No. 19-1644

United States Court of Appeals for the Fourth Circuit

MAYOR AND CITY COUNCIL OF BALTIMORE,

Plaintiff – Appellee,

v.

BP P.L.C., et al

Defendants – Appellants,

Appeal from the United States District Court
for the District of Maryland, No. 1:18-cv-02357-ELH
The Honorable Ellen L. Hollander

PLAINTIFF–APPELLEE'S SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

INTRODUCTION

The Mayor and City Council of Baltimore ("City" or "Baltimore") filed its complaint more than three years ago, asserting Maryland law causes of action. Baltimore brought its state-law case in state court to address localized harms flowing from the defendants' wrongful conduct in misleadingly marketing and promoting fossil fuels. Appellants argue—for the second time—that Baltimore's "Complaint is clear that the 'singular source' of Plaintiff's alleged injuries is greenhouse gas emissions." Appellants' Suppl. Opening Brief at 4, Doc. 193 (Aug. 6, 2021) ("ASB"). This Court has already held that Appellants' characterization is incorrect:

> Baltimore does not merely allege that Defendants contributed to climate change and its attendant harms by producing and selling fossil fuel products; it is the concealment and misrepresentation of the products' known dangers—and simultaneous promotion of their unrestrained use—that allegedly drove consumption, and thus greenhouse gas pollution, and thus climate change.

Mayor & City Council of Baltimore v. BP P.L.C., 952 F.3d 452, 467 (4th Cir. 2020), *vacated and remanded,* 141 S.Ct. 1532 (2021). Those allegations do not implicate any body of federal common law and are

unconnected to any operations on the outer continental shelf, as the district court held below. The Court should again affirm.

Baltimore explained in its Response Brief that its claims do not arise under federal common law and are not subject to removal under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(b)(1) ("OCSLA"). *See* Plaintiff-Appellee's Response Brief at 21–28 & 42–45, Doc. 86 (Aug. 27, 2019) ("Resp."). Since this Court's decision affirming remand, multiple courts have rejected the arguments Appellants continue to press in their Supplemental Brief.[1]

In the most important decision since the parties' initial briefing, the Ninth Circuit in *City of Oakland v. BP PLC*, 969 F.3d 895, 902 (9th Cir. 2020), *cert. denied*, No. 20-1089 (U.S. June 14, 2021), rejected Appellants' theory that the plaintiffs' "public-nuisance claim was governed by federal

[1] In addition to the decisions cited in the State's Response Brief *see* Resp. 1, three district courts have granted motions to remand in similar cases involving climate change injuries, rejecting both "arising under" and OCSLA jurisdiction. *City & Cnty. of Honolulu v. Sunoco LP*, No. 20-cv-00163-DKW, 2021 WL 531237 (D. Haw. Feb. 12, 2021), *appeal filed*, No. 21-15318 (9th Cir. Feb. 23, 2021); *Minnesota v. Am. Petroleum Inst.*, No. CV 20-1636 (JRT/HB), 2021 WL 1215656 (D. Minn. Mar. 31, 2021), *appeal filed*, No. 21-1752 (8th Cir. April 5, 2021); *Connecticut v. Exxon Mobil Corp.*, No. 3:20-CV-1555 (JCH), 2021 WL 2389739 (D. Conn. June 2, 2021), *appeal filed*, No. 21-1446 (2d Cir. June 8, 2021).

common law because the claim implicates 'uniquely federal interests.'" That court correctly held that a state law claim filed in state court only "arises under" federal law for removal jurisdiction purposes when the claim is completely preempted by a federal statute, or satisfies the four-part test articulated in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005). Neither *Grable* nor complete preemption provide a basis for removal in this case, as the City explained in its initial brief. Resp. 28–41. Appellants have not reargued those positions.

The holding in *Oakland* comports with Judge Hollander's holding below that "Defendants' assertion that the City's public nuisance claim under Maryland law is in fact 'governed by federal common law' is a cleverly veiled preemption argument" that *per se* cannot provide a basis for removal. JA341. The malleable "artful pleading" approach Appellants propose would add confusion and imprecision to subject-matter jurisdiction analysis, in derogation of the Supreme Court's repeated warning that "administrative simplicity is a major virtue in a jurisdictional statute." *Hertz Corp. v. Friend*, 559 U.S. 77, 79 (2010).

