No. 19-1644

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MAYOR AND CITY COUNCIL OF BALITMORE,
Plaintiff/Appellee

v.

BP P.L.C., *et al.*,
Defendants/Appellants

On Appeal from the United States District Court for the District of Maryland, No. 1:18-cv-02357-ELH, The Honorable Ellen L. Hollander, Judge

AMICUS BRIEF OF INDIANA AND 14 OTHER STATES IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING AND REHEARING EN BANC

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INTEREST OF *AMICI* STATES

The States of Indiana, Alabama, Alaska, Arkansas, Georgia, Kansas, Kentucky, Mississippi, Missouri, Montana, Nebraska, South Carolina, Texas, Utah, and Wyoming respectfully submit this brief as *amici curiae* in support of the petition for rehearing and rehearing en banc. The panel's ruling that nuisance claims to abate global climate change must proceed in state court, under state law, is of significant interest to *amici*. That ruling threatens to let a single State's judiciary set climate-change policy for other States. As co-equal sovereigns, *amici* States have a profound interest in, and unique perspective on, the proper role of state law and state courts in addressing climate change.

ARGUMENT

This case involves common-law nuisance claims by the City of Baltimore against energy companies for contributing to "*global* greenhouse gas pollution" and "*global* warming" by extracting, producing, and promoting fossil-fuel products. JA43 (emphasis added). Under the City's theory, mitigating liability would require the companies to act differently not just in Maryland but everywhere in the world they do business.

As the Supreme Court has recognized, such claims for interstate emissions implicate federalism and other unique national interests. Courts thus are "require[d]" to "apply federal"—not state—nuisance law to interstate-pollution claims, giving federal courts jurisdiction over them. *Illinois v. City of Milwaukee*, 406 U.S. 91, 105 & n.6 (1972) (*Milwaukee I*). That principle controls here. Permitting 50 different state judiciaries to set *global emissions standards* would lead to utter chaos.

The panel nonetheless ruled that Maryland courts applying Maryland law must decide the City's claims. That ruling not only contravenes binding precedent, but also threatens to give Maryland courts the power to set climate-change policy for the entire country. En banc review is warranted.

I. The City's Nuisance Suit To Abate Global Climate Change Is Removable to Federal Court

A. Federal law necessarily governs any common-law claims to abate global climate change

Although *Erie Railroad Co. v. Tompkins* established that there "is no federal *general* common law," 304 U.S. 64, 78 (1938) (emphasis added), the Supreme Court has repeatedly recognized that "'*specialized* federal common law'" continues to govern "'subjects within national legislative

power where Congress has so directed' or where the basic scheme of the Constitution so demands," *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 421 (2011) (*AEP*) (emphasis added). Some areas involving "'uniquely federal interests'" are so committed to federal control that any claims "are governed *exclusively* by federal law." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988) (emphasis added); *see, e.g.*, *United States v. Standard Oil Co.*, 332 U.S. 301, 305 (1947) ("liability [for interference in the government-soldier relationship] is not a matter to be determined by state law"); *Clearfield Tr. Co. v. United States*, 318 U.S. 363, 366 (1943) ("rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law").

1. One area of "uniquely federal interest" subject to federal law is pollution affecting multiple States: "When we deal with air and water in their ambient or interstate aspects, there is a federal common law." *Milwaukee I*, 406 U.S. at 103. In *Milwaukee I*, the Supreme Court considered whether a common-law public nuisance claim for "pollution of interstate or navigable waters" was governed by federal law and "ar[ose] under the 'laws' of the United States" within the meaning of 28 U.S.C. §1331(a)—and held "that it d[id]." *Id.* at 99. "'[T]he ecological rights of a

State in the improper impairment of them from sources outside the State's own territory,'" the Court ruled, is "'a matter having basis and standard in federal common law.'" *Id.* at 99–100.

In so holding, the Court acknowledged that the claim fell outside of any federal statute addressing interstate pollution. *See* 406 U.S. at 103. But that did not mean state law governed. To the contrary, the Court observed that the very nature of a claim for "pollution of a body of water . . . bounded" by multiple States "require[d]" it "to apply federal law." *Id.* at 105 n.6. The claim implicated "an overriding federal interest in the need for a uniform rule of decision" and "basic interests of federalism." *Id.* Thus, the Court declared, "federal law governs." *Id.* at 107; *see id.* at 102 ("federal, not state, law . . . controls"); *id.* at 107 n.9 (similar).

Not long ago in *American Electric Power Co. v. Connecticut*, the Supreme Court reiterated those principles: "Environmental protection," the Court explained, is "undoubtedly" an area "meet for federal law governance" in which federal courts "may fill in 'statutory interstices,' and, if necessary, even 'fashion federal law.'" 564 U.S. at 421–22. That is why the Supreme Court has for 120 years "approved federal common-law suits brought by one State to abate pollution emanating from another State."

