No. 19-1818

# United States Court of Appeals for the First Circuit

STATE OF RHODE ISLAND,

*Plaintiff-Appellee*,

v.

SHELL OIL PRODUCTS COMPANY, LLC; CHEVRON CORP.; CHEVRON USA, INC.; EXXON MOBIL CORP.; BP, PLC; BP AMERICA, INC.; BP PRODUCTS NORTH AMERICA, INC.; ROYAL DUTCH SHELL PLC; MOTIVA ENTERPRISES, LLC; CITGO PETROLEUM CORP.; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66; MARATHON OIL COMPANY; MARATHON OIL CORPORATION; MARATHON PETROLEUM CORP.; MARATHON PETROLEUM COMPANY, LP; SPEEDWAY, LLC; HESS CORP.; and DOES 1-100,

*Defendants-Appellants*,

GETTY PETROLEUM MARKETING, INC.,

*Defendant*.

Appeal from the U.S. District Court
for the District of Rhode Island, No. 1:18-cv-00395-WES-LDA
(The Honorable William E. Smith)

## DEFENDANTS-APPELLANTS' PETITION FOR REHEARING AND REHEARING EN BANC

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## RULE 35(B)(1) STATEMENT AND INTRODUCTION

This case raises two questions of exceptional importance regarding federal jurisdiction: *First*, whether one state's law can provide the rules of decision over disputes seeking damages related to the cumulative impact of interstate and international greenhouse-gas emissions, which under longstanding Supreme Court precedent must be governed exclusively by federal law by virtue of our constitutional structure. *Second*, whether the displacement of federal common law by the Clean Air Act allows such inherently federal claims to be governed by state law. The two-judge panel in this case answered "yes" to both questions. In doing so, it departed from numerous decisions by other courts of appeals (as well as the position of the United States), contravened the teaching of a long line of Supreme Court cases, and ignored binding precedent from this Court.

The State of Rhode Island seeks to hold a select group of 21 energy companies liable for alleged physical injuries resulting from "sea level rise … caused and/or exacerbated by Defendants' conduct," namely, "extraction, refining, and/or formulation of fossil fuel products," the global use of which caused the "buildup of $CO_2$ in the environment" that allegedly "drives global warming." JA.25, 121. Asserting numerous causes of

action ostensibly under Rhode Island state tort law, Plaintiff demands compensatory and punitive damages, disgorgement of profits, abatement of alleged nuisances, and other relief. JA.137–62.

Defendants removed the case to federal court on several grounds, including that federal law necessarily governs claims seeking redress for injuries caused by interstate and international emissions. After the Supreme Court vacated the panel's earlier decision affirming remand, the case is once again before this Court.

As a matter of constitutional structure, Plaintiff's claims—which seek damages for the impact of interstate and global emissions from every state in the nation and every country in the world—necessarily "arise under" federal law alone; no single state's law could possibly govern such claims. In a case involving similar claims against many of the same defendants, the Second Circuit explained in reasoning equally applicable here that "[a]rtful pleading cannot transform the [plaintiff's] complaint into anything other than a suit over global greenhouse gas emissions. It is precisely *because* fossil fuels emit greenhouse gases—which collectively 'exacerbate global warming'—that the [plaintiff] is seeking damages." *City of New York v. Chevron Corp.*, 993 F.3d 81, 91

(2d Cir. 2021). Relying on longstanding Supreme Court precedent that applies "federal law to disputes involving interstate air or water pollution," the Second Circuit unequivocally held that a "suit seeking to recover damages for the harms caused by global greenhouse gas emissions" raises "federal claims" that "must be brought under federal common law." *Id.* at 91, 95. Numerous courts of appeals have also recognized that federal common law provides a ground for federal removal jurisdiction. *See, e.g.*, *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 926 (5th Cir. 1997).

Nevertheless, the panel affirmed the district court's remand order, holding that removal was improper because the Clean Air Act had "displaced" the federal common law of interstate pollution. *See* Op.13–19. As the Supreme Court has explained, however, "the basic scheme of the Constitution … demands" that "federal common law"—not state law—govern disputes involving "air and water in their ambient or interstate aspects." *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 421 (2011) ("*AEP*"). The exclusively federal nature of the issue does not change even if federal statutory law has displaced federal-common-law remedies. By

holding to the contrary, the panel confused the question of displacement—*i.e.*, whether there is a remedy—with the antecedent question of what body of law necessarily governs the merits of a dispute over interstate emissions.

