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.,

Respondents.

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

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE SUPPORTING PETITIONERS

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INTEREST OF THE AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber often files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber has a strong interest in legal and policy issues relating to climate change. The global climate is changing, and human activities contribute to these changes. There is much common ground on which all sides could come together to address climate change with policies that are practical, flexible, predictable, and durable. The Chamber believes that durable climate policy must be made by Congress, which should both encourage innovation and investment to ensure significant emissions reductions and avoid economic harm for businesses, consumers, and disadvantaged communities. *See, e.g.*, Press Release, Sen. Sheldon Whitehouse, *New Bipartisan, Bicameral Proposal Targets Industrial Emissions for Reduction* (July 25, 2019), https://www.whitehouse.senate.gov/news/release/new-bipartisan-bicameral-

[1] All parties have consented to the filing of this brief. *Amicus curiae* timely provided notice of intent to file this brief to all parties. No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

proposal-targets-industrial-emissions-for-reduction (reporting the Chamber's support for the bipartisan Clean Industrial Technology Act). U.S. climate policy should recognize the urgent need for action, while maintaining the national and international competitiveness of U.S. industry and ensuring consistency with free enterprise and free trade principles. *See* U.S. Chamber of Commerce, The Chamber's Climate Position: '*Inaction is Not an Option*', https://www.uschamber.com/climate-change/the-chambers-climate-position-inaction-is-not-an-option. Governmental policies aimed at achieving these goals should not be made by the courts, much less by a patchwork of actions under state common law.

Under this Court's precedent, cases involving "uniquely federal interests," for which a uniform federal policy is necessary, should be decided under federal common law. In the limited range of circumstances in which such uniquely federal interests arise, the relevant legal questions often intersect with the interests of many of the Chamber's members, who rely on the predictability and uniformity of federal policy. This case presents an example of a court veering from this Court's precedent and allowing a claim about *global* emissions—for which no State can claim a superior tie or interest—to be decided by a single state's law. The Chamber has an interest in ensuring that claims for which a uniform federal standard is necessary, because of their interstate or international aspects, are heard in federal court.

SUMMARY OF ARGUMENT

I. Federal common law applies in the limited instances where "uniquely federal interests" leave no room for state law to apply. Cross-border claims

implicating the interests of more than one State or of a foreign sovereign—such as an interstate water dispute—constitute a paradigmatic example of such an instance. Respondents' claims, which are founded on allegations regarding the effects of *global* climate change, naturally implicate both interstate and international interests, and thus are subject to federal common law. State nuisance laws, which are intended to resolve localized problems, are a poor match for global climate issues. That is true even if the claims purport to concern the localized effects resulting from such issues.

The court of appeals concluded that even if federal common law governed respondents' claims, the claims did not "arise under" federal law because the Clean Air Act displaced federal common law, and the state-law claims were not completely preempted by the Act. Pet. App. 30a-31a. But the court of appeals failed to recognize what the Second Circuit acknowledged in addressing similar claims of harm arising from climate change: federal common law applies because state law cannot, and state laws do not gain competence to address issues that demand a unified federal standard simply because any ability to win relief under federal common law has been displaced. Displacement affects remedies, not jurisdiction; the fact that a remedy afforded by federal common law has been displaced by federal statute does not mean state law is suitable to decide the claim.

This Court should grant certiorari to resolve the split over whether federal common law applies to claims seeking liability for the local impact of global climate change (thereby giving rise to federal jurisdiction). State-court cases applying local law to claims about an international issue are already well

underway. Unless the Court intervenes now, a patchwork of disparate state-law decisions—which federal common law exists to prevent—will soon emerge.

II. This Court should also grant certiorari to address the conflict regarding whether a plaintiff may evade federal jurisdiction by artfully pleading their federal common law claims as state common law claims. Plaintiffs may be the masters of their complaint, but this Court has repeatedly reaffirmed the principle that a plaintiff cannot frustrate federal jurisdiction by characterizing an inherently federal claim as a state-law claim.

