United States Court of Appeals

for the

Third Circuit

Case No. 21-2728

CITY OF HOBOKEN,

Plaintiff-Appellee,

– v. –

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

Defendants-Appellants.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY IN NO. 2-20-CV-14243

BRIEF FOR PLAINTIFF-APPELLEE

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INTRODUCTION

Defendants do not like state courts. They do not want to be held to account for their decades of lies about the effects of their products. The law, however, as recognized by the Supreme Court, this Court, the court below, and dozens of other courts hearing analogous arguments, is not on their side. The City of Hoboken has lost and will continue to lose millions of dollars as a result of Defendants' half-century disinformation campaign. Hoboken is the master of its complaint. It has the right to bring New Jersey state law claims in New Jersey state court, including against a company—Exxon Mobil—which was founded in New Jersey. The district court should be affirmed. This action should be remanded to be litigated in Hoboken's chosen forum—the Superior Court of New Jersey in Hudson County.

STATEMENT OF ISSUES

1. Whether a complaint filed in state court that only seeks relief under state law "arises under" federal law sufficient to remove it to federal court under 28 U.S.C. § 1441 because Defendants claim those state law claims are "really" federal common law claims (federal common law removal), or because they have necessary and substantial federal law elements (removal under *Grable & Sons Metal Prods., Inc. v. Darue Engineerings & Mfg*., 545 U.S. 308 (2005)).

2. Whether claims against private parties for misrepresentations designed to increase sales of their commercial goods to the general public are

sufficiently "for, or relating to" acts taken under color of a federal office to support federal officer removal under 28 U.S.C. § 1442.

3. Whether a complaint that seeks to hold private parties liable for their misrepresentations and subsequent increased sales of commercial goods "aris[es] out of, or in connection with" the commercial production of a small subset of those goods on the Outer Continental Shelf ("OCS") sufficient to support removal to federal court under 43 U.S.C. § 1349(b)(1) (OCS Lands Act ("OCSLA").

RELATED CASES

Decision	**Removal Ground(s) Rejected**
Mayor & City Council of Baltimore v. BP P.L.C., 952 F.3d 452 (4th Cir. 2020) ("*Baltimore II*"), *vacated and remand on other grounds*, 141 S. Ct. 1532 (2021) [1]	Federal officer
Rhode Island v. Shell Oil Prod. Co., L.L.C., 979 F.3d 50 (1st Cir. 2020) ("*Rhode Island II*"), *cert. granted and vacated and remanded on other grounds*, 2021 WL 2044535 (Mem) (U.S. May 24, 2021)	Federal officer
Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 965 F.3d 792 (10th Cir. 2020) ("*Boulder II*"), *cert. granted and vacated and remanded on other grounds*, 2021 WL 2044533 (Mem) (U.S. May 24, 2021)	Federal officer

[1] Following *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532 (2021) ("*Baltimore III*"), holding that all of Defendants' asserted removal grounds are reviewable on appeal, the Supreme Court vacated and remanded the *Rhode Island*, *Boulder*, *San Mateo*, and *Baltimore* cases for the appeals courts to review Defendants' non-federal officer removal grounds for removal. Neither *Baltimore III* nor these vacaturs, all purely procedural, change the fact that every court to have considered Defendants' removal arguments has rejected them.

Cnty. of San Mateo v. Chevron Corp., 960 F.3d 586 (9th Cir. 2020) ("*San Mateo II*"), *cert. granted and vacated and remanded on other grounds*, 2021 WL 2044535 (Mem) (U.S. May 24, 2021)	Federal officer
City of Oakland v. BP PLC, 969 F.3d 895, 906-08 (9th Cir. 2020) ("*City of Oakland II*"), *cert. denied*, 141 S. Ct. 2776 (2021), *reversing California v. BP PLC*, No. 17 Civ. 06011, 2018 WL 1064293 (N.D. Cal. Feb. 27, 2018) ("*City of Oakland I*")	Federal common law; *Grable*
Connecticut v. Exxon Mobil Corp., No. 20 Civ. 1555, 2021 WL 2389739 (D. Conn. June 2, 2021) ("*Connecticut*"), *appeal filed* No. 21-1446 (2d Cir. Sept. 22, 2021)	Federal common law; *Grable*; federal officer; OCSLA
Minnesota v. Am. Petroleum Institute, No. 20 Civ. 1636, 2021 WL 1215656 (D. Minn. March 31, 2021) ("*Minnesota*"), *appeal filed* No. 21-1752 (8th Cir. Apr. 5, 2021)	Federal common law; *Grable*; federal officer; OCSLA
Massachusetts v. Exxon Mobil Corp., 462 F. Supp. 3d 31 (D. Mass. 2020) ("*Massachusetts*")	Federal common law; *Grable*; federal officer
City and Cnty. Of Honolulu v. Sunoco LP, et al., No. 20 Civ. 163, 2021 WL 531237 (D. Haw. Feb. 12, 2021) ("*Honolulu*"), *appeal filed* No. 21-15318 (9th Cir. Feb. 23, 2021)	Federal common law; federal officer; *Grable*; OCSLA
Rhode Island v. Chevron Corp., 393 F. Supp. 3d 142 (D.R.I. 2019) ("*Rhode Island I*")	Federal common law; *Grable*; federal officer; OCSLA
Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc., 405 F. Supp. 3d 947 (D. Colo. 2019) ("*Boulder I*")	Federal common law; *Grable*; federal officer; OCSLA
Mayor & City Council of Baltimore v. BP P.L.C., 388 F. Supp. 3d 538 (D. Md. 2019), *as amended* (June 20, 2019) ("*Baltimore I*")	Federal common law; *Grable*; federal officer; OCSLA
Cnty. of San Mateo v. Chevron Corp., 294 F. Supp. 3d 934 (N.D. Cal. 2018) ("*San Mateo I*")	Federal common law; *Grable*; federal officer; OCSLA

RELEVANT FACTS AND RULING PRESENTED FOR REVIEW

"Defendants have known about the enormous harms that fossil fuels have caused and will continue to cause to the climate and communities around the world for more than fifty years, dating back to when these harms were only vaguely understood by the general public." Complaint, 2-Joint Appendix ("JA")-79-80 ¶ 75. Instead of sharing that data, Defendants—several of the world's largest fossil fuel companies, often funneling their activities through the American Petroleum Institute—engaged in a decades-long sustained campaign of misinformation and deception, all in the interest of "prioritiz[ing] profits over averting monumental harm to communities like Hoboken." *Id.*; *see also* 2-JA-79-112 ¶¶ 75-161. That campaign of disinformation continues to this day, has been spearheaded by Exxon Mobil, a New Jersey corporation, has been directed at New Jersey consumers, and has caused hundreds of millions of dollars of damage to Hoboken. 2-JA-115-125 ¶¶ 172-93, 2-JA-129-130 ¶¶ 209-15, 2-JA-132-157 ¶¶ 222-87.

Defendants should bear the costs of their illegal activities, not Hoboken. Hoboken sued Defendants in the Superior Court of New Jersey, Hudson County, asserting New Jersey common law claims for public nuisance, private nuisance, trespass, and negligence, and a claim under the New Jersey Consumer Fraud Act, N.J. Stat. §§ 56:8-1, *et seq*. ("CFA"). Defendants removed to the District of New Jersey, asserting seven grounds for federal court jurisdiction: federal common law,

OCSLA, the Federal Officer Removal Statute, *Grable* jurisdiction, complete federal preemption, federal enclave jurisdiction, and the Class Action Fairness Act ("CAFA"). They abandoned their complete preemption argument before the district court.

The district court found removal unwarranted. "Ultimately, the crux of Hoboken's Complaint is that Defendants knew that their products caused substantial harm to the environment. Yet, Defendants misled consumers for decades about the real risks of continued dependence on fossil fuels and continued to sell their products. Now, Hoboken wants help paying for the effects of climate change it has faced and will continue to face." 1-JA-19.

The district court concluded that "Plaintiff does not assert any federal claims here; Hoboken only asserts state law claims." 1-JA-23. Nor are any "of Hoboken's claims . . . premised on federal law and Defendants do not contend that Plaintiff omitted any facts to avoid federal jurisdiction" under 28 U.S.C. § 1441(a). 1-JA-27. It rejected Defendants' OCSLA and federal officer arguments because Plaintiff's claims have no connection with Defendants' operations on the Outer Continental Shelf or any of the other discrete contracts Defendants assert as hooks for federal court jurisdiction. 1-JA-31-37. Defendants abandoned federal enclave and CAFA removal on appeal—which the court below also rejected. 1-JA-38.

SUMMARY OF ARGUMENT

1. "[A] suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution." *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152 (1908). Plaintiff's claims can be removed because they are "based upon" or "arise under" federal law only if "a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 391-92 (1987). Defendants concede Hoboken has not cited any federal law, whether statutory or otherwise, for its causes of action in this case; each of the claims of relief sound in long-standing New Jersey tort and consumer protection laws. Since Defendants have conceded Plaintiff's claims are not "completely preempted" by federal law of any kind, and since they have not identified any element of any cause of action that requires resolution of a substantial federal question, jurisdiction does not lie with the district court. Their argument from federal common law is nothing more than a federal affirmative defense and hence insufficient to support removal.

