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
THE UNITED STATES COURT OF APPEALS
FOR THE AMES CIRCUIT

BRIEF FOR RESPONDENT

The Justice Ruth Bader Ginsburg Memorial Team

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NOVEMBER 10, 2022, 7:30 P.M.
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Oral Argument

QUESTIONS PRESENTED

1. Whether displaced federal common law exclusively governs state law claims for in-state conduct contributing to greenhouse gas emissions.
2. Whether claims pleaded solely under state law for in-state conduct contributing to greenhouse gas emissions are removable under 28 U.S.C. § 1331 to federal court.

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INTRODUCTION

Federal law cannot and should not solve every problem alone. When the Framers "split the atom of sovereignty" with federalism, they ensured that "our citizens would have two political capacities, one state and one federal, each protected from incursion by the other." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J. concurring). The Framers' vision not only protected against incursion but also contemplated cooperation. Dual sovereignty "cannot work without informed, extensive, and cooperative interaction . . . between sovereign systems for the mutual benefit of each system." *City of New York v. United States*, 179 F.3d 29, 35 (2d Cir. 1999). The system of cooperative federalism underlying national environmental policy and grounded in our Constitution protects States' rights to regulate their domestic affairs in the absence of federal law.

With this federalist structure in mind, Congress enacted the Clean Air Act ("CAA"). It "made the States and the Federal Government partners in the struggle against air pollution." *Gen. Motors Corp. v. United States*, 496 U.S. 530, 532 (1990). In doing so, Congress enshrined the "*primary* responsibility" of the States to combat air pollution in the statute's text, 42 U.S.C. § 7401(a)(3) (emphasis added), saving state common law causes of actions like the one before this Court, *see id.* §§ 7416, 7604(e). Ames County seeks to play its congressionally

sanctioned role in holding accountable those who act and cause harm within its borders, including Energon.

Energon concedes that the Clean Air Act displaced the federal common law of air pollution, Pet'r's Br. 7, which means that federal common law cannot govern. Neither does the CAA govern this dispute, and because the County's claim raises no substantial, disputed issue of federal law, the State of Ames may regulate its domestic affairs. Here, Ames County seeks to regulate the in-state marketing and production of a good that injures the public rights of Ames residents. Because federal law is silent, Ames law controls, and federal courts have no jurisdiction under 28 U.S.C. § 1331. This question of Ames common law belongs in Ames courts.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Ames Circuit is reproduced at page 3 of the Joint Appendix. The order by the U.S. District Court for the District Court of Ames granting the motion to remand is reproduced at page 16 of the Joint Appendix.

STATEMENT ON JURISDICTION

The Ames Circuit issued its decision on March 22, 2022. JA-3. The petition for writ of certiorari was granted on August 29, 2022. JA-2. This Court has statutory appellate jurisdiction under 28 U.S.C. § 1254(1) and § 1447(d) because the case was removed to federal court

partly on the basis of federal officer jurisdiction. *See BP P.L.C. v. Mayor of Baltimore*, 141 S. Ct. 1532, 1537–38 (2021). However, because the County lacks Article III standing to sue for public nuisance, this suit, including this appeal, cannot be heard in federal court. *See infra* section II.A.

CONSTITUTIONAL AND STATUTORY PROVISIONS

All relevant provisions are reproduced in the Appendix.

STATEMENT OF THE CASE

An Ames Corporation Profits While Ames Residents Suffer

Man-made climate change has wreaked havoc on Ames. The State has experienced "unusually severe forest fires" and significant flooding, while Ames County has suffered its hottest summers and coldest winters on record. JA-20. Historic flash floods have washed out entire County-managed roads, JA-22, and future crises threaten the County's farmlands and rivers, *see* JA-21.

Meanwhile, Energon, U.S.A., an Ames corporation whose principal place of business is in Ames, has thrived. *See* JA-22, JA-24. In Ames, it processes and produces over forty million barrels of gasoline annually, from oil drawn from wells in Ames, JA-22, the value of which exceeds five billion dollars, *see Today in Energy*, U.S. Energy Info. Admin., https://perma.cc/2P6Q-5XRX (last accessed Oct. 21, 2022). On the back of its Ames operation, Energon has become the seventh-largest

petroleum producer in the world, all while pursuing a billion-dollar rebranding to avoid "association with several environmental disasters." JA-23–24. It adopted the slogan "Clean Oil for a Clean World," changed its name from R.J. Welles Oil Co. to Energon, and now spends tens of millions of dollars annually to promote itself as an "environmentally conscious energy company" while continuing to produce gasoline from Ames oil. *Id.*

The Ames County Board of Commissioners Sues an Ames Corporation in Ames State Court

Observing Energon's contribution to these local crises, the Ames County Board of Commissioners ("the County") took action. Empowered by Ames law, JA-21, the County sued Energon in the Ames County Court of Common Pleas. JA-4. Under a theory of public nuisance, the County's claim concerns Energon's intra-county production, deceptive marketing, and sale of fossil fuels that have contributed to the climate crisis. *Id.* It "only seeks compensatory damages and remediation of the harm Energon has caused within [Ames] County." *Id.*

Energon Tries to Remove the Case to Federal Court

Energon removed this case to the United States District Court for the District of Ames under 28 U.S.C. § 1441(a) and § 1442(a)(1). To justify removal, Energon suggested that a state cause of action under these circumstances is futile because the claim is inherently federal, and thus federal common law governs, thereby granting federal courts

original jurisdiction. JA-5. Alternatively, Energon insisted that it had acted under the direction of a federal officer by complying with federal leases. JA-18.

The District Court rejected both theories and remanded the case to state court. JA-17–18. The Court remarked that "[t]he CAA preempts the federal common law that may have previously governed this suit," thus opening the field to state regulation. JA-17. Then, the Court summarily dismissed Energon's suggestion that federal officer removal applied. JA-17–18. Energon timely appealed the district court's remand order under 28 U.S.C. 1447(d). JA-5.

Energon fared no better before the Ames Circuit. There, the court permitted the County's claim because "when Congress speaks on the issue . . . it displaces judge-made law and in doing so may allow states to enter a once exclusively federal domain." JA-11. But Energon also argued, for the first time, that the CAA completely preempts state causes of action to justify removal under the well-pleaded complaint rule. JA-12–13. The Ames Circuit was unmoved, noting that "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." JA-14. After the Ames Circuit affirmed the district court's judgment, Energon filed a timely notice of appeal to this Court, which granted certiorari. JA-2.

SUMMARY OF THE ARGUMENT

No valid basis exists to remove this case to federal court. The complaint pleads no federal cause of action, nor does displaced federal common law provide the rule of decision by which the complaint must be governed. And the statute that displaced federal common law, the CAA, does not preempt Ames County's claim. The County's complaint applies Ames state common law to Energon's intrastate deceptive marketing and production of fossil fuels. As such, this case raises no federal issue sufficient to justify removal under *Grable*. This Court should side with the myriad federal circuits that have rejected removal efforts like Energon's and remand this suit to the Ames County Court of Common Pleas for lack of Article III jurisdiction or, alternatively, affirm the judgment of the Ames Circuit.

I. The CAA "displace[d] any federal common-law right to seek abatement of carbon-dioxide emissions." *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011). As a discarded rule of decision, displaced federal common law cannot govern the County's claim. Instead, the CAA's preemptive effect determines the County's ability to bring its claim. *Id.* at 429. The CAA does not preempt Ames County's claim, and thus removal to federal court is improper.

A. This approach reflects that courts resort to federal common law only "[w]hen Congress has not spoken to a particular issue" and that

"the decision whether to displace state law . . . is generally made not by the federal judiciary, . . . but by the people through their elected representatives in Congress." *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981). But the CAA saves state law and displaces federal common law in toto, a view adopted by federal courts at every level and across the country.

B. Even if this Court accepts Energon's unprecedented theory that federal common law's jurisdiction survived displacement by the CAA, such jurisdiction would not govern this case. The County's complaint does not implicate the interstate or international interests that would have triggered the now-displaced federal common law. The County, under a public nuisance theory, requests an abatement order to remedy damages stemming from Energon's conduct within Ames, comprising its deceptive marketing efforts and its annual production of more than forty million barrels of gasoline. JA-23. Regulating the marketing and production of goods within its borders is well within a State's traditional police powers, and suits of this type have not historically been the exclusive province of federal courts.

C. State courts are also competent to decide public nuisance cases like this one. Complex causal chains, nationwide industries, and innovative remedies have not prevented state courts from applying state law in the past and should not do so here. The principles of federalism

and the results of public nuisance suits targeting the paint, opioid, and gun industries demonstrate that a uniform rule of decision is not required.

II. The limited jurisdiction of federal courts does not extend to this case. Removal would be improper because the County does not have standing to bring this claim in federal court. Even if the County were to have Article III standing, it could "avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). Under this posture, removal to federal court would be justified in only two narrow circumstances: if the CAA completely preempted the state claim or if the state claim "necessarily raise[d] 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." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005). Neither justification applies here.

