No. 21-2728

IN THE

United States Court of Appeals for the Third Circuit

CITY OF HOBOKEN,

Plaintiff-Appellee,

v.

EXXON MOBIL CORP., EXXONMOBIL OIL CORP., ROYAL DUTCH SHELL PLC, SHELL OIL COMPANY, BP P.L.C., BP AMERICA INC., CHEVRON CORP., CHEVRON U.S.A. INC., CONOCOPHILLIPS, CONOCOPHILLIPS COMPANY, PHILLIPS 66, PHILLIPS 66 COMPANY, AMERICAN PETROLEUM INSTITUTE,

Defendants-Appellants.

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

DEFENDANTS-APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Defendants submit the following statement:

Chevron Corporation is a publicly traded company (NYSE: CVX). It does not have a parent corporation, and no publicly held company owns more than 10% of its stock.

Chevron U.S.A. Inc. is an indirect subsidiary of Chevron Corporation. No publicly traded corporation owns 10% or more of Chevron U.S.A.'s stock.

Exxon Mobil Corporation is a publicly traded corporation and has no corporate parent. No publicly held corporation owns 10% or more of Exxon Mobil Corporation's stock.

ExxonMobil Oil Corporation's corporate parent is Mobil Corporation, which owns 100% of ExxonMobil Oil Corporation's stock. Mobil Corporation, in turn, is wholly owned by Exxon Mobil Corporation.

ConocoPhillips is a publicly traded corporation incorporated under the laws of Delaware with its principal place of business in Texas. It does not have a parent corporation and no publicly held company owns more than 10% of its stock.

ConocoPhillips Company is wholly owned by ConocoPhillips.

Phillips 66 is a publicly traded company. It does not have a parent corporation and no publicly held company owns 10% or more of its stock.

Phillips 66 Company is wholly owned by Phillips 66.

Royal Dutch Shell plc is a publicly held company organized under the laws of the United Kingdom. Royal Dutch Shell plc does not have any parent corporations, and no publicly traded company owns 10% or more of Royal Dutch Shell plc's stock.

Shell Oil Company is a wholly owned subsidiary of Shell Petroleum Inc., whose ultimate corporate parent is Royal Dutch Shell plc. No other publicly held company owns 10% or more of the stock of Shell Oil Company.

BP plc is a publicly traded corporation organized under the laws of England and Wales. No publicly traded corporation owns 10% or more of its stock.

BP America Inc. is a wholly owned indirect subsidiary of BP plc.

American Petroleum Institute is a non-profit, tax-exempt organization incorporated in the District of Columbia. It is a non-stock corporation and thus has no parent organization, and no publicly held corporation holds 10% or more of its stock.

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INTRODUCTION

Plaintiff the City of Hoboken filed this case in New Jersey state court, seeking to apply New Jersey state tort law to impose liability on selected energy companies for alleged physical harms that Plaintiff contends are attributable to the effects of global climate change. This sweeping lawsuit, however, belongs in federal court. First, Plaintiff's claims involving the alleged physical effects of interstate and international greenhouse-gas emissions necessarily arise under federal common law. Indeed, in a case involving nearly identical claims, the Second Circuit recently held that such claims "must be brought under federal common law" because they cross state and national boundaries, and "a federal rule of decision is necessary to protect uniquely federal interests." *City of New York v. Chevron Corp.*, 993 F.3d 81, 90, 95 (2d Cir. 2021). Moreover, under Plaintiff's theory of harm, a substantial portion of its alleged injuries can be traced to oil and gas that Defendants extracted and produced under the direction of federal officers and on the Outer Continental Shelf ("OCS"), thereby establishing jurisdiction under the federal-officer-removal statute and the Outer Continental Shelf Lands Act ("OCSLA").

The court below, however, remanded to state court, concluding that Plaintiff's claims solely involved Defendants' alleged "misinformation campaigns" regarding the science surrounding climate change. 1-JA-17. The district court was incorrect.

Plaintiff's claims seek to base liability on interstate and international emissions—the source of Plaintiff's alleged physical injuries. Plaintiff's attempts to focus solely on alleged "misrepresentations" cannot change this fundamental fact. And under our federal constitutional structure, "state law cannot be used" to regulate interstate emissions. *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 313 n.7 (1981) ("*Milwaukee II*"); *see also Illinois v. City of Milwaukee*, 406 U.S. 91, 107 n.9 (1972) ("*Milwaukee I*") ("Federal common law and not the varying common law of the individual States is … necessary to be recognized as a basis for dealing in uniform standard with the environmental rights of a State against improper impairment by sources outside its domain."). Because Plaintiff's claims arise under federal common law, removal was proper.

Similarly, because Plaintiff's claims involve federal common law and implicate Defendants' speech protected by the First Amendment,

they inherently raise substantial and disputed elements of federal law and, therefore, are removable under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005).

The district court also erred in denying federal-officer and OCSLA removal by focusing exclusively on Plaintiff's misrepresentation allegations. Plaintiff does not allege that its injuries arise solely from Defendants' purported misrepresentations. Instead, Plaintiff claims injury resulting from phenomena like rising sea levels that are—in Plaintiff's account—consequences of worldwide fossil-fuel production and emissions. The only causal effect of the alleged misrepresentations that the Complaint identifies is to have "unduly inflated the market for fossil fuels," 2-JA-142, and to have "conceal[ed] Defendants' continuing acceleration of their extraction, production, marketing, and sale of fossil fuels," 2-JA-129.

Accordingly, under Plaintiff's own causal theory, interstate and international emissions—and the allegedly resulting climate-related injuries—are connected to acts that Defendants took under federal officers and on the OCS. For example, Defendants have produced and supplied large quantities of specialized, non-commercial grade fuel for and at the

direction of the U.S. military, and in recent years as much as 30% of annual oil produced domestically has come from federally owned lands on the OCS. Defendants submitted unrebutted expert declarations from Professors Mark Wilson and Tyler Priest—historians of military-industrial relations and energy policy—that draw on over a half century of evidence to show the deep connections between Defendants' oil operations and the federal government's mandate to ensure an abundant and reliable supply of oil and gas for the nation. Because Plaintiff's claims are based on global climate change, they necessarily encompass the worldwide production, sale, and use of oil and gas—not just Defendants' operations in New Jersey—including the significant portion that occurred under the direction, supervision, and control of federal officers and on the OCS.

In sum, under Plaintiff's own theory, Defendants' production activities and the emissions claimed to result therefrom are the *sine qua non* of Plaintiff's alleged harm and requested damages. As a result, Plaintiff's claims arise under federal common law, raise substantial and dis-

puted issues of federal law, and involve actions taken under federal officers and on the OCS. This case belongs in federal court and removal was proper.

JURISDICTIONAL STATEMENT

Defendants timely removed this action to the district court on October 9, 2020. 28 U.S.C. § 1446(b)(2)(A); 3-JA-188. The district court had jurisdiction under 28 U.S.C. §§ 1331, 1332(d), 1367(a), 1441(a), 1442, and 1446, and 43 U.S.C. § 1349(b).

On September 8, 2021, the district court granted Plaintiff's motion to remand, 1-JA-15, and, on September 14, 2021, Defendants timely filed a notice of appeal under 28 U.S.C. §§ 1291 and 1447(d). 1-JA-2.

This Court has jurisdiction under 28 U.S.C. §§ 1291 and 1447(d) to review the district court's entire remand order. *See BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532 (2021).

STATEMENT OF ISSUES

1. Whether the district court had removal jurisdiction on the basis that Plaintiff's claims for injuries stemming from global climate change arise under federal common law. *See* 3-JA-230–242; 5-JA-824–31; 5-JA-753–760; 1-JA-24–28.

2. Whether the district court had removal jurisdiction under *Grable* for claims raising substantial and disputed federal questions, given that Plaintiff's claims involve questions of federal common law and—to the extent they are based on misrepresentation allegations—include federal constitutional elements that Plaintiff has the burden to prove. *See* 3-JA-307–332; 5-JA-836–39; 5-JA-767–78; 1-JA-28–31.

3. Whether the district court had jurisdiction under 28 U.S.C. § 1442(a)(1), since Plaintiff's claims are "for or relating to" injuries that were allegedly caused by emissions from Defendants' fossil fuels, a substantial amount of which was produced at the direction of federal officers. *See* 3-JA-250–307; 5-JA-843–71; 5-JA-778–92; 1-JA-33–37.

4. Whether Plaintiff's claims "aris[e] out of, or in connection with" Defendants' operations on the OCS, 43 U.S.C. § 1349(b)(1), given that Plaintiff alleges its injuries were caused by emissions from Defendants' oil and gas, a substantial amount of which came from the OCS, and given that Plaintiff's requested relief would impair OCS activities. *See* 3-JA-242–250; 5-JA-839–43; 5-JA-796–99; 1-JA-31–33.

[An addendum of key statutory provisions is included at the end of the brief.]

STATEMENT OF RELATED CASES

Plaintiff's underlying state-court case is *City of Hoboken v. Exxon Mobil Corp.*, No. HUD-L-003179-20 (N.J. Super. Ct.). No related case has come before this Court. Defendants listed several, separate cases pending in other courts involving similar issues in Attachment B to the Civil Appeal Information Statement. Dkt. No. 50-3.

STATEMENT OF THE CASE

A. Background

As an issue of national and international significance, climate change has for decades been the subject of federal laws and regulations, political negotiations, and diplomatic engagement with other countries. *See* 3-JA-239–40.

Beginning in 2017, however, state and local governments across the country, dissatisfied with the federal government's approach to the issue, launched a coordinated series of lawsuits seeking to hold certain energy companies liable for global climate change in state courts under various states' laws. These plaintiffs are seeking to use novel tort theories sounding in nuisance and trespass to regulate global greenhouse-gas emissions by imposing massive civil liability on selected energy companies.

