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' REPLY BRIEF

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INTRODUCTION

Plaintiff brought far-reaching claims in New Jersey state court seeking to hold Defendants liable for the alleged *physical effects of global climate change*. Based on wide-ranging theories, such as nuisance and trespass, these claims necessarily depend upon Defendants' worldwide production of petroleum products over many decades. In an effort to avoid federal jurisdiction, however, Plaintiff now argues that this Court should ignore its actual claims, its alleged injuries, and its requested relief, and focus instead solely on its allegations of "misrepresentation."

Plaintiff cannot divest federal courts of jurisdiction by pretending away essential elements of its own claims. Plaintiff's Complaint explicitly defines its alleged injuries as the physical impact of rising sea levels and soil erosion caused by the production, marketing, sale, and third-party combustion of Defendants' oil and gas products. Indeed, Plaintiff concedes "that greenhouse gas emissions from fossil fuels are the main driver of global warming," 2-JA-65, and demands compensatory damages for *all* injuries suffered as a result of *global* climate change, 2-JA-44–46, 184. These interstate and international claims are necessarily governed

exclusively by federal common law, a point to which Plaintiff offers no response.

Nor does Plaintiff dispute that its claims require proof that Defendants *caused* the alleged harms. Those harms—as well as the rationale for the requested remedies—are alleged to have arisen from the production, marketing, sale, and combustion of Defendants' fossil fuels. That Plaintiff also included allegations in its Complaint about supposed "deception" does not eliminate its other, detailed allegations regarding the source of Plaintiff's alleged injuries. Defendants do not need to show that *every* aspect of *all* of Plaintiff's claims has a federal connection—just that *one* of them does. And injury causation is a required element of all of Plaintiff's claims, whereas "deception" is not required by any of them. In fact, at times, the Complaint does not even mention deception in delineating Plaintiff's injury-causation theory: "Defendants' *extraction, production and sale* of fossil fuels 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 (emphasis added), and Plaintiff "seeks compensation to offset the costs it has and will continue to incur

from the effects of global warming," not the effects of alleged deception, 1-JA-17 (emphasis added).

While a plaintiff may be master of its complaint, it cannot compel the courts to ignore what that complaint actually pleads. This is the essence of the artful-pleading doctrine: Plaintiffs cannot block removal by artfully pleading claims in order to disguise an inherently federal cause of action.

At bottom, Plaintiff's claims all rest on alleged physical injuries that, as the Complaint puts it, are caused by "greenhouse gas emissions from fossil fuels." 2-JA-65. As a result, there are ample bases for federal jurisdiction under federal common law, the *Grable* removal doctrine, the federal-officer-removal statute, and the Outer Continental Shelf Lands Act ("OCSLA").

ARGUMENT

I. Plaintiff's Claims Arise Under Federal Common Law And Are Removable.

Claims that are based on interstate and international emissions are necessarily governed by federal common law as a matter of constitutional structure. *See* Defendants' Opening Brief ("OB") at 16–17. Plaintiff never disputes this black-letter rule, nor could it. And Plaintiff admits

that "federal courts have subject matter jurisdiction over complaints that, on their face and expressly, allege violations of federal common law." Resp.11. These two undisputed points together make clear that removal is proper here.

Plaintiff tries to circumvent this logical conclusion by insisting that "there is no 'federal common law' exception to the well-pleaded complaint rule." Resp.13 (capitalization omitted). But as the artful-pleading corollary makes clear, the well-pleaded complaint rule itself—not an exception to it—prevents Plaintiff from evading federal court by disguising its inherently federal claims. As the Supreme Court has explained, "a plaintiff may not defeat removal by omitting to plead necessary federal questions." *Franchise Tax Bd. of the State of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 22 (1983).

A. Federal Common Law Necessarily And Exclusively Governs Plaintiff's Claims.

Plaintiff never disputes that its claims—despite the state-law labels it has slapped on them—are necessarily governed by federal common law. In fact, Plaintiff never addresses the threshold issue of *what law* necessarily governs its claims. And with good reason: As the Second Circuit recently noted, a "mostly unbroken string of [Supreme Court]

cases has applied federal law to disputes involving interstate air or water pollution." *City of New York v. Chevron Corp.*, 993 F.3d 81, 91 (2d Cir. 2021).

