UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND
(Northern Division)

CITY OF ANNAPOLIS, MARYLAND, Plaintiff, vs. BP P.L.C.; *et al.*, Defendants.	Case Number: 21-cv-00772-ELH

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION TO REMAND TO STATE COURT AND FOR FEES AND COSTS INCURRED AS A RESULT OF REMOVAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

I. INTRODUCTION

The City of Annapolis ("City") brought this action in Maryland state court, asserting Maryland common law and statutory claims for public and private nuisance, negligent and strict liability failure to warn, trespass, and violations of the Maryland Consumer Protection Act. The City seeks to rectify its local injuries caused by Defendants' decades-long campaign to discredit the science of global warming, conceal the dangers posed by their fossil fuel products, and misrepresent their role in responding to the climate crisis. Defendants removed, asserting a litany of arguments that misrepresent the City's complaint and controlling law. Every basis for jurisdiction in Defendants' 123-page Notice of Removal ("NOR") has already been rejected by this Court and the Fourth Circuit. *See 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*"). Six other district courts, as well as the First, Ninth, and Tenth Circuits, have also rejected attempts to remove materially similar cases on identical jurisdictional theories in the last three years.[1] Defendants' positions remain meritless, and this case should be remanded to state court, where it was filed and where it belongs.

[1] In addition to *Baltimore I* and *Baltimore II*, *see Cnty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934 (N.D. Cal. 2018) ("*San Mateo I*"), *aff'd in part, appeal dismissed in part*, 960 F.3d 586 (9th Cir. 2020) ("*San Mateo II*"), *reh'g en banc denied* (Aug. 4, 2020), *petition for cert. docketed*, No. 20-884 (U.S. Jan. 4, 2021); *City of Oakland v. BP PLC*, 969 F.3d 895 (9th Cir. 2020) ("*Oakland*"), *petition for cert. docketed*, No. 20-1089 (U.S. Feb. 9, 2021); *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 405 F. Supp. 3d 947 (D. Colo. 2019) ("*Boulder I*"), *aff'd in part, appeal dismissed in part*, 965 F.3d 792 (10th Cir. 2020) ("*Boulder II*"); *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. docketed*, No. 20-900 (U.S. Jan. 5, 2021); *Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31 (D. Mass. 2020); *City & Cnty. of Honolulu v. Sunoco LP*, No. 20-cv-00163-DKW-RT, 2021 WL 531237 (D. Haw. Feb. 12, 2021) (granting motion to remand in that matter and the related case of *Cnty. of Maui v. Chevron U.S.A. Inc.*, No. 20-cv-00470-DKW-KJM (D. Haw.)) (together, "*Honolulu*"); *Minnesota v. Am. Petroleum Inst.*, No. CV 20-1636 (JRT/HB), 2021 WL 1215656 (D. Minn. Mar. 31, 2021), *appeal filed*, No. 21-1752 (8th Cir. Apr. 5, 2021).

Defendants advance the same grounds for removal here that they have litigated and lost time and again: (1) a theory based in federal common law; (2) *Grable* jurisdiction; (3) the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1331 *et seq.*; (4) the federal officer removal statute, 28 U.S.C. § 1442; and (5) federal enclave jurisdiction. As in all the previous cases, "[t]he principal problem with Defendants' arguments is that they misconstrue [the City's] claims." *Honolulu*, 2021 WL 531237, at *1. This lawsuit does *not* seek to "halt Defendants' business activities," "enjoi[n], or at least drastically limi[t], fossil fuel production and sales," "regulate the production and sale of oil and gas," "challenge [conduct supporting] critical national policy objectives," "overturn decades of federal energy policy," or pulverize "the ineluctable backbone of United States energy policy." *See* NOR at 1, 3, 4, 6, 10, 21. Instead, as the Fourth Circuit recognized in *Baltimore II*, 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." 952 F.3d at 467. As for remedies, the City merely seeks to ensure that the Defendants who have profited from the alleged tortious conduct also bear some of the City's costs in mitigating and adapting to the impacts of that conduct.

The bases for removal asserted in the NOR do not demonstrate that federal jurisdiction exists over the City's state law claims. The Complaint has no relation to any body of federal common law, which at any rate does not provide a standalone basis for removal jurisdiction. The City's state-law claims do not fall within the scope of *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005), because they do not necessarily raise a substantial question of federal law. OCSLA provides no basis for jurisdiction because the City's claims, focused on Defendants' disinformation campaign, do not "aris[e] out of, or in connection with," any operation conducted on the outer continental shelf ("OCS"). *See* 43 U.S.C. § 1349(b)(1). Nor does the federal

officer removal statute confer jurisdiction here, because no federal officer directed or controlled Defendants' efforts to conceal and misrepresent the dangers of fossil fuel consumption, and the various activities Defendants have conducted with the government simply have nothing to do with the City's claims here. Defendants cannot rely on federal enclave jurisdiction, both because the City disclaims any injuries on federal land and because its claims did not arise there.

This Court should again reject Defendants' baseless arguments for removal jurisdiction and remand this case to State court. Because Defendants had no objectively reasonable basis to believe this case was removable, the City asks the Court to award just costs and attorney's fees pursuant to 28 U.S.C. § 1447(c).

II. FACTS

The City sued Defendants in Maryland state court, asserting state-law tort and statutory claims. *See* Complaint, Dkt. 2, Ex. 1 to Notice of Removal ¶¶ 13, 243–310 ("Compl."). The City's claims rest on Defendants' decades-long campaign to deceive and mislead consumers and the public about the impacts of climate change and its link to fossil fuels, which led to disastrous impacts caused by profligate and increased use of Defendants' products. *See, e.g.*, *id.* ¶¶ 1–12.

For more than half a century, Defendants have known that their fossil fuel products create greenhouse gases that change the climate, causing sea levels to rise, storms to worsen, the atmosphere and oceans to warm, and a cascade of other consequences. *Id.* ¶¶ 1, 7, 64–105. Starting as early as the 1950s, Defendants researched the link between fossil fuels and global warming, amassing a comprehensive understanding of the adverse climate impacts caused by their products. *Id.* ¶¶ 64–67. In internal reports and communications, their own scientists predicted that the unabated consumption of fossil fuels would cause "dramatic environmental effects," warning that the world had only a narrow window of time to curb emissions and stave off "catastrophic" climate

change. *Id.* ¶¶ 69, 71, 78, 82–85. Defendants took these warnings seriously: they evaluated impacts of climate change on their own infrastructure, invested to protect assets from rising seas and more extreme storms, and developed technologies to profit off a warmer world. *See id.* ¶¶ 142–47.

But when the United States and other countries began to treat climate change as a grave threat requiring concerted action, Defendants embarked on a campaign of denial and disinformation about the existence, cause, and adverse effects of global warming. *See id.* ¶¶ 106–141. Among other tactics, Defendants (1) bankrolled contrarian climate scientists whose views conflicted not only with the overwhelming scientific consensus, but also with Defendants' internal understanding of global warming; (2) funded think tanks, front groups, and dark money foundations that peddled in climate change denialism; and (3) spent millions of dollars on advertising and public messaging that casted doubt on the science of climate change. *See id.* Defendants continue to mislead the public about their own responses to the climate crisis, through so-called "greenwashing" campaigns that falsely portray their companies, products, and activities as environmentally responsible and actively engaged in finding "climate solutions." *See generally id.* ¶¶ 161–221.