Plaintiff Hoboken's lawsuit is part of this coordinated campaign. *See* 1-JA-16. Plaintiff brought suit in New Jersey state court against a select group of energy companies, plus a trade association, alleging that "Defendants' extraction, production, and sale of fossil fuels on an enormous scale is the driving force behind the unprecedented combustion of fossil fuels over the last thirty years that has caused the Earth to warm." 2-JA-77. According to the Complaint, Defendants' actions have increased greenhouse-gas emissions and contributed to global climate change, leading to Plaintiff's alleged injuries stemming from rising sea levels, more frequent extreme heat, and increased extreme precipitation. 2-JA-69–79. Plaintiff alleges that "Defendants[']' actions were, at the very least, a substantial factor in the creation of the [alleged] nuisance" because "Defendants have produced more than 12% of the world's fossil fuels since 1965, the combustion of which has been the driving force behind" climate change, and "[w]ithout Defendants' actions, climate change effects" would be "much less severe." 2-JA-164.

Plaintiff asserts claims for public and private nuisance, trespass, negligence, and violation of New Jersey's Consumer Fraud Act. 2-JA-158–184. Plaintiff demands damages for all injuries suffered as a result

of global climate change, disgorgement of profits from Defendants' production and sale of oil and gas, and an order compelling Defendants to abate the alleged nuisance of global climate change. 2-JA-184–85.

B. Proceedings Below

Defendants timely removed this action to the U.S. District Court for the District of New Jersey. *See* 3-JA-188. Defendants asserted multiple bases for removal, including that (1) Plaintiff's claims arise under federal common law, given that its injuries were allegedly caused by interstate and international emissions, 3-JA-230–42; (2) Plaintiff's claims raise disputed federal issues and thereby are removable under *Grable*, 3-JA-307–32; (3) Plaintiff's claims relate to acts performed under the direction and supervision of federal officers and therefore are removable under 28 U.S.C. § 1442, 3-JA-250–307; and (4) removal was appropriate under OCSLA because Plaintiff's claims are connected to production on the OCS, 3-JA-242–50.

The district court remanded to state court without holding oral argument. The court acknowledged that Plaintiff was "seek[ing] compensation to offset the costs it has and will continue to incur to protect itself from the effects of *global* warming." 1-JA-17 (emphasis added). The

court also acknowledged that Plaintiff's theory of liability is that "Defendants' production, marketing, *and* sale of fossil fuels has been a 'substantial factor' in skyrocketing carbon dioxide (CO_2) emissions," which led to global warming and Plaintiff's alleged injuries. *Id.* (emphasis added). Nevertheless, in analyzing jurisdiction the court ignored the "production," "sale," and "emissions" aspects of Plaintiff's claims, as well as Plaintiff's theory of damages causation, and focused solely on Plaintiff's misrepresentation allegations. That oversight led the court to reject Defendants' federal-officer and OCSLA bases for removal. The court rejected Defendants' federal-common-law argument by incorrectly assuming that Defendants were "in essence raising the affirmative defense that the federal common law preempts Plaintiff's claims." 1-JA-25. The court further held that removal would not be proper "even assuming that this matter is ultimately governed by the federal common law." *Id.*

SUMMARY OF ARGUMENT

I. This case belongs in federal court because, as a matter of federal constitutional law and structure, Plaintiff's claims necessarily arise under federal, not state, law. Plaintiff seeks to hold Defendants liable for

the consequences of emissions-producing conduct by billions of consumers occurring in other states and around the world stretching back decades. Under long-established Supreme Court precedent, claims involving interstate pollution arise under federal common law.

II. Similarly, Plaintiff's claims raise substantial and disputed issues of federal law, thereby rendering federal-removal jurisdiction appropriate under *Grable*. Because Plaintiff's claims involve questions of federal common law, federal law provides the rule of decision for those claims. Plaintiff's misrepresentation allegations also raise substantial and disputed elements of federal constitutional law under the First Amendment.

III. This case is removable under the federal-officer-removal statute. 28 U.S.C. § 1442(a). Defendants acted under the federal government's direction and control to provide fossil fuels to support national policy goals, including the production and supply of highly specialized fuels to the military, the exploration and extraction of oil from the federal government's lands on the OCS, and management of vital oil reserves under detailed arrangements with the federal government. Because

Plaintiff's purported causes of action, theory of injury, and desired remedies implicate the cumulative and global use of fossil fuels, Plaintiff's claims are connected to acts that Defendants undertook at the direction of federal officers.

IV. Removal is also appropriate under OCSLA. Defendants have long engaged in extensive exploration, development, and production of oil and gas on the OCS, which has accounted for as much as 30% of annual oil produced domestically. The Complaint unequivocally alleges that all of Plaintiff's claimed injuries arise from the cumulative impact of Defendants' extraction, production, and sale of oil and gas products over the past several decades—activities that necessarily include Defendants' substantial OCS production. Additionally, Plaintiff's claims are removable under OCSLA because Plaintiff's requested relief would discourage Defendants' operations on the OCS.

ARGUMENT

A defendant may remove a civil case from state court if the plaintiff "could have filed its operative complaint in federal court." *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1748 (2019); *see also* 28 U.S.C. § 1441(a) (allowing removal of "any civil action" within district court's

"original jurisdiction"). The removing party need only demonstrate federal jurisdiction over a single claim to authorize removal. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 559, 563 (2005). Here, removal was proper because the district court had jurisdiction over this suit under the federal-question-jurisdiction statute, 28 U.S.C. § 1331, the federal-officer-removal statute, *id.* § 1442, and OCSLA, 43 U.S.C. § 1349(b)(1).

Standard of Review. This Court reviews issues of subject-matter jurisdiction de novo. *Papp v. Fore-Kast Sales Co.*, 842 F.3d 805, 810 (3d Cir. 2016).

I. Removal Was Proper Because Plaintiff's Claims Arise Under Federal Law.

As a matter of federal constitutional law and structure, Plaintiff's claims necessarily arise under federal, not state, law. Plaintiff seeks to hold Defendants liable for the consequences of emissions-producing conduct occurring in other states and around the world. Under long-established Supreme Court precedent, such claims are necessarily and exclusively governed by federal common law. And, as numerous courts of appeals have recognized, where uniform federal rules of decision govern a

common-law claim, the claim "arises out of" federal law, and thus is removable. *See, e.g.*, *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 926, 929 (5th Cir. 1997); *see also Milwaukee I*, 406 U.S. at 100 ("[Section] 1331 jurisdiction will support claims founded upon federal common law as well as those of a statutory origin.").

A. Claims Based On Interstate And International Emissions Arise Under Federal Common Law.

As a matter of federal constitutional structure, Plaintiff's claims arise under federal, not state, law, because they seek redress for harms allegedly caused by transboundary emissions.

The Supreme Court in *Erie Railroad Co. v. Tompkins* recognized that there "is no federal general common law." 304 U.S. 64, 78 (1938). But even after *Erie*, there remains federal authority over "matters … so vitally affecting interests, powers and relations of the Federal Government as to require uniform national disposition rather than diversified state rulings." *United States v. Standard Oil Co.*, 332 U.S. 301, 307 (1947). The "federal judicial power to deal with common-law problems" of this sort thus "remain[s] unimpaired for dealing independently, wherever necessary or appropriate, with essentially federal matters, even

though Congress has not acted affirmatively about the specific question." *Id.*

Thus, "where there is an overriding federal interest in the need for a uniform rule of decision," *Milwaukee I*, 406 U.S. at 105 n.6, "state law cannot be used," *Milwaukee II*, 451 U.S. at 313 n.7. In particular, in certain narrow contexts that implicate "uniquely federal interests"—such as where "the interstate or international nature of the controversy makes it inappropriate for state law to control"—the Constitution gives federal courts "the need and authority … to formulate" a national body of law, rather than allowing for piecemeal (and potentially contradictory) rules of decision to develop among the states. *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640–41 (1981). Likewise, "state courts [are] not left free to develop their own doctrines" of foreign relations or dictate our "relationships with other members of the international community." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425–26 (1964). In these areas, federal common law necessarily supplies any causes of action and rules of decision.

Interstate pollution—including the interstate effects of greenhouse-gas emissions—is one such area where federal law necessarily governs.

The Supreme Court has consistently held that claims based on ambient, cross-border pollution arise under federal common law, not any individual state's law: "When we deal with air and water in their ambient or interstate aspects, there is a federal common law." *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 421 (2011) ("*AEP*"). Likewise, "the regulation of interstate water pollution is a matter of federal, not state, law." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987). "Federal common law and not the varying common law of the individual States is … necessary to be recognized as a basis for dealing in uniform standard with the environmental rights of a State against improper impairment by sources outside its domain." *Milwaukee I*, 406 U.S. at 107 n.9. For this reason, as the Second Circuit recently explained, "[f]or over a century, a mostly unbroken string of cases has applied federal law to disputes involving interstate air or water pollution." *New York*, 993 F.3d at 91.

This principle flows from the constitutional structure itself. In our federal system, each state may make laws within its own borders, but no state may "impos[e] its regulatory policies on the entire Nation." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585 (1996). The Constitution's allocation of sovereignty between the states and the federal government, and

among the states themselves, precludes applying state law when the claims' inherently interstate nature requires uniform *national* rules of decision. Allowing state law to govern such claims would permit one state to "impose its own legislation on … the others," violating the "cardinal" principle that "[e]ach State stands on the same level with all the rest." *Kansas v. Colorado*, 206 U.S. 46, 97 (1907). Thus, "the basic scheme of the Constitution so demands" that federal common law govern claims that greenhouse-gas emissions contributed to global climate change. *AEP*, 564 U.S. at 421.

