UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

(Northern Division)

ANNE ARUNDEL COUNTY, MARYLAND, Plaintiff, v. BP P.L.C., *et al.*, Defendants.	CASE NO.: 21-cv-01323-SAG

OPPOSITION TO PLAINTIFF'S MOTION TO REMAND

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I. INTRODUCTION

Plaintiff seeks to impose liability for global climate change on a select group of energy companies that it alleges are responsible for supplying the world with a small fraction of the oil and gas products that governments, businesses, and consumers have demanded and used over many decades. Despite the obvious national and international implications of its claims, Plaintiff tried to evade federal jurisdiction by filing suit in state court and pleading nominally state-law claims. But Plaintiff's artful pleading does not divest this Court of jurisdiction. Plaintiff cannot obscure the necessary role that federal law plays in the Complaint's core allegations or the fact that a significant portion of Defendants' actions that purportedly caused Plaintiff's injuries were performed under the direction, supervision, and control of the U.S. government.

As the Court knows, Plaintiff's Motion to Remand is not the first to be filed in a climate change case. But here, Defendants present a materially expanded evidentiary record—including the unrebutted declarations of two prominent historians—that is among the most extensive presented to any court to date. Indeed, Plaintiff concedes that Defendants have presented additional arguments and evidence in support of removal that were not considered by the Fourth Circuit in *Mayor and City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178 (4th Cir. 2022) ("*Baltimore*") or most of the other courts that have previously addressed related issues. For example, Professor Mark Wilson, from the University of North Carolina, explains in his declaration how "the U.S. government has controlled and directed oil companies in order to secure and expand fuel supplies for its military forces and those of its allies, both in wartime and in peacetime," by employing "direct orders, government ownership, and national controls." Wilson Decl. ¶ 2. Professor Tyler Priest, from the University of Iowa, explains in his declaration that for "more than six decades, the U.S. federal Outer Continental Shelf ("OCS") program filled a national

government need," Priest Decl. ¶ 7(1), and federal officials "supervised, directed, and controlled the rate of oil and gas production" from Defendants' operations on the OCS to enforce "the federal government's responsibilities as a resource owner and trustee" of these federal lands, *id.* ¶ 48.

The decisions of other courts, including the Fourth Circuit in *Baltimore*, thus do not dictate the outcome here. As demonstrated by, among other things, this new and expanded factual record, Defendants properly removed this action on multiple independent grounds.

***First*, this case is removable under the federal officer removal statute.** Federal law provides for removal of an action against "any officer (or any person acting under that officer) of the United States or of any agency thereof . . . for or relating to any act under color of such office." 28 U.S.C. § 1442(a)(1). The "federal officer removal statute must be 'liberally construed.'" *Cnty. Bd. of Arlington Cnty., Virginia v. Express Scripts Pharmacy, Inc.*, 996 F.3d 243, 250–51 (4th Cir. 2021) (quoting *Watson v. Philip Morris Companies, Inc.*, 551 U.S. 142, 150 (2007)). And the Court must "construe the facts in the removal notice in the light most favorable to" Defendants. *In re Commonwealth's Motion To Appoint Couns. Against Or Directed To Def. Ass'n Of Phila.*, 790 F.3d 457, 466 (3rd Cir. 2015) ("*Def. Ass'n of Philadelphia*").

Although the Fourth Circuit rejected the federal officer removal arguments in *Baltimore*, the record here includes substantial, additional categories of evidence not presented there that overcome the deficiencies identified by the Fourth Circuit. This evidence shows that Defendants have: performed critical and necessary functions for the U.S. military to meet national security needs; engaged in activities related to Plaintiff's claims pursuant to government mandates, leases, and contracts; and produced oil and gas on federal lands (including the OCS) under federal direction, supervision, and control. These are all activities that, "in the absence of [] contract[s] with [] private firm[s], the Government itself would have had to perform," which is sufficient for

removal. *Watson*, 551 U.S. at 154. Additional evidence here includes, among other things:

- New evidence that the federal government controlled Defendants' production during World War II and the Korean War. Indeed, as senior government officials have explained: "No one who knows even the slightest bit about what the petroleum industry contributed to the war can fail to understand that it was, without the slightest doubt, one of the most effective *arms of this Government* . . . in bringing about a victory," NOR Decl. Ex. 43 at 1 (emphasis added);

- New evidence that Defendants acted under federal officers by producing and supplying highly specialized, non-commercial grade fuels for the military that continue to be the "lifeblood of the full range of Department of Defense ["DOD"] capabilities," NOR Decl. Ex. 57;

- A declaration from Professor Mark Wilson detailing how "the U.S. government has controlled and directed oil companies in order to secure and expand fuel supplies for its military forces and those of its allies, both in wartime and in peacetime," by employing "direct orders, government ownership, and national controls," Wilson Decl. ¶ 2;

- New evidence, including declassified documents, showing that Standard Oil, a predecessor of Defendant Chevron, acted under federal officers by operating the Elk Hills reserve under the control of the U.S. Navy, and that Standard Oil was "*in the employ* of the Navy Department and [was] responsible to the Secretary thereof," NOR Decl. Ex. 29 at 3 (emphasis added);

- New evidence that Defendants acted under federal officers in performing operations on the OCS to fulfill basic government duties that the federal government would otherwise need to perform itself. In fact, in response to the Organization of the Petroleum Exporting Countries ("OPEC") oil embargo, the federal government considered creating a *national* oil company to facilitate the production of oil and gas on the OCS, but ultimately decided to use private companies to accomplish this objective, NOR Decl. Exs. 13–14;

- A declaration from Professor Tyler Priest explaining that for "more than six decades, the U.S. federal [OCS] program filled a national government need," and federal officials "supervised, directed, and controlled the rate of oil and gas production." Priest Decl. ¶¶ 7(1), 48. These leases are "not merely commercial transactions between the federal government and the oil companies;" rather, "[f]ederal officials viewed these firms as agents of a larger, more long-range energy strategy to increase domestic oil and gas reserves," *id.* ¶¶ 7(1), 7(2); and

- New evidence that Defendants acted under federal officers by supplying oil for and managing the Strategic Petroleum Reserve, including during emergency drawdowns, NOR Decl. Ex. 115 at 17.

This evidence was not considered by the Fourth Circuit in *Baltimore* and is more than sufficient to establish jurisdiction under the federal officer removal statute. Indeed, the Supreme

Court has held that federal officer removal is proper when a defendant engages in "an effort to assist, or to help carry out, the duties or tasks of the federal superior." *Watson*, 551 U.S. at 150. And the Fourth Circuit has repeatedly emphasized that courts "have unhesitatingly treated the 'acting under' requirement as satisfied where a contractor seeks to remove a case involving injuries arising from equipment that it *manufactured for the government*." *Arlington*, 996 F.3d at 250 (quoting *Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 255 (4th Cir. 2017)). The Fourth Circuit's recent decision in *Arlington*, finding that the defendants' provision of opioids under contracts with the Department of Defense was sufficient for federal officer removal, is directly on point and confirms that removal is appropriate here. 996 F.2d at 253. In fact, the propriety of removal is even more apparent here, where the non-commercial grade fuels and services that Defendants provided to the federal government were more specialized and more uniquely tailored under the direction of federal officers than the opioids in *Arlington*.

When Plaintiff cannot run from the evidence, it runs from its own allegations. In Plaintiff's telling, none of Defendants' evidence supports federal jurisdiction because its claims are based not on the production, sale and use of oil and gas, but rather on a "campaign to deceive and mislead consumers." Mot. at 4. But even if liability is tied to an alleged "campaign of deception," that does not change the fact that Defendants' production and sale of fossil fuels, including at the direction of federal officers, is undeniably *necessary* to Plaintiff's claims, which seek damages for alleged harms caused by the *cumulative production and use* of oil and gas around the world. Compl. ¶¶ 47, 133.

