No. 22-1435

IN THE

Supreme Court of the United States

ENERGON, U.S.A.,
Petitioner,

AMES COUNTY BOARD OF COMMISSIONERS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE AMES CIRCUIT

REPLY BRIEF FOR PETITIONER

The Lani Guinier Memorial Team

DANIEL ERGAS
GILLIAN HANNAHS
EMILY HATCH
SAMANTHA NEAL
SIERRA POLSTON
NATALIE TSANG

Counsel for Petitioner

NOVEMBER 10, 2022, 7:30PM
AMES COURTROOM

Oral Argument

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—continued:

Cases—continued:

Statutes:

Other Authorities:

Treatises:

ARGUMENT

I. FEDERAL COMMON LAW GOVERNS THE COUNTY'S SUIT.

A. The County's claim seeks to regulate interstate conduct.

In its complaint, the County seeks redress for climate change–related injuries caused by interstate emissions, not in-state production. But the County now argues it merely seeks to regulate Energon's alleged "intrastate deceptive marketing and production of fossil fuels." Resp't's Br. 6. In so doing, it defends a version of the complaint that does not exist.

The County's complaint alleges that its injuries arise out of the "use" of Energon's petroleum "all over the world," which produces "significant greenhouse gas emissions" when burned—for example, to heat homes, propel vehicles, and produce electricity. J.A. 23. The County's lawsuit therefore does not merely regulate "incidental interstate effects." Resp't's Br. 20. The County instead seeks to regulate based on emissions caused by Energon's interstate business activities and from the interstate use of Energon's petroleum—a result foreclosed by this Court's prohibition against "regulat[ing] the conduct of out-of-state sources." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 495 (1987). Indeed, the County concedes that when an "out-of-state industry" was

"sued by a political entity," the application of federal common law was "required." Resp't's Br. 18.[1]

Even if the County had sued Energon only for its intrastate emissions—which it did not—the result would be the same. The County claims that Ames is the "source state," given that Energon extracts and refines oil there. Resp't's Br. 25. But there is no source state for climate change. The County's climate change–related injuries exist with or without Energon's refinery in Ames. Greenhouse gases are "mixed globally in the atmosphere," such that "emissions in China" may contribute more to flooding in Ames than "emissions in New Jersey." *Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 422 (2011). Because climate change turns on the effects of centuries of greenhouse gas accumulation to which countless actors have contributed, "borrowing the law of a particular State would be inappropriate." *Id.*

The County attempts to repackage a global tort into one of garden-variety misrepresentation. But the County's injuries still "hinge[] on the link between the release of greenhouse gases and the

[1] The County claims that *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971), allows "a state's suit against a private company" based on interstate pollution to "be resolved by reference to state nuisance law." Resp't's Br. 19. Although *Wyandotte* "suggested in dicta" that state law may apply to such a claim, in *Illinois v. City of Milwaukee* (*Milwaukee I*), 406 U.S. 91 (1972), this Court "affirmed the view that the regulation of interstate water pollution is a matter of federal, not state, law, thus overruling the contrary suggestion in *Wyandotte*." *Ouellette*, 479 U.S. at 487.

effect those emissions have on the environment generally (and on the [County] in particular)." *City of New York v. Chevron Corp.*, 993 F.3d 81, 97 (2d Cir. 2021). Unlike the typical consumer protection case, the redress sought is not limited to relief for consumers who use Energon's petroleum.[2] Instead, the County seeks redress for injuries caused by "[m]an-made climate change" itself, Resp't's Br. 3, injuries undifferentiated from the climate change–related harms suffered by billions of others. Because the County seeks relief from the effects of transboundary emissions, federal common law must govern.

B. The County's claim requires a uniform federal rule of decision.

The interstate and international nature of the County's claim requires a uniform rule of decision. *See Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). The County's suit, alleging generalized harms from interstate climate change, is different in kind from suits alleging particularized harms from intrastate conduct by opioid, handgun, and lead paint manufacturers.

