No. 21-1752

In the United States Court of Appeals for the Eighth Circuit

STATE OF MINNESOTA, PLAINTIFF-APPELLEE

v.

AMERICAN PETROLEUM INSTITUTE; EXXON MOBIL CORPORATION; EXXONMOBIL OIL CORPORATION; KOCH INDUSTRIES, INC.; FLINT HILLS RESOURCES LP; AND FLINT HILLS RESOURCES PINE BEND LLC, DEFENDANTS-APPELLANTS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA (CIV. NO. 20-1636) (THE HONORABLE JOHN R. TUNHEIM, C.J.)

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SUMMARY OF THE CASE

The State of Minnesota, appellee here, filed a five-count complaint in Minnesota state court against appellants American Petroleum Institute; Exxon Mobil Corporation; ExxonMobil Oil Corporation; Koch Industries, Inc.; Flint Hills Resources LP; and Flint Hills Resources Pine Bend LLC. The complaint asserted violations of state consumer-protection statutes, common-law fraud, and common-law strict and negligent failure to warn, alleging that defendants' production, sale, and promotion of fossil fuels have contributed to climate change and caused wide-ranging harm to Minnesota and its citizens. The complaint seeks restitution, disgorgement, and injunctive relief.

Defendants removed the case to the United States District Court for the District of Minnesota, asserting federal jurisdiction under the federal-question statute (28 U.S.C. § 1331); the federal-officer removal statute (28 U.S.C. § 1442); the Outer Continental Shelf Lands Act (43 U.S.C. § 1349); the Class Action Fairness Act (28 U.S.C. § 1453); and the diversity-jurisdiction statute (28 U.S.C. § 1332). Among other grounds, defendants argued that federal common law necessarily governs claims seeking redress for injuries allegedly caused by global climate change, as the Second Circuit recently held in a similar case. *See City of New York* v. *Chevron Corp.*, 993 F.3d 81 (2021).

Defendants respectfully submit that oral argument would assist the Court, and, because of the complexity and number of distinct issues, request 30 minutes per side.

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INTRODUCTION

This case is one of nearly two dozen lawsuits filed by state and local governments in state courts across the country seeking to impose liability on energy providers for injuries allegedly caused by global climate change. Here, the State of Minnesota claims that defendants are liable for such harms because defendants purportedly misled the public about climate change. The State seeks redress for alleged injuries such as flooding, harm to forests and infrastructure, and personal injuries.

Because the State seeks relief for harms allegedly caused by emissions associated with the use of fossil fuels by billions of consumers around the world, the district court had jurisdiction over this lawsuit on a number of grounds. Those grounds include that federal common law governs claims seeking redress for transboundary emissions; that the State's claims necessarily raise substantial federal issues; and that the State's claims encompass conduct taken at the direction of federal officers. Based on those grounds and others, defendants properly removed this case to federal court.

The district court rejected defendants' grounds for removal only by accepting at face value the State's characterization of its lawsuit. There is no dispute that the State has pleaded its claims as premised on consumer deception, but the State cannot defeat federal jurisdiction by concealing federal claims in state garb. As the Second Circuit recently explained in a similar

climate-change case—decided one day after the district court's remand decision in this case—a plaintiff cannot use "[a]rtful pleading" to disguise a complaint seeking redress for global climate change as "anything other than a suit over global greenhouse gas emissions." *City of New York* v. *Chevron Corp.*, 993 F.3d 81, 91 (2021). The same reasoning applies here. Notably, the Second Circuit further held that federal common law necessarily governs claims seeking redress for global climate change, such as the State's claims here. *Id.* at 91-92. The district court erred in holding that it lacked jurisdiction over this lawsuit, and its remand order and judgment should therefore be vacated.

STATEMENT OF JURISDICTION

On July 27, 2020, defendants removed this action from the Ramsey County District Court, Second Judicial District Court of Minnesota, to the United States District Court for the District of Minnesota. *See* App. 102-160. On March 31, 2021, the district court entered an order granting the State's motion to remand this case to state court. *See* Add. 1a-37a. The district court entered a final judgment on April 1, 2021, and defendants filed a timely notice of appeal that same day. *See* App. 237-243. This Court has jurisdiction under 28 U.S.C. §§ 1291 and 1447(d), and that jurisdiction extends to all of the independent grounds for removal encompassed in the district court's remand order. *See BP p.l.c.* v. *Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 1537, 1543 (2021). In defendants' view, the district court had jurisdiction under

28 U.S.C. §§ 1331, 1332(d)(2), 1367(a), 1441(a), 1442, 1453(b), and 43 U.S.C. § 1349(b).

STATEMENT OF THE ISSUE

Whether the district court had jurisdiction over the State's claims alleging harm from global climate change, permitting defendants to remove this case from state to federal court. *See City of New York* v. *Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021); *In re Otter Tail Power Co.*, 116 F.3d 1207 (8th Cir. 1997); *Baker* v. *Atlantic Richfield Co.*, 962 F.3d 937 (7th Cir. 2020).

STATEMENT OF THE CASE

1. In 2017, a number of state and local governments began filing lawsuits in state court against various energy companies alleging that the companies' worldwide production, sale, and promotion of fossil fuels caused injury by increasing the amount of greenhouse gases in the atmosphere and contributing to global climate change. Some of the lawsuits assert that the energy companies' alleged conduct constitutes a public nuisance and gives rise to product liability under state common law. Other lawsuits proceed under state consumer-protection statutes, alleging that defendants misled the public regarding the alleged likelihood and risks of harm from climate change. Whatever the exact causes of action, the state and local governments seek relief related to alleged past and future harms purportedly caused by climate change.

The defendants in these cases have consistently removed them to federal court. The defendants have asserted multiple bases for federal jurisdiction, including that the allegations in the complaints pertain to actions defendants took at the direction of federal officers, *see* 28 U.S.C. § 1442; that plaintiffs' climate-change claims necessarily arise under federal common law, *cf. American Electric Power Co.* v. *Connecticut*, 564 U.S. 410, 420-423 (2011); *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 103 (1972); that federal-question jurisdiction was otherwise present under *Grable & Sons Metal Products, Inc.* v. *Darue Engineering & Manufacturing*, 545 U.S. 308 (2005); and that removal was appropriate on other grounds. Following the Supreme Court's recent decision in *BP p.l.c.* v. *Mayor & City Council of Baltimore*, 141 S. Ct. 1532 (2021), the propriety of removal in these cases is currently pending before four other courts of appeals. *See Rhode Island* v. *Shell Oil Products Co.*, No. 19-1818 (1st Cir.); *BP p.l.c.* v. *Mayor & City Council of Baltimore*, No. 19-1644 (4th Cir.); *County of San Mateo* v. *Chevron Corp.*, No. 18-15499 (9th Cir.); *Board of County Commissioners of Boulder County* v. *Suncor Energy (U.S.A.) Inc.*, No. 19-1330 (10th Cir.).

2. Plaintiff-appellee is the State of Minnesota. App. 19-20. Defendants-appellants are the American Petroleum Institute; Exxon Mobil Corporation; ExxonMobil Oil Corporation; Koch Industries, Inc.; Flint Hills Resources LP; and Flint Hills Resources Pine Bend, LLC. App. 20-28.

In June 2020, the State filed a complaint against defendants in Minnesota state court, claiming violations of state consumer-protection statutes, common-law fraud, and common-law strict and negligent failure to warn. App. 88-97. The complaint alleged that defendants' production, sale, and promotion of fossil fuels have increased greenhouse-gas emissions and contributed to climate change, purportedly causing wide-ranging harm to Minnesota, its citizens, and fossil-fuel consumers. App. 17, 72-85. In so doing, the complaint focuses expansively on the greenhouse-gas emissions allegedly resulting from defendants' fossil-fuel production activities. For example, the complaint alleges emissions have substantially increased since World War II, that the increase has caused climate change, and that, "[w]ithout Defendants' exacerbation of global warming caused by their conduct," the effects of climate change would be less than observed. App. 30-31.

In the complaint, the State invoked its *parens patriae* authority and Section 8.31 of the Minnesota Statutes, which authorizes the Attorney General to file a civil action to enforce certain state laws on behalf of consumers and requires the distribution of any recovery to injured consumers. App. 98. The complaint sought restitution, disgorgement, and injunctive relief. App. 97-98.

