No. 19-1644

United States Court of Appeals for the Fourth Circuit

MAYOR AND CITY COUNCIL OF BALTIMORE,

Plaintiff-Appellee,

v.

BP P.L.C., et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the District of Maryland, No. 1:18-cv-02357-ELH
(The Honorable Ellen L. Hollander)

APPELLANTS' SUPPLEMENTAL REPLY BRIEF

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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.45; *see* Opening Supplemental Brief ("OSB") 3–19. 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.72; *see also* JA.90–91 (alleging that "Defendants, through their extraction, promotion, marketing, and sale of their fossil fuel products, caused … a substantial portion of all [fossil-fuel-related CO_2] emissions in history, and [are therefore responsible for] 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 to Plaintiff's alleged physical injury, as well as to Plaintiff's requested relief from the direct, physical effects of global

climate change. Plaintiff's attempts to overlay its claims with a "misrepresentation" gloss cannot change this fundamental fact. Indeed, *all* of Plaintiff's claims require proof of causation as an element.

Under our constitutional system, only federal law—not state law—can regulate or impose liability for emissions from other states or 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). 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.3–19. 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 that all of its injuries result from the physical effects of interstate and

international greenhouse-gas emissions. Under Plaintiff's theory, greenhouse-gas emissions are an essential link in the causal chain leading to Plaintiff's alleged property-based injuries. Plaintiff cannot avoid removal by artfully pleading its claims to ignore all intervening steps between the alleged misrepresentations and the alleged injuries. Plaintiff 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 Such As That At Issue Here, And Thus Plaintiff's Claims Are Governed By Federal Common Law.

This case is about transboundary greenhouse-gas emissions—the "mechanism" causing Plaintiff's alleged physical property injuries. JA.72. 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 "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 impact 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. *Compare* 993 F.3d at 86–87 (plaintiff alleged defendants "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"), *with* JA.43 (alleging 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"). The Second Circuit's holding that federal common law governs directly applies here.

Plaintiff insists that its nominal state-law claims have "nothing to do with" federal common law. Resp.7. 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" where a plaintiff's claims target out-of-state emissions, *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 313 n.7 (1981). Far from "invent[ing] new federal law," Resp.7, Defendants ask this Court simply to apply existing federal law to Plaintiff's claims seeking redress for the alleged physical 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, 26–28. But Plaintiff's Complaint makes clear that—as in *New York*—the "singular source" of all Plaintiff's 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.25–29 (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" in its tort claims and requested relief.

Resp.8. And this Court has already recognized that the "production and use of Defendants' fossil fuel products" are "necessary to establish the avenue of Baltimore's climate change-related injuries." *Mayor & City Council of Baltimore v. BP P.L.C.*, 952 F.3d 452, 467 (4th Cir. 2020).

Plaintiff ignores the unmistakable 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 claims necessarily invoke federal law, which exclusively regulates interstate and international emissions.

Plaintiff attempts to write off *New York* as involving ordinary preemption. 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." *New York*, 993 F.3d at 90. 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 do not 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 whether federal common law applied; 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 satisfy the "substantial question" test for removal under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005). *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* 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," just as New York City did, 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 *Oakland* merely assumed that conclusion, without analysis or citation of apposite authority, and it ignored contrary appellate caselaw, including its own circuit precedent on the question, *New SD, Inc. v. Rockwell Int'l Corp.*, 79 F.3d 953 (9th Cir. 1996). In *New SD*, the court upheld the propriety of removal, 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.* As numerous federal courts of appeals—including this Court—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.*, *Caudill v. Blue Cross & Blue Shield of N.C., Inc.*, 999 F.2d 74, 77–80 (4th Cir. 1993); *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 926, 929 (5th Cir. 1997). Whether this is an additional exception to the well-pleaded-complaint rule, or consistent with the rule because the applicability of federal common law is apparent from the face of the Complaint, the result is clear: Claims governed by federal common law are removable.

