

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

DISTRICT OF COLUMBIA,

Plaintiff,

v.

EXXON MOBIL CORP., EXXONMOBIL
OIL CORPORATION, ROYAL DUTCH
SHELL PLC, SHELL OIL COMPANY, BP
P.L.C., BP AMERICA INC., CHEVRON
CORPORATION, CHEVRON U.S.A. INC.,

Defendants.

No. 1:20-cv-01932-TJK

**DEFENDANTS' RESPONSE TO THE ATTORNEY GENERAL'S
NOTICE OF SUPPLEMENTAL AUTHORITY**

Defendants write in response to the Attorney General's notice of supplemental authority (ECF No. 97) regarding *Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.) Inc.*, No. 19-1330, 2022 WL 363986 (10th Cir. Feb. 8, 2022) ("Op.").¹ Contrary to the Attorney General's assertions, *Boulder County* does not undermine federal jurisdiction in this action.

First, the Tenth Circuit erred by rejecting removal jurisdiction based on the application of federal common law. The Tenth Circuit conflated the artful-pleading doctrine with complete preemption and therefore focused exclusively on "congressional intent." Op. at 10, 13. But the artful-pleading doctrine is not limited to whether Congress chooses to preempt state-law claims. Here, our *constitutional structure* renders the Attorney General's interstate-emissions claims

¹ By filing this response, Defendants do not waive any right, defense, affirmative defense, or objection, including any challenges to personal jurisdiction over Defendants.

exclusively federal in nature. “As a matter of constitutional structure,” federal law exclusively governs claims like the Attorney General’s which implicate “‘uniquely federal interests’ that make it ‘inappropriate for state law to control.’” ECF No. 51 at 15 (quoting *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640-41 (1981)). As the Second Circuit explained, these claims “must be brought under federal common law” because they cross state and national boundaries, and “a federal rule of decision is necessary to protect uniquely federal interests.” *City of New York v. Chevron Corp.*, 993 F.3d 81 90, 95 (2d Cir. 2021); *see id.* at 91 (confirming that federal common law governs suits like the Attorney General’s “seeking to recover damages for the harms caused by greenhouse gas emissions”).

Second, removal is independently proper under *Grable* because “federal common law alone governs” the Attorney General’s claims. *Battle v. Seibels Bruce Ins. Co.*, 288 F.3d 596, 607 (4th Cir. 2002). The Tenth Circuit did not consider this argument.

Third, the Tenth Circuit’s federal enclave analysis considered only the location of plaintiffs’ injuries, and not the other grounds raised here. *See Op.* at 21-22. Here, federal enclave jurisdiction is warranted because the Attorney General seeks to hold Defendants liable for, among other things: (i) selling their products on federal enclaves, including within the District of Columbia; and (ii) producing oil and gas around the world, including on various federal enclaves. *See ECF No. 51 at 29-31.*

Fourth, the Tenth Circuit confirmed that federal officer jurisdiction is satisfied where a defendant “produce[s] essential government products,” of which “[w]artime production” is “the paradigmatic example.” *Op.* at 6. That standard is easily met here. Federal officers “extensively supervised and controlled Defendants’ production of fossil fuels and development of specialized military products in support of multiple war efforts.” ECF No. 51 at 35; *see id.* at 34-46. This

evidence was not before the Tenth Circuit, where removal was premised solely on ExxonMobil's leases on the Outer Continental Shelf ("OCS"). *See* Op. at 4-8.

Fifth, the *Boulder County* court erred in interpreting the Outer Continental Shelf Lands Act's "in connection with" prong as requiring "but-for" causation, Op. at 22-24. *See Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017, 1026 (2021). In any event, "but for" causation is satisfied here because the Attorney General alleges injury based on the cumulative impact of Defendants' global extraction and production activities over the past several decades. *See, e.g.*, ECF No. 1-14 ¶¶ 97, 137, 149. Indeed, the Attorney General alleges a direct connection—that "Defendants' deception has . . . enabled the unabated and expanded extraction [and] production" of fossil fuels resulting in the purported harm. *Id.* ¶ 2. That necessarily sweeps in Defendants' significant activities on the OCS.

Sixth, *Boulder County* did not involve removal under the Class Action Fairness Act, or pursuant to diversity jurisdiction. The Tenth Circuit's decision, therefore, has no bearing on those bases for removal.

Finally, Defendants believe that oral argument on the motion to remand could assist the Court in deciding the issues raised in the parties' briefing, and Defendants are available to have oral argument if the Court believes it would be useful.

DATE: March 1, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on March 1, 2022, I caused the foregoing Response to Plaintiff's Notice of Supplemental Authority to be electronically filed using the Court's CM/ECF system, and service was effected electronically pursuant to Local Rule 5.3 to all counsel of record.

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