A. The County has no standing to sue in federal court. Thus, this case should be remanded to Ames state court. To be sure, a State may sue on behalf of its residents as *parens patriae* and have Article III standing, provided that it "articulate[s] an interest apart from the interests of particular private parties." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982). Ames County sues as *parens*

patriae here, alleging only a public nuisance claim. But under Article III, a political subdivision of a State, such as Ames County, cannot bring a *parens patriae* suit in federal courts. *El Paso County v. Trump*, 982 F.3d 332, 338 (5th Cir. 2020). Accordingly, even if this case were removable due to complete preemption or *Grable* jurisdiction, it must nevertheless be remanded to state court because the County lacks Article III standing.

B. The CAA does not completely preempt the County's state common law claim. This Court has found complete preemption only three times, none of which is at issue here. Moreover, the text and purpose of the CAA belie the notion that it preempts the County's claim. The CAA has multiple saving clauses that contemplate state action. Indeed, Congress envisioned the CAA's purpose as "forc[ing] the states to do their job in regulating air pollution effectively." *Exxon Mobil Corp. v. EPA*, 217 F.3d 1246, 1255 (9th Cir. 2000). Lastly, complete preemption requires that the statute provide a substitute cause of action, but "[the CAA] does not provide . . . a free-standing cause of action for nuisance that allows for compensatory damage." *City of Oakland v. BP PLC*, 969 F.3d 895, 908 (9th Cir. 2020). Accordingly, complete preemption cannot justify removal here.

C. Nor does the County's claim satisfy *Grable* jurisdiction. It does not necessarily raise or actually dispute a federal issue. Moreover, a

federal forum lacks a comparatively greater stake or competency to resolve the claim. And granting federal jurisdiction in this case would substantially affect the federal-state balance, which the *Grable* Court warned against disrupting. Because Energon fails to satisfy each of *Grable*'s four necessary conditions, this case cannot be removed on *Grable* jurisdiction grounds.

ARGUMENT

I. THE COUNTY CAN SUE ENERGON IN AMES STATE COURT BECAUSE FEDERAL COMMON LAW DOES NOT GOVERN.

Specialized common law, developed in the wake of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938), permits federal judges to craft rules of decision for "essentially federal matters." *United States v. Standard Oil Co.*, 332 U.S. 301, 307 (1947). Suits concerning transboundary pollution fell in this category. *See Illinois v. City of Milwaukee* (*Milwaukee I*), 406 U.S. 91, 103 (1972). However, this federal judicial power dissipates when Congress, by enacting legislation, displaces federal common law and the federal judiciary's ability to craft it. *Am. Elec. Power Co. v. Connecticut* (*AEP*), 564 U.S. 410, 415 (2011).

Such is the case here. In *AEP*, this Court held that the CAA displaced federal common law regarding carbon-dioxide emissions and transboundary pollution. *Id.* at 424. Displacement leaves no room for half-measures. *See Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238, 1261 (10th Cir. 2022). Federal

common law either exists or it does not; it does not operate from beyond the grave. After displacement occurs, as it did here, "whether the federal act that displaced the federal common law preempt[s] the state-law claims" is the only relevant question. *Id.* The answer is no.

Even if federal common law still governed today, this suit would not implicate it because applying Ames common law does not pose an obstacle to any uniquely federal interest. Instead, a uniform federal rule of decision would displace claims that complement federal law and which state courts are competent to decide. Accordingly, the County may hold an Ames corporation responsible for damage caused in Ames under Ames state law.

A. The CAA displaced federal common law that formerly governed suits concerning interstate greenhouse gas emissions.

In the field of air pollution, the CAA displaced federal common law, which no longer functions as a federal rule of decision mandating federal jurisdiction in this case. Courts nationwide have held as much, and Energon cites no case suggesting otherwise.

1. *Federal common law cannot furnish jurisdiction once it is displaced.*

Federal common law consists only of rules of decision, not rules of jurisdiction. When it applies, 28 U.S.C. § 1331 grants federal jurisdiction, and when it conflicts with state common law, the Supremacy Clause requires that federal law control. *See* U.S. Const.

art. VI, cl. 2. However, that jurisdictional grant and that choice of law no longer govern when federal law is absent, just as a repealed statute does not "leave behind a pre-emptive grin without a statutory cat." *P.R. Dep't of Consumer Affs. v. Isla Petroleum Corp.*, 485 U.S. 495, 504 (1988). Once federal common law is displaced—as it was here—it no longer supports federal jurisdiction.

Energon suggests federal common law's jurisdictional grant survives after its remedies are displaced. Pet'r's Br. 25. This theory would upend the separation of powers. If federal judges could create, through federal common law, federal jurisdiction outlasting congressional displacement, they could arrogate to themselves jurisdiction beyond Congress's grant. Such an expansive theory of judge-made jurisdiction would make courts superior to Congress and unsettle centuries of this Court's precedent. *See Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845) (concluding that inferior federal courts' jurisdiction is "dependent . . . entirely upon the action of Congress").

For instance, Energon suggests that *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012), indicates that the "choice-of-law inquiry differs from the merits inquiry," Pet'r's Br. 25, but this conclusion exceeds *Kivalina*'s bounds. There, the Plaintiff-City sued in *federal* court, pleading *federal* common law claims related to climate change. 696 F.3d at 853. Thus, *Kivalina* emphasized that "[t]he

question before us is whether the CAA . . . displaces Kivalina's [federal common law] claims." *See id.* The Court held that it did. *Id.* But that question is narrower than the one here: whether state common law is available once the previously preemptive federal common law is displaced. *Kivalina*, which did not consider this question, therefore cannot support Energon's distinction between jurisdiction and remedy.

2. *Federal courts at every level have determined that federal common law governing transboundary pollution suits no longer exists.*

In light of these principles, federal courts across the country have held that federal common law no longer supplies the rule of decision for suits pleading damages caused by interstate greenhouse gas emissions. In *AEP*, private and government plaintiffs brought a federal common law nuisance claim, and, in the alternative, state nuisance claims against electric power corporations. 564 U.S. at 418–19. The Court emphasized that the availability of the state claim depended on the CAA's preemptive effect. *Id.* at 429. However, this Court's judgment was clear regarding federal common law: "the Clean Air Act and the EPA actions it authorizes displace any federal common-law right to seek abatement" of greenhouse gas emissions. *Id.* at 424–25.

Energon's theory flouts this Court's precedent. Accepting *AEP*'s holding that the CAA displaced federal common law, Pet'r's Br. 11, Energon suggests that in doing so, the CAA displaced *only* the right to

a federal common law remedy yet preserved federal common law's ability to supply "the exclusive rule of decision," *id.* at 22. Under this theory, federal common law—now extinct in this field—nevertheless excludes the County's state common law claim, as it did before displacement.

But neither this Court nor any circuit court has *ever* held that federal common law displaced by statute nevertheless governs to the exclusion of state causes of action. Indeed, Energon cites no statutory scheme that is similar to the CAA's *and* retains federal common law's exclusive governance despite completely displacing federal common law.

Its argument instead misconstrues this Court's jurisprudence. Energon notes that this Court once stated, prior to the CAA, that "[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law." Pet'r's Br. 9 (quoting *Milwaukee I*, 406 U.S. at 103). At first blush, the quote supports Energon's theory. However, the *AEP* Court refused to consider *Milwaukee I*'s discussion of whether federal common law still exists when dealing with ambient air or water, describing it as merely "academic" because the CAA "displaced *any* federal common-law." 564 U.S. at 423 (emphasis added). It strains credulity to claim, as Energon does, that the *AEP* Court held both that the CAA displaced "any federal common law" in this field *and*—in the same breath—that federal

common law nevertheless operates to the exclusion of state common law claims. Energon's unprecedented theory contradicts every circuit court to consider the interaction between the CAA, federal common law, and state causes of action.[1]

Once a federal statute displaces federal common law, its preemptive effects are rendered null. In *Mayor of Baltimore*, the Fourth Circuit considered whether state common law claims filed in state court were removable. 31 F.4th at 194–95. It rejected the notion that "federal common law control[led] Baltimore's state-law claims because federal common law in this area cease[d] to exist due to statutory displacement." *Id.* at 204–05. Rather, the CAA "displaced *any* federal common law that previously existed," *id.* at 207 (emphasis added), rendering removal proper only if there were a "significant conflict between Maryland law and [the defendant's] purported federal interests," *id.* at 204. The court made no distinction between the CAA's displacement of rights and jurisdiction, unlike Energon. Instead, it joined "the parade of recent opinions," *City of New York v. Chevron Corp.*, 993 F.3d 81, 93 (2d Cir. 2021) (collecting cases), holding that the CAA, not federal common law, determines the availability of state common law claims related to

[1] *See Rhode Island v. Shell Oil Prods. Co.*, 35 F.4th 44, 56 (1st Cir. 2022); *City of Hoboken v. Chevron Corp.*, 45 F.4th 699, 703 (3d Cir. 2022); *Mayor of Baltimore v. BP P.L.C.*, 31 F.4th 178, 204 (4th Cir. 2022); *County of San Mateo v. Chevron Corp.*, 32 F.4th 733, 747–78 (9th Cir. 2022); *Suncor*, 25 F.4th at 1261.

transboundary pollution, *Mayor of Baltimore*, 31 F.4th at 207; *see also Kivalina*, 696 F.3d at 866 (Pro, J., concurring) ("Once federal common law is displaced, state nuisance law becomes an available option to the extent it is not preempted by federal law."). "[I]t would 'def[y] logic' to base removal on a 'federal common law claim [that] has been deemed displaced, extinguished, and rendered null by the Supreme Court.'" *Rhode Island*, 35 F.4th at 56 (quoting *Mayor of Baltimore*, 31 F.4th at 199, 205–06).

