Nos. 21-2728, 22-1096

IN THE

United States Court of Appeals for the Third Circuit

CITY OF HOBOKEN,

Plaintiff-Appellee,

v.

CHEVRON CORPORATION, *et al.*,

Defendants-Appellants.

On Appeal from an Order
of the United States District Court
for the District of New Jersey (20-cv-14243)

STATE OF DELAWARE, *ex rel.* KATHLEEN JENNINGS,
ATTORNEY GENERAL OF THE STATE OF DELAWARE,

Plaintiff-Appellee,

v.

BP AMERICA INC., *et al.*,

Defendants-Appellants.

On Appeal from an Order
of the United States District Court
for the District of Delaware (20-cv-1429)

DEFENDANTS-APPELLANTS' PETITION FOR REHEARING EN BANC

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

Other Authorities

TABLE OF AUTHORITIES

(continued)

Page(s)

Rules

RULE 35.1 STATEMENT

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to decisions of the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court, *i.e.*, the panel's decision is contrary to the decisions of the Supreme Court, including *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972), and *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011), and involves questions of exceptional importance, *i.e.*, whether nominally state-law claims controlled exclusively by federal law are removable, and whether plaintiffs may artfully plead their complaint in order to circumvent federal officer jurisdiction.

RULE 35(B)(1) STATEMENT AND INTRODUCTION

This case raises two questions of exceptional importance regarding federal jurisdiction. *First*, are claims that are necessarily and exclusively governed by federal law by virtue of our constitutional structure removable to federal court? The panel in this case answered in the negative. That holding contradicts principles enunciated by the Supreme Court—as well as the position of the United States—and (as the panel recognized) conflicts with decisions of other courts of appeals. *Second*, may plaintiffs artfully plead their complaint in order to circumvent federal officer jurisdiction? The panel said yes, but in doing so, it created a conflict with decisions of other courts of appeals that have prohibited precisely that sort of artful disclaimer.

The City of Hoboken and State of Delaware initiated these suits in New Jersey and Delaware state courts, respectively, alleging that "Defendants' extraction, production, and sale of fossil fuels on an enormous scale is the driving force behind the unprecedented combustion of fossil fuels over the last thirty years that has caused the Earth to warm." 2-*Hoboken*-JA-77. Plaintiffs contend that Defendants' actions have increased greenhouse-gas emissions and contributed to global climate

change, leading to rising sea levels, more frequent extreme heat, and increased extreme precipitation, which in turn led to their alleged physical injuries. 2-*Hoboken*-JA-69–79. Plaintiffs allege that "Defendants[']actions were, at the very least, a substantial factor in the creation of the [alleged] nuisance" because "Defendants have produced more than 12% of the world's fossil fuels since 1965, the combustion of which has been the driving force behind" climate change, and "[w]ithout Defendants' actions, climate change effects" would be "much less severe." 2-*Hoboken*-JA-164. Plaintiffs seek to have these claims—which would impose liability on select energy companies for physical harms allegedly attributable to the alleged effects of global climate change stemming from the cumulative worldwide production, promotion, sale, and use of oil and gas and other sources of emissions—decided in state court under state law.

Defendants removed the cases to federal court on several grounds, including that federal common law necessarily and exclusively governs claims seeking redress for injuries allegedly caused by interstate and international emissions. As a matter of constitutional structure, Plaintiffs' claims necessarily "arise under" federal law alone because they seek damages for harms allegedly caused by interstate and global emissions.

See City of New York v. Chevron Corp., 993 F.3d 81, 91, 95 (2d Cir. 2021) (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"). And numerous courts of appeals have recognized that federal common law provides a ground for federal removal jurisdiction over nominally state-law claims that in fact are governed by federal law. *See, e.g.*, *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 926 (5th Cir. 1997); *In re Otter Tail Power Co.*, 116 F.3d 1207, 1213–14 (8th Cir. 1997); *see also Republic of Philippines v. Marcos*, 806 F.2d 344, 354 (2d Cir. 1986).

