IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

STATE OF DELAWARE, *ex rel.* KATHLEEN JENNINGS, Attorney General of the State of Delaware,

Plaintiff,

v.

BP AMERICA INC., BP P.L.C., CHEVRON CORPORATION, CHEVRON U.S.A. INC., CONOCOPHILLIPS, CONOCOPHILLIPS COMPANY, PHILLIPS 66, PHILLIPS 66 COMPANY, EXXON MOBIL CORPORATION, EXXONMOBIL OIL CORPORATION, XTO ENERGY INC., HESS CORPORATION, MARATHON OIL CORPORATION, MARATHON OIL COMPANY, MARATHON PETROLEUM CORPORATION, MARATHON PETROLEUM COMPANY LP, SPEEDWAY LLC, MURPHY OIL CORPORATION, MURPHY USA INC., ROYAL DUTCH SHELL PLC, SHELL OIL COMPANY, CITGO PETROLEUM CORPORATION, TOTAL S.A., TOTAL SPECIALTIES USA INC., OCCIDENTAL PETROLEUM CORPORATION, DEVON ENERGY CORPORATION, APACHE CORPORATION, CNX RESOURCES CORPORATION, CONSOL ENERGY INC., OVINTIV, INC., and AMERICAN PETROLEUM INSTITUTE,

Defendants.

Civil Action No. 20-cv-01429-LPS

DEFENDANTS' ANSWERING BRIEF
IN OPPOSITION TO PLAINTIFF'S MOTION TO REMAND

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I. INTRODUCTION

This case belongs in federal court because Plaintiff's claims, which are based on the effects of global climate change, arise in an area governed by federal law, where state law cannot reach. These claims necessarily arise under federal law because the Constitution prohibits the application of state law in certain narrow areas involving uniquely federal interests—including interstate and international pollution. Plaintiff nonetheless seeks to use state tort law and the Superior Court of Delaware to impose liability on a select group of companies in the energy industry for the alleged past, present, and future harms allegedly resulting from worldwide conduct and global climate change, functionally levying an illegitimate worldwide tax on lawful conduct. In doing so, Plaintiff calls upon a state court to resolve critical national and international policy issues—and potentially to impose devastating extraterritorial liability for lawful conduct encouraged by Congress, other states, and foreign governments alike. The production of oil and gas has in fact long been encouraged at all levels of government—indeed, the federal government alone has collected over $150 billion in royalties from offshore oil and gas leases since 1954—and remains essential to the health of the economy and the security, stability, and economic interests of the United States.

Despite the obvious national and international reach of its claims, Plaintiff tries to evade federal jurisdiction by characterizing the case as chiefly involving state law claims for nuisance, trespass and misrepresentation. In reality, the heart of the case involves the extraction, production, and consumption of fossil fuels everywhere in the world. While this particular case was filed in Delaware, Plaintiff seeks recovery based not only on Defendants' production and sales in the State, but on *all* production and sales across the nation and worldwide. Given the breadth of Plaintiff's claims and the inappropriateness of these claims for state court resolution, Plaintiff's artful

pleading cannot divest this Court of jurisdiction. Plaintiff cannot defeat federal jurisdiction simply by recasting and renaming its claims as something they clearly are not.

No matter how it characterizes them, Plaintiff's claims necessarily arise under federal common law. As the Supreme Court has explained, "[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law." *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 421 (2011) ("*AEP*"). Under our federal constitutional structure, no State's law may regulate—through enacted legislation or court-imposed order—interstate pollution such as that for which Plaintiff seeks to hold Defendants liable here. All of Plaintiff's claims depend upon the interstate and, indeed, international activities of Defendants' extraction, production, and sale of fossil fuels—lawful products that every human being uses to heat their homes, power their schools, hospitals, and vehicles, and manufacture limitless products that provide the comfort, safety, and convenience of modern society. *See* Compl. ¶¶ 6–10.

Plaintiff alleges that the production and use of these fossil fuels has resulted in increased greenhouse gas emissions, which has contributed to global climate change and its alleged injuries. *See, e.g.*, Compl. ¶ 4. Within our constitutional system there is, and can be, *no state law* of interstate pollution for Plaintiff's claims to "arise under," 28 U.S.C. § 1331, but "[e]nvironmental protection is undoubtedly an area . . . in which federal courts may . . . 'fashion federal law.'" *AEP*, 564 U.S. at 421; *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 313 n.7 (1981) ("*Milwaukee II*") ("If federal common law exists, it is because state law cannot be used."). Because federal law exclusively governs here, this Court has federal-question jurisdiction.

Beyond the inherently interstate and international character of Plaintiff's liability theories, Plaintiff's nominally state-law claims seek to supplant vital federal laws and policies, which themselves provide their own bases for removal. For fundamental reasons of national security and

economic prosperity, the United States government has long promoted specific measures to encourage the production of oil and gas. In fact, every Administration since President Taft's has taken active steps to increase U.S. production. While government policymakers are responding to global climate change through a series of actions that include expanded use of alternative energy sources, petroleum remains the backbone of U.S. energy supply. For this reason, in 2010, President Obama "announc[ed] the expansion of offshore oil and gas exploration, but in ways that balance the need to harness domestic energy resources and the need to protect America's natural resources." Dick Decl. Ex. 1. President Obama explained that "the bottom line is this: Given our energy needs, in order to sustain economic growth and produce jobs, and keep our businesses competitive, we are going to need to harness traditional sources of fuel even as we ramp up production of new sources of renewable, homegrown energy." *Id.*

This lawsuit is a misguided attempt to regulate the energy industry's impact on global climate change outside of the legislative and executive branches of the federal government, and necessarily implicates disputed and substantial federal issues. It is therefore also removable under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 314 (2005). The Complaint singles out a select group of members of the energy industry in ways inconsistent with those deemed advisable by the federal policymakers actually responsible for formulating the nation's response to global climate change. In fact, much of the conduct on which Plaintiff bases its alleged injuries has furthered fundamental federal, national and international security and economic policies. Plaintiff's claims thus contradict federal energy policies and the federal government's exclusive authority over foreign affairs.

In addition, much of the conduct upon which Plaintiff seeks to base liability and damages took place in locations subject to federal jurisdiction—including the Outer Continental Shelf

("OCS")—and/or under the direction, supervision, and control of officers of the U.S. government. Thus, Defendants properly removed this action pursuant to the express statutory authorizations of the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1349(b)(1), which confers federal jurisdiction over all claims "in connection with" production on the OCS. Defendants also properly removed under the federal officer removal provisions of 28 U.S.C. § 1442(a)(1) because Plaintiff's claims challenge Defendants' conduct performed under federal direction, supervision, and control, including the production and supply of oil and gas products for the U.S. armed forces and other federal agencies to assist them in accomplishing critical national policy objectives.

Defendants present a robust evidentiary record establishing this Court's jurisdiction under OCSLA and the federal officer removal statute—including the declarations of two prominent historians, Professor Tyler Priest of the University of Iowa and Professor Mark Wilson of the University of North Carolina at Charlotte—that explain in detail how Defendants acted under the direction, guidance, supervision, and control of federal officers. Professor Wilson explains 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 Priest explains that for "more than six decades, the U.S. federal [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," *id.* ¶ 48.

Plaintiff argues that none of these removal grounds is proper because its claims are based *in part* on alleged "deception" and "misrepresentations" about oil and gas products, rather than the production of those products. *See, e.g.*, Compl. ¶ 46(a). But Plaintiff does not allege that such deception or misrepresentation alone caused its alleged injuries because that is not possible. At

most, Plaintiff's allegations suggest that supposed deception caused some marginal increase in the consumption of oil and gas, which allegedly contributed to global climate change and Plaintiff's purported injuries. *See id.* ¶ 12 ("Defendants' concealment and misrepresentation of their products' known dangers . . . drove consumption."). Indeed, Plaintiff pointedly asserts that "production and use of [Defendants'] products," *not* Defendants' deception or misrepresentations, "is the leading cause of climate change." Compl. ¶ 207. Accordingly, Plaintiff's chain of causation necessarily includes Defendants' production and sales activities, which Plaintiff underscores when it asserts that "the production of fossil fuels is simply the delivery mechanism of the State's injury." Mot. at 30. As such, when the Complaint is read "as a whole," as is required in assessing jurisdiction, it is clear that Plaintiff's claims and the "theories undergirding those claims" center on Defendants' production and sale of oil and gas. *In re Lipitor Antitrust Litig.*, 855 F.3d 126, 144–45 (3d Cir. 2017), *as amended* (Apr. 19, 2017). But even if, contrary to the Complaint's plain text, this Court were to construe Plaintiff's claims as limited to a "misrepresentation theory," removal would still be proper because they target Defendants' speech on matters of public concern like climate change, and the First Amendment injects affirmative federal-law elements into such claims, including factual falsity, actual malice, and proof of causation of actual damages. Thus, this theory implicates substantial and disputed federal questions, including federal constitutional elements imposed by the First Amendment, making removal appropriate under *Grable*.

In sum, no amount of artful pleading or tactical disclaimers can defeat this Court's jurisdiction over Plaintiff's claims. Plaintiff seeks to use state tort law and state courts to impose liability on the energy industry for the full extent of the alleged present and future harms resulting from global climate change. But Delaware state law may no more assess liability against

Defendants for their lawful conduct in other states or countries than Delaware may tax those activities. This case belongs in federal court and removal is proper.[1]

II. NATURE AND STAGE OF THE PROCEEDINGS

On September 10, 2020, Plaintiff filed this action in the Superior Court of Delaware, asserting claims for negligent failure to warn, trespass, nuisance, and violations of the Delaware Consumer Fraud Act. On October 23, 2020, Defendants removed this action to this Court, asserting multiple grounds for federal jurisdiction: (1) federal question jurisdiction (28 U.S.C. §§ 1331, 1441(a)) because Plaintiff's claims "arise under" federal law; (2) jurisdiction under OCSLA (43 U.S.C. § 1349(b)); (3) jurisdiction under the federal officer removal statute (28 U.S.C. § 1442); (4) federal question jurisdiction because this action necessarily raises disputed and substantial federal issues; (5) federal question jurisdiction because Plaintiff's claims are completely preempted by federal law; (6) federal enclave jurisdiction because Plaintiff's claims arise from alleged acts on multiple federal enclaves; and (7) jurisdiction under the Class Action Fairness Act (28 U.S.C. § 1332(d)). On November 5, 2020, the Court granted the parties' stipulation to modify the briefing schedule and page limits for the Motion to Remand. D.I. 76. On November 20, 2020, Plaintiff filed its Motion to Remand. D.I. 86. On January 5, 2021, Plaintiff filed its Brief in Support of its Motion to Remand ("Mot."). D.I. 89. Defendants now submit their Opposition Brief to Plaintiff's Motion to Remand.

Since 2017, more than twenty State and municipal plaintiffs have brought similar climate change-related claims against Defendants and other members of the energy industry in various state courts throughout the United States. Eleven of these cases are now before the United States

[1] Several Defendants contend that they are not subject to personal jurisdiction in Delaware. Defendants submit this remand opposition subject to, and without waiver of, these personal jurisdiction objections.

Supreme Court, with certiorari petitions either granted or pending[2]—including *BP p.l.c. v. Mayor and City Council of Baltimore*, No. 19-1189 (U.S.), which was argued on January 19, 2021—presenting the Supreme Court the opportunity to resolve, at least in part, whether there is federal jurisdiction over these types of claims. Defendants respectfully submit that awaiting guidance from the Supreme Court on the issues raised in Plaintiff's Motion may further the interests of judicial economy and efficiency.[3]

III. SUMMARY OF ARGUMENT

1. No matter how it characterizes them, Plaintiff's claims necessarily arise under federal common law. Claims based on ambient, cross-border pollution, like Plaintiff's, arise under federal common law, not any individual State's law. *AEP*, 564 U.S. at 421 ("When we deal with air and water in their ambient or interstate aspects, there is a federal common law."); *Milwaukee II*, 451 U.S. at 313 n.7 ("If federal common law exists, it is because state law cannot be used.").

