21-1446-cv

In the United States Court of Appeals for the Second Circuit

STATE OF CONNECTICUT,
BY ITS ATTORNEY GENERAL, WILLIAM M. TONG,
PLAINTIFF-APPELLEE

v.

EXXON MOBIL CORPORATION, DEFENDANT-APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT (CIV. NO. 20-1555) (THE HONORABLE JANET C. HALL, J.)

BRIEF OF APPELLANT EXXON MOBIL CORPORATION

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INTRODUCTION

State and local governments across the country have filed over two dozen lawsuits against energy companies for injuries allegedly caused by global climate change. This is one of those cases. Here, the State of Connecticut claims that appellant Exxon Mobil Corporation is liable for such harms because it purportedly misled the public about climate change. The State seeks redress for alleged injuries such as flooding, harm to infrastructure, and personal injuries.

Because the State seeks relief for harms allegedly caused by emissions associated with the use of fossil fuels by billions of consumers around the world, the district court has jurisdiction over this lawsuit on a number of grounds. Those grounds include that federal common law governs claims seeking redress for transboundary emissions; that the State's claims necessarily raise substantial federal issues; and that the State's claims encompass conduct taken at the direction of federal officers. Based on those grounds and others, appellant properly removed this case to federal court.

The district court rejected appellant's grounds for removal only by accepting at face value the State's characterization of its lawsuit. There is no dispute that the State has pleaded its claims as premised on consumer deception. But the State cannot defeat federal jurisdiction by concealing federal claims in state garb. As this Court recently explained in a similar climate-

change case, a plaintiff cannot use "[a]rtful pleading" to disguise a complaint seeking redress for global climate change as "anything other than a suit over global greenhouse gas emissions." *City of New York* v. *Chevron Corp.*, 993 F.3d 81, 91 (2021). The same reasoning applies here. The district court erred in holding that it lacked jurisdiction over this lawsuit, and its remand order should therefore be vacated.

STATEMENT OF JURISDICTION

On October 14, 2020, appellant removed this action from the Connecticut Superior Court for the Judicial District of Hartford to the United States District Court for the District of Connecticut. *See* J.A. 53-143. On June 2, 2021, the district court entered an order granting the State's motion to remand this case to state court. *See* J.A. 217-248. Appellant filed a timely notice of appeal on June 8, 2021. *See* J.A. 249-250. This Court has jurisdiction under 28 U.S.C. §§ 1291 and 1447(d), and that jurisdiction extends to all of the independent grounds for removal encompassed in the district court's remand order. *See BP p.l.c.* v. *Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 1537, 1543 (2021). In appellant's view, the district court had jurisdiction under 28 U.S.C. §§ 1331, 1332, 1367(a), 1441(a), 1442, and 43 U.S.C. § 1349(b).

STATEMENT OF THE ISSUE

Whether the district court had jurisdiction over the State's claims alleging harm from global climate change, permitting appellant to remove this case from state to federal court.

STATEMENT OF THE CASE

The State of Connecticut, appellee here, filed an eight-count complaint in Connecticut state court against appellant-defendant Exxon Mobil Corporation. The complaint alleged that appellant's production, sale, and promotion of fossil fuels have contributed to climate change and caused wide-ranging environmental harm to Connecticut and its citizens. The State seeks restitution, disgorgement, statutory damages, and declaratory and injunctive relief purportedly under Connecticut's consumer-protection statute. J.A. 51.

Appellant removed the case to the United States District Court for the District of Connecticut (Hall, J.), asserting federal jurisdiction under the federal-question statute (28 U.S.C. § 1331); the federal-officer removal statute (28 U.S.C. § 1442); the Outer Continental Shelf Lands Act (43 U.S.C. § 1349); and the diversity-jurisdiction statute (28 U.S.C. § 1332). Among other grounds, appellant argued that federal common law necessarily governs claims seeking redress for injuries allegedly caused by global climate change, as this Court recently held in a similar case. *See City of New York* v. *Chevron Corp.*, 993 F.3d 81, 91 (2021). The district court rejected those grounds for removal and

remanded the case to state court. That decision was erroneous, and the remand order should be vacated and the case remanded so that the case can proceed in federal court.

1. In 2017, a number of state and local governments began filing lawsuits in state court against various energy companies, alleging that the companies' worldwide production, sale, and promotion of fossil fuels caused injury by increasing the amount of greenhouse gases in the atmosphere and thereby contributing to global climate change. Some of the lawsuits assert that the energy companies' alleged conduct constitutes a public nuisance and gives rise to product liability under state common law. Other lawsuits purport to proceed under state consumer-protection statutes, alleging that defendants misled the public regarding the likelihood and risks of harm from climate change. Regardless of the nominal cause of action, the state and local governments seek relief related to alleged past and future harms purportedly caused by climate change.

The defendants in these cases have consistently removed them to federal court. The defendants have asserted multiple bases for federal jurisdiction, including that the allegations in the complaints pertain to actions defendants took at the direction of federal officers, *see* 28 U.S.C. § 1442; that plaintiffs' climate-change claims necessarily arise under federal common law, *cf.*

American Electric Power Co. v. *Connecticut*, 564 U.S. 410, 420-423 (2011); *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 103 (1972); that federal-question jurisdiction was otherwise present under *Grable & Sons Metal Products, Inc.* v. *Darue Engineering & Manufacturing*, 545 U.S. 308 (2005); and that removal was appropriate on other grounds. Appeals regarding the propriety of removal in those cases are currently pending before five other courts of appeals. *See Rhode Island* v. *Shell Oil Products Co.*, No. 19-1818 (1st Cir.); *BP p.l.c.* v. *Mayor & City Council of Baltimore*, No. 19-1644 (4th Cir.); *Minnesota* v. *American Petroleum Institute*, No. 21-1752 (8th Cir.); *County of San Mateo* v. *Chevron Corp.*, No. 18-15499 (9th Cir.); *City & County of Honolulu* v. *Sunoco LP*, No. 21-15313 (9th Cir.); *Board of County Commissioners of Boulder County* v. *Suncor Energy (U.S.A.) Inc.*, No. 19-1330 (10th Cir.).

2. On September 14, 2020, the State filed a complaint against appellant in Connecticut state court. J.A. 7-52. The complaint alleges that appellant's production, sale, and promotion of fossil fuels have increased greenhouse-gas emissions and contributed to climate change, purportedly causing wide-ranging harm to Connecticut, its citizens, and fossil-fuel consumers. J.A. 7-10, 41-43. In so doing, the complaint focuses expansively on the greenhouse-gas emissions allegedly resulting from appellant's fossil-fuel production activities. For example, the complaint alleges that emissions have substantially increased in the industrial era, J.A. 41, that the increase has caused climate

change, J.A. 42, and that "ExxonMobil's business practices over at least the last thirty years have prevented or helped to slow the transition to cleaner alternative fuels," J.A. 43.

In the complaint, the State invokes its authority under Section 42-110m of the Connecticut General Statutes, which authorizes the Attorney General to file a civil action to enforce certain state laws on behalf of the State. J.A. 15. The law the Attorney General purports to enforce here is the Connecticut Unfair Trade Practices Act (CUTPA), Conn. Gen. Stat. § 42-110b. The complaint seeks restitution, disgorgement, statutory damages, and declaratory and injunctive relief. J.A. 51-52.

3. Appellant removed this action to federal court on six grounds. *See* J.A. 63-64. Appellant asserted, *inter alia*, that the district court had federal-question jurisdiction because federal common law necessarily governed the State's claims, in part because the State seeks redress for injuries allegedly caused by interstate and international emissions. *See* J.A. 64-74; 28 U.S.C. § 1331. While the State styled its complaint as alleging only state-law claims, appellant contended that artful pleading could not obscure the fact that the complaint is predicated on harms allegedly caused by climate change. J.A. 64-65. Appellant additionally argued that the State's claims necessarily raised disputed federal issues and thus were removable under *Grable*. *See* J.A. 74-83.

