity," "quasi-sovereign interests," and the need for "caution." *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237–38, 27 S.Ct. 618, 51 L.Ed. 1038 (1907) (emphasis omitted); *Missouri v. Illinois*, 200 U.S. 496, 520–21, 26 S.Ct. 268, 50 L.Ed. 572 (1906). Applying state law, by contrast, only raises the risk of conflict between states, which never "agree[d] to submit to whatever might be done" to their citizens. *Tennessee Copper*, 206 U.S. at 237, 27 S.Ct. 618. For that reason, state law has never "st[oo]d in the way" of using "recognized" (federal) common-law principles. *Missouri*, 200 U.S. at 520, 26 S.Ct. 268; *see* The Federalist

No. 80 (Alexander Hamilton) ("Whatever practices may have a tendency to disturb the harmony between the States, are proper objects of federal superintendence and control.").

***10** The point is that federal law still reigns supreme in these types of disputes, notwithstanding *Erie*'s famous declaration that "[t]here is no federal general common law." *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed. 1188 (1938); *see* *Collins v. Virginia*, —— U.S. ——, 138 S. Ct. 1663, 1678–79, 201 L.Ed.2d 9 (2018) (Thomas, J., concurring) (explaining why the federal common law may have preemptive force). The reason is the " 'overriding ... need for a uniform rule of decision' on matters influencing national energy and environmental policy." *City of New York*, 993 F.3d at 91–92 (quoting *Illinois v. City of Milwaukee*, 406 U.S. 91, 105 n.6, 92 S.Ct. 1385, 31 L.Ed.2d 712 (1972), *superseded by statute*, Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816). As the Second Circuit has put it in circumstances like these, conflicts between states with different tolerances for greenhouse-gas emissions can only be resolved at the federal level because of the "unique[ ] federal interests" involved. *Id.* at 90; *see* *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 496–97, 107 S.Ct. 805, 93 L.Ed.2d 883 (1987) (warning that regulation by multiple states "would lead to chaotic confrontation" (citation omitted)).

Today's lawsuit is as good an example as any. Minnesota accuses the energy companies of "caus[ing] a substantial portion of *global* atmospheric greenhouse-gas concentrations, and the attendant historical, projected, and committed disruptions to the environment" that go with them. (Emphasis added). Although those "disruptions" have allegedly led to a host of costly problems within Minnesota, they are by no means limited to the "effects of [local] emissions." *City of New York*, 993 F.3d at 92. Rather, the complaint claims that the companies encouraged the consumption of fossil fuels "both in *and outside of* Minnesota," (emphasis added), meaning that it "intends to hold the [companies] liable, under [state] law, for the effects of emissions made around the globe," *City of New York*, 993 F.3d at 92.

Minnesota's end game is equally clear: change the companies' behavior on a global scale. "[T]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 637, 132 S.Ct. 1261, 182 L.Ed.2d 116 (2012) (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959)); *see* *Cipollone v. Liggett Grp.*, 505 U.S. 504, 548, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (observing that "general tort-law duties" can "impose 'requirement[s] or prohibition[s]' " on private parties (quoting 15 U.S.C. § 1334(b))). And the wide-ranging request for injunctive relief speaks for itself.

The problem, of course, is that the state's attempt to set national energy policy through its own consumer-protection laws would "effectively override ... the policy choices made by" the federal government and other states. *Ouellette*, 479 U.S. at 495, 107 S.Ct. 805. Regulating the production and sale of fossil fuels worldwide, in other words, is "simply beyond the limits of state law." *City of New York*, 993 F.3d at 92.

B.

Yet somehow, when interstate disputes are litigated through the surrogate of a private party as the defendant, fifty state courts get to handle them. Under the well-pleaded complaint rule, federal preemption operates only "as a defense to the allegations in a plaintiff's complaint." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987). And a defense, "even [one that] is anticipated in the plaintiff's complaint, and even if both parties admit that [it] is the only question truly at issue in the case," is not a reason to remove a case to federal court. *Franchise Tax Bd. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 14, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983).

Most of the time, the well-pleaded complaint rule works well. After all, federal courts can't know what they don't know. The complaint usually does not say whether a federal defense is available and, if so, whether anyone will raise it. *See* *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 153, 29 S.Ct. 42, 53 L.Ed. 126 (1908); *see also* *Grable & Sons Metal Prods. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 313–14, 125 S.Ct. 2363, 162 L.Ed.2d 257 (2005) (requiring a "disputed federal issue"). Nor does it generally say whether

the federal issue, if raised, will play a "substantial" role in the litigation. *Grable*, 545 U.S. at 314–15, 125 S.Ct. 2363.