In those contexts, the use of state law makes sense because the conduct that gave rise to the harm can be traced back to a specific

[2] The County invokes its "core police power," Resp't's Br. 26, but it is irrelevant here. The cases cited by the County merely confirm that a state may regulate intrastate conduct—from in-state waste disposal, *see Massachusetts v. U.S. Dep't of Transp.*, 93 F.3d 890, 894 (D.C. Cir. 1996), to in-state cigarette marketing, *see Altri Grp., Inc. v. Good*, 555 U.S. 70, 73 (2008).

manufacturer's intrastate conduct. In *People v. ConAgra Grocery Products Co.*, 227 Cal. Rptr. 3d 499 (Cal. Ct. App. 2017), upon which the County relies, the manufacturers of lead paint were liable for harms felt in California attributable to paint they had "sold, . . . advertised, and promoted" in California. *Id.* at 518. But the County's climate change–related injuries necessarily arise out of interstate and international greenhouse gas emissions. Unlike an opioid marketed in-state, or a gun sold in-state, Resp't's Br. 28, there is no way to attribute the discrete harm felt in Ames to the discrete conduct of Energon in-state.

The County argues that Congress "can act" to create a "uniform rule of decision," but neglects to mention that Congress *did* act—and left each state's authority where it found it. Resp't's Br. 29. In the Clean Air Act, Congress confirmed the "[r]etention of state authority." 42 U.S.C. § 7416. This preserved each state's ability to set emissions standards "within its domain," *Am. Elec.*, 564 U.S. at 428, and sue in-state sources for injuries arising out of intrastate conduct, *see, e.g.*, *Bell v. Cheswick Generating Station*, 734 F.3d 188, 189 (3d Cir. 2013) (suing an in-state power plant under state trespass law for directly emitting coal dust onto plaintiffs' in-state property). A state cannot retain what it never had: the ability to regulate interstate pollution. And no party disputes that when the Clean Air Act was enacted, federal common law governed disputes over "transboundary pollution." Resp't's Br. 10. The

regulation of interstate air pollution is and has always been a "question[] of national or international policy." *Am. Elec.*, 564 U.S. at 427.

The United States itself recognizes the acute interstate and international interests at play. *Contra* Resp't's Br. 22 (citing a brief from former federal officials). In an amicus brief, the United States explained that state-law claims against defendants who sell fossil fuels "implicate[] sensitive national and foreign policy judgments" and "improperly disrupt and interfere with the proper roles, responsibilities, and ongoing work of the Executive Branch and Congress in this area." Brief of the United States as Amicus Curiae at 1, *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017 (N.D. Cal. 2018) (No. 17-6011). Because a uniform rule of decision is required here, federal common law must govern.

C. Displacement of a federal common law remedy does not authorize states to enter an exclusively federal domain.

In the County's view, "[o]nce a federal statute displaces federal common law, its preemptive effects are rendered null" and state law may enter the frame. Resp't's Br. 15. But that misunderstands the nature of federal common law. Displacement of federal common law means displacement of federal remedies, not displacement of a federal rule of decision.

Federal common law does not "preempt" state law; by definition, it exists where state law cannot. *See United States v. Standard Oil Co.*,

332 U.S. 301, 307 (1947) (holding that state law cannot govern an "essentially federal matter[]" even when federal common law provides no remedy). As this Court explained in *City of Milwaukee v. Illinois* (*Milwaukee II*), 451 U.S. 304 (1981), "[i]f federal common law exists, it is because state law cannot be used." *Id.* at 313 n.7. But that is not because of preemption—that is because the Constitution commits areas of "uniquely federal interest" to sole "federal control." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988).

