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 OF INDIANA AND 15 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether federal common law necessarily and exclusively governs claims seeking redress for injuries allegedly caused by the effect of interstate greenhouse-gas emissions on the global climate.

2. Whether a federal district court has jurisdiction under 28 U.S.C. § 1331 over claims necessarily and exclusively governed by federal common law but labeled as arising under state law.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CASES [CONT'D]

CASES [CONT'D]

STATUTES

STATUTES [CONT'D]

OTHER AUTHORITIES

INTEREST OF THE *AMICI* STATES*

The States of Indiana, Alabama, Alaska, Arkansas, Georgia, Kansas, Kentucky, Mississippi, Missouri, Montana, Nebraska, Oklahoma, South Carolina, Texas, Utah, and Wyoming respectfully submit this brief as *amici curiae* in support of petitioners. The court of appeals' ruling that nuisance claims to abate global climate change must proceed in state court under state law is of significant interest to *amici*. That ruling threatens to let a single State's judiciary set climate-change policy for other States. If replicated in other similar lawsuits (many of which are pending throughout the country), it threatens to subject energy companies—and other contributors to greenhouse-gas emissions—to multiple vague and conflicting rules governing the extraction, production, and promotion of fossil fuels (among a potentially infinite array of supposed "public nuisances"). The threatened regulatory chaos undermines the coequal sovereignty of each State to regulate emissions within their respective borders. *Amici* States have a profound interest in, and critical perspective on, the proper role of state law and state courts in addressing global emissions and climate change.

ARGUMENT

This case is one of many where local governments have alleged common-law nuisance claims against a few energy companies for contributing to global climate change by extracting, producing, and promoting fossil-fuel products. States and localities have

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

asserted similar claims in at least 23 other cases filed around the country.

State-court public-nuisance lawsuits seeking to "redress" global climate change are a menace to coherent law, politically accountable government, and federalism. To be sure, state courts are critical for remedying local injuries arising from local conduct. But their capacities to evaluate the costs and benefits of local economic activity makes them ill-suited to impose standards for greenhouse gases emitted elsewhere, even if those out-of-state emissions have some attenuated local effect. As the Second Circuit observed, mitigating liability for the effects of global greenhouse-gas emissions would require energy companies to act differently not just in California, Colorado, or New York but in "*every* state (and country)." *City of New York v. Chevron Corp.*, 993 F.3d 81, 92 (2d Cir. 2021) (emphasis added).

Nuisance claims to abate global climate change thus necessarily present "an interstate matter raising significant federalism concerns." *City of New York*, 993 F.3d at 92. A cardinal rule of federalism is that no single State may impose its policy preferences on other States. Accordingly, as the Court recognized a half century ago, applying state law to nuisance claims over transboundary pollution undermines "basic interests of federalism." *Illinois v. City of Milwaukee*, 406 U.S. 91, 105 n.6 (1972). The result would be chaotic state common-law policies and inconsistent rules and standards. Respect for federalism requires that nuisance claims confronting global climate

change be resolved under *federal* law, rendering those claims removable to *federal* court.

In conflict with the Second Circuit, however, the Tenth Circuit below held that nuisance claims for global climate change arise under state law and must proceed in state court. That decision cries out for review. It threatens to let a few States set national climate policy—or, more likely, multiple, inconsistent policies—via their own courts. To protect the interests of other sovereign States, the Court should intervene to make clear that federal—not state—law necessarily and exclusively governs nuisance claims concerning global emissions and global climate change.

I. Whether Federal Law Necessarily Governs Nuisance Claims for Global Greenhouse-Gas Emissions Affects Important State Interests

States have long had the sovereign responsibility to regulate emissions emanating from within their borders. The Court itself has observed that pollution regulation "clearly falls within the exercise of even the most traditional concept of . . . the police power." *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960). Even today, the Clean Air Act (CAA), 42 U.S.C. § 7401, *et seq.*, affords States considerable flexibility in setting emissions policy for in-state sources. Preserving the regulatory prerogatives of all States requires that state law reach no further than the state line. Applying state common law to disputes over emissions (and pre-emission economic activity) occurring in other States would allow one State to set policy for all the rest, contrary to the constitutional design. Only federal law is

competent to resolve such transboundary disputes. The Tenth Circuit's contrary ruling that claims concerning global greenhouse-gas emissions can proceed under state law in state court jeopardizes important state interests.