In its Supreme Court *amicus* brief in a parallel climate-change case, the United States made precisely this point: "[C]ross-boundary tort claims associated with air and water pollution involve a subject that 'is meet for federal law governance.'" U.S. *Amicus Curiae* Br. 26–27, *BP p.l.c. v. Mayor & City Council of Baltimore*, No. 19-1189 (U.S. Nov. 23, 2020) (quoting *AEP*, 564 U.S. at 422).[1] Claims "that seek to apply the

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[1] At oral argument, the United States confirmed its view that Plaintiff's claims "are inherently federal in nature." Tr. of Oral Argument at 31:4–5, *Baltimore*, 2021 WL 197342 (U.S. Jan. 19, 2021). Although Plaintiff "tried to plead around th[e] Court's decision in *AEP*, its case still depends on alleged injuries to [Plaintiff] caused by emissions from

(Cont'd on next page)

law of an affected State to conduct in *another* State" necessarily "arise under 'federal, not state, law' for jurisdictional purposes, given their inherently federal nature." *Id.* at 27 (quoting *Ouellette*, 479 U.S. at 488).

The Second Circuit recently held that nearly identical claims seeking relief for injuries caused by global climate change "must be brought under federal common law." *New York*, 993 F.3d at 95. In that case, the City of New York alleged that the defendant energy companies—all of whom are Defendants here—"have known for decades that their fossil fuel products pose a severe risk to the planet's climate" but "downplayed the risks and continued to sell massive quantities of fossil fuels." *Id.* at 86–87. The City argued that "state tort law," not federal common law, applied because emissions were "only a link in the causal chain of the City's damages." *Id.* at 85, 91. The Second Circuit soundly rejected this argument, noting that the City could not use "[a]rtful pleading" to transform its complaint into "anything other than a suit over global greenhouse gas emissions." *Id.* at 91. It was "precisely *because* fossil fuels emit

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all over the world, and those emissions just can't be subjected to potentially conflicting regulations by every state and city." *Id.* at 31:7–13.

greenhouse gases" that the City brought suit. *Id.* The City was not allowed to "disavow[] any intent to address emissions" while at the same time "identifying such emissions as the source of [its alleged injuries]." *Id.*

Although jurisdiction in the Second Circuit case was premised on diversity, the Court still had to decide whether federal or state law governed the plaintiff's claims. That decision was necessary because the defendants had argued that federal common law in this area had been "displaced" by the Clean Air Act, as the Supreme Court earlier held in *AEP*. In order to determine whether *AEP*'s holding concerning displacement of federal-common-law claims applied to the City of New York's lawsuit, the Second Circuit first had to decide whether the City's claims were properly brought under state law (as the City claimed) or whether the City's claims were instead brought under federal common law. The Second Circuit held that federal law—not state law—necessarily governed the City's claims. "Such a sprawling case is simply beyond the limits of state law." *New York*, 993 F.3d at 92. The City's lawsuit—which is very similar to Plaintiff's—was "the quintessential example of when federal common law is most needed," given that "a substantial damages award like the

one requested by the City would effectively regulate [the defendants'] behavior far beyond New York's borders" and would "risk upsetting" federal policy. *Id.* at 92–93. Claims centered on transboundary emissions "must be brought under federal common law" because they span state and even national boundaries, and "a federal rule of decision is necessary to protect uniquely federal interests." *Id.* at 90, 95. The City's claims thus were "federal claims" governed by federal common law. *Id.* at 92, 95.

B. Plaintiff's Claims And Alleged Injuries Are Based On Interstate And International Emissions, And Therefore Arise Under Federal Common Law.

Under these precedents, Plaintiff's claims arise under federal common law. Plaintiff's Complaint makes clear that this is a case about interstate and international pollution—indeed, the very first paragraph discusses the "catastrophic consequences of pollution," which the Complaint expressly ties to sources outside New Jersey. The Complaint expressly asserts "that greenhouse gas emissions from fossil fuels are the main driver of global warming." 2-JA-42. Plaintiff concedes that the "Complaint targets Defendants' responsibility for 12% of total *global* emissions." 2-JA-56. And Plaintiff demands damages for all injuries suffered as a result of global climate change, including more frequent and

severe flooding, harsher storm events, and more frequent "high-heat days." 2-JA-133. In fact, the district court acknowledged that Plaintiff was "seek[ing] compensation to offset the costs it has and will continue to incur to protect itself from the effects of global warming." 1-JA-17.

Plaintiff's claims are no different from those asserted in *New York*. *Compare* 993 F.3d at 86–87 (plaintiff alleged defendants "have known for decades that their fossil fuel products pose a severe risk to the planet's climate" and yet "downplayed the risks and continued to sell massive quantities of fossil fuels"), *with* 2-JA-94–95 (alleging that Defendants "had known about fossil fuels' deleterious effects on the climate for decades" but "chose instead to wage a multifaceted and multimillion-dollar campaign against climate science" and to "rapidly accelerate[] their own production, marketing, and sale of fossil fuels on a scale they knew was likely to produce devastating climate consequences"). And, like the City of New York, Plaintiff seeks "substantial" relief that "would effectively regulate [p]roducers' behavior far beyond" New Jersey. *New York*, 993 F.3d at 92.

Accordingly, any judgment about transboundary emissions or their alleged causal contribution to the overall phenomenon of climate change

requires evaluation at an interstate and, indeed, international level. Plaintiff does not—and could not—base its theory of the case solely on in-state emissions. Rather, Plaintiff alleges that Defendants created a public nuisance by "control[ling] every step of the supply, production, and distribution chain for their fossil fuel products" into the stream of global commerce, 2-JA-158, with no geographical limitation whatsoever. Likewise, Plaintiff's trespass claim is based on Defendants' "extracting … fossil fuels from the Earth, refining and marketing the products for sale, and distributing them for sale across the globe." 2-JA-171. Because of the very nature of the global climate-change phenomenon and Plaintiff's tort theories, the claims here necessarily seek to hold Defendants liable "for the effects of emissions made around the globe over the past several hundred years." *New York*, 993 F.3d at 92.

Plaintiff's claims are also inherently federal and arise under federal common law because they seek to impose liability based on the production and sale of oil and gas abroad. The federal government has exclusive authority over the nation's international policy on climate change and relations with foreign nations. *United States v. Pink*, 315 U.S. 203, 233 (1942) ("Power over external affairs is not shared by the States; it is

vested in the national government exclusively."). Accordingly, "our federal system does not permit the controversy to be resolved under state law" "because the authority and duties of the United States as sovereign are intimately involved" and "because the interstate [and] international nature of the controversy makes it inappropriate for state law to control." *Texas Indus.*, 451 U.S. at 641; *see also Sabbatino*, 376 U.S. at 425–26 (issues involving "our relationships with other members of the international community must be treated exclusively as aspects of federal law" and "state courts [are] not left free to develop their own doctrines" of foreign relations); *Republic of Philippines v. Marcos*, 806 F.2d 344, 352–54 (2d Cir. 1986) ("there is federal question jurisdiction over actions having important foreign policy implications" under federal common law, and nominally state-law claims "arise[] under federal law" when they "necessarily require[] determinations that will directly and significantly affect American foreign relations").

The district court held that Plaintiff's claims do not implicate the federal government's foreign-affairs power because "Plaintiff seeks compensation to help it pay for damage that has already occurred and for remediation efforts to prevent further damage." 1-JA-27. But Plaintiff

alleges that its injuries were caused by forces arising from around the world. As the Second Circuit explained, "[g]lobal warming presents a uniquely international problem of national concern" and "is therefore not well-suited to the application of state law." *New York*, 993 F.3d at 85–86. The Complaint's repeated use of the term "*global* warming," 2-JA-43, 2-JA-59, 2-JA-64, 2-JA-68, 2-JA-69, 2-JA-124–25, 2-JA-166, 2-JA-172, 2-JA-181–82 (emphasis added), makes clear that the alleged causes of Plaintiff's alleged injuries are not confined to particular sources, cities, counties, states, or even countries. Rather, the claims implicate inherently national and international activities and interests.

At bottom, "[t]he question before" this Court, as was before the Second Circuit, "is whether municipalities may utilize state tort law to hold multinational oil companies liable for the damages caused by global greenhouse-gas emissions. Given the nature of the harm and the existence of a complex web of federal and international environmental law regulating such emissions … the answer is 'no.'" *New York*, 993 F.3d at 85. These claims "must be brought under federal common law." *Id*. at 95.

C. Because Plaintiff's Claims Necessarily Arise Under Federal Common Law, They Are Removable To Federal Court.

It is "well settled" that 28 U.S.C. § 1331's "grant of 'jurisdiction will support claims founded upon federal common law.'" *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 850 (1985). And a case may be removed to federal court whenever the plaintiff could invoke a federal court's jurisdiction to "file[] its operative complaint in federal court." *Home Depot*, 139 S. Ct. at 1748. This straightforward syllogism confirms that removal was proper here: because Plaintiff's claims arise under and are governed by federal common law, they could have been brought in federal court in the first place, and thus are removable.

The district court, however, held that, "*even assuming that this matter is ultimately governed by the federal common law*," it *still* did not have jurisdiction because, unlike the plaintiffs in *National Farmers Union* and *Milwaukee I*, Plaintiff filed its Complaint in state court and mentioned only state-law causes of action. 1-JA-25–26 (emphasis added). But this Court has long instructed that "a court will not allow a plaintiff to deny a defendant a federal forum when the plaintiff's complaint contains a federal claim 'artfully pled' as a state law claim." *United Jersey*

Banks v. Parell, 783 F.2d 360, 367 (3d Cir. 1986).[2] Although Plaintiff purports to style its claims as arising under state law, the inherently federal nature of the claims apparent on the face of the Complaint—not Plaintiff's characterization of them as state-law claims—controls. "[A] plaintiff cannot frustrate a defendant's right to remove by pleading a case without reference to any federal law when the plaintiff's claim is necessarily federal." 14B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3722 (4th ed.). While a plaintiff may be the master of its complaint, a plaintiff cannot demand that a court ignore the nature and substance of what the plaintiff actually pleaded in the body of the complaint and focus solely on the headings of the claims for relief at the end of the document. When courts exercise their "independent duty" to ascertain their own jurisdiction, *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 426 F.3d 694, 702 (3d Cir. 2005), what matters is "the substance of the plaintiff's claims," not "how the plaintiff pled the action."

