No. 19-1189

IN THE

Supreme Court of the United States

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

Petitioners,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF AMICI CURIAE CHESAPEAKE BAY FOUNDATION AND NATURAL RESOURCES DEFENSE COUNCIL IN SUPPORT OF RESPONDENT

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INTERESTS OF AMICI CURIAE

Amici Curiae Chesapeake Bay Foundation, Inc. (CBF) and Natural Resources Defense Council, Inc. (NRDC), submit this brief to identify several failings in petitioners' treatment of certain environmental law issues that petitioners raise, but which fall outside the question presented to this Court.

CBF is a non-profit, tax exempt organization incorporated in the State of Maryland whose purpose is to "Save the Bay" and keep it saved, as defined by reaching a 70 on the Chesapeake Bay Foundation's Health Index. Climate change poses a threat to the restoration of the unique Chesapeake Bay, including by complicating efforts of municipalities like the City of Baltimore to address pollution entering its waterways. CBF submits this brief to highlight these and other localized impacts on the City of Baltimore.

NRDC is a nonprofit organization that works to protect public health and the environment. Since its founding in 1970, NRDC has litigated hundreds of environmental cases in state and federal court—including many under the Clean Air Act. *E.g.*, *Natural Resources Defense Council v. E.P.A.*, 489 F.3d 1364 (D.C. Cir. 2007). The petitioners here advance a theory of federal-question jurisdiction tied to federal pollution law. NRDC submits this brief to explain why a reasoned decision on federal jurisdiction would require analysis of provisions of the Clean Air Act that the petitioners have not put before the Court.[1]

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[1] This brief was not authored in whole or part by counsel for a party. No one other than Amici made a monetary contribution to its preparation or submission. All parties have consented to its filing.

SUMMARY OF THE ARGUMENT

This Court granted certiorari to answer a single question about the scope of appellate jurisdiction under 28 U.S.C. § 1447(d) for reviewing a district court order that remands a removed case to state court. Petitioners now ask the Court to go further and rule directly on the merits of removing this action to federal court. As respondent explains, that question is improperly presented to the Court. Resp. Br. 41–44. Indeed, the question is also incompletely presented, and the Court should not entertain it.

Respondent Mayor and City Council of Baltimore sued petitioners in Maryland state court, alleging that petitioners promoted and sold their fossil fuel products through deceptive means while concealing known dangers. Respondent alleges that this conduct violated Maryland state law, giving it cause to bring a civil action. Whether respondent is right about that is a question of Maryland state law over which the federal courts lack jurisdiction.

Petitioners nonetheless argue that this action is removable to federal court because "[a]t bottom, whenever there is 'an overriding federal interest in the need for a uniform rule of decision' . . . any claims necessarily arise under federal law." Br. 39 (quoting *Illinois v. City of Milwaukee*, 406 U.S. 91, 105 n.6 (1972) (*Milwaukee I*)). But that is not the law. Removal here turns on whether respondent's pleaded cause of action is one "arising under" federal law within the meaning of the federal-question jurisdiction statute, 28 U.S.C. § 1331. Petitioners purport to find their alternative standard in various federal environmental common law cases like *Milwaukee I*. But none of those cases involved federal-question jurisdiction over a civil action pleading only state causes, and

petitioners' theory does not account for this Court's cases that did.

Petitioners' argument also relies on premises in dispute, and they have not provided this Court with the information necessary to resolve those disputes. For example, they contend that federal common law is the relevant source of law for their theory of respondent's action. But, in fact, under this Court's cases, the Clean Air Act would be the relevant source. *See American Electric Power Co. v. Connecticut,* 564 U.S. 410, 423, 429 (2011) (*AEP*). The United States, as amicus, agrees that the Clean Air Act displaced federal common law, but suggests this does not mean "the door was opened" for state tort claims. U.S. Br. 27. The United States acknowledges, however, that how far the door is open for state claims depends on specific provisions of the Clean Air Act, none of which petitioners have briefed here.

Petitioners' foundational contention—that federal law, whatever its source, must "exclusively govern" this action—is also doubtful. Though in petitioners' view this case "implicates" various broad federal interests (*e.g.* Br. 42), the United States does not take up those implications in its brief (*compare* U.S. Br. 26–28), and neither it nor petitioners identify any particular provision of Maryland state law in conflict with federal law. Maryland has the right and the responsibility to protect the health, safety, and welfare of its residents, and respondent has every right to pursue available state law causes to address localized injuries caused by petitioners' allegedly deceptive conduct.