Today and in the years to come, the City bears the costs of Defendants' deception and disinformation. *See id.* ¶¶ 236–42. The City has experienced nearly one foot of sea level rise, which will accelerate over the coming decades—even if all combustion of fossil fuels ended today. *Id.* ¶ 238(a). Higher sea levels are submerging lowlands, exacerbating coastal flooding, inundating natural resources, and damaging the City's property and infrastructure. *Id.* The destructive force of hurricanes in Annapolis is growing due to increased rainfall and windspeed, coupled with slower movement of storms over land. *Id.* More frequent and severe flooding threatens City Dock and related infrastructure, necessitating the demolition and costly reconstruction of a major parking structure less than 500 feet from the Maryland State House. *Id.* ¶¶ 238(b). Climate change also

threatens the important historic and cultural buildings within the City, including in particular the nearly 50 colonial-era buildings in the Annapolis Historic District. *Id.* ¶¶ 238(c). Climate change also threatens commercially and recreationally important maritime activities in Annapolis, including boating, fishing, sailing, racing, and the annual Annapolis Boat Shows, which attract tourists and competitors from around the world. *Id.* ¶ 19. Blue crab, oyster, and clam fisheries are also likely to suffer due to increased ocean temperatures and acidification, harming the fishing and seafood industries that are also important to the City. *Id*. ¶ 238(a). The most critical of these burdens fall disproportionately on under-resourced communities and communities of color in Annapolis, which will require additional resources from the City and others to respond and adapt to the climate crisis. *Id.* ¶¶ 238(d).

III. APPLICABLE LEGAL STANDARDS

Courts must "construe removal jurisdiction strictly" because it implicates "significant federalism concerns." *Lontz v. Tharp*, 413 F.3d 435, 441 (4th Cir. 2005) (citation omitted). Accordingly, "[t]he burden of demonstrating jurisdiction resides with the party seeking removal," and "if federal jurisdiction is doubtful, a remand to state court is necessary." *Dixon v. Coburg Dairy, Inc.*, 369 F.3d 811, 816 (4th Cir. 2004) (*en banc*) (quotations omitted).

The well-pleaded complaint rule governs whether a case "arises under" federal law for purposes of district courts' original and removal jurisdiction under 28 U.S.C. §§ 1331 and 1441. *E.g., Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 830 (2002). The rule "is the basic principle marking the boundaries of the federal question jurisdiction of the federal district courts," *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987), and "makes the plaintiff the master of the claim" such that "he or she may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). Subject-matter "jurisdiction may not be sustained on a theory that the plaintiff has not advanced," *Beneficial Nat'l Bank v. Anderson*,

539 U.S. 1, 12 (2003) (citation omitted), and cannot arise based on "an actual or anticipated defense," *Vaden v. Discover Bank*, 556 U.S. 49 (2009), even if "both parties admit that the defense is the only question truly at issue in the case," *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 14 (1983).

IV. DEFENDANTS' REMOVAL ARGUMENTS ARE FORECLOSED BY BINDING PRECEDENT, AND AN AWARD OF FEES AND COSTS IS WARRANTED.

The City responds in this memorandum to every argument presented in the Notice of Removal. Because every one of those arguments has been unanimously rejected by *seven* district courts and *four* courts of appeal, including this Court and the Fourth Circuit, Defendants lacked an objectively reasonable basis for removal, and an award of costs is appropriate, including attorneys' fees. This Court may "require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal" in an order remanding a case to state court. 28 U.S.C. § 1447(c). The fee-shifting provision is designed to "deter removals sought for the purpose of prolonging litigation and imposing costs on the opposing party." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 140 (2005). An award of fees pursuant to this provision is proper where "the removing party lacked an objectively reasonable basis for seeking removal." *Id.* at 141.

Defendants' legal bases for removal are objectively unreasonable. To begin, this Court already considered and rejected nearly identical theories of subject-matter jurisdiction in *Baltimore I*, 388 F. Supp. 3d at 549. Defendants make no attempt to distinguish that case beyond vaguely asserting that they offer new "evidence and arguments" here. NOR ¶ 13. That is the sole reference to *Baltimore I* in the NOR's 123 pages. They spend the remaining pages rehashing the same set of arguments that many of these same Defendants litigated and lost in *Baltimore I*—without mentioning that decision's contrary reasoning and holdings.

Defendants take the same approach with *Baltimore II*, the Fourth Circuit decision that binds this Court. They ask this Court to wade through hundreds of pages of exhibits that purportedly establish federal officer jurisdiction by showing that the government directed some of Defendants to produce or sell fossil fuels. But they fail to mention *Baltimore II*'s holding that evidence of this sort fails to satisfy the requirements for removal under § 1442 because "the relationship between [the plaintiff's] claims [of climate deception] and any federal authority over a portion of certain Defendants' production and sale of fossil fuel products is too tenuous." 952 F.3d at 468.

Defendants' omission approaches a lack of candor to the Court, and is an "ostrich-like tactic of pretending that potentially dispositive authority . . . does not exist." *Smith v. Hewlett-Packard Co.*, No. 1:15-CV-120, 2015 WL 11622962, at *4 (E.D. Va. Mar. 12, 2015) (quoting *Borowski v. DePuy, Inc.*, 850 F.2d 297, 304–05 (7th Cir. 1988)) (cleaned up). District courts in this Circuit have not hesitated to award § 1447(c) fees and costs when a defendant asserts removal arguments that have already been rejected by other district courts. *See, e.g.*, *Smiley v. Forcepoint Fed. LLC*, No. 3:18-CV-60-JAG, 2018 WL 3631885 (E.D. Va. July 31, 2018); *LOP Cap., LLC v. Cosimo, LLC*, No. 7:11-CV-03312-JMC, 2012 WL 2446894 (D.S.C. June 27, 2012); *Caufield v. EMC Mortg. Corp.*, 803 F. Supp. 2d 519 (S.D.W. Va. 2011). Here, *eleven* federal courts have rejected many of these same Defendants' attempts to remove substantially similar lawsuits.[2] Remarkably, Defendants' Notice of Removal does not grapple with the reasoning of *any* of those decisions, despite extensively discussing other cases. This Court should not "casually overlook[]" Defendants'

[2] The Supreme Court granted certiorari to consider the scope of appellate jurisdiction granted by 28 U.S.C. § 1447(d) over orders remanding cases to state court. *See BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S.Ct. 222 (2020). The Question Presented in that petition implicates none of the jurisdictional issues before the Court here. Many of the defendants in this case are petitioners there, and opted *not* to appeal the Fourth Circuit's holding that the district court lacks federal officer jurisdiction over Baltimore's claims under Maryland law.

efforts to "[r]ehash[] th[e] same issue[s] endlessly." *Wilson v. Ethicon Women's Health & Urology*, No. 2:14-CV-13542, 2014 WL 1900852, at *3 (S.D.W. Va. May 13, 2014) (awarding costs and fees due to improper removal).

