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
District of Maryland
Case No. 1:18-cv-02357-ELH
Hon. Ellen L. Hollander

BRIEF OF NATURAL RESOURCES DEFENSE COUNCIL AS AMICUS CURIAE IN SUPPORT OF APPELLEE AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1 and Local Rules 26.1(a)(2)(A) and (a)(2)(C), Amicus Curiae Natural Resources Defense Council, Inc., certifies that it is a non-profit environmental and public health membership organization that has no publicly held corporate parents, affiliates, and/or subsidiaries.

Under Local Rule 26.1(a)(2)(B), NRDC certifies that it is unaware of any publicly held corporation that has a direct financial interest in the outcome of the litigation by reason of a franchise, lease, other profit sharing agreement, insurance, or indemnity agreement with NRDC.

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INTEREST OF AMICUS CURIAE

Amicus Curiae Natural Resources Defense Council (NRDC) is a non-profit environmental and public health organization with hundreds of thousands of members. Founded in 1970, NRDC has worked for decades to ensure enforcement of the Clean Air Act and other laws to address major environmental challenges.

The Clean Air Act sets a nationwide baseline for addressing air pollution and provides federal remedies to improve air quality. But the Act does not relieve states of the primary responsibility for protecting the health of their residents and the quality of their air. The Act also recognizes that each state faces its own challenges and encourages state and local efforts that reduce air pollution.

Baltimore and its residents have been harmed by the effects of climate change. Basic public infrastructure—roads, bridges, sewers, storm drains—must be repaired and hardened against the rising seas and unprecedented storms. The Mayor and City Council seek to avail themselves of state law tort remedies, important tools that Maryland has long provided to address harms to the welfare of its residents.

Defendants contend that enforcing state law will impermissibly undermine federal authority, because climate change is an interest "unique" to the federal government. NRDC strongly disagrees that states lack a legitimate interest in addressing climate change or that state law regulation is impermissible.

Climate change is the major environmental challenge of our time. Action is urgently needed on many fronts. NRDC works extensively at the state and local level to help deploy a broad range of effective legal, policy, and technology tools to combat all forms of climate pollution. From the nine-state Regional Greenhouse Gas Initiative that caps and reduces power sector carbon dioxide emissions; to renewable portfolio standards that require utilities to supply electricity from renewable sources; to building codes that reduce energy waste, enforcing state law is an effective means to help society transition to an energy system that will not harm the climate that sustains us.

NRDC—in and out of court—has defended the enforceability of state law against the challenge that it interferes with federal authority. *See, e.g.*, *Am. Fuel & Petrochemical Mfrs. v. O'Keeffe*, 903 F.3d 903 (9th Cir. 2018) (upholding Oregon clean fuels program from Clean Air

Act preemption and commerce clause challenges). NRDC submits this brief to highlight why state law—both statutory and common law—remains available to address harms related to climate change.[1]

[1] All parties have consented to the filing of this brief. No party or party's counsel has authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting the brief. No person or entity, other than amicus, has contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

States have the right and the responsibility to protect the health, safety, and welfare of their residents. To that end, states can provide a range of legal remedies—both statutory and common law—that they deem appropriate. Maryland provides causes of action for nuisance, trespass, and products liability. Plaintiff Mayor and City Council of Baltimore ("Plaintiff" or "Baltimore") seeks relief thereunder, alleging Defendants are liable for their misleading promotion and marketing of fossil fuels. If proven, these Maryland state law claims are enforceable unless preempted by federal law. *See Murphy v. N.C.A.A.*, 138 S. Ct. 1461, 1479 (2018); *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990).

Importantly, whether federal law preempts Maryland law is not a question that must be answered in federal court. Here, in fact, it is a question that *cannot* be answered in federal court. Baltimore pled only state law claims in state court. Even if federal preemption could ultimately provide a defense to those claims, it does not provide federal jurisdiction to remove the claims from state court. *Franchise Tax Bd. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 14 (1983).

Rather, under "the century-old jurisdictional framework governing removal," federal jurisdiction must be grounded on what necessarily appears in Baltimore's own statement of its claims. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 391 (1987). This rule—the "well-pleaded complaint rule"—makes the plaintiff "master of the claim" and allows it to "avoid federal jurisdiction by exclusive reliance on state law." *Id.* at 392. Thus, outside of narrow exceptions, removal is available only when a plaintiff seeks to rely on federal law by pleading a cause of action created by federal law. *Gunn v. Minton*, 568 U.S. 251, 257 (2013). Because Baltimore pled only state-created causes—and no exception applies—the federal courts lack jurisdiction and the district court correctly remanded the case to state court.

