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*.	C.A. No. 1:20-cv-01429-LPS

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF
MOTION TO REMAND TO STATE COURT

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I. INTRODUCTION

In their Opposition (D.I. 96, "Opp.") to the State's Motion to Remand (D.I. 89, "Mot."), Defendants repackage arguments that have now been rejected by seven district courts and four circuit courts, giving Defendants "[a] batting average of .000" in opposing the remand of materially identical lawsuits. *City & Cty. of Honolulu v. Sunoco LP*, No. 20-CV-00163-DKW, 2021 WL 839439, at *2 n.3 (D. Haw. Mar. 5, 2021) ("*Honolulu* Stay Denial I"); *accord* Nos. 21-15313 & 21-15318, 2021 WL 1017392 (9th Cir. Mar. 13, 2021) ("*Honolulu* Stay Denial II").[1] This Court should join the unanimous tide of decisions, reject Defendants' meritless attempts to manufacture removal jurisdiction, and remand this case to state court, where it was filed and where it belongs.[2] Additionally, an award of attorney fees and costs pursuant to 28 U.S.C. § 1447(c) is appropriate

[1] *See also Cty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 937 (N.D. Cal. 2018) ("*San Mateo I*"), *aff'd in part, appeal dismissed in part*, 960 F.3d 586 (9th Cir. 2020), *reh'g en banc denied* (Aug. 4, 2020) ("*San Mateo II*"), *petition for cert. filed*, No. 20-884 (Jan. 4, 2021); *Mayor & City Council of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538 (D. Md. 2019) ("*Baltimore I*"), *as amended* (June 20, 2019), *aff'd in part, appeal dismissed in part*, 952 F.3d 452 (4th Cir. 2020) ("*Baltimore II*"), *cert. granted*, 141 S. Ct. 222 (2020); *Bd. of Cty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, 405 F. Supp. 3d 947 (D. Colo. 2019) ("*Boulder I*"), *aff'd in part, appeal dismissed in part*, 965 F.3d 792 (10th Cir. 2020) ("*Boulder II*"), *petition for cert. filed*, No. 20-783 (Dec. 8, 2020); *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142 (D.R.I. 2019) ("*Rhode Island I*"), *aff'd in part, appeal dismissed in part*, 979 F.3d 50 (1st Cir. 2020) ("*Rhode Island II*"), *petition for cert. filed*, No. 20-900 (Jan. 5, 2021); *Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31 (D. Mass. 2020); *City & Cty. of Honolulu v. Sunoco LP*, No. 20-CV-00163-DKW, 2021 WL 531237 (D. Haw. Feb. 12, 2021) ("*Honolulu*"), *appeals filed*, Nos. 21-15313 & 21-15318 (9th Cir. Feb. 23, 2021); *Minnesota v. Am. Petroleum Inst.*, No. CV 20-1636 (JRT/HB), 2021 WL 1215656 (D. Minn. Mar. 31, 2021).

[2] Defendants ask the Court in passing to defer any ruling until next fall, after the Supreme Court rules on their pending certiorari petitions. *See* Opp. 7. Yet they have not satisfied their heavy burden of establishing the need for such a stay of proceedings. *See Nken v. Holder*, 556 U.S. 418, 434 (2009); *Honolulu* Stay Denial II, 2021 WL 1017392, at *1 (denying a motion to stay premised on identical arguments). Nor will the pending Supreme Court decision in *Baltimore* address any of the issues now before this Court, because the defendants in that case chose *not* to ask the Supreme Court to address the merits of the Fourth Circuit's rejection of federal officer jurisdiction. *See* Petition for Writ of Certiorari, *BP P.L.C. v. Mayor & City Council of Baltimore*, U.S. No. 19-1189 (argued Jan. 19, 2021).

because Defendants' arguments—reached only by mischaracterizing the Complaint and by ignoring on-point authority—lack an objectively reasonable basis for seeking removal.

Defendants initially asserted that removal was proper based on the Class Action Fairness Act ("CAFA"), complete preemption, and federal enclave jurisdiction, among other grounds. Notice of Removal (D.I. 1, "NOR") ¶¶ 177–206. However, Defendants only allude to CAFA once in their Opposition, *see* Opp. at 6, and their references to complete preemption and federal enclaves are relegated to a sparse footnote each, *see id*. at 19 n.7 (complete preemption); *id*. at 51 n.12 (federal enclaves). Defendants have therefore abandoned their removal arguments as to CAFA, the complete preemption doctrine, and federal enclave jurisdiction. *See John Wyeth & Bro. Ltd. v. CIGNA Int'l Corp.*, 119 F.3d 1070, 1076 (3d Cir. 1997) ("[A]rguments raised in passing (such as, in a footnote), but not squarely argued, are considered waived."); *Peters v. Ryan*, No. CV 16-01332-RGA, 2017 WL 1393692, at *2 (D. Del. Apr. 13, 2017) ("When a party files an opposition brief and fails to contest an issue raised in the opening brief, the issue is considered waived or abandoned by the non-movant."). Defendants' abandonment of these arguments is further evidence that they lacked an objectively reasonable basis for asserting them as grounds for removal in the first place.

Defendants' remaining grounds for removal—federal common law, *Grable* jurisdiction, federal officer removal, and the Outer Continental Shelf Lands Act ("OCSLA")—fail for a simple reason: they all rest on a mischaracterization of the Complaint (D.I. 1-1, "Compl."). As in all the previous cases, "[t]he principal problem with Defendants' arguments is that they misconstrue [the State's] claims." *Honolulu*, 2021 WL 531237, at *1. This lawsuit does *not* "seek to impose liability for the extraction, production, and sale of oil and gas." Opp. 54 (quotations omitted). Instead, the "source of tort liability" in this litigation is Defendants' "concealment and misrepresentation of [fossil fuel] products' known dangers," together with their "simultaneous promotion of [those

products'] unrestrained use." *Baltimore II*, 952 F.3d at 467; *see also, e.g.*, Compl. ¶¶ 1–12. Nor does the State seek to "enjoin[] . . . Defendants from producing and selling oil and natural gas," "stop" or "significantly limit" the "production and use of fossil fuels," "supplant federal energy policy," or "regulate Defendants' speech." Opp. 11, 22. Rather, the State merely seeks to abate the localized harms resulting from Defendants' tortious conduct (e.g., paying for necessary resiliency measures, such as sea walls), thereby ensuring that the parties who have profited from decades of disinformation and deceit bear the associated costs of that unlawful conduct. *See, e.g.*, Compl. ¶¶ 15, 263, Prayer for Relief. As a result, nothing in this lawsuit will prevent Defendants from continuing to produce and sell fossil fuels, if they so choose.

This Court should therefore discard Defendants' sham theory of the case, as courts around the country have done in similar suits. *See, e.g.*, *Minnesota*, 2021 WL 1215656, at *13 ("[T]he State's action here is far more modest than the caricature Defendants present."); *Honolulu*, 2021 WL 531237, at *1 ("The principal problem with Defendants' arguments is that they misconstrue Plaintiffs' claims."); *Baltimore I*, 388 F. Supp. 3d at 560 ("This argument rests on a mischaracterization of the City's claims."); *Boulder I*, 405 F. Supp. 3d at 969 ("Defendants mischaracterize Plaintiffs' claims."); *Massachusetts*, 462 F. Supp. 3d at 44 (criticizing "ExxonMobil's caricature of the complaint"). Once Defendants' mischaracterizations are swept away, their purported grounds for removal quickly crumble, and it is clear this case belongs in State court.

II. THE COURT SHOULD REMAND THIS CASE BECAUSE THERE IS NO SUBJECT-MATTER JURISDICTION.

A. Federal common law provides no basis for subject-matter jurisdiction here.

As explained in the State's Motion, federal common law does not provide an independent basis for removal of state law causes of action. The century-old rule that a plaintiff can "avoid federal jurisdiction by exclusive reliance on state law" in its well-pleaded complaint, *Caterpillar*

Inc. v. Williams, 482 U.S. 386, 392 (1987), does not have any exceptions outside the established frameworks of *Grable* and complete preemption as recognized by the Supreme Court. Defendants still "cite no controlling authority for the proposition that removal may be based on the existence of an unplead[ed] federal common law claim," because there is none; their argument therefore lacks an objectively reasonable basis for removal. *Boulder I*, 405 F. Supp. 3d at 962.

Defendants' repeated insistence that federal common law "governs," "exclusively governs," "is exclusive," or provides the "rule of decision" in this case, *see* Opp. 17; NOR ¶¶ 16, 17, 31, 145, 158, is all euphemism for their position that federal common law *preempts* the State's claims. Ordinary federal preemption cannot create subject-matter jurisdiction, and the Ninth Circuit and seven district courts have rejected identical arguments in substantially similar cases for that reason. *See Oakland*, 969 F.3d at 906; *Baltimore I*, 388 F. Supp. 3d at 555 ("Defendants' assertion that the City's public nuisance claim under Maryland law is in fact 'governed by federal common law' is a cleverly veiled preemption argument."); *Boulder I*, 405 F. Supp. 3d at 963–64 ("Defendants' argument that Plaintiffs' state law claims are governed by federal common law appears to be a matter of ordinary preemption which . . . would not provide a basis for federal jurisdiction."); *Rhode Island*, 393 F. Supp. 3d at 148–49; *Massachusetts*, 462 F. Supp. 3d at 43–44; *Honolulu*, 2021 WL 531237 at *2 n.8; *Minnesota*, 2021 WL 1215656, at *6.[3]

[3] The Court of Appeals for the Second Circuit recently affirmed the dismissal of a nuisance and trespass action by the City of New York alleging injuries from climate change, but that decision does not conflict with granting remand here or in any of the other analogous cases. *See City of New York v. Chevron Corp.*, No. 18-2188, 2021 WL 1216541 (2d Cir. Apr. 1, 2021). There, "the City filed suit in federal court in the first instance," and the court expressly distinguished cases like this one and the "parade of recent opinions" granting remand to state court in analogous cases, where "the plaintiffs brought state-law claims in state court." *Id.* at *8. The court held that because the case was initiated in federal court and the decision appealed from was an order granting a motion to dismiss, rather than an order resolving a motion to remand, it would consider "the [defendants]' preemption defense on its own terms, not under the heightened standard unique to the removability

The Ninth Circuit's decision in *Oakland* illustrates the correct analytic framework. The court there rightly analyzed the defendants' contention that federal common law "govern[ed]" the plaintiffs' state law public nuisance claim through the lenses of *Grable* and complete preemption. The court rejected the district court's conclusion "that it had federal-question jurisdiction under 28 U.S.C. § 1331 because the [plaintiffs]' claim was 'necessarily governed by federal common law,'" *Oakland*, 969 F.3d at 902, holding that "because neither exception to the well-pleaded-complaint rule [*Grable* jurisdiction or complete preemption] applies to the [plaintiffs]' original complaints, the district court erred in holding that it had jurisdiction," *id.* at 908. The court did not analyze the plaintiffs' complaints under a third exception for state-law claims "governed by" federal common law because there is no such exception. *See also New Mexico ex rel. Balderas v. Monsanto Co.*, 454 F. Supp. 3d 1132, 1151 (D.N.M. 2020) ("Monsanto does not offer any legal authority for the proposition that federal common law confers federal removal jurisdiction, and case law is to the contrary.").