Nor should the Court tolerate Defendants' "blatant mischaracterizations of the Complaint." *Owen v. Stokes*, No. 21-cv-01581, 2020 WL 127552, at *2 (D. Nev. Jan. 10, 2020), *aff'd*, No. 20-15129, 2021 WL 963774 (9th Cir. Mar. 15, 2021). This Court, the Fourth Circuit, and many others have confirmed that these types of cases seek to hold Defendants liable for their "sophisticated disinformation campaign," not for their extraction, production, and sale of fossil fuels. *Baltimore II*, 952 F.3d at 467 ("[T]he Complaint clearly seeks to challenge the promotion and sale of fossil fuel products without warning and abetted by a sophisticated disinformation campaign."); *see also, e.g.*, *Baltimore I*, 388 F. Supp. 3d at 566 ("Defendants were not sued merely for producing fossil fuel products."); *Honolulu*, 2021 WL 531237, at *1 ("Plaintiffs have chosen to pursue claims that target Defendants' alleged concealment of the dangers of fossil fuels, rather than the acts of extracting, processing, and delivering those fuels."). Many of these courts—including this one—have called out Defendants for their mischaracterizations of the plaintiffs' claims. *See, e.g.*, *Baltimore I*, 388 F. Supp. 3d at 560 ("This argument rests on a mischaracterization of the City's claims."); *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."); *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"). Defendants disregard these warnings and plow ahead, continuing to distort the City's Complaint.

Finally, the unreasonableness of Defendants' removal is compounded by the volume of materials they have submitted in support of arguments they must know will fail. Defendants have attached 2,489 pages of materials to their NOR, across dozens of exhibits and two expert declarations. Given the unbroken line of cases rejecting Defendants' theories of removal, "it would be unfair to require either [the City] or [its] counsel to absorb the cost of litigating the remand motion, which in no way advance[s] [the] case." *Greenidge v. Mundo Shipping Corp.*, 60 F. Supp. 2d 10, 12 (E.D.N.Y. 1999). In this Circuit, "[a]n award under § 1447(c) is remedial, not punitive, and is designed to compensate the plaintiff when, in the court's discretion, justice so requires." *McPhatter v. Sweitzer*, 401 F. Supp. 2d 468, 479 (M.D.N.C. 2005) (citing, *inter alia*, *Benson v. SI Handling Sys., Inc.*, 188 F.3d 780, 783 (7th Cir. 1999) ("Multiple removals could . . . lead to sanctions, if nothing of significance changes between the first and second tries.")). Here, the removal lacked an objectively reasonable basis and has substantially burdened the City and the Court. An award of attorneys' fees is appropriate, to support the goal of "deter[ing] removals sought for the purpose of prolonging litigation and imposing costs on the opposing party." *Martin*, 546 U.S. at 140. The City stands ready to provide the Court the expense information required by Local Rule App. B (D. Md. 2021). The reasons for remand are discussed *seriatim* below.

V. REMAND TO STATE COURT IS REQUIRED BECAUSE THERE IS NO SUBJECT-MATTER JURISDICTION.

A. There is no federal officer removal jurisdiction because no federal officer directed the Defendants' tortious conduct.

The bulk of Defendants' NOR and their supporting documents take a kitchen-sink approach to federal officer removal. *See* NOR ¶¶ 67–182. They assert that this case implicates virtually every interaction any Defendant has had with the government since at least the dawn of the twentieth century, covering everything from fossil fuel sales during World War II, to mineral leases on the OCS, joint operation of an oil reserve shared with the Navy, and fuel sales to the military.

Ultimately, however, they simply repackage the same arguments that have been rejected by eleven different courts. *See supra* n.2. The "mirage [of federal officer jurisdiction] only lasts until one remembers what [the City] is alleging in its lawsuit": that Defendants engaged in a disinformation campaign to conceal and misrepresent the known dangers of fossil fuels. *Rhode Island II*, 979 F.3d at 59–60; *accord Baltimore II*, 952 F.3d at 467.

To the extent Defendants rely on relationships to the federal government that were rejected in *Baltimore I* and *II*, specifically their leases on the OCS and Standard Oil's operations at the Elk Hills Reserve, those arguments are frivolous. Defendants have not challenged the merits of the *Baltimore II* federal officer analysis in their certiorari proceedings pending before the Supreme Court, and those determinations are final and binding here. Nothing in the 2,489 pages of materials Defendants attached to their NOR changes the result.

To remove a case under the federal officer removal statute, "a private defendant must show: (1) that it acted under a federal officer, (2) that it has a colorable federal defense, and (3) that the charged conduct was carried out for [or] in relation to the asserted official authority." *Baltimore II*, 952 F.3d at 461–62 (cleaned up). Defendants have failed to make any of these showings.

First, as discussed in greater detail below, Defendants cannot establish the "nexus prong" of federal officer jurisdiction. *Baltimore II*, 952 F.3d at 467. A removing party must demonstrate "a connection or association" between "the alleged government-directed conduct" and "the conduct charged in the Complaint." *Id.* at 466, 468; *see also Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 258 (4th Cir. 2017). Defendants fail to identify any official act that relates, in any way, to the "sophisticated disinformation" that is the "source of tort liability" in this litigation. *Baltimore II*, 952 F.3d at 467. Under *Baltimore II*, that omission is fatal. *See id.* at 467–68.

Defendants also fail the acting-under prong of federal officer removal. As detailed below, none of the actions that Defendants purportedly took under a federal officer involved the level of "subjection, guidance, or control" that Section 1442 demands. *Id.* at 462. Although they present plenty of "arm's-length business arrangement[s]" with the government, they do not identify any "unusually close [relationship] involving detailed regulation, monitoring, or supervision." *San Mateo II*, 960 F.3d at 602; *see also Baltimore II*, 952 F.3d at 465–66 (same).

Finally, Defendants do not carry their burden of showing the existence of a colorable federal defense. To be sure, this prong "does not require [a] defendant to win his case before he can have it removed," or "even [to] establish that the defense is clearly sustainable." *Ripley v. Foster Wheeler LLC*, 841 F.3d 207, 210 (4th Cir. 2016) (quotations omitted). Yet a defendant must, at a bare minimum, offer some explanation as to why its asserted defenses rise to the level of colorability. Here, Defendants simply list defenses and then assert—without analysis—that these defenses are "meritorious." NOR ¶ 132. That is plainly not enough. *See Honolulu*, 2021 WL 531237, at *7 ("[S]omething more than simply asserting a defense and the word 'colorable' in the same sentence must be required."). This Court should reject Defendants' arguments for federal officer jurisdiction.

1. No nexus exists between Defendants' challenged conduct in this case and the directions of any federal officer.

Defendants flunk the causal connection requirement of federal officer removal because they cannot "demonstrate a connection or association" between "the alleged government-directed conduct" and "the conduct charged in the Complaint." *Baltimore II*, 952 F.3d at 467. The acts complained of here are Defendants' decades-long campaigns to conceal and misrepresent the dangers of their fossil fuel products. *See, e.g.*, Compl. ¶¶ 1–2, 8–9. Defendants make no attempt to connect that wrongdoing to any government-controlled conduct—nor could they.