3. Defendants removed this action to federal court on seven grounds. *See* App. 112-113. Defendants asserted, *inter alia*, that the district court had

federal-question jurisdiction because federal common law necessarily governed the State's claims, in part because the State seeks redress for injuries allegedly caused by interstate and international emissions. *See* App. 114-122; 28 U.S.C. § 1331. While the State styled its complaint as alleging only state-law claims, defendants contended that artful pleading could not obscure the fact that the complaint is predicated on harms allegedly caused by climate change. App. 118. Defendants additionally argued that the State's claims necessarily raised disputed federal issues and thus were removable under *Grable*. *See* App. 123.

Defendants further argued that removal was appropriate under the federal-officer removal statute, 28 U.S.C. § 1442, citing several examples of activities that defendants took at the direction of federal officers. *See* App. 133-148. Defendants noted that they had entered into supply agreements with the armed forces to produce special fuels, including high-octane aviation fuel. App. 133-137. In addition, certain defendants had long produced oil and gas belonging to the federal government on the Outer Continental Shelf under leases that gave the government control over various aspects of their operations, including approval of exploration and production plans; regulation of extraction rates; and a right of first refusal during wartime to purchase all extracted oil and gas. App. 138-141. Some defendants, moreover, had acted

under federal officers in producing oil and operating infrastructure for the Strategic Petroleum Reserve. App. 144-146.

Defendants additionally asserted that removal was permissible under the Class Action Fairness Act, the Outer Continental Shelf Lands Act, federal-enclaves jurisdiction, and diversity jurisdiction. *See* App. 113.

The State moved to remand the case to state court. *See* D. Ct. Dkt. 35. It contended that, even though it was seeking relief for harms allegedly caused by the effects of global climate change, its complaint had no relationship to interstate and international pollution or waters of the United States. *See id.* at 22. The State further argued that the case did not necessarily implicate any federal issues or have a sufficient causal connection to defendants' activities taken at the direction of federal officers. *See id.* at 16, 23.

4. The district court granted the motion to remand. Add. 1a-37a. In so doing, the court stated that it had "some reluctance in remanding such significant litigation to state court." Add. 33. The court further stated that "state court would most certainly be an inappropriate venue" for a case "seeking a referendum on the broad landscape of fossil fuel extraction, production, and emission." *Id.* Although the court did not view the State's complaint as requesting such a referendum, the court acknowledged that the State requested relief for alleged harms caused by climate change, and that "whether there can

be a state law action for alleged climate change injuries at all" "raises broad and complicated questions." Add. 22.

As it relates to federal common law as a basis for removal, the court acknowledged that "[t]he Supreme Court has specifically recognized federal common law in the arena of transboundary pollution and environmental protection." Add. 11a-12a. But the court reasoned that the State's complaint did not implicate federal common law and that claims governed exclusively by federal common law are not removable to federal court. Add. 12a-16a. With respect to removal under *Grable*, although the court acknowledged that "the complex features of global climate change certainly present many issues of great federal significance that are both disputed and substantial," Add. 21a, the court concluded that the State's claims did not necessarily raise a substantial question of federal law. Add. 17a-22a. With respect to federal-officer removal, the court acknowledged that defendants had identified "plausible ways" in which they "may have acted under the direction of federal officers," but nevertheless declined to exercise jurisdiction because it found the connection between those actions and the State's claims too attenuated. Add. 23a-24a. The court also rejected defendants' other grounds for removal. Add. 26a-34a.

5. At defendants' request, the district court entered a temporary stay of its remand order while the parties briefed whether a longer stay

pending appeal was warranted. *See* D. Ct. Dkt. 86. The district court heard oral argument but has not yet ruled on the stay motion.*

SUMMARY OF ARGUMENT

This case belongs in federal court primarily because the injury alleged and relief requested are governed by federal law. The State's lawsuit threatens to interfere with longstanding federal policies over matters of uniquely national importance, including energy policy, environmental protection, and foreign affairs. The State seeks to hold defendants liable for the alleged impacts of climate change; its alleged injuries purportedly result from greenhouse-gas emissions associated with the use of fossil fuels by billions of consumers worldwide—including the State itself. Despite the State's efforts artfully to plead its claims as arising under state law, federal jurisdiction exists over these claims on multiple independent grounds.

A. First and foremost, the district court had federal-question jurisdiction because federal common law governs the State's claims. Federal common law governs claims that concern the regulation of air and water in their ambient or interstate aspects; as courts have recognized, that includes

* Defendants separately filed a petition for permission to appeal the remand order under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(1)(B). The Court docketed the petition as No. 21-8005 and granted defendants' request to consider the petition together with this appeal. The separate petition is now moot because, after the Supreme Court's decision in *BP*, *supra*, this Court has jurisdiction in this appeal to consider all of defendants' grounds for removal, including the CAFA ground.

claims alleging that energy companies caused injury by contributing to global climate change. And that makes good sense. If state law were to govern claims such as these, energy companies and emissions sources would be subjected to a patchwork of non-uniform state-law standards, and States would be empowered to regulate in areas reserved for the federal government.

The district court disagreed, concluding both that federal common law did not govern the State's claims and that claims governed by federal common law are not removable to federal court if they are labeled as state-law claims. Both conclusions are erroneous. The first squarely conflicts with the Second Circuit's recent decision in *City of New York* v. *Chevron Corp.*, 993 F.3d 81 (2021)—issued a day after the district court's remand decision in this case—and holding that federal common law governs climate-change claims similar to those here. The Second Circuit's reasoning was correct, and this Court should follow it. The second of the district court's conclusions conflicts with precedent from this Court and others recognizing that putative state-law claims are removable to federal court if they are exclusively governed by federal common law.

B. The State's claims also necessarily raise substantial and disputed issues of federal law, permitting the exercise of federal-question jurisdiction. *See Grable & Sons Metal Products, Inc.* v. *Darue Engineering & Manufac-*

turing, 545 U.S. 308, 312-313 (2005). The fact that federal common law supplies the rule of decision for the State's claims alone permits removal on this basis. The State's claims also seek collaterally to attack cost-benefit analyses in the energy and environmental context that are committed to, and already have been conducted by, the federal government. Those issues are substantial, disputed, and can only be resolved by federal (and not state) courts without disrupting the federal-state balance. Removal was therefore permissible under *Grable*.

C. The federal-officer removal statute also supported removal here. Acting at the federal government's direction and subject to its extensive control, defendants have contributed significantly to the United States military by providing fossil fuels that support the national defense. Defendants have also acted under the federal government's direction pursuant to federal policies promoting energy security and reducing reliance on foreign oil. And because the State's theory of liability sweeps so broadly, the State's claims have a sufficient causal nexus with the conduct that defendants took at the direction of federal officers. Defendants also have colorable federal defenses against the claims asserted here, permitting removal on federal-officer grounds.

D. Removal was further permissible under the Outer Continental Shelf Lands Act because the State's claims arise out of defendants' substantial

operations on the outer continental shelf. By alleging injuries from the contribution of fossil fuels to greenhouse-gas emissions and global climate change, the State necessarily includes defendants' exploration, extraction, and production of fossil fuels on the outer continental shelf.

E. Finally, this action is removable under the Class Action Fairness Act. This lawsuit is in substance a class action, as its explicit purpose is to recover the costs of alleged climate-change injuries on behalf of Minnesota's citizens and fossil-fuel consumers and to distribute any recovery to those individuals.

ARGUMENT

Under 28 U.S.C. § 1441, a defendant in a civil action filed in state court may remove the case to federal court if the case "originally could have been filed there." *Baker* v. *Martin Marietta Materials, Inc.*, 745 F.3d 919, 923 (8th Cir. 2014). Removal is permitted as long as at least one claim falls within the original jurisdiction of the federal court. *See In re Pre-Filled Propane Tank Antitrust Litigation*, 893 F.3d 1047, 1059-1060 (8th Cir. 2018); 28 U.S.C. § 1367(a). The district court below had original jurisdiction over this action on multiple grounds, including under the federal-question statute (28 U.S.C. § 1331). This action was also independently removable under the federal-officer removal statute (28 U.S.C. § 1442) and the Class Action Fairness Act (28 U.S.C. § 1453). Under de novo review, *see Bell* v. *Hershey Co.*, 557 F.3d 953,

956 (8th Cir. 2009), the Court should conclude that the district court erred in remanding this case to state court, and accordingly vacate the remand order and the judgment below.