Defendants' main arguments for removal are divorced from the well-settled standard and rely on erroneous constructions of federal environmental law.

Defendants first argue that the case is removable because, under a "choice-of-law" analysis, federal common law "governs" resolution of Baltimore's claims. This argument is doubly flawed:

First, Defendants' proposed test is untethered from the statutory grant of removal jurisdiction, 28 U.S.C. §§ 1441, 1331, and decades of interpretation. Removal jurisdiction is not determined by a "choice-of-law" governance analysis—jurisdiction must be found on the face of the plaintiff's well-pleaded complaint. *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 808 (1986). The question of whether federal law "governs" state law under the Supremacy Clause is only relevant in cases of conflict between federal and state law—*i.e.*, in preemption cases. *Murphy*, 138 S. Ct. at 1479–80. What Defendants are proposing, then, is an ordinary preemption test. But it is well-established that "even if preemption forms the very core of the litigation, it is insufficient for removal." *Lontz v. Tharp*, 413 F.3d 435, 441 (4th Cir. 2005).

Second, even if a "choice-of-law" governance analysis could create removal jurisdiction, Defendants fail their own test. No federal common law exists to "govern" Baltimore's claims. There is no federal common law of fossil fuel marketing and promotion. Nor is there a federal common law of—as Defendants erroneously recharacterize Baltimore's claims—the regulation of interstate air pollution. The Supreme Court has held, in *American Electric Power Co. v. Connecticut*, that federal

common law addressing harms from interstate air pollution no longer exists: Congress displaced it with the Clean Air Act, and this Act—not any extinct federal common law—determines the preemptive scope of federal law. 564 U.S. 410, 423–24, 429 (2011) ("*AEP*").

The preemptive effect of federal law can be relevant to removal, but only in the "extraordinary" event of "complete preemption." *Caterpillar*, 482 U.S. at 393. Unlike ordinary preemption, "complete preemption" *is* jurisdictional: It refers to the situation in which federal law not only preempts a state-law cause of action, but also substitutes an exclusive federal cause of action in its place. *Lontz*, 413 F.3d at 440-41. But the district court correctly observed that Defendants did not identify a federal common law cause of action available to Baltimore, and on appeal Defendants do not argue complete preemption under federal common law.

Instead—and perhaps recognizing the absence of federal common law—Defendants later argue that the Clean Air Act is actually the "exclusive vehicle" for regulating air pollution; as such, they argue, it must "completely preempt" Baltimore's claims. But, again, the Act does not address the marketing or promotion of fossil fuels, so Defendants

recharacterize Baltimore's claims as ones seeking to regulate air pollution. But even so construed, neither condition for complete preemption is met: Far from preempting all state law related to air pollution, the Clean Air Act expressly preserves broad state authority in this area. *E.g.*, 42 U.S.C. § 7416. And the Act does not provide a federal cause of action—much less an *exclusive* one—that could substitute for Baltimore's claims.

At bottom, Defendants simply fail to grapple with the posture of the case and with Baltimore's right to seek relief from the jurisdiction of its choosing. *Merrell Dow*, 478 U.S. at 809 n.6. Defendants seek to rely on federal law. But Baltimore does not. As such, Baltimore is entitled to the opportunity to prove a claim for relief in Maryland state court.

ARGUMENT

"States are independent sovereigns in our federal system," *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), and possess the "traditional authority to provide tort remedies" as they deem appropriate, *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). Maryland provides causes of action for nuisance, trespass, and products liability. JA.330–31.

Baltimore alleges that Defendants have long known that the continued burning of fossil fuels would cause significant climate-related harms. Baltimore contends that Defendants concealed that knowledge while continuing to wrongfully promote the unrestrained use of their fossil fuel products. Baltimore claims this wrongful promotion gives rise to liability under Maryland state law.

Baltimore is entitled to the opportunity to prove these claims in Maryland state court. Under the "well-pleaded complaint rule," Baltimore is the master of its own claims and "may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar*, 482 U.S. at 392. Baltimore filed this action in state court and exclusively pled Maryland law causes of action.

Defendants' main arguments for removal all rely on the contention that any claim related to climate change *must* be removable. But there is no "climate exception" to the well-pleaded complaint rule. And, as explained below, state law claims are not somehow converted to federal claims merely because the claims are brought to address harms related to climate change.

Removal of state law claims to federal court raises "significant federalism concerns." *Lontz*, 413 F.3d at 440. Thus, outside of narrow exceptions,[2] state law actions can only be removed to federal court in the "extraordinary" event of "complete preemption": where existing federal law not only preempts a Maryland law cause of action, but also substitutes an exclusive federal cause of action in its place. *Caterpillar*, 482 U.S. at 393; *see also Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003); *Lontz*, 413 F.3d at 440–41. Such extraordinary preemption is not present here.

