No. 19–1818

United States Court of Appeals for the First Circuit

STATE OF RHODE ISLAND,

Plaintiff-Appellee,

v.

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

Defendants-Appellants,

GETTY PETROLEUM MARKETING, INC.,

Defendant.

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

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

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CORPORATE DISCLOSURE STATEMENT

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

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INTEREST OF AMICUS CURIAE

Amicus Curiae Natural Resources Defense Council (NRDC) is a non-profit environmental and public health organization with hundreds of thousands of members. Founded in 1970, NRDC has worked for decades to ensure enforcement of the Clean Air Act and other laws to address major environmental challenges.

The Clean Air Act sets a nationwide baseline for addressing air pollution and provides federal remedies to improve air quality. But the Act does not relieve states of their responsibility for protecting the health and welfare of their residents and the quality of their air. The Act also recognizes that each state faces its own specific challenges, and encourages state and local efforts that reduce air pollution under state law. NRDC—in and out of court—has defended the enforceability of state law against the challenge that it interferes with federal authority. *See, e.g.*, *Am. Fuel & Petrochemical Mfrs. v. O'Keeffe*, 903 F.3d 903 (9th Cir. 2018) (upholding Oregon clean fuels program from Clean Air Act preemption and Commerce Clause challenges). NRDC submits this brief to highlight why enforcement of state law in state courts is a viable means to address harms related to climate change.

Rhode Island has been harmed by the effects of climate change. Basic public infrastructure—roads, sewers, electrical grids—must be repaired and hardened against unprecedented storms, rising seas, and warming temperatures. The State seeks relief under causes of action that Rhode Island has long provided to address harms to the welfare of the State and its residents. Defendants contend that enforcing state law here would impermissibly undermine federal authority because climate change is a "uniquely" federal interest. NRDC strongly disagrees. States have a legitimate and compelling interest in addressing climate change, and state law regulation is permissible.

Climate change is the major environmental challenge of our time. Action is urgently needed on many fronts. NRDC works extensively at the state and local level to help deploy a broad range of effective legal, policy, and technology tools to combat all forms of climate pollution. From the nine-state (and counting) Regional Greenhouse Gas Initiative that caps and reduces power sector emissions; to standards that require utilities to supply electricity from renewable sources; to mandates for electric vehicles; to building codes that reduce energy waste, enforcing

state law is an effective means to help society transition to an energy system that will not harm the climate that sustains us.[1]

[1] 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

States have the right and the responsibility to protect the health, safety, and welfare of their residents. To that end, states can provide a range of legal tools that they deem appropriate to address harms to themselves and their residents. Rhode Island provides various rights of civil action under state common law and statute.

The State here complains that Defendants produced and marketed massive quantities of fossil fuel products with the knowledge that use of those products contributes to harmful climate change, all while concealing their knowledge and downplaying the harms. The State pleads specific causes of action under Rhode Island law. These state law claims are enforceable unless preempted by federal law. *See Murphy v. N.C.A.A.*, 138 S. Ct. 1461, 1479 (2018).

Importantly, whether federal law preempts enforcement of Rhode Island law is not a question that must be answered in a federal court. Here, in fact, it is a question that *cannot* be answered in federal court. The State pled claims under Rhode Island law only and filed its complaint in state court. Even if federal law could ultimately provide a defense to these claims, it does not provide federal jurisdiction to

remove the action from state court. *Franchise Tax Bd. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 14 (1983).

Defendants suggest that the allegations in the complaint also give rise to a right of action under federal common law or the Clean Air Act. Even if that were correct, it is insufficient to create removal jurisdiction. As "master of the complaint," the State may, "by eschewing claims based on federal law, choose to have the cause heard in state court." *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 398–99 (1987).

The existence of an un-pled federal cause on the facts of the complaint could only theoretically create removal jurisdiction in the "extraordinary" event of "complete preemption." *Caterpillar*, 482 U.S. at 393. Despite the linguistic similarity to ordinary preemption, the doctrine of "complete preemption" is qualitatively different, and can create federal jurisdiction: it refers to the situation in which federal law *both* ordinarily preempts a state law cause of action *and* substitutes a federal cause of action in its place. *Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 8–9 (2003). But both of those conditions are missing here.

