ORAL ARGUMENT REQUESTED

No. 19-1330

In the United States Court of Appeals for the Tenth Circuit

BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY, ET AL.,
PLAINTIFFS-APPELLEES

v.

SUNCOR ENERGY (U.S.A.) INC., ET AL.,
DEFENDANTS-APPELLANTS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (CIV. NO. 18-1672) (THE HONORABLE WILLIAM J. MARTINEZ, J.)

SUPPLEMENTAL BRIEF OF APPELLANTS

THEODORE V. WELLS, JR.
DANIEL J. TOAL
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019

COLIN G. HARRIS
FAEGRE BAKER DANIELS LLP
1470 Walnut Street, Suite 300
Boulder, CO 80302

KANNON K. SHANMUGAM
WILLIAM T. MARKS
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006
(202) 223-7300

HUGH QUAN GOTTSCHALK
WHEELER TRIGG O'DONNELL LLP
370 Seventeenth Street, Suite 4500
Denver, CO 80202

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INTRODUCTION

Pursuant to the Court's June 25 order, defendants file this supplemental brief to address the impact of the Supreme Court's order vacating the judgment in this case and remanding for further proceedings in light of *BP p.l.c.* v. *Mayor & City Council of Baltimore*, 141 S. Ct. 1532 (2021). In this Court's prior decision, the Court held that it had appellate jurisdiction to review only the portion of the district court's remand order rejecting removal under the federal-officer removal statute. The Supreme Court disagreed in *BP*, holding that appellate jurisdiction extends to all grounds for removal in a case removed in part on federal-officer grounds. In light of that decision, the Court should now proceed to consider each of the remaining removal grounds that defendants asserted in their prior briefing.

Defendants present multiple compelling grounds for removal, and the case for removal is even stronger after the Second Circuit's recent decision in *City of New York* v. *Chevron Corp.*, 993 F.3d 81 (2021). In an exhaustive opinion, the Second Circuit held that federal common law necessarily governs climate-change claims materially similar to plaintiffs' claims here. That decision directly supports defendants' argument for removal, and it directly refutes many of plaintiffs' arguments to the contrary. For that reason and the others explained in defendants' prior briefing, the remand order should be vacated and the case remanded to the district court for further proceedings.

BACKGROUND

Plaintiffs filed the underlying complaint against defendants in Colorado state court, alleging that defendants have contributed to global climate change, which in turn has caused harm in Colorado. *See* App. 73-77. The complaint pleads a variety of claims that plaintiffs assert arise under state law, including public and private nuisance and trespass. *See* App. 173-181. Defendants removed this case to federal court on several grounds, including that claims asserting harm from interstate emissions necessarily arise under federal common law, *see* 28 U.S.C. § 1331, and that plaintiffs' allegations pertain to actions defendants took under the direction of federal officers, *see* 28 U.S.C. § 1442. *See* App. 12-48. The district court remanded the case to state court for lack of jurisdiction, and this Court affirmed. 965 F.3d 792 (2020). The Court held that 28 U.S.C. § 1447(d) deprived it of jurisdiction to review any aspect of the remand order other than federal-officer removal, *see id.* at 800-819, and that jurisdiction was not present on that ground, *see id.* at 819-827.

Defendants petitioned the Supreme Court for a writ of certiorari, presenting the question whether 28 U.S.C. § 1447(d) permits a court of appeals to review any issue encompassed in a district court's remand order where the removing defendant premised removal in part on the federal-officer removal statute. *See* 20-783 Pet. i. When the petition was filed, the Supreme Court had already granted a petition presenting the same question in a related case, *BP p.l.c.* v. *Mayor & City Council of Baltimore*, No. 19-1189. *See* 141 S. Ct. 222

(2020). On May 17, 2021, the Supreme Court issued its decision in *BP*, holding that a court of appeals has jurisdiction "to consider all of [a defendant's] grounds for removal" on appeal from a remand order in a case removed in part on federal-officer grounds. 141 S. Ct. 1532, 1537 (2021). The Supreme Court then granted the petition in this case, vacated this Court's judgment, and remanded for reconsideration in light of *BP*. *See* Judgment in No. 20-783.

