No. 19–1644

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MAYOR AND CITY COUNCIL OF BALTIMORE,

Plaintiff-Appellee,

v.

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

Defendants-Appellants.

On Appeal from the United States District Court
District of Maryland
Case No. 1:18-cv-02357-ELH
Hon. Ellen L. Hollander

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

Pete Huffman
NATURAL RESOURCES
DEFENSE COUNCIL
1152 15th Street NW, Suite 300
Washington, D.C. 20005
(202) 289-2428

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTEREST OF AMICUS CURIAE

Amicus Curiae Natural Resources Defense Council (NRDC) reaffirms the statement of interest in its September 3, 2019 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.

SUMMARY OF ARGUMENT

Baltimore's claims do not "arise under" federal environmental common law. Defendants continue to argue that the City's claims are "governed by" federal environmental common law and point to cases 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 those cases say nothing of the sort. None of them even addressed whether federal-question jurisdiction would lie over an action pleading only state claims.

Defendants' "governed by" premise itself is also unfounded. The federal common law they invoke has no applicability to Baltimore's claims of concealment and misrepresentation. Nor could that common law govern even in an actual "interstate pollution" case, because that body of common law has been displaced by the Clean Air Act.

Finally, Defendants' appeals to "constitutional structure" cannot help them. Neither removal nor district court subject matter jurisdiction are created by the Constitution. Both are creatures of statute—and those statutes have long been construed to foreclose removal on Defendants' "governed by" theory.

ARGUMENT

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

None of the "interstate" pollution cases that Defendants highlight addressed whether a state claim can arise under federal common law. *See* Appellants' Suppl. Opening Br. at 4–8, Doc. 193 (Aug. 6, 2021) ("ASB"). To be sure, the Supreme Court once recognized the availability of federal causes of action under federal environmental common law. *See 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. *See*

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]

---

[1] Jurisdiction in Defendants' other cases, ASB 5–8, 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).

In this regard, Defendants' reliance throughout on *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021), ASB 4–5, 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 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).

---

[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.

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 Baltimore seeks redress. But even had the City brought an "interstate pollution" claim, Defendants would still be wrong that federal common law would "exclusively gover[n]" that action. ASB 3.

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. 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 "necessarily governs" all transboundary pollution suits, ASB 7, and supplies the "rules of decision," ASB 13, the Court would not have needed to construe and apply the Act at all. If the Vermont plaintiffs' state claims were "inherently" 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*

---

[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.

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 common law ones, ASB 8.

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.

The requirements for removal are well settled and Defendants' theory does not meet them. Neither removal nor district court subject

matter jurisdiction are created by "constitutional . . . structure." ASB 3. Both are creations of statute. *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 Baltimore's claims to arise under federal environmental common law for purposes of Section 1331, and be removable under Section 1441, "[a] right or immunity created by [federal environmental common law] must be an element, and an essential one, of [the City's] cause of action." *Franchise Tax Bd.*, 463 U.S. at 10–11 (1983). Defendants nowhere identify that essential federal right. Nor could they. The federal common law they point to does not address the subject of deceptive conduct for which the City seeks redress. And even in the area of "interstate pollution" where Defendants would situate this

action, ASB 3, the Clean Air Act, not federal common law, defines the "rights or immunities" of federal law—if any. *AEP*, 564 U.S. at 424, 426.

Defendants' "governed by" theory is no more than a federal preemption argument. Defendants protest this straightforward conclusion, but they nowhere explain what their theory substantively requires that is more than preemption. And more than preemption *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; *Lontz v. Tharp*, 413 F.3d 435, 442 (4th Cir. 2005) (The "sine qua non of complete preemption is a pre-existing *federal* cause of action.") (emphasis original); *King v. Marriott Int'l Inc.*, 337 F.3d 421, 425 (4th Cir. 2003) ("Where no discernable federal cause of action exists on a plaintiff's claim, there is no complete preemption . . . .").

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 13–17, 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]

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.

---

[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).

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 Baltimore's action "implicate[s]" various federal "interests . . . [and] regulatory schemes," ASB 10, are insufficient. *See, e.g.*, *United States v. Moffitt, Zwerling & Kemler, P.C.*, 83 F.3d 660, 669 (4th Cir. 1996); *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 Baltimore'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"); *see also North Carolina, ex rel. Cooper v. Tennessee Valley Auth.*, 615 F.3d 291, 296 (4th Cir. 2010) (injunction imposing "specific emissions caps and emissions control technologies" "at four TVA electricity generating plants"). Defendants do not identify *any* source that would face a regulatory change—much less regulatory conflict—as a result of the City'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 14, 2021

Respectfully submitted,

/s/ Pete Huffman

Pete Huffman
Natural Resources Defense Council
1152 15th Street NW, Suite 300
Washington, D.C. 20005
phuffman@nrdc.org
(202) 289-2428

Counsel for Amicus Curiae
Natural Resources Defense Council

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 2,892 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/ Pete Huffman
Pete Huffman

CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2021, I caused the foregoing to be filed electronically with the Clerk of Court for the United States Court of Appeals for the Fourth Circuit using the appellate CM/ECF system. Participants in this case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Pete Huffman
Pete Huffman