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
for the District of Maryland
(Ellen L. Hollander, District Judge)

SUPPLEMENTAL BRIEF OF THE STATES OF MARYLAND, CALIFORNIA, CONNECTICUT, DELAWARE, HAWAI'I, MAINE, MINNESOTA, NEW JERSEY, NEW MEXICO, NEW YORK, OREGON, RHODE ISLAND, VERMONT, AND WASHINGTON, THE COMMONWEALTH OF MASSACHUSETTS, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE SUPPORTING PLAINTIFF-APPELLEE

BRIAN E. FROSH
Attorney General of Maryland

JOSHUA M. SEGAL
Special Assistant Attorney General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
jsegal@oag.state.md.us
(410) 576-7446

Counsel for the State of Maryland

September 14, 2021

[Additional counsel listed on signature page.]

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INTERESTS OF AMICI CURIAE

Amici the States of Maryland, California, Connecticut, Delaware, Hawai‘i, Maine, Minnesota, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington, the Commonwealth of Massachusetts, and the District of Columbia ("the Amici States") have a strong interest in "preserving the 'dignity' to which [they] are entitled 'as residuary sovereigns and joint participants in the governance of the Nation.'" *West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d 169, 178 (4th Cir. 2011) (quoting *Alden v. Maine*, 527 U.S. 706, 713-14 (1999)). More specifically, the Amici States have a sovereign interest in maintaining their courts' authority to develop and enforce requirements of state statutory and common law in cases brought against entities causing harm to and within their jurisdictions. That interest led certain of the Amici States to file an amicus brief in 2019 ("2019 States' Br.") in support of Plaintiff-Appellee the Mayor and City Council of Baltimore ("the City"), and it now prompts the Amici States to file this supplemental brief.

In their supplemental brief, the oil company Defendants-Appellants ("the Companies") argue that removal was proper because, they say, the City's claims arise under federal law. But removal jurisdiction rests on the claims actually asserted, and the claims here are only for violations of state law. That the local harms caused by the Companies' alleged violations also have national or global

dimensions, in addition to their local ones, does not guarantee the Companies a federal forum. Indeed, states have "a legitimate interest in combatting the adverse effects of climate change on their residents" even though the crisis is also global, *American Fuel & Petrochem. Mfrs. v. O'Keeffe*, 903 F.3d 903, 913 (9th Cir. 2018), and many states have exercised their sovereign authority to do just that. A rule like the one the Companies advocate here—predicating removal jurisdiction on the fact that the plaintiff's claims have national or global dimensions—contravenes settled precedent and, if accepted, would severely damage states' sovereign prerogative to develop and apply their own law in their own courts.

This Court should affirm the decision below.

ARGUMENT

To redress harms flowing from the manner in which the Companies have marketed and promoted their products, the City raises classic state-law tort claims. As previously explained, those claims—which expressly decline to seek liability for the Companies' direct emissions, or to seek regulation of any emissions—do not satisfy either recognized exception to the "well-pleaded complaint" rule, namely, *Grable*[1] jurisdiction or complete preemption. *See* 2019 States' Br. 4-14. Further, the Companies' argument that federal common law "necessarily governs" is merely

[1] *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005).

an ordinary preemption defense that, whatever its merits, cannot give rise to removal jurisdiction. *Id.* at 14-15.

The Companies' Supplemental Brief ("Supp. Br.") reprises their federal common law argument, but that argument again fails. Despite the Companies' assertion that the City brings "interstate or international pollution claims," Supp. Br. 19, it remains the case that the City's claims, as pleaded, are for ordinary state-law violations arising out of the Companies' alleged conduct in promoting and marketing their products. That the harms have national or global dimensions does not change this fact. The well-pleaded complaint rule thus requires remand to state court. *See*, *e.g.*, *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987); *Darcangelo v. Verizon Comms., Inc.*, 292 F.3d 181, 186 (4th Cir. 2002). Nothing in the cases that the Companies cite—including *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021), on which they heavily rely—disturbs this conclusion.