2. Plaintiff's claims necessarily raise substantial federal issues, and are thus removable under *Grable*, 545 U.S. at 312–313. Plaintiff's claims, which target oil and gas production, attempt to supplant federal energy policy, *e.g.*, 42 U.S.C. § 7401(c), and interfere with foreign affairs, *United States v. Pink*, 315 U.S. 203, 233 (1942). And even if the claims solely targeted Defendants' alleged misrepresentations—as Plaintiff erroneously contends—the alleged

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[2] *See BP p.l.c. v. Mayor & City Council of Balt.*, No. 19-1189 (U.S. argued Jan. 19, 2021); *Chevron Corp. v. County of San Mateo*, *petition for cert. filed*, No. 20-884 (U.S. Dec. 30, 2020) (consolidating six cases); *Shell Oil Prods. Co. v. Rhode Island*, *petition for cert. filed*, No. 20-900 (U.S. Dec. 30, 2020); *Suncor Energy (U.S.A.) Inc. v. Bd. of Cnty. Comm'rs of Boulder Cnty.*, *petition for cert. filed*, No. 20-783 (U.S. Dec. 4, 2020); *Chevron Corp. v. City of Oakland*, *petition for cert filed*, No. 20-1089 (U.S. Jan. 8, 2021) (consolidating two cases) ("*Oakland*").

[3] In *Oakland*, one of the questions presented is "[w]hether putative state-law tort claims alleging harm from global climate change are removable because they arise under federal law." That issue was also briefed in *Baltimore*.

misstatements involve matters of "public concern," and thus the First Amendment *injects elements* into these claims and puts substantial and disputed federal issues squarely at issue. *See, e.g.*, *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 774–76 (1986).

3. Defendants properly removed this action pursuant to the express statutory authorization set forth in OCSLA, 43 U.S.C. § 1349(b)(1). OCSLA confers jurisdiction here because Plaintiff expressly alleges that the cumulative impact of Defendants' overall extraction and production activities over the past several decades—which necessarily include their substantial operations on the OCS—contributed to the global greenhouse gas emissions that Plaintiff claims caused its alleged injuries.

4. Defendants properly removed this action pursuant to the express statutory authorization set forth in the federal officer removal provision of 28 U.S.C. § 1442(a)(1), because much of the conduct upon which Plaintiff seeks to base liability and damages took place under the direction, supervision, and control of officers of the U.S. government. The federal officer removal statute authorizes removal where, as here, "(1) the defendant is a 'person' within the meaning of the statute; (2) the plaintiff's claims are based upon the defendant's conduct 'acting under' the United States, its agencies, or its officers; (3) the plaintiff's claims against the defendant are 'for, or relating to' an act under color of federal office; and (4) the defendant raises a colorable federal defense to the plaintiff's claims." *Papp v. Fore-Kast Sales Co.*, 842 F.3d 805, 812 (3d Cir. 2016). "[T]he federal officer removal statute is to be broadly construed in favor of a federal forum." *In re Commonwealth's Motion to Appoint Counsel Against or Directed to Def. Ass'n of Philadelphia*, 790 F.3d 457, 466–67 (3d Cir. 2015) ("*Def. Ass'n of Philadelphia*" or "*Defender*") (internal quotation marks omitted).

a. Defendants are "persons" under the statute, who acted under federal officers in numerous ways, including by producing oil and gas on federal lands subject to federal leasing programs; operating federal oil reserves for the federal government; supplying fuel for and managing the Strategic Petroleum Reserve under the direction, supervision, and control of the federal government; distributing gasoline supplies to wholesale purchasers under the direction, supervision, and control of the federal government in response to oil embargoes; producing oil and gas and constructing pipelines for and under the direction, supervision, and control of the federal government and military during wartime; and producing and supplying large quantities of specialized, noncommercial-grade fuel for the U.S. military, which conforms to exact and unique military specifications, to this day.

b. Plaintiff's claims are for or relating to these acts under federal officers, because they encompass Defendants' production and extraction activities, many of which took place at the behest of the U.S. government. Plaintiff concedes that emissions from petroleum products that Defendants produced at the direction and supervision of the U.S. government combine with and cannot be parsed from all other emissions. Plaintiff therefore cannot disclaim alleged climate change harms resulting from work done under U.S. government direction and control.

c. Defendants raise colorable federal defenses, including the government contractor defense, *see Boyle v. United Techs. Corp.*, 487 U.S. 500, 512–13 (1988); *Gertz v. Boeing Co.*, 654 F.3d 852, 860–66 (9th Cir. 2011); preemption, *see Goncalves By & Through 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, 166–68 (2016). In addition, Defendants raise colorable defenses under the United States Constitution, including the Interstate and Foreign

Commerce Clause, U.S. Const. art. I, § 8, cl. 3, the Due Process Clauses, *id.* amends. V & XIV, § 1, and the foreign affairs doctrine, *see Pink*, 315 U.S. at 230–31.

5. Plaintiff seeks to evade federal jurisdiction by asking this Court to ignore the core theory of its Complaint (*i.e.*, worldwide production and emissions) and instead focus exclusively on one narrow aspect of its claims (*i.e.*, alleged misrepresentations). But "[t]he court must consider the complaint in its entirety and review the allegations as a whole and in context." *Hussain v. PNC Fin. Servs. Grp.*, 692 F. Supp. 2d 440, 442 (D. Del. 2010) (citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)); *see also Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009) ("[T]he complaint should be read as a whole, not parsed piece by piece."). As the Third Circuit has explained, when assessing jurisdiction, "regardless of how a complaint labels its claims or counts, courts are to look to the complaint and its allegations as a whole to identify the plaintiff's claims and any theories undergirding those claims." *In re Lipitor Antitrust Litig.*, 855 F.3d at 144–45.

IV. STATEMENT OF FACTS

The alleged facts relevant to Plaintiff's motion are set forth in the Complaint and in the Notice of Removal. In addition, Defendants present additional factual evidence, including declarations and other materials attached as exhibits to this Opposition.[4]

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[4] Although Plaintiff may argue in its Reply that court approval is required to amend a notice of removal, Defendants' evidence does not entail an attempted *amendment* to add new bases for removal, but instead simply *substantiates* and confirms the allegations contained in the notice. This is entirely proper. The law is clear that the Court may consider the evidence presented in a defendant's opposition to remand, including declarations. "[T]he Court is not limited to an examination of the original petition in determining jurisdictional questions." *Giangola v. Walt Disney World Co.*, 753 F. Supp. 148, 153 n.5 (D.N.J. 1990) (citation and internal quotation marks omitted); *Notte v. Sears, Roebuck & Co.*, 1991 WL 275595, at *1 (E.D. Pa. Dec. 20, 1991); *see also Minker v. HSB Indus. Risk Insurers*, 2000 WL 291542, at *4 (D. Del. Mar. 14, 2000) ("[T]here is no support for plaintiff's argument that defendants are required to offer proof of their jurisdictional contentions in the notice of removal itself."). The Supreme Court has upheld removal where jurisdictional facts required to support the removal were found in later-filed affidavits rather than in the notice of removal. *See, e.g.*, *USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 206 (3d Cir. 2003) (citing *Willingham v. Morgan*, 395 U.S. 402, 407 n.3 (1969)). After all, a notice of removal need only "contain[] a short and plain statement of the

The Complaint seeks to hold Defendants liable, individually and as members of a "conspiracy," for decades of "extraction, production, and consumption" of "oil, coal and natural gas," which the Complaint calls "fossil fuel products." Compl. ¶¶ 2, 5, 46(b); *see also id.* ¶¶ 4, 6, 167, 170. Plaintiff seeks "compensatory" and "punitive damages," as well as "an order that provides for abatement of the public nuisance [certain] Defendants have created." Compl. ¶ 263; *id.* at 217 (Prayer for Relief). Plaintiff also seeks an order that "enjoins" those Defendants from producing and selling oil and natural gas in order to prevent them "from creating future common-law nuisances." *Id.* In other words, the Complaint seeks to stop, or at least significantly limit, the production and use of fossil fuels. Defendants vigorously dispute the merits of Plaintiff's claims and novel theories, and will address the merits at the appropriate time and in the appropriate forum. At this time, Defendants focus on Plaintiff's attempts to avoid federal jurisdiction and have this action remanded to state court. For the reasons explained above and below, removal was proper and this action belongs in federal court.

V. 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). When invoking removal jurisdiction, a defendant's "factual allegations will ordinarily be accepted as true unless challenged by the [plaintiff]." *Leite v. Crane Co.*, 749 F.3d 1117, 1121–22 (9th Cir. 2014). The removing party need show only that there is

grounds for removal." 28 U.S.C. § 1446(a); *see Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81, 84, 87 (2014).

federal jurisdiction over a single claim. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 559, 563 (2005).

VI. ARGUMENT

A. Plaintiff's Claims Target Defendants' Production and Sale of Oil and Gas

Plaintiff's claims—especially its nuisance and trespass claims—necessarily rest on the worldwide "*extraction*, *production*, and *consumption*" of oil and natural gas that Plaintiff alleges caused an "increase in global greenhouse gas pollution." Compl. ¶ 2. Under Plaintiff's theory, without any "*extraction*, *production*, and *consumption*" of oil and gas there would be no significant increase in global greenhouse gas emissions, which Plaintiff alleges is "the main driver of the gravely dangerous changes occurring to the global climate" and the cause of its injuries. *Id.* ¶ 4. Nevertheless, Plaintiff argues that Defendants' grounds for removal are not proper because Plaintiff's claims are based *in part* on Defendants' alleged "deception" and "misrepresentations," rather than on production and consumption. *Id.* ¶ 12. But the Complaint does not allege that any deception or misrepresentation alone caused Plaintiff's alleged injuries, nor could it. In fact, Plaintiff asserts that "Defendants' concealment and misrepresentation of their products' known dangers . . . drove consumption" across the globe, *id.*, and that "production and use of such products is the leading cause of climate change," *id.* ¶ 207. Despite Plaintiff's attempt to recast its Complaint as based *only* on Defendants' purported "misrepresentations," Plaintiff's claims expressly—and unavoidably—target Defendants' global production activities. Indeed, the alleged misrepresentations are almost completely beside the point, as Plaintiff seeks damages for alleged harms from the effects of global climate change, which, the Complaint makes plain, flow from worldwide production and sales untethered to any misstatements. For example, in identifying the alleged harms of global climate change, Plaintiff omits any reference to Defendants' purported "deception" and "misstatements":

- "Anthropogenic greenhouse gas pollution, primarily in the form of CO_2 is far and away *the dominant cause* of global warming, resulting in severe impacts including, but not limited to: sea level rise, disruption of the hydrologic cycle, more frequent and intense extreme precipitation events and associated flooding, more frequent and intense heatwaves, more frequent and intense droughts, and associated consequences of those physical and environmental changes." *Id.* ¶ 5 (emphasis added).

Plaintiff alleges that climate change results from increases in global greenhouse gas emissions across the globe, not just in Delaware, again with no reference to Defendants' statements. For example:

- "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.* ¶ 4.
- "[F]ossil fuel emissions are the dominant source of increases in atmospheric CO2 since the mid-twentieth century." *Id.* ¶ 51.

Plaintiff then acknowledges that it is the global combustion of fossil fuels, not statements, that releases greenhouse gases into the atmosphere. For example:

- "Greenhouse gases are largely byproducts of humans combusting fossil fuels." *Id.* ¶ 49.
- "The primary cause of the climate crisis is the combustion of coal, oil, and natural gas." *Id.* ¶ 5.

Plaintiff next alleges that Defendants are responsible for increased worldwide combustion, and the resulting increase in global emissions, because they extracted, produced and sold oil and gas, not because of anything they said. For example:

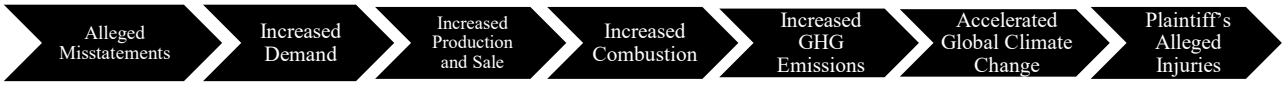
- "Fossil Fuel Defendants specifically created, contributed to, and/or assisted, and/or were a substantial contributing factor in the creation of the public nuisance by . . . [c]ontrolling every step of the fossil fuel product supply chain, including the extraction of raw fossil fuel products, including crude oil, coal, and natural gas from the Earth; the refining and marketing of those fossil fuel products, and the placement of those fossil fuel products into the stream of commerce." *Id.* ¶¶ 257–257(a).