This case involves transboundary greenhouse-gas emissions—what Plaintiff alleges are the "driver of global warming" causing its physical property injuries. 2-JA-65. Accordingly, Plaintiff's claims "demand the existence of federal common law," and "a federal rule of decision is necessary to protect uniquely federal interests." *New York*, 993 F.3d at 90. The Supreme Court has consistently recognized that "the basic scheme of the Constitution … demands" that federal law govern interstate or international pollution claims, *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 421 (2011) ("*AEP*"), and that "state law cannot be used" where, as here, a plaintiff's claims target out-of-state emissions, *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 n.7 (1981) ("*Milwaukee II*"). For these reasons, the Second Circuit found that such "sprawling" claims, which seek "damages for the cumulative impact of conduct occurring simultaneously across just about every jurisdiction on the planet," are "simply beyond the limits of state law" and thus in reality are "federal claims" governed by federal common law. *New York*, 993 F.3d at 92, 95.

By not disputing any of these principles, Plaintiff effectively concedes that its claims are governed by federal common law. This is dispositive, because claims are removable if a plaintiff could have invoked a federal court's jurisdiction and "filed its operative complaint in federal court." *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1748 (2019); *see also Maglioli v. All. HC Holdings LLC*, 16 F.4th 393, 406 (3d Cir. 2021) (removal appropriate when "plaintiff could have originally filed the action in federal court"). And 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). Accordingly, in *E.O.H.C. v. Secretary, U.S. Department of Homeland Security*, this Court held that a claim at issue was "governed by federal [common] law," and "because federal common law is federal law, disputes governed by it 'arise under the … laws … of the United States,'" the Court had federal-question jurisdiction. 950 F.3d 177, 192 (3d Cir. 2020) (alterations omitted). Here, too, removal is appropriate because Plaintiff's claims are governed by federal common law and could have originally been brought in federal court.

B. Plaintiff's Responses Are Unavailing.

Although Plaintiff does not dispute that its claims are governed by federal law, it maintains that its claims should be resolved in state courts under a patchwork of varying state-court rules and procedures. Plaintiff's arguments fail.

The well-pleaded complaint rule does not allow Plaintiff to avoid federal courts by putting state labels on federal claims. Plaintiff argues that it was entitled to plead its claims under state law because it is "master of its Complaint" under the "well-pleaded complaint rule." Resp.12–13. But an "independent corollary" of that rule is that "a plaintiff may not defeat removal by omitting to plead necessary federal questions." *Franchise Tax Bd.*, 463 U.S. at 22. "[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*" or by disguising an "inherently federal cause of action." 14C Wright & Miller, Fed. Prac. & Proc. Juris. § 3722.1 (4th ed.) (emphasis added).

It therefore makes no difference that Plaintiff did not explicitly label its claims as federal. *Contra* Resp.11. There is "ample precedent" demonstrating that federal jurisdiction lies where "the state claim

pleaded is 'really one' of federal law," and a plaintiff cannot "deny a defendant a federal forum" by artfully pleading "a federal claim … as a state law claim." *United Jersey Banks v. Parell*, 783 F.2d 360, 367 (3d Cir. 1986). As the Supreme Court has explained, "courts will not permit plaintiff to use artful pleading to close off defendant's right to a federal forum and occasionally the removal court will seek to 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) (alterations omitted).

Plaintiff erroneously insinuates that this Court in *Parell* and the Supreme Court in *Rivet* rejected the Supreme Court's observation in *Moitie*. Resp.15. But Plaintiff misreads the cases. *Parell* described *Moitie* as "the paradigmatic case of 'artful pleading,'" confirming the appropriateness of removing a case where, as here, "the extent of federal primacy is well established" and "all state law is displaced." 783 F.2d. at 367–68. *Rivet v. Regions Bank of Louisiana*, in turn, narrowed *Moitie*'s second footnote only as regards the separate, second part of that footnote, which discussed whether removal could rest on the preclusive effect of a prior federal judgment. 522 U.S. 470, 478 (1998). *Rivet*, however, expressly

confirmed the broader principle of removal jurisprudence articulated in that footnote, stating: "If a court concludes that a plaintiff has 'artfully pleaded' claims in this fashion, it may uphold removal even though no federal question appears on the face of the plaintiff's complaint." *Id.* at 475. And as this Court has since explained, "the 'artful pleading' doctrine … requires a court to peer through what are ostensibly wholly state claims to discern the federal question lurking in the verbiage." *U.S. Express Lines Ltd. v. Higgins*, 281 F.3d 383, 389 (3d Cir. 2002).

