No. 20-1089

IN THE
Supreme Court of the United States

CHEVRON CORPORATION, *et al.*,
Petitioners,
v.

CITY OF OAKLAND, *et al.*,
Respondents.

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

BRIEF OF INDIANA, ALABAMA, ALASKA, ARKANSAS, GEORGIA, KANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether putative state-law tort claims alleging harm from global climate change are removable because they arise under federal law.

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INTEREST OF THE *AMICI* STATES*

The States of Indiana, Alabama, Alaska, Arkansas, Georgia, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Oklahoma, South Carolina, South Dakota, Texas, Utah, and Wyoming respectfully submit this brief as *amici curiae* in support of petitioners.

The decision below permits plaintiffs to keep in *state* court common-law public-nuisance claims premised on *global* climate change. *Amici* States file this brief to explain why this decision is incorrect and why it presents an issue of enormous importance that deserves the Court's consideration.

The Court's decisions squarely establish that the defendants had a right to remove this case to federal court, for the plaintiffs' public-nuisance claim seeks redress for pollution of "air . . . in [its] ambient or interstate aspects," and thus necessarily arises under "federal common law." *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972). By rejecting federal-court jurisdiction here, the decision below contravenes the Court's precedents and threatens to give California state courts the power to set climate-change policy for the entire country. The Court should grant the petition and reverse this decision.

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* Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties received notice of *Amici* States' intention to file this brief at least ten days prior to the due date of this brief.

SUMMARY OF THE ARGUMENT

This case presents an issue of extraordinary importance to *Amici* States. Here the Cities of San Francisco and Oakland seek judicial resolution of one of the most complicated and contentious issues confronting policymakers today—global climate change. The Cities allege injuries they claim are caused by global climate change, which they in turn argue is caused by greenhouse gases emitted by countless entities around the world. Yet in this suit the Cities take aim at just a handful of companies: They contend these companies, by producing fossil fuels and promoting their use, have broken the law—but not law enacted by a legislature, promulgated by a government agency, or negotiated by a President. Rather, the law the Cities invoke is the common law: They claim the production and promotion of fossil fuels constitutes a "public nuisance" such that courts may impose on these defendants all the costs of remedying the Cities' alleged climate-change injuries. Federal law gives the defendants a right to have this common-law public-nuisance claim heard by a *federal* court. The Ninth Circuit's contrary conclusion contravenes this Court's precedents and demands this Court's intervention.

1. For more than 230 years federal law has in certain circumstances "grant[ed] defendants a right to a federal forum." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 137 (2005). Today, the general removal statute, 28 U.S.C. § 1441, entitles a defendant to remove a case filed in state court if the state-court "action could have been brought originally in federal court"—

such as when the case "raises claims arising under federal law" under the federal-question statute. *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1748 (2019).

Here, the defendant companies were entitled to remove the case because the Cities' common-law public-nuisance claim arises under federal law. This Court has long held that federal common law must govern disputes over interstate pollution: "When we deal with air and water in their ambient or interstate aspects, there is a federal common law." *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972). And the dispute for which the Cities' public-nuisance claim seeks judicial resolution pertains not merely to *interstate* air pollution, but to *international* air pollution. This public nuisance claim asks courts to craft rules of decision assigning liability for *global* climate change—an incredibly complex, value-laden question that affects every State and every citizen in the country. The Cities' public-nuisance claim thus *necessarily* arises under federal common law, and they cannot evade federal-court jurisdiction by merely affixing a state-law label to what is in truth a federal-law claim. The district court thus correctly concluded that it had jurisdiction over this case.

2. The Ninth Circuit, however, reversed the district court and disclaimed federal-court jurisdiction. And in doing so the decision below makes California state courts arbiters of America's climate-change policy. The decision thereby excludes other States from

the climate-change policymaking process and threatens to undermine the cooperative federalism model our country has long used to address environmental problems. For these reasons, the Court should grant the petition and reverse the decision below.

ARGUMENT

I. The Decision Below Remanding the Case Back to State Court Contravenes the Court's Decisions on Federal Common Law

A. Federal law must govern any common-law claims to abate global climate change

1. In *Erie Railroad Co. v. Tompkins* the Court recognized that federal courts have no power to supplant state common law with "federal *general* common law," 304 U.S. 64, 78 (1938) (emphasis added). The Court soon made it clear, however, that this principle does not prevent *specialized* federal common law from governing exclusively areas implicating unique federal interests. "[I]n an opinion handed down the same day as Erie and by the same author, Mr. Justice Brandeis, the Court declared, 'For whether the water of an interstate stream must be apportioned between the two States is a question of "federal common law" . . . .'" *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964) (quoting *Hinderlider v. La Plata River Co.*, 304 U.S. 92, 110 (1938)); *see also Hinderlider*, 304 U.S. at 110 ("Jurisdiction over controversies concerning rights in interstate streams is not different from

those concerning boundaries. These have been recognized as presenting federal questions.").