Neither federal environmental common law nor the Clean Air Act addresses the conduct that Rhode Island complains of, much less

provides an exclusive federal cause of action for that conduct. Without an exclusive federal cause of action to substitute for Rhode Island's state law cause, complete preemption does not exist; and without complete preemption, the state law action is not removable.

Defendants ask the Court to recharacterize the state claims here as ones that would impose restrictions on greenhouse gas emissions. Rhode Island fairly disputes that characterization. But even so construed, complete preemption still would not exist: Defendants have not identified an exclusive federal cause of action that could be brought against them for the conduct of which Rhode Island complains.

Defendants first suggest that federal environmental common law provides a right of action for harms resulting from interstate greenhouse gas emissions. It might once have done so, but any such federal common law cause no longer exists. *Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 424 (2011) ("*AEP*"). Congress displaced it with the Clean Air Act, which now determines the preemptive scope of federal law in this area. *Id.* at 429. And the Clean Air Act does *not* completely preempt all state law causes of action related to emissions or climate change. No court has ever so held, and the Act expressly

preserves states' broad authority to address air pollution under state law. *E.g.*, 42 U.S.C. § 7416.

In short, neither federal environmental common law nor the Clean Air Act provide jurisdiction to remove this action to federal court.

ARGUMENT

"States are independent sovereigns in our federal system," *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), and possess the "traditional authority to provide tort remedies" as they deem appropriate, *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). Rhode Island provides rights of action for nuisances and other harms caused by conduct defined in common law and statute. *E.g.*, *Citizens for Pres. of Waterman Lake v. Davis*, 420 A.2d 53, 59 (R.I. 1980).

Rhode Island here alleges that Defendants have long known that continued use of fossil fuels would cause significant climate change-related harms. The State also alleges that Defendants concealed that knowledge while continuing to wrongfully promote the unrestrained use of their fossil fuel products. The State contends that Defendants' conduct gives rise to various causes of action under Rhode Island law, and pleads claims for relief thereunder.

Rhode Island is entitled the opportunity to prove its claims in state court. Under the "well-pleaded complaint rule," Rhode Island is the master of its claims and "may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar*, 482 U.S. at 392. As such, outside of narrow exceptions,[2] this case can only be removed to federal court in the "extraordinary" event of "complete preemption." *Id.* at 393. "Complete preemption" is a term of art, "conceptually distinct from the doctrine of ordinary (or defensive) preemption," and "comprises a narrow exception to the well-pleaded complaint rule" that can create federal jurisdiction. *López-Muñoz v. Triple-S Salud, Inc.*, 754 F.3d 1, 5 (1st Cir. 2014). But "complete preemption" requires that existing federal law both ordinarily preempt Rhode Island law and provide a substitute federal cause of action. *Beneficial Nat'l Bank*, 539 U.S. at 8; *López-Muñoz*, 754 F.3d at 5. Such extraordinary jurisdictional preemption is not present here.

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[2] The State explains why this case is not removable under *Grable*, the federal-officer statute, 28 U.S.C. § 1142, or any other specialized removal statute. Appellee's Br. at 11–18, 28–37, 42–51.

As explained below, Rhode Island law causes of action are not completely preempted by federal law simply because the claims are brought to address harms related to climate change:

First, federal common law does not completely preempt state law claims related to climate change. Federal common law does not address the wrongful promotion of fossil fuels, and any federal common law cause of action for harms from interstate air pollution no longer exists: Congress displaced it with the Clean Air Act, and this Act—not any extinct federal common law—determines the preemptive scope of federal law. *AEP*, 564 U.S. at 423–424, 429.

Second, the Clean Air Act does not completely preempt state law claims related to climate change. To the contrary, the Act, in a number of different sections, explicitly protects the authority of the states to regulate air pollution, *e.g.*, 42 U.S.C. §§ 7416, 7604(e), and the Act does not regulate the promotion of fossil fuels at all.