The necessary connection between Defendants' production of oil and gas and Plaintiff's claims is confirmed on the face of the Complaint, which is replete with references to Defendants' production and sales and their alleged impacts. *See, e.g.*, *id.* ¶¶ 6–7, 25–34, 167. Indeed, Plaintiff

alleges—in the very first paragraph of its Complaint—that the "*unrestricted production and use* of fossil fuel products create greenhouse gas pollution that warms the planet and changes our climate." *Id.* ¶ 1 (emphasis added). According to Plaintiff, the "production and consumption of oil, coal and natural gas" have led to an "increase in global greenhouse gas pollution," which has "substantially contributed to a wide range of dire climate-related effects" and caused Plaintiff's alleged injuries. *Id.* ¶ 2. "It is precisely because fossil fuels emit greenhouse gases—which collectively 'exacerbate global warming'—that the [plaintiff] is seeking damages." *City of New York v. Chevron Corp.*, 993 F.3d 81, 91 (2d Cir. 2021). And because significant quantities of Defendants' oil and gas production and sales took place under the direction, supervision, and control of federal officers, federal jurisdiction under the federal officer removal statute is proper.

***Second*, Plaintiff's claims are removable under *Grable*.** Suits alleging only state-law causes of action may still "arise under" federal law where the "state-law claim[s] necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005). To the extent Plaintiff's claims are based on supposed misrepresentations made by Defendants, those claims would arise under federal law for purposes of *Grable* jurisdiction because they necessarily incorporate affirmative federal constitutional elements imposed by the First Amendment. The trial court cannot resolve Plaintiff's claims without addressing on the merits those federal constitutional elements. The Supreme Court has made clear that where nominally state-law tort claims target speech on matters of public concern (like climate change), the First Amendment injects affirmative federal-law elements into the plaintiff's cause of action, including factual falsity, actual malice, and proof of causation of actual damages. These issues are not

"defenses," but constitutionally required elements of the claim on which Plaintiff bears the burden of proof as a matter of federal law.

Finally, removal is proper on several additional grounds including federal common law; the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1349(b)(1); and federal enclaves jurisdiction. NOR ¶¶ 14–28; 30–41; 189–98. Although the Fourth Circuit held that these grounds did not support removal in *Baltimore*, Defendants raise them here, and incorporate by reference the relevant portions of the Notice of Removal, to preserve their arguments on these removal grounds for appellate review. *Id.* Moreover, Defendants respectfully submit that the Fourth Circuit's decision was incorrect and the defendants in *Baltimore* will seek further review by petitioning the Supreme Court for a writ of certiorari, and that petition is due by October 14, 2022. As explained more fully in Defendants' Motion to Stay, the Supreme Court may well grant review in that case given the current conflict among the courts of appeals on these issues of significant national importance—indeed, the Supreme Court already granted review and reversed the Fourth Circuit once before in that very case. ECF Nos. 128, 136. Accordingly, the Court should await further guidance from the Supreme Court before deciding this Motion. Further, in response to the Court's June 27, 2022 letter Order (ECF No. 137), Defendants will provide the Court with a copy of the petition for certiorari as soon as it is filed.[1]

* * *

[1] The Court's June 27, 2022, letter Order reserved ruling on Defendants' Motion to Stay until the parties have completed briefing on the motion to remand. When this briefing is complete and the Court considers whether a further stay is warranted, it should also consider that the Circuit Court for Baltimore City recently issued a stay of all proceedings until Defendants' anticipated petition to the Supreme Court of the United States in *Baltimore* is resolved. *See* **Exhibit 1**, attached. The decision to stay that proceeding—which has been pending much longer than this case—demonstrates that it would be appropriate to stay proceedings in this case until the federal appellate process is concluded.

In sum, the Complaint challenges the production, sale, and consumption of oil and gas products used every day by virtually every person on the planet. A substantial portion of these products was produced on federal lands and under the direction and control of federal officers. The Complaint seeks to upend longstanding national and international policies developed by the political branches of our federal government to balance the need to protect our national economy and security while preserving the environment and climate. This case belongs in federal court and removal is proper.[2]

II. LEGAL STANDARD

Removal from state court is proper if the federal court would have had original jurisdiction of the action. 28 U.S.C. § 1441(a). Federal district courts "have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. "The removal process was created by Congress to protect defendants." *Legg v. Wyeth*, 428 F.3d 1317, 1325 (11th Cir. 2005). To justify removal, the removing party need only show that there is federal jurisdiction over a single claim. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 559, 563 (2005).

III. ARGUMENT

A. This Action Is Removable Under the Federal Officer Removal Statute

Defendants properly removed this action because the federal government directed Defendants to engage in activities relating to Plaintiff's claims and alleged injuries. *See* 28 U.S.C. § 1442(a)(1). The federal officer removal statute authorizes removal where, as here, (1) Defendants "acted under" a federal officer; (2) Plaintiff's claims are "for or relating to" an act

[2] Many Defendants contend that they are not subject to personal jurisdiction in Maryland. Defendants submit this Opposition subject to, and without waiver of, these jurisdictional objections.

under color of federal office; and (3) Defendants have a "colorable federal defense." *Sawyer*, 860 F.3d at 254–55.

"[T]he federal officer removal statute is to be 'broadly construed' in favor of a federal forum." *Def. Ass'n of Philadelphia*, 790 F.3d at 466–67. As the Fourth Circuit recently explained, the "federal officer removal statute must be liberally construed" and "the ordinary presumption against removal does not apply." *Arlington*, 996 F.3d at 251 (citations omitted). At this stage, Defendants' allegations "in support of removal" need only be "facially plausible," and Defendants receive the "benefit of all reasonable inferences from the facts alleged." *Baker v. Atl. Richfield Co.*, 962 F.3d 937, 941, 945 (7th Cir. 2020). A federal court must "credit [the defendant's] theory of the case for purposes of [removal]." *Jefferson County, Ala. v. Acker*, 527 U.S. 423, 432 (1999); *accord Leite v. Crane Co.*, 749 F.3d 1117, 1124 (9th Cir. 2014); *K&D LLC v. Trump Old Post Off. LLC*, 951 F.3d 503, 506 (D.C. Cir. 2020); *Baker*, 962 F.3d at 947.

1. Defendants "Acted Under" the Direction of Federal Officers

The United States Supreme Court has held that the "acting under" phrase is "broad" and is to be "liberally construed in favor of the entity seeking removal." *Watson*, 551 U.S. at 147. The requirement can thus be satisfied in multiple ways. Where "'the federal government uses a private corporation to achieve an end it would have otherwise used its own agents to complete,' that contractor is 'acting under' the authority of a federal officer." *Papp v. Fore-Kast Sales Co.*, 842 F.3d 805, 812 (3d Cir. 2016); *see also, e.g.*, *Watson*, 551 U.S. at 154 ("[Defendants] performed a job that, in the absence of a contract with a private firm, the Government itself would have had to perform."). Similarly, where the government enlists a private party in "an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior," the acting under requirement is met. *Watson*, 551 U.S. at 152 (emphases added). In addition, when there is an "unusually close [relationship] involving detailed regulation, monitoring, or supervision," the acting under

requirement is satisfied, too—as Plaintiff itself concedes. *Id.* at 151, 153; Mot. at 19.

This is true regardless of whether the federal government uses the private company through an arm's-length contract or otherwise. The Fourth Circuit has repeatedly emphasized that "courts have unhesitatingly treated the 'acting under' requirement as satisfied where a contractor seeks to remove a case involving injuries arising from equipment that it *manufactured for the government*." *Arlington*, 996 F.3d at 250 (quoting *Sawyer*, 860 F.3d at 255). Similarly, the First Circuit has explained that "[c]ourts have consistently held that the 'acting under' requirement is easily satisfied where a federal contractor removes a case involving injuries arising from a product manufactured for the government." *Moore v. Elec. Boat Corp.*, 25 F.4th 30, 35 n.3 (1st Cir. 2022) (collecting cases).

