No. 19-1644

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MAYOR AND CITY COUNCIL OF BALTIMORE,

Plaintiff-Appellee,

v.

BP P.L.C. *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Maryland
(Ellen L. Hollander, District Judge)

BRIEF OF THE STATES OF MARYLAND, CALIFORNIA, CONNECTICUT, NEW JERSEY, NEW YORK, OREGON, RHODE ISLAND, VERMONT, AND WASHINGTON AS AMICI CURIAE SUPPORTING PLAINTIFF-APPELLEE

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INTERESTS OF AMICI CURIAE

The States of Maryland, California, Connecticut, New Jersey, New York, Oregon, Rhode Island, Vermont, and Washington, as sovereigns, have an interest in maintaining our state courts' authority to develop and enforce requirements of state statutory and common law—including monetary remedies—in cases brought against commercial entities causing harm to and within our jurisdictions. That interest extends to claims brought in state court for climate-change-related harms alleged to result from the conduct of fossil fuel producers and sellers. Indeed, climate change already is having a variety of costly impacts within our states, and those impacts are expected to worsen.

The district court's order remanding this case to state court, where the Mayor and City Council of Baltimore ("the City") chose to sue multiple fossil fuel producers and distributors ("the Companies") under state law, properly recognized state courts' authority and ability to adjudicate claims against entities that cause or contribute to climate change through conduct that violates state law applicable to a broad array of commercial actors. Reversal of the district court's decision, by contrast, could divest state courts of authority to adjudicate this kind of action, and thus deprive states and their subdivisions of the ability to seek redress for harms caused by others who should be held accountable under state law.

SUMMARY OF ARGUMENT

All levels of government have a vital and shared interest in addressing the impacts of climate change, which is a problem crying out for multiple complementary solutions in our federal system. Here, the district court properly recognized as much when it rejected the Companies' arguments that the City's claims are inherently federal-law claims and granted the motion to remand.

Below, the Amici States address three of the Companies' arguments for removal, none of which can overcome the well-pleaded complaint rule.[1] First, the City's claims do not necessarily raise *any* federal issue, much less one that warrants the exercise of jurisdiction under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005). Second, the doctrine of complete preemption does not support federal jurisdiction, as no provision of the Clean Air Act transforms state law claims into federal law claims. And third, there is no merit to the notion that the City's claims, pled under state law, belong in federal court because they inherently arise under federal common law. Even if this kind of argument could theoretically supply an independent basis for removal—which it cannot—the interest in combating climate change is not uniquely federal. Rather,

[1] The Amici States agree with the City that this Court has jurisdiction only to review the Company's arguments for removal on federal-officer grounds. *See* Plaintiff-Appellee's Resp. Br. 8-14. Should the Court conclude otherwise, however, the Companies' remaining theories for removal lack merit for reasons including those set forth in this brief.

the effects of climate change often are felt at the state and local level, and state and local efforts to address the problem are essential.

ARGUMENT

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

The "well-pleaded complaint" rule presents an overwhelming burden for the Companies' argument that the City's state-law claims actually arise under federal law. That rule is a "powerful doctrine" that "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." *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 9-10 (1983). Under the well-pleaded complaint rule, a plaintiff is "master of the claim," so that "he or she may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987); *see, e.g.*, *Darcangelo v. Verizon Comms., Inc.*, 292 F.3d 181, 186 (4th Cir. 2002). Even if a state-law claim is preempted by federal law, that is normally a defense to be raised in, and adjudicated by, state court—not a basis for removal to federal court.

The exceptions to the well-pleaded complaint rule are narrow.[2] As relevant here, a defendant may remove a case where a nominally state-law claim "necessarily

[2] *See generally* 14C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3722.1 (rev. 4th ed. 2018).

raise[s]" a substantial and disputed federal issue that a federal court can entertain without disturbing the federal-state judicial balance. *Grable*, 545 U.S. at 313-14. Alternatively, a defendant may remove such a case on the basis of "complete preemption." *See, e.g.*, *Prince v. Sears Holdings Corp.*, 848 F.3d 173, 177 (4th Cir. 2017). But neither of these two limited exceptions applies here, and this Court should not create a new one.