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[2] While courts have applied the artful-pleading principle in complete-preemption cases involving federal statutes, 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 Court and the Federal System* 819 (7th ed. 2015).

Est. of Campbell by Campbell v. S. Jersey Med. Ctr., 732 F. App'x 113, 116 (3d Cir. 2018); *see also Jarbough v. Att'y Gen. of U.S.*, 483 F.3d 184, 189 (3d Cir. 2007) ("We are not bound by the label attached by a party to characterize a claim and will look beyond the label to analyze the substance of a claim.").

Accordingly, a federal court must sometimes "determine whether the real nature of the claim is federal, regardless of plaintiff's characterization." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n.2 (1981); *see also First Pa. Bank, N.A. v. E. Airlines, Inc.*, 731 F.2d 1113, 1115–16 (3d Cir. 1984) (finding nominally state-law claims seeking damages for lost interstate shipment arose under federal common law). Here, because the structure of the Constitution requires application of federal law, regardless of the labels Plaintiff attached to its claims, there is federal jurisdiction.

Although ignored by the district court, numerous courts of appeals have recognized this fundamental rule that "removal is proper" when, as here, a plaintiff's claims, though nominally pleaded under state law, in fact "arose under federal common law." *Sam L. Majors*, 117 F.3d at 924, 931; *see also, e.g.*, *North Carolina ex rel. N.C. Dep't of Admin. v. Alcoa*

Power Generating, Inc., 853 F.3d 140, 147, 149 (4th Cir. 2017) (removal is proper when "the constitutional nature" of nominally state-law claims means that they were "governed by" federal common law); *New SD, Inc. v. Rockwell Int'l Corp.*, 79 F.3d 953, 954–55 (9th Cir. 1996) (where federal common law applies, "it follows that the question arises under federal law, and federal question jurisdiction exists," thereby enabling removal).

The district court instead held that this Court's decision in *Goepel v. National Postal Mail Handlers Union*, 36 F.3d 306, 311–12 (3d Cir. 1994), forecloses a finding of federal-question jurisdiction on this ground. 1-JA-27 n.7. That reading misunderstands *Goepel*. Although the *Goepel* Court stated that "the only state claims that are 'really' federal claims and thus removable to federal court are those that are preempted completely by federal law," *Goepel*, 36 F.3d at 311–12, it elsewhere acknowledged that complete preemption is not the only basis for removal of nominally state-law claims. *See id.* at 310 (removal permissible "when it appears that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims"). In any event, *Goepel* involved an allegedly preemptive federal statute, and accordingly this

Court looked to the complete-preemption doctrine applicable to such statutes. This case, by contrast, is governed by the fundamental constitutional principle that federal law is exclusive and state law simply does not exist in areas (such as interstate-pollution claims) where "our federal system does not permit the controversy to be resolved under state law." *Texas Indus.*, 451 U.S. at 641. *Goepel* did not and could not address that issue.

The court below also incorrectly assumed that Defendants were asserting an ordinary preemption defense, which is insufficient to confer federal jurisdiction. 1-JA-25. But Defendants' federal-common-law argument is not an ordinary preemption defense; the point, rather, is that Plaintiff's claims arise under federal law in the first place, and thus federal law alone governs those claims. If federal common law simply created a preemption defense, the federal courts would have lacked jurisdiction in the numerous cases where the Supreme Court has recognized that claims filed initially in federal court that are governed by federal common law arise under federal law for the purposes of 28 U.S.C. § 1331. *See Nat'l Farmers Union*, 471 U.S. at 850 & n.7 (collecting cases).

Indeed, because Plaintiff's claims are governed exclusively by federal law, state law cannot be used to create a claim for relief. "[I]f federal common law exists, it is because state law cannot be used." *Milwaukee II*, 451 U.S. at 313 n.7. Accordingly, a plaintiff asserting claims in one of these "narrow areas" like transboundary pollution cannot choose between state and federal law because *no state law exists*. *See Tex. Indus*, 451 U.S. at 641. Under the Constitution, any claims asserted in this area are inherently federal no matter the labels attached to them. The right to recover, if any, is created by federal law.

Finally, the district court distinguished the Second Circuit's decision in *New York* on the basis that the court there referred to Defendants' argument as a "defense." 1-JA-28 (quoting *New York*, 993 F.3d at 94). But because that case was filed initially in federal court, the Second Circuit did not address removal jurisdiction. *Id.* What the Second Circuit did decide, however, was that the claims in that case—which mirror Plaintiff's claims—are "simply beyond the limits of state law" and "must be brought under federal common law"—indeed, it "concluded" that they are "federal claims." *New York*, 993 F.3d at 92, 95. That reasoning resolves the removal question.

The district court had federal-question jurisdiction over this case under 28 U.S.C. § 1331 and erred in remanding it to state court.

II. The Action Is Removable Because Plaintiff's Claims Necessarily Raise Disputed And Substantial Federal Issues.

Federal jurisdiction also exists over Plaintiff's claims because they require resolution of substantial, disputed federal questions, thereby justifying removal under *Grable*, 545 U.S. at 313–14.

A. Plaintiff's Complaint Raises Contested Issues Of Federal Common Law.

As noted above, Plaintiff's claims arise under federal common law and are therefore removable under 28 U.S.C. § 1441(a). Even if the Court disagrees with this argument, however, the fact that Plaintiff's claims necessarily embody federal common law and are governed by federal rules of decision independently justifies removal under *Grable*.

Numerous courts have upheld removal over nominally state-law claims when "federal common law *alone* governs" those claims, because "the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Battle v. Seibels Bruce Ins. Co.*, 288 F.3d 596, 607 (4th Cir. 2002); *see also Newton v. Capital Assurance Co.*, 245 F.3d 1306, 1309 (11th Cir. 2001) (similar).

For example, in *In re Otter Tail Power Co.*, 116 F.3d 1207 (8th Cir. 1997), the plaintiff's complaint "raise[d] important questions of federal law requiring interpretation of treaties, federal statutes, and the federal common law of inherent tribal sovereignty." *Id.* at 1215. Therefore, the Eighth Circuit held, the "plaintiff's characterization of a claim as based solely on state law is not dispositive" because the complaint "necessarily presents a federal question," and removal was proper. *Id.* at 1213–14. The Fifth Circuit, too, affirmed removal of "state-law tort claims"—despite the plaintiffs' invocation of "the well-pleaded complaint rule"—because the case "raise[d] substantial questions of federal common law by implicating important foreign policy concerns." *Torres v. S. Peru Copper Corp.*, 113 F.3d 540, 542–43 (5th Cir. 1997).

Here, the district court ruled that Defendants "[did] not identify any provision of federal law" that was "a necessary component of [Plaintiff's] cause[s] of action." 1-JA-29. But Plaintiff's theory of harm stems from "global warming and its attendant climate consequences," 2-JA-124–25, which was allegedly caused by the normal "use of [Defendants'] fossil fuels," 2-JA-158. Because such claims thus "deal with air and water

in their ambient or interstate aspects, there is a federal common law." *AEP*, 564 U.S. at 421.

Those interests are also "substantial," given that, among other reasons, these issues "directly implicate[] actions taken by the" federal government, *Manning v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 772 F.3d 158, 165 n.4 (3d Cir. 2014), to regulate the interstate and international phenomenon of global climate change. These federal actions are disputed because Plaintiff and Defendants disagree over whether federal law allows Plaintiff to recover at all on its claims. And the claims are properly adjudicated in federal court because this "sprawling case is simply beyond the limits of state law." *New York*, 993 F.3d at 92.

B. Plaintiff's Complaint Also Raises Contested Issues Under The First Amendment.

Separately, even under Plaintiff's erroneous argument that its claims are premised solely on alleged misrepresentations, those claims would still be removable because Plaintiff cannot prevail without demonstrating that the alleged misrepresentations are not protected by the First Amendment.

The Supreme Court has made clear that where nominally state-law tort claims target speech on matters of public concern like climate

change, the First Amendment injects affirmative federal-law elements into the plaintiff's cause of action, such as factual falsity, actual malice, and proof of causation of actual damages. *See Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 774–76 (1986) (state common-law claims subject "to a constitutional requirement that the plaintiff bear the burden of showing falsity"); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80, 285–86 (1964) (public officials have burden of proving with "convincing clarity" that "statement was made with 'actual malice'"). Indeed, "[c]limate change has staked a place at the very center of this Nation's public discourse," and "its causes, extent, urgency, consequences, and the appropriate policies for addressing it" are "hotly debated." *Nat'l Review, Inc. v. Mann*, 140 S. Ct. 344, 347–48 (2019) (Alito, J., dissenting from denial of certiorari).

These are not "defenses," but rather constitutionally required elements on which the plaintiff bears the burden of proof—by clear and convincing evidence—as a matter of federal law. *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 53, 56 (1988) (extending rule beyond defamation context to other state-law attempts to impose liability for allegedly harmful speech); *In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, 511 F.

Supp. 2d 742, 811 (S.D. Tex. 2005) ("First Amendment protections and the actual malice standard … have been expanded to reach … breach of contract, misrepresentation, and tortious interference with contract or business.").