A. Removal Was Proper Because The State's Claims Arise Under Federal Common Law

In this lawsuit, the State seeks restitution, disgorgement, and injunctive relief under several theories of liability for injuries allegedly resulting from climate change. *See* App. 88-97. The Supreme Court has long made clear that, as a matter of constitutional structure, claims seeking redress for interstate pollution are governed exclusively by federal common law, not state law. Such claims necessarily arise under federal law for purposes of federal-question jurisdiction and are thus removable to federal court.

1. Federal Common Law Governs Claims Alleging Harm From Global Climate Change

The State alleges that greenhouse-gas emissions from the combustion of fossil fuels have contributed to global climate change, and it seeks redress from defendants for harms allegedly caused by climate change, including flooding, harm to forests and infrastructure, and personal injuries. *See* App. 30-31, 74-85. A line of Supreme Court decisions, as well as lower-court decisions applying them, demonstrates that claims seeking redress for climate-change-induced harms arise under federal common law.

a. In *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938), the Supreme Court announced the familiar principle that "[t]here is no federal general common law." *Id.* at 78. But even after *Erie*, the "federal judicial power to deal with common law problems" remains "unimpaired for dealing independently, wherever necessary or appropriate, with essentially federal matters, even though Congress has not acted affirmatively about the specific question." *United States* v. *Standard Oil Co.*, 332 U.S. 301, 307 (1947).

Of particular relevance here, federal law necessarily supplies the rule of decision for certain narrow categories of claims that implicate "uniquely federal interests," including where "the interstate or international nature of the controversy makes it inappropriate for state law to control." *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 640-641 (1981) (citation omitted). At bottom, whenever there is "an overriding federal interest in the need for a uniform rule of decision," *Illinois* v. *City of Milwaukee* (*Milwaukee I*), 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), and any claims necessarily arise under federal law.

b. The structure of our constitutional system requires that federal common law exclusively govern claims seeking redress for interstate pollution. The States are "coequal sovereigns," *PPL Montana, LLC* v. *Montana*, 565

U.S. 576, 591 (2012), and the Constitution "implicitly forbids" them 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). In similar fashion, although each State may make law within its own borders, 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).

Accordingly, for more than a century, the Supreme Court has applied uniform federal rules of decision to common-law claims seeking redress for interstate pollution. *See*, *e.g.*, *Milwaukee I*, 406 U.S. at 103, 107 n.9; *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230, 237 (1907); *see also City of New York* v. *Chevron Corp.*, 993 F.3d 81, 91 (2d Cir. 2021) (collecting additional cases). The most recent such decision is *American Electric Power Co.* v. *Connecticut*, 564 U.S. 410 (2011). There, the plaintiffs sued several electric utilities, contending that the utilities' greenhouse-gas emissions contributed to global climate change and created a "substantial and unreasonable interference with public rights, in violation of the federal common law of interstate nuisance, or, in the

alternative, of state tort law." *Id.* at 418 (internal quotation marks and citation omitted). In determining whether the plaintiffs had properly stated a claim for relief, the Supreme Court determined that federal common law governs claims involving "air and water in their ambient or interstate aspects." *Id.* at 421. The Court rejected the notion that state law could govern public-nuisance claims related to global climate change, stating that "borrowing the law of a particular State would be inappropriate." *Id.* at 422.

c. Applying the Supreme Court's precedent on claims seeking redress for interstate pollution, the Second Circuit recently held in *City of New York*, *supra*, that claims seeking redress for global climate change—as the State's claims do here—arise under federal common law. *See* 993 F.3d at 91. There, the municipal government of New York City alleged that the defendant energy companies (including ExxonMobil, a defendant here) "have known for decades that their fossil fuel products pose a severe risk to the planet's climate" but nevertheless "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 question before the Second Circuit in *City of New York* 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. In deciding that issue, the Second Circuit faced the question

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 (citation and internal quotation marks 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.*

The Second Circuit proceeded to hold that federal common law necessarily governed claims seeking redress for global climate change. 993 F.3d at 91. In so holding, the court found that the case presented "the quintessential example of when federal common law is most needed." *Id.* at 92. The Second Circuit 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 (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 far too "sprawling" for state law to govern. 993 F.3d at 92. The court reasoned first 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.*

d. In *Native Village of Kivalina* v. *ExxonMobil Corp.*, 696 F.3d 849 (2012), the Ninth Circuit also held that federal common law necessarily governs climate-change claims similar to those alleged here. In *Kivalina*, a municipality and native village asserted public-nuisance claims for harms to their property allegedly resulting from the defendant energy companies' "emissions

of large quantities" of greenhouse gases. *Id.* at 854. The plaintiffs contended that their claims arose under federal and (alternatively) state common law. *Native Village of Kivalina* v. *ExxonMobil Corp.*, 663 F. Supp. 2d 863, 869 (N.D. Cal. 2009). The district court dismissed the federal claim and declined to exercise supplemental jurisdiction over any related state-law claims. *Id.* at 882-883. On appeal, the Ninth Circuit held that federal common law governed the plaintiffs' nuisance claims. *Kivalina*, 696 F.3d at 855. Citing *American Electric Power* and *Milwaukee I*, the Ninth Circuit began from the premise that "federal common law includes the general subject of environmental law and specifically includes ambient or interstate air and water pollution." *Id.* Given the interstate and transnational character of claims asserting harm from global greenhouse-gas emissions, the court concluded that the suit fell within that rule. *Id.*

2. The State's Claims Are Necessarily Governed By Federal Common Law

Applying the foregoing precedents here leads to a straightforward result: the State's climate-change claims are necessarily governed by federal common law.

The State alleges that defendants are liable under Minnesota law on the theory that defendants misled the public about climate change. *See* App. 88-97. But the claims are plainly premised on transboundary pollution. The State

alleges that defendants' conduct "caused a substantial portion of global atmospheric greenhouse-gas concentrations." App. 86. And the remedies the State is seeking are not limited to economic harm to consumers who would have purchased fewer fossil-fuel products in the absence of the alleged deception (as in the typical consumer-protection case). Instead, the State is seeking redress for injuries alleged to have been caused by global climate change: for example, flooding, harm to forests and infrastructure, and personal injuries. *See* App. 30-31, 75-85. The State also seeks disgorgement of profits earned by defendants from the production and sale of fossil fuels on behalf of fossil-fuel consumers. *See* App. 98. In fact, the terms "greenhouse gas," "air pollution," "emissions," and "climate change" collectively appear approximately 300 times in the complaint. The complaint demonstrates that this case is a "suit over global greenhouse gas emissions," which federal common law must govern. *City of New York*, 993 F.3d at 91.

Indeed, this case is remarkably similar to *City of New York*. There, the City claimed that the defendants "ha[d] 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." 993 F.3d at 86-87. Here, the State alleges that defendants "knew that their products

caused climate change," and yet continue to market their products to consumers, thereby causing "severe environmental and social consequences." App. 31.

Similarly, like in *City of New York*, the State seeks "substantial" relief that would "effectively regulate [p]roducers' behavior far beyond" Minnesota. 993 F.3d at 92. Because "[g]reenhouse gases once emitted 'become well mixed in the atmosphere,'" meeting the State's preferred fossil-fuel emission levels would require fossil-fuel producers to "cease *global* production altogether." *Id.* at 92-93 (emphasis added; citation omitted).

The State's failure to allege any actionable statements attributable to defendants further illustrates that this case is not about consumer protection. For example, with respect to Flint Hills, the State attacks a single, constitutionally protected statement of opinion, with which the State apparently disagrees and which is not even attributable to Flint Hills. App. 53 (statement attributed to the late Mr. David Koch, appearing in a personal biographical profile in New York Magazine in 2010, that "he's not sure if global warming is caused by human activities" and that "[l]engthened growing seasons in the northern hemisphere, he says, will make up for any trauma caused by the slow migration of people away from the disappearing coastlines"). The State likewise pleads only non-actionable, constitutionally protected statements of opinion against ExxonMobil and API. The complaint takes issue with statements

in the New York Times that the State attributes to ExxonMobil, including statements acknowledging a "range" of "views on the climate change debate" and expressing the opinion that "[t]here is not enough information to justify harming economies and forcing the world's population to endure unwarranted lifestyle changes by dramatically reducing the use of energy now." App. 52; *see also* App. 36 (statement from an ExxonMobil predecessor that "[t]he science of climate change is too uncertain to mandate a plan of action that could plunge economies into turmoil"). The complaint's focus on non-actionable statements of opinion further demonstrates that this case is a "suit over global greenhouse gas emissions," notwithstanding the State's attempts at "[a]rtful pleading." *City of New York*, 993 F.3d at 91.

