21-1446-CV

United States Court of Appeals
for the Second Circuit

STATE OF CONNECTICUT,
BY ITS ATTORNEY GENERAL, WILLIAM M. TONG,
Plaintiff-Appellee

against

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 FOR AMICUS CURIAE CITY OF NEW YORK IN SUPPORT OF PLAINTIFF-APPELLEE TO AFFIRM THE DISTRICT COURT'S DECISION

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RULE 29(A) CONSENT TO FILING

Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, Amicus Curiae have obtained the consent of all parties to file this brief.

INTEREST OF AMICUS CURIAE[1]

Amicus the City of New York ("City"), a political subdivision of the State of New York, has a unique interest in the Court's recognition that state courts, not federal courts, have jurisdiction over state and local law claims to enforce requirements of state and local laws. This basic principle is applicable to all such cases, absent diversity or other appropriate source of federal jurisdiction; this brief explains why it applies in cases brought against corporate entities causing harm to and within such plaintiffs' geographic boundaries.

Plaintiff-Appellee the State of Connecticut, by its Attorney General, William M. Tong, ("Connecticut") has alleged that Exxon Mobil Corporation ("ExxonMobil") violated Connecticut's Unfair Trade Practices Act ("CUTPA") within Connecticut, in a manner that has caused local harms. The fact that the alleged deception relates to products that have an impact on climate change does not override states' and local governments' longstanding interests in remedying consumer deception occurring within their jurisdictions. In arguing otherwise, ExxonMobil is essentially seeking judicial conversion of well-pleaded state or local statutory claims into vaguely defined federal common law claims. The exercise of federal jurisdiction over such oddly construed and not-actually-pleaded claims

[1] Pursuant to FRAP 29(a)(4)(E) and Local Rule 29.1(b), Amicus states: counsel for Amicus authored this brief in its entirety, and no person or entity other than Amicus and its representatives made any monetary contribution to the preparation or submission of this brief.

would intrude on local and state governments' authority within our federal system to rely on state and local law and state courts to seek redress for localized harms.

Directly to this point, the City has an interest in protecting its ability to enforce its own local Consumer Protection Law, NYC Code §§ 20-700 *et seq.*, as it seeks to do in *City of New York v. Exxon Mobil Corporation et al.*, No. 21-cv-04807 (S.D.N.Y.). In that case, the City alleges that several oil-and-gas companies and their top trade association are systematically deceiving the City's consumers by making false and misleading statements about the climate-change impacts of their products and businesses. Through newspaper ads, social media posts, and other promotional materials directed at New York City consumers, the defendants promote their gasoline products as "cleaner" and "emissions-reducing," while failing to disclose that those same products are leading drivers of climate change. In a similar vein, they trumpet their supposed investments in low-emission technologies and zero-emission renewable energy, while failing to disclose that those investments constitute a negligible percentage of their total business, that many of their so-called "clean" energy projects contribute substantially to climate change, and that they plan to dramatically ramp up fossil-fuel production in the coming years.

Appellant badly misreads *City of New York v. Chevron*, as the City explains in this *amicus* brief. 993 F.3d 81 (2d Cir. 2021). The City was, obviously, the plaintiff in that case, and is thus uniquely able to address how the circumstances

and reasoning underlying that decision are starkly different from those presented by the matter currently before this Court, rendering that decision of little influence on the appropriate outcome here.

The City respectfully urges this Court to affirm—on all grounds—the district court's well-reasoned decision to remand Connecticut's state-law claims to Connecticut's properly chosen forum: state court.

SUMMARY OF ARGUMENT

"The [well-pleaded complaint] rule makes the plaintiff the master of the claim." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). A plaintiff "may avoid federal jurisdiction by exclusive reliance on state law," as Connecticut did here. *Id.* Unless an exception to the well-pleaded complaint rule can be established, "a defendant's argument that a case involves an issue of federal law—even a dispositive issue of federal law—is not sufficient to remove a case." J.A. at 222. Recent case law from this Court does not compel a different result. The underlying facts and circumstances present in *City of New York* diverge dramatically from those before this Court now.

