No. 19-1644

United States Court of Appeals for the Fourth Circuit

MAYOR AND CITY COUNCIL OF BALTIMORE,

Plaintiff-Appellee,

v.

BP P.L.C., et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the District of Maryland, No. 1:18-cv-02357-ELH
(The Honorable Ellen L. Hollander)

APPELLANTS' SUPPLEMENTAL OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

Cases

Statutes

Other Authorities

INTRODUCTION

The Mayor and City Council of Baltimore initiated this suit in state court, seeking to hold a select group of 26 energy companies liable under Maryland state law for what they characterize as harms arising from the global "buildup of CO_2 in the environment" allegedly caused by the extraction, production, and marketing of fossil-fuel products, which "drive[] global warming." JA.140 ¶193, JA.45 ¶6.

Defendants removed the case to the U.S. District Court for the District of Maryland, highlighting that nearly all of the relevant conduct that Plaintiff alleges caused climate change—including *all* of Defendants' production of oil and gas—occurred outside of Maryland, with a significant portion occurring in foreign countries or on the Outer Continental Shelf ("OCS"). JA.202–04, JA.207–11.

Defendants' notice of removal raised several grounds for federal jurisdiction, including that Plaintiff's claims: (1) arise under federal law; (2) raise disputed and substantial federal questions; (3) warrant original federal jurisdiction under the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1349; and (4) fall within the scope of the federal-officer-removal statute, 28 U.S.C. § 1442. JA.185–202, JA.207–17.

Plaintiff moved to remand, and the district court granted Plaintiff's motion, rejecting Defendants' bases for removal. JA.375. On appeal, this Court concluded that it had jurisdiction to address only the federal-officer-removal ground, and it affirmed the district court's ruling on that issue. *Mayor & City Council of Baltimore v. BP P.L.C.*, 952 F.3d 452, 461–71 (4th Cir. 2020).

The Supreme Court, however, has since held that, when a party seeks appellate review of an order remanding a "case … removed pursuant to section 1442," "the whole of [that] order bec[omes] reviewable on appeal." *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 1538 (2021). The Court accordingly remanded this case for further proceedings. *See id.* at 1543.

Now back before this Court, Defendants emphasize two grounds for removal that this Court has not yet considered: (1) federal jurisdiction is proper because Plaintiff's claims necessarily arise under federal law; and (2) Plaintiff's alleged injuries are connected to the production of oil and gas from the OCS and accordingly the case is removable under OCSLA.[1]

[1] Defendants also maintain that the case is removable on the additional grounds addressed in their prior briefing.

ARGUMENT

I. Removal Was Proper Because Plaintiff's Claims Arise Under Federal Law.

As a matter of federal constitutional law and structure, Plaintiff's claims necessarily arise under federal, not state, law. Plaintiff seeks to hold Defendants liable for the consequences of emissions-producing conduct occurring in other states and around the world. Under long-established Supreme Court precedent, such claims are necessarily and exclusively governed by federal common law. The artful-pleading doctrine precludes Plaintiff's attempt to mischaracterize its inherently federal claims as based on state law, because the structure of the Constitution dictates that only federal law can apply to such interstate pollution claims. Accordingly, Plaintiff's claims arise under federal law, and removal was proper. *See Caudill v. Blue Cross & Blue Shield of N.C.*, 999 F.2d 74, 77 (4th Cir. 1993) (holding that, despite state-law label, claim was necessarily "governed by 'federal common law'" and thus removable to federal court).

A. Plaintiff Seeks To Impose Liability For Interstate And International Conduct.

Plaintiff seeks relief for harms allegedly caused by climate change—notably, sea-level rise—and alleges that anthropogenic climate change occurs not as a result of localized actions but by virtue of the worldwide production and consumption of fossil fuels resulting in undifferentiated accumulated emissions from all emitters in the world over several decades. *See, e.g.*, JA.72 ¶¶39–42. Climate change is a worldwide, transboundary phenomenon, caused by greenhouse gases that "once emitted become well mixed in the atmosphere." *Am. Elec. Power Co. v. Connecticut,* 564 U.S. 410, 422 (2011) ("*AEP*"). And despite Plaintiff's claims that Defendants engaged in a disinformation campaign to conceal the risks of fossil fuels, the Complaint is clear that the "singular source" of Plaintiff's alleged injuries is greenhouse gas emissions. *City of New York v. Chevron Corp.*, 993 F.3d 81, 91 (2d Cir. 2021).