A. *Grable* Jurisdiction Does Not Warrant Reversal.

Federal jurisdiction under *Grable*—the first recognized exception to the well-pleaded complaint rule—is limited to a "special and small category" of cases. *Gunn v. Minton*, 568 U.S. 251, 258 (2013). Specifically, *Grable* jurisdiction exists only when "a federal issue 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." *Id.* The district court correctly concluded that the City's claims do not satisfy these tightly circumscribed criteria.[3]

The City's claims do not "necessarily raise[]" any federal issue at all, let alone one that is actually disputed, substantial, and capable of resolution in federal court

[3] The court below is not alone in reaching this conclusion. In a similar case brought by the State of Rhode Island against fossil fuel companies, the court rejected the defendants' assertion of *Grable* jurisdiction, reasoning that the State's claims were "thoroughly state-law claims." *Rhode Island v. Chevron Corp.*, C.A. No. 18-395 WES, 2019 WL 3282007, *4 (D.R.I. Jul. 22, 2019).

without disrupting the federal-state balance approved by Congress. The City's claims are simply state law tort claims. And although there may be a federal regulatory backdrop for some of the conduct alleged, that does not mean a federal issue is "necessarily raised" in the manner that *Grable* requires. In *Grable*, for instance, the plaintiff "premised its superior title claim on a failure by the IRS to give adequate notice, as defined by federal law," so that "[w]hether [the plaintiff] was given notice within the meaning of the federal statute" was "an *essential element* of its quiet title claim." 545 U.S. at 314-15 (emphasis added); *see also Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 813 (1986) ("[T]he mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction."). Here, by contrast, the City need not prove the violation of any federal-law requirement as an "essential element" of any of its tort claims.

Still, the Companies argue that the City's claims touch upon various federal interests implicated by climate change, such as national security, foreign affairs, and economic prosperity. *See* Appellants' Opening Br. ("Companies' Br.") 33. That is beside the point. While all of these undeniably are federal interests, a federal *interest* is not a federal *issue*, and thus does not necessarily implicate *Grable*. Rather, claims raise federal issues only when they "turn on substantial questions of federal law." *Grable*, 545 U.S. at 312. For instance, *Grable* described *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921), as the "classic example" because, although the

plaintiff had pled its claim under state law, the "principal issue in the case was the federal constitutionality of [a particular] bond issue." *Grable*, 545 U.S. at 312; *see also Gunn*, 568 U.S. at 258 (cases giving rise to *Grable* jurisdiction are a "slim category" in which, among other things, resolution of the federal question must be "necessary" to the case).

The claims here do not "turn on substantial issues of federal law," as *Grable* requires. 545 U.S. at 312. The City does not seek (for instance) to compel the federal government to alter its national security strategy, foreign policy, or economic regulations. Rather, it seeks money damages for local harms resulting from the Companies' alleged tortious conduct in producing and marketing fossil fuels and seeks abatement of the nuisance the Companies allegedly have caused. (J.A. 172.) And the City's claims—like virtually all state-law claims, even ones that may have a federal regulatory backdrop—turn on issues of state law, not federal law. *See Bennett v. Southwest Airlines Co.*, 484 F.3d 907, 909-10, 912 (7th Cir. 2007) (remanding tort claims regarding airline crash despite "national regulation of many aspects of air travel"). As a district court in California explained, "gestur[ing] to federal law and federal concerns in a generalized way" does not raise any substantial or actually disputed federal issue. *County of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 938 (N.D. Cal. 2018), *appeal docketed*, No. 18-15499 (9th Cir. Mar. 27, 2018).

The Companies are likewise wrong to contend that the City's public nuisance claim raises federal issues because the City may have to show that the harm from the Companies' conduct outweighs its utility. Companies' Br. 34-36. That determination does not necessarily entail resolution of any issue of federal law. A state court can evaluate the impact of the Companies' conduct (including its harm and its utility), consider the relevance of any federal regulatory backdrop, make a determination as to the unreasonableness of the Companies' conduct, and craft an appropriate remedy, all without resolving any federal issue within the meaning of *Grable*.

