NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 22-7163

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DISTRICT OF COLUMBIA,

Plaintiff-Appellee,

v.

EXXON MOBIL CORP., EXXONMOBIL OIL CORPORATION, BP P.L.C., BP AMERICA INC., CHEVRON CORPORATION, CHEVRON U.S.A. INC., SHELL P.L.C., F/K/A ROYAL DUTCH SHELL P.L.C., SHELL USA, INC., F/K/A SHELL OIL COMPANY,

Defendants-Appellants.

On Appeal from the United States District Court for the District of Columbia, No. 1:20-cv-01932-TJK, The Honorable Timothy J. Kelly

BRIEF OF INDIANA AND 13 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS

Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

THEODORE E. ROKITA
Attorney General of Indiana

THOMAS M. FISHER
Solicitor General

JAMES A. BARTA
Deputy Solicitor General

Counsel for Amici Curiae
(additional counsel listed in addendum)

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I, Thomas M. Fisher, counsel for *amici* States and a member of the Bar of this Court, certify as follows:

(A) Parties and *amici*. Except for the following, all parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Brief of Appellants: The States of Indiana, Alabama, Alaska, Arkansas, Georgia, Kansas, Kentucky, Mississippi, Montana, Nebraska, South Carolina, Texas, Utah, and Wyoming; and the Chamber of Commerce of the United States of America.

(B) Rulings under review. References to the rulings at issue appear in the Brief of Appellants.

(C) Related cases. References to related cases appear in the Brief of Appellants.

March 8, 2023

/s/ Thomas M. Fisher
Thomas M. Fisher
Solicitor General

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CASES [CONT'D]

CONSTITUTIONAL AND STATUTORY PROVISIONS

CONSTITUTIONAL AND STATUTORY PROVISIONS [CONT'D]

OTHER AUTHORITIES

GLOSSARY

CAA.....Clean Air Act

STATUTES AND REGULATIONS

Any pertinent materials are contained in Brief of Appellants.

INTEREST OF *AMICI* STATES

The States of Indiana, Alabama, Alaska, Arkansas, Georgia, Kansas, Kentucky, Mississippi, Montana, Nebraska, South Carolina, Texas, Utah, and Wyoming respectfully submit this brief as *amici curiae* in support of defendants-appellants.

This case is one of many asserting injuries from "rising sea levels, destruction of property, and other consequences of climate change" allegedly caused by "fossil fuel usage." J.A. 470, 472. Those injuries are by definition "'widely shared.'" *Massachusetts v. EPA*, 549 U.S. 497, 522 (2007). Greenhouse-gas emissions from smokestacks, tailpipes, and other sources scattered across the globe affect "every state (and country)." *City of New York v. Chevron Corp.*, 993 F.3d 81, 92 (2d Cir. 2021). Yet the district court ruled that the District of Columbia could bring claims asserting injuries from climate change in its own courts under its own law.

That ruling is of significant interest to *amici*. As sovereigns, *amici* States have a profound interest in, and unique perspective on, the proper role of local law and local courts in addressing climate change. Under

"basic" principles of "federalism," all fifty States have the prerogative to pursue their own policies towards climate change within their own borders. *Illinois v. City of Milwaukee*, 406 U.S. 91, 105 n.6 (1972). By the same token, however, no State (or locality) may set policy for the rest. The Court should reject the District's attempt to use its own courts and law to regulate beyond its borders on a contentious issue.

SUMMARY OF ARGUMENT

I. Claims arising from transboundary emissions and seeking relief for global climate change must be resolved under federal law. As the Supreme Court recognized in *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972), and *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011), claims involving interstate air and water pollution implicate unique federal interests that require the application of federal law. Using state or local law to resolve such claims would offend basic principles of federalism under which no single State can set policy for the rest.

Although the district court construed the claims asserted here as seeking relief for the consequences of global climate change, the court ruled that resolving those claims under local law would not endanger any unique federal interests. But that ruling overlooks that awarding relief

for the consequences of global climate change penalizes companies for out-of-state conduct beyond any single locality's authority to regulate. And while the Clean Air Act may prevent the District from successfully asserting a claim for the effects of global climate change under federal law, that does not mean courts may resort to state or local law instead.

II. Claims for transboundary emissions and global climate change can be removed to federal court. As Supreme Court precedent establishes, federal district courts have original jurisdiction over such claims, rendering them removable under 28 U.S.C. § 1441(a). Artful plaintiffs cannot defeat removal by slapping a state-law label on claims necessarily and exclusively governed by federal law.