Indeed, it was less than five years after *Erie* that the Court issued its seminal decision in *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943), holding that federal common law should determine whether the United States could obtain reimbursement for a stolen check it had issued and that a bank had cashed over a forged endorsement. *Id.* at 364–66. The district court applied state law and concluded that the United States had unreasonably delayed giving notice of the forgery and was therefore barred from recovery, but this Court held that *federal*, not state, law governed: "The rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law," because "[t]he authority to issue the check had its origin in the Constitution and the statutes of the United States and was in no way dependent on the laws of Pennsylvania or of any other state." *Id.* at 366.

In the nearly eighty years since *Clearfield*, the Court has held that federal common law necessarily and exclusively governs disputes in numerous other areas as well. *See, e.g., United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979) (holding that "the priority of liens stemming from federal lending programs must be determined with reference to federal law"); *Banco Nacional de Cuba,* 376 U.S. at 425–427 (holding, in light of "the potential dangers were

Erie extended to legal problems affecting international relations," that "the scope of the act of state doctrine must be determined according to federal law").

In *United States v. Standard Oil Co.*, for example, the Court held that federal common law applied to the federal government's claims against an oil company whose driver had struck and injured an American soldier. 332 U.S. 301, 302 (1947). The Court observed that *Erie* did not alter the longstanding rule that federal law—including federal common law—must apply to "matters exclusively federal, because made so by constitutional or valid congressional command, or others so vitally affecting interests, powers and relations of the Federal Government as to require uniform national disposition rather than diversified state rulings." *Id.* at 307. Rather, "federal judicial power . . . remained unimpaired for dealing independently, wherever necessary or appropriate, with essentially federal matters, even though Congress has not acted affirmatively about the specific question." *Id.* In light of the federal government's "exclusive power to establish and define the [military] relationship" and the fact that "the Government's purse is affected," the Court held that "[a]s in the Clearfield case, . . . the matter in issue is neither primarily one of state interest nor exclusively for determination by state law within the spirit and purpose of the Erie decision." *Id.* at 306–07.

More recently, in *Boyle v. United Technologies Corp.*, the Court held that federal common law gov-

erns design-defect claims brought against manufacturers of military equipment. 487 U.S. 500, 512 (1988). The Court explained that "procurement of equipment by the United States is an area of uniquely federal interest" and that in this context "the application of state law would frustrate specific objectives of federal legislation." *Id.* at 507 (internal alterations, quotation marks, and citations omitted). In particular, the Court emphasized the practical problems with inevitably conflicting state laws in this area: "[P]ermitting second-guessing" of the federal government's military-equipment-design decisions "through state tort suits against contractors would produce the same effect sought to be avoided by" the Federal Tort Claims Act. *Id.* at 511. "The financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself, since defense contractors will predictably raise their prices to cover, or to insure against, contingent liability for the Government-ordered designs." *Id.* at 511–12. Because of the unique federal concerns pertaining to military procurement and the potential for significant conflicts with federal policy, *federal* common law, not state common law, governs such design-defect claims.

In sum, the "clarion yet careful pronouncement of *Erie*, 'There is no federal general common law,' opened the door for what, for want of a better term, we may call specialized federal common law." Henry J. Friendly, *In Praise of Erie–and of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 405 (1964). And it is now well established that this specialized federal

common law applies to the "few areas, involving 'uniquely federal interests,'" that "are so committed by the Constitution and laws of the United States to federal control" that they must be "governed exclusively by federal law." *Boyle*, 487 U.S. at 504 (quoting *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981)).

2. Of particular relevance here, for nearly half a century the Court has held that one area of "uniquely federal interest" to which federal common law must apply is *interstate pollution*: "When we deal with air and water in their ambient or interstate aspects, there is a federal common law." *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972). For this reason, federal common law governs the Cities' public-nuisance claim—which alleges that the defendant companies' production and promotion of fossil fuels caused interstate pollution (in the form of greenhouse gases emitted by countless entities worldwide) that contributed to global climate change, which in turn caused the injuries for which the Cities seek abatement. *See* Pet. App. 3a. If the complex and controversial policy questions underlying such claims are going to be resolved by courts at all, those defending against these claims are entitled to have *federal* courts answer these questions by applying *federal* common law.

