Case No. 15-30162

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BOARD OF COMMISSIONERS OF THE SOUTHEAST LOUISIANA FLOOD PROTECTION AUTHORITY–EAST; ORLEANS LEVEE DISTRICT; LAKE BORGNE BASIN LEVEE DISTRICT; EAST JEFFERSON LEVEE DISTRICT,

Plaintiffs-Appellants,

v.

TENNESSEE GAS PIPELINE COMPANY, L.L.C.; ALTA MESA SERVICES, L.P.; ANADARKO E&P ONSHORE, L.L.C.; APACHE CORPORATION; ATLANTIC RICHFIELD COMPANY; BEPCO, L.P.; BOARDWALK PIPELINE PARTNERS, L.P.; BOPCO, L.P.; BP AMERICA PRODUCTION COMPANY; BP OIL PIPELINE COMPANY; CALLON OFFSHORE PRODUCTION, INCORPORATED; CALLON PETROLEUM COMPANY; CASKIDS OPERATING COMPANY; CENTERPOINT ENERGY RESOURCES CORPORATION; CHEVRON PIPELINE COMPANY; CHEVRON USA, INCORPORATED; CLAYTON WILLIAMS ENERGY, INCORPORATED; CLOVELLY OIL COMPANY, L.L.C.; COASTAL EXPLORATION AND PRODUCTION, L.L.C.; COLLINS PIPELINE COMPANY; CONOCOPHILLIPS COMPANY; CONTINENTAL OIL COMPANY; COX OPERATING, L.L.C.; CRAWFORD HUGHES OPERATING COMPANY; DALLAS EXPLORATION, INCORPORATED; DAVIS OIL COMPANY; DEVON ENERGY PRODUCTION COMPANY, L.P.; ENERGEN RESOURCES CORPORATION; ENTERPRISE INTRASTATE, L.L.C.; EOG RESOURCES, INCORPORATED; EP ENERGY MANAGEMENT, L.L.C.; EXXON MOBIL CORPORATION; EXXON MOBIL PIPELINE COMPANY; FLASH GAS & OIL NORTHEAST, INCORPORATED; GRAHAM ROYALTY, LIMITED; GREKA AM, INCORPORATED; GULF PRODUCTION COMPANY, INCORPORATED; GULF SOUTH PIPELINE COMPANY, L.P.; HELIS ENERGY, L.L.C.; HELIS OIL & GAS COMPANY, L.L.C.; HESS CORPORATION, a Delaware Corporation; HILLIARD OIL & GAS, INCORPORATED; HKN, INCORPORATED; INTEGRATED EXPLOR-

(caption continued on inside cover)

ATION & PRODUCTION, L.L.C.; J.C. TRAHAN DRILLING CONTRACTOR, INCORPORATED; J.M. HUBER CORPORATION; KENMORE OIL COMPANY, INCORPORATED; KEWANEEINDUSTRIES, INCORPORATED; KOCH EXPLORATION COMPANY, L.L.C.; KOCH INDUSTRIES, INCORPORATED; LIBERTY OIL & GAS CORPORATION; LLOG EXPLORATION COMPANY; MANTI OPERATING COMPANY; MARATHON OIL COMPANY; McMORAN EXPLORATION COMPANY; MOEM PIPELINE, L.L.C.; MOSBACHER ENERGY COMPANY; NATURAL RESOURCES CORPORATION OF TEXAS; NEWFIELD EXPLORATION GULF COAST, L.L.C.; NOBLE ENERGY, INCORPORATED; O'MEARA, L.L.C.; P. R. RUTHERFORD; PLACID OIL COMPANY; PLAINS PIPELINE, L.P.; PXP PRODUCING COMPANY, L.L.C.; REPUBLIC MINERAL CORPORATION; RIPCO, L.L.C.; ROZEL OPERATING COMPANY; MURPHY EXPLORATION & PRODUCTION COMPANY, USA; SENECA RESOURCES CORPORATION; SHELL OIL COMPANY; SOUTHERN BAY ENERGY, L.L.C., also known as HK Energy, L.L.C.; SOUTHERN NATURAL GAS COMPANY, L.L.C.; SUN OIL COMPANY; SUNDOWN ENERGY, L.P.; UNION OIL COMPANY OF CALIFORNIA; WHITING OIL & GAS CORPORATION; WILLIAMS EXPLORATION COMPANY; YUMA EXPLORATION AND PRODUCTION COMPANY, INCORPORATED; MERIDIAN RESOURCE & EXPLORATION, L.L.C.; PICKENS COMPANY, INCORPORATED; ESTATE OF WILLIAM G. HELIS; LOUISIANA LAND AND EXPLORATION COMPANY, L.L.C. MARYLAND; KAISER-FRANCIS OIL COMPANY; BP PIPELINES (NORTH AMERICA) INC.; VINTAGE PETROLEUM, L.L.C., DELAWARE; ENLINK LIG, L.L.C.,

Defendants-Appellees.

On Appeal from the Judgment of the United States
District Court for the Eastern District of Louisiana,
No. 2:13-cv-05410, Hon. Nannette J. Brown

BRIEF FOR AMICUS CURIAE
THE CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA
SUPPORTING APPELLEES AND AFFIRMANCE

Kate Comerford Todd
U.S. CHAMBER LITIGATION
CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Evan A. Young
Counsel of Record
Carlos R. Romo
BAKER BOTTS L.L.P.
98 San Jacinto Boulevard
Suite 1500
Austin, Texas 78701
Telephone: (512) 322-2506
Facsimile: (512) 322-8306
evan.young@bakerbotts.com

Counsel for Amicus Curiae
The Chamber of Commerce of the United States of America

October 5, 2015

SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

No. 15-30162

Board of Commissioners of the Southeast Louisiana Flood Protection Authority et al. v. Tennessee Gas Pipeline Co. L.L.C., et al.