Plaintiff ignores the central lesson of the artful-pleading case law. What matters is "the substance of the plaintiff's claims," not "how the plaintiff pled the action." *Est. of Campbell by Campbell v. S. Jersey Med. Ctr.*, 732 F. App'x 113, 116 (3d Cir. 2018). Plaintiff's theory is that courts should blindly accept the labels a plaintiff puts on its claims, and ignore the substance of those claims. That is counter to the precedent of this Court and the Supreme Court, and would fly in the face of this Court's "independent duty" to ascertain its own jurisdiction. *Interfaith Cmty. Org. v. Honeywell Int'l*, Inc., 426 F.3d 694, 702 (3d Cir. 2005). Accepting Plaintiff's argument would also allow plaintiffs to illegitimately *enter* federal court, simply by using the necessary labels. *See 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.").

As the Supreme Court has explained in similar contexts, courts must often examine claims in order to determine the "gravamen" of a complaint for jurisdictional purposes. *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 35 (2015). To do so, courts are to "zero[] in on the core of [the] suit," in particular what "actually injured" the plaintiff. *Id.* "What 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. Sch.*, 137 S. Ct. 743, 755 (2017). 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 by using the right "magic words." *Id.* (citing *Sachs*, 577 U.S. at 32–36).

Plaintiff is attempting to assert claims that can arise only under federal law and keep them out of federal court simply by labelling them as state-law claims. This is exactly what the artful-pleading doctrine is meant to prevent. To allow Plaintiff to strategically evade federal court

in this manner "would elevate form over substance and would put a premium on artful labeling." *Jarbough*, 483 F.3d at 189.

The artful-pleading doctrine is not limited to complete preemption. Plaintiff next argues that "artful pleading" refers solely to complete preemption. Resp.13. But neither this Court nor the Supreme Court has ever so held. In fact, complete preemption is simply one application of the artful-pleading corollary, which arises *whenever* a plaintiff artfully pleads either to avoid or manufacture a federal claim.

Thus, in *Estate of Campbell*, this Court affirmed removal where a plaintiff should have brought its claims through the Federal Tort Claims Act, but instead relied on "a purely state law claim in state court." 732 F. App'x at 116. Without the power to remove such cases, "a defendant's ability to avail himself of a federal forum would be partly dependent on how the plaintiff pled the action, rather than the substance of the plaintiff's claims," thereby allowing the plaintiff to "avoid federal question jurisdiction through 'artful pleading.'" *Id.*

Lacking any genuine support for its novel argument, Plaintiff attempts to rely on cases that address whether Congress intended federal *statutes* to govern the claims at issue. *See* Resp.15–17 (citing *Goepel v.*

Nat'l Postal Mail Handlers Union, 36 F.3d 306 (3d Cir. 1994)). But *Goepel* did not hold, as Plaintiff suggests, that claims arising under *federal common law* do not provide subject-matter jurisdiction. Nor did *Goepel* consider whether claims pleaded with state-law labels can actually be federal-common-law claims by virtue of the Constitution's structure. *See Goepel*, 36 F.3d at 309 n.3 (the Court did "not reach the question of whether the Goepels could have stated a cause of action under federal common law"). Instead, the Court considered a situation where the defendant "relied upon" a "statute," *id.* at 311, in contrast to this case, where federal law applies because our constitutional structure "does not permit the controversy to be resolved under state law," *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981).

In any event, the rationale behind applying the artful-pleading doctrine in the complete-preemption and federal-common-law contexts is the same. That doctrine exists to prevent plaintiffs from camouflaging a claim that is "purely a creature of federal law" beneath state-law labels in an effort to rob defendants of their right to a federal forum. *Franchise Tax Bd.*, 463 U.S. at 23. That principle applies all the more here, given that federal common law alone governs Plaintiff's claims. Indeed, 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).

This is why numerous other courts have recognized federal common law as a basis for removal. *See, 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); *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 928 (5th Cir. 1997). Plaintiff's attempts to distinguish these cases are unavailing. Plaintiff argues that *Alcoa* represented a mere articulation of *Grable* and "was limited to its unusual facts." Resp.18. But *Alcoa* never considered *Grable* removal. As the dissent correctly noted: "The *Grable* theory … has not been addressed by … the panel majority." 853 F.3d at 156 (King, J., dissenting). Rather, *Alcoa* held that North Carolina's ostensibly state-law suit for state ownership of a riverbed was removable because, as here, "the constitutional nature" of nominally state-law claims requires them to be "governed by" federal common law. *Id.* at 147 (majority).