The panel split from these decisions by affirming remand to state court. Relying on *Goepel v. National Postal Mail Handlers Union*, 36 F.3d 306 (3d Cir. 1994)—which never reached the issue—the panel concluded that only federal *statutes*, not federal common law or constitutional structure, can justify removal of nominally state-law claims that are actually federal-law claims. Op.25.

Additionally, the panel held that Plaintiffs could avoid federal officer removal by purporting to disclaim reliance on acts that Defendants

took under federal direction. This holding directly conflicts with decisions of other courts of appeals. *See Baker v. Atl. Richfield Co.*, 962 F.3d 937, 945 n.3 (7th Cir. 2020); *St. Charles Surgical Hosp., L.L.C. v. La. Health Serv. & Indem. Co.,* 990 F.3d 447, 451 (5th Cir. 2021).

This Court should grant rehearing en banc because the panel's holding (1) "misapprehend[s]" this Court's precedents, Fed. R. App. P. 40(a)(2), and (2) decides "question[s] of exceptional importance" in a manner that conflicts with "the authoritative decisions of other United States Courts of Appeals" and that is in tension with Supreme Court decisions, *id*. 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 climate change-related actions, which "seek abatement of carbon-dioxide emissions," *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011) ("*AEP*"), 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 campaign. Plaintiffs sued 29 energy companies in New Jersey and Delaware state courts, alleging that Defendants are responsible for global climate change because, allegedly, "[t]ogether, Defendants have produced more than 12% of the world's fossil fuels since 1965, the combustion of which has been the driving force behind sea level rise, increasingly frequent and severe extreme precipitation events, and increasingly frequent extreme heat." 2-*Hoboken*-JA-164. And Plaintiffs demand damages for all injuries allegedly suffered as a result of global climate change, including more frequent and severe flooding, harsher storm events, and more frequent "high-heat days." 2-*Hoboken*-JA-133; *see also* 1-*Hoboken*-JA-17 (Hoboken is "seek[ing] compensation to offset the costs it has and will continue to in-

cur to protect itself from the effects of global warming"). Asserting numerous causes of action ostensibly under New Jersey and Delaware state tort law, including for public nuisance and trespass, Plaintiffs demand compensatory and punitive damages, disgorgement of profits, abatement of the alleged nuisances, and other relief. 2-*Hoboken*-JA-184–85.

Defendants removed these actions to the District of New Jersey and the District of Delaware, 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, 3-*Hoboken*-JA-188; 2-*Delaware*-JA-89. The district courts remanded to state court. 1-*Hoboken*-JA-15; 1-*Delaware*-JA-59.

On consolidated appeal, the panel affirmed the district courts' remand orders. Op.19–20.

REASONS FOR GRANTING THE PETITION

In concluding that Plaintiffs' claims could proceed in New Jersey and Delaware state courts, the panel made two fundamental errors. *First*, the panel assumed that it was bound by precedent to conclude that, while nominally state-law claims that in reality are federal claims by virtue of a federal *statute* are removable, claims that are necessarily federal

by virtue of federal *common law* derived from the Constitution's structure are not. Op.23–25 (citing *Goepel v. Nat'l Postal Mail Handlers Union*, 36 F.3d 306, 312 (3d Cir. 1994)). In doing so, the panel misinterpreted *Goepel*, deepened an acknowledged circuit split, and diverged from the position of the United States and the teachings of the Supreme Court.

Second, the panel erred in giving effect to Plaintiffs' purported disclaimer of claims involving emissions caused by fuel provided to the federal government, and in deeming irrelevant Defendants' showing that their allegedly harmful activities were undertaken at the direction of federal officers. Op.35–36. This holding, too, conflicts with the decisions of other courts of appeals, which do not allow artful disclaimers that are designed to evade federal jurisdiction.

I. The Panel Exacerbated A Circuit Conflict Regarding The Removability Of Claims Governed Exclusively By Federal Law.

The panel did not dispute that Plaintiffs' claims are necessarily governed by federal common law. These cases hinge on transboundary greenhouse-gas emissions, which Plaintiffs allege are the "driver of global warming" that allegedly caused their physical property injuries. 2-*Hoboken*-JA-65. Accordingly, Plaintiffs' claims "demand the existence

of federal common law," 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 (2d Cir. 2021). Indeed, as the Second Circuit recently noted, a "mostly unbroken string of [Supreme Court] cases has applied federal law to disputes involving interstate air or water pollution." *Id.* at 91.

