FEDERAL COURTS — FEDERAL COMMON LAW — FOURTH CIRCUIT DECLINES TO APPLY FEDERAL COMMON LAW FOR MUNICIPAL CLIMATE CHANGE LAWSUIT. — *Mayor of Baltimore v. BP P.L.C.*, 31 F.4th 178 (4th Cir. 2022).

Starting in July 2017, state and local governments across the nation began filing lawsuits in state courts against oil and gas companies, alleging that the companies' exploration, production, and marketing of fossil fuels were contributing to the plaintiffs' climate change–related injuries.[1] Now, in 2023, these cases have still not reached the merits stage. For the last several years, the primary fight has been over a procedural issue — removal. Specifically, the dispute has been over whether these cases can be heard in federal courts, as the oil and gas companies urge.[2] Recently, in *Mayor of Baltimore v. BP P.L.C.*,[3] the Fourth Circuit delivered a small victory for one plaintiff, holding that the litigation was not removable to federal court.[4] In analyzing whether federal common law should be created to govern the dispute, the Fourth Circuit applied the test from *Boyle v. United Technologies Corp.*,[5] which requires that a significant conflict exist between uniquely federal interests and state law, or that the application of state law would frustrate the pursuits of the federal interests, in order to create federal common law.[6] However, based on an inflexible reading of *Boyle*, the court concluded that federal common law could not be expanded because the defendants failed to identify a significant conflict between a particular state law and federal interests.[7] This approach departed from how courts have analyzed whether federal common law should be expanded in the past, and it ignored the defendants' theory of why federal common law controlled the case. By failing to engage with the open question of whether these claims are better suited to be adjudicated under federal law, as the *Boyle* test suggests it should, the Fourth Circuit missed an opportunity to address an important legal question head on.

In 2018, the Mayor and City Council of Baltimore (City) filed suit against twenty-six oil and gas companies in the Circuit Court for Baltimore City.[8] The City alleged that the defendants' conduct — their "lead role" in promoting and selling fossil fuels, despite their awareness

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[1] *Backgrounder: Climate Damage and Deception Lawsuits*, SHER EDLING LLP, https://www.sheredling.com/wp-content/uploads/2022/04/Backgrounder-16-041222-FINAL.pdf [https://perma.cc/6UJD-J3G2].

[2] *See, e.g.*, Mayor of Balt. v. BP P.L.C., 31 F.4th 178 (4th Cir. 2022); Rhode Island v. Shell Oil Prods. Co., 35 F.4th 44 (1st Cir. 2022).

[3] 31 F.4th 178.

[4] *Id.* at 195.

[5] 487 U.S. 500 (1988).

[6] *Id.* at 506–08.

[7] *BP*, 31 F.4th at 202.

[8] Plaintiff's Complaint, Mayor of Balt. v. BP P.L.C., 388 F. Supp. 3d 538 (D. Md. 2019) (No. 18-cv-02357).

of the associated hazards; their "dogged campaign" against regulations, based on deception and misinformation; and their failure to develop less dangerous alternatives — "substantially and measurably contributed to the City's climate change–related injuries."[9] The City's complaint asserted eight causes of action: seven based on state tort law and one based on the Maryland Consumer Protection Act.[10]

Two of the defendant companies filed a notice to remove the case to federal court.[11] After the case was removed, the City filed a motion to remand the case to state court.[12] On June 10, 2019, the U.S. District Court for the District of Maryland granted the motion for remand, holding that removal to federal court was improper under each of the defendants' eight asserted theories[13]: that (1) the case was governed by federal common law,[14] (2) the action raised disputed and substantial issues of federal law,[15] (3) the Clean Air Act[16] (CAA) completely preempted the state law–based claims,[17] (4) there was original federal jurisdiction under the Outer Continental Shelf Lands Act[18] (OCSLA),[19] (5) the federal officer removal statute[20] authorized removal,[21] (6) the federal enclaves theory authorized removal,[22] (7) the claims' relatedness to one or more federal bankruptcies authorized removal,[23] and (8) original admiralty jurisdiction authorized removal.[24] The defendants appealed the remand order to the Fourth Circuit. On March 6, 2020, the Fourth Circuit affirmed the lower court's ruling on the sole ground that removal was improper under the federal officer removal statute.[25] The defendants appealed to the U.S. Supreme Court, which granted certiorari.[26] On May 17, 2021, the Supreme Court vacated the judgment and remanded the case for further proceedings, finding that the Fourth Circuit did, in fact, possess jurisdiction to consider all eight of the defendants'

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[9] *Id.* ¶ 102.