No case Energon considers suggests otherwise. Energon invokes *Standard Oil Co.* to support the proposition that once a claim is federal in nature, it is to be "governed exclusively by federal common law." Pet'r's Br. 24. The case concerned the United States' ability to recoup medical expenses after Standard Oil struck an enlisted soldier with a vehicle. *Standard Oil*, 332 U.S. at 302. The Court thus held that state law "should not be selected as the federal rule" because there is nothing "more distinctively federal in character than that between it and members of its armed forces." *Id.* at 305, 310. The Court suggested that Congress, not the courts, should create that remedy, particularly because the United States was a party to the suit. *Id.* at 316. But even if the claim in this case were federal in character, *Standard Oil* provides no guidance about the availability of Ames County's claim. The *Standard Oil* Court did not consider what would happen once Congress

gave its imprimatur to state law claims, as with the CAA, or what would happen when a statute displaced all federal common law that previously governed the field.

* * *

This case cannot be "removed to federal court on the basis of federal common law that no longer exists." *County of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 937 (N.D. Cal. 2018), *aff'd*, 32 F.4th 733 (9th Cir. 2022). Energon's novel theory fails to recognize Congress as the source of inferior federal courts' jurisdiction, subverts the separation of powers, and contradicts every circuit court to consider the interaction between the CAA, federal common law, and state causes of action. *See* cases cited *supra* note 1; *City of Honolulu v. Sunoco L.P.*, No. 20-cv-00163-DKW-RT, 2021 WL 839439, at *2 n.3 (D. Haw. Mar. 5, 2021) ("A batting average of .000 does not suggest a substantial case exists."), *aff'd*, 39 F.4th 1101 (9th Cir. 2022). Federal common law no longer exists in this field and thus does not govern this case.

B. Even if federal common law still existed in this field, it does not govern this suit.

Energon suggests that this claim is "inherently governed by federal law," which justifies removal, even though "the CAA displaced federal common law," the only federal law that may apply to this suit. Pet'r's Br. 12. This rationale permits federal judges to double as federal lawmakers, enacting rules of jurisdiction to apply their rules of decision.

No court has adopted this theory. But even if federal common law's jurisdictional effects still existed, federal courts would nevertheless lack jurisdiction because the County's claim "do[es] not satisfy the necessary 'precondition' of creating federal common law—the recognition of a significant conflict between a federal interest and state law's application." *Mayor of Baltimore*, 31 F.4th at 202 (quoting *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994)); *see also Rodriguez v. FDIC*, 140 S. Ct. 713, 717 (2020) ("[B]efore federal judges may claim a new area for common lawmaking, strict conditions must be satisfied.").

1. *This case does not concern the types of interstate issues that fell within federal common law's exclusive jurisdiction.*

If federal common law still existed, any interstate effects present here would not trigger it. Two kinds of interstate concerns required the application of federal common law in this field: when political entities sued one another, *Milwaukee I,* 406 U.S. at 103, or where a private party sued by a political entity was an "out-of-state industry," *AEP*, 564 U.S. at 419. But when a private party is sued, state law may apply. *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 498 n.3 (1971). Here, Energon is headquartered and principally operated in Ames, JA-22, and the County seeks redress only for Energon's in-state contributions to climate change, JA-24. Ames County's suit thus does not conflict with federal interstate interests.

Federal interstate interests arise when political entities sue one another. For instance, in *Milwaukee I*, Illinois sued multiple municipalities within Wisconsin. 406 U.S. at 93–94. The *Milwaukee I* Court said that "[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law." *Id.* at 103; *see also* Pet'r's Br. 9. The suit was "interstate" in character and thus governed by federal common law because it dealt with a political entity suing another political entity, unlike this case. But as this Court recognized in *Wyandotte Chemicals*, a state's suit against a private company may be resolved by reference to state nuisance law. 401 U.S. at 498 n.3. Indeed, it is unclear whether federal common law can *ever* be invoked when it is a political subdivision, not a State, that is party to the suit, rendering state law the only means of redress. *AEP*, 564 U.S. at 422 ("We have not yet decided whether . . . political subdivisions . . . of a State may invoke the federal common law of nuisance . . . .").

The County sues no political entity—it sues a private company for its in-state, daily production of 120,000 barrels of gasoline and related deceptive marketing. JA-23. In turn, Ames does not seek relief "based on interstate conduct," Pet'r's Br. 12, or to regulate beyond its borders. While Energon contends that Ames seeks redress for its operations "around the world," *id.* at 6 (citing JA-23), that language from the

complaint describes Energon's operations, not its damaging conduct in Ames for which the County seeks redress.

State regulation like the County's is permissible even if it results in incidental interstate effects. For instance, in *Rocky Mountain Farmers Union v. Corey*, California passed a fuel standard to reduce greenhouse gas emissions stemming from ethanol and crude oil consumption in California. 913 F.3d 940, 947 (9th Cir. 2019). This standard regulated only the in-state supply of ethanol but affected in-state sellers' out-of-state production. The producers argued, as Energon does here, that "a state cannot regulate beyond its borders" under the Dormant Commerce Clause. *Id.* at 952; Pet'r's Br. 12 (citing *Kansas v. Colorado*, 206 U.S. 46 (1907), a Dormant Commerce Clause case). However, the Ninth Circuit held that states "may regulate to minimize the in-state harm caused by products sold in-state, a central aspect of the state sovereignty protected by the Constitution." *Rocky Mountain*, 913 F.3d at 952. Thus, the regulation was permissible. *Id.* at 952–53. Similarly, Ames County seeks only to regulate Energon's in-state conduct. That such regulation might incidentally affect Energon's out-of-state conduct does not pose a per se prohibition. *Accord* Pet'r's Br. 28 ("[S]tate common law may regulate based on the direct effects of an in-state source (even for effects felt out-of-state . . .) .").

Lastly, Energon claims that injunctive relief would "requir[e] Energon to cease operations," *id.* at 17, which would be tantamount to Ames applying its law extraterritorially. That could be true if Ames sought that remedy. But the County seeks an abatement order, which can be exclusively monetary, to help mitigate the past and ongoing effects of Energon's deceptive marketing and intra-Ames production of fossil fuels. JA-25; *see, e.g.*, *United States v. Apex Oil Co.*, 579 F.3d 734, 736 (7th Cir. 2009) ("That equitable remedies are always orders to act or not to act, rather than to pay, is a myth; equity often orders payment."); *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-2804, 2022 WL 3443614, at *22 (N.D. Ohio Aug. 17, 2022) (abatement order to stop the opioid crisis included only legal, not injunctive, remedies).

Nor are damages a form of extraterritorial regulation. Although any damages award may affect an actor's conduct, it is permissible if it furthers the "State's interest in protecting its own consumers and its own economy" and is not solely an attempt to regulate interstate or nationwide policy. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 573 (1996). Ames County seeks damages only for Energon's in-state production and marketing of fossil fuels to protect the wellbeing of its residents. Thus, Energon fails to show that, even if federal common law's jurisdictional component still existed, this suit is sufficiently "interstate" to trigger it.

2. *This suit does not implicate international concerns sufficient to trigger now-displaced federal common law's jurisdiction.*

Neither does this suit conflict with foreign relations. Here, Energon supplies a substantial portion of the global fossil-fuel supply, claims that it creates "Clean Oil for a Clean World," JA-24, and spends tens of millions annually to maintain that facade. JA-23–24. No less a misrepresentation than Marlboro billing its Reds as healthy, Energon "knowingly supplied a substantial portion of the world's fossil fuels and misrepresented the dangers associated with their use." JA-24. Regulating that misrepresentation does not conflict with foreign policy.

Energon contends that the application of state law would "directly conflict with the federal government's prerogative to . . . conduct foreign policy, and ensure national security." Pet'r's Br. 16. But amici in *Rhode Island*, including the now-incumbent U.S. Secretary of State, concluded that "no aspect of U.S. foreign policy seeks to exonerate companies for knowingly misleading consumers about the dangers of their products." Brief of Former U.S. Government Officials as Amici Curiae Supporting Appellee and Affirmance of the District Court's Decision at 10, *Rhode Island*, 35 F.4th 44 (No. 19-1818). Indeed, even state tort claims involving international parties do not sufficiently implicate foreign relations concerns such that federal common law must apply. For example, Bolivia and Venezuela once brought state common law claims

alleging "that the tobacco industry fraudulently concealed the dangers of smoking" against eighteen tobacco companies in American state courts. *In re Tobacco/Governmental Health Care Costs Litig.*, 100 F. Supp. 2d 31, 34 (D.D.C. 2000). In that case, the court denied a federal-common-law-removal argument. *Id.* at 37. It explained that the suit's question was of domestic deceit, not foreign relations. *Id.* So too here.