Accordingly, any judgment about such emissions or their alleged causal contribution to the overall phenomenon of climate change inherently requires evaluation at an interstate and, indeed, international level. Even assuming that Maryland state law could govern emissions

from in-state sources, Plaintiff does not—and could not—base its theory of the case solely on in-state emissions.

Rather, Plaintiff alleges that Defendants created a public nuisance by "[c]ontrolling every step of the fossil fuel product supply chain" and introducing fossil-fuel products "into the stream of commerce," JA.149 ¶221(a), with no geographical limitation whatsoever. Likewise, Plaintiff's failure-to-warn claims are based on Defendants' extraction of "fossil fuel products" and the introduction of those "products into the stream of commerce" worldwide. JA.158 ¶243, JA.167 ¶276; *see also* JA.159 ¶250, JA.163–64 ¶264 (same for design-defect claims). Because of the very nature of the global climate-change phenomenon and Plaintiff's tort theories, the claims here necessarily seek to hold Defendants liable "for the effects of emissions made around the globe over the past several hundred years." *City of New York*, 993 F.3d at 92.

B. Claims Based On Interstate and International Emissions Necessarily Arise Under Federal Law.

In our federal system, each state may make laws within its own borders, but no state may "impos[e] its regulatory policies on the entire Nation," *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585 (1996), or dictate our "relationships with other members of the international community,"

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964). The Constitution's allocation of sovereignty between the states and the federal government, and among the states themselves, precludes applying state law in certain areas that are inherently interstate in nature.

In these narrow areas, "there is an overriding federal interest in the need for a uniform rule of decision." *Illinois v. City of Milwaukee*, 406 U.S. 91, 105 n.6 (1972) ("*Milwaukee I*"). As a result, the Constitution gives federal courts "the need and authority" in appropriate circumstances "to formulate" a national body of law, rather than allowing for piecemeal (and potentially contradictory) rules of decision to develop among the states. *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981). For example, "state courts [are] not left free to develop their own doctrines" of foreign relations, *Sabbatino*, 376 U.S. at 426, or to decide disputes with neighboring states, *e.g.*, *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938). In these areas, the "federal judicial power" must supply any rules necessary "to deal with common-law problems." *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301, 307 (1947).

This case falls into one such area where federal law necessarily governs. As the Supreme Court has recognized, "[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law." *AEP,* 564 U.S. at 421. This is because "[f]ederal common law and not the varying common law of the individual States" is "necessary" for "dealing in uniform standard with the environmental rights of a State against improper impairment by sources outside its domain." *Milwaukee I,* 406 U.S. at 107 n.9 (citation omitted). Indeed, as the Second Circuit recently observed in a closely analogous case: "For over a century, a mostly unbroken string of cases has applied federal law to disputes involving interstate air or water pollution." *City of New York*, 993 F.3d at 91.

Federal law necessarily governs interstate or international pollution claims to the exclusion of state law, because "the basic scheme of the Constitution so demands." *AEP*, 564 U.S. at 421. As a consequence, state law cannot exist in this area. "[I]f federal common law exists, it is because state law cannot be used." *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 313 n.7 (1981) ("*Milwaukee II*"). As the Supreme Court has observed, "interstate ... pollution is a matter of

federal, not state, law." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987).

In its Supreme Court *amicus* brief in this case, the United States made precisely this point: "[C]ross-boundary tort claims associated with air and water pollution involve a subject that 'is meet for federal law governance.'" U.S. *Amicus Curiae* Br. 26–27, *BP p.l.c. v. Mayor & City Council of Baltimore*, No. 19-1189 (U.S. Nov. 23, 2020) (quoting *AEP*, 564 U.S. at 422).[2] Claims "that seek to apply the law of an affected State to conduct in another State" necessarily "arise under 'federal, not state, law' for jurisdictional purposes, given their inherently federal nature." *Id.* at 27 (quoting *Ouellette*, 479 U.S. at 488). The same reasoning applies here.