Appellant further argued that removal was appropriate under the federal-officer removal statute, 28 U.S.C. § 1442, citing several examples of activities that appellant undertook at the direction of federal officers. *See* J.A. 83-100. Appellant noted that it had entered into supply agreements with the armed forces to produce special fuels, including high-octane aviation fuel. J.A. 85-90. In addition, appellant had long produced oil and gas belonging to the federal government on the Outer Continental Shelf under leases that gave the government control over various aspects of their operations, including approval of exploration and production plans; regulation of extraction rates; and a right of first refusal during wartime to purchase all extracted oil and gas. J.A. 90-97. Appellant also had acted under federal officers in producing oil and operating infrastructure for the Strategic Petroleum Reserve. J.A. 97-98.

Appellant additionally asserted that removal was permissible under the Outer Continental Shelf Lands Act, federal-enclaves jurisdiction, and diversity jurisdiction. *See* J.A. 98-108.

The State moved to remand the case to state court. *See* J.A. 111. It contended that, even though it was seeking relief for harms allegedly caused by the effects of global climate change, its complaint had no relationship to interstate and international pollution or waters of the United States. *See* D. Ct. Dkt. 36 at 3, 11-12 & nn.7, 13. The State further argued that the case did not necessarily implicate any federal issues or have a sufficient connection

to appellant's activities taken at the direction of federal officers. *See id.* at 6-10, 22-23.

4. The district court granted the motion to remand. J.A. 217-248. It recognized that "several of the issues raised by ExxonMobil are novel within the Second Circuit." J.A. 248. For example, in addressing appellant's argument that federal common law was a basis for removal, the district court acknowledged that the "Supreme Court's decisions pertaining to the well-pleaded complaint rule have not squarely addressed federal common law." J.A. 232. Nevertheless, the district court held that federal common law cannot be an independent basis for removal. J.A. 232. The court reasoned that at least one decision from this Court suggesting otherwise had been implicitly abrogated by intervening law. *See* J.A. 230 & n.6 (citing *Republic of Philippines* v. *Marcos*, 806 F.2d 344, 354 (2d Cir. 1986)). The court acknowledged that "[t]he precise scope of the artful-pleading doctrine is not entirely clear" within this circuit, but nevertheless concluded the doctrine's use is limited to the context of *Grable* jurisdiction. J.A. 239 n.10 (citation omitted).

With respect to federal-officer removal, the district court observed that, "through various arrangements for the production of fossil fuels, the federal government has at times exercised a significant degree of control and direction over ExxonMobil's operations." J.A. 240. But, relying on this Court's decision

in *Isaacson* v. *Dow Chemical Co.*, 517 F.3d 129 (2008), the district court determined that it had to find a *causal* nexus between the State's claims and appellant's acts taken under color of a federal officer. J.A. 240. The court did not address the intervening Removal Clarification Act of 2011, Pub. L. 112-51, 125 Stat. 545, which amended the statute to allow removal of suits involving acts "for *or relating to*" a federally directed action. 28 U.S.C. § 1442(a)(1) (emphasis added); *see, e.g.*, *County Board of Arlington County* v. *Express Scripts Pharmacy, Inc.*, 996 F.3d 243, 256-257 (4th Cir. 2021); *Latiolais* v. *Huntington Ingalls, Inc.*, 951 F.3d 286, 292 (5th Cir. 2020) (en banc); *In re Commonwealth's Motion to Appoint Counsel*, 790 F.3d 457, 471-472 (3d Cir. 2015).

The district court also declined to exercise jurisdiction under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(b)(1), despite observing that the State's complaint "details" the alleged "harms caused by combustion of fossil fuels in order to explain why ExxonMobil's statements violate" state law. J.A. 243. The court rejected the other grounds for removal. J.A. 243-247.

5. On June 11, 2021, the district court granted appellant's motion for a temporary stay in order to allow appellant to seek a stay from this Court. The district court otherwise denied appellant's motion for a stay, concluding that appellant did not have a likelihood of success on the merits. *See* D. Ct. Dkt. 56. The court did not rule on whether appellant would suffer irreparable harm or whether the balance of the equities were in appellant's favor. On June

18, 2021, appellant moved this Court to stay the district court's remand order. *See* No. 21-1446, Dkt. 31. That motion is fully briefed and currently pending.

SUMMARY OF ARGUMENT

This case belongs in federal court primarily because, as this Court has previously held, federal law governs lawsuits alleging injury from and seeking redress for climate change. The State's claims also threaten to interfere with longstanding federal policies over matters of uniquely national importance, including energy policy, environmental protection, and foreign affairs. Statutory grounds provide further bases for removal. The State's attempt to evade federal jurisdiction by cloaking its claims in state law garb amounts to nothing more than artful pleading that does not preclude removal.

A. First and foremost, the district court had federal-question jurisdiction because, under a straightforward application of this Court's recent decision in *City of New York* v. *Chevron Corp.*, 993 F.3d 81 (2021), federal common law governs the State's claims because they concern the regulation of air and water in their ambient or interstate aspects. As this Court has explained, that category includes "sprawling" claims, like those asserted here, alleging that energy companies caused injury by contributing to global climate change. *See id.* at 92. And that makes good sense. If state law were to govern claims such as these, energy companies and emissions sources would be subjected to a patchwork of non-uniform state-law standards, and States

would be empowered to regulate extraterritorially and in areas reserved for the federal government.

The district court disagreed, concluding that claims governed by federal common law are not removable to federal court if they are labeled as state-law claims. That conclusion is erroneous and conflicts with decisions from this Court and others recognizing that putative state-law claims are removable to federal court if they are exclusively governed by federal common law.

B. The State's claims also necessarily raise substantial and disputed issues of federal law, permitting the exercise of federal-question jurisdiction. *See Grable & Sons Metal Products, Inc.* v. *Darue Engineering & Manufacturing*, 545 U.S. 308, 312-313 (2005). The fact that federal common law supplies the rule of decision for the State's claims, standing alone, permits removal on this basis. The State's claims also seek collaterally to attack cost-benefit analyses in the energy and environmental context that are committed to, and already have been conducted by, the federal government. Those issues are substantial, disputed, and can only be resolved by federal (and not state) courts without disrupting the federal-state balance. Removal was therefore permissible under *Grable*.

C. The federal-officer removal statute also supported removal here. Acting at the federal government's direction and subject to its extensive control, appellant has contributed significantly to the United States military

by providing fossil fuels that support the national defense. Appellant has also acted under the federal government's direction pursuant to federal policies promoting energy security and reducing reliance on foreign oil. And because the State's theory of liability sweeps so broadly, the State's claims have a sufficient nexus with the conduct that appellant took at the direction of federal officers. Appellant also has colorable federal defenses against the claims asserted here, permitting removal on federal-officer grounds.

D. Removal was further permissible under the Outer Continental Shelf Lands Act because the State's claims arise out of appellant's substantial operations on the Outer Continental Shelf. By alleging injuries from the contribution of fossil fuels to greenhouse-gas emissions and global climate change, the State necessarily includes appellant's exploration, extraction, and production of fossil fuels on the Outer Continental Shelf.

