No. 21-1752

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

STATE OF MINNESOTA,
PLAINTIFF-APPELLEE

v.

AMERICAN PETROLEUM INSTITUTE; EXXON MOBILE CORPORATION; EXXON MOBILE OIL CORPORATION; KOCH INDUSTRIES, INC.; FLINT HILLS RESOURCES LP; AND FLINT HILLS RESOURCES PINE BEND LLC, DEFENDANTS-APPELLANTS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA (CIV. NO. 20-1636) (THE HONORABLE JOHN R. TUNHEIM, C.J.)

BRIEF OF SCHOLARS OF FOREIGN RELATIONS AND FEDERAL COURTS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE FOR AFFIRMANCE

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Statement of Interest of *Amici Curiae*

Amici curiae are scholars of foreign relations law and federal courts:

- Zachary D. Clopton, Professor of Law,
  Northwestern Pritzker School of Law;
- Evan J. Criddle, Ernest W. Goodrich Professor of Law and
  W. Taylor Reveley III Research Professor,
  William & Mary Law School
- Seth Davis, Professor of Law,
  University of California, Berkeley School of Law;
- William S. Dodge, John D. Ayer Chair in Business Law and
  Martin Luther King Jr. Professor of Law,
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- Robin Effron, Professor of Law,
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- David Sloss, John A. and Elizabeth H. Sutro Professor of Law,
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- Alan M. Trammell, Associate Professor of Law,
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- Diego A. Zambrano, Associate Professor of Law, Stanford Law School;
- Adam Zimmerman, Professor of Law, Loyola Law School, Los Angeles.

Amici submit this brief because they have an interest in the proper understanding of foreign relations law and the authority of federal courts.[1]

Summary of Argument

Plaintiff filed a lawsuit in state court alleging violations of state law related to corporate deception and consumer protection. Defendants removed to federal court and asserted that this case deserves special treatment because they allege that it interferes with the foreign relations of the United States.

The premises of Defendants' arguments are mistaken. A case about corporate deception and consumer protection does not interfere with the

[1] Parties have consented to *amicus curiae* briefs. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. The law schools employing *amici* provide financial support for activities related to faculty members' research and scholarship, which helped defray the costs in preparing and submitting this brief. Otherwise, no person or entity has made a monetary contribution intended to fund the preparation or submission of this brief. Titles and institutional affiliations are for identification purposes only.

foreign relations of the United States just because Defendants happen to be engaged in the international fossil-fuel business. Otherwise, any defendant engaged in international business would be able to invoke "foreign relations" in any case against it. Indeed, former U.S. government officials have explained how, if anything, suits like this one are *consistent* with U.S. foreign relations.

Moreover, the supposed presence of some foreign relations interests in this case does not answer any relevant legal question. First, federal common law is available in "few and restricted" areas when "necessary to protect uniquely federal interests." The mere invocation of foreign relations does not pass this test. Federal courts routinely apply state law (and not federal common law) in cases implicating far greater foreign-relations interests: cases against foreign sovereigns; cases arising out of foreign military operations; and cases implicating state secrets, among others.

Second, federal jurisdiction is limited to those areas authorized by the Constitution and Congress. The mere invocation of foreign relations does not establish federal jurisdiction. Congress has carefully modulated federal jurisdiction over cases implicating foreign relations

for more than 200 years, from the First Judiciary Act of 1789 to the Justice Against Sponsors of Terrorism Act of 2016. This case does not fall within any congressionally authorized basis of jurisdiction. Federal courts should be wary about expanding jurisdiction under the guise of foreign relations when Congress has so carefully calibrated jurisdiction to reflect its considered view of these interests.

In sum, this court should affirm the decision of the district court because this case does not implicate foreign relations in any legally meaningful way.

Argument

I. This Case Does Not Interfere With The Foreign Relations Of The United States.

This is a case about corporate deception and consumer protection. Plaintiff makes no claims for damages from international pollution itself, nor does this case seek to regulate legal commercial activity.

Corporate-deception and consumer-protection cases do not implicate the foreign relations interests of the United States. This is true even if the corporate deception is in furtherance of an international business—otherwise every corporation doing international business would be able to invoke "foreign relations" in every case.

For these reasons, this court should reject Defendants' arguments for federal common law and federal jurisdiction grounded in foreign relations. Importantly, though, if this court disagrees and concludes that this case may interfere with foreign relations, that conclusion does not necessarily make any of Defendants' arguments succeed. Rather, any such finding only begins the inquiry whether federal common law and federal jurisdiction are appropriate.