The Court held that federal common law governed the interstate-pollution dispute in *Illinois*, and federal common law is all the more applicable here. As here, *Illinois* involved a suit brought to abate interstate pollution that the plaintiff claimed constituted a

public nuisance. Invoking the Court's original jurisdiction, Illinois claimed that several Wisconsin cities had polluted Lake Michigan with raw or inadequately treated sewage: "The cause of action alleged is pollution by the defendants of Lake Michigan, a body of interstate water," and Illinois asked the Court to "abate this public nuisance." *Illinois*, 406 U.S. at 93. The Court recognized that because Illinois had sued an out-of-state entity the case fell within its original jurisdiction, but it observed that if the case could have instead been brought "in a federal district court, [its] original jurisdiction is not mandatory." *Id.* at 98. The Court thus proceeded to consider "whether pollution of interstate or navigable waters creates actions arising under the 'laws' of the United States within the meaning of § 1331(a) [the federal-question statute]." *Id.* at 99.

The Court held "that it does." *Id.* It explained that an earlier Tenth Circuit decision had "stated the controlling principle"—"'the ecological rights of a State in the improper impairment of them from sources outside the State's own territory. . . [is] a matter having basis and standard in federal common law and so directly constituting a question arising under the laws of the United States.'" *Id.* at 99–100 (quoting *Texas v. Pankey*, 441 F.2d 236 (10th Cir. 1971)). Further, the Court analogized interstate-pollution disputes to disputes "concerning interstate waters," which *Hinderlider* more than three decades prior had "'recognized as presenting federal questions.'" *Id.* at 105 (quoting *Hinderlider*, 304 U.S. at 110). *Hinderlider*—which "was written by Mr. Justice Brandeis who also wrote

for the Court in *Erie*, the two cases being decided the same day"—foreclosed the argument "that state law governs" interstate-pollution disputes; it established that *federal* common law governs such disputes instead. *Id.* at 105 n.7 (internal citations omitted). At bottom, cases, like *Illinois*, that arise from interstate pollution implicate "an overriding federal interest in the need for a uniform rule of decision" and "touch[] basic interests of federalism," and in such cases the Court has therefore "fashioned federal common law." *Id.* at 105 n.6 (citing *Banco Nacional de Cuba*, 376 U.S. at 421–27).

In *American Electric Power Co. v. Connecticut*, the Court reiterated *Illinois*'s conclusion that "[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law." 564 U.S. 410, 421 (2011) (quoting *Illinois*, 406 U.S. at 103). Justice Ginsburg's opinion for the Court reaffirmed precisely the Court's reasoning in *Illinois*: Specialized federal common law governs "'subjects within national legislative power where Congress has so directed' or where the basic scheme of the Constitution so demands." *Id.* (quoting Friendly, *supra*, at 408 n.119, 421–22). And because the "'national legislative power'" includes the power to adopt "environmental protection" laws addressing interstate pollution, federal courts can, "if necessary, even 'fashion federal law'" in this area. *Id.* (quoting Friendly, *supra,* at 421–422).

Illinois held that claims to abate public nuisance in interstate waters arise under federal common law,

and it expressly extended this conclusion to the parallel situation of disputes involving "air . . . in their ambient or interstate aspects" as well. *Illinois*, 406 U.S. at 103. That definitively establishes that federal—not state—common law governs the Cities' claim to abate public nuisance in interstate air. What is more, the reasons the Court cited for applying federal common law in *Illinois* apply with even greater force here, where the Cities seek to bring a purportedly California-common-law claim against energy companies for injuries allegedly produced by a long chain of conduct—including conduct of third parties—that occurred all over the globe.

3. Indeed, this case powerfully illustrates why the Court has held that, in areas of unique federal interests, any common-law rules of decision must be articulated by federal—not state—courts.

The Cities urge California state courts to determine—under the auspices of the common law of public nuisance—whether "the gravity of the harm [of fossil fuels] outweighs [their] utility." Pet. App. 42a (quoting Restatement (Second) of Torts § 826 (1979)). That is, the Cities ask California courts to weigh the costs and benefits of fossil fuels and then decide how to regulate them—quintessentially legislative judgments. As the district court below aptly pointed out in exercising jurisdiction over and dismissing the Cities' public-nuisance claims, such weighing of costs and benefits "falls squarely within the type of balancing best left to Congress (or diplomacy)." *Id.* at 41a.