ARGUMENT

Under 28 U.S.C. § 1441, a defendant in a civil action filed in state court may remove the case to federal court if the case "originally could have been filed in federal court." *Marcus* v. *AT&T Corp.*, 138 F.3d 46, 52 (2d Cir. 1998). Removal is permitted as long as at least one claim falls within the original jurisdiction of the federal court. *See Broder* v. *Cablevision Systems Corp.*, 418 F.3d 187, 194 (2d Cir. 2005); 28 U.S.C. § 1367(a). The district court below had original jurisdiction over this action on multiple grounds, including under the

federal-question statute (28 U.S.C. § 1331). This action was also independently removable under the federal-officer removal statute (28 U.S.C. § 1442). Under de novo review, *see Romano* v. *Kazacos*, 609 F.3d 512, 517 (2d Cir. 2010), the district court erred in remanding this case to state court, and the remand order should therefore be vacated.

A. Removal Was Proper Because The State's Claims Arise Under Federal Common Law

In this lawsuit, the State seeks restitution, disgorgement, statutory damages, and declaratory and injunctive relief under several theories of liability for injuries allegedly resulting from climate change. *See* J.A. 51-52. Following a long line of Supreme Court authority, this Court's decision in *City of New York* v. *Chevron Corp.*, 993 F.3d 81 (2021), made clear that claims seeking redress for interstate pollution are governed exclusively by federal common law, not state law. Such claims necessarily arise under federal law for purposes of federal-question jurisdiction and are thus removable to federal court.

1. Federal Common Law Governs Claims Alleging Harm From Global Climate Change

The State alleges that greenhouse-gas emissions from the combustion of fossil fuels have contributed to global climate change, and it seeks redress from appellant for harms allegedly caused by climate change, including flooding, harm to natural resources and infrastructure, and personal injuries. *See* J.A. 41-43. Just months ago, this Court held in *City of New York* that claims

seeking redress for climate-change-induced harms—such as the State's claims here—require the application of a uniform federal rule of decision under federal common law. *See* 993 F.3d at 91. That holding flows naturally from the Supreme Court's decisions addressing federal common law and its role in disputes about transboundary pollution.

a. In *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938), the Supreme Court announced the familiar principle that "[t]here is no federal general common law." *Id.* at 78. But even after *Erie*, the "federal judicial power to deal with common law problems" remains "unimpaired for dealing independently, wherever necessary or appropriate, with essentially federal matters, even though Congress has not acted affirmatively about the specific question." *United States* v. *Standard Oil Co.*, 332 U.S. 301, 307 (1947).

Of particular relevance here, federal law necessarily supplies the rule of decision for certain narrow categories of claims that implicate "uniquely federal interests," including where "the interstate or international nature of the controversy makes it inappropriate for state law to control." *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 640-641 (1981) (citation omitted). At bottom, whenever there is "an overriding federal interest in the need for a uniform rule of decision," *Illinois* v. *City of Milwaukee* (*Milwaukee I*), 406 U.S. 91, 105 n.6 (1972), "state law cannot be used," *City of Milwaukee*

v. *Illinois* (*Milwaukee II*), 451 U.S. 304, 313 n.7 (1981), and any claims necessarily arise under federal law.

Those principles require that federal common law exclusively govern claims seeking redress for interstate pollution. The States are "coequal sovereigns," *PPL Montana, LLC* v. *Montana*, 565 U.S. 576, 591 (2012), and the Constitution "implicitly forbids" them from applying their own laws to resolve "disputes implicating their conflicting rights," *Franchise Tax Board* v. *Hyatt*, 139 S. Ct. 1485, 1498 (2019) (alteration and citations omitted). In similar fashion, although each State may make law within its own borders, no State may "impos[e] its regulatory policies on the entire Nation." *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, 585 (1996); *see Healy* v. *Beer Institute, Inc.*, 491 U.S. 324, 336 (1989). Allowing state law to govern disputes regarding interstate pollution would violate the "cardinal" principle that "[e]ach state stands on the same level with all the rest," by permitting one State to impose its law on other States and their citizens. *Kansas* v. *Colorado*, 206 U.S. 46, 97 (1907).

Accordingly, for more than a century, the Supreme Court has applied uniform federal rules of decision to common-law claims seeking redress for interstate pollution. *See*, *e.g.*, *Milwaukee I*, 406 U.S. at 103, 107 n.9; *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230, 237 (1907); *see also City of New York*, 993 F.3d at 91 (collecting additional cases). The most recent such decision is *American Electric Power* v. *Connecticut*, 564 U.S. 410 (2011). There, the

plaintiffs sued several electric utilities, contending that the utilities' greenhouse-gas emissions contributed to global climate change and created a "substantial and unreasonable interference with public rights, in violation of the federal common law of interstate nuisance, or, in the alternative, of state tort law." *Id.* at 418 (internal quotation marks and citation omitted). In assessing whether the plaintiffs had properly stated a claim for relief, the Supreme Court determined that federal common law governs claims involving "air and water in their ambient or interstate aspects." *Id.* at 421 (internal quotation marks and citation omitted). The Court rejected the notion that state law could govern public-nuisance claims related to global climate change, stating that "borrowing the law of a particular State would be inappropriate." *Id.* at 422.

b. Applying the Supreme Court's precedent on claims seeking redress for interstate pollution, this Court recently held in *City of New York* that claims seeking redress for global climate change—as the State's claims do here—are governed by federal common law. *See* 993 F.3d at 91. There, the municipal government of New York City alleged that the defendant energy companies (including appellant here) "have known for decades that their fossil fuel products pose a severe risk to the planet's climate" but nevertheless "downplayed the risks and continued to sell massive quantities of fossil fuels,

which has caused and will continue to cause significant changes to the City's climate and landscape." *Id.* at 86-87.

The question before this Court was "whether municipalities may utilize state tort law to hold multinational oil companies liable for the damages caused by global greenhouse gas emissions." 993 F.3d at 85. In deciding that issue, the Court faced the question whether federal common law or state law governed the City's claims. The City argued that federal common law did not apply because the case did not concern the "regulation of emissions"; instead, the City argued, emissions were "only a link in the causal chain of [its] damages." *Id.* at 91 (citation and internal quotation marks omitted). The Court rejected that argument, explaining that the City could not use "[a]rtful pleading" to disguise its complaint as "anything other than a suit over global greenhouse gas emissions." *Id.* The Court noted that it was "precisely *because* fossil fuels emit greenhouse gases," and thereby exacerbate climate change, that the City was seeking relief. *Id.* The City could not "disavow[] any intent to address emissions" while "identifying such emissions" as the source of its harm. *Id.*

This Court proceeded to hold that federal common law necessarily governed claims seeking redress for global climate change. 993 F.3d at 91. In so holding, the Court found that the case presented "the quintessential example of when federal common law is most needed." *Id.* at 92. The Court observed

that a "mostly unbroken string of cases" from the Supreme Court over the last century has applied federal law to disputes involving "interstate air or water pollution." *Id.* at 91. The Supreme Court did so, this Court explained, because those disputes "often implicate two federal interests that are incompatible with the application of state law": the "overriding need for a uniform rule of decision" on matters influencing national energy and environmental policy, and "basic interests of federalism." *Id.* at 91-92 (citation omitted).

