No. 19-1818

United States Court of Appeals for the First Circuit

STATE OF RHODE ISLAND,

Plaintiff-Appellee,

v.

SHELL OIL PRODUCTS COMPANY, LLC; CHEVRON CORP.; CHEVRON USA, INC.; EXXON MOBIL CORP.; BP, PLC; BP AMERICA, INC.; BP PRODUCTS NORTH AMERICA, INC.; ROYAL DUTCH SHELL PLC; MOTIVA ENTERPRISES, LLC; CITGO PETROLEUM CORP.; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66; MARATHON OIL COMPANY; MARATHON OIL CORPORATION; MARATHON PETROLEUM CORP.; MARATHON PETROLEUM COMPANY, LP; SPEEDWAY, LLC; HESS CORP.; LUKOIL PAN AMERICAS LLC; and DOES 1-100,

Defendants-Appellants,

GETTY PETROLEUM MARKETING, INC.,

Defendant.

Appeal from the U.S. District Court
for the District of Rhode Island, No. 1:18-cv-00395-WES-LDA
(The Honorable William E. Smith)

APPELLANTS' CONSENT MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEFING

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Appellants, with the consent of Appellee, respectfully move under Federal Rule of Appellate Procedure 26(b) to modify the schedule for supplemental briefing established by the Court's June 22, 2021 order. Immediately following the Supreme Court's decision in *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532 (2021), the parties conferred extensively and reached agreement as to the scope and timing of supplemental briefing to propose to this Court. In order to effect this agreement, Appellants planned to file a consent motion for supplemental briefing once the Supreme Court issued its certified judgment. *See* S. Ct. R. 45. Given this Court's intervening, June 22, 2021 order, Appellants now file this consent motion asking the Court to modestly extend and modify the current supplemental briefing schedule.

The proposed stipulated schedule would extend and stagger the parties' briefing deadlines, at the same time that it would significantly shorten the length of the briefs: (1) Appellants would file a principal brief of no more than 6,000 words due 30 days after the Court's disposition of this Motion, with (2) the Appellee then filing 30 days thereafter a principal brief of no more than 6,000 words, and (3) Appellants would 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.

There is good cause to grant this motion and to adopt the parties' stipulated briefing schedule and request for oral argument. The Supreme Court's decision in *Baltimore* permits this Court to consider all of Appellants' arguments supporting removal. In the eighteen months since the initial briefing, there have been significant developments in the caselaw related to several of the grounds for removal that this Court will now consider. Both parties should be afforded the opportunity to brief these issues, but the current schedule allows little time to complete the principal briefs, particularly with the number of Appellants needing to coordinate on the submission and the intervening observance of Independence Day. This Court should adopt the parties' staggered briefing schedule, which extends the briefing period but shortens the length of each brief.

1. On July 2, 2018, the State of Rhode Island filed a complaint against 21 energy companies, alleging that it has been injured by "sea level rise … caused and/or exacerbated by Defendants' conduct," namely,

"extraction, refining, and/or formulation of fossil fuel products" that, when used by global consumers, cause the "buildup of CO2 in the environment" that allegedly "drives global warming." JA.25 ¶ 6, 121 ¶¶ 199–201. Asserting numerous causes of action ostensibly under Rhode Island tort law, including product-liability claims and claims for public nuisance and trespass, Plaintiff demands compensatory and punitive damages, disgorgement of profits, abatement of the alleged nuisances, and other relief. JA.137–62.

Defendants removed the action to the United States District Court for the District of Rhode Island. The notice of removal asserted seven 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; and (7) that removal is authorized under the bankruptcy-

removal statute, 28 U.S.C. § 1452(a). JA.169–71. Plaintiff filed a motion to remand, which the district court granted. JA.436. 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. *Rhode Island v. Shell Oil Prod. Co.*, 979 F.3d 50, 58–59 (1st Cir. 2020).

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 added).

Thereafter, on May 24, 2021, the Supreme Court vacated this Court's judgment in this appeal and remanded for further proceedings in light of its decision in *Baltimore*. *See Shell Oil Prods. Co. v. Rhode Island*, No. 20-900, 2021 WL 2044535 (U.S. May 24, 2021). The certified judgment of the Supreme Court will issue imminently. *See* S. Ct. R. 45.

2. Appellants, with the consent of Appellee, respectfully request that this Court modify its June 22, 2021 order and adopt the parties' stipulated schedule for supplemental briefing, and that the case be set for oral argument.

There is good cause to modify the supplemental briefing structure and to adjust the July 6, 2021 deadline for the first round of briefing. First and foremost, the parties require more time to develop and properly brief the weighty and newly consequential issues in this appeal. In their prior 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 devote, for example, only three pages on OCSLA jurisdiction, *see* AOB 42–45, and just over two pages on federal-enclaves jurisdiction, *see* AOB 45–47, both of which this Court has yet to address.

Moreover, briefing before this Court closed in this case nearly one-and-a-half 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 had 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 have not shown that [Plaintiff's] injuries would not have occurred *but for* [Defendants' OCS] operations." JA434 (emphasis added). But as the Supreme Court recently concluded in analyzing a similar formulation in the personal-jurisdiction context, the "requirement of a 'connection' be-

tween a plaintiff's suit and a defendant's activities" can in the right circumstances 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 caselaw 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 statutory provision.

For these reasons, Appellants require more time than the current briefing schedule affords to develop their arguments fully and to properly present them to this Court. Especially given the intervening observance of Independence Day, Appellants also require an extension of time beyond July 6, 2021, in order to coordinate among themselves as they prepare and coordinate one joint brief for the Court's consideration. Likewise, Appellee has expressed a desire for staggered briefing in order to respond fully to Appellants' arguments.

Appellants therefore respectfully submit that the Court would benefit from a staggered supplemental briefing schedule and subsequent 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 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 could then be set for oral argument in the ordinary course.

In the alternative, if the Court is not inclined to accept the parties' joint request for a staggered briefing schedule as set forth above, the parties nonetheless request that the briefing schedule be extended to permit 30 days for submission of principal briefs and 21 days for submission of reply briefs.

3. 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.

Dated: June 25, 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 1,516 words. This certificate was prepared in reliance on the word-count function of the word-processing system used to prepare this brief.

/s/ Theodore J. Boutrous Jr.
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CERTIFICATE OF SERVICE

I hereby certify that on June 25, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system.

All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: June 25, 2021

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