After displacement, these "inherent limits" on each state's legislative power remain. *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982) (plurality opinion). "[O]ur federal system" requires that an "interstate . . . dispute[]"—like this one—"be resolved" under federal law because no other law can govern. *Tex. Indus.*, 451 U.S. at 641. As the Second Circuit concluded, "state law does not suddenly become presumptively competent to address issues that demand a unified federal standard simply because Congress saw fit to displace a federal court-made standard with a legislative one." *City of New York*, 993 F.3d at 98. For this reason, "displacement of a federal common law right of action" must "mean[] displacement of remedies," not withdrawal of federal jurisdiction over such claims. *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 857 (9th Cir. 2012).

In arguing otherwise, the County "conflate[s]" distinct "jurisdiction" and "merits-related determination[s]." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006). *Contra* Resp't's Br. 11 ("Federal common law cannot furnish jurisdiction once it is displaced."). As this Court held in *Bell v. Hood*, 327 U.S. 678 (1946), federal jurisdiction "is not defeated . . . by the possibility that the averments might fail to state a cause of action on which [plaintiffs] could actually recover." *Id.* at 682. To hold that a complaint does not "state[] a cause of action on which relief [can] be granted"—for instance, to hold here that federal common law does not afford the County a remedy—is a "question of law" that "must be decided after and not before the court has assumed jurisdiction over the controversy." *Id.* That follows from this Court's common-sense conclusion that a claim may be governed by federal common law for "jurisdictional purposes," even if that claim "may fail at a later stage for a variety of reasons." *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 675 (1974). Federal common law governs the County's claim.

II. THE DISTRICT COURT HAS JURISDICTION OVER THE COUNTY'S CLAIM.

A. The County has standing.

The County satisfies Article III standing requirements. The County suggests that, in bringing a public nuisance action, the only injury it has asserted is harm to its quasi-sovereign interest in the well-being of its residents. Resp't's Br. 32. And, as the County explains,

under the *parens patriae* doctrine, only states—and not political subdivisions—have Article III standing to assert such injuries. *Id.* But the County neglects to mention that its complaint alleges several physical and monetary injuries distinct from any quasi-sovereign interest it might otherwise hold.

Indeed, as a matter of Ames law, the County was *required* to plead such injuries to seek monetary damages.[3] Consistent with that requirement, the County's complaint alleges damage to "County-owned and maintained property," J.A. 22, as well as financial losses from "mitigat[ing] the effects and severity" of climate change, J.A. 24. Those sorts of physical and monetary harms "stand apart from" quasi-sovereign interests, *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex. rel. Barez*, 458 U.S. 592, 602 (1982), and "readily qualify as concrete injuries under Article III," *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021). Now that the County is facing the prospect of federal jurisdiction, it cannot disclaim the very injuries it relies on in its complaint.

[3] Under Ames law, plaintiffs who seek damages for public nuisances "must have suffered harm of a kind different from that suffered by other members of the public." RESTATEMENT (SECOND) OF TORTS § 821C(1) (Am. L. Inst. 1979). That requirement applies to *all* plaintiffs, including political subdivisions. *See In re Lead Paint Litig.*, 924 A.2d 484, 499 (N.J. 2007).

Nor is this Court limited to considering only the County's alleged quasi-sovereign interest in its standing inquiry. Were that the case, political subdivisions like the County would never have standing to bring public nuisance claims in federal court. But such a contention is belied by the fact that several federal courts have relied on physical and monetary harms when determining that political subdivisions have standing to bring public nuisance claims. *See, e.g.*, *City & County of San Francisco v. Purdue Pharma L.P.*, 491 F. Supp. 3d 610, 633 (N.D. Cal. 2020) (holding that San Francisco had standing to bring a public nuisance claim because it was "forced to expend resources"). Here too, the County's alleged physical and monetary injuries satisfy Article III.

B. The County's claim is removable.

Both parties agree that if federal common law exclusively governs the County's claim, removal is proper. Resp't's Br. 30 n.2. The only remaining points of contention, then, are whether the Clean Air Act completely preempts the County's claim and whether *Grable* jurisdiction exists.