As to OCSLA jurisdiction, Appellants' arguments are meritless. Their chief contention now is that a recent Supreme Court opinion clarifying the Court's own use of the word "connection" in its constitutional personal jurisdiction jurisprudence, *see Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S.Ct. 1017 (2021), should be understood as a gloss on the words "in connection with" in the unrelated OCSLA statue's subject-matter jurisdiction provisions. ASB 25–27. Appellants present no reason why the Court's use of the word "connection" when interpreting constitutional due process limitations on specific personal jurisdiction should in any way inform this Court's interpretation of the phrase "in connection with" in OCSLA.

Appellants also now argue that the City's climate-related harm "necessarily ties back to *all* global production" of fossil fuels, including production on the outer continental shelf ("OCS"), and therefore the City's case "relates to" OCS operations. ASB 27 (emphasis added). This Court has already rejected that characterization of the City's claims in analyzing Appellants' federal officer removal arguments, however, and the district court held that Appellants "offer no basis to enable this Court to conclude that the City's claims for injuries stemming from climate

change would not have occurred but for defendants' extraction activities on the OCS," JA362. Thus, there is no OCSLA jurisdiction.

Accordingly, the Court should again affirm.

ARGUMENT

I. The Well-Pleaded Complaint Rule Is the Standard for Removability of State Law Claims.

The standards of review for determining removal jurisdiction under the general removal statute, 28 U.S.C. § 1441, and under OCSLA, are well established. *See* Resp. 21–22, 42–43. The well-pleaded complaint rule governs whether a case "arises under" federal law for purposes of 28 U.S.C. §§ 1331 and 1441. *See, e.g.*, *Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 830 (2002). The rule "makes the plaintiff the master of the claim" such that "he or she may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). Jurisdiction exists "only when the plaintiff's statement of his own cause of action shows that it is based upon federal law," *Vaden v. Discover Bank*, 556 U.S. 49, 60 (2009) (cleaned up), and cannot rest on "a federal defense, including the defense of preemption." *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 14 (1983).

II. Baltimore Has Pleaded Purely Maryland Claims That Do Not "Arise Under" Any Body of Federal Common Law.

Baltimore's claims do not arise under federal common law. The various areas of federal concern Appellants identify are irrelevant to the City's Complaint, which rests on traditional state-law nuisance, trespass, products liability, and consumer protection claims. Even if the City's complaint had any relationship to federal common law, it would at best provide Appellants an ordinary preemption defense.

The Second Circuit's decision in *City of New York* lends Appellants no support, both because subject-matter jurisdiction was not at issue there and because the plaintiff's claims and theories of liability were critically different from the City's claims and theories here. Baltimore does not concede that *City of New York* was correctly decided; but even if it were, that court "consider[ed] the [defendants]' *preemption defense* on its own terms, not under the heightened standard unique to the removability inquiry" at issue on this appeal. *City of New York v. Chevron Corp.*, 993 F.3d 81, 94 (2d Cir. 2021) (emphasis added).

A. The City's Claims Have Nothing to Do with Any Body of Federal Common Law.

Federal common law cannot provide an independent basis for federal question jurisdiction. *See* Part II.B, *infra*; Resp. 21–24. Even if it could, this case still would not be removable because it has nothing to do with any body of federal common law, and the Court should not invent new federal law to accommodate Appellants' theory. The Ninth Circuit held that the defendants in *Oakland* failed to satisfy the requirements for crafting federal common law, 969 F.3d at 906–07, and this Court should do the same.

"Judicial lawmaking in the form of federal common law plays a necessarily modest role under a Constitution that vests the federal government's 'legislative Powers' in Congress and reserves most other regulatory authority to the States." *Rodriguez v. Fed. Deposit Ins. Corp.*, 140 S.Ct. 713, 717 (2020). "The instances where [the Supreme Court] ha[s] created federal common law are few and restricted," *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963), and have "included admiralty disputes and certain controversies between States," *Rodriguez*, 140 S.Ct. at 717. "[S]trict conditions must be satisfied" before a new area of federal common law may be recognized, *id.*, most prominently that there must

be a "significant conflict" between state law and a "uniquely federal interest," *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507–08 (1988). The proponent of federal common law must show a "specific, concrete federal policy or interest," "as a precondition for recognition of a federal rule of decision." *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 87, 88 (1994).