First, federal common law does not completely preempt state law climate claims. Federal common law does not govern the promotion of fossil fuels, and, under *AEP*, federal common law addressing harms from interstate air pollution no longer exists. Congress displaced it with

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[2] Baltimore explains why this case is not an exception removable under *Grable*, the federal–officer jurisdiction statute, 28 U.S.C. § 1442, or any other specialized removal statute. Plaintiff-Appellee's Response Brief ("Baltimore Br.") at 14–20, 33–52. Baltimore also explains why this Court's review is limited to federal-officer jurisdiction. *Id.* at 8–14. In the event this Court determines it has jurisdiction to review all of Defendants' grounds for removal, NRDC submits this brief to explain how Defendants rely on erroneous constructions of federal environmental law in their attempt to remove this case under federal common law or the Clean Air Act.

the Clean Air Act, and this Act—not any extinct federal common law—determines the preemptive scope of federal law. 564 U.S. at 423-24, 429.

Second, the Clean Air Act does not completely preempt state law climate claims. The Act does not regulate the promotion of fossil fuels and it expressly preserves broad state authority to regulate air pollution. *E.g.*, 42 U.S.C. § 7416. The Act also does not provide an exclusive substitute federal cause of action for state law climate claims.

I. Federal common law does not completely preempt Baltimore's claims.

Defendants invoke federal common law as a ground for removal. But they eschew well-settled removal standards. Instead, Defendants advance a "choice-of-law" standard under which jurisdiction would turn on what law—federal or state—will "govern" resolution of the claims.

However convoluted, Defendants are simply making a preemption argument. But it is black-letter law that only "complete preemption" will support removal. *Caterpillar*, 482 U.S. at 393. And Baltimore's claims are not completely preempted by federal common law because no relevant federal common law exists to preempt them.

Historically, the federal courts fashioned a common law of interstate air pollution. *See, e.g.*, *Georgia v. Tennessee Copper Co.*,

206 U.S. 230, 237–39 (1907). However, the Supreme Court has since held that Congress displaced this federal common law with the Clean Air Act. *See AEP*, 564 U.S. at 424. Congress, not the federal courts, has primary responsibility for setting federal policy, and once Congress legislates in an area, any preexisting federal common law "disappears." *Id.* at 423 (quotation omitted). The preemptive scope of federal law thus turns on the displacing federal statute, not the displaced federal common law. *See id.* at 429.

a. "Choice-of-law" is not a removal standard.

Defendants argue that removal jurisdiction exists if a "choice-of-law" analysis would determine that federal common law "governs" resolution of the claims. Defendants-Appellants' Opening Brief ("AOB") at 15–16. This is not the law.

Defendants cite several Supreme Court cases in support, AOB at 15–19, but none are *removal* cases. *Cf. Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 632 (1981) (plaintiff filed federal claim in federal court); *Illinois v. City of Milwaukee*, 406 U.S. 91, 93, 103 (1972) ("*Milwaukee I*") (plaintiff invoking federal original jurisdiction); *United States v. Standard Oil Co.*, 332 U.S. 301, 305 (1947) (federal

government, as plaintiff, pursuing relief under federal law); *AEP*, 564 U.S. at 418 (plaintiff filed federal claim in federal court). Nor are many of the intermediate appellate decisions. *E.g.*, *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 854 (9th Cir. 2012) (plaintiff filed federal claim in federal court).[3] These cases involve *plaintiffs* invoking federal jurisdiction. None required the court to consider whether federal jurisdiction existed *notwithstanding* a plaintiff invoking only state jurisdiction by pleading only state law causes of action.

Defendants' "choice-of-law" governance proposal conflicts with well-settled removal jurisprudence. It is in substance a preemption test: State law can only be "governed" by federal law, via the Supremacy Clause, in cases of conflict between federal and state law—*i.e.*, when federal law has preempted state law. *Murphy*, 138 S. Ct. at 1479–80. And ordinary preemption does not support removal. *Lontz*, 413 F.3d at 440–41. Defendants' test is not the law—only "complete preemption" by federal common law could theoretically support removal.

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[3] The Fourth Circuit case cited, *Pinney v. Nokia, Inc.*, is a removal case, but the Court there applied the longstanding "well-pleaded complaint rule." 402 F.3d 430, 445–46 (4th Cir. 2005).

b. Congressional legislation defines the substance of federal law to the exclusion of federal common law.