2. "The federal-officer-removal statute permits certain officers of the United States to remove actions to federal court." *Maglioli v. All. HC Holdings LLC*, 16 F.4th 393, 404 (3d Cir. 2021). A private defendant can invoke federal officer jurisdiction only when it was "acting under any 'agency' or 'officer' of 'the

United States'" when "carrying out the 'acts' that are the subject of the petitioner's complaint." *Watson v. Phillip Morris Cos., Inc.*, 551 U.S. 142, 147 (2007) (quoting 28 U.S.C. § 1442(a)(1)). Plaintiff's Complaint is based on Defendants' half-century disinformation campaign to deceive the public about fossil fuels' devastating climate impacts to drive sales. Defendants identify no federal officer they acted under when waging this campaign. Instead, Defendants invoke a smattering of arms-length commercial transactions with the federal government that lack the required connection with the Complaint and that do not show Defendants "acted under" federal officers.

3. The OCSLA provides federal jurisdiction over claims "arising out of, or in connection with . . . any operation conducted on the outer Continental Shelf which involves exploration, development or production of the minerals." 43 U.S.C. § 1349(b). Defendants must establish a "but-for" connection between Plaintiff's claims and their OCS operations to give rise to OCSLA jurisdiction. *In re Deepwater Horizon*, 745 F.3d 157, 163-64 (5th Cir. 2014). Defendants concede the absence of any connection between their disinformation campaign and their OCS operations, and there is no but-for connection between Plaintiff's claims and whatever small and unknown fraction of Defendants' total fossil fuel production occurred on the OCS.

ARGUMENT

"Federal courts are not courts of general jurisdiction." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541-42 (1986). They do "not exercise power that the Constitution and Congress have not given" them. *Maglioli*, 16 F.4th at 400. Defendants have failed to identify any constitutional or statutory basis for federal jurisdiction. Federal courts "must resolve all contested issues of substantive fact in favor of the plaintiff and must resolve any uncertainties about the current state of controlling substantive law in favor of the plaintiff" on removal. *Boyer v. Snap-On Tools Corp.*, 913 F.2d 108, 111 (3d Cir. 1990); *see also Batoff v. State Farm Ins. Co.*, 977 F.2d 848, 851 (3d Cir. 1992); *Samuel-Bassett v. KIA Motors Am., Inc.*, 357 F.3d 392, 396 (3d Cir. 2004).

Defendants asked the court below to recast Plaintiff's Complaint as arising under federal rather than state law, and as addressing Defendants' contracts with the federal government and drilling in the Outer Continent shelf rather than Defendants' own independent deceptive conduct. The district court correctly held that Defendants cannot re-write Plaintiff's Complaint to make it removable. Plaintiff's Complaint and causes of action are properly heard in state, not federal, court.

Standard of Review: The standard of review is de novo. *Papp v. Fore-Kast Sales Co.*, 842 F.3d 805, 810 (3d Cir. 2016).

I. NO "ARISING UNDER" JURISDICTION

Presumably because Defendants recognize that their arguments for removal under established doctrines do not come close to justifying removal here, *see infra* §§II-III, they devote the lion's share of their brief to their "arising under" argument. Their argument for "arising under" jurisdiction is breathtaking in its breadth and implications.

Defendants are asking this Court to create a new doctrine of original and exclusive federal jurisdiction over all claims asserted against corporations with interstate or international operations that engage in conduct actionable under state law. Corporations that violate the laws of scores of states while operating global businesses should supposedly only be brought to account for their misconduct in federal court and only under federal common law "when the claims' inherently interstate nature requires uniform *national* rules of decision." Defendants-Appellants' Opening Brief, ECF No. 61 ("Br.") at 17 (emphasis in original). Were Defendants to succeed, whole swaths of laws of all fifty states will be nullified and state courts stripped of their historical co-equal jurisdiction, only because Defendants do not want to answer in state courts for their state law violations.

Fortunately for the City of Hoboken and the many other state and local governments seeking redress for similar harms in state courts under state laws, our Constitution did not create special federal courts of general jurisdiction that nullify

state laws and are available only to powerful multi-state or multi-national corporations. The Third Circuit, only two months ago, held that the well-pleaded complaint rule, the principle that a plaintiff is the master of its complaint, and the limitations on federal removal jurisdiction are reflections of the "divi[sion of] powers between the national government and the states." *Maglioli*, 16 F.4th at 400. Where plaintiffs "have not invoked the power of the federal courts, and Congress has not given [federal courts] power to take this case from the state court," this Court will not countenance removal. *Id.* Plaintiff did not plead a federal cause of action and Plaintiff's Complaint does not "arise under" federal law to permit removal.

A. Binding Third Circuit and Supreme Court Precedent Requires Remand of Hoboken's Well-Pleaded State Law Complaint

"The 'well-pleaded complaint rule' is the basic principle marking the boundaries of the federal question jurisdiction of the federal district courts." *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987). "[F]ederal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar*, 482 U.S. at 391–92; *see also Home Depot U. S. A., Inc. v. Jackson*, 139 S. Ct. 1743, 1748 (2019) ("the 'civil action of which the district court' must have 'original jurisdiction'" for removal purposes "is the action as defined by the plaintiff's complaint") (quoting 28 U.S.C § 1441) (cleaned up). This rule makes the plaintiff the master of its complaint and "serves

as a 'quick rule of thumb' for resolving jurisdictional conflicts," without having to dive deep into parties' contentions at the removal stage. *Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 832 (2002).

Hoboken, as is its right, seeks relief under longstanding New Jersey common law and statutory causes of action. Defendants do not—and cannot—cite to a single federal law Plaintiff is seeking relief under. Removal was thus improper.

Defendants' argument around the applicability of the well-pleaded complaint rule—a "syllogism," Br. at 25, they claim—fails. While it is true federal courts have subject matter jurisdiction over complaints that, on their face and expressly, allege violations of federal common law under 28 U.S.C. § 1331, Hoboken did not claim a violation of federal common law in the complaint. Defendants argue, nevertheless, that the only *viable* claims against them could be brought under federal common law. *Id.* at 30. Thus, Plaintiff's state law claims, because they supposedly cannot survive the application of federal common law, should be considered federal law claims which can be removed to federal court under 28 U.S.C. § 1441(a). *Id.*

The Supreme Court rejected this same argument in *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). Caterpillar removed California state law employment contract disputes to federal court, arguing the contracts were governed by and could only be interpreted via the federal Labor Relations Act. *Id.* at 390.

The Supreme Court ordered remand to state court and explained that Caterpillar—by arguing no state law claim survived a federal statutory regime—was claiming federal preemption, an affirmative defense. *Id.* at 393. The Court noted that Congress had amended the removal statute in 1887 to authorize federal courts to only hear cases where the plaintiff affirmatively pleads a federal cause of action, making the plaintiff the master of its own complaint. *Id.*; *see also Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 807 (1986) ("statutory grant of federal-question jurisdiction" is "more limited" than "the constitutional meaning of 'arising under'"); *Home Depot*, 139 S. Ct. at 1749 ("[T]he limits Congress has imposed on removal show that it did not intend to allow all defendants an unqualified right to remove."). That meant federal defenses could not be grounds for removal.

The Court rejected Caterpillar's suggestion—the same suggestion made by Defendants here—that the plaintiffs could have and should have brought a federal claim, and thus removal could be premised on "different facts [plaintiffs] might have alleged that would have constituted a federal claim." *Caterpillar*, 482 U.S. at 397. "If a defendant could [so remove], the plaintiff would be master of nothing." *Id.* at 399. Since Hoboken is the master of its Complaint, and since the Complaint pled no federal claim, removal was improper.

B. There Is No "Federal Common Law" Exception to The Well-Pleaded Complaint Rule

The Supreme Court and Third Circuit have recognized only two exceptions to the well-pleaded complaint rule: "(1) when it appears that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims or (2) when it appears that plaintiff's claim is 'really' one of federal law." *Goepel v. Nat'l Postal Mail Handlers Union*, 36 F.3d 306, 310 (3d Cir. 1994) (cleaned up). The first exception is now known as *Grable* removal and is addressed *infra* § I.C. The latter exception is "known as the complete preemption doctrine." *Id*. (cleaned up). Defendants waived their complete preemption removal argument in the court below. 1-JA-23 n.6.

Defendants argue removal is proper because Hoboken's claims are "inherently federal" and are thus removable as they arise under federal common law, no matter how they are pled. Br. at 26. There is no "federal common law removal" exception to the well-pleaded complaint rule. No court has recognized it, ten courts have ruled that Defendants' argument fails, and accepting such an exception would swallow the rule itself.

1. No Court Has Accepted Defendants' Theory

Defendants have tried to remove climate deception cases from state to federal court over a dozen times. *Supra* at 2-3. Only *City of Oakland I* agreed with Defendants on "arising under" jurisdiction, which the Ninth Circuit reversed,

and the Supreme Court denied certiorari. Defendants ignore all of this caselaw in their briefing. 1-JA-26 ("Defendants do not attempt to explain why these other courts were incorrect or why this case is different.").

a. No Supreme Court or Third Circuit Support

No authority supports Defendants' claim that, "[a]lthough 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." Br. at 26. Defendants cite *United Jersey Banks v. Parell*, 783 F.2d 360 (3d Cir. 1986), but this Court held the opposite. The plaintiffs in *Parell* sued in New Jersey state court to block the merger of nationally chartered banks. Instead of suing under the Federal Bank Merger Act, which included a private cause of action, plaintiffs pursued inventive claims under New Jersey's Bank Holding Company Act and Antitrust Act in state court. The district court denied remand because "the plaintiffs necessarily are stating a federal cause of action." *Id.* at 364 (cleaned up).[2]

This Court reversed the district court's denial of remand, while noting that "[t]here may be some basis to agree with defendants that United Jersey's view of the state law is incorrect and will be so found." *Id.* at 367. "It is, however, for the

[2] The district court in *Parell* quoted Wright & Miller for this principle, as Defendants do, Br. at 16.

state court to make the determination as to the applicability of its state law." *Id.* Like the defendants in *Parell*, Defendants here "disclaim[] relying on federal preemption," but this Court held "that [is] the practical effect" of their argument. *Id.* at 368. It was "immaterial that plaintiff *could* have elected to proceed on a federal ground" when the plaintiff *did not* proceed on such a ground. *Id.* (emphasis added). *Parell* disposes of Defendants' argument.