In its attempt to distinguish these cases, Plaintiff misunderstands the holding and significance of each. To start, Plaintiff contends (at 17) that "[n]one of *Caudill*'s reasoning remains good law" after *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677 (2006). Plaintiff is wrong. The Supreme Court held only that the particular facts in that case did not give "cause to displace state law" under federal common law and thereby "lodge th[e] case in federal court." *Id.* at 693. It never

disagreed with this Court's holding that removal is "proper" where "federal common law … supplant[s] state law," *Caudill*, 999 F.2d at 78–79 (internal quotation marks omitted). Thus, *Empire Healthchoice*—which did not concern removal jurisdiction—did not disturb *Caudill*'s independent holding that, where federal common law governs putative state-law claims, those claims are removable. That holding remains intact and binding here.

Indeed, this Court recently reiterated that removal is proper when "the constitutional nature" of nominally state-law claims means that federal common 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). Plaintiff contends that *Alcoa* involved "an older articulation" of *Grable*, Resp.16, but *Alcoa* never considered that theory of removal. As the dissent correctly noted: "The *Grable* theory … has not been addressed by … the panel majority." 853 F.3d at 156 (King, J., dissenting). Rather, *Alcoa* held that North Carolina's ostensibly state-law suit for state ownership of a riverbed was removable because the claim "was governed by" federal common law. *Id.* at 147 (majority). Like *Caudill*, that holding is binding and dispositive here.

Plaintiff next asserts that the Fifth Circuit's decision in *Sam L. Majors* was "'necessarily limited,'" but correctly concedes that the Fifth Circuit held the claim at issue removable because it "ar[ose] under federal common law." Resp.19. *Sam L. Majors* (like *Caudill*) makes clear that, if a cause of action nominally pleaded under state law "arises under federal common law principles," then "removal is proper." 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.").

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.19. In fact, the *Swiss American* court examined whether the district court possessed personal jurisdiction under Rule 4(k)(2), which requires a showing that the claim "ar[o]s[e] under federal law." 191 F.3d at 38. The court therefore squarely examined "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.

Plaintiff's narrow theory of federal jurisdiction would result in absurd consequences that are inconsistent with our federal system—and common sense. Illinois could sue the City of Milwaukee in Illinois state court under Illinois law for interstate water pollution, and Milwaukee would be denied a federal forum to address the interstate dispute. *Contra Milwaukee*, 451 U.S. 304. Or Connecticut could bring suit in its own state courts under Connecticut law 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. Plaintiff's proposed rule is inconsistent with the Supreme Court's rulings that these cases arise under federal common law and thus are properly heard 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 find 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.21–22 (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 *Ford* 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. Plaintiff's contrary view would render the "connection" prong superfluous.

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.112, "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.44. Plaintiff's claims thus implicate *all* of Defendants' "exploration, development, extraction, manufacturing," and "marketing" of oil and gas—including on the OCS. JA.57.

Plaintiff insists that Defendants' OCS activities are immaterial because "[t]he relevant activity" is Defendants' alleged "misrepresentation campaigns." Resp.27. But Plaintiff asserts that the *purpose* of allegedly spreading misinformation was to "accelerate [Defendants'] business practice of exploiting fossil fuel reserves." JA.115. 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.148, JA.158. Under any formulation, Plaintiff's claims plainly satisfy OCSLA's "in connection with" standard.

Plaintiff argues that Defendants' interpretation of OCSLA sweeps too broadly. Resp.27. But federal jurisdiction exists here because of the unbounded nature of Plaintiff's claims, which are global in scope. *See* JA.73, Fig. 2, JA.76 (discussing global CO_2 emissions). And because "greenhouse gas molecules do not bear markers that permit tracing them to their source," JA.156, Plaintiff's claims implicate all global sources of emissions. As the source of up to one-third of annual domestic oil

production, *see* OSB.23 & n.4, the OCS is squarely within the scope of Plaintiff's sprawling claims.[1]

Finally, Plaintiff ignores that "*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.172—relief that would deter, if not make entirely impractical, further production on the OCS. "[T]o avoid all liability" under Plaintiff's theory of the case, "[Defendants'] 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 remand order.

[1] Plaintiff (at 28) also points to this Court's prior conclusion that Defendants' OCS operations do not relate to activities under federal direction. *Baltimore*, 952 F.3d at 466. Defendants disagree with that holding, but regardless, it involved the separate question of federal-officer removal, not OCSLA removal, which this Court has not yet addressed.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the undersigned certifies that this supplemental 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 2,999 words. This certificate was prepared in reliance on the word-count function of the word-processing system used to prepare this brief.

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CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system.

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