Petitioner's suggestion that "any role Energon plays in advancing the President's [goal of increased oil production] would leave it open to tort liability," Pet'r's Br. 17, is hyperbole. As Energon says, its Ames "refinery is responsible for a small fraction of Energon's petroleum production." *Id.* at 4. In any case, neither Energon nor the President has an inviolable right to Ames's oil reserves. Energon can extract and refine as much oil as it wants; it simply cannot evade liability for its harms. If increasing the specter of liability for energy producers like Energon justified the application of federal common law, state regulation of energy producers would be per se prohibited. Even Energon's theory does not go so far.

Above all, applying—or in this case, reviving—federal common law is a measure of last resort. As this Court explained, "[j]udicial lawmaking in the form of federal common law plays a necessarily modest role under a Constitution that vests the federal government's 'legislative Powers' in Congress and reserves most other regulatory

authority to the States." *Rodriguez*, 140 S. Ct. at 717. But even before the CAA jettisoned federal common law in this field, federal common law would never have governed a suit like this one because the suit lies squarely within the province of state police power.

C. The history of state power to police polluters further demonstrates that federal common law does not control this suit.

Although Energon contends that this suit is "uniquely federal," *see* Pet'r's Br. 11, and thus requires federal jurisdiction, history suggests otherwise. Regulation of air pollution and deceptive marketing is a core state police power, even when such regulation has incidental interstate or international effects. Just as state common law no more regulates cigarette *sellers* than cigarette *smokers*, Ames common law targets the producers rather than the consumers of fossil fuels. *See Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1914–15 (2019) (Ginsburg, J., concurring in the judgment) ("[R]egulating an upstream activity within the State's authority is not preempted simply because a downstream activity falls within a federally occupied field."); *accord id.* at 1903 (plurality opinion). And absent "a clear and manifest purpose" from Congress to supersede a State's historic police powers, those historic powers are presumed to be preserved when federal legislation is passed. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

Air-quality regulation is a quintessential state police power. This Court has declared that state action "designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power." *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 441 (1960). Indeed, environmental regulation is traditionally a matter of state authority. *See Massachusetts v. U.S. Dep't of Transp.*, 93 F.3d 890, 894 (D.C. Cir. 1996). Despite Energon's suggestion that the States never had this power, Pet'r's Br. 23, the very purpose of the CAA was "to force the states to do their job in regulating air pollution effectively," *Exxon Mobil Corp. v. EPA*, 217 F.3d 1246, 1255 (9th Cir. 2000).

Because air-pollution regulation is at the core of state police power, courts have expressly permitted suits like this one to be predicated on state causes of action under "the law of the [polluter's] source [s]tate." *City of New York*, 993 F.3d at 99. In *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), the Court noted that while the Clean Water Act preempted a Vermonter from holding a New York point source liable under Vermont common law, it would not preempt the same suit under New York common law. *Id.* at 497. Here, Ames County sues an Ames corporation under Ames common law. Ames is the source state because Energon refines oil in Ames that is drawn from oil reserves also located within Ames, JA-23. Ames state common law can therefore

apply to claims against Energon for its intra-Ames conduct and effects. *See Ouellette*, 479 U.S. at 498; *accord* Pet'r's Br. 28.

In addition to point-source pollution, regulation of deceptive marketing practices also falls under the States' police powers. For instance, in *Altria Group, Inc. v. Good*, Maine residents sued Philip Morris for its deceptive trade practices related to the nicotine yield of Marlboro Lights. 555 U.S. 70, 72–73 (2008). Like Energon, Philip Morris deceived the plaintiffs about the harmful nature of its product. There, this Court recognized that the power to police deceptive advertising, like Philip Morris's and Energon's, is a core police power. *Id.* at 79.

This Court has reiterated that the States and localities may protect their citizens from air pollution and deceptive trade practices. In *AEP*, it said that the CAA "permit[s] each State to take the first cut at determining how best to achieve . . . emissions standards within its domain." 564 U.S. at 428. The instant suit, as history shows, falls squarely within that domain.

D. Federalism counsels against a uniform rule of decision that replaces the common law experience of state courts.

State courts regularly apply state police powers via public nuisance suits like this one—involving nationwide industries, complex causal chains, and innovative remedies. Indeed, this Court has recognized that "public nuisance law, like common law generally, adapts

to changing scientific and factual circumstances." *AEP*, 564 U.S. at 423. Energon's insistence that resolving the County's claim is beyond the "scientific, economic, and technological" capabilities of state courts, Pet'r's Br. 21 (quoting *AEP*, 564 U.S. at 428), belies the demonstrated competence of state courts in the field of public nuisance.

In *People v. ConAgra Grocery Products Co.*, a California state court found several manufacturers of lead paint liable for public nuisance because they deceptively marketed their product. 227 Cal. Rptr. 3d 499, 514 (Cal. Ct. App. 2017). To do so, the court examined scientific evidence regarding the connection between lead paint and lead poisoning, the defendants' knowledge of it, and whether their marketing increased lead paint usage. *Id.* at 543–46. The court then fashioned an appropriate remedy: an abatement fund. *Id.* at 568–71. The court was tasked with making a complex determination about the cause of a public nuisance and the liability that attached to it, and did so successfully. So too could Ames state courts. *See* Roda Verheyen, *Loss and Damage Due to Climate Change*, 8 Int. J. Global Warming 158, 163 (2015) (noting that in light of technological developments, "showing causation in climate change . . . is not necessarily more complicated" than in suits related to tobacco and asbestos).

Variation in nuisance law across the United States is a feature, not a bug, of our federalist system. State tort law allows local

communities to decide what conduct is blameworthy and who deserves compensation within their borders. Betsy J. Grey, *The New Federalism Jurisprudence and National Tort Reform*, 59 Wash. & Lee L. Rev. 475, 513–518 (2002) (collecting examples). This advances important interests that complement federal law. Drawing abatement directly from the blameworthy actor, rather than a federally funded compensation pool, Pet'r's Br. 18, promotes tailored and ongoing redress for victims. Further, the experiences of other industries demonstrate that variations in public nuisance law will not impermissibly burden the oil industry. The Rhode Island Supreme Court, faced with a suit substantially similar to that in *ConAgra*, found no public nuisance. *See State v. Lead Indus. Ass'n, Inc.*, 951 A.2d 428, 435 (R.I. 2008). Despite this lack of uniformity between high-stakes suits for environmental abatement, the paint industry continues to thrive. *See Conagra Brands Reports Strong FY21 Fourth Quarter And Full-Year Results*, Conagra Brands (July 13, 2021), https://perma.cc/3EKD-KQ62. Courts have also reached disparate results in public nuisance claims regarding opioids, *see, e.g.*, *State ex rel. Hunter v. Johnson & Johnson*, 499 P.3d 719, 730–31 (Okla. 2021), and guns, *see, e.g.*, *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1118–20 (Ill. 2004). Yet both industries prosper. *See* Sweta Killa, *Pharma ETFs in Focus Post Q1 Earnings*, Yahoo (May 12, 2022), https://perma.cc/4JNN-5VVL; Elizabeth Crisp, *Gun Industry*

Points to Rapid Growth, The Hill (Apr. 1, 2022), https://perma.cc/7PHQ-8YJT.

If Congress believes state courts lack competence in this field or that a uniform rule of decision is required, it can act. It did so in response to firearms litigation, immunizing gun manufacturers from liability for public nuisances based on crimes committed with their products. *See* 15 U.S.C. §§ 7901–7903. Congress may also remove state courts' jurisdiction over a subject. *See*, *e.g.*, *id.* § 1121 (trademark); 28 U.S.C. § 1400(b) (patent); *id.* § 1334(b) (bankruptcy). It is the proper role of Congress, not the federal courts, to put an end to public nuisance suits like this one. *See City of Milwaukee v. Illinois* (*Milwaukee II*), 451 U.S. 304, 313 (1981) ("[T]he decision whether to displace state law . . . is generally made not by the federal judiciary, . . . but by the people through their elected representatives in Congress."). But Congress has not done so.

State courts like the Ames County Court of Common Pleas are well-equipped to adjudicate public nuisance suits. The principles of federalism and the experiences of the paint, opioid, and gun industries indicate that a uniform federal rule of decision is unnecessary.

