No. 21–1752

In the United States Court of Appeals for the Eighth Circuit

STATE OF MINNESOTA,

Plaintiff-Appellee,

v.

AMERICAN PETROLEUM INSTITUTE; EXXON MOBIL CORPORATION; EXXONMOBIL OIL CORPORATION; KOCH INDUSTRIES, INC.; FLINT HILLS RESOURCES LP; AND FLINT HILLS RESOURCES PINE BEND LLC,

Defendants-Appellants,

On Appeal from the United States District Court
District of Minnesota
Civ. No. 20-1636
Hon. John R. Tunheim

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, 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.

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INTEREST OF AMICUS CURIAE

Amicus Curiae Natural Resources Defense Council (NRDC) is a non-profit organization that works to protect public health and the environment. Since its founding in 1970, NRDC has worked to ensure enforcement of the Clean Air Act and other federal and state laws to address major environmental challenges.

Minnesota is bearing many harmful effects of climate change. The State here seeks some relief under causes of action that Minnesota law provides to address harms to the welfare of the State and its residents. Defendants contend that enforcing these laws would impermissibly undermine federal authority to regulate interstate pollution. NRDC strongly disagrees. The State's consumer protection claims seek redress for deceptive conduct, not emissions regulation.

NRDC submits this brief to explain why Defendants' theory of federal-question jurisdiction misconstrues the nature of federal emissions regulation. The federal Clean Air Act, not historical federal common law, is the substantive source of federal emissions law. The Act sets a nationwide baseline for addressing air pollution and provides some federal remedies. But the Act does not relieve states of the

primary responsibility for protecting the health and welfare of their residents. NRDC has defended state laws addressing the effects of climate change against the challenge that they interfere 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).

Action on climate change 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 climate pollution. From the multi-state Regional Greenhouse Gas Initiative that reduces power sector carbon dioxide emissions; to requirements for utilities to supply electricity from renewable sources; to mandates for electric vehicles; to building efficiency codes, enforcing state law is an effective means to help society transition to an energy system that will not harm the climate that sustains us.[1]

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[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, Minnesota has consumer protection laws that provide rights of action against violators. The State claims Defendants here violated these laws by promoting fossil fuel products through deceptive means while concealing their known dangers. Whether the State is right about that is a question of Minnesota state law over which the federal courts lack jurisdiction.

In particular, the State's claims do not "arise under" federal environmental common law so as to create federal-question jurisdiction. Defendants argue that the State's claims are "governed by" federal environmental common law, and they point to decisions like *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) ("*Milwaukee I*") for the proposition that "governed by" and "arising under" are the same thing. Appellants' Opening Brief ("AOB") 13–16, 27. But Defendants simply misconstrue those cases. None of them even addressed whether federal-question jurisdiction would lie over a civil action pleading only state law claims, and Defendants' theory conflicts with the many Supreme Court cases that *do* address that question.

For the State's claims to arise under federal environmental common law, "[a] right or immunity created by [federal environmental common law] must be an element, and an essential one, of [Minnesota's] cause of action." *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 10–11 (1983) (citation omitted). But Defendants nowhere specify what federal common law right is an essential element of the State's causes of action. Nor could they. The common law they point to does not address the subject of deceptive conduct for which the State seeks redress. And even in the area of "transboundary emissions" where Defendants would situate this action, AOB 1, the source of federal rights is the Clean Air Act, not federal common law. *Am. Electric Power Co. v. Connecticut*, 564 U.S. 410, 423, 429 (2011) ("*AEP*").

The Clean Air Act likewise does not speak to the actual claims here, and Defendants' overarching contention that this action "threatens to interfere" with federal emissions regulation, AOB 9, is unfounded. But it shows their "governed by" argument for what it is: a conflict preemption argument. And it is well settled that more than a conflict with federal law is required to create jurisdiction to remove state actions to federal court. *Franchise Tax Bd.*, 463 U.S. at 10–12.

ARGUMENT

Minnesota sued in state court. Defendants may remove the action to federal district court if the court would have original jurisdiction over the action. 28 U.S.C. § 1441(a). That jurisdiction includes civil actions "arising under" federal law. 28 U.S.C. § 1331. Although this 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," the Supreme 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 on the plaintiff's chosen cause of action. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). Because the State here claims rights of action under state law, the action does not arise under federal law except in specific narrow circumstances. *See Gunn v. Minton*, 568 U.S. 251, 257–58 (2013) ("*Grable*" jurisdiction); *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003) ("complete preemption"). These rules are well settled. Defendants have not shown they are met.