Similarly, while Plaintiff asserts that *Sam L. Majors* "d[id] not announce a general exception to the well-pleaded complaint rule," Resp.18,

Plaintiff misses the point. Federal common law is a distinct branch of federal law that on its own supports "arising under" jurisdiction. *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972). The Fifth Circuit held the claim at issue removable because it "ar[ose] under federal common law." *Sam L. Majors*, 117 F.3d at 928. Accordingly, *Sam L. Majors* confirms that, if, as here, a cause of action nominally pleaded under state law "arises under federal common law principles," then "removal is proper." *Id.* at 924; *see also id.* at 926 ("Federal [removal] jurisdiction exists if the claims in this case arise under federal common law.").

Defendants' federal-common-law basis for removal is not an ordinary preemption defense. *See* Resp.19–22. An ordinary preemption defense would contend that a federal statute prevents the plaintiff from recovering under an otherwise viable state-law claim. That type of argument has not been invoked by Defendants as a basis for jurisdiction. Rather, the Court must consider Defendants' position that Plaintiff's nominally state-law claims necessarily and exclusively arise under federal law. *See* OB.29–30.

Plaintiff mischaracterizes Defendants' federal-common-law argument as a merits-stage defense, but Defendants' removal argument concerns the antecedent question of which law governs Plaintiff's claims. The Supreme Court's decision in *Standard Oil* elucidates this distinction. Under the two-step analytical framework set forth in *Standard Oil*, courts must: (1) determine whether, for jurisdictional purposes, the source of law is federal or state; and then (2) if federal law is the source, determine the substance of the federal law and decide whether the plaintiff has stated a viable federal claim. *United States v. Swiss Am. Bank, Ltd.*, 191 F.3d 30, 42–45 (1st Cir. 1999) (citing *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301, 305 (1947)).

Only that first "source" question—asking which law applies—is relevant to removal jurisdiction, and the "choice-of-law task is a federal task for federal courts." *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 592 (1973). The answer to that choice-of-law question is clear: for interstate and international pollution claims like Plaintiff's, the only available source of law is federal, meaning those claims "arise under" federal law for purposes of removal.

By contrast, Plaintiff's theory would result in absurd consequences that are inconsistent with our federal system and common sense. Illinois could sue the City of Milwaukee in Illinois state court under Illinois law for interstate water pollution, and Milwaukee would be denied a federal forum to address the interstate dispute. *Contra Milwaukee II*, 451 U.S. 304. Or Connecticut could bring suit in its own state courts under Connecticut law against an out-of-state defendant seeking to abate interstate air pollution, and the defendant could not remove to federal court. *Contra AEP*, 564 U.S. 410. Plaintiff's proposed rule is inconsistent with the Supreme Court's rulings that these claims arise under federal common law and thus are properly heard in federal court.

II. Plaintiff's Claims Necessarily Raise Disputed And Substantial Federal Issues And Are Thus Removable Under *Grable*.

Plaintiff's claims are also removable because their resolution requires answering substantial, disputed federal questions under federal common law and the First Amendment, thereby justifying removal under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 313–14 (2005).

Federal Common Law. Plaintiff argues that Defendants have not identified an element of its claims that requires resolution of federal law.

Resp.23–24. But as explained above, federal common law *exclusively* governs Plaintiff's claims, meaning that the elements are *entirely* federal. Therefore, even if federal common law did not provide an independent basis for removal, the action would still be removable under *Grable*. Where "federal common law *alone* governs" a claim, "the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law," making removal appropriate. *Battle v. Seibels Bruce Ins. Co.*, 288 F.3d 596, 607 (4th Cir. 2002); *accord Republic of Philippines v. Marcos*, 806 F.2d 344, 354 (2d Cir. 1986); *Newton v. Capital Assurance Co.*, 245 F.3d 1306, 1308–09 (11th Cir. 2001); *Torres v. S. Peru Copper Corp.*, 113 F.3d 540, 542–43 (5th Cir. 1997).

Plaintiff's exclusively federal claims stand in stark contrast to the cases relied on by Plaintiff where the "underlying right or obligation arises only under state law." Resp.24–45. Here, Plaintiff's interstate tort claims necessarily arise under federal law alone, meaning they are removable. Indeed, it is difficult to imagine a situation in which a cause of action that is inherently federal would *not* raise a substantial federal question.