The only possible distinction with *City of New York* is that this action focuses on an even "earlier moment" in the causal chain than defendants' production and sale of fossil fuels, 993 F.3d at 97—namely, statements in defendants' marketing materials that purportedly created the demand for defendants' products in the first instance. But this action still "hinges on the link between the release of greenhouse gases and the effect those emissions have on the environment generally." *Id.* The State's focus on the "earlier moment" of defendants' advertising "is merely artful pleading and does not change the substance of its claims." *Id.* Federal common law therefore necessarily governs.

Any contrary approach would not only contravene precedent but also permit suits alleging injuries pertaining to climate change to proceed under the laws of all fifty States—a recipe for complete chaos. As the federal government explained in its brief in *American Electric Power*, "virtually every person, organization, company, or government across the globe . . . emits greenhouse gases, and virtually everyone will also sustain climate-change-related injuries," giving rise to claims from "almost unimaginably broad categories of both potential plaintiffs and potential defendants." TVA Br. at 11, 15, *American Electric Power*, *supra* (No. 10-174). Out-of-state actors (including certain defendants) would quickly find themselves subject to a "variety" of "vague" and "indeterminate" state common-law tort standards, and States would be empowered to "do indirectly what they could not do directly—regulate the conduct of out-of-state sources." *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 495-496 (1987). That could lead to "widely divergent results" if a patchwork of fifty different legal regimes applied. TVA Br. at 37. This outcome is far from hypothetical: nearly two dozen lawsuits have already been filed by state and local governments against energy providers, in state courts across the country, seeking redress for alleged climate-change-related injuries.

The State's climate-change claims also implicate the foreign affairs of the United States, further justifying the application of federal common law.

See City of New York, 993 F.3d at 91; *see also Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 425, 426 (1964); *Republic of Philippines* v. *Marcos*, 806 F.2d 344, 353 (2d Cir. 1986). The Supreme Court has long held that "[p]ower over external affairs is not shared by the States; it is vested in the national government exclusively." *United States* v. *Pink*, 315 U.S. 203, 233 (1942); *see Hines* v. *Davidowitz*, 312 U.S. 52, 63 (1941).

As the federal government has stated in a similar climate-change case, "federal law and policy has long declared that fossil fuels are strategically important domestic resources that should be developed to reduce the growing dependence of the United States on politically and economically unstable sources of foreign oil imports." U.S. En Banc Br. at 10, *City of Oakland* v. *BP p.l.c.*, 960 F.3d 570 (9th Cir. 2020) (No. 18-16663) (Dkt. 198) (citation and internal quotation marks omitted). The linkage between the federal government's fossil-fuel policy and foreign affairs traces its origins to at least the 1950s, when President Eisenhower invoked his statutory authority to impose quotas on imports of petroleum and petroleum-based products into the United States in order to "avoid discouragement of and decrease in domestic oil production, exploration and development to the detriment of the national security." 24 Fed. Reg. 1,781 (Mar. 12, 1959). After the 1973 oil embargo, the United States signed a treaty that requires member countries of the International Energy Agency to hold emergency oil stocks equivalent to at least 90 days of net oil

imports. *See* Agreement on an International Energy Program, Art. 2, Nov. 18, 1974, 27 U.S.T. 1692, 1040 U.N.T.S. 271.

The trend continued in the ensuing decades. President Reagan eliminated federal controls on domestic oil production and marketing in order to "end the entitlements system," which he viewed as "a subsidy for the importation of foreign oil." President Ronald Reagan, *Statement on Signing Executive Order 12287* (Jan. 28, 1981); *see* Exec. Order No. 12,287 (1981). In response to President Clinton's signing of the Kyoto Protocol, an international commitment to reduce greenhouse-gas emissions, the Senate resolved that the Nation should not be a signatory to any protocol that "would result in serious harm to the economy" or fail to regulate the emissions of developing nations. S. Res. 98, 105th Cong., 1st Sess. (1997). In response, Congress enacted a series of laws barring the Environmental Protection Agency from implementing or funding the Kyoto Protocol. *See* Act of Oct. 27, 2000, Pub. L. No. 106-377, 114 Stat. 1441A-41; Act of Oct. 20, 1999, Pub. L. No. 106-74, 113 Stat. 1080; Act of Oct. 21, 1998, Pub. L. No. 105-276, 112 Stat. 2496.

Recent federal actions align with the decades-long treatment of fossil fuels as resources of the utmost strategic importance for the United States. President Trump cited foreign-affairs implications in his decision to withdraw from the Paris Agreement, which had been designed to manage greenhouse-

gas emissions mitigation, adaptation, and finance. *See Depositary Notification, United Nations* (Aug. 4, 2017); President Donald Trump, *Remarks by President Trump at the Unleashing American Energy Event* (June 29, 2017). And when the United States recently rejoined the Paris Agreement, President Biden specifically indicated that the Nation's approach to fossil-fuel emissions is "vital in our discussions of national security, migration, international health efforts, and in our economic diplomacy and trade talks." Press Statement, Antony J. Blinken, U.S. Secretary of State, *The United States Officially Rejoins the Paris Agreement* (Feb. 19, 2021) (referring to *Depositary Notification, United Nations* (Jan. 20, 2021)). The State's claims, if successful, would thus interfere with longstanding American foreign policy, further supporting the application of federal common law to the State's claims.

The relationship of the State's claims to federal navigable waters also supports the application of federal common law. *See Milwaukee I*, 406 U.S. at 102; *Hinderlinder* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938); *Michigan* v. *Army Corps of Engineers*, 667 F.3d 765, 770-771 (7th Cir. 2011). Here, the State seeks to recover for harms allegedly caused by climate-change-induced flooding, including "mass evacuations, damage to buildings, and drinking water contamination." App. 74-77. The State alleges that those harms are connected to navigable waters of the United States, cit-

ing, for example, a 1997 flood of the Red River that resulted in billions of dollars in harm. App. 75. Minnesota contains countless other navigable waters of the United States, and the State has not disclaimed flood-related relief from those waterways as well.

In sum, the State's climate-change claims squarely implicate the strong federal interest in uniformly addressing suits involving transboundary pollution, foreign affairs, and the navigable waters of the United States. Federal common law therefore controls.

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

Under 28 U.S.C. § 1331, federal district courts "have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." That includes claims "founded upon federal common law as well as those of a statutory origin." *National Farmers Union Insurance Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845, 850 (1985) (citation omitted). As a result, if the "dispositive issues stated in the complaint require the application" of a uniform rule of federal law, the action "arises under" federal law for purposes of Section 1331, *Milwaukee I*, 406 U.S. at 100, and the case is removable to federal court, *see* 28 U.S.C. § 1441(a).

Consistent with those principles, courts have long recognized that federal jurisdiction exists if federal common law supplies the rule of decision, even if the plaintiff purports to assert only state-law claims. *See In re Otter Tail*

Power Co., 116 F.3d 1207, 1214 (8th Cir. 1997); *Treiber & Straub, Inc.* v. *UPS, Inc.*, 474 F.3d 379, 387 (7th Cir. 2007); *Sam L. Majors Jewelers* v. *ABX, Inc.*, 117 F.3d 922, 926 (5th Cir. 1997); *Marcos*, 806 F.2d at 354; *Caudill* v. *Blue Cross & Blue Shield of North Carolina, Inc.*, 999 F.2d 74, 77-80 (4th Cir. 1993).

This Court's decision in *Otter Tail*, *supra*, is illustrative. At issue in *Otter Tail* was the effect of a judgment in a previous federal action resolving a dispute between an Indian tribe in North Dakota; North Dakota's state energy regulator; and several energy providers, including Otter Tail Power Company. The dispute in the first action arose when the Tribe attempted to allow Otter Tail to service certain tribal businesses on the Tribe's reservation without approval of the state regulator. *See* 116 F.3d at 1209. After certain proceedings in state court, the Tribe filed suit in federal court to prevent the state regulator from overriding the Tribe's decision. The district court held that the Tribe's "inherent sovereignty"—which is governed by federal common law, *see*, *e.g.*, *United States* v. *Lara*, 541 U.S. 193, 207 (2004)—permitted the Tribe to determine which energy provider could service "[t]ribal owned businesses located upon Indian owned or trust lands." *Devils Lake Indian Sioux Tribe* v. *North Dakota Public Service Commission*, 896 F. Supp. 955, 961 (D.N.D. 1995).

