No. 19-1644

In the United States Court of Appeals for the Fourth Circuit

MAYOR AND CITY COUNCIL OF BALTIMORE,
PLAINTIFF-APPELLEE

v.

BP P.L.C.; BP AMERICA, INC.; BP PRODUCTS NORTH AMERICA, INC.; CROWN CENTRAL LLC; CROWN CENTRAL NEW HOLDINGS LLC; CHEVRON CORP.; CHEVRON U.S.A. INC.; EXXON MOBIL CORP.; EXXONMOBIL OIL CORPORATION; CITGO PETROLEUM CORP.; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66; MARATHON OIL COMPANY; MARATHON OIL CORPORATION; MARATHON PETROLEUM CORPORATION; SPEEDWAY LLC; HESS CORP.; CNX RESOURCES CORPORATION; CONSOL ENERGY, INC.; CONSOL MARINE TERMINALS LLC; SHELL PLC; SHELL USA, INC., DEFENDANTS-APPELLANTS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND (CIV. NO. 18-2357) (THE HONORABLE ELLEN L. HOLLANDER, J.)

PETITION FOR REHEARING EN BANC

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INTRODUCTION

A group of state and local governments have filed over two dozen lawsuits in various jurisdictions against energy companies for injuries allegedly caused by global climate change. In this case, the municipal government of Baltimore, Maryland, alleges that defendants are liable for such harms because their production, sale, and promotion of fossil fuels around the world resulted in increased greenhouse-gas emissions that exacerbated climate change. Defendants removed the case from state to federal court on several grounds, including that federal law necessarily and exclusively governs claims seeking redress for injuries allegedly caused by interstate emissions. After the Supreme Court vacated the panel's earlier decision affirming the remand of the case, the case is once again before this Court.

As a matter of constitutional structure, plaintiff's claims arise under federal law because they seek redress for harms allegedly caused by interstate emissions. In a case involving materially similar claims against some of the same defendants, the Second Circuit relied on longstanding Supreme Court precedent applying "federal law to disputes involving interstate air or water pollution" to hold that claims seeking redress for injuries allegedly caused by interstate emissions "must be brought under federal common law." *City of New York* v. *Chevron Corp.*, 993 F.3d 81, 91, 95 (2021). In the panel's most recent decision here, however, it once again affirmed the order remanding this

case to state court. It expressly declined to follow the Second Circuit's decision and recognize a "federal rule of decision" to govern plaintiff's claims. Op. 25. And it further held that, even if federal common law necessarily and exclusively governed, the well-pleaded complaint rule prevented removal. *Id.*

The panel's decision in this case squarely conflicts with the Second Circuit's decision, and it is irreconcilable with the Supreme Court's decisions regarding the application of federal common law to controversies concerning interstate pollution. The panel's application of the well-pleaded complaint rule also conflicts with two earlier published decisions of this Court, which remain good law and were binding on the panel. This is a case of enormous importance, and it cries out for rehearing by the full Court.

STATEMENT OF THE CASE

1. In 2017, a number of state and local governments began filing lawsuits against various energy companies, alleging that the companies' production, sale, and promotion of fossil fuels caused injury by leading to an increased amount of greenhouse gases in the atmosphere and thereby contributing to global climate change. The state and local governments seek compensation for injuries allegedly caused by the cumulative impact of worldwide fossil-fuel emissions.

One of the first plaintiffs was the City of New York, which filed suit directly in federal court based on diversity jurisdiction, asserting putative state-

law nuisance and trespass claims. The district court dismissed the complaint for failure to state a claim, and the Second Circuit affirmed. *See City of New York* v. *Chevron Corp.*, 993 F.3d 81 (2021). Following the Supreme Court's "mostly unbroken string of cases" from "over a century" applying "federal law to disputes involving interstate air or water pollution," *id.* at 91, the Second Circuit concluded that federal common law necessarily governs claims seeking redress for injuries allegedly caused by the contribution of global greenhouse-gas emissions to climate change. *See id.* at 89-95. It then applied Supreme Court precedent to hold that the Clean Air Act and principles of extraterritoriality precluded any remedy otherwise available under federal common law. *See id.* at 95-103. The Second Circuit rejected the notion that statutory displacement of a federal-common-law remedy allowed state law to "snap back into action." *Id.* at 98.