In *Baltimore II*, the Fourth Circuit considered and rejected Defendants' federal officer removal arguments based on certain Defendants' OCS leases and Chevron's operations at Elk Hills Reserve, finding, among other things, that those alleged undertakings were not sufficiently related to the plaintiff's claims. 952 F.3d at 466–68, 471. The court explained:

> When read as a whole, the Complaint clearly seeks to challenge the promotion and sale of fossil fuel products without warning and abetted by a sophisticated disinformation campaign. Of course, there are many references to fossil fuel production in the Complaint, which spans 132 pages. But, by and large, these references only serve to tell a broader story about how the unrestrained production and use of Defendants' fossil fuel products contribute to greenhouse gas pollution. Although this story is necessary to establish the avenue of Baltimore's climate change-related injuries, it is not the source of tort liability. Put differently, Baltimore does not merely allege that Defendants contributed to climate change and its attendant harms by producing and selling fossil fuel products; it is the concealment and misrepresentation of the products' known dangers—and simultaneous promotion of their unrestrained use—that allegedly drove consumption, and thus greenhouse gas pollution, and thus climate change.

Id. at 467. The same is true here.

Unable to establish the required nexus or distinguish the Fourth Circuit's decision in *Baltimore II*, Defendants simply insist that this Court must "credit the defendant's theory of the case." NOR ¶¶ 68, 174–75. But Defendants cannot rewrite the Complaint and replace the City's theory of the case with one of their own making. *See Baltimore II*, 952 F.3d at 467 (rejecting similar attempts to rewrite the complaint). The district court in *Honolulu* rejected identical arguments, explaining that "if Defendants had it their way, they could assert *any* theory of the case, however untethered to the claims of [the City]," and "completely ignore the requirement that there must be a causal connection *with the plaintiff's claims*." *Honolulu*, 2021 WL 531237, at *7. Nor can Defendants rely on the fact that the production and supply of fossil fuels is a link in the causal chain connecting Defendants' tortious conduct (the deception campaign) to the City's injuries (the local impacts of climate change). *See* NOR ¶ 174. "While it does not take a geologist to know that fossil

fuels must go through a process of production and supply before they can be used, this does not mean that [the City's] claims rely on or even relate to" extraction or production in a relevant way. *Honolulu*, 2021 WL 531237, at *6. *Minnesota*, 2021 WL 1215656, at *5 ("[A]dopt[ing] Defendants' theory . . . is a bridge too far."). Defendants' liability arises from their "concealment and misrepresentation of [fossil fuel] products' known dangers," and "simultaneous promotion of [their] unrestrained use," not production at government behest. *Baltimore II*, 952 F.3d at 467. "[T]he relationship between [the City'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.

Defendants' cited cases only underscore the differences between this lawsuit and those that satisfy the nexus standard. *In re Commonwealth's Motion to Appoint Counsel Against or Directed to Defender Ass'n of Philadelphia* involved efforts to bar attorneys from the Federal Community Defender Organization from representing clients in state post-conviction proceedings based on their alleged misuse of federal grant funds. 790 F.3d 457, 461 (3d Cir. 2015). The Third Circuit held "the acts complained of undoubtedly 'relate to' acts taken under color federal office because the case was predicated on the issue of whether 'the Federal Community Defender is violating the federal authority granted to it.'" *Id.* at 472. The case thus involved a direct connection between the tortious conduct and the acts taken under a federal officer. The same is true for *Baker v. Atlantic Richfield Co.*, where the plaintiffs alleged that the defendants' manufacturing operations "tortiously contaminated" their properties, but the defendants claimed that the federal government controlled and directed the same specific operations that allegedly directly contaminated the subject properties. 962 F.3d 937, 940–41 (7th Cir. 2020). The government-directed conduct in these cases overlapped with the culpable behavior described in the complaint. Here, Defendants do not contend the federal

government had any involvement in the alleged deceptive marketing and disinformation that underpin the City's causes of action. *See* NOR ¶¶ 171–78.

2. Defendants have not shown they "acted under" federal officers.

Cutting across Defendants' wide-ranging arguments that they "acted under" federal officers is the mistaken proposition that federal contractors or lessees may automatically avail themselves of federal officer jurisdiction. The Supreme Court made clear in *Watson v. Phillip Morris Cos.*, however, that government contractors "act under" federal officers only where they have an "unusually close" relationship that "must involve an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior." 551 U.S. 143, 153 (2007). "[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' proffered relationships with the government demonstrate the requisite level of "subjection, guidance, or control" by a federal officer to support jurisdiction. *Watson*, 551 U.S. at 143.

a. *Baltimore II* forecloses removal based on OCS leases.

The Fourth Circuit considered Defendants' federal officer removal arguments based on OCS leases in *Baltimore II* and squarely rejected them. *See* NOR ¶¶ 76–102. It held that OCS lessees like Defendants are not acting under federal officers because the lease terms do not "connote the sort of 'unusually close' relationship that courts have previously recognized as supporting federal officer removal." *Baltimore II*, 952 F.3d at 465–66. There is no relevant distinction between this case and *Baltimore II*; its holdings therefore control.

Defendants do not attempt to show that *their allegedly tortious conduct in this case* was done under federal supervision, and instead dedicate their briefing to the general importance and history of the OCSLA leasing program. NOR ¶¶ 76–102. But the Fourth Circuit has directly

rejected this argument: "Though OCS resource development is highly regulated, 'differences in the degree of regulatory detail or supervision cannot by themselves transform . . . regulatory *compliance* into the kind of assistance' that triggers the 'acting under' relationship." *Baltimore II*, 952 F.3d at 465 (quoting *Watson*, 551 U.S. at 157). The *Baltimore II* court was "not convinced that the supervision and control to which OCSLA lessees are subject connote the sort of 'unusually close' relationship that courts have previously recognized as supporting federal officer removal." *id.* at 465–66. Defendants' long description of the statute's legislative history and policy goals do not alter what the statute actually says and does, and does not overcome *Baltimore II.*

All the "new" information Defendants provide concerning the history of OCS leasing has already been considered and rejected by multiple district courts as a basis for removal in analogous cases. Defendants first focus on the regulatory relationship between OCS lessees and the government in the 1950s. They argue that because the initial provisions of OCSLA went beyond typical federal regulation at the time, and "recognized [OCS oil and gas] to be a 'vital national resource,'" Defendants were "acting under" federal officers. *See* NOR ¶ 76 (quoting 43 U.S.C. § 1332(3)). The declaration of Professor Tyler Priest argues that the government has "exerted substantial control and oversight over Defendants' operations on the OCS" by setting limits on the rate of production on OCS wells, controlling the computation of royalties, and issuing "highly specific and technical orders" concerning well safety and engineering. *See* NOR ¶¶ 77–78. The very same arguments and the same declaration from Professor Priest were before the court in *Honolulu I*, which rejected them. The court was "unconvinced that any of the supposedly additional or new arguments presented here alter the Ninth Circuit's holding" in *San Mateo II* "that the leases do not give rise to an unusually close relationship with the federal government." *Honolulu*, 2021 WL 531237, at *5. Specifically, the court held that "[t]he leases are the same leases the Ninth Circuit

reviewed less than a year ago," and "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." *Id.* Exactly the same scenario is present here: the Fourth Circuit rejected the same leases as a basis for federal officer removal, and "[n]othing has changed in the cited relationship with the government over the last year." *See id.* Defendants "newly cited lease provisions show nothing more than what the Ninth Circuit described as 'largely track[ing] legal requirements' and evidencing a high degree of regulation" that cannot support federal officer removal jurisdiction. *See id.*

