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.)

REPLY BRIEF OF APPELLANT EXXON MOBIL CORPORATION

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The State of Connecticut asserts sweeping claims that seek redress for the alleged effects in Connecticut of global climate change. The injuries for which the State seeks relief allegedly result from greenhouse-gas emissions associated with the use of fossil fuels by billions of consumers worldwide. Given the sweeping nature of the State's allegations and the relief it seeks, it is unsurprising that this case is removable to federal court on multiple grounds—including on the ground that federal common law necessarily governs the State's claims.

The State builds its brief around the premise that "[c]limate change is only relevant to this case because it is the *topic* of ExxonMobil's unlawful acts and practices"—namely, alleged deceptive "marketing and branding." Br. 2, 32. At the same time, the State forthrightly acknowledges that it is seeking "equitable relief" in the form of "money recovery" for the alleged "catastrophic harm" caused by climate change. Br. 24, 31 (citation omitted). But as this Court put it in *City of New York* v. *Chevron Corp.*, 993 F.3d 81 (2021), the State "cannot have it both ways." *Id.* at 91. "Artful pleading cannot transform the [State's] complaint into anything other than a suit over global greenhouse gas emissions" because the State is seeking relief "precisely *because* fossil fuels emit greenhouse gases" and thereby "exacerbate" climate change. *Id.*

By requesting such sweeping remedies based on the connection between global climate change and greenhouse-gas emissions, the State has necessarily pleaded itself into federal court. The district court erred by concluding otherwise, and its remand order should be vacated.

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

Appellant's argument for removal on the basis of federal common law rests on two basic premises. *First*, federal common law necessarily governs claims seeking redress for harms allegedly caused by global climate change, like those the State asserts here. *See* Br. of Appellant 13-19. *Second*, federal courts have jurisdiction under 28 U.S.C. § 1331 over claims arising under federal common law, making them removable under 28 U.S.C. § 1441. *See* Br. of Appellant 20-26. Applied here, those premises lead to the inexorable conclusion that appellant properly removed this case to federal court. The State's attempts to undermine both premises of appellant's argument are unsuccessful.

1. The State does not dispute that federal common law necessarily supplies the rule of decision when "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, 641 (1981). Nor does the State dispute that this Court recently recognized in *City of New York* that

federal common law governs claims seeking redress for harm allegedly caused by global climate change. *See* Br. of Appellee 29-33.

Those principles squarely govern the State's lawsuit. The complaint alleges various injuries that Connecticut has purportedly experienced because of global climate change: "sea level rise, flooding, drought, an increase in extreme temperatures, a decrease in air quality, an increase in severe storms, contamination of drinking water, and an increase in certain disease-transmitting species." J.A. 42. And the State seeks relief for "practices that will require future climate change mitigation, adaptation, and resiliency," as well as "restitution to the State for all expenditures attributable to ExxonMobil that the State has made and will have to make to combat the effects of climate change." J.A. 51. In other words, the State seeks to obtain a significant monetary award "for the harms caused by global greenhouse gas emissions." *City of New York*, 993 F.3d at 91. As this Court held in *City of New York*, the answer to the question whether such a case may proceed under state law "is simple: no." *Id.*; *see also Native Village of Kivalina* v. *ExxonMobil Corp.*, 696 F.3d 849, 855 (9th Cir. 2012). The State cannot evade that holding.

a. The State principally argues that its claims purportedly challenging appellant's marketing practices do not raise the same concerns as the nuisance and trespass claims in *City of New York* because climate change is merely the "topic" of the challenged marketing. *See* Br. 2, 30, 32. That is a

distinction without a difference. The State's case "hinges on the link between the release of greenhouse gases and the effect those emissions have on the environment generally (and on the [State] in particular)." *City of New York*, 993 F.3d at 97. If it did not, there would be no need to demand redress for the "catastrophic harm" described in the State's complaint. Br. 24; J.A. 51. Nor would the State need to assert that appellant's alleged "campaign of deception has allowed it to continue to inflict decades of avoidable harm on Connecticut's natural environment." J.A. 10. Like the common-law claims at issue in *City of New York*, the State's statutory claims arise under federal common law.

The State responds that it need not prove "the environmental impact—or for that matter any impact—of ExxonMobil's CUTPA violations" in order to establish liability. Br. 27. According to the State (Br. 23-24), such proof is required only to determine the appropriate remedy. That argument is unavailing for two reasons.