Appellants argue that the City's state law claims "implicate inherently national and international activities and interests, including treaty obligations and federal and international regulatory schemes," ASB 10, and therefore "arise under" federal common law. Those incorrect conclusions flow from the incorrect premise that the City seeks to regulate air pollution across the nation and globe. The City's actual theory is that Appellants are liable for climate change-related harms caused by their deliberate misrepresentation of the climatic dangers of fossil fuels and their misleading marketing of those products.

The City's case seeks to vindicate the core state "interest in ensuring the accuracy of commercial information in the marketplace." *Edenfield v. Fane*, 507 U.S. 761, 769 (1993). It targets misconduct that falls within fields of traditional state regulation, including "protection of consumers," *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132,

150 (1963); "advertising," *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541–42 (2001); and "unfair business practices," *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989). It pursues state tort remedies that are rooted in "the state's historic powers to protect the health, safety, and property rights of its citizens." *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 725 F.3d 65, 96 (2d Cir. 2013). And it redresses injuries within the states' purview: "the adverse effects of climate change." *Am. Fuel & Petrochem. Mfrs. v. O'Keeffe*, 903 F.3d 903, 913 (9th Cir. 2018). There is no unique federal interest in these subjects.

Unable to draw a clear connection with any uniquely federal interest, Appellants resort to a generic assertion that "[a]s a matter of federal constitutional law and structure," any claim involving climate change-related harms arises under federal common law. ASB 3. The Ninth Circuit rejected that argument in *Oakland*, reversing the district court's determination that "the [plaintiffs]' claim was 'necessarily governed by federal common law,'" because it "implicate[d] 'uniquely federal interests.'" 969 F.3d at 902. There, as here, the defendants did not "identify a legal issue" with a specific conflict, but instead "suggest[ed] that the [plaintiffs]' state-law claim implicates a variety of

'federal interests,' including energy policy, national security, and foreign policy." *Id.* at 906–07. The court observed that whether the defendants could be held liable for public nuisance was "no doubt an important policy question, but it does not raise a substantial question of federal law for the purpose of determining whether there is jurisdiction under § 1331." *Id.* at 907. So too here.

As the City has explained, Resp. 24–28, the federal common law of interstate air and water pollution that once existed has been displaced by Congress through the Clean Air Act and Clean Water Act, such that "the need for such an unusual exercise of law-making by federal courts [has] disappear[ed]." *See Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 423 (2011) (citation omitted). The City has also already explained that the foreign affairs doctrine supplies only an ordinary preemption defense, where a state "take[s] a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420 n.11 (2003); Resp. 38–40.[2] Multiple then-former United States foreign policy officials, including

[2] None of the cases Appellants cite for their foreign relations argument involved removal jurisdiction. Each of them applied a garden-variety

Secretary of State Antony Blinken, appeared as *amici* in state court in this case in opposition to Appellants' motions to dismiss, to explain that no aspect of this case would interfere with federal foreign policy prerogatives. *See* Brief of Former Gov't Officials, *Mayor & City Council of Baltimore v. B.P. p.l.c.*, No. 24-C-18-4219 (Balt. City Cir. Ct., Apr. 7, 2020). No area of federal common law applies to this case, and there is no basis to craft a new one.

B. State Law Complaints Are Only Removable if They Satisfy *Grable* or Are Completely Preempted by Statute.

Appellants' arguments that every case arises under federal law and is removable if "'dispositive issues stated in the complaint require the application of federal common law," ASB 14 (citation omitted), misconstrues jurisdictional boundaries the Supreme Court has taken pains to simplify and clarify.

As the Ninth Circuit held in *Oakland*, *Grable* and complete preemption are the only two recognized exceptions to the well-pleaded complaint rule. *See Oakland*, 969 F.3d at 904–06, 908. Appellants'

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preemption analysis to claims that were already in federal court. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *United States v. Pink*, 315 U.S. 203 (1942); *City of New York*, 993 F.3d 81.

insistence that federal common law "governs," "exclusively govern[s]," "necessarily governs," "controls," or provides "the rule of decision," *see* ASB 3, 6, 7, 9, 11, 12–15, 17, 18, & n.3., is all euphemism for the proposition that federal common law *preempts* Maryland law. Ordinary preemption is a federal defense, however, that can never supply federal question jurisdiction. *See, e.g.*, *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987).

