No. 22-1096

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

STATE OF DELAWARE, ex rel.
Kathleen Jennings, Attorney General of the State of Delaware,
Plaintiff-Appellee,

v.

B.P. AMERICA INC.; BP P.L.C; CHEVRON CORPORATION; CHEVRON U.S.A. INC.; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66; PHILLIPS 66 COMPANY; EXXON MOBIL CORPORATION; EXXONMOBIL OIL CORPORATION; XTO ENERGY INC.; HESS CORPORATION; MARATHON OIL CORPORATION; MARATHON PETROLEUM CORPORATION; MARATHON PETROLEUM COMPANY LP; SPEEDWAY LLC; MURPHY OIL CORPORATION; MURPHY USA INC.; ROYAL DUTCH SHELL PLC; SHELL OIL COMPANY; CITGO PETROLEUM CORPORATION; TOTAL S.A.; OCCIDENTAL PETROLEUM CORPORATION; DEVON ENERGY CORPORATION; APACHE CORPORATION; CNX RESOURCES CORPORATION; CONSOL ENERGY INC.; OVINTIV, INC.; AMERICAN PETROLEUM INSTITUTE; TOTALENERGIES MARKETING USA, INC.,
Defendants-Appellants.

On Appeal from the United States District Court for the District of Delaware
No. 20-cv-01429 (The Hon. Leonard P. Stark)

BRIEF OF AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANTS AND VACATUR

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March 22, 2022

United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and Statement of Financial Interest

No. 22-1096

STATE OF DELAWARE, ex rel.
Kathleen Jennings, Attorney General of the State of Delaware,

v.

B.P. AMERICA INC.; BP P.L.C; CHEVRON CORPORATION; CHEVRON U.S.A. INC.; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66; PHILLIPS 66 COMPANY; EXXON MOBIL CORPORATION; EXXONMOBIL OIL CORPORATION; XTO ENERGY INC.; HESS CORPORATION; MARATHON OIL CORPORATION; MARATHON PETROLEUM CORPORATION; MARATHON PETROLEUM COMPANY LP; SPEEDWAY LLC; MURPHY OIL CORPORATION; MURPHY USA INC.; ROYAL DUTCH SHELL PLC; SHELL OIL COMPANY; CITGO PETROLEUM CORPORATION; TOTAL S.A.; OCCIDENTAL PETROLEUM CORPORATION; DEVON ENERGY CORPORATION; APACHE CORPORATION; CNX RESOURCES CORPORATION; CONSOL ENERGY INC.; OVINTIV, INC.; AMERICAN PETROLEUM INSTITUTE; TOTALENERGIES MARKETING USA, INC.

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Amicus Curiae The Chamber of Commerce of the United States of America makes the following disclosure: (Name of Party)

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

None.

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

None.

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

Not applicable.

s/William M. Jay
(Signature of Counsel or Party)

Dated: March 22, 2022

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INTEREST OF THE AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber often files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber has a strong interest in legal and policy issues relating to climate change. The global climate is changing, and human activities contribute to these changes. There is much common ground on which all sides could come together to address climate change with policies that are practical, flexible, predictable, and durable. The Chamber believes that durable climate policy must be made by Congress, which should both encourage innovation and investment to ensure significant emissions reductions and avoid economic harm for businesses, consumers, and disadvantaged communities. *See, e.g.*, Press Release, Sen. Sheldon

[1] All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no entity or person, aside from amicus curiae, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

Whitehouse, *New Bipartisan, Bicameral Proposal Targets Industrial Emissions for Reduction* (July 25, 2019), https://tinyurl.com/y49xfg3a (reporting the Chamber's support for the bipartisan Clean Industrial Technology Act). U.S. climate policy should recognize the urgent need for action, while maintaining the national and international competitiveness of U.S. industry and ensuring consistency with free enterprise and free trade principles. *See* U.S. Chamber of Commerce, Our Approach to Climate Change, https://www.uschamber.com/climate-change-position. Governmental policies aimed at achieving these goals should not be made by the courts, much less by a patchwork of actions under state common law.