The court of appeals determined that "artful pleading" is limited to only those cases where a state-law claim is completely preempted by a federal statute. As other courts of appeals have recognized, artful pleading is not so limited. None of the principles underlying the well-pleaded-complaint rule supports such a narrow construction of artful pleading.

For these reasons, and those set forth below, this Court should grant the petition.

ARGUMENT

I. This Court should grant certiorari on the first question presented to reconcile conflicting decisions on whether federal common law applies to claims based on alleged global emissions.

Federal courts may consider any claim arising under federal law, including federal common law. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 850, 852 (1985). While federal common law is limited in scope, common-law claims arising

from a transboundary dispute that implicates the interests of more than one State or other sovereign must, by necessity, arise under federal common law, because a single state's law cannot adequately reconcile competing sovereign interests in resolving the claim. For decades, this Court has identified claims regarding the air and water in their "ambient and interstate aspects" as entailing the sort of dispute fit for the application of federal common law. Because emissions cross state and national borders, a single state's law of public nuisance cannot resolve an emissions dispute like this one. Such a nationally and internationally significant dispute necessarily arises under federal common law and belongs in federal court.

The court of appeals nevertheless incorrectly held that respondents' purported state-common-law claims of nuisance allegedly caused by *global* emissions should proceed in state court. To the extent that federal common law would ordinarily apply, the court reasoned, the Clean Air Act displaced it—but did *not* displace or completely preempt respondents' state-law claims. Pet. App. 29a-31a.

The Tenth Circuit's reasoning was flawed in three respects. First, to the extent that the court of appeals doubted whether federal common law applies to respondents' claims, Pet. App. 29a n.5, this Court's decisions extending the application of the common law to "air and water in their ambient or interstate aspects" resolve any such doubts. Second, where federal common law applies, state law does not—and cannot. Thus, even if a federal statute prevents a plaintiff from obtaining a remedy available under federal common law, that does not make the claim any less "federal" in character. Finally, the court of

appeals erred in treating displacement as an issue affecting jurisdiction, not remedies.

A. Federal common law governs where a dispute implicates interstate and international interests.

1. "There is no federal *general* common law," *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (emphasis added), but federal courts may "fashion federal law" in limited areas "where federal rights are concerned." *Illinois v. City of Milwaukee (Milwaukee I)*, 406 U.S. 91, 103 (1972) (citation omitted). *Erie* does not undermine this principle. Indeed, on "the same day *Erie* was decided, the Supreme Court released an opinion in which Justice Brandeis, the author of *Erie*, relied upon federal common law to resolve a case." *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 927 n.8 (5th Cir. 1997) (citing *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938)).

Courts typically apply federal common law in cases presenting one (or more) of three characteristics. First, federal common law applies in cases where "common lawmaking must be 'necessary to protect uniquely federal interests.'" *Rodriguez v. FDIC*, 140 S. Ct. 713, 717 (2020) (quoting *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981)). Second, federal common law is used in "those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law." *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 173-74 (1942). Finally, federal common law applies "[w]hen Congress has not spoken to a particular issue,"

City of Milwaukee v. Illinois (Milwaukee II), 451 U.S. 304, 313 (1981), but federal policy calls for a "uniform standard." *Milwaukee I*, 406 U.S. at 107 n.9 (citation omitted).

Several types of cross-border disputes—particularly those that implicate the interests of more than one State or sovereign—present "uniquely federal interests" that require the application of a federal common law because state law cannot govern. Courts have applied federal common law in cases involving interstate water disputes,[2] tribal land rights,[3] interstate air carrier liability,[4] and foreign relations.[5] In such cases, federal common law is necessary because "local law will not be sufficiently sensitive to federal concerns, it is not likely to be uniform across state lines, and it will develop at various rates of speed in different states." Wright & Miller, 19 Fed. Prac. & Proc. Juris. § 4514 (4th ed. 2022). Moreover, the structure of the Constitution does not allow States to engage in such cross-border regulation. *Tex. Indus.*, 451 U.S. at 641 ("In these instances, our federal system does not permit the controversy to be resolved under state law…."); *see*

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[2] *Hinderlider*, 304 U.S. at 110; *Kansas v. Colorado*, 206 U.S. 46, 95 (1907).