I. Federal common law does not completely preempt Rhode Island's claims.

Defendants invoke federal common law to remove this action under 28 U.S.C. § 1441. But under section 1441, removal would only be available if federal common law "creates the cause of action asserted" by

Rhode Island. *See Gunn v. Minton*, 568 U.S. 251, 257 (2013).[3] Because Rhode Island asserted only state-law created causes of action, the well-pleaded complaint rule bars removal unless one of those causes has been "transmogrifie[d]" into a federal cause via "complete preemption." *See Lawless v. Steward Health Care Sys., LLC*, 894 F.3d 9, 17–18 (1st Cir. 2018). As explained below, Rhode Island's claims are not completely preempted by federal common law, because no relevant federal common law exists to completely preempt them.[4]

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[3] A *state*-law created cause can also be removed under section 1441 if establishing an element of the state-law claim necessarily requires resolving a substantial issue of federal law—so-called "*Grable*" removal. *See Gunn*, 568 U.S. at 258–59 (discussing *Grable & Sons Metal Prod., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005)). Defendants do not attempt a *Grable* showing based on federal common law.

[4] Defendants avoid the term "preemption," but their argument that federal common law "governs" Rhode Island's claims *is* a preemption argument: state law can only be "governed" by federal law, under the Supremacy Clause, in cases of conflict between federal and state law—*i.e.*, when federal law has preempted state law. *See Murphy*, 138 S. Ct. at 1479–80; *see also Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 690–91 (2006). And however styled—as "preemption," or as "governing law" or as "choice of law," or as "conflicts of law"—more than a conflict with federal law is required to create federal jurisdiction to remove state-law causes of action to federal court. *See Caterpillar*, 482 U.S. at 393. The "more" that is required is "complete preemption," *id.*, which is the only theoretical way that Defendants could overcome the well-pleaded complaint rule here. *See, e.g.*, Appellee's Br. 20–22.

Although there is no general federal common law, it exists in certain narrow areas. *See Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). Historically, the federal courts fashioned a federal common law of interstate air pollution. *See, e.g.*, *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237–39 (1907). However, the Supreme Court has since held that this federal common law has been displaced by Congress via the federal Clean Air Act. *See AEP*, 564 U.S. at 424. Congress, not the federal courts, has primary responsibility for setting federal policy and once Congress legislates in an area, any preexisting federal common law "disappears." *Id.* at 423 (quotation omitted). The preemptive—or "governing"—scope of federal law thus turns on the displacing federal statute, not the displaced federal common law. *See id.* at 429.

a. Congressional legislation defines the substance of federal law to the exclusion of federal common law.

Before enactment of the major federal environmental statutes, federal courts adjudicated some environmental nuisance cases by resort to a federal common law. *See, e.g.*, *Missouri v. Illinois*, 180 U.S. 208, 241 (1901); *Tennessee Copper Co.*, 206 U.S. at 237; *Illinois v. City of Milwaukee, Wis.*, 406 U.S. 91, 103 (1972) ("*Milwaukee I*"). The courts

foresaw, however, that this federal common law would be replaced by federal statutes. As the Supreme Court observed: "[i]t may happen that new federal laws and new federal regulations may in time preempt the field of federal common law of nuisance." *Milwaukee I*, 406 U.S. at 107.

Those new federal laws arrived in the 1970s in the form of major updates to the Clean Water Act[5] and the Clean Air Act.[6] The Supreme Court subsequently revisited the availability of federal common law nuisance claims for water pollution in light of the Clean Water Act. In *City of Milwaukee v. Illinois* ("*Milwaukee II*"), the Court explained that federal common law is only "a necessary expedient," "subject to the paramount authority of Congress," "and when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears." 451 U.S. 304, 313–14 (1981) (quotations omitted). In updating the Act, Congress "ha[d] not left the formulation of

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[5] Pub. L. 92-500 (Oct. 18, 1972), 86 Stat. 816, *codified as amended at* 33 U.S.C. §§ 1251 *et seq*.

[6] Pub. L. 91-604 (Dec. 31, 1970), 84 Stat. 1676, *codified as amended at* 42 U.S.C. §§ 7401 *et seq*.

appropriate federal standards to the courts," but rather had adequately "occupied the field" so as to "supplant federal common law." *Id.* at 317. Under *Milwaukee II*, then, new legislation does not add a layer of federal statutory law on top of existing federal common law. Instead, the new statute defines the substance of federal law and the federal common law on that subject ceases to exist.