A. This is a case about corporate deception.

A fair reading of the complaint shows that this is a case about corporate deception and consumer protection. This lawsuit is directly predicated on the revelation of documents revealing corporate deception. Appellant App. 17; 31-72. The five claims in this case arise from and seek to address that corporate deception. Appellant App. 88-97; *see also Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 595 (2013) ("[P]laintiffs . . . are the masters of their complaints.").

This case, therefore, is about *illegal* activity in the form of corporate deception. This stands in contrast to the Second Circuit's decision in *City of New York*—cited more than twenty times by Defendants—which was predicated on that court's conclusion that the suit was grounded in

plaintiffs' attempts to regulate otherwise *legal* activity. *City of New York v. Chevron Corp.*, 993 F.3d 81, 86 (2d Cir. 2021) ("The City of New York . . . instituted a state-law tort suit against five oil companies to recover damages caused by those companies' admittedly *legal* commercial conduct in producing and selling fossil fuels around the world.") (emphasis added). Again, this is not such a case.

B. Claims of corporate deception do not interfere with the foreign relations of the United States.

Seeing this case for what it is—a case about corporate deception—clarifies the interests at stake. To wit, claims about corporate deception and consumer protection do not interfere with the foreign relations of the United States.

Defendants speculate about how this case interferes with foreign policy, *see* Appellant Br. at 23-26 & 35-39, but that speculation is unavailing. Defendants argue that this case interferes with foreign relations because the United States government treats fossil fuels as a strategic resource. *Id.* at 24-26.[2] This claim proves too much. It simply

[2] It is also noteworthy that, in this context, Defendants quote from U.S. Secretary of State Antony Blinken, who prior to becoming Secretary State was among the then-former officials who signed the briefs

cannot be true that any claim of any kind against a fossil fuel company automatically qualifies for federal jurisdiction or federal common law. Innumerable cases against fossil fuel defendants are litigated in state courts under state law, and that is as it should be.

Defendants also seek cover from a brief filed by the U.S. government in the Ninth Circuit, *see id.* at 24, but that reliance is misplaced. In the Ninth Circuit, the U.S. government made these arguments regarding claims it understood to be directly addressing international pollution, rather than claims about corporate deception. *Id.* In other words, this brief offers no support for their claim that a suit about corporate deception interferes with U.S. foreign relations.

More germane to this case are briefs filed in similar cases by thirteen then-former U.S. government officials. *See* Brief of Former U.S. Government Officials as Amici Curiae Supporting Appellee and Affirmance of the District Court's Decision, *Rhode Island v. Shell*, 2019 WL 7565366 (1st Cir. Dec. 23, 2019) (on behalf of *amici curiae* Susan Biniaz, Antony Blinken, Carol M. Browner, William J. Burns, Stuart E.

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disclaiming any foreign relations problems with suits such as this one. *Compare* Appellant Br. 26 *with* Baltimore Brief and Rhode Island Brief.

Eizenstat, Avril D. Haines, John F. Kerry, Gina McCarthy, Jonathan Pershing, John Podesta, Susan E. Rice, Wendy R. Sherman, and Todd D. Stern) (hereinafter "Rhode Island Brief"); Brief of Former U.S. Government Officials as Amici Curiae in Support of Plaintiff's Opposition to Defendants' Motion to Dismiss, *Mayor & City Council of Baltimore v. B.P. P.L.C.*, No. 24-C-18-004219 (Cir. Ct. Baltimore City, April 7, 2020) (same officials) (hereinafter "Baltimore Brief").

The then-former officials explained that it would be inappropriate to allow claims of foreign relations to undermine corporate liability regimes. As they wrote: "U.S. foreign policy does not immunize corporations who deceive consumers regarding the effects of their products. . . . [N]o aspect of U.S. foreign policy seeks to exonerate companies for knowingly misleading consumers about the dangers of their products." Baltimore Brief at 12-13.[3]

[3] This statement helps further distinguish the Second Circuit's decision in *City of New York*. As noted above, that decision was based on the court's conclusion that the plaintiffs were seeking to regulate lawful activity. Minnesota alleges illegal activity, and again, "no aspect of U.S. foreign policy seeks to exonerate companies for knowingly misleading consumers about the dangers of their products." *See* Baltimore Brief at 12-13.