II. REMOVAL IS IMPROPER BECAUSE THE DISTRICT COURT LACKS JURISDICTION OVER THE COUNTY'S STATE LAW CLAIM.

It is a "well-established principle that federal courts . . . are courts of limited jurisdiction," while state courts are courts of general

jurisdiction. *Aldinger v. Howard*, 427 U.S. 1, 15 (1976), *superseded by statute*, 28 U.S.C. § 1367. This principle flows from the Constitution, U.S. Const. art. III, § 2, cl. 1, and reflects a long-standing confidence in the competency of state courts, *see Tafflin v. Levitt*, 493 U.S. 455, 458 (1990); *see also supra* section I.C. Consistent with the limited jurisdiction of federal courts, a plaintiff capable of seeking redress under both federal and state law "may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). Thus, under the well-pleaded complaint rule, a suit arises under federal law—and is therefore removable—only if an essential federal element appears in the plaintiff's properly pleaded complaint. *See Vaden v. Discover Bank*, 556 U.S. 49, 60 (2009). When a plaintiff chooses to rely on state law, only two exceptions[2] permit removal to federal court. First, a statute may completely preempt the claim. *Caterpillar*, 482 U.S. at 393. Second, a state law claim that "necessarily raise[s] a stated

[2] Energon suggests that this suit is removable because it is governed by federal common law. Pet'r's Br. 33–34. If federal common law existed and preempted here, this case would fall within "arising-under" jurisdiction. But there is no federal common law here, *supra* section I.A, and if there were, it would not preempt Ames law, *see supra* section I.B. Where federal common law does not completely preempt, it creates no independent basis for removal. *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 & n.4 (2003) ("[A] state claim may be removed to federal court in only two circumstances—when Congress expressly so provides, . . . when a federal statute wholly displaces the state-law cause of action through complete pre-emption," or based "on the special historical relationship between Indian Tribes and the Federal government," as in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974).)

federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities" may also be removed. *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005). Energon cannot satisfy the requirements for either exception, making removal improper. Even if it could, state court would still be the proper forum because the County has no standing to bring a claim in federal court.

A. The County lacks standing to sue in federal court, which requires remand to the Ames County Court of Common Pleas.

Article III limits federal jurisdiction, even where granted by statute. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 138, 174 (1803). To satisfy Article III, "the plaintiff must have . . . standing." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2202 (2021). Here, the County is "empowered under Ames law to sue and be sued." JA-21; Restatement (Second) of Torts § 821C cmt. j (Am. L. Inst. 1979). However, it lacks Article III standing to bring its claim in federal court. Accordingly, this Court must remand the case to the Ames County Court of Common Pleas. *Collier v. SP Plus Corp.*, 889 F.3d 894, 897 (7th Cir. 2018) (remanding to state court due to lack of Article III jurisdiction a state law claim originally filed in state court).

When a government sues on behalf of its residents, Article III requires that it "articulate an interest apart from the interests of

particular private parties." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982). States can satisfy that requirement by asserting a "'quasi-sovereign' interest . . . in the well-being of its populace," *id.* at 601–02, thus obtaining "*parens patriae* standing" under Article III, *id.* at 600–01 & n.8. Government-brought suits vindicating "an interest in the abatement of public nuisances" are "examples of such *parens patriae* suits." *See id.* at 604. Here, the County claims only that Energon's public nuisance "interfere[s] with public rights" and seeks abatement of and compensation for that public injury. JA-25. This case is thus a *parens patriae* suit.

Under Article III, a political subdivision of a State, like Ames County, cannot bring *parens patriae* suits in federal court. *El Paso County v. Trump*, 982 F.3d 332, 338 (5th Cir. 2020); *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122, 131 (9th Cir. 1973) ("[P]olitical subdivisions such as cities and counties, whose power is derivative and not sovereign, cannot sue as *parens patriae*."). Though claims similar to the County's have been litigated in federal court, those claims were not brought under *parens patriae*, and the standing issue was thus never litigated. These cases alleged *private* nuisance and trespass, not just public nuisance. *Mayor of Baltimore*, 31 F.4th at 195; *Suncor*, 25 F.th at 1248; *City of New York*, 993 F.3d at 88. But the County has not brought those additional claims. It alleges only an

"interfer[ence] with public rights" and seeks to recover only its costs expended in "mitigat[ing] the effect and severity" of that *public* injury. JA-24.

Accordingly, because federal courts have no Article III jurisdiction to adjudicate this dispute, this case must be remanded to the Ames County Court of Common Pleas, where Ames state law empowers the County to bring its claim. JA-21; *Collier*, 889 F.3d at 897 (remanding to state court due to lack of Article III jurisdiction); *Hillesheim v. Holiday Stationstores, Inc.*, 900 F.3d 1007, 1010–11 (8th Cir. 2018) (same); *Polo v. Innoventions Int'l, LLC*, 833 F.3d 1193, 1196 (9th Cir. 2016) (same).

B. The CAA does not completely preempt the County's claim.

Even if the County had *parens patriae* standing to sue in federal court, it has not chosen to do so, and the well-pleaded complaint rule requires the courts to respect its choice. A federal defense like ordinary preemption is insufficient to form the basis of removal "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." *Caterpillar*, 482 U.S. at 393. Such is the case here. Energon therefore must show *complete* preemption to circumvent the well-pleaded complaint rule. It cannot.

Complete preemption is a rare phenomenon. It is reserved only for those statutory provisions exhibiting an "unusually 'powerful' pre-emptive force" that transforms any suit within its breadth into "purely a creature of federal law." *Anderson*, 539 U.S. at 7 (quoting *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 23–24 (1983)). The Court has only ever found three such instances. *See Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinist & Aerospace Workers*, 390 U.S. 557, 560 (1968) (section 301 of the Labor Management Relations Act (LMRA)); *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 67 (1987) (section 502(a) of the Employee Retirement Income Security Act (ERISA)); *Anderson*, 539 U.S. at 11 (sections 85 and 86 of the National Bank Act). These decisions "share a common denominator: exclusive federal regulation of the subject matter of the asserted state claim, coupled with a federal cause of action for wrongs of the same type." *Fayard v. Ne. Vehicle Servs., LLC*, 533 F.3d 42, 46 (1st Cir. 2008) (citations omitted). Petitioner's theory fails on both scores.

1. *The CAA does not establish exclusive federal regulation of air pollution.*

When courts analyze the preemptive scope of federal legislation, the statute's express language controls. *See, e.g.*, *Cipollone v. Liggett Grp. Inc.*, 505 U.S. 504, 517 (1992). It does so because "[t]he purpose of Congress is the ultimate touchstone in every preemption case," and that intent is primarily discerned "from the language of the [statute] and the

statutory framework surrounding it." *Medtronic*, 518 U.S. at 485–86 (internal quotations omitted). The CAA's text, purpose, and framework disprove Energon's assertion of exclusive federal regulation.

The CAA's saving clauses demonstrate that Congress did not intend to completely preempt common law suits related to climate change. One, entitled "Retention of State authority," declares that "nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce . . . any requirement respecting control or abatement of air pollution" that meets or exceeds federal standards. 42 U.S.C. § 7416. Congress thus authorized States and counties to further enforce "*any* requirement," a phrase that "sweeps broadly and suggests no distinction between positive enactments and common law." *Cipollone*, 505 U.S. at 521 (plurality opinion); *see also Riegel v. Medtronic, Inc.*, 552 U.S. 312, 324 (2008) ("Absent other indication, reference to a State's 'requirements' includes its common-law duties.").

The other saving clause, regarding citizen suits, expresses a similar idea. It states 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" that meets or exceeds federal standards. 42 U.S.C. § 7604(e); *see also id.* § 7602(e) (including a "political subdivision of a

State" within the definition of "person"). Here, too, the language of "any other relief" includes common law duties. *See The Queen ex rel. Ontario v. City of Detroit*, 874 F.2d 332, 343 (6th Cir. 1989). Taken together, these clauses authorize the County to bring a state public nuisance claim.

Energon claims that despite these clauses, the "various provisions of the Clean Air Act establish the exclusive cause of action." Pet'r's Br. 42. Neither text nor context supports its conclusions. For one, Energon only points to the CAA's emission standards, enforcement of these standards, and rulemaking petitions. *Id.* at 40–41. But as noted above, the CAA is a floor rather than a ceiling: its express text contemplates States enforcing requirements beyond its statutory baseline. This suit regards Energon's "fossil-fuel products and [an] extravagant misinformation campaign that contributed to its injuries," *Mayor of Baltimore*, 31 F.4th at 217, an area of state authority the CAA retains.

For another, this Court has never recognized complete preemption on such a broad subject or across so many subsections. Section 301 of the LMRA completely preempts collective-bargaining agreements but not individual employee contracts. *See Caterpillar*, 482 U.S. at 388–89. Section 502 of ERISA completely preempts employee-benefit plans but not tax levies. *See Franchise Tax Bd.*, 463 U.S. at 25–26. Just so, if every state law cause of action within the scope of the

CAA were completely preempted, "there would be nothing . . . to 'save,'" rendering such provisions surplusage. *In re NOS Commc'ns, MDL No. 1357*, 495 F.3d 1052, 1058 (9th Cir. 2007). Lower courts agree that these saving clauses "take[] complete preemption off the table." *Rhode Island*, 35 F.4th at 58; *Suncor*, 25 F.4th at 1263 ("[T]he CAA is designed to provide a floor upon which state law can build, not a ceiling to stunt complementary state-law actions."); *The Queen*, 874 F.2d at 342–43 ("[T]he plain language of the [CAA's] savings clause . . . clearly indicates that Congress did not wish to abolish state control.").

