No. 17-99

IN THE

Supreme Court of the United States

BOARD OF COMMISSIONERS OF THE SOUTHEAST LOUISIANA FLOOD PROTECTION AUTHORITY—EAST; ORLEANS LEVEE DISTRICT; LAKE BORGNE BASIN LEVEE DISTRICT; EAST JEFFERSON LEVEE DISTRICT,

Petitioners,

v.

TENNESSEE GAS PIPELINE COMPANY, L.L.C., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

HARVEY S. BARTLETT III
GLADSTONE N. JONES, III
JONES, SWANSON, HUDDELL & GARRISON, L.L.C.
601 Poydras Street, Suite 2655
New Orleans, LA 70130
(504) 523-2500

JAMES A. FELDMAN
Counsel of Record
5335 Wisconsin Avenue, N.W., Suite 440
Washington, D.C. 20015
(202) 730-1267
wexfeld@gmail.com

Counsel for Petitioners

[*Additional Counsel Listed on Signature Page*]

275920

COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

State-law causes of action that "arise under" federal law constitute a "special and small category," *Empire Healthchoice Assur. v. McVeigh*, 547 U.S. 677, 699 (2006), that is "extremely rare." *Gunn v. Minton*, 568 U.S. 251, 257 (2013). The four-element test of *Grable & Sons Metal Prods. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005), for such "arising under" cases is generally satisfied when, as in *Grable*, the validity of federal agency action is challenged in a state-law action. Cases without that feature will rarely or never satisfy *Grable*'s test.

The court of appeals' errors in this case converted *Grable*'s deliberately narrow test into a manipulable and easily satisfied standard. That result is particularly difficult to justify for three reasons:

First, "jurisdictional rules should be clear." *Lapides v. Board of Regents of University Sys. of Ga.*, 535 U.S. 613, 621 (2002). The court of appeals' construction of *Grable* is instead an invitation to litigation, as emphasized by respondents' view that this case involves only the application of law to specific facts. Application of the *Grable* test, properly construed, would be relatively determinate and would be largely limited to state-law claims that *challenge* federal actions.

Second, *Grable* itself pointedly gave a clear instruction for one class of cases. Federal jurisdiction will not lie where the federal regimes at issue involve "the combination of no federal cause of action and no preemption of state remedies." 545 U.S. at 318. Respondents do not dispute—

and therefore implicitly concede—that the federal regulatory regimes here embody that combination. *See* Pet. 15-16. If that combination is present, "no welcome mat mean[s] keep out." *Grable,* 545 U.S. at 319. The court of appeals disregarded that clear instruction.

Third, the result below is particularly destructive of the federal-state balance. Where, as here, a case involves vital state-law legal issues that only the state system can authoritatively resolve, policing the boundary of federal court jurisdiction is particularly important. Those issues here include not only whether purely state-law standards of care could resolve this case, *see* Pet. App. 10a, but also key questions regarding whether Louisiana law would authorize the Board to enforce federal standards of care, *see* Pet. App. 18a-24a. Under the court of appeals' decision, the non-authoritative federal courts will likely permanently oust the state courts from resolving those important state-law questions.

I. RESPONDENTS DO NOT DEFEND THE FIFTH CIRCUIT'S MISINTERPRETATION OF *GRABLE*'S "SUBSTANTIALITY" AND "FEDERAL-STATE BALANCE" ELEMENTS

1. State-law causes of action may trigger "arising under" jurisdiction only if they present "substantial" federal issues—*i.e.*, issues "importan[t] … to the federal system as a whole." *Gunn*, 568 U.S. at 260. In *Grable*, a taxpayer brought a state-law quiet title action that challenged title to property on the ground that the IRS's notice of the property's seizure was inadequate under a federal statute. 545 U.S. at 315. Federal jurisdiction was justified because the government had a direct interest in

"the availability of a federal forum to vindicate its own administrative action." *Id.* The "classic example" in this area is *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921), in which the "principal issue" in a state-law action "was the federal constitutionality of [a federal] bond issue." *Grable*, 545 U.S. at 312. When a state-law claim attacks the action of a federal agency, the federal interest in litigating the case in a federal forum is indeed substantial.

The quintessential case in which the federal interest is *not* substantial, however, is one in which a state-law claim charges a violation of a federal standard of care and challenges no action of any federal entity. *Grable* explained that, although state tort cases "commonly give[] negligence per se effect" to the "violation of federal statutes and regulations," such cases lie *outside* federal jurisdiction. 545 U.S. at 319. A State's voluntary absorption of a federal standard does not "fundamentally change the state tort nature of the action," *Merrell Dow Pharms. v. Thompson*, 478 U.S. 804, 815 n.12 (1986), because the ultimate source of tort liability remains state law.

