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' SUPPLEMENTAL REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES

Page(s)

Statutes

INTRODUCTION

All of Plaintiff's claims rest on alleged physical harms from global climate change that, as the Complaint expressly pleads, are caused by the worldwide "buildup of CO_2 in the environment." JA.25; *see* Opening Supplemental Brief ("OSB") 3–18. Plaintiff describes this case as being only about "misrepresentations," but Plaintiff cannot succeed on its claims without proving that Defendants caused its alleged harms. And no purported misrepresentations could possibly have caused Plaintiff's alleged injuries. Rather, in Plaintiff's own words, interstate and international "greenhouse gas emissions" are "[t]he mechanism" of Plaintiff's harm. JA.52; *see also* JA.71 ("Defendants, through their extraction, promotion, marketing, and sale of their fossil fuel products, caused a substantial portion of both those emissions and the *attendant*" climate-change consequences) (emphasis added).

Thus, Plaintiff's claims necessarily seek to base liability upon interstate and international CO_2 emissions—the only mechanism that ties the alleged tortious conduct with Plaintiff's alleged physical injury, as well as with Plaintiff's requested relief from the physical forces of global

climate change. Plaintiff's attempts to overlay their claims with a "misrepresentation" gloss cannot change this fundamental fact, because, while none of Plaintiff's claims requires a misrepresentation, all of them require proof of causation.

Under our constitutional system, however, only federal law—not state law—can regulate or impose liability based on conduct that occurs in other states or other countries. Indeed, "[f]or over a century, a mostly unbroken string of cases has applied federal law to disputes involving interstate air or water pollution." *City of New York v. Chevron Corp.*, 993 F.3d 81, 91 (2d Cir. 2021) ("*New York*"). Because this case necessarily arises under federal law, removal was proper.

ARGUMENT

I. Plaintiff's Claims Are Based On Interstate And International Emissions And Therefore Arise Under Federal Common Law.

Plaintiff's claims necessarily arise under federal law as a matter of constitutional law and structure. *See* OSB.3–18. Plaintiff argues that its claims involve only alleged misrepresentations, but whether the claims are characterized as targeting misrepresentation or production (or both), the critical and uncontested fact remains that Plaintiff alleges all

its injuries result from interstate and international greenhouse-gas emissions. Indeed, even under Plaintiff's theory, greenhouse-gas emissions are an essential link in the causal chain leading to Plaintiff's alleged climate-change-related injuries. It defies common sense for Plaintiff to ignore all intervening steps in the logical chain. Plaintiff also argues that the artful-pleading doctrine provides no independent basis for removal, even for claims "arising under" federal common law, but that argument is equally meritless.

A. No State May Impose Liability For Transboundary Pollution, And Thus Plaintiff's Claims Are Governed By Federal Common Law.

This case is about transboundary greenhouse-gas emissions—the "mechanism" of Plaintiff's alleged physical property injuries. JA.52. As the Second Circuit recently explained, claims centered on transboundary emissions "demand the existence of federal common law" because they span state and even national boundaries, and thus "a federal rule of decision is necessary to protect uniquely federal interests." *New York*, 993 F.3d at 90. The Second Circuit concluded that the City's "sprawling" claims, which—like Plaintiff's—sought "damages for the cumulative im-

pact of conduct occurring simultaneously across just about every jurisdiction on the planet," were "simply beyond the limits of state law" and thus were "federal claims" governed by federal common law. *Id.* at 92, 95.

The claims asserted in *New York* are no different from those Plaintiff asserts here: that defendants supposedly "have known for decades that their fossil fuel products pose a severe risk to the planet's climate" and yet "downplayed the risks and continued to sell massive quantities of fossil fuels." 993 F.3d at 86–87. These claims are indistinguishable from Plaintiff's allegations that Defendants "have known for decades" that "production and use of their fossil fuel products create greenhouse gas pollution that warms the planet and changes our climate" but "nevertheless engaged in a coordinated, multi-front effort to conceal and deny their own knowledge of those threats." JA.23. The Second Circuit's holding that federal common law governs thus directly applies here.

Plaintiff insists that its nominal state-law claims have "nothing to do with" federal common law. Resp.6. But Plaintiff fails to grapple with the "mostly unbroken string of cases [that] has applied federal law to disputes involving interstate air or water pollution." *New York*, 993 F.3d at 91. The Supreme Court has consistently recognized that "the basic

scheme of the Constitution … demands" that federal law govern interstate or international pollution claims, *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 421 (2011) ("*AEP*"), and that "state law cannot be used," *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 313 n.7 (1981). Far from "invent[ing] new common law," Resp.6, Defendants ask this Court simply to apply existing federal law to Plaintiff's far-reaching claims seeking redress for the alleged impacts of global climate change.