Before enactment of the major federal environmental statutes, federal courts adjudicated some environmental nuisance cases by resort to a federal common law. *See, e.g.*, *Missouri v. Illinois*, 180 U.S. 208, 241 (1901); *Tennessee Copper Co.*, 206 U.S. at 237; *Milwaukee I*, 406 U.S. at 103. The courts foresaw, however, that the federal common law would be replaced by federal statutes. As the Supreme Court observed in *Milwaukee I*: "[i]t may happen that new federal laws and new federal regulations may in time preempt the field of federal common law of nuisance." 406 U.S. at 107.

Those new federal laws arrived in the early 1970s in the form of major updates to the Clean Water Act and the Clean Air Act. The Supreme Court subsequently revisited the availability of federal common law nuisance claims for water pollution in light of the Clean Water Act. In *City of Milwaukee v. Illinois* ("*Milwaukee II*"), the Court explained that federal common law is only "a necessary expedient," "subject to the paramount authority of Congress," "and when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of

lawmaking by federal courts disappears." 451 U.S. 304, 313–14 (1981) (quotations omitted). In updating the Act, Congress "ha[d] not left the formulation of appropriate federal standards to the courts," but rather had adequately "occupied the field" so as to "supplant federal common law." *Id.* at 317. Under *Milwaukee II*, then, new legislation does not add a layer of federal statutory law on top of existing federal common law. Instead, the new statute defines the substance of federal law and the federal common law on that subject ceases to exist.

Milwaukee II presaged the extinction of most federal common law regarding interstate pollution. New statutes would replace judicially-created federal standards with congressionally-enacted federal standards. Importantly, however, federal statutes' displacement of federal common law does not simultaneously extinguish all *state* common law. To the contrary, in *International Paper Co. v. Ouellette*, the Court explained that although the federal common law was displaced by the Clean Water Act, state common law nuisance claims for interstate water pollution could be available. 479 U.S. 481, 489 (1987). With federal common law no longer at issue, the only question

was whether Congress intended the federal *statute* to preempt state law. *See id.* at 491.

c. The Clean Air Act defines the substance of federal law concerning air pollution.

Just as the Clean Water Act supplanted the federal common law of nuisance for water pollution, so too did the Clean Air Act supplant the federal common law of nuisance for air pollution. Thus, as explained further below, the existence of any pre-Clean Air Act federal cause of action for interstate air pollution does not provide removal jurisdiction.

In *AEP*, eight States sued major power companies in federal court, alleging that defendants' emissions contributed to global warming and thereby unreasonably interfered with public rights. 564 U.S. at 418. Plaintiffs sought an injunction setting emission caps for each defendant under the federal common law of nuisance and, in the alternative, state tort law. *See id.* at 418–19.

The case eventually reached the Supreme Court. The Second Circuit had ruled that federal common law "governed" these claims, *id.* at 419, 429, and the Supreme Court granted certiorari to address whether plaintiffs "can maintain federal common law public nuisance claims against carbon-dioxide emitters," *id.* at 415.

The parties disputed the historic availability of federal common law, but the Court found that passage of the Clean Air Act had rendered that dispute "academic." *Id.* at 423. Relying heavily on *Milwaukee II*, the Court held that "the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants." *Id.* at 424.

Importantly, the Court held that displacement turned on the congressional decision to legislate in this area, and not on the content of federal rights Congress decided to provide. *Id.* at 426. Congress had not directly established a federal right to seek abatement—it had delegated authority to EPA to set a standard that would trigger federal rights. *Id.* But, the Court concluded, even if EPA declined to set a standard, "courts would have no warrant to employ the federal common law." *Id.*

In other words, even if federal common law historically recognized a right to abatement, Congress is not bound to preserve it. The Supreme Court has "always recognized that federal common law is subject to the paramount authority of Congress." *Milwaukee II*, 451 U.S. at 313 (quotations omitted). That paramount authority would be hollow unless

Congress could reject prior judicially-created federal common law. Congress instead has the power to "strike a different accommodation" than that recognized under federal common law, *AEP*, 564 U.S. at 422, including *contracting* the scope of federal law. Under *AEP*, as under *Milwaukee II*, new legislation does not coexist with prior federal common law—the new statute displaces any federal common law and that common law disappears. Thereafter the Clean Air Act defines the substance of federal law to the exclusion of federal common law.[4]

The Ninth Circuit applied *AEP* in *Kivalina*. There an Alaskan village, Kivalina, sued energy companies in federal court for their contribution to climate change. Like the *AEP* plaintiffs, Kivalina sued under both federal and state common law. Unlike the *AEP* plaintiffs, Kivalina did not seek an injunction limiting emissions, but rather sought compensatory damages. *Kivalina*, 696 F.3d at 853–55.