Indeed, the then-former officials explained that these corporate-deception suits, if anything, support U.S. foreign relations interests. "In *amici*'s experience, any diplomatic backlash against the United States in recent years has been caused not by state court adjudication of civil liability for corporate deception, but rather by the current administration's efforts to withdraw from the Paris Agreement. Far from interfering with diplomacy, prudent adjudication of claims of corporate liability for deception might even enhance U.S. diplomatic efforts by reinforcing U.S. credibility with respect to the climate problem." Baltimore Brief at 16-17 (internal footnotes omitted). *See also* Rhode Island Brief, 2019 WL 7565366 at 5 ("[S]uch suits are *consistent* with both U.S. foreign policy and the emerging worldwide consensus that legal action is needed on climate change.").

For these reasons, this court should conclude that this case does not interfere with the foreign relations of the United States.

C. Even if this court concluded that this case interferes with foreign relations, that would not answer any relevant legal question.

Whether this case affects the foreign relations of the United States is not—or should not be—an abstract question. Defendants invoke foreign

relations in the context of federal common law and federal jurisdiction. Appellant Br. 23-26, 35-39. Each of those areas have their own legal tests, and none of those tests provides that a defendant showing a "foreign relations interest" automatically qualifies for federal common law or federal jurisdiction. *See infra* Parts II & III. As the Second Circuit acknowledged, "the mere existence of a federal interest does not intrinsically call for a corresponding federal rule." *City of New York*, 993 F.3d at 90.

So, while the lack of a foreign relations interest defeats Defendants' arguments that rely on that interest, the existence of a foreign relations interest does not necessarily make those arguments succeed. Instead, if this court concludes that the foreign relations of the United States would be affected by this suit, then the effect is only that it may proceed to the next steps in the relevant legal analyses. It is to those analyses that this brief now turns.

II. Any Foreign Relations Interests Raised In This Case Do Not Authorize This Court To Create Federal Common Law.

Defendants primarily invoke foreign relations to justify the creation of federal common law. Appellant Br. at 23-26.

As explained above, claims of corporate misconduct do not interfere with foreign relations. Even if they did, they do not automatically justify the application of federal common law. The federal courts' power to make federal common law is limited, and the presence of foreign relations interests does not necessarily require federal common law be applied.

A. Federal courts' ability to make federal common law is limited.

Federal common law is, in many ways, a last resort. *Erie Railroad Co. v. Tompkins* held that "[t]here is no federal general common law." 304 U.S. 64, 78 (1938). Federal common law in specialized areas survived *Erie*'s admonition, but it has done so only in "few and restricted" instances. *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963).

The Supreme Court and the lower federal courts have been cautious in expanding federal common law. As the Supreme Court explained, "before federal judges may claim a new area for common lawmaking, strict conditions must be satisfied." *Rodriguez v. Federal Deposit Insurance Corp.*, 140 S.Ct. 713, 717 (2020); *see also United States v. Kimbell Foods*, 440 U.S. 715 (1979); *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943).

Among the reasons that federal common law is so limited is that it implicates the separation of powers. As the Supreme Court recently reminded, "[j]udicial lawmaking in the form of federal common law plays a necessarily modest role under a Constitution that vests the federal government's 'legislative Powers' in Congress and reserves most other regulatory authority to the States." *Rodriguez*, 140 S.Ct. at 717.

Federal common lawmaking also implicates federalism, because federal common law preempts state law. *See Atherton v. F.D.I.C.*, 519 U.S. 213, 218 (1997) ("Whether latent federal power should be exercised to displace state law is primarily a decision for Congress, not the federal courts.") (internal quotation marks omitted); *see also Boyle v. United Technologies Corp.*, 487 U.S. 500, 517 (Brennan, J., dissenting) ("*Erie* was deeply rooted in notions of federalism, and is most seriously implicated when, as here, federal judges displace the state law that would ordinarily govern with their own rules of federal common law."). Federalism is thus another reason for caution with respect to federal judicial lawmaking.

B. The presence of foreign relations interests does not automatically justify federal common law.

Although it is true that the Supreme Court has applied federal common law in cases implicating foreign relations, it has never held that cases implicating foreign relations are *necessarily* governed by federal common law.

The legal test for the appropriateness of federal common law does not turn on the presence of foreign relations. The question, instead, is whether "a federal rule of decision is 'necessary to protect uniquely federal interests.'" *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964)).

While defendants seek to equate foreign relations and federal common law, the Supreme Court and other federal courts have demonstrated across countless areas that the presence of foreign relations interests—often greater than the interests alleged in this case—is not a sufficient basis to displace state law and apply federal common law.