It is not true that "a federal court must sometimes 'determine whether the real nature of the claim is federal, regardless of plaintiff's characterization.'" Br. at 27 (quoting *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n.2 (1981)). Three years after *Moitie* was decided, the *Parell* court noted that the statement in footnote 2 of that decision was arguably in conflict with the well-pleaded complaint rule. *Parell*, 783 F.2d at 368. The Supreme Court then limited that very footnote to the facts of *Moitie* in *Rivent v. Regions Bank of Louisiana*, 522 U.S. 470, 478 (1998) ("[W]e . . . clarify today that *Moitie* did not create a preclusion exception to the rule, fundamental under currently governing legislation, that a defendant cannot remove on the basis of a federal defense.").

This Court's holding in *Goepel*, 36 F.3d 306, is consistent with *Parell* and *Rivent*. In *Goepel,* this Court identified the *only* exceptions to the well-pleaded complaint rule are: "(1) when it appears that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims or

(2) when it appears that plaintiff's claim is 'really' one of federal law.'" 36 F.3d at 310 (cleaned up). The latter "is an independent corollary of the well-pleaded complaint rule . . . known as the complete preemption doctrine." *Id*. (cleaned up). This Court held 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." *Id.* at 311-12; *see also Inselberg v. New York Football Giants, Inc.*, 661 F. App'x 776, 779 (3d Cir. 2016) (non-precedential) ("artful pleading" is the same as "complete preemption"); *Rivent*, 522 U.S. at 475 ("The artful pleading doctrine allows removal where federal law completely preempts a plaintiff's state-law claim.").[3] This Court rejected the Fourth Circuit's approach in *Caudill v. Blue*

[3] This court has held that the complete preemption doctrine must be "applied with circumscription" because "[a]n expansive application of the doctrine could effectively abrogate the rule that a plaintiff is master of his or her complaint." *Parell*, 783 F.2d at 368. Defendants now disclaim complete preemption, but as the district court noted, the existence of the complete preemption doctrine shows that Defendants' "federal common law removal" argument is incompatible with the well-pleaded complaint rule and existing exceptions to that rule. *See* 1-JA-23, 27. In particular, the Supreme Court has directed that complete preemption removal is only proper with clear Congressional direction, *Empire HealthChoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 698 (2006), and only where federal statutes provide "the exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action," *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003). Federal common law, by definition, does not evince clear statutory directives, and these Defendants have previously argued no federal common law causes of action exist in this field in any case. *See* Answering Brief of Defendants-Appellees Shell Oil Company et al., *Native Vill. of Kivalina v. Exxon Mobil Corp.*, No. 09 Civ. 17490, 2010 WL 3299982, at *57 n.23 (9th Cir. June 30, 2010) (arguing no "uniquely federal interests" justify recognizing "federal common law" in this area).

Cross and Blue Shield of North Carolina, 999 F.2d 74 (4th Cir. 1993)—and Defendants' argument here—that removal was proper because, irrespective of the complete preemption doctrine, "federal common law entirely replaces state contract law." *Goepel*, 36 F.3d at 313 (cleaned up). This Court's approach in *Goepel* was subsequently approved of by *Empire HealthChoice*, 547 U.S. 677, resolving a circuit split in the Third Circuit's favor. The court below did not "misunderstand[]," Br. at 28, that *Goepel* foreclosed Defendants' argument.[4]

b. No Support From Other Courts of Appeals

Nor have "numerous courts of appeals 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,'" Br. at 27 (quoting *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 924, 931 (5th Cir. 1997), and citing *North Carolina ex rel. N.C. Dep't of Admin. v. Alcoa Power Generating, Inc*., 853 F.3d 140, 147, 149 (4th Cir. 2017) and *New SD, Inc. v. Rockwell Int'l Corp.*, 79 F.3d 953, 954–55 (9th Cir. 1996). Defendants are misconstruing their authority.

[4] Defendants' other cited Third Circuit authority is far afield. *See Jarbough v. Attorney General*, 483 F.3d 184 (3d Cir. 2007) (no appellate jurisdiction from a Board of Immigration Appeals decision); *Est. of Campbell by Campbell v. S. Jersey Med. Ctr.*, 732 F. App'x 113 (3d Cir. 2018) (non-precedential decision finding 42 U.S.C. § 233(l)(2)—a specialized removal provision under the Public Health Service Act—allowed removal to decide "the appropriate forum or procedure" for the claim); *First Pa. Bank, N.A. v. E. Airlines, Inc.*, 731 F.2d 1113, 1115 (3d Cir. 1984) (ordinary preemption case, filed in federal court, regarding Interstate Commerce Act).

Sam L. Majors addressed "the historical availability of [a pre-existing federal] common law remedy" for lost property claims in interstate shipping, where federal statutes "preserv[ed]" that remedy. 117 F.3d at 929 n.16. The Fifth Circuit did not address the master of the complaint rule and held its own holding was "necessarily limited." *Id.* Other courts, including in climate deception cases, have recognized *Sam L. Majors* does not announce a general exception to the well-pleaded complaint rule. *See, e.g.*, *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 650–51 (7th Cir. 2006); *Boulder I*, 405 F. Supp. 3d at 963; *Greer v. Fed. Express*, 66 F. Supp. 2d 870, 874 (W.D. Ky. 1999).

Alcoa, 853 F.3d 140 (4th Cir. 2017) and *New SD*, 79 F.3d 953 (9th Cir. 1996) are no better. *Alcoa* allowed removal under the *Grable* doctrine because the State of North Carolina's declaratory action to quiet title to a portion of the Yadkin River's riverbed "turn[s] on" the federal constitutional "Equal Footing Doctrine." *Alcoa*, 853 F.3d at 146. District courts in the Fourth Circuit recognize *Alcoa* addressed *Grable* jurisdiction and was limited to its unusual facts. *See, e.g., Cnty. of Moore v. Acres*, 447 F. Supp. 3d 453, 460 (M.D.N.C. 2020); *see also Baltimore I*, 388 F. Supp. 3d at 556 (D. Md. 2019) (district court in the Fourth Circuit rejecting Defendants' federal common law argument without reference to *Alcoa*).

Courts in the Ninth Circuit have similarly recognized that *New SD* is both cabined to its unique facts and is not good law. *New SD* allowed removal for

federal defense contractual disputes regarding a space-based ballistic missile system, based on a strong federal interest in that system. 79 F.3d 953. The Supreme Court subsequently rejected such "federal interest" removal in *Grable*, 545 U.S. 308 (2005), and *Empire HealthChoice*, 547 U.S. 677. *See Raytheon Co. v. Alliant Techsystems, Inc.*, No. 13 Civ. 1048, 2014 WL 29106, at *6 (D. Ariz. Jan. 3, 2014) ("The Court concludes . . . *New SD*, in light of *Grable* and *Empire*, do[es] not support the exercise of federal question jurisdiction."); *Earth Island Inst. v. Crystal Geyser Water Co.*, 521 F. Supp. 3d 863, 875 (N.D. Cal. 2021) (collecting cases). The Ninth Circuit subsequently *expressly* held that these Defendants' argument fails in *City of Oakland II*, 969 F.3d at 907, a case conspicuous by its absence from Defendants' briefing.

2. Ordinary Preemption Cases Do Not Help

The majority of Defendants' briefing on federal common law removal relates to the ordinary preemption of state law claims by various forms of federal law. Ordinary preemption is not a basis for removal, *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987), so Defendants claim their "federal-common-law argument is not an ordinary preemption defense," Br. at 29. The argument that "Plaintiff's claims arise under federal law in the first place," *id.*, instead of under

the state law provisions Hoboken actually pled, "amounts to an argument for ordinary preemption," 1-JA-25.[5]

Defendants know this. Every single case they cite on the supposed broad scope of federal common law removal is (1) an ordinary preemption or displacement case, and (2) jurisdiction was based either on diversity or because a federal common law claim was pled on the face of the complaint.[6]

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[5] *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) does not support Defendants' assertion that, "[i]f 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," Br. at 29. The district court held that, "[i]n *National Farmers Union*, however, the petitioners filed their complaint in federal court, arguing that their claims arose under the federal common law." 1-JA-25-26. Thus, the *National Farmers* well-pleaded complaint pled federal law claims, whereas Hoboken's Complaint does not.