First Amendment. Plaintiff's allegations of "disinformation campaigns," 1-JA-36–37, necessarily include affirmative federal-law elements required by the First Amendment, OB.33–36. Plaintiff suggests that these First Amendment arguments are "federal constitutional defenses" rather than aspects of its claims. Resp.29. But the First Amendment grafts affirmative federal-law *elements—not* defenses—onto common-law speech torts. The First Amendment imposes "a constitutional requirement" onto these torts under which plaintiffs must "bear the burden of showing falsity, as well as fault, before recovering damages." *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986).

The constitutional proof requirements for speech-related claims are "essential" elements of Plaintiff's claims. *Gully v. First Nat'l Bank*, 299 U.S. 109, 112 (1936). Plaintiff objects that the cases Defendants cited did not involve removal, Resp.29, but Plaintiff misses the point. Plaintiff's claims provide a basis for *Grable* removal because "a court will have to construe the United States Constitution" to decide Plaintiff's claims, which implicate broader federal interests involving matters of national and international concern. *Ortiz v. Univ. of Med. & Dentistry of N.J.*, 2009 WL 737046, at *3 (D.N.J. Mar. 18, 2009).

III. Plaintiff's Complaint Seeks To Impose Liability And Damages For Acts Undertaken At The Direction, Supervision, Or Control Of Federal Officers.

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). Plaintiff seeks to impose liability and damages based on the effects of Defendants' extraction, production, marketing, and sale of fossil fuels, substantial portions of which were performed under the direction, supervision, and control of federal officers. *See* OB.36–59.

A. Defendants Acted Under Federal Officers.

Plaintiff's chief contention is that federal contractors have a heightened burden to establish an "unusually close" relationship with the federal government, and that entities cannot "act under" federal officers when the relationship involves "[r]egulatory compliance and arms-length business relationships." Resp.43–44. That proposed standard flies in the face of this Court's precedent, which has made clear that federal contractors do not "bear some additional 'special burden'" in establishing that they acted under the authority of the federal officer. *Papp v. Fore-Kast Sales Co.*, 842 F.3d 805, 813 (3d Cir. 2016).

To the contrary, "[g]overnment contractors are a classic example" of federal-officer removal. *Maglioli*, 16 F.4th at 405. And federal contractors "act under" federal officers whenever "the contractors help[] the Government to produce an item that it needed," or "the federal government uses a private corporation to achieve an end it would have otherwise used its own agents to complete." *Papp*, 842 F.3d at 812 (alteration omitted).

The fact that contracts and regulations may govern a defendant's relationship with the federal government changes nothing. Federal contractors necessarily work pursuant to contracts with the federal government; if such contracts precluded an acting-under relationship, federal contractors could *never* qualify for federal-officer removal. Moreover, the federal government routinely communicates its instructions in the form of official regulations, but that does not negate federal-officer removal. *See, e.g.*, *In re Commonwealth's Motion to Appoint Couns. Against or Directed to Def. Ass'n of Phila.*, 790 F.3d 457, 461, 469 (3d Cir. 2015).

This Court has held only that "regulation or compliance" alone is not *sufficient*; defendants must also "show that their actions involve an

effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior." *Maglioli*, 16 F.4th at 404–05. And that is exactly what "[g]overnment contractors" do when, as here, they "help[] the Government to produce an item that it needs." *Id*.

Defendants have pointed to numerous examples where they acted under federal officers in producing substantial amounts of fossil fuels for the federal government. Moreover, this record is far more comprehensive than any that a court of appeals has yet considered, so the prior cases considering similar claims on which Plaintiff relies (Resp.35) are unpersuasive and inapposite.

First, for decades Defendants have been manufacturing and supplying specialized fuels for the military, items that the government needed and otherwise would have had to produce for itself. *See* OB.47–48. Notably, Plaintiff does not contest that Defendants were acting under federal officials in performing these activities, nor could it. Defendants produce and supply large quantities of highly specialized, non-commercial-grade fuels that must conform to precise governmental needs to satisfy the unique operational and ever-changing requirements of the U.S. military's planes, ships, and other vehicles. *See* 3-JA-256–63. The record

here is clear: "[T]he military" has "rel[ied] on oil companies to supply it under contract with specialty fuels." 7-JA-1476–77. This arrangement is "an archetypal case" of acting under federal-officer direction. *See Papp*, 842 F.3d at 813. Plaintiff's allegations in part are "directed at actions [Defendants] took while working under a federal contract to produce an item the government needed, to wit, [specialized military fuels], and that the government otherwise would have been forced to produce on its own." *Id.*