The rest of Defendants' evidence all suffers the same deficiency: it describes ordinary regulation of private business, not subjection and control. Defendants note OCS leases require an environmental impact statement under the National Environmental Policy Act, NOR ¶¶ 98–99; and that lessees must submit "detailed plans" to federal agencies, *id.* ¶ 92; pay substantial royalties either in cash or in kind, *id.* ¶¶ 96, 99, 101; and comply with a range of regulations created by statute or codified in the Code of Federal Regulations, *see id.* ¶¶ 92–96, 100. Those are all "mere iterations of the OCSLA's regulatory requirements," compliance with which cannot confer jurisdiction. *See Baltimore II*, 952 F.3d at 465. The smattering of never-enacted bills Defendants cite, which supposedly would have amended OCSLA to create a "national oil company," NOR ¶¶ 84–85, have no bearing on whether Defendants "acted under" federal officers when they extracted oil on the OCS for their own commercial purposes under the private leasing program that was actually enacted. An unenacted law establishes no federal control and evinces no congressional intent. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994). Defendants argue that their performance under government contracts is "not merely a commercial transaction," but they support that contention with statements about their *commercial* output: the creation of $44

billion in annual GDP and "relatively high-paying jobs." NOR ¶ 91; Declaration of Prof. Tyler Priest, ¶ 7(1). Generalized economic productivity does not show an unusually close relationship with a federal superior.

b. Removal based on mineral development on other federal lands is similarly foreclosed.

Defendants' arguments as to onshore mineral development on federal lands are premised on the same flawed reasoning as their arguments as to OCS mineral development. The "willingness to lease federal property or mineral rights to a private entity for the entity's own commercial purposes, without more" is not the type of assistance required to show that a private entity is acting under a federal officer. *Baltimore II*, 952 F.3d at 465.

Defendants mischaracterize features of a Bureau of Land Management (BLM) lease—such as the payment of royalties, the preservation of endangered species and natural resources, and termination provisions—none of which connotes unusually close federal supervision and control. *See* NOR ¶ 107 n.64. For example, 30 U.S.C. § 266(i) provides that leases will not be terminated for cessation or suspension of production; it does not, as Defendants claim, provide government authority to suspend operations. Similarly, 34 U.S.C. § 3103.4-4 provides that either party may suspend operations "in the interest of conservation of natural resources." By definition, these are detailed, statutorily imposed regulations that apply to any lessee of federal mineral rights. They do not demonstrate subjection or control by a federal superior and do not support removal. *See San Mateo II*, 960 F.3d at 602–03; *Baltimore II*, 952 F.3d at 465–66; *Boulder II*, 965 F.3d at 821, 823.

c. *Baltimore II* forecloses removal based on the Elk Hills Reserve.

Next, Defendants seek to remove based on various activities by Standard Oil (Chevron's predecessor) at the Elk Hills Reserve in California. *See* NOR ¶¶ 110–28. This argument too was already rejected by this Court and the Fourth Circuit in *Baltimore*. *See Baltimore I*, 388 F. Supp. 3d

at 568–69; *Baltimore II*, 952 F.3d at 468–71. In *Baltimore I*, this Court held that Standard Oil's operations at the Elk Hills Reserve could not support federal officer removal because the defendants there failed to show "that the *charged conduct*" alleged in the complaint, namely "producing, promoting, selling, *and concealing the dangers of* fossil fuel products" "was carried out for or relating to the alleged official authority." 388 F. Supp. 3d at 568 (internal citation omitted). The Fourth Circuit affirmed for the same reason, holding that oil production at the Elk Hills Reserve was "not sufficiently 'related' to" the plaintiff's claims to satisfy the "for or relating to" element. *Baltimore II*, 952 F.3d at 471.

The City's lawsuit here targets precisely the same misconduct at issue in *Baltimore*: "the promotion and sale of fossil fuel products without warning and abetted by a sophisticated disinformation campaign." *Id.* at 467. Defendants still do not try to connect Standard Oil's conduct at the Elk Hills Reserve to the "misleading-marketing allegations" that lie at the heart of this litigation. *Id.* at 464 n.7. Instead, they repeat the same assertions that the Fourth Circuit considered and found inadequate. *Compare* NOR ¶¶ 110–28 (reviewing the history of Elk Hills, the Unit Plan Contract, oil production levels at the reserve, the Naval Petroleum Reserves Production Act of 1976, and Chevron's involvement with the reserve until 1997), *with Baltimore II*, 952 F.3d at 468–70 (reviewing the same). *Baltimore II* unambiguously precludes Defendants from relying on the Elk Hills Reserve as a basis for federal officer removal.

In any event, Standard Oil did not "act under" federal officers at Elk Hills. Although the Fourth Circuit declined to address this prong of federal officer jurisdiction in *Baltimore II*, 952 F.3d at 471, this Court can easily conclude that Standard Oil's contractual arrangement with the Navy does not give rise to the "unusually close relationship" that Section 1442 demands, *see id.* at 466 n.9. As the Ninth Circuit explained in *Oakland*, the Unit Plan Contract ("UPC") between Standard

Oil and the Navy represents an "arm's-length business arrangement" that allowed the two parties to "coordinate their use of the oil reserve in a way that would benefit both." *San Mateo II*, 960 F.3d at 600, 602. The "agreement required that both Standard and the Navy curtail their production and gave the Navy 'exclusive control over the exploration, prospecting, development, and operation of the Reserve.'" *San Mateo II*, 960 F.3d at 602; *see also* Kelly Decl. Ex. 20 at 8, 9, §§ 3(a), 4(a) (UPC) & Ex. 26 (U.S. Gov't Accountability Off., *Naval Petroleum Reserve No. 1: Efforts to Sell the Reserve*, GAO/RCED-88-198 at 15 (July 1988) ("GAO Report")) at 15. "To compensate Standard for reducing production, the unit agreement gave Standard the right to produce a specified amount of oil per day." *San Mateo II*, 960 F.3d at 601; Kelly Decl. Ex. 20 at 9–12, §§ 4(b), 5. "Both parties could dispose of the oil they extracted as they saw fit, and neither had a preferential right to purchase any portion of the other's share of the production." *San Mateo II*, 960 F.3d at 601 (cleaned up).When Standard obtained and sold oil from the reserve, it was exercising its mineral rights for its own commercial purposes—precisely the sort of "'arms-length commercial transaction[]'" that does not trigger federal officer jurisdiction. *Baltimore II*, 952 F.3d at 465 (quoting *Boulder I*, 405 F. Supp. 3d at 977)).

Defendants' separate argument based on the Operating Agreement between Standard Oil and the Navy also fails. Under that contract, the Navy apparently hired Standard Oil as an independent contractor to maintain and preserve the Elk Hills Reserve. *See* NOR ¶¶ 122, 123; Kelly Decl. Ex. 29 (Operating Agreement Between Navy and Standard Oil Relating to Elk Hills (Nov. 3, 1971)). Among other things, the arrangement directs Standard Oil, not the Navy, to "furnish . . . a set of field operating procedures that are commensurate with [state law] . . . and good oil field practice," which simply does not show close direction and control. Kelly Decl. Ex. 29 § 4(f). To the contrary, it shows an unremarkable contract under which Standard was hired to apply industry

standard techniques to perform industry standard tasks. Nothing in the record suggests that the Operating Agreement is anything more than "an arm's-length business arrangement with the Navy," like the UPC. *See San Mateo II*, 960 F.3d at 602. Defendants effectively acknowledge as much when they note that the Navy selected the operator for the reserve by means of "competitive bidding." NOR ¶ 121; *see also* GAO Reportat 15. Reviewing the same evidence, the *Honolulu* court was "unconvinced" that the agreement "rendered Standard Oil as acting under a federal officer":

> While the 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.

