No. 22-821

IN THE
Supreme Court of the United States

BP AMERICA INC., ET AL.,
Petitioners,
v.
STATE OF DELAWARE,
Respondent.

CHEVRON CORPORATION, ET AL.,
Petitioners,
v.
CITY OF HOBOKEN,
Respondent.

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

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

The disclosure statement included in the petition remains accurate.

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INTRODUCTION

The decision below deepens a longstanding conflict on the question whether federal removal jurisdiction exists over claims that are necessarily and exclusively governed by federal law but have been pleaded under state law. It also implicates a second conflict concerning whether claims based on transboundary emissions are necessarily and exclusively governed by federal law. Both questions have arisen with particular frequency in the numerous and materially identical climate-change cases now pending in courts across the Nation.

The need for this Court's guidance on these vital questions has become even clearer since this petition was filed in February. In March, the United States filed its *amicus* brief in *Suncor Energy (U.S.A.) Inc.* v. *Board of County Commissioners of Boulder County*, No. 21-1550—another climate-change case raising the same legal questions—and expressly reversed the position it took on those questions only *two years ago*, citing the "change in Administration." U.S. *Suncor* Br. 7.

Previously, the government told this Court that claims seeking damages for injuries allegedly caused by the effects of transboundary emissions on the global climate "are inherently federal in nature," even when labeled as state-law claims. Oral Arg. Tr. 31, *BP p.l.c.* v. *Mayor & City Council of Baltimore*, 141 S. Ct. 1532 (2021). And the government explained that, despite the Clean Air Act's displacement of any remedy under federal common law, "[a]ny putative tort claims that seek to apply the law of an affected State to conduct in another State … continue to arise under

federal, not state law, for jurisdictional purposes." U.S. Br. 27, *BP*, *supra* (cleaned up). Now, the government has repudiated that position. It argues that the well-pleaded complaint rule bars removal of these nominal state-law claims and that due to displacement by the Clean Air Act, federal law may no longer exclusively govern claims alleging injury from transboundary emissions. *See* U.S. *Suncor* Br. 7–16.

That the past two administrations have taken diametrically opposed positions on these fundamental and important questions confirms that these cases raise substantial and unresolved legal issues requiring this Court's urgent review. Indeed, in late March, one prominent circuit judge noted in yet another climate-change case that these cases "seek[] a global remedy for a global issue"; the narrow views of federal jurisdiction urged by the government and respondents here would force "the removal rules to operate in … a confounding way"; and "only … [this] Court" can resolve these issues. *Minnesota* v. *Am. Petroleum Inst.*, 63 F.4th 703, 717, 720 (8th Cir. 2023) (Stras, J., concurring).

Respondents here make the same arguments as the United States in *Suncor*, asserting that the government's reasoning "applies equally to this petition." Delaware Opp. 2; *see also* Hoboken Opp. 5 (same). As in *Suncor*, these arguments are unpersuasive.

First, respondents spend much of their briefs arguing the merits of the case, insisting that claims for injuries stemming from transboundary emissions are not governed by federal law and that, even if they were, such claims are not removable if artfully pleaded under state law. Respondents are wrong on

both counts. But, more importantly, these merits arguments do nothing to undercut the need for this Court's review.

Respondents also argue that the Third Circuit's decision does not conflict with the decisions of any other circuits. But the court below expressly recognized the conflict among the circuits on the removability question and declined to "follow" "two circuit cases that relabeled state-common-law claims as federal." App. 25a.

Finally, respondents attempt to downplay the importance of the question presented. But identical claims are pending in dozens of lawsuits across the country, with more potentially on the way, so this Court's decision will have a dramatic effect on nationwide litigation concerning matters that implicate national security and international policy.

Given the overlap between this petition and *Suncor*, the Court should hold the petition pending a decision on the petition in *Suncor*. The petition in *Suncor* should be granted because the questions presented in these cases have divided the courts of appeals and will determine whether state courts have the power to impose the costs of global climate change on the Nation's energy industry. Alternatively, this petition should be granted.

I. THE THIRD CIRCUIT'S DECISION IMPLICATES TWO CONFLICTS AMONG THE COURTS OF APPEALS.

Respondents contend that the decision below implicates no circuit conflicts, rehashing the same arguments made by the *Suncor* respondents. Those arguments remain invalid.