As a result, even the misrepresentational aspects of Plaintiff's claims provide an independent basis for federal jurisdiction under *Grable*. The constitutional proof requirements for speech-related claims are "essential" elements of Plaintiff's claims, and Defendants' First Amendment rights will be "supported" or "defeated" depending on whether Plaintiffs meet their high burden of proof on those federal elements of their claims. *Gully v. First Nat'l Bank*, 299 U.S. 109, 112 (1936). When "a court will have to construe the United States Constitution" to decide Plaintiff's claim, the claim "necessarily raise[s] a stated federal issue" under *Grable*, and federal jurisdiction is proper. *Ortiz v. Univ. of Med. & Dentistry of N.J.*, No. 08-cv-2669, 2009 WL 737046, at *3 (D.N.J. Mar. 18, 2009).

The district court never addressed this point, brushing aside Defendants' First Amendment arguments because, in the precedents cited,

federal jurisdiction "did not appear to turn on the existence of the constitutional defense." 1-JA-30. But the district court refused to grapple with the logic of those cases, which demonstrates that removal was proper here under *Grable*.

III. Plaintiff's Actions Are Removable Under The Federal-Officer-Removal Statute.

Plaintiff's claims are independently removable under the federal-officer-removal statute because Plaintiff seeks to impose liability and damages for conduct that Defendants undertook under the direction, supervision, or control of federal officers.

The federal-officer-removal statute provides for removal of suits brought against "any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office." 28 U.S.C. § 1442(a)(1). To invoke the statute, a party must allege that "(1) the defendant is a 'person' within the meaning of the statute; (2) the plaintiff's claims are based upon the defendant's conduct 'acting under' the United States, its agencies, or its officers; (3) the plaintiff's claims against the defendant are 'for, or relating to' an act under color of federal office; and

(4) the defendant raises a colorable federal defense to the plaintiff's claims." *Papp*, 842 F.3d at 812.

"[T]he federal officer removal statute is to be 'broadly construed' in favor of a federal forum." *In re Commonwealth's Motion to Appoint Counsel Against or Directed to Def. Ass'n of Phila.*, 790 F.3d 457, 466–67 (3d Cir. 2015) ("*Def. Ass'n*"); *see also Watson v. Philip Morris Cos.*, 551 U.S. 142, 147 (2007) (federal-officer-removal statute requires a "liberal construction"). Courts must "construe the facts in the removal notice in the light most favorable to the" existence of federal jurisdiction. *Def. Ass'n*, 790 F.3d at 466. "The classic case of such assistance … is when the private contractor acted under a federal officer or agency because the contractors helped the Government to produce an item that it needed." *Papp*, 842 F.3d at 812 (citations and alterations omitted).

Defendants' allegations "in support of removal" need only be "facially plausible," and Defendants must be given the "benefit of all reasonable inferences from the facts alleged." *Baker v. Atl. Richfield Co.*, 962 F.3d 937, 941, 945 (7th Cir. 2020). In assessing federal-officer-removal jurisdiction, the court must "credit [the defendant's] theory of the case." *Jefferson Cnty. v. Acker*, 527 U.S. 423, 432 (1999).

A. Defendants "Act[ed] Under" Federal Officers.

Private persons "act[] under [a federal] officer," 28 U.S.C. § 1442(a)(1), when they, subject to a federal officer's "subjection, guidance, or control," help the government "perform[] a job that, in the absence of a contract with a private firm, the Government itself would have had to perform." *Watson*, 551 U.S. at 154.

Defendants have established through substantial evidence including unrebutted declarations from Professors Tyler Priest and Mark Wilson—professors of history in relevant fields—that a significant portion of their oil and gas production and sales over the last century was conducted under the direction, guidance, supervision, and control of the federal government.[3] As Professor Wilson explains: "Over the last 120 years, the U.S. government has relied upon and controlled the oil and gas industry to obtain oil and gas supplies and expand the production of petroleum products, in order to meet military needs and enhance national security."

[3] Professor Priest is an Associate Professor of History and Geographical and Sustainability Sciences at the University of Iowa. 7-JA-1355. Professor Wilson is a Professor of History at University of North Carolina-Charlotte. 7-JA-1435.

7-JA-1436; 3-JA-205–06. "[T]he U.S. government has controlled and directed oil companies in order to secure and expand fuel supplies for its military forces and those of its allies, both in wartime and in peacetime." 7-JA-1437: *see also* 3-JA-257. When, as here, "'the federal government uses a private corporation to achieve an end it would have otherwise used its own agents to complete,' that contractor is 'acting under' the authority of a federal officer." *Papp*, 842 F.3d at 812.

As Plaintiff concedes: "unusually close and detailed … contractual relationship[s]" with "close supervision by the federal government" are sufficient for removal. 5-JA-788. These types of "close and detailed" relationships are at issue here, as shown by Professors Priest and Wilson. Defendants' relationships with the government *did not* consist of mere supply arrangements to provide the government with a fungible consumer good; rather, these relationships were deep, complex, and long-lasting arrangements that were formed as part of the U.S. government's mobilization of the entire energy industry to win wars and to achieve energy security at home—objectives that benefitted the nation as a whole and continue to provide benefits today. In each of the examples below, Defendants "acted under" federal officers to produce and supply oil and

gas for the federal government, in furtherance of federal policies. The district court did not engage with any of this analysis. *See generally* 1-JA-34–37.

1. Defendants Produced Oil and Gas at Federal Direction in Furtherance of Important Federal Interests.

For decades, the federal government has used Defendants and their predecessors,[4] under contracts with detailed specifications, to take specific actions to fulfill the government's long-term objective of producing significant amounts of oil and gas from federal lands. This objective is vital to the nation's energy security. It has long been the policy of the United States 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." 42 U.S.C. § 15927(b)(1). Defendants performed these critical tasks in several ways, including by developing resources on the OCS

[4] The complaint improperly conflates the activities of Defendants with the activities of their separately organized predecessors, subsidiaries, and affiliates. Defendants reject Plaintiff's erroneous attribution attempts, but for purposes of the jurisdictional analysis, those allegations show that Plaintiff's Complaint as pleaded was properly removed.

by operating the Elk Hills reserve, and by managing the Strategic Petroleum Reserve.

OCS Leases. Defendants fulfilled a government function in exploring, extracting, and producing oil and gas from government-owned and controlled resources on the OCS. As Professor Wilson explained in his uncontested declaration, OCS leases are "*not merely commercial transactions* between the federal government and the oil companies. They reflect the creation of a valuable national security asset for the United States over time." 7-JA-1359 (emphasis added). The federal OCS program "procured the services of oil and gas firms to develop urgently needed resources on federal offshore lands that the federal government was unable to do on its own." 7-JA-1357–58. The federal government "had no experience or expertise," and "[t]herefore … had little choice but to enlist the service of the oil firms who did." 7-JA-1370. But it was the *federal government*, not the oil companies, that "dictated the terms, locations, methods and rates of hydrocarbon production on the OCS" in order to advance federal interests. 7-JA-1360. Accordingly, "[t]he policies and plans of the federal OCS program did not always align with those of the oil firms interested in drilling." *Id.*; *see also* 2-JA-270–71.

Federal supervisors exerted substantial control and oversight over Defendants' operations on the OCS. 7-JA-1371. The federal supervisors had complete authority to control and dictate the "rate of production from OCS wells," 7-JA-1378; 3-JA-271, and to suspend operations in certain situations, 7-JA-1371–72; 3-JA-273–74. The federal supervisors also "had the final say over methods of measuring production and computing royalties," which was based on "the estimated reasonable value of the product as determined by the supervisor." 7-JA-1372. These federal officials "did not engage in perfunctory, run-of-the-mill permitting and inspection." 7-JA-1374. Rather, the federal supervisors "provided direction to lessees regarding when and where they drilled, and at what price, in order to protect the correlative rights of the federal government as the resource owner and trustee" of federal lands. 7-JA-1380–81.

In addition, the federal government exerted substantial control by issuing highly specific and technical orders, known as "OCS Orders," which, among other things: "specified how wells, platforms, and other fixed structures should be marked"; "dictated the minimum depth and methods for cementing well conduct casing in place"; "prescribed the minimum plugging and abandonment procedures for all wells"; and "required

the installation of subsurface safety devices … on all OCS wells." 7-JA-1376–77. Through these OCS Orders, federal officials "exercised active control on the federal OCS over the drilling of wells, the production of hydrocarbons, and the provision of safety." 7-JA-1378.

OCS's congressional history confirms that the federal government uses OCS lessees to perform a basic governmental task. Multiple legislative proposals in the 1970s sought to address the nation's oil and gas needs by creating a national oil company. *See* 3-JA-265; 3-JA-395–403; 7-JA-1405–07; 5-JA-890–92; 121 Cong. Rec. 4490 (daily ed. Feb. 26, 1975). One bill, for example, "would have formally established a 'Federal Oil and Gas Corporation.'" 7-JA-1406. These proposals were ultimately rejected in favor of an arrangement by which the government contracted with private energy companies, including Defendants, to perform these essential tasks on its behalf under close federal supervision and control. *See* 7-JA-1408–10.

The importance of the OCS to domestic energy security and economic prosperity has continued to the present, across every administra-

tion. *See* 7-JA-1433–34. For example, in 2010 President Obama announced "the expansion of offshore oil and gas exploration" because "our dependence on foreign oil threatens our economy." 7-JA-1432–33.

At bottom, the federal government controls substantial amounts of oil and gas that are contained in the OCS. The government could either extract and sell (or use) the oil and gas itself or hire third parties to perform that task on its behalf. Since the federal government had "no prior experience or expertise," it chose the second option. 7-JA-1370. This is the classic definition of "acting under": "[I]n the absence of … contract[s] with … private firm[s], the Government itself would have had to" extract and produce oil and gas from the OCS. *Watson*, 551 U.S. at 147, 154.