[10] MD. CODE ANN., COM. LAW §§ 13-101 to -501 (West 2018); Plaintiff's Complaint, *supra* note 8, ¶¶ 218–298.

[11] Notice of Removal by Defendants Chevron Corp. & Chevron U.S.A., Inc., *BP*, 388 F. Supp. 3d 538 (No. 18-cv-02357).

[12] *BP*, 31 F.4th at 196.

[13] *BP*, 388 F. Supp. 3d at 574.

[14] *Id.* at 558.

[15] *Id.* at 561.

[16] 42 U.S.C. §§ 7401–7671q.

[17] *BP*, 388 F. Supp. 3d at 563.

[18] 43 U.S.C. § 1349(b)(1).

[19] *BP*, 388 F. Supp. 3d at 567.

[20] 28 U.S.C. § 1442(a)(1).

[21] *Id.* at 569.

[22] *Id.* at 566.

[23] *Id.* at 572.

[24] *Id.* at 574.

[25] *See* Mayor of Balt. v. BP P.L.C., 952 F.3d 452, 457 (4th Cir. 2020).

[26] BP P.L.C. v. Mayor of Balt., 141 S. Ct. 1532, 1532 (2021).

theories of removal, not just the theory relating to the federal officer removal statute.[27]

The Fourth Circuit affirmed the district court's order remanding the case to state court.[28] Writing for the panel, Judge Floyd[29] held that removal of the City's lawsuit to federal court was improper under each of the defendants' eight proposed theories. First, Judge Floyd concluded that the City's claims were not governed by federal common law.[30] Since the plaintiff did not facially plead a federal cause of action in its complaint, Judge Floyd found that no existing federal law applied to the case.[31] However, the court also deemed it prudent to consider whether federal common law should be created to govern the dispute.[32] Judge Floyd reasoned from the baseline principle that "federal common law does not exist wholesale" but instead exists only in "narrow areas," acknowledging that "[f]ederal courts should be reluctant to displace state law through federal common law because displacement is typically a legislative decision for Congress."[33] In order to "promulgate a federal rule of decision,"[34] the *Boyle* test requires that a dispute implicate uniquely federal interests and generate a significant conflict between federal policy and state law, or that the application of state law frustrate the objectives of federal legislation.[35] Though the defendants identified three uniquely federal interests — (1) the control of interstate pollution, (2) energy independence, and (3) multilateral treaties — Judge Floyd concluded that the defendants failed to satisfy the *Boyle* test because they did not identify a specific, significant conflict that existed between federal policy and state law.[36] Because Judge Floyd effectively treated the *Boyle* test as a pleading standard, requiring the defendants to show how a specific state law conflicts with federal interests, he concluded that the defendants' failure to adequately describe a conflict in their notice of removal or opening brief constituted a waiver of the argument.[37] Thus, Judge Floyd declined to create a new area of federal common law on the grounds that the defendants did not show a significant conflict.[38]

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[27] *Id.* at 1543.

[28] *BP*, 31 F.4th at 238.

[29] Judge Floyd was joined by Chief Judge Gregory and Judge Thacker.

[30] *BP*, 31 F.4th at 208.

[31] *Id.*

[32] *Id.* at 201–02.

[33] *Id.* at 200.

[34] *Id.*

[35] *Id.* at 200–01 (citing Boyle v. United Techs. Corp., 487 U.S. 500, 504, 507 (1988)).

[36] *Id.* at 202.

[37] *Id.* (citing Grayson O Co. v. Agadir Int'l LLC, 856 F.3d 307, 316 (4th Cir. 2017) ("A party waives an argument by failing to present it in its opening brief . . . .")).

[38] The district court found that the City's claims were not governed by federal common law because the state law was not completely preempted by federal law. *See* Mayor of Balt. v. BP P.L.C., 388 F. Supp. 3d 538, 563 (D. Md. 2019). However, the court never addressed whether federal common law should be created under the requirements of the *Boyle* test.