Milwaukee II presaged the extinction of most federal common law regarding interstate pollution. New statutes would replace judicially-created federal standards with congressionally-enacted federal standards. Importantly, however, federal statutes' displacement of federal common law does not simultaneously extinguish all *state* common law. To the contrary, in *International Paper Co. v. Ouellette*, the Court explained that although federal common law was displaced by the Clean Water Act, state common law nuisance claims for interstate water pollution could still be available. 479 U.S. 481, 489 (1987). With federal common law no longer at issue, the only question was whether Congress intended the *statute* to preempt state claims. *See id.* at 491.

b. The Clean Air Act defines the substance of federal law concerning air pollution.

Just as the Clean Water Act supplanted the federal common law of nuisance for water pollution, so too did the Clean Air Act supplant the federal common law of nuisance for air pollution. Thus, as further explained below, the existence of any pre-Clean Air Act federal cause of action for interstate air pollution does not create removal jurisdiction.

In *AEP*, eight States sued major power companies in federal court, alleging that defendants' emissions contributed to global warming and thereby unreasonably interfered with public rights. *See* 564 U.S. at 418. Plaintiffs sought an injunction setting emission caps for each defendant under the federal common law of nuisance and, in the alternative, state tort law. *See id.* at 418–19.

The case eventually reached the Supreme Court. The Second Circuit had ruled that federal common law "governed" these claims, *id.* at 419, 429, and the Supreme Court granted certiorari to address whether plaintiffs "can maintain federal common law public nuisance claims against carbon-dioxide emitters," *id.* at 415.

The parties disputed the historic availability of federal common law rights, but the Supreme Court found that passage of the Clean Air

Act had rendered that dispute "academic." *Id.* at 423. Relying heavily on *Milwaukee II*, the Court held that "the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants." *Id.* at 424.

Importantly, the Court held that displacement turned on the congressional decision to legislate in this area, and not on the content of federal rights that Congress provided. *Id.* at 426. Congress had not directly established a federal right to seek abatement—it had delegated authority to EPA to set a standard that would trigger federal rights. *Id.* But, the Court concluded, even if EPA declined to set a standard, "courts would have no warrant to employ the federal common law." *Id.*

In other words, even if federal common law historically recognized a right to seek abatement, Congress is not bound to preserve it. The Supreme Court has "always recognized that federal common law is subject to the paramount authority of Congress." *Milwaukee II*, 451 U.S. at 313 (quotations omitted). That paramount authority would be hollow unless Congress could reject prior judicially-created federal common law. Congress instead has the power to "strike a different

accommodation" than that recognized under federal common law, *AEP*, 564 U.S. at 422, including *contracting* the scope of federal law. Under *AEP*, as under *Milwaukee II*, new legislation does not coexist with prior federal common law—the statute displaces any federal common law and that common law disappears. Thereafter the Clean Air Act defines the substance of federal law to the exclusion of federal common law.[7]

The Ninth Circuit applied *AEP* in *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (2012). There an Alaskan village, Kivalina, sued energy companies in federal court for their contribution to climate change. Like the *AEP* plaintiffs, Kivalina sued under both federal and state common law. Unlike the *AEP* plaintiffs, Kivalina did not seek an injunction limiting emissions, but rather sought compensatory damages. *Kivalina*, 696 F.3d at 853–55.

The Ninth Circuit applied *AEP* to dispose of Kivalina's federal common law claim. Under *AEP*, the "federal common law addressing domestic greenhouse gas emissions has been displaced by Congressional

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[7] Federal common law may occasionally fill in "statutory interstices." *AEP*, 564 U.S. at 421. But *AEP* makes clear that the Clean Air Act does not leave a nuisance-sized interstice in federal law for federal common law to fill. *Id.* at 423.

action." *Kivalina*, 696 F.3d at 858. Displacement, the Court held, means that any "federal common law *cause of action* has been extinguished," and, once the "cause of action is displaced, displacement is extended to all remedies." *See id.* at 857 (emphasis added). In short, congressional action had extinguished the substance of federal common law, and displacement of the federal cause of action, as well as all federal common law remedies, necessarily followed. *Id.* at 857–58.