Thus, Plaintiff's central theory is that Defendants' *global* extraction, production, and sale of oil and gas products has led to increased global combustion, which has led to increased greenhouse gas emissions, which has led to climate change, which has led to its alleged injuries in Delaware.

Yet Plaintiff now tries to portray this case as revolving around Defendants' alleged misrepresentations alone. But, at most, the Complaint's allegations suggest that Defendants' supposed misrepresentations may have increased consumer demand for oil and gas by some marginal (and unspecified) amount, which then prompted Defendants to extract, produce, and sell some marginally greater quantities of those products. For example:

- "Defendants' . . . promotion of the unrestrained use of their products drove consumption, and thus greenhouse gas pollution, and thus climate change." *Id.* ¶ 243.
- "Defendants' concealment and misrepresentation . . . drove consumption, and thus greenhouse gas pollution, and thus the climate crisis." *Id.* ¶ 12.

Even accepting this thinly veiled recasting of its claims, Plaintiff therefore necessarily places Defendants' production and sale of oil and gas directly in its alleged causal chain—and these links are closer to its alleged injuries than any alleged misrepresentations. This alleged causal chain is depicted below:



Plaintiff acknowledges that fossil fuel production is a necessary element of its causal chain, arguing that "the production of fossil fuels is simply the delivery mechanism of the State's injury." Mot. at 30. Plaintiff thus concedes that it is *production* that "deliver[s]" the alleged harms. *Id.* By Plaintiff's own argument, there would be no tort for Plaintiff to allege without Defendants' production. Plaintiff does not contest the above causal chain; it simply seeks to cherry-pick one link in its chain and ignore the others to avoid jurisdiction.

Indeed, if Plaintiff's claims were based exclusively on alleged 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 misrepresentations.

But the Complaint has no such limitation. In fact, Plaintiff seeks far broader relief, including for alleged "damage to publicly owned infrastructure and real property, and injuries to public resources," Compl. ¶ 244, as a result of "flood waters, extreme precipitation, saltwater, . . . storm surges and heightened waves," *id.* ¶ 251, none of which is caused by any statements or omissions made by Defendants or others. Plaintiff seeks recovery for *all harm* allegedly caused by *all combustion* of *all fossil fuels*.

Moreover, Plaintiff seeks to enjoin Defendants' production and sale of oil and gas. Plaintiff brings its nuisance claim *only against* Defendants involved in the production and sale of oil and gas, and "seeks an order" that "enjoins [those] Defendants from creating future common-law nuisances." *Id.* ¶ 263. If the injunctive relief Plaintiff seeks were targeted at alleged misrepresentations, rather than at Defendants' production and sales activities, Plaintiff would have asserted this claim against all Defendants—not just oil and gas producers—and sought injunctive relief against all Defendants. Plaintiff's aim is therefore clear—to enjoin Defendants' lawful production and sales activities across the country and around the world. At a minimum, Plaintiff's nuisance and trespass claims, brought solely against "fossil fuel" *producers* are subject to removal, and therefore there is federal jurisdiction over the entire action. *See Allapattah*, 545 U.S. at 559, 563; *Shah v. Hyatt Corp.*, 425 F. App'x 121, 124 (3d Cir. 2011).

At bottom, Plaintiff's claims necessarily rest on the extraction, production, sale, and consumption of fossil fuels, and the resulting interstate and international greenhouse gas emissions they produce when combusted by the end user. Plaintiff's claims are not, and could not be, limited to injuries caused by Defendants' alleged misrepresentations. No amount of artful pleading can transform these claims into something they are not. Plaintiff's broad theory must be heard in federal court.

B. Irrespective of How Characterized, Plaintiff's Claims Necessarily Arise Under Federal Law

1. Plaintiff's Claims Seek to Regulate Transboundary and International Emissions and Pollution

As a matter of federal constitutional structure, Plaintiff's claims necessarily arise under federal, not state, law, because they seek to regulate transboundary and international emissions and pollution. After *Erie*, there "is no federal general common law." *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). But *Erie* did not eliminate federal authority over "matters . . . so vitally affecting interests, powers and relations of the Federal Government as to require uniform national disposition rather than diversified state rulings." *United States v. Standard Oil Co.*, 332 U.S. 301, 307 (1947) ("*Standard Oil*"). The "federal judicial power to deal with common-law problems" thus "remain[s] unimpaired for dealing independently, wherever necessary or appropriate, with essentially federal matters, even though Congress has not acted affirmatively about the specific question." *Id.* In these specialized areas, "where there is an overriding federal interest in the need for a uniform rule of decision," *Illinois v. City of Milwaukee*, 406 U.S. 91, 105 n.6 (1972) ("*Milwaukee I*"), "state law cannot be used," *Milwaukee II*, 451 U.S. at 313 n.7 (1981).

Interstate pollution is one such area. *Milwaukee I* held, and *AEP* reiterated, that claims based on ambient, cross-border pollution arise under federal common law, not any individual State's law. "Environmental protection is undoubtedly an area . . . in which federal courts may . . . 'fashion federal law.'" *AEP*, 564 U.S. at 421. In particular, "[w]hen we deal with air and water in their ambient or interstate aspects, there is a federal common law." *Id.* (quoting *Milwaukee I*, 406 U.S. at 103). Likewise, "the regulation of interstate water pollution is a matter of federal, not state, law." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987). As the Supreme Court explained: "Federal common law and not the varying common law of the individual States is . . . necessary to be recognized as a basis for dealing in uniform standard with the environmental

rights of a State against improper impairment by sources outside its domain." *Milwaukee I*, 406 U.S. at 107 n.9. Plaintiff's Complaint makes clear that this is a case about interstate and international pollution—indeed, the very first paragraph discusses the "catastrophic" "impacts of climate change," which the Complaint plainly ties to sources outside Delaware: "[P]ollution from Defendants' fossil fuel products plays a direct and substantial role in the unprecedented rise in emissions of greenhouse gas pollution and increased atmospheric CO_2 concentrations that have occurred since the mid-20th century. This dramatic increase in atmospheric CO_2 and other greenhouse gases is the main driver of the gravely dangerous changes occurring to the global climate." Compl. ¶ 4.

Given the centrality of alleged transboundary pollution to Plaintiff's claims, the conclusion that state law cannot apply and that federal law is exclusive here flows directly from the Constitution's structure. "[F]ederal common law addresses 'subjects within national legislative power' . . . where the basic scheme of the Constitution so demands." *AEP*, 564 U.S. at 421. The Constitution's allocation of sovereignty between the States and the federal government, and among the States themselves, precludes applying state law in certain narrow areas whose inherently interstate nature requires uniform *national* rules of decision. Allowing state law to govern such claims would permit one State to "impose its own legislation on . . . the others," violating the "cardinal" principle that "[e]ach State stands on the same level with all the rest." *Kansas v. Colorado*, 206 U.S. 46, 97 (1907).

Just as "state courts [are] not left free to develop their own doctrines" of foreign relations, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964), or to decide disputes with neighboring states, *e.g.*, *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938), neither can they make rules that govern interstate or international pollution. In these

areas, "there is an overriding federal interest in the need for a uniform rule of decision," *Milwaukee I*, 406 U.S. at 105 n.6, so the "federal judicial power" must supply any rules necessary "to deal with common-law problems," *Standard Oil*, 332 U.S. at 307.

As the United States recently explained to the Supreme Court in *Baltimore*: "[C]ross-boundary tort claims associated with air and water pollution involve a subject that 'is meet for federal law governance'" because any such putative claims "that seek to apply the law of an affected State to conduct in another State" have an "inherently federal nature." Brief of United States as Amicus Curiae at 26–27, *BP p.l.c. v. Mayor and City Council of Baltimore*, No. 19-1189 (U.S. Nov. 23, 2020) (quoting *AEP*, 564 U.S. at 422). Claims "that seek to apply the law of an affected State to conduct in *another* State" necessarily "arise under 'federal, not state, law' for jurisdictional purposes, given their inherently federal nature." *Id.* at 27 (quoting *Ouellette*, 479 U.S. at 488).[5]

Plaintiff's claims also arise under federal law because they seek to regulate the production and sale of oil and gas abroad and, therefore, implicate the federal government's foreign affairs power and the Constitution's Foreign Commerce Clause. The federal government has exclusive authority over the nation's international policy on climate change and relations with foreign nations. *Pink*, 315 U.S. at 233 ("Power over external affairs is not shared by the States; it is vested in the national government exclusively."). Accordingly, "our federal system does not permit the controversy to be resolved under state law," "because the authority and duties of the United States

[5] At oral argument, the United States confirmed that Baltimore's claims, like Plaintiff's claims here, "are inherently federal in nature." Tr. at 31:4–5. The United States explained that although Baltimore "tried to plead around th[e Supreme] Court's decision in *AEP*, its case still depends on alleged injuries to the City of Baltimore caused by emissions from all over the world, and those emissions just can't be subjected to potentially conflicting regulations by every state and city affected by global warming." Tr. at 31:7–13.

as sovereign are intimately involved" and "because the interstate [and] international nature of the controversy makes it inappropriate for state law to control."[6] *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981); *see also Sabbatino*, 376 U.S. at 425 (noting that issues involving "our relationships with other members of the international community must be treated exclusively as aspects of federal law"); *Republic of Philippines v. Marcos*, 806 F.2d 344, 352–53 (2d Cir. 1986) (explaining that "there is federal question jurisdiction over actions having important foreign policy implications" and that a nominally state-law claim "arises under" federal common law when it "necessarily require[s] determinations that will directly and significantly affect American foreign relations").

Because Plaintiff's claims necessarily arise under federal common law, there is federal jurisdiction. Although Plaintiff argues that "federal common law does not provide an independent basis for removal jurisdiction," Mot. at 7–9, it is "well settled" that section 1331's "grant of 'jurisdiction will support claims founded upon federal common law as well as those of a statutory origin.'" *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 850 (1985) (quoting *Milwaukee I*, 406 U.S. at 100). Plaintiff does not even attempt to address these clear pronouncements from the Supreme Court. In short, when a claim "arise[s] under federal common law" there "is a permissible basis for jurisdiction based on a federal question." *Treiber & Straub, Inc. v. U.P.S., Inc.*, 474 F.3d 379, 383 (7th Cir. 2007).[7]

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[6] Plaintiff relies on out-of-jurisdiction decisions in other climate change cases like *Oakland* and *Massachusetts*, *see, e.g.*, Mot. at 10, that do not bind this Court. The *Massachusetts* action does not even set forth a nuisance or trespass cause of action, instead alleging violations of shareholder and consumer rights, thus making it particularly inapposite in assessing removal here. *See* Complaint, ECF No. 1-13, *Massachusetts v. Exxon*, No. 19-12430 (D. Mass. Nov. 29, 2019).

[7] Not surprisingly, Plaintiff does not even cite the Third Circuit's decision in *Goepel v. National Postal Mail Handlers Union, a Division of LIUNA*, 36 F.3d 306, 311–12 (3d Cir. 1994), in addressing Defendants' federal common law ground for removal, as that decision does not

2. Plaintiff Cannot Avoid Federal Jurisdiction Through Artful Pleading

Plaintiff's reliance on the well-pleaded complaint rule is misplaced. *E.g.*, Mot. at 7–9, 14. "[I]t is an independent corollary of the well-pleaded complaint rule that a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint." *Franchise Tax Bd.*, 463 U.S. at 22. That is, "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." 14C Wright & Miller, Federal Practice and Procedure: Jurisdiction § 3722.1 (rev. 4th ed. 2020). In exercising its "independent duty" to ascertain its jurisdiction, *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 426 F.3d 694, 702 (3d Cir. 2005), the court must analyze the *substance* of the claim. *See Jarbough v. Attorney General*, 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.").[8] As a result, a federal court must "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). The Third Circuit has done just that. For example, in *First Pennsylvania*

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resolve the questions at issue here. *Goepel* stated that "the only state claims that are 'really' federal claims and thus removable to federal court are those that are preempted completely by federal law," *Goepel*, 36 F.3d at 311–12, but it was merely explaining the operation of the doctrine of complete preemption as enunciated by the Supreme Court, which applies that doctrine where "it appears that . . . [plaintiff's] claim is 'really' one of federal law," *Franchise Tax Bd. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 13 (1983). *Goepel* did not hold that complete preemption is the "only" basis for removal jurisdiction over nominally state-law claims, which even Plaintiff acknowledges would be incorrect, since it recognizes that, at a minimum, *Grable* supplies another established basis for federal question jurisdiction. *See* Mot. at 13. Moreover, the Supreme Court has expressly held that section 1331's grant of "jurisdiction will support claims founded upon federal common law as well as those of statutory origin." *Milwaukee I*, 406 U.S. at 100; *Nat'l Farmers Union Ins.*, 471 U.S. at 850. *Goepel* did not hold otherwise.