The district court saw petitioners' argument for what it is: "a veiled complete preemption argument." Pet. App. 49a. Petitioners deny this, presumably

because they cannot establish the stringent requirements for removal by complete preemption. *See, e.g.*, *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8–11 (2003). But petitioners have not identified any other plausible way in which respondent's state law causes of action could "arise under" federal common law for purposes of removal.

Behind the linguistic veil, petitioners' argument that federal environmental common law "governs" here is, in substance, an ordinary preemption argument: it is premised on their answer to the disputed question of whether or not there is an irreconcilable conflict between federal common law and the state law that respondent seeks to enforce. State courts routinely resolve such questions in the first instance, and if petitioners could show they were right about the answer, the Supremacy Clause would ultimately protect them by "directing state courts that they must not give effect to state laws that conflict with federal law." *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2262 (2020) (direct appeal) (citation omitted). But the question of whether there *is* any conflict between enforcing Maryland law and federal law is not, itself, a federal question that creates jurisdiction. *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 10–12 (1983). The Court should affirm.

ARGUMENT

Respondent sued petitioners in Maryland state court, alleging that petitioners violated state law by promoting their fossil fuel products using "disinformation" to conceal "the products' known dangers." Pet. App. 21a–22a. Although respondent only claims causes

of action under Maryland state law, petitioners seek to remove the action as "arising under" federal common law.

The jurisdictional rules of removal are well defined, and petitioners have not shown they are met. A defendant may remove a "civil action" from state court to federal court if the federal district court would have original jurisdiction over the action. 28 U.S.C. § 1441(a). Congress has limited this original jurisdiction to those civil actions "arising under" federal law. 28 U.S.C. § 1331. Although this "arising under" language tracks the language of Article III, and "the constitutional meaning of 'arising under' may extend to all cases in which a federal question is an ingredient of the action," this Court "ha[s] long construed the statutory grant of federal-question jurisdiction as conferring a more limited power." *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 807 (1986) (citation omitted).

For statutory purposes, the "presence or absence of federal-question jurisdiction" depends heavily on the plaintiff's chosen cause of action. *Rivet v. Regions Bank of La.*, 522 U.S. 470, 475 (1998). The statutory inquiry is "governed by the 'well-pleaded complaint rule,'" *id.*, which looks to "the plaintiff's statement of his own cause of action," *Beneficial Nat'l Bank*, 539 U.S. at 6 (citation omitted), recognizing that plaintiffs are entitled to "avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). Where, as here, a plaintiff relies on state-law created causes of action, the action does not arise under federal law except in specific narrow circumstances. *See Gunn v. Minton*, 568 U.S. 251, 257–258 (2013) (discussing "*Grable*"

jurisdiction); *Beneficial Nat'l Bank*, 539 U.S. at 8 (discussing "complete preemption").

Petitioners here do not situate this action within one of these recognized exceptions. Instead, they posit that "direct[]" application of other "longstanding precedents" shows that respondent's action arises under federal common law. Br. 37. As explained below, however, none of petitioners' cases involved federal-question jurisdiction over a civil action pleading only state causes, and their theory fails to account for relevant federal law and this Court's removal precedents.

I. Removal on petitioners' theory would be unprecedented.

None of the cases petitioners cite in support of removal (Br. 38–42) even addressed if a state law claim can "arise under" federal common law. To be sure, this Court has previously recognized the availability of causes of action under federal environmental common law. *E.g. City of Milwaukee v. Illinois*, 451 U.S. 304, 309 (1981) ("*Milwaukee II*"). But contrary to petitioners' suggestion (Br. 38–39), those cases did not hold that state claims are removable if they may ultimately be resolved by a federal common law "rule of decision." None of those cases addressed whether federal-question jurisdiction would lie over a state created cause of action because the question was irrelevant: federal jurisdiction was already grounded elsewhere.