Second, Judge Floyd dismissed the argument that the City's claims necessarily raised substantial and actually disputed federal issues.[39] Third, Judge Floyd concluded that the City's state law claims were not completely preempted by the CAA because congressional intent to displace state law could not be sufficiently established.[40] Fourth, Judge Floyd rejected the defendants' federal enclaves theory as a justification for removal.[41] Though federal jurisdiction is appropriate when a "substantial portion" of a defendant's operations occurs on federal land, the Fourth Circuit found that federal jurisdiction cannot be premised on a federal enclaves theory when "*some* of Defendants' activities occurred on [federal] military installations," as was the case here.[42] Fifth, the court rejected the defendants' theory that their exploration and production activities on the outer continental shelf (OCS) justified removal to federal court under OCSLA's federal jurisdictional grant, finding that the defendants failed to establish a connection between their activities on the OCS and the City's claims.[43] Sixth, Judge Floyd concluded that the bankruptcy removal statute did not provide a valid basis for removal to federal court because no "close nexus" existed between the bankruptcy proceedings the defendant cited and the City's lawsuit.[44] The court found that even if bankruptcy jurisdiction were proper, "removal is still inappropriate if the proceeding is a civil action by a 'governmental unit to enforce such government unit's police or regulatory power'" and that the City's suit "[was] such an action."[45] Seventh, Judge Floyd rejected the defendants' argument that "fossil-fuel extraction occurr[ing] on vessels engaged in maritime commerce" authorizes admiralty jurisdiction under the Constitution and 28 U.S.C. § 1331(1), concluding that this was too far-reaching a view.[46] Eighth, and finally, the court reiterated its rejection of the defendants' theory of federal officer removal, based on its finding that the defendants' production of oil on a particular reserve was not sufficiently related to the City's claims.[47]

In declining to create federal common law, the Fourth Circuit adopted an unnecessarily narrow reading of the *Boyle* test. That understanding of *Boyle* is inconsistent with the defendants' theory of why

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[39] *BP*, 31 F.4th at 208–12.
[40] *Id.* at 217.
[41] *Id.* at 219.
[42] *Id.* at 218.
[43] *Id.* at 222.
[44] *Id.* at 223–24.
[45] *Id.* at 224 (citing 28 U.S.C. § 1452(a)).
[46] *Id.* at 225 (quoting Appellants' Opening Brief at 53, *BP* (No. 19-1644)).
[47] *Id.* at 228–38. The Fourth Circuit had previously rejected federal jurisdiction on these grounds. *Id.* at 228. Although the Supreme Court "only required [the court] to consider Defendants' other removal grounds on remand and never addressed [the] holding concerning federal officer removal," Judge Floyd noted that the entire opinion was vacated and, thus, had no precedential effect. *Id.* Since the defendants did not present any new arguments, Judge Floyd essentially rearticulated the prior opinion's reasoning and conclusion for this removal theory. *Id.*

federal common law governs the case. Because of the difficulty inherent in tracking emissions from greenhouse gases, the climate change context may be particularly well suited for federal common law. Thus, by reading *Boyle* narrowly, the Fourth Circuit failed to fully address the compelling issue of whether federal common law should apply.

By narrowing in on *Boyle*'s requirement that a significant conflict must exist in order to expand federal common law, the Fourth Circuit read *Boyle* to say that the only type of conflict that justifies the creation of a federal rule of decision is one in which a federal interest conflicts with a specific state law.[48] The Supreme Court's description of what might satisfy the significant conflicts analysis in *Boyle* accounted specifically for the possibility that the conflict might not be carefully describable and that the federal interest might not create a significant conflict with a particular state law.[49] Although the Supreme Court stated that a conflict must exist, it acknowledged that "[t]he conflict with federal policy need not be as sharp as that which must exist for ordinary pre-emption when Congress legislates."[50] Instead, the Supreme Court implied that although there are some circumstances where particular elements of state law are displaced and "the conflict is more narrow," in other instances, when an entire body of state law is displaced by federal common law, the conflict might be only broad in nature.[51] This suggests that the conflict requirement of *Boyle* can be met when an entire body of state law is broadly frustrating a federal policy interest, not only when a particular state law and federal law are coming into direct conflict.

The Fourth Circuit effectively treated *Boyle* as an inflexible requirement that the defendant identify a specific conflict with a particular state law. But in *Boyle*, the Supreme Court specifically affirmed that conflicts can vary in scope and nature and can result in different degrees of displacement.[52] According to the Supreme Court, a broad conflict with federal interests can be enough to justify the creation of federal common law.[53] Though the Fourth Circuit acknowledged that the removal burden would be met if defendants could satisfy the *Boyle*

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[48] *See id.* at 202 ("Defendants' request for federal common law still fails because they do not satisfy the necessary 'precondition' of creating federal common law — the recognition of a significant conflict between a federal interest and state law's application." (quoting Atherton v. FDIC, 519 U.S. 213, 218 (1997))). The court observed that the defendants "never establish[ed] a significant conflict between Baltimore's state-law claims . . . and any federal interests . . . ." *Id.*

[49] *See* Boyle v. United Techs. Corp., 487 U.S. 500, 506–08 (1988).

[50] *Id.* at 507.