It is true as a general proposition that "[i]n some circumstances, a claim in federal court may arise under federal common law, which is a permissible basis for jurisdiction based on a federal question under 28 U.S.C. § 1331." *Treiber & Straub, Inc. v. U.P.S., Inc.*, 474 F.3d 379, 383 (7th Cir. 2007). None of the cases Defendants cite deal with the separate proposition that they assert here, however—that federal common law converts state causes of action into federal ones for removal purposes. Virtually all the cases Defendants cite say nothing about removal or subject-matter jurisdiction because the plaintiff either expressly alleged federal common law claims in a

inquiry." *See id*. The *City of New York* decision, by its own terms, answers a different question than the one before this Court, and its analysis of federal common law as a matter of ordinary preemption is consistent with the many analogous decisions denying remand. It does not alter the analysis here.

complaint filed in federal court,[4] or because jurisdiction was present for reasons unrelated to federal common law.[5]

A recent decision rejecting identical federal common law arguments in a water pollution case is instructive. The plaintiff in *Earth Island Institute v. Crystal Geyser Water Company*, No. 20-CV-02212-HSG, 2021 WL 684961, at *1 (N.D. Cal. Feb. 23, 2021), brought state law claims in California state court against "several food, beverage, and consumer goods companies," alleging that the defendants caused injurious "plastic pollution in California coasts and waterways" by selling plastic products "without sufficient warning of known dangers" and making misleading "statements to the public regarding those dangers." The defendants removed, arguing in relevant part that "federal jurisdiction exists because Plaintiff's causes of action necessarily turn on federal common law, such that federal common law *must* govern interstate pollution or public nuisance cases." *Id.* at *2. The court disagreed:

> [C]ases about whether a federal common law right *exists* (i.e., may a plaintiff bring a federal common law nuisance action if it wishes?) have limited application here, where Plaintiff intentionally seeks to *avoid* invoking federal common law (or any other federal law). Defendants essentially argue that Plaintiff's claims must be assessed with reference to federal common law, but

[4] *Am. Elec. Power Co. v. Connecticut* ("*AEP*"), 564 U.S. 410, 418, 421 (2011) (plaintiff expressly pleaded federal common law claims in federal district court); *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 848–50 (1985) (same); *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 310 (1981) (same); *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972) (proceeding by state plaintiff under Supreme Court's original jurisdiction pursuant to U.S. Const. art. III, § 2, cl. 2); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 406 (1964) (common law conversion claim brought by foreign government in federal district court); *United States v. Standard Oil Co.*, 332 U.S. 301, 302 (1947) (claims brought by United States in federal district court); *Treiber & Straub.*, 474 F.3d at 383 (plaintiff expressly pleaded federal common law claims in federal district court).

[5] *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 632 (1981) (complaint alleging Sherman Act antitrust claims filed in federal district court); *Republic of Philippines v. Marcos*, 806 F.2d 344, 354 (2d Cir. 1986) (applying pre-*Grable* authority to hold that jurisdiction existed over conversion claim brought by foreign government in federal district court because "the claim raises, as a necessary element, the question whether to honor the request of a foreign government" to freeze assets in the United States, which "is itself a federal question").

> it is not even clear to the Court what the standards for such a claim would be. So while the best answer the Court can muster to the question of whether Plaintiff could have brought a federal common law claim here if it wanted to do so is "perhaps," that is not really the right question given the posture of this case. Instead, the key question is whether federal common law, even assuming it still exists, completely displaces Plaintiff's state law claims.

2021 WL 684961, at *4 (citation omitted). The court held that even if a viable analogous federal common law claim existed (which it did not resolve), the defendants' "creative argument [was] inconsistent with the well-pleaded complaint rule and longstanding controlling authority." *Id.* at *5. After a thorough discussion of controlling circuit precedent and persuasive decisions, the court "reject[ed] Defendants' request for displacement of the well-pleaded state law claims in Plaintiff's complaint by federal common law," held that "removal is not proper on this basis," and granted remand. *Id.* at *7, *11. The same reasoning applies here, and the Court should reach the same result.

1. The State's case does not explicitly or implicitly seek to "regulate transboundary and international emissions."

Even if Defendants' federal common law theory were viable in the abstract, it would fail here because this case has nothing to do with regulation of transboundary and international emissions. The State has already explained in its Motion that this case "seeks to ensure that the parties who have profited from externalizing the consequences and costs of dealing with global warming and its physical, environmental, social, and economic consequences, bear the costs of those impacts on Delaware, rather than the State, taxpayers, residents, or broader segments of the public," Compl. ¶ 15, and does not "seek to regulate emissions, solve the countless environmental problems stemming from climate change, or usurp control over energy policy in every country on earth," Mot. 11.

Defendants do not cite any allegation in the Complaint in support of their contention that this case would "regulate the production and sale of oil and gas," Opp. 18, or regulate "cross-border pollution," *id.* 16, except to say that "the very first paragraph discusses the 'catastrophic' 'impacts

of climate change,'" *id.* 17 (quoting Compl. ¶ 4). Defendants do not attempt to connect the dots between that allegation, or anything else in the Complaint, and any specific regulation that this case might implicate. *Cf. Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1568 (2016) (if a state breach of contract plaintiff "alleges, for atmospheric reasons, that the defendant's conduct also violated the [Securities] Exchange Act [of 1934]," the suit is not one "brought to enforce" the Exchange Act "because the plaintiff can get all the relief he seeks just by showing the breach of an agreement, without proving any violation of federal securities law").[6]

Seven district courts have held that similar claims do not arise under federal common law, and Defendants do not cite or attempt to distinguish any of those decisions. *See* Mot. 10–11; *Massachusetts*, 462 F. Supp. 3d at 43–44 ("[T]he Commonwealth wants 'to hold ExxonMobil accountable for misleading the state's investors and consumers.' No one doubts that this task falls within the core of a state's responsibility."); *San Mateo I*, 294 F. Supp. 3d at 937; *Rhode Island I*, 393 F. Supp. 3d at 148–50; *Baltimore I*, 388 F. Supp. 3d at 554–58; *Boulder I*, 405 F. Supp. 3d at 957–64; *Honolulu*, 2021 WL 531237, at *2 n.8; *Minnesota*, 2021 WL 1215656, at *5–6.

2. The "artful pleading" doctrine is co-extensive with complete preemption and does not independently provide jurisdiction.

Defendants' appeal to the "artful pleading" doctrine is incorrect and lacks an objectively reasonable basis for multiple reasons. First, the artful pleading rule is coextensive with the doctrine of complete preemption. As Defendants correctly concede, *see* Opp. 19 n.7, the Third Circuit has reached that exact holding: "[T]he only state claims that are 'really' federal claims and thus removable to federal court . . . are those that are preempted completely by federal law," and "'[t]his

[6] Defendants contend elsewhere that the State's case is *de facto* regulatory because the State "seeks a massive damages award." Opp. 23. For the reasons discussed below, none of Defendants' authorities stand for the proposition that that a case arises under federal law any time the plaintiff's alleged damages are high enough. *See* Part II.B.1, *infra*.

same principle has been referred to elsewhere as the "artful pleading" doctrine.'" *Goepel v. Nat'l Postal Mail Handlers Union, a Division of LIUNA*, 36 F.3d 306, 311–12 & n.5 (3d Cir. 1994) (quoting *United Jersey Banks v. Parell*, 783 F.2d 360, 367 (3d Cir. 1986)); *accord Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 471 (1998) ("The artful pleading doctrine allows removal where federal law completely preempts an asserted state-law claim."); *Rossello-Gonzalez v. Calderon-Serra*, 398 F.3d 1, 12 (1st Cir. 2004) ("[W]e are skeptical of the applicability of the artful pleading doctrine outside of complete federal preemption of a state cause of action.").

In describing the "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," the Supreme Court explained that the "necessary ground" underpinning that corollary is "that the preemptive force of [a federal statute] is so powerful as to displace entirely any state cause of action," because in that circumstance "the federal cause of action *completely preempts* a state cause of action." *See Franchise Tax Bd. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 23 (1983) (emphasis added). To the extent there are cases in conflict on this point, that is a symptom of the "muddled backdrop" of § 1331 jurisprudence that the Supreme Court has worked to clarify and simplify since *Grable*. *See Manning*, 136 S. Ct. at 1571; Mot. 9. The Ninth Circuit in *Oakland* correctly described the contemporary, clarified framework under which *Grable* and complete preemption are the only recognized exceptions to the well-pleaded complaint rule. *See Oakland*, 969 F.3d at 904–05.

Defendants' cases do not hold otherwise. The phrase "artful pleading" does not appear in *Interfaith Community Organization v. Honeywell International, Inc.*, 426 F.3d 694, 701 (3d Cir. 2005), *as amended* (Nov. 10, 2005), which in any event involved claims pleaded in federal court expressly under the federal Resource Conservation and Recovery Act (RCRA), 42 U.S.C.

§ 6972(a)(1)(B). Even further afield, the Third Circuit in *Jarbough v. Attorney General*, 483 F.3d 184 (3d Cir. 2007), considered a petition for review of a deportation order from the Board of Immigration Appeals. The court held that the petitioner had not "state[d] a colorable violation of the United States Constitution" as required for the court to assert jurisdiction under 8 U.S.C. § 1252(a)(2)(D), because "[a]side from the constitutional label," the petitioner made "no attempt to tie his claim of factual errors" in his deportation decision to any constitutional rights. *Id.* at 189–90. That case was at no time in state court or even federal district court, and obviously did not involve any state law causes of action, federal common law, or removal jurisdiction.