ARGUMENT

I. Claims Arising from Transboundary Emissions and Global Climate Change Necessarily Arise Under Federal Law

Amici States will be among the first to acknowledge that, in our federal system, the bulk of lawmaking power belongs to state and local governments. *See Bond v. United States*, 572 U.S. 844, 854 (2014). In "a few areas, involving 'uniquely federal interests,'" *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504 (1988) (quoting *Texas Indus., Inc. v.*

Radcliff Materials, Inc., 451 U.S. 630, 640 (1981)), however, the "basic scheme of the Constitution" requires federal law to govern, *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 421 (2011) (*AEP*). Interstate emissions is one of those matters that federal law must govern.

A. Federalism principles preclude application of state or local law to transboundary emissions

A "cardinal rule, underlying all the relations of the states to each other, is that of equality of right." *Kansas v. Colorado*, 206 U.S. 46, 97 (1907). "[N]o single State" has "authority to enact . . . policy for the entire Nation . . . or even impose its own policy choice on neighboring States." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571 (1982); *see Texas Indus.*, 451 U.S. at 641 ("our federal system does not permit" disputes "implicating the conflicting rights of States" to be "resolved under state law"). Thus, "[f]or over a century," the Supreme Court has "applied federal law to disputes involving interstate air or water pollution." *City of New York v. Chevron Corp.*, 993 F.3d 81, 91 (2d Cir. 2021) (collecting cases); *see AEP*, 564 U.S. at 421–22 (collecting additional cases).

In *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) (*Milwaukee I*), for example, the Supreme Court considered whether a nuisance claim for "pollution of interstate or navigable waters" was governed by federal

common law and "ar[ose] under the 'laws' of the United States" within the meaning of 28 U.S.C. § 1331(a)—and held "that it d[id]." 406 U.S. at 99. "'[T]he ecological rights of a State in the improper impairment of them from sources outside the State's own territory,'" the Court ruled, is "'a matter having basis and standard in federal common law.'" *Id.* at 99–100 (quoting *Texas v. Pankey*, 441 F.2d 236, 240 (10th Cir. 1971)).

In so ruling, the Court acknowledged that no federal statute applied. 406 U.S. at 103. But that did not mean "state law c[ould] be applied." *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 n.7 (1981) (*Milwaukee II*). To the contrary, the Court explained, an "overriding federal interest in the need for a uniform rule of decision," and "basic interests of federalism," "require[d]" it "to apply federal law." *Milwaukee I*, 406 U.S. at 105 n.6; *see id.* at 102 ("federal, not state, law . . . controls"); *id.* at 107 ("federal law governs"). "Federal common law and not the varying common law of the individual States," the Court observed, is the proper basis for addressing environmental impairment "by sources outside [a State's] domain." *Id.* at 107 n.9 (quoting *Pankey*, 441 F.2d at 241–42).

In *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011) (*AEP*), the Supreme Court recognized that principle's enduring nature.

"Environmental protection," the Court explained, is "undoubtedly" an area "meet for federal law governance"—so much so that federal courts "may fill in 'statutory interstices,' and, if necessary, even 'fashion federal law.'" 564 U.S. at 421–22. That is why it has for more than 120 years "approved federal common-law suits brought by one State to abate pollution emanating from another State." *Id.* at 421. The Court has applied federal law precisely because "borrowing the law of a particular State would be inappropriate." *Id.* at 422; *see Milwaukee II*, 451 U.S. at 313 n.7 ("[I]f federal common law exists, it is because state law cannot be used.").

That principle applies with no less force to the District's laws. Congress's authority to legislate for the District extends only "over such District" as becomes the "Seat of Government." U.S. Const. art. I, § 8, cl. 17. That is why the District's "legislative power" is limited to "rightful subjects of legislation *within the District*." D.C. Code § 1-203.02 (emphasis added); *see* D.C. Code § 1-201.02(a) (delegating authority to relieve Congress of the "burden of legislating upon essentially local District matters"). District laws are equivalent to those of a "local government, not the Federal Government." *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1659 (2020); *see Key v. Doyle*, 434

U.S. 59, 68 n.13 (1977). The District possesses no greater authority to regulate transboundary emissions than any other local government.