[3] *Cnty. of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 235-36 (1985).

[4] *Treiber & Straub, Inc. v. UPS, Inc.*, 474 F.3d 379, 384 (7th Cir. 2007) (discussing the Fifth Circuit's "extensive analysis of the history of federal common law liability of common carriers" in *Sam L. Majors*, 117 F.3d at 922).

[5] *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 (1964); *Provincial Gov't of Marinduque v. Placer Dome, Inc.*, 582 F.3d 1083, 1088 (9th Cir. 2009); *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1233 (11th Cir. 2004).

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980) (the "sovereignty of each state … implie[s] a limitation on the sovereignty of its sister States").

Cases about global emissions, like this one, squarely give rise to the concerns that necessitate federal common law. Accordingly, "[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law." *Milwaukee I*, 406 U.S. at 103 (citing *Texas v. Pankey*, 441 F.2d 236 (10th Cir. 1971)); *accord Am. Elec. Power Co. v. Connecticut* ("*AEP*"), 564 U.S. 410, 421 (2011); *see also Hinderlider*, 304 U.S. at 110 (apportionment of interstate stream "is a question of 'federal common law'"). "Environmental protection" is, after all, "an area 'within national legislative power,'" and thus, it is appropriate for federal courts to "fill in 'statutory interstices,' and, if necessary, even 'fashion federal law.'" *AEP*, 564 U.S. at 421 (citation omitted). As this Court has recognized, allowing states to apply their own varying common-law rules to environmental concerns crossing state lines would mean "more conflicting disputes, increasing assertions and proliferating contentions" about the standards for adjudging claims of "improper impairment." *Milwaukee I*, 406 U.S. at 107 n.9 (quoting *Pankey*, 441 F.2d at 241-42).

Because claims regarding transboundary emissions implicate "uniquely federal interests," "our federal system does not permit the controversy to be resolved under state law," as the "interstate or international nature of the controversy makes it inappropriate for state law to control." *Tex. Indus.*, 451 U.S. at 640-41 & n.13; *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 855 (9th Cir. 2012) ("[F]ederal common law can

apply to transboundary pollution suits."). And where, as here, a claim falls within an area that is exclusively federal in nature, the case falls within federal jurisdiction. *Nat'l Farmers*, 471 U.S. at 850, 852.

2. Climate change is an international and interstate phenomenon. In order for climate change to occur, as alleged by respondents here, myriad events caused by myriad actors must occur all around the world. *See* Pet. App. 109a (agreeing with the premise that claims similar to the respondents' are "based on a broad array of conduct … all of which occurred globally" (citation and internal quotation marks omitted)); *City of N.Y. v. BP P.L.C.*, 325 F. Supp. 3d 466, 472 (S.D.N.Y. 2018), *aff'd sub nom. City of N.Y. v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021).

Respondents' claims are thus not only about "air and water in their ambient or interstate aspects," a quality that "undoubtedly" calls for the application of federal common law, *AEP*, 564 U.S. at 421 (citation omitted); *Milwaukee I*, 406 U.S. at 103, they also implicate foreign policy and the United States' sovereign interests, which, too, call out for federal common law. *Tex. Indus.*, 451 U.S. at 641 (identifying instances where "our federal system does not permit [a] controversy to be resolved under state law, … because the interstate or international nature of the controversy makes it inappropriate for state law to control").

Respondents' claims turn on an allegation of *global* climate change; accordingly, state and local governments cannot claim some unique tie to the phenomenon. Some commercial activity may happen within a particular state or locality's borders, but that localized activity is not the basis of the plaintiff-governments'

claims. And the localized activity hardly justifies allowing the law of one state to decide a sweeping claim concerning emissions that cross state and national borders. After all, none of the governmental entities claims that what happened in their respective jurisdictions caused the alleged harm of *global* warming. Nor could they do so: as this Court explained in *AEP*, "emissions in New Jersey may contribute no more to flooding in New York than emissions in China." 564 U.S. at 422.