ARGUMENT

A. The Court Has Appellate Jurisdiction To Review All Of Defendants' Grounds For Removal

The effect of the Supreme Court's order vacating this Court's judgment and remanding for reconsideration in light of *BP p.l.c.* v. *Mayor & City Council of Baltimore*, 141 S. Ct. 1532 (2021), is to reopen the case and allow the Court to consider the appeal anew with the benefit of the intervening authority. *See*, *e.g.*, *Johnson* v. *Board of Education*, 457 U.S. 52, 53-54 (1982) (per curiam); *Aldaba* v. *Pickens*, 844 F.3d 870, 871 (10th Cir. 2016).

In its earlier decision in this case, the Court held that it had jurisdiction to review only defendants' federal-officer ground for removal. 965 F.3d at 800-819. The Supreme Court disagreed in *BP*, holding that, when a remand order "rejects all of the defendants' grounds for removal, [Section] 1447(d) authorizes a court of appeals to review each and every one of them." 141 S. Ct. at 1538. Here, because the district court's remand order rejected all of defend-

ants' grounds for removal, *see id.* at 1537; Add. 1-56, the Court has "mandatory" jurisdiction to consider each of those grounds on appeal, *see* 965 F.3d at 811, 812 n.11.

In light of *BP*, this Court should proceed to determine whether any of defendants' remaining grounds for removal is meritorious. Those grounds include removal based on federal common law; *Grable & Sons Metal Products, Inc.* v. *Darue Engineering & Manufacturing*, 545 U.S. 308, 314 (2005); complete preemption; federal-enclaves jurisdiction; and the Outer Continental Shelf Lands Act. *See* Br. of Appellants 16-37, 43-48. If any of those grounds has merit, federal jurisdiction would be present, and the district court's remand order would be erroneous. *See* 28 U.S.C. § 1367; *Exxon Mobil Corp.* v. *Allapattah Services, Inc.*, 545 U.S. 546, 563 (2005). This supplemental brief focuses on the federal-common-law ground, though each ground independently confers jurisdiction.

B. Recent Authority Confirms That Federal Common Law Governs Plaintiffs' Claims

As defendants previously explained (Br. 18-25), this case is removable because federal common law governs claims that seek redress for injuries allegedly caused by interstate emissions. Such claims arise under federal law for purposes of 28 U.S.C. § 1331 and thus are removable under 28 U.S.C. § 1441. *See* Br. 16-18. Recently, in *City of New York* v. *Chevron Corp.*, 993 F.3d 81 (2021), the Second Circuit held that federal common law necessarily

governs materially similar claims seeking redress for global climate change. That compelling decision directly supports removal here.

1. In *City of New York*, the municipal government of New York City filed suit in federal court against several energy companies (including ExxonMobil, a defendant here), alleging that the "production, promotion, and sale of fossil fuels" by the defendant energy companies made them liable for public and private nuisance and trespass. 993 F.3d at 88. The complaint further alleged that the energy companies "have known for decades that their fossil fuel products pose a severe risk to the planet's climate," yet "downplayed the risks and continued to sell massive quantities of fossil fuels, which has caused and will continue to cause significant changes to the City's climate and landscape." *Id.* at 86-87. The City sought damages for "the past and future costs of climate-proofing its infrastructure and property," as well as "an equitable order ascertaining damages and granting an injunction to abate the public nuisance and trespass" if damages were not paid. *Id.* at 88.