In *City of New York*, this Court examined state nuisance and trespass claims brought by the City against fossil fuel producers for their admittedly *lawful* commercial activity, which, if successful, the Court determined would amount to imposing strict liability and effectively regulate cross-border emissions. In contrast,

Connecticut seeks to hold ExxonMobil responsible under provisions of its state consumer protection statute which, Connecticut alleges, render ExxonMobil's actions *unlawful*. In pursuing such claims, Connecticut's litigation does not seek to impose strict liability on ExxonMobil for merely manufacturing fossil fuel products. Nor does it seek to regulate worldwide greenhouse gas emissions. Rather, Connecticut simply seeks to enforce the laws of its jurisdiction prohibiting consumer deception. That such deception happens to be about the impact of fossil fuel on the climate does not change the nature of Connecticut's case. ExxonMobil could eliminate any "ongoing liability" by simply stopping its climate deception campaigns—it need not cease its global production of fossil fuels to avoid liability. Connecticut's success on its claims would not operate as a *de facto* regulation on transborder emissions. *See City of New York,* 993 F.3d at 96.

Additionally, *City of New York* arrived before this Court in a very different procedural posture than ExxonMobil's current appeal of the District Court's grant of Connecticut's motion to remand. The complaint in *City of New York* was originally filed in federal court as there was diversity between the parties; removal and remand were never issues before the Court in that case. Because of the posture of that case, the Court conducted an ordinary preemption analysis, which *per se* cannot create removal jurisdiction under the well-pleaded complaint rule. In

contrast, what the Court referred to as the "heightened standard" unique to the removability inquiry, *id.* at 94, applies here.

As the factors this Court found dispositive and procedural posture of *City of New York* differ so fundamentally from the issue presently before the Court, this Court's decision in *City of New York* does not support ExxonMobil's effort to have Connecticut's CUTPA claims heard in federal court. Connecticut should remain the master of its claims.

ARGUMENT

POINT I

AN ENFORCEMENT ACTION CONCERNING UNFAIR AND DECEPTIVE TRADE PRACTICES DOES NOT INVOLVE THE FACTORS THIS COURT FOUND DISPOSITIVE IN *CITY OF NEW YORK.*

ExxonMobil's reliance on this Court's decision in *City of New York v. Chevron* is entirely misplaced. By its terms and its logic, *City of New York* applies to one and only one type of claim: those that "regulate cross-border emissions" by imposing "strict liability" on the "lawful" production, promotion, and sale of fossil fuels. 993 F.3d at 87, 93 (cleaned up). Nothing in that decision suggests that federal common law preempts and replaces Connecticut's CUTPA claims, which premise liability on ExxonMobil's *unlawful* consumer deception. Indeed, under the *City of*

New York's own reasoning, Connecticut's deception-based claims do not—and cannot—regulate emissions of any sort.

In its opening appellate brief in *City of New York*, the City made clear that its "particular theory of the claims" (1) sought to hold the defendants liable for "lawful commercial activity," (2) "assume[d]" that defendants' activity "ha[d] substantial social utility," and (3) did not require any proof that the defendants' conduct was "unreasonable" or violated any "standard of conduct." Brief for Appellant at 19, 49, Dkt. 89, *City of New York v. Chevron Corp.*, No. 18-2188, 2018 WL 5905772 (2d Cir. Nov. 8. 2018). On reply, the City reaffirmed that the defendants' liability "turn[ed] on the extent of harm suffered, rather than the failure to satisfy a prescribed duty." Reply Brief at 8, Dkt. 213, *City of New York v. Chevron Corp.*, No. 18-2188, 2019 WL 1380028 (2d Cir. Mar. 25, 2019).

The Second Circuit, in turn, analyzed whether federal common law preempted *that* particular theory of liability. In keeping with the City's representations to the Court, the panel emphasized that the lawsuit targeted "lawful commercial activity," and that the complaint did "not concern itself with aspects of fossil fuel production and sale that are unrelated to emissions. *City of New York*, 993 F.3d at 87, 97 (cleaned up). Based on that understanding, the Court reasoned that the lawsuit "effectively impose[d] strict liability for the damages caused by fossil fuel emissions." *Id.* at 93. The defendants would therefore need to "cease

global production [of fossil fuels] altogether" if they "want[ed] to avoid all liability." *Id.* And because the threat of "ongoing liability" would "no doubt compel the [defendants] to develop new means of pollution control," the Court concluded that the City's lawsuit "would regulate cross-border emissions." *Id.* (cleaned up).