The additional evidence Defendants present here clearly and unequivocally establishes that Defendants acted under federal officers in several ways. To be sure, a defendant does not act under a federal officer by "simply complying with the law" or "selling standardized consumer products to the federal government," and Defendants do not contend otherwise. *Arlington*, 996 F.3d at 251; Mot. at 2. But Defendants have done so much more. Defendants have worked under the direction of federal officers to provide the government with specialized, non-commercial grade fuels and services that are essential to the national economy and security. Defendants detail below five categories of activities they undertook pursuant to the direction of federal officers, many of which were not considered at all by the Fourth Circuit in *Baltimore*; and to the extent some activities were considered, Defendants provide here the "pertinent details" the Fourth Circuit found were lacking there. *Baltimore*, 31 F.4th at 237. Each one of these categories standing alone demonstrates that Defendants acted under federal officers; collectively, they leave no doubt that removal under the federal officer removal statute is proper.

a. Defendants Acted Under Federal Officers During World War II and the Korean War

The United States Department of Defense ("DOD") is the single largest consumer of energy in the United States, and one of the world's largest consumers of petroleum fuels. *See* NOR Decl. Ex. 51. As two former Chairmen of the Joint Chiefs of Staff explained, the "history of the Federal Government's control and direction of the production and sale of gasoline and diesel to ensure that the military is 'deployment-ready'" spans "more than a century," and during their tenures, petroleum products were "crucial to the success of the armed forces." NOR Decl. Ex. 52 at 2–3. "Because armed forces have used petroleum-based fuels since the 1910s, oil companies have been essential military contractors, throughout the last century." Wilson Decl. ¶ 2. The "U.S. government has controlled and directed oil companies in order to secure and expand fuel supplies for its military forces and those of its allies, both in wartime and in peacetime." *Id.*

World War II. During World War II, the United States pursued full production of its oil reserves and created agencies to *control* the petroleum industry, including Defendants' predecessors and affiliates.[3] The federal government built refineries and directed the production of certain products, and it managed scarce resources for the war effort. As Senator O'Mahoney, Chairman of the Special Committee Investigating Petroleum Resources, put it in 1945: "No one who knows even the slightest bit about what the petroleum industry contributed to the war can fail to understand that it was, without the slightest doubt, one of the most effective *arms of this Government* . . . in bringing about a victory." NOR Decl. Ex. 43 at 1 (emphasis added).

Multiple courts have found that the federal government exerted extraordinary control over

[3] The Complaint conflates the activities of Defendants with those of their predecessors, subsidiaries, and affiliates. Defendants reject these attributions, but describe the conduct of certain predecessors, subsidiaries, and affiliates to show that the Complaint, as pleaded, should remain in federal court.

Defendants during wartime to guarantee the supply of oil and gas for wartime efforts, such as high-octane aviation gasoline ("avgas"). "Because avgas was critical to the war effort, the United States government exercised significant control over the means of its production during World War II." *United States v. Shell Oil Co.*, 294 F.3d 1045, 1049 (9th Cir. 2002). Put simply, "[t]he government . . . used [its] authority to control many aspects of the refining process and operations." *Exxon Mobil Corp. v. United States*, 2020 WL 5573048, at *14 (S.D. Tex. Sept. 16, 2020). These cases show the nature and extent of federal control exerted through agencies such as the Petroleum Administration for War ("PAW"), which directed construction of new oil exploration, manufacturing facilities and allocation of raw materials; issued production orders; entered into contracts giving extraordinary control to federal officers; and "programmed operations to meet new demands, changed conditions, and emergencies." NOR ¶ 53.

As Professor Wilson explains in his unrebutted declaration, "PAW instructed the oil industry about exactly which products to produce, how to produce them, and where to deliver them." Wilson Decl. ¶ 11; *see also* NOR Decl. Ex. 16 at 28, 171, 177–79, 184 & n.18. "PAW told the refiners what to make, how much of it to make, and what quality." *Shell Oil Co. v. United States*, 751 F.3d 1282, 1286 (Fed. Cir. 2014). "Some directives restricted the use of certain petroleum products for high-priority war programs; others dictated the blends of products; while others focused on specific pieces of the industry, such as the use of individual pipelines." Wilson Decl. ¶ 11. PAW's directives to Defendants were mandatory and enforceable by law. *Exxon Mobil*, 2020 WL 5573048, at *11 (rejecting argument that private refiners "voluntarily cooperated," and instead finding they had "no choice" but to comply with the federal officers' direction). Its message to the energy industry was clear: the government would "get the results" it desired, and if "we can't get them by cooperation, then we will have to get them some other

way." NOR Decl. Ex. 47, at 8. PAW also maintained "disciplinary measures" for noncompliance, including "restricting transportation, reducing crude oil supplies, and withholding priority assistance." NOR Decl. Ex. 48. Controlling production of petroleum products by setting production levels, dictating where and how to explore for petroleum, managing operations, and rationing materials in order to help conduct a war are not the stuff of mere "regulation." They are the kind of special relationship that the Supreme Court described in *Watson*.

Defendants also acted under the federal government by operating and managing government-owned and/or government-funded petroleum production facilities. During World War II, the government built "dozens of large government-owned industrial plants" that were "*managed by private companies under government direction*." Wilson Decl. ¶ 14 (emphasis added). "The U.S. government enlisted oil companies to operate government-owned industrial equipment . . . [in order] to comply with government orders." *Id.* ¶ 15. These "oil companies were not merely top World War II prime contractors, but also served as government-designated operators of government-owned industrial facilities" or government-owned equipment within industrial facilities. *Id.* ¶ 19. Among the largest facilities was a refinery site in Richmond, California, operated by Socal (a Chevron predecessor), which was "the second-largest of all the facilities focused on aviation gasoline production, providing 10 percent of total global output of aviation fuel" by 1945. *Id.* And Defendants also acted under federal officers in constructing and operating the Inch Lines (pipelines extending from Texas to New Jersey) "under contracts" and "as agent[s]" for the federal government, bringing hundreds of millions of barrels of oil and refined products for use and combustion on the cross-Atlantic fronts during World War II.[4] Without

[4] *Schmitt v. War Emergency Pipelines, Inc.*, 175 F.2d 335, 335 (8th Cir. 1949); 8 Fed. Reg. 1068–69 (Jan. 20, 1943); 8 Fed. Reg. 13343 (Sept. 30, 1943); NOR Decl. Ex. 116 at 1–2; *id.* Ex. 46 at 104–05, 108; *id.* Ex. 94 at 3.

Defendants as contractors and agents (via War Emergency Pipelines, Inc.), "the Government itself would have had to perform" these wartime activities. *Watson*, 551 U.S. at 154.

Korean War. With the advent of the Korean War in 1950, President Truman established the Petroleum Administration for Defense ("PAD") under authority of the Defense Production Act ("DPA"). PAD issued production mandates to Defendants and other oil and gas companies, including to ensure adequate quantities of avgas for military use. *See* NOR ¶ 145; *see also Exxon Mobil*, 2020 WL 5573048, at *15 (detailing government's use of DPA "to force" petroleum industry to "increase their production of wartime . . . petroleum products"). As Professor Wilson explains, the DPA "gave the U.S. government broad powers to direct industry for national security purposes," and "PAD directed oil companies to expand production during the Korean War, for example, by calling on the industry to drill 80,000 wells inside the United States, and more than 10,000 more wells abroad, in 1952." Wilson Decl. ¶ 28; NOR ¶ 145.

