NO. 21-1752

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

STATE OF MINNESOTA, Plaintiff-Appellee,
v.
AMERICAN PETROLEUM INSTITUTE; EXXON MOBIL CORPORATION; EXXONMOBIL OIL CORPORATION; KOCH INDUSTRIES, INC.; FLINT HILLS RESOURCES LP; AND FLINT HILLS RESOURCES PINE BEND LLC, Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, CIV NO. 20-1636-JRT
THE HONORABLE JOHN R. TUNHEIM, C.J.

AMICUS CURIAE BRIEF OF THE STATES OF WASHINGTON, CALIFORNIA, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, NEW MEXICO, NEW YORK, OREGON, PENNSYLVANIA, VERMONT, WISCONSIN AND THE DISTRICT OF COLUMBIA, IN SUPPORT OF THE STATE OF MINNESOTA AND AFFIRMANCE OF THE DISTRICT COURT'S OPINION.

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INTEREST OF AMICI CURIAE

Amici States of Washington, California, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, New Mexico, New York, Oregon, Pennsylvania, Vermont, and Wisconsin and the District of Columbia have a unique interest in maintaining authority to develop and enforce state law addressing corporate harms in their state courts. That interest is particularly apparent where a State is the plaintiff, because "considerations of comity" disfavor federal courts "snatch[ing] cases which a State has brought from the courts of that State, unless some clear rule demands it." *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 21 n.22 (1983).

States are "vested with the responsibility of protecting the health, safety, and welfare of [their] citizens." *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342 (2007). This responsibility extends to bringing classic state-law claims in state court, like the ones Minnesota brings here: to vindicate the State's interest in preventing and remedying consumer fraud perpetrated by the oil company defendant-appellants (the Companies). Preventing unfair business practices and consumer deception is "an area traditionally regulated by the States." *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989); *see also Edenfield v. Fane*, 507 U.S. 761, 769 (1993) ("[T]here is

no question that [a State's] interest in ensuring the accuracy of commercial information in the marketplace is substantial."). The fact that the alleged deception concerns the impact of the Companies' products on climate change does not override that longstanding state interest.

The enforcement of state law in state courts often implicates national or even international interests, but that alone has never supplied a sufficient basis for removal. Federal courts have thus rejected attempts to remove state-led actions for state-law violations arising from, for example, the international Volkswagen "diesel-gate" vehicle emissions cheating scandal,[1] the national subprime mortgage lender housing and economy-wide crisis,[2] the national opioid sales and marketing health epidemic,[3] and the nationwide use of gasoline

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[1] *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, No. MDL 2672 CRB, 2017 WL 2258757 (N.D. Cal. May 23, 2017); Arnold W. Reitze Jr., *The Volkswagen Air Pollution Emissions Litigation*, 46 Envtl. L. Rep. 10564, 10566–68 (2016) (noting both federal and state enforcement and the important role of states).

[2] *E.g.*, *Massachusetts v. Fremont Inv. & Loan*, No. Civ. A. 07-11965-GAO, 2007 WL 4571162 (D. Mass. Dec. 26, 2007); *see also* Mark Totten, *The Enforcers & The Great Recession*, 36 Cardozo L. Rev. 1611, 1612 (2015) ("No one played a more vital role responding to the worst economic crisis since the Great Depression than a small band of state attorneys general.").

[3] *E.g.*, *Commonwealth v. Purdue Pharma L.P.*, No. 1884-CV-01808-BLS2, 2019 WL 4669561 (Mass. Super. Ct. Sept. 16, 2019); *New Mexico ex rel. Balderas v. Purdue Pharma L.P.*, 323 F. Supp. 3d 1242, 1245, 1251 (D.N.M. 2018); *New York v. Purdue Pharma, L.P.*, No. 400016/2018 (N.Y. Sup. Ct.

additive methyl tertiary butyl ether,[4] to name just a few examples. Accordingly, numerous federal courts have applied settled law to remand state lawsuits similar to this one.[5] As this Court has stated, "[c]ourts should be wary of obstructing the states in their varied efforts to grapple with the great public issues of the day." *Boyle v. Anderson*, 68 F.3d 1093, 1109 (8th Cir. 1995).

While Minnesota brings consumer protection and deceptive business practice claims, Amici States also have a strong interest in addressing the causes and effects of climate change within their borders. *See Am. Fuel & Petrochemical Mfrs. v. O'Keefe*, 903 F.3d 903, 913 (9th Cir. 2018); *cf. Huron Portland Cement v. Detroit*, 362 U.S. 440, 442 (1960) (regulation of air pollution "clearly falls within the exercise of even the most traditional concept of . . . the police power"). Each year, many Amici States face increasingly

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Suffolk Cty. filed Aug. 14, 2018); *State v. Purdue Pharma, L.P.*, No. 17-2-25505-0 SEA, 2018 WL 7892618 (Wash. Super. May 14, 2018); *Delaware ex rel. Denn v. Purdue Pharma L.P.*, 2018 WL 1942363, at *3-5 (D. Del. Apr. 25, 2018). Lenny Bernstein, *Five More States Take Legal Action Against Purdue Pharma for Opioid Crisis*, Wash. Post, May 16, 2019, https://tinyurl.com/y6yrljkb (noting actions by forty-five states).