For example, in *Georgia v. Tennessee Copper Co.,* plaintiff Georgia invoked this Court's original jurisdiction—not a district court's federal-question jurisdiction. 206 U.S. 230 (1907). *Milwaukee I* was also an original action in this Court. 406 U.S. at 93. The Court declined to exercise original jurisdiction, however,

because the dispute was not between two States and "Illinois could appeal to federal common law" in "an action in federal district court." *Milwaukee II*, 451 U.S. at 309. So, Illinois did, *id*. at 310, and jurisdiction lay in the district court because Illinois' complaint pled a federal cause of action. The *Milwaukee* cases do not hold—and had no reason to hold—that an action by Illinois appealing only to *state* law could be removed to federal district court as "arising under" federal law. And although *United States v. Standard Oil Co*. (Br. 38) was not an original action, federal jurisdiction was solidly grounded because the United States was the plaintiff. 332 U.S. 301 (1947); *see Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 691 (2006).

Whether or not the Court "resolv[ed]" Georgia's claim under federal law in *Tennessee Copper*, or explained considerations for choosing to apply federal over state law in *Milwaukee I* (Br. 40), is beside the point. Jurisdiction was grounded on the nature of the parties, not the source of the plaintiff's environmental rights in dispute. Once a federal court *has* jurisdiction, it may need to then conduct a "choice-of-law" analysis to determine whether state or federal law (including federal common law) will "determine the merits of the controversy." *Empire Healthchoice*, 547 U.S. at 691. But the need to perform a "choice-of-law" analysis in the face of a potential conflict of state and federal law is not a *source* of federal-question jurisdiction. *Cf. Franchise Tax Bd.*, 463 U.S. at 12 ("By unimpeachable authority, a suit brought upon state statute does not arise under [federal law] because prohibited thereby.") (quoting *Gully v. First Nat'l Bank*, 299 U.S. 109, 116 (1936)).

Petitioners' remaining cases (Br. 38–42) do not help them either, because, again, the Court there was not addressing whether a pled state cause of action "arises under" federal law to create federal-question jurisdiction. Jurisdiction in *International Paper Co. v. Ouellette* was grounded on diversity, 479 U.S. 481, 500 (1987); *cf. Ouellette v. Int'l Paper Co.*, 86 F.R.D. 476, 478 (D. Vt. 1980), and the plaintiffs in *AEP* pled a federal common law cause, 564 U.S. 410, 418 (2011). *See also, e.g.*, *PPL Montana LLC v. Montana*, 565 U.S. 576, 580–581 (2012) (direct appeal of civil action litigated in state court involving dispute over constitutional "equal-footing" doctrine) (Br. 39). The non-environmental cases that petitioners cite are even further afield, and involved plaintiffs claiming violations of federal rights. *Cf., e.g.*, *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 632–633 (1981) (civil action filed in federal court alleging federal right of contribution under federal statute); *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 849–853 (1985) (civil action filed in federal court alleging a federal right of protection from tribal jurisdiction).

In short, none of the cases petitioners point to addressed whether a state law cause of action "arises under" federal common law. Contrary to petitioners' suggestion (Br. 4), simply "applying [those] precedents" would not answer any removal-relevant question here, and the Court should decline to try.

II. Petitioners have not briefed the relevant source of federal law for their theory of this case: the Clean Air Act.

Petitioners argue (Br. 43–44) that the Court should ignore respondent's formally pled tort claims, because

"the real nature" of the claim "seeks to regulate" interstate pollution. "[C]laims seeking redress for interstate pollution are governed exclusively by federal common law," petitioners say, such that they "necessarily arise under federal law for purposes of federal-question jurisdiction." Br. 38. But even were this an action here to regulate interstate pollution, petitioners do not explain why federal redress—exclusive or otherwise—would come from common law instead of from the Clean Air Act, 42 U.S.C. §§ 7401 *et seq*.

Indeed, in the court below petitioners argued that the Clean Air Act "establishes the exclusive vehicle for regulating nationwide emissions of air pollutants." Defendants' Fourth Cir. Br. at 48. They argued that injured parties may "petition the EPA for rulemaking," and highlighted that Maryland had sought judicial redress for EPA's failure "to regulate emissions from . . . neighboring states." Defendants' Fourth Cir. Br. at 49 & n.14. After certiorari was granted here, and shortly before submitting their opening brief, various petitioners were still arguing to other courts in "related cases" (Br. 6–7 n.1) that emissions regulation "is governed by the Clean Air Act"; that the Act "provides the exclusive means for regulation of interstate emissions"; and that state "causes of action based on the *interstate* emission of greenhouse gases" are completely preempted by the Clean Air Act because the Act provides "the exclusive cause of action for the claim asserted" and "provides the exclusive remedy." *E.g.* Notice of Removal, at 92 ¶ 151, 108–110 ¶¶ 180–182, *Delaware v. BP America Inc.*, Civ. No. 20-1429 (D. Del. Oct. 23, 2020). Here, in contrast, petitioners argue that "federal common law governs claims seeking redress for interstate air . . . pollution," (Br. 41), and they barely mention the Clean Air Act.

