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; DOES 1-100,

Defendants-Appellants,

GETTY PETROLEUM MARKETING, INC.,

Defendant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND, NO. 18-CV-00395-WES-LDA (WILLIAM E. SMITH, CHIEF JUDGE)

BRIEF OF MASSACHUSETTS, CALIFORNIA, CONNECTICUT, DELAWARE, HAWAII, MAINE, MARYLAND, MINNESOTA, NEW JERSEY, NEW YORK, OREGON, VERMONT, AND WASHINGTON, AS AMICI CURIAE IN SUPPORT OF APPELLEE AND AFFIRMANCE

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INTERESTS OF AMICUS CURIAE

Amici Massachusetts, California, Connecticut, Delaware, Hawaii, Maine, Maryland, Minnesota, New Jersey, New York, Oregon, Vermont, and Washington, (Amici States), as sovereigns, have a unique interest in maintaining their state courts' authority to develop and enforce requirements of state statutory and common law—including monetary remedies—in cases brought against commercial entities causing harm to and within their jurisdictions. That interest is particularly apparent where a state itself is the plaintiff, because "considerations of comity" disfavor federal courts "snatch[ing] cases which a State has brought from the courts of that State, unless some clear rule demands it." *Franchise Tax Bd. v. Construction Laborers Vacation Tr.*, 463 U.S. 1, 21 n.22 (1983). And it extends to classic state-law tort claims like the ones at issue here: claims brought in state court to vindicate Rhode Island's interests in redressing climate change-related harms within the state that it alleges are caused by the conduct of fossil fuel producers, marketers, and distributors. Indeed, climate change already is having a variety of costly impacts within our states, and those impacts are expected to worsen.

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)). Preserving

that dignity includes ensuring that their prerogative, as sovereign entities, to enforce state law in state courts is respected, "unless some clear rule demands" otherwise. *Franchise Tax Bd.*, 463 U.S. at 21 n.22. The enforcement of state law in state courts often implicates national or even international interests, but that fact alone has never supplied a sufficient basis for overriding a state's choice to remedy state-law violations in its own courts. Federal courts have thus rejected claims to remove state-led actions for state-law violations arising from, for example, the international Volkswagen "diesel-gate" vehicle emissions cheating scandal,[1] the national subprime mortgage lender housing and economy-wide crisis,[2] and the national opioid sales and marketing health epidemic.[3] Like these widespread crises, states

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[1] *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, MDL No. 2672, 2017 WL 2258757 (N.D. Cal. May 23, 2017); Arnold W. Reitze Jr., *The Volkswagen Air Pollution Emissions Litigation*, 46 Envtl. L. Rep. 10564, 10566-68 (2016) (noting both federal and state enforcement and the important role of states).

[2] *E.g.*, *Massachusetts v. Fremont Inv. & Loan*, Civ. A. No. 07-11965-GAO, 2007 WL 4571162 (D. Mass. Dec. 26, 2007); *see also* Mark Totten, *The Enforcers & The Great Recession*, 36 Cardozo L. Rev. 1611, 1612 (2015) ("No one played a more vital role in responding to the worst economic crisis since the Great Depression than a small band of attorneys general.").

[3] *E.g.*, *New Mexico ex rel. Balderas v. Purdue Pharma L.P.*, 323 F. Supp. 3d 1242, 1245, 1251 (D.N.M. 2018); *see also Town of Randolph v. Purdue Pharma L.P.*, Civ. A. No. 19-cv-10813-ADB, 2019 WL 2394253 (D. Mass. June 6, 2019); *City of Worcester v. Purdue Pharma L.P.*, Civ. A. No. 18-11958-TSH (D. Mass. Nov. 21, 2018) (Doc. No. 36); Lenny Bernstein, *Five More States Take Legal Action Against Purdue Pharma for Opioid Crisis*, Wash. Post, May 16, 2019, https://tinyurl.com/y6yrljkb (noting actions by forty-five states).

also have "a legitimate interest in combatting the adverse effects of climate change on their residents," despite the global nature of the crisis, *see American Fuel & Petrochem. Mfrs. v. O'Keeffe*, 903 F.3d 903, 913 (9th Cir. 2018), and many states are exercising their sovereign authority to do so. *Infra* Argument C.2.b. A rule like the one the oil company defendant-appellants (Companies) advocate here—that pins removal jurisdiction to the implication of national or international interests—is contrary to settled precedent and, if accepted, would work immeasurable damage to states' guarded sovereign prerogative to pursue their state-law claims in state courts in environmental and non-environmental cases alike.