[4] *In re MTBE Prods. Liab. Litig.,* 488 F.3d. 112, 135 (2d Cir. 2007).

[5] *See, e.g., City of Oakland v. BP PLC*, 969 F.3d 895, 911 (9th Cir. 2020); *Connecticut v. Exxon Mobil Corp.*, No. 3:20-CV-1555, 2021 WL 2389739 (D. Conn. June 2, 2021); *Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31, 34 (D. Mass. 2020); *see also City of New York v. Chevron*, 993 F.3d 81, 94 (2d Cir. 2021) (citing a "fleet of cases");

destructive storms, rising sea levels, flooding, wildfires, drought, and heat waves that kill their citizens, destroy their property, and imperil their food sources and local economies.[6] As the Intergovernmental Panel on Climate Change recently concluded, these weather events are going to worsen and "[m]any of the changes observed in the climate are unprecedented in thousands, if not hundreds of thousands of years."[7]

Amici States have a strong interest in preventing the Companies' attempt to remove traditional state-law claims like consumer protection, merely because they touch on an issue of national interest. This Court should reject the Companies' invitation to federalize state-law claims, and thus harm states' sovereign prerogative to redress state-law violations in their own courts.

[6] *See e.g.*, Gillian Flaccus, *Pacific Northwest Braces for Another Multiday Heat Wave*, ASSOC. PRESS, Aug. 12, 2021, https://www.pbs.org/newshour/nation/pacific-northwest-braces-for-another-multiday-heat-wave ("The June heat in Oregon, Washington and British Columbia killed hundreds of people and . . . was virtually impossible without human-caused climate change, a scientific analysis found."); *see also infra*, n.7; pp. 21–23.

[7] Intergovernmental Panel on Climate Change, *Climate Change widespread, rapid, and intensifying – IPCC*, (Aug. 9, 2021), https://www.ipcc.ch/2021/08/09/ar6-wg1-20210809-pr/.

INTRODUCTION

The application of the well-pleaded complaint rule dictates remand. Minnesota's complaint raises only state-law claims; the claims do not necessarily rely on any question of federal law; and no federal law completely preempts them. Any argument that federal common law "necessarily governs" is simply an ordinary preemption defense that a state court is competent to decide. Regardless, federal common law does not govern because there is no uniquely federal interest in addressing corporate fraud related to climate change. Further, the Companies' argument that a State Attorney General suit is a "class action" removable under the Class Action Fairness Act contradicts the Act's plain text and legislative intent.[8]

The Companies' position would permit removal for essentially any state case that raises an issue of national importance. Such a rule would contradict longstanding precedent and undermine the states' traditional authority to protect their citizens from corporate misconduct in state courts. In the Companies' view, the absence of applicable federal law (as is the case here) is irrelevant because

[8] The Amici States also disagree with the Companies' arguments for removal based on the federal officer removal statute and the Outer Continental Shelf Lands Act, *see* Def's Opening Br. 40–50, though not addressed in this brief.

judge-made common law could override state statutes in any issue of national concern, thus creating federal removal jurisdiction. The Court should reject the Companies' position and affirm the district court's decision remanding the case to state court.

ARGUMENT

I. THE WELL-PLEADED COMPLAINT RULE COMPELS AFFIRMANCE OF THE DISTRICT COURT DECISION

To preserve state sovereign authority, the right to remove is construed narrowly against removal. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108–09 (1941). "[T]he 'claim of sovereign protection from removal arises in its most powerful form'" where the removed action is one brought by a State in state court to enforce state law. *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 676 (9th Cir. 2012) (quoting *W. Virginia v. CVS Pharmacy, Inc.*, 646 F.3d 169, 178 (4th Cir. 2011); *see also LG Display Co. v. Madigan*, 665 F.3d 768, 774 (7th Cir. 2011). "[A]ll doubts about federal jurisdiction must be resolved in favor of remand." *Griffioen v. Cedar Rapids & Iowa City Ry. Co.*, 785 F.3d 1182, 1192 (8th Cir. 2015).

It is well-established that "federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Great Lakes Gas Transmission Ltd. P'ship v. Essar Steel Minnesota LLC*,

843 F.3d 325, 329 (8th Cir. 2016). The plaintiff is "master of the claim," such that "he or she may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar Inc. v. Williams,* 482 U.S. 386, 392 (1987). This doctrine "severely limits the number of cases in which state law 'creates the cause of action' that may be initiated in or removed to federal district court, thereby avoiding more-or-less automatically a number of potentially serious federal-state conflicts." *Franchise Tax Bd.*, 463 U.S. at 9–10.

The exceptions to the well-pleaded complaint rule are narrow. Federal jurisdiction exists only if "federal law creates the cause of action" or if "the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law" under *Grable & Sons Metal Products., Inc. v. Darue Engineering & Manufacturing.*, 545 U.S. 308 (2005). *Great Lakes Gas*, 843 F.3d at 329. Alternatively, federal jurisdiction will exist where a federal law completely preempts a state-law claim.

