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.; 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.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND, NO. 18-CV-00395-WES-LDA (WILLIAM E. SMITH, CHIEF JUDGE)

SUPPLEMENTAL BRIEF OF MASSACHUSETTS, MINNESOTA, CALIFORNIA, CONNECTICUT, DELAWARE, HAWAII, MAINE, MARYLAND, NEW JERSEY, NEW MEXICO, NEW YORK, OREGON, PENNSYLVANIA, VERMONT, WASHINGTON, AND WISCONSIN, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF APPELLEE AND AFFIRMANCE

MAURA HEALEY
Attorney General for the Commonwealth of Massachusetts
SETH SCHOFIELD, No. 1141881
Senior Appellate Counsel
Energy and Environment Bureau
OFFICE OF THE ATTORNEY GENERAL OF MASSACHUSETTS
One Ashburton Place, 18th Floor
Boston, Massachusetts 02108
(617) 963-2436

KEITH ELLISON
Attorney General for the State of Minnesota
LEIGH CURRIE
Special Assistant Attorney General
445 Minnesota Street, Suite 1400
Saint Paul, MN 55108
(651) 757-1291

(additional counsel listed on signature page)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities – Continued *Page*

Table of Authorities – Continued *Page*

Statutes

Miscellaneous

INTERESTS OF AMICI CURIAE

Amici Massachusetts, Minnesota, California, Connecticut, Delaware, Hawaii, Maine, Maryland, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Vermont, Washington, and Wisconsin, and the District of Columbia (Amici States), as sovereigns, have a unique interest in maintaining their state courts' authority to develop and enforce requirements of state statutory and common law in cases brought against entities causing harm to and within their jurisdictions. That interest is particularly apparent where a state itself is the plaintiff, because "considerations of comity" disfavor federal courts "snatch[ing] cases which a State has brought from the courts of that State, unless some clear rule demands it." *Franchise Tax Bd. v. Construction Laborers Vacation Tr.*, 463 U.S. 1, 21 n.22 (1983). Amici States have a strong interest in "preserving the 'dignity' to which [they] are entitled 'as residuary sovereigns and joint participants in the governance of the Nation.'" *West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d 169, 178 (4th Cir. 2011) (quoting *Alden v. Maine*, 527 U.S. 706, 713-14, 748-49 (1999)). Those interests led certain of the Amici States to file in this appeal their amicus brief of January 2, 2020, in support of Plaintiff-Appellee Rhode Island, and now leads the Amici States to file this supplemental brief.[1]

[1] The Amici States incorporate by reference the arguments made in the prior brief (hereinafter 2020 Amici States' Br.).

The oil company defendant-appellants (Companies) are wrong to claim both in their original brief and now again in their supplemental brief that violating state laws in a manner that causes local harms with national or global dimensions guarantees them a federal forum. Federal jurisdiction rests on the claims actually asserted, and the claims asserted here are for violating Rhode Island's state laws. Protecting its residents from the harm caused by state-law violations is plainly a state interest, not a federal one. A rule like the one the Companies advocate here—that pins removal jurisdiction to the implication of national or international interests in addressing a particular harm—is contrary to settled precedent and, if accepted, would work immeasurable damage to states' sovereign prerogative to pursue state-law claims in state courts.

This Court should affirm—on all grounds—the District Court's well-reasoned decision to remand Rhode Island's state-law claims to Rhode Island's properly chosen forum—state court.

ARGUMENT

Rhode Island raises classic state-law tort claims to redress climate change harms within its borders caused by the Companies' decades-long efforts to deceive the public about the harms caused by the use of their fossil fuel products. As detailed in the 2020 Amici States' Brief, the claims do not satisfy either exception to the well-

pleaded complaint rule: *Grable*[2] or complete preemption. Instead, the Companies' argument that federal common law "governs" is merely an ordinary preemption defense that does not give rise to federal jurisdiction. 2020 Amici States' Br. 6-15.

The Companies re-emphasize their federal common law argument in their Supplemental Brief (SBr.), but that argument still fails even under the reasoning in *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021)—a case on which the Companies rely heavily. The Companies continue to mischaracterize Rhode Island's claims as challenging global climate change or seeking to regulate the entire American economy. But when read as they are written, Rhode Island's claims plainly do not arise under federal common law. The well-pleaded complaint rule thus requires remand to state court because Rhode Island asserts only state-law claims. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987); *see also*, *e.g.*, *López–Muñoz v. Triple–S Salud, Inc.*, 754 F.3d 1, 5 (1st Cir. 2014).