Despite the substantial control and direction exerted over Defendants' activities during the World Wars and the Korean War, Plaintiff urges the Court to simply ignore these activities because they supposedly predate the alleged disinformation campaigns. Mot. at 24. But Plaintiff's alleged injuries result from the cumulative impact of *all* emissions, including those released from oil and gas produced by Defendants during these times of conflict. Indeed, Plaintiff itself cites the rapid rise in fossil fuel emissions "since the mid-twentieth century" as causing "a correspondingly sharp spike in atmospheric concentration of CO_2." Compl. ¶¶ 53–54. And because "greenhouse gas molecules do not bear markers" and "comingle in the atmosphere," *id.* ¶ 260, the emissions from this period are indistinguishable from and cumulative with all later emissions.

b. Defendants Continue to Act Under Federal Officers by Producing and Supplying Large Quantities of Specialized Fuels Under Military Direction

To this day, Defendants continue to produce and supply large quantities of highly

specialized fuels that are required to conform to exact DOD specifications to meet the unique operational needs of the U.S. military. U.S. Navy Captain Matthew D. Holman recently explained that "[f]uel is truly the lifeblood of the full range of Department of Defense (DoD) capabilities, and, as such, must be available on specification, on demand, on time, every time. In meeting this highest of standards, we work hand-in-hand with a dedicated team of Sailors, civil servants, *and contractors* to deliver fuel to every corner of the world, ashore and afloat." NOR Decl. Ex. 11 (emphasis added). "By 2010, the U.S. military remained the world's biggest single purchaser and consumer of petroleum products" and, "[a]s it had for decades, the military continued to rely on oil companies to supply it under contract with specialty fuels, such as JP-5 jet aviation fuel and other jet fuels, F-76 marine diesel, and Navy Special Fuel." Wilson Decl. ¶ 40. "[I]n the absence of . . . [these] contract[s] with [the Defendants], the Government itself would have had to perform" these essential tasks to meet the critical DOD fuel demands. *Baker*, 962 F.3d at 942 (quoting *Watson*, 551 U.S. at 154).

For example, during the Cold War, Shell Oil Company developed and produced specialized jet fuel to meet the unique performance requirements of the U-2 spy plane and later the OXCART and SR-71 Blackbird programs. NOR ¶ 55. For the U-2, Shell Oil Company produced fuel known as JP-7, which required special processes and a high boiling point to ensure the fuel could perform at very high altitudes and speeds. NOR Decl. Ex. 59, at 61–62. "The Government stated that the need for the 'Blackbird' was so great that the program had to be conducted despite the risks and the technological challenge. . . . A new fuel and a chemical lubricant had to be developed to meet the temperature requirements." NOR ¶ 55 n.26. For OXCART, Shell Oil Company produced millions of gallons of specialized military fuel under government contracts with specific testing and inspection requirements. NOR Decl. Exs. 62–69. It also constructed "special fuel facilities"

for handling and storage, including a hangar, pipelines, and storage tanks at Air Force bases at home and abroad, and "agreed to do this work without profit" under special security restrictions specified in detailed government contracts. *Id.* Ex. 64; *see id.* Exs. 65–69.

Similarly, BP entities and subsidiaries of Tesoro Corporation ("Tesoro"), which is now a subsidiary of Marathon Petroleum, have contracted with the Defense Logistics Agency ("DLA") to provide a significant quantity of specialized military fuels over decades.[5] BP entities entered into approximately 25 contracts with the DLA to provide approximately 1.5 billion gallons of specialized military fuels, such as JP-5, JP-8, and F-76. *Id.* Ex. 69, at 8–14. And Tesoro subsidiaries entered into at least fifteen contracts with the DLA between 1983 and 2011 to supply highly specialized military jet fuel, such as JP-4, JP-5, and JP-8.[6] The DOD exerted significant control over BP entities' and Tesoro subsidiaries' actions in fulfilling these contracts, seeking to ensure that these unique fuels (1) ignite, but do not freeze, at low temperatures from high altitudes; (2) rapidly dissipate accumulated static charge so as not to produce sparks or fires during rapid refueling (such as on an aircraft carrier where such a fire would be devastating); (3) efficiently combust to allow for longer flights on less fuel; and (4) maintain the integrity of the fuel handling systems over a long period of time. *See* NOR ¶ 58.

To meet these unique operational needs, DLA required that the fuels contain express amounts of "military unique additives that are required by military weapon systems,"[7] such as static dissipator additive ("SDA"), fuel system icing inhibitor ("FSII"), corrosion

[5] The contract examples in this section are only illustrative. They are by no means an exhaustive collection of the contracts that Defendants executed with the federal government to supply specialized military fuels during the relevant time period.

[6] The contracts were executed by various Tesoro subsidiaries, such as Tesoro Refining and Marketing Company and Tesoro Alaska Petroleum Company. For a list of the Tesoro contract numbers and dates, *see* NOR Decl. Ex. 91.

[7] NOR Decl. Ex. 92 at 10.

inhibitor/lubricity improver ("CI/LI") and, for F-76 fuels, lubricity improver ("LIA"). *Id.* SDA is necessary to dissipate static charge to minimize sparks or fires during rapid refueling with hot military engines. FSII is required to prevent freezing caused by the fuels' natural water content when military jets operate at ultra-high altitudes, potentially leading to engine flameout, while CI/LI and LIA are used to avoid engine seizures and to ensure fuel handling system integrity when military fuels are stored for long periods, as on aircraft carriers. NOR Decl. Ex. 92; NOR ¶¶ 56–61 (detailing the necessary function of SDA, FSII, and CI/LI additives and how the DOD exerted control over production and supply of these specialized military fuels and additives). DOD specifications also required BP entities and Tesoro subsidiaries to conform the fuels to other specific chemical and physical requirements, such as enumerated ranges for conductivity, heat of combustion, and thermal stability, all of which are essential and unique to the performance of the military function. NOR Decl. Ex. 92 at 6.

As another example, from at least 2010–2013, Shell Oil Company or its affiliates entered into billion-dollar contracts with DLA to supply specialized JP-5 and JP-8 military jet fuel. *Id.* Exs. 83–89. The DOD's detailed specifications for the makeup of military jet fuels require that they "shall be refined hydrocarbon distillate fuel oils" made from "crude oils" with "military unique additives that are required by military weapon systems." *Id.* Ex. 74 at 6, 15; *id.* Ex. 75 at 7, 15; *id.* Ex. 90 at 5, 11; *id.* Ex. 92 at 5, 10. Those requirements and "the compulsion to provide the product to the government's specifications," demonstrate the necessary "acted under" special relationship between Defendants and the government. *Baker*, 962 F.3d at 943 (quoting *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 400 (5th Cir. 1998)).

These unique jet fuels are products designed specifically to assist the military in fulfilling its unique and essential missions, and thus support federal officer jurisdiction. *See Watson*, 551

U.S. at 154 (stating that "providing the Government with a product that it used to help conduct a war" supports removal) (citing *Winters*, 149 F.3d 387); *Baker*, 962 F.3d at 943. Just like the contracts the Fourth Circuit found were sufficient in *Arlington*, these contracts also established "how [Defendants] must operate" and fixed "pricing … shipping, payment and many other specifications." 996 F.3d at 252. In fact, the specialized fuels provided by Defendants were more tailored to exacting federal requirements than the standardized opioids at issue in *Arlington*.

The amicus brief recently filed by former Chairmen of the Joint Chiefs of Staff in a similar climate change-related case 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, *City of Hoboken v. Chevron Corp., et al.*, No. 21-2728, ECF No. 67 (3d Cir. Nov. 22, 2021). 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.

The record here is clear: "[T]he military" has "rel[ied] on oil companies to supply it under contract with specialty fuels." Wilson Decl. ¶ 40. This arrangement is "an archetypal case" of acting under federal-officer direction because Plaintiff's allegations 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." *Papp*, 842 F.3d at 813. Under the Fourth Circuit's precedents,

including *Arlington* and *Sawyer*, Defendants satisfy the "acting under" prong because Plaintiff's alleged injuries arise from products Defendants "*manufactured for the government*." *Arlington*, 996 F.3d at 250 (quoting *Sawyer*, 860 F.3d at 255).