[8] *Accord Rivet v. Regions Bank of La.*, 522 U.S. 470, 475 (1998) ("[A]n independent corollary to the well-pleaded complaint rule is the further principle that a plaintiff may not defeat removal by omitting to plead necessary federal questions. 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.") (internal quotations and citations omitted).

Bank, N.A. v. Eastern Airlines, Inc., the court held that nominally state-law claims seeking to recover damages for a lost interstate shipment arose under federal common law. 731 F.2d 1113, 1115–16 (3d Cir. 1984).

To be sure, plaintiffs can usually avoid removal by pleading only state-law claims, even if federal claims are available. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). But in an area governed *exclusively* by federal law as a matter of constitutional structure, there is no state law to be applied. "If federal common law exists, it is because state law cannot be used." *Milwaukee II*, 451 U.S. at 313 n.7. Accordingly, a plaintiff asserting claims in one of these "narrow areas" like transboundary pollution cannot choose between state and federal law because *no state law exists*. *See Texas Indus.*, 451 U.S. at 641. Under the Constitution, any claims asserted in this area are inherently federal no matter the labels attached to them. When a plaintiff brings a claim in an exclusively federal area, that claim necessarily arises under and is governed by federal law, thereby creating federal jurisdiction.

That is precisely the situation here. Because federal law *exclusively* governs the types of claims Plaintiff brings, which seek damages for the alleged harms caused by interstate (and even worldwide) emissions of greenhouse gases, the claims arise under federal common law.

3. Whether the Clean Air Act Displaced Plaintiff's Claims Is Irrelevant to the Jurisdictional Analysis

Plaintiff's argument that the Clean Air Act ("CAA") displaced the federal common law governing its claims, Mot. at 11–12, misapprehends the jurisdictional inquiry and is premature. As the First Circuit explained in *United States v. Swiss American Bank, Ltd.*, the Supreme Court's decision in *Standard Oil* mandates a "two-part approach [that] involves what may be characterized as the source question and the substance question. The former asks: should the source of the controlling law be federal or state? The latter (which comes into play only if the source question

is answered in favor of a federal solution) asks" how the court should "defin[e] the substance of the rule." 191 F.3d 30, 42–45 (1st Cir. 1999). "As long as the source of the rule to be applied is federal, the . . . case is one 'arising under' federal law," and "the answer to the source question suffices, regardless of what the answer to the substance question eventually may prove to be." *Id.* at 45.

In cases that involve "interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations," only federal law can apply because "our federal system does not permit the controversy to be resolved under state law" at all. *Texas Indus.*, 451 U.S. at 641. Thus, whether the CAA would displace *state* law is irrelevant—no state law exists here. Federal common law is necessarily the source of Plaintiff's claims, and those claims therefore belong in federal court.

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

The Supreme Court has held that even suits alleging only state-law causes of action "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. Defendants do not raise *Grable* jurisdiction based on federal defenses, as Plaintiff suggests. Mot. at 15. Rather, Plaintiff's claims raise affirmative "federal issue[s]" that are "actually disputed and substantial." *Grable*, 545 U.S. at 314. Plaintiff's claims necessarily involve inherently federal issues because they attempt to supplant federal energy policy, exercise the federal foreign affairs power, and regulate Defendants' speech over matters of public concern.

1. Plaintiff's Claims Attempt To Supplant Federal Energy Policy

Congress has exercised its "considered judgment" concerning environmental regulation by

enacting federal statutes such as the CAA, 42 U.S.C. § 7401 *et seq*. Congress has given the Environmental Protection Agency ("EPA") authority to make informed assessments of potential environmental benefits, while taking into account the country's energy needs and the possibility of economic disruption, in regulating Defendants' and other greenhouse gas emitters' conduct consistent with cost-benefit analyses and other assessments as directed by the CAA. *See AEP*, 564 U.S. at 426–27; Notice of Removal ("NOR") ¶¶ 145–51. The issues of greenhouse gas emissions, global climate change, hydrologic cycle disruption, and sea level rise are not unique to the State of Delaware or even the United States. Yet the Complaint attempts to strike a new regulatory balance that would supplant decades of national energy, economic, and environmental policies on these issues by inviting a Delaware state court to assert control over an entire industry and its interstate (indeed, international) commercial activities, and impose damages and injunctive relief contrary to long-standing federal law and regulatory schemes. In *AEP*, the Supreme Court recognized that Congress has spoken directly to the issue of greenhouse gas emissions because they "qualify as air pollution subject to regulation under the [Clean Air] Act." 564 U.S. at 424 (citing *Massachusetts v. EPA*, 549 U.S. 497, 528–29 (2007)). Because Congress has "designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions," Plaintiff's claims "cannot be reconciled with the decisionmaking scheme Congress enacted." *AEP*, 564 U.S. at 428–29.

Plaintiff also seeks a massive damages award, and as courts recognize and common sense confirms, "regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236, 247 (1959) ("*San Diego Unions*"); *see*

also Ouellette, 479 U.S. at 495 (recognizing that damages addressing common-law environmental tort claims often force defendants to "change [their] methods of doing business and controlling pollution to avoid the threat of ongoing liability"). Plaintiff seeks to use state tort law to impose these types of *de facto* regulations of interstate conduct. This Court, therefore, would need to decide substantial and disputed questions of whether existing federal regulations or *de facto* state regulations are best suited to address issues relating to global climate change.

The answer to that question is clear: A patchwork of 50 different state-law responses to this global issue would be unworkable and is precluded under our federal constitutional system. "If courts across the nation were to use the vagaries" of state "public nuisance doctrine to overturn the carefully enacted rules governing air-borne emissions, it would be increasingly difficult for anyone to determine what standards govern." *North Carolina ex rel. Cooper v. TVA*, 615 F.3d 291, 298 (4th Cir. 2010). In our federal system, a state may make law within its own borders, but no state may "impos[e] its regulatory policies on the entire Nation." *BMW of N. Am. v. Gore*, 517 U.S. 559, 585 (1996). Plaintiff's claims, contrary to its assertions, do not fall "within its traditional police authority . . . [and] federalism concerns" weigh in favor of removal. Mot. at 19. For this reason, this action is also removable under *Grable*, because the claims necessarily incorporate federal common law and, accordingly, require the "construction or effect of [federal] law." *Grable*, 545 U.S. at 313.

2. Plaintiff's Claims Necessarily Interfere With Foreign Affairs

Plaintiff's claims also necessarily incorporate federal law by seeking to regulate global climate change, which is an inherently federal matter that is the subject of major international treaties. NOR ¶¶ 23, 139, 146, 155, 172–73, 179. In international negotiations, the United States has sought to balance environmental policy with robust economic growth. After President Clinton signed the Kyoto Protocol in 1997, for example, the U.S. Senate expressed its 95-0 view that the

United States should not be a signatory to any protocol that "would result in serious harm to the economy" or fail to regulate the emissions of developing nations. *See* S. Res. 98, 105th Cong. (1997). Congress then enacted a series of laws barring the EPA from implementing or funding the Protocol. *See* Pub. L. No. 105-276, 112 Stat. 2461, 2496 (1998); Pub. L. No. 106-74, 113 Stat. 1047, 1080 (1999); Pub. L. No. 106-377, 114 Stat. 1441, 1441A-41 (2000). On January 20, 2021, as one of President Biden's first acts in office, the United States rejoined the Paris Agreement, *see* Dick Decl. Ex. 2, which provides that government efforts to address "the threat of climate change" should occur "in the context of sustainable development" and "take into consideration" the economic "impacts of response measures," Dick Decl. Ex. 3, art. 2, § 1; *id.* art. 4, § 15. More broadly, the nation's climate change policy is also inextricably "infus[ed]" into its "trade policies," "foreign aid programs," "bilateral discussions and even [its] military readiness." Dick Decl. Ex. 4.

Plaintiff seeks to replace these international negotiations and decisions from the representative branches of government with a state-law solution crafted by a state court applying Delaware's common law. Plaintiff's claims attempt to regulate extraterritorial conduct that occurs in foreign nations, giving the claims an inherently federal component: "an issue concerned with . . . ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law." *Sabbatino*, 376 U.S. at 425; *see also* NOR ¶ 170 (citing cases). The United States has long sought multilateral reductions in worldwide carbon emissions, using domestic emissions reductions as negotiating leverage to extract similar commitments from other nations. If successful, Plaintiff's claims would diminish that bargaining chip, undermining the U.S. response to a global issue.

Accordingly, Plaintiff's claims necessarily raise a substantial federal question that is appropriate for federal court resolution because they implicate issues of foreign relations and

require the exercise of authority that is necessarily federal in nature. *See, e.g.*, *Marcos*, 806 F.2d at 346, 352–54 (nominally state-law claim "arises under federal law" when it "necessarily require[s] determinations that will directly and significantly affect American foreign relations"); *Torres v. S. Peru Copper Corp.*, 113 F.3d 540, 542–43 (5th Cir. 1997) ("[S]tate-law tort claims" arose under federal law because they "raise[d] substantial questions of federal common law by implicating important foreign policy concerns.").

3. Plaintiff's Claims Include Federal Constitutional Elements

Even if the Court were to construe Plaintiff's claims as limited to Defendants' alleged misrepresentations, which it should not, Plaintiff's claims still would necessarily incorporate affirmative federal constitutional elements imposed by the First Amendment. "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 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. *See Hepps*, 475 U.S. at 774–76 (explaining that 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) (holding public officials have the burden of proving with "convincing clarity" that a "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.").

These First Amendment issues are not "defenses," but rather constitutionally required

elements of the claim on which Plaintiff bears the burden of proof—by clear and convincing evidence—*as a matter of federal law*. *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 53, 56 (1988) (extending First Amendment substantive requirements beyond the defamation context to other state-law attempts to impose liability for allegedly harmful speech); *In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, 511 F. Supp. 2d 742, 811 (S.D. Tex. 2005) ("First Amendment protections and the actual malice standard . . . have been expanded to reach . . . breach of contract, misrepresentation, and tortious interference with contract or business."). As a result, 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 removable because they typically do not implicate the broader federal interests at issue in this case. As shown above, those federal interests are themselves unquestionably "substantial" under *Grable*. So is the speech that Plaintiff is trying to suppress, because it addresses a subject of national and international importance that falls within the purview of federal authority over foreign affairs and domestic economic, energy, and security policy. Moreover, Plaintiff is a public entity seeking to use the machinery of its own state courts to impose *de facto* regulations on Defendants' nationwide speech on issues of national public concern. *See supra* Section VI.C.1. But "it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas." *Falwell*, 485 U.S. at 56 (internal quotation marks and citation omitted). First Amendment interests are at their apex where, as here, it is a governmental entity that seeks to use state-law claims to regulate speech on issues of "public concern." *Hepps*, 475 U.S. at 774. 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.

Indeed, 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." *Mann*, 140 S. Ct. at 344 (2019) (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'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.