Similar cases were filed in various state courts, and the defendants removed them to federal court on the ground (among others) that federal-question jurisdiction is present under 28 U.S.C. § 1331 because federal law necessarily and exclusively governs claims seeking redress for injuries allegedly resulting from global climate change. Aside from the panel's decision in this case, two courts of appeals declined to permit removal on that basis. *See County of San Mateo* v. *Chevron Corp.*, No. 18-15499, 2022 WL 1151275, at *4-*6 (9th Cir. Apr. 19, 2022); *City of Oakland* v. *BP plc*, 969 F.3d 895, 906-907

(9th Cir. 2020), *cert. denied*, 141 S. Ct. 2776 (2021); *Board of County Commissioners* v. *Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238, 1257-1262 (10th Cir. 2022). The issue is pending in three other courts of appeals as a matter of first impression. *See Rhode Island* v. *Shell Oil Products Co.*, No. 19-1818 (1st Cir.); *City of Hoboken* v. *Exxon Mobil Corp.*, No. 21-2728 (3d Cir.); *Delaware* v. *BP America Inc.*, No. 22-1096 (3d Cir.); *Minnesota* v. *American Petroleum Institute*, No. 21-1752 (8th Cir.).

2. Defendants in this case are 23 domestic and foreign energy companies that produce or sell fossil fuels (or allegedly have done so through subsidiaries or affiliates). Plaintiff is the municipal government of Baltimore. In 2018, plaintiff filed a complaint in Maryland state court, alleging that defendants had engaged in conduct that increased global greenhouse-gas emissions and thereby contributed to global climate change. As did the plaintiff in *City of New York*, plaintiff here asserts claims for nuisance and trespass, among other legal theories. Plaintiff seeks damages for the alleged effects of climate change, as well as an order requiring defendants to "abate[]" the "nuisances" their activities allegedly created. J.A. 149-172, 182.

Defendants removed this action to federal court, asserting (among other grounds) that federal-question jurisdiction exists because federal law necessarily and exclusively governs plaintiff's claims. J.A. 185-191. Defendants also argued that the federal-officer removal statute permits removal. J.A. 211-217;

see 28 U.S.C. § 1442. The district court remanded the case to state court based on a lack of subject-matter jurisdiction. J.A. 330-375.

The panel affirmed the district court's remand order. 952 F.3d 452 (2020). The panel first addressed the "threshold question" of appellate jurisdiction, concluding that 28 U.S.C. § 1447(d) limited its review to the federal-officer ground for removal. 952 F.3d at 458. The panel then concluded that the case was not removable on that ground. *Id.* at 471. Defendants sought certiorari from the Supreme Court, which granted review and held that Section 1447(d) permits appellate review of all grounds for removal in a case removed in part on federal-officer grounds. *See* 141 S. Ct. 1532, 1543 (2021). The Supreme Court vacated this Court's earlier judgment and remanded the case for this Court to consider defendants' remaining grounds for removal. *See id.*

3. On remand, the panel again affirmed. At the outset, the panel recognized that plaintiff's claims seek redress for harms allegedly caused by the contribution of transboundary emissions to global climate change. As the panel explained, the complaint is premised on the theory that defendants engaged in actions that "substantially contributed to greenhouse gas pollution, global warming, and climate change" by having "individually and collectively *manufactured*, *promoted*, *marketed*, *and sold* a substantial percentage of all fossil-fuel products ultimately used and combusted." Op. 7-8 (citation and alteration omitted). In the panel's words, plaintiff "seeks to shift the burden of

its climate-change costs onto [d]efendants," Op. 9, by obtaining redress for "sea level rise and associated impacts, increased frequency and severity of extreme precipitation events, increased frequency and severity of drought, increased frequency and severity of heat waves and extreme temperatures, and consequent social and economic injuries associated with those physical and environmental changes." Op. 8 (alteration omitted) (quoting J.A. 140-141).

The panel nevertheless declined to hold that federal common law governs plaintiff's claims. The panel began its analysis by setting forth "two strict conditions" that it understood must be satisfied before it could create a "new federal rule of decision": namely, the presence of a "uniquely federal interest[]" and a "significant conflict" between that interest and the application of state law. Op. 19, 25. But instead of "immediately proceed[ing] to the [Supreme] Court's authorities dealing with global warming and interstate pollution," the panel "deem[ed] it prudent" to apply the test for determining whether to extend federal common law to a new area. Op. 21. The panel faulted defendants for relying on the Supreme Court's decisions regarding interstate pollution, holding that defendants had waived any argument that federal common law applies by failing independently to "establish a significant conflict between [plaintiff's] state-law claims" and any "federal interests." Op. 22. The panel further held that the absence of any identified conflict "substantively precludes the creation of federal common law." *Id.*

The panel expressly declined to follow the Second Circuit's decision in *City of New York*, reasoning that the decision arose in a different procedural posture and "suffers from the same legal flaw as [d]efendants' arguments": namely, that it "fails to explain a significant conflict between the state-law claims before it and the federal interests at stake." Op. 23-24. The panel acknowledged, however, that the Second Circuit identified the federal interests of "federalism"; "the need for a uniform rule of decision"; and the "balance" between "global warming's prevention and energy production, economic growth, foreign policy, and national security." Op. 24 (citation omitted).