The case *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981), see Opp. 20, is likewise inapposite, and the Supreme Court has expressly cabined its jurisdictional holding to the facts of that case. "The only question presented" there was "whether the Court of Appeals for the Ninth Circuit validly created an exception to the doctrine of res judicata" where a plaintiff elected not to appeal an adverse judgment, but other similarly situated plaintiffs in actions against common defendants successfully appealed similar judgments. *Moitie*, 452 U.S. at 395. The plaintiffs had brought federal antitrust claims in federal court; after those were dismissed, the plaintiffs tried to refile essentially identical actions in state court under state law, and the defendant removed. *Id.* at 396. The district court held that the state court complaints "were 'in many respects identical' with the prior complaints, and were thus properly removed to federal court because they raised 'essentially federal law' claims," which were in turn barred as *res judicata* by the earlier decisions dismissing the original federal complaints. *Id.* at 396. The Supreme Court observed in a footnote "that at least some of the claims had a sufficient federal character to support removal," and that it would not "question [the district court's] factual finding" that the plaintiffs had "attempted to avoid

removal jurisdiction by 'artful[ly]' casting their 'essentially federal law claims' as state-law claims." *Id.* at 397 n.2. The Court has since explained:

> The *Moitie* footnote, however, was a marginal comment and will not bear the heavy weight lower courts have placed on it. . . . *Moitie*'s enigmatic footnote, we recognize, has caused considerable confusion in the circuit courts. We therefore clarify today that *Moitie* did not create a preclusion exception to the rule, fundamental under currently governing legislation, that a defendant cannot remove on the basis of a federal defense.
>
> In sum, claim preclusion by reason of a prior federal judgment is a defensive plea that provides no basis for removal under § 1441(b).

Rivet, 522 U.S. at 477–78. The *Moitie* footnote says nothing outside the "case-specific context" in which it arose. *Id.* at 477.

Finally, in *First Pennsylvania Bank, N.A. v. Eastern Airlines, Inc.*, 731 F.2d 1113, 1117 (3d Cir. 1984), the court made the *choice of law* determination that a contract dispute involving a parcel lost by a common carrier in interstate air travel had to be resolved under federal common law, because those federal common law claims were traditionally available and the Civil Aeronautics Act and Federal Aviation Act "expressly incorporated the entire federal common law applicable to carriers." This case too was filed and adjudicated in federal district court in the first instance, and says nothing about the removability of state-law claims or any other issue of subject-matter jurisdiction.

Defendants' invocation of the artful pleading doctrine as an independent exception to the well-pleaded complaint rule here "was, if not frivolous, at best insubstantial." *Mints v. Educ. Testing Serv.*, 99 F.3d 1253, 1261 (3d Cir. 1996).

3. Defendants' contention that displaced federal common law provides both jurisdiction and the rule of decision here is mistaken.

Defendants' final argument that the federal common law of interstate nuisance regarding greenhouse emissions "governs" and creates an independent basis for jurisdiction, Opp. 21–22, also

lacks an objectively reasonable basis, as that body of common law has been displaced by the Clean Air Act ("CAA"). As discussed in detail in the State's Motion, the Supreme Court held in *AEP* that "the Clean Air Act and the EPA actions it authorizes displace any federal common-law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired powerplants," and on that basis declined to resolve the "academic question whether, in the absence of the [CAA] . . . , the plaintiffs could state a federal common-law claim for curtailment of greenhouse gas emissions because of their contribution to global warming." 564 U.S. at 423, 424. To the contrary, the Court held that "the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the" CAA. *Id.* at 429. The court in *San Mateo I* explained:

> Far from holding (as the defendants bravely assert) that state law claims relating to global warming are superseded by federal common law, the Supreme Court [in *AEP*] noted that the question of whether such state law claims survived would depend on whether they are preempted by the federal statute that had displaced federal common law (a question the Court did not resolve). . . . This seems to reflect the Court's view that once federal common law is displaced by a federal statute, there is no longer a possibility that state law claims could be superseded by the previously-operative federal common law. . . . Because federal common law does not govern the plaintiffs' claims, it also does not preclude them from asserting the state law claims in these lawsuits. Simply put, these cases should not have been removed to federal court on the basis of federal common law that no longer exists.

294 F. Supp. 3d at 937.

As further explained in the State's Motion, Defendants' continued reliance on *United States v. Standard Oil*, 332 U.S. 301 (1947), and *United States v. Swiss American Bank, Ltd.*, 191 F.3d 30 (1st Cir. 1999), makes no sense. *See* Mot. 9, n.4. Neither of those cases discussed a "jurisdictional inquiry," *see* Opp. 21, because both were filed in federal court, and subject-matter jurisdiction was never in doubt since the United States was the plaintiff. The "two-part approach" applied in both cases was a choice-of-law analysis to determine whether the United States' subrogation and conversion claims were governed by state or federal law. Those two cases simply have nothing to

do with this one. Defendants' federal common law arguments remain meritless and lack objectively reasonable basis, and remand is required.

B. Defendants also lack an objectively reasonable basis to remove this case under *Grable*.

Defendants' arguments for *Grable* jurisdiction are meritless, and do not engage with or discuss any relevant controlling or persuasive authority, demonstrating they lack an objectively reasonable basis. In the six pages they dedicate to *Grable* in their Opposition, Defendants do not cite any decisions from the Third Circuit on any topic, and do not cite or attempt to distinguish any of the seven recent district court decisions or the recent decision of the Ninth Circuit, that all rejected *Grable* jurisdiction in factually and legally indistinguishable cases. *See Oakland*, 969 F.3d at 906–07; *Baltimore I*, 388 F. Supp. 3d at 558–61; *Boulder I*, 405 F. Supp. 3d at 964–68; *San Mateo I*, 294 F. Supp. 3d at 938; *Rhode Island I*, 393 F. Supp. 3d at 150–51; *Massachusetts*, 462 F. Supp. 3d at 44–45; *Honolulu*, 2021 WL 531237, at *2 n.8; *Minnesota*, 2021 WL 1215656, at *6–8. Defendants do not discuss the applicability of most of the case law they relied on in the Notice of Removal,[7] and do not attempt to distinguish any of the in-Circuit authority cited in the State's Motion. Most of the cases relied on in the Opposition did not involve *Grable* jurisdiction, or any question of subject-matter jurisdiction at all. *See infra*. Defendants' Opposition also abandons and does not discuss at least five *Grable* theories asserted in the Notice.[8] The Opposition says very little

[7] To briefly illustrate, the following cases are discussed in Defendants' Notice of Removal, discussed in the State's Motion, and not cited at all in Defendants' Opposition: *Bd. of Comm'rs v. Tenn. Gas Pipeline Co.*, 850 F.3d 714 (5th Cir. 2017); *Pet Quarters, Inc. v. Depository Trust & Clearing Corp.*, 559 F.3d 772 (8th Cir. 2009); *Bennett v. Southwest Airlines Co.*, 484 F.3d 907 (7th Cir. 2007); *M.K. by & through Barlowe K. v. Prestige Academy Charter School*, 302 F. Supp. 3d 626 (D. Del. 2018). *Compare* Mot. at 15–18 *with, e.g.,* NOR ¶¶ 150–54 *and* Opp. 22–28.

[8] The NOR alleges, among other things, that *Grable* jurisdiction is proper because the State's case "depends on proof that federal policymakers would have adopted different energy and climate policies absent the alleged conduct"; "the State's trespass claim raises the issue whether a state

of import regarding *Grable*, and confirms that Defendants lacked an objectively reasonable basis to remove on that ground.

Defendants have not attempted to even apply any of the four *Grable* elements to prove that "a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Manning v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 772 F.3d 158, 163 (3d Cir. 2014), *aff'd*, 136 S. Ct. 1562 (2016). "Rather than identify a legal issue, [Defendants] suggest that the [State's] state-law claim implicates a variety of 'federal interests,' including energy policy, national security, and foreign policy," which, even if correct, would "not raise a substantial question of federal law for the purpose of determining whether there is jurisdiction under § 1331." *Oakland*, 969 F.3d at 906–07. "Every court to consider the question has rejected the oil-industry defendants' arguments for *Grable* jurisdiction," *Massachusetts*, 462 F. Supp. 3d at 45, and this Court should as well.

1. The State has not attempted to "supplant federal energy policy."

Defendants' prediction that the State's case will empower a judge to "strike a new regulatory balance that would supplant decades of national energy, economic, and environmental policies" and "assert control over an entire industry and its interstate (indeed, international) commercial activities," Opp. 23, is without basis in law or fact and lacks an objectively reasonable basis. Defendants do not identify any allegations in the Complaint or any provisions of federal or Delaware law that would lead to those outcomes, let alone explain how any of those concerns "is

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may, by lawsuit, assert control over the navigable waters of the United States"; "the State's claims require interpretation of international climate treaties"; the case involves "injuries allegedly suffered by way of navigable waters"; and "this action raises important constitutional issues regarding the relationship between states and the division of authority between the federal government and the states." NOR ¶ 145; *see also, e.g.*, *id.* ¶¶ 155–65, 174–76. None of these issues is referenced in Defendants' Opposition, demonstrating that again, Defendants lacked an objectively reasonable basis to raise them in the first place.

an essential element of the [State]'s state law claim[s]." *See Delaware ex rel. Denn v. Purdue Pharma L.P.*, No. CV 1:18-383-RGA, 2018 WL 1942363, at *2 (D. Del. Apr. 25, 2018) (granting State's motion to remand case alleging public nuisance and other state-law claims against opioid manufacturers and distributors); Mot. 14. As explained in the State's Motion, the State's Complaint "does not challenge or seek to overturn any federal law, rule, or program," "does not claim that Defendants are liable for violating any federal law," and "neither directly nor indirectly seeks any relief from any federal agency." Mot. 15. The court in *San Mateo I* aptly explained why Defendants' invocation of federal regulatory regimes is insufficient:

> [E]ven if deciding the nuisance claims were to involve a weighing of costs and benefits, and even if the weighing were to implicate the defendants' dual obligations under federal and state law, that would not be enough to invoke *Grable* jurisdiction. On the defendants' theory, many (if not all) state tort claims that involve the balancing of interests and are brought against federally regulated entities would be removable. *Grable* does not sweep so broadly.