***11** None of those mysteries exist here. The complaint itself all but dares the companies to raise a federal-preemption defense. And no one doubts that they will or that it will be the focal point of the litigation. There is no reason for the removal rules to operate in such a confounding way.

And at one point, they didn't. *See Tennessee v. Union & Planters' Bank*, 152 U.S. 454, 460, 14 S.Ct. 654, 38 L.Ed. 511 (1894) (collecting cases). If there was a "real and substantial dispute or controversy which depend[ed] altogether upon the construction and effect of an act of Congress," even if "the claim ... might[ ] possibly be determined by reference alone to State enactments," it was removable. *R.R. Co. v. Mississippi*, 102 U.S. 135, 140, 26 L.Ed. 96 (1880); *see Union & Planters' Bank*, 152 U.S. at 460–62, 14 S.Ct. 654 (discussing the history). Perhaps for a "uniquely federal interest[ ]" like interstate pollution, it *should* still be that way. *City of New York*, 993 F.3d at 90; *see Franchise Tax Bd.*, 463 U.S. at 11–12, 103 S.Ct. 2841 (describing the well-pleaded complaint rule "as a quick rule of thumb" that "may produce awkward results").

C.

But only Congress or the Supreme Court gets to make that call. And we have our marching orders: even the strongest arguments for removal don't work here.

One is complete preemption. In rare cases, a federal statute "may so completely pre-empt" state law that any claim within its scope "is necessarily federal." *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987). In those circumstances, we can take "a peek behind" the complaint to figure out whether the suit raises a federal question. *Krakowski v. Allied Pilots Ass'n*, 973 F.3d 833, 836 (8th Cir. 2020). The problem is that the energy companies identify no federal *statute* that completely preempts the consumer-protection claims in Minnesota's complaint. *See ante*, at —— – ——; *see also Krakowski*, 973 F.3d at 839–40 (explaining why "a judicial creation" cannot give rise to complete preemption (quotation marks omitted)).

The other is the substantial-federal-question test. *See Grable*, 545 U.S. at 314–15, 125 S.Ct. 2363; *see also Gunn v. Minton*, 568 U.S. 251, 258, 133 S.Ct. 1059, 185 L.Ed.2d 72 (2013). It applies when state-law claims "implicate significant federal issues." *Grable*, 545 U.S. at 312, 125 S.Ct. 2363. At first glance, this possibility looks promising because regulating interstate pollution does, as I explain above, have a long federal pedigree. But Minnesota's consumer-protection claims do not "necessarily require application of [federal] law." *Gunn*, 568 U.S. at 259, 133 S.Ct. 1059; *see ante*, at —— – ——. Even if federal questions are lying in wait, Minnesota has artfully pleaded around them. [14]

II.

For the time being, that is. As the case progresses, Minnesota may make it even clearer that the case necessarily "turn[s] on substantial questions of federal law." *Grable*, 545 U.S. at 312, 125 S.Ct. 2363. And developments along those lines could give rise to federal jurisdiction. *See* 28 U.S.C. § 1446(b)(3) (authorizing removal "within 30 days after receipt by the defendant ... of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable"); *see also Parish of Plaquemines v. Chevron USA, Inc.*, 7 F.4th 362, 365 (5th Cir. 2021); *Chaganti & Assocs., P.C. v. Nowotny*, 470 F.3d 1215, 1220–21 (8th Cir. 2006). Until then, however, I am duty bound to agree that this lawsuit does not "aris[e] under" federal law. 28 U.S.C. § 1331.

All Citations

--- F.4th ----, 2023 WL 2607545

Footnotes

1 American Petroleum Institute, Exxon Mobil Corporation, ExxonMobil Oil Corporation, Koch Industries, Flint Hills Resources LP, and Flint Hills Resources Pine Bend.

2 The Honorable John R. Tunheim, then Chief Judge, United States District Court for the District of Minnesota.

3 Minn. Stat. §§ 325D.44(1), 325F.67, 325F.69(1).

4 This principle has also been described as artful pleading, which occurs when a plaintiff disguises federal claims as state ones. *See* 14C Wright et al., *Federal Practice & Procedure* § 3722.1 (artful pleading). 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. *See generally* *Johnson* v. *Humphreys*, 949 F.3d 413 (8th Cir. 2020); *In re Otter Tail Power Co.*, 116 F.3d 1207 (8th Cir. 1997).