Regardless of petitioners' current litigating position, the Clean Air Act is indisputably relevant to any consideration of the scope of federal rights and immunities in the area of air pollution.

In *Ouellette*, this Court considered a diversity action claiming redress for transboundary water pollution under state common law of nuisance. 479 U.S. at 484–485. Contrary to petitioners' suggestion here, the Court there did not "appl[y] federal common law to [the] claims" (Br. 15) or "resolv[e them] by reference to federal common law," (Br. 9), because the federal Clean Water Act "now occupied the field, pre-empting all *federal* common law." *See* 479 U.S. at 488–489 (emphasis original). "[W]hether injured parties still had a cause of action under *state* law" was an "open . . . question" in this Court. *Id*. at 489 (emphasis original). To answer that open question, the Court needed to consider "the pre-emptive scope of the Clean Water Act." *Id.* at 483.[2]

The Court's detailed analysis of the Clean Water Act in *Ouellette, e.g.*, *id*. at 489–491, makes no sense under petitioners' theory here. If "[n]o state law exists in this area . . . to invoke," and all "claims alleging injury from interstate . . . pollution . . . inherently *are* federal claims" (Br. 43), the Court would not have needed to construe and apply the Act at all. If the Vermont plaintiffs' state common law claims "inherently [*were*] federal" common law claims, the Court could have stopped writing after reiterating the *Milwaukee II* holding that "all federal common law"

[2] A federal statute can readily displace federal common law while not preempting state law, because the effect of the statute on each is evaluated under different standards, and the test for preempting state law is significantly more stringent. *See, e.g.*, *AEP*, 564 U.S. at 423–24; *Milwaukee II*, 451 U.S. at 316, 317 n.9.

was preempted. *See* 479 U.S. at 489. The Court's continued construction and application of the Clean Water Act, *id*. at 489–500, only makes sense if transboundary pollution claims under state law are *not* inherently federal.

So too in *AEP*, where this Court considered an action claiming redress for transboundary air pollution under both federal common law and state tort law. 564 U.S. at 418. Only the federal common law claim was before the Court, *id.* at 429, and the parties hotly disputed whether such a claim existed, *id.* at 422–423. The dispute, however, was "academic," because the Clean Air Act displaced "[a]ny such claim." *Id*. at 423; *see also id.* at 415, 424, 429. On petitioners' theory here, that holding should have disposed of the state tort claims as well. But, as in *Ouellette*, this Court explained that "the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal [Clean Air] Act." *Id.* at 429. Again, as in *Ouellette*, the Court's admonition to consider the preemptive effect of the statute only makes sense if the state tort claims were *not* inherently federal common law claims.

In short, petitioners' "inherently federal" theory is not consistent with *Ouellette* and *AEP*. For its part, the United States, as amicus here, accepts that the Clean Air Act displaced federal common law in this area, but suggests this does not mean "the door was opened" for state tort claims. U.S. Br. 27. But it acknowledges, as it must, that how far the door is open for state claims depends on specific provisions of that Act (U.S. Br. 27), none of which petitioners have briefed here.

Because petitioners seek to remove this action as "arising under" federal law, "a right or immunity" created by federal law "must be an element, and an

essential one, of [respondent's] cause of action." *Franchise Tax Board*, 463 U.S. at 10–11 (quoting *Gully*, 299 U.S. at 112); *Rivet*, 522 U.S. at 475. Under *AEP*, the Clean Air Act defines the substance of federal law—and its "rights or immunities," if any—in the area where petitioners would situate this action. Because petitioners have not briefed the substance of the Act that is necessary to an informed removal decision, the Court should not consider their theory.

III. This action is not a controversy over "uniquely federal" interests.

Independent of the Clean Air Act's displacement of federal common law, petitioners' contention that this action must be "governed exclusively by federal common law," because it "implicate[s]" "uniquely federal interests" is doubtful (Br. 38)—and they have provided scant support for the premise. As a legal matter, petitioners fail to explain how this action puts the sovereign rights of different States in conflict such that this Court would need to create federal common law. And as a factual matter, respondent has a very real interest in addressing the localized injuries caused by petitioners' alleged deception.