Importantly, the rules do not change if this case is characterized, as Defendants would have it, as "premised on transboundary pollution," AOB 19, and "not about consumer protection," AOB 21. As explained below, none of Defendants' "transboundary pollution" cases show that the State's claims arise under federal law, because none of those cases involved federal-question jurisdiction over a civil action pleading only state causes. Defendants' theory also fails to account for relevant federal law and controlling removal precedents.

I. Defendants' Environmental Common Law Removal Theory Is Unprecedented.

Defendants' primary theory is that the district court had federal-question jurisdiction because "claims seeking redress for interstate pollution are governed exclusively by federal common law" such that they "necessarily arise under federal law." AOB 13. But none of the "interstate pollution" cases Defendants cite in support, AOB 14–19, addressed whether a state law claim can arise under federal common law, "necessarily" or otherwise. To be sure, the Supreme 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 Defendants'

suggestion, AOB 14, those cases did not hold that state claims arise under federal law 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.*, AOB 15, plaintiff Georgia invoked the Supreme Court's original jurisdiction—not a district court's federal-question jurisdiction. 206 U.S. 230 (1907). *Milwaukee I*, upon which Defendants heavily rely, *e.g.* AOB 4, 14–15, 26, was also an original action in the Supreme Court. 406 U.S. at 93. The Supreme Court declined to exercise its 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 just that, *id.* at 310, and jurisdiction lay in the district court because Illinois' complaint pled a federal common law 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 have been removed to federal district court.

Whether or not the Supreme Court "applied" a federal "rule of decision" to resolve Georgia's claim in *Tennessee Copper*, AOB 15, or discussed considerations for applying federal over state law in *Milwaukee I*, AOB 14, is beside the point. Jurisdiction was grounded on the nature of the parties, not on 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 apply to "determine the merits of the controversy." *Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 691 (2006). But the need to perform a "choice-of-law" analysis in the face of potential conflict between 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.") (citation omitted).

Defendants' remaining environmental cases, AOB 14–27, do not help them either, because, again, the courts there were not addressing whether a state cause of action arose 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. at 418. *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), AOB 14.[2]

In this regard, Defendants' reliance throughout on *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021), AOB 3, 10, 16–18, 20–22, is particularly misplaced. Jurisdiction there was grounded on diversity, as the Second Circuit itself emphasized in explaining why it was *not* making a federal-question jurisdiction determination but was rather adjudicating a preemption defense on the merits. 993 F.3d at 94.

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[2] Defendants' non-environmental cases are even further afield. Federal jurisdiction in *United States v. Standard Oil Co.*, AOB 14, was solidly grounded because the United States was the plaintiff. 332 U.S. 301 (1947); *see Empire Healthchoice*, 547 U.S. at 691. Defendants' other cases involved plaintiffs claiming *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).

City of New York says nothing about whether a state claim arises under federal environmental common law.[3]

Native Village of Kivalina v. ExxonMobil Corp., AOB 18–19, is also inapposite, because the plaintiff there pled a federal cause of action. 696 F.3d 849, 853 (9th Cir. 2012). Defendants tellingly ignore the Ninth Circuit's more recent decision in *City of Oakland v. BP plc*, which specifically rejected a federal common law removal theory like the one advanced here. 969 F.3d 895, 908 (2020), *cert. denied*, 2021 WL 2405350 (2021).

Finally, *In re Otter Tail Power Co.*, AOB 28–29, was not an environmental common law case, but in any event the plaintiff there stated its claim as "an action to enforce" a prior federal law judgement. 116 F.3d 1207, 1214 (8th Cir. 1997). It is unexceptional that an action

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[3] *City of New York* was also wrongly decided. State law rights are enforceable unless preempted by federal law. *Murphy v. N.C.A.A.*, 138 S. Ct. 1461, 1479–80 (2018). The Second Circuit found plaintiff's state claims preempted by federal common law, 993 F.3d at 90–93; however, the Supreme Court has held that that common law was displaced by the Clean Air Act and that the existence (or not) of federal preemption must be determined by the provisions of that Act, *AEP*, 564 U.S. at 429.

may arise under federal law where the plaintiff claims a right under federal law as the basis for the action.