In this Court's view, because the City was seeking to hold the defendants liable for injuries arising from "the cumulative impact of conduct occurring simultaneously across just about every jurisdiction on the planet," the City's lawsuit was far too "sprawling" for state law to govern. 993 F.3d at 92. The Court first reasoned that "a substantial damages award like the one requested by the City would effectively regulate the [energy companies'] behavior far beyond New York's borders." *Id.* The Court further explained that application of state law to the City's claims would "risk upsetting the careful balance that has been struck between the prevention of global warming, a project that necessarily requires national standards and global participation, on the one hand, and energy production, economic growth, foreign policy, and national security, on the other." *Id.* at 93. The Court thus concluded that federal common law necessarily governed the City's claims—and that "those federal claims" were not viable. *Id.* at 95.

c. In *Native Village of Kivalina* v. *ExxonMobil Corp.*, 696 F.3d 849 (2012), the Ninth Circuit also held that federal common law necessarily governs climate-change claims similar to those alleged here. In *Kivalina*, a municipality and a native village asserted public-nuisance claims for harms to their property allegedly resulting from the defendant energy companies' "emissions of large quantities of greenhouse gases." *Id.* at 853-854. The plaintiffs contended that their claims arose under federal and (alternatively) state common law. *Native Village of Kivalina* v. *ExxonMobil Corp.*, 663 F. Supp. 2d 863, 869 (N.D. Cal. 2009). The district court dismissed the federal claim and declined to exercise supplemental jurisdiction over any related state-law claims. *Id.* at 882-883. On appeal, the Ninth Circuit held that federal common law governed the plaintiffs' nuisance claims. *Kivalina*, 696 F.3d at 855. Citing *American Electric Power* and *Milwaukee I*, the Ninth Circuit began from the premise that "federal common law includes the general subject of environmental law and specifically includes ambient or interstate air and water pollution." *Id.* Given the interstate and transnational character of claims asserting harm from global greenhouse-gas emissions, the court concluded that the suit fell within that rule. *Id.*

2. The State's Claims Are Necessarily Governed By Federal Common Law

A straightforward application of this Court's decision in *City of New York* establishes that federal common law necessarily governs the State's climate-related claims.

The State alleges that appellant is liable under Connecticut law on the theory that it misled the public about climate change. *See* J.A. 12-15. But the claims are ultimately premised on transboundary pollution. The State alleges that appellant's conduct "has contributed to climate change by causing the sale of fossil fuel and petroleum products, in Connecticut and elsewhere, that emit large quantities of greenhouse gases responsible for trapping atmospheric heat that causes global warming." J.A. 11. And the remedies the State is seeking are not limited to economic harm to consumers who would have purchased fewer fossil-fuel products in the absence of the alleged deception (as in the typical consumer-protection case). Instead, the State is seeking redress for injuries alleged to have been caused by global climate change *itself*: for example, flooding, harm to ecosystems and infrastructure, and personal injuries. *See* J.A. 42. The State also seeks disgorgement of profits earned by appellant from the production and sale of fossil fuels on behalf of fossil-fuel consumers. *See* J.A. 51-52. In fact, the terms "greenhouse gas," "emissions," and "climate change" collectively appear approximately 150 times in the complaint. The complaint demonstrates that this case is a "suit over global greenhouse gas

emissions," which federal common law must govern. *City of New York*, 993 F.3d at 91.

Indeed, this case is remarkably similar to *City of New York*. There, the City claimed that the defendants "ha[d] known for decades that their fossil fuel products pose a severe risk to the planet's climate," yet "downplayed the risks and continued to sell massive quantities of fossil fuels, which has caused and will continue to cause significant changes to the City's climate." 993 F.3d at 86-87. Here, the State alleges that appellant knew that the combustion of its products formed "a substantial factor in causing global warming" and yet continued to market its products to consumers, thereby causing "more severe health, economic and environmental consequences to the State of Connecticut." J.A. 11, 43.

Similarly, as in *City of New York*, the State seeks "substantial" relief that would "effectively regulate the [p]roducers' behavior far beyond" Connecticut. 993 F.3d at 92. Because "[g]reenhouse gases once emitted 'become well mixed in the atmosphere,' " meeting the State's preferred fossil-fuel emission levels would require fossil-fuel producers to "cease *global* production altogether." *Id.* at 92-93 (emphasis added; citation omitted).

For example, the State requests an order directing appellant "to pay restitution to the State for all expenditures attributable to [appellant] that the State has made and will have to make to combat the effects of climate change."

J.A. 51. The district court felt obliged to "construe[] this request for relief as seeking restitution only for expenditures attributable to [appellant's] allegedly deceptive and unfair practices in marketing its products," on the ground that "the court cannot award relief corresponding with conduct that goes beyond the claims in the [c]omplaint." J.A. 224 n.4. But the State has never disavowed that it is seeking redress for harms caused by the effects of global climate change, and not merely the costs incurred by consumers who would have purchased fewer fossil-fuel products in the absence of appellant's alleged misstatements. That is precisely why federal common law must govern: the State is seeking relief from the effects of transboundary emissions.

The only possible distinction between this case and *City of New York* is that this action focuses on an even "earlier moment" in the causal chain than appellant's production and sale of fossil fuels, 993 F.3d at 97—namely, statements in appellant's marketing materials that purportedly increased the demand for appellant's products in the first instance. But this action still "hinges on the link between the release of greenhouse gases and the effect those emissions have on the environment generally." *Id.* The State's focus on the "earlier moment" of appellant's advertising "is merely artful pleading and does not change the substance of its claims." *Id.* Federal common law therefore necessarily governs.

Any contrary approach would not only contravene precedent but also permit suits alleging injuries pertaining to climate change to proceed under the laws of all fifty States—a recipe for chaos. As the federal government explained in its brief in *American Electric Power*, "virtually every person, organization, company, or government across the globe . . . emits greenhouse gases, and virtually everyone will also sustain climate-change-related injuries," giving rise to claims from "almost unimaginably broad categories of both potential plaintiffs and potential defendants." TVA Br. at 11, 15, *American Electric Power*, *supra* (No. 10-174). Out-of-state actors (including appellant) would quickly find themselves subject to a "variety" of "vague" and "indeterminate" state-law standards, and States would be empowered to "do indirectly what they could not do directly—regulate the conduct of out-of-state sources." *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 495-496 (1987). That could lead to "widely divergent results" if a patchwork of 50 different legal regimes applied. TVA Br. at 37. This outcome is far from hypothetical: over two dozen lawsuits have already been filed by state and local governments against energy providers, in state courts across the country, seeking redress for alleged climate-change-related injuries.

3. Claims Necessarily Governed By Federal Common Law Are Removable To Federal Court

Under 28 U.S.C. § 1331, federal district courts "have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United

States." That includes claims "founded upon federal common law as well as those of a statutory origin." *National Farmers Union Insurance Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845, 850 (1985) (citation omitted). As a result, if the "dispositive issues stated in the complaint require the application" of a uniform rule of federal law, the action "arises under" federal law for purposes of Section 1331, *Milwaukee I*, 406 U.S. at 100, and the case is removable to federal court, *see* 28 U.S.C. § 1441(a).

Consistent with those principles, courts have long recognized that federal jurisdiction exists if federal common law supplies the rule of decision, even if the plaintiff purports to assert only state-law claims. *See Republic of Philippines*, 806 F.2d at 354; *Sam L. Majors Jewelers* v. *ABX, Inc.*, 117 F.3d 922, 926-927, 929 (5th Cir. 1997); *In re Otter Tail Power Co.*, 116 F.3d 1207, 1214 (8th Cir. 1997); *Caudill* v. *Blue Cross & Blue Shield of North Carolina, Inc.*, 999 F.2d 74, 77-80 (4th Cir. 1993), *abrogated on other grounds*, *Empire Healthchoice Assurance, Inc.* v. *McVeigh*, 547 U.S. 677 (2006).

This Court's decision in *Republic of Philippines*, *supra*, is illustrative. At issue there was a lawsuit filed in state court by the Republic of Philippines against its former president, alleging that he used funds and assets stolen from the Philippine government to purchase properties in New York. 806 F.2d at 348. The complaint alleged only state-law claims of conversion. *Id.* at 354. The defendant removed the case to federal court, and the district court concluded

that the presence of federal jurisdiction was "not to be open to serious doubt." *Id.* at 352 (internal quotation marks omitted).