In doing so, the panel split from several other courts of appeals. As the Second Circuit has explained, federal common law arises precisely "because state law cannot be used," so the notion that its statutory displacement renders state law "competent to address" disputes concerning interstate pollution is "too strange to seriously contemplate." *New York*, 993 F.3d at 98–99. The Seventh Circuit also has recognized that state law cannot apply to interstate pollution disputes "despite the displacement of federal common law." *People of State of Ill. v. City of Milwaukee*, 731 F.2d 403, 409 (7th Cir. 1984) ("*Milwaukee III*"). The panel's decision thus squarely conflicts with the Second and Seventh Circuits' decisions and is irreconcilable with the Supreme Court's longstanding recognition that *only federal*, and *not state*, law may govern controversies centered on interstate pollution. The panel also failed to heed this Court's teaching that the "source question and the substance question" are analytically

distinct. *United States v. Swiss Am. Bank, Ltd.*, 191 F.3d 30, 43 (1st Cir. 1999).

This Court should grant rehearing en banc because the panel's holding (1) "misapprehend[s]" the effect of statutory displacement on federal common law, Fed. R. App. P. 40(a)(2), and (2) decides a "question of exceptional importance" in a manner that conflicts with "the authoritative decisions of other United States Courts of Appeals," and is in tension with numerous Supreme Court decisions, Fed. R. App. P. 35(b)(1)(A)–(B).

## BACKGROUND

As an issue of national and international significance, climate change has long been the subject of federal laws and regulations, political negotiations, and diplomatic engagement with other countries. Dissatisfied with the federal government's approach to this issue, various parties for years have sought to effect their preferred policies through litigation. This lawsuit is another in a long series of such climate change-related actions, which "seek abatement of carbon-dioxide emissions," *AEP*, 564 U.S. at 424, and "damages on a scale unlike any prior environmental pollution case," *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 876 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012).

Most recently, state and local governments across the country have launched a coordinated wave of lawsuits in state courts seeking to hold certain energy companies liable for the effects of global climate change under various states' laws. This case is part of that new campaign. Plaintiff sued 21 energy companies in Rhode Island state court, alleging that "the dominant cause of global warming" is worldwide "greenhouse gas pollution," JA.24, and that "Defendants, through their extraction, promotion, marketing, and sale of their fossil fuel products, caused over 14.5% of global fossil fuel product-related $CO_2$ between 1965 and 2015, with contributions currently continuing unabated," JA.70. Asserting numerous causes of action ostensibly under Rhode Island state tort law, including for public nuisance and trespass, Plaintiff demands compensatory and punitive damages, disgorgement of profits, abatement of the alleged nuisances, and other relief. JA.137–62.

Defendants removed the action to the District of Rhode Island, asserting several grounds for federal jurisdiction, including the federal-officer-removal statute, 28 U.S.C. § 1442, and federal-question jurisdiction based on federal common law, JA.172–77, but the district court remanded the case to state court, JA.420–36.

On appeal, the panel initially addressed only federal-officer removal, concluding that it did not have appellate jurisdiction to review any other basis for removal. *Rhode Island v. Shell Oil Prods. Co.*, 979 F.3d 50, 58–59 (1st Cir. 2020). The Supreme Court vacated that decision in light of *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532 (2021), and remanded for the panel to consider all of Defendants' bases for removal, *Shell Oil Prods. Co. v. Rhode Island*, 141 S. Ct. 2666 (2021).

On remand, both parties filed supplemental briefing regarding the additional bases for removal, and on May 23, 2022, without holding oral argument, the panel affirmed the district court's remand order, Op.34.

## REASONS FOR GRANTING THE PETITION

In concluding that Plaintiff's claims could proceed in Rhode Island state court, the panel made two fundamental errors. *First*, the panel assumed that one state's law could provide the rules of decision for disputes concerning the cumulative effect of interstate and international greenhouse-gas emissions. But "[f]or over a century, a mostly unbroken string of cases has applied federal law to disputes involving interstate air … pollution." *New York*, 993 F.3d at 91. *Second*, the panel held that the

displacement of federal common law by the Clean Air Act prevented Plaintiff's claims from arising under federal law, confusing the long-recognized distinction between questions of jurisdiction and the merits of a case.

## I. The Panel Erroneously Held That Federal Law Does Not Govern Plaintiff's Claims.

By allowing Plaintiff's claims to proceed in state court under state law, the panel's decision squarely conflicts with a recent decision by the Second Circuit and departs from a long line of Supreme Court precedent making clear that, under our Constitution's structure, a claim for relief based on the cumulative effects of global emissions necessarily and exclusively arises under federal, not state, law.