The undersigned counsel of record for *amicus curiae* certifies that the following listed persons and entities as described in the fourth sentence of this Court's Rule 28.2.1 have an interest in the outcome of this case in addition to those already identified in the certificates appearing in the opening briefs of the parties. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

- The Chamber of Commerce of the United States of America
- Baker Botts L.L.P.
- Kate Comerford Todd
- Evan A. Young
- Carlos R. Romo

Dated: October 5, 2015 *____/s/ Evan A. Young____*

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INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America (Chamber) is the nation's largest federation of businesses and associations. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million U.S. businesses and professional organizations of every size, in every geographic region, and from every economic sector, including the oil-and-gas industry. The Chamber represents its members and their interests in part by filing *amicus curiae* briefs in state and federal courts on important issues of national concern.[1]

This case qualifies as one of immense national importance. It asks if plaintiffs can sue entire industries in state court to replace the outputs of an extensive and carefully-calibrated federal regulatory regime with results the plaintiffs prefer. Such an unworkable result would be disastrous for industry, the public, and the integrity of federal law. If federal programs can be dismantled and reassembled through state tort law, the regulated community could not know its regulatory obligations with any reasonable degree of certainty. This, in turn, would deter citizens and businesses from undertak-

[1] All parties, through their counsel of record, have given consent that this *amicus* brief be filed. No party or counsel for any party authored this brief in whole or in part or otherwise contributed monetarily towards its preparation or submission. No other person other than the *amicus*, its members, or its counsel contributed monetarily towards the preparation or submission of this brief.

ing endeavors that the federal program intends to *encourage*. The problem is exacerbated by the specter of a 50-state patchwork of inconsistent requirements, varying from place to place and case to case. The availability of federal courts to adjudicate cases that challenge a federal regulatory scheme, including cases initially brought in state court, serves as a bulwark against just such a patchwork.

For these reasons, the underlying questions—both jurisdiction and merits—are of exceptional significance to the Chamber's members and the public, and the Chamber respectfully submits this brief.

SUMMARY OF ARGUMENT

The district court properly found that it had jurisdiction over this case and that, in its entirety, the lawsuit should be dismissed for failing to state a claim. The jurisdictional and merits questions in this case largely turn on the same crucial feature: This lawsuit seeks to use *state-court* process to adjust the results of a complex, nationwide regulatory system with carefully-delineated and calibrated roles for both federal and state regulators, invoking a trio of federal statutes concerning coastal land management and national energy policy. These are federal matters for federal courts to address. And the claims brought by the Board (as *amicus* refers to Appellants, the plaintiffs below) should be dismissed. They are displaced by the

existence of a congressionally-mandated regulatory system that speaks to the Board's concerns.

1. This suit targets the oil-and-gas industry as a whole, and asks state courts to commandeer the federally designed regulatory program by directing specific, substantive policy results for collective, industry-wide compliance. The district court rightly viewed the suit as a "collateral attack" in state court that specifically targets the outputs of the federal regulatory process. ROA.2365. Nor are "coastal land management, national energy policy, and national economic policy" trivial concerns—they are "vital federal interests." ROA.2364. Claims central to a carefully-calibrated and extensive regulatory program established to protect important federal interests belong in federal court.

Such state-court collateral attacks would fundamentally distort the careful balancing of competing alternatives that generated the need for the national system in the first place. If state courts *do* order the relief the Board demands, the repercussions would extend throughout the overall system; that is the nature of a nationally important, highly reticulated regulatory program. These effects would directly affect the entities, like *amicus*'s members, who are comprehensively regulated via the complex thicket of federal environmental and energy standards. They should be able to rely

on federal courts to protect their rights and clarify their obligations under the federal programs at issue.

2. Federal law wholly displaces the Board's claims. As the Supreme Court has explained in comparable circumstances, an extensive and carefully-calibrated regulatory regime administered by expert agencies leaves no room for tinkering by judges and juries in tort suits. Courts address the regulatory sphere in cases that are properly presented for judicial review of administrative actions or when Congress authorizes citizen suits. A lawsuit alleging that specific defendants caused some specific, unauthorized harm may be a proper tort suit (and possibly in state court). But this case seeks to impose new substantive standards on an entire industry. That is what regulators or legislatures do. These claims are therefore displaced, and the district court correctly dismissed all claims.

ARGUMENT

The Board's lawsuit challenges the policy outcomes of complex, sensitive, and carefully calibrated federal regulatory programs—here, the extensive regulation and protection of coastal lands from erosion and environmental harm, alongside federal rules and requirements for the energy industry. This regulatory program allows the nation's energy needs to be met without unduly threatening other important interests. As in any complex

system, maximizing benefits requires prioritizing competing goals. This decision-making has been assigned in the first instance to expert regulatory agencies, whose resolution of conflicting demands inevitably leaves someone (occasionally everyone) unhappy.

Those who are unhappy may seek change through the federal regulatory process—sometimes including statutorily authorized litigation in federal court. But plaintiffs may not seek that systemic change through state-court tort suits.

I. Federal courts have jurisdiction over cases, like this one, where substantial federal questions and interests are central to the allegations and the demanded relief.