Exacerbating the problem, the Cities have sued just a handful of energy companies for conduct that occurred not only outside California, but outside the country—conduct the Cities concede to be injurious only in conjunction with others' *use* of fossil fuels the defendants (and others) produce and sell. *Id.* at 36a ("[D]efendants stand accused, not for their own emissions of greenhouse gases, but for their sale of fossil fuels to those who eventually burn the fuel."). The Cities seek, from these few disfavored companies, abatement of *all* the harm they have allegedly suffered from global climate change, even though many other actors, through conduct occurring in many other States and countries, are—on the Cities' own account—responsible for much of that alleged harm. As the district court observed below, the "scope of plaintiffs' theory is breathtaking," for it "rests on the sweeping proposition that otherwise lawful and everyday sales of fossil fuels, combined with an awareness that greenhouse gas emissions lead to increased global temperatures, constitute a public nuisance." *Id.* at 32a. This theory "would reach the sale of fossil fuels anywhere in the world," and "[w]hile these actions are brought against the first, second, fourth, sixth and ninth largest producers of fossil fuels, anyone who supplied fossil fuels with knowledge of the problem would be liable." *Id.*

State courts have no business deciding how global climate change should be addressed and who—among all the countless actors around the world whose conduct contributes to it—bears legal responsibility for creating it. In addition to the obvious potential for

gross unfairness, such state-court-created common-law rules would inevitably "present a 'significant conflict' with federal policy." *Boyle*, 487 U.S. at 512. Among many other problems, state-common-law rules would undermine the regulatory authority States themselves have under carefully calibrated cooperative-federalism programs—programs that are administered by politically accountable officials at the federal, state, and local levels. *See infra* Part II.

Making matters still worse, the Cities are not alone in urging state courts to impose judicially created regulations on the worldwide production of fossil fuels. Many other jurisdictions have filed similar public-nuisance claims urging state courts to hold fossil fuel companies liable for the costs of global climate change. *See, e.g.*, Pet. App. 43a n.9. Chances are that state courts in at least some of these actions will be receptive to the claims, which will ultimately lead to a patchwork of conflicting standards purporting to create liability for the same extraterritorial conduct. Ultimately, therefore, all this and other similar lawsuits have to offer is regulatory chaos.

Any worldwide allocation of responsibility for remediation of climate change requires national or international action, not ad hoc intervention by individual state courts acting at the behest of a handful of local governments. It is precisely for this reason that the Court long ago held that if plaintiffs are going to ask courts to give common-law answers to questions

of interstate pollution, defendants have a right to ensure that any such courts are federal courts applying federal common law. *See Illinois*, 406 U.S. at 103.

B. Because the Cities' public-nuisance claim is governed by federal common law, it necessarily arises under federal law and removal was therefore proper

That federal common law governs the Cities' public-nuisance claim necessarily means this case is removable to federal court. The federal-question statute gives district courts jurisdiction to hear claims sounding in federal common law. The Cities' action thus "could have been brought originally in federal court," *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1748 (2019), and accordingly "the general removal statute . . . permits" the defendant companies "to remove that action to federal court," *id.* at 1746. For these reasons, the district court was correct to deny the Cities' remand motion, and the Ninth Circuit contravened Supreme Court precedents in reversing and ordering the case remanded.

1. The federal-question statute gives federal district courts "original jurisdiction" over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331(a). And a "case 'arising under' federal common law presents a federal question and as such is within the original subject matter jurisdiction of the federal courts." 19 Charles Alan Wright & Arthur R. Miller, *Federal Common Law*, Fed. Prac. & Proc. Juris. § 4514 (3d ed. 2020).

The Court has recognized on multiple occasions "'the statutory word 'laws' includes court decisions'" and "embrace[s] claims founded on federal common law." *Illinois*, 406 U.S. at 99 (quoting *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 393 (opinion of Brennan, J.)); *see also id.* (acknowledging that lower courts have reached this same conclusion); *San Carlos Apache Tribe v. United States*, 272 F. Supp. 2d 860, 882 (D. Ariz. 2003), *aff'd*, 417 F.3d 1091 (9th Cir. 2005) ("Jurisdiction exists over violations to the federal common law as well as those of statutory origin, and, therefore, this Court has subject matter jurisdiction over Plaintiffs' common law nuisance claim."). In *Illinois*, for example, the Court determined that, as here, a claim seeking abatement of interstate pollution "creates an action that arises under the 'laws' of the United Sates within the meaning of 1331(a)." 406 U.S. at 99.