Perhaps most directly, cases against foreign sovereigns do not require federal common law. Suits against foreign sovereigns are

addressed by the Foreign Sovereign Immunities Act (FSIA). Surely cases against foreign sovereigns may implicate foreign relations, and yet the substantive law applied in FSIA cases is typically state law. *See* WRIGHT & MILLER, 14A FED. PRAC. & PROC. JURIS. § 3662 (4th ed.); *see, e.g.*, *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27 (2015); *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993). Congress commanded as much when, in 28 U.S.C. § 1606, it provided that "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." *Id.*; *see also First City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 622 n. 11 (1983) ("[W]here state law provides a rule of liability governing private individuals, the FSIA requires the application of that rule to foreign states in like circumstances."). For this reason, some courts have referred to the FSIA as a "'pass-through' to state law principles." *Pescatore v. Pan Am. World Airways, Inc.*, 97 F.3d 1, 12 (2d Cir. 1996); *Owens v. Republic of Sudan*, 864 F.3d 751, 763 (D.C. Cir. 2017).

The Supreme Court also has indicated that state law may apply to disputes arising out of foreign military operations. For example, in *Day & Zimmermann v. Challoner*, 423 U.S. 3 (1975), plaintiffs sued the

manufacturer of a howitzer round for death and personal injury resulting from its premature explosion during U.S. military operations in Cambodia. The foreign relations concerns raised by a suit arising out of U.S. military operations in a foreign conflict are unambiguous. Yet, not only did the Court call for the application of forum-state choice of law, but it did so in a short *per curiam* reversal. *Id.* at 4 ("A federal court in a diversity case is not free to engraft onto those state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits."). Similarly, the Second Circuit held in the *Agent Orange* litigation that federal common law did not provide a right of action arising out of overseas military operations. *See In re "Agent Orange" Product Liability Litigation*, 635 F.2d 987 (2d Cir. 1980).

State secrets cases are yet another class of cases to which federal common law does not automatically apply. The state secrets privilege is available when there is "a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." *See United States v. Reynolds*, 345 U.S. 1, 10 (1953). The privilege is federal law, but it does not

require the claims at issue be preempted by federal common law. Instead, the privilege may be invoked in cases where the claims arise under state law. *See*, *e.g.*, *Fitzgerald v. Penthouse Intern., Ltd.*, 776 F.2d 1236 (4th Cir. 1985); *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544 (2d. Cir. 1991); *In re Agent Orange Product Liability Litigation*, 97 F.R.D. 427 (EDNY 1983).

In sum, even if this court finds that this case implicates the foreign relations of the United States, that finding does not authorize this court to preempt state law with federal common law.

III. Any Foreign Relations Interests Raised In This Case Do Not Authorize This Court To Assert Federal Jurisdiction.

Defendants also suggest that foreign relations interests necessitate a finding of federal jurisdiction. Appellant Br. 35-39. They do not.

Federal jurisdiction is limited by the Constitution and by Congress. The potential presence of a federal defense (such as preemption) or an alleged free-floating federal interest (such as in foreign relations) do not support federal jurisdiction in this case.

A. This Court should not ignore the Supreme Court's repeated insistence that jurisdiction and merits are separate inquiries.

Federal courts are courts of limited subject-matter jurisdiction. *See, e.g.*, *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). The subject-matter jurisdiction of federal courts is limited by Article III of the Constitution and then by the bases of subject matter jurisdiction authorized by Congress. U.S. Const. art. III, §§ 1-2.; 28 U.S.C. §§ 1330-1369.

Federal courts have a special duty to ensure that cases are within their subject-matter jurisdiction. *See Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149 (1908). Indeed, federal courts "have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) (citing *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999)).

In light of subject matter jurisdiction's special role, the Supreme Court has been careful to police the boundaries of "jurisdictional" determinations. *See, e.g.*, *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010) (expressing concern with "drive-by jurisdictional rulings" and

drawing the line between jurisdictional conditions and claim-processing rules).

Among the ways that federal courts cabin jurisdictional determinations is by applying the well-pleaded complaint rule. *See*, *e.g.*, *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149 (1908). Federal question jurisdiction may not be grounded in an anticipated defense but instead must appear on the face of the complaint. *See id.*; *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987); *City of Oakland v. BP PLC*, 969 F.3d 895, 903-08 (9th Cir. 2020) (applying this logic to find no federal question jurisdiction in a climate suit).