The Supreme Court's "caselaw construing § 1331 was for many decades … highly 'unruly.'" *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S.Ct. 1562, 1571 (2016). To "bring some order" to the doctrine, the Court in *Grable* "condensed [its] prior cases" into a straightforward inquiry: "a case can 'aris[e] under' federal law in two ways," namely if "federal law creates the cause of action asserted," or if it falls within the "'special and small category' of cases" that satisfy *Grable*'s four-part analysis. *Gunn v. Minton*, 568 U.S. 251, 258 (2013). The only other exception to the well-pleaded complaint rule is the complete preemption doctrine. *See Oakland*, 969 F.3d at 906; Resp. 20–24.

Manning itself illustrates why Appellants' alternative jurisdictional approach must be rejected. The state court plaintiff there alleged the defendant bank violated state securities laws. 136 S.Ct. at 1566. The plaintiff brought no federal claims, but the complaint "couched its description" of the defendant's conduct "in terms suggesting that [the defendant] violated" an SEC regulation issued under the Securities Exchange Act. *Id.* at 1566–67. The Exchange Act grants exclusive federal jurisdiction over any case "brought to enforce any liability or duty created by [the statute] or the rules or regulations thereunder." 15 U.S.C. § 78aa(a). The defendant removed, arguing that whenever a complaint "explicitly or implicitly 'assert[s]' that 'the defendant breached an Exchange Act duty,' then the suit is 'brought to enforce' that duty and a federal court has exclusive jurisdiction." 136 S.Ct. at 1568.

The Supreme Court disagreed. It explained that it had previously interpreted the statutory phrase "brought to enforce" as "coextensive with [its] construction of 'arising under'" for the purposes of 28 U.S.C. § 1331, *id.* at 1571, and thus the *Grable* analysis "well captures [those] classes of suits 'brought to enforce'" an Exchange Act duty, *id.* at 1569. The Court stressed it had "time and again declined to construe federal

jurisdictional statutes more expansively than their language, most fairly read, requires," based on "the need to give due regard to ... the power of the States to provide for the determination of controversies in their courts." *Id.* at 1573 (cleaned up). The Court acknowledged that there is "nothing to prevent state courts from resolving Exchange Act questions that result from defenses or counterclaims," and thus "s[aw] little difference, in terms of the uniformity-based policies [the defendant] invoke[d], if those issues instead appear in a complaint." *Id.* at 1574. The Court held it was "less troubling for a state court to consider such an issue than to lose all ability to adjudicate a suit raising only state-law causes of action." *Id.*

Appellants' arguments here suffer the same pitfalls as the defendant's in *Manning*. They claim federal jurisdiction is essential to support "an overriding federal interest in the need for a uniform rule of decision" on certain topics. ASB 27 (quoting *Illinois v. City of Milwaukee*, 406 U.S. 91, 105 n.6 (1972)). But the Court in *Manning* repeated its "confidence that state courts would look to federal court interpretations of the relevant [federal] statutes," which presented "no 'incompatibility with federal interests.'" 136 S.Ct. at 1574. Appellants argue that "the

structure of the Constitution dictates that only federal law can apply" to the City's claims, and thus federal jurisdiction must also exist. ASB 3. But the Court in *Manning* repeated its "deeply felt and traditional reluctance to expand the jurisdiction of federal courts through a broad reading of jurisdictional statutes," and adopted an approach that would "keep state-law actions like [the plaintiff's] in state court," and thus "help maintain the constitutional balance between state and federal judiciaries." 136 S.Ct. at 1573 (cleaned up). Ultimately, the Court stated it would "not lightly read the statute to alter the usual constitutional balance, as it would by sending actions with all state-law claims to federal court just because a complaint references a federal duty." *Id.* at 1574. All those principles apply here.

The cases Appellants cite for their position, ASB 11–15, all either applied an outdated articulation of the *Grable* test, applied complete preemption, or did not analyze removal jurisdiction at all. Their three cases from this Circuit turned on the straightforward application of *Grable* or complete preemption. In *Davis v. Bell Atl.-W. Virginia, Inc.*, 110 F.3d 245, 247–48 (4th Cir. 1997), the court applied "th[e] complete pre-emption corollary to the well-pleaded complaint rule," and held that

the plaintiff's claims were completely preempted by the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 185, one of the three statutes the Supreme Court has recognized as having complete preemptive force. The Court in *N. Carolina v. Alcoa Power Generating, Inc.*, applied an older articulation of the *Grable* test, and asked whether "the vindication of a right under state law necessarily turn[ed] on some construction of federal law." 853 F.3d 140, 146 (4th Cir. 2017). Under that analysis, the court held that "the right that North Carolina s[ought] to vindicate, [title to a riverbed], turn[ed] on construction of federal law," based on Supreme Court precedent that "title to the beds of navigable waters is conferred ... by the Constitution itself.'" *Id.* at 147 (cleaned up). Here, by contrast, all the rights and duties on which the City bases its claims spring from Maryland law, and Appellants have argued at most that federal common law preempts the City's state law right to relief.