Defendants' reliance on *Milwaukee I*, *AEP*, and *Kivalina*, *e.g.* Appellants' Br. 19–22, is thus misplaced. None of those cases supports removal. All three were filed in federal court by plaintiffs asserting a federal cause of action. *Milwaukee I*, 406 U.S. at 93; *AEP*, 564 U.S. at 418; *Kivalina*, 696 F.3d at 853. Neither *AEP* or *Kivalina* held that climate tort claims *must* be governed by federal common law, and neither case ruled on whether such claims *may* be authorized by state law. Both Courts held only that the Clean Air Act had extinguished preexisting *federal* common law. *AEP*, 564 U.S. at 415; *Kivalina*, 696 F.3d at 853; *cf. Milwaukee II*, 451 U.S. at 317 (holding Clean Water Act displaced federal common law recognized in *Milwaukee I*).

Importantly, *AEP* did not address whether the Clean Air Act preempts state law claims related to climate change. Plaintiffs asserted state common law claims in the alternative, 564 U.S. at 418, but the Court did not reach those claims at all, *id.* at 429. *Cf. Kivalina*, 696 F.3d at 858 (Pro, J., concurring) (same). In short, because the "Clean Air Act displaces federal common law," the "availability *vel non*" of state law claims depends on the "preemptive effect of the federal Act." *AEP*, 564 U.S. at 429.[8] As explained *infra* Section II, the Clean Air Act does not preempt—much less completely preempt—all state law climate claims.

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[8] Displacement and preemption are materially different. *AEP*, 564 U.S. at 423–24. Displacement is readily found, because "it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law." *Milwaukee II*, 451 U.S. at 316–17. In contrast, when considering preemption, courts "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* at 316; *see AEP*, 564 U.S. at 423. The Supreme Court has sometimes used the terms "preemption" and "displacement" interchangeably, *cf. Milwaukee I*, 406 U.S. at 107; *AEP*, 564 U.S. at 423, but regardless of the terminology, the Court has always employed a more stringent standard when considering whether federal law preempts state law. *E.g.*, *Milwaukee II*, 451 U.S. at 316, 317 n.9.

c. There is no unique federal interest in climate change that completely preempts state law.

To the extent Defendants contend that addressing climate change—or addressing it "uniformly"—is a uniquely federal interest, such that a federal court could fashion in the first instance new common law rights that completely preempt state law, they are mistaken.

Only a "narrow" category of transboundary disputes truly raises uniquely federal interests: those interstate or international disputes "implicating the conflicting rights of States or our relations with foreign nations." *Texas Industries*, 451 U.S. at 641. Rhode Island's claims here are brought against private parties for the tortious promotion of fossil fuels. These claims do not implicate the conflicting rights of States or relations with foreign nations.

The actual interstate or international aspects of Rhode Island's claims are mundane. Suits involving parties in different jurisdictions, or conduct that crosses national or state boundaries, or global branding or marketing, all have "interstate" or "international" characteristics, but do not implicate uniquely federal concerns. For example, a coalition of forty different state attorneys general recently reached a settlement with a Swiss bank concerning the fraudulent manipulation of LIBOR,

"a benchmark interest rate that affects financial instruments worth trillions of dollars and has a far-reaching impact on global markets and consumers."[9] *Cf. also O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 88 (1994) ("uniformity of law" governing "primary conduct on the part of private actors" not a significant federal interest).

To be sure, the federal government has an interest—or it should—in addressing climate change. But it is not a unique interest: "It is well settled that the states have a legitimate interest in combating the adverse effects of climate change on their residents." *O'Keeffe*, 903 F.3d

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[9] Press Release, N.Y. Att'y Gen., *A.G. Underwood Announces $68 Million Multistate Settlement With UBS AG ("UBS") For Artificially Manipulating Interest Rates* (Dec. 21, 2018), https://ag.ny.gov/press-release/ag-underwood-announces-68-million-multistate-settlement-ubs-ag-ubs-artificially; *see also*, *e.g.*, *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, 895 F.3d 597, 603 (9th Cir. 2018) (affirming approval of $10 billion settlement between consumers and German company to resolve "a bevy of claims under state and federal law"), *cert. denied*, 139 S. Ct. 2645 (2019); *Felix v. Volkswagen Grp. of Am., Inc.*, 2017 WL 3013080, at *1, *6–7 (N.J. Super. Ct. App. Div. July 17, 2017), *appeal denied*, 231 N.J. 525, 177 A.3d 109 (Table) (2017) (state law claims against non-resident car manufacturer for fraudulent marketing not preempted by Clean Air Act); *W. Virginia ex rel. Morrisey v. McKesson Corp.*, 2017 WL 357307, at *1, *9 (S.D. W. Va. Jan. 24, 2017) (state tort claims against non-resident, national drug distributor, arising out of interstate shipments, remanded to state court).