After the first federal action ended, the Tribe asked Otter Tail to service additional accounts that were not covered by the district court's order. *See Otter Tail*, 116 F.3d at 1211. A competing energy provider filed suit in state

court to enjoin Otter Tail from proceeding, and Otter Tail removed the case to federal court. The district court dismissed the action and remanded it to state court.

This Court reversed. The Court began its analysis by acknowledging that, under the well-pleaded complaint rule, removal based on federal-question jurisdiction is permitted only when the complaint establishes that "federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Otter Tail*, 116 F.3d at 1213 (citation omitted). It noted, however, that "[a] plaintiff's characterization of a claim as based solely on state law is not dispositive of whether federal question jurisdiction exists." *Id.* (citation omitted). Turning to the complaint before it, the Court concluded that removal based on federal-question jurisdiction was permissible because the district court's order in the first action concerned "the extent of an Indian Tribe's authority to regulate nonmembers on a reservation," which is "manifestly a federal question." *Id.* at 1213-1214. In reaching that conclusion, the Court cited the Supreme Court's decision in *National Farmers Union*, *supra*, which held that a claim concerning an Indian tribe's sovereign powers was governed by federal common law and thus gave rise to federal-question jurisdiction. *See id.*

Under *Otter Tail* and other similar cases, claims necessarily governed by federal common law are removable to federal court, even if the plaintiff

purports to assert only state-law claims. Because federal common law necessarily governs the State's claims seeking redress for injuries allegedly caused by global greenhouse-gas emissions, defendants properly removed this case to federal court.

4. The District Court's Contrary Conclusion Is Erroneous

The district court rejected federal common law as a basis for removal for two reasons. The court first concluded that federal common law does not govern the State's claims here. It then held that the well-pleaded complaint rule precluded removal based on federal common law, even if federal common law did in fact govern the State's putative state-law claims. Both determinations are erroneous and warrant reversal.

a. The district court first concluded that removal was not permitted because the complaint did not expressly plead a claim "related to pollution regulations or disputes between states over emissions standards." Add. 12a-13a. Instead, the district court observed, the claims in the complaint target an alleged "misinformation campaign" by defendants to "mislead consumers and the general public" about the likelihood and dangers of climate change. Add. 6a. As such, the court concluded that federal common law did not govern the State's claims. *See* Add. 13a.

The Second Circuit's decision in *City of New York* demonstrates why that reasoning is erroneous. There, as here, the City of New York did not

expressly allege a claim related to transboundary pollution. The City asserted claims "stemming from the [energy companies'] production, promotion, and sale of fossil fuels." 993 F.3d at 88. But the City sought relief "for the past and future costs of climate-proofing its infrastructure and property." *Id.*; *see* App. 84-85. The State here likewise seeks relief for past harms allegedly caused by climate change.

As the Second Circuit explained, a plaintiff cannot use "[a]rtful pleading" to "transform" an action seeking relief from climate-change injuries "into anything other than a suit over global greenhouse gas emissions." 993 F.3d at 91. As was the case in *City of New York*, "[i]t is precisely *because* fossil fuels emit greenhouse gases—which collectively exacerbate global warming—that the [State] is seeking damages." *Id.* The State cannot "disavow[] any intent to address emissions" while "identifying such emissions" as the source of its harm. *Id.* That is true regardless of which tort theory a plaintiff identifies as its means for achieving the relief it seeks.

b. The district court also concluded that the well-pleaded complaint rule precludes removal of a claim necessarily governed by federal common law but pleaded under state law. *See* Add. 15a. That too is incorrect.

The well-pleaded complaint rule provides that federal-question jurisdiction exists only when "a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Wullschleger* v. *Royal Canin U.S.A., Inc.*,

953 F.3d 519, 521 (8th Cir.) (citation omitted), *cert. denied*, 141 S. Ct. 621 (2020). But an "independent corollary" of the rule is that "a plaintiff may not defeat removal by omitting to plead necessary federal questions." *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 22 (1983). Under that corollary, known as the artful-pleading doctrine, a court must "look beyond the plaintiffs' artful attempts to characterize their claims to avoid federal jurisdiction," *Phipps* v. *FDIC*, 417 F.3d 1006, 1011 (8th Cir. 2005), and "determine whether the real nature of the claim is federal, regardless of plaintiff's characterization," *Gore* v. *Trans World Airlines*, 210 F.3d 944, 950 (8th Cir. 2000) (citation omitted); *see* 14C Charles A. Wright et al., *Federal Practice and Procedure* § 3722.1, at 131-132 (4th ed. 2018). That explains why this Court and others have long held that claims necessarily arising under federal common law are removable to federal court, even if pleaded as state-law claims. *See* pp. 27-30, *supra*.

The district court concluded that the artful-pleading doctrine is not a "separate and distinct basis for removal" from the doctrine of complete preemption, which applies when a federal *statute* wholly displaces any state-law remedy. Add. 16a; *see, e.g.*, *Johnson* v. *Humphreys*, 949 F.3d 413, 415 (8th Cir. 2020). Instead, the court understood there to be only two bases for removal of a putative state-law claim: removal under *Grable & Sons Metal Products, Inc.* v. *Darue Engineering & Manufacturing*, 545 U.S. 308, 314 (2005),

and complete preemption. Add. 10a, 15a. But neither *Otter Tail* nor any of the other cases permitting removal of putative state-law claims necessarily governed by federal common law involved complete preemption by a federal statute. To be sure, other cases discuss the artful-pleading doctrine in the context of complete preemption, but 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 district court attempted to distinguish *Otter Tail* and the cases cited above on the ground that the claims at issue were "explicitly connected to or relied upon interpretation of a discrete area of federal law." Add. 16a & n.3. But the same is true here: the State's claims necessarily depend upon the discrete areas of federal common law governing claims related to transboundary pollution, foreign affairs, and navigable waters. *See* pp. 19-27, *supra*. The district court resisted that conclusion because it viewed defendants' theory of the case as lacking a "substantial relationship to the actual claims alleged." Add. 17a. But that is just another way of saying that federal common law does not apply at all—which is erroneous for the reasons previously set forth.

In sum, although the State labels its claims as arising under state common and statutory law, the federal issues implicated by the substance of the

claims and the nature of the alleged injuries demand the application of federal common law. The district court therefore had jurisdiction over this action, and it erred in remanding the case to state court.

B. Removal Was Proper Because The State's Claims Raise Disputed And Substantial Federal Issues

Federal jurisdiction is also present because the State's claims raise disputed and substantial federal issues. It is "common[] sense" that "a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues." *Grable*, 545 U.S. at 312-313. That form of federal-question jurisdiction, often referred to as *Grable* jurisdiction, will lie "if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn* v. *Minton*, 568 U.S. 251, 258 (2013). The State's claims necessarily raise several disputed and substantial federal issues that justify federal jurisdiction, thereby meriting removal.

1. The State's Claims Necessarily Raise Federal Issues

The first *Grable* prong is satisfied because the State's claims necessarily raise issues governed by federal common law and amount to a collateral attack on cost-benefit analyses committed to, and already performed by, the federal government.

a. As a preliminary matter, if the Court concludes that federal common law governs the State's claims but that federal common law does not provide an independent basis for removal, this action is still removable under *Grable*. Several courts of appeals have held that, where "federal common law *alone* governs" a claim, "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). As explained above, this case implicates the federal common law of transboundary pollution, foreign affairs, and navigable waters. The district court rejected removal under *Grable* based on those federal issues on the theory that the complaint "only requires a court to determine whether [d]efendants engaged in a misinformation campaign." Add. 18a. That is incorrect for the reason already explained: namely, that the State has requested relief for injuries allegedly caused by climate change. *See* pp. 19-22, *supra*.

b. In addition, the State's claims threaten to upset what the Second Circuit recently described as the "careful balance" struck by the federal government "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." *City of New York*, 993 F.3d at 93; *see* 42 U.S.C. § 7401(c). This Court has made clear that *Grable* permits federal courts to exercise jurisdiction over claims that "directly implicate[] actions taken by [federal agencies] in approving the creation of [federal programs] and the rules governing [them]." *Pet Quarters, Inc.* v. *Depository Trust & Clearing Corp.*, 559 F.3d 772, 779 (2009); *accord Board of Commissioners* v. *Tennessee Gas Pipeline Co.*, 850 F.3d 714, 724-725 (5th Cir. 2017); *Bennett* v. *Southwest Airlines Co.*, 484 F.3d 907, 909 (7th Cir. 2007); *McKay* v. *City & County of San Francisco*, Civ. No. 16-3561, 2016 WL 7425927, at *4-*5 (N.D. Cal. Dec. 23, 2016); *West Virginia ex rel. McGraw* v. *Eli Lilly & Co.*, 476 F. Supp. 2d 230, 234 (E.D.N.Y. 2007).