In our federal system, each State may make law within its own borders, but no State may "impos[e] its regulatory policies on the entire Nation," *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585 (1996), or dictate our "relationships with other members of the international community," *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964). The Constitution's allocation of sovereignty between the States and the federal government, and among the States themselves, precludes the use of state law in certain areas that are inherently interstate in nature.

For this reason, the Supreme Court has long held that, as a matter of constitutional structure, claims based on interstate and international emissions are necessarily governed *exclusively* by federal law. "[T]he basic scheme of the Constitution … demands" that "federal common law" govern disputes involving "air and water in their ambient or interstate aspects." *AEP*, 564 U.S. at 421; *see also Illinois v. City of Milwaukee*, 406 U.S. 91, 105 n.6 (1972) ("*Milwaukee I*") (noting that the "basic interests of federalism … demand[]" this result). When the States "by their union made the forcible abatement of outside nuisances impossible to each," they agreed that disputes of that sort would be governed by federal law. *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907). Thus, "our federal system does not permit [a] controversy [of this sort] to be resolved under state law." *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). Indeed, "state law cannot be used" at all. *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 n.7 (1981) ("*Milwaukee II*"). Rather, the "rule of decision [must] be[] federal," and the claims thus necessarily "arise[] under federal law." *Milwaukee I*, 406 U.S. at 100, 108 n.10. The Constitution gives federal courts "the need and authority" "to formulate" a national body of law, rather than allowing for piecemeal (and potentially

contradictory) rules of decision to develop among the States. *Tex. Indus.*, 451 U.S. at 640. Indeed, "interstate … pollution is a matter of federal, not state, law." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987).

The United States government made precisely this point in parallel climate change-related cases raising nearly identical claims: "[C]ross-boundary tort claims associated with air and water pollution involve a subject that is meet for federal law governance" because claims "that seek to apply the law of an affected State to conduct in *another* State" necessarily "arise under federal, not state, law for jurisdictional purposes, given their inherently federal nature." U.S. *Amicus Curiae* Br. 26–27, *BP p.l.c. v. Mayor & City Council of Baltimore*, No. 19-1189 (U.S. Nov. 23, 2020); *see also* U.S. *Amicus Curiae* Reh'g Br. 4, *City of Oakland v. BP PLC*, No. 18-16663, ECF No. 198 (9th Cir. Aug. 3, 2020) ("U.S. *Oakland* Br.") ("Interstate pollution claims … arise in an inherently federal area in which state law does not apply"; indeed, "state law could never validly apply in the first place. As a matter of constitutional structure, any claims asserted in this area are inherently federal.").

The Second Circuit, too, has held that claims seeking damages for the impacts of transboundary emissions "demand the existence of federal

common law." *New York*, 993 F.3d at 90. Such claims span state and even national boundaries, and "a federal rule of decision is necessary to protect uniquely federal interests." *Id.* Indeed, "a mostly unbroken string of cases has applied federal law to disputes involving interstate air … pollution." *Id.* The Second Circuit held that New York City's "sprawling" claims, which—like Plaintiff's here—sought "damages for the cumulative impact of conduct occurring simultaneously across just about every jurisdiction on the planet," were "simply beyond the limits of state law." Accordingly, even though the claims were pleaded under state law, they necessarily were "federal claims" that "must be brought under federal common law." *Id.* at 92, 95.

Contrary to this long line of cases from the Supreme Court and other courts of appeals, the panel rejected Defendants-Appellants' position that "applying state law in this area would upset our constitutional scheme." Op.18. This decision squarely conflicts with the holding of the Second Circuit in *New York* that our constitutional structure mandates that claims of this sort are necessarily governed by federal law alone, as well as with the position of the United States and the logic underlying numerous Supreme Court cases.