B. Applying state or local law to transboundary emissions would undermine important federalism interests

The district court did not dispute that this case "implicate[s]" "uniquely federal interests" in "interstate pollution." J.A. 459 & n.2. It construed the District's putative state-law claims as seeking relief for "[a]lleged rising sea levels, destruction of property, and other consequences of climate change," J.A. 472—which the District attributes to rising atmospheric CO_2 concentrations, "increas[ing] *global* temperatures," and a "warming *planet*," J.A. 81 ¶ 6 (emphasis added); *see* J.A. 121–23 ¶¶ 89–97. Thus, by the district court's own assessment, the District's complaint seeks relief for "the effects of emissions made around the globe." *City of New York v. Chevron Corp.*, 993 F.3d 81, 92 (2d Cir. 2021). It requests relief for "the cumulative impact of conduct occurring simultaneously across just about every jurisdiction on the planet." *Id.*

Despite the ambitious reach of the District's claims, the district court ruled that applying local law would not "conflict" with any unique federal interests. J.A. 459. But applying state or local law to claims con-

cerning transboundary emissions necessarily undermines "basic interests of federalism." *Milwaukee I*, 406 U.S. at 105 n.6. As the Supreme Court has recognized, applying local law to extraterritorial emissions would "effectively override" "policy choices made by the source State." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 495 (1987). It "would compel the source" to follow whatever law is most stringent, without regard to how other States have "weigh[ed]" regulatory "costs and benefits." *Id.* The "inevitable result" of applying local law to ambient emissions would be a "'chaotic confrontation'" between different sovereigns. *Id.* at 495–97.

The relief sought illustrates the danger. In the district court's view, the District requests (among other things) damages for "[a]lleged rising sea levels, destruction of property, and other consequences of climate change." J.A. 472; *see* p. 7, *supra*. Awarding damages for the effects of "fossil fuel emissions no matter where in the world those emissions were released" might not regulate "cross-border emissions" directly. *City of New York*, 993 F.3d at 93. But such a damages award "would regulate them nonetheless," penalizing companies for out-of-District emissions that source jurisdictions' laws may permit or even encourage. *Id.*; *see Kurns v. RR. Friction Prods. Corp.*, 565 U.S. 625, 637 (2012).

Had the District limited its claims to local harms caused by local conduct, the matter would be different. No federalism concerns would arise if, for example, the District contented itself with an injunction requiring warnings about climate change at gas stations in the District. Nor would the District intrude upon *amici* States' domains if it had limited its damages request to harms stemming from in-District conduct, foregoing damages for the effects of global climate change. The District, however, has not disavowed any damages attributable to "rising sea levels, destruction of property, and other consequences of climate change" allegedly caused by "fossil fuel usage" around the world. J.A. 470–472.

C. The Clean Air Act does not alter the governing law

The Clean Air Act (CAA) does not alter the principle that federal law necessarily governs claims arising from transboundary emissions. *Contra* J.A. 460 n.3. Through the CAA, Congress transferred responsibility for setting interstate standards from the *federal* judiciary to other *federal* actors. *See AEP*, 564 U.S. at 423–25. Congress made plain that "'federal courts'" are no longer to engage in "'law-making,'" *id.* at 423 (quoting *Milwaukee II*, 451 U.S. at 314), or "'supplement' Congress' answer" for ambient emissions, *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625

(1978). It is, however, "too strange to seriously contemplate" that Congress authorized state or local courts to regulate transboundary emissions under state or local law. *City of New York*, 993 F.3d at 99.

"[T]he very reasons the [Supreme] Court gave for resorting to federal common law in *Milwaukee I* are the same reasons why the state claiming injury cannot apply its own state law to out-of-state [emissions] now." *Illinois v. City of Milwaukee*, 731 F.2d 403, 410 (7th Cir. 1984). In *Milwaukee I*, the Court recognized that "basic interests of federalism" "require[d]" it to apply federal law to claims arising from transboundary pollution. 406 U.S. at 105 n.6. It perceived that applying state law claims would contravene "the basic scheme of the Constitution." *AEP*, 564 U.S. at 421. Thus, even after the CAA's enactment, the Supreme Court reiterated that using the "law of a particular State" to resolve claims concerning interstate emissions "would be inappropriate." *Id.* at 422.

To be sure, the CAA preserves a role for States to regulate emissions sources "within" their borders. 42 U.S.C. § 7410(a)(1); *see Int'l Paper*, 479 U.S. at 490–500. But a State's traditional authority over *intra*state emissions does not imply States (or the District) have authority over *inter*state emissions—which lie outside any single State's or locality's

control. The CAA gives "primary" responsibility for regulating interstate "greenhouse gas emissions" to a federal agency. *AEP*, 564 U.S. at 428; *see West Virginia v. EPA*, 142 S. Ct. 2587, 2601 (2022) ("EPA itself still retains the primary regulatory role in Section 111(d)"). Nothing in the CAA changes the rule that federal law governs transboundary emissions.

Of course, as the district court recognized, J.A. 460 n.3, the CAA's enactment means that the District may lack any meritorious federal claims against private companies for the alleged consequences of climate change. *See AEP*, 564 U.S. at 424–29; *City of New York*, 993 F.3d at 91–100. But that provides no reason for refusing to apply federal law. Federal law still controls matters within unique areas of federal concern even where it provides no remedy for the alleged wrong. *See United States v. Standard Oil Co. of California*, 332 U.S. 301, 305, 313–16 (1974). The district court confused questions about the source of the governing law with its content.