D. The Action Is Removable Because It Is Connected to Defendants' Activities on the Outer Continental Shelf

This Court also has jurisdiction under OCSLA, which grants jurisdiction over actions "*arising out of, or in connection with . . . any operation* conducted on the [OCS] which *involves exploration, development, or production* of the minerals, of the subsoil and seabed of the [OCS], or which involves rights to such minerals." 43 U.S.C. § 1349(b)(1) (emphases added). OCSLA was enacted "to establish federal ownership and control over the mineral wealth of the OCS and to provide for the development of those natural resources." *EP Operating Ltd. v. Placid Oil Co.*, 26 F.3d 563, 566 (5th Cir. 1994). To promote this broad aim, Congress extended federal jurisdiction "to the entire range of legal disputes that it knew would arise relating to resource development on the [OCS]." *Laredo Offshore Constructors, Inc. v. Hunt Oil Co.*, 754 F.2d 1223,

1228 (5th Cir. 1985). Accordingly, the phrase "arising out of, or in connection with" is "undeniably broad in scope." *EP Operating Ltd.*, 26 F.3d at 569.

1. Defendants Satisfy Both Elements of OCSLA's Jurisdictional Test

OCSLA's jurisdictional test is two-fold: (1) did the defendant engage in an "operation conducted on the [OCS]" that entails the "exploration" and "production" of "minerals," and (2) do the plaintiff's claims "aris[e] out of or in connection with" Defendants' operations on the OCS. 43 U.S.C. § 1349(b)(1). Defendants satisfy both prongs of this test.

Defendants satisfy the first prong because they engage in substantial "operation[s] conducted on the [OCS]" that entail the "exploration" and "production" of "minerals." 43 U.S.C. § 1349(b)(1); *see, e.g.*, NOR ¶ 40. Defendants and/or their affiliates operate a large share of the "more than 5,000 active oil and gas leases on nearly 27 million OCS acres" that the U.S. Department of the Interior ("DOI") administers under OCSLA. NOR ¶ 38. According to DOI data for the period 1947 to 1995, 16 of the 20 largest—including the five largest—OCS operators in the Gulf of Mexico, measured by oil volume, were either a Defendant in this action, or one of their predecessors or subsidiaries. NOR Decl. Ex. 22. And in every subsequent year, at least three of the top five OCS operators in this area have been a Defendant, or one of their predecessors or subsidiaries. Dick Decl. Ex. 5; *see also* NOR ¶ 39.[9]

Defendants also satisfy the second prong of OCSLA's jurisdictional test because Plaintiff's claims "aris[e] out of *or in connection with*" Defendants' operations on the OCS. 43 U.S.C. § 1349(b)(1) (emphasis added). Indeed, Plaintiff alleges that the cumulative impact of Defendants'

[9] The Complaint improperly conflates the activities of Defendants with the activities of their separately organized predecessors, subsidiaries, and affiliates. Although Defendants reject Plaintiff's erroneous attempt to attribute the actions of predecessors, subsidiaries, and affiliates to the named Defendants, for purposes of this motion only, Defendants describe the conduct of certain predecessors, subsidiaries, and affiliates of certain Defendants to show that Plaintiff's Complaint, as pleaded, should remain in federal court.

global extraction and production activities over the past several decades—which necessarily include Defendants' significant production on the OCS—contributed to global greenhouse gas emissions that caused Plaintiff's alleged injuries. *See, e.g.*, Compl. ¶¶ 50–55. There is no question that Defendants' production activities—which are a critical link in Plaintiff's alleged causal chain—are substantial. Oil produced from the OCS accounts for approximately *30% of all domestic production*. Dick Decl. Ex. 6, at 1–4. "Between 1954 and 2016 . . . production from offshore leases totaled more than 20 billion barrels of oil" and "the federal government collected an estimated $80 billion in signature bonuses and $150 billion in royalties—not adjusted for inflation—from offshore oil and gas leases." Priest Decl. ¶ 7(1).

The Complaint does not, and cannot, distinguish between alleged injuries caused by fossil fuels based on the location of their extraction or production. Rather, Plaintiff contends that Defendants' *cumulative* fossil fuel production activities—including those on the OCS—contribute to *undifferentiated* greenhouse gas emissions that caused its alleged injuries. Compl. ¶ 55. Defendants' production activities on the OCS are thus clearly connected to Plaintiff's claims and alleged injuries and are more than sufficient to satisfy the "undeniably broad . . . scope" of this prong of the statute. *EP Operating Ltd.*, 26 F.3d at 569.

Plaintiff tries to evade OCSLA jurisdiction by arguing that the complained-of conduct is not production—on the OCS or anywhere else—but rather the "concealment and misrepresentation of their products' known dangers," Mot. at 3, which did not occur on the OCS. But, as explained above, Plaintiff's claims are not limited to alleged misrepresentations. Plaintiff's central theory is that Defendants' extraction, production, and sale of fossil fuels led to increased combustion, which led in turn to increased greenhouse gas emissions, which led to climate change, which resulted in Plaintiff's alleged injuries. *See supra* Section VI.A. Defendants extracted and produced oil and

gas on the OCS. Those products were then combusted, resulting in greenhouse gas emissions that are *indistinguishable* from any others, as Plaintiff acknowledges, "because greenhouse gasses quickly diffuse and comingle in the atmosphere." Compl. ¶ 245. It is therefore impossible to distinguish removal-eligible emissions from non-removal-eligible emissions. Because Plaintiff's claims and the damages they seek are thus predicated on Defendants' production activities on the OCS, removal is proper under OCSLA.

2. OCSLA Does Not Require But-For Causation

Plaintiff's assertion that "but-for" causation is required for removal under OCSLA is wrong. *See* Mot. at 53. Not only is this interpretation contrary to the text of the statute, which requires only a "connection," 43 U.S.C. § 1349(b), but the case law Plaintiff cites also does not support that requirement. To the extent courts have discussed "but-for" causation, it has been to explain that but-for causation is *sufficient* for jurisdiction, in the course of *rejecting* higher causation standards proposed by the plaintiffs in those cases. *See In re Deepwater Horizon*, 745 F.3d 157, 163 (5th Cir. 2014) (rejecting argument that more than a "'but-for' connection" is required for jurisdiction); *Tenn. Gas Pipeline v. Houston Cas. Ins. Co.*, 87 F.3d 150, 155 (5th Cir. 1996) (declining to require more than but-for causation, because of the "broad jurisdictional grant under § 1349").

Plaintiff cites no controlling authority rejecting OCSLA jurisdiction on the ground that but-for causation is *necessary* for jurisdiction. Indeed, the only case Plaintiff cites rejecting OCSLA jurisdiction based on the but-for test adopted that test as an alternative to a more stringent "intimate connection" test that plaintiff advanced. *See Plains Gas Sols., LLC v. Tennessee Gas Pipeline Co.*, 46 F. Supp. 3d 701, 704 (S.D. TEx. 2014); Mot. at 52. Congress's use of the phrase "in connection with," 43 U.S.C. § 1349(b)—separate and apart from the grant of jurisdiction over claims "arising out of" OCS operations—necessarily means there is no causal requirement at all. Courts have

routinely held that OCSLA jurisdiction is proper in the absence of but-for causation—for example, where the plaintiff's claims are connected to OCSLA operations in the sense that they threaten to "impair" the "recovery" of minerals from the OCS. *See, e.g.*, *EP Operating Ltd.*, 26 F.3d at 570 (applying "impaired recovery" test); *United Offshore Co. v. S. Deepwater Pipeline Co.*, 899 F.2d 405, 407 (5th Cir. 1990) (same).

OCSLA jurisdiction is proper here under that rationale as well. Congress intended OCSLA's removal provision to cover "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." *EP Operating Ltd.*, 26 F.3d at 570. Plaintiff seeks potentially billions of dollars in damages, together with an order of abatement and an order enjoining Defendants' alleged trespass, which would necessarily require enjoining their production of oil and gas. *See* Compl. ¶ 263; *id.* at 217, Prayer for Relief. The relief Plaintiff seeks would indirectly if not directly threaten the viability of future OCSLA production by making it prohibitively costly. *See Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 521 (1992) ("[R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief."); *San Diego Unions*, 359 U.S. at 247 (same). This would substantially interfere with OCSLA's congressionally mandated goal of obtaining the largest "total recovery of the federally-owned minerals" underlying the OCS. *Amoco Prod. Co. v. Sea Robin Pipeline Co.*, 844 F.2d 1202, 1210 (5th Cir. 1988); *see* 43 U.S.C. § 1802(1)–(2); *see also* 43 U.S.C. § 1332(3) (federal policy is "expeditious and orderly development" of the OCS). Defendants have significant production on the OCS. Accordingly, this action falls within the "legal disputes . . . relating to resource development on the [OCS]" that Congress intended to be heard in the federal courts. *Laredo Offshore*, 754 F.2d at 1228.

E. The Action Is Removable Because It Is Connected to Defendants' Activities Undertaken at the Direction, Supervision, and Control of Federal Officers

This action is also removable because Plaintiff seeks to impose liability and damages for conduct Defendants undertook (and still undertake) under the direction, supervision, and control of officers of the federal government. *See* 28 U.S.C. § 1442(a)(1). The federal officer removal statute authorizes removal where, as here, "(1) the defendant is a 'person' within the meaning of the statute; (2) the plaintiff's claims are based upon the defendant's conduct 'acting under' the United States, its agencies, or its officers; (3) the plaintiff's claims against the defendant are 'for, or relating to' an act under color of federal office; and (4) the defendant raises a colorable federal defense to the plaintiff's claims." *Papp*, 842 F.3d at 812 (alterations omitted) (citation omitted).

"[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. The Supreme Court has emphasized that "the statute must be liberally construed" and, in particular, "[t]he words 'acting under' are broad." *Watson v. Philip Morris Cos.*, 551 U.S. 142, 147 (2007); *Def. Ass'n of Philadelphia*, 790 F.3d at 468. Accordingly, in assessing removal, the court must "construe the facts in the removal notice in the light most favorable to the" existence of federal jurisdiction. *Def. Ass'n of Philadelphia*, 790 F.3d at 466.

The facts contained in Defendants' Notice of Removal show that this case falls squarely within the ambit of the federal officer removal statute. First, Plaintiff does not dispute that Defendants are persons under the federal officer removal statute. Second, Defendants have "acted under" federal officers for decades by producing and supplying oil and gas under the direction, supervision, and control of the U.S. government. Third, Plaintiff's claims "relate to" these activities because the claims—based on the alleged consequences of global climate change—necessarily encompass *all* production and sales, including Defendants' activities under the

direction, supervision, and control of federal officers. Finally, Defendants raise colorable federal defenses. Accordingly, all four elements for removal are met. *See Papp*, 842 F.3d at 812.

1. Defendants "Acted Under" Federal Officers

Oil and gas are at the heart of multiple economic, energy, and security policies of the United States, and have been for decades. It has long been the policy of the United States that fossil "fuels are strategically important domestic resources that should be developed to reduce the growing dependence of the United States on politically and economically unstable sources of foreign oil imports." 42 U.S.C. § 15927(b)(1); *see also* 83 Fed. Reg. 23295, 23296 (Final List of Critical Minerals 2018) ("[F]ossil fuels" are "indispensable to a modern society for the purposes of national security, technology, infrastructure, and energy production."). As Professor Wilson explains: "Over the last 120 years, the U.S. government has relied upon and controlled the oil and gas industry to obtain oil and gas supplies and expand the production of petroleum products, in order to meet military needs and enhance national security." Wilson Decl. ¶ 1; *see* NOR ¶¶ 52–66.

It should therefore be no surprise that Defendants have acted under the direction, supervision, and control of federal officers in numerous ways over the last century in order to help the U.S. government accomplish critical national policies and ensure adequate energy sources for national defense and economic security. As explained below, these include the following: (a) developing mineral resources on the OCS through highly technical leases that were overseen and managed by federal supervisors; (b) operating the federal petroleum reserve at Elk Hills "in the employ" of the U.S. Navy; (c) supplying fuel for and managing the Strategic Petroleum Reserve; (d) distributing gasoline supplies to wholesale purchasers in response to the oil embargoes of the 1970s; (e) producing oil and gas, operating government-owned equipment, and constructing pipelines during World War II at the direction of the Petroleum Administration for War ("PAW") and supplying petroleum to the federal government during the Korean War under

directives under the Defense Production Act of 1950, Pub. L. No. 81-774, 64 Stat. 798 ("DPA"); and (f) producing and supplying large quantities of specialized, noncommercial-grade fuel for the U.S. military.