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. The Supreme Court has consistently recognized that "the basic scheme of the

Constitution . . . demands" that federal law govern interstate or international pollution claims, *AEP*, 564 U.S. at 421, and that "state law cannot be used" where, as here, the claims seek relief for alleged injuries arising from out-of-state emissions, *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 n.7 (1981) ("*Milwaukee II*"). For these reasons, the Second Circuit found that such "sprawling" claims, which seek "damages for the cumulative impact of conduct occurring simultaneously across just about every jurisdiction on the planet," are "simply beyond the limits of state law" and thus in reality are "federal claims" governed by federal common law. *New York*, 993 F.3d at 92, 95.

Because Plaintiffs seek to impose liability for injuries resulting from interstate and international emissions—just as the plaintiff in *New York* did—their claims cannot arise under state law. 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. *Milwaukee II*, 451 U.S. at 313 n.7; *see also Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987) ("interstate . . . pollution is a matter of federal, not state, law"). Rather, the "rule of decision [must] be[] federal," and the claims thus necessarily "arise[] under federal law." *Illinois v. City of Milwaukee*, 406 U.S. 91, 100, 108 n.10 (1972) ("*Milwaukee I*") (internal quotation marks omitted).

Accordingly, Plaintiffs' claims could have been filed in the first instance in federal court. *See Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 850 (1985) (noting that it is "well settled" that 28 U.S.C. § 1331's "grant of jurisdiction will support claims founded upon federal common law" (internal quotation marks omitted)). And claims are removable if a plaintiff could have "filed its operative complaint in federal court." *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1748 (2019). Because Plaintiffs' claims can be governed only by federal law and could have originally been brought in federal court, removal is appropriate.

The United States has taken this position in a substantially similar case, explaining that these types of climate change-related claims are removable because, "although nominally couched as state-law claims, they are inherently and necessarily federal in nature." U.S. *Amicus* Br. 26, *BP p.l.c. v. Mayor & City Council of Baltimore*, No. 19-1189 (U.S. Nov. 23, 2020). "Where," as here, "federal common law would govern, it ousts state law." *Id.* at 27. "[W]hen a plaintiff has artfully pleaded claims by omitting to plead necessary federal questions, a court may uphold removal even though no federal question appears on the face of the plaintiff's complaint." *Id.* at 28. And as the United States explained in another case raising nearly identical claims: "[W]here a putative state-law claim is alleged in a field that the Constitution commits to the national government and that is properly governed by federal common law, that claim may be removed." U.S. *Amicus* Reh'g Br. 4, *City of Oakland v. BP PLC*, No. 18-16663, ECF No. 198 (9th Cir. Aug. 3, 2020).

The panel here, however, denied removal based on a cramped reading of precedents. The panel acknowledged that nominally state-law claims sometimes are in reality federal claims. But it concluded that only a federal statute—and not federal common law or the structure of our

Constitution—"can transform state-law claims into federal ones." Op.23. The panel thus assumed that complete preemption by a statute is the only circumstance in which courts may apply the artful-pleading doctrine. *Id.* But the Supreme Court has never so held, and many courts have cast doubt on that premise. *See, e.g.*, *Ohio ex rel. Skaggs v. Brunner*, 629 F.3d 527, 531 (6th Cir. 2010) (when complete preemption by a statute is unavailable, "[t]hat leaves the possibility that these state-law claims amounted to federal claims in disguise"); *Indeck Me. Energy, L.L.C. v. ISO New England Inc.*, 167 F. Supp. 2d 675, 685 (D. Del. 2001) ("[a]nalysis of" artful pleading and complete preemption "is not the same"); 14C Wright & Miller, *Federal Practice & Procedure* § 3722.1 (rev. 4th ed. 2020) ("This view of the coextensiveness of the complete preemption and artful pleading doctrines has not been expressly embraced by most federal courts[.]"). As leading commentators have observed, there is "[n]o plausible reason" why "the appropriateness of and need for a federal forum should turn on whether the claim arose under a federal statute or under federal common law." Richard H. Fallon, Jr., et al., *Hart & Wechsler's Federal Courts and the Federal System* 819 (7th ed. 2015).