The question before the Second Circuit was "whether municipalities may utilize state tort law to hold multinational oil companies liable for the damages caused by global greenhouse gas emissions." 993 F.3d at 85. That issue required the Second Circuit to decide whether federal common law or state law governed the City's claims. The City argued that federal common law did

not apply because the case did not concern the "regulation of emissions"; instead, the City argued, emissions were "only a link in the causal chain of [its] damages." *Id.* at 91 (internal quotation marks and citation omitted). The Second Circuit rejected that argument, explaining that the City could not use "[a]rtful pleading" to disguise its complaint as "anything other than a suit over global greenhouse gas emissions." *Id.* The court noted that it was "precisely *because* fossil fuels emit greenhouse gases," and thereby "exacerbate" climate change, that the City was seeking relief. *Id.* The City could not "disavow[] any intent to address emissions" while "identifying such emissions" as the source of its harm. *Id.*

Accordingly, the Second Circuit viewed the question before it as "whether a nuisance suit seeking to recover damages for the harms caused by global greenhouse gas emissions may proceed under New York law." 993 F.3d at 91. The court's "answer [was] simple: no"—such claims "must be brought under federal common law." *Id.* at 91, 95.

In so holding, the court found that the case presented the "quintessential example of when federal common law is most needed." 993 F.3d at 92. The court began by observing that a "mostly unbroken string of cases" from the Supreme Court over the last century has applied federal law to disputes involving "interstate air or water pollution." *Id.* at 91. The Supreme Court did so, the Second Circuit explained, because those disputes "often implicate two

federal interests that are incompatible with the application of state law": the "overriding need for a uniform rule of decision" on matters influencing national energy and environmental policy, and "basic interests of federalism." *Id.* at 91-92 (alteration and citation omitted).

In the Second Circuit's view, because the City was seeking to hold the defendants liable for injuries arising from "the cumulative impact of conduct occurring simultaneously across just about every jurisdiction on the planet," the City's lawsuit was too "sprawling" for state law to govern. 993 F.3d at 92. The court 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 court thus concluded that federal common law necessarily governed the City's claims. *See id.*

2. The claims at issue here are indistinguishable from those in *City of New York*. As in *City of New York*, plaintiffs here allege injury caused by the effect of global greenhouse-gas emissions on the global climate. *Compare* 993 F.3d at 88, 91, *with* App. 76, 88, 92, 160, 163-164, 174-175. Plaintiffs assert

causes of action for, *inter alia*, public and private nuisance and trespass. *Compare* 993 F.3d at 88, *with* App. 173-181. And plaintiffs seek damages for past and future costs of responding to climate change and climate-proofing their infrastructure and property, as well as an equitable order for remediation or abatement. *Compare* 993 F.3d at 88, *with* App. 176-177, 179, 180-181, 193-194.

Indeed, in holding that federal common law necessarily governed the City of New York's claims, the Second Circuit rejected nearly all of the arguments that plaintiffs have made here against the application of federal common law. For example, plaintiffs argue that federal common law does not govern here because this is not a lawsuit "brought by one State" to "control or enjoin out-of-state emitters." Br. 26, 27. But the Second Circuit held that federal common law governed similar claims brought by a municipal government. *See* 993 F.3d at 91, 95. Plaintiffs here also argue that federal common law is inapplicable because they are seeking "monetary remedies." Br. 27-28. The Second Circuit rejected that argument as well, explaining that "regulation can be effectively exerted through an award of damages" and that "the obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." 993 F.3d at 92 (quoting *Kurns* v. *Railroad Friction Products Corp.*, 565 U.S. 625, 637 (2012)).

The Second Circuit also disagreed with plaintiffs' position here that the presence of "out-of-state third-party emitters" in the "causal chain" between

"[d]efendants' acts and [p]laintiffs' injuries" does not require the application of federal common law. Br. 27. As the Second Circuit explained, plaintiffs "cannot have it both ways" by "disavowing any intent to address emissions" while "identifying such emissions" as the source of its harm. 993 F.3d at 91. Plaintiffs here are seeking relief "precisely *because* fossil fuels emit greenhouse gases," and they cannot use "[a]rtful pleading" to disguise their complaint as "anything other than a suit over global greenhouse gas emissions." *Id.* The Second Circuit's decision thus makes clear that federal common law governs plaintiffs' climate-change claims here.