This Court should affirm the District Court's well-reasoned decision to remand Rhode Island's state-law claims to Rhode Island's properly chosen forum—state court. First, Rhode Island's claims do not necessarily raise any federal issue, much less one that warrants the exercise of jurisdiction under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005). Second, the doctrine of complete preemption does not support federal jurisdiction. And third, there is no merit to the notion that Rhode Island's claims belong in federal court because they inherently "arise under" federal common law. Even if that kind of argument could theoretically supply an independent basis for removal—which it cannot—the interest in combating climate change is not uniquely federal.

ARGUMENT

The Well-Pleaded Complaint Rule Compels Affirmance of the District Court's Remand Decision.

The right to remove is construed narrowly against removal, *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-109 (1941), and "the 'claim of sovereign protection from removal arises in its most powerful form,'" where, as here, the removed action is one brought by a state in state court to enforce state-law, *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 676 (9th Cir. 2012) (citation omitted); *see also LG Display Co. v. Madigan*, 665 F.3d 768, 774 (7th Cir. 2011); *West Virginia*, 646 F.3d at 178-79. The Companies assert that federal question jurisdiction applies because Rhode Island's claims "arise under" federal law. Appellants' Opening Br. (Br.) 15. But the Companies cannot satisfy their burden to show that removal is appropriate here. *Danca v. Private Health Care Sys.*, 185 F.3d 1, 4 (1st Cir. 1999) (removal statutes are "strictly construed" and the "defendants have the burden of showing the federal court's jurisdiction"); *see Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921).

The "well-pleaded complaint" rule presents an insurmountable burden for the Companies' argument because, as the District Court correctly held, Rhode Island's state-law claims do not actually arise under federal law. That rule is a "powerful doctrine" that "severely limits the ... cases in which state law 'creates the cause of action' that may be initiated in or removed to federal district court, thereby avoiding

more-or-less automatically a number of potentially serious federal-state conflicts." *Franchise Tax Bd.*, 463 U.S. at 9-10. A plaintiff is "master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987); *see also*, *e.g.*, *López–Muñoz v. Triple–S Salud, Inc.*, 754 F.3d 1, 5 (1st Cir. 2014). Even an "obvious" preemption defense does not create removal jurisdiction; instead, a preemption defense is to be raised in, and adjudicated by, state court. *López–Muñoz*, 754 F.3d at 6. Indeed, it is well settled that "[m]inimal respect for the state processes ... precludes any *presumption* that state courts will not safeguard federal constitutional rights." *Middlesex Cty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982).

The exceptions to the well-pleaded complaint rule are narrow, 14C C.A. Wright & A.R. Miller, Federal Practice and Procedure § 3722.1 (4th ed. 2018): a defendant may remove a case where a nominally state-law claim "necessarily raise[s]" a substantial and disputed federal issue that a federal court can entertain without disturbing the federal-state judicial balance, *Grable*, 545 U.S. at 313-14, or, alternatively, a defendant may remove a case on the basis of "complete preemption." *E.g.*, *Fayard v. Ne. Vehicle Servs., LLC*, 533 F.3d 42, 45 (1st Cir. 2008); *Prince v. Sears Holdings Corp.*, 848 F.3d 173, 177 (4th Cir. 2017). But as the District Court determined, neither of those two exceptions applies here. This Court should reject

the Companies' invitation to create a new, legally-unsupported exception to the well-pleaded complaint rule.

A. *Grable* Jurisdiction Does Not Warrant Reversal.

Federal jurisdiction under *Grable*—the first recognized exception to the well-pleaded complaint rule—is limited to a "special and small category" of cases. *Gunn v. Minton*, 568 U.S. 251, 258 (2013). *Grable* jurisdiction exists only when "a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Id*. Here, Rhode Island's claims do not "necessarily raise[]" any federal issue at all, let alone one that is actually disputed, substantial, and capable of resolution in federal court without disrupting the federal-state balance approved by Congress. Thus, the District Court correctly concluded that these tightly circumscribed criteria do "not exist here, because the Companies have not located 'a right or immunity created by the Constitution or laws of the United States' that is 'an element and an essential one, of ... [Rhode Island]'s cause[s] of action.'" Br. Add-81 (citing *Gully v. First Nat. Bank*, 299 U.S. 109, 112 (1936)).

Rhode Island's complaint also does not "necessarily raise[]" a federal issue. While the Companies argue that Rhode Island's claims touch upon various "federal interests" implicated by climate change such as national security, foreign affairs, energy policy, economic policy, and environmental regulation, Br. 31, that is beside

the point; these federal *interests* are not federal *issues* for the court to resolve. Rather, to be "necessarily raised," the federal claims must "turn on substantial questions of federal law." *Grable*, 545 U.S. at 312. In *Grable*, for instance, compliance with federal law was "an essential element of ... [plaintiff's state-law] quiet title claim." *Id*. at 314-15. Indeed, "the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction." *Merrell Dow Pharms. v. Thompson*, 478 U.S. 804, 813 (1986). That is so even where, unlike here, the state-law claim "references a federal ... statute," because a contrary rule "would herald[] a potentially enormous shift of traditionally state cases into federal courts." *Nevada*, 672 F.3d. at 676 (quoting *Grable*, 545 U.S. at 319). Claims giving rise to *Grable* jurisdiction are thus a "slim category" in which, among other things, resolution of the federal question is "necessary." *Gunn*, 568 U.S. at 258.