I. THE COMPANIES CANNOT ESTABLISH REMOVAL JURISDICTION BY REWRITING THE COMPLAINT.

The Companies have the burden of establishing removal jurisdiction. *See, e.g.*, *Mayor & City Council of Baltimore v. BP P.L.C.*, 952 F.3d 452, 461 (4th Cir. 2019), *vacated and remanded on other grounds*, 141 S. Ct. 1532 (2021); *see also Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921). They cannot do so here, for the City has pleaded only state-law claims.

The City raises claims arising out of an array of alleged non-emitting conduct by the Companies. Specifically, the complaint alleges that the Companies' "production, promotion, marketing of fossil fuel products, simultaneous concealment of the known hazards of those products, and their championing of anti-science campaigns actually and proximately caused Plaintiff's injuries." Compl. ¶ 10 (JA47). Thus, the City seeks to hold the Companies liable, under various state-law theories, for marketing and selling fossil fuel products while concealing their hazards:

> [C]onsidering the Defendants' lead role in promoting, marketing, and selling their fossil fuel[] products between 1965 and 2015; their efforts to conceal the hazards of those products from consumers; their promotion of their fossil fuel products despite knowing the dangers associated with those products; their dogged campaign against regulation of those products based on falsehoods, omissions, and deceptions; and their failure to pursue less hazardous alternatives available to them, Defendants, individually and together, have substantially and measurably contributed to the City's climate change-related injuries.

Id. ¶ 102 (JA92). Notably absent is any effort to hold the Companies liable for emitting greenhouse gases. Indeed, the complaint expressly disclaims as much. *See id.* ¶ 10 (JA47) ("The City does not seek to impose liability on Defendants for their direct emissions of greenhouse gases and does not seek to restrain Defendants from engaging in their business operations."). Also absent is any effort to regulate *any* emissions in the future.

The Companies, however, seek to rewrite the City's claims to make them sound like ones that should be federal. Thus, the Companies assert that the City brings "interstate or international pollution claims," Supp. Br. 7, that "implicate inherently national and international activities and interests, including treaty obligations and federal and international regulatory schemes," *id.* at 10; *see id.* at 5 (describing claims as "Based On Interstate and International Emissions"). Similarly, the Companies characterize the claims as seeking to "address[] greenhouse gas emissions." *Id.* at 11.

This effort to rewrite the complaint cannot give rise to removal jurisdiction. The plaintiff is, of course, master of its own complaint. *See Caterpillar*, 482 U.S. at 392. And under the well-pleaded complaint rule, it is the claims as written—not as a defendant wishes they were written—that determine the existence of federal jurisdiction. *See, e.g.*, *Darcangelo*, 292 F.3d at 186. Indeed, this Court took that very approach the last time it considered this case. *See Mayor & City Council of Baltimore*, 952 F.3d at 467 & n.10 (evaluating the Companies' claim of federal-officer removal jurisdiction by carefully considering how the City had framed its claims).

Nor can the Companies transform the City's claims into federal ones by pointing to the national and global dimensions of climate change. The Companies assert that "[c]limate change is a worldwide, transboundary phenomenon, caused by

greenhouse gases that 'once emitted become well mixed in the atmosphere.'" Supp. Br. 4 (quoting *American Elec. Power Co. v. Connecticut*, 564 U.S. 410, 422 (2011) ("*AEP*")). That statement is true but irrelevant to jurisdiction here. What controls jurisdiction are the *claims* that the City has brought to redress the local climate harms it has suffered. *See Gunn v. Minton*, 568 U.S. 251, 257 (2013) (explaining that, apart from *Grable* jurisdiction, "a case arises under federal law when federal law *creates the cause of action asserted*" (emphasis added)). And the particular claims the City has brought to challenge the Companies' allegedly deceptive and illegal conduct in marketing and selling fossil fuels are plainly state-law claims.