That is precisely the situation here. This case neither challenges nor questions any federal agency action. It presents no substantial federal question under *Grable*.

2. Federal jurisdiction here would significantly upset the federal-state balance. This case plainly does present important state-law questions regarding whether respondents' violations of state and federal standards of care are actionable by petitioners *under Louisiana tort law*. Petitioners believe they are. *See* Pet. 9-10, 19-20. The court of appeals held to the contrary (although the bases

for its decision were weak).[1] But either way, the court of appeals' decision opens the federal courts to any future case attempting to enforce any similar obligations through state tort law. As a result, it transforms federal courts into the primary decisionmakers in this important area of state tort law. No decision of this Court in the entire line of cases beginning with *Smith* supports such a substantial intrusion of federal courts into state tort law.

3. The court of appeals apparently recognized that the mere presence of a federal standard of care is insufficient to support federal jurisdiction. *See* Pet. App. 14a. The court of appeals gave only one reason for finding that the *Grable* "substantiality plus" element is satisfied:

> The dispute between the parties does not just concern whether [respondents] breached duties created by federal law; it concerns whether federal law creates such duties.

Pet. App. 14a. The court held that federal jurisdiction here does not disrupt the federal-state balance for the same reason. *See* Pet. 9 (quoting Pet. App. 16a-17a). Under the court's reasoning, a disputed claim that a defendant violated an acknowledged federal duty is insufficient to support federal jurisdiction. But the "substantiality" and "federal-state balance" *Grable* elements are satisfied

1. As amici Law Professors detail (Br. 14-16), the court of appeals' decision took no cognizance of Louisiana's public trust doctrine, *Avenal v. State of La.*, 886 So. 2d 1085, 1101-02 (La. 2004), or of SLFPA-E's special role and special rights in enforcing that doctrine. It also relied almost exclusively on federal court decisions applying state law, rather than state-court decisions themselves. Amici Br. 15.

(and federal jurisdiction may well follow) as soon as the defendant disputes that federal law embodies that duty.

Respondents do not defend—or even mention—the court of appeals' rule. Respondents actually *concede* that the answer to the first question presented—whether the fact that "the parties dispute whether federal law embodies" a claimed standard is sufficient to satisfy the "substantiality" and "federal-state balance" factors—is "*No.*" BIO 8. Respondents' sole defense is that, after addressing the first two *Grable* factors, the court of appeals "went on to find that *Grable*'s substantiality and federal-state-balance elements were each satisfied." BIO 9. True enough. But it is the court of appeals' *misunderstanding* of those elements—undefended by respondents—that warrants this Court's review.

4. Respondents assert that this suit would have a "significant impact on vital federal interests in coastal land management, national energy policy, and national economic policy." BIO 10 (internal quotation marks omitted). This case indeed seeks to require petitioners to comply with not just state but also federal obligations, as does every state-law claim that invokes a standard of care derived from federal law. But the federal interests in a state-law claim seeking enforcement of a federal standard of care are *not* "substantial" under *Grable*. *See* 545 U.S. at 319. This Court has to date confined "arising under" jurisdiction to cases *attacking* federal action. Neither respondents nor the court of appeals explained how requiring *compliance* with respondents' federal obligations would interfere with any federal action.

Merrell Dow rejected the argument made by respondents here. The *Merrell Dow* petitioner attempted to justify federal jurisdiction on the ground that "state use and interpretation of [a federal regulatory regime], pose a threat to the order and stability of th[at] … regime." 478 U.S. at 816. The Court responded that petitioner's argument reduces to the claim "that the [federal regulatory regime] pre-empts state-court jurisdiction over the issue in dispute." *Id.* Such a claim could not support federal jurisdiction in any event. Moreover, respondents apparently accept—and certainly do not challenge—that savings clauses here, *see* Pet. 15, establish Congress's intent *not* to preempt state law.

5. Respondents also repeatedly assert that this case was brought "against the entire oil-and-gas industry," and that it is an "industry-wide lawsuit." BIO 1, 2. As the Petition explains (at 4, 18-19), the complaint here alleges specific conduct by specific defendants. The same legal issues would have been presented if only one defendant were sued. We are aware of no jurisdictional rule that depends on the quantity of defendants. Given a plaintiff's ability to bring combined or separate lawsuits against multiple defendants, at one time or in succession, no rule of federal jurisdiction that turns on the number of parties would be defensible.