The panel additionally concluded that removal based on federal common law was improper because the Clean Air Act had displaced any remedy otherwise available under federal common law. Op. 26. The panel reasoned that "[p]ublic nuisance claims involving interstate pollution, including issues about greenhouse-gas emissions, are nonexistent under federal common law," rendering removal based on federal common law impermissible. Op. 29.

Finally, the panel declined to adhere to this Court's earlier decisions in *Caudill* v. *Blue Cross & Blue Shield of North Carolina*, 999 F.2d 74 (1993), and *North Carolina Department of Administration* v. *Alcoa Power Generating, Inc.*, 853 F.3d 140 (2017), both of which permitted the removal of claims necessarily and exclusively governed by federal common law but artfully

pleaded under state law. Op. 31-33. With respect to *Caudill*: the panel concluded that the portion of that decision authorizing the removal of claims governed by federal common law had been abrogated by *Empire HealthChoice Assurance, Inc.* v. *McVeigh*, 547 U.S. 677 (2006), which held that federal common law did not govern the substantive question at issue there. Op. 32. With respect to *Alcoa*: the panel held that, unlike in *Alcoa*, defendants here are not relying on a federal rule of decision derived from the Constitution. Op. 33. The panel did not attempt to reconcile that conclusion with defendants' argument that the "Constitution's allocation of sovereignty between the [S]tates and the federal government, and among the [S]tates themselves, precludes applying state law in certain areas that are inherently interstate in nature." Supp. Br. 6; *see also* Opening Br. 32.

REASONS FOR GRANTING REHEARING EN BANC

The panel rejected defendants' argument that federal common law necessarily and exclusively governs claims that, like plaintiff's here, seek redress for injuries allegedly caused by conduct that contributed to global greenhouse-gas emissions and thereby exacerbated climate change. In so doing, the panel expressly rejected the Second Circuit's thorough and well-reasoned decision in *City of New York* v. *Chevron Corp.*, 993 F.3d 81 (2021), and departed from a century of Supreme Court precedent holding that federal common law nec-

essarily governs claims seeking redress for harms caused by interstate pollution. The panel also declined to adhere to circuit precedent holding that the well-pleaded complaint rule does not preclude the removal of claims necessarily governed by federal common law but artfully pleaded under state law. Rehearing by the full Court is warranted.

A. The Panel's Decision Conflicts With The Decision Of Another Court of Appeals And Supreme Court Precedent

1. Federal common law necessarily supplies the rule of decision for certain narrow categories of claims that implicate "uniquely federal interests," including where "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, 640-641 (1981) (citation omitted). For more than a century, the Supreme Court has applied uniform federal common-law rules of decision to claims seeking redress for interstate pollution. *See City of New York*, 993 F.3d at 91 (collecting cases). For example, in *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972), the Supreme Court reasoned that "[f]ederal common law," and not the "varying common law of the individual States," is "necessary to be recognized as a basis for dealing in uniform standard with the environmental rights of a State against improper impairment by sources outside its domain." *Id.* at 108 n.9 (citation omitted). In *International Paper Co.* v. *Ouellette*, 479 U.S. 481 (1987), the Court unambiguously reaffirmed that "the regulation of interstate water pollution is a matter of federal, not state, law."

Id. at 488 (citation omitted). And in *American Electric Power Co.* v. *Connecticut*, 564 U.S. 410 (2011)—a case involving similar claims alleging injury from the contribution of greenhouse-gas emissions to global climate change—the Court reiterated that federal common law "undoubtedly" governs claims involving "air and water in their ambient or interstate aspects." *Id.* at 421 (citation omitted).

As those precedents explain, the Constitution dictates that federal law must govern controversies over interstate pollution, because those controversies "touch[] basic interests of federalism" and implicate the "overriding federal interest in the need for a uniform rule of decision." *City of Milwaukee*, 406 U.S. at 103 n.6. The Constitution prohibits States from "regulat[ing] the conduct of out-of-state sources" of pollution. *Ouellette*, 479 U.S. at 495. Yet when the States "by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done." *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230, 237 (1907). Because "borrowing the law of a particular State would be inappropriate" to resolve such interstate disputes, "the basic scheme of the Constitution" requires the application of a federal rule of decision. *American Electric Power*, 564 U.S. at 421, 422.