This lawsuit "sensibly belongs in a federal court." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 315 (2005). Appellees have thoroughly and correctly explained how the four-prong *Grable* framework brings this case within federal jurisdiction, *see* Appellees Br. 10-26, and the Chamber will not duplicate that discussion.[2] Rather, it seeks to emphasize two points. First, *Grable*'s inquiry is eminently practical; when it would threaten important federal interests if a case were kept out of fed-

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[2] That is, the Board's claims (1) necessarily raise a federal issue that (2) is actually disputed and (3) substantial, and (4) federal jurisdiction over them would not disturb the congressionally approved balance of federal and state responsibilities. *See Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005).

eral court, *Grable*'s tests will almost certainly be satisfied. Second, the Board's purportedly contrary cases are readily distinguishable precisely because they did *not* involve the kind of crucial federal interests at stake here.

A. The Board's claims arise under federal law.

1. Substantial federal interests are at stake.

The federal interests in this case are not only important, but pervasive. There are, as the district court put it, "important federal interests in coastal land management, sound energy policy, and developing natural resources." ROA.2359. National oversight of "coastal land management, national energy policy, and national economic policy" are, it explained, "vital federal interests." ROA.2364. The Board itself has both acknowledged and relied upon the multiple federal statutes that together form the extensive regulatory framework that governs industry participation in energy production and transportation. *See, e.g.*, Board Br. 32-34 (quoting provisions of three major federal statutes); ROA.2289, ROA.2364 (district court opinion discussing Board's arguments). It seeks to obtain state-court relief against a nationwide industry and to compel the backfilling of federally-regulated waters.

Congress has determined that managing this complicated area requires carefully balancing ecological and economic interests, among other concerns. For instance, Congress established in the Coastal Zone Manage-

ment Act "that it is the national policy to encourage . . . the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone, giving full consideration to ecological, cultural, historic, and esthetic values as well as the needs for compatible economic development," 16 U.S.C. § 1452(2). Congress also declared a national interest in establishing "a long-term balance between resource production, energy use, a healthy environment, natural resources conservation, and social needs." 30 U.S.C. § 1602.[3] Federal court review is essential to facilitate uniform application of the comprehensive regulatory scheme.

These national goals, therefore, led to a regulatory framework where federal uniformity is not only desirable but indispensable and urgent. A permittee, for instance, could spend significant resources conducting the necessary engineering and environmental reviews to obtain a dredge-and-fill permit, implementing conservation measures pursuant to requirements in the permit, and mitigating for environmental impacts. *See* Board Br. 33 (citing permit requirements under the Clean Water Act). Yet the permittee

[3] Many other statutes relevant to the issues at play in this case make similar policy declarations. The Natural Gas Act, for instance, makes "transporting and selling natural gas" a matter of national "public interest" requiring "Federal regulation in matters relating to the transportation of natural gas and sale thereof . . . ." 15 U.S.C. § 717(a).

could never reasonably rely on its federal permit if its terms and implementation could be collaterally attacked at any time via *ad hoc* state tort claims, thereby destabilizing the delicate balance reached by the federal regulatory regime. The state-court injunctive relief that the Board seeks could not help but upset that equation—indeed, doing so is the *entire purpose* of the proposed injunction.

2. *Grable* and subsequent cases extend jurisdiction to cases like this one.

The chief lesson of *Grable* is that a case that inevitably implicates such important federal questions and interests is properly removed to federal court. The Supreme Court's post-*Grable* cases—*Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677 (2006), and *Gunn v. Minton*, 133 S. Ct. 1059 (2013)—confirm that lesson by highlighting the sorts of disputes that are *not* substantial to the Federal Government itself. This case comfortably fits within *Grable*.

a. *Grable* traces from a long line of Supreme Court precedents that have sought, with famous difficulty, to circumscribe federal arising-under jurisdiction to proper cases. *See, e.g.*, Fallon et al., Hart & Wechsler's The Federal Courts and The Federal System 831-37 (7th ed. 2015) (discussing the complexities of "arising under" jurisdiction for state-law causes of action). No one disputes that the district courts have jurisdic-

tion, originally or through removal, over "only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 27-28 (1983).

This encapsulated test—which *Grable* and subsequent cases have refined—lies at the core of why removal was proper here: The Board's complaint is wholly dependent on the allocation of responsibility by, and the substantive outputs of, federal environmental and energy law. At stake is not only the functioning of the national regulatory systems described above, but also whether attacks on the results of those systems ought to proceed in in state courts.

b. Finding federal jurisdiction here satisfies the principle that substantiality turns "not on the interests of the litigants themselves, but rather on the broader significance of the [litigated] question for the Federal Government." *Gunn*, 133 S. Ct. at 1066. The federal interest in stable administration of the pervasive federal regulatory programs at issue here (and in determining the balance of power between federal agencies and state courts) is paramount. This case is not merely about the individual defendants' own interests, as important as they are. As the district court noted,

"although this matter is a single case, it affects an entire industry, not just a few isolated parties." ROA.2365. That broad scope is itself indicative of the substantial federal interest.

The overriding federal interest here is what makes this case far more like *Grable* (where jurisdiction was found) than *Gunn* or *Empire Healthchoice* (where it was not). In *Grable*, the Court recognized that the Government had a "'strong interest' in being able to recover delinquent taxes through seizure and sale of property, which in turn 'require[d] clear terms of notice to allow buyers . . . to satisfy themselves that the [IRS] has touched the bases necessary for good title.'" *Gunn*, 133 S. Ct. at 1066 (quoting *Grable*, 545 U.S. at 315). If the state court had deemed the IRS action deficient, and found that the original owner still owned the property seized and sold, it would amount to a potentially massive collateral attack on federal tax-collection standards used nationwide.