I. The Companies Cannot Establish Removal Jurisdiction Based on a Mischaracterization of Rhode Island's Complaint.

The Companies cannot satisfy their burden to establish removal jurisdiction here. *Danca v. Private Health Care Sys.*, 185 F.3d 1, 4 (1st Cir. 1999) (removal statutes are "strictly construed" and the "defendants have the burden of showing the

[2] *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005).

federal court's jurisdiction"); *see also Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921).

The Companies' removal arguments rely primarily on their continued mischaracterization of Rhode Island's lawsuit. The complaint, however, is clear that "Defendants' production, promotion, and marketing of fossil fuel products, simultaneous concealment of the known hazards of those products, and their championing of anti-science campaigns, actually and proximately caused Rhode Island's injuries." Joint Appendix (JA) 26 ¶10. Rhode Island is not seeking to impose strict liability for simply emitting greenhouse gases, but is instead seeking to hold the Companies liable under various state-law claims for affirmatively deceiving consumers and concealing hazards while producing and selling fossil fuels:

> [C]onsidering the Defendants' lead role in promoting, marketing, and selling their fossil fuel products between 1965 and 2015; their efforts to conceal the hazards of those products from consumers; their promotion of their fossil fuel products despite knowing the dangers associate[d] with those products; their dogged campaign against regulation of those products based on falsehoods, omissions, and deceptions; and their failure to pursue less hazardous alternatives available to them, Defendants, individually and together, have substantially and measurably contributed to the State's climate change-related injuries.

JA-72 ¶105.

Instead of addressing the complaint Rhode Island filed, the Companies paint Rhode Island's lawsuit as attempting to hold them "liable for the consequences of emissions-producing conduct occurring in other States and around the World,"

SBr.3, and as attempting to "regulate the production and sale of oil and gas abroad," SBr.8. The Companies focus on the fact that "[c]limate change is a worldwide, transboundary phenomenon, caused by greenhouse gases that 'once emitted become well mixed in the atmosphere'" and ignore the actual bases for liability that Rhode Island asserts. SBr.4 (quoting *American Elec. Power Co. v. Connecticut*, 564 U.S. 410, 422 (2011) (*AEP*)). Indeed, Rhode Island's complaint states directly that it *does not* seek to impose liability on the Companies "for their direct emissions of greenhouse gases, and *does not* seek to restrain Defendants from engaging in their business operations." JA-27 ¶12 (emphases added).

This Court has already once rejected the Companies' "mirage" with respect to federal officer removal. "At first glance, [defendants' contract to produce oil] may have the flavor of federal officer involvement in the oil companies' business, but that mirage only lasts until one remembers what Rhode Island is alleging in its lawsuit." *Rhode Island v. Shell Oil Prods. Co.*, 979 F.3d 50, 59-60 (1st Cir. 2020), *vacated and remanded on other grounds*, No. 20-900, 2021 WL 2044535 (U.S. May 24, 2021). The Companies employ the same mirage tactic for their other removal grounds.

Attorneys General have long used different sources of authority to combat local harms affecting their citizens—even harms that are national or global in scope as the numerous citations in the 2020 Amici States' Brief make clear. *See*, *e.g.*, Br.

2 nn.1-3. Jurisdiction in those cited cases depended on the claims asserted, not on their potential relationship to a nationwide—or even global—public health epidemic. *Compare*, *e.g.*, *Texas v. American Tobacco Co.*, 14 F. Supp. 2d 956 (E.D. Tex. 1997) (Texas suit filed against tobacco companies in federal court for, *inter alia*, violations of a federal statute), *with Minnesota v. Phillip Morris Inc.*, 551 N.W.2d 490 (Minn. 1996) (Minnesota suit filed against tobacco companies in state court for alleged violations of state laws).

It is likewise irrelevant to jurisdiction that states seeking to hold fossil-fuel companies accountable for affirmatively deceiving the public about climate-change science for decades have all been harmed by climate change. It is the cause of action, not the means of injury, that determines federal jurisdiction. *See Gunn v. Minton*, 568 U.S. 251, 257 (2013).