Applying the Supreme Court's precedents in this area, the Second Circuit held in *City of New York* that claims seeking redress for injuries allegedly

caused by the contribution of global greenhouse-gas emissions to global climate change presented "the quintessential example of when federal common law is most needed." 993 F.3d at 92. In the Second Circuit's view, claims seeking to hold defendants liable for injuries arising from "the cumulative impact of conduct occurring simultaneously across just about every jurisdiction on the planet" are far too "sprawling" for state law to govern. *Id.* The court first reasoned that "a substantial damages award like the one requested by the City would effectively regulate the [energy companies'] behavior far beyond New York's borders." *Id.* The court further explained that application of state law to the City's claims would "risk upsetting the careful balance that has been struck between 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." *Id.* at 93.

The Second Circuit further rejected the argument that statutory displacement of any remedy under federal common law allows state law to "snap back into action." 993 F.3d at 98. That "position is difficult to square with the fact that federal common law governed this issue in the first place," the court reasoned, because "where 'federal common law exists, it is because state law cannot be used.'" *Id.* (quoting *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 313 n.7 (1981)). "[S]tate law does not suddenly become presumptively competent

to address issues that demand a unified federal standard simply because Congress saw fit to displace a federal court-made standard with a legislative one." *Id.* Such an outcome, the Second Circuit concluded, is "too strange to seriously contemplate." *Id.* at 98-99.

2. The panel here refused to "follow *City of New York*," and it "decline[d] to create a federal rule of decision" to govern plaintiff's claims. Op. 25. The panel concluded that the Second Circuit erred by relying on the "mostly unbroken string of cases" from the Supreme Court over the last century, *City of New York*, 993 F.3d at 91, instead of assessing whether there was a "significant conflict between the state-law claims before it and the federal interests at stake," Op. 24. The panel thus concluded that the Second Circuit "evad[ed] the careful analysis that the Supreme Court requires" to determine whether federal common law applies. *Id.*

The panel further departed from the Second Circuit by holding that federal common law does not govern plaintiff's claims because the Clean Air Act displaced any federal-common-law remedy. The Second Circuit held the opposite, reasoning that climate-change claims are "simply beyond the limits of state law" and thus "demand the existence of federal common law." *City of New York*, 993 F.3d at 90, 92. The panel's holding that "federal common law in this area ceases to exist due to statutory displacement," Op. 26, could also be read to preclude a federal or state court from dismissing similar putative

state-law claims on the merits based on the exclusivity of federal law—as the Second Circuit did in *City of New York*. But state law cannot "return" after statutory displacement of federal common law: no state law governed interstate emissions before Congress acted, and the application of state law to interstate-pollution claims remains inconsistent with our constitutional structure after the statutory displacement, even if federal law provides no remedy for the particular claim alleged. *Cf. City of New York*, 993 F.3d at 98-99.

The panel attempted to distinguish *City of New York* on the ground that the Second Circuit did not need to apply the well-pleaded complaint rule because "New York City initially filed suit in federal court." Op. 23. But that difference does not explain the divergence in the opinions: the panel saw "no reason to fashion any federal common law for [d]efendants," Op. 23, whereas the Second Circuit held that similar climate-change claims "must be brought under federal common law." *City of New York*, 993 F.3d at 92, 96. The decisions are thus irreconcilable, and the resulting conflict warrants the full Court's attention.

The panel faulted defendants (and the Second Circuit) for "immediately proceed[ing] to the [Supreme] Court's authorities dealing with global warming and interstate pollution" and failing to establish the "requirements for expanding federal common law." Op. 20-21. But defendants never asked the Court to *expand* federal common law; the Supreme Court has already recognized

that federal law alone necessarily governs interstate pollution. *See* pp. 9-10, *supra*. The panel thus erred by applying the test for determining whether to extend federal common law to a new context and invoking the waiver doctrine based on that test. Defendants did not waive their argument for removal based on federal common law; the panel simply declined to follow the Supreme Court precedent on which it was based.