294 F. Supp. 3d at 938. Defendants' "regulatory balancing" argument does not satisfy *Grable*. *See Minnesota*, 2021 WL 1215656, at *7–8 (rejecting same argument).

Defendants' tag-along argument, that the State's case necessarily presents federal questions because the State "seeks a massive damages award," Opp. 23, is baseless, and Defendants provide no support for it. Defendants' citation to *San Diego Building Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236 (1959), is irrelevant. The Court held there that California could not provide injunctive or monetary relief for claims arising out of picketing activities protected by the National Labor Relations Act, because the Act vests exclusive jurisdiction with the National Labor Relations Board, and thus "the States *as well as the federal courts* must defer to the exclusive competence of the National Labor Relations Board" because under the terms of the Act "courts are not primary tribunals to adjudicate such issues." *Id.* at 244–45. The Court's decision in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), is also irrelevant. The Court there

held that Alabama courts could not constitutionally award punitive damages for conduct "that was lawful where it occurred and that had no impact on Alabama or its residents." *Id.* at 573. Both cases were tried and appealed entirely in state court systems prior to Supreme Court review, and neither case discussed or resolved any question of federal subject-matter jurisdiction. None of Defendants' authorities stands for the proposition that every case that might end in a "massive damages award" arises under federal law, and the State is aware of no authority that supports such a proposition.

2. The State's claims have nothing to do with foreign relations.

The United States' foreign affairs prerogatives do not create a basis for federal jurisdiction here, and Defendants do not attempt to show how foreign affairs concerns would satisfy *Grable*. Defendants do not identify any necessary element in any of the State's claims that would require resolution of a foreign affairs question, nor specify what foreign affairs question a court might be called on to resolve. They instead again misrepresent the State's claims as vaguely seeking to "replace . . . international negotiations and decisions" about the climate crisis "with a state-law solution" which they warn would "diminish" the United States' ability to "us[e] domestic emissions reductions as negotiating leverage" with other countries. Opp. 25. Defendants provide no legal or factual support for that speculation, and it plainly misrepresents the theory of the State's case and relief it seeks. "Contrary to [Defendants'] caricature of the complaint, the [State's] allegations do not require any forays into foreign relations or national energy policy." *Massachusetts*, 2020 WL 2769681, at *10; *see also Minnesota*, 2021 WL 1215656, at *5. Like their other arguments, Defendants have no objectively reasonable basis for asserting that "foreign affairs" provides a basis for removal.

Even if there were any basis in fact for Defendants' outlandish notion of supposed conflict between this case and American foreign policy, there is no authority for the proposition that such a conflict creates *Grable* jurisdiction. Two of the three cases Defendants cite were filed in federal

court by a foreign government. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401–07 (1964) (conversion action by Cuban government seeking to recover property expropriated from American-owned businesses operating in Cuba); *Republic of Philippines v. Marcos*, 806 F.2d 344, 346 (2d Cir. 1986) (action by Philippine government seeking to recover real property in New York purchased with public funds stolen by former head of state). Both cases stand for the proposition that under the act of state doctrine "the courts of one country will not sit in judgment on the acts of the government of another," *Banco Nacional*, 376 U.S. at 416, and neither case involved or analyzed subject-matter jurisdiction at all, let alone removal jurisdiction. The court in *Torres v. Southern Peru Copper Corp.*, 113 F.3d 540 (5th Cir. 1997), did hold that substantial federal questions were present in a case by Peruvian citizens alleging that they were poisoned by a Peruvian copper mine. It so held, however, only because the complaint explicitly attacked "Peru's sovereign interests by seeking damages for activities and policies in which the government actively has been engaged," and in fact "the state of Peru ha[d] protested the lawsuit by filing a letter with the State Department and by submitting an amicus brief to th[e] court." *Id.* at 543. The facts of this case bear no resemblance to *Torres*.

Unsurprisingly, every court that has considered Defendants' foreign policy argument in an analogous case has rejected it. *See Oakland*, 969 F.3d at 906–07 (rejecting *Grable* jurisdiction based on theory "that the Cities' state-law claim implicates a variety of 'federal interests,' including . . . foreign policy"); *San Mateo I*, 294 F. Supp. 3d at 938 ("The mere potential for foreign policy implications . . . does not raise the kind of actually disputed, substantial federal issue necessary for *Grable* jurisdiction."); *Rhode Island I*, 393 F. Supp. 3d at 151 ("By mentioning foreign affairs, . . . Defendants seek to raise issues . . . that are not perforce presented by the State's claims."); *Baltimore I*, 388 F. Supp. 3d at 559 ("[D]efendants' generalized references to foreign policy wholly

fail to demonstrate that a federal question is 'essential to resolving' the City's state law claims."); *Boulder I*, 405 F. Supp. 3d at 966 ("Certainly Defendants have not shown that any interpretation of foreign policy is an essential element of Plaintiffs' claims."). This Court should do the same.

3. Defendants' First Amendment argument is clearly meritless.

Defendants' argument that the First Amendment "injects" affirmative federal law elements into the State's Delaware law claims is unserious, and again, lacks an objectively reasonable basis. They argue that there is original federal subject-matter jurisdiction over the entire universe of state-law claims that involve "speech on [an] important public matter," Opp. 26–28, from defamation to false advertising, perhaps even to "breach of contract, misrepresentation, and tortious interference with contract or business," and thus over this case also. *Id.* at 27 (quoting *In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, 511 F. Supp. 2d 742, 811 (S.D. Tex. 2005)). Defendants cite no case where federal subject-matter jurisdiction has been sustained (or even pursued) on this theory, and the State is aware of none.

Defendants' central premise, that the federal Constitution's First Amendment converts some state law causes of action involving speech into federal causes of action, at least for jurisdictional purposes, is obviously wrong. The constitutional protections recognized in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and its progeny are just that: protections afforded by the First Amendment that provide certain defendants immunity from liability. That is why "a court presiding over a defamation action," for example, "must determine: (1) whether the defendants have harmed the plaintiff's reputation within the meaning of state law; and (2) if so, whether the First Amendment nevertheless precludes recovery." *Moore v. Vislosky*, 240 F. App'x 457, 462 (3d Cir. 2007) (quoting *Marcone v. Penthouse Int'l Magazine for Men*, 754 F.2d 1072, 1077 (3d Cir. 1985); *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 270 (3d Cir. 1980) (same). The First Amendment prohibits state *courts* from enforcing certain defamation judgments that are otherwise meritorious

under state law, in the same way that the Fourteenth Amendment prohibits state courts from enforcing racially restrictive covenants attached to real property. *See Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) ("[T]he power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment."). Neither constitutional provision converts state law rights and remedies into federal ones, much less provides federal removal jurisdiction over those claims. The Third Circuit has thus repeatedly stated: "Although a defamation suit has profound First Amendment implications, it is fundamentally a state cause of action." *Tucker v. Fischbein*, 237 F.3d 275, 281 (3d Cir. 2001) (quoting *McDowell v. Paiewonsky*, 769 F.2d 942, 945 (3d Cir. 1985)).

The State is unaware of any case where a federal court has found subject-matter jurisdiction over state law defamation claims on the theory Defendants espouse, let alone over state law nuisance, trespass, and consumer protection claims—further demonstrating that Defendants' theory lacks an objectively reasonable basis. To the contrary, state and local governments routinely litigate nuisance and similar theories in cases that "target speech on matters of public concern," Opp. 26; *see, e.g.*, *Delaware ex rel. Denn v. Purdue Pharma*, No. CV 1:18-383-RGA, 2018 WL 1942363 (D. Del. Apr. 25, 2018), at *1 (remanding State's case "against manufacturers, distributors, and pharmacy retailers of prescription opioids, alleging state common law claims for their roles in Delaware's opioid crisis" to state court where State alleged in part that defendants "misrepresented material facts or suppressed, concealed, or omitted material facts" concerning their products and compliance with federal drug laws); *State v. Purdue Pharma LP*, No. CJ-2017-816, 2019 WL 4019929, at *12 (Okla. Dist. Aug. 26, 2019) (awarding $572 million judgment in nuisance trial where the "challenged conduct" was "misleading marketing and promotion of opioids" which contributed to a statewide opioid crisis); *Cty. of Santa Clara v. Atl. Richfield Co.*, 137 Cal. App. 4th

292, 304 (2006) (reversing dismissal of public nuisance complaint alleging in relevant part that defendants misled consumers and the public about dangers of indoor lead paint). Almost all the Supreme Court decisions Defendants cite were litigated to judgment in state court, and reviewed by the Supreme Court after state court appeals. *See New York Times Co.*, 376 U.S. at 256 (Alabama); *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 6–7 (1990) (Ohio); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 770 (1986) (Pennsylvania); *see also Nat'l Rev., Inc. v. Mann*, 140 S. Ct. 344, 345 (2019) (Alito, J., dissenting from denial of certiorari) (District of Columbia).

In the remaining decisions Defendants cite, subject-matter jurisdiction existed because of complete diversity or another independent basis, not because of a lurking First Amendment question. *See Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 48 (1988) (diversity jurisdiction); *Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 772 (1984) (diversity jurisdiction); *In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, 511 F. Supp. 2d at 762 (bankruptcy jurisdiction). The only case Defendants cite that involved *Grable* jurisdiction was removable because the plaintiff expressly alleged that *her* federal First and Fourteenth Amendment rights were violated by the *defendant*—not because, as Defendants postulate here, the *defendant's* First Amendment rights "injected" federal issues into the plaintiff's wrongful termination claim. *See Ortiz v. Univ. of Med. & Dentistry of New Jersey*, No. 08-2669, 2009 WL 737046, at *7 (D.N.J. Mar. 18, 2009). None of the cases remotely stand for the proposition that the First Amendment creates federal subject-matter jurisdiction over any state-law claims that involves "speech on [an] important public matter." *See* Opp. 28.