But fossil-fuel-company defendants, including the Companies' here, have thus far treated multiple state-initiated lawsuits[3] against them as identical, notwithstanding the claims asserted, because the ultimate harms are climate-related. With only minor word changes, the defendants in those cases claim hyperbolically that state plaintiffs are bringing these lawsuits "to limit and ultimately end

[3] *See Minnesota v. American Petroleum Inst.*, No. 62-cv-20-3837 (Minn. 2d Jud. Dist. 2020); *Massachusetts v. Exxon Mobil Corp.*, No. 19-3333 (Mass. Super. Ct. 2019); *Connecticut v. Exxon Mobil Corp.*, No. 3:20-cv-01555 (Conn. Super. Ct. 2020); *Delaware v. BP*, No. N20C-09-097 (Del. Super. 2020); *District of Columbia v. Exxon Mobil Corp.*, No. 2020 CA 002892B (D.C. Super. Ct. 2020).

Defendants' production of fossil fuels because of their purported connection to alleged climate change-based injuries."[4] The Companies similarly ask this Court to ignore Rhode Island's specific state-law claims and instead rewrite them as seeking to "regulate the nationwide—and indeed, worldwide—economic activity of key sectors of the American economy." JA-166.

Even a cursory review of Rhode Island's Complaint reveals that is simply not the case, and the Court should thus decline the Companies' invitation to rewrite Rhode Island's Complaint. Just as the success or failure of these state-initiated lawsuits will depend on the state statutes and state common law on which they are based and whether the state plaintiffs can prove the elements of their claims, federal jurisdiction, too, depends on the *actual claims* asserted and whether they arise out of federal common law.

II. Rhode Island's Actual Claims Do Not "Arise Under" Federal Common Law.

The "rights, duties, and rules of decision implicated by the complaint are all supplied by state law, without reference to anything federal." Companies' Opening Br. Add-81. The fact that the Companies' tortious conduct in Rhode Island also led to widespread climate-related harm does not create federal jurisdiction. First, states have a compelling interest in addressing the harmful effects of climate change within

[4] *See*, *e.g.*, Notice of Removal ¶3, *Minnesota v. American Petroleum Inst.*, Civ. A. No. 20-cv-01636 (D. Minn. July 27, 2020) (ECF No. 1).

their borders—it is not a uniquely federal interest. Second, the cases the Companies rely on to claim that Rhode Island's claims are "inherently federal" are distinguishable from this case.

A. States Have a Compelling Interest In Addressing Climate Change Harms Within Their Borders.

As explained above, the Companies attempt to distort the relevant jurisdictional inquiry here by focusing on the fact that Rhode Island's case involves climate-change harm rather than the actual claims asserted by Rhode Island. But that is not their only misstep: the Companies are also mistaken that Rhode Island's "claims ... unquestionably implicate 'uniquely federal interests.'" SBr.15. The Supreme Court has made clear that there are only "a few areas involving 'uniquely federal interests,' [that] are so committed by the Constitution and the laws of the United States to federal control that state law is pre-empted and replaced'" by federal common law. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988) (citation omitted).[5] But that occurs only in "'few and restricted' instances," *id.* at 518, and climate change harm is not an area that falls within that narrow exception.

[5] As the District Court explained, *Boyle* does not help the Companies' removal arguments because it "was not a removal case, but rather one brought in diversity, where the Court held that federal common law ... preempts, in the ordinary sense, state tort law." Companies' Opening Br. Add-76 n.2. The Companies nevertheless continue to assert the "uniquely federal interest" argument in their Supplemental Brief. SBr. 15.

States have long been recognized as having the power to combat environmental harms, including harms caused by climate change. One court of appeals has deemed it "well settled that the states have a legitimate interest in combating the adverse effects of climate change on their residents." *American Fuel & Petrochemical Mfrs. v. O'Keeffe*, 903 F.3d 903, 913 (9th Cir. 2018); *see also Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442-43 (1960) (noting that states' "broad police powers" allow them "to protect the health of citizens in the state"). Indeed, states have used their police powers to do just that. The 2020 Amici States' Brief documents some of the many actions taken by state governments to combat climate change. Br. 16-24.

The Companies' argument to the contrary rests principally on their contention that climate change is a national problem permitting only a national solution. *See* SBr.4-5. That the problem and its solutions include national and global dimensions, however, does not present a "uniquely federal interest[]." *Boyle*, 487 U.S. at 504.