Caudill v. Blue Cross & Blue Shield of N.C., 999 F.2d 74 (4th Cir. 1993), was abrogated by *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677 (2006). The Court there applied a *Grable* analysis and held that federal common law did not provide "a basis for federal jurisdiction" over reimbursement claims related to certain health insurance plans. *Id.*

at 690–93. Appellants' contention that *Empire Healthchoice* "does not disturb *Caudill*'s independent holding that putative state-law claims are removable when ... they are governed by federal common law," ASB 12 n.3, is demonstrably false. The Supreme Court "granted certiorari ... to resolve a conflict among lower federal courts concerning the proper forum for claims of the kind" at issue, and disapproved *Caudill*'s holding "upholding federal jurisdiction." *Empire Healthchoice*, 547 U.S. at 689. The Court did so by applying *Grable*, *id.* at 699, finding it was not satisfied, *id.* at 700, and noting that "[t]he state court ... is competent to apply federal law, to the extent it is relevant," *id.* at 701. None of *Caudill*'s reasoning remains good law.

Looking outside the circuit: The plaintiff in *Treiber & Straub, Inc. v. UPS, Inc.* 474 F.3d 379 (7th Cir. 2007), filed its complaint in federal court and alleged federal *and* state causes of action; no question of subject-matter jurisdiction was before the court. *See Treiber & Straub, Inc. v. United Parcel Serv., Inc.*, 2005 WL 2108081, at *1, *10–11 (E.D. Wis. 2005); 28 U.S.C. § 1367. The Eighth Circuit's decision in *In re Otter Tail Power Co.*, 116 F.3d 1207 (8th Cir. 1997), applied the substantial federal issue test that has since been synthesized in *Grable*. *See* 116 F.3d

at 1213 (jurisdiction exists where "the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law"). The First Circuit in *BIW Deceived v. Loc. S6, Indus. Union of Marine & Shipbuilding Workers of Am.* 132 F.3d 824, 831 (1st Cir. 1997), held that the plaintiff's claims were removable because they were completely preempted by the LMRA. It is unclear what test Ninth Circuit applied in *New SD, Inc. v. Rockwell Int'l Corp.*, 79 F.3d 953, 955 (9th Cir. 1996), to determine that "on government contract matters having to do with national security, state law is totally displaced by federal common law," because it did not discuss complete preemption, "artful pleading," or the pre-*Grable* substantial federal issue test. That court clarified in *Oakland*, however, that the "two exceptions to the well-pleaded-complaint rule" are *Grable* and complete preemption.[3] 969 F.3d at 906. The Fifth Circuit's decision in *Sam L. Majors Jewelers v. ABX, Inc.*, is inapposite because

[3] Even before *Oakland*, circuit and district courts criticized *New SD* both for its jurisdictional reasoning and its holding that the plaintiff's contract claims arose under federal common law. *See Babcock Servs., Inc. v. CH2M Hill Plateau Remediation Co.*, 2013 WL 5724465, at *4 (E.D. Wash. 2013) (*New SD*'s "premise is no longer sound" after *Grable*); *Raytheon Co. v. Alliant Techsys., Inc.*, 2014 WL 29106, at *4 (D. Ariz. 2014) (same); *see also Woodward Governor Co. v. Curtiss Wright Flight Sys., Inc.*, 164 F.3d 123, 128 (2d Cir. 1999) ("[T]he reasoning behind *New SD* is, in our opinion, flawed.").

that case held only that a claim against an interstate air carrier for property lost in shipping arises under federal common law based on "the historical availability of this common law remedy, and the statutory preservation of the remedy," rendering the decision "necessarily limited" by its own terms. 117 F.3d 922, 929 n.16 (5th Cir. 1997).