A. Not all interstate disputes are federal.

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 the "conflicting rights of States" that create the

conditions for federal common lawmaking. *See Texas Indus.,* 451 U.S. at 641.[3]

Petitioners are private actors, and they do not explain why general concepts of "coequal sovereignty" make *this* action one that could implicate the conflicting rights of States. *Franchise Tax Board v. Hyatt* (Br. 39), for example, involved a *State's* right to sovereign immunity from private suit in the courts of other States. 139 S. Ct. 1485, 1492 (2019). Such a right is patently not at issue here. *Cf., e.g.*, *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" is not a significant federal interest).

Petitioners suggest this action generally puts different States' air pollution laws in conflict (Br. 39), but the environmental common law cases they rely on were all actions to enjoin operations at discrete pollution sources, where specific competing state regulation might present identifiable conflict. *E.g. Georgia v. Tennessee Copper Co.*, 237 U.S. 474, 475, 477–478 (1915) (injunction limiting smelting plant from emitting more than 20 tons of sulphur per day); *Milwaukee II*, 451 U.S. at 308–309, 311–312 (injunction to "achieve specified effluent limitations" at two sewage treatment

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[3] For example, forty state attorneys general—including for Indiana and most of its co-amici here—settled with a Swiss bank to resolve claims under both state and federal law 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. *See* https://ag.ny.gov/sites/default/files/ubs_settlement_agreement.pdf (last visited Dec. 22, 2020). *See also, e.g.*, *In re Volkswagen "Clean Diesel" Mktg., Sales Prac., & Prod. 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"), *cert. denied*, 139 S. Ct. 2645 (2019).

plants and eliminate sewer overflows at "discrete discharge points"). Here, petitioners do not identify any particular source facing regulatory conflict, or explain how such a conflict would come about.

Suppositions about the federal interest in air pollution would also need to address the Clean Air Act, Congress's word on the subject. The Act is dense but opens by declaring that its "primary goal" is "to encourage or otherwise promote reasonable Federal, State, and local government actions, consistent with [its] provisions . . . for pollution prevention." 42 U.S.C. § 7401(c). Petitioners do not address any of these provisions. And although a partial reading cannot substitute for consideration of the full text, even a quick skim of the Act calls into question petitioners' demand for exclusively federal uniform standards. The Act, for example, expressly provides for broad retention of *state* authority, 42 U.S.C. § 7416, and then separately authorizes citizen suits against any person who violates *federal* standards, *id.* § 7604(a), while expressly reserving "*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," *id.* § 7604(e) (emphasis added). And as amici can attest, even those pollution standards that are set federally are rarely "uniform" in petitioners' sense, *see generally* 40 C.F.R. §§ 50.1–98.478 ("Air Programs"), for the straightforward reason that the causes, effects, and needed solutions to air pollution problems are not uniform.

Finally, in petitioners' view this case "implicates" a list of broad federal interests (e.g. Br. 42), but they do not identify any particular provision of federal law in conflict with relevant Maryland state law, or explain why a conflict would cause the action to "arise

under" federal law. The United States is here as amicus, but it does not raise these same concerns. *Compare* U.S. Br. 26–28. Further, petitioners' proposed federal interest in "fossil-fuel production" (Br. 15), misapprehends federal common lawmaking, which is concerned with specific interests necessary to a "federal *system*" of government. *Texas Indus.*, 451 U.S. at 641 (emphasis added). Petitioners fail to explain how a federal system of government necessarily depends on any of those purported interests.

B. Respondent faces unique local challenges.

To be sure, amici believe the federal government should take action to address greenhouse gas pollution, and there are some actions only it can take. The federal government might also take action to address misinformation about the causes and effects of pollution, though here the states have often taken the lead. Although petitioners will have an opportunity to dispute in the court of first review whether respondent's claims of a "sophisticated disinformation campaign" are accurate, *see* Pet. App. 21a, deception clearly can produce distinct harms. For example, a federal law allowance to dispose of chemicals in a stream does not obviously immunize the disposer against misrepresenting known health risks to a prospective downstream community.

