No. 19–1818

United States Court of Appeals for the First Circuit

STATE OF RHODE ISLAND,
Plaintiff-Appellee,

v.

SHELL OIL PRODUCTS COMPANY, LLC; CHEVRON CORP.; CHEVRON USA, INC.; EXXONMOBIL CORP.; BP, PLC; BP AMERICA, INC.; BP PRODUCTS NORTH AMERICA, INC.; ROYAL DUTCH SHELL PLC; MOTIVA ENTERPRISES, LLC; CITGO PETROLEUM CORP.; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66; MARATHON OIL COMPANY; MARATHON OIL CORPORATION; MARATHON PETROLEUM CORP.; MARATHON PETROLEUM COMPANY, LP; SPEEDWAY, LLC; HESS CORP.; LUKOIL PAN AMERICAS LLC; and DOES 1–100,
Defendants-Appellants,

GETTY PETROLEUM MARKETING, INC.,
Defendant.

On Appeal from the United States District Court
District of Rhode Island
Case No. 18-cv-00395
Hon. William E. Smith

SUPPLEMENTAL BRIEF OF AMICUS CURIAE NATURAL RESOURCES DEFENSE COUNCIL 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) reaffirms the statement of interest in its January 2, 2020 brief filed in this Court. 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.

ARGUMENT

Rhode Island's claims do not "arise under" federal environmental common law. Defendants continue to argue in their Supplemental Brief ("ASB") 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. But Defendants misconstrue those cases. None of them even addressed whether federal-question jurisdiction would lie over an action pleading only state law claims, and Defendants' theory conflicts with the many Supreme Court cases that do address that question.

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

None of the "interstate" pollution cases that Defendants highlight, ASB 6–8, addressed whether a state claim can arise under federal common law. To be sure, the Supreme Court once recognized the availability of federal causes of action under federal environmental common law. *See, e.g.*, *City of Milwaukee v. Illinois*, 451 U.S. 304, 309 ("*Milwaukee II*"). But contrary to Defendants' suggestion, ASB 6, 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 *Milwaukee I*, ASB 6–7, plaintiff Illinois invoked the Supreme Court's original jurisdiction—not a district court's federal-question jurisdiction. 406 U.S. at 93 ("This is a motion by Illinois to file a bill of complaint under our original jurisdiction . . . ."). 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." *See 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, *id.* ("Illinois filed a complaint in [district court] seeking abatement, under federal common law . . . ."). 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 court.

Whether or not the Supreme Court discussed considerations for applying federal law in *Milwaukee I*, ASB 6–7, is beside the point.

Jurisdiction was grounded on the nature of the parties, not on the source of 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 itself a *source* of federal-question jurisdiction. *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 12 (1983).

Defendants' remaining environmental cases, ASB 6–8, do not help them either, because, again, those courts 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

American Electric Power Co. v. Connecticut pled a federal common law cause, 564 U.S. 410, 418 (2011) ("*AEP*").[1]

In this regard, Defendants' reliance throughout on *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021), ASB 4, 7, 9–11, is particularly misplaced. Jurisdiction there was grounded on diversity, as the Second Circuit 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. *City of New York* says nothing about whether a state claim arises under federal

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[1] Jurisdiction in Defendants' other cases, ASB 6–8, was also grounded on something other than a state claim "arising under" federal law. For example, federal jurisdiction in *United States v. Standard Oil Co.* was solidly grounded because the United States was the plaintiff. 332 U.S. 301 (1947); *see Empire Healthchoice*, 547 U.S. at 691. *See also Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421 & n.20 (1964) (diversity); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 632–33 (1981) (federal court action alleging federal right of contribution under federal statute); *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 848–53 (1985) (federal court action alleging federal right of protection from tribal jurisdiction); *BMW of N. Am. v. Gore*, 517 U.S. 559, 563–68 (1996) (certiorari to state court); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 100–01 & n.3 (1938) (same).

environmental common law.[2] In contrast, *City of Oakland v. BP plc* did address federal-question jurisdiction and rejected a federal common law removal theory like the one advanced here. 969 F.3d 895, 908 (9th Cir. 2020), *cert. denied*, No. 20-1089 (U.S. June 14, 2021).

II. Defendants' Environmental Common Law Removal Theory Relies on an Erroneous Premise.

The environmental common law Defendants point to does not address the subject of deceptive conduct for which the State seeks redress. But even had the State brought an "interstate pollution" claim, Defendants would still be wrong that federal common law would "exclusively govern" that action.

