No. 22-1435

IN THE

Supreme Court of the United States

ENERGON, U.S.A.,

Petitioner,

v.

AMES COUNTY BOARD OF COMMISSIONERS,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ames Circuit

JOINT APPENDIX

Joseph N. Posimato '17 & William V. Bergstrom '17

TABLE OF CONTENTS

(ORDER LIST: 597 U.S.)

MONDAY, AUGUST 29, 2022

CERTIORARI GRANTED

22-1435 ENERGON U.S.A. V. AMES COUNTY BOARD OF COMMISSIONERS

The petition for a writ of certiorari is granted on the following two questions:[1]

1. Whether federal common law exclusively governs claims seeking redress for injuries allegedly caused by the effect of interstate greenhouse gas emissions.

2. Whether a federal district court has jurisdiction under 28 U.S.C. § 1331 over claims seeking redress for injuries allegedly caused by the effect of interstate greenhouse gas emissions even if they are pleaded under state law.

[1] The parties may rephrase the Questions Presented how they wish and treat them in the order they see fit. The parties should not address issues substantially outside those mentioned in this order, but they are not confined to the arguments raised before the district court or appellate court.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE AMES CIRCUIT

AMES COUNTY BOARD OF COMMISSIONERS, *Plaintiff-Appellee* v. ENERGON, U.S.A., *Defendant-Appellant*.	Case No. 21-3464

Appeal from the United States District Court for the
District of Ames, Vesper Lynd, District Judge, Presiding

Argued and Submitted January 13, 2022
Ames City, Ames

Filed March 22, 2022

Before Bonham, Page, and Plant, Circuit Judges.

PLANT, J., Circuit Judge:

This case presents two questions concerning the scope of the federal judicial power. The first is whether federal common law governs claims seeking redress for harm caused by the effect of

interstate greenhouse gas emissions. The second is whether this court has jurisdiction under 28 U.S.C. § 1331 over such claims. These questions have split the courts of appeals. Today we contribute to this growing jurisprudence by answering "No" to both questions.

BACKGROUND

In January 2021, Appellee Ames County Board of Commissioners (the "County") sued Appellant Energon, U.S.A in Ames state court alleging a public nuisance arising from their production, marketing, and selling of fossil fuels which have contributed to climate change and harmed Ames County. The County alleged that Energon conducted these activities even though it knew that they were contributing to the effects of climate change and that Energon concealed and misrepresented the dangers associated with these activities. The sole claim for public nuisance arises under Ames common law. The County only seeks compensatory damages and remediation of the harm Energon has caused within the County.

After the County filed its complaint, Energon filed a notice of removal in the United States District Court for the District of Ames, asserting that removal was justified under 28 U.S.C. § 1441(a), which provides for removal "of any civil action brought in a State court of

which the district courts of the United States have original jurisdiction," and under 28 U.S.C. § 1442(a)(1), which provides for removal of a state civil action "that is against or directed to . . . any officer (or any person acting under that officer) of the United States or of any agency thereof . . . for or relating to any act under color of such office." As to its first basis for removal, Energon argues that Ames' claims are governed by federal common law because they concern the effects of global greenhouse gas emissions and the nation's energy supply, quintessentially federal concerns. The district court rejected Energon's arguments and remanded the matter back to state court. Energon subsequently appealed pursuant to 28 U.S.C. § 1447(d), which provides "that an order remanding a case to the State court from which it was removed . . . pursuant to section 1442 or 1443 of this title shall be reviewable by appeal." *See also BP P.L.C. v. Mayor & City of Baltimore,* 141 S. Ct. 1532, 1543 (2021).

STANDARD OF REVIEW

"We review the district court's ruling on the propriety of removal de novo." *Frederick v. Hartford Underwriters Ins. Co.*, 683 F.3d 1242, 1245 (10th Cir. 2012). Questions regarding our subject matter

jurisdiction are also reviewed de novo. *Landau v. Eisenberg*, 922 F.3d 495, 497 (2d Cir. 2019).

ANALYSIS

I. Federal common law does not displace state law actions concerning interstate gas emissions.[2]

Energon argues that federal common law must provide the rule of decision in cases, such as this one, that allege damages resulting from global greenhouse gas emissions to ensure uniformity and to protect federal interests in energy security and international relations. Energon is wrong. While federal common law may have governed such claims in the past, Congress has since replaced governing federal common law with statutory law.