The Tenth Circuit's decision favoring the application of state law over federal common law encourages a patchwork of outcomes arising under disparate state laws, which are poor frameworks for "regulat[ing] the conduct of out-of-state sources." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 495 (1987). Allowing claims about global emissions to be decided by the varied laws of the 50 states would lead to fragmentation of judicial decisionmaking that in turn would hinder a coordinated and effective federal response to climate change. That inevitable fragmentation would be exacerbated by plaintiffs' reliance on theories of public nuisance in asserting their claims. Public nuisance is an amorphous cause of action, "often vague and indeterminate." *Milwaukee II*, 451 U.S. at 317.

Even if every state were to use the same standard of public nuisance—which is extremely unlikely—state courts would still disagree as to what the articulated standard requires, and how to account for the State's sovereign interests. A coastal state may, for example, view public nuisance caused by water pollution differently than a landlocked state. Leaving state courts to adjudicate disputes about interstate emissions based on "the vagaries of public nuisance doctrine" would on-

ly make it "increasingly difficult for anyone to determine what standards govern." *North Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 298 (4th Cir. 2010).

B. Displacement does not cause a federal-common-law claim regarding global climate change to lose its federal "character."

The court of appeals concluded that respondents' claims do not "arise under" federal common law for jurisdictional purposes because the Clean Air Act displaces federal common law governing cross-border emissions, and thus, complete preemption is "the sole path for federal removal jurisdiction." Pet. App. 28a-30a.

But the court of appeals' reasoning cannot be squared with this Court's rule that, where federal common law arises, state law cannot govern. *Tex. Indus.*, 451 U.S. at 641 & n.13 (federal common law governs where the nature of the claim "makes it inappropriate for state law to control"); *Milwaukee II*, 451 U.S. at 313 n.7 ("[I]f federal common law exists, it is because state law cannot be used."). Congress's decision to displace any right to sue under federal common law does not make state law capable of resolving interstate disputes.

As the Second Circuit explained in rejecting a climate-nuisance action similar to respondents'—using reasoning that conflicts with the Tenth Circuit's reasoning here, Pet. 11-15—the notion that a state-law claim lies dormant and may "snap back into action" once federal law is displaced is "difficult to square with the fact that federal common law governed [the] issue

in the first place." *New York*, 993 F.3d at 98. When a federal statute displaces federal common law, it eliminates the causes of action or remedies that might have been available under common law—"our federal system" does not allow state-law claims into an area that is exclusively federal in character. *Tex. Indus.*, 451 U.S. at 641. Thus, for example, a State may surrender its federal common-law cause of action over water rights in an interstate compact. *See Hinderlider*, 304 U.S. at 104-05. But that does not invite state-law causes of action that otherwise are plainly displaced by federal common law. *See id.* at 110.

After discussing the Ninth Circuit's decision in *Kivalina*, the court of appeals here concluded that because "the federal common law of nuisance that formerly governed transboundary pollution suits *no longer exists* due to Congress's displacement of that law through the CAA," the displaced federal common law claim cannot give rise to federal-question jurisdiction. Pet. App. 29a-30a. But the court of appeals' analysis incorrectly treats displacement as an issue of jurisdiction, not remedies. In *AEP*, for example, this Court explained that the scope of the displacement was to be determined by the "reach of remedial provisions" available in the displacing statute. 564 U.S. at 425 (citing *Cnty. of Oneida*, 470 U.S. at 237-39); *see also Milwaukee II*, 451 U.S. at 332 (observing that Congress's changes to the Clean Water Act meant that "no federal common-law remedy was available"); *Illinois v. Outboard Marine Corp.*, 680 F.2d 473, 476 (7th Cir. 1982) (statutory displacement of "the federal common law remedy for nuisances resulting from discharges of pollutants"). *Kivalina* itself conceptualizes statutory displacement as the displacement of *causes of action or*

remedies, not of federal jurisdiction. 696 F.3d at 856 (displacement means that federal common law "does not provide a remedy"); *id.* at 857 ("displacement of a federal common law right of action means displacement of remedies.").