Energon cites an ERISA case, *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004), to argue that saving clauses do not always preclude complete preemption, *see* Pet'r's Br. 44–45. But this is true only when a separate provision establishes "clear congressional content to make [the] remedy exclusive." *Aetna*, 542 U.S. at 209. No such remedial provision exists here. The CAA does expressly prohibit some types of regulation, such as state and local "enforcement [of] any standard relating to the control of emissions from new motor vehicles." 42 U.S.C. § 7543(a); *see also id.* § 7545(c)(4)(A) (same for fuel standards); *id.* § 7573 (same for aircraft emissions). But the CAA refrains from prohibiting state common law's application to stationary sources like Energon's refineries. And the principle of *in pari materia* applies with direct force—as it is for the Clean Water Act, so it must be for the Clean Air

Act. *See Merrick v. Diageo Ams. Supply, Inc.*, 805 F.3d 685, 692 (6th Cir. 2015) (concluding that *Ouellette*'s interpretation of the Clean Water Act's analogous saving clause requires that the CAA also preserve source-state claims). Congress chose to preserve state regulation of stationary sources and, by extension, Ames's authority to hold its polluters accountable in its own state courts.

Beyond the text, Energon suggests that Ames County's suit may "pose an obstacle to the purposes and objectives of [the CAA]." Pet'r's Br. 45 (quoting *Aetna*, 542 U.S. at 217). The CAA's purpose and legislative history weigh against this suggestion. One primary goal of the CAA is "to reduce to the maximum extent possible emissions of . . . greenhouse gases." S. Rep. No. 101-228, at 3770 (1989). To effectuate this goal, Congress declared in the CAA that "air pollution prevention . . . and air pollution control at its source is the *primary* responsibility of States and local governments." 42 U.S.C. § 7401(a)(3) (emphasis added). The Report of the Senate Committee on Public Works explained that the CAA "would specifically preserve any rights or remedies under any other law," such that "[c]ompliance with standards under this Act would not be a defense to a common law action for pollution damages." S. Rep. No. 91-1196, at 38 (1970). Thus, permitting state common law suits like the County's would further the CAA's "cooperative federalis[t]" approach that credits "primary responsibility for enforcement on state and local

governments." *N.Y. Pub. Int. Rsch. Grp. v. Whitman*, 321 F.3d 316, 320 (2d Cir. 2003) (internal quotation marks omitted).

2. *The CAA does not provide a substitute cause of action.*

The CAA also fails to provide a substitute cause of action for the County's claim. Its citizen-suit provisions allow private actions challenging the EPA's rules, as well as review of petitions to undertake new rulemaking. *See* 42 U.S.C. §§ 7604(a), 7607(b)(1). Neither is relevant here. Rather than rulemaking, the County looks to tort liability to hold polluters like Energon accountable for the damage wrought within the State. An administrative remedy under the CAA, by contrast, would provide no compensation and would target the federal government rather than private tortfeasors like Energon. *See Suncor*, 25 F.4th at 1265. These sections, as does the rest of the CAA, supplement rather than supplant state law and do not support a finding of complete preemption.

Congress's treatment of other statutes confirms the CAA's lack of preemptive effect. In the aftermath of *Avco*, which held that section 301 of the LMRA completely preempted state collective-bargaining laws, Congress took its cue from the Court and drafted ERISA to mirror the LMRA's completely preemptive language. *See* H.R. Rep. No. 93-1280, at 327 (1974) (Conf. Rep.). *Compare* 29 U.S.C. § 185(a) (granting jurisdiction to all federal district courts without regard to parties'

citizenship or the amount in controversy), *with id.* § 1132(f) (same). Accordingly, this Court held that section 502 of ERISA was likewise completely preemptive. *Metro. Life*, 481 U.S. at 65. By contrast, the only provisions of the CAA with such exclusive language are its citizen-suit and whistleblower retaliation provisions, neither of which controls here. *See* 42 U.S.C. §§ 7604(a), 7622(e).

Energon's last resort is the National Bank Act, but it too is distinct from the CAA. Energon claims that the National Bank Act "did not contain a specific usury provision." Pet'r's Br. 40. Yet section 85 provides a federal usury formula: whichever is the greatest of (a) 1% in excess of the Federal Reserve's discount rate, (b) the State's limit, or (c) 7% (if no state limit exists). 12 U.S.C. § 85. Section 86 provides the cause of action, remedy, and statute of limitations for violating this formula. *Id.* § 86. Taken together, and considering the "special nature of federally chartered banks," the *Anderson* Court found complete preemption. 539 U.S. at 10. But Energon's collection of scattered sections of the CAA, *see* Pet'r's Br. 40–41 (citing 42 U.S.C. §§ 7401, 7411, 7475, 7521, 7543, 7602, 7604, 7607), provide no such formulaic definition of environmental public nuisance. Moreover, Energon is not nationally chartered, nor does the CAA contemplate a "power to destroy" that States could exert over such national institutions. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819). Rather, Energon is an

Ames-incorporated company that has inflicted injuries within Ames's borders. The CAA saved state tort law to apply in just such circumstances.

Each circuit to consider the question has held that the CAA is not completely preemptive. *See* cases cited *supra* note 1. At first blush, *City of New York* may seem to be a lone dissenter. But the Second Circuit distinguished its case, noting it addressed only ordinary preemption "on its own terms," rather than the "heightened standard unique to the removability inquiry." *City of New York*, 993 F.3d at 94. And Energon's other lynchpin cases are inapposite. *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), is "about garden-variety preemption, not the complete preemption [Energon] need[s]," *City of Hoboken*, 45 F.4th at 708, and *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922 (5th Cir. 1997) is an "outlier" that "most courts recognize . . . [is] not good law," *City of Hoboken*, 45 F.4th at 708. Energon's case for complete preemption is thus inconsistent with the precedent of this Court and the circuits.

C. The County's state law tort claim does not raise substantial and disputed questions of federal law.

Even if the CAA does not completely preempt state tort law, Energon argues that the County's claim satisfies the requirements for federal question jurisdiction under *Grable*. Four factors determine whether *Grable* jurisdiction is proper over a state law claim. The claim

must involve a federal issue that is "(1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal state balance approved by Congress." *Gunn v. Minton*, 568 U.S. 251, 258 (2013). "Where all four of these requirements are met . . . jurisdiction is proper." *Id.*

Grable jurisdiction is a "slim category," *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 701 (2006), reserved for a "very rare class" of cases, *Rhode Island*, 35 F.4th at 56. The two questions of federal law Energon alleges exist in this case—whether federal common law bars the County's state law claim for climate-related injuries and whether the County's suit "collaterally attacks" the EPA's judgment, Pet'r's Br. 46–47—cannot satisfy *Grable*.

1. *The County's public nuisance claim does not "necessarily raise" a federal issue.*

A state law claim "necessarily raises" a federal issue when resolution of its elements requires the application of federal law. *See Grable*, 545 U.S. at 312–13. Thus, this Court described "the classic example" of *Grable* jurisdiction as a state law claim that turns on federal constitutional law. *See id.* at 312. And in *Grable* itself, this Court held there was federal question jurisdiction because a plaintiff based a quiet title action under state law on the meaning of federal tax law. *Id.* at 314–16. The very purpose of *Grable* jurisdiction reflects that "a federal

court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law." *Id.* at 312.

Energon does not argue that to decide the elements of the County's public nuisance claim, a court must apply a specific provision of federal law. *See* Pet'r's Br. 46–47. Nor could it—the County's claim only requires the application of Ames law. *See* Restatement (Second) of Torts § 821B(2) (Am. L. Inst. 1979). Instead, Energon first argues that because federal common law *replaces* the County's claim, it necessarily raises a federal issue. *See* Pet'r's Br. 46. Federal common law cannot raise a federal issue because it was displaced. *See supra* Part I. Nor can federal common law—if it wholly displaces state law—serve as a basis for *Grable* jurisdiction, which is implicated only "where a claim finds its origins in state," not federal, law. *Gunn*, 568 U.S. at 258.

Alternatively, Energon contends that the County's claim necessarily raises a federal issue because it "collaterally attacks" federal law by second-guessing the EPA's "balancing of the harm and utility of greenhouse gas emission." Pet'r's Br. 46–47. Energon's "collateral attack" theory has been rejected by numerous circuits because deciding such state law claims does not require the application of federal law. *See, e.g.*, *Mayor of Baltimore*, 31 F.4th at 210; *Suncor*, 25 F.4th at 1266–67; *Rhode Island*, 35 F.4th. at 56–57. Nor have the circuits Energon cites endorsed it. For instance, in *Bennett v. Southwest Airlines Co.*, the

Seventh Circuit rejected removal because the plaintiffs' claims did not require "a context-free inquiry into the meaning of federal law" but rather heavily implicated state law. 484 F.3d 907, 910–11 (7th Cir. 2007). *Bennett* did not suggest that any state claim within the ambit of an agency's regulatory agenda represents a "collateral attack on agency action" sufficient for *Grable* jurisdiction. *Id.* at 909. So too, Energon's remaining authorities are inapposite. *See Old Dominion Electric Coop. v. PJM Interconnection, LLC*, 24 F.4th 271, 283–84 (4th Cir. 2022) (holding the plaintiff's claim was "incontrovertibly barred by the governing regulatory tariff" because the claim required direct amendment of federal law); *Pet Quarters, Inc. v. Depository Tr. & Clearing Corp.*, 559 F.3d 772, 779 (8th Cir. 2009) (concerning a facial challenge to an SEC-approved program). In each case, plaintiffs challenged specific actions approved by agencies—a far cry from the general attack on the EPA's purpose that Energon claims has occurred here. *See* Pet'r's Br. 47.