5 Some of our sister circuits have addressed both whether the Clean Air Act displaced federal common law on transboundary pollution, *Baltimore III*, 31 F.4th at 204, and whether the Clean Air Act preempts state-law claims seeking to recover damages for the effects of climate change, *Boulder III*, 25 F.4th at 1265. We decline to reach either question. Unlike in those cases, the Energy Companies didn't raise the CAA as a basis for complete preemption here. And, even assuming that federal common law still exists in this space, it doesn't completely preempt Minnesota's claims for the reasons explained below.

6 Though failure to warn under Minnesota law does require the involvement of a *dangerous* product, it does not require a court to determine whether a product is unreasonably dangerous or opine on whether it should be sold generally. *See, e.g.*, *Glorvigen v. Cirrus Design Corp.*, 816 N.W.2d 572, 582 (Minn. 2012) (explaining that the duty to warn consists of "two duties: (1) the duty to give adequate instructions for safe use; and (2) the duty to warn of dangers inherent in improper usage." (citation omitted) (cleaned up)).

7 *See Maps: Oil and Gas Exploration, Resources, and Production*, U.S. ENERGY INFO. ADMIN., https://www.eia.gov/maps/maps.htm (compiling maps of oil production sites in the United States). The Complaint lists some of these other drilling locations, which include sites in Canada and North Dakota. Appx. at 28.

8 *See* *In re Deepwater Horizon*, 745 F.3d 157, 163–64 (5th Cir. 2014) (finding removal jurisdiction over a lawsuit to recover damages to wildlife caused by the blowout of an OCS drilling rig); *Barker v. Hercules Offshore, Inc.*, 713 F.3d 208, 213 (5th Cir. 2013) (finding removal jurisdiction over a lawsuit involving the death of an OCS rig worker in a workplace accident); *Tenn. Gas Pipeline v. Hous. Cas. Ins. Co.*, 87 F.3d 150, 155 (5th Cir. 1996) (finding removal jurisdiction over claims resulting from a ship allision with an OCS oil rig platform); *EP Operating Ltd. P'ship v. Placid Oil Co.*, 26 F.3d 563, 567–68 (5th Cir. 1994) (exercising original jurisdiction over a lawsuit seeking to partition property located on the OCS); *Amoco Prod. Co. v. Sea Robin Pipeline Co.*, 844 F.2d 1202, 1210 (5th Cir. 1988) (finding removal jurisdiction over a contract dispute involving natural gas extracted from OCS wells); *Laredo Offshore Constructors, Inc. v. Hunt Oil Co.*, 754 F.2d 1223, 1227 (5th Cir. 1985) (exercising original jurisdiction over a contract dispute involving construction of a stationary offshore platform on the OCS).

9 The parties do not dispute that the Energy Companies are "persons" under § 1442.

10 That section, as amended, reads:

> (a) A civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> > (1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

28 U.S.C. § 1442(a)(1) (amended 2011) (strikethrough denoting deletion; underline denoting addition).

11 We note that Minnesota has no nuisance claim in its complaint. The federal common law applies to suits "brought by one State to abate pollution emanating from another state." *Am. Elec. Power Co.*, 564 U.S. at 421, 131 S.Ct. 2527 (collecting cases). We believe that a nuisance claim creates a stronger case for federal jurisdiction, and as the claims move away from "abat[ing] pollution emanating from another state," the case becomes weaker. *Am. Elec. Power Co.*, 564 U.S. at 421, 131 S.Ct. 2527; *see* *In re Otter Tail Power Co.*, 116 F.3d 1207, 1214 (8th Cir. 1997). *But see* *Hoboken*, 45 F.4th at 712 (holding that City's nuisance claim was still "too far away from Shelf oil production.").

12 Because the Energy Companies fail the first and second prongs of federal officer removal, we do not address whether they have a colorable federal defense.

13 "The doctrine of *parens patriae* allows a sovereign to bring an action on behalf of the interest of all of its citizens." *United States v. Santee Sioux Tribe of Neb.*, 254 F.3d 728, 734 (8th Cir. 2001) (citing *Louisiana v. Texas*, 176 U.S. 1, 19, 20 S.Ct. 251, 44 L.Ed. 347 (1900)).

14 Although at times we have described the artful-pleading doctrine as "limited" to complete preemption, *M. Nahas & Co. v. First Nat'l Bank of Hot Springs*, 930 F.2d 608, 612 (8th Cir. 1991), it is best understood as an umbrella term that applies whenever the complaint obscures the suit's federal nature, *see* Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3722.1 (4th ed. 2022); *see also* *Ohio ex rel. Skaggs v. Brunner*, 629 F.3d 527, 532 (6th Cir. 2010) (recognizing that the description might apply when "federal issues necessarily must be resolved to address the state law causes of action").

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