Thus, displacement concerns "whether the field has been occupied, not whether it has been occupied in a particular manner." *Milwaukee II*, 451 U.S. at 324. When a state law claim is impermissible because of the federal nature of the interests at stake, and federal common law is displaced by a federal statute, the case continues to arise under federal law and establish federal jurisdiction. The fact that federal common law provides no *remedy* does not make the interests at stake any less federal; it means only that Congress has exercised its right to make rules for an exclusively federal area, and has elected not to create a remedy in that space.

Here, the claims concerning interstate emissions do not become any less "interstate" simply because an environmental statute displaces remedies under federal common law. The court of appeals' reasoning looks nothing like displacement by Congress; it is *re*placement of Congress—by state courts.

C. The practical problems created by allowing inherently federal claims for climate change to be recast as state-law claims will only worsen without immediate review.

In 2017 and 2018, 13 state and local governments, including respondents, filed lawsuits in their respective home state courts against petitioners, alleging that petitioners created both a public and a private nuisance

under state law by "producing, promoting, refining, marketing and selling a substantial amount of fossil fuels used at levels sufficient to alter the climate."[6] C.A. App. 173 ¶ 445. Respondents' allegations are both international and interstate in scope. They allege that the fossil fuels cause, or at least contribute to, rising sea levels induced by climate change. C.A. App. 151 ¶ 344. Respondents seek to impose liability for emissions for fossil fuels produced and consumed as far back as the late 1980s. C.A. App. 92 ¶ 82 & n.8. They do not assert (nor could they) that these emissions occurred exclusively—or even substantially—within their respective borders. Instead, respondents seek to hold petitioners liable for conduct that occurred all over the world, "including in Colorado." C.A. App. 103 ¶ 127; C.A. App. 147 ¶ 325. State and local governments like respondents seek to connect petitioners to their respective jurisdictions by pointing to the injuries allegedly

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[6] *Rhode Island v. Chevron Corp.*, No. PC-2018-4716 (R.I. Super. Ct. July 2, 2018); *King Cnty. v. BP p.l.c.*, No. 18-2-11859-0 (Wash. Super. Ct. May 9, 2018); *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, No. 2018CV030349 (Colo. Dist. Ct. Apr. 17, 2018) (on behalf of Boulder County, San Miguel County, and the City of Boulder); *City of Richmond v. Chevron Corp.*, No. C18-00055 (Cal. Super. Ct. Jan. 22, 2018); *Mayor & City Council of Balt. v. BP p.l.c.*, No. 24-C-18-004219 (Md. Cir. Ct. July 20, 2018); *City of Imperial Beach v. Chevron Corp.*, No. C17-01227 (Cal. Super. Ct. July 17, 2017); *Cnty. of Marin v. Chevron Corp.*, No. CIV1702586 (Cal. Super. Ct. July 17, 2017); *Cnty. of San Mateo v. Chevron Corp.*, No. 17CIV03222 (Cal. Super. Ct. July 17, 2017); *City of Santa Cruz v. Chevron Corp.*, No. 17CV03243 (Cal. Super. Ct. Dec. 20, 2017); *Cnty. of Santa Cruz v. Chevron Corp.*, No. 17CV03242 (Cal. Super. Ct. Dec. 20, 2017); *Cal. ex rel. Herrera v. BP p.l.c.*, No. CGC-17-561370 (Cal. Super. Ct. Sept. 19, 2017) (San Francisco); *Cal. ex rel. Oakland City Att'y v. BP p.l.c.*, No. RG17875889 (Cal. Super. Ct. Sept. 19, 2017) (Oakland).

caused there by global emissions from fossil fuels—specifically, the use and combustion of those fuels. *E.g.*, C.A. App. 148 ¶ 327. In other words, they seek to frame a global problem as a local nuisance.