[6] *See Kansas v. Colorado*, 206 U.S. 46 (1907) (inter-state suit regarding water-sharing, brought under original jurisdiction of the Court); *United States v. Pink*, 315 U.S. 203 (1942) (suit by the United States regarding foreign bank; certiorari from opinion of the New York Court of Appeals); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (scope of the act of state doctrine presents a question of federal law; diversity case filed in federal court); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481 (1987) (Clean Water Act ordinary preemption of Vermont common law, removed to federal court for diversity); *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972) ("*Milwaukee I*") (claim by state against city in neighboring state, claiming the Court's original jurisdiction; remanded to district court on general federal question jurisdiction based on federal cause of action); *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304 (1981) ("*Milwaukee II*") (displacement of federal common law by federal statute; federal common law cause of action pleaded in federal district court); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996) (reversing Alabama Supreme Court affirmation of state court punitive damages award on federal due process grounds); *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011) (federal common law displaced by Clean Air

City of New York v. Chevron Corp., 993 F.3d 81 (2d Cir. 2021), proves the point. Defendants fault the court below for "distinguish[ing] the Second Circuit's decision in *New York* on the basis that the court there referred to Defendants' argument as a 'defense.'" Br. at 30. The Second Circuit distinguished "the Producers' preemption defense," which it considered "on its own terms, not under the heightened standard unique to the removability inquiry." *City of New York*, 993 F.3d at 94 (emphasis added). The Second Circuit expressly said its holding "does not conflict" with the dozen courts to have held there is no removal jurisdiction in similar cases, *id.*, decisions Defendants continue to ignore.[7]

Hoboken's claim is not the same as the City of New York's was, notably because Hoboken is challenging *illegal* activities by Defendants as opposed to New York City's claim regarding "admittedly legal commercial conduct," *City of New York*, 993 F.3d at 86. But whether *City of New York* poses a challenge to Hoboken's substantive claims is a matter for New Jersey state courts to decide. *See Empire HealthChoice Assur., Inc. v. McVeigh*, 396 F.3d 136, 142 (2d Cir. 2005), *aff'd*, 547 U.S. 677 (2006) (court cannot "conflate[] the [ordinary]

Act; federal common law cause of action pled in federal district court); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981) (claimed violation of the Sherman Act, filed in federal court).

[7] The District of Connecticut, in the Second Circuit, subsequently remanded an analogous case to Hoboken's, distinguishing *City of New York* on just these grounds. *Connecticut*, 2021 WL 2389739.

preemption and jurisdiction analyses" as that "giv[es] short shrift to the well-pleaded complaint rule" and ignores state courts' authority to resolve federal common law preemption).[8] It is not appropriate to litigate that question in this procedural posture. *Maglioli*, 16 F.4th at 407 n. 8 ("Because complete preemption is a distinct concept from ordinary preemption, we do not engage in an ordinary preemption analysis.") (cleaned up).

Put in stark terms: were this Court to accept Defendants' theory of "federal common law removal," it would (1) contradict consistent Supreme Court authority that creates only two exceptions to the well-pleaded complaint rule (complete preemption and *Grable*), (2) necessarily overrule its own precedents in *Parell*, *Goepel*, and *Maglioli*, (3) split with every court to have considered this same question, and (4) throw open federal removal jurisdiction to an unbounded number of state law-state court cases.

[8] Contrary to amici States' argument that "put[ting] *state* courts in the position of creating *federal* common-law . . . would undermine the very purpose of federal common law," ECF No. 70 at 15 (emphasis in original), the Supreme Court squarely rejected just this argument in *Charles Dowd Box Co., Inc. v. Courtney*, 368 U.S. 502, 507 (1962) (rejecting the argument that the "task of formulating federal common law in this area of labor management relations must be entrusted exclusively to the federal courts"). *See also Tafflin v. Levitt*, 493 U.S. 455, 464-65 (1990) (abstract concerns about incompatible decisions not sufficient to wrest jurisdiction over interpreting federal law away from state courts).

C. No Necessary and Substantial Federal Law Issue Compels *Grable* Removal

The only remaining exception to the well-pleaded complaint rule, known as *Grable* jurisdiction, is also inapplicable. *Grable* jurisdiction involves a "special and small category of cases in which arising under jurisdiction still lies," *Gunn v. Minton*, 568 U.S. 251, 258 (2013) (cleaned up), if they "really and substantially involve a dispute or controversy respecting the validity, construction or effect of federal law," *Grable*, 545 U.S. at 313 (cleaned up). The federal law issue must be "(1) necessarily raised [by the plaintiff's state law cause of action], (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn*, 568 U.S. at 258. "[I]t is not enough that there be a 'substantial, disputed question of federal law.' It is only if that question also 'is a necessary element of one of the well-pleaded state claims' that federal jurisdiction can be found." *Parell*, 783 F.2d at 366. Further, "a claim supported by alternative theories in the complaint may not form the basis for [federal question] jurisdiction unless [federal] law is essential to each of those theories." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 810 (1988).

Defendants fail at the first hurdle: they do not identify any "necessary element of one of the well-pleaded state claims" Hoboken brought that requires

construction of "federal law," *Parell*, 783 F.2d at 366 (cleaned up), and they have the burden of proof, *Empire HealthChoice*, 547 U.S. at 699.

1. Invocation of Federal Common Law Preemption Defense Is Insufficient

Defendants do not even mention the elements of Hoboken's state law causes of action—for public and private nuisance, trespass, negligence, and consumer fraud—or identify which of those elements necessarily require a ruling on a question of federal law, let alone a "substantial" issue. Instead, for the first time on appeal, Defendants claim that "the fact that Plaintiff's claims necessarily embody federal common law and are governed by federal rules of decision independently justifies removal under *Grable*," Br. at 31, and thus only "gesture to federal law and federal concerns in a generalized way," *San Mateo I*, 294 F. Supp. 3d at 938.

Again, Defendants' argument from federal common law is a federal *defense* to state law causes of action. A defense, even one that requires construction of federal law, is not sufficient for *Grable* removal. *Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335, 1350 n.4 (2020) ("federal jurisdiction" under *Grable* and *Gunn* "cannot be predicated on an actual or anticipated defense") (cleaned up); *Maglioli*, 16 F.4th at 413 (same). Even if federal common law is a "barrier to [the] effectuation" of Hoboken's claims for relief—which is denied—that is not sufficient for removal because Hoboken's "underlying right or obligation arises

only under state law," *Becker v. Ute Indian Tribe of the Uintah & Ouray Rsrv.*, 770 F.3d 944, 948 (10th Cir. 2014) (cleaned up).

Grable removal requires much more. In *Grable*, federal jurisdiction lay because the plaintiff's ostensible state law quiet title claim required the state court to find first that an IRS tax lien on the same property had been illegal. 545 U.S. at 313. Defendants identify nothing remotely comparable in Hoboken's claims.

Defendants' cited cases address circumstances analogous to *Grable*. In *Battle v. Seibels Bruce Ins. Co.*, 288 F.3d 596 (4th Cir. 2002), the Fourth Circuit held removal was proper where the plaintiff's "conversion" and breach of the "implied covenant of good faith and fair dealing" claims required first determining whether a federal common law-governed contract had such a covenant and had been breached. *See also Newton v. Cap. Assur. Co.*, 245 F.3d 1306, 1308 (11th Cir. 2001) (nearly identical claim for breach of a federal flood contract); *Baltimore I*, 388 F. Supp. 3d at 552 (district court in Fourth Circuit rejecting *Grable* jurisdiction without reference to *Battle*). Similarly, in *In re Otter Tail Power Co.*, 116 F.3d 1207 (8th Cir. 1997), the Eighth Circuit held removal was proper because the state law claim "is specifically premised on th[e] alleged deviation by [the defendant] from the terms of the district court's previous order," which had interpreted the scope of tribal authority under federal treaties and statutes. *Id.* at 1213. The District of Minnesota granted remand in a climate deception case,

noting that *In re. Otter Tail*, binding upon it, was inapposite because, there, "plaintiffs' precise claims were explicitly connected to or relied upon interpretations of a discrete area of federal law." *Minnesota*, 2021 WL 1215656, at *6. Removal in *In re Otter Tail* was proper not because the complaint raised "important questions of federal law," Br. at 32, but because the Eighth Circuit held the plaintiff *could not prevail* without finding a violation of the prior district court order and federal treaties. Defendants have pointed to no similar federal common law issue necessary to granting Plaintiff relief.

2. Invocation of "Foreign Affairs" Is Insufficient

Defendants claim supposedly grave "foreign policy concerns" are sufficient to trigger *Grable* removal. Br. at 32. They identify no treaty, law, or foreign government intervention to support their argument. A general claim of federal common law of foreign affairs will not suffice for removal, especially since "Congress has not . . . extend[ed] federal-question jurisdiction to all suits where the federal common law of foreign relations might arise as an issue." *Patrickson v. Dole Food Co.*, 251 F.3d 795, 803 (9th Cir. 2001).

In *Abrahamsen v. ConocoPhillips, Co.*, the Third Circuit dismissed the argument by one of these same Defendants that removal was proper because the plaintiff's claims "'implicat[e] . . . our relations with foreign nations,' and thus raise questions under federal common law." 503 F. App'x 157, 160 (3d Cir. 2012)

(non-precedential) (cleaned up). This Court questioned the existence of any foreign affairs removal "doctrine," "especially for private disputes." *Id.* It noted that cases like *Torres v. S. Peru Copper Corp.*, 113 F.3d 540 (5th Cir. 1997), where Peru intervened to protect the source of 50% of its export income, trace the "broadest" extent of removal jurisdiction and, even on their own terms, are only relevant where there is "intervention in the case by a foreign sovereign and proof that the lawsuit will significantly affect the foreign government's vitality." *Abrahamsen,* 503 F. App'x at 160 (also rejecting defendants' reliance on *Republic of Philippines v. Marcos*, 806 F.2d 344, 352-54 (2d Cir. 1986), a case brought by a sovereign state). No foreign state has intervened here, so even the "broadest" jurisdictional grants would not justify removal, even if foreign affairs or treaties are implicated in Hoboken claims, which they are not.