C. There is no federal officer removal jurisdiction.

Defendants' federal officer removal arguments under 28 U.S.C. § 1442 are meritless. The First, Fourth, Ninth, and Tenth Circuits already squarely rejected these arguments—evidence that Defendants' arguments lack an objectively reasonable basis—and nothing in Defendants' removal

notice allows them to escape the same outcome here. To invoke federal officer jurisdiction, Defendants must establish, among other things, that (1) they acted under the direction of a federal officer and (2) the State's claims are "for or relating to" such acts under color of federal office. *See Papp v. Fore-Kast Sales Co.*, 842 F.3d 805, 812 (3d Cir. 2016). Defendants fail both points.

1. There is no "direct connection or association" between the State's claims and any acts Defendants purportedly performed under a federal officer.

Defendants flunk the nexus requirement of federal officer removal because they cannot show any connection or association between the "acts complained of by [the State] and the federal government." *Papp*, 842 F.3d at 813. Here, the complained-of acts are Defendants' decades-long campaigns to conceal and misrepresent the dangers of their fossil fuel products. *See, e.g.*, Compl. ¶¶ 8–9. Yet Defendants make no attempt to connect this wrongdoing to any government-controlled conduct—nor could they. That omission fatally undermines their efforts to clear the nexus prong of federal officer jurisdiction, as every court to consider the issue has concluded in related cases. *See, e.g.*, *Rhode Island II*, 979 F.3d at 59–60; *Baltimore II*, 952 F.3d at 466–68; *Minnesota*, 2021 WL 1215656, at *9; *Honolulu*, 2021 WL 531237, at *6–7; *Boulder I*, 405 F. Supp. 3d at 976–77; *Rhode Island I*, 393 F. Supp. 3d at 152; *San Mateo I*, 294 F. Supp. 3d at 939.

Unable to draw the requisite connection, Defendants instead try to hijack the Complaint, insisting that this Court must "credit the defendant's theory of the case." Opp. 55 (brackets omitted). The nexus standard does not, however, give Defendants license to contort the State's claims into something they are not. *See Honolulu*, 2021 WL 531237, at *7 ("[I]f Defendants had it their way, they could assert any theory of the case, however untethered to the claims of Plaintiffs, because this Court must 'credit' that theory."); *Minnesota*, 2021 WL 1215656, at *5 ("[A]dopt[ing] Defendants' theory . . . is a bridge too far."). Rather, a defendant must "demonstrate a direct connection or association between the federal government and the [culpable conduct] *described by [the plaintiff]*."

Papp, 842 F.3d at 813 (emphasis added); *In re Commonwealth's Motion to Appoint Counsel Against or Directed to Defender Ass'n*, 790 F.3d 457, 470 (3d Cir. 2015) (nexus requirement satisfied where the complaint's "allegations are directed at the relationship" between the defendant and the federal government).

Here, Defendants' liability springs from their "concealment and misrepresentation of [fossil fuel] products' known dangers," together with their "simultaneous promotion of [those products'] unrestrained use." *Baltimore II*, 952 F.3d at 467. It does not—as Defendants assert—stem from their "extraction, production, and sale of oil and gas" alone. Opp. 54 (quotations omitted). The Court should therefore disregard Defendants' strawman theory of the case, as courts around the country have done. *See, e.g.*, *Minnesota*, 2021 WL 1215656, at *8; *Honolulu*, 2021 WL 531237, at *1; *Boulder I*, 405 F. Supp. 3d at 969; *Massachusetts*, 462 F. Supp. 3d at 44.

Nor can Defendants salvage federal officer jurisdiction by framing fossil fuel production as a link in the causal chain connecting their tortious conduct (the deception campaigns) to the State's injuries (the local impacts of climate change). *See* Opp. 55. Again, the nexus inquiry turns on the relationship between the federal government and the "culpable behavior" that a plaintiff has chosen to target. *Papp*, 842 F.3d at 810, 813. And here, the State has "chosen to target Defendants' alleged failure to warn and/or disseminate accurate information about the use of fossil fuels." *Honolulu*, 2021 WL 531237, at *6. Although Defendants' disinformation campaigns increased the production of oil and gas by hyperinflating the demand for fossil fuel products, that enhanced production is simply an *effect* of Defendants' culpable behavior, "not the source of tort liability." *Baltimore II*, 952 F.3d at 467. Thus, even under a maximally "relaxed reading" of the nexus requirement, "the relationship between [the State's] claims and any federal authority over a portion of certain Defendants' production and sale of fossil fuel products is too tenuous to support removal under

§ 1442." *Id.* at 467–68. Or, as the First Circuit aptly put it when faced with identical attempts to remove similar state-law claims, the removal notice "may have the flavor of federal officer involvement," but "that mirage only lasts until one remembers what [the State] is alleging in its lawsuit." *Rhode Island II*, 979 F.3d at 59–60.

Defendants' cited cases only underscore the differences between this lawsuit and those that actually satisfy the nexus standard. In *Papp*, the Third Circuit found this requirement met because the plaintiff charged Boeing with failing to warn about "the dangers of asbestos" in its "C-47 aircraft," but Boeing claimed that the U.S. military controlled "the content of written materials and warnings associated with [that] aircraft." 842 F.3d at 813. Likewise, *Defenders Association of Philadelphia* involved a direct connection between the federal government and the allegedly culpable behavior, namely: the misuse of federal funds by attorneys who worked for "a non-profit entity created through the [federal] Criminal Justice Act." 790 F.3d at 464, 469, 472. The same is true for *Baker v. Atlantic Richfield Company*, where the plaintiffs alleged that the defendants' manufacturing operations "tortiously contaminated" their properties, but the defendants claimed that the federal government controlled and directed those same operations. 962 F.3d 937, 940–41 (7th Cir. 2020).

In all these cases, the government-directed conduct overlapped with the culpable behavior described in the complaint. Here, by contrast, Defendants do not contend that the federal government had any involvement whatsoever in the sophisticated deception campaign that underpins the State's causes of action. *See, e.g.*, Compl. ¶¶ 234–79. Defendants' argument therefore lacks an objectively reasonable basis to assert federal officer jurisdiction, and the Court must reject it. *Cf. Cty. of Montgomery v. Atl. Richfield Co.*, 795 F. App'x 111, 112 (3d Cir. 2020) (nexus prong

not satisfied where government did not direct defendant manufacturers to supply the particular lead-based paint that created the alleged public nuisance).

Even if the Court concluded that fossil fuel production (not the deception campaigns) were the source of tort liability in this lawsuit, Defendants would still fail to satisfy the nexus requirement for four overlapping reasons. *First*, many of the acts that Defendants purportedly took at the behest of a federal officer, such as their fossil fuel production during World War II and the Korean War, *predate* the earliest allegations in the Complaint by more than a decade.

Second, the Complaint expressly disclaims "injuries . . . that arose from Defendants' provision of fossil fuel products to the federal government," Compl. ¶ 14, and that disclaimer covers the vast majority of Defendants' alleged government-controlled conduct, including their sales of fossil fuels and specialized fuel products to the government, operations at the Elk Hill Reserve, and their contributions to the Strategic Petroleum Reserve.[9]

Third, according to Defendants' own descriptions and exhibits, the Emergency Petroleum Allocation Act ("EPAA") simply controlled the allocation and "distribut[ion] [of] *available*

[9] The State's disclaimer is effective because it is "specific," "clear," and "unambiguous." *Martincic v. A.O. Smith Corp.*, No. 2:20-CV-958-WSS, 2020 WL 5850317, at *3–4 (W.D. Pa. Oct. 1, 2020) (upholding disclaimer that foreswore "bringing any claims . . . for exposure to asbestos-containing products during [the plaintiff's] service in the United States Navy"). Defendants' cited cases are not to the contrary. In *Dougherty*, for example, the court disregarded the plaintiff's disclaimer because it was "inconsistent with [other] allegations of the Complaint" and therefore "ambiguous." *Dougherty v. A O Smith Corp.*, No. CV 13-1972-SLR-SRF, 2014 WL 3542243, at *3 (D. Del. July 16, 2014), *report and recommendation adopted sub nom. Dougherty v. A.O. Smith Corp.*, No. CV 13-1972-SLR-SRF, 2014 WL 4447293 (D. Del. Sept. 8, 2014). Defendants identify no comparable inconsistency here. *Nessel*, on the other hand, is distinguishable because, in that case, the plaintiffs offered the Western District of Michigan no information on how they would differentiate between chemical contamination caused by commercial- and military-use of aqueous film-forming foams. *Nessel v. Chemguard, Inc.*, No. 1:20-CV-1080, 2021 WL 744683, at *3 (W.D. Mich. Jan. 6, 2021). Here, by contrast, the Complaint provides that information, alleging: "By quantifying greenhouse gas pollution attributable to Fossil Fuel Defendants' products and conduct, climatic and environmental responses to those emissions are also calculable, and can be attributed to Fossil Fuel Defendants on an individual and aggregate basis." Compl. ¶ 59.

gasoline supplies." Opp. 43. It did not require fossil fuel companies to increase production levels and so does not even relate to *Defendants*' proposed theory of this case.

Fourth, and finally, Defendants fail to show that their production of fossil fuels on the Outer Continental Shelf—which in any event was not performed under the direction of a federal officer—constituted a "*significant*[] portion" of their overall production. *Baker*, 962 F.3d at 945 (observing that defendants satisfied the nexus requirement because their government-controlled conduct "was a small, yet *significant*, portion of the[] relevant conduct" charged in the complaint) (emphasis in original). Indeed, their removal notice leaves that fraction entirely "unknown," relying instead on general statistics that have no connection to any particular Defendant. *See Boulder I*, 405 F. Supp. 3d at 979.

In short, Defendants cannot satisfy the nexus requirement because none of their purportedly government-directed conduct relates, in any way, to "the misleading-marketing allegations that are at the center of [the State's] Complaint." *Baltimore II*, 952 F.3d at 464. They cannot plug this gaping hole in federal officer jurisdiction by inventing a complaint of their own design. And even if they could, Defendants' strawman theory of the case would still fail the nexus requirement. Accordingly, this Court should reject Defendants' assertion of federal officer jurisdiction, which lacks an objectively reasonable basis, as every court has done in similar cases.

