No. 19-1818

IN THE
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.; EXXONMOBIL 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; DOES 1-100,
Defendants-Appellants,

GETTY PETROLEUM MARKETING, INC.,
Defendant.

On Appeal from the United States District Court
for the District of Rhode Island, No. 1:18-cv-395-WES
(Hon. William E. Smith)

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF OF AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANTS AND REVERSAL

Andrew R. Varcoe
Stephanie A. Maloney
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

William M. Jay
Andrew Kim
GOODWIN PROCTER LLP
1900 N Street, N.W.
Washington, D.C. 20036
(202) 346-4000
wjay@goodwinlaw.com

Counsel for Amicus Curiae the Chamber of Commerce of the United States of America

July 28, 2021

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF OF AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANTS AND REVERSAL

Pursuant to Federal Rule of Appellate Procedure 29(a), the Chamber of Commerce of the United States of America ("Chamber") respectfully seeks leave to file the attached brief as amicus curiae in support of Appellants. All parties consent to this Motion and to the filing of the attached brief.

The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region in the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber often files amicus curiae briefs in cases that raise issues of concern to the nation's business community, as it did here during the panel's initial consideration of this appeal. The Chamber reaffirms the statement of identity and interest set forth in its December 19, 2019 brief filed in this Court.

The Chamber's short proposed amicus brief will aid this Court's consideration of the appeal. The brief addresses why cases in areas governed by federal common law belong in federal court, and why removal of such cases cannot be defeated by the plaintiff's artful pleading. The well-pleaded complaint rule is intended, in part,

to honor the plaintiff's choice of state law. But where federal common law governs (as it does here), there is no state law to apply. The Chamber's proposed brief elaborates on the interplay among removal jurisdiction, the well-pleaded complaint rule and the artful pleading doctrine, and federal common law, in a manner that will aid the Court's decisionmaking. The brief covers these topics efficiently, containing only 2,711 words (less than half the length allowed for the parties' supplemental briefs), and complements the amicus brief filed at the panel stage. As the Court recognized in permitting supplemental briefing, much of the briefing at the panel stage was devoted to the scope of review under 28 U.S.C. § 1447(d), which the Supreme Court has now resolved.

For these reasons, this Court should grant the Chamber leave to file the attached amicus brief in support of Appellants.

Dated: July 28, 2021

Respectfully submitted,

/s/ William M. Jay

William M. Jay
Andrew Kim
GOODWIN PROCTER LLP
1900 N Street, N.W.
Washington, D.C. 20036
(202) 346-4000
wjay@goodwinlaw.com

Counsel for Amicus Curiae the Chamber of Commerce of the United States of America

Andrew R. Varcoe
Stephanie A. Maloney
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 391 words, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: July 28, 2021

/s/ William M. Jay

William M. Jay
GOODWIN PROCTER LLP
1900 N Street, N.W.
Washington, D.C. 20036
(202) 346-4000
wjay@goodwinlaw.com

Counsel for Amicus Curiae the Chamber of Commerce of the United States of America

CERTIFICATE OF SERVICE

I hereby certify that 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 on July 28, 2021.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: July 28, 2021

/s/ William M. Jay
William M. Jay
GOODWIN PROCTER LLP
1900 N Street, N.W.
Washington, D.C. 20036
(202) 346-4000
wjay@goodwinlaw.com

Counsel for Amicus Curiae the Chamber of Commerce of the United States of America

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1900 N Street, N.W.
Washington, D.C. 20036
(202) 346-4000
wjay@goodwinlaw.com

Counsel for Amicus Curiae the Chamber of Commerce of the United States of America

July 28, 2021

CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1, the Chamber of Commerce of the United States of America states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

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The Chamber of Commerce of the United States of America reaffirms the statement of identity and interest set forth in its December 19, 2019 brief filed in this Court. The Chamber has filed a motion for leave to file this supplemental amicus brief. No counsel for any party authored this brief in whole or in part, and no entity or person, aside from amicus curiae, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The well-pleaded complaint rule makes a plaintiff the master of its complaint, but the rule does not let plaintiffs escape the jurisdictional consequences of the claims they choose to assert. Federal claims are removable to federal court, and that rule holds true even if the plaintiff fails to acknowledge—or tries to obscure—the federal nature of its claims. Where the distinctly federal nature of a claim is apparent from the plaintiff's allegations—such as allegations that present a cross-border claim for contributions to global climate change, which can arise only under federal common law—the plaintiff's artful refusal to attach the label "federal common law" to its cause of action does not matter. If the gravamen of the complaint reveals that the claim can only be federal, then it arises under federal law.

