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' CONSENT MOTION FOR SUPPLEMENTAL BRIEFING AND ORAL ARGUMENT

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Appellants, with the consent of Appellee, respectfully move the Court to set a schedule for supplemental briefing and oral argument in this appeal on remand from the Supreme Court to provide the opportunity for this Court to fully and fairly consider all of the arguments supporting federal removal.

1. On July 20, 2018, the Mayor and City Council of Baltimore sued 26 energy companies in Maryland state court, alleging that "the dominant cause of global warming resulting in severe impacts, including … sea level rise" is worldwide "greenhouse gas pollution," JA.44, and that "Defendants, through their extraction, promotion, marketing, and sale of their fossil fuel products, caused approximately 15 percent of global fossil fuel product-related CO_2 between 1965 and 2015, with contributions currently continuing unabated," JA.90. Asserting numerous causes of action ostensibly under Maryland tort law, including product-liability claims and claims for public and private nuisance, Plaintiff demands compensatory and punitive damages, disgorgement of profits, abatement of the alleged nuisances, and other relief. JA149–72.

Defendants removed the action to the United States District Court for the District of Maryland. The notice of removal asserted eight

independent grounds for federal jurisdiction: (1) that Plaintiff's claims are governed by federal common law; (2) that Plaintiff's claims necessarily raise disputed and substantial federal questions; (3) that Plaintiff's claims are completely preempted by the U.S. Constitution, the Clean Air Act, and other federal statutes; (4) that the district court had original jurisdiction under the Outer Continental Shelf Lands Act ("OCSLA"); (5) that federal-officer removal is authorized under 28 U.S.C. § 1442(a); (6) that Plaintiff's claims are based on alleged conduct on federal enclaves; (7) that removal is authorized under the bankruptcy-removal statute, 28 U.S.C. § 1452(a); and (8) that Plaintiff's claims fall within the district court's original admiralty jurisdiction under 28 U.S.C. § 1333. JA.183–85. Plaintiff filed a motion to remand, which the district court granted. JA.321. Defendants appealed.

In its original decision in this appeal, this Court addressed only federal-officer removal, concluding that it did not have appellate jurisdiction under 28 U.S.C. § 1447(d) to review any other basis for removal. *Mayor & City Council of Baltimore v. BP P.L.C.*, 952 F.3d 452, 461 (4th Cir. 2020). Appellants petitioned for a writ of certiorari, and the Supreme Court granted review.

On May 17, 2021, the Supreme Court announced its decision in *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532 (2021). The Court clarified that, when a party seeks appellate review of an order remanding a "case … removed pursuant to section 1442 or 1443," "*the whole* of [that] order bec[omes] reviewable on appeal." *Id.* at 1538 (quoting 28 U.S.C. § 1447(d)) (emphasis and alterations added). The Supreme Court vacated this Court's judgment and remanded for further proceedings. The certified judgment of the Supreme Court issued on June 18, 2021. *See* S. Ct. R. 45.

2. Appellants, with consent of Appellee, respectfully request that this Court permit the parties to submit supplemental briefing on the numerous issues to be decided on remand from the Supreme Court, and that the case be set for oral argument.

In their briefs before this Court, Appellants were constrained by the need to devote large portions of their brief to the scope of appellate review of the remand order—which the Supreme Court has now resolved in their favor. As a result, Appellants' Opening Brief was able to spend, for example, only three pages on OCSLA jurisdiction, *see* AOB 43–46, and

fewer than two pages on federal-enclaves jurisdiction, *see* AOB 46–48, both of which have yet to be addressed by this Court.

Moreover, briefing before this Court closed in this case nearly two years ago, and there have been significant legal developments since then. For example, the Second Circuit—confronting one of the many substantially similar climate-change cases that state and local governments have brought against oil producers over the last few years—held that federal common law necessarily governs Plaintiff's claims. *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021). This holding directly supports Appellants' argument that federal jurisdiction is proper here because "Plaintiff's global warming claims … implicate 'uniquely federal interests' in controlling interstate pollution, promoting energy independence, and negotiating multilateral treaties addressing global warming." AOB 15 (citing *Tex. Indus., Inc., v. Radcliff Materials, Inc.*, 451 U.S. 630, 640–41 (1981)).

Additionally, the district court in this case rejected removal under OCSLA—which gives federal courts original jurisdiction over any action "arising out of, or in connection with" an operation on the Outer Continental Shelf, 43 U.S.C. § 1349(b)(1)—on the basis that Defendants

did not show "that the City's claims for injuries stemming from climate change would not have occurred *but for* defendants' extraction activities on the OCS." JA362 (emphasis added). But as the Supreme Court recently concluded in analyzing a similar formulation in the personal-jurisdiction context, the "requirement of a 'connection' between a plaintiff's suit and a defendant's activities" can be satisfied even absent "a strict causal relationship." *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1026 (2021) (interpreting the personal-jurisdiction requirement that "the suit 'arise out of or relate to the defendant's contacts with the forum'" as "contemplat[ing] that some relationships will support jurisdiction without a causal showing"). Thus, *Ford Motor Co.* indicates that the district court applied the wrong standard to the analogously worded OCSLA provision.

For these reasons, Appellants respectfully submit that the Court would benefit from supplemental briefing and oral argument. Appellants further propose that the parties be permitted to submit supplemental briefs as follows:

- Appellants file a principal brief of no more than 6,000 words, due 30 days after the Court's disposition of this Consent Motion.
- Appellee files a principal brief of no more than 6,000 words, due 30 days after Appellants' principal brief is submitted.
- Appellants file a reply brief of no more than 3,000 words, due 21 days after Appellee's principal brief is submitted.

The case can then be set for oral argument in the ordinary course.

3. Pursuant to Local Rule 27(a), counsel for Appellants have notified Appellee. Appellee has consented to this proposal and schedule for supplemental briefing, although does not agree with all the statements or positions Appellants have made in support of their motion.

June 22, 2021 Respectfully submitted

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the undersigned certifies that this consent motion complies with the applicable typeface, type-style, and type-volume limitations. This consent motion 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 consent motion contains 1,048 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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CERTIFICATE OF SERVICE

I hereby certify that on June 22, 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.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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