2. Defendants were not "acting under" a federal officer.

Defendants search far and wide for evidence of an "acting under" relationship, seeking a hook for federal officer jurisdiction in everything from World War II policies to commercial mineral leases on the OCS. Cutting across Defendants' arguments is the mistaken proposition that federal contractors may automatically avail themselves of federal officer jurisdiction. Defendants' citations to *Agyin v. Razmzan*, 986 F.3d 168, 175 (2d Cir. 2021), and *Papp*, 842 F.3d at 813, on that point are misleading. *See* Opp. 52. *Watson* makes clear that contractors "act under" federal officers

only where they have an "unusually close" relationship. *Defender Ass'n*, 790 F.3d at 468 (quoting *Watson v. Phillip Morris Cos.*, 551 U.S. 143, 153 (2007)). While "private contractors performing tasks for the government are sometimes covered under section 1442," Defendants "take this idea too far." *Panther Brands, LLC v. Indy Racing League, LLC*, 827 F.3d 586, 590 (7th Cir. 2016). And "a person is not 'acting under' a federal officer when the person enters into an arm's-length business arrangement with the federal government." *San Mateo II*, 960 F.3d at 600. None of Defendants' identified relationships involve the requisite level of "subjection, guidance, or control" by a federal officer, and Defendants have not met their burden. *Watson*, 551 U.S. at 143.

a. Defendants' mineral leases provide no basis for federal officer removal.

The First, Fourth, Ninth, and Tenth Circuits have all expressly rejected Defendants' argument that they acted under federal officers by developing mineral resources pursuant to Outer Continental Shelf ("OCS") leases. *See Rhode Island II*, 979 F.3d at 59; *Baltimore II*, 952 F.3d at 465–68; *San Mateo II*, 960 F.3d at 602; *Boulder II*, 965 F.3d at 820–27. No court has held otherwise, and Defendants' reliance on the same evidence rejected by other courts—including regulations governing OCS lessees, hortatory Presidential policy statements, and never-enacted bills they contend could have nationalized OCS production—does not compel a different result.

The Fourth, Ninth, and Tenth Circuits examined these same OCS leases in depth, and determined that they cannot support federal officer jurisdiction because they "do not require that lessees act on behalf of the federal government, under its close direction, or to fulfill basic governmental duties." *San Mateo II*, 960 F.3d at 602–03; *accord Baltimore II*, 952 F.3d 463–66; *Boulder II*, 965 F.3d at 821–27. Each Circuit based its holding on the Supreme Court's decision in *Watson*, which held:

> a highly regulated firm cannot find a statutory basis for removal in the fact of federal regulation alone. A private firm's compliance (or noncompliance) with

> federal laws, rules, and regulations does not by itself fall within the scope of the statutory phrase "acting under" a federal "official." And that is so even if the regulation is highly detailed and even if the private firm's activities are highly supervised and monitored. A contrary determination would expand the scope of the statute considerably, potentially bringing within its scope state-court actions filed against private firms in many highly regulated industries.

551 U.S. at 153.

Here, Defendants largely rely on the Declaration of Richard Tyler Priest (D.I. 98, "Priest Decl."). Dr. Priest, a historian, in turn relies on OCS leases as well as several statutes and regulations and what he characterizes as standard petroleum engineering practices. But his declaration merely describes a straightforward relationship between a regulated industry and regulator, under a statute that delegates rulemaking authority to an agency that in turn promulgates and enforces rules. *See, e.g.*, Priest Decl. ¶¶ 23–25. The crux of Dr. Priest's opinion is that "[t]he initial Code of Federal Regulations (C.F.R.), finalized in May 1954, went well beyond those that governed the average federally regulated entity at that time." *Id.* ¶ 19. That is a debatable proposition. But even if Dr. Priest were correct, his opinion expressly describes a set of codified regulations that apply to every regulated entity. *See, e.g.*, *Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d 588, 594 (D.C. Cir. 2015) (describing OCSLA as "a statute with a structure for every conceivable step to be taken on the path to development of an OCS leasing site") (quotations omitted). That is not enough to establish federal officer jurisdiction: "Mere compliance with the law, even if the laws are highly detailed, and thus leave an entity highly regulated, does not show that the entity is acting under a federal officer." *San Mateo II*, 960 F.3d at 603 (cleaned up) (citing *Watson*, 551 U.S. at 143).

Moreover, allegations that federal supervisors measured production and computed royalties (Opp. 38 & Priest Decl. ¶ 20) or incentivized production by offering more acres for lease (Opp. 39 & Priest Decl. ¶ 32) entirely support the Ninth Circuit's characterization of the relationships as arms-length business transactions, *San Mateo II*, 960 F.3d at 601. *Accord Boulder II*, 965 F.3d at

827 ("The OCS leases represent arms-length commercial transactions whereby ExxonMobil agreed to certain terms . . . in exchange for the right to use government-owned land for its own commercial purposes.") (cleaned up). Dr. Priest's opinion thus all but concedes that Defendants' arguments fail. Defendants attempt to argue that the OCS leases "reflect the creation of a valuable national security asset," Opp. 36, but as the *Boulder II* court held, "[o]ur determination that ExxonMobil was not 'acting under' federal officers in drilling pursuant to OCS leases is not altered by the OCS's status as a vital national resource reserve. . . . [because] the facilitation of fossil fuel resource development by private companies is not a critical federal function." 965 F.3d at 826 (quotation omitted). Indeed, the court in *Honolulu* reviewed the same declaration from Dr. Priest and held that "while Defendants appear to have taken a new approach in presenting the leases—describing them as securing an essential governmental purpose—ultimately, they have merely rearranged the deckchairs. . . . [The leases] show nothing more than what the Ninth Circuit described as 'largely track[ing] legal requirements' and evidencing a high degree of regulation." *Honolulu*, 2021 WL 531237, at *5 (quoting *San Mateo II*, 960 F.3d at 603).

Finally, the smattering of never-enacted bills cited by Defendants, which supposedly would have amended OCSLA to create a "national oil company" (Opp. 39–40), have no bearing on whether Defendants "acted under" federal officers when they extracted oil on the OCS for their own commercial purposes. *See* Mot. at 39–40. An unenacted law establishes no federal control and evinces no congressional intent. *Cent. Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 187 (1994).

b. Standard Oil did not act under a federal officer when it operated the Elk Hills Reserve.

In contrast to their Notice of Removal, Defendants now disclaim reliance on the Unit Plan Contract ("UPC") as a basis for removal. *See* Opp. 41. Instead, they premise federal officer jurisdiction on a 1971 "Operating Agreement," a separate contractual arrangement wherein the

Navy purportedly hired Standard Oil to maintain the Elk Hills Reserve. *Id.* However, the court in *Honolulu* just rejected that very same argument, explaining:

> While the [operating] agreement states, without explaining, that Standard Oil was "in the employ" of the Navy, nothing else in the agreement, and certainly nothing to which Defendants cite, sets forth the kind of "unusually close" relationship that is necessary. Instead, the agreement provides only general direction regarding the operation of Elk Hills.

Honolulu, 2021 WL 531237, at *6; *see also id.* at *6 n.11.

For similar reasons, Defendants cannot manufacture removal jurisdiction by vaguely asserting that the federal government "directed" Standard Oil to increase oil production during World War II and a 1974 energy shortage. Opp. 41; NOR ¶¶ 100–02. Nothing in the record suggests that these general directions involved anything close to "the detailed regulation, monitoring, or supervision" that the acting-under standard demands. *Watson*, 551 U.S. at 151. At any rate, courts have rightly recognized that a private entity does not act under a federal officer where it "supplies [the government] with widely available commercial products or services." *San Mateo II*, 960 F.3d at 600 (collecting cases). And here, Standard Oil simply provided the Navy with barrels of oil, a quintessentially "off-the-shelf product[]." *Baltimore II*, 952 F.3d at 464 (quotations omitted).

c. Defendants' contributions to the Strategic Petroleum Reserve do not give rise to an acting-under relationship with the government.

Nor can Defendants rely on their involvement in the Strategic Petroleum Reserve ("SPR") to remove this lawsuit to federal court. Defendants do not dispute that they supplied fossil fuels to the SPR pursuant to OCS leases, some of which required lessees to make in-kind royalty payments to the government, rather than cash royalty payments. *See* Opp. 43; NOR ¶ 110. Yet as every court to consider the issue has concluded, those very same OCS leases do not give rise to an acting-under relationship. *San Mateo II*, 960 F.3d at 602–03; *Baltimore II*, 952 F.3d at 465–66; *Boulder II*, 965 F.3d at 823; *Honolulu*, 2021 WL 531237, at *5; *Boulder I*, 405 F. Supp. 3d at 976. Defendants

cannot overcome this uniform chorus of judicial authority. *See supra* at Part II.C.2.a. As a result, their SPR-based theory of removal must also fail because "if the [OCS] leases *in toto* do not create a Section 1442(a)(1) relationship," there is no basis in logic or precedent for concluding that "a part of those leases—royalties—could either." *Honolulu*, 2021 WL 531237, at *6 n.12.

For similar reasons, Defendants cannot rest removal jurisdiction on vague allegations that they "manag[ed] the [SPR] for the government." Opp. 42–43; *see also* NOR ¶¶ 112–13. The court in *Honolulu* correctly rejected these very same arguments, observing that "Defendants provide no explanation as to any type of control the government may wield over them" and concluding that, "[a]t best, the relationship Defendants describe is a regular business one." *Honolulu*, 2021 WL 531237, at *6. Indeed, to the extent that the removal notice offers any non-conclusory allegations of government control over Defendants' SPR activities, it does so in connection with the emergency drawdown provisions found in some of Defendants' leases. *See* NOR ¶¶ 112–13. Yet Defendants do not contest that these provisions simply track regulatory requirements. *See* Opp. 42–43. And that omission is fatal because "[m]ere compliance with the law, even if the laws are highly detailed, and thus leave an entity highly regulated, does not show that the entity is acting under a federal officer." *San Mateo II*, 960 F.3d at 603 (cleaned up) (holding that "lease requirements [which] largely track legal requirements" do not satisfy the acting-under standard); *Baltimore II*, 952 F.3d at 465 (same).

d. Defendants' compliance with the Emergency Petroleum Allocation Act does not satisfy the acting-under standard.