Finally, Appellants' discussion of *United States v. Swiss Am. Bank, Ltd.*, 191 F.3d 30 (1st Cir. 1999), and *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301 (1947), is misleading. *See* ASB 17–19. Neither case involved any question of subject-matter jurisdiction; both were filed in federal court and subject-matter jurisdiction existed because the United States was the plaintiff. *Standard Oil*, 332 U.S. at 302; *Swiss Am. Bank*, 191 F.3d at 35; *see also* 28 U.S.C. § 1345. The "two-step framework" applied in both cases was a choice-of-law analysis to determine whether the United States' subrogation claim in *Standard Oil* and conversion claim in *Swiss American Bank* were cognizable under state or federal law. In both cases the government argued that its claims were federal and the courts agreed. *See Standard Oil*, 332 U.S. at 305–06; *Swiss Am. Bank*, 191 F.3d at 42–45. The cases say nothing about removal jurisdiction or federal question jurisdiction.

C. The "Artful Pleading Doctrine" Is Another Name for Complete Preemption, and Is Not an Independent Exception to the Well-Pleaded Complaint Rule.

Appellants' contention that the "artful pleading doctrine" creates a free-standing basis for jurisdiction apart from the *Grable* and complete preemption adds confusion where the Supreme Court has strived for clarity. *See* ASB 13–17. Baltimore has explained that the doctrine does not create a separate basis for jurisdiction, *see* Resp. 22–24, and adds detail here in response to Appellants' supplemental arguments.

The artful pleading doctrine is best understood as another name for the complete preemption doctrine. The Supreme Court has made clear that "[t]he 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). The Ninth Circuit in *Oakland* was correct: federal question jurisdiction does not exist over state law claims "unless one of the *two* exceptions to the well-pleaded-complaint rule applies," namely *Grable* and complete preemption. *Oakland*, 969 F.3d at 906 (emphasis added). There is no *third* avenue to remove state law claims. This Court should heed the Supreme Court's admonition not to

return to the "muddled backdrop" predating "what we now understand as the 'arising under' standard." *See Manning*, 136 S.Ct. at 1571.

This Court treats complete preemption and artful pleading as equivalent. Appellants cite *Davis* for the proposition that "a plaintiff is not permitted 'to circumvent' federal jurisdiction through 'artful pleading.'" ASB 13 (quoting 110 F.3d at 247). But they omit critical context:

> [T]he Supreme Court has refused to allow artful pleading to circumvent the power of [the LMRA's] preemptive force. ... Under this "***complete pre-emption corollary*** to the well-pleaded complaint rule," ... it follows that a purportedly state law claim, the resolution of which depends substantially upon the analysis of a collective-bargaining agreement's terms, must either be treated as a claim under [the LMRA] or be dismissed as preempted under federal labor law.

Davis, 110 F.3d at 247 (emphasis added); *see also Barton v. House of Raeford Farms, Inc.*, 745 F.3d 95, 107 (4th Cir. 2014) (LMRA complete preemption cannot be "evade[d]" "through artful plead"). There is no basis in this Court's precedent to treat "artful pleading" as an independent theory of removal.

Most appellate courts have likewise held that it is another way of describing complete preemption. *See, e.g.*, *Oakland*, 969 F.3d at 905

(quoting *Rivet*, 522 U.S. at 475)); *Lawless v. Steward Health Care Sys., LLC*, 894 F.3d 9, 17 (1st Cir. 2018) (discussing "the complete preemption doctrine (sometimes referred to as the artful pleading doctrine)"); *Bernhard v. Whitney Nat'l Bank*, 523 F.3d 546, 551 (5th Cir. 2008) ("[W]e have said that the artful pleading doctrine applies *only* where state law is subject to complete preemption."); *Blackburn v. Sundstrand Corp.*, 115 F.3d 493, 495 (7th Cir. 1997); *Goepel v. Nat'l Postal Mail Handlers Union, a Division of LIUNA*, 36 F.3d 306, 311–12 & n.5 (3d Cir. 1994).[4]

The Supreme Court in *Manning* rejected the same appeal to "artful pleading" untethered from complete preemption that Appellants raise here. The defendant in *Manning* urged that even where *Grable* is not satisfied, "a judge should go behind the face of a complaint to determine whether it is the product of 'artful pleading.'" 136 S.Ct. at 1575. The Court did not mince words: "We have no idea how a court would make that judgment," and holding plaintiffs to such an amorphous but exacting standard would be "excruciating for courts to police." *Id.* Courts should