INTRODUCTION AND SUMMARY OF ARGUMENT

The well-pleaded complaint rule makes a plaintiff the master of its complaint, but the rule does not let plaintiffs escape the jurisdictional consequences of the claims they choose to assert. Federal claims are removable to federal court, and that rule holds true even if the plaintiff fails to acknowledge—or tries to obscure—the federal nature of its claims. Where the distinctly federal nature of a claim is apparent from the plaintiff's allegations—such as allegations that present a cross-border claim for contributions to global climate change, which can arise only under federal common law—the plaintiff's artful refusal to attach the label "federal common law" to its claims does not matter. If the gravamen of the complaint reveals that the claim can only be federal, then it arises under federal law.

Treating inherently federal claims as federal is entirely consistent with the well-pleaded complaint rule. That rule respects a plaintiff's deliberate choice to present a state-law claim in state court, but there is no such choice available where there *is* no state-law claim. In the narrow, discrete, and easily identifiable subset of areas where federal common law governs, a state common law cause of action cannot exist.

Delaware's claims regarding the harm arising from the effects of global climate change are exactly the sort of interstate and international claims that require the application of federal common law. The State may assert a localized harm, but the alleged cause of that harm is anything but local—an inherently global phenomenon that is caused by parties and activities not only in every state in the United States, but in every country on the planet. Claims seeking to impose liability for such cross-border harms are inherently federal and belong in federal court.

ARGUMENT

I. Federal courts have original jurisdiction over a claim that can be based only on federal common law.

A. The well-pleaded complaint rule does not allow courts to ignore the inherently federal basis of a claim.

Under the well-pleaded complaint rule, "federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). But an

"independent corollary" of the rule is that "a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint." *Franchise Tax Bd. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 22 (1983) (citation omitted). Thus, a plaintiff may be the "master of his complaint" and ordinarily may choose to bring a state-law claim in state court, but he cannot deliberately disguise an "inherently federal cause of action." 14C Wright & Miller, Fed. Prac. & Proc. Juris. § 3722.1 (4th ed.). Where a plaintiff obscures the inherently federal nature of his claim, the plaintiff's case is removable to federal court. *United Jersey Banks v. Parell*, 783 F.2d 360, 367 (3d Cir. 1986) (noting there is "ample precedent" demonstrating that federal jurisdiction lies where "the state claim pleaded is 'really one' of federal law").

In other jurisdictional contexts, courts look to the "gravamen" of the complaint, not just to the label the plaintiff attaches, to determine whether the complaint invokes federal jurisdiction. *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 36 (2015) (looking not just at how the plaintiff "recast[s]" her negligence claims, but instead at the "'essentials' of her suit," to determine whether jurisdiction existed under the Foreign Sovereign Immunities Act (citation omitted)); *see also Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 755 (2017) (holding that courts must look to the "gravamen" of the plaintiff's complaint and "set[] aside any attempts at artful pleading" to determine whether the plaintiff's claim requires exhaustion under

federal law). What matters is "substance, not surface": "[t]he use (or non-use) of particular labels and terms is not what matters." *Fry*, 137 S. Ct. at 755; *Estate of Campbell v. S. Jersey Med. Ctr.*, 732 F. App'x 113, 116 (3d Cir. 2018) (noting that basing "a defendant's ability to avail himself of a federal forum . . . on how the plaintiff pled the action, rather than the substance of the plaintiff's claims," would allow a plaintiff to "avoid federal question jurisdiction through 'artful pleading'"). Focusing on the "gravamen" of a complaint, rather than whether a plaintiff used or avoided the right "magic words," ensures that a plaintiff cannot manipulate federal jurisdiction "through artful pleading." *Fry*, 137 S. Ct. at 755 (citation omitted).

The rule is no different in the narrow but important circumstances where a claim is inherently federal; in those situations, casting the claim in different language does not make it arise under different law. One such inherently federal claim is a common law cause of action governed by a uniform federal decisional standard.[2] Where the claim arises in an area that is governed exclusively by federal law, a

[2] *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 924, 929 (5th Cir. 1997) ("[I]f the cause of action arises under federal common law principles, jurisdiction may be asserted."); *In re Otter Tail Power Co.*, 116 F.3d 1207, 1214-15 (8th Cir. 1997) (holding that a case presented a federal question because it "raise[d] important questions of federal law," including "the federal common law of inherent tribal sovereignty"); *New SD, Inc. v. Rockwell Int'l Corp.*, 79 F.3d 953, 954-55 (9th Cir. 1996) (noting that, "on government contract matters having to do with national security, state law is totally displaced by federal common law," and "[w]hen federal law applies . . . it follows that the question arises under federal law, and federal question jurisdiction exists").