Plaintiff next asserts that federal common law does not apply because its claims supposedly concern only Defendants' alleged misrepresentations, and have nothing to do with Defendants' production of fossil fuels. Resp.1, 8–9, 26–27. But Plaintiff's Complaint makes clear that—as in *New York*—the "singular source" of all its alleged injuries is not "misrepresentation," but greenhouse-gas emissions caused by the worldwide "production, promotion, and sale of fossil fuels." 993 F.3d at 91; *see also* OSB.25–27 (citing Plaintiff's allegations that Defendants' production and use of fossil-fuel products led to its alleged injuries). Indeed, far from denying this fact, Plaintiff *acknowledges* the central role of "climate change-related harms" to its tort claims and requested relief. Resp.8.

Plaintiff thus ignores the necessary connections between its claimed physical injuries and the global production, combustion, and emissions of fossil fuels. As in *New York*, Plaintiff "whipsaws between disavowing any intent to address emissions and identifying such emissions as the singular source of [its] harm." 993 F.3d at 91. But Plaintiff "cannot have it both ways," and "[a]rtful pleading cannot transform [Plaintiff's] complaint into anything other than a suit over global greenhouse gas emissions." *Id.* Indeed, "[i]t is precisely *because* fossil fuels emit greenhouse gases—which collectively exacerbate global warming—that [Plaintiff] is seeking damages." *Id*. (internal quotation marks omitted). No matter how Plaintiff's claims are characterized, and no matter how often Plaintiff maintains that its claims target "deception," its requested relief *necessarily* seeks damages for harms resulting from global emissions, and thus its argument would allow Rhode Island law to govern that interstate and international activity.

Plaintiff also attempts to write off *New York* as a simple preemption case. Resp.24–26. But even though the Second Circuit did not rule on any removal-jurisdiction question—because it was not a removal case—its core holding demonstrates that Plaintiff's claims arise under federal

law: Transboundary emissions "demand the existence of federal common law" because "a federal rule of decision is necessary to protect uniquely federal interests." *Id*. at 90. Indeed, the District of Minnesota recently recognized that "*New York* provides a legal justification for addressing climate change injuries through the framework of federal common law." *Minnesota v. Am. Petroleum Inst.*, 2021 WL 3711072, at *2 (D. Minn. Aug. 20, 2021). The critical and threshold question is whether Plaintiff's claims are governed by federal common law, and *New York* confirms they are.

Finally, Plaintiff contends that the Ninth Circuit held that claims involving climate change-related harms cannot "necessarily arise[] under federal common law." Resp.9 (citing *City of Oakland v. BP PLC*, 969 F.3d 895 (9th Cir. 2020)). But the Ninth Circuit never determined the applicability of federal common law; rather, it concluded that, "[*e*]*ven assuming* that the [plaintiffs'] allegations could give rise to a cognizable claim for public nuisance under federal common law," those claims did not "raise a substantial question of federal law" under *Grable*. *Oakland*, 969 F.3d at 906–07 (emphasis added). The Ninth Circuit's limited review was

based on its incorrect assumption that claims arising under federal common law are not removable to federal court outside of *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005), and the complete-preemption doctrine. Thus, Plaintiff's reliance on the Ninth Circuit's decision is misplaced.

B. Claims Arising Under Federal Common Law Are Removable.

Because Plaintiff's "claims aris[e] under federal law," Plaintiff "could have filed its operative complaint in federal court," and its claims are therefore removable. *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1748 (2019).

Plaintiff contests this straightforward reasoning by citing *Oakland* for the proposition that the only exceptions to the well-pleaded-complaint rule are complete preemption and *Grable*. Resp.11–14. But not only did that panel incorrectly assume, without analysis, that there are only two exceptions to the well-pleaded-complaint rule, it also failed to address its own leading precedent on the question, *New SD, Inc. v. Rockwell Int'l Corp.*, 79 F.3d 953 (9th Cir. 1996). In *New SD*, the court affirmed the denial of a remand motion, even though the plaintiff's claims were nominally asserted under state law, because federal common law governed

the claims. *Id.* at 955. As the court explained, where federal common law applies, "it follows that the question arises under federal law, and federal question jurisdiction exists." *Id.* at 955 (internal quotation marks omitted). As numerous federal courts of appeals have recognized, where uniform federal rules of decision govern a common-law claim, the claim "arises out of" federal law regardless of the label a plaintiff affixes, and thus is removable to federal court. *See*, *e.g.*, *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 926, 929 (5th Cir. 1997); *Caudill v. Blue Cross & Blue Shield of N.C., Inc.*, 999 F.2d 74, 77–80 (4th Cir. 1993).