3. Invocation of the First Amendment Is Insufficient

Finally, Defendants claim *Grable* jurisdiction because Hoboken's consumer fraud claim "cannot prevail without demonstrating that the alleged misrepresentations are not protected by the First Amendment." Br. at 33. Defendants do not cite the New Jersey Consumer Fraud Act, which provides compensation upon proof of "(1) an unlawful practice, (2) an ascertainable loss, and (3) a causal relationship between the unlawful conduct and the ascertainable loss." *Lee v. Carter-Reed Co., L.L.C.*, 4 A.3d 561, 576 (N.J. 2010). Hoboken

alleged all three elements. *See* 2-JA-178-84 ¶¶ 357-66. None of them emerge from or are necessarily dependent on federal law, constitutional or otherwise, and Defendants do not suggest otherwise.

Defendants appear to argue, instead, that imposing CFA liability on them would violate their First Amendment rights, and thus removal is proper. *See* Br. at 34. First, it is a truism that any court, state or federal, must enforce and interpret laws in ways that are consistent with the federal constitution. The New Jersey Supreme Court has done just that. *See, e.g.*, *Turf Lawnmower Repair, Inc. v. Bergen Rec. Corp.*, 655 A.2d 417 (N.J. 1995) (CFA and Free Speech); *Ran-Dav's Cty. Kosher, Inc. v. State*, 608 A.2d 1353 (N.J. 1992) (CFA and Establishment Clause).[9] That does not mean *every* right of action under *every* state law necessarily raises a necessary and substantial question of whether the statute is being enforced in a manner consistent with the federal Constitution.[10]

[9] The New Jersey Constitution also protects speech and New Jersey courts must, of course, read a New Jersey statute—the CFA—in conformity with the New Jersey Constitution, which "offers greater protection than the First Amendment," *Mazdabrook Commons Homeowners' Ass'n v. Khan*, 6 A.3d 507, 513 (N.J. 2012).

[10] *Gully v. First Nat'l Bank*, 299 U.S. 109, 114 (1936) does not stand for the proposition that removal is proper if a Plaintiff must meet "constitutional proof requirements for speech-related claims." Br. at 35. That case, decided well before *Grable*, *reversed* the Fifth Circuit because removal was improvident, despite a federal statutory right being dispositive to the state law claim.

Second, "[s]tate courts routinely adjudicate federal constitutional issues," and the Supreme Court recognized that principle as far back as *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). *Degennaro v. Grabelle*, No. 21-1536, 2021 WL 5445809, at *2 (3d Cir. Nov. 22, 2021). Indeed, New Jersey state courts routinely address similar (often frivolous) free-speech-type arguments against the enforcement of consumer protection laws. *See, e.g.*, *Allstate Ins. Co. v. Northfield Med. Ctr., PC*, No. A-0964-12T4, 2019 WL 1119664, at *4 (N.J. Super. Ct. App. Div. Mar. 11, 2019) (free speech defense to insurance fraud claim); *Barry v. Arrow Pontiac, Inc.*, 494 A.2d 804 (N.J. 1985) (free speech and deceptive advertising).[11]

The fact that Defendants are massive companies does not, by itself, make their First Amendment defenses any more important than those routinely considered in state court. Unsurprisingly, *not one* of the First Amendment cases they cite is a removal case and *every* case was either litigated in state court or in district court on diversity or bankruptcy grounds, where the defendants raised federal constitutional defenses to the application of state tort law. *See* Br. at 34-35; 1-JA-30 ("Each of the cases [cited by Defendants] involve a federal constitutional defense to a state tort law.").

[11] Defendants wrongly suggest Justice Alito's dissent from the denial of certiorari in *Nat'l Review, Inc. v. Mann*, 140 S. Ct. 344 (2019), supports a federal forum for cases regarding climate change. Justice Alito said nothing about the forum for the claim, even though that state law defamation case was in state court.

4. None of These Supposedly "Federal Issues" Are "Substantial" or "Capable of Resolution Without Disrupting the Federal-State Balance" for *Grable* Purposes

Supposed federal government interests in the outcome of this litigation are not sufficient to make federal law "substantial" for *Grable* purposes. The Supreme Court foreclosed Defendants' argument in *Empire HealthChoice*, where it held the federal government's "overwhelming interest in attracting able workers to the federal workforce" and "in the health and welfare of the federal workers upon whom it relies to carry out its functions" was found insufficient to transform a "state-court-initiated tort litigation" relating to federal employee health insurance into a "federal case." 547 U.S. at 701; *see also K2 Am. Corp. v. Roland Oil & Gas, LLC*, 653 F.3d 1024, 1032 (9th Cir. 2011) ("The mere fact that the Secretary of the Interior must approve oil and gas leases does not raise a federal question."); *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1907 (2019) (invocations of Congressional intent to create a cost-benefit "balance" in regulating nuclear power not sufficient to justify even ordinary preemption of state law). This Court has held that merely claiming "a plaintiff's claim was uncomfortably juxtaposed with federal regulations" is insufficient for the purposes of *Grable* jurisdiction because otherwise "preemption-like arguments would always create federal-question jurisdiction." *Manning v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 772 F.3d 158, 165 n.4 (3d Cir. 2014) (noting limitations in Eight Circuit's arguably broader

decision in *Pet Quarters, Inc. v. Depository Tr. & Clearing Corp.*, 559 F.3d 772 (8th Cir. 2009)). If federal interests in federal employee health insurance policies are not sufficient to satisfy *Grable* "substantiality" requirements, speculative federal interests in a state law commercial deception lawsuit against private parties cannot satisfy *Grable*. *See also California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989) (prevention of unfair business practices and consumer deception is "an area traditionally regulated by the States").

And, for a federal issue to be substantial, the court must be engaged in a "context-free-inquiry into the meaning of a federal law" and not a "a fact-specific application of rules that come from both federal and state law." *Bennett v. Southwest Airlines Co.*, 484 F.3d 907, 910 (7th Cir. 2007); *see also Grable*, 545 U.S. at 315 ("[T]he meaning of the federal statute . . . appears to be the only legal or factual issue contested in the case."). Here, even if Defendants are correct that the determination of Plaintiff's claims necessitate untangling foreign affairs, free speech, and general federal interest issues—and they are not—Defendants make no serious claim that the federal issues would be a "context-free inquiry into the meaning of a federal law," *Bennett*, 484 F.3d at 910. Their arguments turn on the detailed factual basis of Plaintiff's claims and the speculative effects of such claims on the fossil fuels market.

Accepting Defendants' theory "would radically expand the class of removable cases, contrary to the due regard for the rightful independence of state governments that [the Supreme Court's] cases addressing removal require," and would mire the lower courts in complex analyses of counterclaims and defenses—as is evident here—and "undermine the clarity and ease of administration of the well-pleaded-complaint doctrine." *Holmes Grp.*, 535 U.S. at 832 (cleaned up);[12] *see also Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 379 (1959) (Frankfurter, J.) (federal courts have a "deeply felt and traditional reluctance . . . to expand the jurisdiction of the federal courts through a broad reading of jurisdictional statutes"); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1574 (2016) ("it is less troubling for a state court to consider" supposedly federal issues than it is for the state court "to lose all ability to adjudicate a suit raising only state-law causes of action"). *Grable* removal can thus be rejected purely because, "[o]n the defendants' theory, many (if not all) state tort claims that involve the balancing of interests and are brought against federally

[12] Defendants repeatedly imply that the scale of the harm alleged, and Defendants' supposed importance to the country's development means that these cases are somehow special, not subject to the regular rules. The Supreme Court has warned against just such arguments, even in areas where federal policy is very clear about the need for uniform policy and law. *See Holmes Grp.*, 535 U.S. at 833 (refusing to create exception to the well-pleaded complaint rule to protect the uniformity of interpretation of patent law, which is entirely a creature of federal law).

regulated entities would be removable." *San Mateo I*, 294 F. Supp. 3d at 938. "*Grable* does not sweep so broadly." *Id.*

"28 U.S.C. § 1441 is to be strictly construed against removal," *Samuel-Bassett*, 357 F.3d at 396, and these is no basis to depart from this well-settled jurisprudence. This case does not "arise under" federal law and thus cannot be removed under 28 U.S.C. § 1441.

II. FEDERAL OFFICER REMOVAL FAILS AGAIN

The district court correctly rejected federal officer jurisdiction. 1-JA-33-37. Defendants were not acting under federal officers when they "spent the last fifty years deceiving the public about their central role in causing climate change in order to grease the wheels of their ever-expanding production and sale of fossil fuels," 2-JA-42-43 ¶ 3, making their federal officer removal argument a "mirage [that] only lasts until one remembers what [Plaintiff] is alleging in this lawsuit," *Rhode Island II*, 979 F.3d at 59-60.

Defendants have now lost the exact same federal officer removal arguments they make here *thirteen* times. They have lost in four federal appeals courts and nine federal district courts, *see supra* at 2-3, and they provide no basis for this Court to reach a different result. The scattershot contracts and regulations they assert as hooks for federal officer jurisdiction possess neither the connection with

Plaintiff's claims nor the subjection, guidance, or control of federal officers required for federal officer removal.

"The federal-officer-removal statute permits certain officers of the United States to remove actions to federal court." *Maglioli*, 16 F.4th at 404. The statute's "central aim is protecting officers of the federal government from interference by litigation in state court while those officers are trying to carry out their duties." *Papp*, 842 F.3d at 811. Defendants "must meet four requirements" to establish federal officer jurisdiction:

> (1) the defendant must be a "person" within the meaning of the statute; (2) the plaintiff's claims must be based upon the defendant "acting under" the United States, its agencies, or its officers; (3) the plaintiff's claims against the defendant must be "for or relating to" an act under color of federal office; and (4) the defendant must raise a colorable federal defense to the plaintiff's claims.