[51] *Id.* at 508.

[52] *Id.*

[53] *See id.* According to scholars, the Supreme Court has recognized that cases involving certain areas of law, such as admiralty and foreign relations, should be governed by uniform, federal law because "[i]n these areas, the risk is great that a state, understandably focusing on the interests within its boundaries, will give insufficient weight to the larger national and international interests, and that each state, left to its own devices, will choose varying rules of decision." Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585, 648 (2006).

requirements, it declined to find that the *Boyle* requirements were satisfied in *BP*.[54] Judge Floyd rested his conclusion on the theory that the defendants failed to identify a conflict between a particular state law and uniquely federal interests, and in so doing waived the argument that federal common law should be created.[55]

The Fourth Circuit's analysis of whether federal common law should be created is peculiarly inconsistent with how the case was briefed by the defendants and discussed at oral argument. The defendants' notice of removal never purported to identify a specific state law that conflicted with federal interests. Instead, the defendants rested their argument that the case was controlled by federal common law on the theory that applying the entire body of state tort law "to address global climate-change issues" would directly interfere with federal interests, including the interest in addressing interstate pollution in a uniform manner.[56] The defendants argued that because the City's claims were not based on defendants' emitting activities from local sources within the state but instead were based on defendants' aggregate, global activities, state tort law could not be applied to govern the dispute.[57] Thus, the defendants stated that applying state tort law to adjudicate liability for contributions to global warming would result in a "patchwork of fifty different answers to the same fundamental global question."[58] This language suggested that the defendants believed not only that the adjudication of these disputes under state law would implicate federal interests but also that it would produce results that would be judicially unworkable and create conflicts in the laws. Though the defendants did not base their argument on the existence of a discrete conflict between a particular state law and a federal interest, they did describe how the adjudication of these climate change disputes under state law would result in a broader conflict between the entire body of state law and federal interests.[59]

The defendants rearticulated this theory of the case in their opening brief. Though the Fourth Circuit faulted the defendants for failing to

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[54] *BP*, 31 F.4th at 202.

[55] *Id.* ("Defendants' failure to argue a 'significant conflict' between Baltimore's causes of action and its identified federal interests constitutes a waiver." (citing Grayson O Co. v. Agadir Int'l LLC, 856 F.3d 307, 316 (4th Cir. 2017))). The Fourth Circuit cited *Boyle*'s progeny to support this analysis. *Id.* at 201 (citing Rodriguez v. FDIC, 140 S. Ct. 713 (2020); Atherton v. FDIC, 519 U.S. 213 (1997); O'Melveny & Myers v. FDIC, 512 U.S. 79 (1994); Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981)). However, these cases do not change the fact that *Boyle* contemplated a relatively flexible analysis to create federal common law.

[56] Notice of Removal by Defendants Chevron Corp. & Chevron U.S.A., Inc., *supra* note 11, ¶ 19.

[57] *Id.* ¶ 20 ("[T]ort liability for Defendants' . . . contributions to *global* warming would require an over-arching consideration of *all* of the [defendants'] emissions . . . in each of the states and, in fact, in the more than 180 nations.").

[58] *Id.* (quoting California v. BP P.L.C., No. 17-06011, 2018 WL 1064293, at *3 (N.D. Cal. Feb. 27, 2018)).

[59] *See id.* ¶¶ 19–20.

engage with *Boyle* and its progeny,[60] the defendants explicitly stated why *Boyle* did not govern this case, and if anything, why the precedent provided support for their theory.[61] First, the defendants stated that *Boyle*'s facts — which concerned a defendant's defense to a plaintiff's state-law claims — and its procedural posture — which did not involve removal — made the case unrelated to the claim at issue.[62] Second, the defendants argued that *Boyle* did not foreclose their removal argument, and if anything, confirmed that where "federal interest[s] require[] a unique rule, the entire body of state law applicable to the area conflicts and is replaced by federal rules."[63] Accordingly, the defendants rested their conclusion on the theory that the entire body of state tort law conflicts with identified federal interests, and thus, a federal rule of decision must apply to govern the claims.[64]

The scientific reality of how greenhouse gases are released into the atmosphere may tip the scales in favor of adjudicating these claims under a uniform federal rule of decision. The federal government's interest in uniformly dealing with interstate pollution concerns has been a major motivating force for Congress to legislate.[65] In the water pollution context, the Supreme Court established a workable solution that eliminated the conflict between state common law and the federal interest in uniformly addressing interstate pollution. In *International Paper Co. v. Ouellette*,[66] the Supreme Court held that the law of the *source* state — meaning the state from which the water pollutant was discharged — governs nuisance claims.[67] However, based on differences in how water and air pollutants travel, it is reasonable that courts may come to a different conclusion about the degree of displacement of state common law that is necessary to preserve federal interests in this

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[60] *See BP*, 31 F.4th at 201. But the panel for the Fourth Circuit did not ask the defendant to identify a "significant conflict" at oral argument, nor did it direct any questions toward the conflicts analysis under *Boyle*. *See* Oral Argument, *BP* (No. 19-1644), https://www.ca4.uscourts.gov/OAarchive/mp3/19-1644-20220125.mp3 [https://perma.cc/45AA-J3R7].