2. Crucially, the district court had jurisdiction over this case because the Cities' public-nuisance claim *necessarily arises* under federal common law—not merely subject to a federal-law defense. And that means the Cities cannot simply stamp their public-nuisance claim with a state-law label and thereby deprive federal courts of jurisdiction.

Generally, of course, a plaintiff is "the master of the claim" and "may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). Yet, "[a]llied as an 'independent corollary'" to the well-pleaded complaint rule "is the further principle that 'a plaintiff may not

defeat removal by omitting to plead necessary federal questions.'" *Rivet v. Regions Bank of La.*, 522 U.S. 470, 475 (1998) (quoting *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 22 (1983)). Plaintiffs cannot evade the reach of federal law or federal courts by declaring unilaterally that their claims arise under state law. "If a court concludes that a plaintiff has 'artfully pleaded' claims in this fashion, it may uphold removal even though no federal question appears on the face of the plaintiff's complaint." *Id.* In other words, when a plaintiff raises a nominal state-law claim that *is in reality* governed by federal law, removal is proper.

Such was the foundation, for example, of the Court's holding in *Avco Corp. v. Aero Lodge No. 735*, which held that an action to enforce a provision of a collective bargaining agreement was "controlled by federal substantive law even though it is brought in a state court"—and was therefore removable to federal court—because the case necessarily stated a claim "arising under the 'laws of the United States' within the meaning of the removal statute." 390 U.S. 557, 560 (1968) (quoting 28 U.S.C. § 1441(b)). Lower courts, too, have applied this reasoning to uphold removal of cases raising purportedly state-common-law claims that in truth arise under federal common law. *See New SD, Inc. v. Rockwell Int'l Corp.*, 79 F.3d 953, 955 (9th Cir. 1996) (declaring that federal, rather than state, common law provides the rule of decision—and a basis for federal question jurisdiction—to a dispute over a federal defense contract); *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 926–28 (5th

Cir. 1997) (citing *Illinois* and holding that, notwithstanding plaintiff's nominal plea of a state law claim, federal common law applied to—and conferred federal-question jurisdiction over—an air-transit lost-cargo claim because Congress preserved a "federal common law cause of action against air carriers for lost shipments").

Indeed, allowing artful pleading to avert removal of claims governed by federal common law would put *state* courts in the position of creating *federal* common-law. And that would undermine the very purpose of federal common law, which is to ensure that in "a few areas, involving uniquely federal interests," the rules of decision "are governed exclusively by federal law." *Boyle*, 487 U.S. at 504 (internal quotation marks and citations omitted). Where, as here, the rules of decision "must be determined according to federal law," "state courts [are] not left free to develop their own doctrines." *Banco Nacional de Cuba*, 376 U.S. at 426–27.

In contrast with disputes over the meaning of federal statutory or constitutional provisions, common-law cases require courts to make difficult judgments about what "seems to [them] sound policy," *Boyle*, 487 U.S. at 513, which is why state-court common-law decisions are usually understood to announce (and perhaps inherently do announce) *state* common law. Permitting plaintiffs to compel state-court adjudication of federal-common-law claims, therefore, would put state courts in the position of discerning federal judi-

cial policy—or else guess what policy judgments regarding "uniquely federal interests" *this* Court would adopt. The Court's decisions, however, hold that in certain areas, such as those involving interstate pollution, any common-law rules must be crafted by *federal* judges—that is, judges appointed by a nationally elected president and confirmed by a Senate in which every State is entitled to equal representation.

It is therefore essential to permit removal of claims that, while pleaded in state-law terms, in fact sound in federal common law. And here, the Cities' common-law public-nuisance claim must be governed by *federal* common-law rules of decision articulated by *federal* courts. The district court thus had jurisdiction to consider this claim, and the defendant companies were therefore entitled to remove the case to federal court.

II. The Decision Below Puts the Country's Climate-Change Policy in the Hands of California State Courts and Thereby Raises an Issue of Nationwide Importance

The Ninth Circuit's mistaken denial of federal-court jurisdiction here allows plaintiffs to keep in *state* court claims seeking judicial answers to the vexing policy questions presented by *global* climate change. That decision affects companies, consumers, and policymakers around the country—in fact, around the world—and thus presents an important question of federal law that warrants resolution by this Court. *See* Sup. Ct. R. 10.