In alleging that defendants are liable for strict and negligent failure to warn, the State must prove that the products at issue—here, fossil fuels—are "unreasonably dangerous." *Hagen* v. *McAlpine & Co. Limited*, Civ. No. 14-1095, 2015 WL 321428, at *5 (D. Minn. Jan. 26, 2015). The State's claims therefore necessarily raise the question whether any alleged harms caused by greenhouse-gas emissions outweigh the recognized societal benefits of defendants' extraction, refinement, and promotion of fossil fuels. *See* Restatement (Second) of Torts §§ 826-831 (1979). But "greenhouse gas emissions are the subject of numerous federal statutory regimes," and the State's attempt to "sidestep[]" those "carefully crafted frameworks," *City of New York*, 993 F.3d at 86, necessarily implicates substantial federal issues. *See, e.g.*, 42 U.S.C.

§ 13384 (directing the Secretary of Energy to provide to Congress a "comparative assessment of alternative policy mechanisms for reducing the generation of greenhouse gases"); 43 C.F.R. § 3162.1(a) (requiring federal oil and gas lessees to drill in a manner that "results in maximum ultimate economic recovery of oil and gas with minimum waste"); Exec. Order No. 12,866 (1993) (requiring that agencies impose a significant regulation "only upon a reasoned determination that the benefits . . . justify its costs").

The State's claims of fraud and consumer deception are no different. Those claims each require proof that defendants' statements in advertisements misrepresented "the role of [d]efendants' products in causing climate change, the potential harmful consequences of climate change, and the urgency of action required to mitigate climate change." App. 46; *see Popp Telecom, Inc.* v. *American Sharecom, Inc.*, 361 F.3d 482, 491 (8th Cir. 2004); Minn. Stat. §§ 325D.44, 325F.67, 325F.69. Accordingly, the State's claims require a determination that the sale and use of fossil fuels is unsafe and detrimental in light of their alleged role in causing climate change. Yet as just explained, the federal government has already decided the appropriate balance between fossil-fuel production and use and alleged environmental harms.

The district court disagreed, determining that it need not "supplant its judgment for Congress's regarding the safety and use of a product." Add. 20a n.4. But that is *precisely* what the State calls on the court to do. The State

aims to achieve through state tort law what it could not achieve in the federal legislative and regulatory process: namely, a determination that defendants' activities are unreasonable. The Second Circuit held as much when it found that a balancing exercise like the one plaintiff seeks here poses "a real risk" of "undermin[ing] important federal policy choices." *City of New York*, 993 F.3d at 93. Such collateral attacks on federal legislative and regulatory determinations implicate federal issues for purposes of federal-question jurisdiction.

2. The Federal Interests Implicated Are Substantial

This case sits at the intersection of federal energy and environmental regulation and necessarily implicates foreign policy and national security. Any one of those federal interests qualifies as "substantial." *See Bennett*, 484 F.3d at 910; *In re NSA Telecommunications Records Litigation*, 483 F. Supp. 2d 934, 943 (N.D. Cal. 2007); *Grynberg Production Corp.* v. *British Gas, p.l.c.*, 817 F. Supp. 1338, 1356 (E.D. Tex. 1993).

Although the district court did not reach whether those federal interests were substantial or actually disputed, it suggested that they were not because the State "does not bring claims capable of addressing the panoply of social, environmental, and economic harms posed by climate change." Add. 21a. That is a high bar, and it is not the bar set by this Court. When a claim "directly implicates action taken by [federal agencies] in approving the creation of [fed-

eral programs] and the rules governing [them]," a federal question is substantial. *Pet Quarters*, 559 F.3d at 779. The fact that the State's lawsuit asks a court to weigh certain social, environmental, and economic considerations in lieu of the federal government's more holistic decisions renders the questions substantial.

3. The Federal Interests Are Disputed And Properly Adjudicated In Federal Court

The final two *Grable* requirements are clearly satisfied. *First*, the federal questions presented here are disputed. The State's claims are governed by federal common law and place squarely at issue whether regulators should have struck a different balance between the harms and benefits of defendants' conduct. Defendants contend that the State cannot recover under federal common law and that the State's claims amount to an impermissible collateral attack on federal policies that expressly encourage the precise conduct on which the State bases its requested relief.

Second, the State's claims would be properly adjudicated in federal court, as the exercise of federal jurisdiction over this action is fully consistent with federalism principles. As the Second Circuit observed, "a sprawling case" seeking to regulate global emissions (like this one) "is simply beyond the limits of state law." *City of New York*, 993 F.3d at 92. Federal courts are the traditional forums for adjudicating the issues presented by this case, including environmental regulation, regulation of vital national resources, foreign policy,

and national security. *See* pp. 13-27, *supra*. And state courts have no sovereign interest in developing federal common law.

The district court reached the contrary conclusion only by misinterpreting the nature of the State's claims and the federal claims implicated by them. *See* Add. 21a-22a. As defendants have explained, the crux of this lawsuit is that defendants' conduct contributed to the release of greenhouse gases around the world, which allegedly caused the State to suffer injuries due to global climate change. Such claims necessarily implicate substantial federal issues that belong in federal court. The district court therefore had jurisdiction over this action under *Grable*.

C. Removal Was Proper Under The Federal-Officer Removal Statute

The federal-officer removal statute, 28 U.S.C. § 1442, allows removal of an action against "any officer (or any person acting under that officer) of the United States or of any agency thereof . . . for or relating to any act under color of such office." 28 U.S.C. § 1442(a)(1). The right of removal is "made absolute whenever a suit in a state court is for any act 'under color' of federal office, regardless of whether the suit could originally have been brought in federal court." *Willingham* v. *Morgan*, 395 U.S. 402, 406 (1969). The basic purpose of the federal-officer removal statute is to "protect the [f]ederal [g]overnment" from "interference with its operations." *Watson* v. *Philip Mor-*

ris Cos., 551 U.S. 142, 150 (2007) (internal quotation marks and citation omitted). To protect federal interests from state-court interference, the Supreme Court has given the statute a "liberal construction." *Id.* at 147.

A private actor may remove a case under Section 1442 if it can show that it acted under the direction of a federal officer; there was some relation or connection between the defendant's actions and the official authority; it has a colorable defense to the plaintiff's claims; and it is a "person" within the meaning of the statute. *Jacks* v. *Meridian Resource Co.*, 701 F.3d 1224, 1230 (8th Cir. 2012). There is no dispute here that defendants are "person[s]" within the meaning of Section 1442. All of the remaining criteria are likewise satisfied. The district court erred in concluding otherwise.

1. Defendants Acted Under The Direction Of Federal Officers

Whether a private party acted under the direction of a federal officer typically focuses on whether the party was subject to the officer's "subjection, guidance, or control" when endeavoring to "assist, or to help carry out, the [officer's] duties or tasks." *Watson*, 551 U.S. at 151-152 (emphasis omitted). That test is satisfied when a party "fulfill[s] the terms of a contractual agreement" with the government and "perform[s] a job that, in the absence of a contract with a private firm, the [g]overnment itself would have had to perform." *Id.* at 153-154.

As the district court correctly determined, the notice of removal and the extensive record in this case demonstrate several "plausible ways in which [d]efendants may have acted under the direction of federal officers." Add. 23a. To begin with, certain defendants have contributed significantly to the United States military by providing fossil fuels that support the national defense. *See* App. 134-137, 192-199. For example, "[b]ecause avgas [aviation fuel] was critical to the war effort" in World War II, "the United States government exercised significant control over the means of its production." *United States* v. *Shell Oil Co.*, 294 F.3d 1045, 1049 (9th Cir. 2002). The "federal government directed the owners and operators of the [N]ation's crude oil refineries"—including ExxonMobil's predecessor companies—"to convert their operations" in order to produce avgas and other products that "the military desperately needed." *See Exxon Mobil Corp.* v. *United States*, Civ. No. 10-2386, 2020 WL 5573048, at *30 (S.D. Tex. Sept. 16, 2020).