6. Respondents' attempts to distinguish away the circuit conflict are mistaken. In *Municipality of Mayaguez v. Corporacion Para el Desarrollo del Oeste*, 726 F.3d 8 (1st Cir. 2013), the First Circuit held that a claim that a municipality violated federal regulations does not support federal jurisdiction, emphasizing especially that there were no claims that the federal agency "acted inappropriately

in any way." *See* Pet. 23-24. That is exactly the situation here. The only distinction advanced by respondents (BIO 15-16) is that this case involves numerous defendants. But, as noted, the existence of federal jurisdiction cannot turn on the number of defendants.

Similarly, in *Great Lakes Gas Transmission v. Essar Steel Minnesota*, 843 F.3d 325 (8th Cir. 2016), the Eighth Circuit held that a claim of violation of commonly used tariff provisions filed with FERC was insufficient to support federal jurisdiction, because enforcing those provisions would implicate no strong federal interest. *See* Pet. 25. Respondents attempt to distinguish *Great Lakes* on the ground that "allowing this lawsuit to proceed would inevitably interfere with the exclusive federal role in regulating the nation's navigable waterways and the waters of the United States." BIO 17. But enforcing compliance with the state and federal standards of care here would not "interfere" with federal interests; it would advance them.

Respondents attempt to distinguish *Neuro-Repair v. The Nath Law Group*, 781 F.3d 1340 (Fed. Cir. 2015), on the ground that a state-court ruling on the disputed patent law issue in that case "would not be controlling over later federal litigation on the issue and would not make any subsequent actions by the U.S. Patent and Trademarks Office difficult." BIO 26. Here, too, no state-court ruling on any federal issue in this case would be binding on federal courts or federal agencies. Yet because the Fifth Circuit's decision would always permit removal of claims like this to federal court, it in effect authorizes *federal* courts to establish *state law* in this area—notwithstanding the state courts' preeminent interest in having the final say on state law.

II. RESPONDENTS DO NOT DEFEND THE FIFTH CIRCUIT'S REJECTION OF PETITIONERS' PURELY STATE-LAW CLAIMS ON THEIR MERITS

Under *Grable*, a state-law cause of action may support federal jurisdiction only if the case necessarily presents questions of federal law, *i.e.*, the case cannot be decided on purely state-law grounds, If there is a colorable, purely state-law basis for resolving the case, the question "[w]hether the complaint states a cause of action on which relief could be granted … must be decided after and not before the court has assumed jurisdiction over the controversy." *Bell v. Hood*, 327 U.S. 678, 582 (1946).

The court of appeals disregarded that principle. Contrary to *Bell*, it first rejected petitioners' purely state-law claims on their merits; only then did it conclude that the case necessarily presents federal questions. That maneuver opens up a huge loophole. As amici law professors explain, this case presents "unsettled questions of state law concerning whether Louisiana's public and private law, independent of any federal law, imposed liability on Respondents for the damage their activities have caused to the state wetlands." Amici Br. 3. By thus "usurp[ing] the role of the state courts," the decision "prevents Louisiana and other states from relying upon their own laws to protect their important natural resources." *Id.*

1. The court of appeals correctly recognized that if Louisiana law alone imposes the same or more stringent obligations on respondents as does federal law, this case does not necessarily present questions of federal law. *See*

Pet. App. 10a. The court even conceded that Louisiana law requirements were "apparently similar" to those in federal law, citing the state-law requirement that mineral production sites be restored "as near as practicable to their original condition upon termination of operations to the maximum extent practicable." Pet. App. 11a. But the court concluded on its own that this "maximum extent practicable" state-law standard is less stringent than federal law. *Id.* The determination of the content of the state-law "maximum extent practicable" standard should have been made by the authoritative state courts.

The court of appeals gave two bases for its conclusion. First, the court stated that "[n]o Louisiana court has used this ['maximum extent practicable'] provision as the basis for the tort liability that [petitioners] would need to establish." Pet. App. 11a. Even if correct, that would show, at most, that Louisiana law is uncertain; it does not suggest that petitioners' purely state-law claim is not colorable under state law. Moreover, the court's conclusion mistakenly rests on the inherently unlikely proposition that federal law requires respondents to restore the lands *more* than "to the maximum extent practicable."

Second, the court stated that a *different* state-law provision that imposes a "reasonably prudent conduct" obligation has been interpreted by Louisiana courts not to "require oil and gas lessees to restore the surface of dredged land." Pet. App. 11a. There is no reason to think that "reasonably prudent conduct" under state law is the same as restoration to the "maximum extent practicable." Accordingly, the court's reasoning does not establish even that respondents are right on the merits; it could not possibly establish that petitioners' claims are not colorable.