None of these exceptions applies here. First, federal law does not create the cause of action, as Minnesota's claims arise exclusively under state law and seek to redress harms that deceptive sale and advertising of fossil fuel products in the state caused. Second, Minnesota pleads only state-law claims, so its right to relief does not depend on the resolution of a substantial question of federal

law, as required for *Grable* jurisdiction. Nor could a federal court resolve Minnesota's claims without seriously disrupting the federal-state balance. Third, the Companies do not even argue that federal law completely preempts Minnesota's claims (it does not). The Court should thus affirm the district court's remand to the state court where it was filed.

A. Minnesota's Claims Arise Under State Law and Are Properly Adjudicated in State Court

Minnesota asserts traditional state-law consumer protection claims, seeking redress for how the Companies misled and deceived Minnesota consumers. As the complaint makes clear, this case concerns whether "[the Companies] lied to [Minnesota] consumers, and [whether] these lies affected the behavior of those consumers." *Connecticut*, 2021 WL 2389739, at *3; *see* Appendix of Appellants (App.) 31–70, 88–98 (Compl.). The right of Minnesotans "not to be lied to in a fashion that causes reliance and results in [] injury . . . [is] not a right created by federal law." *In re Standard & Poor's Rating Agency Litig.*, 23 F. Supp. 3d 378, 395 (S.D.N.Y. 2014) (holding that States' fraud claims relating to credit rating companies arose under state law, despite extensive federal regulation of companies).

Preventing and remedying deception in the marketplace "falls within the core of a state's responsibility." *Massachusetts v. Exxon,* 462 F. Supp. 3d at 44;

see also Connecticut, 2021 WL 2389739, at *3. Amici States regularly investigate and bring actions against defendants who have harmed our citizens under our respective consumer protection and antitrust statutes. This includes lawsuits against multinational corporations whose unlawful acts are also of national concern. For example, States have sued pharmaceutical companies for their role in the opioid epidemic,[9] tobacco companies for deceiving consumers about the health risks from cigarettes,[10] and oil companies for selling fuel additives that pollute groundwater.[11] A rule that such actions nonetheless arise under federal law would infringe on the rights of states to bring these actions in state courts, potentially impeding their ability to protect their citizens from unlawful activity.

Rather than face Minnesota's claims as they were brought, the Companies rewrite them as policy challenges to worldwide greenhouse gas emissions. Def's Opening Br. 13–27 (Def's Br.). According to them, because the remedies relate to harms from climate change, Minnesota purportedly raises claims about interstate pollution, foreign affairs, and the federal management of navigable

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[9] *See supra* n. 3.

[10] *See* Tobacco Master Settlement Agreement, Ex. D: List of Lawsuits (July 2014 Printing), https://1li23g1as25g1r8so11ozniw-wpengine.netdna-ssl.com/wp-content/uploads/2020/09/MSA.pdf.

[11] *MTBE,* 488 F.3d. at 135.

waters, which the Companies maintain are governed by federal common law. But as a district court concluded in a similar case, "the fact that the alleged lies were about the impacts of fossil fuels on the Earth's climate does not empower the court to rewrite the Complaint and substitute other claims" for the ones the plaintiff brought. *Connecticut,* 2021 WL 2389739, at *3; *see also* Mem. Op. and Order Granting Mot. To Remand and Denying Mot. To Stay (Mem. Op.), App. 212 ("To adopt Defendants' theory, the Court would have to weave a new claim for interstate pollution out of the threads of the Complaint's statement of injuries. This is a bridge too far.").

The Companies rely heavily on *City of New York*, 993 F.3d 81 (2d Cir. 2021), which held that federal common law preempted state-law claims that New York City brought against various fossil fuel companies. Their reliance is misplaced for at least two reasons. First, *City of New York* did not address federal subject matter jurisdiction, which indisputably existed on the basis of diversity. Instead, the Second Circuit treated the defendants' federal common law arguments as an ordinary preemption defense, and it expressly declined to consider whether those same arguments could satisfy "the heightened standard unique to the removability inquiry." 993 F.3d at 94. By its own terms, *City of*

New York has no bearing on the questions of removal jurisdiction that are raised in the present appeal.