Plaintiff's claims are also inherently federal and necessarily arise under federal law because they seek to impose liability based on the production and sale of oil and gas abroad. As the Second Circuit

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[2] At oral argument, the United States confirmed that Plaintiff's claims "are inherently federal in nature." Tr. of Oral Argument at 31:4–5, *Baltimore*, 2021 WL 197342 (Jan. 19, 2021). Although Plaintiff "tried to plead around th[e] Court's decision in *AEP*, its case still depends on alleged injuries to [Plaintiff] caused by emissions from all over the world, and those emissions just can't be subjected to potentially conflicting regulations by every state and city." *Id.* at 31:7–13.

explained, the "substantial damages award" Plaintiff seeks "would effectively regulate the [defendants'] behavior far beyond [the forum State's] borders." *City of New York*, 993 F.3d at 92. The claims therefore implicate the federal government's foreign-affairs power and the Constitution's Foreign Commerce Clause. "Power over external affairs is not shared by the States; it is vested in the national government exclusively," *United States v. Pink*, 315 U.S. 203, 233 (1942), and thus the federal government has exclusive authority over the Nation's international climate policy and foreign relations. "[O]ur federal system does not permit the controversy to be resolved under state law" "because the authority and duties of the United States as sovereign are intimately involved" and "the interstate [and] international nature of the controversy makes it inappropriate for state law to control." *Tex. Indus.*, 451 U.S. at 641; *see also Sabbatino*, 376 U.S. at 425 ("[O]ur relationships with other members of the international community must be treated exclusively as aspects of federal law.").

As the Second Circuit recently explained, "[g]lobal warming presents a uniquely international problem of national concern. It is therefore not well-suited to the application of state law." *City of New*

York, 993 F.3d at 85–86. Indeed, the complaint's repeated use of the term "*global* warming," JA.46 ¶8, JA.61 ¶26(c), JA.71–72 ¶¶38–39, JA.74 ¶44, JA.76–77 ¶¶48, 52–53, JA.152 ¶224(d), (f), JA.157 ¶239, JA.161–62 ¶¶253(h), 256 (emphasis added), makes clear that the alleged causes of Plaintiff's alleged injuries are not confined to particular sources, cities, counties, or even states. *See* JA.73 ¶43, Fig. 2 (depicting CO_2 emissions from various sources); JA.76 ¶48 (CO_2 emissions cause "global mean sea level rise"). On the contrary, the claims here implicate inherently national and international activities and interests, including treaty obligations and federal and international regulatory schemes. *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 509, 523–24 (2007) (describing Senate rejection of the Kyoto Protocol because emissions-reduction targets did not apply to "heavily polluting nations such as China and India"); *AEP*, 564 U.S. at 427–29 (describing regulatory scheme of the Clean Air Act and role of EPA). The complaint itself demonstrates that the unbounded nature of greenhouse gas emissions, diversity of sources, and magnitude of the alleged consequences have prompted extensive federal and international engagement. *See, e.g.*, JA.113–14 ¶143.

As a "question[] of national or international policy," addressing greenhouse gas emissions is inherently a federal concern subject to exclusive application of federal law; state law has no role to play. *See AEP*, 564 U.S. at 427. Because Plaintiff's claims "must be brought under federal common law," *City of New York*, 993 F.3d at 95, it necessarily follows that there "is a permissible basis for jurisdiction based on a federal question," *Treiber & Straub, Inc. v. U.P.S., Inc.*, 474 F.3d 379, 383 (7th Cir. 2007); *see also Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 924, 931 (5th Cir. 1997) ("[R]emoval is proper" because plaintiff's claims, though pleaded under state law, "arose under federal common law."). It is "well settled" that Section 1331's "grant of 'jurisdiction will support claims founded upon federal common law as well as those of a statutory origin.'" *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 850 (1985). And "[t]he test for determining the existence of federal question jurisdiction under the removal statute is identical to the jurisdictional test of 28 U.S.C. § 1331." *Caudill*, 999 F.2d at 77.

In fact, binding circuit precedent compels the conclusion that removal is appropriate here. In *Caudill*, this Court affirmed removal of

a state-court complaint alleging a putative "state law claim for breach of [a federal health] insurance contract." 999 F.2d at 77. The Court explained that "some areas involving 'uniquely federal interests' may be so important to the federal government that a 'federal common law' related to those areas will supplant state law." *Id.* at 78. After determining that federal common law governed the cause of action at issue, this Court concluded that "federal jurisdiction existed over this claim and removal was proper." *Id.* at 79.[3] Likewise, in *North Carolina ex rel. North Carolina Department of Administration v. Alcoa Power Generating, Inc.*, this Court recognized that removal is proper when "the constitutional nature" of nominally state-law claims means that federal law governs. 853 F.3d 140, 147, 149 (4th Cir. 2017). *Caudill* and *North Carolina* thus confirm that nominally state-law claims in areas governed by federal law arise under federal law for removal purposes.

[3] The Supreme Court later concluded that state law generally governs federal health-benefit contracts, *see Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 693 (2006), but that decision does not disturb *Caudill*'s independent holding that putative state-law claims are removable when, as here, they are governed by federal common law. Accordingly, that holding remains binding circuit precedent. *See Taylor v. Grubbs*, 930 F.3d 611, 619 (4th Cir. 2019).