Treating inherently federal claims as federal is entirely consistent with the well-pleaded complaint rule. That rule respects a plaintiff's deliberate choice to

present a state-law claim in state court, but there is no such choice available where there *is* no state-law claim. In the narrow, discrete, and easily identifiable subset of areas where federal common law governs, a state common law cause of action cannot exist.

Rhode Island's claims regarding the harm arising from the effects of global climate change are exactly the sort of interstate and international claims that require the application of federal common law. The State may assert a localized harm, but the alleged cause of that harm is anything but local—an inherently global phenomenon that is caused by parties and activities not only in every state in the United States, but in every country on the planet. Claims seeking to impose liability in a U.S. court for causing such cross-border harms are inherently federal and belong in federal court.

ARGUMENT

I. Federal courts have original jurisdiction over a claim that can be based only on federal common law.

A. The well-pleaded complaint rule does not allow courts to ignore the inherently federal basis of a claim.

Under the well-pleaded complaint rule, "federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). But an "independent corollary" of the rule is that "a plaintiff may not defeat removal by

omitting to plead necessary federal questions in a complaint." *Franchise Tax Bd. of the State of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 22 (1983) (citation omitted). Thus, a plaintiff may be the "master of his complaint" and ordinarily may choose to bring a state-law claim in state court, but he cannot deliberately disguise an "inherently federal cause of action." 14C Wright & Miller, Fed. Prac. & Proc. Juris. § 3722.1 (4th ed.). Where a plaintiff obscures the inherently federal nature of his claim, the plaintiff's case is removable to federal court. *Lopez-Munoz v. Triple-S Salud, Inc.*, 754 F.3d 1, 4 (1st Cir. 2014) ("[T]he artful pleading doctrine allows a federal court to peer beneath the local-law veneer of a plaintiff's complaint in order to glean the true nature of the claims presented.").

In other jurisdictional contexts, courts look to the "gravamen" of the complaint, not just to the label the plaintiff attaches, to determine whether the complaint invokes federal jurisdiction. *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 36 (2015) (looking not just at how the plaintiff "recast[s]" her negligence claims, and instead at the "'essentials' of her suit," to determine whether jurisdiction existed under the Foreign Sovereign Immunities Act (citation omitted)); *see also Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 755 (2017) (holding that courts must look to the "gravamen" of the plaintiff's complaint and "set[] aside any attempts at artful pleading" to determine whether the plaintiff's claim requires exhaustion under federal law). What matters is "substance, not surface": "[t]he use (or non-use) of

particular labels and terms is not what matters." *Fry*, 137 S. Ct. at 755. Focusing on the "gravamen" of a complaint, rather than whether a plaintiff used or avoided the right "magic words," ensures that a plaintiff cannot manipulate federal jurisdiction "through artful pleading." *Id.* (citation omitted).

The rule is no different in the narrow but important circumstances where a claim is "inherently federal"; in those situations, casting the claim in different language does not make it arise under different law. One such inherently federal claim is a common law cause of action governed by a uniform federal decisional standard.[1] Where the claim arises in an area that is governed exclusively by federal law, "a plaintiff may not, by the expedient of artful pleading, defeat a defendant's legitimate right to a federal forum." *BIW Deceived v. Local S6, Indus. Union of Marine & Shipbuilding Workers of Am.*, 132 F.3d 824, 831 (1st Cir. 1997). Thus, a federal common law claim may be readily apparent from the "essentials" of a complaint if the allegations involve matters such as "air and water in their ambient

[1] *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 924, 929 (5th Cir. 1997) ("[I]f the cause of action arises under federal common law principles, jurisdiction may be asserted."); *In re Otter Tail Power Co.*, 116 F.3d 1207, 1214-15 (8th Cir. 1997) (holding that a case presented a federal question because it "raise[d] important questions of federal law," including "the federal common law of inherent tribal sovereignty"); *New SD, Inc. v. Rockwell Int'l Corp.*, 79 F.3d 953, 954-55 (9th Cir. 1996) (noting that, "on government contract matters having to do with national security, state law is totally displaced by federal common law," and "[w]hen federal law applies . . . it follows that the question arises under federal law, and federal question jurisdiction exists").

or interstate aspects," *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972) (*Milwaukee I*), or other "especial federal concerns to which federal common law applies," such as "the rights and obligations of the United States," or "the conflicting rights of States or our relations with foreign nations." *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 & n.13 (1981); *e.g.*, *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938) ("[W]hether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive." (citations omitted)). In those areas where "especial federal concern[s]" are implicated, the *only* claim that can be pleaded is a federal one, as federal common law governs where the nature of the claim "makes it inappropriate for state law to control." *Tex. Indus.*, 451 U.S. at 641 & n.13. That claim can be governed only by the laws of the United States and thus is properly brought in federal court.