Second, Minnesota's claims are qualitatively different from those raised in *City of New York*. The latter sought to hold companies "strict[ly] liable" for conduct it described as "lawful" production and sale of fossil fuels. 993 F.3d at 86, 93 (quotations omitted). In Minnesota's lawsuit, by contrast, the conduct that triggers liability is the Companies' *unlawful* use of deception and fraud to market and sell their products. *Id*. at 86, 93. Minnesota thus seeks civil penalties, funding for a corrective public education campaign in Minnesota, and restitution and disgorgement of profits obtained *as a result of the Companies' consumer fraud on Minnesotans*. *See* App. 88–98 (Compl.).[12]

For similar reasons, the Court should reject the Companies' argument that Minnesota's claims must arise under federal common law because its requested remedies relate to climate-change-induced harms. *See* Def's Br. 13–18. Minnesota seeks redress for deception and fraud, and the remedies are limited to harms to Minnesota from that conduct – not from interstate pollution, the management of navigable waters, or foreign affairs. Even if the Companies were

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[12] Amici States disagree with the Second Circuit's holding in *City of New York*, but the Court need not reach that issue because the case is inapplicable for other reasons.

correct that Minnesota's remedies seek to redress harms from emissions, under the well-pleaded complaint rule it is the cause of action, not the means of injury, which determines federal jurisdiction. *See Gunn v. Minton*, 568 U.S. 251, 257 (2013).

B. There Is No *Grable* Jurisdiction Because Minnesota's Traditional Consumer Protection Claims Raise No Federal Issue and Shifting Them to Federal Court Would Disrupt the Federal-State Balance

Because Minnesota raises only state-law claims, federal jurisdiction exists only if "the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Great Lakes Gas*, 843 F.3d at 329 (citation omitted). Here, it does not. The Supreme Court's test to establish federal jurisdiction under *Grable* requires that the federal question be: "(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*, 568 U.S. at 258.

The *Grable* exception applies only to a "'special and small category' of cases," *id*. (citation omitted), and the Companies fail to show it applies here. Minnesota's claims do not "necessarily raise[]" any federal question, let alone one that is actually disputed, substantial, and capable of resolution in federal

court without disrupting the federal-state balance. *See* App. 216–221 (Mem. Op.).

1. Minnesota's claims do not raise any issue of federal law

This Court has held that the party seeking removal under *Grable* "should be able to point to the specific elements of [the plaintiffs'] state law claims that require proof that [a federal law] was violated and explain why that proof is necessary." *Cent. Iowa Power Co-op. v. Midwest Indep. Transmission Sys. Operator*, 561 F.3d 904, 914 (8th Cir. 2009). This "inquiry demands precision." *Id*. In *Grable*, for instance, compliance with federal law was "an essential element of [plaintiff's state-law] quiet title claim." 545 U.S. at 314–15. On the other hand, if the plaintiff can establish its case-in-chief without relying on federal law, resolution of the federal question is not "necessary." *See, e.g.*, *Moore v. Kansas City Pub. Sch*., 828 F.3d 687, 693 (8th Cir. 2016) (holding that although federal law *could* apply to the plaintiff's tort claim, the plaintiff could rely exclusively on state law and remain in state court).

To prove its case, Minnesota need only meet the elements of its state consumer protection laws. Count One alleges the Companies violated Minnesota's Consumer Fraud Prevention Act by making fraudulent, misleading, or deceptive statements in connection with the sale of their products with the

intent that others rely on them. *See* Minn. Stat. § 325F.69(1) (2020); App. 88–89. Count Two alleges the Companies, except American Petroleum Institute, violated state tort law by breaching their duty to warn consumers that their products could result in injury. App. 89–92. Count Three alleges the Companies violated state tort law by intentionally misrepresenting material facts about their products. App. 92–93. Count Four alleges the Companies violated Minnesota's Deceptive Trade Practices Act by making representations or engaging in other conduct that created a likelihood of confusion or misunderstanding about their products. *See* Minn. Stat. § 325D.44(1) (2020); App. 93–95. Count Five alleges the Companies violated Minnesota's False Statements in Advertising Act by making false, deceptive, or misleading advertisements with the intent to increase sales. *See* Minn. Stat. § 325F.67 (2020); App. 96-97. These are all classic "state common-law and statutory remedies against . . . unfair business practices." *California*, 490 U.S. at 101.

No claim necessarily turns on a question of federal law. They primarily turn on facts about the Companies' representations and whether they caused harm in Minnesota. A state court can determine liability and craft a remedy here without interpreting or relying on federal law.

"Illustratively, none of the [Companies] even discuss the elements of [Minnesota's] state law claims in any detail." *Cent. Iowa Power Co-op.*, 561 F.3d at 914. Aside from vague references to "numerous federal statutory regimes," Def's Br. 34–38, the Companies cite only one statute, one regulation, and one executive order as federal laws that are "necessarily raised." *See* Def's Br. 36–37 (citing 42 U.S.C. § 13384; 43 C.F.R. § 3162.1(a) (2021); Exec. Order No. 12,866 (1993), 58 Fed. Reg. 51735 (Oct. 4, 1993)). These sources direct federal agencies to study greenhouse gas emissions, *see* 42 U.S.C. § 13384, and to evaluate the costs and benefits of regulatory action generally, *see* Exec. Order No. 12,866, and set standards for oil and gas leasing on federal land, *see* 43 C.F.R. § 3162.1(a). They do not regulate advertising or sale of fossil fuel products to consumers and are thus wholly irrelevant to Minnesota's claims.[13] *See City of Oakland*, 969 F.3d at 906 (holding climate-change nuisance claim