The federal common law Defendants rely on was displaced by the Clean Air Act. *AEP*, 564 U.S. at 424, 426. Defendants' theory thus depends on the notion that an action can "arise under" a displaced law.

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[2] *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.

Such a theory is conceptually suspect, but in any event 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' theory here that federal common law would govern such claims and the court would need to apply a federal common law "rule of decision," *see* ASB 6–7, the *Ouellette* Court did not, because the Clean Water Act "now occupied the field, pre-empting all *federal* common law." *See* 479 U.S. at 488–89 (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.[3]

The Supreme Court's detailed analysis of the Clean Water Act in *Ouellette* makes no sense under Defendants' theory here. If federal common law "actually governs" all transboundary pollution suits, ASB 12, and supplies the "rules of decision," ASB 6, the Court would not have needed to construe and apply the Act at all. If the Vermont plaintiffs' state claims were "necessarily" federal common law claims, ASB 8, 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]label[ed]" federal common law ones, ASB 12.

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[3] 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 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* "inherently federal [common law] claims." ASB 3.

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

Defendants cannot change the rules of removal by gesturing to "constitutional law and structure." ASB 3. Neither removal nor district court subject matter jurisdiction are created by the Constitution. Both are creatures of statute. 28 U.S.C. §§ 1331, 1441; *Gunn v. Minton*, 568 U.S. 251, 256–58 (2013); *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1746 (2019). And although the "arising under" language of

28 U.S.C. §1331 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 the State's claims to arise under federal environmental common law for purposes of the jurisdictional statute, "[a] right or immunity created by [federal environmental common law] must be an element, and an essential one, of [the State's] cause of action." *Franchise Tax Bd.*, 463 U.S. at 10–11 (1983) (citation omitted). 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 "interstate pollution" where Defendants would situate this action, the Clean Air Act, not federal common law, defines the substance of federal law, *AEP*, 564 U.S. at 424, 426, and its "rights or immunities"—if any.

Defendants' argument that federal common law "governs" is simply a preemption argument: federal law can only govern state 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 is required to create jurisdiction to remove state-law causes of action to federal court. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987). The "more" that is required for jurisdiction is "complete preemption." *Id.*

Defendants do not make a complete preemption argument for federal common law, presumably because they cannot establish the stringent requirements. *See Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8–11 (2003). But they do not explain how jurisdiction can be had for less. As explained below, the reasons why 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 also provide a substitute federal *cause of action* that encompasses the state law claim. *Id*. at 8–11; *López-Muñoz v. Triple-S Salud, Inc.*, 754 F.3d 1, 5 (1st Cir. 2014) ("The Supreme Court decisions finding complete preemption share a common denominator: exclusive federal regulation of the subject matter of the asserted state claim, coupled with a federal cause of action for wrongs of the same type.").

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. *Cf. Native Village of Kivalina v. ExxonMobil*

Corp., 696 F.3d 849, 857 (9th Cir. 2012) (under *AEP,* the Clean Air Act "extinguished" "any previously available federal common law action" within its field). Defendants do not explain why, if jurisdictional preemption requires a federal cause of action, their theory can suffice without one. In this regard, Defendants' concerns with "artful" pleading, ASB 12–16, are unfounded, as 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).[4]

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

Defendants' theory lacks another core element required to turn conflict into jurisdiction: the existence of actual conflict. Concerns that the State's action "implicate" various federal "interests . . . [and] regulatory schemes," ASB 9–10, are insufficient. *See Pharm. Research*

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[4] 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 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. *Oneida Indian Nation of N. Y. State v. County of Oneida*, 414 U.S. 661, 666–67 (1974).

& Mfrs. of Am. v. Concannon, 249 F.3d 66, 77 (1st Cir. 2001); *cf. Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019) (Gorsuch, J.) (plurality opinion) ("Invoking some brooding federal interest . . . should never be enough to win preemption of a state law.").

Defendants' concerns about conflict are also unfounded. Even had federal 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 vaguely suggest that the State's action would put different states' air pollution regulations into conflict, *e.g.* ASB 8 n.2, the Supreme Court environmental common law cases they rely on were actions against operations at discrete pollution sources, where specific competing regulations might present identifiable conflict. *E.g. 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 a regulatory change—much less regulatory conflict—as a result of the State's deception claims here, nor do they explain how such a conflict could actually come about.

CONCLUSION

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

Dated: September 3, 2021

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 2,662 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, 2021, I caused the foregoing to be filed electronically with the Clerk of Court for the United States Court of Appeals for the First 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/ Peter Huffman
Peter Huffman