B. Removal of federal common law claims, however they are labeled, is wholly consistent with the policies underlying the well-pleaded complaint rule.

Three "longstanding policies" justify the ordinary application of the well-pleaded complaint rule: (1) respect for the plaintiff's deliberate choice to "eschew[] claims based on federal law, . . . to have the cause heard in state court"; (2) avoiding the radical expansion of "the class of removable cases, contrary to the '[d]ue regard

for the rightful independence of state governments'"; and (3) preventing the "undermin[ing] [of] the clarity and ease of administration of the well-pleaded complaint doctrine, which serves as a 'quick rule of thumb' for resolving jurisdictional conflicts." *Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831-32 (2002) (citation omitted). Each of those policies is completely consistent with upholding the removal of federal common law claims, including federal common law claims set forth in an artfully pleaded complaint that attempts to recast such claims as state-law claims.

First, the usual respect accorded to a plaintiff's choice of law and forum do not apply when the plaintiff alleges a common-law claim that is inherently federal; where federal common law applies, there can be no state-law claim. One of the main purposes of the well-pleaded complaint rule is to honor the plaintiff's choice of bringing a claim "in state court under state law." *Id.* at 832. But where federal common law governs, the "implicit corollary" is that there is no state law to apply. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987); *see also Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988) (where federal common law applies, "state law is . . . replaced"); *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 n.7 (1981) (*Milwaukee II*) ("If state law can be applied, there is no need for federal common law; if federal common law exists, it is because state law cannot be used."). That corollary is best demonstrated in cases where federal common law necessarily

governs because the claim is interstate and international in nature; transboundary issues cannot be resolved by a patchwork of state courts applying local law in an uncoordinated manner. *E.g.*, *City of New York v. Chevron Corp.*, 993 F.3d 81, 85-86 (2d Cir. 2021) ("Global warming presents a uniquely international problem of national concern. It is therefore not well-suited to the application of state law."); *Grynberg Prod. Corp. v. British Gas, p.l.c.*, 817 F. Supp. 1338, 1356 (E.D. Tex. 1993) ("International relations are not such that both the states and the federal government can be said to have an interest; the states have little interest because the problems involved [in international relations] are uniquely federal." (citation omitted and internal quotation marks)).

Second, there is no risk of flooding federal courts with a new wave of removal cases premised on federal common law. *Holmes*, 535 U.S. at 832; *R.I. Fishermen's Alliance, Inc. v. R.I. Dep't of Envt'l Mgmt.*, 585 F.3d 42, 51 (1st Cir. 2009) (federal jurisdiction must be "consistent with congressional judgment about the sound division of labor between state and federal courts" (citation and internal quotation marks omitted)). Federal common law plays "a necessarily modest role," *Rodriguez v. FDIC*, 140 S. Ct. 713, 717 (2020), and thus the "instances where [federal courts] have created federal common law are few and restricted." *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963); *see Tex. Indus.*, 451 U.S. at 641 (federal common law exists only in "narrow areas"). In those few areas where federal common law applies, there

is little risk of intruding upon the "independence of state governments," as those areas necessarily fall outside state authority. *Holmes*, 535 U.S. at 832 (citation omitted).

Conversely, failing to recognize federal common law claims for what they are, just because the plaintiff refuses to acknowledge it, risks allowing state courts and state law to intrude upon federal priorities. As the Second Circuit has warned, attempting to apply state law in an area where federal common law should apply risks "upsetting the careful balance" of federal prerogatives. *New York*, 993 F.3d at 93. In a case very similar to this one that presented claims for relief based on climate change, the Supreme Court made clear that "[e]nvironmental protection" is one such area that is "undoubtedly . . . within *national* legislative power, one in which federal courts may fill in statutory interstices and, if necessary, even fashion federal law." *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 421 (2011) (emphasis added, citation and internal quotation marks omitted); *see id.* (quoting *Milwaukee I*, 406 U.S. at 103); *id.* at 422 (noting not only that the subject of tort law claims based on climate change "is meet for federal law governance," but that "borrowing the law of a particular State would be inappropriate" for federal common law claims based on climate change).[2]

[2] Congress can also enact a statute that displaces federal common law, but whether Congress has done so here is a question that is not currently presented to this Court. *Am. Elec. Power*, 564 U.S. at 423; *New York*, 993 F.3d at 95.