The Ninth Circuit applied *AEP* to dispose of Kivalina's federal common law claim. Under *AEP*, the "federal common law addressing

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[4] Federal common law may occasionally fill in "statutory interstices." *AEP*, 564 U.S. at 421. But *AEP* makes clear that the Clean Air Act does not leave a nuisance-sized interstice in federal law for federal common law to fill. *Id*. at 423.

domestic greenhouse gas emissions has been displaced by Congressional action." *Kivalina*, 696 F.3d at 858. Displacement, the Court held, means that any "federal common law *cause of action* has been extinguished," and, once the "cause of action is displaced, displacement is extended to all remedies." *See id.* at 857 (emphasis added). In short, congressional action had extinguished the substance of federal common law, and displacement of the federal cause of action, as well as all federal common law remedies, necessarily followed. *Id.* at 857–58.

Defendants' reliance on *Milwaukee I*, *AEP*, and *Kivalina*, *see* AOB 20–21, is thus misplaced. None of those cases supports removal. All three were filed in federal court by plaintiffs asserting a federal cause of action. *Milwaukee I*, 406 U.S. at 93; *AEP*, 564 U.S. at 418; *Kivalina*, 696 F.3d at 853. Neither *AEP* or *Kivalina* held that climate tort claims *must* be governed by federal common law, and neither case ruled on whether such claims *may* be authorized by state law. Both Courts held only that the Clean Air Act had extinguished preexisting *federal* common law. *AEP*, 564 U.S. at 415; *Kivalina*, 696 F.3d at 853; *cf. Milwaukee II*, 451 U.S. at 317 (holding Clean Water Act displaced federal common law recognized in *Milwaukee I*).

Importantly, *AEP* did not address whether the Clean Air Act preempts state law claims related to climate change. Plaintiffs asserted state common law claims in the alternative, 564 U.S. at 418, but the Court did not reach those claims at all, *id.* at 429. *Cf. Kivalina*, 696 F.3d at 858 (Pro, J., concurring) (same). In short, because the "Clean Air Act displaces federal common law," the "availability *vel non*" of state law claims depends on the "preemptive effect of the federal Act." *AEP*, 564 U.S. at 429.[5] As explained below, *infra* Section II, the Clean Air Act does not completely preempt all state law climate claims.

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[5] Displacement and preemption are materially different. *AEP*, 564 U.S. at 423–24. Displacement is readily found, because "it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law." *Milwaukee II*, 451 U.S. at 317. In contrast, when considering preemption, courts "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* at 316; *see AEP*, 564 U.S. at 423. The Court has sometimes used the terms "preemption" and "displacement" interchangeably, *cf. Milwaukee I*, 406 U.S. at 107; *AEP*, 564 U.S. at 423, but regardless of the terminology, the Court has always employed a more stringent standard when considering claims that federal law preempts state law. *E.g.*, *Milwaukee II*, 451 U.S. at 316, 317 n.9.

d. There is no unique federal interest in climate change that completely preempts state law.

To the extent Defendants contend that addressing climate change—or addressing it "uniformly"—is a uniquely federal interest, such that a federal court could fashion in the first instance new common law that completely preempts state law, they are mistaken.

Only a "narrow" category of transboundary disputes truly raises uniquely federal interests: those interstate or international disputes "implicating the conflicting rights of States or our relations with foreign nations." *Texas Indus.*, 451 U.S. at 641. Baltimore's claims are brought against private parties for the tortious promotion of fossil fuels. These claims do not implicate the conflicting rights of States or relations with foreign nations.

The actual interstate or international aspects of Baltimore's claims are mundane. Suits involving parties in different jurisdictions, or conduct that crosses national or state boundaries, or global branding or marketing, all have "interstate" or "international" characteristics, but do not implicate uniquely federal concerns. For example, a coalition of forty state attorneys general recently reached a settlement with a Swiss bank concerning the fraudulent manipulation of LIBOR, "a benchmark

interest rate that affects financial instruments worth trillions of dollars and has a far-reaching impact on global markets and consumers."[6] *Cf. also*, *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 88 (1994) ("uniformity of law" governing "primary conduct on the part of private actors" not a significant federal interest).