In that vein, state courts across the country have applied nuisance law in cases of environmental contamination, even when there is related federal regulation on the same topic. For example, in *Hoffman v. United Iron and Metal Co.*, the Maryland Court of Special Appeals affirmed the viability of a common law nuisance claim against a facility that was subject to federal and state regulation of air pollution. 108 108 Md. App. 117, 143-45 (1996); *see also Washington Suburban Sanitary Comm'n v. CAE-Link Corp.*, 330 Md. 115, 132-40 (1993) (upholding plaintiff's nuisance claims that sewage sludge processing plant, constructed pursuant to federal court orders, interfered with neighboring landowners' use and enjoyment of their property); *Biddix v. Henredon Furniture Industries, Inc.*, 76 N.C. App. 30, 33-41 (Ct. App. 1985) (allowing plaintiffs to maintain common law nuisance claims for

discharges impairing water quality even though defendant's conduct was regulated by both the state Clean Water Act and the federal Clean Water Act). Likewise, in *Merrick v. Diageo Americas Supply, Inc*., the Sixth Circuit held that the plaintiffs' nuisance claims alleging harm from the ethanol emissions of a nearby, out-of-state whiskey distillery were not preempted even though those emissions were directly regulated by the federal Clean Air Act. 805 F.3d 685, 686 (6th Cir. 2015).

Finally, removal of Plaintiffs' state-law claims would disrupt the federal-state balance that Congress struck. State courts are the most appropriate venue for state law tort claims. *See, e.g.*, *Darcangelo*, 292 F.3d at 194 (stressing that "state common law torts such as invasion of privacy and negligence are traditional areas of state authority"). And as the Supreme Court has explained, when there is "no federal cause of action and no preemption of state remedies," Congress likely intended for the claims to be heard in state court. *Grable*, 545 U.S. at 318. That is the case here, and no circumstances support deviating from this general rule.

Federal courts have also recognized that it is appropriate for state courts to decide complex environmental cases—even ones that may involve federal issues. For instance, the Second Circuit remanded claims brought in state court against corporations that had used methyl tertiary butyl ether ("MTBE") as a gasoline additive. *In re MTBE Prods. Liab. Litig.*, 488 F.3d 112, 136 (2d Cir. 2007). Relying on a Supreme Court decision in the *Grable* line of case law, the Second Circuit held

that the mere fact that defendants "refer to federal legislation by way of a defense" was insufficient to establish federal jurisdiction. *Id.* at 135 (citing *Merrell Dow*, 478 U.S. 813). Ultimately, the Supreme Court of New Hampshire held Exxon Mobil liable under the common law of negligence and strict liability. *State v. Exxon Mobil Corp.*, 168 N.H. 211, 218, 220 (2015).

B. The Clean Air Act Cannot Support Removal on Complete Preemption Grounds.

Also unavailing is the Companies' alternative argument that the City's state-law claims actually arise under federal law because of the doctrine of "complete preemption." Companies' Br. 48-51. Not only is complete preemption an exceedingly narrow doctrine, but the Companies' argument could stretch it so as to severely constrain states' ability to protect the health and welfare of their citizens. *See Holliday Amusement Co. v. South Carolina*, 493 F.3d 404, 409 (4th Cir. 2007) (noting "legitimate exercises of state police power in furtherance of important goals—such as health, public welfare, and environmental protection"); *see also Rocky Mountain Farmers Union v. Corey*, 913 F.3d 940, 945-46 (9th Cir. 2019) (emphasizing that the Constitution's drafters "respected the rights of individual states to pass laws that protected human welfare and recognized their broad police power to accomplish this goal" (footnote and citation omitted)).

Complete preemption is jurisdictional because it "converts an ordinary state common law complaint into one stating a federal claim." *Prince*, 848 F.3d at 177

(4th Cir. 2017); *see Lontz v. Tharp*, 413 F.3d 435, 440 (4th Cir. 2005). "[W]hen complete preemption exists, . . . the federal claim is treated as if it appears on the face of the complaint because it effectively displaces the state cause of action." *Id.* at 441. Ordinary preemption, by contrast, is a defense that is "insufficient to allow the removal of the case to federal court." *King v. Marriott Int'l, Inc.*, 337 F.3d 421, 424 (4th Cir. 2003). This remains true "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.