The same reasoning precludes Defendants from using the Emergency Petroleum Allocation Act ("EPAA") to satisfy the acting-under prong of federal officer jurisdiction. When Congress passed EPPA in response to a national fuel shortage, it authorized the President to promulgate regulations that controlled the allocation and distribution of petroleum products across the country. *See* EPAA, Pub. L. No. 93-159, § 4, 87 Stat. 635 (Nov. 27, 1973). Defendants argue that their

participation in this "regulatory scheme" gives rise to an acting-under relationship. *See* Dick Decl. Ex. 16, D.I. 97-1 at 390 (House hearing). But the Supreme Court could not be clearer on this point: "A private firm's compliance (or noncompliance) with federal laws, rules, and regulations does not by itself fall within the scope of the statutory phrase 'acting under' a federal 'official.'" *Watson*, 551 U.S. at 153. Here, Defendants' exhibits simply describe fossil fuel companies complying with various EPAA rules and regulations—nothing more. *See* Dick Decl., Ex. 16, D.I. 97-1 at 387–95 (detailing various allocation "regulations"); Dick Decl., Ex. 17, D.I. 97-1 at 397–405 (same).

e. Historic wartime contracts and supply of fuels to the military.

As determined by federal courts around the country, Defendants' assertions regarding their interactions with the military do not support federal jurisdiction. *See, e.g.*, *San Mateo II*, 960 F.3d at 600–02; *Baltimore II*, 952 F.3d at 463–64. To the extent Defendants seek to present the military-industrial relationship from a different angle, Defendants' newly provided evidence of historical contracts during WWII and the Korean War predates the misconduct alleged in the Complaint and fails to demonstrate the "delegation" of federal duties necessary to trigger federal officer removal. *Watson*, 551 U.S. at 157; *see also San Mateo II*, 960 F.3d at 599.

First, Defendants' characterization of directives from the Petroleum Administration for War ("PAW") during WWII, even if they had occurred during a time pertinent to these cases, does not meet the "acting under" prong, as a federal court has already held. *See Parish of Cameron v. Auster Oil & Gas Inc.*, 420 F. Supp. 3d 532, 543–44 (W.D. La. 2019). In *Parish of Cameron*, as here, the defendants sought removal under § 1442 by "characteriz[ing] the U.S. oil and gas industry as essentially an agent of the federal government during [WWII]," and asserting that "the industry's activities were tightly controlled to support the country's war efforts." *Id.* at 543. The court nonetheless remanded because, as here, the defendants did not show "that PAW and other federal agencies directed Defendants' activities or that they mandated how Defendants were to comply

with federal regulations and directives." *Id*. at 544. The mere fact that the government set production quotas or otherwise influenced production thus demonstrated "little more than a regulated industry complying with . . . a federal regulatory regime," which cannot support federal officer removal. *Id*. The cases Defendants cite only reinforce this conclusion, noting that although PAW had the authority to compel production, "in fact they relied almost exclusively on contractual agreements to ensure avgas production," and the government "did not exercise direct control over the production of avgas." *United States v. Shell Oil Co.*, 294 F.3d 1045, 1050 (9th Cir. 2002).[10]

Second, even assuming that Defendants' conduct during the Korean War would be temporally relevant, Defendants' evidence of "acting under" during that period is similarly deficient. The suggestion that any Defendant was "directed" to expand production during the Korean War is belied by the mechanism by which Defendants say the government executed that "directive": by "calling on"—asking—the oil industry to drill new wells. Opp. 48; Declaration of Dr. Mark R. Wilson, D.I. 99 ("Wilson Decl."), ¶ 28. Defendants also offer no evidence that any Defendant responded to that request, let alone acted under a federal officer in doing so. *See Honolulu*, 2021 WL 531239, at *5 (finding no "acting under" relationship for "fuel supplied during the Korean War" because "Defendants provide no information as to why this constituted the sort of 'unusually close' relationship required").

Similarly, Defendants offer no evidence of the actual relationship between the government and the sole Defendant predecessor identified as having operated a government-owned, contractor-operated facility. Opp. 47. Instead, Defendants rely on generalizations across the "oil companies" without identifying how any specific Defendant acted under a federal officer in carrying out any of

[10] Defendants' new evidence concerning the "Inch" pipelines fares no better, because it fails to specify any particular Defendant, let alone what role it played, and thus fails to establish the "acting under" element. *See* Wilson Decl. ¶ 13.

the conduct in the Complaint. *See* Opp. 47; Wilson Decl. ¶ 19.[11] The same is true of the government's contracts with oil companies to supply specialty fuels. Opp. 49 (citing Wilson Decl. ¶ 40). Without evidence that any particular relationship was "unusually close" and "involving detailed, regulation, monitoring, or supervision," Defendants offer nothing more than the type of "arm's-length business arrangement" that does not support federal officer jurisdiction. *Watson*, 551 U.S. at 153; *San Mateo II*, 960 F.3d at 599, 600.

D. There is no OCSLA jurisdiction.

There is no OCSLA jurisdiction because Defendants cannot show that the "activities that caused the injury constituted an 'operation' 'conducted on the [OCS]' that involved the exploration and production of minerals.'" *See In re Deepwater Horizon*, 745 F.3d 157, 163 (5th Cir. 2014) (quoting *EP Operating Ltd. P'ship v. Placid Oil Co.*, 26 F.3d 563, 569 (5th Cir. 1994)); *see also Plains Gas Sols., LLC v. Tenn. Gas Pipeline Co.*, 46 F. Supp. 3d 701, 704–05 (S.D. Tex. 2014). Nor can Defendants establish that the State's claims "aris[e] out of, or in connection with," Defendants' offshore activities, 43 U.S.C. § 1349(b)(1), even under a broad reading of OCSLA's removal provision.[12] *See, e.g.*, *Boulder I*, 405 F. Supp. 3d at 978 (collecting cases). This Court

[11] This flaw is representative of the Wilson Declaration generally, which fails to identify specific oil companies and how they purportedly "acted under" federal officers, as would be required to satisfy Defendants' burden. *See San Mateo II*, 960 F.3d at 603. For instance, almost all references to a Defendant or a Defendant's predecessor are in a single paragraph establishing that certain oil companies have won government contracts, Wilson Decl. ¶ 34, which is insufficient on its own to establish federal officer jurisdiction. *See, e.g.*, *Cabalce v. Thomas E. Blanchard & Assocs., Inc.*, 797 F.3d 720, 729 (9th Cir. 2015). The declaration also says nothing about whether any Defendant "acted under" a federal officer in carrying out the deception campaign at the heart of the State's claims, and likewise provides no support for Defendants' nexus arguments.

[12] The cases Defendants cite for the proposition that OCSLA's jurisdictional grant is broad, *see* Opp. 28–29, actually demonstrate that jurisdiction generally applies only to claims arising directly from facilities *on* the OCS. *See EP Operating*, 26 F.3d at 569 (action to determine ownership rights in offshore equipment); *Laredo Offshore Constructors, Inc. v. Hunt Oil Co.*, 754 F.2d 1223, 1225 (5th Cir. 1985) (contract dispute involving construction of offshore platform). Those cases also

should therefore reject OCSLA as a basis for jurisdiction. Given that every court to rule on this issue in analogous cases has found that no OCSLA jurisdiction applies, Defendants' arguments here also lack an objectively reasonable basis for removal. *See Minnesota*, 2021 WL 1215656, at *10; *Honolulu*, 2021 WL 531237, at *3; *Boulder I*, 405 F. Supp. 3d at 978; *Rhode Island I*, 393 F. Supp. 3d at 151–52; *Baltimore I*, 388 F. Supp. 3d at 566; *San Mateo I*, 294 F. Supp. 3d at 938–39.

Defendants suggest they meet the first prong of the OCSLA jurisdictional test simply because they "engage in substantial operations conducted on the OCS that entail the exploration and production of minerals." *See* Opp. 29 (quotations and alterations omitted). But "for jurisdiction to lie, a case must arise directly out of OCS operations." *Boulder I*, 405 F. Supp. 3d at 978; *see also Par. of Plaquemines v. Total Petrochem. & Refining USA, Inc.*, 64 F. Supp. 3d 872, 895 (E.D. La. 2014) (holding "[Section] 1349 expressly tethers OCSLA jurisdiction to an operation on the OCS" and finding no OCSLA jurisdiction where injurious conduct occurred in state waters, even though it "involved pipelines that ultimately stretch to the OCS"). The State seeks to hold Defendants liable for decades of deceiving and misleading consumers and the public about the dangers of fossil fuels, which inflated the market for Defendants' products, leading to their profligate and increased use, which ultimately caused the State's disastrous climate injuries—not for their exploration within the OCS. *See, e.g.*, Compl. ¶¶ 1–12. Here, just as in *Boulder*, "Defendants cite no case authority holding that injuries associated with downstream uses of OCS-derived oil and gas products creates OCSLA jurisdiction." *Boulder I*, 405 F. Supp. at 979; *see also Minnesota*, 2021 WL 1215656, at *10 ("[T]he State's claims are rooted not in the Defendants' fossil fuel production, but in [their] alleged misinformation campaign"). And Defendants' argument that mere exploration and production

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emphasized that "'the purpose of [OCSLA] was to define a body of law applicable to the seabed, the subsoil, and the fixed structures . . . on the [OCS].'" *Laredo*, 754 F.2d at 1228 & n.8 (quoting *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 355 (1969)); *EP Operating*, 26 F.3d at 566.

constitutes an "operation" on the OCS "that caused the [State's] injury," *see In re Deepwater Horizon*, 745 F.3d at 163, "would arguably lead to the removal of state claims that are only 'tangentially related' to the OCS." *Boulder I*, 405 F. Supp. at 979. That is not the law.

Nor does this case "arise[] out of, or in connection with" an OCS operation. 43 U.S.C. § 1349(b)(1). OCSLA requires "a 'but-for' connection" between "the cause of action and the OCS operation," *In re Deepwater Horizon*, 745 F.3d at 163, and while the test is broad, it "is not limitless," *Plains Gas Sols.*, 46 F. Supp. 3d at 704–05. Here, Defendants do not even attempt to argue that the State "would not have been injured 'but for'" their operations on the OCS. *Recar v. CNG Producing Co.*, 853 F.2d 367, 369 (5th Cir. 1988). At best, Defendants argue that their purportedly "significant" OCS production has contributed in some way to the State's injuries. *See* Opp. 30. But that "'mere connection' between the [State's] cause of action and the OCS" is simply "too remote to establish federal jurisdiction," *Deepwater Horizon*, 745 F.3d at 163, and every court to consider that same argument has rejected it accordingly. *See* Mot. at 52 n.25; *Minnesota*, 2021 WL 1215656, at *10; *Honolulu*, 2021 WL 531237, at *3; *see also Hammond v. Phillips 66 Co.*, No. 14-CV-119-KS, 2015 WL 630918, at *4 (S.D. Miss. Feb. 12, 2015) (remanding where defendant failed to show plaintiff's asbestosis would not have occurred "but for" his nine-month exposure on OCS rigs given his 10 years of employment on land-based oil rigs). Defendants fail to distinguish (or even acknowledge) those persuasive authorities.