To be sure, the federal government has an interest—or it should—in addressing climate change. But it is not a *unique* interest: "It is well settled that the states have a legitimate interest in combating the

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[6] Press Release, N.Y. Att'y Gen., *A.G. Underwood Announces $68 Million Multistate Settlement With UBS AG ("UBS") For Artificially Manipulating Interest Rates* (Dec. 21, 2018), https://ag.ny.gov/press-release/ag-underwood-announces-68-million-multistate-settlement-ubs-ag-ubs-artificially; *see also*, *e.g.*, *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, 895 F.3d 597, 603 (9th Cir. 2018) (affirming approval of $10 billion settlement between consumers and German company to resolve "a bevy of claims under state and federal law"); *Felix v. Volkswagen Grp. of Am., Inc.*, No. A-0585-16T3, 2017 WL 3013080, at *1, *6–7 (N.J. Super. Ct. App. Div. July 17, 2017), *appeal denied*, 177 A.3d 109 (N.J. 2017) (state law claims against non-resident car manufacturer for fraudulent marketing not preempted by Clean Air Act); *W. Virginia ex rel. Morrisey v. McKesson Corp.*, No. 16-1772, 2017 WL 357307, at *1, *9 (S.D. W. Va. Jan. 24, 2017) (state law tort claims against non-resident, national drug distributor, arising out of tortious interstate shipments, remanded to state court).

adverse effects of climate change on their residents." *O'Keeffe*, 903 F.3d at 913. And there are federal remedies that should be brought to bear. But federal remedies are not the exclusive means to address climate change. State law remedies are an important component of mitigation efforts.[7]

II. The Clean Air Act does not completely preempt Baltimore's claims.

Defendants also contend that this action is removable because Baltimore's claims are completely preempted by the Clean Air Act. AOB 48-51. Defendants are wrong. Complete preemption can only occur when a federal statute both preempts a state law claim and provides an exclusive substitute federal cause of action. *Caterpillar*, 482 U.S. at 393.

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[7] *See, e.g.*, Fourth National Climate Assessment, vol. II, ch. 29, fig. 29.1 *Mitigation-Related Activities at State and Local Levels,* https://nca2018.globalchange.gov/chapter/29/. "For example, states in the Northeast take part in the Regional Greenhouse Gas Initiative, a mandatory market-based effort to reduce power sector emissions." *Id.* at *State of Emissions Mitigation Efforts*. This state law initiative has led to substantial reductions in emissions and corresponding public health benefits. *See, e.g.*, Abt Associates, *Analysis of the Public Health Impacts of the Regional Greenhouse Gas Initiative*, 2009–2014 (Jan. 2017), https://www.abtassociates.com/insights/publications/report/analysis-of-the-public-health-impacts-of-the-regional-greenhouse-gas-0.

Neither condition is met here. The Clean Air Act does not address the marketing and promotion of fossil fuels. It thus presents no conflict with Maryland state law for preemption to resolve. *See Murphy*, 138 S. Ct. at 1480. Nor does recasting Baltimore's claims as air pollution claims change the result. The Act expressly preserves states' traditional authority to address air pollution under state law. *E.g.*, 42 U.S.C. § 7416.

Even if there were conflict between Baltimore's claims and the Act, however, complete preemption requires more: a substitute, exclusive federal cause of action "that replaces the preempted state cause of action." *King v. Marriott Int'l Inc.*, 337 F.3d 421, 425 (4th Cir. 2003). The Act does not provide a federal cause of action against private parties for the tortious promotion of fossil fuels. And the Act's provision of a "citizen suit" cause of action for violations of regulations, 42 U.S.C. § 7604, cannot sustain complete preemption because the Act expressly provides that this cause of action is not exclusive. *Id.* § 7604(e).

a. The Clean Air Act does not preempt all state law claims relating to climate harms.

The Act does not meet the first condition to completely preempt state claims relating to climate change: it does not *ordinarily* preempt

them. All preemption requires conflict between federal and state law. *Murphy*, 138 S. Ct. at 1480; *cf. Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019) (plurality opinion) ("Invoking some brooding federal interest . . . should never be enough to win preemption of a state law . . . ."). No such conflict exists.

Preemption is analyzed through various lenses: "express," "field," and "conflict." *Murphy*, 138 S. Ct. at 1480. But under any test, the Act does not preempt the claims here. As an initial matter, the Act does not address the promotion of fossil fuels—*i.e.*, it does not regulate the conduct of Defendants of which Baltimore complains. At the threshold, then, there can be no conflict. But even recharacterizing Baltimore's claims as "climate" or "air pollution" claims does not create a conflict.

i. The Act does not expressly preempt such claims.

First, the Clean Air Act does not expressly preempt state law that relates to air pollution or the climate. Rather, the Act expressly preserves broad state authority in this area. 42 U.S.C. § 7416; *See Exxon Mobil Corp. v. U.S. EPA*, 217 F.3d 1246, 1254 (9th Cir. 2000). The Act also contemplates the existence of both statutory and common law rights to seek relief from harmful emissions *outside* the Act's

framework, and explicitly preserves them. *See, e.g.*, 42 U.S.C. § 7604(e). These provisions do not demonstrate congressional intent to preempt all state law that relates to air pollution.[8]

The Act does contain express preemption provisions. For example, Section 209(a) provides that states may not prescribe "any standard relating to the control of emissions from new motor vehicles." 42 U.S.C. § 7543(a).[9] Section 211(c) likewise provides that states may not impose controls on any "fuel or fuel additive" "for purposes of motor vehicle emission control." *Id.* § 7545(c)(4)(A); *see also id.* § 7573 (preempting direct state regulation of aircraft emissions).