The panel also suggested that "the federal common law [Defendants] bring up does not address the type of acts Rhode Island seeks judicial redress for" because Plaintiff alleges misrepresentations. Op.18 & n.8. But this only deepens the panel's conflict with the Second Circuit. New York City made the same allegations that Plaintiff does here: that the defendants "have known for decades that their fossil fuel products pose a severe risk to the planet's climate" and yet "downplayed the risks and continued to sell massive quantities of fossil fuels." *New York*, 993 F.3d at 86–87. The Second Circuit held that this focus on the "earlier moment" in the causal chain leading to the plaintiff's alleged injuries was "artful pleading": "It is precisely *because* fossil fuels emit greenhouse gases—which collectively 'exacerbate global warming'—that [the plaintiff] is seeking damages." *Id.* at 91, 97. The Second Circuit also found that the plaintiff's "claims, if successful, would operate as *de facto* regulation on greenhouse gas emissions." *Id.* at 96. By contrast, the panel concluded that Plaintiff's similar claims would not "regulate greenhouse-gas emissions." Op.18 n.8. But like New York City, Plaintiff's claims, including alleged misrepresentations, "depend on harms stemming from

emissions" and therefore "must be" "federal claims." *New York*, 993 F.3d at 95, 97.

## II. The Panel Misunderstood The Effect Of Federal Displacement On Choice-Of-Law Questions.

The panel next held that because the Clean Air Act had "displaced" the federal common law of interstate air pollution, the panel "cannot rule that any federal common law controls Rhode Island's claims." Op.18–19. This ruling, too, conflicts with decisions of other circuits, and with a decision of this Court.

First, the panel's reasoning erroneously conflates the merits of the claims with the court's jurisdiction. Although the Clean Air Act displaces any *remedy* under federal common law, it does not displace the exclusively federal *source* of law. *New York*, 993 F.3d at 95 & n.7. Whether a party can obtain a remedy under federal common law is a *merits* question distinct from the *jurisdictional* question whether federal law must supply the rule of decision in the first instance. If federal common law could not "control," Op.19, then the Second Circuit in *New York* would not have been able to affirm dismissal of plaintiff's claims under federal common law (and rather would have considered the merits under state law). Yet the Second Circuit did just that, holding that claims seeking redress for

global climate change presented "the quintessential example of when federal common law is most needed." 993 F.3d at 92.

Whether a claim arises under state or federal law for jurisdictional purposes turns on which law governs; it does not depend on whether the plaintiff has stated a *viable* claim under federal law. As this Court has explained, under the Supreme Court's two-step analytical approach for such questions, courts must: (1) determine whether, for jurisdictional purposes, the source of law is federal or state based on the nature of the claims asserted and the issues at stake; and then (2) if federal law is the source, determine the substance of the federal law and decide whether the plaintiff has stated a viable federal claim and is entitled to relief under federal law. *Swiss Am. Bank*, 191 F.3d at 42–45 (citing *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301, 305 (1947)).

In *Swiss American*—which the panel never grappled with—this Court articulated the *Standard Oil* two-step framework, emphasizing the difference between the "source question and the substance question." 191 F.3d at 43. *Swiss American* involved civil-asset-forfeiture claims against foreign banks and turned on whether the district court possessed personal jurisdiction under Rule 4(k)(2), which itself requires a showing that

the claim "ar[o]s[e] under federal law," *id.* at 38—the same question at issue here. The plaintiffs argued that their case involved "garden-variety tort" and "breach of contract" claims, but the Court concluded that those nominally state-law claims arose under federal law because "the ascertained federal interest necessitate[d] a federal source for the rule of decision." 191 F.3d at 43, 45. The Court explained that the "source question" asks whether "the source of the controlling law [should] be federal or state." *Id.* at 43. The substance question, on the other hand, "which comes into play only if the source question is answered in favor of a federal solution," asks whether the federal courts should "fashion a uniform federal rule" authorizing relief on the merits. *Id.* Whether a claim "arises under" federal law "turns on the resolution of the source question." *Id.* at 44.

Only that first "source" question—asking which law applies—is relevant to federal jurisdiction and, as such, it must be resolved by a federal court. As the Supreme Court explained, this "choice-of-law task is a federal task for federal courts." *Milwaukee II*, 451 U.S. at 349. Thus, sometimes—as here—federal law governs, even though the party has no *remedy* under federal law on the merits. "[I]t has long been understood that

a claim can arise under federal law even if a court ultimately concludes that federal law does not provide a cause of action." *Al-Qarqani v. Chevron Corp.*, 8 F.4th 1018, 1025 (9th Cir. 2021). A claim governed by federal common law arises under federal law for "jurisdictional purposes," even if that claim "may fail at a later stage." *Oneida Indian Nation v. Cnty. of Oneida*, 414 U.S. 661, 675 (1974); *see also New York*, 993 F.3d at 95. Courts must not "conflate[]" these distinct "jurisdiction" and "merits-related determination[s]." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006).