Maglioli, 16 F.4th at 404.

Defendants fail two of the factors. Plaintiff's claims have no connection with the handful of contracts and regulations that Defendants claim give rise to federal officer removal, and thus those contracts are not "for, or relating to" Plaintiff's claims. Defendants were also not "acting under" federal officers when conducting these activities.

A. Defendants' Shifting Theories of Federal Officer Removal Have Not Altered Their 0-for-13 Record

Defendants' federal officer removal arguments have evolved over time, but their lack of success has remained constant. Defendants initially asserted two bases for federal officer removal that they raise again here, even though the First, Fourth, Ninth, and Tenth Circuits unanimously rejected both: (1) oil and gas leases on the Outer Continental Shelf under the OCSLA; and (2) Chevron predecessor Standard Oil's ("Standard") joint operation of the Elk Hills Reserve with the Navy.

Perhaps recognizing the futility of these arguments, Defendants have added two new bases for federal officer removal to their most recent round of rebuffed removal efforts: (1) fuel sales to the military; and (2) storage and transport of oil and gas on the Strategic Petroleum Reserve ("SPR"). All four federal district courts to review these allegations, including the court below, have rejected them as a basis for federal officer removal.[13]

The thirteen courts to uniformly reject federal officer jurisdiction over analogous climate change state law tort claims are correct.

[13] 1-JA-34-37; *Connecticut*, 2021 WL 2389739, at *11; *Minnesota*, 2021 WL 1215656, at *9; *Honolulu*, 2021 WL 531237, at *5.

B. Plaintiff's Claims Are Not "For, or Relating to" Acts Under Color of a Federal Office

To satisfy the "for, or relating to" requirement, Defendants must demonstrate a "'connection' or 'association' between the act in question and the federal office." *In re Commonwealth's Motion to Appoint Against or Directed to Defender Ass'n of Philadelphia*, 790 F.3d 457, 471 (3d Cir. 2015) ("*Defender Ass'n*"). As Defendants acknowledge, they must be "acting under federal officers when 'carrying out the act[s] that are the *subject* of [Plaintiff's] complaint.'" Br. at 54 (quoting *Watson*, 551 U.S. at 147) (emphasis and alterations in original).

The subject of Plaintiff's Complaint is Defendants' half-century of deceiving the public about climate change. Those acts have no "connection" or "association" with the federal offices identified by Defendants. Although the Court may credit the factual allegations in a removal petition, it should not blindly adopt Defendants' legal conclusions when, as the district court held, "Hoboken's Complaint is focused on Defendants' decades long misinformation campaign that was utilized to boost Defendants' sales to consumers," and "Defendants do not claim that any federal officer directed them to engage in the alleged misinformation campaign," 1-JA-35.

Plaintiff's theory of liability is consistent throughout the Complaint: Defendants' unlawful deceptions drove the increased production, marketing, and

sale of fossil fuels that injured Hoboken.[14] The Complaint chronicles Defendants' campaign of deception in three phases. *First*, through the 1980s, Defendants received "countless reports from their own scientists" that "fossil fuels were causing climate change with likely dire impacts," but "kept these findings secret as they pumped out more and more fossil fuels to be marketed and sold around the world." 2-JA-43; *see* 2-JA-79-93. *Second*, beginning in the late 1980s, as public consciousness about the dangers of climate change grew, "Defendants orchestrated massive campaigns to discredit the valid climate science their own scientists had developed over the previous thirty years." 2-JA 43; *see* 2-JA-93-111. *Third*, in the last decade, "Defendants have launched 'greenwashing' campaigns that feign concern about climate change and promote nonexistent commitments to

[14] Defendants claim the Court should disregard the deceptions at the heart of the Complaint and instead "credit [the defendant's] theory of the case," Br. at 53 (quoting *Jefferson Cnty. v. Acker*, 527 U.S. 423, 432 (1999)) (alteration in original). This misrepresents the legal standard. Defendants must show that "the acts complained of [] 'relate to' acts taken under color of federal office." *Defender Ass'n*, 790 F.3d at 472. As every court to reject Defendants' arguments has concluded, Defendants' deceptions are the "acts complained of" here, and they do not relate to any conduct taken under the direction of federal officers. *See Honolulu*, 2021 WL 531237, at *7 ("[I]f Defendants had it their way, they could assert *any* theory of the case, however untethered to the claims of Plaintiffs, because this Court must 'credit' that theory.") (emphasis in original). Contrary to Defendants' argument, in *Acker*, the Supreme Court credited the defendant's theory only with respect to a disputed issue of statutory interpretation because "to choose between those readings of the Ordinance" would "decide the merits of the case . . . , [which] would defeat the purpose of the federal officer removal statute." 527 U.S. at 432. That concern is not present here.

sustainable energy" to "purposefully conceal [their]extraction, marketing, and sale of fossil fuels at historically unmatched rates." 2-JA-44; *see* 2-JA-115-25, 129-31. This decades-long campaign of deception is a fundamental component of all five of Plaintiff's state law claims. *See* 2-JA-118-19, 162-66, 169-72, 175-84. Defendants cannot downplay the central role of their disinformation campaign in Plaintiff's claim, just as it is in similar lawsuits. *See Rhode Island II*, 979 F.3d at 60 ("The contracts the oil companies invoke as the hook for federal-officer jurisdiction mandate none of th[e] activities [alleged in the Complaint]."); *Baltimore II*, 952 F.3d at 466-67 (OCS leases and Elk Hills operations "too remote" from "promotion and sale of fossil fuel[s] . . . abetted by a sophisticated disinformation campaign").

Defendants wade into the merits on causation, arguing Plaintiff's claims "necessarily encompass *all* of the production activities undertaken by Defendants" because "[t]here is no way to differentiate the marginal damage supposedly caused by alleged 'misinformation.'" Br. at 55-56 (emphasis in original).[15] But, as the

[15] *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743 (2017) and *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27 (2015), cited by Defendants, arise in inapposite procedural contexts but support Plaintiff to the extent they are relevant at all. *Fry* held that whether a lawsuit under, *inter alia*, the Americans with Disabilities Act triggers the Individuals with Disabilities in Education Act's exhaustion requirement by seeking relief in the form of a "free appropriate public education" ("FAPE") depends on the "substance" of the complaint rather than the use of "magic words" like "FAPE." *Fry*, 137 S. Ct. at 754-55. *Sachs* held that a claim is not "based upon" a foreign state's commercial activity in the United States, thus

Fourth Circuit explained, that miscasts the role of the production allegations in the Complaint:

> [R]eferences to fossil fuel production in the Complaint . . . only serve to tell a broader story about how the unrestrained production and use of [fossil fuels] contribute[s] to greenhouse gas pollution. . . . [I]t is the concealment and misrepresentation of [fossil fuels'] known dangers—and simultaneous promotion of their unrestrained use—that allegedly drove consumption, and thus greenhouse gas pollution, and thus climate change.

Baltimore II, 952 F.3d at 467. Regardless, whether Defendants' climate deceptions drove the increased consumption of fossil fuels that caused Plaintiff's injuries is a merits question, and "a court [should not] resolve contested questions of law when its jurisdiction is in doubt." *Steel Co. v. Citizens for a Better Env't.*, 523 U.S. 83, 101 (1998).

This Court's decision in *Papp* supports Plaintiff. 842 F.3d 805. "[T]he heart of Papp's claim against Boeing [was] the failure to provide sufficient warning about the dangers of asbestos" in an aircraft Boeing produced for the federal government. *Id.* at 813. The Third Circuit found the "for, or relating to" prong satisfied because the government's "control" of Boeing's production

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precluding Foreign Sovereign Immunities Act jurisdiction, where "there is nothing wrongful about [defendant's conduct in the United States] standing alone." *Sachs*, 577 U.S. at 35. Here, Defendants' deceptions are not mere magic words in the Complaint. They make up the substance of Plaintiff's claims and they are wrongful standing alone.

"extended to the content of written materials and warnings associated with such aircraft." *Id.* (cleaned up). The opposite is true here. The federal government had no relationship to, much less any control over, the deceptions about climate change that are at the heart of the Complaint. The disconnect between Defendants' disinformation campaign and the discrete contracts invoked by Defendants defeats federal officer removal.

Defendants also fail to satisfy the "for, or relating to" requirement for several additional reasons.

First, Defendants' World War II and Korean War fuel sales to the military, as well as the majority of Standard Oil's Elk Hills operations (1944-1975), predate the allegations in the Complaint by a decade or more. "Critical under the [federal officer] statute is to what extent defendants acted under federal direction at the time they were engaged in the conduct now being sued upon." *In re Methyl Teriary Butyl Ether Prods. Liab. Litig.*, 488 F.3d 112, 124-125 (2d Cir. 2007) (cleaned up). Plaintiff sues Defendants based on harms "since 1965," 2-JA-43, 164, because this time period coincides with the earliest warnings Defendants received (and concealed) about fossil fuels' devastating climate impacts, 2-JA-79-93. Any conduct before 1965 has no bearing on federal officer removal.