That conclusion was the linchpin of *City of New York's* preemption analysis. Indeed, this Court said as much, observing that the defendants' preemption defenses "demand[ed] at the outset" that the Court determine whether the "the City's lawsuit . . . [was] a clash over regulating worldwide greenhouse gas emissions and slowing global climate change." *Id.* at 90–91. Had the Court *not* held that the City's claims "operate[d] as a *de facto* regulation on greenhouse gas emissions," *id.* at 96, the decision would have marked a notable departure from precedent, as the Supreme Court has only applied the federal common law of interstate pollution to lawsuits that have the purpose and effect of regulating cross-border pollution.[2]

[2] *See Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 419 (2011) (seeking "injunctive relief" that would "require[e] each defendant to cap its carbon dioxide emissions and then reduce them by a specified percentage each year for at least a decade" (cleaned up)); *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 311 (1981) (*Milwaukee II*) (seeking an order requiring "petitioners to eliminate all overflows and to achieve specified effluent limitations on treated sewage"); *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972) (*Milwaukee I*) (same); *New Jersey v. City of New York*, 283 U.S. 473, 476–77 (1931) (seeking "an injunction" that would "restrain[] the city from dumping garbage into the ocean or waters of the United States off the coast of New Jersey and from otherwise polluting its waters and beaches"); *New York v. New Jersey*, 256 U.S. 296, 298 (1921) (seeking to "permanently enjoin[]" defendant from "discharging . . . sewage" into the New York harbor); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 236 (1907) (seeking "to enjoin the defendant copper companies from discharging noxious gas"); *Missouri v. Illinois*, 200 U.S. 496, 517 (1906) (seeking "to restrain the discharge of . . . sewage"); *see also North Dakota v. Minnesota*, 263 U.S. 365, 371–72 (1923) (seeking "an order enjoining the continued use of [certain] ditches" that were causing floods in neighboring state).

None of that reasoning supports applying federal common law to Connecticut's consumer-protection claims. The State does *not* seek to hold ExxonMobil "strict[ly] liable" for harms caused by "lawful commercial activity." *City of New York,* 993 F.3d at 87, 93 (cleaned up). Rather, the complaint clearly seeks to hold ExxonMobil liable for violating CUPTA by concealing and misrepresenting the climate-impacts of their fossil-fuel products in Connecticut markets. As a result, ExxonMobil would not need to cease its "global production [of fossil fuels] altogether" to avoid "all liability" under Connecticut's complaint. *Id.* at 93. In fact, it would not need to reduce production at all. It could eliminate any "ongoing liability" by simply stopping its climate deception campaigns. *Id.* Under *City of New York*'s own logic, then, Connecticut's climate-deception lawsuit cannot regulate "cross-border emissions." *Id.* It therefore falls far outside any recognized body of federal common law.

Perhaps for that reason, ExxonMobil attempts to twist Connecticut's lawsuit into one seeking "relief for harms allegedly caused by emissions associated with the use of fossil fuels by billions of consumers around the world." Def.-Appellant Appeal Br. at 1 (Dk. No. 66). Relying on this strained characterization of the complaint, ExxonMobil argues that interstate and international pollution is an area of law so saturated with federal interests and regulation that Connecticut's claims must be federal in nature. *See* Def.'s Opp'n to Remand at 17; *see also* J.A.

at 231. But courts around the country have rightly rebuffed analogous attempts to mischaracterize climate-deception lawsuits.[3] Connecticut's claims, like those of other jurisdictions seeking compliance with their own consumer protection laws (including the City), simply seek to hold ExxonMobil responsible for its alleged unfair and deceptive acts and practices in the course of engaging in trade or commerce in Connecticut in violation of Connecticut state statute. Compl. ¶¶ 182, 195. The fact that ExxonMobil engages in a business that involves interstate pollution does not entitle it to special jurisdictional rules, nor does it mean that federal common law rules necessarily preempt Connecticut's consumer protection statute.

[3] *See, e.g.*, *Mayor & City Council of Baltimore v. BP P.L.C.*, 952 F.3d 452, 467 n.10 (4th Cir. 2020) ("[T]hat is not how Baltimore has framed its claim."); *City & Cty. of Honolulu v. Sunoco LP*, No. 20-CV-00163-DKW-RT, 2021 WL 531237, at *1 (D. Haw. Feb. 12, 2021) ("The principal problem with Defendants' arguments is that they misconstrue [the City's] claims."); *Minnesota v. Am. Petroleum Inst.*, No. CV 20-1636 (JRT/HB), 2021 WL 1215656, at *13 (D. Minn. Mar. 31, 2021) ("[T]he State's action here is far more modest than the caricature Defendants present."); *Mayor & City Council of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538, 560 (D. Md. 2019) ("This argument rests on a mischaracterization of the City's claims."); *Bd. of Cty. Commissioners of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, 405 F. Supp. 3d 947, 969 (D. Colo. 2019) ("Defendants mischaracterize Plaintiffs' claims."); *Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31, 44 (D. Mass. 2020) (criticizing "ExxonMobil's caricature of the complaint"); *City of Hoboken v. Exxon Mobil Corp.*, No. 20-CV-14243, 2021 WL 4077541, at *6 (D.N.J. Sept. 8, 2021) (rejecting the defendants' characterization of the plaintiff's claims as "seek[ing] to regulate the production and sale of oil and gas abroad").