Each of these examples demonstrates that Defendants have produced oil and gas under the direction, supervision, and control of the federal government. Any one of them is sufficient to support federal officer removal, and each demonstrates the strong federal interest in petroleum production, which Plaintiff now seeks to disrupt. Plaintiff relies heavily on opinions from other courts to argue that Defendants do not meet the "acting under" element of federal officer removal. Mot. at 26, 33–48. But Defendants here present substantial evidence that was not before those courts and unequivocally establishes that Defendants were acting in "an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior." *Watson*, 551 U.S. at 152.[10] This evidence includes:

- Evidence that Defendants acted under federal officers in performing operations on the OCS to fulfill basic government duties that the federal government would otherwise have to perform itself. In fact, in response to the 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. Ex. 9, Dick Decl. Ex. 7;
- 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. This evidence shows, for example, that Standard Oil was "*in the employ* of the Navy Department and [was] responsible to the Secretary thereof," Dick

[10] In its Reply, Plaintiff may cite to a recent order granting remand from the District Court of Hawaii. *See Honolulu v. Chevron U.S.A. Inc.*, 2021 WL 531237 (D. Haw. Feb. 12, 2021). There, that court "assume[d] Defendants acted under a federal officer" by supplying specialized fuels and constructing pipelines for the federal government, but indicated that it felt constrained by the Ninth Circuit's decision in *San Mateo*. *Id.* at *5 ("[T]he Court observes that this case hardly operates on a clean slate. . . . This is because the Ninth Circuit recently addressed that exact same issue in a similar lawsuit."); *id.* (noting "the tinged canvas upon which the Court writes"). Courts in the Third Circuit are not similarly bound by Ninth Circuit precedent. In any case, Defendants have appealed from that remand order. *See Honolulu v. Chevron U.S.A. Inc.*, No. 21-15313 (9th Cir. filed Feb. 18, 2021); *Maui v. Chevron U.S.A. Inc.*, No. 21-15318 (9th Cir. filed Feb. 18, 2021).

Decl. Ex. 8, at 3 (emphasis added);

- Evidence that Defendants acted under federal officers by supplying oil for and managing the Strategic Petroleum Reserve, including in the event that the President calls for an emergency drawdown, which was done, for example, in response to Hurricane Katrina in 2005 and disruptions to the oil supply in Libya in 2011, Dick Decl. Ex. 9;
- Evidence that the federal government controlled Defendants' production activities 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," Dick Decl. Ex. 10 (emphasis added); and
- 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," Dick Decl. Ex. 11.

In short, Defendants have established through substantial evidence—including declarations from Professors Priest and Wilson—that a significant portion of Defendants' oil and gas production and sales over the last century was conducted under the direction, guidance, supervision, and control of the federal government.

a. Defendants Acted Under Federal Officers By Developing Mineral Resources on the Outer Continental Shelf

Defendants, through OCS leases, acted on behalf of the federal government to extract federally owned mineral resources under close direction and supervision of the federal government, 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. Contrary to Plaintiff's suggestion, these are not "arms-length" business arrangements divorced from the federal government's satisfaction of its fundamental, national policy objectives set by Congress. Mot. at 37. As Professor Priest explains, 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 ¶¶ 68–88.

The federal OCS program "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." 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 ¶ 79. "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 prior experience or expertise," it chose the second option. 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 oil and gas from the OCS. *Watson*, 551 U.S. at 147, 154.

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) (emphases added); NOR ¶¶ 79–80. The federal government retained the power to "direct how oil and gas resources would be extracted and sold from the OCS." Priest Decl. ¶ 20.

Professor Priest further explains that federal officials in the Department of Interior—who 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. Federal supervisors had complete authority to control and dictate the "rate of production from OCS wells," *id.* ¶ 26; NOR ¶ 80, and had authority to suspend operations in certain situations, Priest Decl. ¶ 20; NOR ¶ 84. And the supervisors also "had the final say over methods of measuring production and computing royalties," which was based on "the estimated reasonable value of the product as determined by the supervisor." Priest Decl. ¶ 20 (internal quotation marks omitted). As Professor Priest explains, these federal officials "did not engage in perfunctory, run-of-the-mill permitting and inspection." *Id.* ¶ 22. 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. *Id.* ¶ 28.

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

. . . on all OCS wells." *Id.* ¶ 24 (citations omitted). Professor Priest observes that through these OCS Orders, federal officials "exercised active control on the federal OCS over the drilling of wells, the production of hydrocarbons, and the provision of safety." *Id.* ¶ 25. These controls went far beyond typical regulations; the federal government imposed requirements as the resource owner to achieve its economic and policy goals. *E.g.*, *id.* ¶¶ 28, 32.

Federal officials have repeatedly recognized the importance of OCS development to support the nation's need for energy. In response to the 1973 OPEC oil embargo, for example, President Nixon "called for a national effort . . . to develop the 'potential to meet our own energy needs without depending on any foreign energy sources' by 1980." *Id.* ¶ 50. Congress mandated "expedited exploration and development of the [OCS] in order to achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments," *id.* ¶ 55, including by "mak[ing] such resources available to meet the Nation's energy needs as rapidly as possible," 43 U.S.C. § 1802(1)–(2). *See also Cal. ex rel. Brown v. Watt*, 668 F.2d 1290, 1297–98 (D.C. Cir. 1981).

During this period, multiple proposals in Congress sought to address the nation's oil and gas needs by creating a national oil company. *See* NOR ¶ 69; NOR Decl. Ex. 9; Priest Decl. ¶¶ 52–53; 121 Cong. Rec. 4490 (daily ed. Feb. 26, 1975); Dick Decl. Ex. 7. One proposal, by Senator Hollings, would have put "a moratorium on conventional leasing" and "authoriz[ed] and direct[ed] the Secretary of the Interior to initiate a major program of offshore oil exploration." NOR Decl. Ex. 9. 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)). A second proposal "would have formally established a 'Federal Oil and Gas Corporation'" that would be "'owned by the federal government' and 'in case of any shortage of natural gas or oil and serious

public hardship, could itself engage in production on Federal lands in sufficient quantities to mitigate such shortage and hardship.'" *Id.* Yet another proposal, from Representatives Harris and McFall, "would provide for the establishment of a National Energy and Conservation Corporation—to be called Ampower—similar to the Tennessee Valley Authority." 121 Cong. Rec. 4490 (daily ed. Feb. 26, 1975). Representative Harris explained: "The creation of a quasi-public corporation such as Ampower can and should perform these functions on public lands" to "[e]nsure that the public's oil and gas is developed in the public interest." Dick Decl. Ex. 7, 9275–76. These proposals were ultimately rejected in favor of an arrangement by which the government would contract with private companies, including Defendants—*acting as agents*—to achieve this federal objective with expanded federal supervision and control. *See* Priest Decl. ¶ 55. Legislative history thus confirms that the federal government uses OCS lessees to meet a "basic governmental task." *County of San Mateo v. Chevron Corp.*, 960 F.3d 586, 599 (9th Cir. 2020); *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.").

Where, as here, "'the federal government uses a private corporation to achieve an end it would have otherwise used its own agents to complete,' that contractor is 'acting under' the authority of a federal officer." *Papp*, 842 F.3d at 812. The importance of the OCS to domestic energy security and economic prosperity has continued to the present, and across every administration. *See* 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.

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

Standard Oil of California ("Standard Oil"), a predecessor to defendant Chevron, acted under the direction and supervision of federal officers by operating the federal government's National Petroleum Reserve No. 1 in Elk Hills, which it did for decades in the employ of the Navy. Plaintiff relies on other court decisions that concluded that the Unit Production Contract ("UPC") between Standard Oil and the Navy, *standing alone*, did not provide sufficient evidence that Standard Oil "acted under" federal officers. Mot. at 42–46. 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 wherein the Navy hired Standard to *operate* the Navy's portion of the reserve on its behalf for 31 years, such that Standard was "in the employ" of the Navy during this period. NOR ¶ 102.

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.* ¶ 100. Standard "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.* ¶¶ 58–61. 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). And 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." Dick Decl. Ex. 12, at 3 (emphases added).

There can be no doubt that, "in the absence of [this] contract with [Standard], the Government itself would have had to perform" these tasks. *Watson*, 551 U.S. at 154. Indeed, declassified documents, 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 was "chosen as operator because it was the only large company capable of furnishing the facilities for such a development program." NOR Decl. Ex. 8, at 1. Nor can there be any dispute that 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." Dick Decl. Ex. 13 at 3, 15. And when the country faced an energy shortage in 1974, the government once again directed Chevron to produce 400,000 barrels per day. NOR ¶ 102.

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

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

In further response to the 1970s oil embargoes, Congress created the Strategic Petroleum Reserve to reduce the impact of any disruptions in oil supply. NOR ¶ 108. 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. NOR ¶ 110; Dick Decl. Ex. 14, 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 ¶ 111; *see, e.g.*, Dick Decl. Ex. 15, at 19.

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 ¶ 113; *see* Dick Decl. Ex. 9, at 16, 34. 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. NOR ¶ 113 & n.127; Dick Decl. Ex. 9. 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.

d. Defendants Acted Under Federal Officers Pursuant to the Emergency Petroleum Allocation Act

Also in response to the oil embargoes of the 1970s, Congress passed the Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 635, in order to manage resulting shortages and "distribute [petroleum products] fairly across the total spectrum of petroleum use in this country." Dick Decl. Ex. 16, at 35. Pursuant to the Act, from 1974 to 1981 the federal government implemented an "omnibus mandatory allocation program covering every facet of the petroleum industry and affecting, if not dictating, virtually every domestic transaction involving crude oil and covered petroleum products." Dick Decl. Ex. 17, at 6. This program required that Defendants distribute available gasoline supplies to wholesale purchasers (largely service stations)

on a pro rata basis. *See* Dick Decl. Ex. 16 at 37. Further, the program mandated that Defendants regularly report to the federal government on their crude oil supplies and refining activities; where a Defendant's crude oil supplies exceeded a certain benchmark, it was forced to sell to others who fell below that benchmark. *See id.* at 41. Congress deemed the allocation system, and the oil companies' participation in it, necessary due to "shortages of crude oil" that constituted "a national energy crisis which is a threat to the public health, safety, and welfare" requiring "prompt action by the Executive branch." Pub. L. No. 93-159, sec. 2(a)(1) & (3), 87 Stat. 628. By virtue of the government's comprehensive direction and supervision of gasoline and crude oil sales, Defendants again engaged in "an effort to *assist*, or to help carry out" the federal government's goals—here, to equitably distribute fossil fuel products during the embargoes of the 1970s. *Watson*, 551 U.S. at 152.

e. 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* Dick Decl. Ex. 18. 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." Dick Decl. Ex. 19, 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.*: *see also* NOR ¶ 55.

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. It 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." Dick Decl. Ex. 10 (emphasis added).

Multiple courts have found that the federal government exerted extraordinary control over Defendants during wartime to guarantee the supply of oil and gas for wartime efforts, such as high-octane 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); NOR ¶ 115. 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) *appeal docketed*, No. 20-20590 (5th Cir. Nov. 13, 2020). Defendants also acted under federal officers in constructing and operating the Inch Lines "under contracts" and "as agent[s]" for the federal government, bringing hundreds of millions of barrels of crude oil and refined products for use and combustion on the cross-Atlantic fronts during the war. *Schmitt v. War Emergency Pipelines, Inc.*, 175 F.2d 335, 335 (8th Cir. 1949); *see* NOR ¶¶ 121–22. The Inch Lines "were built for a single purpose, to meet a great war emergency. . . . [T]hey helped to win a war that would have taken much longer to win without them." NOR ¶ 124 (Statement of Ralph K. Davies, Deputy Petroleum Administrator of War, S. Res. 96 at 11 (Nov. 28, 1945)). Indeed, Defendants' wartime provision

of oil and gas is a "classic case . . . [of] when [a] private contractor acted under a federal officer or agency because the contractors helped the Government to produce an item that it needed." *Papp*, 842 F.3d at 812 (cleaned up).

