UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 19-1818

STATE OF RHODE ISLAND,
Plaintiff/Appellee,

v.

SHELL OIL PRODUCTS CO., 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-00395-WES-LDA, The Honorable William E. Smith, Judge

AMICUS BRIEF OF INDIANA AND 14 OTHER STATES IN SUPPORT OF APPELLANTS AND REVERSAL

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INTEREST OF AMICI STATES

The States of Indiana, Alabama, Alaska, Arkansas, Georgia, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nebraska, South Carolina, Texas, Utah, and Wyoming respectfully submit this brief as *amici curiae* in support of the defendant energy producers. The Supreme Court remanded this case in light of *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 1538 (2021), which held that 28 U.S.C. § 1447(d)—a statute that permits appellate review of orders remanding cases removed under the federal-officer or civil-rights removal statutes—authorizes appellate consideration of all grounds raised for removal. *Amici* States urge this Court to hold that federal law entitled the defendants to remove this case—and to thereby prevent a *state* court from resolving a common-law claim expressly premised on *global* climate change.

SUMMARY OF THE ARGUMENT

In this case the State of Rhode Island seeks judicial resolution of one of the most complicated and contentious issues confronting policymakers today—global climate change. It seeks abatement of injuries it claims are caused by global climate change, which it in turn argues is

caused by greenhouse gases emitted by countless entities around the world. Yet in this suit, Rhode Island takes aim at just a handful of companies: It contends that these companies, by producing fossil fuels and promoting their use, have broken the law—but not law enacted by a legislature, promulgated by an agency, or negotiated by a President. Rather, the law Rhode Island invokes is the common law: It claims the production and promotion of fossil fuels constitutes a common-law "public nuisance" such that courts may impose on the defendant energy producers all the costs of remedying its alleged climate-change injuries. Federal law gives the defendants a right to have this claim heard by a *federal* court.

For more than 230 years, federal law has, in certain circumstances, "grant[ed] defendants a right to a federal forum." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 137 (2005). Today, the general removal statute, 28 U.S.C. § 1441, entitles a defendant to remove a case filed in state court if the state-court "action could have been brought originally in federal court"—such as when the case "raises claims arising under federal law" under the federal-question statute. *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1748 (2019).

Here, the defendant energy producers were entitled to remove the case because Rhode Island's common-law public-nuisance claim arises under federal law. The Supreme Court has long held that federal common law must govern common-law claims concerning interstate pollution, *see Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972), and Rhode Island's claim pertains not merely to *interstate* air pollution, but to *international* air pollution: It asks courts to craft rules of decision assigning liability for *global* climate change—an incredibly complex, value-laden question that affects every State and every citizen in the country. The claim thus *necessarily* arises under federal common law, and Rhode Island cannot evade federal-court jurisdiction by merely affixing a state-law label to what is in truth a federal-law claim.

The district court's contrary conclusion not only contravenes binding precedent, but also threatens to give Rhode Island state courts the power to set climate-change policy for the entire country. Such a result excludes other States from the climate-change policymaking process and threatens to undermine the cooperative federalism model our country has long used to address environmental problems. This Court should reject this outcome and reverse the decision below.

ARGUMENT

I. Federal Law Must Govern Any Common-Law Claims To Abate Global Climate Change

1. In *Erie Railroad Co. v. Tompkins*, the Supreme Court recognized that federal courts have no power to supplant state common law with "federal *general* common law," 304 U.S. 64, 78 (1938) (emphasis added). The Court soon made it clear, however, that this principle does not prevent *specialized* federal common law from exclusively governing areas that implicate unique federal interests. "[I]n an opinion handed down the same day as Erie and by the same author, Mr. Justice Brandeis, the Court declared, 'For whether the water of an interstate stream must be apportioned between the two States is a question of federal common law.'" *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964) (quoting *Hinderlider v. La Plata River Co.*, 304 U.S. 92, 110 (1938)).