POINT II

INQUIRIES INTO REMOVABILITY REQUIRE APPLICATION OF THE COMPLETE PREEMPTION ANALYSIS, WHICH WAS NOT AT ISSUE IN *CITY OF NEW YORK*.

As this Court said in distinguishing its decision in *City of New York* from the "parade of recent opinions" holding that state-law claims brought against fossil fuel producers do not arise under federal law and thus are not removable to federal court, "the devil is in the (procedural) details." *City of New York*, 993 F.3d at 94. And those procedural details operate similarly here and distinguish Connecticut's complaint from the City's previous nuisance and trespass action. Although asserting state-law nuisance and trespass claims, the complaint in *City of New York* was initially brought in federal court and complete diversity existed between the parties, such that federal jurisdiction was proper, and neither the parties nor the court doubted the district court's subject-matter jurisdiction. Thus, in determining whether state or federal law applied, in *City of New York* this Court did not apply "the heightened standard unique to the removability inquiry"—the inquiry before the Court now. *See City of New York,* 993 F.3d at 94 ("[T]he City filed suit in federal court in the first instance. We are thus free to consider the Producers' preemption defense on its own terms . . . .").

It has been settled for well over a century that ordinary federal preemption by operation of the Supremacy Clause can never be a basis for federal subject-matter jurisdiction. A case may *not* be removed to federal court on the basis of a federal defense, including preemption, except in a limited number of cases in which an area of law has been "completely preempted" because "the pre-emptive force of a [federal] statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule'"—a situation not relevant here.[4] *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 (1987) (quoting *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987)).

Those time-honored principles apply with equal force to preemption defenses that are premised on federal common law. As then-Judge Sotomayor observed more than a decade ago, "satisfaction of the two-prong *Boyle* test [for federal common law] does not necessarily create federal jurisdiction under 28 U.S.C. § 1331." *Empire HealthChoice Assur., Inc. v. McVeigh*, 396 F.3d 136, 142 (2d Cir. 2005), *aff'd*, 547 U.S. 677 (2006). Instead, "even in cases in which *Boyle* is satisfied, courts must still ask the secondary question of whether the federal common law issue appears on the face of the plaintiff's well-pleaded complaint." *Id.* at 143 n.4. To

[4] For further description of complete preemption, see brief of Plaintiff-Appellee State of Connecticut in opposition to Defendant-Appellant's appeal at 27-29, 32-33 (Dkt. No. 84).

hold otherwise would "conflate[] the preemption and jurisdiction analysis," and "giv[e] short shrift to the well-pleaded complaint rule." *Id.* at 142.[5]

This Court used the procedural posture of *City of New York* to distinguish its decision from the "parade of opinions" finding that defendants' anticipated defense could not create federal question jurisdiction sufficient to remove state-law claims brought in state court against fossil fuel producers to federal court. *City of New York,* 993 F.3d at 93–94. It should not now depart from that reasoning to extend the scope of *City of New York* to cases in the distinctly different procedural posture of a removability inquiry.

[5] On this point, the panel was unanimous. *See id.* at 150 (Sacks, J., concurring) (noting that federal common law would give rise to subject-matter jurisdiction only "if th[e] litigant's well-pleaded complaint arises under federal law"); *id.* at 154 (Raggi, J., dissenting) (agreeing that, where a "complaint pleaded claims under only state law," "federal common law . . . was not a ground for removal of those state claims to federal court").

CONCLUSION

This Court should affirm the District Court's decision and decline to extend the preemption analysis of *City of New York* to the context of removability.

Dated: November 12, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word, and according to that software, it contains 3,069 words, not including the table of contents, table of authorities, this certificate, and the cover.

/s Hilary Meltzer
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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of November, I filed the foregoing brief and served the foregoing brief on all registered counsel through the Court's CM/ECF system.

Dated: November 12, 2021

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