Id. (collecting examples, including *Milwaukee I*). The Court has applied "federal common law" precisely "because state law cannot be used." *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 n.7 (1981) (*Milwaukee II*).

2. As those decisions establish, nuisance claims to abate *inter-state* pollution are governed exclusively by federal common law. *A fortiori* nuisance claims to abate *global* emissions are governed exclusively by it as well. As this case illustrates, nuisance claims to abate global green-house-gas emissions raise the same unique federal interests that require courts to apply federal common law to interstate-pollution claims.

This case involves nuisance claims for injuries allegedly caused by "global warming." JA43. On the City's own account, however, global warming is a global problem. The City concedes that a wide variety of human actions—including actions by innumerable third parties—have contributed to global warming since the "industrial era began." JA74; *see also* JA44–46, JA72–73. And it concedes that the handful of fossil-fuel companies named in this case extracted, produced, and marketed fossil fuels all over the globe, not merely in Baltimore. JA48–69, JA89–153. For those companies to avoid liability under the City's theory, they would have to take actions in "every state (and country)." *City of New York v.*

Chevron Corp., 993 F.3d 81, 92 (2d Cir. 2021). Yet the City seeks to have Maryland courts applying Maryland law determine what those actions should be. It effectively asks a single State to set global climate policy.

As the Second Circuit has recognized, that approach to climate change raises obvious "foreign policy" and "federalism" concerns. *City of New York*, 993 F.3d at 92–93. States (and other countries) have a variety of carefully calibrated regulatory programs to address emissions *within* their respective borders. *See, e.g.*, Ind. Code § 13-17-1-1 *et seq.* And those programs consider a variety of environmental, economic, and other local interests, striking different balances. *See, e.g.*, *id.* § 13-17-1-1 (listing considerations). To let Maryland's judiciary override the policy choices of co-equal sovereigns by imposing liability for out-of-state emissions under Maryland nuisance law would undermine "basic interests of federalism." *Milwaukee I*, 406 U.S. at 105 n.6.

Worse, the City is not alone in urging state courts to craft judicial solutions to the complex issue of global climate change. *See, e.g.*, *City of New York*, 993 F.3d at 85–86. Many other cities and counties have brought similar nuisance claims, and if such claims are left in state court,

chances are that at least some state courts will be receptive. The inevitable result will be a "chaotic" patchwork of conflicting standards for the same conduct. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 496–97 (1987).

Any worldwide allocation of responsibility for remediation of climate change requires national or international action, not ad hoc intervention by individual state courts under state nuisance law acting at the behest of a handful of state and local governments. It is precisely for this reason that the Supreme Court long ago recognized that any common-law answers to interstate-pollution problems should be given by federal courts applying federal law. *See Milwaukee I*, 406 U.S. at 103.

B. The City's common-law claims to abate global climate change are removable to federal court

Because federal law necessarily governs the City's nuisance claims to abate global climate change, this case is removable to federal court. Defendants may remove any state-court case over which federal district courts would have had "original jurisdiction," 28 U.S.C. § 1441(a), including cases presenting claims "arising under the Constitution, laws, or treaties of the United States," *id.* § 1331; *see Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1748 (2019). And it is well-established that a "case 'arising under' federal common law presents a federal question and

as such is within the original subject matter jurisdiction of the federal courts." Charles Alan Wright & Arthur R. Miller, *Federal Common Law*, 19 Fed. Prac. & Proc. Juris. § 4514 (3d ed. 2021).

Milwaukee I makes particularly clear that federal courts have jurisdiction here. There, the Supreme Court held that "nuisance" claims for "pollution of interstate or navigable waters creates actions arising under the 'laws' of the United States within the meaning of § 1331(a)," the statute providing for federal-question jurisdiction. 406 U.S. at 99. As the Court explained, such claims "require[]" application of federal law—just like state disputes over "boundaries" and "interstate streams," which have long "'been recognized as presenting federal questions.'" *Id.* at 105 & n.6. That means the claims have their "'basis and standard in federal common law and so directly constitut[e] a question arising under the laws of the United States.'" *Id.* at 99–100. The same is true here.

The mere fact that the City's complaint "never expressly asserts any claim under federal common law," Op. 17, is immaterial. Under the artful-pleading doctrine, a "'plaintiff may not defeat removal by omitting to plead necessary federal questions.'" *Rivet v. Regions Bank of La.*, 522 U.S. 470, 475 (1998). Thus, where—as here—a claim is "controlled by

federal substantive law," it may be removed to federal court, *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 560 (1968), "even though no federal question appears on the face of the plaintiff's complaint," *Rivet*, 552 U.S. at 475. The City cannot evade federal law or federal jurisdiction by declaring unilaterally that its nuisance claims arise under state law.