plaintiff cannot "deny a defendant a federal forum" by artfully pleading "a federal claim . . . as a state law claim." *United Jersey*, 783 F.2d at 367. Thus, a federal common law claim may be readily apparent from the "essentials" of a complaint if the allegations involve matters such as "air and water in their ambient or interstate aspects," *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972) (*Milwaukee I*), or other "especial federal concerns to which federal common law applies," such as "the rights and obligations of the United States," or "the conflicting rights of States or our relations with foreign nations." *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 & n.13 (1981); *see, e.g.*, *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938) ("[W]hether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive." (citations omitted)). In those areas where "especial federal concern[s]" are implicated, the *only* claim that can be pleaded is a federal one, as federal common law governs where the nature of the claim "makes it inappropriate for state law to control." *Tex. Indus.*, 451 U.S. at 641 & n.13. That claim can be governed only by the laws of the United States and thus is properly brought in federal court.

The district court concluded that Defendants' invocation of federal common law did not provide a basis for federal question jurisdiction because, in the district court's view, only complete preemption allowed the court to look past Delaware's

well-pleaded complaint to discern a basis for federal jurisdiction, and "Plaintiff's claims are not completely preempted by federal common law." JA34. The court treated Defendants' federal-common-law arguments as a defense of "[o]rdinary preemption," but it was wrong to do so: federal common law governs the entirety of Delaware's claims, not just the defenses to those claims. *See Milwaukee I*, 406 U.S. at 100 ("[Section] 1331 jurisdiction will support claims founded upon federal common law as well as those of a statutory origin."). When federal common law governs a claim, it is the only law that can apply, *see* pp. 11-14, *infra*, and thus the claim necessarily "aris[es] under the . . . laws . . . of the United States." 28 U.S.C. § 1331; *see E.O.H.C. v. Sec'y U.S. Dep't of Homeland Sec.*, 950 F.3d 177, 192 (3d Cir. 2020) (noting that because the underlying "claim [wa]s governed by federal common law," and "because federal common law is federal law," the federal courts had "arising under" jurisdiction under § 1331). And any claim that "aris[es] under" federal law is removable to federal court.

Claims rooted in federal common law, even if not labeled as such, also give rise to federal-question jurisdiction under *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005). In an area that is exclusively governed by federal law, claims (however pleaded) "necessarily raise" a federal issue that is "actually disputed," "substantial," and capable of being entertained by a federal court "without disturbing a congressionally approved balance of federal and state

judicial responsibilities." *Id.* at 314. Such claims are within federal jurisdiction, and they cannot be kept out "simply because they appear[] in state raiment." *Id.*

The district court erred by treating "artful pleading" and "complete preemption" as the same, even though they are conceptually distinct exceptions to the well-pleaded complaint rule. Citing *Goepel v. National Postal Mail Handlers Union*, 36 F.3d 306 (3d Cir. 1994), the court determined that "the 'artful pleading' doctrine is synonymous with the 'complete preemption' doctrine for purposes of establishing federal jurisdiction, supporting removal where there is 'a clear indication of a Congressional intention to permit removal despite the plaintiff's exclusive reliance on state law.'" JA37. But the court misunderstood *Goepel.* While *Goepel* did say that "the only state claims that are 'really' federal claims and thus removable to federal court are those that are preempted completely by federal law," 36 F.3d at 311-12, the *Goepel* panel had no occasion to consider whether state claims could be treated as "'really' federal" by some other means, such as the obvious application of federal common law for claims masquerading as state-law claims. The basis for artful-pleading removal in that case was a claim of statutory preemption, and thus, this Court had no reason to discuss anything other than statutory preemption in its jurisdictional analysis. *Id.* at 313 (concluding that the Federal Employees Health Benefit Act "does not create a statutory cause of action vindicating the same interest that the Goepels' state causes of action seek to

vindicate," and thus that "complete preemption does not apply"). Accordingly, *Goepel* does not foreclose a case from being removed to federal court by virtue of the obvious application of federal common law to claims that are labeled as state-law claims. *Cf. id.* at 309 n.3 ("We do not reach the question of whether the Goepels could have stated a cause of action under federal common law.").