Here, by contrast, federal law is not an "essential element" of any of Rhode Island's claims. Instead, Rhode Island's claims are state-law tort claims—Rhode Island seeks money damages for local harms resulting from the Companies' alleged tortious conduct in producing, marketing, and distributing fossil fuels and seeks abatement of the nuisance the Companies allegedly have caused. Joint Appendix (JA) 23-27. The "rights, duties, and rules of decision implicated by the complaint are all supplied by state law, without reference to anything federal." Br. Add-81.

Rhode Island's claims—like virtually all state-law claims, even ones with a federal regulatory backdrop—turn on issues of state law, not federal law. *See Bennett v. Southwest Airlines Co.*, 484 F.3d 907, 909-10, 912 (7th Cir. 2007) (remanding tort claims regarding airline crash despite "national regulation of many aspects of air travel"). And simply "gestur[ing] to federal law and federal concerns in a generalized way" does not raise any substantial or actually disputed federal issue that may justify federal jurisdiction. *County of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 938 (N.D. Cal. 2018), *appeal docketed*, No. 18-15499 (9th Cir. May 27, 2018).

The Companies are likewise wrong to contend that Rhode Island's public nuisance claim raises federal issues because Rhode Island may have to show that the harm from the Companies' conduct outweighs its utility. Br. 31-33. That determination does not "necessarily" require resolution of any federal law issue either. The federal laws the Companies cite regarding cost-benefit analysis of certain *potential* federal greenhouse gas control programs are inapposite, because the analysis they require does not establish the utility of state efforts to address climate change impacts in their own states. *See id*. at 32 (citing 42 U.S.C. §§ 13384, 13389(c)(1)). Indeed, a state court can evaluate the impact of the Companies' conduct (including its harm and its utility), consider the relevance of any federal regulatory backdrop, make a determination as to the unreasonableness of the

Companies' conduct, and craft an appropriate remedy, all without resolving any federal issue within the meaning of *Grable*.

State courts across the country have applied nuisance law in environmental cases, even when federal law also regulates the conduct at issue. *E.g.*, *Hoffman v. United Iron & Metal Co.*, 671 A.2d 55, 68-69 (Md. Ct. App. 1996) (affirming maintenance of state common-law nuisance claim against a facility that was subject to federal and state air pollution regulation); *see Washington Suburban Sanitary Comm'n v. CAE-Link Corp.*, 622 A.2d 745, 753-57 (Md. Ct. App. 1993) (upholding plaintiff's nuisance claims that sewage sludge processing plant, constructed pursuant to federal court orders, interfered with neighboring landowners' use and enjoyment of their property); *Biddix v. Henredon Furniture Indus.*, 331 S.E.2d 717, 720-24 (N.C. Ct. App. 1985) (allowing plaintiffs to maintain common-law nuisance claims for discharges impairing water quality even where defendant's conduct was regulated by both the state and federal Clean Water Acts). Likewise, the Sixth Circuit rejected a claim that the federal Clean Air Act preempted a plaintiff's claims that federally-regulated ethanol emissions from a nearby, out-of-state whiskey distillery created a nuisance. *Merrick v. Diageo Americas Supply, Inc.*, 805 F.3d 685, 686 (6th Cir. 2015).

Federal courts have also recognized that it is appropriate for state courts to decide complex environmental cases—even ones that may touch on federal issues.

For instance, the Second Circuit remanded claims brought in state court against corporations that had used methyl tertiary butyl ether (MTBE) as a gasoline additive. *In re MTBE Prods. Liab. Litig.*, 488 F.3d 112, 136 (2d Cir. 2007). Relying on a Supreme Court decision in the *Grable* line of case law, the Second Circuit held that the mere fact that defendants "refer to federal legislation by way of a defense" was insufficient to establish federal jurisdiction. *Id*. at 135 (citing *Merrell Dow*, 478 U.S. 813).

Finally, federal jurisdiction under *Grable* is not appropriate here because removal of Rhode Island's state-law claims would disrupt the federal-state balance that Congress struck. State courts are the most appropriate venue for state-law tort claims. *See*, *e.g.*, *Darcangelo v. Verizon Commc'ns, Inc.*, 292 F.3d 181, 194 (4th Cir. 2002) (stressing that "state common law torts ... are traditional areas of state authority"). And as the Supreme Court has explained, when, as in the case here, there is "no federal cause of action and no preemption of state remedies," Congress likely intended for the claims to be heard in state court. *Grable*, 545 U.S. at 318.