This approach to federal question jurisdiction differentiates it from questions of federal preemption. When a defendant argues that federal law preempts a state law claim, typically they do so as a defense. *See generally* HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM at 677-86 (7th ed. 2015). Defensive preemption, under the well-pleaded complaint rule, is not a basis for federal subject matter jurisdiction. As WRIGHT & MILLER explains:

> If the plaintiff chooses to assert a claim based solely on state law, and that state-law claim continues to exist, preemption can be only a defense. Ordinary preemption will not permit removal. Even if the defense of federal preemption is

> anticipated by the plaintiff and negated in the complaint, the complaint would not be well-pleaded and thus, under settled principles . . . , would not create federal jurisdiction and permit removal.

WRIGHT & MILLER, 14C FED. PRAC. & PROC. JURIS. § 3722.2 (Rev. 4th ed.) (internal footnotes omitted).

The Second Circuit in *City of New York* agreed, emphasizing that its decision about preemption grounded in foreign relations was not the same as a ruling on jurisdiction or removal. 993 F.3d at 94 ("Here, the City filed suit in federal court in the first instance. We are thus free to consider the Producers' preemption defense on its own terms, not under the heightened standard unique to the removability inquiry. So even if this fleet of cases is correct that federal preemption does not give rise to a federal question for purposes of removal, their reasoning does not conflict with our holding.").

All of this is to say that this court should be careful to distinguish between foreign-relations arguments about preemption (*see supra* Part II) and those about jurisdiction (*see infra* Part III.B).

B. Grounding federal jurisdiction on purported foreign relations interests is inconsistent with the law of federal jurisdiction and with the will of Congress.

Defendants' attempts to connect purported foreign relations interests to federal jurisdiction fail.

First, as described above, this case does not interfere with any foreign relations interests. *See supra* Part I. The inquiry thus should end there.

If this court concludes that foreign relations are at stake, that does not mean federal jurisdiction is appropriate. Federal jurisdiction does not obtain simply because a party invokes the phrase "foreign relations," nor should it. Instead, jurisdiction must be grounded in the existing jurisdictional statutes. This case does not fall within the text of any of those statutes, and courts should be wary of expanding their jurisdiction beyond what Congress intended.

This case is a particularly weak case for judicially expanded jurisdiction because Congress has calibrated the scope of federal jurisdiction in light of foreign relations for more than two centuries. The Judiciary Act of 1789 included various grants of jurisdiction implicating foreign relations: disputes between U.S. and foreign citizens; admiralty

and maritime claims; and alien tort claims. 28 U.S.C. §§ 1332(a)(2), 1333, 1350. In 1948, Congress added jurisdiction over civil actions against consular officials. 28 U.S.C. § 1351. In 1970, to implement its obligations under the New York Convention, Congress authorized removal from state court for claims related to international arbitration. 9 U.S.C. § 205. In 1976, Congress adopted the Foreign Sovereign Immunities Act, providing for federal jurisdiction over claims against foreign sovereigns. 28 U.S.C. § 1330. In 1994, Congress expanded jurisdiction over certain counterclaims related to international trade. 28 U.S.C. § 1368. In 2008, Congress authorized federal jurisdiction for certain claims against foreign sovereigns designated as state sponsors of terrorism. 28 U.S.C. § 1605A. And in 2016, Congress further expanded federal jurisdiction over claims against foreign sovereigns with the Justice Against Sponsors of Terrorism Act (JASTA). 28 U.S.C. § 1605B.

This laundry list is important because it shows that Congress has attentively managed federal jurisdiction over cases implicating foreign relations. Courts always should be cautious about expanding jurisdiction beyond Congress's command. Courts should be *especially*

cautious when Congress has carefully calibrated jurisdiction related to foreign relations and did not include any basis of jurisdiction applicable to this case. *Cf. Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018) (explaining that Congress's considered judgment reflected in the Torture Victims Protection Act counseled against judicial lawmaking with respect to the Alien Tort Statute). If Congress wants cases such as this one to be within federal jurisdiction, then it knows exactly how to achieve that goal. In other words, modifying federal jurisdiction in light of global climate change would be a task best suited for Congress, not the federal courts.

Conclusion

For the foregoing reasons, *amici curiae* respectfully urge this court to affirm the decision of the district court.

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Attorney for Scholars of Foreign Relations and Federal Courts

Dated: August 25, 2021