II. STATES HAVE A CLEAR AND COMPELLING INTEREST IN ADDRESSING CLIMATE CHANGE HARMS WITHIN THEIR BORDERS.

The Companies repeatedly argue that climate change represents a "uniquely federal interest" of the sort that might trigger the application of federal common law. That argument is beside the point: it sounds in ordinary preemption, *see Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988), which is a defense that is "insufficient to allow the removal of the case to federal court," *King v. Marriott Int'l*, 337 F.3d 421, 424 (4th Cir. 2003). But it is also wrong on the merits.

The Supreme Court has made clear that there are only "a few areas, involving 'uniquely federal interests,' [that] are so committed by the Constitution and the laws of the United States to federal control that state law is pre-empted and replaced" by federal common law. *Boyle*, 487 U.S. at 504 (quoting *Texas Indus., Inc. v. Radcliff*

Materials, Inc., 451 U.S. 630, 640 (1981)). Instances where that is true are "few and restricted." *Id.* at 518 (quoting *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963)).

The Companies fail to show that this is such an instance. Their argument that climate change represents a "uniquely federal interest" rests principally on the assertion that climate change is a national and global problem. *See* Supp. Br. 4-8. But it does not follow that the interest in addressing climate change is *uniquely* federal. To the contrary, states have long been recognized as empowered to combat environmental harms whose broader impacts may be felt across national and international borders, including harms caused by climate change. The Ninth Circuit recently deemed it "well settled that the states have a legitimate interest in combatting the adverse effects of climate change on their residents." *O'Keeffe*, 903 F.3d at 913; *see also Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442-43 (1960) (explaining that states' police powers allow them to protect citizens' health). States have repeatedly used their police powers to do just that. The 2019 States' Brief documents some of the many actions that states have taken to confront climate change. 2019 States' Br. 16-24.

More generally, States frequently play a vital role in addressing concerns with national and international implications. The opioid crisis is one prominent example. State and local governments, including several of the Amici States, have pursued (and continue to pursue) state-law claims against companies that manufacture,

market, and sell opioids to state residents in violation of state laws. The defendants' attempts to remove some of those cases were rejected despite the epidemic's obvious national scope. *See, e.g.*, *Delaware ex rel. Denn v. Purdue Pharma L.P.*, C.A. No. 1:18-383-RGA, 2018 WL 1942363, at *4-*5 (D. Del. Apr. 25, 2018); *New Mexico ex rel. Balderas v. Purdue Pharma L.P.*, 323 F. Supp. 3d 1242, 1245, 1251 (D.N.M. 2018). As with the opioid crisis, the consequences of climate change often are felt locally, with state and local governments playing a critical role in crafting and implementing solutions. And as with the harms of the opioid epidemic, the fact that the harms of climate change have national and global dimensions does not mean that the problem can be addressed only at the federal level.

III. THE CASES THAT THE COMPANIES CITE DO NOT SUPPORT REMOVAL JURISDICTION HERE.

The Companies point to an assortment of cases involving climate change, interstate pollution, or foreign affairs to urge that the City's claims are removable because they arise under federal common law. *See*, *e.g.*, Supp. Br. 6-7. None of those cases supports removal jurisdiction here.

Most notably, the Second Circuit's decision in *City of New York*, 993 F.3d 81, which held (erroneously, the Amici States believe) that federal common law preempted state-law claims that New York City had brought against fossil fuel companies, is inapposite for two principal reasons. First, *City of New York* was not a removal case, and the Second Circuit had no occasion to address federal subject

matter jurisdiction. Rather, the case was filed in federal court, where jurisdiction existed on the basis of diversity. *See*, *e.g.*, *id.* at 88, 94. Because the case did not involve removal, the Second Circuit determined that it was "free to consider the Producers' [federal common law] preemption defense on its own terms, not under the heightened standard unique to the removability inquiry." *Id.* at 94. The court thus emphasized that its decision did not conflict with federal court decisions in climate change-related cases brought in state court—including the district court's decision in this case—holding that "federal preemption does not give rise to a federal question for purposes of removal." *Id.*; *see id.* (noting that "[t]he single issue before each of those federal courts was . . . whether the defendants' anticipated defenses could singlehandedly create federal-question jurisdiction under 28 U.S.C. § 1331 in light of the well-pleaded complaint rule").