Operation of the Elk Hills Reserve. The analysis above applies equally to Chevron predecessor Standard Oil of California's operation of the federal government's National Petroleum Reserve No. 1 in Elk Hills, which it did for decades in the employ of the Navy. Congress's policy objective was to maintain and preserve these fields exclusively for federal strategic purposes, and the government used Standard Oil to accomplish these objectives. 3-JA-278. The Navy hired Standard Oil to operate the Reserve on its behalf for 31 years, and Standard Oil was "in the employ"

of the Navy during this period. 3-JA-282. This relationship between Standard Oil and the Navy was far more than a standard commercial interaction. The Navy had "full and absolute power to determine … the rate of prospecting and development on, and the quantity and rate of production from [Elk Hills]." 3-JA-379. And the Navy reserved the right to "shut in wells on the Reserve if it so desire[d]." *Id*.

Standard Oil's operation and production of Elk Hills for the Navy were subject to substantial supervision by Navy officers. 3-JA-279–82. The Operating Agreement between the Navy and Standard Oil provided that Standard Oil "is *in the employ of the Navy Department* and is *responsible to the Secretary thereof*." *See* 3-JA-408 (emphases added). Naval officers directed Standard Oil to conduct operations to further national policy. For example, in November 1974, the Navy directed Standard Oil to determine whether it was possible to produce 400,000 barrels per day to meet the unfolding energy crisis, advising Standard Oil that "*you are in the employ of the Navy* and *have been tasked with performing a function which is within the exclusive control of the Secretary of the Navy*." 5-JA-933 (emphasis added). This arrangement thus allowed the Navy to

manage Elk Hills as it saw fit, but "rather than [do so] with its own personnel," "[t]he Navy chose to operate the reserve through a contractor" that acted in the employ of the Navy. 5-JA-910. When, as here, "'the federal government uses a private corporation to achieve an end it would have otherwise used its own agents to complete,' that contractor is 'acting under' the authority of a federal officer." *Papp*, 842 F.3d at 812 .

Standard Oil's operation of Elk Hills at the Navy's direction is quintessential "acting under" activity. It was "an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior." *Watson*, 551 U.S. at 152. Standard Oil operated Elk Hills for decades "in the employ of," and under the "subjection, guidance, or control" of the Navy, a paradigmatic example of an "unusually close [relationship] involving detailed regulation, monitoring, or supervision." *Id.* at 151, 153.

Strategic Petroleum Reserve. In further response to the 1970s oil embargoes, Congress created the Strategic Petroleum Reserve to reduce the impact of any disruptions in oil supply. 3-JA-285–86. Defendants "acted under" federal officers by supplying federally owned oil and managing the Strategic Petroleum Reserve for the government. From

1999 to 2009, "the Strategic Petroleum Reserve received 162 million barrels of crude oil through the [royalty-in-kind ('RIK')] program" valued at over $6 billion. 3-JA-286; 5-JA-959; 5-JA-980 tbl.13.

The Strategic Petroleum Reserve subjects Defendants to the federal government's supervision and control, including in the event that the President calls for an emergency drawdown, under which the reserve oil can be used to address national crises. 3-JA-288–89; *see* 5-JA-993–1011. The United States exercised this emergency control to draw down the reserve in response to Hurricane Katrina in 2005 and disruptions to oil supply in Libya in 2011. 3-JA-288–89 & n.154; 5-JA-994. Thus, Defendants engaged in "an effort to *assist*, or to help *carry out*," the federal government's mission to ensure energy security. *Watson*, 551 U.S. at 152.

2. Defendants Have Acted Under Federal Officers To Produce And Supply Specialized Fuels For The Military.

The U.S. Department of Defense ("DOD") is the single largest consumer of energy in the United States and one of the world's largest consumers of petroleum fuels. *See* 6-JA-1033–37. Many of the Defendants have acted under federal officers for decades by producing and supplying large quantities of specialized jet fuel for the U.S. military, producing and

supplying oil and gas during World War II at the direction of the Petroleum Administration for War ("PAW"), and supplying petroleum to the federal government under directives issued pursuant to the Defense Production Act of 1950, Pub. L. No. 81-774, 64 Stat. 798 ("DPA"). *See* 3-JA-256–63.

Defendants Acted Under Federal Officers During World War II and the Korean War. During World War II, the United States pursued full production of its oil reserves and created agencies to control the petroleum industry, including Defendants' predecessors and affiliates. As Senator O'Mahoney, Chairman of the Special Committee Investigating Petroleum Resources, put it in 1945: "No one who knows even the slightest bit about what the petroleum industry contributed to the war can fail to understand that it was, without the slightest doubt, one of the most effective *arms* of this Government … in bringing about a victory." 6-JA-1044 (emphasis added).

Under agencies like PAW, the government dictated where and how to drill, rationed essential materials, and set statewide minimum levels for production. 6-JA-1054–62 & n.18. "PAW instructed the oil industry about exactly which products to produce, how to produce them, and where

to deliver them." 7-JA-1447. PAW also maintained "disciplinary measures" for noncompliance, including "restricting transportation, reducing crude oil supplies, and withholding priority assistance." 4-JA-683.

Defendants also acted under the federal government by operating and managing government-owned and government-funded petroleum-production facilities. During World War II, the government built "dozens of large government-owned industrial plants" that were "managed by private companies under government direction." 7-JA-1450. "The U.S. government enlisted oil companies to operate government-owned industrial equipment." 7-JA-1451. Among the largest facilities was a refinery site in Richmond, California, operated by Socal (a Chevron predecessor), which was "the second-largest of all the facilities focused on aviation gasoline [("avgas")] production, providing 10 percent of total global output of" avgas by 1945. 7-JA-1457.

When the Korean War began in 1950, President Truman established the Petroleum Administration for Defense ("PAD") under authority of the DPA. PAD issued production orders to Defendants and other oil and gas companies to ensure adequate quantities of avgas for military

use. *See* 3-JA-296–97. The DPA "gave the U.S. government broad powers to direct industry for national security purposes," and "PAD directed oil companies to expand production during the Korean War, for example, by calling on the industry to drill 80,000 wells inside the United States, and more than 10,000 more wells abroad, in 1952." 7-JA-1465–66; 3-JA-296–97.

Defendants Have Continued to Produce and Supply Large Quantities of Specialized Fuel Under Military Direction. To this day, Defendants continue to produce and supply large quantities of highly specialized fuels to the federal government. These products are required to conform to exact DOD specifications to meet the unique operational needs of the U.S. military. "By 2010, the U.S. military remained the world's biggest single purchaser and consumer of petroleum products" and, "[a]s it had for decades, the military continued to rely on oil companies to supply it under contract with specialty fuels, such as JP-5 jet aviation fuel and other jet fuels, F-76 marine diesel, and Navy Special Fuel." 7-JA-1476–77. "[I]n the absence of … [these] contract[s] with [the

Defendants], the Government itself would have had to perform" these essential tasks to meet the critical DOD fuel demands. *Baker*, 962 F.3d at 942.

For example, during the Cold War, Shell Oil Company developed and produced specialized jet fuel to meet the unique performance requirements of the U-2 spy plane and later the OXCART and SR-71 Blackbird programs. 3-JA-298–99. For the U-2, Shell Oil Company produced fuel known as JP-7, which required special processes and a high boiling point to ensure the fuel could perform at very high altitudes and speeds. "The Government stated that the need for the 'Blackbird' was so great that the program had to be conducted despite the risks and the technological challenge. … A new fuel and a chemical lubricant had to be developed to meet the temperature requirements." 3-JA-449. For OXCART, Shell Oil Company produced millions of gallons of specialized fuel under contracts with specific testing and inspection requirements. *See generally* 3-JA-454–69; 4-JA-470–681.

Similarly, BP entities contracted with the Defense Logistics Agency to provide approximately 1.5 billion gallons of specialized military fuels for the DOD's use in *the past four years alone*. 6-JA-1083–88. Since 2016,

BP entities entered into approximately 25 contracts to supply various military-specific fuels, such as JP-5, JP-8, and F-76, together with fuels containing specialized additives, including a fuel system icing inhibitor ("FSII"), a corrosion inhibitor/lubricity improver ("CI/LI") and, for F-76 fuels, a lubricity improver ("LIA"). *Id.* Such additives are essential to support the high performance of the military engines they fuel. FSII is required to prevent freezing caused by the fuels' natural water content when military jets operate at ultra-high altitudes, potentially leading to engine flameout, while CI/LI and LIA are used to avoid engine seizures and to ensure the integrity of the fuel-handling systems used to store military fuels for long periods, such as on aircraft carriers. 4-JA-708–09; 6-JA-1136–39; 3-JA-299–303. DOD specifications also required BP entities to conform the fuels to other specific chemical and physical requirements, such as enumerated ranges for conductivity, heat of combustion, and thermal stability, all of which are essential and unique to performance of the military function. 6-JA-1150–1322; 7-JA-1323–53.

B. Defendants' Extraction, Production, And Sales Activities, Including Those Under Federal Officers, Were "For Or Relating To" Plaintiff's Claims.

The district court dismissed Defendants' federal-officer-removal argument as "not relevant," focusing only on Plaintiff's allegations of "misinformation," as opposed to Defendants' extraction, production, and sale of oil and gas. 1-JA-35. That approach misunderstands the relevant legal standard.

Congress entrusted federal courts to hear any claim "for or relating to any act" taken under a federal officer's direction. 28 U.S.C. § 1442(a)(1). When Congress inserted the words "or relating to" into the Removal Clarification Act of 2011, it "broadened 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); *accord Def. Ass'n*, 790 F.3d at 471–72 ("[I]t is sufficient for there to be a 'connection' or 'association' between the act in question and the federal office."). And a federal court must "credit [the defendant's] theory of the case" in assessing the applicability of the federal officer removal statute. *Acker*, 527 U.S. at 432.