C. Claims Necessarily Governed By Federal Common Law Are Removable To Federal Court

As defendants have explained (Br. 17-18, 25-27), the fact that climate-change claims are necessarily governed by federal common law makes them removable to federal court under 28 U.S.C. §§ 1331 and 1441. In *City of New York*, the Second Circuit noted that the Ninth Circuit in *City of Oakland* v. *BP p.l.c.*, 969 F.3d 895, 907 (2020), *cert. denied*, No. 20-1089 (June 14, 2021), and several district courts have held that similar climate-change claims "do not arise under federal law" for purposes of Section 1331 and the well-pleaded complaint rule. *City of New York*, 993 F.3d at 93-94 (brackets and citation omitted). The Second Circuit explained that its decision was "not incompatible with those decisions" because the City had "filed suit in federal court" on diversity grounds, and the application of federal common law arose as part of a

merits inquiry. *Id.* at 94. It was thus irrelevant whether the claims arose under federal law for jurisdictional purposes, and the Second Circuit was "free" to treat federal common law as if it provided only a "preemption defense" without deciding whether jurisdiction was present under Section 1331. *See id.*

The district courts that have held that the application of federal common law constitutes a "preemption defense," however—including the court below, *see* Add. 19—were mistaken. Defendants "are not invoking federal common law as a defense"; they are "arguing that federal common law supplies *the rule of decision*" for the plaintiffs' climate-change claims. Br. 26 (emphasis added). Put another way, the nature of plaintiffs' claims demands the application of federal common law, and federal law thus provides the content of the substantive law on which plaintiffs must rely to prove their claims.

That principle is founded in our Nation's constitutional structure. The Constitution "implicitly forbids" the States from applying their own laws to resolve "disputes implicating their conflicting rights," *Franchise Tax Board* v. *Hyatt*, 139 S. Ct. 1485, 1498 (2019) (alteration and citations omitted), and no State may "impos[e] its regulatory policies on the entire Nation." *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, 585 (1996); *see Healy* v. *Beer Institute, Inc.*, 491 U.S. 324, 336 (1989). Allowing state law to govern disputes regarding interstate pollution would violate the "cardinal" principle that "[e]ach state stands on the same level with all the rest," by permitting one State to

impose its law on other States and their citizens. *Kansas* v. *Colorado*, 206 U.S. 46, 97 (1907). As the Supreme Court has explained, whenever there is "an overriding federal interest in the need for a uniform rule of decision," *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 105 n.6 (1972), "state law *cannot be used*," *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 313 n.7 (1981) (emphasis added).

Notably, the Ninth Circuit did not treat defendants' federal-common-law ground for removal as a preemption defense in *City of Oakland*. *See* 969 F.3d 895. Instead, the court analyzed defendants' invocation of federal common law under the exception to the well-pleaded complaint rule recognized in *Grable*, declining to address defendants' argument that federal common law provides an independent basis for removal. *See City of Oakland*, 969 F.3d at 906. The Ninth Circuit then concluded that, "[e]ven assuming that the [plaintiffs'] allegations could give rise to a cognizable claim for public nuisance under federal common law," the state-law claims at issue did not require resolution of a "substantial" federal question, as *Grable* requires. *Id.*

While the Ninth Circuit did not treat defendants' argument as a preemption defense, it still misunderstood the relationship between state law and federal common law. In some contexts, plaintiffs can avoid removal by pleading only state-law claims, even if federal claims are available. *See Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 392 (1987). But a plaintiff asserting claims in an area necessarily governed by federal common law cannot choose between state

and federal law, because "our federal system does not permit the controversy to be resolved under state law" in the first instance. *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). The Ninth Circuit thus erred when it assumed that the plaintiffs could rely on state law where a "cognizable claim" under federal common law existed. *See* 969 F.3d at 906.