Plaintiff's claims thus necessarily arise under and are governed exclusively by federal law. As the Second Circuit has explained, "[s]uch a sprawling case" is "simply beyond the limits of state law." *City of New York*, 993 F.3d at 92. Because claims like Plaintiff's "implicat[e] the conflicting rights of States [and] our relations with foreign nations, this case poses the *quintessential* example of when federal common law is needed." *Id.* (emphasis added). In such a case, "borrowing the law of a particular State would be inappropriate." *AEP*, 564 U.S. at 422.

C. Plaintiff's Artful Pleading Of Nominally State-Law Claims Cannot Defeat Federal Jurisdiction.

The district court failed to recognize federal common law as an independent ground for removal of Plaintiff's claims because it mistakenly concluded that it could not look behind the state-law labels that Plaintiff used in its complaint. *See* JA.346. But a plaintiff is not permitted "to circumvent" federal jurisdiction through "artful pleading." *Davis v. Bell Atl.-W. Virginia, Inc.*, 110 F.3d 245, 247 (4th Cir. 1997).

Indeed, this Court and several other courts of appeals have held that, where uniform federal rules of decision necessarily govern a common-law claim, the claim arises under federal law—no matter *how* the complaint labels it. *See*, *e.g.*, *Caudill*, 999 F.2d at 77–80; *BIW*

Deceived v. Loc. S6, Indus. Union of Marine & Shipbuilding Workers of Am., 132 F.3d 824, 831 (1st Cir. 1997); *Sam L. Majors Jewelers*, 117 F.3d at 926, 929; *In re Otter Tail Power Co.*, 116 F.3d 1207, 1214 (8th Cir. 1997); *New SD, Inc. v. Rockwell Int'l Corp.*, 79 F.3d 953, 954–55 (9th Cir. 1996). The same result is required here.

Although Plaintiff purports to style its nuisance and other claims as arising under state law, it is the inherently federal nature of the claims apparent on the face of the complaint, not Plaintiff's characterization of them as state-law claims, that controls. "[A] plaintiff cannot frustrate a defendant's right to remove by pleading a case without reference to any federal law when the plaintiff's claim is necessarily federal." 14C Wright et al., *Fed. Prac. & Proc. Juris*. § 3722.1 (rev. 4th ed.). Where the structure of the Constitution requires application of federal law, there is federal jurisdiction, regardless of the label a plaintiff attaches to the claim. This Court recognized this principle when it affirmed federal removal jurisdiction in *North Carolina*, a case brought ostensibly under state law to establish riverbed-ownership rights. Under settled law, a state's "absolute title to the beds of navigable waters 'is conferred not by Congress but *by the Constitution itself*.'" 853 F.3d at 147 (quoting *Oregon*

ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 372 (1977)). Because "the constitutional nature of state ownership of navigable waters" requires that federal law govern, removal was proper. *Id.* at 149–50.

It is well settled that the question whether a case arises under federal law is an issue of subject-matter jurisdiction that the federal court must resolve for itself in light of its "unflagging obligation" to exercise such jurisdiction where it exists. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Where, as here, the complaint's substantive allegations and demands for relief reveal that those claims are inherently and exclusively federal, treating Plaintiff's characterization of those claims as controlling would contravene this fundamental obligation.

The Second Circuit similarly concluded in *City of New York* that "[a]rtful pleading cannot transform the [plaintiff's] complaint into anything other than a suit over global greenhouse gas emissions." 993 F.3d at 91. As explained above, claims for interstate or international pollution unquestionably implicate "'uniquely federal interests.'" *Caudill*, 999 F.3d at 78. And where, as here, "the federal interest

requires the application of a uniform rule, federal common law displaces state law entirely." *Id.* at 79. Accordingly, regardless of Plaintiff's attempt to conceal the federal nature of its claims, Plaintiff's claims are "simply beyond the limits of state law" and "must be brought under federal common law"—indeed, they are "federal claims." *City of New York*, 993 F.3d at 92, 95. Because the "dispositive issues stated in the complaint require the application of federal common law," Plaintiff's interstate-pollution claims "'arise under' federal law"—and are removable. *Milwaukee I*, 406 U.S. at 100.