A. Basic federalism values require the application of federal law to disputes involving transboundary emissions

1. States have long been responsible for regulating pollution sources within their borders. *See Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001); *Huron Portland*, 362 U.S. at 442; *Nw. Laundry v. City of Des Moines*, 239 U.S. 486, 491–92 (1916). For decades, States and local governments have enacted ordinances to abate dense smoke from furnaces in parts of cities, *see, e.g.*, *Nw. Laundry*, 239 U.S. at 489–90, 492, or permitted nuisance suits to redress injuries from noxious smoke, odors, and gasses emitted by local industries, *see, e.g.*, *Holman v. Athens Empire Laundry Co.*, 100 S.E. 207, 210–13 (Ga. 1919); *Fisher v. Zumwalt*, 61 P. 82, 82–84 (Cal. 1900); *Matthews v. Stillwater Gas & Elec. Light Co.*, 65 N.W. 947, 948 (Minn. 1896). States' historic police power extends to enacting "[l]egislation designed to free from pollution the very air that people breathe." *Huron Portland*, 362 U.S. at 442.

The States' role as regulators of local air pollution continues today under the Clean Air Act (CAA), a comprehensive (and cooperative) regulatory scheme. *See Train v. Nat. Res. Def. Council, Inc.*, 421 U.S. 60, 64 (1975). Under the CAA, States have "primary responsibility" for controlling emissions "at [their]

source." 42 U.S.C. § 7401(a)(3). The CAA authorizes States to develop their own plans and permitting programs for achieving federal air quality standards "within [a] State." *See, e.g.*, *id.* §§ 7410(a), 7412(*l*), 7661a. That approach allows States to "tailor standards" to "local conditions and needs," *Duquesne Light Co. v. EPA*, 698 F.2d 456, 471 (D.C. Cir. 1983), "balanc[ing]" environmental goals against "competing interests," *Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 427 (2011) (*AEP*); *see Train*, 421 U.S. at 64. And as state statutes reflect, a wide variety of interests bears on state regulatory decisions, including air purity, "public health," "public enjoyment," available "resources," "flora and fauna," "employment," "industrial development," and "practical and economic[] feasib[ility]." Ind. Code § 13-17-1-1; *see, e.g.*, N.H. Stat. § 125-C:1; Wash. Stat. § 70A.15.1005.

2. By contrast, regulation of *interstate* pollution has long been a matter for "federal, not state, law." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987); *see AEP*, 564 U.S. at 421–22. Even before the advent of federal environmental statutes employing "cooperative federalism," federal courts recognized territorial limits to state environmental policies. "For over a century," this Court has "applied federal law to disputes involving interstate air or water pollution." *City of New York*, 993 F.3d at 91 (collecting cases); *see AEP*, 564 U.S. at 421–22 (collecting additional cases).

In *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) (*Milwaukee I*), for example, this Court considered whether a nuisance claim for "pollution of interstate or navigable waters" was governed by federal common

law and "ar[ose] under the 'laws' of the United States" within the meaning of 28 U.S.C. §1331(a)—and held "that it d[id]." 406 U.S. at 99. "'[T]he ecological rights of a State in the improper impairment of them from sources outside the State's own territory,'" it ruled, is "'a matter having basis and standard in federal common law.'" *Id.* at 99–100 (quoting *Texas v. Pankey*, 441 F.2d 236, 240 (10th Cir. 1971)). It necessarily rejected that state law could "be used." *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 n.7 (1981) (*Milwaukee II*).

Milwaukee I's holding that federal law governs nuisance claims related to "air and water in their ambient or interstate aspects," 406 U.S. at 103, follows from "the basic scheme of the Constitution," *AEP*, 564 U.S. at 421. A "cardinal rule, underlying all the relations of the states to each other, is that of equality of right." *Kansas v. Colorado*, 206 U.S. 46, 97 (1907). "[N]o single State" has "authority to enact . . . policy for the entire Nation . . . or even impose its own policy choice on neighboring States." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571 (1982). "[O]ur federal system" therefore "does not permit" interstate-pollution disputes "to be resolved under state law." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 & n.13 (1981). An "overriding federal interest in . . . a uniform rule of decision" and "basic interests of federalism" "require[] [courts] to apply federal law" instead. *Milwaukee I*, 406 U.S. at 105 n.6.