II. Artful Pleading Cannot Defeat Removal of Claims Necessarily Governed by Federal Law

The District's failure to plead claims for the consequences of global climate change under federal law cannot defeat their removal to federal

court. *Contra* J.A. 461. Section 1441(a) permits removal of any state-court case over which federal district courts would have had "original jurisdiction," 28 U.S.C. § 1441(a), including cases "arising under the Constitution, laws, or treaties of the United States," *id.* § 1331; *see Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1748 (2019). And it is well-established that a "case 'arising under' federal common law presents a federal question . . . within the original subject matter jurisdiction of the federal courts." 19 C. Wright & A. Miller, *Federal Practice & Procedure Jurisdiction* § 4514 (3d ed. 2021). Claims seeking relief for the consequences of global climate change are thus removable.

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

standard in federal common law and so directly constitut[ed] a question arising under the laws of the United States.'" *Id.* at 99–100. The same is true for climate-change claims arising from transboundary emissions.

The mere fact that a plaintiff asserting claims for global climate change does not expressly invoke federal common law is immaterial. Under the artful-pleading doctrine, a "'plaintiff may not defeat removal by omitting to plead necessary federal questions.'" *Rivet v. Regions Bank of La.*, 522 U.S. 470, 475 (1998). Thus, where a claim is "controlled by federal substantive law," it may be removed to federal court, *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 560 (1968), "even though no federal question appears on the face of the plaintiff's complaint," *Rivet*, 522 U.S. at 475. "[S]tate courts [are] not left free to develop their own doctrines" where rules of decision "must be determined according to federal law." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426–27 (1964)

The district court nevertheless declined to construe the District's claims as removable claims arising under federal law, objecting that applying federal law would have a similar effect to complete preemption and that complete preemption is appropriate only "in the context of federal *statutes*." J.A. 462. Section 1441(a), however, permits removal

whenever federal courts have "original jurisdiction." Neither it nor 28 U.S.C. § 1331, which provides original jurisdiction over federal questions, distinguishes between claims that necessarily arise under federal statutes and federal common law. *See Milwaukee I*, 406 U.S. at 99–100.

Nor is the need for a federal forum any less where a claim necessarily arises under federal common law instead of a federal statute, particularly where the claims raise issues of state authority to regulate extraterritorially. *Cf. Boyle v. United Technologies Corp.*, 487 U.S. 500, 504 (1998) (observing that state law is "pre-empted and replaced" in areas "involving 'uniquely federal interests,'" even "in the absence of either a clear statutory prescription . . . or a direct conflict between federal and state law" (internal citations omitted)). Adopting the district court's reasoning would allow plaintiffs to avoid federal law and removal in cases involving "uniquely federal interests" and the "conflicting rights of States." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640–41 (1981).

CONCLUSION

The district court's remand order should be vacated.

Respectfully submitted,

Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov

THEODORE E. ROKITA
Attorney General of Indiana

/s/ Thomas M. Fisher
THOMAS M. FISHER
Solicitor General

JAMES A. BARTA
Deputy Solicitor General

ADDITIONAL COUNSEL

STEVE MARSHALL
Attorney General
State of Alabama

TREG TAYLOR
Attorney General
State of Alaska

TIM GRIFFIN
Attorney General
State of Arkansas

CHRISTOPHER M. CARR
Attorney General
State of Georgia

KRIS KOBACH
Attorney General
State of Kansas

DANIEL CAMERON
Attorney General
Commonwealth of Kentucky

LYNN FITCH
Attorney General
State of Mississippi

AUSTIN KNUDSEN
Attorney General
State of Montana

MICHAEL T. HILGERS
Attorney General
State of Nebraska

ALAN WILSON
Attorney General
State of South Carolina

KEN PAXTON
Attorney General
State of Texas

SEAN D. REYES
Attorney General
State of Utah

BRIDGET HILL
Attorney General
State of Wyoming

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the undersigned certifies that this brief complies with the applicable typeface, type-style, and type-volume limitations. This brief was prepared using a proportionally spaced type (Century Schoolbook, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(e)(1), this brief contains 2,883 words. This certificate was prepared according to the word-count function of Microsoft Word, the word-processing program used to prepare this brief.

March 8, 2023

/s/ Thomas M. Fisher
Thomas M. Fisher
Solicitor General

CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Thomas M. Fisher
Thomas M. Fisher
Solicitor General

Office of the Indiana Attorney General
Indiana Government Center South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204-2770
Telephone: (317) 232-6255
Facsimile: (317) 232-7979
Tom.Fisher@atg.in.gov