Second, the Complaint "disclaims injuries . . . that arose from [Defendants'] provision of fossil fuel products to the federal government for military and national

defense purposes." 2-JA-132. This disclaimer expressly excises from the Complaint Defendants' removal allegations regarding fuel sales to the military and storage and transport of fuels on the SPR, *see* 3-JA-285-303, because "specialized fuel [purchased by the military] does not appear to be the same fuel that consumers purchased because of Defendants' alleged marketing and disinformation campaigns." 1-JA-36. "Generally, courts respect [such] express disclaimers." *St. Charles Surgical Hosp., L.L.C. v. La. Health Serv. & Indem. Co.*, 990 F.3d 447, 451 (5th Cir. 2021) (cleaned up); *see also Dougherty v. A O Smith Corp.*, No. 13 Civ. 1972, 2014 WL 3542243, at *10 (D. Del. July 16, 2014) (respecting disclaimer of claims arising from asbestos exposure during plaintiff's service in the Navy).

Third, even if the Complaint were focused on production, the contracts invoked by Defendants constitute an unknown but at most inconsequential percentage of Defendants' total fossil fuel production. Defendants do not meaningfully quantify their asserted bases for removal. Their contention that OCS production has accounted for "as much as 30%" of total domestic oil production, Br. at 4, 63, is not tied to any particular defendant. In reality, the OCS accounts for at most 1% to 5% of most Defendants' total production. 5-JA-798. BP may have provided 1.5 billion gallons of specialized fuels to the government in the last four years, Br. at 51-52, but BP produced that same volume of oil in *less than two*

weeks in 2019. 7-JA-1494. Such scant and opaque ties to Defendants' total production of fossil fuels since 1965, even without the disinformation campaign driving Plaintiff's claims, are insufficient. *See Defender Ass'n*, 790 F.3d at 470 (allegations must be "directed at the relationship" between Defendants and the federal government).

The District Court appropriately ended the analysis here, finding that the absence of a connection between Plaintiff's claims and Defendants' jurisdictional hooks defeats federal officer removal. But even if Defendants could establish the requisite connection, none of their bases for removal meets the federal officer statute's "acting under" requirement.

C. Defendants Were Not "Acting Under" Federal Officers

Defendants were not under the "subjection, guidance, or control of [a federal] officer," as required to be "acting under" a federal officer for removal purposes. *Watson*, 551 U.S. at 151 (cleaned up). "[P]recedent and statutory purpose make clear that the private person's 'acting under' must involve an effort to *assist*, or help *carry out*, the duties or tasks of the federal superior." *Defender Ass'n*, 790 F.3d at 468 (quoting *Watson*, 551 U.S. at 152).

Watson and its progeny establish two guideposts for the "acting under" analysis. *First*, the "help or assistance necessary to bring a private person within the scope of the statute does not include simply *complying* with the law." *Watson*,

551 U.S. at 152-53 (emphasis in original). "Even a firm subject to detailed regulations and whose 'activities are highly supervised and monitored' is not 'acting under' a federal officer." *Maglioli*, 16 F.4th at 404 (quoting *Watson*, 551 U.S. at 153). Defendants "must demonstrate something beyond regulation or compliance." *Id.*

Second, "[g]overnment contractors fall within the terms of the federal officer removal statute" only "when the relationship between the contractor and the Government is an unusually close one involving detailed regulation, monitoring, or supervision." *Defender Ass'n*, 790 F.3d at 468 (quoting *Watson*, 551 U.S. at 153-54); *see also Goncalves ex rel. Goncalves v. Rady Children's Hosp. San Diego*, 865 F.3d 1237, 1245 (9th Cir. 2017) ("[I]n order for a private contractor to qualify for federal removal under § 1442(a)(1), the contractor must have an 'unusually close' relationship to the federal government.") (cleaned up); *Jacks v. Meridian Res. Co., LLC*, 701 F.3d 1224, 1232 (8th Cir. 2012) (same). *Watson* identified *Winters v. Diamond Shamrock Chem. Co.*, where the government "maintained strict control over [defendants'] development and subsequent production of Agent Orange" under a government contract during the Vietnam War, 149 F.3d 387, 399-400 (5th Cir. 1998), as an example of the type of "unusually close" relationship required, *see Watson*, 551 U.S. at 153-54. On the other hand, contracts that establish an "arms-length business arrangement with the federal government" or

"supply it with widely available commercial products" do not suffice. *San Mateo II*, 960 F.3d at 600.

Regulatory compliance and arms-length business relationships define each of Defendants' asserted bases for federal officer removal. *See, e.g.*, *Boulder II*, 965 F.3d at 827; *San Mateo II*, 960 F.3d at 600; *Baltimore II*, 952 F.3d at 465.

Outer Continental Shelf: OCS leases give Defendants "the exclusive right and privilege to drill for, develop, and produce oil and gas" on the OCS, *Baltimore II*, 952 F.3d at 465, "facilitat[ing] commercial production of a standardized, undifferentiated consumer product," *Boulder II*, 965 F.3d at 825. The First, Fourth, Ninth, and Tenth Circuits agree that they do not establish the "acting under" relationship: "[T]he willingness to lease federal property or mineral rights to a private entity for the entity's own commercial purposes, without more," cannot be "characterized as the type of assistance that is required." *Baltimore II*, 952 F.3d at 465.

Defendants' invocation of federal policy interests through the declaration of Professor Richard Tyler Priest, Br. at 41,[16] does not alter the leases themselves, which are "arms-length commercial transactions." *Baltimore II*, 952 F.3d at 465; *see also Boulder II*, 965 F.3d at 826 (Defendants' failure to establish "acting

[16] Defendants mistakenly identify this declaration as belonging to Professor Mark Wilson. Br. at 41. Priest's declaration, not Wilson's, discusses the history of and regulations governing Defendants' OCS operations.

under" relationship "is not altered by the OCS's status as a vital national resources reserve held by the Federal Government") (cleaned up).

The federal government's alleged "oversight" of Defendants' OCS leases, Br. at 42, cannot establish the "acting under" relationship because these allegations merely "track legal requirements" of the OCSLA and its regulations. *San Mateo II*, 960 F.3d at 603. Defendants argue the government oversees computation of OCS royalties, can sometimes cap production from OCS wells, and can "suspend operations in certain situations." Br. at 42. But statutes and regulations are the source of *all* of this conduct. *See* 2-JA-271 & nn.99-101 (production caps); 7-JA-1372 & nn.24, 26 (royalty computation and suspension). "[P]eriodically issued" OCS orders, another peg on which Defendants try to hook federal officer removal, were just "directions . . . on how to meet the requirements in the C.F.R." 7-JA-1376. If compliance with these regulations made a defendant "acting under" a federal superior, *all* extractors of commercial products from federal lands—miners, loggers, fisheries, etc.—would be federal officers if they followed regulations on what, when, and how much can be harvested on public property, and any case brought against such parties, irrespective of how divorced from this production, would land in federal court. *See Boulder II*, 965 F.3d at 825 (Defendants' arguments "risk expanding the scope of the statute considerably to include state-

court actions filed against private firms in many highly regulated industries") (cleaned up).

Elk Hills Reserve: Defendants offer no reason to disrupt the appeals courts' consensus that Standard Oil was not "acting under" federal officers when extracting oil for sale on the Elk Hills Reserve. *See Rhode Island II*, 979 F.3d at 59; *San Mateo II*, 960 F.3d at 601-02; *Baltimore II*, 952 F.3d at 468-471.[17] Under the Unit Plan Contract ("UPC"), from 1944 to 1975, Standard had autonomy to "dispose of oil as it may desire," and "[n]either the Navy or Standard [had] any preferential right to purchase any portion of the other's share of [] production." 3-JA-384. Standard and the Navy governed operations as equals—Standard had "a 50% vote on [the] two-member Operating Committee and six-member Engineering Committee." 5-JA-910. Standard was not acting under federal officers at Elk Hills because the UPC "benefit[ted] both parties: the government maintained [the] oil reserves for emergencies, and Standard ensured its ability to produce oil for sale. When Standard extracted oil from the reserve, Standard was acting independently." *San Mateo II*, 960 F.3d at 602.

A 1971 Operating Agreement stating that Standard was "in the employ" of the Navy, Br. at 45; 3-JA-408, does not change this analysis, because "the agreement provides only general direction regarding the operation of Elk Hills,"

[17] Elk Hills was not at issue in *Boulder* because Chevron was not a defendant.

Honolulu, 2021 WL 531239, at *6; *see* 3-JA-407, 410 (Standard "furnish[ed] . . . field operating procedures" to govern operations). Nor does Standard's one-time expansion of production on the Reserve to 400,000 barrels per day in November 1974, Br. at 45; 5-JA-933, establish the "acting under" relationship because Standard was merely supplying the domestic market "with widely available commercial products," *San Mateo II*, 960 F.3d at 600.

Strategic Petroleum Reserve: Defendants' storage and transport of fuels for the federal government on the SPR is a "regular business" relationship. *Honolulu*, 2021 WL 531239, at *6. The SPR Annual Reports cited in Defendants' removal notice confirm that Defendants independently "provide[] all normal operations and maintenance" of fuel storage terminals on the reserve. *See* 3-JA-286 & n.146 (SPR 2010 Annual Report at 16). Defendants' operation of the terminals as a "sales and distribution point in the event of a drawdown," *id.*; *see* Br. at 47, is simply the federal government procuring "off-the-shelf products" from Defendants, which does "not show that the federal government has supervised the manufacture of such products" required to be "acting under." *Baltimore II*, 952 F.3d at 464 (cleaned up). Defendants' provision of oil for the SPR through OCS royalty payments, Br. at 46-47, is another example of Defendants "complying with federal laws and regulations," which is not "acting under" federal officers, *Maglioli*, 16 F.

4th at 404. *See* 3-JA-267-69, 272, 286 & nn.88, 90, 104, 111 (citing governing statutes and regulations).