Plaintiff attempts to distinguish this line of cases, but it misunderstands the holding and significance of each case. To start, Plaintiff suggests that the Fifth Circuit's decision in *Sam L. Majors* is not apt because the application of the rule to the Airline Deregulation Act was "a difficult one." Resp.16. But *Sam L. Majors* is relevant not for its particular facts, but for its clear recognition of the rule that, if a cause of action nominally pleaded under state law "arises under federal common law principles, [removal] jurisdiction may be asserted." 117 F.3d at 924; *see also id.* at 926 ("Federal [removal] jurisdiction exists if the claims in this case arise

under federal common law."). Plaintiff ignores this straightforward holding.

Similarly, in *Caudill*, the Fourth Circuit affirmed removal of a putative "state law claim for breach of [a federal health] insurance contract." 999 F.2d at 77. The court explained that removal is "proper" where "federal common law … supplant[s] state law." *Id.* at 78–79. The Supreme Court later held in *Empire Healthchoice Assurance, Inc. v. McVeigh* that federal common law did not govern the health-insurance contracts at issue. 547 U.S. 677 (2006). But *Empire Healthchoice*—which did not concern removal jurisdiction—did not disturb *Caudill*'s independent holding that putative state-law claims are removable where they are governed by federal common law. Indeed, the Fourth Circuit recently reiterated that removal is proper when "the constitutional nature" of nominally state-law claims means that federal law governs. *North Carolina ex rel. N.C. Dep't of Admin. v. Alcoa Power Generating, Inc.*, 853 F.3d 140, 147, 149 (4th Cir. 2017).

Finally, Plaintiff mischaracterizes *United States v. Swiss American Bank, Ltd.*, 191 F.3d 30 (1st Cir. 1999), asserting that it did not "involve[] any question of subject-matter jurisdiction." Resp.17. In fact, the *Swiss*

American court examined whether the district court possessed personal jurisdiction under Federal Rule of Civil Procedure 4(k)(2), which requires a showing that the plaintiff's claim "ar[o]s[e] under federal law." 191 F.3d at 38. The Court therefore squarely examined the question of "arising under" jurisdiction, beginning with the "bedrock" rule that "a case in which the rule of decision must be drawn from federal common law presents a uniquely federal question, and, thus, comes within the original subject matter jurisdiction of the federal courts." *Id.* at 42. *Swiss American*, which is binding circuit precedent, thus stands for the proposition that the question whether a claim arises under state or federal law for jurisdictional purposes turns on which law governs, and not whether the plaintiff has stated a viable claim under federal law. *Id.* at 42–45.

Plaintiff's narrow theory of federal jurisdiction would result in absurd consequences that are inconsistent with our federal system—and with common sense. Under Plaintiff's theory, cases involving commercial paper issued by the federal government, once filed in state court, would have to remain in state court. *Contra Clearfield Tr. Co. v. United States*, 318 U.S. 363 (1943). Illinois could sue the City of Milwaukee in Illinois

state court for interstate water pollution, and Milwaukee would be denied a federal forum to address the interstate dispute. *Contra Milwaukee*, 451 U.S. 304. Connecticut could bring suit in its own state courts against an out-of-state defendant seeking to abate interstate air pollution, and the defendant would be powerless to seek recourse from federal courts. *Contra AEP*, 564 U.S. 410. And Georgia could force a Tennessee company into Georgia state court to enjoin it from discharging fumes across state lines. *Contra State of Ga. v. Tenn. Copper Co.*, 206 U.S. 230, 236 (1907). Plaintiff's proposed rule is inconsistent with the Supreme Court's rulings that all of these cases arise under federal common law and thus are cognizable in federal court.

In sum, Plaintiff's claims are governed by federal common law and removable to federal court.

II. Plaintiff's Action Is Removable Because It Is Connected To Defendants' Activities On The Outer Continental Shelf.

Plaintiff's claims are also removable because they are connected with Defendants' extraction and production of oil and gas from the Outer Continental Shelf ("OCS"), and Plaintiff's requested relief would potentially impair OCS operations. Plaintiff does not contest that significant portions of Defendants' oil and gas production take place on the OCS.