Contrary decisions in climate-change cases in other courts have failed to grapple with these governing legal principles and the inherently federal nature of Plaintiff's claims. In *City of Oakland v. BP p.l.c.*, 969 F.3d 895 (9th Cir. 2020), *cert. denied*, No. 20-1089 (U.S. June 14, 2021), for example, the Ninth Circuit analyzed the defendants' invocation of federal common law exclusively under the exception to the well-pleaded complaint rule recognized in *Grable & Sons Metal Products v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005). *See Oakland*, 969 F.3d at 906. The court then concluded that, "[e]ven assuming that the [plaintiffs'] allegations could give rise to a cognizable claim for public

nuisance under federal common law," the state-law claims at issue did not satisfy the *Grable* test. *Id.* But this statement misunderstands the nature of the artful-pleading rule where, as here, the Constitution divests states of the authority to regulate certain interstate activities. Ordinarily, plaintiffs can avoid removal by pleading only state-law claims, even if federal claims are available. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). But a plaintiff asserting claims in an area necessarily governed by federal law cannot choose between state and federal law because "our federal system does not permit the controversy to be resolved under state law." *Tex. Indus.*, 451 U.S. at 641. The Ninth Circuit thus erred when it assumed without analysis that the plaintiffs could rely on state law in an area subject to federal common law. *See City of Oakland*, 969 F.3d at 906. By "exalt[ing] form over substance," the Ninth Circuit missed the inherently federal nature of the plaintiffs' claims. *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 595 (2013).

D. Federal Jurisdiction Does Not Depend On The Viability Of Plaintiff's Inherently Federal Claims.

Whether a claim arises under state or federal law for jurisdictional purposes turns on which law governs; it does not depend on whether the

plaintiff has stated a *viable* claim under federal law. Under the Supreme Court's two-step analytical framework set forth in *Standard Oil*, courts must: (1) determine whether, for jurisdictional purposes, the source of law is federal or state based on the nature of the issues at stake; and then (2) if federal law is the source, determine the substance of the federal law and decide whether the plaintiff has stated a viable federal claim. *United States v. Swiss Am. Bank, Ltd.*, 191 F.3d 30, 42–45 (1st Cir. 1999) (citing *Standard Oil*, 332 U.S. at 305). This appeal implicates only the first inquiry.

For example, in *Swiss American*, the First Circuit articulated the *Standard Oil* two-step framework, emphasizing the difference between the "source question and the substance question." *Swiss American* involved civil asset-forfeiture claims against foreign banks, which the plaintiffs argued were "garden-variety tort" and "breach of contract" claims. The court concluded, however, that those nominally state-law claims arose under federal law because "the ascertained federal interest necessitate[d] a federal source for the rule of decision." 191 F.3d at 43, 45. The court explained that the "source question" asks whether "the source of the controlling law [should] be federal or state." *Id.* at 43. The

substance question, "which comes into play only if the source question is answered in favor of a federal solution," asks whether the federal courts should "fashion a uniform federal rule" authorizing relief on the merits. *Id.* Whether a claim "arises under" federal law "turns on the resolution of the source question." *Id.* at 44.

Only that first "source" question—asking which law applies—is relevant to removal jurisdiction, and it must be resolved by a federal court. As the Supreme Court explained, this "choice-of-law task is a federal task for federal courts." *Milwaukee II*, 451 U.S. at 349 (quoting *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 592 (1973)). And for the reasons set forth above, the answer to that choice-of-law question is clear: for interstate and international pollution claims like Plaintiff's, the only available source of law is federal, which means those claims "arise under" federal law for purposes of removal jurisdiction.

II. This Action Is Removable Because It Has A Connection With Defendants' Activities On The Outer Continental Shelf.

Plaintiff's claims are also removable because they necessarily are connected with Defendants' extraction and production of oil and gas from the OCS. The claims implicate *all* of Defendants' oil-and-gas production, and, in some years, nearly one-third of the oil produced domestically has

come from federal leases on the OCS, making Plaintiff's claims inextricably connected to OCS production. Moreover, Plaintiff's requested relief would threaten to impair operations on the OCS. The district court therefore had jurisdiction under OCSLA.

A. OCSLA Gives Federal Courts Jurisdiction Over Any Claim That Arises Out Of Or In Connection With An OCS Operation.

OCSLA establishes federal jurisdiction over actions "arising out of, or *in connection with* … any operation conducted on the [OCS]" involving the "exploration, development, or production of the [OCS] minerals" or "subsoil and seabed." 43 U.S.C. § 1349(b)(1) (emphasis added). The breadth of this jurisdictional provision reflects OCSLA's "expansive substantive reach." *EP Operating Ltd. P'ship v. Placid Oil Co.*, 26 F.3d 563, 569 (5th Cir. 1994). Congress passed OCSLA "to establish federal ownership and control over the mineral wealth of the OCS and to provide for the development of those natural resources." *Id.* at 566. OCSLA declares "the policy of the United States" to be that the OCS "should be made available for expeditious and orderly development." 43 U.S.C. § 1332(3).