B. The Clean Air Act Cannot Support Removal on Complete Preemption Grounds.

The Companies' alternative "complete preemption" argument fares no better. *See* Br. 48-52. Complete preemption may support removal jurisdiction because it allows "what a plaintiff calls a state law claim to be *recharacterized* as a federal claim." *Fayard*, 533 F.3d at 45. Ordinary preemption, by contrast, is "merely a

defense and is not a basis for removal." *Id*. Complete preemption is an exceedingly narrow doctrine and has no applicability to the types of claims alleged by Rhode Island here. Moreover, the Companies' argument, that the purely state-law claims in this case are completely preempted, would stretch the doctrine to severely constrain states' recognized authority to protect their residents' health and welfare. *See IMS Health Inc. v. Mills*, 616 F.3d 7, 28, 44 (1st Cir. 2010) (noting that states retain authority under their police powers to regulate matters of local concern and are vested with the responsibility of protecting the health, safety, and welfare of their citizens).

Complete preemption applies only in the rarest of circumstances. The defendant must establish that Congress both: (i) intended to displace the state-law cause of action; and (ii) provided a substitute federal cause of action. *See Caterpillar*, 482 U.S. at 393. Complete preemption thus exists only where the conduct at issue is subject to exclusive federal regulation and where federal law provides a federal cause of action. *Fayard*, 533 F.3d at 46. As stated by the District Court, "Congress, not the federal courts, initiates this 'extreme and unusual mechanism.'" Br. Add-76 (quoting *Fayard*, 533 F.3d at 47-49). And only with regard to three federal statutes—the Labor Management Act, the Employees Retirement Income Security Act, and the National Bank Act—has the Supreme Court actually held that Congress provided the "exclusive cause of action" for the

conduct at issue so as to justify removal based on the doctrine of complete preemption. *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8-9 (2003).[4]

The complete preemption doctrine does not provide a basis for removal here. First, Congress plainly did not intend for the Clean Air Act to displace Rhode Island's state-law claims. In fact, the Act declares that "air pollution prevention ... is the primary responsibility of States and local governments," 42 U.S.C. § 7401(a)(3), and it includes two broad savings clauses that expressly preserve non-Clean Air Act claims. The first, the citizen suit savings clause, provides (among other things) that "[n]othing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief." *Id*. at § 7604(e). The second, the states' rights savings clause, provides generally that "nothing in ... [the Clean Air Act] shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of

[4] Given its narrowness, courts have rejected complete preemption arguments where federal environmental statutes are at issue. *See In re MTBE*, 488 F.3d at 135 (no Clean Air Act complete preemption); *ARCO Envtl. Remediation, L.L.C. v. Department of Health & Envtl. Quality*, 213 F.3d 1108, 1114 (9th Cir. 2000) (no complete preemption under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)); *City of Chesapeake v. Sutton Enters.*, 138 F.R.D. 468, 475-78 (E.D. Va. 1990) (no complete preemption under CERCLA or the Toxic Substances Control Act).

air pollution," except that certain state or local emission standards *may not be less stringent* than their federal counterparts. *Id*. at § 7416. Section 7416 "clearly encompasses common law standards." *Merrick*, 805 F.3d at 690; *see also In re MTBE*, 488 F.3d at 135 (holding that Clean Air Act did not completely preempt state law MTBE groundwater claims). Indeed, the Act's savings clause is "sweeping and explicit." *American Fuel & Petrochem. Mfrs. v. O'Keeffe*, 134 F. Supp. 3d 1270, 1285-86 (D. Or. 2015), *aff'd*, 903 F.3d 903 (9th Cir. 2018).

Second, Congress did not provide a substitute federal-law cause of action here, as required to establish complete preemption. *Fayard*, 533 F.3d at 46. The Companies' complete preemption argument rests on the fact that the Clean Air Act regulates, or enables EPA to regulate, emissions of greenhouse gases and other pollutants. Br. 48-52. But Rhode Island has not sued the Companies as *emitters* of greenhouse gases. Instead, it has sued them as producers, marketers, and distributors of fossil fuels, on state common-law and statutory theories that would be every bit as applicable to producers, marketers, and distributors of other products. The Companies fail to explain how the Clean Air Act could completely preempt state-law claims arising out that conduct when the Act does not even regulate it. *See*, *e.g*., *King v. Marriott Int'l, Inc*., 337 F.3d 421, 425 (4th Cir. 2003). Nor could they: even with respect to ordinary preemption, the Supreme Court has explained: "[t]here is no federal pre-emption in vacuo, without a constitutional text or a federal statute to

assert it." *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988). The Companies point to no "enacted statutory text" that would support complete preemption of Rhode Island's claims here.