2021 WL 531237 at *6.

As for the changes at the Elk Hills Reserve in response to the oil crisis of the 1970s, *see* NOR ¶¶ 125–28, those only confirm that private production at the reserve was not done at the behest of a federal superior. At that time, "Congress determined that the Navy no longer needed to maintain a petroleum reserve for a national emergency." *Chevron U.S.A., Inc. v. United States*, 110 Fed. Cl. 747, 754 (2013). It therefore directed, as part of the Naval Petroleum Reserve Production Act of 1976 ("NPRPA"), that reserve oil be sold "at public sale to the highest qualified bidder," on terms "so structured as to give full and equal opportunity for the acquisition of petroleum by all interested persons, including major and independent oil producers and refiners alike," without "creat[ing] or maintain[ing] a situation inconsistent with the antitrust laws." 10 U.S.C. §§ 8730(b)(1), (d), (g)(2). Shortly thereafter, the parties to the UPC "executed an amendment to the [contract], removing any reference to the need for a petroleum reserve and substituting language emphasizing the new national policy to encourage *economic productivity*." *Chevron*, 110 Fed. Cl. at 754 (emphasis added).

Ultimately, the government's role at Elk Hills became that of a market participant offering its oil rights for sale at public auction. The Elk Hills Reserve has "generated over $17 billion for

the United States Treasury," NOR ¶ 127, precisely because the government sold oil on the open market. Standard "chose to withdraw from operating Elk Hills" in 1975, one year before Congress enacted NPRPA. NOR ¶¶ 98–99, 125. Its relationship with the government there did not involve the kind of subjection, guidance, and control necessary to satisfy federal officer removal.

In short, Defendants cannot escape *Baltimore II*'s binding determination that the operations on the Elk Hills Reserve are not related to the campaign of climate deception alleged in this case. *See* 952 F.3d at 471. And even if they could, they cannot establish that Standard Oil had an "unusually close relationship" with a federal superior. *Id.* at 466 n.9. The Court should therefore reject this theory of removal a second time—as every court to consider it has done. *See id.* at 471; *San Mateo II*, 960 F.3d at 601–02; *Honolulu*, 2021 WL 531237, at *6.

d. Defendants' involvement with the Strategic Petroleum Reserve provides no basis for federal officer removal.

Defendants' argument that they acted under a federal officer when they produced oil and operated infrastructure for the SPR, *see* NOR ¶¶ 129–34, fail for the same reasons as their positions concerning the OCS and Elk Hills Reserve. The SPR represents the United States' supply of emergency crude oil, and it has been stocked, from time to time, through in-kind royalty payments by certain Defendants under the terms of their OCS leases. NOR ¶¶ 129–32. But "'the willingness to lease federal property or mineral rights to a private entity for the entity's own commercial purposes, without more' cannot be 'characterized as the type of assistance that is required' to show that the private entity is 'acting under' a federal officer." *See San Mateo II*, 960 F.3d at 603 (quoting *Baltimore II*, 952 F.3d at 465); *Boulder II*, 965 F.3d at 821, 823. That conclusion does not change because some lessees at times paid royalties in the form of oil that the government then deposited into the SPR. The court in *Honolulu* squarely rejected the defendants' reliance on the SPR, finding

that "if the leases *in toto* do not create a Section 1442(a)(1) relationship," there was no reason that "a part of those leases—royalties—could either." *Honolulu*, 2021 WL 531237, at *6 & n.12.

In any event, the royalty-in-kind program was largely phased out in 2009, *see* NOR ¶ 131, and the SPR is now supplied primarily through purchases on the open market. The regulations governing the purchase and sale of SPR oil make clear that the government views its role as that of a market participant, not one involving subjection, guidance, or control over entities like Defendants. "To reduce the potential for negative impacts from *market participation*," for example, the Department of Energy must review certain factors "prior to commencing acquisition of petroleum for the SPR," including: "[t]he outlook for international and domestic production levels;" "[e]xisting or potential disruptions in supply or refining capability;" and "[t]he level of market volatility." 10 C.F.R. § 626.4(a) (emphasis added). DOE must provide public notice before purchasing SPR oil, "usually in the form of a solicitation," and must "inform the public of its overall fill goals, so that they may be factored into market participants' plans and activities." *Id.* § 626.5(a)(1). Selling commodity oil to the government through a competitive bidding process is simply not "an effort to *assist*, or to help *carry out*, the duties . . . of [a] federal superior" simply because the government directs the oil it purchased into the SPR. *See Watson*, 551 U.S. at 152.

Finally, lease provisions requiring certain lessees to participate "as a sales and distribution point in the event of an SPR drawdown," NOR ¶ 133, are also insufficient. The Secretary of Energy may "drawdown and sell petroleum products in the [SPR]" if the President makes certain findings. 42 U.S.C. § 6241(a), (d)(1). Apparently, certain Defendants' leases contain provisions describing their role in the event a drawdown is ordered. NOR ¶¶ 133–34. Those provisions are strikingly similar to the OCS lease terms that the Fourth Circuit rejected in *Baltimore II* because they were "mere iterations of the OCSLA's regulatory requirements." 952 F.3d at 465; *see also San Mateo II*,

960 F.3d at 603 (reaching the same conclusion regarding OCS "lease requirements [that] largely track legal requirements"). The lease terms concerning SPR drawdowns simply require compliance with federal statutes, which, once again, does not satisfy Section 1442.

As a result, Defendants' involvement with the SPR does not qualify as "acting under" a federal officer. "At best, the relationship Defendants describe is a regular business one" that cannot support federal officer jurisdiction. *Honolulu*, 2021 WL 531237, at *6.

e. Emergency Petroleum Allocation Act

Defendants cannot use the Emergency Petroleum Allocation Act ("EPAA") to satisfy the acting-under prong of federal officer jurisdiction because they have done nothing more than comply with the regulatory scheme promulgated under the statute. 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. 627 (Nov. 27, 1973). Defendants argue that their participation in this regulatory scheme gives rise to an acting-under relationship. NOR ¶ 135. 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. Defendants have simply described fossil fuel companies complying with various EPAA rules and regulations—nothing more. *See id.*

f. The provision of fossil fuels to the military provides no basis for federal officer jurisdiction.

Finally, Defendants claim they acted under federal officers by producing and distributing fossil fuels to the government for national defense purposes. *See* NOR ¶¶ 136–170. Plumbing the depths of history, they spend pages of their removal notice describing the production and supply of oil and gas during wartimes and the 1973 oil embargo, as well as the sale of specialized fuels to the

military. None of these examples, however, support federal officer jurisdiction for three independent reasons.