To protect the substantial federal interests in the OCS leasing program, Congress established original federal jurisdiction over "the entire range of legal disputes that it knew would arise relating to resource development on the Outer Continental Shelf." *Laredo Offshore Constructors, Inc. v. Hunt Oil Co.*, 754 F.2d 1223, 1228 (5th Cir. 1985). The jurisdictional grant is "straightforward and broad," *Petrobras Am., Inc. v. Vicinay Cadenas, S.A.*, 815 F.3d 211, 215 (5th Cir. 2016), and represents "a sweeping assertion of federal supremacy over the submerged lands," *Ten Taxpayer Citizens Grp. v. Cape Wind Assocs., LLC*, 373 F.3d 183, 188 (1st Cir. 2004). Accordingly, OCSLA's "arising out of, or in connection with" jurisdictional standard is "undeniably broad in scope." *EP Operating*, 26 F.3d at 569.

Consistent with OCSLA's plain language and Congress's intent, courts repeatedly have found OCSLA jurisdiction even where an OCS operation is only indirectly related to a plaintiff's alleged harms that occur downstream from the OCS operation. For example, in *United Offshore Co. v. Southern Deepwater Pipeline Co.*, OCSLA conferred jurisdiction over a case that "involve[d] a contractual dispute over the control of an entity which operates a gas pipeline," even though that

"dispute is one step removed" from OCS operations. 899 F.2d 405, 407 (5th Cir. 1990). And the court in *Superior Oil Co. v. Transco Energy Co.*, found OCSLA jurisdiction over a claim involving the breach of contracts for the sale of natural gas that was simply *produced* on the OCS. 616 F. Supp. 98, 100–01 (W.D. La. 1985).

Similarly, courts have found OCSLA jurisdiction over disputes when an OCS operation accounted for only a *portion* of the plaintiff's alleged injury. *See Lopez v. McDermott, Inc.*, No. CV 17-8977, 2018 WL 525851, at *3 (E.D. La. Jan. 24, 2018) (finding OCSLA jurisdiction where "it *appear*[*ed*] that *at least part of the work* that [p]laintiff alleges caused his exposure to asbestos arose out of or in connection with the OCS operations" (emphases added)); *Ronquille v. Aminoil Inc.*, No. 14-164, 2014 WL 4387337, at *2 (E.D. La. Sept. 4, 2014) (finding OCSLA jurisdiction over asbestos damages claims at an onshore facility where "*at least part of the work* that [p]laintiff allege[d] caused his exposure to asbestos arose out of or in connection with [the] OCS operations" (emphasis added)). In short, OCSLA jurisdiction is sweeping in scope, encompassing all claims with a connection to OCS operations.

B. Plaintiff's Alleged Injuries Are Connected To Defendants' OCS Operations.

Here, both elements of OCSLA jurisdiction are satisfied: (1) as Plaintiff alleges, Defendants have engaged in "operation[s] conducted on the [OCS]" that entail the "exploration" and "production" of "minerals," and (2) Plaintiff's claims "aris[e] out of, or *in connection with*" those operations. 43 U.S.C. § 1349(b)(1) (emphasis added); *see EP Operating*, 26 F.3d at 569.

1. Defendants Have Long Engaged In Extensive OCS Operations.

It is uncontested that Defendants have long engaged in extensive "exploration, development, or production" on the OCS. *See* Appellee's Resp. Br. 42–45. Indeed, Plaintiff alleges that one Defendant began a new exploration project on the OCS as recently as 2017. JA.49–50 ¶20(b).