Several of these cases have gone to-and-from (and back to) state court, and they are now moving ahead on the merits while the legal landscape regarding the removability of such cases remains unsettled. The First, Fourth, Ninth, and Tenth Circuits have directed that climate-change nuisance claims brought by state and local governments should be remanded to state court,[7] while the Third and Eighth Circuits are actively considering whether federal common law governs nuisance claims based on global emissions, and thus provides a basis for federal-question jurisdiction and removal.[8] And new cases continue to pile on.[9]

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[7] *Rhode Island v. Shell Oil Prods. Co.*, No. 19-1818, 2022 WL 1617206 (1st Cir. May 23, 2022); *Mayor & City Council of Balt. v. BP P.L.C.*, 31 F.4th 178 (4th Cir. 2022); *City of Oakland v. BP plc*, 969 F.3d 895 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2776 (2021); Pet. App. 1a.

[8] *Minnesota v. Am. Petroleum Inst.*, No. 21-1752 (8th Cir. argued Mar. 15, 2022); *City of Hoboken v. Chevron Corp.*, No. 21-2728 (3d Cir. argued June 21, 2022); *Delaware v. BP America, Inc.*, No. 22-1096 (3d Cir. argued June 21, 2022). While the Second Circuit has held that federal common law governs nuisance claims, purportedly brought under state law, relating to global climate change, *City of N.Y.*, 993 F.3d at 81, it is currently considering in *Connecticut v. Exxon Mobil Corp.*, No. 21-1446 (2d Cir.), whether the application of federal common law in such a case gives rise to federal removal jurisdiction.

[9] *Anne Arundel Cnty. v. BP P.L.C.*, No. 21-cv-1423 (D. Md.); *City of Annapolis v. BP P.L.C.*, No. 21-cv-772 (D. Md.); *City of Charleston v. Brabham Oil Co.*, No. 20-cv-3579 (D.S.C.); *Dist. of Columbia v.*

In the meantime, federal courts are left with no clear direction on whether federal common law governs claims regarding the local effects of global climate change, and whether the application of federal common law generally provides a basis for removal jurisdiction. And because several cases have since been remanded back to state court, a patchwork of decisions resolving interstate pollution claims under disparate state laws will soon begin to emerge, further complicating—perhaps irreversibly—federal efforts to combat climate change. To resolve the question whether federal common law applies to claims of global climate change, this Court should grant certiorari now, before the effects of an individualized, state-by-state approach begin to take hold.

II. This Court should grant certiorari on the second question presented to resolve the split over the use of artful pleading to conceal claims governed by federal common law.

A. Under the well-pleaded complaint rule, "federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). But an "independent corollary" of the 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. for S. Cal.*, 463 U.S. 1, 22 (1983) (citation omitted). Thus, a plaintiff may be the "master of his complaint" and ordinarily may choose to bring a state-law claim in

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Exxon Mobil Corp., No. 20-1932 (D.D.C.); *Vermont v. Exxon Mobil Corp.*, No. 21-cv-260 (D. Vt.).

state court, but he cannot deliberately disguise an "inherently federal cause of action." Wright & Miller, 14C Fed. Prac. & Proc. Juris. § 3722.1 (4th ed. 2022). Where a plaintiff obscures the inherently federal nature of her claim, the plaintiff's case is removable to federal court. *United Jersey Banks v. Parell*, 783 F.2d 360, 367 (3d Cir. 1986) (noting "ample precedent" demonstrating that federal jurisdiction lies where "the state claim pleaded is 'really one' of federal law" (citation omitted)).