[4] Two circuits have expressed an understanding that the scope of the doctrine is not settled. None have held, as Appellants suggest, that the doctrines function independently. *See Ohio ex rel. Skaggs v. Brunner*, 629 F.3d 527, 532 (6th Cir. 2010); *Sullivan v. Am. Airlines, Inc.*, 424 F.3d 267, 272 n.4 (2d Cir. 2005).

instead apply the "familiar" arising under standard clarified in *Grable*. *Id.* at 1574–75. There is no separate artful pleading analysis to determine jurisdiction under the Exchange Act, which is "coextensive with" the test for jurisdiction under § 1331. *See id.* at 1571; Part II.B, *supra*. There is, *a fortiori*, no artful pleading analysis that applies to § 1331.

D. The Second Circuit's Decision in *City of New York* Supports Remand.

Although Appellants discuss the Second Circuit's opinion in *City of New York* throughout their Supplemental Brief, that case is distinguishable on its face. It does not speak to any of the issues pending before the Court and is factually inapposite. To the extent the decision is relevant at all, it supports remand.

First, the court in *City of New York* reviewed an order granting a motion to dismiss, and distinguished its reasoning and holding from the numerous recent decisions granting motions to remand in cases involving climate change, including the district court's decision here. *See* 993 F.3d at 93–94. Because New York City "filed suit in federal court in the first instance," the court considered "the [defendant companies'] preemption defense on its own terms, not under the heightened standard unique to the removability inquiry." *Id.* at 94. The court emphasized, moreover,

that its ordinary preemption analysis "d[id] not conflict" with the Ninth Circuit's decision in *Oakland*, as well as with "the fleet of [other] cases" holding that "anticipated defense[s]"—including those based on federal common law—could not "single-handedly create federal-question jurisdiction." *Id.* at 93–94. The district court here reached exactly that holding. *See* JA341–46.

Second, the allegations in the *City of New York* complaint are critically different from Baltimore's complaint, and the Second Circuit's preemption analysis would not apply here. New York City defined the conduct giving rise to liability as "lawful commercial activity": the defendants' lawful "production, promotion, and sale of fossil fuels." *City of New York*, 993 F.3d at 87–88 (cleaned up). New York City reaffirmed to the Second Circuit that its "core theory of liability" was under New York public nuisance law, a court may award damages to "reallocate the costs imposed by lawful economic activity without requiring that activity to cease *or imposing a standard of conduct*." Brief for Appellant at 12, *City of New York v. Chevron Corp.*, 993 F.3d 81, No. 18-2188, Dkt. 89, 2018 WL 5905772 (2d Cir. Nov. 8. 2018) (emphasis added). New York City's "particular theory of the claims ... assume[d] that Defendants'

business activities have substantial social utility and d[id] not hinge on a finding that those activities themselves were unreasonable or violated any obligation other than the obligation to pay compensation." *Id.* at 19. At most, New York City alleged that manufacturers of a product can be held liable in nuisance and trespass if it sells the products "*with the knowledge* that those products will cause environmental harm," even if the plaintiff has not satisfied the elements of a failure to warn claim or shown other tortious conduct by the manufacturer. *Id.* at 23 (emphasis added).

New York City's theory, the Second Circuit held, would "effectively impose strict liability for the damages caused by fossil fuel emissions no matter where in the world those emissions were released (or who released them)," and the defendants would need to "cease global production [of fossil fuels] altogether" if they "want[ed] to avoid all liability." 993 F.3d at 93. That lawsuit, "if successful, would operate as a *de facto* regulation on [transborder] emissions," and the court held it was preempted. *Id.* at 96.

Baltimore's causes of action, theories of liability, relief sought are all categorically different. The City does not allege that it was injured by

the lawful sale of a lawful product; rather, it has brought claims for injuries caused by Appellants' use of *unlawful* affirmative misrepresentations to inflate the market for their products, as this Court has already recognized. *Baltimore*, 952 F.3d at 467. Nothing in this case would directly or indirectly require Appellants to cease production of fossil fuels, either to satisfy a judgment or to avoid future liability, and Appellants do not argue it would. *City of New York* is inapposite.

III. There Is No OCSLA Jurisdiction Because the City's Claims Arise Out of Appellants' Misinformation Campaigns, Not Their Offshore Fossil Fuel Production Activities.