In fact, the Petroleum Administration for War, a federal agency established during World War II to regulate fossil-fuel usage in support of the war effort, made clear that ExxonMobil and other energy companies had no choice but to comply with the federal government's production and specifications mandates. *See Exxon Mobil*, 2020 WL 5573048, at *13; Exec. Order No. 9,276 (1942). The federal government also exempted the energy industry from antitrust laws, so that the Petroleum Administration for War could control the

industry as one functional unit. *See* Petroleum Administration for War, *A History of the Petroleum Administration for War, 1941-1945*, at 383-384 (John W. Frey & H. Chandler Ide eds. 2005) (letter of assurance from the Attorney General stating that "emergency acts performed by [the energy] industry under the direction of public authority, and designed to promote public interest and not to achieve private ends, do not constitute violations of the antitrust laws"). And to this day, certain defendants supply fossil-fuel products, including the dominant jet fuel for NATO, to the military under exacting specifications established by the federal government. *See* App. 137, 192, 194-196. That level of federal control suffices to constitute direction. *See Betzner* v. *Boeing Co.*, 910 F.3d 1010, 1015 (7th Cir. 2018).

Defendants have also played an integral role in promoting energy security and reducing reliance on oil imported from hostile powers. *See* App. 138-144. Over the last 70 years, the federal government has directed defendants to explore, develop, and produce oil and gas on the outer continental shelf pursuant to leases issued by the federal government under the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356b. In so doing, defendants have been subject to myriad federal government requirements, including the obligation to "develop[] . . . the leased area" by carrying out exploration, development, and production activities for the express purpose of "maximiz[ing] the ultimate

recovery of hydrocarbons from the leased area." App. 168. In addition, defendants have made possible the creation of a strategic energy stockpile for the United States, a crucial element of national energy security and treaty obligations. Specifically, ExxonMobil has acted as an operator and lessee of the Strategic Petroleum Reserve Infrastructure, through which it has been required to pay royalties in kind to the federal government. *See* App. 144-145.

2. The State's Claims Have A Sufficient Connection To Defendants' Federally Directed Activities

The hurdle presented by the connection requirement of the federal-officer removal statute is "quite low." *Jacks*, 701 F.3d at 1230 n.3 (citation omitted). Although the statute initially conditioned removal on a defendant being "sued in an official or individual capacity *for* any act under color of such office," 28 U.S.C. § 1442(a) (2006) (emphasis added), the statutory text was amended in 2011 to permit removal of lawsuits "for *or relating to*" a federally directed action. Removal Clarification Act of 2011, Pub. L. No. 112-51, § 2(b)(1)(A), 125 Stat. 545 (emphasis added). The effect of that amendment was to "broaden federal officer removal to actions, not just *causally* connected, but alternatively *connected* or *associated*, with acts under color of federal office." *Latiolais* v. *Huntington Ingalls, Inc.*, 951 F.3d 286, 292 (5th Cir. 2020) (en banc); *see also*, *e.g.*, *Baker* v. *Atlantic Richfield Co.*, 962 F.3d 937, 943-944 (7th Cir. 2020); *Sawyer* v. *Foster Wheeler LLC*, 860 F.3d 249, 258 (4th Cir. 2017); *In re Commonwealth's Motion to Appoint Counsel*, 790 F.3d 457, 471 (3d Cir. 2015).

Defendants have more than cleared that hurdle. According to the State, defendants' worldwide supply of fossil fuels—which necessarily encompasses the activities taken at federal direction discussed above—allegedly caused the injuries at issue. While defendants dispute the State's allegation, a defendant need not admit causation in order to permit removal. *See*, *e.g.*, *Maryland* v. *Soper*, 270 U.S. 9, 32-33 (1926).

The district court nevertheless held that defendants were not entitled to remove because they did not show that "the act for which they are being sued occurred at least in part '*because of* what they were asked to do by the Government.'" Add. 24a. That was erroneous. Following the 2011 amendments, Section 1442 no longer requires a causal nexus; a mere association will suffice. *See*, *e.g.*, *Latiolais*, 951 F.3d at 292.

The district court also reasoned that the requisite connection was lacking because "[d]efendants do not claim that any federal officer directed their respective marketing or sales activities, consumer-facing outreach, or even their climate-related data collection." Add. 24a. That too was erroneous, and the Seventh Circuit's recent decision in *Baker*, *supra*, demonstrates why. In *Baker*, a company that had produced chemicals at the government's direction sought to remove a pollution lawsuit to federal court. *See* 962 F.3d at 939-940. The plaintiffs argued that the defendant could do so only by showing that it produced the injury-causing chemicals under federal direction. *See id.* at 943.

The Seventh Circuit disagreed, explaining that such a showing involved "*merits questions* that a federal court should decide." *Id.* at 944. As the Seventh Circuit noted, courts have consistently held that it is not necessary that the conduct in question "*itself* was at the behest of a federal agency"; rather, it is "sufficient" if a plaintiff's "allegations are directed at the relationship between the [defendant] and the federal government" for at least part of the conduct underlying the plaintiff's claims. *Id.* at 944-945 (citation omitted); *accord Commonwealth's Motion to Appoint Counsel*, 790 F.3d at 470.

The same is true here. Defendants have produced fossil fuels at the direction of the federal government and under federal control for decades. *See* pp. 42-44, *supra*. The question whether that production—as opposed to defendants' "marketing or sales activities"—is responsible for the State's alleged injuries is a merits question properly resolved at a later phase of this case.

3. Defendants Have Colorable Defenses To The State's Claims

The final requirement for removal under the federal-officer removal statute is that there be a "colorable" federal defense to the plaintiff's claims. A defense "need only be plausible" to be "considered colorable" for purposes of Section 1442. *United States* v. *Todd*, 245 F.3d 691, 693 (8th Cir. 2001). In analyzing this element, a court must "credit the [defendant's] theory of the case." *Jefferson County* v. *Acker*, 527 U.S. 423, 432 (1999).

Defendants have multiple meritorious (and certainly plausible) federal defenses, including preemption under the Clean Air Act, *see American Electric Power*, 564 U.S. at 424, and the foreign-affairs doctrine, *see American Insurance Association* v. *Garamendi*, 539 U.S. 396, 420 (2003). The district court held that neither defense was colorable because "the State does not raise claims related to environmental regulation or foreign policy." Add. 25a. But that reasoning not only fails to "credit [defendants'] theory of the case," *Acker*, 527 U.S. at 432, it also misconstrues the State's lawsuit, which requests relief for harms pertaining to climate change in order to impose costs on defendants' worldwide fossil-fuel production activities, *see* pp. 19-22, *supra*.

D. Removal Was Proper Because The State's Claims Arise Out Of Defendants' Operations On The Outer Continental Shelf

Removal was additionally proper because the State's claims arise out of defendants' operations under the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331-1356b.

1. OCSLA is designed to achieve "the efficient exploitation of the minerals" on the outer continental shelf by establishing a program to explore and to lease the shelf's oil and gas resources. *Amoco Production Co.* v. *Sea Robin Pipeline Co.*, 844 F.2d 1202, 1210 (5th Cir. 1988); *see also* 43 U.S.C. § 1332; *California* v. *Watt*, 668 F.2d 1290, 1316 (D.C. Cir. 1981). OCSLA supplies a body of federal law applicable to the outer continental shelf, *see Rodrigue* v. *Aetna Casualty & Surety Co.*, 395 U.S. 352, 355-356 (1969), and

grants federal courts jurisdiction over actions "arising out of, or in connection with . . . any operation conducted on the outer [c]ontinental [s]helf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer [c]ontinental [s]helf." 43 U.S.C. § 1349(b)(1).