II. Defendants' Environmental Common Law Removal Theory Relies on the Wrong Source of Federal Rights.

For an action to arise under federal law, a "right or immunity created by [federal law] must be an element, and an essential one, of the plaintiff's cause of action." *Franchise Tax Bd.*, 463 U.S. at 10–11 (citation omitted). This jurisdictional inquiry into essential federal elements "demands precision," and Defendants "should be able to point to the specific elements of [the State's] claims that require proof" of some right under federal environmental common law. *See Cent. Iowa Power Co-op. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 561 F.3d 904, 913–14 (8th Cir. 2009). Defendants nowhere explain with "precision" what federal common law right is essential for the State to prove for any of its causes of action. Nor could they. As explained below, even were this an "interstate pollution" action, the relevant source of federal rights—if any—would be the Clean Air Act, *AEP*, 564 U.S. at 423, 429, not federal common law.

a. 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 pollution cases by resort to a federal common law of nuisance. *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 this federal common law would be replaced by federal statutes: "It may happen that new federal laws and new federal regulations may in time preempt the field of federal common law of nuisance." *Milwaukee I*, 406 U.S. at 107.

Those new federal laws arrived in the 1970s in the form of major updates to the Clean Water Act and the Clean Air Act.[4] The Supreme Court subsequently revisited the availability of federal common law nuisance claims for water pollution in light of the Clean Water Act. In *Milwaukee II*, the Court explained that federal common law is only "a necessary expedient," "subject to the paramount authority of Congress,"

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[4] Pub. L. 92-500 (Oct. 18, 1972), 86 Stat. 816, *codified as amended at* 33 U.S.C. §§ 1251 *et seq*. (Clean Water Act); Pub. L. 91-604 (Dec. 31, 1970), 84 Stat. 1676, *codified as amended at* 42 U.S.C. §§ 7401 *et seq*. (Clean Air Act).

"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. at 313–14 (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, 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. Statutes would replace judicially-created federal rights with congressionally-enacted federal rights. Importantly, however, and as discussed below, statutory displacement of federal common law does not simultaneously extinguish *state* law. *See Ouellette*, 479 U.S. at 489, 491; *AEP*, 564 U.S. at 429.

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

Just as the Clean Water Act supplanted the federal common law for water pollution, so too did the Clean Air Act supplant the federal

common law of nuisance for air pollution. 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 emissions caps for each defendant under federal common law and, in the alternative, state tort law. *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 scope of federal common law rights, but the Court found that passage of the Clean Air Act had rendered that dispute "academic." *Id.* at 423. That was because "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 that Congress provided. *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 provided federal rights, Congress can displace that common law without being bound to preserve those historical rights in federal law. 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 rights. 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 rights under federal law. Under *AEP*, as under *Milwaukee II*, federal legislation does not coexist with prior federal common law. The Clean Air Act now defines the substance of federal law to the exclusion of federal common law. *Accord Kivalina*, 696 F.3d at 857 (holding the Clean Air Act "extinguished" "any previously available federal common law action" within its field).

c. The enforceability of state law to redress transboundary pollution turns on provisions of the Clean Air Act.

Defendants' theory depends on the notion that an action can "arise under" a displaced body of federal common law. Such a theory is flatly inconsistent with the Supreme Court's decisions in *Ouellette* and *AEP*.

Ouellette was a quintessential "transboundary pollution" case: Lake Champlain divides New York from Vermont. A paper mill on the New York side discharged effluents into the lake toward Vermont, fouling residences on the Vermont side. The Vermont landowners sued the New York mill in diversity, claiming redress for the transboundary pollution under state common law of nuisance. *See* 479 U.S. at 483–85.

Contrary to Defendants' "demand" here to "appl[y] federal common law" to such state law claims, AOB 34, the *Ouellette* Court did not, because, as discussed above, 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." *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.[5]

The Supreme Court's detailed analysis of the Clean Water Act in *Ouellette* makes no sense under Defendants' theory here. If federal common law "controls" all transboundary pollution suits, AOB 27, and "supplies the rule of decision," AOB 14, the Court would not have needed to construe and apply the Act at all. If the Vermont plaintiffs' state common law claims were really "conceal[ed] federal [common law] claims in state garb," AOB 1, the Court could have stopped writing after reiterating the *Milwaukee II* holding that "all federal common law" 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* in substance "[mis]labeled" federal common law ones, AOB 10.

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[5] 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.

So too in *AEP*, an action seeking 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, but the parties' dispute about that claim was "academic," because the Clean Air Act displaced "[a]ny such claim," *id.* at 422–23; *see also id.* at 415, 424, 429. On Defendants' theory here, that holding should have disposed of the state tort claims there as well. But, as in *Ouellette*, the *AEP* 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 *AEP* Court's admonition to consider the preemptive effect of the statute only makes sense if the state claims were *not* "necessarily" federal common law claims in substance. *Cf.* AOB 13.