In fact, states often play a vital role in addressing concerns in their states with national implications. The opioid crisis is one prominent and tragic example. In that context, state and local governments, including several of the Amici States, pursued (and continue to pursue) state-law claims against companies that manufacture, market, and sell opioids to state residents for violating state laws. The defendants' attempts to remove some of those cases were similarly rejected despite the

epidemic's national scope. *See*, *e.g.*, *New Mexico ex rel. Balderas v. Purdue Pharma L.P.*, 323 F. Supp. 3d 1242, 1245, 1251 (D.N.M. 2018); *Town of Randolph v. Purdue Pharma L.P.*, Civ. A. No. 19-cv-10813-ADB, 2019 WL 2394253 *1 (D. Mass. June 6, 2019). Just like with the opioid crisis, the consequences of climate change often are felt locally, and state and local governments play a critical role in crafting and implementing solutions, including filing lawsuits in state court to stop the deceptive conduct and remedy the unlawful conduct.

B. There Is No Support for The Companies' Argument that Rhode Island's State-Law Claims Arise Under Federal Common Law.

The Companies insist, nevertheless, that Rhode Island's claims arise under federal common law and point to a handful of unrelated cases involving climate change, foreign affairs, or interstate pollution that courts found arose under federal common law. *See*, *e.g.*, SBr.6-7. But the Companies' analysis of those cases is flawed; none addressed removal jurisdiction or involved claims like Rhode Island's state-law claims here.

The Companies rely heavily on *City of New York*, 993 F.3d 81, which held that federal common law preempted state-law claims that New York City brought against various fossil-fuel companies *in* federal court. Even if *City of New York* were correct, the Second Circuit simply had no occasion to address federal subject matter jurisdiction, because New York City filed its complaint in federal court and jurisdiction indisputably existed based on diversity. Instead, the Second Circuit

treated the defendants' federal common law arguments as an ordinary preemption defense.

> 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.

Id. at 94. The court emphasized that "anticipated defense[s]"—including those based on federal common law—could not "single-handedly create federal-question jurisdiction under 28 U.S.C. § 1331 and the well-pleaded complaint rule." *Id*.

As with *City of New York*, almost all of the other cases the Companies rely on to claim that "[t]his case falls into [an] area where federal law necessarily governs," SBr.6, were initiated in federal court or did not address removal. *See*, *e.g.*, *AEP*, 564 U.S. 410 (initiated in federal court), *International Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987) (did not address removal); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (initiated in federal court); *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) (same); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964) (same); *United States v. Pink*, 315 U.S. 203, 233 (1942) (same); *City of Milwaukee v. Illinois*, 451 U.S. 304 (1931) (same). Those cases are therefore irrelevant to the question of whether Rhode Island's state-law claims, pleaded in state court, may be removed to federal court.

Similarly, none of the cases relied on by the Companies involved allegations of deceptive conduct, an element at the heart of Rhode Island's state-law claims. For example, in *City of New York*, the plaintiff specifically defined the conduct giving rise to liability as "*lawful* ... commercial activit[y]." 993 F.3d at 87 (emphasis added). Here, Rhode Island expressly states that liability is premised on "Defendants' tortious, misleading conduct" that "deliberately and unnecessarily deceived" consumers about the scientific consensus concerning climate change and its devastating impacts, or the central role of their products in causing it. JA-108-09 ¶177. Whereas a nuisance claim based on the *lawful* production and sale of a lawful product may (according to the Second Circuit[6]) arise under federal common law, it does not follow that a nuisance claim based on *deceptive* marketing of a product does as well.

The instant case does not seek to alter climate-change policy or regulate greenhouse gas emissions, and Rhode Island does not challenge any federal regulation, permit, treaty, or contract, or any international air pollution emissions. Nor does Rhode Island seek abatement relief outside of Rhode Island's borders. Rather, Rhode Island's claims fall squarely within Rhode Island's police power to redress tortious conduct by non-governmental actors. Thus, treating these claims as

[6] The Amici States disagree with the Second Circuit's opinion in *City of New York*. But, even if it were correct, the holding is not relevant to the removal issue under consideration in this case.

arising under state law, not federal common law, is consistent with how courts have treated other deceptive-marketing suits.

Far from dictating that Rhode Island's claims give rise to federal jurisdiction because they allegedly "arise under" federal law, case law and common-sense counsel that Rhode Island's state-law claims must be returned to state court where they were first raised. "Restraint is particularly appropriate" here, "in light of the Supreme Court's directive that removal statutes should be 'strictly construed,' ... and the sovereignty concerns that arise when a case brought by a state in its own courts is removed to federal court." *LG Display Co. v. Madigan*, 665 F.3d 768, 774 (7th Cir. 2011) (citation omitted).

CONCLUSION

This Court should affirm the District Court's order remanding this case to Rhode Island state court.