Second, the alleged conduct at issue here is materially different from that in *City of New York*. In that case, the plaintiff defined the conduct giving rise to liability as "lawful . . . commercial activit[y]." *Id.* at 87 (ellipsis and brackets in original). Here, by contrast, the City has premised liability on "Defendants' tortious, false and misleading conduct," which "deliberately and unnecessarily deceived" reasonable consumers about (among other things) the scientific consensus regarding climate change and its devastating impacts, as well as the central role of the Companies' products in causing climate change. Compl. ¶ 170 (JA128). This Court recognized

as much when it previously considered this case: "Baltimore does not merely allege that Defendants contributed to climate change and its attendant harms by producing and selling fossil fuel products; it is the concealment and misrepresentation of the products' known dangers—and simultaneous promotion of their unrestrained use—that allegedly drove consumption, and thus greenhouse gas pollution, and thus climate change." *Mayor & City Council of Baltimore*, 952 F.3d at 467. Even if a claim based on the *lawful* production and sale of a product may (according to the Second Circuit) arise under federal common law, it does not follow that claims centering on *unlawful*, deceptive marketing of a product do so as well.

Nearly all of the other cases the Companies rely on to claim that "[t]his case falls into [an] area where federal law necessarily governs" (Supp. Br. 7) were initiated in federal court in the first instance or did not address the propriety of removal. *See, e.g.*, *AEP*, 564 U.S. 410 (initiated in federal court); *International Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987) (did not address propriety of removal); *Texas Indus.*, 451 U.S. at 641 (initiated in federal court); *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972) (same); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964) (same); *United States v. Pink*, 315 U.S. 203, 233 (1942) (same); *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 310 (1981) (same). These cases are therefore irrelevant to whether the City's state-law claims, brought in state court, may be removed to federal court.

Nor does this Court's decision in *Caudill v. Blue Cross & Blue Shield of North Carolina*, 999 F.2d 74 (4th Cir. 1993), support the Companies' position here. *Caudill* upheld removal jurisdiction over a government employee's state-law claims against a health insurer in connection with a contract subject to the Federal Employee Health Benefits Act, holding that federal common law had displaced those claims. *See id.* at 77. But the Court reached this conclusion only because it believed that the matter implicated a "uniquely federal interest" under *Boyle*, *see id.*—and, as discussed above, the interest in addressing climate change and redressing its harms is not "uniquely federal." In any event, the Supreme Court later overruled the decision in *Caudill*, holding that suits of that nature do not "arise under" federal law for purposes of federal subject matter jurisdiction. *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 683 (2006); *see id.* at 689 (explaining that the grant of certiorari was intended "to resolve a conflict among lower federal courts concerning the proper forum for claims of the kind Empire assets," and citing *Caudill*).[2]

[2] The idea that "putative state-law claims are removable when . . . they are governed by federal common law" is not, as the Companies would have it, an "independent holding" that somehow survives *Empire Healthchoice*. Supp. Br. 12 n.3. Far from being "independent," that proposition was thoroughly entwined with *Caudill*'s holding regarding the existence of federal jurisdiction over the claims at issue—the very matter on which the Supreme Court overruled *Caudill*. *See Caudill*, 999 F.2d at 77.