First, even if it were true that proof of causation is not required to demonstrate liability under CUTPA, the State requests relief on a scale that would unavoidably regulate emissions. *See City of New York*, 993 F.3d at 93. The State seeks potentially "billions" of dollars from appellant for climate-related harms allegedly driven by global greenhouse-gas emissions. J.A. 43. Monetary relief on that scale "can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *City of New York*, 993 F.3d at 92

(quoting *Kurns* v. *Railroad Friction Products Corp.*, 565 U.S. 625, 637 (2012)). That reality brings the State's claims well within the ambit of federal common law.

The State's rejoinder is that questions of remedy "do not change the law under which the State's claims arise" and thus can be left "for another day." Br. 24. The State cites no authority for that proposition, and this Court squarely rejected it in *City of New York*. *See* 993 F.3d at 91.

Second, the State is incorrect that it need not prove causation or injury in order to establish liability under CUTPA. To the contrary, the State affirmatively argues that it "pleads all three" theories of unfair trade practices under CUTPA, Br. 38; *see* J.A. 46, 50, one of which requires the State to show that appellant's challenged conduct "cause[d] substantial injury to consumers." *See Ulbrich* v. *Groth*, 78 A.3d 76, 100 (Conn. 1992) (citation omitted); *see also McLaughlin Ford Inc.* v. *Ford Motor Co.*, 473 A.2d 1185, 1192 (Conn. 1984); *In re Zyprexa Products Liability Litigation*, Civ. No. 08-955, 2009 WL 1117485, at *2 (E.D.N.Y. Apr. 24, 2009). The State cites Section 42-110m of the Connecticut General Statutes and *Caldor Inc.* v. *Heslin*, 577 A.2d 1009 (Conn. 1990), *see* Br. 22-23, but neither source addresses the role of causation in an action brought by the State under CUTPA. The one provides only that "[p]roof of *public* interest or *public* injury" is not required, Conn. Gen. Stat.

§ 42-110m (emphasis added); the other examined only the lawfulness of a regulation promulgated under CUTPA, *see Caldor*, 577 A.2d at 1013.

b. To avoid the conclusion that federal common law governs the claims here, the State attempts to distinguish *City of New York* on several other grounds. Those attempts fall short.

The State first argues that this case is different because the State brought "an enforcement action in its sovereign capacity," whereas New York City, a non-sovereign, brought its suit under state common-law theories of trespass and nuisance. Br. 29-30. The State fails to explain why that difference is legally relevant.

Two interests animate the federal common law of transboundary emissions: "(i) the 'overriding . . . need for a uniform rule of decision on matters influencing national energy and environmental policy, and (ii) 'basic interests of federalism.' " *City of New York*, 993 F.3d at 91-92 (quoting *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 105 n.6 (1972)). As the United States argued before the Supreme Court in a related climate-change case, the lawsuits seeking the relief sought by the State here "depend[] on alleged injuries . . . caused by emissions from all over the world, and those emissions just can't be subjected to potentially conflicting regulations by every state and city." Oral Arg. Tr. at 31, *BP p.l.c.* v. *Mayor & City Council of Baltimore*, 141 S. Ct. 1523 (2021) (No.

19-1189). An enforcement action by a State in its sovereign capacity contributes to a patchwork of environmental rules at least as much as a rule inferred from state common law, making the need for uniform federal standards all the more pressing.

For a similar reason, the "considerations of comity" the State invokes do not apply to this removal analysis. Br. 14. In *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), where a State had sued to seek a declaration as to the validity of one of its regulations, the Court was "reluctant" to allow removal "unless some clear rule demands it." *Id.* at 21 n.22. But here, those considerations of comity weigh *against* resolving this case in state court under state law, given the States' varying approaches to the issue of climate change. *See City of New York*, 993 F.3d at 93.

The State next notes (Br. 30) that it is bringing statutory consumer-protection claims rather than common-law tort claims. In the State's view, that difference matters because CUTPA claims do not require proof of injury or causation. But that is incorrect for reasons already explained. *See* p. 5, *supra*. The State also points out (Br. 31) that it seeks only equitable relief, whereas New York City sought damages. Putting aside that New York City also sought equitable relief, *see* 993 F.3d at 92 n.5, the State's argument "ignores economic reality." *Id.* at 92. Whether in the form of restitution, disgorgement, compensatory damages, or punitive damages, financially penalizing energy companies

for their promotion and production of fossil fuels is tantamount to regulating cross-border emissions. *See id.* at 93.