This Court agreed. The Court first concluded that a uniform federal rule of decision under federal common law was necessary because the claims at issue "necessarily require[d] determinations that will directly and significantly affect American foreign relations." 806 F.2d at 352. The Court acknowledged that the Philippines had brought only state-law claims, but it noted that even a "well-pleaded" state-law complaint can implicate issues of federal law. *See id.* at 354. The Court concluded that the federal common law of foreign relations was "probably" sufficiently "powerful, or important, as to displace a purely state cause of action," thereby permitting removal. *Id.* But even if that were not so, the Court held, removal would be proper because the claims alleged necessarily implicated substantial federal issues. *See id.* Notably, the Court identified no obstacle to removal based on federal common law alone, where, as here, federal law entirely displaces state law. *Cf. Empire Healthchoice*, 547 U.S. at 692-693 (holding that federal-question jurisdiction does not lie where federal common law governs the claims but merely borrows state law as the rule of decision).

City of New York is not to the contrary. There, the Court had no reason to address whether the claims alleged arose under federal law for purposes of

28 U.S.C. § 1331 because the lawsuit originated in federal court based on diversity jurisdiction. For the same reason, the Court treated federal common law as a matter of ordinary preemption on a motion to dismiss for failure to state a claim, and observed that its decision did not "conflict with" decisions from other courts remanding climate-change cases to state courts. *See* 993 F.3d at 994. Nothing about the Court's analysis forecloses removal based on federal common law. Rather, as discussed above, the Court's holding that climate-change claims are necessarily governed by federal common law decides a central premise in appellant's argument squarely in appellant's favor. *See* pp. 20-23.

In short, under *Republic of Philippines* and other similar cases, claims necessarily governed by a uniform rule of federal common law are removable to federal court, even if the plaintiff purports to assert only state-law claims. Because a uniform rule of federal common law necessarily governs the State's claims seeking redress for injuries allegedly caused by global greenhouse-gas emissions, appellant properly removed this case to federal court.

4. The District Court's Contrary Holding Is Erroneous

The district court rejected federal common law as a basis for removal, holding that the well-pleaded complaint rule precluded removal based on federal common law, even if federal common law did in fact govern the State's

putative state-law claims. *See* J.A. 224-32. That holding is erroneous and warrants reversal.

The well-pleaded complaint rule provides that federal-question jurisdiction exists only when "a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Whitehurst* v. *Healthcare Workers*, 928 F.3d 201, 206 (2d Cir. 2019). But an "independent corollary" of the rule is that "a plaintiff may not defeat removal by omitting to plead necessary federal questions." *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 22 (1983). Under that corollary, known as the artful-pleading doctrine, a court must look beyond the plaintiff's characterization of its claims and determine whether "the real nature" of the complaint is "federal," even if the plaintiff is attempting to "avoid[] federal jurisdiction by framing [its claims] in terms of state law." *NASDAQ OMX Group, Inc.* v. *UBS Securities, LLC*, 770 F.3d 1010, 1019 (2d Cir. 2014); *see* 14C Charles A. Wright et al., *Federal Practice and Procedure* § 3722.1, at 131-132 (4th ed. 2008). That explains why courts have long held that, even if pleaded as state-law claims, claims necessarily arising under federal common law are removable to federal court. *See* pp. 24-26, *supra*.

As explained above, *see* p. 25, this Court's decision in *Republic of Philippines* comports with those principles. The district court concluded, however,

that this Court's decision in *Marcus* v. *AT&T Corp.*, 138 F.3d 46 (1998), abrogated the relevant portion of *Republic of Philippines*. *See* J.A. 229-230 & n.6. That is not a fair reading of *Marcus*. There, the Court held that the Federal Communications Act (FCA) does not completely preempt state law by action of statute or related federal common law. *See Marcus*, 138 F.3d at 54. In reaching that conclusion, the Court determined first that the FCA did not completely preempt state law. *See id.* But then, rather than holding that federal common law cannot provide a basis for removal, the Court held that federal common law did not apply at all because there was no "*uniquely* federal interest" at issue. *Id.* This case is different because, as this Court explained in *City of New York*, the uniquely federal interest in cases involving transboundary emissions and the federal nature of our constitutional structure necessitate that federal common law displace state law entirely in the context of claims seeking redress for harms allegedly caused by climate change. *See City of New York*, 993 F.3d at 94.

The district court further erred when it determined that the artful-pleading doctrine is "coextensive with *Grable*." J.A. 239. Far from being limited to "prevent[ing] a plaintiff from avoiding *Grable* jurisdiction," *id.*, the artful-pleading doctrine has been applied in a variety of contexts without reference to *Grable* or its equivalents. *See*, *e.g.*, *Romano* v. *Kazacos*, 609 F.3d 512,

519-520 (2d Cir. 2010). And while the Supreme Court stated in *Rivet* v. *Regions Bank of Louisiana*, 522 U.S. 470 (1998), that "[t]he artful pleading doctrine allows removal where federal law completely preempts a plaintiff's state-law claim," *id.* at 475, it did not hold that the two doctrines are coextensive. *See Ohio ex rel. Skaggs* v. *Brunner*, 629 F.3d 527, 532 (6th Cir. 2010). At most, as the district court acknowledged, the scope of the artful-pleading doctrine is "not entirely clear." J.A. 239 (quoting *Sullivan* v. *American Airlines, Inc.*, 424 F.3d 267, 272 n.4 (2d Cir. 2005)). This, however, is a paradigmatic case for the doctrine's application, because the plaintiff is cloaking inherently federal claims about the global phenomenon of climate change in the garb of state-law causes of action.

In sum, although the State labels its claims as arising under state law, the federal issues implicated by the substance of the claims and the nature of the alleged injuries demand the application of federal common law. The district court therefore had jurisdiction over this action, and it erred in remanding the case to state court.

B. Removal Was Proper Because The State's Claims Raise Disputed And Substantial Federal Issues

Federal jurisdiction is also present because the State's claims raise disputed and substantial federal issues. It is "common[] sense" that "a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the

experience, solicitude, and hope of uniformity that a federal forum offers on federal issues." *Grable*, 545 U.S. at 312. That form of federal-question jurisdiction, often referred to as *Grable* jurisdiction, will lie "if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn* v. *Minton*, 568 U.S. 251, 258 (2013). The State's claims necessarily raise several disputed and substantial federal issues that justify federal jurisdiction, thereby meriting removal.