These examples highlight the nature and extent of the control exerted by the federal government through agencies such as the PAW, which directed construction of new oil exploration and 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." *See* NOR ¶ 115; *Shell Oil Co. v. United States*, 751 F.3d 1282, 1286 (Fed. Cir. 2014) ("PAW told the refiners what to make, how much of it to make, and what quality."); *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).[11]

The government dictated where and how to drill, rationed essential materials, and set statewide minimum levels for production. Dick Decl. Ex. 20 at 28, 171, 177–79, 184 & n.18. As Professor Wilson explains: "PAW instructed the oil industry about exactly which products to produce, how to produce them, and where to deliver them." Wilson Decl. ¶ 11. Professor Wilson establishes that "[s]ome directives restricted the use of certain petroleum products for high-priority

[11] It is irrelevant that the *Exxon Mobil* court elsewhere held that the federal government was not an "operator" of ExxonMobil's refineries under CERCLA. CERCLA's "operator" standard demands a significantly tighter nexus to waste disposal activity than the federal officer removal statute. *Compare United States v. Bestfoods*, 524 U.S. 51, 66–67 (1998) (an "operator" must "manage, direct, or conduct operations *specifically related* to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations" (emphasis added)), *with Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286, 296 (5th Cir. 2020) (en banc) ("[A]ny civil action that is *connected or associated with* an act under color of federal office may be removed." (emphasis added)). Further, Plaintiff's claims here relate to the product produced at the facilities, not to how the contractor disposed of waste at the facility in question.

war programs; others dictated the blends of products; while others focused on specific pieces of the industry, such as the use of individual pipelines." *Id.* PAW's directives to Defendants were mandatory and were enforceable by law. *Id.* ¶ 15. PAW's message to the oil and gas 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. 59, at 8. PAW also maintained "disciplinary measures" for noncompliance, including "restricting transportation, reducing crude oil supplies, and withholding priority assistance." NOR Decl. Ex. 55. In sum, the federal government deployed an array of coercive actions, threats, and sanctions to ensure Defendants assented to PAW's directives. Controlling production of petroleum products by setting production levels, dictating where and how to explore for petroleum, micromanaging operations, and rationing materials in order to help conduct a war are not the stuff of mere "regulation." They are instead the kind of special relationship that the Supreme Court described in *Watson* and the Third Circuit described in *Papp*.

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.* Several other Defendants or their predecessors operated similar production equipment and facilities for the government. *Id.* ¶ 20.

Defendants further acted under federal officers as contractors to build plants and manufacture war products for the Allied effort. For example, "[o]n January 22, 1942, Shell entered into a contract with the United States on behalf of the Army Ordnance Department for the purchase of 20 million to 25 million gallons of nitration grade toluene over a two year period. The contract provided that Shell would construct a toluene plant at Shell['s] Wilmington, California refinery and that the Government would advance 30% of the contract price or $2,040,000 for construction of the plant. . . . Shell completed a toluene plant in 1943 and produced toluene for the remainder of the war" "to manufacture TNT" and later "as a blending agent" to make "avgas." Dick Decl. Ex. 21; *see also* Wilson Decl. ¶ 23.

Korean War. At the advent of the Korean War in 1950, President Truman established the Petroleum Administration for Defense ("PAD") under authority of the DPA. PAD issued production orders to Defendants and other oil and gas companies, including to ensure adequate quantities of avgas for military use. *See* NOR ¶ 125; *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 ¶¶ 125–26.

f. Defendants Have Acted Under Federal Officers By Continuing to Produce and Supply 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." Dick 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 v. Atl. Richfield Co.*, 962 F.3d 937, 942 (7th Cir. 2020) (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 ¶ 127. For the U-2, Shell Oil Company produced fuel known as JP-7, which required special processes and a high boiling point to ensure the fuel could perform at very high altitudes and speeds. "The Government stated that the need for the 'Blackbird' was so great that the program had to be conducted despite the risks and the technological challenge. . . . A new fuel and a chemical lubricant had to be developed to meet the temperature requirements." NOR Decl. Ex. 40, at 24. 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. 43–49. 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 per detailed government contracts. NOR Decl. Exs. 43, 46.

Similarly, BP entities contracted with the Defense Logistics Agency ("DLA") to provide approximately 1.5 billion gallons of specialized military fuels for the DOD's use in *the past four years alone*. Dick Decl. Ex. 22, at 5–6. Since 2016, BP entities entered into approximately 25 contracts to supply various military-specific fuels, such as JP-5, JP-8, and F-76. DLA required that the fuels contain specialized additives, including fuel system icing inhibitor ("FSII"), corrosion inhibitor/lubricity improver ("CI/LI") and, for F-76 fuels, lubricity improver ("LIA"). *Id.* Such additives are essential to support the high performance of the military engines they fuel. FSII is required to prevent freezing caused by the fuels' natural water content when military jets operate at ultra-high altitudes, potentially leading to engine flameout, while CI/LI and LIA are used to avoid engine seizures and to ensure fuel handling system integrity when military fuels are stored for long periods, as on aircraft carriers. NOR Decl. Ex. 65; Dick Decl. Ex. 23; NOR ¶¶ 131–34; *see also* NOR ¶¶ 120–29 (detailing the necessary function of 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 to conform the fuels to other specific chemical and physical requirements, such as enumerated ranges for conductivity, heat of combustion, and thermal stability, all of which are essential and unique to performance of the military function. Dick Decl. Exs. 24–32.

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. *See* Dick Decl. Exs. 33–36; NOR Decl. Ex. 60 at 8–14, 39–43; Dick Decl. Exs. 37–39.[12] The DOD's detailed specifications for the makeup of the military jet fuels require that they "shall be refined hydrocarbon distillate fuel oils" made from "crude oils" with special additives. *See* NOR Decl. Ex. 50, at 5, 7, 10; Dick Decl. Ex. 40. 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)); *see* NOR ¶¶ 128–37. These unique jet fuels are specifically designed for military use and thus fall into the category of specialized military products that support federal officer jurisdiction. *See Watson*, 551 U.S. at 154 (finding 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.

g. Defendants' Actions Under Federal Officers Fall Within The Ambit Of The Federal Officer Removal Statute

The Third Circuit has explained that "[w]hen . . . '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

[12] Given that Plaintiff's claims encompass *all* of Defendants' production and sales activities and its alleged injuries arise from *global* climate change, Plaintiff necessarily complains about the federal government's emissions from jet fuel supplied by Defendants on U.S. military bases, and thus federal enclave jurisdiction supports removal. *See Jones v. John Crane-Houdaille, Inc.*, 2012 WL 1197391, at *1 (D. Md. Apr. 6, 2012) ("A suit based on events occurring in a federal enclave . . . must necessarily arise under federal law and implicates federal question jurisdiction under § 1331."); NOR ¶¶ 190–94.

federal lands subject to federal leasing programs; operated federal oil reserves; supplied and managed the Strategic Petroleum Reserve; distributed gasoline supplies to wholesale purchasers in response to oil embargoes; produced oil and gas, operated government-owned facilities and equipment, and constructed pipelines as agents for the federal government and military during wartime; and produced, and continue to produce specialized, noncommercial-grade fuels for the military. 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 VI.E.1.a. Indeed, 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. Instead, the U.S. government tasked Defendants with these critical duties, and subjected them to substantial federal control and supervision.

Plaintiff argues that Defendants' activities do not qualify for federal officer removal because they reflect "arms-length" business arrangements, Mot. at 37, but that is not the law. The Supreme Court has emphasized that "[t]he words 'acting under' are broad," and are satisfied where, "in the *absence of . . . contract[s] with . . . private firm[s]*, the Government itself would have had to perform" such tasks. *Watson*, 551 U.S. at 147,154 (emphasis added). "The Supreme Court has said, for example, that a private company acting pursuant to a contract with the federal government has this [federal officer] relationship." *Agyin v. Razmzan*, 986 F.3d 168, 175 (2d Cir. 2021). The Third Circuit in *Papp* called "actions Boeing took while working under a federal contract to produce an item the government needed, to wit, a military aircraft, and that the government otherwise would have been forced to produce on its own," "an archetypal case" of conduct "'acting under' the direction of a federal officer or agency," and thus "Boeing easily

satisfie[d] the 'acting under' requirement." 842 F.3d at 813. Boeing's actions parallel, but do not nearly match in scale or scope, those of Defendants in producing specialized oil and gas for the military. *See supra* Section VI.E.1.f.

As a court in this Circuit held just weeks ago, a "high threshold requirement of supervision and control . . . is inconsistent with the Third Circuit's directives in *Defender* and *Papp*. The Third Circuit . . . has *never* held that a contractor cannot have a high level of autonomy or that it must be closely supervised or controlled by the federal agency in order to invoke Officer Removal jurisdiction." *MHA, LLC v. Amerigroup Corp.*, 2021 WL 226110, at *6 (D.N.J. Jan. 21, 2021) (emphasis added). Indeed, courts have consistently found removal appropriate where federal contractors and others allege they were acting under federal officers through conduct undertaken as part of voluntary, mutually beneficial contractual arrangements. *See, e.g.*, *Baker*, 962 F.3d at 942; *Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 255 (4th Cir. 2017) ("[C]ourts 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*."); *Doe v. UPMC*, 2020 WL 5742685, at *3 (W.D. Pa. Sept. 25, 2020) ("The 'triggering relationship' encompasses a broad range of relationships, including, but not limited to, agent-principal, contract or payment, and employer-employee relationships." (citation omitted)).

In any event, Defendants' relationship with the government does not consist of mere supply arrangements to provide the government with a fungible consumer good; rather, the relationship was formed out of the U.S. government's need to mobilize an entire industry to accomplish essential public policy objectives—objectives that benefit the nation as a whole. In fact, Plaintiff acknowledges that "an unusually close [relationship] involving detailed regulation, monitoring, or supervision" is sufficient for removal. Mot. at 43. The federal government has subjected

Defendants to over a century of direction, supervision, and control that is precisely the type of relationship that subjects claims to removal under the federal officer removal statute.

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

Plaintiff's claims, which seek to impose liability for the "extraction, production, and sale" of oil and gas, necessarily relate to Defendants' acts under federal officers. The "hurdle erected by [the connection] requirement is quite low." *Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 137 (2d Cir. 2008). When Congress inserted the words "or relating to" into the Removal Clarification Act of 2011, it "broadened federal officer removal to actions, not just *causally* connected, but alternatively *connected* or *associated*, with acts under color of federal office." *Latiolais*, 951 F.3d at 292 (emphases added) (citing Pub. L. No. 112-51, § 2(b)(1)(A), 125 Stat. 545); *see also 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). Defendants need not establish "a causal nexus between the wrongdoing alleged in the complaint and . . . acti[ons] at the direction of a federal authority. . . . [A]fter the 2011 statutory amendments . . . acts need not be at [the] behest of [a] federal agency to justify Officer Removal jurisdiction." *MHA*, 2021 WL 226110, at *7 (citing *Papp*, 842 F.3d at 813).

a. Plaintiff's Claims Encompass Defendants' Production Activities Conducted Under Federal Officers and Pursuant to Federal Policy

Plaintiff argues that "none of Defendants' tortious conduct is connected, causally or otherwise, with the duties of a federal superior." Mot. at 28. But Plaintiff's broad allegations encompass *all* of the production activities undertaken by Defendants, and rely on Defendants' *production* and *sales* activities to seek massive damages resulting from these activities. *E.g.*, Compl. ¶¶ 2, 6, 14, 21–35, 167–68. Thus, the production and sales activities Defendants conducted

at the direction of federal officers are necessarily "connect[ed] or associate[ed]" with Plaintiff's claims. *Def. Ass'n of Philadelphia*, 790 F.3d at 471 (internal quotation marks omitted).