Finally on this score, the State argues (Br. 32) that *City of New York* is inapposite because it was brought in federal, not state, court. But in so arguing, the State conflates the second premise of appellant's argument (that claims arising under federal common law can be removed to federal court) with the first (that this case arises under federal common law). In *City of New York*, the Court held that claims seeking redress from climate change "must be brought under federal common law"—a conclusion that holds true independent of the forum in which the claims were brought. 993 F.3d at 95.

c. One amicus argues (NRDC Br. 15) that federal common law does not govern the State's claims because the Clean Air Act displaced the applicable federal common law. But whether a party can obtain a remedy under federal common law is a distinct question from whether federal common law supplies the rule of decision in the first instance. The Supreme Court made this very point in *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661 (1974), reasoning that a claim governed by federal common law arises under federal law for "jurisdictional purposes" even if that claim "may fail at a later stage for a variety of reasons." *Id.* at 675; *accord United States* v. *Standard Oil Co.*, 332 U.S. 301, 310-314 (1947) (holding that federal common law governed the claim but provided no remedy); *City of New York*, 993 F.3d at 95 (similar). The

Supreme Court has long admonished courts and litigants not to "conflate[]" "jurisdiction" and "merits-related determination[s]," *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 511 (2006), but amicus invites this Court to do just that.

2. Addressing the second premise of appellant's argument for removal based on federal common law, the State contends that the well-pleaded complaint rule would bar removal even if federal common law applied. That argument too lacks merit.

a. The State first insists that appellant's federal-common-law argument "is just another way of arguing that [the State's CUTPA claims] are preempted." Br. 24. As appellant has explained, however, federal common law necessarily supplies *the rule of decision* for the State's claims; appellant is not invoking federal common law *as a defense*. *See* Br. 14. Put another way, appellant contends that the nature of the State's claims demands the application of federal common law, such that federal law provides the content of the substantive law on which the State must rely.

Appellant is decidedly not seeking to "eliminate the well-pleaded complaint rule." Br. of Appellee 19. The Supreme Court has repeatedly recognized that claims governed by federal common law arise under federal law for purposes of 28 U.S.C. § 1331. *See National Farmers Union Insurance Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845, 850 & n.7 (1985) (collecting cases). Section 1331 is also the source of the well-pleaded complaint rule, *see*, *e.g.*, *Arditi*

v. *Lighthouse International*, 676 F.3d 294, 298 (2d Cir. 2012), which precludes the exercise of jurisdiction by a district court based on a federal defense. If federal common law merely provided a preemption defense, the claims raised in *National Farmers* and the cases cited therein would not have been a proper basis for jurisdiction. Removal is therefore fully consistent with the well-pleaded complaint rule and its application by the Supreme Court and this Court. *See* Br. of Appellant 26-29.

Citing *Fax Telecommunicaciones Inc.* v. *AT&T*, 138 F.3d 479 (2d Cir. 1998), the State suggests (Br. 21) that this Court must view appellant's arguments based on federal common law through the lens of complete preemption. But this Court said nothing of the sort in *Fax Telecommunicaciones*. Rather, it rejected removal based on an argument that the Federal Communications Act completely preempted the claims at issue. *See* 138 F.3d at 486. Similarly, in *Marcus* v. *AT&T*, 138 F.3d 46 (1998), on which *Fax Telecommunicaiones* relies, this Court concluded that federal common law did not apply at all to the subject matter at issue. *See id.* at 54; *see also* Br. of Appellant 27-28. Here, federal common law plainly applies to lawsuits seeking redress for harm allegedly caused by climate change. *See City of New York*, 993 F.3d at 95.

b. The State also argues (Br. 16-18) that the artful-pleading doctrine does not apply here. Relying on *Beneficial National Bank* v. *Anderson*, 539 U.S. 1 (2003), and *Fracasse* v. *People's United Bank*, 747 F.3d 141 (2d Cir.