Action at all levels of government is both possible and necessary, and amici can speak from experience that the nature of pollution challenges necessitates local action. To say that the climate is changing is not to say that it is changing everywhere uniformly as

petitioners here suggest.[4] These changes vary by location and interact with different preexisting local infrastructure and topology to produce uniquely local injuries. Petitioners do not explain how a "uniform" federal solution could fully address these localized impacts.

Respondent here must continue to direct limited resources to address local scale impacts. Among many other climate related impacts, Baltimore is experiencing unprecedented increases in flooding, precipitation, extreme heat, and ground level ozone. These impacts often fall hardest on the most vulnerable communities within the city.

For example, as sea level rises, instances of "sunny day flooding"—flooding of normally dry parts of the city due simply to regular movement of the tides—continue to increase.[5] A NOAA report found that Baltimore experienced an increase in the number of

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[4] Elsewhere, some petitioners acknowledge the true nature of climate change. For example: "Chevron accepts the consensus of the scientific community on climate change. That scientific consensus is embodied in the results of the Intergovernmental Panel on Climate Change, the IPCC." Hearing Tr., *City of Oakland v. BP p.l.c.*, No. 17-cv-6011 (N.D. Cal. Mar. 21, 2018) (Dkt. 189) at 80:20–24. The IPCC is an organization that convenes leading scientific experts to "provide governments at all levels with scientific information that they can use to develop climate policies." https://www.ipcc.ch/about/. The misperception that climate change is "uniform" is common enough that the IPCC has provided a public primer in its Frequently Asked Questions: "The impacts of climate change are being felt in every inhabited continent and in the oceans. However, they are not spread uniformly across the globe, and different parts of the world experience impacts differently." *See* https://www.ipcc.ch/sr15/faq/faq-chapter-3/.

[5] Scott Dance, *Baltimore, Annapolis set records for sunny-day flooding in 2018—and it could eventually occur every other day*, BALTIMORE SUN (July 10, 2019), https://bit.ly/3h92Boo.

flood days of more than 920 percent since 1960,[6] and the agency projects that by end of the century, high tide flooding will occur "every other day" in the region.[7] In May 2020, Baltimore experienced the worst coastal flooding since Hurricane Isabel hit in 2003.[8] The combination of high winds and rainfall flooded Baltimore's Inner Harbor, with a peak tide of 4.24 feet, which equates to a tide 2.5 to 3 feet above normal and a full foot of flooding on normally dry ground. Flooding events like this will continue to increase, a harm with specific local costs to Baltimore, including lack of access to transportation and delays, impairment of energy, water and sewage services, and closing of businesses.[9]

Precipitation levels are also increasing in the Baltimore area as a result of climate change, leading to stronger storms, particularly in the winter months.[10] August 2020 was the one of the wettest in

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[6] NOAA, *'Nuisance flooding' an increasing problem as coastal sea levels rise* (July 28, 2014), https://www.noaa.gov/media-release/noaa-nuisance-flooding-increasing-problem-as-coastal-sea-levels-rise.

[7] NOAA, *Patterns and Projections of High Tide Flooding Along the U.S. Coastline Using a Common Impact Threshold*, NOAA Tech. Report NOS CO-OPS 086, ix (2018).

[8] Jason Samenow, *Baltimore experiences worst coastal flooding since 2003*, WASHINGTON POST (May 1, 2020), https://wapo.st/3aHtVsC..

[9] Center for Integrative Environmental Research at the University of Maryland, *The US Economic Impacts of Climate Change and the Cost of Inaction*, 16–19 (2007), https://bit.ly/2WGEyEa.

[10] Raymond G. Naijar, et. al, *Potential climate-change impacts on the Chesapeake Bay*, 86 Estuarine, Coastal, and Shelf Sci. 1, 3

Baltimore history, with the city receiving nearly twelve inches of rainfall.[11] Strong storms with heavier than normal rainfall overwhelm infrastructure designed for normal precipitation, and heavy rain can cause dangerous flash flooding. Baltimore experienced flash floods this past summer, where quickly rising water trapped cars and even a city bus with passengers still onboard.[12] The city will continue to experience unprecedented levels of rainfall, leading to flooding that damages city infrastructure and that threatens the health and safety of residents. And respondent will continue to expend resources in response to these local harms.