The next Term, the Court decided *Empire Healthchoice*, where a Plan (established pursuant to the Federal Employees Health Benefits Act of 1959, 5 U.S.C. § 8901 *et seq.*, to provide benefits for federal employees) had brought suit in federal court against a Plan beneficiary's estate. 547 U.S. at 682. Having previously paid benefits for care arising out of an injury, the Plan sought reimbursement from the beneficiary, who had won a money

judgment in a state-court tort suit. The Court rejected federal jurisdiction because the federal interests were attenuated, and—most importantly—the lawsuit did not raise significant questions *of law*, but was "fact-bound and situation specific." *Id.* at 701. It turned, for instance, on "whether particular services were properly attributed to the injuries caused by the 1997 accident and not rendered for a reason unrelated to the accident." *Id.* at 701. Thus, while the case mattered to the particular parties, the Court found no real threat to federal uniformity or the fulfillment of federal interests.

Finally, *Gunn* was a state-law malpractice action that involved a lawyer's allegedly inadequate representation of a client in a patent case. True, as in every legal malpractice claim, reexamination of the merits of the previous case would be inevitable. But the federal question (from the governmental perspective) was insubstantial, for whether the lawyer's services failed to measure up to reasonable professional standards *or not* would "not change the real-world result of the prior federal patent litigation." *Gunn*, 133 S. Ct. at 1067. The fundamentals of patent construction and enforcement were in no sense transferred to the Texas state court; there were no systemic consequences that extended beyond the private relationship between Gunn and Minton.

By contrast, the maintenance of coastal lands and related policies at

issue in this case—including the demand for physical changes to the federally mandated infrastructure—have outsized "significance for the federal system," *Gunn*, 133 S. Ct. at 1065. For that reason, this case is like *Grable* and quite unlike *Empire Healthchoice* and *Gunn*. The Board's suit (even if unsuccessful in state court) would bring enormous real-world legal consequences that, as in *Grable* but not the other cases, would be visited upon the federally managed regulatory programs governing coastal erosion, environmental protection, and energy production.

Federal jurisdiction is present here, in short, *not* merely because the Board invoked federal standards in a state-law tort case or because of some attenuated federal interest. Rather, this suit's inherent intrusion into the heart of sensitive federal regulatory terrain is what matters. Mine-run cases involving state tort actions (like *Gunn*, a malpractice claim that touched on federal patent law, or *Empire Healthchoice*, a subrogation claim that affected federal employees' benefits) will not always interfere with important federal programs or interests. This case does.

c. Courts have recognized that the need for uniformity and the importance of the federal government's own interest are typically aligned. *Gunn* acknowledged that *if* state court adjudication could "undermine the development of a uniform body of [federal] law," then the federal question

is more likely to be substantial for purposes of assessing arising-under jurisdiction. 133 S. Ct. at 1067 (internal quotation and punctuation omitted). But the state-court malpractice litigation would *not* be relevant to the development of patent law, and so it was insubstantial—and the need for uniformity was vastly diminished. In *Grable*, by contrast, uniformity was essential, because significant reliance interests across the Nation (not to mention the federal revenue resulting from tax sales) were implicated. *See* 545 U.S. at 312.

Uniformity cannot be achieved without, as a minimum threshold, access to federal court. "[I]f state courts interpret federal dredging permits and third-party beneficiary status inconsistently, permit holders could face different levels of liability in different jurisdictions, undermining the uniform application of federal law" and impeding the federal effort "to balance difficult environmental and economic considerations." ROA.2366-2367. Put another way, this litigation proceeding in state court would present far more immediate consequences for the operation of the federal system than those threatened in *Grable*. That case, after all, involved a far more discrete, less interconnected issue—IRS seizure and sales of property after using particular notice provisions. This case, however, "affects an entire industry," ROA.2365, and seeks to tinker with the mechanics of a unified sys-

tem. If *Grable* found the state-court litigation in that case weighty enough to justify removal, this case, *a fortiori*, must be removable too. Whatever the importance of uniformity was in *Grable*, this case has *at least* as great a need.

d. Additionally, the Board's use of a market-share liability theory in its 149-defendant suit has jurisdictional significance.[4] *Because* the suit is industry-wide, there can be no possible doubt that the suit implicates important federal interests. As the district court recognized, the suit is "a collateral attack" in state court "on an entire [federal] regulatory scheme"—an attack that specifically targets the substantive requirements and results of the extensive and carefully-delineated federal regulatory program. ROA.2365; *accord* ROA.2360 (this is "a suit by a state entity against the entire oil and gas industry for breach of permits approved by the Army Corps of Engineers and fundamental to the achievement of national environmental and energy policies" (internal quotation marks and citation omitted)). The Board essentially seeks to put the regulations that govern the entire industry on trial. So far as *amicus* is aware, no federal court has ever denied federal jurisdiction under like circumstances, as such a scenario necessarily implicates all the *Grable* factors.

[4] Separately, the Board's use of a market-share theory is fatal to its case on the merits. *See infra* Part II.B.