The Tenth Circuit's decision in *Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238 (10th Cir. 2022), made the same mistake as the district court, concluding that complete preemption is the only way to look past a plaintiff's well-pleaded complaint to discern a basis for federal jurisdiction. *Id.* at 1256 ("Sometimes complete preemption is also known as artful pleading."). But like the district court, the Tenth Circuit failed to treat artful pleading and complete preemption as distinct, if overlapping, exceptions to the well-pleaded complaint rule. *E.g.*, *Ohio ex rel. Skaggs v. Brunner*, 629 F.3d 527, 532 (6th Cir. 2010) (artful pleading doctrine may apply independently of complete preemption "where federal issues necessarily must be resolved to address the state law causes of action"); 14C Wright & Miller, Fed. Prac. & Proc. Juris. § 3722.1 (4th ed.) ("coextensiveness of the complete preemption and artful pleading doctrines has not been expressly embraced by most federal courts"). "The artful pleading doctrine allows removal where federal law completely preempts a plaintiff's state-law claim," *Rivet v. Regions Bank of La.*, 522 U.S. 470, 475 (1998), but that is not all

that it does.[3] Complete preemption is not the only circumstance where claims have a "sufficient federal character to support removal." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n.2 (1981). Claims that must necessarily arise under federal common law due to their interstate and transboundary character constitute another such circumstance.

The Tenth Circuit compounded its error by insisting not just on complete preemption, but on a statutory directive to apply it. The court did acknowledge the existence of "federal common law" governing "air and water in their ambient or interstate aspects," *Suncor*, 25 F.4th at 1258-59 (citation omitted), as it must under the Supreme Court's precedents. But the Tenth Circuit held that federal common law can *never* give rise to complete preemption or, in its view, to federal jurisdiction under the artful pleading doctrine. Because "complete preemption requires congressional intent," and "federal common law is created by the judiciary—not Congress," the Tenth Circuit held that "the federal common law for transboundary pollution cannot completely preempt" state-law claims. *Id.* at 1261-62. The Tenth Circuit also reasoned that, in cases involving the "federal common law of interstate water pollution" and "the federal common law of interstate air pollution," there was

[3] That is clear from *Rivet* itself, in which the Supreme Court reiterated *Franchise Tax Board*'s statement that "a plaintiff may not defeat removal by omitting to plead necessary federal questions," and then used complete preemption as one example. 522 U.S. at 475. *Rivet* involved only an ordinary federal defense (preclusion).

no longer federal common law to apply because the Supreme Court had held it to be displaced by the Clean Water Act and the Clean Air Act. *Id.* at 1259 (discussing *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981) (*Milwaukee II*), and *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011)). It concluded (*id.* at 1260) that the same was true in *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012), where the Ninth Circuit held that the Clean Air Act displaced any private cause of action for transboundary pollution under the federal common law of nuisance. *Id.* at 857. From these cases, the Tenth Circuit determined that the relevant question for remand jurisdiction is "whether the federal act that displaced the federal common law [completely] preempted the state-law claims." *Suncor*, 25 F.4th at 1261. Because the Clean Air Act does not provide an exclusive private cause of action against polluters, the Tenth Circuit thought the answer must be no.

But the Tenth Circuit's reasoning mistakenly assumes that there are state law claims to allege once federal common law is displaced. That assumption cannot be squared with the Supreme Court's pronouncements that federal common law exists where state law cannot. *Tex. Indus.*, 451 U.S. at 641 & n.13 (federal common law governs where the nature of the claim "makes it inappropriate for state law to control"); *Milwaukee I*, 406 U.S. at 107 n.9 ("Until the field has been made the subject of comprehensive legislation or authorized administrative standards, only a federal common law basis can provide an adequate means for dealing with such

claims as alleged federal rights.").[4] If it is "inappropriate" for state law to control a claim in one of those fields when federal common law governs, then there is no reason why a state-law cause of action in that field suddenly becomes appropriate when that federal common law is displaced by a federal statutory scheme that also denies private plaintiffs a cause of action. Displacement of federal common law does not suddenly make state common law competent to resolve interstate disputes. *City of N.Y. v. Chevron Corp.*, 993 F.3d 81, 98 (2d Cir. 2021) (notion that a state law claim may "snap back into action" once federal law is displaced is "difficult to square with the fact that federal common law governed [the] issue in the first place");