The amicus brief filed by former Chairmen of the Joint Chiefs of Staff confirms this point: "For more than a century, petroleum products have been essential for fueling the U.S. military around the world." Amicus Br. of Gen. (Ret.) Richard B. Myers & Adm. (Ret.) Michael G. Mullen at 3. To ensure a steady supply, "the Federal Government has directed, incentivized, and contracted with Defendants to obtain oil and gas products," and "[a] substantial portion of the oil and gas used by the U.S. military are non-commercial grade fuels developed and produced by private parties, including Defendants here, under the oversight and direction of military officials." *Id.* at 6. The contracts to produce these specialized

fuels "were not typical commercial agreements"—they required Defendants "to supply fuels with unique additives to achieve important objectives." *Id.* at 20–21.

Second, the Navy hired Defendant Chevron's predecessor Standard Oil to operate the Navy's portions of the Elk Hills Petroleum Reserve. OB.44–46. Plaintiff contends that the contract under which Standard Oil was hired includes "only general direction[s]" and not the precise specifications needed for federal-officer removal. Resp.46. But the relationship between the Navy and Standard Oil went well beyond a federal-contractor relationship. The Navy had to decide whether it wanted to produce oil itself or hire a contractor, OB.45–46, and it "chose to operate the reserve through a contractor rather than with its own personnel," 5-JA-910. Standard Oil operated the Reserve for the Navy for more than 30 years, and during this period, the Navy viewed Standard Oil as "*in the employ of the Navy Department*." 3-JA-408 (emphasis altered). Thus, Standard Oil's activities at Elk Hills taken under the Navy's direction "assist[ed]" and "help[ed] carry out[] the duties [and] tasks of the federal

superior." *Watson v. Philip Morris Cos.*, 551 U.S. 142, 152 (2007) (emphasis omitted). No court of appeals has yet addressed this operating agreement.

Third, Defendants produced oil and gas under detailed OCS leases subject to federal-officer supervision and direction. The government "procured the services of oil and gas firms to develop urgently needed energy resources on federal offshore lands that the federal government was unable to do on its own" because it lacked the experience, expertise, and technological capabilities. 7-JA-1357–58. And the *federal government*, not the oil companies, "dictated the terms, locations, methods, and rates of hydrocarbon production on the OCS" and, accordingly, "[t]he policies and plans of the federal OCS program did not always align with those of the oil firms interested in drilling." 7-JA-1360.

Plaintiff argues that Defendants' OCS leases and operations entail only the right of first refusal by the government without any officer-directed conduct. Resp.44. But that claim is contradicted by the record evidence. The federal officials who oversee and manage the OCS program "did not engage in perfunctory, run-of-the-mill permitting and inspection." 7-JA-1374. Rather, they "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.

Plaintiff also contends that the government's oversight of the OCS constitutes nothing more than a standard set of "legal requirements." Resp.45. But Plaintiff misstates the relevant standard—not only is formal oversight not required, but this Court has rejected "the notion that a defendant could only be 'acting under' a federal officer if the complained-of conduct was done at the specific behest of the federal officer or agency." *Papp*, 842 F.3d at 813. Moreover, Plaintiff misses Defendants' key role in the federal government's OCS endeavors. Because the federal government had "no prior experience or expertise" in extracting oil and gas, it chose to rely on private entities. 7-JA-1370. This is the 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 Government-owned oil and gas. *Watson*, 551 U.S. at 154.

Fourth, Plaintiff challenges Defendants' operation of the Strategic Petroleum Reserve ("SPR"), arguing that it simply involved "off-the-shelf

products." Resp.47–48. Plaintiff misapprehends the nature of Defendants' arrangement with the government: Defendants had to pay in-kind royalties to fill the reserve and to draw down the supply whenever called upon by the government. *See* 3-JA-286; 5-JA-959; 5-JA-980 tbl.13. Under this arrangement, Defendants function as private contractors helping "the [g]overnment to produce an item that it needs." *Baker v. Atl. Richfield Co.*, 962 F.3d 937, 942 (7th Cir. 2020).

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

Plaintiff argues that its Complaint focuses on Defendants' alleged misrepresentations, rather than the decades of fossil-fuel production that Plaintiff alleges actually caused its physical injuries. Resp.36. This argument misstates the law and ignores Plaintiff's own allegations.