C. There Is No Other Basis for Treating Rhode Island's State-Law Claims As If They Arise Under Federal Law.

Unable to satisfy the two established exceptions above, the Companies attempt to avoid the well-pleaded complaint rule altogether. Rhode Island's state-law claims, they say, are *really* federal common-law claims and thus arise under federal law for purposes of the removal statute. Br. 15-31. The Companies make that claim even though the Clean Air Act has displaced *federal* common law with respect to greenhouse gas emissions. Br. 27-29. The Companies' contention is misguided for at least three reasons.

1. The Companies' Argument Is Merely an Alternative Preemption Argument and Cannot Support Removal.

The thrust of the Companies' argument is that (i) federal law provides the only rule of decision for the kinds of claims that Rhode Island has asserted in its complaint, and (ii) for that reason, Rhode Island's claims should be treated as arising under federal law. *See* Br. 15. But that argument simply repackages the Companies' complete preemption arguments. *See*, *e.g.*, *Fayard*, 533 F.3d at 45 (explaining that under complete preemption "what a plaintiff calls a state law claim is to be *recharacterized* as a federal claim," and that, "[b]y contrast, ordinary preemption—

i.e., that a state claim conflicts with a federal statute—is merely a *defense* and is not a basis for removal"). As explained above, the Companies' complete preemption argument is meritless, and that conclusion applies with even more force in its repackaged form, which does not rely on any congressional enactment.[5]

To be sure, the Companies' arguments may be an attempt to invoke ordinary preemption, for their argument is that federal law bars the state-law remedies that Rhode Island seeks. *See* Br. 15. Yet, a federal-law preemption defense does not permit removal. *See Caterpillar*, 482 U.S. at 386. Thus, on remand to the state court, the Companies are free to argue that some combination of the Clean Air Act and federal common law means that Rhode Island's claims are not viable. But that, like other federal-law issues not present on the face of Rhode Island's well-pleaded complaint, is a matter for the state court to resolve.

2. Rhode Island's Well-Pleaded Claims Are Not Federal in Any Event.

Even if it were possible to establish federal jurisdiction on the sort of alternative ground that the Companies proffer, which it is not, remand is still

[5] The Companies attempt to frame their "arising under federal law" argument as a choice-of-law issue. Br. 16-19. They provide no legal basis for this argument, and there is none. Legal grounds must exist for exercising federal jurisdiction, and as discussed herein, when a well-pleaded complaint raises only state-law claims, those claims are not removable unless *Grable* jurisdiction exists or the state-law claims are completely preempted.

required. Contrary to the Companies' argument, Rhode Island's state-law tort law claims do not arise under federal common law. The interest in combating and adapting to climate change is not exclusively federal, and it is immaterial that climate change involves transboundary emissions.

a. Addressing Climate Change Harms Is Not a "Uniquely Federal Interest."

The Supreme Court has explained that there are "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 v. United Techs. Corp.*, 487 U.S. 500, 504 (1988) (citation omitted). But such unique federal interests giving rise to federal common law is the exception—not the rule—and climate change harms are not an area that falls within that exception.

The Companies' argument to the contrary rests principally on the idea that climate change is a national problem requiring a national solution. *See* Br. 24. That the problem and its solutions include national and global dimensions, however, does not mean that they present a "uniquely federal interest[]." *Boyle*, 487 U.S. at 504. In fact, as explained above, states often play a vital role in addressing concerns in their states with national implications. *See supra* pp.2-3. The opioid crisis is one prominent and tragic example. In that context, states and local governments, including Massachusetts, are pursuing state-law claims against companies that

manufacture, market, and sell opioids to state residents for violating state laws. The defendants' attempts to remove some of those cases, too, were rejected despite the epidemic's national scope. *See*, *e.g.*, *New Mexico*, 323 F. Supp. 3d at 1245, 1251; *Town of Randolph*, 2019 WL 2394253, *1. Just like with the opioid crisis, the consequences of climate change often are felt locally, *see*, *e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 522-23 (2007), and state and local governments play a critical role in crafting and implementing solutions.

Rising sea levels, for example, are a global phenomenon—but that phenomenon often takes a local toll.[6] Over the past half century, sea levels in the Northeast have been increasing three to four times faster than the global average.[7] Rhode Island, a low-lying coastal state, is experiencing and will continue to experience greater sea level rise than the global average, and its topography, geography, and land use patterns make it particularly susceptible to harm from sea level rise. *See* JA-26. The direct effects of rising temperature also are felt locally. Urban development means that temperatures often are highest in densely populated inner-city neighborhoods, which can increase the health risk to sensitive populations

[6] *E.g.*, Nestor Ramos, *Seven Things We Learned Researching Climate Change on Cape Cod*, Boston Globe, Sept. 27, 2019, https://www.bostonglobe.com/metro/2019/09/26/things-learned-researching-climate-change-cape-cod/ydI10vGJ7ummlw1JQLxSAL/story.html.