Finally, using the artful pleading doctrine to recognize federal jurisdiction in cases presenting federal common law claims does not make the well-pleaded complaint rule any more complicated to apply. It is not difficult to identify the few narrow areas of the law that raise the sort of "especial federal concerns to which federal common law applies." *Tex. Indus.*, 451 U.S. at 641 n.13; *e.g.*, *id.* at 641 (identifying several "narrow areas" in which federal common law applies). The subject of "air and water in their ambient or interstate aspects," *Am. Elec. Power Co.*, 564 U.S. at 421 (quoting *Milwaukee I*, 406 U.S. at 103), is one such narrow category, and a claim of harm resulting from global climate change fits squarely into it.

II. The artful pleading doctrine applies here to make Rhode Island's claims removable.

Rhode Island's claims are about the inherently global problem of climate change. It alleges that Defendants have caused harm to "the State's manmade infrastructure, its roads, bridges, railroads, dams, homes, businesses, and electric grid"—not by local conduct, but by "extract[ing], advertis[ing], and s[elling] . . . fossil fuels burned *globally* since the 1960s." J.A. 421 (emphasis added). The inherently global phenomenon of climate change—both its causes and its consequences—is the key issue that makes Rhode Island's cause of action inherently federal in nature. As the Second Circuit explained in *New York*, artful pleading cannot turn "a suit over global greenhouse gas emissions" into a "local spat," simply

by focusing on Rhode Island's sliver of the alleged global environmental harm; the alleged "global greenhouse gas emissions" are "the singular source of . . . harm," and thus must be adjudged by federal common law standards, not by state common law. 993 F.3d at 91.

Rhode Island's claims regarding cross-boundary emissions are of such an interstate and international character that the governing law can only be federal common law. "[A] mostly unbroken string of cases has applied federal law to disputes involving interstate air or water pollution." *Id.* Rhode Island may be asserting a localized harm (or rather a localized manifestation of harms that occur everywhere), but the alleged harm flows entirely from interstate and international conduct, *i.e.*, when Defendants allegedly contribute to global emissions. *Id.* (federal common law applies to claims of "harms caused by global greenhouse gas emissions").

The conclusion that federal common law necessarily governs Rhode Island's claims is reinforced by the fact that any individual state's common law of nuisance is ill-equipped to deal with cross-border pollution issues. The Supreme Court has recognized that "vague and indeterminate nuisance concepts" are a poor fit for addressing interstate environmental issues. *Milwaukee II*, 451 U.S. at 317. As one federal court has recognized, applying "vague public nuisance standards" offered under different states' laws to balance "the need for energy production and the need

for clean air" would result in "a confused patchwork of standards, to the detriment of industry and the environment alike." *North Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 296, 302, 306 (4th Cir. 2010). This is all the more true when the phenomenon in question is attributable not just to sources of emissions on the other side of a particular state or national border, but to millions (if not billions) of sources of emissions originating in every country in the world.

If Rhode Island has a common law cause of action to assert its claims for relief based on *global* climate change, that cause of action can arise only under *federal* common law. Rhode Island's case was removable from state court even if it failed to utter the words "federal common law" in its complaint.

CONCLUSION

The district court's remand order should be vacated, and this case should be remanded for further proceedings.

Dated: July 28, 2021

Respectfully submitted,

/s/ William M. Jay

William M. Jay
Andrew Kim
GOODWIN PROCTER LLP
1900 N Street, N.W.
Washington, D.C. 20036
(202) 346-4000
wjay@goodwinlaw.com

Counsel for Amicus Curiae the Chamber of Commerce of the United States of America

Andrew R. Varcoe
Stephanie A. Maloney
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
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/s/ William M. Jay

William M. Jay
GOODWIN PROCTER LLP
1900 N Street, N.W.
Washington, D.C. 20036
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Washington, D.C. 20036
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wjay@goodwinlaw.com

Counsel for Amicus Curiae Chamber of Commerce of the United States of America