[13] The Companies argue Minnesota's claims require a weighing of the societal costs and benefits based on the elements of a *private nuisance* claim. *See* Def's Br. 36 (citing Restatement (Second) of Torts §§ 826-831). Minnesota has not pled a nuisance claim. The Companies next cite a case regarding the elements for negligent failure to warn, but that case does not weigh societal costs and benefits as an element of the claim. *See* Def's Br. 36 (citing *Hagen v. McAlpine & Co., Ltd*, No. 14-1095, 2015 WL 321428, at *5 (D. Minn. Jan. 26, 2015)). Even if Minnesota's claims did require a weighing of costs and benefits, such policy choices are not "committed to" the federal government. *See* Def's Br. 11, 34. States can and do make policy choices to address the causes and effects of climate change. *See infra* pp. 21-27.

does not "require[] interpretation or application of a federal law at all"). Assuming *arguendo* these laws are relevant, the Companies also have not met their burden to show their meaning is "actually disputed." *See Gunn*, 568 U.S. at 258.

Accepting the Companies' arguments would not only contradict Supreme Court precedent, it also would seriously damage our federal system and the States' ability to enforce state laws in state court. The Companies argue that, merely because Minnesota's claim is tangentially related to federal environmental and energy policy, it necessarily raises a federal question. An "important policy question" does not create federal jurisdiction. *City of Oakland*, 969 F.3d at 907. Holding the contrary would disregard the States' important role "as residuary sovereigns and joint participants in the governance of the Nation.'" *W. Virginia*, 646 F.3d at 178 (quoting *Alden v. Maine*, 527 U.S. 706, 713–14 (1999)). "Our federalism does not mean . . . centralization of control over every important issue in our National Government and its courts." *Younger v. Harris,* 401 U.S. 37, 44 (1971).

Moreover, although the federal government has taken some actions to address climate change, the existence of a federal regulatory backdrop does not create federal question jurisdiction. *See, e.g., Cent. Iowa Power Co-op.*, 561 F.3d

at 912–914; *Moore*, 828 F.3d at 692 (holding that while disabled student had rights under federal IDEA law protecting disabled students, federal question jurisdiction did not exist because the state tort claims did not rely on IDEA's protections); *Standard Poor's*, 23 F. Supp. 3d at 395 (holding that, while federal regulations required defendants to promulgate a code of conduct, state-law claims that the defendants' code of conduct contained false statements did not rely on the federal regulations). The simple fact that a federal policy or law is related to the subject matter of litigation does not mean a federal issue of law is "necessarily raised."

2. Minnesota's claims cannot be resolved in federal court without disrupting the federal-state balance because consumer protection is traditionally entrusted to the States

Resolving Minnesota's consumer protection claims in federal court would disrupt the federal-state balance Congress has struck for consumer protection suits. *See Gunn,* 568 U.S. at 263–64 (holding that courts should not exercise federal question jurisdiction where the issue implicates a traditional state-law area). State court is the appropriate venue for the state consumer protection claims raised here.

The Supreme Court consistently has recognized that preventing unfair business practices and consumer deception is "an area traditionally regulated by

the States." *California,* 490 U.S. at 101; *see also Edenfield,* 507 U.S. at 769; *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982) ("[A] State has a quasi-sovereign interest in the health and well-being — both physical and economic — of its residents in general.").

Nor is it correct that addressing climate change has been "committed to" the federal government. It is well within States' sovereign authority to address the causes and effects of climate change within their borders, even if Minnesota's state-law claims could be fairly characterized as doing so. *See infra* pp. 19–27. Removal of Minnesota's state-law claims would improperly deprive Minnesota of its chosen forum to protect the health and welfare of its citizens.

For these reasons, there is no *Grable* jurisdiction.

C. The Companies' Ordinary Preemption Defense Does Not Support Removal

As Minnesota has pled only state-law claims that do not raise any federal questions, the only remaining exception under the well-pleaded complaint rule is if a federal statute "completely preempts" the state claims. *Caterpillar*, 482 U.S. at 393. The Companies do not make this argument. *See* Def's Br. 32.

They instead argue that federal common law "necessarily governs" the action and creates removal jurisdiction in federal court. *See* Def's Br. 33–34. This is nothing more than an ordinary preemption defense, which is not a basis

for removal. *See Caterpillar*, 482 U.S. at 392–93. State courts are more than competent to determine whether federal common law preempts a state law. *See McKesson v. Doe*, 141 S. Ct. 48, 51 (2020) ("Our system of 'cooperative judicial federalism' presumes federal and state courts alike are competent to apply federal and state law."); *Empire HealthChoice Assur., Inc. v. McVeigh*, 396 F.3d 136, 142 (2d Cir. 2005) (Sotomayor, J.) (highlighting the competency of state courts "to apply federal common law"). "To hold otherwise would not only denigrate the respect accorded coequal sovereigns, but would also ignore [the Supreme Court's] consistent history of hospitable acceptance of concurrent jurisdiction." *Tafflin v. Levitt*, 493 U.S. 455, 466 (1990) (quotations omitted).