In *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011) (*AEP*), the Court recognized that principle's enduring nature. "Environmental protection," it explained, is "undoubtedly" an area "meet for

federal law governance" in which federal courts "may fill in 'statutory interstices,' and, if necessary, even 'fashion federal law.'" 564 U.S. at 421–22. That is why the Court has for more than 120 years "approved federal common-law suits brought by one State to abate pollution emanating from another State." *Id.* at 421. It has applied federal common law precisely because "borrowing the law of a particular State would be inappropriate." *Id.* Where "federal common law exists, it is because state law cannot be used." *Milwaukee II*, 451 U.S. at 313 n.7.

3. Applying federal law to disputes involving transboundary pollution is essential to protect each State's freedom to pursue different policies within its own jurisdiction. As the Court has recognized, applying an affected State's law extraterritorially to out-of-state sources would "effectively override" the "policy choices made by the source State." *Ouellette*, 479 U.S. at 495. It "would compel the source to adopt" whichever state standards were most stringent, without regard to how other States have "weigh[ed]" the regulatory "costs and benefits." *Id.* The "inevitable result" of applying state law to ambient air or water pollution would be to let one or two States dictate environmental policy for other sovereign States. *Id.*

Such extraterritorial regulation would lead to "chao[s]." *Ouellette*, 479 U.S. at 496–97. To determine liability, any court considering public nuisance claims would need to find a "right" to the climate—in all of its infinite variations—as it stood at some unspecified time in the past, then find not only that this idealized climate has changed (for the worse—whatever that

might mean), but that the defendants caused that change through "unreasonable" action. And, as a remedy, the court would need to impose a regulatory scheme—balancing the gravity of the alleged harms against the utility of each defendant's conduct—on fossil fuel extraction, production, promotion, and emission that are *already* subject to comprehensive state and federal regulation. No principled, judicially administrable standards exist for that undertaking, and no national political accountability exists for state courts who embrace it anyway.

Applying state nuisance law, moreover, would pit state policies against one another. Suppose a Colorado court were to rule that CO_2 emissions from power plants constitute a nuisance under state tort law and require energy producers outside Colorado to cap and reduce production by a specified percentage each year for a decade. *See AEP*, 564 U.S. at 418–19 (describing a similar injunction requested under state and federal tort law). Such a ruling—made without the benefit of the "scientific, economic, and technological resources" of federal and state regulators—would effectively override regulatory decisions made by other States. *Id.* at 426–28. And it could subject those States to dire consequences: An injunction might force power plants nationwide to shut down or reduce generation, which could in turn disrupt state economies and even subject citizens to blackouts. *Cf. id.* at 427.

Even remedies short of injunctive relief could be nationally devastating. Suppose a Colorado court were to award damages against energy companies for

injuries allegedly stemming from "fossil fuel emissions no matter where in the world those emissions were released." *City of New York*, 993 F.3d at 93. Such a damages award—which might require companies "to spend billions of dollars," *City of Oakland v. BP PLC*, 696 F.3d 895, 907 (9th Cir. 2020)—could be as "'potent [a] method of governing conduct and controlling policy'" as an injunction, *Kurns v. RR. Friction Prods. Corp.*, 565 U.S. 625, 637 (2012). Avoiding liability would require companies "to cease global [fossil-fuel] production altogether." *City of New York*, 993 F.3d at 93. That would set Colorado nuisance law against the choices other States have made to encourage oil, gas, or coal production or to permit fossil fuels' use.

"And even if some level of ongoing liability were deemed palatable, a significant damages award would no doubt 'compel[]'" companies to ratchet up "'pollution control'" beyond what is required where they operate. *City of New York*, 993 F.3d at 93 (quoting *Ouellette*, 479 U.S. at 495, 498 n. 19). The balances other States have already struck among controlling pollution, promoting economic development, and ensuring energy security would be upended. *See id.* In short, resolving transboundary-pollution disputes under state law—State, by State, by State—would result in "'chaotic confrontation'" between the various public policies of "'sovereign states.'" *Ouellette*, 479 U.S. at 496 (quoting *Illinois v. City of Milwaukee*, 731 F.2d 403, 414 (7th Cir. 1984)).