Defendants also do not dispute that courts in the Fifth Circuit—where almost all OCSLA cases have been adjudicated—routinely apply this but-for test to define the scope of OCSLA jurisdiction. Nor do they identify any case where a court found OCSLA jurisdiction yet concluded there was *no* but-for connection between the lawsuit and an OCS operation. To the contrary, in each of Defendants' cited cases, the dispute would not have existed absent an OCS operation. *See, e.g.*,

EP Operating, 26 F.3d at 565 ("The current dispute arose out of EP's attempt to recover some value from these unused and depreciating assets on the OCS."); *United Offshore Co. v. S. Deepwater Pipeline Co.*, 899 F.2d 405, 407 (5th Cir. 1990) ("The present dispute . . . involves a contractual dispute over the control of an entity which operates a gas pipeline [from the OCS].").

There is also no merit to Defendants' conclusory assertion that the Fifth Circuit's but-for standard "is contrary to the text of the statute." Opp. 31. As the Supreme Court has explained, statutory phrases such as "in connection with" or "relate to" are "essentially indeterminate because connections, like relations, stop nowhere." *Maracich v. Spears*, 570 U.S. 48, 59 (2013) (cleaned up). Accordingly, courts must apply "a limiting principle" to reasonably cabin the scope of these phrases. *Id*. In practice, many courts—like the Fifth Circuit—have done so by requiring a but-for connection between the plaintiff's claims and the defendant's challenged conduct. *See, e.g.*, *Cooper v. Ruane Cunniff & Goldfarb Inc.*, 990 F.3d 173, 183 (2d Cir. 2021) (plaintiff's ERISA claims did not "relate to" his employment because "none of the facts relevant to the merits of [the plaintiff's] claims against [the defendant] relates to his employment"); *Doe v. Princess Cruise Lines*, 657 F.3d 1204, 1219 (11th Cir. 2011) (plaintiff's state-law tort claims for false imprisonment (among others) "did not relate to, arise out of, or . . . connect with [her] crew agreement or her duties for [the defendant cruise line] as a bar server" because "[t]he cruise line could have engaged in that tortious conduct even in the absence of any contractual or employment relationship"); *United States ex rel. Welch v. My Left Foot Children's Therapy, LLC*, 871 F.3d 791, 799 (9th Cir. 2017) (plaintiff's qui tam lawsuit did not "'arise out of' or 'relate to' a contractual or employment relationship" because "even if [the plaintiff] had never been employed by defendants, . . . she would still be able to bring a suit against them for presenting false claims to the government."). Defendants' assertion that the phrase "in connection with" as used in 43 U.S.C. § 1349(b)(1) "means there is no causal

requirement at all," *see* Opp. 31, is absurd. Congress did not intend OCSLA to confer federal jurisdiction over every state-law complaint involving fossil fuel companies, and the statute cannot be construed so broadly. *See S.E.C. v. Zandford*, 535 U.S. 813 (2002) (holding "in connection with" language "must not be construed so broadly as to [reach] every common-law fraud that happens to involve securities").

Defendants cannot escape this conclusion by speculating that the State's requested relief threatens to impair future OCS recovery. *See* Opp. at 32. As set forth in the Motion, the State seeks abatement of the injuries within the State, not an order "enjoining Defendants' global production of fossil fuels." Mot. at 53. It is entirely unclear why Defendants think that such an abatement fund would make "future OCS[] production . . . prohibitively costly," Opp. 32, given that the size of the fund bears no relation to Defendants' future operations on the OCS. As the *Minnesota* court held, "[t]his argument is highly speculative and quite unlikely and asks the Court to assume both the outcome of the suit in state court and the highest damages award possible" and therefore "does not establish a stable ground for supporting removal . . . under OCSLA." 2021 WL 1215656, at *10. On Defendants' theory, federal OCSLA jurisdiction would exist in *every* case seeking a large monetary judgment against a company that extracted oil or gas on the OCS, regardless of the subject matter or nature of the claims. The Court should not "presum[e] that Congress intended such an absurd result." *Boulder I*, 405 F. Supp. 3d at 979. Instead, it must reject Defendants' assertion of OCSLA jurisdiction, as has every court to consider the issue. *See San Mateo I*, 294 F. Supp. 3d at 938–39; *Boulder I*, 405 F. Supp. 3d at 978–79; *Rhode Island I*, 393 F. Supp. 3d at 151–52; *Baltimore I*, 388 F. Supp. 3d at 566; *Honolulu*, 2021 WL 531237, at *3; *Minnesota*, 2021 WL 1215656, at *10.

III. DEFENDANTS' THEORIES OF REMOVAL JURISDICTION WERE INSUBSTANTIAL AND POTENTIALLY FRIVOLOUS, AND AN AWARD OF FEES AND COSTS IS WARRANTED.

Defendants' Opposition demonstrates not only that removal was not proper here, but also that no objectively reasonable basis for federal subject-matter jurisdiction exists over this case. The State therefore respectfully requests that the Court award just costs and actual expenses, including attorneys' fees, incurred by the State as a result of Defendants' improper removal. In the alternative, the State requests an opportunity to brief this issue separately.

An order remanding a case to the state court from which it was removed "may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). An award of fees is typically appropriate where "the removing party lacked an objectively reasonable basis for seeking removal." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005). The moving party need not show that the removing defendant acted in bad faith, and "a district court has broad discretion and may be flexible in determining whether to require the payment of fees under section 1447(c)." *Mints*, 99 F.3d at 1260. The test "turn[s] on the reasonableness of the removal," as opposed to the removing defendant's subjective understanding, to fulfill Congress's "desire to deter removals sought for the purpose of prolonging litigation and imposing costs on the opposing party, while not undermining" defendants' ability to pursue meritorious removals. *See Martin*, 546 U.S. at 140, 141. The Third Circuit has thus held that fees are appropriate when a defendant's basis for removal "was, if not frivolous, at best insubstantial." *Mints*, 99 F.3d at 1261; *see also Branson v. Mestre*, No. CV 17-207-VAC-SRF, 2017 WL 2615749, at *6 (D. Del. June 16, 2017) (awarding fees where defendant's notice of removal relied on "speculative factual assertions and sparse, inapposite case authorities"); *Branson v. Mestre*, No. CV 17-207-LPS, 2019 WL 1397147, at *1 (D. Del. Mar. 28, 2019) (denying motion to modify award of fees). Indeed, in recent proceedings before the Supreme Court, many of these same Defendants

argued for an expansive interpretation of Section 1447(d) (which limits the scope of appellate review of orders granting remand), because, under Section 1447(c), "sanctions are available to deter frivolous removal arguments" or "bad-faith" arguments. Brief for the Petitioners at 35, *BP p.l.c. v. Mayor & City Council of Baltimore*, No. 19-1189 (U.S. Nov. 16, 2020) (quotations omitted).

Between the Notice of Removal and Opposition to the State's Motion, Defendants have submitted 195 pages of argument with more than 1,400 pages of attachments across 115 exhibits and two expert declarations. The vast bulk of this material relates to their assertion of federal officer removal jurisdiction—an argument most of these Defendants have lost on the merits in the First, Fourth, Ninth, and Tenth Circuits, and which they expressly abandoned altogether in the Supreme Court. *See supra* n.1 (citing cases). Moreover, nowhere in any of that mound of material have Defendants meaningfully even tried to distinguish their arguments on any issue from identical ones rejected by seven district courts and four circuit courts in cases to which many Defendants were parties. Instead, as the court recognized when it rejected the same arguments once again in *Honolulu*, "they have merely rearranged the deckchairs." *Honolulu*, 2021 WL 531237, at *5.

Defendants' Opposition abandons *sub silentio* numerous jurisdictional theories asserted and argued in their Notice of Removal, including CAFA jurisdiction, complete preemption by the Clean Air Act, the federal enclave doctrine, and at least five different theories of *Grable* jurisdiction, *see* Parts I & II.B, *supra*, all of which the State was forced to brief at length in its Motion. The Opposition replaces several of those arguments with novel ones that are plainly foreclosed by controlling precedent, including that the artful pleading doctrine provides an independent exception to the well-pleaded complaint rule and that Defendants' First Amendment rights "inject" a federal issue into the State's affirmative case. *See* Parts II.A.2 & II.B.3, *supra*. And at their core, Defendants' Notice and Opposition depend on a distorted, inaccurate depiction of the State's

Complaint, which multiple courts have also noted and rejected in analogous decisions granting remand. *See, e.g.*, *Minnesota*, 2021 WL 1215656, at *13 ("[T]he State's action here is far more modest than the caricature Defendants present."); *Honolulu*, 2021 WL 531237, at *1 ("The principal problem with Defendants' arguments is that they misconstrue Plaintiffs' claims."); *Baltimore I*, 388 F. Supp. 3d at 560 ("This argument rests on a mischaracterization of the City's claims."); *Boulder I*, 405 F. Supp. 3d at 969 ("Defendants mischaracterize Plaintiffs' claims."); *Massachusetts*, 462 F. Supp. 3d at 44 (criticizing "ExxonMobil's caricature of the complaint").

Taken together, Defendants' voluminous presentation makes clear that the only purpose served by removal was "prolonging litigation and imposing costs on the" State, *see Martin*, 546 U.S. at 140. Fee awards under § 1447(c) are meant to deter precisely such conduct. Defendants had no objectively reasonable basis to remove this case, and the Court should exercise its broad discretion and award the State just costs and actual expenses incurred as a result of removal.

IV. CONCLUSION

This Court lacks jurisdiction over this case and should grant the State's Motion to Remand and award the State just costs and actual expenses. Given the weight of authority in similar cases, the State does not believe this Motion warrants oral argument.

Respectfully submitted,

Dated: April 6, 2021

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