II. THE STATES HAVE SOVEREIGN AUTHORITY TO BRING STATE LAW CLAIMS THAT REMEDY HARM FROM CLIMATE CHANGE WITHIN THEIR BORDERS

Although the well-pleaded complaint rule dictates affirmance, Amici States are compelled to correct the Companies' erroneous assertion of a federal common law of climate change, which supplants state consumer protection laws seeking redress for climate-related harms. *See* Def's Br. 13–26, 35. First and foremost, this case challenges consumer fraud, not pollution. *See supra* pp. 8–12, 13-14; *see also* App. 98 (Compl.).

Second, climate change is not (as the Companies claim) an area involving a "uniquely federal" interest implicating federal common law.[14] *See* Def's Br. 13–18. The Supreme Court has explained that there are "a few areas, involving 'uniquely federal interests,' [that] are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced" by federal common law. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988) (quoting *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981)).[15] A "uniquely federal interest" does not mean every problem with national or global dimensions. *Boyle*, 487 U.S. at 504. Because federal common law-making raises "important threshold questions at the heart of our separation of powers," federal courts apply it rarely. *Rodriguez v. Fed. Deposit Ins. Corp.*, 140 S. Ct. 713, 718 (2020).

Federal common law is very much the exception, not the rule—and climate change harms do not fall within that exception. To the contrary, States

[14] As a result, even cases claiming harm due to public nuisance or trespass attributable to fossil fuel production and sales do not implicate federal common law.

[15] These "narrow areas" are "those concerned with the United States' rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases." *Texas Indus.*, 451 U.S. at 641.

have grave sovereign interests in climate change, States play a vital role responding to it, and state courts regularly hear cases about it. Our federalist model thrives on States implementing local solutions to harms that are also of national concern. The nation may then draw on their success or failures. "Courts should be wary of obstructing the states in their varied efforts to grapple with the great public issues of the day." *Boyle v. Anderson*, 68 F.3d at 1109.

Courts have recognized that States have sovereign authority to address the harms of climate change within their borders. *See, e.g., O'Keefe*, 903 F.3d at 913 ("It is well settled that the states have a legitimate interest in combating the adverse effects of climate change on their residents"). As this Court has found, States "retain[] broad regulatory authority to protect the health and safety of [their] citizens and the integrity of [their] natural resources" from climate change. *North Dakota v. Heydinger*, 825 F.3d 912, 922 (8th Cir. 2016) (quoting *Maine v. Taylor*, 477 U.S. 131, 151 (1986)).

That courts should so recognize is well justified, as the harms from climate change are often felt locally. Increased temperatures, for example, is a global phenomenon—but the extent of harms from it vary by locality. Minnesota temperatures are rising faster than the global or national rates of increase. App. 72–74. Sea levels in the Chesapeake Bay, which borders the

Amici States of Delaware, New York, Pennsylvania and the District of Columbia, are rising at a rate double the global average.[16]

The nature of the harms are also local matters. In Maine, warming temperatures and ocean acidification threaten the state's $637 million fishing industry, which contributes to the state's economic vibrancy and cultural identity.[17] Diminished snowpack in Washington harms downstream communities that rely on snowmelt for hydroelectric power, drinking water, and agriculture.[18] Whatever adaptation measures are undertaken to redress these harms, the cost to state and local governments will be massive. *See, e.g.*, United States Global Change Research Program, *Fourth National Climate Assessment*, Vol. II, at 1321 (2018)[19] ("Nationally, estimates of adaptation costs range from tens to hundreds of billions of dollars per year."); *id.* at 760 (describing $235

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[16] *See* Benjamin D. DeJong et al., *Pleistocene Relative Sea Levels in the Chesapeake Bay Region and Their Implications for the Next Century*, GSA Today, Aug. 2015, at 4, https://www.geosociety.org/gsatoday/archive/25/8/pdf/gt1508.pdf

[17] *See* Suzie Arnold et al., Maine Climate Council, *Scientific Assessment of Climate Change and Its Effects in Maine* at 13 (Aug. 2020), https://www.maine.gov/future/sites/maine.gov.future/files/inline-files/GOPIF_STS_REPORT_092320.pdf

[18] *See* H.A. Roop, et al., Univ. Wash. Climate Impacts Group, *Shifting Snowlines and Shorelines* (2020), https://cig.uw.edu/wp-content/uploads/sites/2/2020/02/CIG_SnowlinesShorelinesReport_2020.pdf

[19] https://nca2018.globalchange.gov/downloads/NCA4_2018_FullReport.pdf

million spent by Charleston, South Carolina as of 2016 to respond to increased flooding).