In similar fashion, the Ninth Circuit erred by failing to analyze the substance of the plaintiffs' claims, rather than only the label the plaintiffs placed on them. As the Supreme Court's decision in *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661 (1974), demonstrates, the well-pleaded complaint rule turns on the substance of the claim alleged, not whether the cause of action ordinarily arises under state law. In *Oneida*, the Court upheld the exercise of federal jurisdiction over an Indian tribe's possessory-land claims, which usually arise under state law, because the claims were necessarily governed by federal common law. *See id.* at 666-677. The Court explained that the case was not one "where the underlying right or obligation arises only under state law and federal law is merely alleged as a barrier to its effectuation"; instead, federal law protected the rights at issue "wholly apart from the application of state law principles which normally and separately" might apply. *Id.* at 675, 677. Because federal common law applied, federal jurisdiction was present, even if the claims may arise under state law in a different context.

In line with *Oneida*, a number of courts of appeals have held that, where

uniform federal rules of decision govern a common-law claim, the claim has its origins in federal law—no matter how it is labeled. *See*, *e.g.*, *Sam L. Majors Jewelers* v. *ABX, Inc.*, 117 F.3d 922, 926, 929 (5th Cir. 1997); *In re Otter Tail Power Co.*, 116 F.3d 1207, 1214 (8th Cir. 1997); *New SD, Inc.* v. *Rockwell International Corp.*, 79 F.3d 953, 954-955 (9th Cir. 1996); *Caudill* v. *Blue Cross & Blue Shield of North Carolina, Inc.*, 999 F.2d 74, 77-80 (4th Cir. 1993). Notably, the principle that a plaintiff cannot artfully plead its claims to avoid the application of a federal law is not limited to federal-question jurisdiction; it is a broader rule of pleading. *See Fry* v. *Napoleon Community School*, 137 S. Ct. 743, 755 (2017); *OBB Personenverkehr AG* v. *Sachs*, 577 U.S. 27, 36 (2015).

The Ninth Circuit thus erred by uncritically accepting the plaintiffs' argument that their claims arose under state law. In turn, the Ninth Circuit erred by analyzing the federal-common-law argument under the *Grable* framework, which applies when "a claim finds its origins in *state* rather than federal law." *Gunn* v. *Minton*, 568 U.S. 251, 258 (2013) (emphasis added). The claims here are inherently federal in nature and thus necessarily satisfy the well-pleaded complaint rule, as would any other federal cause of action.

Even if the Ninth Circuit were correct to invoke the *Grable* framework, removal still should have been permitted. Some courts of appeals have held that, where "federal common law *alone* governs" a disputed issue in a case, "the plaintiff's right to relief necessarily depends on resolution of a substantial

question of federal law." *Battle* v. *Seibels Bruce Insurance Co.*, 288 F.3d 596, 607 (4th Cir. 2002); *accord Newton* v. *Capital Assurance Co.*, 245 F.3d 1306, 1308-1309 (11th Cir. 2001); *Torres* v. *Southern Peru Copper Corp.*, 113 F.3d 540, 542-543 (5th Cir. 1997). In similar fashion, this Court has held that a case presents a "substantial question" under *Grable* where "federal common law applies to resolve the dispute[d]" issue and the federal government has a "direct interest" in the resolution of that issue. *Nicodemus* v. *Union Pacific Corp.*, 440 F.3d 1227, 1236 (10th Cir. 2006). So too here: federal common law provides the substantive rules governing plaintiffs' claims, and the federal government has a direct interest in the litigation because "subjecting [defendants'] global operations to a welter of different states' laws could undermine important federal policy choices." *City of New York*, 993 F.3d at 93.