First, respondents contend that no conflict exists over the scope of arising-under jurisdiction (Delaware Opp. 12–17; Hoboken Opp. 12–18) because *Sam L. Majors Jewelers* v. *ABX, Inc.*, 117 F.3d 922 (5th Cir. 1997), and *In re Otter Tail Power Co.*, 116 F.3d 1207 (8th Cir. 1997), were decided before this Court issued its decision in *Grable & Sons Metal Products, Inc.* v. *Darue Engineering & Manufacturing*, 545 U.S. 308 (2005). Respondents suggest that *Grable* synthesized the approaches of those two cases and thereby tacitly overruled them. That characterization is incorrect.

The Fifth Circuit in *Sam L. Majors* did not cite any of the precursors to *Grable* in concluding that federal jurisdiction was present; rather, it relied on two of this Court's cases involving federal common law, *see* 117 F.3d at 926 (citing *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 100 (1972) ("*Milwaukee I*"), and *Nat'l Farmers Union Ins. Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845, 850 (1985)), the same cases that petitioners have relied on here, *see* Pet. 11, 19, 23, 24. The Fifth Circuit's decision thus stands apart from the *Grable* line of precedent and articulates an independent basis for federal jurisdiction. Respondents' contention that no conflict exists is incorrect given that the court below expressly refused to "follow" *Sam L. Majors*, recognizing that the Fifth Circuit's decision conflicted with its own. App. 25a. Respondents' interpretation of the Fifth Circuit's decision as inapplicable to their claims is thus unsupportable.

As for the Eighth Circuit's decision, while *Otter Tail* briefly mentioned jurisdiction based on the presence of a "substantial question of federal law," 116 F.3d at 1213, it ultimately relied on the same precedent from this Court involving federal common law to

find that removal was appropriate, *see id*. at 1214 (citing *Nat'l Farmers Union*, 471 U.S. at 852).

Moreover, respondents' characterization of *Sam L. Majors* and *Otter Tail* as implicitly overruled would not eliminate the conflict with the panel's opinion here, because under the modern *Grable* framework, both circuits would still permit removal of respondents' claims. After all, if respondents' claims are exclusively federal in nature, as petitioners have shown, it follows that federal substantive law governs every element of respondents' claims, which means that each element presents a substantial question of federal law, thereby satisfying *Grable*.

The same is true of the other cases on which petitioners rely that used a *Grable*-like analysis. *See* Pet. 13–14 (citing *Newton* v. *Capital Assurance Co*., 245 F.3d 1306 (11th Cir. 2001); *Torres* v. *S. Peru Copper Corp*., 113 F.3d 540 (5th Cir. 1997); *Republic of Philippines* v. *Marcos*, 806 F.2d 344 (2d Cir. 1986)). Respondents attempt—but fail—to distinguish these cases on the facts (Hoboken Opp. 15–16, 18–19) because all of these cases recognized the applicability of *Grable* to claims necessarily raising questions of federal common law, as here. The Third Circuit, however, held the exact opposite—its conflict with those cases is therefore unambiguous. *See* App. 26a–27a.

Second, respondents argue that no conflict exists over the question whether federal law necessarily and exclusively governs claims for injuries allegedly stemming from transboundary emissions (Delaware Opp. 17–20; Hoboken Opp. 19–23) because the Second Circuit's decision in *City of New York* v. *Chevron Corp.*,

993 F.3d 81 (2d Cir. 2021), did not involve a case removed from state to federal court. But as previously explained (Pet. 21–22), that distinction is irrelevant because both cases squarely addressed the question whether federal law governs claims such as those asserted here. That the Second Circuit did not need to consider the well-pleaded complaint rule does not eliminate the circuit conflict over the question of which substantive law governs these types of transboundary-emissions claims.

Respondents also contend that *City of New York* "did not hold that federal common law still 'governs' all civil cases involving air pollution," but instead used "the defunct federal common law" to inform its understanding of the Clean Air Act's preemptive scope. Delaware Opp. 21. But the Second Circuit expressly concluded that, although the plaintiff used state-law labels, it had brought "federal claims" that must arise "under federal common law"; indeed, the court viewed the case as "simply beyond the limits of state law." *City of New York*, 993 F.3d at 92, 95. The Second Circuit further held that the Clean Air Act's displacement of any remedy under federal common law did not affect the choice-of-law analysis because state law is not "competent to address issues that demand a unified federal standard." *Id.* at 98.