While Plaintiff tries to disclaim these clear bases for federal officer removal, accepting Plaintiff's approach would improperly allow it to strategically ignore whole swaths of its Complaint (and uncontested history) through selective disclaimers. *See, e.g.*, *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.").[8] Ultimately, the question of 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).

c. Defendants Acted Under Federal Officers by Developing Mineral Resources on the Outer Continental Shelf

In *Baltimore*, the Fourth Circuit was "not convinced that the supervision and control to

[8] Moreover, courts consistently reject attempts to disclaim conduct that is an alleged cause of the plaintiff's injury. For example, the Seventh Circuit explained in rejecting a similar disclaimer that when plaintiffs allege that a certain product "harmed them," they cannot "have it both ways" by "purport[ing] to disclaim" that their lawsuit excludes the defendant's "manufacture of [that product] for the government." *Baker*, 962 F.3d at 945 n.3. Rather, "[t]his is just another example of a difficult causation question that a federal court should be the one to resolve." *Id.* The same is true here. Plaintiff has not disclaimed any claim or amount of damages against any Defendant—it is seeking all damages it has purportedly suffered from the "adverse effects of climate change." Compl. ¶¶ 47, 133. And whether or not Defendants' activities undertaken at the direction of federal officers caused Plaintiff's alleged harm are "merits questions" that should be resolved in federal court. *See Baker*, 962 F.3d at 944 (explaining that whether the plaintiffs' "injuries flowed from the Companies' specific wartime production for the federal government or from their more general manufacturing operations" are "merits questions that a federal court should decide").

which OCSLA lessees are subject connote the sort of 'unusually close' relationship that courts have previously recognized as supporting federal officer removal." 31 F.4th at 232. But Defendants here provide substantial evidence that the OCS leasing program subjects them to exactly that sort of control. Defendants acted on behalf of the federal government to extract federally owned mineral resources under the federal government's close direction and supervision to assist the government in fulfilling the basic (and critical) government objectives of ensuring sufficient domestic supplies of oil and gas to protect the nation's economic, security, and foreign policy interests. As Professor Priest explains in his unrebutted declaration, these OCS leases are "*not merely commercial transactions* between the federal government and the oil companies. They reflect the creation of a valuable national security asset for the United States over time." Priest Decl. ¶ 7(1) (emphasis added). The development of the OCS was a "political and policy-driven project to incorporate ocean space and the OCS into the nation's public lands and manage OCS resources in the long-term interest of U.S. energy security." *Id.*; *see also* NOR ¶¶ 82–93.

It is essential to understand that the oil and gas resources on the OCS are owned by the United States. Accordingly, when Congress determined that the government had a policy need to extract those resources, its only options were either to assign that task to federal employees or instead obtain the services of private parties in order to achieve the same governmental goals. It chose the second option, "procur[ing] 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." Priest Decl. ¶ 7(1). The federal government "had no prior experience or expertise," and "[t]herefore . . . had little choice but to enlist the service of the oil firms who did." *Id.* ¶ 18. But it was the *federal government*, not the oil companies, that "dictated the terms, locations, methods, and rates of hydrocarbon production on the OCS" in order to advance federal interests. *Id.* ¶ 7(2).

Accordingly, "[t]he policies and plans of the federal OCS program did not always align with those of oil firms interested in drilling offshore." *Id.*; *see also* NOR ¶ 82. "Federal officials viewed these firms as agents of a larger, more long-range energy strategy to increase domestic oil and gas reserves." Priest Decl. ¶ 7(2). The federal government has enlisted Defendants, as its agents, to extract the federal government's oil and gas out of the ground and supply the domestic market to serve a federal government interest. Put differently, the federal government controls substantial amounts of oil and gas that are contained in the OCS. The government could either extract and sell (or use) the oil and gas itself or hire third parties to perform that task on its behalf. Since the federal government had "no experience or expertise," it chose the second option. This is the definition of "acting under": "in the absence of [] contract[s] with [] private firm[s], the Government itself would have had to" extract and produce oil and gas from the OCS. *Watson*, 551 U.S. at 147, 154. And this is the precise sort of "unusually close relationship" the *Baltimore* court was looking for.

In 1953, Congress passed OCSLA for the express purpose of making oil and gas on the OCS "available for expeditious and orderly development" in keeping with "national needs." 43 U.S.C. § 1332(3). The initial regulations "went well beyond those that governed the average federally regulated entity at that time." Priest Decl. ¶ 19. As Professor Priest explains: "An OCS lease was *a contractual obligation* on the part of lessees to ensure that all operations *'conform to sound conservation practice' . . . and effect the 'maximum economic recovery'* of the natural resources on the OCS." *Id.* (citing 19 Fed. Reg. § 250.11, 2656) (emphasis added). And the federal government retained the power to "direct how oil and gas resources would be extracted and sold from the OCS." *Id.* ¶ 20.

Professor Priest explains that federal officials in the Department of the Interior—whom the

Code of Federal Regulations called "supervisors"—exerted substantial control and oversight over Defendants' operations on the OCS from the earliest OCS exploration. *Id.* ¶ 19. "[S]ubstantial discretion [was left] to the [federal] supervisor in implementing [OCS regulations]." *Id.* ¶ 23. For example, a lessee was required to "promptly drill and produce other wells as the supervisor may reasonably require," and therefore supervisors had complete authority to control and dictate the rate of production from OCS wells. *Id.* ¶ 19. Moreover, federal supervisors had "additional powers to direct how oil and gas resources would be extracted and sold." *Id.* ¶ 20.

During the debate over the 1978 OCSLA amendments, members of Congress proposed creating a national oil company to develop the OCS (as national oil companies do in many other countries). *See* NOR Decl. Ex. 15. One proposal, by Senator Hollings, would have "put a moratorium on conventional leasing" and "authorized and directed the Secretary of the Interior to initiate a major program of offshore oil exploration." *Id.* This proposal, as Professor Priest explains, "called for the creation of a national oil company." Priest Decl. ¶ 52 (citing S903-911, 121st Congress (Jan. 27, 1975)). Senator Hollings explained that the "*Federal Government can conduct this program* by using the same drilling and exploration firms that are usually hired by oil companies." NOR Decl. Ex. 15. *This was just one of multiple such proposals. See* NOR ¶¶ 76–77. That the government could use private firms to help conduct its operations is nothing new or remarkable—as noted above, the government uses private firms to carry out essential government functions all the time. In fact, this is precisely the type of relationship that the Supreme Court found warrants federal officer removal in *Watson*. 551 U.S. at 154.

While these proposals were ultimately rejected, the adopted amendments set out an arrangement by which the government would contract with private energy companies, including Defendants, to perform these essential tasks on its behalf with expanded federal supervision and

control. As Professor Priest explains, federal officials set "the size, timing and location of leasing activity." Priest Decl. ¶ 56. This arrangement increased the Secretary of the Interior's control over the OCS leasing program to align production with national needs, and Congress instructed the Secretary to create oil and gas leasing programs on a five-year review cycle that "will best meet national energy needs for the five-year period following its approval or reapproval." 43 U.S.C. § 1344(a)–(e).

This evidence confirms that the federal government uses OCS lessees to meet a "basic governmental task." *Cnty. of San Mateo v. Chevron Corp.*, 960 F.3d 586, 599 (9th Cir. 2020), *cert. granted, judgment vacated sub nom. Chevron Corp. v. San Mateo Cnty.*, 141 S. Ct. 2666 (2021). Rather than forming a national oil company to implement Congress's mandate to exploit these national resources, the government opted to use private parties under the direction of federal officers to provide for the economic and national security of the country. Professor Priest explains that the importance of the OCS to domestic energy security and economic prosperity has continued to the present, across every presidential administration. *Cf.* Priest Decl. ¶ 79. For example, in 2010, President Obama announced "the expansion of offshore oil and gas exploration" because "our dependence on foreign oil threatens our economy." *Id.* ¶ 78. And, in 2021 at the G20 Leaders' Summit, President Biden urged major energy producing countries to increase oil production "to ensure a stronger global economic recovery as part of a broad effort to pressure OPEC and its partners to increase oil supply."[9]

Plaintiff attempts to brush all of this evidence aside on the ground that it does not change "*Baltimore's* holding" or "alter what the statute or Defendants' leases actually say." Mot. at 19.