B. Review is warranted to protect state prerogatives to pursue different emissions policies within their borders

The Court has already recognized the importance of examining the extent to which state statutory law can affect economic transactions and conduct occurring wholly beyond a State's borders—including during October Term 2022. *See, e.g.*, *Nat'l Pork Producers Council v. Ross*, 142 S. Ct. 1413 (2022); *BMW*, 517 U.S. 559; *Healy v. Beer Inst. Inc.*, 491 U.S. 324 (1989). It is no less important to address whether state common law can apply extraterritorially as a means of redressing global climate change.

This case "touches" the same "basic interests of federalism" as other transboundary-pollution cases. *Milwaukee I*, 406 U.S. at 105 n.6. Boulder's nuisance claims are for injuries allegedly caused by "climate change." Pet. App. 3a. As Boulder's own complaint establishes, however, climate change is a global issue caused by conduct worldwide. Boulder complains of injuries allegedly caused by a "warming" planet and increasing "global temperatures," C.A. App. 105–106—injuries that are by definition "'widely shared,'" *Massachusetts v. EPA*, 549 U.S. 497, 523 (2007). But Boulder does not—and cannot—allege that the four companies it singled out for suit are responsible for all, or even most, greenhouse-gas emissions worldwide. Nor does Boulder allege that the "multinational" companies it sued undertook all challenged conduct in Colorado. C.A. App. 84, 90. In fact, Boulder admits that Exxon produces in Colorado only a tiny

fraction of the "billions of barrels of oil" it sources from myriad locations worldwide. *Id.* at 92 & n.7, 99.

Even so, Boulder asks Colorado courts applying Colorado law to impose liability. As the Second Circuit has recognized, that raises obvious "foreign policy" and "federalism" concerns. *City of New York*, 993 F.3d at 92–93. To avoid liability for Boulder's alleged injuries, the defendant energy companies would have to alter their conduct in "every state (and country)" in which they extract, produce, and market fossil fuels. *Id.* at 92. Yet Boulder seeks to have Colorado courts applying Colorado law determine how the companies' conduct should change. It effectively asks a single State's judiciary to set global climate-change policy.

The injury to other States' interests is transparent. As described above, States have a variety of carefully calibrated regulatory programs to "restrict[] emissions from sources within their borders." *West Virginia v. EPA*, 597 U.S. __, No. 20-1530, slip op. at 2 (2022); *see* pp. 4–5, *supra*. And those programs consider a variety of environmental, economic, and other local interests, striking different balances. *See, e.g.*, Ind. Code § 13-17-1-1. To let Colorado's judiciary impose liability for actions undertaken in other States would "effectively override" the "policy choices made by the source State." *Ouellette*, 479 U.S. at 495; *see* pp. 7–9, *supra*. That offends a "cardinal rule" of federalism, *Kansas*, 206 U.S. at 97: In our federal system, "no single State" may "impose its own policy choice on neighboring States," *BMW*, 517 U.S. at 571.

Worse, Boulder is not alone in urging state courts to address the complex issue of global climate change.

At least "23 related cases are pending in federal courts nationwide," Pet. 8—and there have been multiple other attempts to use state nuisance law to abate climate change, *see, e.g.*, *AEP*, 564 U.S. at 418; *City of New York*, 993 F.3d at 85; *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 869 (N.D. Cal. 2009), *aff'd* 696 F.3d 849 (9th Cir. 2012). Those attempts will continue, particularly if the current plaintiffs enjoy success in their own state courts.

It is, moreover, likely that some state courts will be receptive, for public nuisance law is notoriously "'vague'" and "'indeterminate,'" *Ouellette*, 479 U.S. at 496, providing "almost no standard of application," *North Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 302 (4th Cir. 2010); *see City of New York*, 993 F.3d at 97–98. One state court has already refused to dismiss nuisance claims for greenhouse-gas emissions and climate change. *See City & Cnty. of Honolulu v. Sunoco LP*, No. 1CCV-20-0000380 (JPC), Order Denying Mot. to Dismiss (Haw. Cir. Ct. Mar. 29, 2022), *leave for interlocutory appeal granted*.

The mere fact that this case arises in the removal context does not diminish its importance. An essential premise of the decision below is that "claims related to climate change" may be brought under "'state nuisance law.'" Pet. App. 24a–25a, 30a. The Tenth Circuit rejected arguments that "'federal common law supplies the rule of decision for [such] claims.'" *Id.* at 31a. Whether federal or state law governs nuisance claims for harms from transboundary emissions is squarely presented.