To protect their sovereign territories from these localized harms, States have limited emissions and regulated energy production within their borders. *See, e.g.*, *Heydinger*, 825 F.3d at 921 (noting Minnesota had sovereign authority to prohibit development of facilities within Minnesota's borders that contribute to statewide carbon dioxide emissions); *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1107 (9th Cir. 2013) ("California should be encouraged to continue and to expand its efforts to find a workable solution to lower carbon emissions, or to slow their rise."). Many Amici States require utilities to reduce or eliminate their greenhouse gas emissions and/or provide electricity from renewable sources by a set deadline.[20]

[20] *See* Delaware: Act Relating to Renewable Energy Portfolio Standards, 26 Del. C. § 354-363 (2021); Hawaii: Act Relating to Greenhouse Gas Emissions, 2007 Haw. H.B. No. 226 (codified in part at 8 HRS § 342B-A - § 342B-C); Maryland: Clean Energy Jobs Act, 2019 Md. Laws. ch. 757 (S.B. 516) (codified at Md. Code Ann., Pub. Util. § 7-702); New York: Climate Leadership and Community Protection Act, 2019 Sess. Law News of N.Y. ch. 106 (S. 6599); Washington: Clean Energy Transformation Act, Wash. Rev. Code Ann. §§ 19.405.010-19.405.901; Wisconsin: Executive Order No. 38 (Wis. 2019), https://evers.wi.gov/Documents/EO%20038%20Clean%20Energy.pdf.

States also have taken actions to reduce or eliminate greenhouse gas emissions statewide, across economic sectors.[21]

States, including many Amici, also have collaborated on successful regional solutions. A group of western states and Canadian provinces formed the Western Climate Initiative to support the development and implementation of greenhouse gas emissions trading programs.[22] Eleven northeastern states formed the Regional Greenhouse Gas Initiative, a cap-and-trade system that places increasingly stringent limits on carbon pollution from power plants.[23] Building on the Initiative's success, a coalition of Northeast and Mid-Atlantic states are

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[21] Hawaii: Food and Energy Security Act, 2010 Haw. Laws 73 (H.B. 2421) (codified in part at HRS § 196-10.5); Maine: Act To Promote Clean Energy Jobs and To Establish the Maine Climate Council, 2019 Me. Legis. Serv. Ch. 476 (S.P. 550) (L.D. 1679) (West) (codified in scattered sections of Me. Rev. Code tits. 5, 35-A, 38); New York: Climate Leadership and Community Protection Act, 2019 Sess. Law News of N.Y. ch. 106 (S. 6599); Massachusetts: Act Creating a Next-Generation Roadmap for Massachusetts Climate Policy, 2021 Mass. Acts. ch. 8, sec. 8 (codified in scattered sections of Mass. Rev. Code chs. 21N, 23J, 25, 29, 30, 59, 62, 143, 164); Michigan: Executive Directive No. 2020-10 (Mich. 2020), https://www.michigan.gov/whitmer/0,9309,7-387-90499_90704-540278--,00.html; New Jersey: Global Warming Response Act, N.J. Stat. Ann. §§ 26:2C-37 to -68; Oregon: Executive Order No. 20-04 (Or. 2020), https://www.oregon.gov/gov/Documents/executive_orders/eo_20-04.pdf. Washington: Climate Commitment Act, ch. 316, 2021 Wash. Sess. Laws 2606 (codified as amended in scattered sections of Wash. Rev. Code tits. 43, 70A).

[22] *See* Western Climate Initiative, *Our Work*, https://wci-inc.org/.

[23] *See* Elements of RGGI, (2021) https://www.rggi.org/.

now advancing a regional program to cap and reduce transportation-based greenhouse gas emissions.[24] As the above examples illustrate, States have "great latitude" to exercise their general police powers to protect the health and welfare of their citizens. *Corey,* 913 F.3d at 946.

Contrary to the Companies' assertions, the federal government has *not* adopted a comprehensive approach to addressing climate change. Tellingly, the only evidence the Companies cite of a "comprehensive" federal approach is a statute directing an agency to study the issue. Def's Br. 36–37 (citing 28 U.S.C. § 13384). Particularly in the absence of comprehensive federal action, States need not sit on their hands. As Justice Brandeis observed nearly a century ago, to stay a State's experimentation in addressing nationwide problems "is a grave responsibility . . . [and] may be fraught with serious consequences to the nation." *New State Ice Co. v. Leibmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Nowhere is that more true than in the case of climate change.

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[24] Massachusetts Dep't of Envtl. Prot., Overview *in* Transportation & Climate Initiative (TCI), (2021) https://www.mass.gov/info-details/transportation-climate-initiative-tci#overview-.

Finally, climate change is no stranger to state courts, which already hear hundreds of state-law claims related to climate change.[25] For example, state courts routinely address climate change in the context of challenges to land use decisions under state equivalents to the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370m-12. *See*, *e.g.*, *Cleveland Nat'l Forest Found. v. San Diego Ass'n of Gov'ts*, 3 Cal. 5th 497 (2017); *Cascade Bicycle Club v. Puget Sound Reg'l Council*, 175 Wn. App. 494 (Ct. App. 2013). State courts adjudicate the operation and validity of state regulatory efforts to reduce greenhouse gas emissions. *See*, *e.g.*, *Maryland Off. of People's Counsel v. Maryland Pub. Serv. Comm'n*, 461 Md. 380, 406 (2018) (observing that "[r]enewable energy, distributed generation, and related practices have the potential to advance Maryland environmental policy" with respect to climate change, and upholding the state commission's consideration of these issues); *Cal. Chamber of Commerce v. State Air Res. Bd.*, 10 Cal. App. 5th 604, 613–14 (Ct. App. 2017) (upholding California's economy-wide cap-and-trade program)*; New England Power Generators Ass'n v. Dep't of Envtl. Prot.*, 480 Mass. 398, 411 (2018)

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[25] Sabin Center for Climate Change and the Environment and Arnold & Porter Kaye Scholer LLP, *U.S. Climate Change Litigation: State Law Claims,* Climate Change Litigation Database, http://climatecasechart.com/case-category/state-law-claims/ (last visited Aug. 18, 2021).