But these express provisions are limited to their terms and do not preempt even all state law actions relating to fuels or to new motor

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[8] In contrast, the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, for example, preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). The Clean Air Act contains no comparable provision.

[9] California is expressly exempted and allowed to set higher standards in most instances. 42 U.S.C. §§ 7543(b)(1), (e)(2)(A). And, in general, other states may choose to adopt California's standards. *Id.* §§ 7507, 7543(e)(2)(B); *see also id.* § 7545(c)(4)(B).

vehicle emissions. *See, e.g.*, *Oxygenated Fuels Ass'n v. Davis*, 331 F.3d 665, 670 (9th Cir. 2003) ("*OFA*") (California ban on fuel additive not preempted under Section 211(c) because ban was enacted to protect state waters and not to regulate emissions); *O'Keeffe*, 903 F.3d at 917 (Oregon program regulating production and sale of fuels based on greenhouse gas emissions not preempted under Section 211(c)); *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, 349 F.Supp.3d 881, 911 (N.D. Cal. 2018) (state law claims for deceptive marketing of "clean" emission vehicles not preempted by Section 209(a)). The presence of these targeted provisions simply highlights that the Act does not contain any provision that broadly preempts state law claims that relate to climate change.

ii. The Act does not preempt the field.

State law can be preempted "where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively." *OFA*, 331 F.3d at 667 (quoting *English v. Gen. Elec. Co.*, 496 U.S. 72, 78–79 (1990)). But no court has ever held that the Clean Air Act exclusively occupies the entire regulatory field relating to air pollution or climate change, and the Act's express preservation of state authority

negates any inference of congressional intent to do so. *See also, e.g.*, 42 U.S.C §§ 7401(a)(3), (c) (congressional findings and statement of purpose recognizing state authority).[10]

Further, because air pollution control is part of traditional state authority to protect the public health, *O'Keeffe*, 903 F.3d at 913, federal preemption will be found only if it was the "clear and manifest purpose of Congress." *Virginia Uranium, Inc. v. Warren*, 848 F.3d 590, 599 (4th Cir. 2017), *aff'd*, 139 S. Ct. 1894 (2019) (quoting *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)); *cf. Silkwood*, 464 U.S. at 248 (states possess "traditional authority to provide tort remedies"); *accord In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.,* 725 F.3d 65, 96 (2d Cir. 2013).

In *North Carolina, ex rel. Cooper v. Tennessee Valley Authority*, the plaintiff sought to impose, via an injunction under state law, emission controls on specific power plants. 615 F.3d 291, 296 (4th Cir.

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[10] Congressional intent to regulate exclusively can sometimes be inferred from the scope of a statute. *Altria Grp. v. Good*, 555 U.S. 70, 76 (2008). But simply labeling a statute's scope "comprehensive" does not suffice. *See, e.g., Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 613 (1991). The Clean Air Act is a prime example: it "establishes a comprehensive program for controlling and improving the United States' air quality," but it does so through both "state and federal regulation." *NRDC v. U.S. EPA*, 638 F.3d 1183, 1185 (9th Cir. 2011).

2010) ("*Cooper*"). Even there, however, this Court declined to find field preemption, *id.* at 302–303, instead concluding the specific claims conflicted with the Act's permitting scheme for power plants, *id.* at 301–304. And Baltimore's claims are far afield from *Cooper*.

Finally, Defendants' assertion that Baltimore's action "necessarily implicates nationwide emissions standards," AOB at 50, and "necessarily means imposing nationwide (and worldwide) restrictions on combustion of Defendants' fossil fuels," AOB at 49, is absurd. Baltimore does not seek any such relief. And a judgment ordering Defendants to pay damages, or place warnings on their products, will have no effect on emission standards. Warnings—or non-misleading advertisement—might, for example, prompt consumers to burn less fuel. But although driving less, or turning off the lights when going out, may reduce *emissions*, it does not affect *emission standards* one way or the other.

iii. The claims do not conflict with the Act's purposes.

State law climate claims do not inherently conflict with the Clean Air Act. Conflict preemption exists "where compliance with both state and federal law is impossible, or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and

objectives of Congress." *ONEOK, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1595 (2015) (citation omitted).