The scope of OCSLA's jurisdictional provision is "very broad." *Tennessee Gas Pipeline* v. *Houston Casualty Insurance Co.*, 87 F.3d 150, 154 (5th Cir. 1996). In enacting that provision, Congress "intended for the judicial power of the United States to be extended to the entire range of legal disputes that it knew would arise relating to resource development" on the outer continental shelf. *Laredo Offshore Constructors, Inc.* v. *Hunt Oil Co.*, 754 F.2d 1223, 1228 (5th Cir. 1985). "Exploration," "development," and "production" have been construed to "encompass the full range of oil and gas activity from locating mineral resources through the construction, operation, servicing and maintenance of facilities to produce those resources." *EP Operating Limited Partnership* v. *Placid Oil Co.*, 26 F.3d 563, 568 (5th Cir. 1994). A plaintiff's claims have the requisite connection with those operations if the operations form part of the causal chain that allegedly resulted in the alleged injuries. *See In re Deepwater Horizon*, 745 F.3d 157, 163 (5th Cir. 2014).

2. The district court had jurisdiction under OCSLA. As a preliminary matter, defendants indisputably engage in significant "operation[s]" on the outer continental shelf. Defendants and their affiliates have explored and

recovered oil and gas on the outer continental shelf and operate a large share of the more than 5,000 active oil and gas leases on the nearly 27 million acres that the Department of the Interior administers under OCSLA. App. 149. Those leases were collectively responsible for producing 690 million barrels of oil and 1.034 trillion cubic feet of natural gas in 2019 alone. *Id.*

By their own terms, moreover, the State's claims arise in part from defendants' operations on the outer continental shelf. The State's theory of injury and requested relief are not limited to any incremental increase in fossil-fuel use and emissions purportedly caused by the alleged misrepresentations. Instead, the State seeks to recover for all alleged harm caused by climate change in the State of Minnesota. *See*, *e.g.*, App. 72-85, 95, 98. Even if the State sought to recover only for injuries directly attributable to defendants' alleged misrepresentations, such injuries cannot be isolated in light of the undifferentiated nature of harm alleged in the complaint. *See* App. 45-46, 86; *cf. New York*, 993 F.3d at 92; *Kivalina*, 663 F. Supp. 2d at 880.

The exercise of federal jurisdiction here would further OCSLA's purposes. Congress "intended" that "any dispute that alters the progress of production activities" on the outer continental shelf, and thus "threatens to impair the total recovery of the federally[] owned minerals from the reservoir or reservoirs underlying" the outer continental shelf, be within OCSLA's "grant of federal jurisdiction." *Amoco*, 844 F.2d at 1210. That is precisely the case here.

Plaintiff seeks potentially billions of dollars in restitution and disgorgement from defendants in this action. *See* App. 97-98. An award of that magnitude from a state court would substantially discourage production on the outer continental shelf and would jeopardize the future viability of the federal leasing program there.

3. The district court deemed the connection between the State's claims and defendants' operations too indirect to support jurisdiction under OCSLA. *See* Add. 26a-27a. As with federal-officer jurisdiction, however, the State's own pleadings belie that conclusion. Accepting the State's allegations as true, *see EP Operating*, 26 F.3d at 570, "[d]efendants' conduct caused a substantial portion of global atmospheric greenhouse-gas concentrations, and the attendant historical, projected, and committed disruptions to the environment—and consequent injuries to Minnesota—associated therewith." App. 86. Plaintiff's contention that defendants "unduly inflated the market for fossil-fuel products," *id.*, necessarily challenges defendants' exploration and production operations, which occurred in part on the outer continental shelf. For that reason, federal jurisdiction lies under OCSLA, in addition to the myriad other bases for jurisdiction discussed above. Defendants therefore properly removed this case to federal court, and the district court erred in granting the State's motion to remand.

E. Removal Was Proper Under The Class Action Fairness Act

The Class Action Fairness Act (CAFA) permits removal of any "class action" filed in state court in which the parties are minimally diverse and the aggregate amount in controversy exceeds $5 million. 28 U.S.C. § 1332(d)(2). There is no dispute that the parties are minimally diverse and the aggregate amount in controversy exceeds $5 million. The State's lawsuit is also a class action under the statute.

CAFA defines the phrase "class action" to mean "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar [s]tate statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." 28 U.S.C. § 1332(d)(1)(B). There is no "controlling law from the Supreme Court or the Eighth Circuit" interpreting that language. *Missouri ex rel. Koster* v. *Portfolio Recovery Associates, Inc.*, 686 F. Supp. 2d 942, 944 (E.D. Mo. 2010). The ordinary meaning of the phrase "class action," however, is a "lawsuit in which the court authorizes a single person or a small group of people to represent the interests of a larger group." *Black's Law Dictionary* 267 (8th ed. 2004); *accord* Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 1.1, at 2 (4th ed. 2002) (Newberg).

Courts have interpreted CAFA to preclude plaintiffs from thwarting removal of a lawsuit that is "in substance a class action" by "disguis[ing] the true

nature" of the suit. *Addison Automatics, Inc.* v. *Hartford Casualty Insurance Co.*, 731 F.3d 740, 742 (7th Cir. 2013); *accord Williams* v. *Employees Mutual Casualty Co.*, 845 F.3d 891, 901 (8th Cir. 2017). And that is what the State is attempting to do here. The complaint asserts claims in a representative capacity on behalf of all Minnesota residents and fossil-fuel consumers under Minnesota Statutes Section 8.31, which authorizes the Minnesota Attorney General to file a civil action to enforce certain state laws and distribute any recovery to consumers. *See*, *e.g.*, App. 88-89, 92, 94. The State's central theory is that defendants "conspir[ed] to deceive consumers" about the alleged certainty of climate change and failed to "warn[] consumers" of alleged harms purportedly associated with certain of defendants' products. App. 90-91. In addition, the explicit purpose of this action is to recover the costs of alleged climate-change injuries on behalf of Minnesota's citizens and fossil-fuel consumers. *See* App. 18, 98; *see also* Minn. Stat. § 8.31(2c). For all practical purposes, therefore, this suit is a "representative suit[] on behalf of [a] group[] of persons similarly situated." Newberg § 1.1, at 2.

Removal of this suit is also consistent with CAFA's purposes. One of CAFA's "primary purpose[s]" is to "open the federal courts to corporate defendants" to avoid damage to the "national economy" from the "proliferation of meritless class action suits." *Pirozzi* v. *Massage Envy Franchising, LLC*,

938 F.3d 981, 983 (8th Cir. 2019) (citation omitted). This lawsuit directly implicates that concern: the State is attempting to use its statutory enforcement power to bring an action on behalf of all Minnesota residents and fossil-fuel consumers to recover for alleged harms purportedly caused by global climate change from a handful of energy providers. In addition, to prevent removal of this suit would result in claims predicated on climate change—"a uniquely international problem of national concern" that "is simply beyond the limits of state law," *City of New York*, 993 F.3d at 85-86, 92—being litigated in state court, in direct contravention of CAFA's purpose of ensuring that cases of "national importance" are removable to federal court. *See* 28 U.S.C. § 1711 note (congressional finding 4(A)).

The district court rejected the CAFA ground for removal on the basis that it was aware of "no state statute or procedural rule that would classify a suit of this nature as a class action." Add. 31a. But to remove an action under CAFA, a defendant need only show that the state statute in question is "analogous" to Federal Rule 23. *See Williams*, 845 F.3d at 901. And when the State alleges common injury to the State of Minnesota and all state residents, an action under Section 8.31 is sufficiently analogous to an action under Federal Rule 23 to support removal.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I, Kannon K. Shanmugam, counsel for appellants Exxon Mobil Corporation and ExxonMobil Oil Corporation and a member of the Bar of this Court, certify, pursuant to Federal Rule of Appellate Procedure 32(g), that the foregoing Brief for Appellants is proportionately spaced, has a typeface of 14 points or more, and contains 12,362 words. I further certify that the electronic version of this petition and the attached appendix were automatically scanned for viruses and found to contain no known viruses.

JUNE 16, 2021

/s/ Kannon K. Shanmugam
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CERTIFICATE OF SERVICE

I, Kannon K. Shanmugam, counsel for appellants Exxon Mobil Corporation and ExxonMobil Oil Corporation and a member of the bar of this Court, certify that, on June 16, 2021, the attached Brief of Appellants was filed through the Court's electronic filing system. I certify that all participants in the case are registered users with the electronic filing system and that service will be accomplished by that system. I further certify that the Appendix of Appellants was sent, by electronic mail in accordance with Federal Rule of Appellate Procedure 25(c)(2)(B), to counsel of record for appellee the State of Minnesota.

/s/ Kannon K. Shanmugam
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