Nor does the displacement of any federal-common-law remedies mean that Plaintiff can bring its claims under state law. The Seventh Circuit addressed this same question on remand after the Supreme Court recognized in *Milwaukee II* that the Clean Water Act displaced federal common law. The Seventh Circuit noted that the Supreme Court had "continue[d] to cite *Milwaukee I* for the inapplicability of state law" to interstate water-pollution disputes "despite the displacement of federal common law." *Milwaukee III*, 731 F.2d at 409 (citing *Tex. Indus.*, 451 U.S. at 641). The court observed that "[t]he very reasons the [Supreme] Court gave for resorting to federal common law in *Milwaukee I* are the

same reasons why the state claiming injury cannot apply its own state law to out-of-state discharges now," and "*Milwaukee II* did nothing to undermine that result." *Id.* at 410. Notwithstanding displacement, "[t]he claimed pollution of interstate waters is a problem of uniquely federal dimensions requiring the application of uniform federal standards." *Id.* at 410–11.

The Second Circuit also has explained that the application of state law to interstate pollution disputes "is difficult to square with the fact that federal common law governed this issue in the first place" because, "where federal common law exists, it is because state law cannot be used." *New York*, 993 F.3d at 98. "[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.* Statutory displacement cannot "give birth to new state-law claims," *id.*, because our constitutional structure "does not permit the controversy to be resolved under state law," *Tex. Indus.*, 451 U.S. at 640. Indeed, the Second Circuit concluded that the position adopted by the panel is "too strange to seriously contemplate." *New York*, 993 F.3d at 98–99. Regardless of displacement,

our constitutional structure requires "a federal rule of decision" for claims based on interstate emissions. *Id.* at 95.

The panel attempted to distinguish *New York* on the ground that that case did not involve removal from state court. Op.17. But that procedural distinction is irrelevant to the substantive difference between the Second Circuit's opinion and the panel's decision. Both decisions considered whether "the source of the controlling law [should] be federal or state." The panel here held that federal law cannot "control[] Rhode Island's claims," Op.19, whereas the Second Circuit held that similar climate-change claims "*must* be brought under federal common law," *New York*, 993 F.3d at 92, 96 (emphasis added). The decisions are irreconcilable in their conclusions regarding the source of law governing claims for damages relating to greenhouse-gas emissions, and the resulting conflict warrants the full Court's attention.

The United States has taken the same position as the Second and Seventh Circuits: "[T]he [Clean Air Act] does not change the existing background rule that the [plaintiffs'] interstate and international claims, which are inherently and necessarily federal in nature, cannot be pled

under state law." U.S. *Oakland* Br. 8. Congress did not "intend[] to resurrect state-law claims that had never previously been viable in light of federal common law." *Id.* Thus, not only does the panel's decision conflict with other court of appeals decisions and with the logic of numerous Supreme Court cases, it also is inconsistent with the position taken by the United States.

Finally, the panel's narrow theory of federal jurisdiction would result in consequences that are inconsistent with our federal system and with common sense. Under the panel's rationale, Illinois could sue the City of Milwaukee in state court under Illinois state law for the effects of interstate water pollution emanating from Wisconsin, and Milwaukee would be denied a federal forum to address the interstate dispute. *Contra Milwaukee II*, 451 U.S. 304. Connecticut could bring suit in state court under Connecticut state law against an out-of-state defendant seeking to abate interstate air pollution, and the defendant could not remove to federal court. *Contra AEP*, 564 U.S. 410. Or Georgia could subject a Tennessee company to Georgia law to enjoin it from discharging fumes from Tennessee across state lines into Georgia. *Contra Tenn. Copper Co.*, 206 U.S. at 236–37. The holding of the panel is irreconcilable with the

Supreme Court's rulings that such claims arise under federal law and thus are properly heard in federal court.

The Court should grant panel rehearing or en banc review to resolve this question of "exceptional importance" on which the panel's decision is at odds with the decisions of other circuits, this Court's own precedent, the position of the United States, and decisions of the Supreme Court.

## CONCLUSION

This Court should rehear this case and reverse the district court's remand order.

Dated: June 21, 2022

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This petition complies with the type-volume limitation of Federal Rules of Appellate Procedure 35(b)(2) and 40(b)(1) because it contains 3,895 words, excluding the parts of the petition exempted by Rule 32(a)(7)(B)(iii). This petition complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced font using Microsoft Word 2016 in 14-point New Century Schoolbook type.

Dated: June 21, 2022

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## CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system.

All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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