In other jurisdictional contexts, this Court has looked to the "gravamen" of the complaint, not just to the label the plaintiff attaches, to determine whether the complaint invokes federal jurisdiction. *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 35-36 (2015) (looking not just at how the plaintiff "recast[s]" her negligence claims, but instead at the "'essentials' of her suit," to determine whether jurisdiction existed under the Foreign Sovereign Immunities Act (citation omitted)); *see also Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 755 (2017) (courts must look to the "gravamen" of the plaintiff's complaint and "set[] aside any attempts at artful pleading" to determine whether the plaintiff's claim requires exhaustion under federal law). What matters is "substance, not surface": "[t]he use (or nonuse) of particular labels and terms is not what matters." *Fry*, 137 S. Ct. at 755. Focusing on the "gravamen" of a complaint, rather than whether a plaintiff used or avoided the right "magic words," ensures that a plaintiff cannot manipulate federal jurisdiction "through artful pleading." *Id.* (citation omitted).

The rule is no different in the narrow but important circumstances where a claim is inherently federal; in those situations, casting the claim in different lan-

guage does not make it arise under different law. One such inherently federal claim recognized by several courts of appeals is a common law cause of action governed by a uniform federal decisional standard, which the Tenth Circuit disavowed here by limiting artful pleading to complete preemption.[10] Pet. App. 20a-21a. Where the claim arises in an area that is governed exclusively by federal law, a plaintiff cannot "deny a defendant a federal forum" by artfully pleading "a federal claim … as a state law claim." *United Jersey*, 783 F.2d at 367. Thus, a federal common law claim may be readily apparent from the "essentials" of a complaint if the allegations involve matters such as "air and water in their ambient or interstate aspects," *Milwaukee I*, 406 U.S. at 103, or other "especial federal concerns to which federal common law applies," such as "the rights and obligations of the United States," or "the conflicting rights of States or our relations with foreign nations." *Tex. Indus.*, 451 U.S. at 641 & n.13. In those areas where "especial federal concern[s]" are implicated, the *only* claim that can be pleaded is a federal one, as federal common law governs where the nature of the

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[10] *Sam L. Majors*, 117 F.3d at 924, 929 (holding, in a breach-of-contract dispute originally brought under state law, that "if the cause of action arises under federal common law principles, jurisdiction may be asserted"); *In re Otter Tail Power Co.*, 116 F.3d 1207, 1214-15 (8th Cir. 1997) (reversing district court's order remanding case to state court, holding that case presented a federal question because it "raise[d] important questions of federal law," including "the federal common law of inherent tribal sovereignty"); *New SD, Inc. v. Rockwell Int'l Corp.*, 79 F.3d 953, 954-55 (9th Cir. 1996) (noting in case originally brought under state contract law that, "on government contract matters having to do with national security, state law is totally displaced by federal common law" and "it follows that the question arises under federal law, and federal question jurisdiction exists").

claim "makes it inappropriate for state law to control." *Tex. Indus.*, 451 U.S. at 641 & n.13. That claim can be governed only by the laws of the United States and thus is properly brought in federal court. *See Milwaukee I*, 406 U.S. at 100.

B. The "longstanding policies" justifying the application of the well-pleaded complaint rule support allowing the removal of federal-common-law claims: (1) respect for the plaintiff's deliberate choice to "eschew[] claims based on federal law, … to have the cause heard in state court"; (2) avoiding the radical expansion of "the class of removable cases, contrary to the '[d]ue regard for the rightful independence of state governments'"; and (3) preventing the "undermin[ing] [of] the clarity and ease of administration of the well-pleaded-complaint doctrine, which serves as a 'quick rule of thumb' for resolving jurisdictional conflicts." *Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831-32 (2002) (citations omitted).

First, a plaintiff cannot invoke the prerogative to choose the law and forum when the plaintiff alleges a common-law claim that is inherently federal; where federal common law applies, there is no state-law option to choose. One of the main purposes of the well-pleaded complaint rule is to honor the plaintiff's choice of bringing a claim "in state court under state law." *Id.* at 832. But, as explained above, where federal common law governs, the "implicit corollary" is that there is no state law to apply. *Ouellette*, 479 U.S. at 488. That corollary is best demonstrated in cases where federal common law necessarily governs because the claim is interstate and international in nature; transboundary issues cannot be resolved by a patchwork of state courts applying local law in an uncoordinated manner.