Nor does the distant prospect that the energy companies might be able to assert a successful preemption defense under the CAA undercut the need for review. The issue here is fundamental: whether the "basic scheme of the Constitution" requires that public-nuisance claims to abate global greenhouse-gas emissions be resolved under federal law, irrespective of how plaintiffs label them or what statutory defenses might (or might not) be available. *AEP*, 564 U.S. at 421. Review is important to safeguard each State's authority to regulate within its borders.

II. The Decision Below Is Wrong

The Tenth Circuit erred in holding that Boulder's nuisance claims to abate global greenhouse-gas emissions arose under state law and must proceed in state court. Those claims necessarily arise under federal law, rendering them removable to federal court.

A. Boulder's nuisance claims to abate global climate change are removable

As discussed above (pp. 5–7, *supra*), the Court has repeatedly "approved" the application of federal common law to suits "to abate pollution emanating from another State." *Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 421 (2011) (*AEP*). It has recognized that an "overriding federal interest in . . . a uniform rule of decision" and "basic interests of federalism" "require[] [courts] to apply federal law" to transboundary-pollution claims, such as claims to abate "pollution of a body of water . . . bounded" by multiple States. *Illinois v. City of Milwaukee*, 406 U.S. 91,105 n.6. (1972) (*Milwaukee I*). Thus, "[w]hen we deal with air and water in their ambient or interstate

aspects, there is a federal common law." *Id.* at 103. "[F]ederal"—not state—"law governs." *Id.* at 107; *see also id.* at 102, 107 n.9.

The rule that federal law governs nuisance claims for transboundary pollution applies with equal force to Boulder's nuisance claims over *global* emissions—rendering such claims removable. *See* pp. 5–11, *supra*. Defendants may remove any case over which a federal district court would have "original jurisdiction," 28 U.S.C. § 1441(a), including cases presenting claims "arising under the Constitution, laws, or treaties of the United States," *id.* § 1331; *see Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1748 (2019). 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 C. Wright & A. Miller, *Fed. Prac. & Proc. Jurisdiction and Related Matters* § 4514 (3d ed. 2021).

Milwaukee I makes particularly clear that federal courts have jurisdiction here. There, the Court held that "nuisance" claims for "pollution of interstate or navigable waters creates actions arising under the 'laws' of the United States within the meaning of § 1331(a)," the statute providing federal-question jurisdiction. 406 U.S. at 99. As the Court explained, such claims "require[]" application of federal law—just like state disputes over "boundaries" and "interstate streams," which have long "'been recognized as presenting federal questions.'" *Id.* at 105 & n.6. Such claims have their "'basis and standard in federal common law and so directly constitut[e] a question

arising under the laws of the United States.'" *Id.* at 99–100. The same is true here.

The mere fact that Boulder does not expressly assert claims under federal common law is immaterial. Under the artful-pleading doctrine, 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). Thus, where—as here—a claim is "controlled by federal substantive law," it may be removed to federal court, *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 560 (1968), "even though no federal question appears on the face of the plaintiff's complaint," *Rivet*, 552 U.S. at 475. 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 v. Sabbatino*, 376 U.S. 398, 426–27 (1964). Boulder cannot evade federal law or federal jurisdiction by unilaterally declaring that its claims arise under state law.

B. The Clean Air Act does not change the governing rule of decision

The Tenth Circuit's contrary ruling rests on a misapprehension of the CAA. The court admitted the existence of a "'federal common law' concerning 'air and water in their ambient or interstate aspects.'" Pet. App. 25a. Yet, "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," rendering it improper to remove claims formerly governed by it. *Id.* at 29a–30a.

That misapprehends the CAA's effect. Through the CAA, Congress transferred responsibility for setting interstate standards from the *federal* judiciary to other branches of the *federal* government. *See AEP*, 564 U.S. at 423–25. It made plain that "'federal courts'" are no longer to engage in "'law-making,'" *id.* at 423 (quoting *City of Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981) (*Milwaukee II*)), or "'supplement' Congress' answer" for ambient emissions, *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978). It is, however, "too strange to seriously contemplate" that the CAA somehow paved the way for state courts to apply state law to interstate emissions. *City of New York v. Chevron Corp.*, 993 F.3d 81, 99 (2d Cir. 2021). The reason that this Court long applied "federal common law" to transboundary-pollution claims is that "state law cannot be used." *Milwaukee II*, 451 U.S. at 313 n.7.