1. The Clean Air Act completely preempts the County's claim.

Under the framework that this Court adopted in *Beneficial National Bank v. Anderson*, 539 U.S. 1 (2003), the Clean Air Act completely preempts the County's claim. The Act provides the "exclusive cause of action" for claims related to interstate greenhouse

gas emissions. *See id.* at 9. The County, however, relies on a First Circuit decision that this Court has yet to endorse, insisting that the proper test is "exclusive federal regulation" coupled with "a federal cause of action." Resp't's Br. 34 (quoting *Fayard v. Ne. Vehicle Servs., LLC*, 533 F.3d 42, 46 (1st Cir. 2008)). Yet even under the First Circuit's framework, the Clean Air Act easily satisfies the test for complete preemption.

To start, the Clean Air Act vests the federal government with the exclusive authority to set floor standards for interstate greenhouse gas emissions. *See* 42 U.S.C. §§ 7411(b)(1), 7521(a). States may raise the floor for emissions *within* their borders, but they have no authority to raise the floor for emissions *beyond* their borders. *See id.* §§ 7411(c)(1), 7543(b). That authority, according to this Court, belongs exclusively to EPA. *See Ouellette*, 479 U.S. at 490 ("[A]n affected State only has an advisory role in regulating pollution that originates beyond its borders.").

The County's insistence that the Clean Air Act's savings clauses divest EPA of that exclusive authority runs counter to *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987). There, this Court interpreted identical savings clauses in the Clean Water Act and concluded that neither allows states to enforce pollution standards beyond their borders. *Id.* at 493. Instead, both clauses serve only the

limited purpose of preserving a state's authority to apply its own law *within* its borders. *Id.* The identical clauses in the Clean Air Act, then, do not have any bearing on whether the statute completely preempts the application of state law *beyond* a state's borders.

The Clean Air Act also satisfies the second requirement of the First Circuit's test: it provides substitute causes of action for claims related to interstate greenhouse gas emissions. The Act authorizes enforcement actions for violations of emissions standards and allows participation in the rulemaking process. *See* 42 U.S.C. §§ 7475(a)(2), 7604(a)(1), 7604(a)(3), 7607(d)(5). The County insists that those causes of action are insufficient, since the relief they provide is not identical to the relief it seeks under state law. Resp't's Br. 39. Yet as the First Circuit itself recognized, "[f]or complete preemption to operate, the federal claim need not be co-extensive with the ousted state claim." *Fayard*, 533 F.3d at 46.

In a last-ditch effort to defeat complete preemption, the County maintains that a statute can only provide an exclusive cause of action in two circumstances: first, if the statute's legislative history suggests that Congress drafted the statute to mirror Section 301 of the Labor Management Reduction Act, Resp't's Br. 39; or second, if the statute provides a "formulaic definition" to replace any preexisting state cause of action, *id.* at 40. But this Court's most recent extension of the

complete preemption doctrine in *Beneficial National Bank* supports neither contention.

In *Beneficial National Bank*, this Court found that the National Bank Act completely preempted state law usury claims without reference to the statute's legislative history. 539 U.S. at 9–11; *see also* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 852 (7th ed. 2015) (explaining that "*Beneficial National Bank* seems to make clear" that "an intent in the legislative history to permit removal" is not "required to invoke complete preemption"). Nor did this Court rely on any "formulaic definition" of usury. This Court merely noted that, under the statute, the federal government sets "substantive limits" on interest rates. 539 U.S. at 9. Similarly, the Clean Air Act vests EPA with the exclusive authority to set substantive limits on greenhouse gas emissions across the several states. That vesting completely preempts state law claims seeking redress for interstate greenhouse gas emissions.