E.g., *New York*, 993 F.3d at 85-86 (observing that climate change is "not well-suited to the application of state law").

Second, there is no risk of flooding federal courts with a new wave of removal cases premised on federal common law. *Holmes*, 535 U.S. at 832. Federal common law plays "a necessarily modest role," *Rodriguez*, 140 S. Ct. at 717, and thus the "instances where [federal courts] have created federal common law are few and restricted," *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963). *See Tex. Indus.*, 451 U.S. at 641 (federal common law exists only in "narrow areas"). In those few areas where federal common law applies, there is little risk of intruding upon the "independence of state governments," as those areas necessarily fall outside state authority. *Holmes*, 535 U.S. at 832 (citation omitted).

Conversely, failing to recognize federal common law claims for what they are, just because the plaintiff refuses to acknowledge it, risks allowing state courts and state law to intrude upon federal priorities. As the Second Circuit has warned, attempting to apply state law in an area where federal common law should apply risks "upsetting the careful balance" of federal prerogatives. *New York*, 993 F.3d at 93. In *AEP*, a case very similar to this one that presented claims for relief based on climate change, this Court made clear that "[e]nvironmental protection" is one such area that is "undoubtedly … within *national* legislative power, one in which federal courts may fill in statutory interstices, and, if necessary, even fashion federal law." *AEP*, 564 U.S. at 421 (emphasis added, citation and internal quotation marks omitted); *see id.* (quoting *Milwaukee I*, 406 U.S. at 103); *id.* at 422 (noting not only that the subject of tort law claims based on climate change "is

meet for federal law governance," but that "borrowing the law of a particular State would be inappropriate" for federal common law claims based on climate change).

Finally, using the artful pleading doctrine to recognize federal jurisdiction in cases presenting federal common law claims does not make the well-pleaded complaint rule any more complicated to apply. It is not difficult to identify the few specific areas of the law that raise the sorts of "especial federal concerns to which federal common law applies." *Tex. Indus.*, 451 U.S. at 641 n.13; *e.g.*, *id.* at 641 (identifying "narrow areas" in which federal common law applies). The subject of "air and water in their ambient or interstate aspects," *AEP*, 564 U.S. at 421 (quoting *Milwaukee I*, 406 U.S. at 103), is one such category, and a claim of harm resulting from global climate change from interstate and international emissions fits squarely into it.

C. The court of appeals determined that the only exceptions to the well-pleaded complaint rule are for complete preemption (labeled as "artful pleading") and for federal jurisdiction as articulated in *Grable & Sons Metal Products, Inc. v. Darue Engineering and Manufacturing*, 545 U.S. 308 (2005). Pet. App. 21a-23a. But as other courts have recognized, complete preemption and artful pleading exist as two *distinct* bases for federal jurisdiction. *E.g.*, *Ohio ex rel. Skaggs v. Brunner*, 629 F.3d 527, 532 (6th Cir. 2010) (artful pleading doctrine may apply independently of complete preemption "where federal issues necessarily must be resolved to address the state law causes of action"); 15A Moore's Fed. Practice—Civil § 103.43 (2022) (noting that it is not "necessarily accurate" that artful pleading is the same as complete preemption, and that "[p]erhaps a

better expression is that the complete preemption doctrine is a specific application of the artful pleading doctrine"). "The artful pleading doctrine allows removal where federal law completely preempts a plaintiff's state-law claim," *Rivet v. Regions Bank of La.*, 522 U.S. 470, 475 (1998), but that is not all that it does.[11] Complete preemption is not the only circumstance where claims have a "sufficient federal character to support removal." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n.2 (1981). Claims that must necessarily arise under federal common law due to their interstate and transboundary character constitute another such circumstance. *Milwaukee I*, 406 U.S. at 103.

[11] That is clear from *Rivet* itself, in which this Court reiterated *Franchise Tax Board*'s statement that "a plaintiff may not defeat removal by omitting to plead necessary federal questions," and then used complete preemption as one example. 522 U.S. at 475. *Rivet* involved only an ordinary federal defense (preclusion).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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