In *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), the U.S. Supreme Court declared that "[f]ederal courts, unlike state courts, . . . do not possess a general power to develop and apply their own rules of

[2] The Court rejects Energon's assertion of federal officer removal jurisdiction at the outset. Removal pursuant to Section 1442(a)(1) is proper if the private defendant "can show (1) they acted under the direction of a federal officer, (2) the claim has a connection or association with government-directed conduct, and (3) they have a colorable federal defense to the claim or claims." *Board of County Commissioners of Boulder Cnty v. Suncor Energy*, 25 F.4th 1238, 1251 (10th Cir. 2022). Energon's contractual relationship with the government is not sufficient to show that it "acted under the direction of a federal officer." *Id.*

decision," *City of Milwaukee v. Illinois*, 451 U.S. 304, 312 (1981) ("*Milwaukee II*"). That holding, however, was not the end of all federal common law. What remains is "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), made up of "few and restricted" enclaves, *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963), where a federal court is "compelled to consider federal questions [that] cannot be answered from federal statutes alone," *Milwaukee II*, 451 U.S. at 314. Once Congress speaks to the issue, however, "the need for such an unusual exercise of lawmaking by federal courts disappears." *Id.*

Situations that call for the creation of federal common law "fall into essentially two categories: those in which a federal rule of decision is necessary to protect uniquely federal interests, and those in which Congress has given the courts the power to develop substantive law." *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981). It follows, therefore, that where "federal common law exists, it pre-empt[s] and replace[s] state law. *City of New York v. Chevron Corp.*, 993 F.3d 81, 90 (2d Cir. 2021) (internal quotation marks omitted); *see also Starr Int'l Co. v. Fed. Rsrv. Bank of N.Y.*, 742 F.3d 37, 41 (2d Cir.

2014) (explaining that federal common law exists where "the relevant federal interest warrants displacement of state law").

Interstate air pollution is one such enclave. A century of cases have found federal law to govern disputes involving interstate pollution. *See, e.g.*, *Am. Elec. Power Co., Inc. v. Conn.*, 564 U.S. 410, 421 (2011); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907). As the Supreme Court has put it, this is because such cases implicate two federal interests—the "overriding . . . need for a uniform rule of decision" on energy production and "basic interests of federalism"—that conflict with state law. *Illinois v. City of Milwaukee*, 406 U.S. 91, 105 n.6 (1972) ("*Milwaukee I*").

Emphasizing these cases, Energon argues that Ames' suit squarely implicates federal interests and therefore federal common law because it intends to hold Energon liable for its contributions to global greenhouse gas emissions and its accompanying interstate effects. We disagree. By passing the Clean Air Act, Congress has displaced federal common law by directly speaking on the issues raised in Ames' complaint. *See Suncor Energy*, 25 F.4th at 1259 (10th Cir. 2022).

The question thus becomes: Does the CAA completely preempt state law tort claims? Because we conclude it does not, the County remains free to sue Energon in state court under state law.

A federal statutory scheme completely preempts state law when it "provide[s] the exclusive cause of action for the claim asserted." *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003). The CAA falls short of that high bar by expressly providing that "[n]othing in this section shall restrict any right which any person . . . may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief." 42 U.S.C. § 7604(e).

Energon rejects this reasoning, arguing that the CAA's displacement of federal common law does not open the door to state law claims on an issue previously governed by federal common law. It insists that the enactment of the CAA does not change that the County's suit encroaches on overwhelming federal interests in the regulation of interstate gas emissions and national energy production. *See City of New York*, 993 F.3d at 98. As Energon tells it, where "federal common law exists, it is because state law cannot be used." *Milwaukee II*, 451 U.S. at 313 n.7. We are not persuaded.

Our reasoning is guided by recent decisions by other courts of appeals on precisely these questions, in particular, the Second and Tenth Circuits, who have addressed nearly the same questions raised. In *Suncor*, the Tenth Circuit adjudicated a dispute over removal between a municipality seeking redress in state court for greenhouse gas emissions and an energy company who asserted that such claims are governed by a federal rule of decision. 25 F.4th at 1248–49. The Tenth Circuit rejected removal jurisdiction, reasoning that the Clean Air Act displaces the federal common law of the past and in the process revives previously preempted state law claims. *Id.* at 1261. As the Tenth Circuit understood it, the operative question "is whether the federal act that displaced the federal common law preempted the state-law claims." *Id.* Answering that question in the negative, it remanded the case back to state court.