First, as discussed above, Defendants' contribution to wartime petroleum production does not relate in any way to the disinformation campaign that is "the source of tort liability" in this lawsuit. *Baltimore II*, 952 F.3d at 467. Defendants identify only examples of arms-length, contractual relationships for the provision of petroleum-related products or services. None of those examples involves "the federal government direct[ing] [Defendants] to conceal the hazards of fossil fuels or prohibit[ing] them from providing warnings to consumers."[3] *Baltimore I*, 388 F. Supp. 3d at 568. This Court should therefore reject Defendants' attempts to use the U.S. military to shoehorn this case into federal officer jurisdiction, as their provision of oil and gas to the government did not involve any federal control over the misrepresentations that give rise to the City's lawsuit. *See Honolulu*, 2021 WL 531237, at *6–7 (rejecting identical attempts); *see also In re MTBE Prods. Liab. Litig.*, 488 F.3d 112, 131 (2d Cir. 2007) (federal officer removal improper where federal regulations "say nothing" about marketing and other tortious conduct); *Faulk v. Owens-Corning Fiberglass Corp.*, 48 F. Supp. 2d 653, 662 (E.D. Tex. 1999) (remanding case where defendant failed to "tether" production of avgas for military to plaintiff's failure to warn claims about asbestos); *In*

[3] Nor do Defendants' legal citations. *Shell Oil Co. v. United States*, 751 F.3d 1282 (Fed. Cir. 2014), and *Exxon Mobil Corp. v. United States*, No. CV H-10-2386, 2020 WL 5573048 (S.D. Tex. Sept. 16, 2020), both involved the government's role in hazardous waste releases at refineries for the purpose of allocating liability under CERCLA, 42 U.S.C. § 9601 *et seq*. Neither case considered whether the government's control over refining activities would have engendered undue "local prejudice" in state court warranting federal officer removal. *See San Mateo II*, 960 F.3d at 599. *United States v. Shell Oil Co.*, also a CERCLA case, underscores the cooperative relationship between industry and the military during WWII, noting that, despite its war powers, the military "relied almost exclusively on contractual agreements to ensure avgas production," and "the Oil Companies designed and built their facilities, maintained private ownership," "managed their own refinery operations," and "affirmatively sought contracts to sell avgas to the government," which "were profitable throughout the war." 294 F.3d 1045, 1049–50 (9th Cir. 2002).

re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., 428 F. Supp. 2d 1014, 1017–18 (D. Minn. 2006) (remanding design defect case where "FDA did not exercise control over [] design, manufacture, or sale of the defibrillators at issue").

Second, Defendants' bid for federal officer removal fails because the Complaint "disclaims injuries arising from special-formula fossil-fuel products that Defendants designed specifically for, and provided exclusively to, the federal government for use by the military." Compl. ¶ 14; *see Fisher v. Asbestos Corp*., No. 2:14-CV-02338-WGY, 2014 WL 3752020, at *3 (C.D. Cal. July 30, 2014) (collecting cases). This disclaimer is effective, and to "deny remand [in such a] case would affirm [Defendants'] right to assert a defense against a claim that does not exist, an absurd result." *Fisher*, 2014 WL 3752020, at *3.. The cases cited by Defendants do not support finding the disclaimer ineffective, here. *See Rhodes v. MCIC, Inc.*, 210 F. Supp. 3d 778, 786 (D. Md. 2016) (finding disclaimer was ineffective because it was qualified to "keep[] in play a claim against Defendants who could legitimately assert the federal officer defense"); *Ballenger v. Agco Corp*., No. C 06–2271 CW, 2007 WL 1813821 at *1 & n.2, *2 (N.D. Cal. June 22, 2007) (finding disclaimer ineffective when it waived federal claims but not "claims arising out of work done on U.S. Navy vessels"); *but see Keeney v. A.W. Chesterton Co.*, No. CV 11-6192 PA (AGRX), 2011 WL 13220926, at *3 (C.D. Cal. Aug. 9, 2011) (upholding waiver and distinguishing *Ballenger*).

Third, and finally, none of Defendants' various examples of providing fossil fuels to the United States government satisfies the acting-under requirement of federal officer removal.

World War II and the Korean War: Setting aside that the City does not allege misconduct during World War II or the Korean War, the record does not establish that Defendants acted under the "subjection, guidance, or control" of a federal officer when they provided fuel to the military during those times. *Baltimore II*, 952 F.3d at 462 (quotations omitted). Rather, their evidence speaks

to a cooperative, mutually beneficial relationship between government and industry. The report cited by Defendants confirms that "[t]he mechanics of planning, financing, and operating" infrastructure was a "wartime teamwork of the Government and industry," with the PAW and the industry cooperatively agreeing on pipeline construction and funding. NOR Ex. 31 at 3 (John W. Frey & H. Chandler Ide, *A History of the Petroleum Administration for War: 1941–1945* (1946)). "No Government agency had to compel [the fossil fuel industry] to do the job." *Id.* at 5.

Instead of providing evidence of an acting-under relationship, Defendants offer a speech and a threatening telegram. *See* NOR Ex. 47 (Speech by Secretary Harold Ickes to the Conference of Petroleum Industry Committee Chairmen (Aug. 11, 1941)); NOR Ex. 48 (Letter from P.M. Robinson to R.K. Davies, *Refiners Who Did Not Reply to the Gasoline Yield Reduction Telegrams* (Aug. 12, 1942)). Neither demonstrate actual instances of federal subjection, much less one that is coercive enough to satisfy the "acting under" element of federal officer jurisdiction, such as the threat of federal criminal sanction. *See, e.g.*, *Kelly v. Monsanto Co.*, No. 4:15 CV 1825 JMB, 2016 WL 3543050, at *9, *11 (E.D. Mo. June 29, 2016) (granting remand where the defendants failed to show that a defendant "was compelled to produce the PCBs under threat of criminal sanction"). Nor is there any evidence of the government requiring Defendants to make "changes to [their] refining equipment and operations." NOR ¶ 146 (citing NOR Ex. 54 (W.J. Sweeney et al., *Aircraft Fuels and Propellants: A Report of the [Army Air Force] Scientific Advisory Group* (1946)), which simply observes that a "refiner cannot build the equipment for making [a] fuel without knowing what its composition must be").

Defendants' proffered "directives" under the Defense Production Act of 1950 ("DPA") also do not demonstrate federal control. First, Defendants cite to directives that were rescinded in 1953, decades before the misconduct at issue. *See* NOR ¶ 169; NOR Ex. 96 at 3 (*Fourth Annual Report*

of the Activities of the Joint Committee on Defense Production, H.R. Rep. No. 84-1 (Jan. 5, 1955)). These directives, however, did not demand any specific formulation or quantity of production for the military because they applied only to the use of certain fuel additives for non-avgas applications. *See* NOR ¶ 169; NOR Ex. 96 at 3. The suggestion that Defendants were directed to produce under the DPA for two months in 1973, NOR Ex. 99 at 3 (John W. Finney, *Fuel Is Diverted for the Military*, N.Y. TIMES (Nov. 28, 1973)), is insufficient to establish that they "act[ed] under" federal authority, *see New Mexico ex rel. Balderas v. Monsanto Co.*, 454 F. Supp. 3d 1132, 1141, 1145–46 (D.N.M. 2020) (compliance with DPA insufficient to establish "acting under" element under *Watson*). Defendants' evidence does not indicate Defendants were forced to produce anything that they were not already producing; instead, it shows, at most, that Defendants were directed to prioritize government orders over others.