II. The Panel Erred in Rejecting the Governance of Federal Common Law

In refusing to permit removal, the panel misapprehended the source of law governing common-law claims to abate global emissions. The panel objected that it would be improper to treat the City's nuisance claims as federal claims because courts should not extend federal common law to "new" areas absent a demonstrated need. Op. 19–20, 25. But the panel had no need to devise *new* federal law. The Supreme Court has *already* held that, "'[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law.'" *AEP*, 564 U.S. at 421 (quoting *Milwaukee I*, 406 U.S. at 103). Such nuisance claims thus "'aris[e] under the laws of the United States.'" *Milwaukee I*, 406 U.S. at 99–100.

Nor was the panel correct to dismiss concerns that applying state nuisance law would jeopardize unique federal interests. Op. 20–21, 24–

25. Supreme Court precedent establishes the opposite: It recognizes that "[e]nvironmental protection" is "undoubtedly" an area "meet for federal law governance" in which federal courts "may fill in 'statutory interstices,' and, if necessary, even 'fashion federal law.'" *AEP*, 564 U.S. at 421–22. Applying state nuisance law to interstate-pollution claims, the Supreme Court has observed, would endanger "an overriding federal interest in the need for a uniform rule of decision" and "basic interests of federalism." *Milwaukee I*, 406 U.S. at 105 n.6. The same is true here.

The panel's alternative rationale—that the "federal common law ceases to exist" on account of the Clean Air Act (CAA), Op. 28—fares no better. Through the CAA, Congress transferred responsibility for setting interstate standards from the *federal* judiciary to politically accountable branches of the *federal* government. *See AEP*, 564 U.S. at 423–25. It forbade courts from using federal common law to supplement federal statutes. *See id.* But that does not imply state courts may now inject themselves into an area of federal concern and craft national emissions standards. *See City of New York*, 993 F.3d at 98. They did not possess that authority "in the first place," *id.*: Pre-CAA precedent applied "federal

common law" to interstate-pollution nuisance claims precisely because "state law cannot be used," *Milwaukee II*, 451 U.S. at 313 n.7.

The fact that the CAA gives States a role in setting local emissions standards, Op. 49–50, does not imply otherwise. A claim may arise exclusively under federal law even where it incorporates state standards. *See Milwaukee I*, 406 U.S. at 107 ("While federal law governs, consideration of state standards may be relevant."); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726–27, 739–40 (1979) (similar). That is the case here. State authority is confined to *in-state* sources; it does not extend to *out-of-state* sources. *See, e.g.*, 42 U.S.C. § 7410(a)(1) (permitting State to adopt plan for region "within such State"); *AEP*, 564 U.S. at 427–28; *Int'l Paper*, 479 U.S. at 490–500. And that authority is exercised under a *federal* framework that gives "primary" responsibility for "greenhouse gas emissions" to a *federal* agency. *AEP*, 564 U.S. at 428.

The panel's final objection to exercising jurisdiction was that the City's claims would fail if construed as federal common-law claims. Op. 29–30. But that does not "deprive[] federal courts of jurisdiction." *Id.* Whether the City has a viable cause of action merely "goes to the merits." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89–93 (1998). The

panel's ruling cannot be reconciled with prior decisions from this Court permitting removal even where a state-court plaintiff "make[s] no bones about seeking relief" foreclosed by federal law. *Old Dominion Elec. Coop. v. PJM Interconnection, LLC*, 24 F.4th 271, 289 (4th Cir. 2022).

III. The Issue Is of Nationwide Importance

This case warrants review by the full Court. The central issue here—whether federal or state law necessarily governs nuisance claims for global climate change—is of nationwide importance. If (as the panel ruled) state law governs, a handful of state-court judges will have the power to dictate emissions policy for the Nation. That outcome is particularly troubling given that the claims here call for judges to balance "social benefit[s]" and "costs," JA152—a quintessentially legislative function. National policy on an issue as sensitive and complex as global climate change should be made by nationally elected officials.

Congress has recognized as much. In the CAA, it assigned States a significant role under the statute, permitting state officials to craft state-specific solutions, subject to review by federal officials, to the difficult questions surrounding air-pollution regulation. *See, e.g.*, 42 U.S.C. §§ 7401(a)(3), 7410(a), 7412(*l*), 7416, 7661a. Crucially, however, Congress

also made clear that state regulatory prerogatives stop at the state line. *See AEP*, 564 U.S. at 427–28; *Int'l Paper*, 479 U.S. at 490–500. It recognized that limit was necessary if all States were to have autonomy to balance health, economic, and environmental conditions in response to local conditions. The panel's decision, in stark contrast, allows a few States to impose a single, one-size-fits-all policy on the entire country.

CONCLUSION

This Court should grant rehearing and rehearing en banc.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the undersigned certifies that this brief complies with the applicable typeface, type-style, and type-volume limitations. This brief was prepared using a proportionally spaced type (Century Schoolbook, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 2,552 words. This certificate was prepared according to the word-count function of Microsoft Word, the word-processing program used to prepare this brief.

By: /s/ Thomas M. Fisher
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CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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