"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] [C]omplaint." *Watson*, 551 U.S. at 147 (emphasis added). Federal-officer removal is satisfied where, as here, there is a connection between "the plaintiff's claims against the defendant" and the defendant's actions "under color of federal office." *Golden v. N.J. Inst. of*

Tech., 934 F.3d 302, 309 (3d Cir. 2019). A "claim" is not, as Plaintiff would have it, simply one component of the alleged cause of action that the plaintiff has strategically chosen to highlight; a "claim" is a demand for "a legal remedy to which one asserts a right," *Vazquez v. TriAd Media Sols., Inc.*, 797 F. App'x 723, 726 (3d Cir. 2019) (quoting Black's Law Dictionary (10th ed. 2014)), "esp[ecially] the part of a complaint in a civil action specifying what relief the plaintiff asks for," Black's Law Dictionary (11th ed. 2019). Here, Plaintiff's "claims" are pleas for compensatory and punitive damages and orders of abatement for alleged physical injuries stemming from the effects of global climate change allegedly caused by the production and combustion of fossil fuels.

Production and combustion are necessary links in the causal chain leading to Plaintiff's asserted injuries. That is why Plaintiff included them in the Complaint. Plaintiff alleges that greenhouse gases are the "leading" cause of climate change, and that the "[g]lobal production and combustion of fossil fuels is the central reason why the atmospheric concentration of greenhouse gases … has dramatically increased over the last fifty years." 2-JA-64–65. Plaintiff further alleges that all of the

harms that form the basis of its claims, including rising sea levels, erosion, and extreme weather are caused by rising global temperatures that result from fossil-fuel combustion. *See* 2-JA-69. Plaintiff's own allegations thus demonstrate that the *sine qua non* in its claimed injuries is the greenhouse-gas emissions resulting from the production and combustion of petroleum products, making Defendants' extraction, production, and sale of oil and gas essential elements of this causal chain. *See* 2-JA-79.

Plaintiff next argues that its Complaint disclaims injuries arising from Defendants' "provision of fossil fuel products to the federal government for military and national defense purposes." Resp.40–41. But Plaintiff's alleged injuries necessarily arise from the total accumulation of all greenhouse-gas emissions, and Plaintiff offers no method to isolate its alleged climate-related injuries from federally directed conduct, and courts have held that there is no "realistic possibility" of doing so. *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 880 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012).[1] This Court should not

[1] Plaintiff's attempt to cast 1.5 *billion* gallons of fuel provided to the government as "scant," Resp.41–42, is irrelevant. Fossil fuels produced at the behest of the federal government remain a core part of

accept Plaintiff's attempts to strategically ignore whole swaths of its Complaint. *See O'Connell v. Foster Wheeler Energy Corp.*, 544 F. Supp. 2d 51, 54 n.6 (D. Mass. 2008) (rejecting attempt to disclaim "recovery for any injuries resulting from" acts "committed at the direction of an officer of the United States Government"); *Ballenger v. Agco Corp.*, 2007 WL 1813821, at *2 (N.D. Cal. June 22, 2007) ("[T]he fact that Plaintiffs' complaint expressly disavows any federal claims is not determinative."). Indeed, the question whether "Plaintiff['s] injuries occurred under color of federal office" is "for federal—not state—courts to answer." *Nessel v. Chemguard, Inc.*, 2021 WL 744683, at *3 (W.D. Mich. Jan. 6, 2021); *see also Baker*, 962 F.3d at 944 ("[W]hether ... [a plaintiff's] injuries flowed from the Companies' specific war-time" activities are "*merits questions* that a federal court should decide.").[2]

Plaintiff's claims. *See Baker*, 962 F.3d at 945 (all that is required is that "a small, yet significant, portion of [defendants'] relevant conduct" be related to federal authority).

[2] Plaintiff never disputes that Defendants have several colorable defenses, *see* Resp.34; OB.59. This is critical because "[o]ne of the primary purposes of the [federal officer] removal statute—as its history clearly demonstrates—was to have [federal] defenses litigated in the federal courts." *Willingham v. Morgan*, 395 U.S. 402, 407 (1969).

IV. Plaintiff's Action Is Connected To Defendants' Activities On The OCS.

Plaintiff's claims are also removable because they are connected with Defendants' extraction and production of oil and gas from the OCS, and Plaintiff's requested relief would potentially impair those OCS operations. Plaintiff argues that Defendants failed to establish but-for causation between their OCS operations and Plaintiff's claims. Resp.50–51. But this argument misapprehends both the standard for removal and how that standard applies here.