The OCS reserves comprise a massive proportion of the Nation's oil-and-gas resources, and have accounted for as much as 30% of annual domestic oil production.[4] Under OCSLA, the U.S. Department of the Interior ("DOI") oversees an extensive federal leasing program to develop

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[4] *See* Cong. Research Serv., R42432, *U.S. Crude Oil and Natural Gas Production in Federal and Nonfederal Areas* 3, 5 (updated Oct. 23, 2018), https://bit.ly/3eMqdyA.

the oil-and-gas reserves of the OCS. 43 U.S.C. § 1334 *et seq.* In 2019, OCS leases supplied more than 690 million barrels of oil. And OCS production rose substantially in each year from 2013 through 2019.[5]

Defendants (or their predecessors, subsidiaries, or affiliates) operate a large share of the OCS oil-and-gas leases.[6] According to DOI-published data for the period 1947 to 1995, sixteen of the twenty largest—including the five largest—OCS operators in the Gulf of Mexico, measured by oil volume, are a Defendant (or predecessor of a Defendant) or one of their subsidiaries.[7] From 1996 to the present, the five largest OCS operators annually have included at least three entities among the

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[5] Bureau of Safety and Environmental Enforcement, *Outer Continental Shelf Oil and Gas Production* (Oct. 6, 2020), https://on.doi.gov/2S9xfFO.

[6] The complaint improperly conflates the activities of Defendants with the activities of their separately organized predecessors, subsidiaries, and affiliates. Defendants reject Plaintiff's erroneous attribution attempts, but for purposes of the jurisdictional analysis, those allegations show that Plaintiff's complaint, as pleaded, was properly removed to federal court.

[7] U.S. Dep't of Interior, *Bureau of Ocean Energy Mgmt., Ranking Operator by Oil*, https://www.data.boem.gov/Main/HtmlPage.aspx?page=rankOil.

Defendants here (or a predecessor) or one of their subsidiaries.[8] Defendants (and their subsidiaries or affiliates) presently hold, in whole or in part, approximately 22.1% of all OCS leases.[9]

Accordingly, the first prong of OCSLA jurisdiction is easily satisfied.

2. Plaintiff Itself Alleges That A Substantial Portion Of Its Harms Arose From Or In Connection With Defendants' OCS Activities.

Plaintiff's claims "aris[e] out of" or have a "connection with" Defendants' operations on the OCS, phrases that courts have interpreted as "undeniably broad in scope." *EP Operating*, 26 F.3d at 569. The district court erroneously concluded that, although Defendants showed that their alleged OCS operations may have contributed to greenhouse gas emissions, jurisdiction was lacking because Defendants "offer[ed] no basis … to conclude that [Plaintiff's] claims for injuries stemming from climate change would not have occurred *but for* [D]efendants' extraction activities on the OCS." JA.362 (emphasis added).

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[8] *Id.*

[9] *See* Bureau of Ocean Energy Management, Lease Owner Information, https://bit.ly/3vBvkbp.

But-for causation is not required to satisfy OCSLA's broad "in connection with" standard. As the Supreme Court recently concluded in analyzing similar language in the personal-jurisdiction context, the "requirement of a 'connection' between a plaintiff's suit and a defendant's activities" does not require but-for "causation." *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1026 (2021) (declining to require "a strict causal relationship between the defendant's in-state activity and the litigation" for specific jurisdiction).

Defendants' extensive OCS operations readily satisfy OCSLA's "undeniably broad" jurisdictional standard. *EP Operating*, 26 F.3d at 569. Plaintiff's claims challenge *all* of Defendants' "extraction … of coal, oil, and natural gas" around the world. JA.44 ¶3, JA.48–49 ¶18; *see also* JA.129–30 ¶¶172–75 (discussing arctic offshore drilling equipment and patents). Plaintiff's causal theory is that Defendants' increased production and sale of oil and gas led to increases in greenhouse gas emissions, which caused changes to the climate, and thereby caused Plaintiff's alleged injuries. *See* JA.43 ¶1, JA.91–92 ¶¶100–02, JA.134 ¶182, JA.149 ¶¶219–20, JA.154 ¶231, JA.159–61 ¶¶250–53, JA.168 ¶284. And because "greenhouse gas molecules do not bear markers that

permit tracing them to their source," JA.156 ¶235, all of the alleged damage—and, correspondingly, all of the requested relief—necessarily ties back to all global production, including Defendants' substantial activities on the OCS. Defendants' production on the OCS is therefore connected to Plaintiff's claims and alleged injuries.

In any event, Defendants' substantial OCS operations satisfy even the "but-for" standard applied by the district court. *See* JA.361–62; *see also Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1739 (2020) (describing "but-for causation" as a "sweeping standard"). Plaintiff's theory of harm stems from "global warming" and its attendant "social and economic impacts." JA.45 ¶6, JA.48 ¶17. Plaintiff contends that "pollution from the production and use of Defendants' fossil-fuel products plays a direct and substantial role in the unprecedented rise in emissions of greenhouse gas pollution," which "is the main driver of" the climate change that Plaintiff alleges caused its injuries. JA.44 ¶2. In fact, Plaintiff asserts that "the normal use of [Defendants'] fossil fuel products" caused Plaintiff's injuries. JA.112 ¶141.