By contrast, the Second Circuit addressing substantially similar claims concluded that reviving state law claims in a field previously governed by federal common law "is difficult to square" with the proposition that federal common law only exists where "state law cannot be used." *City of New York*, 993 F.3d at 98. In its view, "state law does not suddenly become presumptively competent to address

issues that demand a unified federal standard simply because Congress saw fit to displace a federal court-made standard with a legislative one." *Id.* Allowing that Congress may "grant states the authority to operate in an area of national concern," the Second Circuit found that the Clean Air Act does no such thing for Ames's state tort claims but rather provides states with limited authority to regulate emissions that arise within its borders. *Id.*

Although it's a close call, we agree with the Tenth Circuit's reasoning. Federal common law exists as a judicial stopgap in the absence of congressional instruction in areas of federal concern. When Congress speaks on the issue, however, it displaces judge-made law and in doing so may allow states to enter a once exclusively federal domain. That the CAA did not expressly preempt state law suggests that Congress believed there is room for both federal and state governments in this field.

II. The well-pleaded complaint rule bars removal.

Our decision is guided by the well-pleaded complaint rule. Federal-question jurisdiction exists only when a federal question "appear[s] on the face of a well-pleaded complaint and may not enter in anticipation of a defense." *Verlinden B.V. v. Cent. Bank of Nigeria,*

461 U.S. 480, 494 (1983). "The rule is premised on the notion that the plaintiff is the 'master of the claim' and may 'avoid federal jurisdiction by exclusive reliance on state law.'" *Suncor*, 25 F.4th at 1255 (citing *Caterpillar*, 482 U.S. at 392). Nevertheless, a plaintiff may not avoid federal jurisdiction by "artfully plead[ing]" around claims that necessarily implicate federal questions. *See Rivet v. Regions Bank of La.*, 522 U.S. 470, 475 (1998). Accordingly, federal courts "must first decide whether federal or state law created the cause of action by viewing the face of a plaintiff's complaint. . . . If federal law, as opposed to state law, created a plaintiff's cause of action, then removal is proper." *Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178, 198 (4th Cir. 2022). As a general rule, however, a matter "may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue." *Id.* (citing *Caterpillar*, 482 U.S. at 393).

This rule is not without exception, however. Under the doctrine of complete preemption "a state law cause of action" may transform "into one arising under federal law" where "Congress has occupied the

field so thoroughly as to leave no room for state-law causes of action at all." *Id.* When confronted with this doctrine courts generally examine the relevant statutory scheme for a clear intent to displace state law and the creation of an exclusive federal cause of action in the area. *Id.*; *see also*, *Suncor*, 25 F.4th at 1262. A complaint that pleads only state law claims may also nevertheless trigger federal jurisdiction where the "state-law claim[s] necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Gunn v. Minton*, 568 U.S. 251, 258 (2013).

Energon argues that Ames artfully pleaded its claims in an effort to "disguise [an] inherently federal cause of action" that raises federal issues as one arising under state law. 14 C Charles Alan Wright et al., *Federal Practice and Procedure*, § 3722.1, at 132-132 (4th ed. 2018). Energon first argues that the complaint does not raise issues under state law because state law does not apply to issues involving interstate gas emissions. In the alternative, Energon argues that even if the complaint does raise state law claims, federal jurisdiction is triggered all the same because of the substantial federal interests at stake in regulating

interstate gas emissions and because those emissions are governed by federal common law. Again, we disagree.

Federal common law, even if still existed in this field, cannot "completely" preempt state law because the doctrine is focused on *congressional*, rather than *judicial*, intent and for that reason judge-made common law cannot trigger an exception to the presumption that the face of a complaint supplies the rules of decisions to guide this court. Absent complete preemption, Energon's arguments raise no more than an ordinary preemption defense. Under black letter law, such defenses cannot overcome the well-pleaded complaint rule.

With federal common law a dead end, Energon must rely on the CAA for complete preemption. But as we explained earlier, the CAA specifically contemplates state and private action in the field of air pollution and therefore does not display a clear intent to displace state law and certainly does not create an exclusive federal cause of action in the area.