Respondent must also address the localized effects of unprecedented temperatures. Cities are generally warmer than other locations—known as the urban heat island effect—because concrete and other hard surfaces retain more heat compared to green spaces like parks, lawns, and vegetative areas.[13] On what

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(2010); United States Geological Survey, *Factors Affecting Long-Term Trends in Surface Water Quality in the Gwynns Falls Watershed, Baltimore City and County, Maryland, 1998-2016*, 2 (2018), https://pubs.usgs.gov/of/2018/1038/ofr20181038.pdf; *see also* Fourth National Climate Assessment, Chapter 18: Northeast, https://nca2018.globalchange.gov/chapter/18/.

[11] McKenna Oxenden, *Maryland Weather: August is fourth wettest in history, more rain expected this week*, BALTIMORE SUN (Sept. 1, 2020), https://bit.ly/3mEVUMc.

[12] Kelsey Kushner, *Maryland Weather: MTA Bus Caught in Floodwater in NE Baltimore With Passengers On Board*, CBS BALTIMORE (July 22, 2020), https://cbsloc.al/37Ev4PO.

[13] *See* Baltimore Office of Sustainability, *Urban Heat Island Sensors*¸ https://www.baltimoresustainability.org/urban-heat-island-sensors/ (last visited Dec. 11, 2020); *see also* Roxanne Ready,

would be a hot summer day anywhere, when neighborhoods with parks and significant tree cover record 87 degree heat, less verdant neighborhoods around downtown that are more vulnerable to extreme heat may record temperatures over 101 degrees.[14] The neighborhoods experiencing the worst heat in the city are predominantly Black communities, and often communities with lower incomes. Extreme heat is not just uncomfortable, it is deadly.[15] To combat extreme heat, respondent is actively working to mitigate the urban heat island effect by planting trees, aiming to increase the tree canopy cover in Baltimore by 40 percent.[16]

In Baltimore, increased heat is often directly linked to poor air quality. Ground level ozone or smog forms when nitrogen oxides, byproducts of combustion, react with other organic compounds in the presence of heat and sunlight.[17] The concentration of ozone in the air is "strongly dependent on temperature" and the increased frequency of very hot days and heat waves

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et. al, *Code Red: the Role of Trees*, Howard Center For Investigative Journalism, (Sept. 3, 2019), https://bit.ly/34DPern.

[14] Nadja Popovich and Christopher Flavelle, *Summer in the City Is Hot, but Some Neighborhoods Suffer More*, N.Y. TIMES (Aug 9, 2019) (describing study to map Baltimore's heatscape with assistance from local volunteers), https://nyti.ms/3pgV5uu.

[15] *See, e.g.*, Centers for Disease Control and Prevention, *Heat-Related Deaths — United States, 2004–2018, Morbidity and Mortality Weekly Report*, Vol. 69, No. 24, 730 (June 19, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6924a1-H.pdf.

[16] Baltimore Dept. of Recreation & Parks, TreeBaltimore, https://bcrp.baltimorecity.gov/forestry/treebaltimore (last visited Dec. 16, 2020).

[17] National Weather Service, *Clearing the Air on Weather and Water Quality*, https://www.weather.gov/wrn/summer-article-clearing-the-air (last visited Dec. 11, 2020).

associated with climate change will increase ozone concentrations.[18] Poor air quality directly contributes to higher asthma rates, and other respiratory and cardiovascular diseases, harming residents directly and also leading to increased hospitalizations during periods of abnormal heat.[19]

These and other impacts, and the steps necessary to mitigate them, are unique to the conditions present in Baltimore. Respondent has borne and will continue to bear significant costs to address these local harms.

IV. Petitioners have not shown any federal cause exists to "artfully plead" around.

As discussed above, *supra* Section I, petitioners' removal theory relies on non-removal cases which did not address when a state law cause of action can "arise under" federal law for jurisdictional purposes. But petitioners also fail to show their theory is consistent with this Court's voluminous precedents that *do* address removal. They invoke the "artful pleading" exception to the well-pleaded complaint rule (Br. 44), but cite no case applying it how they propose, and they do not explain how this action possibly falls within that exception.

Relying on a footnote in *Federated Department Stores, Inc. v. Moitie*, petitioners urge the Court to ignore the state-law causes of action in respondent's

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[18] Thomas C. Peterson, *Changes in weather and climate extremes: State of knowledge relevant to air and water quality in the United States*, 64 J. AIR AND WASTE MGMT. ASS'N 184, 187 (2014).