What is more, the Second Circuit concluded that federal common law is "still require[d]" to govern the international aspects of claims challenging undifferentiated global emissions, because the Clean Air Act "does not regulate foreign emissions." 993 F.3d at 95 n.7; *see id.* at 101. *City of New York* can thus only be understood to hold that federal common law continues

to govern in this area, even after the enactment of the Clean Air Act.

Finally, respondents argue that their allegations here "target qualitatively different tortious conduct than those before the Second Circuit." Delaware Opp. 21–22. That is not correct. The claims in *City of New York* are nearly identical to those here. The plaintiff in *City of New York*, like respondents here, argued that the defendants were liable for "nuisance and trespass" because "for decades, Defendants promoted their fossil-fuel products by concealing and downplaying the harms of climate change [and] profited from the misconceptions they promoted." Br. for Appellant at 27, *City of New York* v. *Chevron Corp.*, No. 18-2188, 2018 WL 5905772 (2d Cir. Nov. 8, 2018).

The Second Circuit, however, saw through those allegations to the substance of the claims. As that court concluded, the City of New York's attempt to "focus on" one particular "moment in the global warming lifecycle is merely artful pleading and does not change the substance of its claims." *City of New York*, 993 F.3d at 97 (cleaned up). The Second Circuit recognized that the City's "case hinge[d] on the link between the release of greenhouse gases and the effect those emissions have on the environment generally," given that "the City d[id] not seek any damages for the [defendants'] production or sale of fossil fuels that d[id] not in turn depend on harms stemming from emissions." *Ibid.*

The same is true here: respondents are attempting to collect damages for the alleged effects of global climate change allegedly caused by the combustion of petitioners' products and other sources of emissions. *Delaware* C.A. JA-429–30, 447–48; *Hoboken* C.A. JA-

66–79. The court below recognized that respondents "take issue with [petitioners'] entire business, from production through sale," and although respondents "try to cast their suits as just about misrepresentations[,] … their own complaints belie that suggestion. They charge the oil companies with not just misrepresentations, but also trespasses and nuisances. Those are caused by burning fossil fuels and emitting carbon dioxide." App. 33a. In all material respects, the plaintiff's claims in *City of New York* mirror respondents' claims here.

II. THE DECISION BELOW IS INCORRECT.

Respondents devote much of their opposition briefs to arguing the merits of the cases. But respondents' arguments, which repeat the same fundamental errors as the *Suncor* respondents, all fail.

First, respondents argue that petitioners seek to "create a new exception" to the well-pleaded complaint rule. Delaware Opp. i; *see also id.* at 22–23; Hoboken Opp. 26, 32–33. Not so. The Court has already held that an "independent corollary" of the well-pleaded complaint rule is that a plaintiff "may not defeat removal" by "omitting to plead necessary federal questions in a complaint." *Franchise Tax Bd.* v. *Constr. Laborers Vacation Tr.*, 463 U.S. 1, 22 (1983). A federal question is "necessary" under that corollary where, as here, the constitutional structure mandates the exclusive application of federal law.

Respondents warn that this supposed "new exception" would "explo[de]" this Court's removal precedents. Hoboken Opp. 32–33. But there is no "new exception" at issue here. Petitioners rely on the well-

established artful-pleading doctrine in a context already recognized by this Court—where federal law controls a plaintiff's nominally state-law claims. *See Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 393 n.8 (1987) (citing *Oneida Indian Nation* v. *Cnty. of Oneida*, 414 U.S. 661, 675 (1974)).

Respondents also contend that no element of their nominally pleaded state-law claims turns on a question of federal law. Delaware Opp. 24–26; Hoboken Opp. 27, 31–32. But *every* element of respondents' claims is federal because federal law necessarily and exclusively governs when a claim "involv[es] interstate air … pollution," *City of New York*, 993 F.3d at 91, or "'deal[s] with air'" in its "'interstate aspects,'" *Am. Elec. Power Co.* v. *Connecticut*, 564 U.S. 410, 421 (2011) (quoting *Milwaukee I*, 406 U.S. at 103). The "basic interests of federalism … demand[]" this result. *Milwaukee I*, 406 U.S. at 105 n.6. Thus, under our federal system, "state law cannot be used" at all to resolve a controversy of this kind. *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 313 n.7 (1981). Rather, the "rule of decision [must] be[] federal," and the claims thus necessarily "arise[] under federal law." *Milwaukee I*, 406 U.S. at 100, 108 n.10 (cleaned up).