The panel acknowledged that its holding conflicted with the approach taken by other circuits. *See* Op.24–25. For example, the Fifth Circuit has squarely held that "removal is proper" when, as here, a plaintiff's nominally state-law claims in fact "ar[i]se under federal common law." *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 924, 928 (5th Cir. 1997). The Eighth Circuit, too, has found federal jurisdiction over removed complaints raising putative state-law claims because a "plaintiff's characterization of a claim as based solely on state law is not dispositive" when "federal common law" governs. *In re Otter Tail Power Co.*, 116 F.3d 1207, 1213–14 (8th Cir. 1997). And the Second Circuit has indicated that an "action arises under federal law"—and therefore is removable—when "federal common law" "displace[s] entirely any state cause of action." *Republic of Philippines v. Marcos*, 806 F.2d 344, 352, 354 (2d Cir. 1986).

In affirming remand, the panel rested its holding on a mistaken understanding of the well-pleaded complaint rule. Properly understood, what matters is "the substance of the plaintiff's claims," not "how the plaintiff pled the action." *Est. of Campbell ex rel. Campbell v. S. Jersey Med. Ctr.*, 732 F. App'x 113, 116 (3d Cir. 2018); *see also Jarbough v. Att'y*

Gen. of U.S., 483 F.3d 184, 189 (3d Cir. 2007) ("We are not bound by the label attached by a party to characterize a claim and will look beyond the label to analyze the substance of a claim."). Here, although Plaintiffs purport to style their claims as arising under state law, the inherently federal nature of the claims apparent on the face of their Complaints—not Plaintiffs' characterization of them as state-law claims—controls. "[A] plaintiff cannot frustrate a defendant's right to remove by pleading a case without reference to any federal law when the plaintiff's claim is necessarily federal." 14B Wright & Miller, *Federal Practice and Procedure* § 3722 (4th ed.).

In concluding that Plaintiffs' claims were not removable, the panel assumed that *Goepel* compelled this outcome. *See* Op.25 ("[Defendants'] biggest problem is that our precedent already forecloses their [approach]."). But *Goepel* did not hold that claims arising under *federal common law* cannot provide subject-matter jurisdiction. Nor did *Goepel* consider a situation where the plaintiff's nominally state-law claims were actually governed exclusively by federal common law by virtue of the Constitution's structure. Instead, the Court considered a situation where the defendant's removal argument "relied upon" a "statute," the Federal

Employees Health Benefits Act. *Id.* at 311–12. This case, by contrast, is governed by the fundamental constitutional principle that federal law is exclusive and state law simply does not exist in areas (such as interstate-pollution claims) where "our federal system does not permit the controversy to be resolved under state law." *Tex. Indus.*, 451 U.S. at 641. *Goepel* did not address that issue.

The Court should rehear this case en banc to clarify and confirm that *Goepel*'s holding does not preclude federal common law as a basis for federal jurisdiction, and to align itself with other circuits that have expressly held that claims nominally pleaded under state law but necessarily governed by federal common law are removable. Otherwise, this Court risks permitting plaintiffs to undermine our constitutional system by prosecuting claims governed by federal common law using state-law labels in state court. Indeed, plaintiffs across the country are seeking to have different state courts apply their own State's laws to essentially the same alleged conduct, which would result in a patchwork of differing and conflicting rules. Moreover, allowing these cases to proceed in state court would give state courts the lead role in crafting the rules in areas that are exclusively governed by federal law.

The panel's approach to federal jurisdiction would result in absurd consequences that are inconsistent with our federal system and common sense. 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 state law to enjoin it from discharging fumes in Tennessee that drifted across state lines into Georgia. *Contra Tenn. Copper Co.*, 206 U.S. at 236–37. The panel's holding is irreconcilable with the Supreme Court's rulings that such interstate claims arise only under federal law through the division of power inherent in our constitutional structure and thus are properly heard in federal court.