[7] Rhode Island Sea Grant, Sea Level Rise in Rhode Island: Trends and Impacts (Jan 2013), https://tinyurl.com/ty2fveq.

like the elderly, children, and people with preexisting pulmonary conditions.[8] Whatever measures are undertaken, the cost of sea-level and temperature rise to state and local governments will be massive.[9]

States, for their part, have long been recognized as having the power to combat environmental harms, including harms caused by air pollution. *See*, *e.g.*, *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442-43 (1960) (local regulation of ships' smoke "clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power"). As to climate change in particular, one court of appeals recently deemed it "well settled that the states have a legitimate interest in combatting the adverse effects of climate change on their residents." *American Fuel*, 903 F.3d at 913 (citing *Massachusetts*, 549 U.S. at 522-23); *see id*. (noting that states' "broad police powers" allow them "to protect the health of citizens in the state").

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[8] *See* Nadja Popovich & Christopher Flavelle, *Summer in the City Is Hot, but Some Neighborhoods Suffer More*, N.Y. Times, Aug. 9, 2019, https://tinyurl.com/trap8ro.

[9] *See*, *e.g.*, II U.S GLOBAL CHANGE RESEARCH PROGRAM, FOURTH NATIONAL CLIMATE ASSESSMENT: IMPACTS, RISKS, AND ADAPTATION IN THE UNITED STATES 1321 (2018), https://tinyurl.com/y9d26rjl ("Nationally, estimates of adaptation costs range from tens to hundreds of billions of dollars per year."); *id*. at 760 (describing $235 million spent by Charleston, South Carolina as of 2016 to respond to increased flooding); U.S. GLOBAL CHANGE RESEARCH PROGRAM, CLIMATE CHANGE IMPACTS IN THE UNITED STATES: THE THIRD NATIONAL CLIMATE ASSESSMENT 379 (2014), https://tinyurl.com/y9mc4zj7 (estimating cumulative costs from sea level rise in Boston alone as high as $94 billion through 2100).

And indeed states have used their police powers to do just that, recognizing that they lack the luxury of waiting for a comprehensive solution to come from the federal government.[10] Rhode Island has produced a detailed study on the impacts of climate change on it, which contains numerous, detailed recommendations for increasing the state's resiliency that the state plans to begin implementing in the near term.[11] Rhode Island has also developed the online "Storm Tools," which shows the effects of sea level rise on the Rhode Island shoreline down to effects on specific street addresses.[12] And, in 2004, Rhode Island established a Renewable Energy Standard, which requires the state's retail electricity providers to supply 38.5% of their electricity sales from renewable resources by 2035 to curb the emission of greenhouse gases. *See* R.I. Gen Laws § 39-26-4.

Massachusetts, which has long been a leader in tackling climate change, has also taken a variety of steps designed to reduce greenhouse gas emissions and

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[10] The overwhelming scientific consensus is that immediate and continual progress toward a near-zero greenhouse gas emission economy by mid-century is necessary to avoid catastrophic consequences. *See*, *e.g.*, Myles Allen et al., Summary for Policymakers 12-15 *in* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, SPECIAL REPORT: GLOBAL WARMING OF 1.5°C (2018), https://tinyurl.com/y5yf2lsh.

[11] Rhode Island, Resilient Rhody: An Actionable Vision for Addressing the Impacts of Climate Change in Rhode Island (2018), http://climatechange.ri.gov/documents/resilientrhody18.pdf.

[12] Rhode Island Shoreline Change Special Area Mgmt. Plan, STORMTOOLS, https://www.beachsamp.org/stormtools/.

facilitate the transition to less carbon-intensive forms of energy.[13] In 1997, Massachusetts created a Renewable Portfolio Standard (RPS) to require a percentage of the state's electricity to come from renewable sources, Mass. Gen. Laws. ch. 25A, § 11F, and, in 2001 it was the first state to cap CO_2 emissions from fossil-fueled power plants. 310 Code of Mass. Regulations (C.M.R.) § 7.29(a)(5).[14] In 2008, Massachusetts enacted the Global Warming Solutions Act "to address the grave threats that climate change poses to the health, economy, and natural resources of the Commonwealth." *New England Power Generators Ass'n v. Department of Envtl. Prot.*, 480 Mass. 398, 399, 105 N.E.3d 1156, 1157 (2018) (citing Mass. Gen. Laws. ch. 21N, §§ 1-9). Pursuant to that Act, Massachusetts has established a declining limit on in-state power-plant emissions through 2050, 310 C.M.R. § 7.74, while requiring an increasing amount of clean electricity to be sold annually to Massachusetts consumers, *id*. at § 7.75.