Next, respondents argue that the artful-pleading doctrine is limited to statutory complete preemption. Delaware Opp. 23–24. But the Court has never limited the artful-pleading doctrine in this way. *See* Pet. 25–26. To the contrary, the Court has already recognized that federal common law can function in the same way as completely preemptive statutes for jurisdictional purposes, holding that a "state-law complaint that alleges a present right to possession of Indian tribal lands" was necessarily governed by federal

common law and "is thus completely pre-empted and arises under federal law." *Caterpillar*, 482 U.S. at 393 n.8 (citing *Oneida Indian Nation*, 414 U.S. at 675). The same principle applies here, where the constitutional structure requires the exclusive application of federal law to respondents' claims. *See* Pet. 23–24.

Respondents insist that petitioners' theory of removal based on federal common law boils down to a preemption defense. Hoboken Opp. 29–31. But the merits-stage question whether a party can obtain a remedy under federal common law is distinct from the jurisdictional question whether the claim arises under federal law in the first place. The Court highlighted that distinction in *Oneida Indian Nation*, explaining that a claim governed by federal common law arises under federal law for "jurisdictional purposes" even if the claim "may fail at a later stage for a variety of reasons." 414 U.S. at 675.

Finally, respondents suggest that their claims involve only a routine adjudication of "deceptive marketing and sales of a dangerous product." Hoboken Opp. 35. But this mischaracterizes the complaint. Respondents' theory of causation, their alleged injuries, and their requested remedies all depend on worldwide atmospheric emissions allegedly producing global climate change, Pet. 7–8, and "a mostly unbroken string of cases has applied federal law to disputes involving interstate air or water pollution," *City of New York*, 993 F.3d at 91.

III. THE QUESTION PRESENTED IS IMPORTANT AND WARRANTS THE COURT'S REVIEW.

These cases present a straightforward vehicle for the Court to resolve two related conflicts about the

scope of federal jurisdiction. Respondents argue that review is not warranted because these issues are "extremely narrow" and affect "only ... a tiny sliver of cases." Delaware Opp. 26; Hoboken Opp. 23–24. Neither argument withstands scrutiny.

Respondents' assertion that the questions in these cases are "not broadly applicable or common" (Delaware Opp. 26) ignores both the current cases concerning these issues and the many more that will potentially be filed if the Court does not act here. The question presented is of vital importance in the nearly two dozen climate-change cases—each of which seeks vast monetary relief from the energy industry—currently pending in courts across the country, because it concerns the central question of where the cases will be litigated. *See* Pet. 6 & n.1. A rule of decision foreclosing removal of cases concerning transboundary emissions would open the door to countless more suits brought by States and municipalities seeking to regulate climate change through state law in state courts. Pet. 26.

Moreover, the question presented here could arise in *any* case in which federal common law provides the rule of decision but the plaintiff chooses to label its claims as arising under state law. And contrary to respondents' assertions (Delaware Opp. 28), these cases implicate vital national security concerns because of petitioners' central role in ensuring a steady supply of oil and gas for domestic use and to support the U.S. military. Pet. 30. Respondents highlight the government's opposition to this Court's review in *Suncor* as evidence that no national interest is implicated (Delaware Opp. 28), but the government's brief is notably

silent on this point and does not deny these questions' vital importance.

These cases are also an excellent vehicle to resolve both conflicts among the courts of appeals. Although the Third Circuit did not squarely hold that state law can govern respondents' transboundary-emissions claims, the jurisdictional question presented implicates that threshold issue, which has been fully briefed by the parties, Pet. 17; Hoboken Opp. 25–26; Delaware Opp. 20–21, and is the subject of a mature conflict, Pet. 17–22.

Finally, the United States' unusual about-face on the present issues itself underscores that these questions are uncertain, unresolved, and important—and signals the need for this Court's intervention.

CONCLUSION

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

Respectfully submitted.

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