Complete preemption applies only in the narrowest of circumstances. The defendant must establish that Congress both: (1) intended to displace the state-law cause of action; and (2) provided a substitute federal cause of action. *See id.*; *King*, 337 F.3d at 425 (explaining that "the touchstone of complete preemption is 'whether Congress intended the federal cause of action' to be 'the exclusive cause of action' for the type of claim brought by a plaintiff" (quoting *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 9 (2003))). The Supreme Court has found complete preemption under only three statutes. *See Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists & Aerospace Workers*, 390 U.S. 557, 558-62 (1968) (Section 301 of the Labor Management Relations Act); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 65-67 (1987) (Section 502(a) of the Employee Retirement Income Security Act of 1974); *Beneficial Nat'l Bank*, 539 U.S. at 7-11 (Sections 85 and 86

of the National Bank Act). None of these decisions involved claims related to environmental protection, much less the Clean Air Act. To the contrary, courts have *rejected* claims of complete preemption where federal environmental statutes are at issue. *See ARCO Envtl. Remediation, L.L.C. v. Department of Health & Envtl. Quality*, 213 F.3d 1108, 1114 (9th Cir. 2000) (no complete preemption under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)); *City of Chesapeake v. Sutton Enters., Inc.*, 138 F.R.D. 468, 475-78 (E.D. Va. 1990) (no complete preemption under CERCLA or the Toxic Substances Control Act).

Congress plainly did not intend to displace the sorts of state-law claims that the City has brought here. For one thing, the Act declares that "air pollution prevention . . . is the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3). The act thus speaks in terms of cooperative federalism, not conversion of state-law claims into federal-law ones.

For another thing, and consistent with that cooperative approach, Congress included two broad savings clauses that expressly preserve non-Clean Air Act claims. The first, the citizen suit savings clause, provides (among other things) that "[n]othing 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." *Id.* § 7604(e). The second, the

states' rights savings clause, generally provides that "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 certain state or local emission standards may not be *less* stringent than their federal counterparts. *Id.* § 7416.

By preserving States' authority to "adopt or enforce . . . *any* requirement respecting the control or abatement of air pollution," *id.* (emphasis added), the states' rights savings clause "clearly encompasses common law standards." *Merrick*, 805 F.3d at 690 (6th Cir. 2015); *see also In re MTBE*, 488 F.3d at 135 (holding that the Clean Act did not completely preempt state law claims arising out of contamination of groundwater with MTBE); *American Fuel & Petrochemical Mfrs. v. O'Keeffe*, 134 F. Supp. 3d 1270, 1285-86 (D. Or. 2015) (describing the Act's savings clause as "sweeping and explicit"), *aff'd*, 903 F.3d 903 (9th Cir. 2018). Likewise, in a different statutory context, this Court has noted the significance of a savings clause in rejecting a claim of complete preemption. *See Johnson v. American Towers LLC*, 781 F.3d 693, 703 (4th Cir. 2015) (holding that Federal Communications Act's "savings clause demonstrates that congressional intent to completely preempt this area of law is neither clear nor manifest"). In view of Congress's preservation of

state-law rights and remedies in the Clean Air Act, the district court was correct to reject the Companies' claim of complete preemption.

Nor did Congress provide a substitute federal-law cause of action here, as is required to establish complete preemption. The Companies' complete preemption argument rests on the fact that the Clean Air Act regulates, or enables EPA to regulate, emissions of greenhouse gases and other pollutants. Companies' Br. 48-51. But the City has not sued the Companies as emitters of greenhouse gases. Instead, it has sued them as producers, marketers, and sellers of fossil fuels, on common-law and statutory theories that would be every bit as applicable to producers, marketers, and sellers of other products. The Companies fail to explain how the Clean Air Act could completely preempt state-law claims arising out of conduct—the production, marketing, and sale of fossil fuels—that the Act does not regulate. *See, e.g.*, *King*, 337 F.3d at 425 ("Where no discernable federal cause of action exists on a plaintiff's claim, there is no complete preemption, for in such cases there is no federal cause of action that Congress intended to be the exclusive remedy for the alleged wrong."). Nor could they: even with respect to ordinary preemption, the Supreme Court has explained that "[t]here is no federal pre-emption *in vacuo*, without a constitutional text or a federal statute to assert it." *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp*., 485 U.S. 495, 503 (1988). The

Companies point to no "enacted statutory text" that would support preemption of the City's claims here.