[4] In *American Electric Power*, the Supreme Court concluded that the plaintiffs could not sue under federal statutory law (which gave them no right of action) or under federal common law (which was displaced). The Court expressly did not pronounce on the viability of the remaining possible alternative, "a claim under state nuisance law"; instead, the Court merely observed that "[i]n light of our holding that the Clean Air Act displaces federal common law, the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act." 564 U.S. at 429. The words "*inter alia*" in this sentence are significant; they make clear that preemption questions are not the only questions relevant to "the availability *vel non* of a state lawsuit," without specifying what the relevant questions might be. Such tentativeness was perfectly appropriate in that case, given that, as the Court went on to observe, "[n]one of the parties have briefed preemption or otherwise addressed the availability of a claim under state nuisance law." *Id.* The Court "therefore le[ft] the matter open for consideration on remand." *Id. American Electric Power* should not be read as somehow unanimously endorsing—in a paragraph in which the Court expressly *declined* to rule on any questions about the availability of state law claims—the theory that the displacement of federal common law made state-law claims viable. *Id.* at 429.

cf. Int'l Paper Co. v. Ouellette, 479 U.S. 481, 488 (1987) ("implicit corollary" of *Milwaukee I* is that state common law is replaced by federal common law).

B. Removal of federal common law claims, however they are labeled, is wholly consistent with the policies underlying the well-pleaded complaint rule.

Three "longstanding policies" justify the ordinary application of the well-pleaded complaint rule: (1) respect for the plaintiff's deliberate choice to "eschew[] claims based on federal law, . . . to have the cause heard in state court"; (2) avoiding the radical expansion of "the class of removable cases, contrary to the '[d]ue regard for the rightful independence of state governments'"; and (3) preventing the "undermin[ing] [of] the clarity and ease of administration of the well-pleaded complaint doctrine, which serves as a 'quick rule of thumb' for resolving jurisdictional conflicts." *Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831-32 (2002) (citation omitted). Each of those policies is completely consistent with upholding the removal of federal common law claims, including federal common law claims set forth in an artfully pleaded complaint that attempts to recast such claims as state-law claims.

First, a plaintiff cannot invoke the prerogative to choose the law and forum when the plaintiff alleges a common-law claim that is inherently federal; where federal common law applies, there is no state-law option to choose. One of the main purposes of the well-pleaded complaint rule is to honor the plaintiff's choice of

bringing a claim "in state court under state law." *Id.* at 832. But, as explained above, where federal common law governs, the "implicit corollary" is that there is no state law to apply. *Ouellette*, 479 U.S. at 488; *see also Milwaukee II*, 451 U.S. at 313 n.7 ("If state law can be applied, there is no need for federal common law; if federal common law exists, it is because state law cannot be used."). That corollary is best demonstrated in cases where federal common law necessarily governs because the claim is interstate and international in nature; transboundary issues cannot be resolved by a patchwork of state courts applying local law in an uncoordinated manner. *E.g.*, *New York*, 993 F.3d at 85-86 ("Global warming presents a uniquely international problem of national concern. It is therefore not well-suited to the application of state law."); *Grynberg Prod. Corp. v. British Gas, p.l.c.*, 817 F. Supp. 1338, 1356 (E.D. Tex. 1993) ("International relations are not such that both the states and the federal government can be said to have an interest; the states have little interest because the problems involved [in international relations] are uniquely federal." (citation and internal quotation marks omitted)).

Second, there is no risk of flooding federal courts with a new wave of removal cases premised on federal common law. *Holmes*, 535 U.S. at 832; *PNC Bank, N.A. v. PPL Elec. Utils. Corp.*, 189 F. App'x 101, 104 n.3 (3d Cir. 2006) (federal-question jurisdiction must be "consistent with congressional judgment about the sound division of labor between state and federal courts" (citation and internal quotation

marks omitted)). Federal common law plays "a necessarily modest role," *Rodriguez v. FDIC*, 140 S. Ct. 713, 717 (2020), and thus the "instances where [federal courts] have created federal common law are few and restricted," *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963). *See Tex. Indus.*, 451 U.S. at 641 (federal common law exists only in "narrow areas"). In those few areas where federal common law applies, there is little risk of intruding upon the "independence of state governments," as those areas necessarily fall outside state authority. *Holmes*, 535 U.S. at 832 (citation omitted).