2014), the State specifically contends (Br. 15-16, 20) that a state-law claim may be removed only through operation of a federal statute, complete preemption, or the doctrine of jurisdiction articulated in *Grable & Sons Metal Products, Inc.* v. *Darue Engineering & Manufacturing*, 545 U.S. 308 (2005). But neither *Beneficial National Bank* nor *Fracasse* considered the question presented here: namely, whether a putative state-law claim governed by federal common law may be removed to federal court. And in *Beneficial National Bank*, the Court itself made clear that it is incomplete to say "a state claim may be removed to federal court in only two circumstances"; two sentences later, the Court recognized that it had previously permitted the exercise of federal jurisdiction over an Indian tribe's state-law possessory-land claims because the claims were necessarily governed by federal common law. *See* 539 U.S. at 8 & n.4 (citing *Oneida Indian Nation*, 414 U.S. at 667). Indeed, the Court did not even mention removal based on the presence of a substantial federal issue—a longstanding basis for jurisdiction that the Court reaffirmed in *Grable*. *See Grable*, 545 U.S. at 312 (citing *Smith* v. *Kansas City Title & Trust Co.*, 255 U.S. 180 (1921), as the "classic example" of jurisdiction on that ground).

Similarly, in *Republic of Philippines* v. *Marcos*, 806 F.2d 344 (1986), this Court considered a claim potentially arising under federal common law and held that removal was proper. *See id.* at 354. Although the State dismisses the discussion of federal common law as mere dicta (Br. 20), it fails to grapple

with the fact that the Court did not find any obstacle to removal on the basis of federal common law alone. *See* Br. of Appellant 24-25.

The State also argues (Br. 16-17) that, under *Rivet* v. *Regions Bank*, 522 U.S. 470 (1998), and *Romano* v. *Kazacos*, 609 F.3d 512 (2d Cir. 2010), the artful-pleading doctrine applies only in the three situations identified in *Beneficial National Bank* and *Fracasse*. Not so. Although both *Rivet* and *Romano* provide that the artful-pleading doctrine is available when plaintiffs seek to avoid the exceptions to the well-pleaded complaint rule, neither held that those are the only situations in which the doctrine applies. *Cf. Ohio ex rel. Skaggs* v. *Brunner*, 629 F.3d 527, 532 (6th Cir. 2010). To the contrary, several courts of appeals have held that a claim may arise under federal common law for purposes of federal jurisdiction even when the complaint does not explicitly invoke federal common law. *See, e.g.*, *Sam L. Majors Jewelers* v. *ABX, Inc.*, 117 F.3d 922, 926, 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). And, in *Republic of Philippines*, this Court recognized that a claim may arise under federal common law "even though the plaintiff pleads a state cause of action." 806 F.2d at 354. That observation was made in the context of the Court's conclusion that federal common law likely governed the case, not the Court's alternative holding resting on *Grable*-like principles. *See id.*

Application of artful-pleading principles here leads to a sound doctrinal outcome. "[A] plaintiff may not defeat removal by omitting to plead necessary federal questions," *Franchise Tax Board*, 463 U.S. at 22, or "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). The State has pleaded claims that necessarily arise under federal common law, regardless of the state-law labels applied. Removal was therefore proper under 28 U.S.C. §§ 1331 and 1441.

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

This action is also removable under *Grable* because the claims alleged necessarily raise disputed and substantial federal issues. The State's contrary arguments lack merit.

1. Appellant's principal submission is that the State's claims are properly characterized as federal in nature because they are necessarily governed by federal common law. *See* Br. of Appellant 13-23. But as appellant explained in its opening brief (at 30-31), the State's claims would be removable under *Grable* even if viewed as arising under state law, because claims "implicating . . . federal common law" raise "substantial questions of federal law." *Torres* v. *Southern Peru Copper Corp.*, 113 F.3d 540, 542, 543 (5th Cir. 1997). The State offers no response on that point. If anything, the State acknowledges that this Court "correctly anticipated" in *Republic of Philippines*, *supra*, that *Grable* jurisdiction would lie over a claim that necessarily raised an

issue of federal common law. Br. 17. Because the Court has already held that federal common law governs claims seeking redress for alleged climate-related harms, *see City of New York*, 993 F.3d at 95, the State effectively concedes that this Court's precedent supports removal under *Grable*.

2. Aside from federal common law as a basis for removal, the State contends that its CUTPA claims do not necessarily raise a federal issue because those claims "contain no element of federal law and require no determination about 'transboundary pollution.'" Br. 36. The State similarly contends that adjudication of its claims does not require that a state court intrude on federal judgments about energy policy. *See* Br. 37. At bottom, the State argues that *Grable* jurisdiction is unavailable because a state court purportedly need not decide any question of federal law to determine whether appellant is *liable* under CUTPA, even if an analysis of the State's entitlement to its requested relief necessarily implicates federal questions. That argument is deeply misguided.