[19] National Institute of Environmental Health Services, *Air Pollution and Your Health*, https://www.niehs.nih.gov/health/topics/agents/air-pollution/index.cfm (last accessed Dec. 11, 2020).

complaint here and simply determine whether "the real nature" is federal. (Br. 44 (citing 452 U.S. 394, 397 n.2 (1981).) But petitioners offer no standard to guide the Court's inquiry. *Cf., e.g.*, *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1575 (2016) ("Jurisdictional tests are built for more than a single dispute."). And they fail to acknowledge that the footnote they rely on—inapposite here to begin with—was "confine[d] to its specific context" by a unanimous Court in *Rivet*, *see* 522 U.S. at 472, 477–478, a case petitioners do not cite in their brief.

As *Rivet* explains, "[t]he artful pleading doctrine allows removal where federal law completely preempts a plaintiff's state-law claim." *Id.* at 475. To invoke it, petitioners must show that respondent's state law tort causes are not "well-pleaded," but are instead "artfully" pleaded to avoid pleading a "necessary" federal cause, *Rivet*, 522 U.S. at 475, *i.e.*, an "exclusive [federal] cause of action" whose "scope" encompasses respondent's "state-law cause of action," *see Beneficial Nat'l Bank*, 539 U.S. at 8.

Petitioners, and the United States as amicus, suggest that this Court has never limited the artful pleading exception to cases of complete preemption by federal statute, implying that it could apply in federal common law cases. Br. 44; U.S. Br. 28. But they cite no example of this Court applying it under federal common law, or in any other way than described in *Rivet*, further confirming that petitioners' theory is novel and not an application of existing precedents. *Cf. Beneficial Nat'l Bank*, 539 U.S. at 13–15 (Scalia, J., dissenting) (noting the Court had previously only "twice recognized exceptions to the well-pleaded-complaint rule," both examples of complete preemption by federal statute). Regardless, petitioners appear

to have waived a federal common law argument on this ground in the court below: "[We] did 'not make a complete-preemption argument *as to federal common law*.'" Defendants' Fourth Cir. Reply Br. at 10. So even if complete preemption by federal common were theoretically possible, *but cf.*, *e.g.*, *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (preemption of state law requires clear *legislative* intent), it would not help petitioners here.

Further, even if petitioners had not waived the argument, they still would need to be able to demonstrate the requirements for complete preemption. Among other things, complete preemption requires a federal cause of action that respondent could sue on—and an exclusive one at that. *Beneficial Nat'l Bank*, 539 U.S. at 8–9. By invoking "artful pleading," petitioners imply that respondent had a federal common law cause of action available to it but declined to plead it. But the only potential source of a federal cause—pre-Clean Air Act common law—no longer exists, *AEP*, 564 U.S. at 423, and petitioners do not explain what other cause respondent could have pled.[20] In any event, it is respondent's right to rely only on state causes, and having done so, removal is only available within "the

[20] After *AEP*, it is not clear that a federal district court would have federal-question jurisdiction even over a complaint that expressly pleaded a federal common law cause of action on transboundary air pollution. Although a federal district court may have jurisdiction under 28 U.S.C. § 1331 to determine that a pleaded federal cause ultimately lacks merit, it does not have jurisdiction over a cause "foreclosed by prior decisions of this Court," because there is no "federal controversy" as to the existence of the foreclosed cause. *See Oneida Indian Nation of N. Y. State v. County of Oneida*, 414 U.S. 661, 666–67 (1974). Petitioners do not explain what federal cause respondent could bring that is not foreclosed by this Court's decision in *AEP*.

century-old jurisdictional framework . . . governed by the 'well-pleaded complaint rule,'" *Caterpillar*, 482 U.S. at 391–392, which petitioners barely address.

The district court correctly concluded that petitioners were presenting a "veiled complete preemption argument." Pet. App. 49a. Petitioners deny this—presumably because they cannot establish the stringent criteria for complete preemption—but they nowhere explain why their theory is not simply one of ordinary preemption. However styled, their argument that federal environmental common law "governs" here is, in substance, a preemption argument: it is premised on answering the disputed question of whether there is an irreconcilable conflict between federal common law and the state law that respondent seeks to enforce. That is a preemption question, *cf. Murphy v. N.C.A.A.*, 138 S. Ct. 1461, 1479–80 (2018) (state law rights are enforceable unless they conflict with federal law), and a lurking preemption question is not a federal question that creates jurisdiction for removal. *Franchise Tax Bd.*, 463 U.S. at 14.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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