at 913. And there are federal remedies that should be brought to bear. But federal remedies are not the exclusive means to address climate change. State law remedies are an important component of mitigation.[10]

II. The Clean Air Act does not completely preempt Rhode Island's claims.

Defendants also contend that this action is removable because Rhode Island's claims are completely preempted by the Clean Air Act. Appellants' Br. 48–52. Defendants are wrong. Complete preemption can occur only when the federal statute both preempts a state claim and provides a substitute federal cause of action. *Caterpillar*, 482 U.S. at 393. Neither condition is met here.

First, the Clean Air Act does not address the marketing and promotion of fossil fuels. It thus presents no conflict with Rhode Island

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[10] *See, e.g.*, Fourth National Climate Assessment, vol. II, ch. 29, fig. 29.1 *Mitigation-Related Activities at State and Local Levels,* https://nca2018.globalchange.gov/chapter/29/. "For example, states in the Northeast take part in the Regional Greenhouse Gas Initiative, a mandatory market-based effort to reduce power sector emissions." *Id.* at *State of Emissions Mitigation Efforts*. This state law initiative has led to substantial reductions in emissions and corresponding public health benefits. *See, e.g.*, Abt Associates, *Analysis of the Public Health Impacts of the Regional Greenhouse Gas Initiative*, 2009–2014 (Jan. 2017), https://www.abtassociates.com/insights/publications/report/analysis-of-the-public-health-impacts-of-the-regional-greenhouse-gas-0.

law for preemption to resolve. *See Murphy*, 138 S. Ct. at 1480. Nor does recasting the State's claims here as emissions claims change the result. The Clean Air Act expressly preserves states' traditional authority to address air pollution under state law. *E.g.*, 42 U.S.C. § 7416.

Second, even if there were conflict between Rhode Island's claims and the Act, complete preemption requires more: an exclusive federal cause of action that substitutes for the preempted state cause of action. *López-Muñoz*, 754 F.3d at 5 ("The linchpin of the complete preemption analysis is whether Congress intended that federal law provide the exclusive cause of action for the claims asserted by the plaintiff."). The Act does not provide a federal cause of action against private parties for the tortious promotion of fossil fuels. And the Act's provision of a "citizen suit" cause of action for violations of regulations, 42 U.S.C. § 7604, cannot sustain complete preemption, because the Act expressly provides that this cause of action is not exclusive. *Id.* § 7604(e).

a. The Clean Air Act does not preempt all state law claims relating to climate harms.

The Act does not meet the first condition to completely preempt state claims relating to climate change: it does not preempt them at all. All preemption requires conflict between federal and state law. *Murphy*,

138 S. Ct. at 1480; *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 . . . ."). No such conflict exists.

Preemption is analyzed through various lenses: "express," "field," and "conflict." *Murphy*, 138 S. Ct. at 1480. But under any test, the Act does not preempt the claims here. The Act does not address the promotion of fossil fuels—*i.e.*, it does not regulate the conduct of which Rhode Island complains. But even recharacterizing the State's claims as "emissions" or "climate" claims does not create a conflict.

i. The Act does not expressly preempt such claims.

First, the Clean Air Act does not expressly preempt state law that relates to air pollution or the climate. Rather, the Act expressly preserves broad state authority in this area. 42 U.S.C. § 7416; *see Exxon Mobil Corp. v. EPA*, 217 F.3d 1246, 1254 (9th Cir. 2000). The Act also contemplates the existence of both statutory and common law rights to seek relief from harmful emissions *outside* the Act's framework, and explicitly preserves them. *See, e.g.*, 42 U.S.C. § 7604(e). These

provisions do not demonstrate congressional intent to preempt all state law that relates to air pollution.[11]

The Act does contain express preemption provisions. For example, Section 209(a) provides that states may not prescribe "any standard relating to the control of emissions from new motor vehicles." 42 U.S.C. § 7543(a).[12] Section 211(c) likewise provides that states may not impose controls on any "fuel or fuel additive" "for purposes of motor vehicle emission control." Id. § 7545(c)(4)(A); *see also id.* § 7573 (preempting direct state regulation of aircraft emissions).