Even accepting Energon's theory, the CAA's cooperative federalist structure only sets a floor for state action. *See supra* section II.B.1. Thus, the County's claim, which builds upon that floor, complements rather than "collaterally attacks" "the reasonableness of EPA's regulatory framework." Pet'r's Br. 47. Accordingly, no federal issue is necessarily raised.

2. *No federal issue is "actually disputed" in this case.*

Energon contends that this case involves a "dispute respecting the effect of federal law." Pet'r's Br. 47. But no element of the County's claim turns on the effect of the EPA's risk-utility balance. Instead, there are two ways that Energon's alleged federal issue could be relevant here. The first is whether the EPA's risk-utility determinations displaced the County's claim altogether—a matter of ordinary preemption. But it is well-settled law that a defense such as ordinary preemption cannot be the basis for removal. *Franchise Tax Bd.*, 463 U.S. at 14. The second is whether a determination that Energon's conduct was unreasonable under state law must be made in reference to the EPA's risk-utility determinations. It need not.

Energon argues that an Ames court could find Energon's conduct unreasonable, a necessary element of public nuisance, only if its harms outweighed its social utility. JA-47. But the Second Restatement, which Ames follows, JA-app., provides two independently sufficient tests to determine the unreasonableness of a public nuisance. Restatement (Second) of Torts § 826 (Am. L. Inst. 1979); *see also id.* cmt. a (explaining that this rule "may, and commonly does, apply to . . . public nuisance"). One is Energon's balancing test. Under the alternative "financial burden" test, a nuisance is unreasonable if "the harm caused by the conduct is serious" and the financial burden of compensating for that

harm would not make continuation of the conduct infeasible. *Id.* § 826(b). The balancing test Energon claims is a necessary element is actually "inappropriate when the suit is for compensation for the harm imposed." *Id.* cmt. f. When a suit seeks compensation rather than "to stop the activity," only the "financial burden" test applies. *Id.* Here, the County seeks no injunction to halt Energon's activities, only compensation for and abatement of the damage caused. JA-25. Thus, the public nuisance claim does not implicate the EPA's balancing.

To the extent that a federal agency's risk-balancing is a "federal issue," this case does not implicate it. Nothing (except perhaps Energon's marketing materials) suggests that fossil fuels do not contribute to global warming, and no one suggests that Energon ought to be forcibly shut down rather than pay its fair share for the injuries it has caused. The lack of an actual dispute counsels against *Grable* jurisdiction.

3. *The claim in this case does not present "substantial" federal issues.*

An issue is "substantial" under *Grable* when it reflects "a serious federal interest in claiming the advantages thought to be inherent in a federal forum," such as "experience, solicitude, and hope of uniformity" on federal issues. 545 U.S. at 312, 314. For example, this Court has found a federal issue substantial when it presents "[n]early 'pure issue[s] of law,' . . . [that] thereafter would govern numerous . . . cases."

McVeigh, 547 U.S. at 700. Here, Energon argues two federal issues are substantial: "the effect of federal common law and whether [the] EPA has struck the appropriate balance between regulating emissions and protecting our nation's productive capacity." Pet'r's Br. 45. Neither is.

Resolution of Energon's asserted federal issues would not create a rule for future tort cases. Instead, this case turns on circumstances that are too "fact-bound and situation-specific" to be substantial. *McVeigh*, 547 U.S. at 701. In *McVeigh*, this Court noted the case implicated questions of causation specific to the alleged tort. *Id.* *Grable*, by contrast, dealt with an interpretation of a federal tax provision, a quintessentially legal question. 545 U.S. at 309. Another circumstance demonstrating "the sort of substantiality [this Court] requires," *Gunn*, 568 U.S. at 261, is when the constitutionality of federal legislation is "directly drawn in[to] question," *Smith v. Kan. City Title & Tr. Co.*, 255 U.S. 180, 201 (1921).

Even if Energon were correct that this claim remains "inherently federal" after federal common law's displacement, Pet'r's Br. 23, such a determination would turn on questions of fact, causation, and effect. For instance, determining whether there are interstate or international effects that make a claim "inherently federal" may require complex inquiries into state common law's interplay with national security, *id. at* 16, and its extraterritorial effect, *id.* at 13. Energon's analysis never

implicates a purely legal question, thus falling outside *Grable*'s limited realm.

Nor would determining "whether [the] EPA has struck the appropriate balance between regulating emissions and protecting our nation's productive capacity," *id.* at 45, establish a rule for other cases. To be sure, it would be relevant to ordinary preemption, potentially eliminating state tort law in this domain altogether. But, as noted above, *see supra* section II.C.2, ordinary preemption cannot support removal, *see Franchise Tax Bd.*, 463 U.S. at 14. Any other effect of a determination regarding the EPA's balancing of costs and benefits is necessarily "fact-bound and situation-specific," falling outside the scope of *Grable* jurisdiction.

This case also does not present substantial federal issues because the federal government does not have a strong interest in a federal forum for Ames's claim. In *Grable*, this Court noted that interpretation of the federal tax code was a substantial issue because a federal forum would enable the government "to vindicate its own administrative action"—the tax sale the IRS had conducted and the validity of which the plaintiff challenged. 545 U.S. at 315. Important to this Court, too, was expertise—parties to the tax sale "might find it valuable to come before judges used to federal tax matters." *Id.*

Energon fails to identify a specific action the federal government must vindicate. Instead, Energon proposes a broad principle favoring removal: whenever an element of a tort claim is allegedly in tension with the CAA's general purpose, *see* Pet'r's Br. 48, the scales tip in favor of a federal forum. But a generalized federal interest in a state claim—even an "overwhelming" one—is not enough to transform countless state law claims into "discrete and costly 'federal case[s].'" *McVeigh*, 547 U.S. at 701. Torts fall centrally within the experience and expertise of state courts. *See id.* As such, the Ames County Court of Common Pleas provides an appropriate forum for the County's claim.

4. *Federal jurisdiction in this case would disrupt the federal-state balance approved by Congress.*

The fourth *Grable* prong bars removal if resolution of the claim in federal court would disturb "congressional judgment about the sound division of labor between state and federal courts." *Grable*, 545 U.S. at 313–14. This prong is a "veto" on removal; if no federal statute provides a private right to bring a corresponding claim in federal court, removal may be proper only if doing so would affect only a small number of traditionally state-governed cases or if the claim is traditionally federal. *Id.* at 313, 318.

In *Merrell Dow Pharmacies Inc. v. Thompson*, plaintiffs brought a state tort action alleging a breach of duty based on a violation of federal law. 478 U.S. 804, 805–06 (1986). This Court concluded that the

absence of a federal statutory right of action is "tantamount to a congressional conclusion that," even when the statute's violation is an element of a state claim, it is still "insufficiently 'substantial' to confer federal-question jurisdiction." *Id.* at 814. Removal without a federal right of action was improper because it would "have heralded a potentially enormous shift of traditionally state cases," such as tort cases, "into federal courts," *Grable*, 545 U.S. at 319, amounting to an "unnecessary usurpation of state law domain," *Estate of Cornell v. Bayview Loan Servicing, LLC*, 908 F.3d 1008, 1016 (6th Cir. 2018). No federal private right of action applies here because the CAA provides no remedy for the County's injuries. As discussed *supra* section II.B.2, the CAA furnishes no substitute private right of action.

If a plaintiff cannot bring a "private, federal cause of action, either substantively or procedurally, no federal subject matter jurisdiction exists." *Dixon v. Coburg Dairy, Inc.*, 369 F.3d 811, 819 (4th Cir. 2004) (en banc). The missing federal private right of action here is "a missing welcome mat" required "when exercising federal jurisdiction over a state . . . action would have attracted [to federal court] a horde of original filings and removal cases." *Grable*, 545 U.S. at 318. Courts find removal improper in the absence of a federal cause of action, unless removal would affect only a few cases, *see, e.g.*, *Tantaros v. Fox News Network*, 12 F.4th 135, 147 (2d Cir. 2021), or only traditionally federal claims, *see*

id. (involving federal tax laws); *Old Dominion*, 24 F.4th at 288 (involving "excuse from strict compliance" with federal regulations). The County's claim fits within neither exception. Public nuisance claims sound in tort, an area consisting of "traditionally state cases." *Grable*, 545 U.S. at 319. Adopting Energon's standard would risk federalizing "horde[s]" of these claims because many state tort suits are premised on violations of federal law. *Id.* at 318–19. Energon's rule would thrust them all into federal court. The absence of a federal cause of action in this case thus evinces Congress's intent to keep this wave of traditionally state claims out of federal courts.