[61] Appellants' Opening Brief, *supra* note 46, at 27–28.

[62] *Id.* at 28.

[63] *Id.* (quoting Boyle v. United Techs. Corp., 487 U.S. 500, 508 (1988)).

[64] *See id.*

[65] The earliest environmental laws controlling air pollution were enacted at the state and local levels. *See* Arthur C. Stern, *History of Air Pollution Legislation in the United States*, 32 J. AIR POLLUTION CONTROL ASS'N 44, 44 (1982). But as technological sophistication and scientific understanding developed, Congress realized that regulatory frameworks to control air and water pollution must be set up at the national level. *See id.* at 48–49.

[66] 479 U.S. 481 (1987).

[67] *Id.* at 487. The Supreme Court interpreted the savings clause in the Clean Water Act, 33 U.S.C. §§ 1251–1387, to apply the source state's law in order to avoid creating a choice-of-law rule that would cause "liabilities [to] attach even though the source had complied fully with its state and federal permit obligations," *Ouellette*, 479 U.S. at 495, and would subject a source state "to a variety of common-law rules established by the different States along the interstate waterways," *id.* at 496.

context.[68] Since water pollutant discharge sites are more easily locatable, a choice-of-law rule that applies the source state's law proved a workable solution to overcome the concern that state torts suits would create a patchwork of laws.[69] But unlike with water pollutants, it is nearly impossible to determine the location of the emitting source for the greenhouse gases that are causing climate change–related injuries, or to trace the greenhouse gases that have caused injury to the plaintiff in this litigation to their original source.[70] Just as in the water pollution context, where the Supreme Court declined to allow the law of the *affected* state to apply to the case, it seems reasonable that the law of the affected state should not apply in the air pollution context. In light of this reality, it is more difficult to argue that state tort law should govern, since the defendants' same activities — which must be considered on the national or global level — could potentially give rise to different liabilities depending on what state or city is suing, and thus, which state law applies. The federal interest in establishing uniformity when dealing with interstate pollution issues may counsel in favor of adjudicating this dispute under a federal common law.

Though no general federal common law has existed since *Erie Railroad Co. v. Tompkins*,[71] the Supreme Court has recognized that there are limited pockets where the creation of a federal rule of decision is still appropriate.[72] Litigation involving climate change–related injuries caused by greenhouse gas emissions seems to be the very type of dispute where the federal interest in uniformity may counsel in favor of adjudicating the dispute under federal common law. The *Boyle* analysis, when applied with the flexibility it seems to contemplate, authorized Judge Floyd to engage with the actual question that *BP* raises: whether the application of state law would significantly conflict with the federal interests implicated in this dispute. By reading the *Boyle* test to require the defendants to point to a discrete conflict between federal interests and a particular state law, the Fourth Circuit ignored the possibility that the federal interest in uniformity was strong enough to suggest that the entire body of state tort law should not apply to this litigation.

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[68] The Supreme Court held in *American Electric Power Co. v. Connecticut*, 546 U.S. 410 (2011), that the CAA displaces a federal common law right to seek abatement of greenhouse gases emissions. *Id.* at 429. However, whether the CAA displaces the federal common law claim is a merits question, which does not affect the choice-of-law analysis. This is what the defendants argued in their opening brief. Appellants' Opening Brief, *supra* note 46, at 31 ("The absence of a federal common law remedy has no bearing on whether federal common law governs the claims in the first place." (citing United States v. Standard Oil Co., 332 U.S. 301, 307, 313 (1947))).

[69] *See Ouellette*, 479 U.S. at 487.

[70] Matthew Gerhart, Comment, *Climate Change and the Endangered Species Act: The Difficulty of Proving Causation*, 36 ECOLOGY L.Q. 167, 184 (2009) ("[I]t is nearly impossible to trace the lifecycle of emissions from a particular source.").

[71] 304 U.S. 64 (1938).

[72] *See* Tidmarsh & Murray, *supra* note 53, at 594.