In sum, to remove this action as "arising under" federal law, a "[federal] right or immunity" must be an essential element of the State's cause of action. *Franchise Tax Bd.*, 463 U.S. at 10–11. The Clean Air Act defines the substance of federal law—and its "rights or immunities," if any—in the area where Defendants would situate this action. Because they do not brief the substance of that Act, their argument must fail.

III. Defendants' Environmental Common Law Removal Theory Conflicts with Controlling Removal Law.

Defendants avoid the watchword "preemption," but their argument that federal environmental common law "governs" the State's claims *is* a conflict preemption argument: state law can only be governed by federal law, under the Supremacy Clause, in cases of conflict between federal and state law—*i.e.*, when federal law has preempted state law. *See Murphy*, 138 S. Ct. at 1479–80. It is settled, however, that more than a conflict with federal law is required to create jurisdiction to remove state-law causes of action to federal court. *Caterpillar*, 482 U.S. at 393. The "more" that is required is "complete preemption," *id.*, which is the only theoretical way Defendants could establish "arising under" jurisdiction here.[6]

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[6] Defendants make a "*Grable*" argument in the alternative, AOB 34–40, which acknowledges that the State's cause "finds its origins in state rather than federal law," *Gunn*, 568 U.S. at 258. Their argument fails, however, because a condition of *Grable* jurisdiction—a "substantial" question of federal law, 568 U.S. at 258—is plainly absent here with respect to federal environmental common law. Defendants point to the federal common law of interstate pollution discussed in *AEP*, AOB 15–16, but *AEP* itself held that disputes about that historical body of law present "academic question[s]" because that law has been displaced by the Clean Air Act. 564 U.S. at 423. Defendants do not explain how "academic questions" can be "substantial" for *Grable* purposes.

Defendants do not make a complete preemption argument, presumably because they cannot establish the stringent requirements. *See, e.g.*, *Beneficial Nat'l Bank*, 539 U.S. at 8–11. But they do not explain how jurisdiction can be had for less. As explained below, the reasons that complete preemption can create jurisdiction where ordinary preemption cannot demonstrate why Defendants' theory is insufficient to create jurisdiction.

a. Jurisdictional complete preemption requires a federal cause of action.

All preemption requires a conflict between state and federal law. *Murphy*, 138 S. Ct. at 1480. But preemption alone does not convert a state law cause of action into one "arising under" federal law for purposes of removal. *Beneficial Nat'l Bank*, 539 U.S. at 9. To create jurisdiction, the preempting federal law must additionally provide an *exclusive* substitute federal *cause of action* that encompasses the state law claim. *Id*. at 8–11; *Krakowski v. Allied Pilots Ass'n*, 973 F.3d 833, 836–37 (8th Cir. 2020).

Complete preemption likely requires the federal cause of action be *statutory*. *Cf. Beneficial Nat'l Bank*, 539 U.S. at 8. But even if federal common law could theoretically supply one for jurisdictional purposes,

the only potential source of a federal cause for Defendants' "governed by" theory—pre-Clean Air Act common law—no longer exists, *AEP*, 564 U.S. at 423, and Defendants do not identify any federal common law cause of action that does.[7] Put another way, although Defendants raise the specter of "artful" pleading, AOB 32–33, they have not shown that any cause exists to artfully plead around. *See Rivet v. Regions Bank of La.*, 522 U.S. 470, 475 (1998).

The right place to look for a federal cause of action concerning air pollution would be the Clean Air Act, Congress's word on the subject. Indeed, in a case Defendants argue is "similar," AOB 24, at least one Defendant here argued there that "the Clean Air Act . . . 'provide[s] the exclusive cause of action for the claim asserted.'" Defs. Corr. Joint Opp. to Mot. to Remand at 25, *City of Oakland v. BP p.l.c.*, No. 17-cv-6011

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[7] 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 [the Supreme] 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).

(quoting *Beneficial Nat'l Bank*, 539 U.S. at 8). But Defendants do not make a serious argument for removal via the Clean Air Act here, *cf.* AOB 36 (citing only a purpose provision of the Act), and even a quick skim of the Act shows why such an argument would be futile.