Indeed, less than five years after *Erie*, the Court issued its seminal decision in *Clearfield Trust Co. v. United States*, holding that federal common law governs the "rights and duties of the United States on commercial paper which it issues." 318 U.S. 363, 366 (1943). And in the nearly eighty years since *Clearfield*, the Court has held that federal common law necessarily and exclusively governs disputes in numerous

other areas as well. *See, e.g.*, *Banco Nacional de Cuba,* 376 U.S. at 425–27 (holding, in light of "the potential dangers were Erie extended to legal problems affecting international relations," that "the scope of the act of state doctrine must be determined according to federal law"); *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507 (1988) (holding that the unique federal concerns pertaining to military procurement and the potential for significant conflicts with federal policy mean that federal common law, not state common law, must govern design-defect claims brought against manufacturers of military equipment).

Accordingly, the "clarion yet careful pronouncement of *Erie*, 'There is no federal general common law,' opened the way to what, for want of a better term, we may call specialized federal common law." Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 405 (1964) (quoting *Erie*, 304 U.S. at 78). And it is now firmly established that this specialized federal common law applies to the "few areas, involving 'uniquely federal interests,'" that "are so committed by the Constitution and laws of the United States to federal control" that they must be "governed exclusively by federal law." *Boyle*, 487

U.S. at 504 (quoting *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981)).

2. Of relevance here, for nearly half a century the Supreme Court has held that one area of "uniquely federal interest" to which federal common law must apply is *interstate pollution*: "When we deal with air and water in their ambient or interstate aspects, there is a federal common law." *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972). In *Illinois*, the Court considered "whether pollution of interstate or navigable waters creates actions arising under the 'laws' of the United States within the meaning of § 1331(a) [the federal-question statute]." *Id.* at 99. And, crucially, it held "that it does." *Id.*

The Court explained that an earlier Tenth Circuit decision had "stated the controlling principle"—"'the ecological rights of a State in the improper impairment of them from sources outside the State's own territory. . . [is] a matter having basis and standard in federal common law and so directly constituting a question arising under the laws of the United States.'" *Id.* at 99–100 (quoting *Texas v. Pankey*, 441 F.2d 236, 240 (10th Cir. 1971)). It further analogized interstate-pollution disputes to disputes "concerning interstate waters," which *Hinderlider* more than

three decades prior had "'recognized as presenting federal questions.'" *Id.* at 105 (quoting *Hinderlider*, 304 U.S. at 110). The result: A common-law claim that arises from a dispute over interstate pollution implicates "an overriding federal interest in the need for a uniform rule of decision" and "touch[] basic interests of federalism," and accordingly in such cases federal courts have jurisdiction to "fashion[] federal common law." *Id.* at 105 n.6 (citing *Banco Nacional de Cuba*, 376 U.S. at 421–27).

Notably, in *American Electric Power Co., Inc. v. Connecticut*, the Court reiterated its conclusion that "'[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law.'" 564 U.S. 410, 421 (2011) (quoting *Illinois*, 406 U.S. at 103). Again, the Court explained that specialized federal common law governs "'subjects within national legislative power where Congress has so directed' or where the basic scheme of the Constitution so demands." *Id.* (quoting Friendly, *supra*, at 408 n.119, 421–22). And because the "'national legislative power'" includes the power to adopt "environmental protection" laws addressing interstate pollution, federal courts can, "if necessary, even 'fashion federal law'" in this area. *Id.* (quoting Friendly, *supra*, at 421–22).

In sum, the Supreme Court has repeatedly held that federal common law governs disputes involving air in its "'ambient or interstate aspects.'" *Id.* at 421 (quoting *Illinois*, 406 U.S. at 103). Federal common law must therefore apply to Rhode Island's public-nuisance claim, which plainly seeks redress for injuries allegedly caused by interstate air pollution. Indeed, the Court's reasons for employing federal common law in *Illinois* apply with even greater force here, where Rhode Island itself claims its injuries have been produced by a long chain of conduct—including conduct of third parties—that occurred all over the globe. Under *Illinois* and *American Electric Power*, if the complex and controversial policy questions underlying such claims are going to be resolved by courts at all, those defending against them are entitled to have federal courts resolve these claims by applying federal common law.