C. There Is No Other Basis for Treating the City's State-Law Claims As If They Arise Under Federal Law.

Unable to satisfy either of the two established exceptions above, the Companies take a different tack to avoid the consequences of the well-pleaded complaint rule. The City's state-law claims, they say, are really federal common law claims and thus arise under federal law for purposes of the removal statute. That is so, the Companies claim, even though the Clean Air has *displaced* federal common law with respect to greenhouse gas emissions. These contentions fail because they are merely a dressed-up version of the failed complete-preemption argument and, in any event, the City's claims do not actually arise under federal common law.

1. The Companies' Argument Is Just a Preemption Argument and Cannot Support Removal.

The Companies' contention that the City's state law claims are actually federal law claims is, as the district court observed, merely a veiled argument for complete preemption. JA341. The thrust of the Companies' argument is that (1) federal law provides the only rule of decision for the kinds of claims that the City raises; and (2) for that reason, the City's claims should be treated as arising under federal law. *See* Companies' Br. 15. But that argument is simply a repackaging of

the Companies' complete preemption arguments. *See, e.g.*, *Prince*, 848 F.3d at 177 (explaining that complete preemption "converts an ordinary state common law complaint into one stating a federal claim"). And, as explained above, the Companies' argument for complete preemption is meritless. That is no less true of the argument in its repackaged form, which does not even appear to rely on any congressional enactment.

To be sure, the Companies' arguments may also sound in ordinary preemption, for their argument is that federal law bars the state-law remedies that the City seeks. *See* Companies' Br. 15. Yet that federal-law defense does not permit removal in the face of the well-pleaded complaint rule. *See Caterpillar*, 482 U.S. at 386. Thus, on remand to the state court, the Companies are free to argue that some combination of the Clean Air Act and federal common law means that the City's state law claims are not viable. But that, like other federal-law issues not present on the face of a well-pleaded complaint, is a matter for the state court to resolve.[4]

[4] In a similar vein, it is irrelevant for present purposes that federal common law claims "arise under" federal law for purposes of federal-question jurisdiction. *See* Br. of Amicus Curiae Chamber of Commerce of the United States of Am. 19-20. The City has chosen to plead its claims under state law, and there is no basis on which to override that decision by treating the claims as if they were pled under federal law.

2. The City's Claims Are Not Federal in Any Event.

Even if it were theoretically possible to establish federal jurisdiction on the sort of alternative ground that the Companies proffer, the district court's decision to remand still would be appropriate. The reason is that, contrary to the Companies' argument, the City's claims do not actually arise under federal common law. The interest in combating and adapting to climate change is not uniquely federal, and it is immaterial that climate change involves transboundary emissions.

a. Climate Change Is Not the Subject of a "Uniquely Federal Interest."

The Supreme Court has explained that there are "a few areas, involving 'uniquely federal interests,' [that] are so committed by the Constitution and the 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) (citation omitted) (quoting *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1980)). But federal common law is very much the exception, not the rule—and climate change harms are not an area that falls within that exception.

The Companies' argument to the contrary rests principally on the idea that climate change is a national problem requiring a national solution. *See* Companies' Br. 19-20. That the problem and its solutions include national and global dimensions, however, does not mean that they are the subject of a "uniquely federal interest[]." *Boyle*, 487 U.S. at 504. Rather, the consequences of climate change often are felt

locally. *See, e.g.*, *Massachusetts v. Environmental Prot. Agency*, 549 U.S. 497, 522-23 (2007), and state and local governments play a critical role in crafting and implementing solutions.