[9] A. Shalal & J. Mason, Biden pushes G20 energy producing countries to boost production, Reuters (Oct. 30, 2021), available at: https://www.reuters.com/business/energy/biden-push-g20-energy-producers-boost-capacity-ease-price-pressures-2021-10-30/.

But this misses the point. Defendants' additional evidence demonstrates that federal officers exercised substantial control over Defendants' activities beyond the four corners of the lease. Plaintiff's insistence that this federal control is simply "regulatory compliance" fares no better. *Id.* In fact, Professor Priest confirms that federal officials "did not engage in perfunctory, run-of-the-mill permitting and inspection," Priest Decl. ¶ 22, but rather "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, *id.* ¶ 28.

d. Defendants Acted Under Federal Officers by Operating the Elk Hills Reserve "In the Employ" of the U.S. Navy

In *Baltimore*, the court noted that it was "left wanting for pertinent details about Standard's role in operating the Elk Hills Reserve and producing oil therefrom on behalf of the Navy, [in connection with its activities under a 1944 unit production contract ("UPC") with the U.S. Navy] which might bear directly upon the 'acting under' analysis." 31 F.4th at 238. But Defendants here do not argue that removal is proper based on the UPC. Rather, Standard Oil acted under federal officers pursuant to a separate agreement, which was not before the Fourth Circuit. Under that agreement, the Navy hired Standard Oil to *operate* the Navy's portion of the reserve on its behalf for 31 years, meaning Standard Oil was "*in the employ*" of the Navy during this period. NOR ¶ 112.

The UPC gave the Navy the right to operate the reserve, but it had to decide whether it wanted to produce oil on its own or hire a contractor for the job. "*The 'Navy chose to operate the reserve through a contractor rather than with its own personnel*.'" *Id.* Standard Oil "was awarded the contract, and continued to operate NPR-1 [for the Navy] for the next 31 years." *Id.* Standard's operation and production at Elk Hills for the Navy were subject to substantial supervision by Navy officers. *Id.* ¶¶ 113–19. The Operating Agreement provided that "OPERATOR [Standard Oil] is

in the employ of the Navy Department and is *responsible to the Secretary thereof*." *See* NOR Decl. Ex. 27 at 3 (emphases added). Naval officers directed Standard Oil to conduct operations to further national policy. For example, in November 1974, the Navy directed Standard Oil to increase production to 400,000 barrels per day to meet the unfolding energy crisis, advising Standard Oil that "*you are in the employ of the Navy* and *have been tasked with performing a function which is within the exclusive control of the Secretary of the Navy*." *Id.* Ex. 30 at 3 (emphases added).

It is clear that "in the absence of [this] contract with [Standard Oil], the Government itself would have had to perform" these tasks. *Watson*, 551 U.S. at 154. Indeed, declassified documents from World War II, which were also not before the courts in the cases cited by Plaintiff, demonstrate that a "substantial increase in production at the earliest possible date was urgently requested by the Joint Chiefs of Staff to meet the critical need for petroleum on the West Coast to supply the armed forces in the Pacific theatre," and that Standard Oil was "chosen as operator because it was the only large company capable of furnishing the facilities for such a development program." NOR Decl. Ex. 28 at 1. Those efforts paid off—indeed, the Reserve was ready and produced up to 65,000 barrels per day in 1945 "to address fuels shortages . . . and World War II military needs." *Id.* Ex. 26 at 3, 15. And when the country faced an energy shortage in 1974, the government once again directed Standard Oil to produce 400,000 barrels per day. NOR ¶ 113. Standard Oil's operation of Elk Hills at the Navy's direction is quintessential "acting under" activity. It was "an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior." *Watson*, 551 U.S. at 152 (emphases added). Standard Oil operated Elk Hills for decades "in the employ of," and under the "subjection, guidance, or control" of, the Navy, a paradigmatic example of an "unusually close [relationship] involving detailed regulation, monitoring, or supervision." *Id.* at 151, 153.

e. Defendants Acted Under Federal Officers By Supplying and Managing the Strategic Petroleum Reserve

In response to the 1970s oil embargoes, Congress created the Strategic Petroleum Reserve to reduce the impact of any disruptions in oil supply. NOR ¶ 120. Defendants "acted under" federal officers by supplying federally owned oil for and managing the Strategic Petroleum Reserve for the government. From 1999 to 2009, "the Strategic Petroleum Reserve received 162 million barrels of crude oil through the [royalty-in-kind ('RIK')] program" valued at over $6 billion. *Id.* ¶ 122; NOR Decl. Ex. 37 at 18, 39 tbl.13. The government also contracted with Defendants to assist in the physical delivery of these RIK payments to the Strategic Petroleum Reserve. NOR ¶ 123; *see, e.g.*, NOR Decl. Ex. 39.

The Strategic Petroleum Reserve subjects Defendants to the federal government's supervision and control, including in the event that the President calls for an emergency drawdown, under which the reserve oil can be used to address national crises. NOR ¶ 134. The United States exercised this emergency control to draw down the reserve in response to Hurricane Katrina in 2005 and disruptions to oil supply in Libya in 2011. *Id.*; NOR Decl. Ex. 41. Thus, the hundreds of millions of barrels of oil flowing through these facilities were subject to federal control and supervision, and Defendants engaged in "an effort to *assist*, or to help *carry out*," the federal government's task of ensuring energy security. *Watson*, 551 U.S. at 152; *Papp*, 842 F.3d at 812.

* * *

When "'the federal government uses a private corporation to achieve an end it would have otherwise used its own agents to complete,' that contractor is 'acting under' the authority of a federal officer." *Papp*, 842 F.3d at 812. Defendants, under government supervision and control, took the government's place and performed what would have otherwise been essential government functions: Defendants produced oil and gas on federal lands subject to federal leasing programs;

operated federal oil reserves; supplied and managed the Strategic Petroleum Reserve; and produced oil and gas, operated government-owned facilities and equipment, and constructed pipelines as agents for the federal government and military during wartime. Further, Defendants have supplied the federal government and U.S. military with *billions of gallons* of highly specialized fuels under detailed contracts overseen by federal officers. Without Defendants, the federal government would have needed to create a national oil company, as it contemplated doing, to meet national energy needs and ensure national security. *See supra* Section III.A.1.c. Without Defendants, the federal government would have been forced to develop the federally owned oil resources on the OCS itself, and would have been forced to supply, operate, and manage federal oil reserves on its own—tasks that state-owned companies perform in several other countries. There can be no doubt that Defendants acted in an "effort to assist, or to help carry out, the duties or tasks of the federal superior" and "in the absence of . . . contract[s] with . . . [these] private firm[s], the Government itself would have had to perform" such tasks. *Watson*, 551 U.S. at 147, 154. The "acting under" prong is satisfied.

2. Plaintiff's Claims and Alleged Injuries Are "For or Relating To" Defendants' Acts Under Federal Officers

Plaintiff's claims and alleged injuries "relate to" Defendants' production and supply of oil and gas under the direction of the federal government. The "hurdle erected by [the connection] requirement is quite low." *Bennett v. MIS Corp.*, 607 F.3d 1076, 1088 (6th Cir. 2010) (citation omitted). As the Fourth Circuit has explained, all that is required is "a *connection or association* between the act in question and the federal office." *Sawyer*, 860 F.3d at 258. Indeed, when Congress inserted the words "or relating to" into the removal statute in 2011, it "broadened federal officer removal to actions, not just *causally* connected, but alternatively *connected* or *associated*, with acts under color of federal office." *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286, 292

(5th Cir. 2020) (emphases added) (citing Pub. L. No. 112-51, § 2(b)(1)(A), 125 Stat. 545); *see also Arlington*, 996 F.3d at 256 (noting that Congress has abandoned "the old 'causal nexus' test," such that a removing defendant need show only "a *connection or association* between the act in question and the federal office") (emphasis added); *Def. Ass'n of Philadelphia*, 790 F.3d at 471–72 (observing that "the addition of the words 'or relating to' was intended to 'broaden the universe of acts that enable Federal officers to remove to Federal court'") (citation omitted).