Even assuming *arguendo* the legitimacy of a market-share basis for liability, that would not change the *jurisdictional* analysis, as the case would still challenge the federal regulatory regime. After all, the Board's suit would reach *everyone* covered by the national regulatory framework—in other words, a duplication of regulatory reach. The injunctive relief would subject to state judicial control what previously was controlled via federal administrative oversight. The Board uses its market-share or enterprise-liability theory not as a litigation tool, but as a replacement for federal regulation itself. Courts have recognized how market-share liability verges into overt regulation even in traditional tort contexts. "The imposition of liability upon a manufacturer for harm that it may not have caused is the very legal legerdemain . . . that we believe the courts should avoid unless prior warnings remain unheeded. *It is an act more closely identified as a function assigned to the legislature* under its power to enact laws." *Mulcahy v. Eli Lilly & Co.*, 386 N.W.2d 67, 76 (Iowa 1986); *accord Collins v. Eli Lilly Co.*, 342 N.W.2d 37, 47 (Wis. 1984) (rejecting market-share liability in part because "the drug industry operates under the control of the FDA, which sets the standards and conditions the drug industry must meet").

e. None of the foregoing suggests, of course, that this industry or any other should be able to "get out of" reasonable and legitimate regula-

tion. To the contrary, the question is jurisdictional—not *whether* the oil-and-gas industry is regulated for environmental purposes, but *who* reviews legal questions about those federal environmental regulations. In the interest of preserving a uniform federal regulatory program, federal courts should bear the primary responsibility for interpreting and harmonizing questions implicated by the federal regime.

B. The Board's cases do not require or justify relinquishing federal jurisdiction here.

The Board's brief invoked several cases to argue that this Court's (and other courts') jurisprudence *requires* remanding this case to the Louisiana state courts. This is wrong; no case it cites remotely requires, much less justifies, a remand. The central distinction between this case and the mine-run cases in the Board's brief is that in each of those cases, the courts determined that the federal questions were tangential or insignificant to federal law as a whole, making them like *Empire Healthchoice* and *Gunn*. None was like *Grable* itself, but this case is.

Appellees' affirmative case for arising-under jurisdiction made it unnecessary for them to rebut each of the Board's cases. To remove any doubt that affirming the district court's jurisdictional ruling would risk no tension with precedent, however, *amicus* addresses the Board's cited cases.

1. Fifth Circuit cases

This Circuit, like the Supreme Court, has read *Grable* to impose a demanding standard before a purportedly state-law claim filed in state court can be removed to federal district court. And when "[t]he federal issue . . . is not substantial," *Singh v. Duane Morris LLP*, 538 F.3d 334, 338 (5th Cir. 2008), the Court refuses to find federal jurisdiction. The present case satisfies that demanding standard.

First, the Board (Br. 14-16) incorrectly compared this case with *MSOF Corp. v. Exxon Corp.*, 295 F.3d 485 (5th Cir. 2002). In *MSOF*, the complaint alleged negligence and strict liability under Louisiana law against specific defendants for contaminating land. *Id.* at 488. This Court reversed the district court's conclusion that the plaintiffs' claims arose under federal law (CERCLA). *Id.* at 489-90. The complaint's only reference to federal law was that the defendants' facility *was maintained* in violation of *both* federal regulation and state and local regulations. *Id.* at 490. The Court held that this mere mention of federal law was insufficient to render the action one arising under federal law, as the plaintiffs' rights did not "*turn on* resolution of a federal question." *Id.* at 491 (emphasis added). This case is materially different. The federal question is its essence, not an ancillary issue. As the district court observed, not only is the underlying conduct of

the defendants the end result of a complex regulatory scheme, but the Board's negligence and nuisance claims "turn[] to federal law to establish the standard of care." ROA.2352. To determine the claims, a court *must* interpret federal law. (The Board's claim as a third-party beneficiary for breach of contract also necessarily, and even more clearly, raises an issue of federal law. ROA.2354-2360.)

Second, the Board relies heavily on this Court's decision in *Singh*. But *Singh* merely foreshadowed *Gunn*. 538 F.3d at 336. Anticipating *Gunn*, the Court found that the federal issue was not "substantial," *id.* at 338, and that the plaintiff's "malpractice claim makes federal law only tangentially relevant to an element of a state tort claim." *Id.* at 339. The Court also explained—again consistent with *Gunn*—that federal jurisdiction would disturb the federal-state balance of judicial responsibilities, because state bars and courts regulate lawyers, and legal malpractice is purely a state-law matter. *Id.* at 340.[5]

2. Other courts' cases

The Board's brief noted several other cases where courts used similar reasoning to determine that federal jurisdiction was improper. However,

[5] The Board also cites (Br. 23 n.43) *Broussard v. Basaldua*, 410 F. App'x 838 (5th Cir. 2011). But that case involved a state-law battery claim without a federal nexus; "interpretation of the federal law is not an 'essential element' of the state tort claims." *Id.* at 839.

the courts in each of those cases held that the federal issues were merely tangential or contingent. *Amicus* briefly addresses them in the order they appear in the Board's brief.

a. Federal issue not necessarily raised

- *Chicago Tribune Co. v. Bd. of Trustees of the Univ. of Ill.*, 680 F.3d 1001, 1003 (7th Cir. 2012). The only federal issue identified by the court was a potential federal defense. By contrast, in *Grable* (and here), the federal issue is necessarily part of the plaintiff's own claim.
- *Broder v. Cablevision Sys. Corp.*, 418 F.3d 187 (2d Cir. 2005). Nothing about *Broder* supports the Board's argument. The Board selectively quoted (Br. 16 n.38) the court's observation that "where a federal issue is present as only one of multiple theories that could support a particular claim, however, this is insufficient to create federal jurisdiction." *Id.* at 194. First, the federal issues here are not one of multiple theories, but are indivisible from the crux of the Board's claims. Second, the Board failed to mention that the Second Circuit concluded that there *was* a claim that required prevailing on a federal issue. *Id.* at 195. Only then did the court turn to the rest of the *Grable* analysis—and found every aspect of *Grable* satisfied. *Id.* at 195-96.