//

//

//

//

//

//

//

Dated: September 3, 2021

Respectfully submitted,

STATE OF MINNESOTA

By its attorneys,

KEITH ELLISON
Attorney General for the State of Minnesota

LEIGH CURRIE
Special Assistant Attorney General
445 Minnesota Street, Suite 1400
Saint Paul, Minnesota 55101
(651) 757-1291
leigh.currie@ag.state.mn.us

COMMONWEALTH OF MASSACHUSETTS

By its attorneys,

MAURA HEALEY
Attorney General for the Commonwealth of Massachusetts

/s/ Seth Schofield
SETH SCHOFIELD, No. 1141881
Senior Appellate Counsel
Energy and Environment Bureau
OFFICE OF THE ATTORNEY GENERAL
OF MASSACHUSETTS
One Ashburton Place, 18th Floor
Boston, Massachusetts 02108
(617) 963-2436
seth.schofield@mass.gov

FOR THE STATE OF CALIFORNIA

ROB BONTA
Attorney General for the State of California
1300 I Street
Sacramento, CA 95814
Tel: (510) 879-0260

FOR THE STATE OF CONNECTICUT

WILLIAM TONG
Attorney General of Connecticut
165 Capitol Avenue
Hartford, CT 06106
Tel: (860) 808-5250

FOR THE STATE OF DELAWARE

KATHLEEN JENNINGS
Attorney General of Delaware
391 Lukens Drive
New Castle, DE 19720
Tel: (302) 395-2521

FOR THE STATE OF HAWAII

CLARE E. CONNORS
Attorney General of Hawaii
425 Queen Street
Honolulu, HI 96813
Tel: (808) 586-1500

FOR THE STATE OF MAINE

AARON M. FREY
Attorney General of Maine
6 State House Station
Augusta, ME 04333-0006
Tel: (207) 626-8800

FOR THE STATE OF MARYLAND

BRIAN E. FROSH
Attorney General of Maryland
200 St. Paul Place, 20th Floor
Baltimore, MD 21202
Tel: (410) 576-7446

FOR THE STATE OF NEW JERSEY

ANDREW J. BRUCK
Acting Attorney General of New Jersey
RJ Hughes Justice Complex
25 Market Street, P.O. Box 093
Trenton, NJ 08625-0093
Tel: (609) 376-2740

FOR THE STATE OF NEW MEXICO

HECTOR BALDERAS
Attorney General of New Mexico
408 Galisteo Street
Villagra Building
Santa Fe, NM 87501
Tel: (505) 490-4060

FOR THE STATE OF NEW YORK

LETITIA JAMES
Attorney General of New York
The Capitol
Albany, NY 12224
Tel: (518) 776-2400

FOR THE STATE OF OREGON

ELLEN F. ROSENBLUM
Attorney General of Oregon
1162 Court Street, NE
Salem, OR 97301
Tel: (503) 378-4400

FOR THE COMMONWEALTH OF PENNSYLVANIA

JOSH SHAPIRO
Attorney General of Pennsylvania
Strawberry Square
Harrisburg, PA 17120
Tel: (717) 787-3391

FOR THE STATE OF VERMONT

THOMAS J. DONOVAN, JR.
Attorney General of Vermont
109 State Street
Montpelier, VT 05609
Tel: (802) 828-3171

continued on next page

FOR THE STATE OF WASHINGTON

ROBERT W. FERGUSON
Attorney General of Washington
P.O. Box 40100
Olympia, WA 98504-0100
Tel: (360) 753-6200

FOR THE STATE OF WISCONSIN

JOSHUA L. KAUL
Attorney General of Wisconsin
17 W. Main St.
P.O. Box 7857
Madison, WI 53707
Tel: (608) 266-1221

FOR THE DISTRICT OF COLUMBIA

KARL A. RACINE
Attorney General for the District of Columbia
400 6th Street, NW, Suite 8100
Washington, D.C. 20001
Tel: (202) 727-3400

CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a) and Fed. R. App. P. 29(a)(5), because this brief contains 2,999 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f); and,

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word with 14-point, Times New Roman-style font.

Dated: September 3, 2021
Boston, Mass.

/s/ Seth Schofield
Seth Schofield
Counsel for the Commonwealth of Massachusetts

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system on September 3, 2021, and that parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system.

Dated: September 3, 2021
Boston, Mass.

/s/ Seth Schofield
Seth Schofield
Counsel for the Commonwealth of Massachusetts