Plaintiff's claims, therefore, encompass *all* of Defendants' "exploration, development, extraction, manufacturing, … [and]

marketing" of fossil-fuel products. JA.56–57 ¶24(a). By alleging that Defendants are responsible for the "massive increase in the extraction and consumption" of fossil fuels that led to Plaintiff's alleged injuries, JA.43 ¶1, Plaintiff's complaint thus squarely alleges that Defendants' OCS activities—from extraction to end usage by consumers—are the but-for cause of its injuries.

Plaintiff also alleges "a long-term course of conduct to misrepresent, omit, and conceal the dangers of Defendants' fossil fuel products." JA.66–67 ¶31. But Plaintiff contends that the purpose of that alleged conduct was to "accelerate [Defendants'] business practice of exploiting fossil fuel reserves." JA.115 ¶146. Plaintiff's own allegations demonstrate that a but-for element of the full extent of claimed injuries is the greenhouse gas emissions resulting from the production, sale, and consumption of Defendants' petroleum products—including those from the OCS. *See, e.g.*, JA.148 ¶217 ("Defendants' conduct … is therefore an actual, substantial, and proximate cause of Plaintiff's sea level rise-related and hydrologic regime change-related injuries.").

This Court's previous conclusion that there was an insufficient "nexus" between the actions for which Plaintiff seeks relief and

Defendants' actions under "any federal authority," 952 F.3d at 467–68, addresses a different issue and does not control here. Federal jurisdiction under OCSLA is based on a suit's "connection with" the OCS. Unlike federal-officer-removal jurisdiction, the involvement of a federal officer under OCSLA is irrelevant.

In sum, production of oil and gas—a significant portion of which occurred on the OCS—is a direct and necessary link in the alleged causal chain upon which Plaintiff's claims depend. This suit unquestionably has a "connection with" OCS operations.

C. The District Court Had OCSLA Jurisdiction For The Additional Reason That The Relief Plaintiff Seeks Threatens To Impair OCS Production Activities.

OCSLA jurisdiction is also proper here for an additional and independent reason: the relief Plaintiff seeks would significantly affect the continued scope and viability of Defendants' OCS operations and the federal OCS leasing program as a whole, *see* JA.301–03—a point the district court failed to address.

Courts find OCSLA jurisdiction satisfied if resolution of the dispute simply *could affect* the efficient exploitation of minerals from the OCS. "[*A*]*ny dispute* that alters the progress of production activities on the OCS

and thus *threatens* to impair the total recovery of the federally-owned minerals was intended by Congress to come within the jurisdictional grant of section 1349." *EP Operating*, 26 F.3d at 570 (emphases added). Indeed, this federal "interest is implicated whether a given controversy threatens that total recovery either immediately *or in the long-term*." *Id.* at 570 n.15 (emphasis added); *see also United Offshore*, 899 F.2d at 407 (finding OCSLA jurisdiction where "resolution of the dispute would affect the exploitation of minerals on the [OCS]").

As is true of the numerous similar climate-change cases around the country, Plaintiff here seeks potentially billions of dollars in damages and disgorged profits, as well as an order of "abatement." *See* JA.172. Such relief would inevitably deter Defendants and others from production on the OCS. *Cf. Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 521 (1992) ("[R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief.").

As the Second Circuit has recognized, "[i]f the [Defendants] want to avoid all liability" under Plaintiff's theory of the case, "their only solution would be to cease global production altogether," including on the OCS. *City of New York*, 993 F.3d at 93. Plaintiff's desired relief would thus

substantially interfere with OCSLA's goal of obtaining the largest "total recovery of the federally-owned minerals" underlying the OCS. *Amoco Prod. Co. v. Sea Robin Pipeline Co.*, 844 F.2d 1202, 1210 (5th Cir. 1988). Accordingly, this action falls squarely within the "legal disputes … relating to resource development on the [OCS]" that Congress intended federal courts to hear. *Laredo Offshore Constructors*, 754 F.2d at 1228.

CONCLUSION

The Court should reverse the district court's remand order.

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Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the undersigned certifies that this supplemental brief complies with the applicable typeface, type-style, and type-volume limitations. This brief was prepared using a proportionally spaced type (New Century Schoolbook, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 5,953 words. This certificate was prepared in reliance on the word-count function of the word-processing system used to prepare this brief.

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I hereby certify that on August 6, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system.

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