II. The Panel Decision Also Conflicts With Other Circuits By Accepting Plaintiffs' Disclaimers.

As Defendants argued to the panel, Plaintiffs' claims are removable for the additional reason that Plaintiffs seek to impose liability and damages based on the alleged physical effects of Defendants' extraction, production, promotion, and sale of oil and gas, substantial portions of which were performed under the direction, supervision, and control of federal officers. The claims are accordingly removable, given that Congress has empowered federal courts to hear any claim "for or relating to any act" taken under a federal officer's direction. 28 U.S.C. § 1442(a)(1).

The panel, however, refused to consider Defendants' principal bases for federal officer removal—including Defendants' extensive production and provision of specialty fuels to the military and their contribution of oil to the federal government's Strategic Petroleum Reserve—because Plaintiffs had disclaimed reliance on "emissions caused by fuel provided to the federal government." Op.35–36.

Here again, the panel's decision conflicts with the conclusions of other circuits. The Fifth Circuit has explained that disclaimers fail when they are "merely artful pleading designed to circumvent federal officer jurisdiction." *St. Charles Surgical Hosp., L.L.C. v. La. Health Serv. &*

Indem. Co., 990 F.3d 447, 451 (5th Cir. 2021) (internal quotation marks omitted). And the Seventh Circuit, in rejecting a similar disclaimer, explained that when plaintiffs allege that a certain product "harmed them," they cannot "have it both ways" by "purport[ing] to disclaim" that their lawsuit includes the defendant's "manufacture of [that product] for the government." *Baker v. Atl. Richfield Co.*, 962 F.3d 937, 945 n.3 (7th Cir. 2020). Rather, "[t]his is just another example of a difficult causation question that a federal court should be the one to resolve." *Id.* The same is true here. Plaintiffs cannot purport to disclaim injuries and relief related to Defendants' substantial provision of fuel products to the federal government while continuing to seek all damages they allege to have suffered from the adverse effects of climate change. And whether or not Defendants' activities undertaken at the direction of federal officers caused Plaintiffs' alleged harm is a "merits question[] that a federal court should decide." *Id.* at 944 (emphasis omitted).

The panel rejected this line of cases, stating that "artful pleading" applies only in cases of statutory "complete preemption." Op.36 (dismissing *St. Charles*, 990 F.3d at 451). This conclusion is both a non-sequitur and irreconcilable with the holdings of the Fifth and Seventh Circuits;

complete preemption has nothing to do with the entirely separate question whether a plaintiff has engaged in "artful pleading designed to circumvent federal officer jurisdiction." *St. Charles*, 990 F.3d at 451.

Additionally, Plaintiffs' purported disclaimers make no sense even on their own terms. Under Plaintiffs' theory, their alleged injuries necessarily arise from the total global accumulation of all greenhouse-gas emissions, including those that flow from Defendants' extensive activities on behalf of the federal government. Plaintiffs offer no method to isolate their alleged climate-related injuries from federally directed conduct, and, indeed, courts have found that there is no "realistic possibility" of doing so. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 880 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012). Plaintiffs' attempted disclaimers thus necessarily fail, and there is federal jurisdiction.

CONCLUSION

This Court should rehear these consolidated appeals en banc and reverse the district courts' remand orders.

September 14, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2022, an electronic copy of the foregoing Petition for Defendants-Appellants was filed with the Clerk of Court for the United States Court of Appeals for the Third Circuit using the appellate CM/ECF system, and that service on the following Filing Users will be accomplished by the appellate CM/ECF system.

Date: September 14, 2022

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CERTIFICATE OF COMPLIANCE

1. This Petition complies with the type-volume limitation of Federal Rules of Appellate Procedure 35(b)(2) and 40(b)(1) because it contains 3,784 words, excluding the parts of the petition exempted by Rule 32(a)(7)(B)(iii).

2. This Petition complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point New Century Schoolbook font.

September 14, 2022

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