Conversely, failing to recognize federal common law claims for what they are, just because the plaintiff refuses to acknowledge it, risks allowing state courts and state law to intrude upon federal priorities. As the Second Circuit has warned, attempting to apply state law in an area where federal common law should apply risks "upsetting the careful balance" of federal prerogatives. *New York*, 993 F.3d at 93. In a case very similar to this one that presented claims for relief based on climate change, the Supreme Court made clear that "[e]nvironmental protection" is one such area that is "undoubtedly . . . within *national* legislative power, one in which federal courts may fill in statutory interstices and, if necessary, even fashion federal law." *Am. Elec. Power*, 564 U.S. at 421 (emphasis added, citation and internal quotation marks omitted); *see id.* (quoting *Milwaukee I*, 406 U.S. at 103); *id.* at 422 (noting not only that the subject of tort law claims based on climate change "is meet for

federal law governance," but that "borrowing the law of a particular State would be inappropriate" for federal common law claims based on climate change).[5]

Finally, using the artful pleading doctrine to recognize federal jurisdiction in cases presenting federal common law claims does not make the well-pleaded complaint rule any more complicated to apply. It is not difficult to identify the few narrow areas of the law that raise the sort of "especial federal concerns to which federal common law applies." *Tex. Indus.*, 451 U.S. at 641 n.13; *e.g.*, *id.* at 641 (identifying several "narrow areas" in which federal common law applies). The subject of "air and water in their ambient or interstate aspects," *Am. Elec. Power Co.*, 564 U.S. at 421 (quoting *Milwaukee I*, 406 U.S. at 103), is one such narrow category, and a claim of harm resulting from global climate change fits squarely into it.

II. Delaware's claims are removable under the artful pleading doctrine.

Delaware's claims are about the inherently global problem of climate change. It alleges that Defendants have caused harm to the State by way of the "injury or destruction of State-owned or -operated facilities critical for operations, utility services, and risk management, as well as other assets essential to community health, safety, and well being," JA252-53—not by local conduct, but by extracting and

[5] Congress can also enact a statute that displaces federal common law, but whether Congress has done so here is a question that is not currently presented to this Court. *Am. Elec. Power*, 564 U.S. at 423; *New York*, 993 F.3d at 95.

refining fossil fuel products, and placing them "into the stream of commerce." JA451. The inherently global phenomenon of climate change—both its causes and its consequences—is the key issue that makes Delaware's claims inherently federal in nature. As the Second Circuit explained in *New York*, artful pleading cannot turn "a suit over global greenhouse gas emissions" into a "local spat," simply by focusing on Delaware's sliver of the alleged global environmental harm; the alleged "global greenhouse gas emissions" are "the singular source of . . . harm," and thus must be adjudged by federal common law standards, not by state common law. 993 F.3d at 91.

Delaware's claims regarding cross-boundary emissions are of such an interstate and international character that the governing law can only be federal common law. "[A] mostly unbroken string of cases has applied federal law to disputes involving interstate air or water pollution." *Id*. The State may be asserting a localized harm (or rather a localized manifestation of harms that occur everywhere), but the alleged harm flows entirely from interstate and international conduct, *i.e.*, when Defendants allegedly contribute to global emissions. *Id.* (federal common law applies to claims of "harms caused by global greenhouse gas emissions").

The conclusion that federal common law necessarily governs Delaware's claims is reinforced by the fact that any individual state's common law of nuisance

is ill-equipped to deal with cross-border pollution issues. The Supreme Court has recognized that "vague and indeterminate nuisance concepts" are a poor fit for addressing interstate environmental issues. *Milwaukee II*, 451 U.S. at 317. As one federal court has recognized, applying "vague public nuisance standards" offered under different states' laws to balance "the need for energy production and the need for clean air" would result in "a confused patchwork of standards, to the detriment of industry and the environment alike." *North Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 296, 302, 306 (4th Cir. 2010). This is all the more true when the phenomenon in question is attributable not just to sources of emissions on the other side of a particular state or national border, but to millions (if not billions) of sources of emissions originating in every country in the world.

If Delaware has a common law cause of action to assert its claims for relief based on *global* climate change, that cause of action can arise only under *federal* common law. Delaware's case was removable from state court even if it failed to utter the words "federal common law" in its complaint.

CONCLUSION

The district court's remand order should be vacated, and this case should be remanded for further proceedings.

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Respectfully submitted,

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This brief complies with the type volume limitations of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 4,662 words, excluding the parts exempted by Rule 32(f).

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CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Local Rule of Appellate Procedure 46.1(e), the undersigned hereby certifies that he is a member of the bar of the United States Court of Appeals for the Third Circuit.

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