In short, the court of appeals predicted, albeit for inadequate reasons, that Louisiana courts would have rejected petitioners' claims. Louisiana courts, however, should be able to determine the scope of the "maximum extent practicable" duty—a standard that is inherently open to interpretation. Under the court of appeals' decision, state courts will never have the opportunity to do so. Any case brought to require respondents or others to restore lands in accordance with federal and state-law standards of care will be removable to federal court, as was this case. That result unjustifiably expands federal jurisdiction and upsets the federal-state balance in a particularly destructive way.

3. Respondents quote (BIO 12) our allegations that respondents' activities violate important federal standards of care. We have never argued, however, that those federal standards are *necessary* to this case—and that is the inquiry under *Grable*'s second factor.

4. Respondents argue that part of the relief sought here—backfilling canals—requires permission from the Corps of Engineers. BIO 13; *see also* Pet. App. 15a-16a. The possible need for a federal permit to undertake one possible remedy in this case, however, does not automatically confer federal jurisdiction. At most, if a state court remedial order (or, for that matter, a federal court order) disregarded the need for a permit, respondents would have a federal defense to the order. Defenses—and especially, contingent and hypothetical defenses—do not support federal jurisdiction. That is especially true here, where respondents offer no reason to believe that the Corps, which has its own responsibility for flood prevention, would be reluctant to grant permits

for remediation that would halt or reverse the ongoing destruction of land vital for flood prevention.

5. Respondents argue (BIO 13-14) that federal jurisdiction may rest on our breach of contract claim, which, respondents assert, would necessarily invoke federal law under *Boyle v. United Technologies*, 487 U.S. 500 (1988). Respondent's argument at most advances an alternative ground for affirmance that the Fifth Circuit did not reach. This Court is a "court of review, not of first view," and does not ordinarily consider questions not addressed by the court of appeals. *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Moreover, even if respondents were correct that the contract claim rests on federal law, that claim is not *necessarily* presented in this case, because, as noted above, petitioners can obtain all the relief they seek on purely state-law grounds. *Archer v. Warner*, 538 U.S. 314, 322 (2003); *United States v. Nobles*, 422 U.S. 225, 241 n.16 (1975).

Respondents' contract-claim argument also is wrong. In *Boyle*, "the state-imposed duty of care that [wa]s the asserted basis of … liability … [wa]s precisely contrary to the duty imposed by [a] Government contract." 487 U.S. at 509. That attack on the duty in the government contract triggered the application of federal law. But the Court in *Boyle* observed that *Boyle* was "at the opposite extreme from *Miree* [*v. DeKalb County*, 433 U.S. 25, 31 (1977)]," where the duty sought to be enforced was identical—not contrary—to that imposed by a government contract. 487 U.S. at 509. In *Miree*, federal law did not govern, and it would not govern here, where the complaint seeks only compliance with, not violation of, federal law.

6. Respondents argue that the Fifth Circuit's decision does not conflict with *Manning v. Merrill Lynch Pierce Fenner & Smith*, 772 F.3d 158 (3d Cir. 2014), only on the ground that, in respondents' view, the claims here "depend on federal law." BIO 15. As *Manning* establishes, however, the court of appeals' error consisted in rejecting colorable state-law claims first, in order to pave the way for its conclusion that the case necessarily "depend[s] on federal law" under *Grable*. Further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

HARVEY S. BARTLETT III
GLADSTONE N. JONES, III
BERNARD E. BOUDREAUX, JR.
EBERHARD D. GARRISON
KEVIN E. HUDDELL
EMMA E. ANTIN DASCHBACH
JONES, SWANSON, HUDDELL & GARRISON, L.L.C.
601 Poydras Street, Suite 2655
New Orleans, LA 70130
(504) 523-2500

J. MICHAEL VERON
J. ROCK PALERMO III
ALONZO P. WILSON
VERON, BICE, PALERMO & WILSON, L.L.C.
721 Kirby Street
P.O. Box 2125
Lake Charles, LA 70602
(337) 310-1600
rock@veronbice.com

JAMES A. FELDMAN
Counsel of Record
5335 Wisconsin Avenue, N.W., Suite 440
Washington, D.C. 20015
(202) 730-1267
wexfeld@gmail.com

JAMES R. SWANSON
BENJAMIN D. REICHARD
FISHMAN HAYGOOD, L.L.P.
201 St. Charles Avenue, Suite 4600
New Orleans, LA 70170
(504) 586-5252

SEPTEMBER 29, 2017