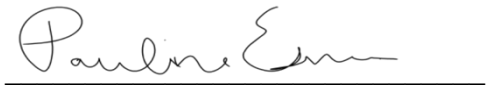
Removal of the County's claim would violate *Grable*'s bar on extending federal jurisdiction over swaths of state law without congressional authorization. And it would arrogate the States' power to the federal judiciary, ignoring Congress's clear directive that the primary responsibility to combat air pollution belongs to them alone.

CONCLUSION

For the foregoing reasons, this Court should remand this case to the Ames County Court of Common Pleas for lack of Article III jurisdiction or, alternatively, affirm the judgment of the Ames Circuit.

October 21, 2022 Respectfully submitted,

The Justice Ruth Bader Ginsburg Memorial Team



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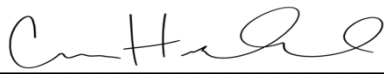

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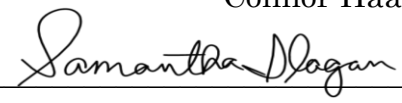

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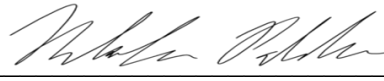

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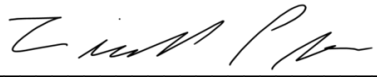

Lincoln Plews

APPENDIX

U.S. Const. art. III, § 2

provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. art. VI, cl. 2

provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.

12 U.S.C. § 85

provides:

> Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under title 62 of the Revised Statutes. When no rate is fixed by the laws of the State,

or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. The maximum amount of interest or discount to be charged at a branch of an association located outside of the States of the United States and the District of Columbia shall be at the rate allowed by the laws of the country, territory, dependency, province, dominion, insular possession, or other political subdivision where the branch is located. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

12 U.S.C. § 86

provides:

The taking, receiving, reserving, or charging a rate of interest greater than is allowed by section 85 of this title, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: Provided, That such action is commenced within two years from the time the usurious transaction occurred.

15 U.S.C. § 1121

provides:

(a) The district and territorial courts of the United States shall have original jurisdiction and the courts of appeal of the United States (other than the United States Court of Appeals for the Federal Circuit) shall have appellate jurisdiction, of all actions arising under this chapter, without regard to the

amount in controversy or to diversity or lack of diversity of the citizenship of the parties.

(b) No State or other jurisdiction of the United States or any political subdivision or any agency thereof may require alteration of a registered mark, or require that additional trademarks, service marks, trade names, or corporate names that may be associated with or incorporated into the registered mark be displayed in the mark in a manner differing from the display of such additional trademarks, service marks, trade names, or corporate names contemplated by the registered mark as exhibited in the certificate of registration issued by the United States Patent and Trademark Office.

28 U.S.C. § 1331

provides:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

15 U.S.C. §§ 7901–7903

provides, in relevant part:

The possibility of imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system, erodes public confidence in our Nation's laws, threatens the diminution of a basic constitutional right and civil liberty, invites the disassembly and destabilization of other industries and economic sectors lawfully competing in the free enterprise system of the United States, and constitutes an unreasonable burden on interstate and foreign commerce of the United States.

. . .

A qualified civil liability action may not be brought in any Federal or State court.

. . .

The term "qualified civil liability action" means a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association.

28 U.S.C. § 1331

provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1441(a)

provides:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1442

provides, in relevant part:

> (a) A civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

28 U.S.C. § 1447(d)

provides:

> An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except 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 or otherwise.

29 U.S.C. § 185(a)

provides:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 1132(f)

provides:

The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

42 U.S.C. § 7401(a)

provides:

The Congress finds—

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;
(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation;
(3) that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution

control at its source is the primary responsibility of States and local governments; and

(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.

42 U.S.C. § 7416

provides:

Except as otherwise provided in sections 1857c-10(c), (e), and (f) (as in effect before August 7, 1977), 7543, 7545(c)(4), and 7573 of this title (preempting certain State regulation of moving sources) nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 7411 or section 7412 of this title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

42 U.S.C. § 7543(a)

provides:

No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

42 U.S.C. § 7545(c)(4)(A)

provides:

Except as otherwise provided in subparagraph (B) or (C), no State (or political subdivision thereof) may prescribe or attempt to enforce, for purposes of motor vehicle emission control, any

control or prohibition respecting any characteristic or component of a fuel or fuel additive in a motor vehicle or motor vehicle engine—

(i) if the Administrator has found that no control or prohibition of the characteristic or component of a fuel or fuel additive under paragraph (1) is necessary and has published his finding in the Federal Register, or

(ii) if the Administrator has prescribed under paragraph (1) a control or prohibition applicable to such characteristic or component of a fuel or fuel additive, unless State prohibition or control is identical to the prohibition or control prescribed by the Administrator.

42 U.S.C. § 7573

provides:

No State or political subdivision thereof may adopt or attempt to enforce any standard respecting emissions of any air pollutant from any aircraft or engine thereof unless such standard is identical to a standard applicable to such aircraft under this part.

42 U.S.C. § 7602(e)

provides:

The term "person" includes an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof.

42 U.S.C. § 7604(a)

provides:

Except as provided in subsection (b), any person may commence a civil action on his own behalf —

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to have violated (if there is

evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation,

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator, or

(3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I (relating to significant deterioration of air quality) or part D of subchapter I (relating to nonattainment) or who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of any condition of such permit.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties (except for actions under paragraph (2)). The district courts of the United States shall have jurisdiction to compel (consistent with paragraph (2) of this subsection) agency action unreasonably delayed, except that an action to compel agency action referred to in section 7607(b) of this title which is unreasonably delayed may only be filed in a United States District Court within the circuit in which such action would be reviewable under section 7607(b) of this title. In any such action for unreasonable delay, notice to the entities referred to in subsection (b)(1)(A) shall be provided 180 days before commencing such action.

42 U.S.C. § 7604(e)

provides:

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency). Nothing in this section or in any other law of the United States shall be construed to prohibit, exclude, or restrict any State, local, or interstate authority from—

(1) bringing any enforcement action or obtaining any judicial remedy or sanction in any State or local court, or
(2) bringing any administrative enforcement action or obtaining any administrative remedy or sanction in any State or local administrative agency, department or instrumentality, against the United States, any department, agency, or instrumentality thereof, or any officer, agent, or employee thereof under State or local law respecting control and abatement of air pollution. For provisions requiring compliance by the United States, departments, agencies, instrumentalities, officers, agents, and employees in the same manner as nongovernmental entities, see section 7418 of this title.

42 U.S.C. § 7607(b)(1)

provides:

A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412 of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I) which is locally or regionally applicable may be filed only in the

United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

42 U.S.C. § 7622(e)

provides:

(1) Any person on whose behalf an order was issued under paragraph (2) of subsection (b) may commence a civil action against the person to whom such order was issued to require compliance with such order. The appropriate United States district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such order.
(2) The court, in issuing any final order under this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate.

H.R. Rep. No. 93-1280 (1974) (Conf. Rep.)

provides, in relevant part:

In addition to being able to request the Secretary of Labor to bring suit on their behalf in cases where benefits are denied in violation of the act, individual participants and beneficiaries will also be able to bring suit in Federal court in such instances, as

well as to obtain redress of fiduciary violations. In addition, participants and beneficiaries may bring suit to recover benefits denied contrary to the terms of their plan, and where such claims by participants or beneficiaries do not involve application of the substantive requirements of this legislation, they may be brought in either State or Federal courts of competent jurisdiction. It is intended that such actions will be regarded as arising under the laws of the United States, in similar fashion to those brought under section 301 of the Labor Management Relations Act.

S. Rep. No. 90-1196 (1970)

provides, in relevant part:

It should be noted, however, that the section would specifically preserve any rights or remedies under any other law. Thus, if damages could be shown, other remedies would remain available. Compliance with standards under this Act would not be a defense to common law action for pollution damages.

S. Rep. No. 101-228 (1989)

provides, in relevant part:

The national goal is declared to be the elimination of emissions of manufactured substances with ozone depleting potential as well as global warming potential, to reduce to the maximum extent possible emissions of other greenhouse gases, and to provide for an orderly and equitable shift to safe alternatives.

Restatement (Second) of Torts § 821B (Am. L. Inst. 1979)

provides:

(1) A public nuisance is an unreasonable interference with a right common to the general public.
(2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:
  (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or

(b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
(c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

Restatement (Second) of Torts § 821C cmt. j (Am. L. Inst. 1979)

provides, in relevant part:

Action to enjoin or abate. A public official who is authorized to represent the state or an appropriate subdivision in an action to abate or enjoin a public nuisance may of course maintain the action. An administrative agency may also be given this authority, whether it promulgated the administrative regulations it is seeking to enforce or not.

Restatement (Second) of Torts § 826 (Am. L. Inst. 1979)

provides, in relevant part:

An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if
(a) the gravity of the harm outweighs the utility of the actor's conduct, or
(b) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.

. . .

a. *Public nuisance.* The rule stated in this Section applies to conduct that results in a private nuisance, as defined in § 821D. A similar rule may, and commonly does, apply to conduct that results in a public nuisance, as defined in § 821B.