Defendants have more than met that standard. "The federal statute permits removal" here because Defendants were acting under federal officers when "carrying out the 'act[s]' that are the *subject* of [Plaintiff's] complaint." *Watson*, 551 U.S. at 147 (emphasis added). Here, the "subject of [Plaintiff's] [C]omplaint" is the production and sale of fossil fuels, which Plaintiff alleges led to global climate change and thereby caused its injuries. Plaintiff's Complaint expressly alleges that Plaintiff's injuries were caused by Defendants' "extraction, production, and sale" of oil and gas, necessarily including the extensive activities that Defendants have undertaken at federal direction. In particular, Plaintiff's theory of harm stems from "global warming and its attendant climate consequences," 2-JA-124–25, which was allegedly caused by the normal "use of [Defendants'] fossil fuels," 2-JA-158; *see also* 2-JA-68 ("Defendants' production, marketing, and sale of fossil fuels on a massive and unprecedented scale has been [a] substantial factor in causing these skyrocketing emissions."). Additionally, Plaintiff asserts that Defendants' alleged misrepresentations "accelerat[ed] … extraction, production, marketing, and sale of fossil fuels," 2-JA-129, including extraction from reserves exploited under the direction of federal officers. Plaintiff's allegations, on

their face, demonstrate that an essential element of their claimed injuries is the emission of greenhouse gases resulting from the production and combustion of Defendants' petroleum products, including products produced under close federal supervision.

Further, the relief that Plaintiff seeks is not limited to allegations of misrepresentation. There is no way to differentiate the marginal damage supposedly caused by alleged "misinformation" from that caused by all other emissions of greenhouse gases. To the contrary, the Complaint seeks relief for harms allegedly caused by worldwide production and sales activities, including compensatory damages for all injuries suffered as a result of global climate change, an order compelling Defendants to abate the alleged nuisance of global climate change, and an order permanently enjoining Defendants from engaging in future "acts of trespass." 2-JA-184–85. If Plaintiff's claims were based exclusively on alleged concealment and misrepresentations, the requested relief would necessarily be limited to—at most—any harms resulting from the purported marginal increase in fossil-fuel consumption caused by the asserted concealment and misrepresentations. But Plaintiff does not even pretend to impose any such limit.

The district court reasoned that "Plaintiff is not focused on [Defendants'] specialized and limited production efforts" for the military or on a federal oil reserve. 1-JA-36. But Plaintiff's broad allegations and request for sweeping relief necessarily encompass *all* of the production activities undertaken by Defendants, and rely on Defendants' *production* and *sales* activities to seek massive damages resulting from these activities. *See, e.g.*, 2-JA-42–43, 2-JA-44, 2-JA-46, 2-JA-47–60, 2-JA-74–75. Likewise, the district court dismissed the specialized fuels sold to the military as irrelevant because they were not encompassed within "Defendants' alleged marketing and disinformation campaigns," 1-JA-36–37, but this, too, overlooks the impact that these fuels had on global emissions and, subsequently, on Plaintiff's alleged injuries and damages.

None of Plaintiff's claims is complete upon a showing of misrepresentation. Nor does Plaintiff assert that global climate change is solely the result of any supposed misrepresentations by Defendants. To prevail on its claims, Plaintiff must show that the alleged tortious conduct caused Plaintiff's claimed property-based injuries. To make that showing, Plaintiff must rely on Defendants' production activities.

The district court elided these aspects of Plaintiff's causal chain and focused only on the first and last steps, *i.e.*, deception and harm, while ignoring all intervening—and much less attenuated with respect to federal-officer removal—links in the chain. But Defendants need not show "that the complained-of conduct *itself*"—according to Plaintiff, the alleged deception alone—"was at the behest of" the federal government. *Baker*, 962 F.3d at 944. Nor is it necessary that the federal-officer activity is the *only* conduct that gave rise to Plaintiff's alleged injuries. *Id.* at 945. Rather, all that is necessary is that certain "allegations are directed at the relationship between the [Defendants] and the federal government" and that "some" portion of the relationship may have "caused [Plaintiffs'] injuries" at least in part. *Id.* at 944–45; *accord Def. Ass'n*, 790 F.3d at 471–72.

As courts have explained in other contexts, when assessing the nature of a plaintiff's claims, "[w]hat matters is the crux—or, in legal-speak, the gravamen—of the plaintiff's complaint, setting aside any attempts at artful pleading." *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 755 (2017). Courts determine the "gravamen" of the complaint by "zero[ing] in on the

core" elements, especially what "actually injured" the plaintiff. *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 35 (2015); *see also Watson*, 551 U.S. at 147 ("the subject" of the complaints). In both *Sachs* and *Fry*, the Court "worr[ied]" that any other approach would make it "too easy" for plaintiffs to manipulate their complaint in order to "bypass" the rules governing federal jurisdiction. *Fry*, 137 S. Ct. at 755 (citing *Sachs*, 577 U.S. at 32–36). Plaintiff's attempt to evade federal court by incanting "magic words," *id*., focusing on its misrepresentation allegations to the exclusion of the rest of its Complaint, is precisely the sort of "artful pleading" the Supreme Court rejected in *Sachs* and *Fry*. Defendants' production of oil and gas under the direction of the federal government constitutes the gravamen of the Complaint and thus "relat[es] to" Plaintiff's claims. 28 U.S.C. § 1442(a)(1).

In sum, as in *New York*, Plaintiff's attempt to characterize its claims as solely involving "misrepresentation" is nothing more than "artful pleading" calculated to focus the court's attention on an "earlier moment" in the causal chain leading to Plaintiff's alleged injuries. 993 F.3d at 97. But Plaintiff cannot "have it both ways" by "whipsaw[ing] between disavowing any intent to address emissions" while "identifying such

emissions as the singular source" of the alleged harm. *Id.* at 91. Such "[a]rtful pleading cannot transform [Plaintiff's] complaint into anything other than a suit over global greenhouse gas emissions." *Id.* "It is precisely *because* fossil fuels emit greenhouse gases—which collectively exacerbate global warming—that [Plaintiff is] seeking damages." *Id*. The district court should not have ignored the centrality of Defendants' fossil-fuel production to Plaintiff's own alleged injuries, causal theory, and requested relief.

C. Defendants Raised Colorable Defenses To Plaintiff's Claims.

Finally, given that Defendants acted under federal officers to implement the government's policies and decisions, Defendants have several colorable defenses.

Plaintiff did not dispute this fact in its Motion to Remand below, and the district court accordingly did not reach the question. 1-JA-34. In any event, Defendants have asserted numerous plausible defenses, such as the government-contractor defense, preemption, and that Plaintiff's claims are barred by the foreign-affairs doctrine. 5-JA-870–71.

IV. This Action Is Removable Because It Has A Connection With Defendants' Activities On The Outer Continental Shelf.

Plaintiff's claims are also removable because they necessarily are connected with Defendants' extraction and production of oil and gas from the OCS. The claims implicate *all* of Defendants' oil-and-gas production, and, in some years, nearly one-third of the oil produced domestically has come from federal leases on the OCS, making Plaintiff's claims inextricably connected to OCS production. Moreover, Plaintiff's requested relief would threaten to impair operations on the OCS. The district court therefore had jurisdiction under OCSLA.

A. OCSLA Gives Federal Courts Jurisdiction Over Any Claim That Arises Out Of Or In Connection With An OCS Operation.

OCSLA establishes federal jurisdiction over actions "arising out of, or *in connection with* … any operation conducted on the [OCS]" involving the "exploration, development, or production of the [OCS] minerals" or "subsoil and seabed." 43 U.S.C. § 1349(b)(1) (emphasis added). The breadth of this jurisdictional provision reflects OCSLA's "expansive substantive reach." *EP Operating Ltd. P'ship v. Placid Oil Co.*, 26 F.3d 563, 569 (5th Cir. 1994). Congress passed OCSLA "to establish federal ownership and control over the mineral wealth of the OCS and to provide for

the development of those natural resources." *Id.* at 566. OCSLA declares "the policy of the United States" to be that the OCS "should be made available for expeditious and orderly development." 43 U.S.C. § 1332(3).

To protect the substantial federal interests in the OCS leasing program, Congress established original federal jurisdiction over "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). The jurisdictional grant is "straightforward and broad," *Petrobras Am., Inc. v. Vicinay Cadenas, S.A.*, 815 F.3d 211, 215 (5th Cir. 2016), and represents "a sweeping assertion of federal supremacy over the submerged lands," *Ten Taxpayer Citizens Grp. v. Cape Wind Assocs., LLC*, 373 F.3d 183, 188 (1st Cir. 2004). Accordingly, OCSLA's "arising out of, or in connection with" jurisdictional standard is "undeniably broad in scope." *EP Operating*, 26 F.3d at 569.

Consistent with OCSLA's plain language and Congress's intent, courts repeatedly have found OCSLA jurisdiction even where an OCS operation is only indirectly related to a plaintiff's alleged harms that occur downstream from the OCS operation. For example, in *United Offshore*

Co. v. Southern Deepwater Pipeline Co., OCSLA conferred jurisdiction over a case that "involve[d] a contractual dispute over the control of an entity which operates a gas pipeline," even though that "dispute is one step removed" from OCS operations. 899 F.2d 405, 407 (5th Cir. 1990). And the court in *Superior Oil Co. v. Transco Energy Co.* found OCSLA jurisdiction over a claim involving the breach of contracts for the sale of natural gas that was simply *produced* on the OCS. 616 F. Supp. 98, 100–01 (W.D. La. 1985).