The federal government's policy choices to produce significant amounts of oil and gas to fulfill national interests, and its direct control and supervision of Defendants' activities to advance those goals, go to the core of Plaintiff's claims, which fundamentally rest upon the alleged impacts caused by the *cumulative production* of petroleum products—including those products produced under the direction and supervision of the federal government. Compl. ¶¶ 55, 148. Plaintiff responds that its claims are limited to Defendants' alleged "campaign to deceive consumers," Mot. at 30, but this contrary position should be recognized for what it is: an attempt to evade the jurisdiction of the federal courts. Plaintiff's argument fails, not only for the reasons discussed in Section VI.A, but also because a federal court must "credit [the defendant's] theory of the case" in assessing the applicability of the federal officer removal statute. *Jefferson Cnty. v. Acker*, 527 U.S. 423, 432 (1999); *accord Def. Ass'n of Philadelphia*, 790 F.3d at 471, 474 ("[W]e must accept the [defendant's] theory of the case at this juncture."); *K&D LLC v. Trump Old Post Off. LLC*, 951 F.3d 503, 506 (D.C. Cir. 2020); *Baker*, 962 F.3d at 947.

The allegations of the Notice of Removal are controlling for jurisdictional purposes, and they establish that Plaintiff's claims are connected to Defendants' federally controlled activities. Plaintiff's claims rise and fall on a chain of causation linking *all* of Defendants' production and sale of oil to global climate change and the alleged resulting harms for which Plaintiff seeks relief. *See supra* Section VI.A. Plaintiff's allegations that misinformation maintained or increased production and consumption of oil and gas, even if (improperly) credited, only underscore the connection, because a substantial amount of that allegedly injurious production indisputably

occurred at the direction of the federal government in furtherance of federal objectives.[13] This satisfies the "low" nexus requirement for federal officer removal. *See Papp*, 842 F.3d at 813 (explaining that there need only be "a connection or association between the act in question and the federal office"); *Def. Ass'n of Philadelphia*, 790 F.3d at 474 (holding same). *See also Baker*, 962 F.3d at 945 (finding even a "small, yet *significant*, portion of [Defendants'] relevant conduct" sufficient to support federal officer removal).

b. Plaintiff Cannot Avoid Removal Through Disclaimers

Defendants' production activities conducted at the direction and under the supervision and control of the U.S. government constitute a significant portion of the production activities targeted by Plaintiff's Complaint. As explained above, production from the OCS alone—where Defendants are some of the largest producers—constitutes approximately *30% of all U.S. oil and gas production*. NOR ¶ 74; Dick Decl. Ex. 6; *see also* NOR ¶¶ 80–88 (describing onshore leasing and production activities at the direction of federal officers). During World War II, "[a]lmost seven billion barrels of [oil] had to be brought from the ground between December 1941 and August 1945. . . . That is *one-fifth of all the oil that had been produced in this country since the birth of the industry in 1859*." Dick Decl. Ex. 20, at 1. The DOD thus has been, and continues to be, one of the largest consumers of oil in the world. And Defendants have continued supplying the military

[13] Plaintiff's argument that certain acts Defendants "took under color of federal office predate the misconduct that forms the core basis of the State's claims," Mot. 29, fails for the same reasons—Plaintiff's claims are predicated on Defendants' cumulative production activities. *See, e.g.*, Compl. ¶ 55. Indeed, under Plaintiff's theory, an emission released from oil and gas produced by Defendants during World War II and the Korean War, for example, has the same impact on climate change as an emission released from specialized fuels produced for the U.S. military today. *See id.* ¶ 148 (alleging that "greenhouse gas pollution accumulates in the atmosphere, some of which does not dissipate for potentially *thousands of years*" resulting in climate change) (emphasis added).

with essential fuels, including, for example, under BP entities' contracts, to provide approximately 1.5 billion gallons of specialized military fuels in just the past four years alone.

Although Plaintiff tries to disclaim injuries "that arose from Defendants' provision of fossil fuel products to the federal government," Compl. ¶ 14, such "attempts at artful pleading to circumvent federal officer removal by the use of jurisdictional disclaimers have generally failed." *Dougherty v. A O Smith Corp.*, 2014 WL 3542243, at *5 (D. Del. July 16, 2014); *see also Reaser v. Allis Chambers Corp.*, 2008 WL 8911521, at *6 (C.D. Cal. June 23, 2008) ("[C]ourts have found that neither a plaintiff's disclaimer nor its characterization of his claims is determinative."). Plaintiff's disclaimer is ineffective because "neither the court nor the parties can identify and exclude at the outset of the case those claims that might ultimately give rise to federal jurisdiction." *Dougherty*, 2014 WL 3542243, at *4 (quoting *Joyner v. A.C. & R. Insulation Co.*, 2013 WL 2460537, at *4 (D. Md. June 6, 2013)), *report and recommendation adopted sub nom. Dougherty v. A.O. Smith Corp.*, 2014 WL 4447293 (D. Del. Sept. 8, 2014).

In *Dougherty*, the court found that a disclaimer of all injuries resulting from plaintiff's exposure to asbestos in the Navy fell directly in "the bad faith/artful-pleading-to-circumvent-federal-officer-removal category," because "plaintiffs alleged that there were injuries incurred as a result" of that exposure. *Martincic v. A.O. Smith Corp.*, 2020 WL 5850317, at *4 (W.D. Pa. Oct. 1, 2020) (citing *Dougherty*, 2014 WL 3542243, at *4–5). The same is true here. Plaintiff's asserted injuries are alleged to have resulted from *global climate change*, resulting from *cumulative emissions*, Compl. ¶ 55, which, by definition, include emissions resulting from "Defendants' provision of fossil fuel products to the federal government," *id.* ¶ 14. And, as Plaintiff concedes, "it is not possible to determine the source of any particular individual molecule of CO_2 in the atmosphere . . . because such greenhouse gas molecules do not bear markers that

permit tracing them to their source, and because greenhouse gasses quickly diffuse and comingle in the atmosphere." *Id.* ¶ 245. "Greenhouse gases once emitted become well mixed in the atmosphere," *AEP*, 564 U.S. at 422 (internal quotation marks omitted). It is therefore impossible to distinguish removal-eligible emissions from non-removal-eligible emissions.

For some similar reasons, the Western District of Michigan recently rejected an attempt by a group of plaintiffs to avoid federal officer removal that went even farther than Plaintiff's disclaimer attempts here. Plaintiffs in *Nessel v. Chemguard, Inc.* alleged injuries caused by environmental contamination from certain firefighting agents that were sold for both military and civilian purposes. 2021 WL 744683, at *3 (W.D. Mich. Jan. 6, 2021). Plaintiffs attempted to avoid removal with respect to civilian production and sales by *filing two separate complaints*—one for injuries resulting from chemicals produced for the military, and one for the commercially produced versions of those same agents. The court found that it had federal officer removal jurisdiction over the commercial-only complaint, denying remand, because plaintiffs did not establish that injuries from commercial chemicals and military chemicals "will be distinguishable." *Id.* at *3. It explained that despite plaintiffs "divid[ing] the two complaints," "[t]he Court . . . will likely have to engage in a detailed fact-finding process to determine whether the injuries . . . can be distinguished" and that "right now, there is not clear evidence either way. It is entirely possible that Plaintiffs' injuries occurred from actions taken while Defendants were acting under color of federal office." *Id.* Here, Plaintiff acknowledges that Defendants produced oil and gas for the military, *see, e.g.*, Mot. at 33, and has not given this Court any reason to believe that it can factually distinguish between its alleged injuries resulting from the combustion of fuels produced at the government's behest, and those resulting from the combustion of fuels sold to any other consumer—regardless of its oft-cited "disclaimer." And here, Plaintiff does not even try to

separate its claims and injuries into two separate complaints—rather, it flatly asserts that its injuries are caused by the cumulative production and combustion of *all* oil and gas production for decades. Compl. ¶¶ 55, 148; *see also Nessel*, 2021 WL 744683, at *3 ("Plaintiffs' artful pleading does not obviate the facts on the ground" demonstrating that "Defendants were at least plausibly acting under color of federal office during the relevant timeframe.").

The Court should reject Plaintiff's attempt to disclaim federal production and emissions, which it admits cannot be separated or distinguished from other emissions. "[T]hat Plaintiff['s] complaint expressly disavows any federal claims is not determinative. Rather, removal is proper under the federal officer removal statute" if the statutory elements are met. *Ballenger v. Agco Corp.*, 2007 WL 1813821, at *2 (N.D. Cal. June 22, 2007) (citations omitted). Defendants here satisfy all four elements.

3. Defendants Raise "Colorable Federal Defenses"

Plaintiff argues in a footnote that "Defendants do not have a colorable federal defense." Mot. at 26 n.10 (citations omitted). This is false. 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."

Defendants' federal defenses include the government contractor defense, *see Boyle*, 487 U.S. at 512–13; *Gertz*, 654 F.3d at 860–66; preemption, *see Goncalves*, 865 F.3d at 1249; and federal immunity, *see Campbell-Ewald*, 577 U.S. at 166–68. *Boyle* is analogous. In *Boyle*, the Supreme 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. *Boyle*, 487 U.S. at 504–13. 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.

Plaintiff's claims are also barred by the U.S. Constitution, including the Interstate and Foreign Commerce Clause, U.S. Const. art. I, § 8, cl. 3, Due Process Clauses, *id.* amends. V & XIV, § 1, and the foreign affairs doctrine, *see Pink*, 315 U.S. at 230–31. Because the relief Plaintiff seeks would have "the practical effect" of "control[ling] conduct beyond the boundaries of [Delaware]," its claims are barred by the Commerce Clause, which "protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State." *Healy v. Beer Inst.*, 491 U.S. 324, 336–37 (1989). Similarly, imposing such extraordinary extraterritorial liability on lawful, government-encouraged conduct would constitute "a due process violation of the most basic sort." *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978).

The foreign affairs doctrine also precludes exercises of state law that would "impair the effective exercise of the Nation's foreign policy." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 419 (2003) (quoting *Zschernig v. Miller*, 389 U.S. 429, 440 (1968)). This prohibition extends to state-law causes of action. *See Pink*, 315 U.S. at 230–31 ("[S]tate law must yield when it is inconsistent with or impairs the policy or provisions of a treaty or of an international compact or agreement."). As explained above, Plaintiff's claims would interfere with the U.S. government's control of foreign policy, now and prospectively, including its efforts to address climate change and the allocation of costs through multilateral negotiations. *See In re Assicurazioni Generali, S.P.A.*, 592 F.3d 113, 115, 119–20 (2d Cir. 2010).

Finally, to the extent Plaintiff's claims target Defendants' statements to federal and state regulators, they are barred by the First Amendment. As the Supreme Court has held, lobbying activity is protected from civil liability. *See E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 145 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 671 (1965); *see also Balt. Scrap Corp. v. David J. Joseph Co.*, 81 F. Supp. 2d 602, 620 (D. Md. 2000), *aff'd*, 237 F.3d 394 (4th Cir. 2001) ("*Noerr–Pennington* immunity . . . applies to . . . state common law claims."). This is true even if "the campaign employs unethical and deceptive methods." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499–500 (1988); *see also New W., L.P. v. City of Joliet*, 491 F.3d 717, 722 (7th Cir. 2007) ("[T]he holding of *Noerr* is that lobbying is protected whether or not the lobbyist used deceit.")

These and other federal defenses are more than colorable, and Defendants' burden upon removal is merely to provide "a short and plain statement of the grounds for removal." 28 U.S.C. § 1446(a); *see Dart Cherokee*, 574 U.S. at 84, 87. A defendant invoking section 1442(a)(1) "need not win his case before he can have it removed." *Willingham*, 395 U.S. at 407; *Papp*, 842 F.3d at 815. Indeed, "[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*, 395 U.S. at 407 (emphasis added). *Accord 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.") (emphases added); *Leite*, 749 F.3d at 1124 ("[The question of] whether [a defendant] was specifically directed by the federal Government, is one for the *federal*—not state—courts to answer.") (emphasis added).

VII. CONCLUSION

For the foregoing reasons, and those set forth in Defendants' Notice of Removal, the Court should deny Plaintiff's Motion to Remand. Additionally, Defendants respectfully submit that, given the forthcoming ruling in the *Baltimore* action (No. 19-1189 (U.S.)), it may be most efficient for this Court to await further guidance from the Supreme Court before ruling on Plaintiff's Motion. Defendants also respectfully request oral argument on Plaintiff's Motion.

Respectfully submitted,

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