1. The State's Claims Necessarily Raise Federal Issues

The first *Grable* prong is satisfied because the State's claims necessarily raise issues governed by federal common law and amount to a collateral attack on cost-benefit analyses committed to, and already performed by, the federal government.

a. As a preliminary matter, if the Court concludes that federal common law governs the State's claims but that federal common law does not provide an independent basis for removal, this action is still removable under *Grable*. Several courts of appeals have held that, where "federal common law *alone* governs" a claim, "the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Battle* v. *Seibels Bruce Insurance Co.*, 288 F.3d 596, 607 (4th Cir. 2002); *accord Republic of Philippines*, 806 F.2d at 354; *Newton* v. *Capital Assurance Co.*, 245 F.3d 1306, 1308-

1309 (11th Cir. 2001); *Torres* v. *Southern Peru Copper Corp.*, 113 F.3d 540, 542-543 (5th Cir. 1997). As explained above, this case implicates the federal common law of transboundary pollution. Even under the district court's limited view of the artful-pleading doctrine, then, federal jurisdiction is appropriate. Indeed, *Republic of Philippines* holds as much; removal was permitted there on the ground that the state law at issue necessarily implicated federal questions because those claims were governed by federal common law. *See* 806 F.2d at 354.

b. In addition, the State's claims threaten to upset what this Court recently described as the "careful balance" struck by the federal government "between the prevention of global warming, a project that necessarily requires national standards and global participation, on the one hand, and energy production, economic growth, foreign policy, and national security, on the other." *City of New York*, 993 F.3d at 93; *see* 42 U.S.C. § 7401(c). Several courts have made clear that *Grable* permits federal courts to exercise jurisdiction over claims that "directly implicate[] actions taken by [federal agencies] in approving the creation of [federal programs] and the rules governing [them]." *Pet Quarters, Inc.* v. *Depository Trust & Clearing Corp.*, 559 F.3d 772, 779 (8th Cir. 2009); *accord Board of Commissioners* v. *Tennessee Gas Pipeline Co.*, 850 F.3d 714, 724-725 (5th Cir. 2017); *McKay* v. *City & County of San Francisco*, Civ. No. 16-3561, 2016 WL 7425927, at *4-*5 (N.D. Cal. Dec. 23, 2016); *West*

Virginia ex rel. McGraw v. *Eli Lilly & Co.*, 476 F. Supp. 2d 230, 234 (E.D.N.Y. 2007).

The State's novel claims necessarily implicate questions of federal law. As the district court observed in its remand order, Connecticut courts have adopted the Federal Trade Commission's "cigarette rule" for determining when a practice is "unfair" under CUTPA. J.A. 236; *see Ulbrich* v. *Groth*, 78 A.3d 76, 100 (Conn. 2013). Under that rule, courts consider if the challenged practice violates public policy and is "immoral, unethical, oppressive, or unscrupulous." *Ulbrich*, 78 A.3d at 100. Invoking that standard here, the State's claims raise some of the following questions: whether appellant's challenged conduct violates Connecticut's policy to "control air, land, and water pollution" and to "harmon[ize]" "human activity" with the "system of relationships among the elements of nature"; whether the alleged harms from appellant's challenged conduct are "outweighed by any countervailing benefits"; and whether appellant's alleged role in purportedly "delaying the creation of alternative technologies" was "immoral" or "unscrupulous." J.A. 46.

Those allegations make plain that the State seeks to have a court make exactly the sort of complex and value-laden policy judgments reserved for federal authorities in deciding the appropriate balance between fossil-fuel production and use, on the one hand, and alleged environmental harms, on the

other. "[G]reenhouse gas emissions are the subject of numerous federal statutory regimes," and the State's attempt to "sidestep[]" those "carefully crafted frameworks," *City of New York*, 993 F.3d at 86, necessarily implicates substantial federal issues. *See*, *e.g.*, 42 U.S.C. § 13384 (directing the Secretary of Energy to provide to Congress a "comparative assessment of alternative policy mechanisms for reducing the generation of greenhouse gases"); 43 C.F.R. § 3162.1(a) (requiring federal oil and gas lessees to drill in a manner that "results in maximum ultimate economic recovery of oil and gas with minimum waste"); Exec. Order No. 12,866 (1993) (requiring that agencies impose a significant regulation "only upon a reasoned determination that the benefits . . . justify its costs").

The district court concluded that the State's claims did not "necessarily" raise a federal question because Connecticut courts are not bound by federal law in assessing whether a challenged practice is unfair and look to public policy as announced by Connecticut (not federal) statutes and common law. J.A. 236. Both observations miss the point. Whether appellant's promotion and sale of fossil fuels violate Connecticut's public policy inevitably sets up a potential conflict with federal decisionmaking about the reasonableness and desirability of those activities. In effect, the State aims to achieve through state consumer-protection law what it could not achieve in the federal legislative and

regulatory process: namely, a determination that appellant's activities are unreasonable. This Court recognized as much when it determined that a balancing exercise like the one the State seeks here poses a "real risk" of "undermin[ing] important federal policy choices." *City of New York*, 993 F.3d at 93. Such collateral attacks on federal legislative and regulatory determinations implicate federal issues for purposes of federal-question jurisdiction.

2. The Federal Interests Implicated Are Substantial

This case sits at the intersection of federal energy and environmental regulation and necessarily implicates foreign policy and national security. Any one of those federal interests qualifies as "substantial." *See In re NSA Telecommunications Records Litigation*, 483 F. Supp. 2d 934, 943 (N.D. Cal. 2007); *Grynberg Production Corp.* v. *British Gas, p.l.c.*, 817 F. Supp. 1338, 1356 (E.D. Tex. 1993).

The district court did not disagree with that conclusion. It acknowledged that the fact that "a state claim relates to issues of national concern may demonstrate that an embedded federal issue is 'substantial,'" and it noted the various ways in which appellant had argued that the State's lawsuit would interfere with federal policymaking. J.A. 233. Yet the district court took an unduly narrow view of the federal issue necessarily raised—construing it as a

question about how federal authorities interpret the Federal Trade Commission Act—and concluded that that question was neither substantial nor actually disputed. *Id.* 236.

For the reasons discussed above, the district court erred by failing to recognize how the State's lawsuit necessarily implicates a host of federal issues. *See* pp. 30-34, *supra*. Those issues are not limited to issues of statutory interpretation and instead concern policy judgments about the appropriate balance between energy production and environmental protection. When a claim "directly implicates action taken by [federal agencies] in approving the creation of [federal programs] and the rules governing [them]," a federal question is substantial. *Pet Quarters*, 559 F.3d at 779.

3. The Federal Interests Are Disputed And Properly Adjudicated In Federal Court

The final two *Grable* requirements are clearly satisfied. *First*, the federal questions presented here are disputed. The State's claims are governed by federal common law and place squarely at issue whether regulators should have struck a different balance between the benefits and harms of appellant's conduct. Appellant contends that the State cannot recover under federal common law and that the State's claims amount to an impermissible collateral attack on federal policies that expressly encourage the precise conduct on which the State bases its requested relief.

Second, the State's claims would be properly adjudicated in federal court, as the exercise of federal jurisdiction over this action is fully consistent with federalism principles. As this Court observed, "a sprawling case" regarding global climate change, such as this one, "is simply beyond the limits of state law." *City of New York*, 993 F.3d at 92. Federal courts are the traditional forums for adjudicating the issues presented by this case, including environmental regulation and regulation of vital national resources. *See* pp. 14-19, *supra*. And state courts have no sovereign interest in developing federal common law.

The district court reached the contrary conclusion only by misinterpreting the nature of the State's claims and the federal issues implicated by them. *See* J.A. 235-238. As appellant has explained, the crux of this lawsuit is that appellant's conduct contributed to the release of greenhouse gases around the world, which allegedly caused the State to suffer injuries due to global climate change. Such claims necessarily implicate substantial federal issues that belong in federal court. The district court therefore had jurisdiction over this action under *Grable*.

C. Removal Was Proper Under The Federal-Officer Removal Statute

The federal-officer removal statute, 28 U.S.C. § 1442, allows removal of an action against "any officer (or any person acting under that officer) of the United States or of any agency thereof . . . for or relating to any act under

color of such office." 28 U.S.C. § 1442(a)(1). The right of removal is "made absolute whenever a suit in a state court is for any act 'under color' of federal office, regardless of whether the suit could originally have been brought in federal court." *Willingham* v. *Morgan*, 395 U.S. 402, 406 (1969). The basic purpose of the federal-officer removal statute is to "protect the [f]ederal [g]overnment" from "interference with its operations." *Watson* v. *Philip Morris Cos.*, 551 U.S. 142, 150 (2007) (internal quotation marks and citation omitted). To protect federal interests from state-court interference, the Supreme Court has given the statute a "liberal construction." *Id.* at 147.