Military Fuel Sales: Defendants were not "acting under" federal officers when providing oil to the federal government during World War II. The Petroleum Administration for War's ("PAW") Report about its own history characterized the relationship between PAW and the fossil fuel industry as a "Story of *Partnership*." 6-JA-1052 (emphasis added). PAW "was dedicated to the proposition that *cooperation, rather than coercion*, was the formula by which the forces of Government and industry could best be joined in service of the Nation." 6-JA-1052 (emphasis added). "[T]he functions and responsibilities of the two partners were quite separate and distinct"; government orders had to be "concurred in by []industry committees." 6-JA-1053, 1062. This was not an "unusually close" relationship involving "detailed regulation, monitoring, or supervision." *Defender Ass'n*, 790 F.3d at 468 (cleaned up); *see also Par. Of Cameron v. Auster Oil & Gas Inc.*, 420 F. Supp. 3d 532, 543, 544 (W.D. La. 2019), *aff'd in part, rev'd in part on other grounds*, 7 F.4th 362 (5th Cir. 2021) (rejecting federal officer removal based on fossil fuel industry's World War II activities because "there is no evidence that PAW and other federal agencies directed Defendants' activities or that they mandated how Defendants were to comply with federal regulations and directives").

Defendants cannot overcome PAW's own account of the industry's relationship with the federal government during World War II. Professor Mark Wilson's declaration is unspecific to the point of uselessness. It overwhelmingly refers to the conduct of "oil companies" rather than particular Defendants, and in some cases does not address oil and gas at all. For example, Wilson's claim that the government built "dozens of large . . . industrial plants" that were "managed by private companies" refers to the manufacture of "aircraft, ships, aircraft engines, tanks, and explosives." 7-JA-1450; *see* Br. at 49. Nor does Wilson offer any evidence that Chevron predecessor Socal's operation of an avgas plant in Richmond, California—one of the rare Defendant-specific allegations in his declaration—involved the type of detailed regulation, monitoring, or supervision required for federal officer removal. Defendants' citation to a 1942 memorandum discussing "possible [] disciplinary measures" that PAW had not yet taken, and which it planned to use "only to [a] minimum extent," 4-JA-683; *see* Br. at 49, does not establish the requisite "close supervision by the federal government," *Jacks*, 701 F.3d at 1232.

Defendants' sparse allegations concerning President Truman's Petroleum Administration for Defense during the Korean War likewise fail to refer to the conduct of a single Defendant. *See* 3-JA-296-67; 7-JA-1465-66. And Professor Wilson's claim that the government "directed oil companies to expand

production," without more, does not establish an "unusually close" relationship. *See Honolulu*, 2021 WL 531239, at *5 ("[D]irectives to increase or ensure the supply of oil" insufficient to establish "acting under").[18]

III. THERE IS NO OUTER CONTINENTAL SHELF LANDS ACT JURISDICTION

To establish OCSLA jurisdiction, Plaintiff's claims must "aris[e] out of, or in connection with . . . any operation conducted on the outer Continental Shelf which involves exploration, development or production of the minerals." 43 U.S.C. § 1349(b)(1). The district court—like the other seven courts to reject Defendants' OCSLA removal argument[19]—correctly concluded that Plaintiff's claims do not "arise out of, or in connection with" Defendants' OCS operations. 1-JA-31-33.

Defendants' OCS operations must be the "but for" cause of Plaintiff's claims to establish OCSLA jurisdiction. *See, e.g.*, *Deepwater Horizon*, 745 F.3d at 163-64; *Tenn. Gas Pipeline v. Houston Cas. Ins. Co.*, 87 F.3d 150, 155 (5th Cir. 1996) (same). Remand is necessary because Defendants cannot show that Plaintiff's

[18] BP's and Shell's jet fuel sales to the military, Br. at 50-52, likewise consist of arms-length contractual arrangements that do not establish the "unusually close" relationship "involving detailed regulation, monitoring, or supervision" required. *Defender Ass'n*, 790 F.3d at 468 (quoting *Watson*, 551 U.S. at 153). Plaintiff has also expressly disclaimed injuries arising from these sales, which have no connection to Defendants' disinformation campaign targeting consumers.

[19] *See supra* at 3.

"injury would not have occurred" but for their conduct on the OCS. *Hufnagel v. Omega Serv. Indus., Inc.*, 182 F.3d 340, 350 (5th Cir. 1999).

Defendants are wrong that there is no "but-for" test. Courts considering analogous claims have applied the but-for test to reject OCSLA jurisdiction.[20] Even Defendants' cases apply the but-for test. *See Lopez v. McDermott, Inc.*, No. 17 Civ. 8977, 2018 WL 525851, at *2 (E.D. La. Jan. 24, 2018) ("[C]ourts in this circuit [] apply a 'but for' test to determine whether the case arises out of, or in connection with the OCS operation."); *Ronquille v. Aminoil Inc.*, No. 14 Civ. 164, 2014 WL 4387337, at *2 (E.D. La. 2014) (same). The only case Defendants cite to support their claim that there is no but-for test, *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1026 (2021), is inapposite. It analyzes the constitutional standard for personal jurisdiction, not the OCSLA's statutory requirement for subject matter jurisdiction. The Supreme Court's holding in *Ford* that the word "connection" does not require a "strict causal relationship," *id.* at 1026, does not alter the well-established but-for test for OCSLA jurisdiction.

Defendants fail even if the Court applies the "connection" proposed by Defendants. Defendants' half-century disinformation campaign that forms of the core of Plaintiff's claims has no connection whatsoever with the OCS. *See supra*

[20] 1-JA-32; *Minnesota*, 2021 WL 1215656, at *10; *Rhode Island I*, 393 F. Supp. 3d at 151-52; *San Mateo I*, 294 F. Supp. 3d at 938-39; *Baltimore I*, 388 F. Supp. 3d at 567.

§ II.B. Given the focus of Plaintiff's claims, whatever small and "unknown fraction of [Defendants'] fossil fuels was produced on the OCS" is not enough to trigger OCSLA jurisdiction. *Boulder I*, 405 F. Supp. 3d at 979; *accord Baltimore I*, 388 F. Supp. 3d at 566-57.

"[I]ndirect" connections are not sufficient for OCSLA jurisdiction. Br. at 61-62. Defendants cite two cases involving contract disputes that directly implicate OCS operations and are nothing like Plaintiff's claims here. *See United Offshore Co. v. S. Deepwater Pipeline Co.*, 899 F.2d 405, 406-07 (5th Cir. 1990) (contractual dispute over control of pipeline company which "transports gas from the outer continental shelf to the coast of Louisiana"); *Superior Oil Co. v. Transco Energy Co.*, 616 F. Supp. 98 (W.D. La. 1985) (lawsuit over six contracts for sale of natural gas produced on OCS). Defendants' claim that there can be OCSLA jurisdiction "when an OCS operation accounted for only a *portion* of the plaintiff's alleged injury," Br. at 62 (emphasis in original), has no application here because it relies on two cases where plaintiffs alleged they were exposed to asbestos while *working on the OCS*, *see Lopez*, 2018 WL 525851, at *3; *Ronquille*, 2014 WL 4387337, at *2.[21]

[21] Defendants' remaining cases are likewise disputes regarding the use or ownership of infrastructure on the OCS. *See, e.g.*, *Petrobras Am., Inc. v. Vicinay Cadenas, S.A.*, 815 F.3d 211, 213-15 (5th Cir. 2016) (underwater chain that broke on OCS); *EP Operating Ltd. P'ship v. Placid Oil Co.*, 26 F.3d 563 (5th Cir. 1994) (ownership rights of offshore equipment attached to OCS).

Finally, Defendants cite nothing to support their assertion that OCSLA jurisdiction is appropriate because the damages Plaintiff seeks would "significantly affect the continued scope and viability of Defendants' OCS operations and the federal OCS leasing program." Br. at 30-31. *EP Operating*, cited by Defendants, held that a "partition action [over] ownership rights" of equipment on the OCS could "alter[] the progress of production activities on the OCS" because "resolution of these ownership rights will facilitate the reuse, sale or salvage of these offshore facilities." 26 F.3d at 570. Hoboken is asking for damages from harms caused by some of the largest companies in the world, completely unrelated to the OCS, and with no plausible effect on production on the OCS. Defendants' theory would establish federal jurisdiction over any damages suit against any company that operates on the OCS.

CONCLUSION

"Federal courts have limited jurisdiction. [They] may decide only cases or controversies that the Constitution and Congress say [they] may decide." *Maglioli v. All. HC Holdings LLC*, 16 F.4th 393, 413 (3d Cir. 2021). Hoboken filed "garden-variety state-law claims" in the New Jersey Superior Court, Hudson County, and that is "where th[is] case[] belong[s]." *Id.* The judgment of the court below must be affirmed.

Dated: December 15, 2021

Respectfully Submitted,

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CERTIFICATION OF ADMISSION TO BAR

I, Jonathan S. Abady, certify as follows:

1. I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a) AND LOCAL RULE 31.1

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 12,992 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure.

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using the 2008 version of Microsoft Word in 14 point Times New Roman font.

This brief complies with the electronic filing requirements of Local Rule 31.1(c) because the text of this electronic brief is identical to the text of the paper copies, and the Vipre Virus Protection, version 3.1 has been run on the file containing the electronic version of this brief and no viruses have been detected.

Dated: December 15, 2021

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CERTIFICATE OF FILING AND SERVICE

I certify that on this 15th day of December 2021, the foregoing Brief was filed through CM/ECF system and served on Defendants-Appellants counsel of record through the CM/ECF system.

Dated: December 15, 2021

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