3. This case powerfully illustrates why the Supreme Court has held that in such areas of unique federal interest any common-law rules of decision must be articulated by federal courts. State courts have no business deciding how global climate change should be addressed and who—among all the countless actors around the world whose conduct contributes to it—bears legal responsibility for creating it. In addition to

the obvious potential for gross unfairness, such state-court-created common-law rules would inevitably intrude upon the federal government's constitutional authority over foreign policy and "present a 'significant conflict' with federal policy" in this area. *Boyle*, 487 U.S. at 512. Among many other problems, state-common-law rules would undermine the regulatory authority States themselves have under carefully calibrated cooperative-federalism programs—programs that are administered by politically accountable officials at the federal, state, and local levels.

Making matters still worse, Rhode Island is not alone in urging state courts to impose judicial answers to the question of climate change. Many other jurisdictions have filed similar common-law public-nuisance claims, and if such claims are left in state court, chances are that at least some state courts will be receptive. The result would inevitably be a patchwork of conflicting standards purporting to create liability for the same extraterritorial conduct.

Any worldwide allocation of responsibility for remediation of climate change requires national or international action, not ad hoc intervention by individual state courts acting at the behest of a handful of

state and local governments. It is precisely for this reason that the Supreme Court long ago held that if plaintiffs are going to ask courts to give common-law answers to questions of interstate pollution, defendants have a right to ensure that any such courts are federal courts applying federal common law. *See Illinois*, 406 U.S. at 103.

II. Because Rhode Island's Public-Nuisance Claim Is Governed by Federal Common Law, It Necessarily Arises Under Federal Law, and Removal Is Therefore Proper

That federal common law governs Rhode Island's public-nuisance claim necessarily means this case is removable to federal court. The federal-question statute gives district courts jurisdiction to hear claims sounding in federal common law, which means Rhode Island's action "could have been brought originally in federal court," *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1748 (2019). Accordingly, "the general removal statute[] permits" the defendant energy producers "to remove that action to federal court." *Id.* at 1746.

1. The federal-question statute gives federal district courts "original jurisdiction" over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. And it is well-established that a "case 'arising under' federal common law presents

a federal question and as such is within the original subject matter jurisdiction of the federal courts." Charles Alan Wright & Arthur R. Miller, *Federal Common Law*, 19 Fed. Prac. & Proc. Juris. § 4514 (3d ed. 2021). The Supreme Court applied this rule in *Illinois v. City of Milwaukee*: It held that common-law claims that, as here, seek abatement of interstate pollution must be governed by federal common law and thus create "actions arising under the 'laws' of the United States within the meaning of § 1331(a)." 406 U.S. 91, 99 (1972).

2. Crucially, the district court had jurisdiction over this case because Rhode Island's public-nuisance claim—rather than merely being subject to a federal-law defense—*necessarily arises* under federal common law. And that means Rhode Island cannot simply stamp its public nuisance claim with a state-law label and thereby deprive federal courts of jurisdiction.

Generally, a plaintiff is "the master of the claim" and "may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). Yet, "[a]llied as an 'independent corollary' to the well-pleaded complaint rule is the further principle that 'a plaintiff may not defeat removal by omitting to plead necessary federal

questions.'" *Rivet v. Regions Bank of La.*, 522 U.S. 470, 475 (1998) (quoting *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 22 (1983)). Rhode Island cannot evade the reach of federal law or federal courts by declaring unilaterally that its claims arise under state law. "If a court concludes that a plaintiff has 'artfully pleaded' claims in this fashion, it may uphold removal even though no federal question appears on the face of the plaintiff's complaint." *Id.* In other words, when a plaintiff raises a nominal state-law claim that is *actually* governed by federal law, removal is proper.