The Ninth Circuit also suggested in passing that the potential displacement of remedies under federal common law by the Clean Air Act may affect federal jurisdiction. *See City of Oakland*, 969 F.3d at 906. But as defendants have explained (Reply Br. 11-13), the question whether a party can obtain a remedy under federal common law is distinct from the question whether federal common law supplies the rule of decision in the first instance. The Supreme Court made the same point in *Oneida*, reasoning that a claim governed by federal common law arises under federal law for "jurisdictional purposes" even if that claim "may fail at a later stage for a variety of reasons." *Oneida*,

414 U.S. at 675; *accord United States* v. *Standard Oil Co.*, 332 U.S. 301, 307-309 (1947) (holding that federal common law governed the claim but provided no remedy). The Supreme Court has long admonished courts not to "conflate[]" "jurisdiction" and "merits-related determination[s]," *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 511 (2006), but the Ninth Circuit erroneously did precisely that.

* * * * *

This Court has appellate jurisdiction to consider all of defendants' grounds for removal, and *City of New York* confirms that federal common law necessarily governs nuisance and tort claims seeking redress for harms allegedly caused by global climate change. Precedent from the Supreme Court, this Court, and other courts of appeals further demonstrates that claims necessarily governed by federal common law are removable to federal court. The district court erred in reaching a contrary conclusion and in rejecting defendants' other grounds for removal, which are valid for the reasons stated in defendants' prior briefs. *See, e.g.*, Br. 27-37, 43-48.

CONCLUSION

The remand order of the district court should be vacated and the case remanded for further proceedings.

Respectfully submitted,

/s/ Hugh Quan Gottschalk
HUGH QUAN GOTTSCHALK
WHEELER TRIGG O'DONNELL LLP
370 Seventeenth Street, Suite 4500
Denver, CO 80202
(303) 244-1800
gottschalk@wtotrial.com

Attorneys for Suncor Energy (U.S.A.) Inc., Suncor Energy Sales Inc., and Suncor Energy Inc.

/s/ Kannon K. Shanmugam
KANNON K. SHANMUGAM
WILLIAM T. MARKS
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006
(202) 223-7300
kshanmugam@paulweiss.com

THEODORE V. WELLS, JR.
DANIEL J. TOAL
JAREN JANGHORBANI
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019

COLIN G. HARRIS
FAEGRE BAKER DANIELS LLP
1470 Walnut Street, Suite 300
Boulder, CO 80302

Attorneys for Exxon Mobil Corporation

JULY 16, 2021

CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I, Kannon K. Shanmugam, counsel for appellant Exxon Mobil Corporation and a member of the Bar of this Court, certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7) and this Court's order of June 25, 2021, that the attached Supplemental Brief of Appellants is proportionally spaced, has a typeface of 14 points, and is less than 15 pages in length, excluding the items listed in Rule 32(f).

/s/ Kannon K. Shanmugam
KANNON K. SHANMUGAM

JULY 16, 2021

CERTIFICATE OF DIGITAL SUBMISSION, ANTIVIRUS SCAN, AND PRIVACY REDACTIONS

I hereby certify, pursuant to the Tenth Circuit CM/ECF User's Manual, that the attached Supplemental Brief of Appellants, as submitted in digital form via the Court's electronic-filing system, has been scanned for viruses using Malwarebytes Anti-Malware (version 2021.07.16.05, updated July 16, 2021) and, according to that program, is free of viruses. I also certify that any hard copies submitted are exact copies of the document submitted electronically, and that all required privacy redactions have been made.

/s/ Kannon K. Shanmugam
KANNON K. SHANMUGAM

JULY 16, 2021

CERTIFICATE OF SERVICE

I, Kannon K. Shanmugam, counsel for appellant Exxon Mobil Corporation and a member of the Bar of this Court, certify that, on July 16, 2021, the attached Supplemental Brief of Appellants was filed with the Clerk of the Court through the electronic-filing system. I further certify that all parties required to be served have been served.

/s/ Kannon K. Shanmugam
KANNON K. SHANMUGAM

JULY 16, 2021