The federal government's policy choices to produce significant amounts of oil and gas to fulfill national interests, and its direct supervision of Defendants' activities to advance those goals, go to the core of Plaintiff's claims, which rest upon the alleged impacts caused by the *cumulative production and use* of petroleum products—including those products produced under the direction and supervision of the federal government. Production and consumption are integral components of Plaintiff's causal theory. Plaintiff alleges, for example, that the "*unrestricted production and use* of fossil fuel products create greenhouse gas pollution that warms the planet and changes our climate." Compl. ¶ 1 (emphasis added). And, according to Plaintiff, it is the "*production and consumption* of oil, coal and natural gas" that has led to an "increase in greenhouse gas pollution," which has "substantially contributed to a wide range of dire climate-related effects" and caused Plaintiff's alleged injuries. *Id.* ¶ 2. In particular, Plaintiff's theory of harm stems from "global warming and its physical, environmental, and socioeconomic consequences," *id.* ¶ 8, which were allegedly caused by "the normal use of [Defendants'] fossil fuel products," *id.* ¶ 106. Plaintiff's allegations, on their face, demonstrate that an essential element of its claimed injuries is the emission of greenhouse gases resulting from the production and combustion of Defendants' petroleum products, including those produced under close federal supervision. *See id.* ¶ 246 (asserting nuisance claim premised on Defendants allegedly "[c]ontrolling every step of the fossil

fuel product supply chain, including the extraction of raw fossil fuel products, including crude oil, coal, and natural gas from the Earth"). Viewing it any other way would be inconsistent with the lenient standard for federal officer removal, which gives Defendants the "benefit of all reasonable inferences from the facts alleged." *Baker*, 962 F.3d at 945.

Plaintiff's only response is that its claims are limited to Defendants' alleged "campaigns to conceal and misrepresent the dangers of their fossil fuel products," not the production and sale of oil and gas. Mot. at 29. But courts must examine the "gravamen" of the Complaint. *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," and, 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 Supreme Court "worr[ied]" that any other approach would make it "too easy" for plaintiffs to manipulate their complaint to "bypass" the rules governing federal jurisdiction by using the right "magic words." *Id*. (citing *Sachs*, 577 U.S. at 32–36). To allow Plaintiff to evade federal jurisdiction in this manner "would elevate form over substance and would put a premium on artful labeling." *Jarbough v. Att'y Gen. of U.S.*, 483 F.3d 184, 189 (3d Cir. 2007); *Arlington*, 996 F.3d at 256–57 (finding federal officer removal and concluding that the plaintiff's contrary "position would elevate form over substance"). Plaintiff's theory is that courts should blindly accept the descriptions that a plaintiff uses to explain its claims and ignore the substance of those claims. That approach is contrary 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).

Plaintiff's attempts to evade a federal forum—by focusing on alleged misrepresentations

to the exclusion of the rest of its Complaint—are far more than the sort of "artful pleading" the Supreme Court rejected in *Sachs* and *Fry*. Plaintiff places Defendants' production and sale of oil and gas *directly in its alleged causal chain*: Under Plaintiff's theory, Defendants' alleged misrepresentations increased demand for Defendants' products, which led to increased production and consumption of those products, which led to increased emissions, which contributed to global climate change, ultimately causing Plaintiff's alleged injuries. *See, e.g.*, Compl. at 9–12, ¶¶ 1–2, 8–9. This chain is depicted below:

Plaintiff's misinformation and failure-to-warn allegations, even if credited, only underscore the connection—Plaintiff alleges *that misinformation maintained or increased production and consumption of oil and gas*, and much of that alleged production occurred at the direction of the federal government in furtherance of federal objectives. In any event, and contrary to Plaintiff's suggestion, the Court does not need to decide whether Plaintiff's claims are more about "misrepresentation" or "production." Mot. at 16 (citations omitted). Because Plaintiff indisputably seeks damages for the alleged impacts of climate change that have been caused by the cumulative production and consumption of oil and gas, there is a "connection or association" between Defendants' production activities at the direction of federal officers and Plaintiff's claims and alleged injuries, regardless of how the claims are characterized. *Sawyer*, 860 F.3d at 258; *Arlington*, 996 F.3d at 256. This more than satisfies the "low" nexus requirement for federal officer removal.

Moreover, Plaintiff makes no attempt to limit its claims or requested relief to Defendants' purported misrepresentations or concealment. The Complaint confirms this fact as it does not assert a claim for fraud or even negligent misrepresentation. Instead, the Complaint seeks relief

for harms allegedly caused by *worldwide production and sales activities*, including emissions that Plaintiff does not (and cannot) attribute to Defendants' alleged misrepresentations. Plaintiff seeks:

- Compensatory damages for all injuries allegedly suffered as a result of global climate change;
- Disgorgement of profits from Defendants' production and sale of oil and gas; and
- An order compelling Defendants to abate the alleged nuisance of global climate change.

Compl. at 169. If Plaintiff's claims were based exclusively on alleged concealment and misrepresentations, the requested relief would necessarily be limited to—at most—any harms allegedly resulting from the purported marginal increase in fossil fuel consumption caused by the asserted concealment and misrepresentations. But the Complaint contains no such limit. In fact, Plaintiff seeks far broader relief, which it carefully avoids disclaiming in its Motion.

The Fourth Circuit's decision in *Arlington* confirms that there is a sufficient connection between Plaintiff's claims and Defendants' activities undertaken at the direction of federal officers. In that case, the plaintiff "sought to impose liability on the ESI Defendants because they were 'keenly aware of the oversupply of prescription opioids. . .' but failed to 'tak[e] any meaningful action to stem the flow of opioids into the communities." 996 F.3d at 248. And although the plaintiff in that case argued that "this requirement is not met" because the "Complaint did not even mention the distribution of opioids to veterans, the DOD contract or the operation of" a pharmacy plan, the Fourth Circuit held that this "position would elevate form over substance" because "Arlington's claims seek monetary damages due to harm arising from 'every opioid prescription' filled by pharmacies" such as the defendants. *Id.* at 256. So, too, here. Although Plaintiff tries to characterize its Complaint as involving alleged misrepresentations about oil and gas rather than the production and sale of those products (including to the federal government), this disregards the substance of its Complaint, which ties Plaintiff's alleged injuries to the global production and sale

of fossil fuels—and their resultant emissions. *See* Compl. ¶ 4 ("Th[e] dramatic increase in atmospheric CO2 and other greenhouse gases is the main driver of the gravely dangerous changes occurring to the global climate."); *id.* ¶ 5 ("Anthropogenic greenhouse gas pollution, primarily in the form of CO2, is far and away the dominant cause of global warming."). As the Second Circuit recently explained, "emissions [are] the singular source of the City's harm," and "the City's focus on [an] 'earlier moment' in the global warming lifecycle is merely artful pleading and does not change the substance of its claims." *City of New York*, 993 F.3d at 91, 97.