To begin with, the State unduly narrows the relevant test under *Grable* by insisting that a federal question must be a necessary "element" of a state-law claim. Br. 35. In fact, as the district court recognized, the question is simply whether a state-law claim necessarily raises a "federal issue." J.A. 235 (citing *Gunn* v. *Minton*, 568 U.S. 251, 258 (2013)). This Court's decision in *New York ex rel. Jacobson* v. *Wells Fargo National Bank, N.A.*, 824 F.3d 308,

315 (2016) (cited at Br. of Appellee 35-36), supports only the limited proposition that *one circumstance* in which a state-law claim "necessarily raises federal questions" is when the claim is premised on the violation of federal law.

Here, a Connecticut state court would have to confront issues of federal law to assess CUTPA liability, on the allegations as pleaded. The State's claim that appellant has engaged in "unfair" trade practices is illustrative. *See* J.A. 45-46, 49-50. The State alleges that what makes appellant's challenged activities "immoral, unethical, oppressive and/or unscrupulous" is that appellant allegedly deceived consumers about what the State considers the unqualifiedly "catastrophic" effects of "burning fossil fuels" and "undermin[ed] and delay[ed] the creation of alternative technologies" that "could have avoided the most devastating effects of climate change." J.A. 46; *see* J.A. 49-50.

In substance, the State is thus asking a Connecticut state court to accept the State's particular theory of the optimal policy outcome: namely, that society should have drastically reduced fossil-fuel consumption and committed instead to hypothetical "alternative technologies." That theory, however, necessarily rests on a cost-benefit analysis about the use of fossil fuels. Similarly, another of the State's theories of unfairness—that appellant's alleged conduct substantially injured consumers—also requires a court to accept that appellant's promotion and production of fossil fuels was "not outweighed by any countervailing benefits." J.A. 46.

As this Court held in *City of New York*, however, any analysis of the appropriate level of greenhouse-gas emissions requires balancing "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." 993 F.3d at 93. That balancing project is properly reserved to the federal government, not a Connecticut state court. What is more, the federal government has already engaged in that balancing over the years and made a judgment that fossil-fuel production is critical to the national interest. That is why the federal government "affirmatively promotes fossil fuel use in a host of ways." *Juliana* v. *United States*, 947 F.3d 1159, 1167 & n.4 (9th Cir. 2020); *see also* Br. of Appellant 33.

By contrast, the State's theories of both liability and relief rest on the premise that fossil-fuel demand is higher than appropriate and that global greenhouse-gas emissions from fossil-fuel combustion have caused Connecticut climate-related injuries. *See* J.A. 10, 14. This lawsuit is a transparent effort to alter the status quo by imposing a liability rule for conduct that allegedly results in excessive greenhouse-gas emissions. Because the State's lawsuit plainly seeks to reduce fossil-fuel demand and greenhouse-gas emissions, it necessarily raises questions about whether such lawsuits are compatible with federal policy judgments. And *Grable* permits federal courts to exercise

jurisdiction over claims like the State's 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).

3. The State argues (Br. 42) that no federal issues are actually disputed. In so doing, however, the State merely reverts to its argument that its claims "will not implicate issues of transboundary pollution nor mostly preempted federal environmental common law." *Id.* As already explained, that is incorrect. *See* pp. 13-17, *supra*.

4. Relying heavily on the Ninth Circuit's decision in *City of Oakland* v. *BP p.l.c.*, 969 F.3d 895 (2020), *cert. denied*, 141 S. Ct. 2776 (2021), the State next argues (Br. 39-41) that the federal issues implicated here are not "substantial" because they are "fact-bound" and "situation-specific." But the issues in this case are indeed "important," as the State concedes (Br. 41), including "to the federal system as a whole," *Gunn*, 568 U.S. at 260. And the Ninth Circuit's *Grable* analysis is erroneous because it ignores two key points.

First, when "federal common law alone governs" a disputed issue in a case, "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).

Second, the federal government has a direct interest in this litigation because "subjecting [appellant's] global operations to a welter of different states' laws could undermine important federal policy choices." *City of New York*, 993 F.3d at 93. The sweeping nature of the State's claims also takes them far beyond the realm of ordinary consumer-protection law, raising the question whether a State can extend its law beyond its borders to hold energy companies liable for harms allegedly caused by global climate change. *See id.* at 98-100. That question of federalism is alone important to the federal system. In addition, nearly two dozen similar lawsuits are pending in federal courts across the Nation, each squarely implicating the federal government's balance between energy production and environmental protection. And because federal common law governs such claims, courts will need to determine the appropriate uniform federal rules to be applied.