Even less on point is *North Carolina ex rel. North Carolina Department of Administration v. Alcoa Power Generating, Inc.*, 853 F.3d 140 (4th Cir. 2017). This Court upheld removal jurisdiction there because it concluded that "the right that North Carolina seeks to vindicate . . . turns on construction of federal law." *Id.* at 146 (citing *Franchise Tax Bd. v. Construction Laborers Vacation Tr.*, 461 U.S. 1, 9 (1983)). The same cannot be said of the rights the City seeks to vindicate here: they are state-law rights, and the Companies can point to no way in which they "turn[] on construction of federal law." *Id.*

* * *

The City's lawsuit does not seek to alter federal climate-change policy or regulate greenhouse gas emissions. Rather, the City raises tort claims that squarely invoke the state's authority to redress in-state harms caused by those who violate state law. Those claims belong in state court, where the City chose to file them.

CONCLUSION

The district court's decision should be affirmed.

Respectfully submitted,

BRIAN E. FROSH
Attorney General of Maryland

/s/ Joshua M. Segal
JOSHUA M. SEGAL
Special Assistant Attorney General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
jsegal@oag.state.md.us
(410) 576-7446

Counsel for the State of Maryland

September 14, 2021

ROB BONTA
Attorney General of California
1300 I Street
Sacramento, CA 95814
(510) 879-0260

Counsel for the State of California

WILLIAM TONG
Attorney General of Connecticut
165 Capitol Avenue
Hartford, CT 06106
(860) 808-5250

Counsel for the State of Connecticut

KATHLEEN JENNINGS
Attorney General of Delaware
820 N. French Street, 6th Floor
Wilmington, DE 19801
(302) 577-0400

Counsel for the State of Delaware

KARL A. RACINE
Attorney General for the
District of Columbia
400 6th Street, NW, Suite 8100
Washington, DC 20001
(202) 727-3400

Counsel for the District of Columbia

CLARE E. CONNORS
Attorney General of Hawai‘i
425 Queen Street
Honolulu, HI 96813
(808) 586-1500

Counsel for the State of Hawai‘i

AARON M. FREY
Attorney General of Maine
6 State House Station
Augusta, ME 04333-0006
(207) 626-8800

Counsel for the State of Maine

MAURA HEALEY
Attorney General of Massachusetts
1 Ashburton Place, 18th Floor
Boston, MA 02108
(617) 727-2200

Counsel for the Commonwealth of Massachusetts

KEITH ELLISON
Attorney General of Minnesota
445 Minnesota Street, Suite 1400
Saint Paul, MN 55101
(651) 296-3353

Counsel for the State of Minnesota

ANDREW J. BRUCK
Acting Attorney General of New Jersey
RJ Hughes Justice Complex
25 Market Street, P.O. Box 093
Trenton, NJ 08625-0093

Counsel for the State of New Jersey

HECTOR BALDERAS
Attorney General of New Mexico
408 Galisteo Street
Villagra Building
Santa Fe, NM 87501
(505) 490-4060

Counsel for the State of New Mexico

LETITIA JAMES
Attorney General of New York
The Capitol
Albany, NY 12224
(518) 776-2400

Counsel for the State of New York

ELLEN F. ROSENBLUM
Attorney General of Oregon
1162 Court Street, NE
Salem, OR 97301
(503) 378-4400

Counsel for the State of Oregon

PETER F. NERONHA
Attorney General of Rhode Island
150 South Main Street
Providence, RI 02903
(401) 274-4400

Counsel for the State of Rhode Island

THOMAS J. DONOVAN, JR.
Attorney General of Vermont
Office of the Attorney General
109 State Street
Montpelier, VT 05609-1001
(802) 828-3171

Counsel for the State of Vermont

ROBERT W. FERGUSON
Attorney General of Washington
1125 Washington St. SE
Olympia, WA 98504
(360) 753-6200

Counsel for the State of Washington

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because this brief contains 2,854 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen point, Times New Roman.

/s/ Joshua M. Segal
Joshua M. Segal

CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2021, 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 appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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Joshua M. Segal