- *Mulcahey v. Columbia Organic Chems. Co., Inc.*, 29 F.3d 148 (4th Cir. 1994). In a pre-*Grable* case, the court found no federal jurisdiction where "negligence per se under the federal environmental statutes is only one of the Plaintiffs' numerous theories of recovery." *Id.* at 154. Federal questions were not *necessarily* disputed in *Mulcahey*—but are certainly disputed here.
- *Stephens County v. Wilbros, LLC*, No. 2:12-CV-0201-RWS, 2012 WL 4888425, at *3 (N.D. Ga. Oct. 6, 2012). As in *Mulcahey*, the court found that federal law was cited merely as an "alternative" basis to establish negligence per se (itself pleaded as an "alternative" to ordinary negligence).
- *DeLuca v. Tonawanda Coke Corp.*, No. 10-CV-859S, 2011 WL 3799985 (W.D.N.Y Aug. 26, 2011). The Court determined that the negligence per se issue could be determined without deciding whether Defendants violated federal law. No such option exists here, where interpretation of a complex web of statutes is inevitable.
- *In re Reserve Fund Sec. & Derivative Litig.*, Nos. 09 MD.2011, 09 Civ.782, 09 Civ.3786, 2009 WL 3634085 (S.D.N.Y. Nov. 3, 2009). The Court noted that "federal jurisdiction is inappropriate where 'no cause of action . . . necessarily stands or falls based on a particular interpretation

or application of federal law." *Id.* at *4. Here, only if federal law is interpreted as the Board hopes could liability be imposed.

b. Federal issue not actually disputed (like *Empire Healthchoice*)

- *Cooper v. International Paper Co.*, 912 F. Supp. 2d 1307, 1313 (S.D. Ala. 2012). Cooper did not involve a dispute about the *meaning* of federal law, as in *Grable* and in the present case, but rather, presented only a factbound application of federal law, like in *Empire Healthchoice*.
- *Caldwell v. Bristol Myers Squibb Sanofi Pharm. Holding P'ship,* No. 6:12-CV-00443, 2012 WL 3862454 (W.D. La. June 12, 2012). Unlike in the present case, which presents a dispute as to the meaning of several federal statutes, *Caldwell* recognized that "[c]ourts have been reluctant to find federal-question jurisdiction when . . . there is no dispute as to the meaning of the statute itself" rather than merely "alleg[ing] that a federal statute was violated." *Id.* at *7.
- *Oregon ex rel. Kroger v. Johnson & Johnson*, 832 F. Supp. 2d 1250 (D. Or. 2011). The remand arose because the disputed question was "primarily a factual inquiry" rather than "a disputed legal question." *Id.* at 1256.

c. Federal issue not substantial (like *Gunn*)

- The primary case the Board cites is *Gunn v. Minton*, addressed above,

supra Part I.B.

- *Haith ex rel. Accretive Health, Inc. v. Bronfman*, 928 F. Supp. 2d 964, 970 (N.D. Ill. 2013). The court compared the litigation to *Gunn*, because it was merely a private (not industry-wide) enforcement dispute that did not directly affect the broad federal regulatory program itself.
- *Municipality of Mayaguez v. Corporacion Para el Desarrollo del Oeste, Inc.*, 726 F.3d 8, 14-15 (1st Cir. 2013). The court applied *Gunn* and concluded that, because the litigation did not have an effect on the federal system itself but only affected the parties, the question was not "substantial" (and, moreover, was primarily fact-bound, not legal).

d. Upsets federal-state balance

The cases the Board cites for this factor (Br. 25 n.49) involve a federal standard merely cross-referenced in negligence or other state-law claims. *See Hampton v. R.J. Corman R.R. Switching Co.*, 683 F.3d 708, 712 (6th Cir. 2012) ("garden-variety state tort claim"); *Richard v. Life Source Servs., LLC*, No. 11-224-RET-DL, 2011 WL 3423702, *5 (M.D. La. July 5, 2011) (ordinary negligence claim without any "clear federal issue, [so] it can hardly be substantial"); *Hofbauer v. Nw. Nat'l Bank of Rochester*, 700 F.2d 1197, 1201 (8th Cir. 1983) (pre-*Grable* case involving mortgage obligations and remanding because *no private right of action* was authorized by feder-

al law). This case, as described in detail above, is not about mere cross-referencing of federal statutes.

* * *

If anything, the Board's cases simply highlight how different this case is from the vast bulk of cases when federal jurisdiction is invoked over a cause of action created by state law. But when, as here, the *Grable* factors are met, a federal court has an obligation to exercise jurisdiction. The Board's position, not the Appellees', is what would mark a change in the law of federal jurisdiction.

II. The Board's claims were properly dismissed because they are displaced by the comprehensive federal regulatory framework.

Many of the reasons that claims like the Board's must be directed to federal rather than state courts are also directly relevant to the validity of the purportedly state-law claims. The Board's suit asks judges and juries to play a regulatory or legislative role. But there is *already* an administrative system in place to address the issues raised in this case; that system displaces the Board's tort claims. This case beyond any doubt belongs in federal court, and the district court properly dismissed once it correctly accepted jurisdiction.

Appellees, like the district court, thoroughly explain why the Louisi-

ana state-law claims must fail, Br. 39-52, 58-66, and why no federal statute creates any "duty" that the Board can use as the predicate for a state-law tort, Br. 52-57. *Amicus* briefly addresses why the issues must fail because of their *federal* content.

A. Comprehensive federal regulation has occupied the field.

By suing 149 oil-and-gas companies (in effect, the entire industry) without alleging any particular harms from any particular defendant or group of defendants, the Board made its real target clear: the federal program itself. The Board dislikes the federal system that comprehensively regulates oil-and-gas development along the coast—how it issues permits, what it allows (or requires) of those it regulates, and especially what its policy outcomes have been. The Board wants different results that, in its view, will better accommodate its own interests. And it wants a single state-court judge to use injunctions to force the entire industry as a whole to do things differently, without regard to the fact that the industry *must* follow federal requirements. Purportedly state-law claims like this, whether or not valid under state law, are displaced by federal law.