A private actor may remove a case under Section 1442 if it can show that it acted under the direction of a federal officer; there was some relation or connection between the appellant's actions and the official authority; it has a colorable defense to the plaintiff's claims; and it is a "person" within the meaning of the statute. *See Badilla* v. *Midwest Air Traffic Control Service, Inc.*, 8 F.4th 105, 120 (2d Cir. 2021). There is no dispute here that appellant is a "person" within the meaning of Section 1442. All of the remaining criteria are likewise satisfied. The district court erred by concluding otherwise.

1. Appellant Acted Under The Direction Of Federal Officers

Whether a private party acted under the direction of a federal officer typically focuses on whether the party "assists, is supervised by, or receives

delegated authority from a federal officer." *Badilla,* 8 F.4th at 120; *see Watson*, 551 U.S. at 151-152. That test is satisfied when a party "fulfill[s] the terms of a contractual agreement" with the government and "perform[s] a job that, in the absence of a contract with a private firm, the [g]overnment itself would have had to perform." *Watson,* 551 U.S. at 153-154.

As the district court correctly determined, the notice of removal and the extensive record in this case demonstrate that, "through various arrangements for the production of fossil fuels, the federal government has at times exercised a significant degree of control and direction over [appellant's] operations." J.A. 240. To begin with, appellant has contributed significantly to the United States military by providing fossil fuels that support the national defense. *See* J.A. 83-90. For example, "[b]ecause avgas [aviation fuel] was critical to the war effort" in World War II, "the United States government exercised significant control over the means of its production." *United States* v. *Shell Oil Co.*, 294 F.3d 1045, 1049 (9th Cir. 2002). The "federal government directed the owners and operators of the [N]ation's crude oil refineries"—including appellant's predecessor companies—"to convert their operations" in order to produce avgas and other products that "the military desperately needed." *Exxon Mobil Corp.* v. *United States*, Civ. No. 10-2386, 2020 WL 5573048, at *30 (S.D. Tex. Sept. 16, 2020).

In fact, the Petroleum Administration for War, a federal agency established during World War II to regulate fossil-fuel usage in support of the war effort, made clear that appellant and other energy companies had no choice but to comply with the federal government's production and specifications mandates. *See Exxon Mobil*, 2020 WL 5573048, at *13; Exec. Order No. 9,276 (1942). The federal government also exempted the energy industry from antitrust laws, so that the Petroleum Administration for War could control the industry as one functional unit. *See A History of the Petroleum Administration for War, 1941-1945*, at 383-384 (John W. Frey & H. Chandler Ide eds. 1946) (letter of assurance from the Attorney General stating that "emergency acts performed by [the energy] industry under the direction of public authority, and designed to promote public interest and not to achieve private ends, do not constitute violations of the antitrust laws"). And to this day, appellant supplies fossil-fuel products to the military under exacting specifications established by the federal government. *See* J.A. 89. That level of federal control suffices to constitute direction. *See Betzner* v. *Boeing Co.*, 910 F.3d 1010, 1015 (7th Cir. 2018).

Appellant has also played an integral role in promoting energy security and reducing reliance on oil imported from hostile powers. *See* J.A. 90-98. Over the last 70 years, the federal government has directed appellant to explore, develop, and produce oil and gas on the outer continental shelf pursuant

to leases issued by the federal government under the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356b. In so doing, appellant has been subject to myriad federal government requirements, including the obligation to "develop[] . . . the leased area" by carrying out exploration, development, and production activities for the express purpose of "maximiz[ing] the ultimate recovery of hydrocarbons from the leased area." J.A. 120. In addition, appellant has made possible the creation of a strategic energy stockpile for the United States, a crucial element of national energy security and treaty obligations. Specifically, appellant has acted as an operator and lessee of the Strategic Petroleum Reserve Infrastructure, through which it has been required to pay royalties in kind to the federal government. *See* J.A. 96-98.

2. The State's Claims Have A Sufficient Connection To Appellant's Federally Directed Activities

The hurdle presented by the connection requirement of the federal-officer removal statute is "quite low." *Isaacson* v. *Dow Chemical Co.*, 517 F.3d 129, 137 (2d Cir. 2008). Although the statute initially conditioned removal on a defendant being "sued in an official or individual capacity *for* any act under color of such office," 28 U.S.C. § 1442(a) (2006) (emphasis added), the statutory text was amended in 2011 to permit removal of lawsuits "for *or relating to*" a federally directed action. Removal Clarification Act of 2011, Pub. L. No. 112-51, § 2(b)(1)(A), 125 Stat. 545 (emphasis added). The effect of that amendment was to "broaden federal officer removal to actions, not just *causally* connected,

but alternatively *connected* or *associated*, with acts under color of federal office." *Latiolais* v. *Huntington Ingalls, Inc.*, 951 F.3d 286, 292 (5th Cir. 2020) (en banc); *see also*, *e.g.*, *Baker* v. *Atlantic Richfield Co.*, 962 F.3d 937, 943-944 (7th Cir. 2020); *Sawyer* v. *Foster Wheeler LLC*, 860 F.3d 249, 258 (4th Cir. 2017); *In re Commonwealth's Motion to Appoint Counsel*, 790 F.3d 457, 471 (3d Cir. 2015).

Appellant has more than cleared that hurdle. According to the State, appellant's worldwide supply of fossil fuels—which necessarily encompasses the activities taken at federal direction discussed above—allegedly caused the injuries at issue. While appellant disputes the State's allegation, a defendant need not admit causation in order to permit removal. *See*, *e.g.*, *Maryland* v. *Soper*, 270 U.S. 9, 32-33 (1926).

The district court nevertheless held that removal was improper, citing this Court's pre-2011 decision in *Isaacson*, because appellant had not shown "why the alleged misrepresentations occurred *because of* what it was asked to do by the Government." J.A. 241 (citations and alterations omitted). That was erroneous. Following the 2011 amendments, Section 1442 no longer requires a causal nexus; a mere association will suffice. *See*, *e.g.*, *Latiolais*, 951 F.3d at 292.

The district court also reasoned that the requisite connection was lacking because appellant does not "allege that its contracts with the government

required it to publish the advertisements and other misrepresentations alleged by Connecticut." J.A. 241. That too was erroneous, and the Seventh Circuit's recent decision in *Baker*, *supra*, demonstrates why. In *Baker*, a company that had produced chemicals at the government's direction sought to remove a pollution lawsuit to federal court. *See* 962 F.3d at 939-940. The plaintiffs argued that the defendant could do so only by showing that it produced the injury-causing chemicals under federal direction. *See id.* at 943. The Seventh Circuit disagreed, explaining that such a showing involved "*merits questions* that a federal court should decide." *Id.* at 944. As the Seventh Circuit noted, courts have consistently held that it is not necessary that the conduct in question "*itself* was at the behest of a federal agency"; rather, it is "sufficient" if a plaintiff's "allegations are directed at the relationship between the [defendant] and the federal government" for at least part of the conduct underlying the plaintiff's claims. *Id.* at 944-945 (citation omitted); *accord Commonwealth's Motion to Appoint Counsel*, 790 F.3d at 470; *Badilla*, 8 F.4th at 120.

The same is true here. Appellant has produced fossil fuels at the direction of the federal government and under federal control for decades. *See* p. 37-40, *supra*. The question whether that production—as opposed to appellant's "misrepresentations"—is responsible for the State's alleged injuries is a merits question properly resolved at a later phase of this case.