In any event, contrary to the panel's contention, defendants' briefing here *did* explain the "significant conflict" between the application of state law and uniquely federal interests: defendants explained that application of state law would improperly allow States to "regulate the conduct of out-of-state sources," Opening Br. 25; would create an "unworkable" "patchwork of fifty different answers to the same fundamental global issue," *id.* at 26; and would require a court to second-guess the federal government's decisions in "setting national and international policy on matters involving energy, the environment, and national security," *id.* at 24; *see also* Supp. Br. 5, 8-9. In fact, the defendants in *City of New York* are also among the defendants here, and defendants in both cases made the same arguments regarding the application of federal common law based on the same Supreme Court precedents. *Compare* Opening Br. 15-26, *and* Supp. Br. 5-13, *with* Br. of Appellees at 13-25, Dkt. 168, *City of New York*, *supra* (No. 18-2188). The full Court should correct the panel's error in failing to follow those precedents.

B. The Panel's Decision Conflicts With Circuit Precedent

Rehearing en banc is also warranted under the well-settled rule that a panel is "bound by prior precedent from other panels in this circuit absent contrary law from an en banc or Supreme Court decision." *Taylor* v. *Grubbs*, 930 F.3d 611, 619 (4th Cir. 2019) (citation omitted). The panel's ruling that claims necessarily and exclusively governed by federal common law but artfully pleaded under state law are not removable conflicts with at least two of this Court's prior decisions applying the well-pleaded complaint rule. *See* Op. 31-33.

In *Caudill* v. *Blue Cross & Blue Shield of North Carolina*, 999 F.2d 74 (1993), this Court affirmed removal of a state-court complaint alleging a putative "state law claim for breach of [a federal health] insurance contract." *Id.* at 77. After determining that federal common law governed the cause of action at issue, *see id.*, the Court concluded that "federal jurisdiction existed over this claim and removal was proper." *Id.* at 79. More than a decade later, the Supreme Court rejected the first step in *Caudill*'s reasoning, holding that state law generally governs federal health-benefit contracts. *See Empire HealthChoice Assurance, Inc.* v. *McVeigh*, 547 U.S. 677, 693 (2006). The panel concluded that the Supreme Court abrogated *Caudill* in *Empire HealthChoice*, *see* Op. 32, but the Supreme Court did not address, much less disturb, *Caudill*'s independent holding that putative state-law claims are removable when they are governed by federal common law. "[W]hen a Supreme Court decision

abrogates one portion of our rationale in a prior case but not another, the rationale not abrogated by the Supreme Court nonetheless binds future panels of this [C]ourt." *Taylor*, 930 F.3d at 619.

The panel's decision also conflicts with *North Carolina Department of Administration* v. *Alcoa Power Generating, Inc.*, 853 F.3d 140 (2017), in which this Court held that a plaintiff's "characterization" of its complaint as arising only under state law "will not always resolve whether federal jurisdiction exists." *Id.* at 146. There, the "constitutional nature" of North Carolina's putative state-law claim for ownership of a riverbed meant that the claim "was governed by" federal common law and properly removed. *Id.* at 147. Curiously, the panel here sought to distinguish *Alcoa* on that basis, reasoning that "[d]efendants do not rely on any constitutional provision suggesting federal law applies to or governs Baltimore's claims." Op. 33. In doing so, the panel overlooked defendants' core submission—namely, that "the structure of the Constitution dictates that only federal law can apply to . . . interstate pollution claims." Supp. Br. 3. *Alcoa* is thus directly on point.

* * * * *

The question of whether federal common law governs claims seeking redress for injuries allegedly caused by climate change and are thus removable from state to federal court is an exceedingly important question pending in multiple courts of appeals across the nation. In addressing that issue, the

panel not only expressly rejected the Second Circuit's thoughtful decision in *City of New York* but also declined to adhere to numerous Supreme Court decisions holding that federal common law necessarily governs claims seeking redress for injuries allegedly caused by interstate pollution. The panel's application of the well-pleaded complaint rule further conflicts with two earlier decisions of this Court holding that claims necessarily governed by federal common law but artfully pleaded under state law are subject to federal jurisdiction.

The question presented, and the context in which it arises, could not be more important. Rehearing by the full Court is badly needed to correct the panel's errors, ensure compliance with binding precedent, and avoid a return trip to the Supreme Court.

CONCLUSION

The petition for rehearing en banc should be granted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I, Kannon K. Shanmugam, counsel for appellants Exxon Mobil Corporation and ExxonMobil Oil Corporation and a member of the Bar of this Court, certify, pursuant to Federal Rules of Appellate Procedure 32(a)(5) and 35(b)(2)(a), that the attached Petition for Rehearing En Banc is proportionately spaced, has a typeface of 14 points or more, and contains 3,899 words.

/s/ Kannon K. Shanmugam
KANNON K. SHANMUGAM

MAY 5, 2022