Rising sea levels, for example, are a global phenomenon—but that phenomenon often takes its toll at the local level. In the Chesapeake Bay, for instance, sea levels are rising at a rate double the global average. *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 (reporting annual sea level rise in Chesapeake Bay of 3.4 mm/year, compared to 1.7 mm/year global average). Swiftly rising seas are affecting coastal communities from Smith Island, the last inhabited island in the Chesapeake, to Baltimore City. The Maryland Commission on Climate Change's Adaptation and Resiliency Working Group continues to study the threat presented by rising sea levels and to develop recommendations for adaptation measures and funding. *See* Maryland Commission on Climate Change, Adaptation and Resiliency Working Group: 2019 Work Plan, https://mde.maryland.gov/programs/Air/ClimateChange/MCCC/Documents/2019ARWGWorkPlan.pdf (last visited Sept. 2, 2019). Whatever measures are undertaken, 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), https://nca2018.globalchange.gov/downloads/NCA4_2018_FullReport.pdf ("Nationally, estimates of adaptation costs range from tens to hundreds of billions of dollars per year."); *id.* at 760 (describing $235 million spent by Charleston, South Carolina as of 2016 to respond to increased flooding).

The direct effects of rising temperature also are felt locally. Urban development means that temperatures often are highest in densely populated inner-city neighborhoods.[5] In Baltimore City, for example, temperatures can vary significantly even from one neighborhood to the next. Baltimore Office of Sustainability, Urban Heat Island Sensors, https://www.baltimoresustainability.org/urban-heat-island-sensors/ (last visited Sept. 2, 2019). This "heat islanding" can increase the health risk to sensitive populations like the elderly, children, and people with preexisting pulmonary conditions. *Id.*

States, for their part, have long been recognized as having the power to combat environmental harms. *See, e.g.*, *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442-43 (1960) (local regulation of ships' smoke "clearly falls within the

[5] Maps recently prepared by Portland State University illustrate the distributional inequity of rising temperatures even within the urban landscape. *See* Nadja Popovich & Christopher Flavelle, *Summer in the City Is Hot, but Some Neighborhoods Suffer More*, N.Y. Times (Aug. 9, 2019), https://www.nytimes.com/interactive/2019/08/09/climate/city-heat-islands.html; *see also* United States Global Change Research Program, *Fourth National Climate Assessment*, Vol. II, at 441 (depicting projected change in number of "very hot days" for five U.S. cities).

exercise of even the most traditional concept of what is compendiously known as the police power"). As to climate change in particular, one court of appeals recently deemed it "well settled that the states have a legitimate interest in combatting the adverse effects of climate change on their residents." *American Fuel & Petrochemical Mfrs. v. O'Keeffe*, 903 F.3d 903, 913 (9th Cir. 2018) (citing *Massachusetts*, 549 U.S. at 522-23); *see id.* (noting that states' "broad police powers" allow them "to protect the health of citizens in the state").

And indeed, states have used their police powers to do just that, recognizing that they lack the luxury of waiting for a comprehensive solution to come from the federal government.[6] Maryland, for example, recently updated its Renewable Portfolio Standard (RPS) to require that each utility company operating in the state provide at least 50% of its electricity from certain renewable sources by the year 2030. Clean Energy Jobs Act, 2019 Md. Laws. ch. 757 (S.B. 516) (to be codified at Md. Code Ann., Pub. Util. § 7-702). New York has passed similar legislation that not only requires 70% of all retail electricity sales to come from renewable sources by 2030, but also instructs all state agencies to ensure that their permitting, licensing,

[6] The overwhelming scientific consensus is that immediate and continual progress toward a near-zero greenhouse gas emission economy by mid-century is necessary to avoid catastrophic consequences. *See, e.g.*, Intergovernmental Panel on Climate Change, 1.5°C Report, Summary for Policymakers 12-15, https://www.ipcc.ch/sr15/chapter/spm/ (last visited Sept. 2, 2019).