The State responds (Br. 42) by asserting that appellant is simply recycling theories of removal that apply to the climate-change cases raising tort claims and not to this case, which raises consumer-protection claims. That is incorrect. As it does throughout its brief, the State refuses to account for the fact that it—like other plaintiffs across the country—is seeking monetary recovery from private actors in order to remedy alleged harms stemming from a global environmental phenomenon. That fact (among others) unifies the jurisdictional analysis in the relevant climate lawsuits.

5. The State worries (Br. 43) that exercising jurisdiction in cases such as this one will disrupt the federal-state balance. To support that argument, it cites the saving clause in the Federal Trade Commission Act, arguing that Congress intended States to retain jurisdiction over certain consumer-protection claims. *See* 15 U.S.C. § 57b. But the saving clause hardly shows that Congress intended for state law to apply to actions seeking redress for harms caused by interstate emissions. Nor does the Clean Air Act "authorize the type of state-law claims the [State] seeks to prosecute." *City of New York*, 993 F.3d at 99; *see* Br. of Appellee 42. Because this case satisfies all of the criteria for removal under *Grable*, the district court erred by remanding it to state court.

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

The federal-officer removal statute provides another source of jurisdiction over the State's claims. *See* 28 U.S.C. § 1442(a)(1). The State contends otherwise, but its arguments are unpersuasive.

1. 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. In particular, appellant has performed critical functions for the military and engaged in exploration and development activities on

federal lands under federal direction, oversight, and control. *See* J.A. 83. The State's objections to what it characterizes as the three overarching categories of federally directed activity lack merit.

a. The State argues that the federal government's control over appellant when the company supported wartime efforts or supplied the military with specialty fuels "does not constitute" the "intense oversight or special agency relationship" required to satisfy the acting-under requirement. Br. 49. That position is at odds with the historical record. Appellant has put forth extensive evidence of the federal government's close direction of its fuel production beginning during World War II and lasting through the present. *See* J.A. 87-90. And the State fails to explain why the mere fact that appellant was not a party in *United States* v. *Shell Oil Co.*, 294 F.3d 1045 (9th Cir. 2002), detracts from the Ninth Circuit's accurate description of the federal government's "significant control" over the production of aviation fuel during World War II. *Id.* at 1049; *see* Br. of Appellee 47-48. Plainly, appellant and other oil companies did more than "develop[] a product and s[ell] it" to the federal government. Br. of Appellee 48; *see Exxon Mobil Corp.* v. *United States*, Civ. No. 10-2386, 2020 WL 5573048, at *30 (S.D. Tex. Sept. 16, 2020).

The State claims that the multiple agencies established to oversee production of aviation gas were "merely strict federal regulators." Br. 49. That is incorrect for reasons appellant explained in its opening brief (at 38-39). To

repeat just one example, the Petroleum Administration for War "made policy determinations regarding the construction of new facilities and allocation of raw materials, and had the authority to issue production orders to refineries." *Shell Oil Co.*, 294 F.3d at 1049. Appellant acted under close federal direction, and this Court can safely disregard the State's hyperbolic assertion that every company that merely "adjusted its production" to contribute to wartime efforts could satisfy the "acting under" prong. Br. 49.

The State also suggests (Br. 47, 50) that appellant must provide record evidence to support its contention that it has acted under the direction of federal officers in support of the military. But the case is at the pleading stage, where a removing defendant need only file a notice of removal "containing a short and plain statement of the grounds for removal." 28 U.S.C. § 1446(a). The Supreme Court has recognized that Congress intended to "simplify the pleading requirements for removal" and that courts should "apply the same liberal rules to removal allegations that are applied to other matters of pleading." *Dart Cherokee Basin Operating Co., LLC*, v. *Owens*, 574 U.S. 81, 87 (2014) (internal quotation marks omitted). And relying on that guidance, in *Betzner* v. *Boeing Co.*, 910 F.3d 1010 (2018), the Seventh Circuit took pains to "correct[] the district court's misimpression that [the defendant] was initially required to submit evidence to support its notice of removal." *Id.* at 1014. Appellant has easily met its pleading burden here. *See* J.A. 86-98.