(upholding Massachusetts' greenhouse gas emissions limits for power plants); *Stevenson v. Delaware Dep't of Nat'l Res. & Env't Control*, 2018 WL 3134849, (Del. Super. June 26, 2018), *aff'd* 205 A.3d 821 (Del. 2019).

Like these state court cases, Minnesota's case is a state-law matter – concerning whether the Companies deceived Minnesotans about the dangers of their products. There is no uniquely federal interest in a corporation's ability to deceive, just as there is no uniquely federal interest in state land use decisions or in-state energy policies – though all these areas relate to climate change.

III. THIS ATTORNEY GENERAL SUIT IS NOT A CLASS ACTION UNDER THE CLASS ACTION FAIRNESS ACT

The Court also should reject the Companies' argument that an attorney general suit is a "class action" and removable under the Class Action Fairness Act (CAFA). This argument contradicts CAFA's plain text and legislative intent and would harm States' ability to enforce state laws in a wide variety of cases.

Minnesota brings this consumer protection suit as *parens patriae* to protect the "health and well-being . . . of its residents" in general, not a specific class of private individuals. *LG Display Co.,* 665 F.3d at 771; *see also* Minn. Stat. § 8.31 (2020). As the Second, Fourth, Sixth, Seventh, and Ninth Circuits already held, such attorney general suits are not removable "class action[s]"

under CAFA. *See Nessel ex rel. Michigan v. AmeriGas Partners, L.P.*, 954 F.3d 831, 836 (6th Cir. 2020) (collecting cases). CAFA permits only "class actions" to be removed to federal court, defined as "any civil action filed under Rule 23 of the Federal Rules of Civil Procedure or similar state statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." *See* 28 U.S.C. § 1332(d)(1)(B).

CAFA's definition is "unambiguous. . . . Congress undoubtedly intended to define 'class action' in terms of its similarity and close resemblance to Rule 23." *See Nessel*, 954 F.3d at 834–35 (quoting *Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 214 (2d Cir. 2013); *W. Virginia*, 646 F.3d at 174). The Companies argue an attorney general's case is a "class action" wherever the attorney general sues on behalf of their citizens and distributes restitution to them. *See* Def's Br. 52. But as five other circuits have held, an attorney general *parens patriae* suit is not analogous to one brought under Rule 23. *See Nessel*, 954 F.3d at 834–35.

CAFA's text does not support the Companies' argument because Congress did not intend it to. During the debate on CAFA, the supporting senators emphasized that "cases brought by state attorneys general will not be affected by this bill." 151 Cong. Rec. S1163 (Feb. 9, 2005) (statement of Sen. Grassley); *see also id.* at S1162 (Sen. Cornyn stating that as to "statutes that are

typical of every State—deceptive trade practice acts and consumer protection statutes—which . . . specifically authorize the attorney general to seek remedies on behalf of aggrieved consumers," it is Congress' intent that "[t]his bill certainly . . . not encroach on that authority"); *id.* at S1162 (statement of Sen. Specter affirming the same); *see also Harvey v. Blockbuster, Inc.*, 384 F. Supp. 2d 749, 752–54 (D.N.J. 2005) (surveying CAFA's legislative history and concluding that it was not Congress' intent to encroach on state authority to bring *parens patriae* suits). Here, Minnesota brings the precise type of lawsuit the Senators intended to remain in state court.

The Companies' broad jurisdictional claims would impede the States from exercising their *parens patriae* authority in state court in a wide range of cases, including consumer protection, antitrust, or product liability claims. Because CAFA's text and legislative intent do not support such a drastic expansion of federal jurisdiction, the Court should reject this argument too.

CONCLUSION

For the foregoing reasons, the District Court's order remanding this case to Minnesota state court should be affirmed.

RESPECTFULLY SUBMITTED this 25th day of August, 2021.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5). This brief contains 6,419 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Office in fourteen (14) point Times New Roman font.

I further certify that the electronic version of this brief was automatically scanned for viruses and found to contain no known viruses.

Dated: August 25, 2021

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CERTIFICATE OF SERVICE

I, Megan Sallomi, hereby certify that on August 25, 2021 I caused an electronic copy of the foregoing to be filed with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. The undersigned certifies that all participants in this case are registered CM/ECF users and that service of this Amicus Brief will be accomplished by the appellate CM/ECF system.

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