Many other states have also taken measures to mandate emissions reductions or reduce their carbon footprint. California, for example, has codified its objective to reduce greenhouse emissions to 40% below 1990 levels by 2030.[15] Maryland's recently-updated RPS requires utility companies to provide at least 50% of

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[13] *See, e.g.*, Ken Kimmell & Laurie Burt, *Massachusetts Takes on Climate Change*, 27 UCLA J. Envtl. L. & Pol'y 295, 296-97 (2009).

[14] Kimmell & Burt, *supra* note 13, at 313 n.24.

[15] Cal. Health & Safety Code, § 38500 et seq.

electricity from renewable sources by 2030,[16] New York law requires 70% of retail electricity sales to come from renewable sources by 2030,[17] and Connecticut has required utilities to obtain 40% of their energy from renewable sources by 2030.[18] Oregon has adopted a Clean Fuels Program to reduce the carbon intensity of fuel.[19] And New Jersey's Global Warming Response Act requires reductions in carbon dioxide emissions—culminating in a 2050 level that is 80% lower than 2006—and establishes funding for climate-related projects and initiatives.[20] Delaware similarly requires utilities to obtain 25% of their electricity from renewable sources, and 3.5% from solar, by 2025.[21]

States also have collaborated on successful regional efforts to reduce greenhouse gas emissions through market-based systems. Rhode Island, Maryland, Connecticut, Delaware, Maine, Massachusetts, New Hampshire, New York, and

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[16] Clean Energy Jobs Act, 2019 Md. Laws. ch. 757 (S.B. 516) (to be codified at Md. Code Ann., Pub. Util. § 7-702).

[17] N.Y. Climate Leadership and Community Protection Act, 2019 McKinney's Sess. Law News of N.Y. ch. 106 (S. 6599).

[18] Conn. Gen. Stat. §§ 16-245a, 16-245n.

[19] Or. Rev. Stat. §§ 468A.265 to 468A.277; Or. Admin. R. 340-253-0000 to 340.253.8100; *see American Fuel*, 903 F.3d 903 (rejecting challenge to Oregon's Clean Fuels Program).

[20] N.J. Stat. Ann. §§ 26:2C-37 to -58.

[21] 26 Del. C. § 354(a).

Vermont participate in the Regional Greenhouse Gas Initiative,[22] a regional cap-and-trade program that uses an increasingly stringent carbon emissions cap to reduce carbon pollution from power plants.[23] Participating states have reduced carbon emissions from the electricity generating sector by 40% since the program launched.[24]

The compatibility of state regulation with federal efforts to address climate change is also borne out by the breadth of climate change cases that state courts already hear. A database maintained by the Sabin Center for Climate Change Law at Columbia Law School and Arnold & Porter Kaye Scholer LLP lists 326 past and ongoing lawsuits throughout the country raising state-law claims related to climate change, more than 90% of which are being or have been adjudicated in state courts or before state agencies.[25] The claims in these cases derive from a wide range of

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[22] In June 2019, New Jersey finalized regulations to establish a market-based program to reduce greenhouse gas emissions. The state will resume participating in RGGI on January 1, 2020.

[23] *See* Regional Greenhouse Gas Initiative, Elements of RGGI, https://www.rggi.org/program-overview-and-design/elements (last visited Dec. 10, 2019).

[24] Acadia Center, Outpacing the Nation: RGGI's Environmental and Economic Success 3 (Sept. 2017), http://acadiacenter.org/wp-content/uploads/2017/09/Acadia-Center_RGGI-Report_Outpacing-the-Nation.pdf.

[25] Sabin Center for Climate Change and the Environment and Arnold & Porter Kaye Scholer LLP, U.S. Climate Change Litigation: State Law Claims, Climate Change Litigation Database, http://climatecasechart.com/case-category/state-law-claims/ (last visited Dec. 10, 2019).

state laws. For example, state courts routinely address climate change in the context of challenges to land-use decisions under state equivalents to the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370m-12. *See*, *e.g.*, *Cleveland Nat'l Forest Found. v. San Diego Ass'n of Gov'ts*, 397 P. 3d 989 (Cal. 2017). State courts also adjudicate the operation and validity of states' regulatory efforts to reduce greenhouse gas emissions. *See*, *e.g.*, *California Chamber of Commerce v. State Air Res. Bd.*, 10 Cal. App. 5th 604, 613-14 (Ct. App. 2017) (upholding California's economy-wide cap-and-trade program); *New England Power*, 105 N.E.3d at 1167 (upholding Massachusetts' declining limits for greenhouse gas emissions from power plants). As with these and other cases, Rhode Island's state courts can and should hear Rhode Island's claims under state law.