b. The State contends (Br. 50-51) that appellant was not acting under federal direction through its operations on the outer continental shelf. The State offers no argument on this point except to point to non-controlling and incorrectly decided decisions; missing from the State's brief is any acknowledgment of the obligations imposed by the federal government on appellant during its participation in the decades-long leasing program on the shelf. *See* Br. of Appellant 39-40. Far from merely "mirror[ing] regulatory requirements," Br. of Appellee 50, the leases afford the federal government significant control over lessees. J.A. 91.

c. The State contests the relevance of appellant's work as an operator and lessee of the Strategic Petroleum Reserve. In conclusory fashion, the State asserts that appellant merely engaged in "arm's-length transactions" to secure the "profitable privilege of conducting oil exploration and production on valuable government-owned land." Br. 50-51. The State ignores the fact that appellant is subject to federal control insofar as it is obligated to pay royalties in the form of oil to the federal government. *See* J.A. 96-97. By fulfilling that requirement, appellant functions as a private contractor helping "the [g]overnment to produce an item that it needs." *Baker* v. *Atlantic Richfield Co.*, 962 F.3d 937, 942 (7th Cir. 2020) (citation omitted).

2. The State next contends (Br. 52-58) that appellant has not established the requisite connection between the challenged conduct and appellant's

actions taken under federal direction. The Removal Clarification Act of 2011 amended the statutory text of the federal-officer removal statute to permit removal of lawsuits "for *or relating to*" a federally directed action. Pub. L. No. 112-51, § 2(b)(1)(A), 125 Stat. 545 (emphasis added). The State argues, however, the amendment was merely intended to "clarify what *type* of proceeding qualifies for federal officer removal," Br. 53, and did not substantively modify the nexus requirement in this circuit, *see* Br. 55-56. The State's argument flies in the face of the statute's plain language and decisions interpreting it.

Contrary to the State's assertion (Br. 54), four courts of appeals have held that the amended statutory language materially "broadened 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 Baker*, 962 F.3d at 943-944; *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). In so holding, the Third Circuit specifically distinguished this Court's decision in *Isaacson* v. *Dow Chemical Co.*, 517 F.3d 129 (2d Cir. 2008)—on which the State doggedly relies (Br. 55-56)—because it predated the Removal Clarification Act. *See In re Commonwealth*, 790 F.3d at 471. And while the State notes (Br. 56) that this Court has "reiterated" *Isaacson*'s standards even after 2011, none of the three cases it cites addresses the

effect of the 2011 amendments on *Isaacson*'s holding—an unsurprising fact, given that the parties in those cases did not raise that issue in their briefing. *See Agyin* v. *Razmzan*, 986 F.3d 168 (2d Cir. 2021); *Veneruso* v. *Mount Vernon Neighborhood Health Center*, 586 Fed. Appx. 604 (2d Cir. 2014) (summary order); *Badilla* v. *Midwest Air Traffic Control Service, Inc.*, 8 F.4th 105 (2d Cir. 2021).

The Fifth Circuit also convincingly rejected the "counterintuitive" interpretation of the Removal Clarification Act the State advances here. *See Latiolais*, 951 F.3d at 293. Like the State here, the plaintiff there argued that the "relating to" language simply identified additional types of proceedings subject to removal, given that the language was introduced in a subsection entitled "Conforming Amendments." *Id.* The Fifth Circuit identified "several reasons" that such an interpretation was "untenable, " chief among them that "an act's subsection title cannot defeat the ordinary meaning of the statutory text it amends." *Id.* The Fifth Circuit also rejected the suggestion made by the State here that reading the "or relating to" language as broadening the statute's nexus requirement would "drastically change[]" the statute's scope for the first time in two centuries. Br. 53. In fact, the court observed, "Congress had consistently broadened the statute before 2011." *Latiolais*, 951 F.3d at 295.

Under the statute's plain language, appellant need not demonstrate that its actions "occurred because of what [it was] asked to do by the Government." Br. of Appellee 56 (emphasis omitted). Appellant need only demonstrate that the alleged conduct "relate[s] to" an act under color of federal office; a mere association will suffice. 28 U.S.C. § 1442(a)(1). "[T]he ordinary meaning of the words 'relating to' is a broad one—'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with.'" *Latiolais*, 951 F.3d at 292 (alterations omitted) (quoting *Morales* v. *Trans World Airlines Inc.*, 504 U.S. 374, 383 (1992)); *see also Sawyer*, 860 F.3d at 258. And "whether the challenged act was outside the scope of [d]efendants' official duties, or whether it was specifically directed by the federal [g]overnment, is one for the federal—not state—courts to answer." *Baker*, 962 F.3d at 945 (citation omitted).