Notably, the decision below places the Ninth Circuit in conflict with at least one other circuit court: In *Sam L. Majors Jewelers v. ABX, Inc.*, the Fifth Circuit upheld removal in a similar situation—as here, the plaintiff's state-court complaint raised purportedly state-law common-law tort claims, and the defendant removed on the ground that the claims were "governed by federal law." 117 F.3d 922, 924 (5th Cir. 1997). The Fifth Circuit began by noting that while federal-question jurisdiction turns on whether "a federal question is presented on the face of a plaintiff's properly pleaded complaint," "jurisdiction may be asserted"—regardless of the complaint's use of a state-law label—where "the cause of action arises under federal common law principles." *Id.*; *see also id.* at 926 (citing *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972), for the proposition that "[f]ederal jurisdiction exists if the claims in this case arise under federal common law"). It then applied the reasoning in *Illinois* and this Court's other specialized-common-law cases to conclude that the common-law claim at issue there "arises under federal common law" and thus federal courts had "jurisdiction over this action." *Id.* at 928–29.

Indeed, in addition to creating an inter-circuit conflict, the decision below creates an internal conflict within the Ninth Circuit itself. In *New SD, Inc. v. Rockwell International Corp.*, the Ninth Circuit upheld removal of an action initially filed in state court "because federal law control[led]" the contract claims to which the complaint had attached a state-law label. 79 F.3d 953, 954 (9th Cir. 1996). The Ninth Circuit

first determined that federal common law governed and then concluded—in direct contradiction to the decision below—that "[w]hen federal law applies, . . . it follows that the question arises under federal law, and federal question jurisdiction exists." *Id.* at 955.

Moreover, beyond this lower-court split, the decision below threatens to have serious nationwide consequences. By preventing defendants from removing climate-change public-nuisance cases to federal court, the decision below threatens to give a small band of state courts effective authority over the national framework regulating the production, promotion, and use of energy—a regulatory framework that has, of course, long endorsed and encouraged the extraction and use of fossil fuels.

Notably, this national regulatory system is one in which *all* States play a critical policymaking role. The Clean Air Act, for example, assigns States a significant role in tailoring and enforcing the statute's requirements, with state officials, subject to review by federal officials, holding authority to craft state-specific solutions to the difficult questions surrounding air-pollution regulation. *See, e.g.*, 42 U.S.C. § 7401(a)(3) (finding that controlling air pollution "at its source is the primary responsibility of States and local governments"); *id.* § 7410(a) (requiring States to adopt implementation plans to achieve federal ambient air quality standards and permitting variation in light of local circumstances); *id.* § 7412(*l*) (authorizing States to implement federal hazardous air pollutant standards and allowing modifications to meet local

needs); *id.* § 7416 (authorizing States to impose state-law requirements more stringent than federal standards); *id.* § 7661a (requiring States to adopt permitting programs tailored to state needs).

Congress identified the Clean Air Act's purpose as promoting *both* the country's "public health and welfare *and* the productive capacity of its population." *Id.* § 7401(b)(1) (emphasis added). And it has endorsed different regulatory approaches in different States because it recognizes that pursuing both of these goals—balancing health and environmental considerations against the value of economic activity, including energy production—is an inherently political undertaking that must be responsive to local conditions. And, critically, each State is afforded regulatory autonomy because *other* States' policy prerogatives stop at the state line. The Cities' lawsuit, in stark contrast, asks state courts impose a single, one-size-fits-all policy for the entire country.

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For decades this Court has recognized that in certain "area[s] of uniquely federal interest," if there is going to be policymaking via common-law adjudication, it must be done in accordance with *federal* common law. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 507 (1988). This rule does more than protect the integrity of federal regulatory schemes. It also preserves the place of *all* States in the policymaking process, for it prevents the courts of a single State from

making common law for the entire country—and ensures any judge-made rules are crafted by jurists appointed by a president elected by the nation's voters and confirmed by a senate in which each State has an equal voice. The decision below, however, undermines this rule: It allows a plaintiff to avoid federal-court scrutiny of common-law claims by simply declaring that the claims arise under state law. Every State has an interest in seeing the Court correct this decision. The Court should do so.

CONCLUSION

For the foregoing reasons, the Court should grant the petition and reverse the decision below.

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