But these express provisions are limited to their terms and do not preempt even all state law actions relating to fuels or to new motor vehicle emissions. *See, e.g.*, *Oxygenated Fuels Ass'n v. Davis*, 331 F.3d 665, 670 (9th Cir. 2003) ("OFA") (California ban on fuel additive not

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[11] In contrast, the Employee Retirement Income Security Act, for example, preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan," 29 U.S.C. § 1144(a). The Clean Air Act contains no comparable provision.

[12] California is expressly exempted and allowed to set higher standards in most instances. 42 U.S.C. §§ 7543(b)(1), (e)(2)(A). And, in general, other states may choose to adopt California's standards. *Id.* §§ 7507, 7543(e)(2)(B); *see also id.* § 7545(c)(4)(B).

preempted under Section 211(c) because ban was enacted to protect state waters and not to regulate emissions); *O'Keeffe*, 903 F.3d at 917 (Oregon program regulating production and sale of fuels based on greenhouse gas emissions not preempted under Section 211(c)); *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, 349 F. Supp. 3d 881, 911 (N.D. Cal. 2018) (state law claims for deceptive marketing of "clean" emission vehicles not preempted by Section 209(a)). The presence of these targeted provisions simply highlights that the Act does not contain any provision that broadly preempts state law claims that relate to climate change.

ii. The Act does not preempt the field.

State law can be preempted where it regulates "conduct in a field that Congress . . . has determined must be regulated by its exclusive governance." *Capron v. Office of Att'y Gen. of Massachusetts*, 944 F.3d 9, 21 (1st Cir. 2019) (citation omitted). But no court has ever held that the Clean Air Act exclusively occupies the entire regulatory field relating to air pollution or climate change. With good reason. Air pollution control is part of traditional state authority to protect the public health, *e.g.*, *O'Keeffe*, 903 F.3d at 913, and federal preemption will be found in such

areas only if it was the "clear and manifest intent" of Congress to do so, *In re Pharm. Indus. Average Wholesale Price Litig.*, 582 F.3d 156, 174 (1st Cir. 2009) (citing *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)). *Cf. Silkwood*, 464 U.S. at 248 (states possess "traditional authority to provide tort remedies"); *accord In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 725 F.3d 65, 96 (2d Cir. 2013). The Clean Air Act's express preservation of state authority, *e.g.*, 42 U.S.C. §§ 7416, 7604(e), negates any inference of congressional intent to occupy the entire field of air pollution control. *See also* 42 U.S.C. §§ 7401(a)(3), (c) (congressional findings and statement of purpose recognizing state authority);[13] *Exxon Mobil Corp.*, 217 F.3d at 1254–56; *cf. Wyeth*, 555 U.S. at 575 (the case for preemption is "particularly weak" where Congress indicates awareness of the operation of state law).

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[13] Congressional intent to regulate exclusively can sometimes be inferred from the scope of a statute. *Altria Grp. v. Good*, 555 U.S. 70, 76 (2008). But simply labeling a statute's scope "comprehensive" does not suffice. *See, e.g.*, *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 613 (1991). The Clean Air Act is a prime example: it "establishes a comprehensive program for controlling and improving the United States' air quality," but it does so through both "state and federal regulation." *NRDC v. EPA*, 638 F.3d 1183, 1185 (9th Cir. 2011).

iii. The claims do not conflict with the Act's purposes.

State law claims related to climate harms do not inherently conflict with the Clean Air Act. Conflict preemption exists "where compliance with both state and federal law is impossible, or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *ONEOK, Inc. v. Learjet, Inc.*, 575 U.S. 373, 377 (2015) (citation omitted).

First, it is not impossible to comply with both "minimum federal standards" and "more demanding state regulations." *See Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141–42 (1963); *see also Sprietsma v. Mercury Marine*, 537 U.S. 51, 65 (2002). The Clean Air Act generally imposes minimum federal standards and expressly contemplates that states can adopt more demanding standards in many areas. *E.g.*, 42 U.S.C. §§ 7416, 7604(e); *Merrick v. Diageo Americas Supply, Inc.*, 805 F.3d 685, 693 (6th Cir. 2015). In other words, even if state law imposes additional or higher standards—such as through tort duties—it is generally possible to meet those standards and also comply with the Act.