OCSLA establishes federal jurisdiction over actions "arising out of, or *in connection with*" any OCS operation. 43 U.S.C. § 1349(b)(1) (emphasis added). Plaintiff insists that "Defendants' OCS operations must be the 'but for' cause of Plaintiff's claims to establish OCSLA jurisdiction." Resp.50. But-for causation, however, is not required to satisfy OCSLA's "in connection with" standard, which is "undeniably broad in scope." *EP Operating Ltd. P'ship v. Placid Oil Co.*, 26 F.3d 563, 569 (5th Cir. 1994).

For this reason, courts routinely find OCSLA jurisdiction even where an OCS operation is only indirectly or partially related to Plaintiff's alleged harms. *See* OB.61–63. Just like when workers are exposed

to asbestos partially on the OCS, *see Lopez v. McDermott, Inc.*, 2018 WL 525851, at *3 (E.D. La. Jan. 24, 2018); *Ronquille v. Aminoil Inc.*, 2014 WL 4387337, at *2 (E.D. La. Sept. 4, 2014), here a portion of Plaintiff's alleged harms arose from Defendants' OCS operations. Plaintiff tries to distinguish these cases as "directly implicat[ing] OCS operations," while arguing that Defendants' alleged "disinformation campaign" was only tangentially related. Resp.51–52. But, again, Plaintiff ignores the central role in its Complaint of Defendants' exploration, extraction, and production of oil and gas—significant portions of which occurred on the OCS. *See* OB.54–59. Just as in *Lopez* and *Ronquille*, the Complaint alleges that Plaintiff's injuries result from the "extraction, production, and sale of fossil fuels," 2-JA-79, and there can be no dispute that a significant portion of those fuels were produced on the OCS, *see* OB.60.

Plaintiff also dismisses the Supreme Court's holding in the personal-jurisdiction context that the "requirement of a 'connection' between a plaintiff's suit and a defendant's activities" does *not* require a "causal showing," let alone but-for causation. *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1026 (2021). Plaintiff argues that *Ford* is "inapposite" because it was not interpreting statutory language. Resp.51.

But *Ford* demonstrates that the Court interprets the term "connection" in the jurisdictional context to require something less than a causal nexus. Plaintiff's contrary view would render the "connection" prong superfluous.

In any event, Defendants' substantial OCS operations satisfy even Plaintiff's preferred "but-for" standard. Plaintiff's theory of harm is 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. In other words, the normal "use of [Defendants'] fossil fuels," 2-JA-158, causes "global warming and its attendant climate consequences," 2-JA-124–25. Plaintiff's claims thus implicate *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"—including on the OCS. 2-JA-49.

Plaintiff insists that Defendants' OCS activities are immaterial because "the core of Plaintiff's claims" is Defendants' alleged "disinfor-

mation campaign." Resp.51. But Plaintiff asserts that the *result* of allegedly spreading misinformation was to "rapidly accelerate[] [Defendants'] production, marketing, and sale of fossil fuels." 2-JA-94–95. Thus, a but-for element of Plaintiff's own claims is the increased production of Defendants' petroleum products, a significant portion of which came from the OCS. *See* OB.63–64. Under any formulation, Plaintiff's claims plainly satisfy OCSLA's "in connection with" standard.

Plaintiff argues that Defendants' interpretation of OCSLA "would establish federal jurisdiction over any damages suit against any company that operates on the OCS." Resp.53. But federal jurisdiction exists here because of the unbounded nature of Plaintiff's claims. *See generally* 2-JA-42–75. As the source of up to one-third of annual domestic oil production, *see* OB.60, the OCS is squarely within the scope of Plaintiff's sprawling claims.

Finally, Plaintiff does not contest that "any 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." *EP Operating*, 26 F.3d at 570. Instead, Plaintiff attempts to distinguish *EP Operating* as involving

a "partition action [over] ownership rights," as opposed to the collateral consequences of a damages suit. Resp.53. But Plaintiff seeks potentially massive damages and disgorged profits, as well as an order of "abatement," 2-JA-184—relief that would deter, if not make entirely impractical, further production on the OCS. "[T]o avoid all liability" under Plaintiff's theory of the case, "[Defendants'] only solution would be to cease global production altogether," including on the OCS. *New York*, 993 F.3d at 93.

CONCLUSION

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

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CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2022, 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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