2. Grable *supports removal.*

Grable provides an independent basis for removal. *See Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005). First, where an alleged state claim is governed by federal common law, each element is necessarily resolved with reference to federal law. Second, a collateral attack on federal agency action exists when a party pursues a state claim to "effectively challenge[]" a regulatory structure

by requesting that a court "stand in the shoes of" the responsible agency. *Old Dominion Elec. Coop. v. PJM Interconnection, LLC*, 24 F.4th 271, 283, 285 (4th Cir. 2022), *cert. denied*, No. 21-1368 (U.S. Oct. 3, 2022). Here, the County asks a state judge to stand in the shoes of EPA and determine whether Energon's lawful interstate conduct should be effectively altered through state law.

The federal issues in this case are disputed. The County argues that the reasonableness of EPA's cost-benefit analysis is not in dispute under the "financial burden" test. Resp't's Br. 45. But the financial burden test applies only in actions for damages; it does not apply in equitable actions. *See* RESTATEMENT, *supra*, § 826 cmt. f; *see also ConAgra*, 227 Cal. Rptr. 3d at 569 ("An abatement order is an equitable remedy, while damages are a legal remedy."). A court considering the County's abatement request must evaluate reasonableness through a cost-benefit analysis. *See* RESTATEMENT, *supra*, § 826 cmt. a.

Furthermore, the federal questions at issue are substantial because they are "significant to the federal system as a whole." *Gunn v. Minton*, 568 U.S. 251, 264 (2013). In disputing substantiality, the County cites *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677 (2006). Resp't's Br. 47. But in *McVeigh*, *Grable* jurisdiction was inappropriate because the relevant question was the amount of money the plaintiff could recover under an insurance contract—clearly "fact-

bound and situation-specific." 547 U.S. at 681. Here, however, the claim implicates EPA's ability to vindicate its regulatory judgments regarding the appropriate balance between "promot[ing] the public health . . . and the productive capacity" of the nation. 42 U.S.C. § 7401(b)(1).

Finally, *Grable* itself undermines the County's argument that removal will disrupt the division of labor between federal and state courts. The County cites *Dixon v. Coburg Dairy, Inc.*, 369 F.3d 811 (4th Cir. 2004), for the contention that federal subject matter jurisdiction does not exist without a federal private right of action. Resp't's Br. 50. But *Grable*, decided one year later, explains that the test is a "contextual enquiry" where "the absence of a federal private right of action [is] . . . not dispositive." 545 U.S. at 318. As the County accepts, removal is proper where it "would affect only a few cases" or address "traditionally federal claims." Resp't's Br. 50. The small subcategory of public nuisance suits based on the effects of climate change should be resolved in federal court—the traditional forum for inherently federal issues.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Ames Circuit should be reversed.

Respectfully submitted,

The Lani Guinier Memorial Team

_____
Daniel Ergas

_____
Gillian Hannahs

_____
Emily Hatch

_____
Samantha Neal

_____
Sierra Polston

_____
Natalie Tsang

APPENDIX

Restatement (Second) of Torts § 821C (Am. L. Inst. 1979) | Who Can Recover for Public Nuisance

> (1) In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference.
> (2) In order to maintain a proceeding to enjoin to abate a public nuisance, one must
>
> > (a) have the right to recover damages, as indicated in Subsection (1), or
> >
> > (b) have authority as a public official or public agency to represent the state or a political subdivision in the matter, or
> >
> > (c) have standing to sue as a representative of the general public, as a citizen in a citizen's action or as a member of a class in a class action.

Restatement (Second) of Torts § 826 (Am. L. Inst. 1979) | Unreasonableness of Intentional Invasion

> 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.
>
> * * *
>
> Comment on Clause (b):
> f. . . . In a damage action for an intentional invasion of another's interest in the use and enjoyment of land, therefore, the invasion is unreasonable not only when the gravity of the harm outweighs the utility of the conduct, but also when the utility outweighs the gravity—provided the financial burden of compensating for the harms caused by the activity would not render it unfeasible to continue conducting the activity. If imposition of this financial burden would make continuation of the activity not feasible, the weighing process for determining unreasonableness is similar to that in a suit for injunction.