Recent cases about displacement of federal common-law claims in light of comprehensive federal environmental regulation make this point clearly. The Board's tort claims here are even more infirm; because they in

fact arise under federal law, *see supra* Part I, displacement analysis is equally applicable. And because they purport to be *state*-law claims, they are even less entitled to control the outcome of *federal* regulatory regimes.

In *American Electric Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527 (2011) (*AEP*), the Supreme Court considered the doctrine of displacement of federal common law in a context markedly like this case—the demand for injunctive relief as a substitute for environmental regulation under a comprehensive federal regulatory regime. Displacement of federal common law and preemption of state law are not always precisely coterminous. *See, e.g.*, *AEP*, 131 S. Ct. at 2537. But often, as here, the analysis will lead to the same conclusion and for the same reasons. "[T]he relevant question for purposes of displacement is 'whether the field has been occupied, not whether it has been occupied in a particular manner.'" *AEP*, 131 S. Ct. at 2538. When the reason for displacement is the existence of a comprehensive federal regulatory regime that occupies a given field, there is room *neither* for federal *nor* state tort law to tinker with that regime. The logic of *AEP* makes clear why the Board's claims, no matter how characterized, are displaced once properly removed to federal court under *Grable*.

Displacement doctrine reflects the separation of powers and the limited role that the judiciary should play in policy-making. "[I]t is primarily

the office of Congress, not the federal courts, to prescribe national policy in areas of special federal interest." *AEP*, 131 S.Ct. at 2537. Of course, it is even less appropriate for state courts than federal courts to "prescribe national policy" of any sort—but that is precisely what the Board is asking the Louisiana courts to do. "'[W]hen Congress addresses a question previously governed by a decision rested on federal common law . . . the need for such an unusual exercise of law-making by federal courts disappears.'" *Id.* (quoting *City of Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981)). Any equivalent function by state courts would be doubly problematic—state courts are not authorized to make federal common law at all, much less to take action in a sphere that has been federally occupied. (Nor, of course, could federal courts use *state* causes of action to invade the federal policy-making regime when *federal* causes of action are unavailable.)

Because the subject-matter here is subject to an "all-encompassing regulatory program, supervised by an expert administrative agency, to deal comprehensively" with a problem of national import, *AEP*, 131 S. Ct. at 2534, common-law remedies cannot coexist. This is the situation the Supreme Court confronted in *AEP*, holding "that the Clean Air Act and the EPA actions it authorizes displace any federal common law right" to seek abatement of certain power plant emissions. 131 S.Ct. at 2537.

As the Court noted, "[t]he critical point is that Congress delegated *to EPA* the decision whether and how to regulate carbon dioxide emissions from power plants; the delegation is what displaces federal common law." *Id.* at 2538 (emphasis added). After all, "[t]he appropriate amount of regulation . . . cannot be prescribed in a vacuum," and "informed assessment of competing interests is required. Along with the environmental benefit potentially achievable, our Nation's energy needs and the possibility of economic disruption must weigh in the balance." *Id.* at 2539. "[S]uch complex balancing," *id.*, is inconsistent with tort-based judicial resolution. "The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions. Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order." *Id.* at 2539-40.

The same analysis is no less applicable in this case. The coastal-erosion and energy-production subjects are just as comprehensively regulated by expert agencies as the air-emissions standards at issue in *AEP*.[6]

[6] Similar to the statutory and administrative Clean Air Act framework at issue in *AEP*, Congress has developed a comprehensive regulatory program to deal with the very issues that are central to the Board's complaint—the erosion of coastal lands and the attendant consequences. In fact, the Board's Petition relies on three federal statutes: (1) the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 407, et seq., ROA.188 ¶ 9.1; (2) the Clean Water Act of 1972, 33 U.S.C. § 1251, ROA.188 ¶ 9.2; and (3) the Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-1464, ROA.189 ¶ 9.4. These federal statutes delegate decisions regarding oil and gas

And if "[*f*]*ederal* judges" are not to assume the role of expert "agenc[ies] . . . in coping with issues of this order," *id.* at 2539-40 (emphasis added), it is no insult to the quality of *state* judges to recognize that state judiciaries are even less institutionally capable of managing a complex federal regulatory program.

The Board's lawsuit is predicated on its disapprobation of the federal regulatory process's outputs, and it asks a state-court judge to order different standards and results that will suit the Board better. The plaintiffs in *AEP* did exactly the same thing—they asked the federal courts to impose controls over conduct that was part of a regulated area. Given the complexity of the statutory and regulatory framework, judicial adjustments could not truly be localized, but would inevitably implicate economic, environmental, and geopolitical interests.

B. Use of the market-share liability theory demonstrates why the Board's claims must be rejected.

As Appellees note, Br. 67-70, the Board's claims were also properly dismissed because of their reliance on market-share or enterprise liability. Generally, market-share liability involves ascertaining a member's share of the relevant market, then imposing pro rata liability. The Board attempts

development to federal agencies, which in turn delegate appropriate authority to state regulatory bodies. *See also* Appellees Br. 2, 3-4, 12-14, 15-19, 21-22.

to use this "novel and even radical" industry-wide theory of liability, *City of Philadelphia v. Lead Indus. Ass'n, Inc.*, 994 F.2d 112, 127 (3d Cir. 1993), to circumvent tort law's proximate-cause requirement.