Indeed, "the very reasons the Court gave for resorting to federal common law in *Milwaukee I* are the same reasons why the state claiming injury cannot apply its own state law to out-of-state [emissions] now." *Illinois v. City of Milwaukee*, 731 F.2d 403, 410 (7th Cir. 1984). In *Milwaukee I*, this Court recognized that (among other things) "basic interests of federalism" "require[]" the application of federal law to nuisance claims for transboundary pollution. 406 U.S. at 105 n.6. Nothing in the CAA alters those interests. In *AEP*, this Court reiterated that "borrowing the law of a particular State" to resolve a claim to abate greenhouse-gas emissions "would be inappropriate." 564 U.S. at 422. Applying state law to such claims would contravene "the basic scheme of the

Constitution." *Id.* at 421; *see Texas Indus. Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 & n.13 (1981).

To be sure, "citing" the principle that "the Clean Water Act does not preclude aggrieved individuals from bringing a 'nuisance claim pursuant to the law of the *source* State,'" *AEP* stopped short of holding state law has no role under the CAA. Pet. App. 28a. But the fact that the CAA authorizes a State to regulate emissions sources "within such State" does not imply state law governs emissions emanating from another State. 42 U.S.C. § 7410(a)(1); *see Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 490–500 (1987). Moreover, under the CAA, States exercise their authority under a federal-law framework that gives "primary" responsibility for "greenhouse gas emissions" to a federal agency. *AEP*, 564 U.S. at 428; *see Virginia v. EPA*, 597 U.S. __, No. 20-1530, slip op. at 6 (2022) ("EPA itself still retains the primary regulatory role in Section 111(d)"). In short, the CAA does not alter the rule that federal law necessarily governs any nuisance claims to abate transboundary emissions, making removal proper here.

The Tenth Circuit also commented that "it is unclear" whether federal common law would permit Boulder to bring claims against sellers of fossil-fuel products even absent the CAA. Pet. App. 29a n.5. Any lack of clarity about the *content* of federal common law, however, is no reason to refuse to apply it. Where—as here—federal common law supplies the governing rule of decision, federal courts must apply that law. *See Texas Indus.*, 451 U.S. at 641; *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301, 305

(1974). Federal courts may ultimately determine that federal common law affords no remedy for an alleged wrong. *See, e.g.*, *Standard Oil*, 332 U.S. at 313–16. But that does not change the *source* of the governing law. Federal common law still controls.

Finally, the Tenth Circuit took the position that Boulder's putative state-law claims should proceed in state court even if they arose under federal common law. Pet. App. 31a–32a. In its view, courts should not "look behind" the plaintiff's assertion that a claim arises under state law absent a federal statute that provides for "complete preemption" of state law. *Id.* As other courts have perceived, however, a plaintiff cannot defeat removal of a claim necessarily arising under federal common law by invoking state law. *See Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 924–29 (5th Cir. 1997); *In re Otter Tail Power Co.*, 116 F.3d 1207, 1212–14 (8th Cir. 1997). For example, in *Sam L. Majors Jewelers*, the Fifth Circuit upheld removal of a putative state-law claim against air carriers for lost or damaged goods. 117 F.3d at 924–29. Even though no federal statute provided for "complete preemption," the court determined that the claim "arose under federal common law" and thus was removable to federal court. *Id.* at 926–29.

The Tenth Circuit's contrary approach makes no sense. The general removal provision, 28 U.S.C. § 1441(a), permits removal whenever federal courts have "original jurisdiction" over a civil action. Neither it nor 28 U.S.C. § 1331, which provides original jurisdiction over federal questions, distinguishes between claims that necessarily arise under federal

statutes and federal common law. *See Milwaukee I*, 406 U.S. at 99–100. Nor is the need for a federal forum any less where a claim necessarily arises under federal common law instead of a federal statute, particularly where the claims raise issues of state authority to regulate extraterritorially. It is proper for claims exclusively governed by federal common law to be resolved in federal court.

* * *

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 Techs. 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 by preventing a single State's courts from making law for the entire country. It ensures that the ultimate decision over any national rule is made by Justices appointed by a President elected by the nation's voters and confirmed by a Senate in which each State has equal representation. The decision below, however, undermines that principle: It allows a plaintiff to avoid federal-court scrutiny of claims that necessarily arise under federal common law by simply declaring that those claims arise under state law. Every State has an interest in seeing the Court correct this decision. The Court should do so.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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