and administrative decisions are not inconsistent with attainment of those goals. N.Y. Climate Leadership and Community Protection Act, 2019 McKinney's Sess. Law News of N.Y. ch. 106 (S. 6599). Washington law requires the largest electric utilities to meet a series of benchmarks on the amount of renewables in their energy mix, and to achieve 15% reliance on renewables by 2020. Wash. Rev. Code §§ 19.285.010-.903. Oregon requires its largest utilities to achieve 20% reliance on renewables by 2020 and 50% by 2040, Or. Rev. Stat. § 469A.052(1)(c), (h), and to cease reliance on coal-generated electricity by 2030, *id.* § 757.518(2). And Connecticut has required utilities to obtain 25% of their energy from renewable sources by 2020 and 40% by 2030, while also creating funding sources for encouraging private renewable growth. *See* Conn. Gen. Stat. §§ 16-245a, 16-245n.

Other measures mandate direct emissions reductions or direct other steps to reduce a state's carbon footprint. For example, California's Senate Bill 32 has codified the State's objective to reduce emissions to forty percent below 1990 levels by 2030. Cal. Health & Safety Code, § 38500 *et seq.* Oregon, in addition to shaping its utilities' energy portfolios, has adopted a Clean Fuels Program to reduce the carbon intensity of fuel. Or. Rev. Stat. §§ 468A.265 to 468A.277; Or. Admin. R. 340-253-0000 to 340.253.8100. And New Jersey's Global Warming Response Act requires reductions in carbon dioxide emissions—culminating in a 2050 level that is

80% lower than 2006—and establishes funding for climate-related projects and initiatives. N.J. Stat. Ann. §§ 26:2C-37 to -58.

States also have collaborated on successful regional efforts to reduce greenhouse gas emissions in an economically efficient manner. Maryland, Connecticut, Delaware, Maine, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont[7] participate in the Regional Greenhouse Gas Initiative (RGGI), a regional cap-and-trade program codified and implemented through the laws and regulations of each state, which uses increasingly stringent carbon emissions budgets to reduce carbon pollution from power plants over time.[8] Participating states have reduced carbon emissions from the electricity generating sector by forty percent since the program launched.[9] In addition, on the West Coast, the Pacific Coast Collaborative represents a series of agreements among California, Oregon, Washington, British Columbia, and the cities of Los Angeles, Oakland, San Francisco, Portland, Seattle, and Vancouver to reduce greenhouse gas emissions

[7] In June 2019, New Jersey finalized regulations to establish a market-based program to reduce greenhouse gas emissions. The state will resume participating in RGGI on January 1, 2020.

[8] *See* Regional Greenhouse Gas Initiative, *Elements of RGGI*, https://www.rggi.org/program-overview-and-design/elements (last visited Sept. 2, 2019).

[9] Acadia Center, *Outpacing the Nation: RGGI's Environmental and Economic Success* 3 (Sept. 2017), http://acadiacenter.org/wp-content/uploads/2017/09/Acadia-Center_RGGI-Report_Outpacing-the-Nation.pdf.

dramatically by 2050. *See* Pacific Coast Collaborative, http://pacificcoast collaborative.org/about/ (last visited Sept. 2, 2019). The backbone of these regional agreements is, in each instance, state law that aims to reduce carbon pollution.

Further, the compatibility of state regulation with federal efforts to address climate change is borne out by the breadth of cases that state courts already hear related to the issue. A database maintained by the Sabin Center for Climate Change Law at Columbia Law School and Arnold & Porter Kaye Scholer LLP lists 293 past and ongoing lawsuits throughout the country raising state-law claims related to climate change, more than 90% of which are being or have been adjudicated in state courts or before state agencies.[10] The claims in these cases derive from a wide range of state laws. 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 Wash. App. 494 (Ct. App. 2013). State courts also adjudicate the operation and validity of states' regulatory efforts to reduce greenhouse gas emissions. *See, e.g.*, *Maryland Off. of People's Counsel v.*

[10] 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. 20, 2019).

Maryland Public 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 manner in which Maryland's Public Service Commission took account of these issues); *California 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, Inc. v. Department of Envtl. Prot.*, 480 Mass. 398, 411 (2018) (upholding Massachusetts' greenhouse gas emissions limits for power plants). As with these and other cases, state courts can and should hear the City's claims under state law.