Appellant easily clears the low bar erected by the Removal Clarification Act. The complaint alleges that appellant's worldwide supply of fossil fuels caused the alleged injuries here. *See* J.A. 11. And that supply of fossil fuels necessarily encompasses the fossil fuel produced by appellant at the direction of the federal government and under federal control for decades. *See* Br. of Appellant 41-42. The district court erred by concluding otherwise.

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

This case is also removable under the Outer Continental Shelf Lands Act (OCSLA). *See* 43 U.S.C. § 1349(b). The State does not dispute that appellant has explored and recovered oil and gas on the outer continental shelf for decades. *See* Br. of Appellee 49-50, 59; J.A. 101-102. And the State confirms that it seeks recovery for the allegedly "catastrophic" climate-related harm Connecticut has experienced. Br. 24. Because the State's claimed climate-change injuries allegedly arise from fossil-fuel extraction and production—which occurs in part through appellant's operations on the outer continental shelf—jurisdiction lies under OCSLA.

The State first responds by attacking a strawman, contending that appellant's marketing practices are not "operation[s]" within the meaning of OCSLA. Br. 59. That proposition is both self-evident and beside the point. The complaint alleges that appellant's challenged statements and omissions are problematic precisely because they allegedly led to increased *production* of oil and gas—which occurs in significant part on the outer continental shelf. *See* pp. 3-5, *supra*. Because appellant's fossil-fuel production occurs in part on the outer continental shelf, the State necessarily puts the company's operations on the shelf in play.

The State also contends (Br. 57-58) that appellant has failed to establish a sufficient causal connection between the State's claims and appellant's

operations on the outer continental shelf. But the required connection is not nearly as onerous as the State suggests. OCSLA grants federal courts jurisdiction over all actions "arising out of, or in connection with," operations on the shelf. 43 U.S.C. § 1349(b)(1). That language creates "broad" jurisdiction, *see Baker* v. *Hercules Offshore, Inc.*, 713 F.3d 208, 213 (5th Cir. 2013)—a point the State does not dispute, *see* Br. 58-60—and Congress "intended" for it to "extend[] to the entire range of legal disputes that it knew would arise relating to resource development" on the shelf, *Laredo Offshore Constructors, Inc.* v. *Hunt Oil Co.*, 754 F.2d 1223, 1228 (5th Cir. 1985).

The State contends (Br. 59-60) that jurisdiction does not lie under OCSLA because its claims are based on appellant's alleged misinformation campaign rather than its fossil-fuel production. But as already explained, the sprawling relief the State requests belies that characterization. *See* pp. 3-6, *supra*. In substance, the State is alleging that appellant's production of fossil fuels to meet consumer demand—production that occurs in part on the outer continental shelf—is a "but for" cause of the State's climate-related injuries. *See Tennessee Gas Pipeline* v. *Houston Casualty Insurance Co.*, 87 F.3d 150, 155 (5th Cir. 1996). While appellant disputes that contention, federal jurisdiction is present under that theory as alleged.

It is no response to assert that the State need not show causation or injury in order to establish liability under CUTPA. *See* Br. of Appellee 60. Not

only is that wrong as a matter of law, *see* p. 5, *supra*; the State's requested relief also reveals exactly why OCSLA jurisdiction is appropriate here and furthers Congress's objectives. 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, comes within OCSLA's "grant of federal jurisdiction." *Amoco Production Co.* v. *Sea Robin Pipeline Co.*, 844 F.2d 1202, 1210 (5th Cir. 1988). The State refuses to acknowledge that point. Yet it seeks to impose massive financial penalties on appellant for its promotion and production of fossil-fuel products. Common sense and basic economics dictate that imposing such penalties—whether labeled restitution, disgorgement, or damages—would affect the recovery of fossil fuels from the shelf. Indeed, the whole point of this lawsuit and similar ones is to discourage the development and production of fossil fuels. *See* J.A. 53-57. Removal was therefore proper under OCSLA.

* * * * *

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

Respectfully submitted,

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NOVEMBER 15, 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 Reply Brief of Appellant Exxon Mobil Corporation is proportionately spaced, has a typeface of 14 points or more, and contains 6,689 words.

NOVEMBER 15, 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 November 15, 2021, the attached Reply 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.

/s/ Kannon K. Shanmugam
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