Nor does Energon succeed in demonstrating that the complaint raises federal issues. As we explained, federal common law no longer governs the field of interstate gas emissions and the CAA contemplates state action.

For these reasons, we have no reason to look beyond the four corners of the County's complaint. The County has asserted exclusively state law claims concerning state-specific harms. Accordingly, this matter belongs in state court.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the district court's order on removal and remand this case back to state court for further proceedings.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF AMES

AMES COUNTY BOARD OF COMMISSIONERS, *Plaintiff,* v. ENERGON, U.S.A., *Defendant.*	Docket No. 1:21-cv-00183-VL

ORDER GRANTING MOTION TO REMAND

The Ames County Board of Commissioners sued Energon, U.S.A. for damages it suffered because of interstate gas emissions produced by Energon. The County brought suit in state court under state theories of liability. Energon nevertheless removed the proceeding to federal court under the theory that the County's complaint implicates crucial federal interests and therefore triggers federal jurisdiction. In the alternative, Energon argues that that jurisdiction is proper under 28 U.S.C. § 1442 federal officer jurisdiction. The County now moves to remand the case back to state court.

DISCUSSION

Energon's principal argument in support of this Court's jurisdiction relies on federal common law. In its view, the County's claims, which implicate interstate air pollution and global emissions, encroach on a field governed exclusively by federal

common law. *See, e.g., Am. Elec. Power Co., Inc. v. Conn.*, 564 U.S. 410, 421 (2011). State law therefore cannot provide the rule of decision in this case no matter how well the County "artfully plead[s]" around federal jurisdiction. *See Rivey v. Regions Bank of La.*, 522 U.S. 470, 475 (1998).

For its part, the County argues that while federal common law may have governed its claims in the past, federal common law has since been displaced by Congress's passage of the Clean Air Act, which now covers the field previously governed by judge-made law.

The parties present this Court with a novel question in this Circuit: Whether state law may reenter a field previously governed by federal common law. Outside of this circuit, the question has sharply split the Courts of Appeals. *See, e.g., Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178, 198 (4th Cir. 2022); *Board of County Commissioners of Boulder Cnty v. Suncor Energy, et al*, 25 F.4th 1238 (10th Cir. 2022); *City of New York v. Chevron Corp.*, 993 F.3d 81, 90 (2d Cir. 2021).

With this in mind, the Court will **GRANT** the County's motion to remand the case back to state court. The CAA preempts the federal common law that may have previously governed this suit and the County's complaint asserts only state law claims. The Federal courts are courts of limited jurisdiction. Without clear guidance from the Ames Circuit, this Court sees no reason to assert that jurisdiction here. As

for Section 1442, Energon has not shown that by complying with federal leases it acted under the direction of a federal officer. *See Suncor*, 25 F.4th at 1254.

Dated: June 3, 2021

/s/ Vesper Lynd
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF AMES

AMES COUNTY BOARD OF COMMISSIONERS, *Plaintiff,* v. ENERGON, U.S.A., *Defendant.*	Docket No. _____ **Defendant Energon, U.S.A's Notice of Removal**

TO: THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF AMES

PLEASE TAKE NOTICE THAT Defendant Energon, U.S.A., an Ames Corporation, removes Case No. 2018 CVA 231-263, filed in the Ames County Court of Common Pleas to the United States District Court for the District of Ames pursuant to 28 U.S.C. §§ 1331, 1441(a), & 1442(a)(1). Defendant reserves all defenses.

Dated: February 1, 2021

Respectfully submitted,

/s/ Brian LeFebvre
Brian LeFebvre
Ames Bar No. 34700
LEFEBVRE & REYNOLDS
831 Walnut Drive
Ames City, Ames
brian@landr.com

AMES COURT OF COMMON PLEAS
[AMES COUNTY]

AMES COUNTY BOARD OF COMMISSIONERS, *Plaintiff*,	Civil Case No. _____
v.	**COMPLAINT AND JURY DEMAND**
ENERGON, U.S.A., *Defendant.*	

Plaintiff the Ames County Board of Commissioners, through the undersigned counsel, alleges as follows against Defendant Energon, U.S.A:

INTRODUCTION

1. Our world is wracked by climate change. The last three years have seen the three hottest summers and the three coldest winters on record in Ames County. The State of Ames has encountered unusually severe forest fires and significant spring flooding in each of these years.