Such was the foundation of the Supreme Court's decision in *Avco Corp. v. Aero Lodge No. 735*, which held that an action to enforce a provision of a collective bargaining agreement was "controlled by federal substantive law even though it is brought in a state court"—and was therefore removable to federal court—because the action necessarily arose under federal law. 390 U.S. 557, 560 (1968). And this Court—as well as other circuit courts—has applied this reasoning to uphold removal of cases raising purportedly state-law claims that in truth arise under federal law. *See BIW Deceived v. Local S6*, 132 F.3d 824, 831 (1st Cir. 1997) ("If the claim appears to be federal in nature—that is, if it

meets the applicable test for one that arises under federal law—then the federal court must recharacterize the complaint to reflect that reality and affirm the removal despite the plaintiff's professed intent to pursue only state-law claims."); *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 926–28 (5th Cir. 1997) (citing *Illinois* and holding that, notwithstanding plaintiff's nominal plea of a state-law claim, federal common law applies to—and confers federal-question jurisdiction over—air-transit lost-cargo claims because Congress preserved a "federal common law cause of action against air carriers for lost shipments"); *New SD, Inc. v. Rockwell Int'l Corp.*, 79 F.3d 953, 955 (9th Cir. 1996) (holding that federal, rather than state, common law provides the rule of decision—and a basis for federal question jurisdiction—to a dispute over a federal defense contract).

Indeed, the Second Circuit recently held that New York City—which raised a remarkably similar climate-change public-nuisance claim against many of the same defendants—could not evade the reach of federal law by simply declaring that its claim arose under state law. *See City of New York v. Chevron Corp.*, 993 F.3d 81, 91–93 (2d Cir. 2021). Federal common law must govern claims "seeking to recover damages for the

harms caused by global greenhouse gas emissions," regardless of the label used in the complaint: "Artful pleading cannot transform the City's complaint into anything other than a suit over global greenhouse gas emissions." *Id.* at 91. As here, it was "precisely *because* fossil fuels emit greenhouse gases—which collectively 'exacerbate global warming'—that the [plaintiff was] seeking damages." *Id.*

Because these claims are governed by federal common law, artful pleading cannot be allowed to avert the removal of such claims, for barring removal would put *state* courts in the position of creating *federal* common-law. And that would undermine the very purpose of federal common law, which is to ensure that in "a few areas, involving uniquely federal interests," the rules of decision "are governed exclusively by federal law." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988) (internal quotation marks and citations omitted). Where, as here, the rules of decision "must be determined according to federal law," "state courts [are] not left free to develop their own doctrines." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426–27 (1964).

In contrast with disputes over the meaning of federal statutory or constitutional provisions, common-law cases require courts to make

difficult judgments about what "seem[s] to [them] sound policy," *Boyle*, 487 U.S. at 513, which is why state-court common-law decisions are usually understood to announce *state* common law. Permitting plaintiffs to compel state-court adjudication of federal-common-law claims, however, would put state courts in the position of deciding for themselves *federal* common law—or perhaps guessing what policy judgments the Supreme Court would adopt.

The Supreme Court's decisions do not give plaintiffs such power. They instead hold that in certain areas, such as those involving interstate pollution, any common-law rules claim must be decided under federal common-law rules. And because such claims arise under federal law, defendants have the right to ensure such rules are crafted by *federal* judges—that is, judges appointed by a nationally elected president and confirmed by a Senate in which every State is entitled to equal representation. Here, because Rhode Island's interstate-pollution public-nuisance claim necessarily arises under federal common law, the district court had jurisdiction to consider the claim, and the defendants were entitled to remove the case to federal court.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the undersigned certifies that this brief complies with the applicable typeface, type-style, and type-volume limitations. This brief was prepared using a proportionally spaced type (Century Schoolbook, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 2,999 words. This certificate was prepared according to the word-count function of Microsoft Word, the word-processing program used to prepare this brief.

By: *s/ Thomas M. Fisher*
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CERTIFICATE OF SERVICE

I hereby certify that on August 4, 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 CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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