The Clean Air Act does not address the deceptive promotion of fossil fuels that is the actual subject of the State's claims. But even if this were an "emissions" case as Defendants would have it, and even if the State could sue Defendants under the Act's citizen suit cause of action, 42 U.S.C. § 7604(a), that cause of action is explicitly *non*-exclusive, *id.* § 7604(e) ("Nothing in this section shall 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 . . . ."). Yet "[f]or complete preemption, the cause of action must be exclusive." *Krakowski*, 973 F.3d at 837.

In short, to create federal jurisdiction out of conflict with federal law, federal law must provide an exclusive substitute cause of action. Defendants rely on non-removal cases to require less for their theory, but they do not explain how that can be consistent with settled requirements from controlling removal cases.

b. Jurisdictional complete preemption also requires actual conflict with federal law.

Defendants have not met another core condition required to turn conflict into jurisdiction: the existence of actual conflict. Claims of "threaten[ed]" conflicts with federal law, AOB 9, or "implicat[ed]" federal issues, AOB 40, are insufficient. *See Granite Re, Inc. v. Nat'l Credit Union Admin. Bd.*, 956 F.3d 1041, 1048 (8th Cir. 2020).

Defendants' claims of potential conflict are also unfounded. Even had federal environmental common law survived the Clean Air Act, there would be no conflict here. Defendants point to no federal common law that would apply to the deceptive promotion of fossil fuels. And although they do suggest that the State's action would generally put different states' air pollution laws into conflict, AOB 10, 14–15, all of the environmental common law cases they rely on were actions to enjoin operations at discrete pollution sources, where specific competing state regulation might present identifiable conflict. *E.g. Tennessee Copper Co.*, 237 U.S. at 475, 477–78 (injunction limiting smelting plant from emitting more than 20 tons of sulphur per day); *Milwaukee II*, 451 U.S. at 308–09, 311–12 (injunction to "achieve specified effluent limitations" at two sewage treatment plants and eliminate sewer overflows at

"discrete discharge points"). Defendants do not identify *any* source that would face regulatory change—much less regulatory conflict—as a result of the State's consumer protection claims, nor do they explain how such a conflict could actually come about.

Regardless, that body of federal common law has been supplanted by the Clean Air Act. *AEP*, 564 U.S. at 429. Defendants cite, without elaboration, a purpose provision of the Act, AOB 36, but that provision "encourage[s]" certain State and local actions. *See* 42 U.S.C. § 7401(c). Defendants nowhere identify any provision of the Clean Air Act that addresses the deceptive conduct of which the State here complains and that could even theoretically create a conflict with state law.

Even mischaracterizing the State's claims as "emissions" or "climate" claims would not create conflict that could ground federal jurisdiction. No categorical conflict could exist, as Congress manifested clear intent for states to continue exercising their traditional authority to control air pollution to protect the public health. The Clean Air Act expressly preserves broad state authority in this area, 42 U.S.C. § 7416; *see ExxonMobil Corp. v. EPA*, 217 F.3d 1246, 1254 (9th Cir. 2000), and further 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).

And no specific conflict is plausible. The Act's targeted preemption provisions, *e.g.*, 42 U.S.C. § 7545(c)(4)(A) (relating to controls on fuel and fuel additives for purposes of motor vehicle emissions control), have no relevance to the State's claims here and are limited by their terms. *See, e.g.*, *Am. Fuel & Petrochemical Mfrs. v. O'Keeffe*, 903 F.3d 903, 917 (9th Cir. 2018) (Oregon program regulating production and sale of fuels based on greenhouse gas emissions not preempted); *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 725 F.3d 65, 96–104 (2d Cir. 2013). And because "[t]he central goal of the Clean Air Act is to reduce air pollution," *Oxygenated Fuels Ass'n v. Davis*, 331 F.3d 665, 673 (9th Cir. 2003) ("*OFA*"), state law that has the effect of reducing pollution is unlikely to conflict.

Broadly speaking, the Clean Air Act imposes minimum federal standards and allows states to 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 general, "more demanding state regulations"—such as those imposed through

tort duties—do not conflict with "minimum federal standards." *See Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141–42 (1963); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 65 (2002). And federal minimum standards do not create a federal right to pollute up to that level. *See 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); *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 486, 488, 499 (9th Cir. 1984) (federal allowance for some 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 the Clean Air Act); *Wyeth v. Levine*, 555 U.S. 555, 583 (20009) (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").

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 5,396 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.

The electronic version of this filing was automatically scanned for viruses and found to contain no known viruses.

/s/ Pete Huffman
Pete Huffman

CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2021, I caused the foregoing to be filed electronically with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit using the appellate CM/ECF system. Participants in this case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Pete Huffman
Pete Huffman