Treating these claims as arising under state law, not federal common law, is consistent with how courts have treated other suits against sellers and manufacturers of products. In particular, it is well-settled that such suits do not present federal issues warranting application of federal common law—even if important federal interests are raised, and even if a product is sold or causes injury in many states. *See, e.g.*, *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1324 (5th Cir. 1985) (en banc) (state law, not federal common law, governed in cases against asbestos manufacturers); *In re "Agent Orange" Prod. Liab. Litig.*, 635 F.2d 987, 995 (2d Cir. 1980) (state law, not federal common law, governed class action tort case against

producers of Agent Orange on behalf of millions of U.S. soldiers who had served in Vietnam, despite federal interest in veterans' health).

b. That Climate Change Involves Transboundary Pollution Does Not Mean the City's Claims Arise Under Federal Common Law.

Despite the foregoing, the Companies insist that the City's claims must arise under federal common law because of their link to transboundary pollution. *See, e.g.*, Companies' Br. 19-20. The Companies are wrong for three principal reasons.

First, the City is not suing the Companies as emitters of pollutants. Rather, it is suing them as producers and distributors of products whose use results in the emission of those pollutants. And it is doing so on the basis of well-established state law tort theories. The legal principles that may govern a suit against (say) a power plant for its transboundary emissions of greenhouse gases do not govern the City's claims.

Second, even if it were appropriate to treat the City's claims as transboundary-emissions claims, Supreme Court precedent establishes that federal common law would not categorically govern. In *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987)—a suit involving ordinary preemption, not complete preemption, and thus not implicating removal jurisdiction—the Court declined to hold all state law claims against out-of-state polluters preempted. *Id.* at 497. Consistent with the outcome of *Ouellette*, the Court in *American Elec. Power Co. v. Connecticut*

("*AEP*"), after finding that the Clean Air Act had displaced federal common law, expressly declined to invalidate the plaintiffs' state-law nuisance claims. 564 U.S. 410, 429 (2011). Instead, it remanded for the lower court to consider the availability of state nuisance law to remedy the defendants' conduct. *See id.*

Third, to say that interstate-emission claims arise under federal common law is nonsensical after *AEP*. *AEP* held that the Clean Air Act *displaced* federal common law claims against greenhouse gas emitters. *Id.* at 424. Federal common law cannot form the basis for federal jurisdiction over such claims, as there is no federal common law for such claims to "arise under."

The principal cases on which the Companies rely fail to establish removal jurisdiction here. First, the Companies rely heavily on *AEP*. *E.g.*, Companies' Br. 20-21. But *AEP* involved conduct—emitting greenhouse gases—that is different from the production and marketing of fossil fuels at issue here. And even if that were not so, *AEP* cuts *against* federal jurisdiction here because, as discussed above, the City's claims cannot arise under federal common law that no longer exists.

Nor does the Ninth Circuit's decision in *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012) ("*Kivalina*"), support the Companies' position. *Kivalina* involved nuisance claims brought against various energy companies, in federal court, under both federal and state common law. *Id.* at 853, 859. In dismissing the federal law claims, the district court declined to exercise

supplemental jurisdiction over the state law claims, which it "dismissed without prejudice to their presentation in a state court action." *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 882–83 (N.D. Cal. 2009), *aff'd on other grounds*, 696 F.3d 849 (9th Cir. 2012). The court of appeals, in turn, merely applied *AEP* to hold that the federal common law claims had been displaced by the Clean Air Act, not that the plaintiff's state-law claims arose under federal common law. *Kivalina*, 696 F.3d at 856. And the concurrence stressed that "[d]isplacement of the federal common law does not leave those injured by air pollution without a remedy," because "[o]nce federal common law is displaced, state nuisance law becomes an available option to the extent it is not preempted by federal law." *Id.* at 866 (Pro, J., concurring).

CONCLUSION

The district court's decision should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because this brief contains 6,153 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen point, Times New Roman.

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I hereby certify that on September 3, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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