Instead, it argues that Defendants failed to establish but-for causation between their OCS operations and Plaintiff's claims. Resp.26–27. This argument misapprehends both the standard for removal and how that standard applies here.

OCSLA establishes federal jurisdiction over actions "arising out of, or *in connection with*" any OCS operation. 43 U.S.C. § 1349(b)(1) (emphasis added). Despite this "straightforward and broad" language, *Petrobras Am., Inc. v. Vicinay Cadenas, S.A.*, 815 F.3d 211, 215 (5th Cir. 2016), Plaintiff insists that "there must be a 'but-for connection' between the cause of action and Defendants' operation on the OCS." Resp.26. But-for causation, however, is not required to satisfy OCSLA's "in connection with" standard, which is "undeniably broad in scope." *EP Operating Ltd. P'ship v. Placid Oil Co.*, 26 F.3d 563, 569 (5th Cir. 1994).

Courts have recognized this point, finding OCSLA jurisdiction even where an OCS operation is only indirectly or partially related to alleged harms that occur downstream from the OCS operation. *See* OSB.20–21 (citing cases). Plaintiff ignores these cases.

Plaintiff also dismisses the Supreme Court's holding in the personal-jurisdiction context that the "requirement of a 'connection' between

a plaintiff's suit and a defendant's activities" does *not* require a "causal showing," let alone but-for causation. *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1026 (2021). Plaintiff argues that this case is irrelevant because it was not interpreting statutory language. Resp.27–28. But the Supreme Court's holding demonstrates that the Court interprets the term "connection" in the jurisdictional context to encompass more than a causal nexus.[1]

In any event, Defendants' substantial OCS operations satisfy even Plaintiff's preferred "but-for" standard. Plaintiff's theory of harm is that "the normal use of Defendants' fossil fuel products," JA.92, "plays a direct and substantial role in the unprecedented rise in emissions of greenhouse gas pollution," which "is the main driver of" Plaintiff's alleged injuries, JA.24. Plaintiff's claims thus implicate *all* of Defendants' "exploration, development, extraction, manufacturing," and "marketing" of oil and gas—including on the OCS. JA.36.

[1] Indeed, the concurring opinions noted that the majority "parse[d]" the words "arise out of or relate to" with the precision of the "language of a statute." *Ford Motor Co.*, 141 S. Ct. at 1033 (Alito, J., concurring in the judgment); *see also id.* at 1034 (Gorsuch, J., concurring in the judgment) (similar).

Plaintiff insists that Defendants' OCS activities are immaterial because "[t]he relevant activity" is Defendants' alleged "misrepresentation campaigns." Resp.26. But Plaintiff alleges that the *purpose* of allegedly spreading misinformation was to "accelerate [Defendants'] business practice of exploiting fossil fuel reserves." JA.95. Thus, a but-for element of Plaintiff's claims is the increased production of Defendants' petroleum products, a significant portion of which came from the OCS. *See* JA.136. Under any formulation, Plaintiff's claims fall well within OCSLA's "in connection with" standard.

Plaintiff argues that Defendants' interpretation of OCSLA sweeps too broadly. Resp.27. But the propriety of federal jurisdiction here results from the unbounded nature of Plaintiff's claims, which are global in scope. *See* JA.53, Fig. 2, JA.56 (discussing global CO_2 emissions). And because "greenhouse gas molecules do not bear markers that permit tracing them to their source," JA.142, Plaintiff's claims implicate all global sources of emissions. As the source of up to one-third of annual domestic oil production, *see* OSB.22 n.3, the OCS is squarely within the scope of Plaintiff's sprawling claims.

Finally, Plaintiff ignores the threat that its claims pose to OCS production activities. But "*any dispute* that alters the progress of production activities on the OCS and thus *threatens* to impair the total recovery of the federally-owned minerals was intended by Congress to come within the jurisdictional grant." *EP Operating*, 26 F.3d at 570 (emphases added). Plaintiff seeks potentially massive damages and disgorged profits, as well as an order of "abatement," JA.162—relief that would inevitably deter, if not make entirely impractical, further production on the OCS. "If the [Defendants] want to avoid all liability" under Plaintiff's theory of the case, "their only solution would be to cease global production altogether," including on the OCS. *New York*, 993 F.3d at 93.

CONCLUSION

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

Dated: September 17, 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 brief complies with the applicable typeface, type-style, and type-volume limitations. This brief 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 brief contains 2,985 words. This certificate was prepared in reliance on the word-count function of the word-processing system used to prepare this brief.

Dated: September 17, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on September 17, 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.

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