This Court has recognized that "[b]oth [market-share liability and enterprise liability] theories represent radical departures from traditional theories of tort liability," *Thompson v. Johns-Manville Sales Corp.*, 714 F.2d 581, 583 (5th Cir. 1983), and has rejected market-share liability even in products-liability cases to protect defendants from unwarranted payouts. *See In re Fibreboard Corp.*, 893 F.2d 706, 711 (5th Cir. 1990) ("In Texas, it is a fundamental principle of traditional products liability law . . . that the plaintiffs must prove that the defendant supplied the product which caused the injury.") (internal quotations omitted); *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 312 (5th Cir. 1998). The Missouri Supreme Court, like many state courts, has agreed, finding "insufficient justification . . . to support abandonment of so fundamental a concept of tort law as the requirement that a plaintiff prove, at a minimum, some nexus between wrongdoing and injury." *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241, 247 (Mo. 1984). Courts have been skeptical nationwide, often rejecting the theory altogether, and when allowing it at all, only under exceptional circumstances; every

one of this Court's sister circuits has repeatedly noted this.[7]

That theory is even less justified here. Beyond the impropriety of dispensing with an entire element of a plaintiff's tort case, there are "significant policy reasons" for "refusing to impose market share liability," *Blackston v. Shook & Fletcher Insulation Co.*, 764 F.2d 1480, 1483 (11th Cir. 1985). First, elimination of a causation requirement would render every oil-and-gas operator an insurer not only of its own operations, but also of all similar operations by its competitors. Second, application of such a nov-

[7] As a sample from all of this Court's sister circuits, see, *e.g.*, *Santiago v. Sherwin Williams Co.*, 3 F.3d 546, 546 (1st Cir. 1993) (rejecting market-share liability in Massachusetts law in lawsuit against lead-paint manufacturers); *Hamilton v. Beretta U.S.A. Corp.*, 264 F.3d. 21, 26-32 (2d Cir. 2001) (rejecting market-share liability based on New York rejection of the theory); *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 379–80 (3d. Cir. 1990) (noting Pennsylvania's repeated rejection of the theory of market-share liability); *Lee v. Baxter Health Care Corp.*, No. 89-2143, 1990 WL 27325, at *4 (4th Cir. Feb. 27, 1990) (refusing to adopt the market-share liability theory); *Barnes v. Kerr Corp.*, 418 F.3d 583, 589 (6th Cir. 2005) (rejecting market-share liability under Tennessee Law); *Gibson v. Am. Cyanamid Co.*, 760 F.3d 600, 611 (7th Cir. 2014) (noting Wisconsin's rejection of market-share and enterprise-liability theories in favor of, when appropriate, "risk contribution" theory); *Doe v. Baxter Healthcare Corp.*, 380 F.3d 399, 408 (8th Cir. 2004) (noting that market-share liability has been rejected in Iowa); *White v. Celotex Corp.*, 907 F.2d 104, 106 (9th Cir. 1990) (commenting that the theory of market-share liability, adopted in California in relation to the drug DES, is entirely inappropriate in asbestos litigation); *Wood v. Eli Lilly & Co.*, 38 F.3d 510, 511 (10th Cir. 1994) (rejecting market-share liability for Oklahoma law in the context of DES litigation); *Hunnings v. Texaco, Inc.*, 29 F.3d 1480, 1488 (11th Cir. 1994) (rejecting market-share liability for a strict-liability claim, noting that Florida "has recognized market share liability as a theory of last resort, developed to provide a remedy where there is an inherent inability to identify the manufacturer of the product that caused the injury") (internal citations omitted); *Tidler v. Eli Lilly & Co.*, 851 F.2d 418, 422 (D.C. Cir. 1988) (rejecting market-share liability for D.C. and Maryland).

el theory of causation would raise serious questions of fairness due to the fact that different operators' activities differ in degrees of potential harmfulness. Third, market-share liability "'continues the risk that the actual wrongdoer is not among the named defendants, and exposes those joined to liability greater than their responsibility.'" *City of St. Louis v. Benjamin Moore*, 226 S.W.3d 110, 116 (Mo. 2007) (quoting *Zafft*, 676 S.W.2d at 246).

The Board has had to strain to fit its policy objections into the form of a state tort suit. The need to invoke the radical and broadly rejected market-share theory of liability only underscores how this lawsuit is a disguised effort to wrest control of national environmental and energy policy away from administrative agencies and to state courts. This analysis should further justify affirming the district court's judgment of dismissal.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the district court.

Respectfully submitted,

/s/ *Evan A. Young*

Evan A. Young
Counsel of Record
Carlos R. Romo
BAKER BOTTS L.L.P.
98 San Jacinto Boulevard
Suite 1500
Austin, Texas 78701
Telephone: (512) 322-2506
Facsimile: (512) 322-8306
evan.young@bakerbotts.com

Kate Comerford Todd
U.S. CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5685

Counsel for Amicus Curiae
The Chamber of Commerce of the United States of America

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that, on October 5, 2015, this brief was served, via the Court's CM/ECF Document Filing system, upon all registered CM/ECF users appearing in this appeal.

Counsel also certifies that, on October 5, 2015, the foregoing brief was transmitted to Mr. Lyle W. Cayce, Clerk of the United States Court of Appeals for the Fifth Circuit, via the Court's CM/ECF Document Filing System, https://ecf.ca5.uscourts.gov/.

Counsel further certifies that: (1) required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1.; and (3) the document has been scanned and is free of viruses.

/s/ *Evan A. Young*
Evan A. Young

Dated: October 5, 2015

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/s/ *Evan A. Young*
Evan A. Young

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