As the City explained in its Response Brief, Resp. 42–44, the district court correctly held there is no federal jurisdiction in this case pursuant to OCSLA, because Appellants "offer no basis ... to conclude that the City's claims for injuries stemming from climate change would not have occurred but for defendants' extraction activities on the OCS." JA362. Under the broadest interpretation of the statute, there must be a "but-for connection" between the cause of action and Defendants' operations on the OCS for OCSLA jurisdiction to attach. *In re Deepwater Horizon*, 745 F.3d 157, 163 (5th Cir. 2014). "[A] 'mere connection' between

the cause of action and the OCS operation" that is "too remote" will not establish federal jurisdiction. *Id.*

The relevant activity here is Appellants' misrepresentation campaigns that promoted the unrestrained use of fossil fuels, not any kind of "operation" conducted on the OCS. *See EP Operating Ltd. P'ship v. Placid Oil Co.*, 26 F.3d 563, 567 (5th Cir. 1994). Under Appellants' theory, any case against any fossil fuel company involving any adverse impact associated with any of their products would be subject to federal jurisdiction under OCSLA. That is absurd, and the district court's holding is in accord with every other court that has considered and rejected Defendants' arguments in similar cases. *See e.g., Honolulu*, 2021 WL 531237 at *3; *Minnesota*, 2021 WL 1215656 at *10.

Appellants' reliance on *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S.Ct. 1017 (2021), *see* ASB 26, is misplaced. The Supreme Court there explained the contours of its own specific personal jurisdiction precedent, *see* 141 S.Ct. at 1026–30, and what it meant when it said constitutional due process limitations require "'a connection between the forum and the specific claims at issue'" before a state may exercise specific personal jurisdiction over a defendant, *see id.* at 1031.

The opinion did not purport to interpret the *statutory* phrase "in connection with," as used in OCSLA or anywhere else.

Appellants' argument that the City "squarely alleges that Defendants' OCS activities ... are the but-for cause of its injuries," *see* ASB 28, is wrong, as this Court has already held. As noted above, this Court observed that "it is the concealment and misrepresentation of [Appellants'] products' known dangers—and simultaneous promotion of their unrestrained use—that allegedly drove consumption, and thus greenhouse gas pollution, and thus climate change." 952 F.3d at 467. Appellants argue the Court's holding that the City's claims do not "relate to" activities under federal direction on the OCS, *id.*, does not "control" its determination as to whether the City's case arises "in connection with" the OCS. *See* ASB 28–29. But that myopic reading misses the analytic forest for the trees. The Court held that while "the alleged government-directed conduct (here, the production and sale of fossils fuels extracted on the OCS) need only 'relate to' the conduct charged in the Complaint," that standard was not satisfied because "production and sales [did not go] to the heart of Baltimore's claims." 952 F.3d at 467–68. The City's claims do not arise "in connection with" operations on the OCS for the

same reason they do not "relate to" operations on the OCS that the federal government may have directed: they seek relief for injuries allegedly caused by deception, not OCS operations.

Appellants also do not explain why adjudicating Baltimore's claims would obstruct OCSLA's objective to achieve "the efficient exploitation of the minerals" on the OCS. *Amoco Production Co. v. Sea Robin Pipeline Co.*, 844 F.2d 1202, 1210 (5th Cir. 1988); 43 U.S.C. § 1332. The remedies the City seeks would not regulate production activities on the OCS for the same reasons they would not regulate emissions. *See* Part II.A, *supra*. Appellants argue that a large award against them "would inevitably deter" OCS production. ASB 30. That contention is entirely speculative, and Appellants' reasoning would mean that *any* case that might, based on the pleadings, lead to a large judgement against a company operating on the OCS would fall within OCSLA's jurisdictional grant because it might eventually impact their operations. No court has adopted such a limitless standard for OCSLA jurisdiction and this Court should not either.

CONCLUSION

The Court should affirm.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the undersigned certifies that this brief complies with the applicable typeface, type-style, and type-volume limitations. This brief was prepared using a proportionally spaced type (Century Schoolbook, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 6,000 words. This certificate was prepared in reliance on the word-count function of the word-processing system used to prepare this brief.

Dated: September 7, 2021

/s/ *Victor M. Sher*
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CERTIFICATE OF SERVICE

I hereby certify that on September 7, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system.

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