The instant case does not seek to alter climate change policy or regulate greenhouse gas emissions, and the complaint challenges no regulation, permit, treaty, contract, or international behavior. Nor does it seek abatement relief outside of Rhode Island's borders. Rather, the tort claims fall squarely within Rhode Island's police power to redress tortious conduct by non-governmental actors. Thus, treating these claims as arising under state law, not federal common law, is consistent with how courts have treated other suits against sellers and manufacturers of products. It is well-settled that such suits do not present federal issues warranting application of federal common law—even if important federal interests are raised,

and even if a product is sold or causes injury in many states. *See*, *e.g.*, *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1324 (5th Cir. 1985) (en banc) (state law, not federal common law, governed in cases against asbestos manufacturers); *In re "Agent Orange" Prod. Liab. Litig.*, 635 F.2d 987, 995 (2d Cir. 1980) (state law, not federal common law, governed class action tort case against producers of Agent Orange on behalf of millions of soldiers, despite federal interest in veterans' health).

b. That Climate Change Involves Transboundary Pollution Does Not Mean Rhode Island's Claims Arise Under Federal Common Law.

Despite the foregoing, the Companies insist that Rhode Island's claims must arise under federal common law because they relate to transboundary pollution. *See*, *e.g.*, Br. 19-22. The Companies are wrong for three principal reasons.

First, even if it were appropriate to treat Rhode Island's claims as transboundary-emissions claims, Supreme Court precedent establishes that federal common law would not categorically govern. In *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987)—a suit involving ordinary preemption, not complete preemption, and thus not implicating removal jurisdiction—the Court declined to hold all state-law claims against out-of-state polluters preempted. *Id.* at 497. Consistent with the outcome of *Ouellette*, the Court in *American Electric Power Company v. Connecticut*, 564 U.S. 410 (2011) (*AEP*), after finding that the Clean Air Act had displaced any federal common law that might have existed for

curtailment of greenhouse gas emissions, expressly *declined* to invalidate the plaintiffs' state-law nuisance claims. *Id*. at 429. Instead, it remanded for the lower court to consider the availability of state nuisance law to remedy the defendants' conduct. *See id*. Thus, the Companies' argument that interstate-greenhouse gas emission claims arise under federal common law is nonsensical after *AEP*.

Second, *Native Village of Kivalina v. ExxonMobil Corp*., 696 F.3d 849 (9th Cir. 2012) also does not support the Companies. *Kivalina* involved nuisance claims brought against energy companies, in federal court, under both federal and state common law. *Id*. at 853, 859. In dismissing the federal-law claims, the District Court declined to exercise supplemental jurisdiction over the state-law claims, which it "dismissed without prejudice to their presentation in a state court action." *Native Village of Kivalina v. ExxonMobil Corp*., 663 F. Supp. 2d 863, 882-83 (N.D. Cal. 2009), *aff'd on other grounds*, 696 F.3d 849. The court of appeals, in turn, merely applied *AEP* to hold that the federal common-law claims had been displaced by the Clean Air Act, not that the plaintiff's state-law claims arose under federal common law. *Kivalina*, 696 F.3d at 856.[26] And the concurrence stressed that "[d]isplacement

[26] Remarkably, the Companies argue that federal common law should supply the decisional law in this case even though many of them argued successfully in *Kivalina* that federal common law on this issue had been displaced. Br. of ExxonMobil et al. at 56-61, *Kivalina*, 696 F.3d 849 (No. 09-17490), 2010 WL 3299982. The Companies may not "assume a contrary position" here. *Gens v. Resolution Trust Corp.*, 112 F.3d 569, 572-73 (1st Cir. 1997).

of the federal common law does not leave those injured by air pollution without a remedy," because "[o]nce federal common law is displaced, state nuisance law becomes an available option to the extent it is not preempted by federal law." *Id*. at 866 (Pro, J., concurring).

Third, unlike in *AEP* and *Kivalina,* Rhode Island is not suing the Companies as emitters of pollutants. Rather, it is suing them as producers, marketers, and distributors of products the use of which results in the emission of those pollutants. And, again, Rhode Island is doing so based on well-established state law tort theories. Thus, the legal principles that may govern a suit against (say) an air pollution source for its transboundary emissions of greenhouse gases do not govern Rhode Island's claims.

Thus, far from dictating that Rhode Island's claims give rise to federal jurisdiction because they allegedly "arise under" federal law, case law and commonsense counsel that Rhode Island's state-law claims must be returned to state court where they were first raised. "Restraint is particularly appropriate" here, "in light of the Supreme Court's directive that removal statutes should be 'strictly construed,' … and the sovereignty concerns that arise when a case brought by a state in its own courts is removed to federal court." *LG Display*, 665 F.3d at 774 (citation omitted).

CONCLUSION

The District Court's order remanding this case to Rhode Island state court should be affirmed.

Dated: January 2, 2020

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32

I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a) and Fed. R. App. P. 29(a)(5), because this brief contains 6,390 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f); and.

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 2010 with 14-point, Times New Roman-style font.

Dated: January 2, 2020
Boston, Mass.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system on January 2, 2020, and that parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system.

Dated: January 2, 2020
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