

UNITED STATES DISTRICT COURT  
DISTRICT OF VERMONT

STATE OF VERMONT,

Plaintiff,

v.

EXXON MOBIL CORPORATION,  
EXXONMOBIL OIL CORPORATION, ROYAL  
DUTCH SHELL PLC, SHELL OIL COMPANY,  
SHELL OIL PRODUCTS COMPANY LLC,  
MOTIVA ENTERPRISES LLC, SUNOCO LP,  
SUNOCO LLC, ETC SUNOCO HOLDINGS LLC,  
ENERGY TRANSFER (R&M) LLC, ENERGY  
TRANSFER LP, and CITGO PETROLEUM  
CORPORATION,

Defendants.

Case No. 2:21-cv-260-wks

**DEFENDANTS' RESPONSE TO PLAINTIFF'S  
NOTICE OF SUPPLEMENTAL AUTHORITY**

Defendants write in response to the Attorney General's notice of supplemental authority regarding the Fourth Circuit's decision in *Mayor & City Council of Baltimore v. BP P.L.C.*, No. 19-1644, 2022 WL 1039685 (4th Cir. Apr. 7, 2022).<sup>1</sup> This decision is contrary to the Second Circuit's controlling decision in *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021), and is not persuasive for the reasons described below. Indeed, the *Baltimore* defendants intend to file a petition for rehearing *en banc* and, depending on the outcome of that petition, a petition for a writ of certiorari seeking the United States Supreme Court's review of the Fourth Circuit's decision.

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

*First*, the Fourth Circuit expressly rejected the Second Circuit’s controlling decision in *City of New York*, which held that federal common law governs suits “seeking to recover damages for the harms caused by greenhouse gas emissions.” 993 F.3d at 91. By contrast, the Fourth Circuit saw “no reason to fashion any federal common law for Defendants.” *Baltimore*, 2022 WL 1039685, at \*7. The Fourth Circuit purported to distinguish *City of New York* on the ground that it involved “a completely different procedural posture” because that case had not been initially brought in a state court. *Id.* But that is not a pertinent distinction. The question is whether federal common law governs a plaintiff’s putative state-law claims—a plaintiff cannot avoid that question by simply filing a complaint in a state court. *See Treiber & Straub, Inc. v. UPS, Inc.*, 474 F.3d 379, 384 (7th Cir. 2007); *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 929 (5th Cir. 1997).

The Fourth Circuit also incorrectly held that jurisdiction did not lie because the Clean Air Act had displaced the federal common law of interstate pollution. That reasoning conflates the merits of the claims with the Court’s jurisdiction. As *City of New York* illustrates, although the Clean Air Act may displace any remedy under federal common law, it does not displace the entire source of law altogether. *See* 993 F.3d at 95 & n.7. Accordingly, whether a party can obtain a remedy under federal common law is a *merits* question distinct from the *jurisdictional* question of whether federal common law supplies the rule of decision in the first instance. *See Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 675 (1974). As the Second Circuit explained, displacement of federal common law by a legislative standard under the Clean Air Act does not render state law “competent to address” disputes concerning interstate pollution. *City of New York*, 993 F.3d at 98. Indeed, such a result would be “too strange to seriously contemplate.” *Id.* at 99.

The Attorney General’s Complaint here asserts injuries supposedly caused by Defendants’ production, promotion, and sale of fossil fuels, based on greenhouse gases created when those

fuels are consumed. Accordingly, based on the Second Circuit’s binding decision in *City of New York*, the Attorney General’s claims, like those in *City of New York*, are governed by federal common law.

*Second*, the Fourth Circuit declined to exercise *Grable* jurisdiction because it concluded that none of the City of Baltimore’s claims “invoke federal law as a necessary requirement for imposing liability upon Defendants.” 2022 WL 1039685, at \*12. But Defendants’ liability for alleged deception here turns on questions about fossil fuel production, federal fuel economy and environmental standards, and alternative energy sources under review by the federal government, all of which necessarily implicate questions of federal law. *See* ECF No. 51 at 24–29.

*Third*, *Baltimore* confirms that federal officer jurisdiction is satisfied where a defendant fulfills “the terms of a contractual agreement by providing the Government with a product that it used to help conduct a war.” 2022 WL 1039685, at \*27. The Tenth Circuit also recently concluded that “[w]artime production is the paradigmatic example” of “closely supervised work” under the direction of federal officers. *Bd. of Cnty. Comm’rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238, 1253 (10th Cir. 2022). Here, Defendants have demonstrated that they “‘carry out’ the duties of the federal government under the government’s supervision and control, including as federal contractors,” and that these duties have supported the military during numerous wars. ECF No. 51 at 32. They also demonstrated that they “performed [production activities] under the supervision of the federal government,” citing “numerous instances in which the federal government subjected Defendants to exacting standards and scrutiny, directing not just *what* Defendants would do for the government, but *how* they were required to do it.” *Id.* at 33–34. This evidence was not before the Fourth Circuit which, like the Tenth Circuit before it,

considered a more limited record. *Baltimore*, 2022 WL 1039685, at \*28; *Boulder*, 25 F.4th at 1253.

The Fourth Circuit also held that oil and gas production under the direction of federal officers was not sufficiently related to the City of Baltimore’s claims because the federal government did not control “the production and sale of *all* fossil-fuel products.” 2022 WL 1039685, at \*32. But the *degree* to which the claims are predicated on Defendants’ production of oil and gas under the direction of federal officers is a *merits* question for a federal court to decide. *See Baker v. Atl. Richfield Co.*, 962 F.3d 937, 941, 944 (7th Cir. 2020); *see also id.* at 945 n.3 (finding that the determination of the source of the alleged injury “is just another example of a difficult causation question that a federal court should be the one to resolve”).

*Fourth*, the Fourth Circuit’s federal enclave analysis is incorrect. Federal jurisdiction is warranted because the action arises out of Defendants’ fossil fuel production and promotional activities on federal enclaves, including those taking place within federal enclaves such as the Marsh-Billings-Rockefeller National Park, the Green Mountain National Forest, and ports of entry along the border with Canada. *See* ECF No. 51 at 42–43. The Attorney General cannot evade federal jurisdiction by attempting to disclaim relief for any injuries suffered on federal enclaves. *See Machnik v. Buffalo Pumps Inc.*, 506 F. Supp. 2d 99, 103 n.1 (D. Conn. 2007).

*Fifth*, the Fourth Circuit held that the Outer Continental Shelf Lands Act’s jurisdictional language requires “but-for” causation. 2022 WL 1039685, at \*21. Even if that heightened standard applied here—and Defendants have shown it does not (*see* ECF No. 51 at 40–41)—the Attorney General’s own Complaint alleges a *direct* connection, e.g., “the development, production, refining, and use of their fossil fuel products . . . *increases* greenhouse gas emissions and is a leading cause of global warming; and that the continued use of these products will cause

catastrophic effects on the environment if unabated.” Compl. ¶ 118 (emphasis in original). That challenged conduct necessarily sweeps in Defendants’ significant oil extraction activities on the Outer Continental Shelf.

*Finally*, unlike here, *Baltimore* did not involve removal based on diversity jurisdiction. The Fourth Circuit’s decision therefore has no bearing on this independent basis for removal.

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Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that, on April 27, 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 to all counsel of record.

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