First, it is not impossible to comply with both "minimum federal standards" and "more demanding state regulations." *See Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141–42 (1963); *see also Sprietsma v. Mercury Marine*, 537 U.S. 51, 65 (2002). The Clean Air Act generally imposes minimum federal standards and expressly contemplates that states can adopt more demanding standards in many areas. *E.g.*, 42 U.S.C. §§ 7416, 7604(e); *Merrick v. Diageo Americas Supply, Inc.*, 805 F.3d 685, 693 (6th Cir. 2015). In other words, even if state law imposes additional or higher standards—such as through tort duties—it is generally possible to meet those standards and also comply with the Act.

Second, state law duties are not likely to stand as an obstacle to achieving the purposes of the Act. "The central goal of the Clean Air Act is to reduce air pollution." *OFA*, 331 F.3d at 673. Nothing in the Act evinces a congressional concern with reducing pollution *too much*. And courts should be wary of implying ancillary purposes not clearly expressed in federal legislation, or to entertain "the existence of a

hypothetical or potential conflict" with state law. *See United States v. Moffitt, Zwerling & Kemler, P.C.*, 83 F.3d 660, 669 (4th Cir. 1996) (citation omitted); *accord Virginia Uranium*, 139 S. Ct. at 1901, 1907 (plurality opinion); *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 486, 488, 499 (9th Cir. 1984) (federal allowance for some low-oil ballast discharges from maritime tankers did not preempt state complete ban on discharges); *OFA*, 331 F.3d at 673 (state law that had the effect of increasing gasoline prices did not conflict with Clean Air Act).

Broadly speaking, the Act directs the EPA to establish minimum federal standards for certain air pollutants and certain sources of air pollution. *See, e.g.*, *AEP*, 564 U.S. at 424–25 (describing regulation of stationary sources under Clean Air Act Section 111). A state law that *required* a source to emit pollution in violation of federal standards would likely be preempted. But a federal pollution standard does not create a federally-guaranteed right to pollute up to that standard. *Cf.*, *Chinatown Neighborhood Ass'n v. Harris*, 794 F.3d 1136, 1142 (9th Cir. 2015) (federal shark fishing allowance did not imply mandate to harvest; accordingly, state law restricting shark fin possession did not conflict); *Wyeth*, 555 U.S. at 583 (Thomas, J., concurring) (FDA approval

of drug label "does not give drug manufacturers an unconditional right to market their federally approved drug at all times"). In other words, state law that has the effect of reducing pollution is unlikely to conflict with the Act.

b. The Clean Air Act does not provide an exclusive federal cause of action for claims related to climate harms.

The Clean Air Act does not meet the second condition for complete preemption here either: it does not provide an exclusive substitute federal cause of action. *See Pinney*, 402 F.3d at 449 ("[A] defendant must establish that the plaintiff has a 'discernible federal [claim]' and that 'Congress intended [the federal claim] to be the exclusive remedy for the alleged wrong.'") (quoting *King*, 337 F.3d at 425).

Defendants point only to the Act's provision for judicial review of agency actions. 42 U.S.C. § 7607(b). But even construed as a "cause of action," it does not encompass the claims here. Indeed, Section 7607 does not allow a plaintiff to sue private parties for anything—and certainly not for tortious promotional conduct not regulated by the Act.

The Act does provide a "citizen suit" cause against private parties. 42 U.S.C. § 7604. But Section 7604 allows suit only for violations of emission standards or EPA orders, and Baltimore's claims are not based

on Defendants violating such standards or orders. Regardless, the Act expressly provides that this cause of action is not exclusive. *Id.* § 7604(e) (provision of citizen suit does not "restrict any right which any person" may have "under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief"); *cf. Lontz*, 413 F.3d at 441 (complete preemption requires evidence Congress intended statute to "provide *the exclusive* cause of action"). In short, without the "vital" exclusive substitute cause, *King*, 337 F.3d at 425, the Clean Air Act cannot completely preempt Baltimore's claims.

CONCLUSION

The Court should affirm the district court's order remanding this case to state court.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(G), I certify that:

This brief complies with Rule 29(a)(5)'s type-volume limitation because it contains 6,498 words (as determined by the Microsoft Word word-processing system used to prepare the brief), excluding the parts of the brief exempted by Rule 32(f).

This brief complies with Rule 32(a)(5)'s typeface requirements and Rule 32(a)(6)'s type-style requirements because it has been prepared in a proportionately spaced typeface using the Office 365 version of Microsoft Word in 14-point Century Schoolbook font.

/s/ Peter Huffman
Peter Huffman

CERTIFICATE OF SERVICE

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

/s/ Peter Huffman
Peter Huffman