Second, additional state law duties are not likely to stand as an obstacle to achieving the purposes of the Clean Air Act. "The central goal of the Clean Air Act is to reduce air pollution." *OFA*, 331 F.3d at 673. Nothing in the Act evinces a congressional concern with reducing pollution *too much*. And courts should be wary of implying ancillary purposes not clearly expressed in federal legislation, or to entertain "[t]he existence of a hypothetical or potential conflict" with state law. *See Pharm. Research & Mfrs. of Am. v. Concannon*, 249 F.3d 66, 77 (1st Cir. 2001) (citation omitted); *accord Va. Uranium*, 139 S. Ct. at 1901, 1907 (Gorsuch, J.) (plurality opinion); *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 486, 488, 499 (9th Cir. 1984) (federal allowance for some low-oil ballast discharges from maritime tankers did not preempt state complete ban on discharges); *OFA*, 331 F.3d at 673 (state law that had the effect of increasing gasoline prices did not conflict with Clean Air Act).

Broadly speaking, the Act directs EPA to establish minimum federal standards for certain air pollutants and certain sources of air pollution. *See, e.g.*, *AEP*, 564 U.S. at 424–25 (describing regulation of stationary sources under Clean Air Act Section 111). A state law that

required a source to emit pollution in violation of federal standards would likely be preempted. But a federal pollution standard does not create a federally-guaranteed right to pollute up to that standard. *Cf. Chinatown Neighborhood Ass'n v. Harris*, 794 F.3d 1136, 1142 (9th Cir. 2015) (federal shark fishing allowance did not imply mandate to harvest; accordingly, state law restricting shark fin possession did not conflict); *Wyeth*, 555 U.S. at 583 (Thomas, J., concurring) (FDA approval of drug label "does not give drug manufacturers an unconditional right to market their federally approved drug at all times"). In other words, state law that has the effect of reducing pollution is unlikely to conflict with the Clean Air Act.

b. The Clean Air Act does not provide an exclusive federal cause of action for claims related to climate harms

The Clean Air Act does not meet the second condition for complete preemption here either: it does not provide an exclusive substitute federal cause of action. *See López-Muñoz*, 754 F.3d at 5 ("Supreme Court decisions finding complete preemption share a common denominator: exclusive federal regulation of the subject matter of the asserted state claim, coupled with a federal cause of action for wrongs of the same type.") (citation omitted).

Defendants point to the Act's provision for judicial review of agency actions. 42 U.S.C. § 7607(b). But even construed as a "cause of action," it does not encompass the claims here. Indeed, section 7607 does not allow a plaintiff to sue private parties for anything—and certainly not for tortious promotional conduct not regulated by the Act.

The Act does provide a "citizen suit" cause against private parties. 42 U.S.C. § 7604. But section 7604 allows suit only for violations of emission standards or EPA orders, and Rhode Island's claims are not based on Defendants violating such standards or orders. Regardless, the Act expressly provides that this cause of action is *not* exclusive. *Id.* § 7604(e) (provision of citizen suit does not "restrict any right which any person" may have "under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief"); *cf. Fayard v. Ne. Vehicle Servs.*, 533 F.3d 42, 45–46 (1st Cir. 2008) (complete preemption requires evidence that Congress intended the statute to provide "an exclusive federal cause of action" for "wrongs of the same type" as state law claim). In short, without the "linchpin" exclusive substitute cause, *López-Muñoz*, 754 F.3d at 5, the Clean Air Act cannot completely preempt Rhode Island's claims.

CONCLUSION

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

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(G), I certify that:

This brief complies with Rule 29(a)(5)'s type-volume limitation because it contains 6,173 words (as determined by the Microsoft Word word-processing system used to prepare the brief), excluding the parts of the brief exempted by Rule 32(f).

This brief complies with Rule 32(a)(5)'s typeface requirements and Rule 32(a)(6)'s type-style requirements because it has been prepared in a proportionately spaced typeface using the Office 365 version of Microsoft Word in 14-point Century Schoolbook font.

/s/ Peter Huffman
Peter Huffman

CERTIFICATE OF SERVICE

I hereby certify that on January 2, 2020, I caused the foregoing to be filed electronically with the Clerk of Court for the United States Court of Appeals for the First Circuit using the appellate CM/ECF system. Participants in this case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Peter Huffman
Peter Huffman