Similarly, courts have found OCSLA jurisdiction over disputes when an OCS operation accounted for only a *portion* of the plaintiff's alleged injury. *See Lopez v. McDermott, Inc.*, 2018 WL 525851, at *3 (E.D. La. Jan. 24, 2018) (finding OCSLA jurisdiction where "it *appear*[*ed*] that *at least part of the work* that [p]laintiff alleges caused his exposure to asbestos arose out of or in connection with the OCS operations" (emphases added)); *Ronquille v. Aminoil Inc.*, 2014 WL 4387337, at *2 (E.D. La. Sept. 4, 2014) (finding OCSLA jurisdiction over asbestos claims at onshore facility where "*at least part of the work* that [p]laintiff allege[d] caused his exposure to asbestos arose out of or in connection with [the]

OCS operations" (emphasis added)). OCSLA jurisdiction is sweeping in scope, encompassing all claims with a connection to OCS operations.

B. Plaintiff's Alleged Injuries Are Connected To Defendants' OCS Operations.

Here, both elements of OCSLA jurisdiction are satisfied: (1) Defendants have engaged in "operation[s] conducted on the [OCS]" that entail the "exploration" and "production" of "minerals," and (2) Plaintiff's claims "aris[e] out of, or *in connection with*" those operations. 43 U.S.C. § 1349(b)(1) (emphasis added); *see EP Operating*, 26 F.3d at 569.

1. Defendants Have Long Engaged In Extensive OCS Operations.

The OCS reserves comprise a massive proportion of the Nation's oil-and-gas resources and have accounted for as much as 30% of annual domestic oil production.[5] Under OCSLA, the U.S. Department of the Interior ("DOI") oversees an extensive federal leasing program to develop the

[5] *See* Cong. Research Serv., R42432, *U.S. Crude Oil and Natural Gas Production in Federal and Nonfederal Areas* 3, 5, https://bit.ly/3eMqdyA.

(Cont'd on next page)

oil-and-gas reserves of the OCS. 43 U.S.C. § 1334 *et seq*. In 2019, OCS leases supplied more than 690 million barrels of oil.[6]

Defendants (or their predecessors, subsidiaries, or affiliates) operate a large share of the OCS oil-and-gas leases. According to DOI-published data for the period 1947 to 1995, 16 of the 20 largest—including the five largest—OCS operators in the Gulf of Mexico, measured by oil volume, are a Defendant (or predecessor of a Defendant) or one of their subsidiaries.[7] Defendants (and their subsidiaries or affiliates) presently hold, in whole or part, approximately 22.1% of all OCS leases.[8]

Accordingly, the first prong of OCSLA jurisdiction is easily satisfied.

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[6] Bureau of Safety and Environmental Enforcement, *Outer Continental Shelf Oil and Gas Production*, https://on.doi.gov/2S9xfFO.

[7] U.S. Dep't of Interior, *Bureau of Ocean Energy Mgmt., Ranking Operator by Oil*, https://bit.ly/3CjpFtC.

[8] *See* Bureau of Ocean Energy Management, Lease Owner Information, https://bit.ly/3vBvkbp.

2. A Substantial Portion Of Plaintiff's Harms Arose From Or In Connection With Defendants' OCS Activities.

Plaintiff's claims "aris[e] out of" or have a "connection with" Defendants' operations on the OCS, phrases that courts have interpreted as "undeniably broad in scope." *EP Operating*, 26 F.3d at 569. The district court erroneously concluded that, although Defendants showed that their alleged OCS operations may have contributed to greenhouse-gas emissions, jurisdiction was lacking because Defendants could not demonstrate "but-for causation," or "that the plaintiffs' causes of action would not have accrued *but for* [Defendants'] activities on the shelf." 1-JA-33. This was an error.

But-for causation is not required to satisfy OCSLA's broad "in connection with" standard. As the Supreme Court recently concluded in analyzing similar language in the personal-jurisdiction context, the "requirement of a 'connection' between a plaintiff's suit and a defendant's activities" does not require but-for "causation." *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1026 (2021).

Defendants' extensive OCS operations readily satisfy OCSLA's "undeniably broad" jurisdictional standard. *EP Operating*, 26 F.3d at 569.

Plaintiff's claims challenge all of Defendants' "extraction, production, marketing, and sale of fossil fuels" around the world. 2-JA-129; *see also* 2-JA-112–13 (discussing arctic offshore drilling equipment and patents). Plaintiff's causal theory is that Defendants' increased production and sale of oil and gas led to increases in greenhouse-gas emissions, which caused changes to the climate, and thereby caused Plaintiff's alleged injuries. *See* 2-JA-42–43; 2-JA-46; 2-JA-64–65; 2-JA-68; 2-JA-74; 2-JA-77; 2-JA-79; 2-JA-158–60; 2-JA-165–68; 2-JA-171–73. All of Plaintiff's alleged damage—and, correspondingly, all the requested relief—necessarily ties back to all global production, including Defendants' substantial activities on the OCS. Defendants' production on the OCS is therefore connected to Plaintiff's claims and alleged injuries.

Regardless, on Plaintiff's theory, Defendants' substantial OCS operations satisfy even the "but-for" standard applied by the district court. *See* 1-JA-32–33; *see also Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1739 (2020) (describing "but-for causation" as a "sweeping standard"). Plaintiff's theory of harm stems from "anthropogenic climate change" and the subsequent "increased frequency of flooding" and "economic losses" that impact a coastal city like Hoboken. 2-JA-133. Plaintiff contends that

"the use of these fossil fuels causes global warming and its attendant climate impacts, including … sea level rise and extreme heat and precipitation," which Plaintiff alleges "has harmed Hoboken." 2-JA-158; 2-JA-166; 2-JA-172.

Plaintiff's claims, therefore, encompass *all* of Defendants' "exploration for and production of crude oil and natural gas; manufacture of petroleum products; and transportation, promotion, marketing, and sale of crude oil, natural gas, and petroleum products." 2-JA-49. By alleging that Defendants are responsible for the "massive and unprecedented scale" of the "production, marketing, and sale of fossil fuels" that led to Plaintiff's alleged injuries, 2-JA-68, Plaintiff's Complaint squarely alleges that Defendants' OCS activities—from extraction to end usage by consumers—are a but-for cause of its injuries.

C. The District Court Also Had OCSLA Jurisdiction Because The Relief Plaintiff Seeks Threatens To Impair OCS Production Activities.

OCSLA jurisdiction is also proper for an additional and independent reason: the relief Plaintiff seeks would significantly affect the continued scope and viability of Defendants' OCS operations and the federal OCS leasing program as a whole.

Courts find OCSLA jurisdiction satisfied if resolution of the dispute simply *could affect* the efficient exploitation of minerals from the OCS. "[*A*]*ny dispute* that alters the progress of production activities on the OCS and thus *threatens* to impair the total recovery of the federally-owned minerals was intended by Congress to come within the jurisdictional grant of section 1349." *EP Operating*, 26 F.3d at 570 (emphases added). This federal "interest is implicated whether a given controversy threatens that total recovery either immediately *or in the long-term*." *Id.* at 570 n.15 (emphasis added); *see also United Offshore*, 899 F.2d at 407 (finding OCSLA jurisdiction where "resolution of the dispute would affect the exploitation of minerals on the [OCS]").

As in the numerous similar climate-change cases around the country, Plaintiff seeks potentially billions of dollars in damages and disgorged profits, as well as an order of "abatement." Such relief would inevitably deter Defendants and others from production on the OCS. *Cf. Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 521 (1992) ("[R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief.").

As the Second Circuit recognized, "[i]f the [Defendants] want to avoid all liability" under Plaintiff's theory of the case, "their only solution would be to cease global production altogether," including on the OCS. *New York*, 993 F.3d at 93. Plaintiff's desired relief would thus substantially interfere with OCSLA's goal of obtaining the largest "total recovery of the federally-owned minerals" underlying the OCS. *Amoco Prod. Co. v. Sea Robin Pipeline Co.*, 844 F.2d 1202, 1210 (5th Cir. 1988). Accordingly, this action falls squarely within the "legal disputes … relating to resource development on the [OCS]" that Congress intended federal courts to hear. *Laredo Offshore Constructors*, 754 F.2d at 1228.

CONCLUSION

This Court should reverse the district court's remand order.

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CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2021, an electronic copy of the foregoing Brief for Defendants-Appellants was filed with the Clerk of Court for the United States Court of Appeals for the Third Circuit using the appellate CM/ECF system, and that service on the following Filing Users will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains 12,996 words, as determined by the word-count function of Microsoft Word 2010, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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

3. This brief complies with this Court's Rule 28.3(d) because at least one of the attorneys whose names appear on the brief, including Theodore J. Boutrous, Jr., is a member of the bar of this Court.

4. This brief complies with this Court's Rule 31.1(c) because: (1) the text of the electronic brief is identical to the text in the paper document, and (2) the document has been scanned with version 12.1.6 of Symantec Endpoint Protection and is free of viruses.

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ADDENDUM

Pursuant to Third Circuit Local Appellate Rule 28.1(a) and Federal Rule of Appellate Procedure 28(f), this addendum includes pertinent statutes, reproduced verbatim:

28 U.S.C. § 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1442. Federal officers or agencies sued or prosecuted

(a) A civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

(2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.

(3) Any officer of the courts of the United States, for or relating to any act under color of office or in the performance of his duties;

(4) Any officer of either House of Congress, for or relating to any act in the discharge of his official duty under an order of such House.

… .

28 U.S.C. § 1447. Procedure after removal generally

… .

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise.

43 U.S.C. § 1349. Citizen suits, jurisdiction and judicial review

… .

(b) Jurisdiction and venue of actions

(1) Except as provided in subsection (c) of this section, the district courts of the United States shall have jurisdiction of cases and controversies arising out of, or in connection with (A) any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals, or (B) the cancellation, suspension, or termination of a lease or permit under this subchapter. Proceedings with respect to any such case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the State nearest the place the cause of action arose.

(2) Any resident of the United States who is injured in any manner through the failure of any operator to comply with any rule, regulation, order, or permit issued pursuant to this subchapter may bring an action for damages (including reasonable attorney and expert witness fees) only in the judicial district having jurisdiction under paragraph (1) of this subsection.

… .