3. Appellant Has Colorable Defenses To The State's Claims

The final requirement for removal under the federal-officer removal statute is that there be a "colorable" federal defense to the plaintiff's claims. Courts impose "few limitations on what qualifies" as a colorable defense, *Badilla*, 8 F.4th at 120, and a defense usually "need only be plausible" to be "considered colorable" for purposes of Section 1442, *United States* v. *Todd*, 245 F.3d 691, 693 (8th Cir. 2001). In analyzing that element, a court must "credit the [defendant's] theory of the case." *Jefferson County* v. *Acker*, 527 U.S. 423, 432 (1999).

Appellant has multiple meritorious (and certainly plausible) federal defenses, including preemption under the Clean Air Act, *see American Electric Power*, 564 U.S. at 424, and the foreign-affairs doctrine, *see American Insurance Association* v. *Garamendi*, 539 U.S. 396, 420 (2003). The district court did not conclude otherwise. *See* J.A. 241.

D. Removal Was Proper Because The State's Claims Arise Out Of Appellant's Operations On The Outer Continental Shelf

Removal was additionally proper because the State's claims arise out of appellant's operations under the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331-1356b.

1. OCSLA is designed to achieve "the efficient exploitation of the minerals" on the outer continental shelf by establishing a program to explore and lease the shelf's oil and gas resources. *Amoco Production Co.* v. *Sea Robin*

Pipeline Co., 844 F.2d 1202, 1210 (5th Cir. 1988); *see also* 43 U.S.C. § 1332; *California* v. *Watt*, 668 F.2d 1290, 1316 (D.C. Cir. 1981). OCSLA supplies a body of federal law applicable to the outer continental shelf, *see Rodrigue* v. *Aetna Casualty & Surety Co.*, 395 U.S. 352, 355-356 (1969), and grants federal courts jurisdiction over actions "arising out of, or in connection with . . . any operation conducted on the outer [c]ontinental [s]helf which involves exploration, development, or production of the minerals, of the sub-soil and seabed of the outer [c]ontinental [s]helf." 43 U.S.C. § 1349(b)(1).

The scope of OCSLA's jurisdictional provision is "very broad." *Tennessee Gas Pipeline* v. *Houston Casualty Insurance Co.*, 87 F.3d 150, 154 (5th Cir. 1996). In enacting that provision, Congress "intended for the judicial power of the United States to be extended to the entire range of legal disputes that it knew would arise relating to resource development" on the outer continental shelf. *Laredo Offshore Constructors, Inc.* v. *Hunt Oil Co.*, 754 F.2d 1223, 1228 (5th Cir. 1985). "Exploration," "development," and "production" have been construed to "encompass the full range of oil and gas activity from locating mineral resources through the construction, operation, servicing and maintenance of facilities to produce those resources." *EP Operating Limited Partnership* v. *Placid Oil Co.*, 26 F.3d 563, 568 (5th Cir. 1994). A plaintiff's claims have the requisite connection with those operations if the operations

form part of the causal chain that allegedly resulted in the alleged injuries. *See In re Deepwater Horizon*, 745 F.3d 157, 163 (5th Cir. 2014).

2. The district court had jurisdiction under OCSLA. As a preliminary matter, appellant indisputably engages in significant "operation[s]" on the outer continental shelf. Appellant and its affiliates have explored and recovered oil and gas on the outer continental shelf and operate a large share of the more than 5,000 active oil and gas leases on the nearly 27 million acres that the Department of the Interior administers under OCSLA. J.A. 101-102. Those leases were collectively responsible for producing 690 million barrels of oil and 1.034 trillion cubic feet of natural gas in 2019 alone. *Id.* at 101.

By their own terms, moreover, the State's claims arise in part from appellant's operations on the outer continental shelf. The State's theory of injury and requested relief, as alleged, are not limited to any incremental increase in fossil-fuel use and emissions purportedly caused by the alleged misrepresentations. Instead, the State claims that appellant "has contributed to climate change by causing the sale of fossil fuel and petroleum products, in Connecticut and elsewhere," J.A. 11, and demands restitution in the amount of "all expenditures attributable to [appellant] that the State has made and will have to make to combat the effects of climate change." J.A. 51. As the district court explained at oral argument, that request is "much broader" than "damages

flowing from . . . the sale of the product attributable to the deceptive advertising." J.A. 151. Even if the State sought to recover only for injuries directly attributable to appellant's alleged misrepresentations, such injuries cannot be isolated in light of the undifferentiated nature of harm alleged in the complaint. *See* J.A. 12-14; *cf. City of New York*, 993 F.3d at 92; *Kivalina*, 663 F. Supp. 2d at 880.

The exercise of federal jurisdiction here would further OCSLA's purposes. Congress "intended" that "any dispute that alters the progress of production activities" on the outer continental shelf, and thus "threatens to impair the total recovery of the federally[] owned minerals from the reservoir or reservoirs underlying" the outer continental shelf, be within OCSLA's "grant of federal jurisdiction." *Amoco*, 844 F.2d at 1210. That is precisely the case here. The State seeks potentially "billions" of dollars in restitution and disgorgement from appellant in this action. *See* J.A. 43. An award of that magnitude from a state court would substantially discourage production on the outer continental shelf and would jeopardize the future viability of the federal leasing program there.

3. The district court disagreed, reasoning that the State seeks redress only for allegedly deceptive trade practices relating to appellant's interactions with Connecticut consumers, "not for harms that might result from the manufacture or use of fossil fuels." J.A. 242. In the district court's view, the

complaint's detailed description of the State's alleged climate-related injuries just serves to "explain why [appellant's] statements violate CUTPA" and does not reflect "the harms that underlie Connecticut's claims in this case." J.A. 243. But the complaint belies that explanation. Accepting the State's allegations as true, *see EP Operating*, 26 F.3d at 570, the State expressly asserts that appellant's sale of fossil fuels and petroleum products contributes to climate change; in its prayer for relief, the State demands restitution "for all expenditures attributable" to appellant in order to "combat the effects of climate change." J.A. 51. The complaint is replete with similar allegations. *See* J.A. 10 (alleging that appellant has "inflict[ed] decades of avoidable harm on Connecticut's natural environment"); J.A. 15 (noting that the State seeks to "remediate" all "past and future damage" allegedly caused by appellant's challenged conduct). Plainly, the State seeks redress for broad, climate-related injuries. The State's further contention that appellant has "delayed" the "transition" to alternative energy sources, J.A. 14, is simply another way of alleging that appellant has engaged in allegedly excessive fossil-fuel exploration and production operations, which occurred in part on the outer continental shelf. For that reason, federal jurisdiction lies under OCSLA, in addition to the myriad other sources for jurisdiction discussed above. Appellant therefore properly removed this case to federal court, and the district court erred by granting the State's motion to remand.

CONCLUSION

The remand order of the district court should be vacated and the case remanded for further proceedings.

Respectfully submitted,

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SEPTEMBER 21, 2021

CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I, Kannon K. Shanmugam, counsel for appellant Exxon Mobil Corporation and a member of the Bar of this Court, certify, pursuant to Federal Rule of Appellate Procedure 32(g) and Local Rule 32.1(a)(4), that the foregoing Brief of Appellant Exxon Mobil Corporation is proportionately spaced, has a typeface of 14 points or more, and contains 10,801 words.

SEPTEMBER 21, 2021

/s/ Kannon K. Shanmugam
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CERTIFICATE OF SERVICE

I, Kannon K. Shanmugam, counsel for appellant Exxon Mobil Corporation and a member of the bar of this Court, certify that, on September 21, 2021, the attached Brief of Appellant Exxon Mobil Corporation was filed through the Court's electronic filing system. I certify that all participants in the case are registered users with the electronic filing system and that service will be accomplished by that system.

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