2. These effects are commonly recognized as the result of man-made climate change. The County of Ames and its taxpayers have incurred high costs combatting the

effects of climate change, but they should not be forced to bear those costs alone.

3. Energon is one of the largest corporations in Ames. It has played a substantial part in causing man-made climate change and has reaped enormous profits as a reward.

4. This lawsuit aims to force Energon to pay its fair share of the mounting costs faced by Ames County and its taxpayers.

PARTIES & FACTS

5. Plaintiff Ames County Board of Commissioners ("Ames County" or "the County") is a subdivision of the state of Ames. It is empowered under Ames law to sue and be sued.

6. Ames County is home to 1,680,000 people and includes unincorporated areas, incorporated townships, and the state capital, Ames City.

7. It is located in northeast Ames and the Ames River, which irrigates almost 190,000 acres of Ames County farmland, runs through it.

8. The County has designated 10,000 acres of conservation land which it has committed to maintaining for the residents of the county now and in the future. The County is also solely responsible for maintaining hundreds of miles of roads and bridges throughout the unincorporated areas of Ames County.

9. People and property (including County-owned and maintained property) and infrastructure within the County have been and will be damaged on account of manmade climate change. As one example, in recent years storms have caused historic flash floods, entirely washing out some county roads and leaving others in severely damaged states. Ames County has taken substantial steps to abate these hazards and will and must continue to do so.

10. Defendant Energon, U.S.A. is an Ames corporation with is headquarters and principal place of business in Ames County. Energon does business across the country and around the world through various associated entities which it owns and controls.

11. Energon is a major player in the oil business; among its many holdings around the world and throughout the country, it owns and operates a refinery in the State of Ames which produces 120,000 barrels of gasoline and aviation gasoline every day. It processes crude oil produced by wells in eastern Ames.

12. Energon supplies oil all over the world and produces all manner of petroleum products. Last year, it was reported to be the seventh largest producer of petroleum products in the world. *See* J.L. Bearly, *10 Biggest Oil Companies*, INVESTOPEDIA (Sept. 2, 2020).

13. Emissions from Energon's business activities, and from the use of its fossil fuel products, produce significant greenhouse gas emissions, which are a major cause of climate change and a source of significant damages to Ames County and its residents.

14. Energon spends tens of millions of dollars every year to project an image as an environmentally conscious energy company. Two years ago, following a billion-dollar rebranding (in which the company name was changed from

"R.J. Welles Oil Co." to "Energon, U.S.A." due to the former name's association with several environmental disasters), Energon adopted the slogan "Clean Oil for a Clean World."

COUNT ONE
***Public Nuisance* (Ames Common Law)**

15. Plaintiff realleges every allegation set forth in the preceding paragraphs as if fully stated herein.

16. Energon has knowingly supplied a substantial portion of the world's fossil fuels and misrepresented the dangers associated with their use. It has specifically billed its fossil fuels as "clean."

17. The climate change caused by Energon constitutes a present and continuing public nuisance in Ames County. Plaintiff has to mitigate the effects and severity of the public nuisance and has incurred damages in doing so.

18. The impacts of climate change caused by Energon has interfered with and will continue to interfere with public rights in Ames County, including the right to use and enjoy public spaces and conservation lands.

19. Energon has profited massively by creating a public nuisance in Ames County and has intentionally, negligently, or recklessly created and continued to create climate change impacts, which are a logical and predictable result of their business activities.

20. Plaintiff's losses are a direct and proximate result of the Defendant's maintenance of a public nuisance.

WHEREFORE, Plaintiffs request the following relief:

* Monetary damages to compensate Plaintiff for past and future damages and costs to mitigate the impact of climate change and abate the nuisance which Defendant has erected;

* Remediation and abatement of the hazards discussed above;

* Attorneys' fees, costs, and disbursements as permitted by law;

* Pre- and post-judgment interest as permitted by law; and

* Any other relief which this Court deems appropriate.

JURY TRIAL DEMAND

Plaintiff demands a trial by jury on all issues so triable.

Dated: January 17, 2021 Respectfully submitted,

/s/ Gerald River
Gerald River, #67923
Ames County Attorney