3. Defendants Raise "Colorable Federal Defenses"

Plaintiff does not dispute that Defendants have raised "colorable federal defenses" in its supplemental memorandum—and for good reason. Because Defendants acted under federal officers to implement the government's policies and decisions to promote the production of oil and gas, they have several colorable federal defenses to raise, including the government contractor defense, *see Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988); *Gertz v. Boeing*, 654 F.3d 852 (9th Cir. 2011); preemption, *see Goncalves v. Rady Children's Hosp. San Diego*, 865 F.3d 1237, 1249 (9th Cir. 2017); and federal immunity, *see Campbell-Ewald Co. v. Gomez*, 577 U.S. 153 (2016). For example, in *Boyle*, the Court applied a federal common law government contractor defense in a state-law product liability action because (1) the suit involved a unique federal interest and (2) a state law holding government contractors liable for design defects in military equipment would present a significant conflict with federal policy. 487 U.S. at 504–13. Both elements are met here. In addition, as the Court acknowledged in *Campbell-Ewald*, "[w]here the Government's 'authority to carry out the project was validly conferred,'" a contractor "who simply performed as the Government directed," may be immune from liability. 577 U.S. at 167 (quoting *Yearsley v. W.A. Ross Const. Co.*, 309 U.S. 18, 21 (1940)). Here, Defendants produced oil and gas at the direction of the federal government, and thus have a colorable argument that they are immune from

liability for any alleged injuries resulting therefrom.[10] Additionally, Plaintiff's claims are barred by the U.S. Constitution, including the Interstate and Foreign Commerce Clause, U.S. Const. art. I, § 8, cl. 3, and Due Process Clauses, *id.* amend. V and XIV, § 1, as well as the First Amendment, *id.* amend. I, and the foreign affairs doctrine, *see United States v. Pink*, 315 U.S. 203, 230–31 (1942).[11]

Defendants are required to show only that a defense is "plausible." *Arlington*, 996 F.3d at 254. These and other federal defenses are more than plausible, and a defendant invoking § 1442(a)(1) "need not win his case before he can have it removed." *Willingham v. Morgan*, 395 U.S. 402, 407 (1969). Indeed, "[t]he purpose of the federal officer removal statute is 'to *ensure a federal forum* in any case where a [defendant] is entitled to raise a defense arising out of his duties.'" *Goncalves*, 865 F.3d at 1244 (quoting *Arizona v. Manypenny*, 451 U.S. 232, 241 (1981))

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[10] Defendants have colorable federal defenses even to the extent Plaintiff's claims are based on deception and failure to warn because Plaintiff's alleged injuries are based on the cumulative production and consumption of fossil fuels. The Supreme Court has repeatedly held that a "colorable federal defense" requires only a connection between "the charged conduct and asserted official authority." *Acker*, 527 U.S. at 431; *see also Mesa v. California*, 489 U.S. 121, 130 (1989) (requiring only that a defendant's counter-argument be "equally defensive and equally based in federal law"). Moreover, the Fourth Circuit has held that a federal-contractor defense is colorable against failure-to-warn claims. *Ripley v. Foster Wheeler LLC*, 841 F.3d 207, 211 (4th Cir. 2016) ("[W]e now join the chorus and hold that the government contractor defense is available in failure to warn cases.").

[11] In addition, because Plaintiff's claimed injuries are based on the cumulative emissions from every State in the Nation (and every country around the world) they are both displaced and preempted by the Clean Air Act ("CAA"). The Supreme Court held that the Clean Water Act ("CWA") preempts state common law claims for injury from interstate water pollution where the plaintiff seeks to apply one state's law to sources outside that state, explaining that "the CWA precludes a court from applying the law of an affected State against an out-of-state source." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987). Because the structure of the CAA parallels the structure of the CWA, courts have consistently construed *Ouellette* to mean that the CAA preempts state law claims challenging air pollution originating out-of-state. *See, e.g., Merrick v. Diageo Ams. Supply, Inc.*, 805 F.3d 685, 693 (6th Cir. 2015). The Fourth Circuit has recognized that a "federal preemption defense" is a valid "colorable federal defense" for purposes of federal officer removal. *Arlington*, 996 F.3d at 256.

(emphasis added). And the question of "whether [a defendant] was specifically directed by the federal Government, is one for the federal—not state—courts to answer." *Leite*, 749 F.3d at 1124 (internal quotation marks omitted); *see also Baker*, 962 F.3d at 945 ("[W]hether . . . [a plaintiff's] injuries flowed from the Companies' specific wartime production for the federal government or from their more general manufacturing operations" are "*merits questions* that a federal court should decide.").

B. Plaintiff's Claims Necessarily Raise Disputed and Substantial Federal Issues Satisfying *Grable* Jurisdiction

Suits alleging only state-law causes of action may still "arise under" federal law where the "state-law claim[s] necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Grable*, 545 U.S. at 314. To the extent Plaintiff's claims are based on misrepresentations, the claims still arise under federal law for purposes of *Grable* jurisdiction because they necessarily incorporate affirmative federal constitutional elements imposed by the First Amendment.

The Supreme Court has made clear that where nominally state-law tort claims target speech on matters of public concern, the First Amendment injects affirmative federal-law elements into the plaintiff's cause of action, including factual falsity, actual malice, and proof of causation of actual damages. *See Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 774–76 (1986) (state common-law standards "must similarly fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages"); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (public officials have the burden of proving with "convincing clarity" that "the statement was made with 'actual malice'"); *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 20 (1990) ("[A] statement of opinion relating to matters of public concern which

does not contain a provably false factual connotation will receive full constitutional protection.").

Plaintiff's only response is that these issues are "defenses." That is incorrect. These are not defenses, but constitutionally required elements of the claim on which the plaintiff bears the burden of proof *as a matter of federal law*. *See id.*; *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 53, 56 (1988) (extending First Amendment requirements beyond defamation to other state-law attempts to impose liability for speech); *In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, 511 F. Supp. 2d 742, 811 (S.D. Tex. 2005) ("First Amendment protections and the actual malice standard . . . have been expanded to reach . . . breach of contract, misrepresentation, and tortious interference with contract or business."). As a result, federal jurisdiction exists over the misrepresentational aspects of Plaintiff's claims under *Grable*: when "a court will have to construe the United States Constitution" to decide Plaintiff's claim, the claim "necessarily raise[s] a stated federal issue" under *Grable*, and federal jurisdiction is proper. *Ortiz v. Univ. of Med. & Dentistry of N.J.*, 2009 WL 737046, at *3 (D.N.J. Mar. 18, 2009).

To be sure, most state-law misrepresentation claims are not subject to removal because they do not implicate broader federal interests. Here, however, the federal interests are unquestionably "substantial" given the sweeping nature of Plaintiff's claims and the central role climate change has played, and continues to play, in our public discourse. "Climate change has staked a place at the very center of this Nation's public discourse," and "its causes, extent, urgency, consequences, and the appropriate policies for addressing it" are "hotly debated." *Nat'l Review, Inc. v. Mann*, 140 S. Ct. 344, 347–48 (2019) (Alito, J., dissenting from denial of certiorari). The speech that Plaintiff seeks to suppress addresses a subject of national and international importance that falls within the purview of federal authority over foreign affairs and economic, energy, and security policy. Moreover, freedom of speech is "most seriously implicated . . . in cases involving

disfavored speech on important political or social issues," chief among which in the contemporary context is the question of "[c]limate change," which "is one of the most important public issues of the day." *Id.* at 344 (noting recourse to a federal forum is especially warranted in suits "concern[ing] a political or social issue that arouses intense feelings," because "a plaintiff may be able to bring suit in whichever jurisdiction seems likely to have the highest percentage of jurors who are sympathetic to the plaintiff's point of view") (citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 (1984)).

Plaintiff is a public entity seeking to use the machinery of its state courts to impose *de facto* regulations on Defendants' nationwide speech on issues of national concern. First Amendment interests are at their apex where, as here, a governmental entity seeks to use state law to regulate speech on issues of "public concern." *Hepps*, 475 U.S. at 774. Plaintiff's attempt to regulate Defendants' speech on the important public matter of climate change through litigation thus necessarily raises substantial First Amendment questions that belong in federal court. Given the compelling federal interests at stake here, federal courts may entertain the claims at issue in this case "without disturbing any congressionally approved balance of federal and state judicial responsibilities," making removal appropriate. *Grable*, 545 U.S. at 314.

IV. CONCLUSION

For the foregoing reasons, and those set forth in Defendants' Notice of Removal, the Court should deny Plaintiff's Motion to Remand. Defendants also respectfully request oral argument on Plaintiff's Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of August 2022, the foregoing document was filed through the ECF system and was thereby served on the registered participants identified on the Notice of Electronic Filing.

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