Similarly, any actions taken under Executive Order 9639, issued October 4, 1945, predate (and are unrelated to) the allegations at issue here—and are insufficient to establish that Defendants were "acting under" a federal officer. That order authorized the Secretary of the Navy to "hire such employees and agents" and take any action necessary to avoid disruption of the war effort caused by "existing and threatened strikes and other labor disturbances" at petroleum facilities. NOR ¶ 412, Ex. 50. The Executive Order explicitly stated that its purpose was to address disruptions caused by labor disputes, and the Operating Agreement underscores that the government was not directing Defendants' activities, but, if anything, was facilitating the "normal business and operations connected with or relating to the plant in the same manner and on the same basis as was customary before the date of said Executive Order." NOR Ex. 50.

Activities on Government Owned or Funded Facilities and Pipelines: As described in other sections of this brief, the construction of infrastructure or products under contract with the

government does not give rise to federal officer jurisdiction. Defendants' supporting declaration concedes that the oil companies were merely "military contractors" whose primary business was civilian fuel production. Wilson Decl., ¶ 18. Defendants do not offer evidence of anything other than the type of "arm's-length business arrangement" that courts have consistently rejected as insufficient to give rise to federal officer jurisdiction. *See San Mateo II*, 960 F.3d at 600, 602. For example, Defendants assert that through PAW, "[f]ederal officers exerted operational control" over two large pipelines commonly known as the "Big Inch" and "Little Inch." NOR ¶¶ 164–70. But War Emergency Pipelines, Inc. ("WEP") built the "Inch" pipelines, not Defendants. *See Schmitt v. War Emergency Pipelines*, 175 F.2d 335, 335 (8th Cir. 1949); NOR ¶ 165. Thus, while a handful of Defendants held minority shares in WEP, WEP is the proper entity to evaluate "acting under" with respect to pipeline construction, and it dissolved in 1947. *See* NOR Ex. 116 (Certificate of Dissolution of War Emergency Pipelines, Inc. (Aug. 28, 1947)).

Sales of Specialized Military Fuels: Finally, Defendants contend that they acted under federal officers when they sold specialized fuel products to the military. *See* NOR ¶¶ 120–30. None of those sales involved the requisite level of government control that § 1442 demands.[4]

First, Defendants claim that, during World War II, the government "exerted substantial control and direction" over the development and production of avgas. NOR ¶ 151. But beyond conclusory allegations, their Notice of Removal offers no details on the "type of control" purportedly exercised—and thus no basis for finding the acting-under standard satisfied. *Honolulu*, No. 2021 WL 531237, at *6 (rejecting analogous federal-officer arguments where "Defendants provide[d] no explanation as to any type of control the government may wield over them, instead

[4] As noted above, these sales also fail the nexus prong because, among other things, none of them relate at all to "the misleading-marketing allegations that are at the center" of the City's claims. *Baltimore II*, 952 F.3d 464 n.7.

only conclusorily stating that they 'acted at the direction of federal officers' when supplying oil or operating infrastructure."). To the extent, moreover, that Defendants' exhibits say anything about this wartime relationship, they suggest that fossil fuel companies and the U.S. government entered into a cooperative, mutually beneficial arrangement where "all operating details" were handled by "oil-industry group[s]." NOR Ex. 46 at 108 (providing a history of the PAW). That kind of hands-off involvement by the federal government cannot satisfy the acting-under prong. *See Baltimore II*, 952 F.3d at 464 (requiring "close supervision"); *see also Par. of Cameron v. Auster Oil & Gas Inc.*, 420 F. Supp. 3d 532, 543–44 (W.D. La. 2019) (rejecting Defendants' efforts to "characterize the U.S. oil and gas industry as essentially an agent of the federal government during World War II").[5]

Pivoting, Defendants next rely on various contracts under which some of them purportedly supplied the military with "specialized fuels," such as "JP-5 and JP-8 military jet fuel," "F-76 marine diesel," and "Processing Fluid." NOR ¶ 151–63. That reliance is misplaced, however, because Defendants mistakenly conflate detailed product specifications with "the type of close [government] supervision" that Section 1442 requires. *Baltimore II*, 952 F.3d at 464. As the Fourth Circuit explained, whether a government-contractor relationship satisfies the acting-under prong depends on both "the nature of the 'item' provided *and* the level of supervision and control that is

[5] Defendants' legal citations do not lead to a contrary conclusion. *Shell Oil Co. v. United States*, 751 F.3d 1282 (Fed. Cir. 2014), and *Exxon Mobil Corp. v. United States*, No. CV H-10-2386, 2020 WL 5573048 (S.D. Tex. Sept. 16, 2020), both involved the government's role in hazardous waste releases at refineries for the purpose of allocating liability under CERCLA, 42 U.S.C. § 9601 et seq. Neither case considered whether the government's control over refining activities would have engendered undue "local prejudice" in state court warranting federal officer removal. *See San Mateo II*, 960 F.3d at 599. As for *United States v. Shell Oil Co.*, another CERCLA case, that decision undermines Defendants' claim to federal officer jurisdiction because it underscores the cooperative relationship between industry and the military during WWII, noting that the military "relied almost exclusively on contractual agreements to ensure avgas production," and "the Oil Companies designed and built their facilities, maintained private ownership," "managed their own refinery operations," and "affirmatively sought contracts to sell avgas to the government," which "were profitable throughout the war." 294 F.3d 1045, 1049–50 (9th Cir. 2002).

contemplated by the contract." *Id.* at 463 (emphasis added). A defendant must do more that show that the government "set forth detailed [product] specifications" that define the nature of the item being purchased. *Id.* at 464 (quotations omitted). It must also show that the government "close[ly] supervised" the production process, such as by "exercise[ing] intense direction and control over all written documentation to be delivered with [that product]" or by "maintain[ing] strict control over the [product's] development." *Id.* at 464 (quoting *Sawyer*, 860 F.3d at 253, and *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 399 (5th Cir. 1998)) (cleaned up).

Defendants make no such showing here. They spend pages of their removal notice describing *the nature* of the fuel products that they supplied to the military—noting, for example, that some military jet fuels consist of "refined hydrocarbon distillate fuel oils"; others have "specialized additives" or meet certain industry standards, such as those published by "American Society for Testing Materials"; and still others possess certain properties, such as igniting but not freezing at low temperatures, rapidly dissipating "accumulated static," "efficiently combust[ing]," or "maint[aining] the integrity of the fuel handling systems." NOR ¶¶ 152–63. But these various fuel specifications merely show that the government wanted Defendants to sell them particular products, not that the government exercised control or close supervision over the development or production of those products.[6]

[6] *See also* NOR Ex. 70 at 4 (Summary of OSA Activities for Week Ending 21 August 1963 (Aug. 23, 1963)) (simply noting that the Shell Oil Company tested standards for JFA-5 fuel); NOR Ex. 71 (BP Contracts for Specialized Military Fuels (2016-2020)) (merely listing fuel specifications); NOR Ex. 72 at § 1.2.2 (DOD Handbook on Aerospace Fuels Certification) (simply describing the properties of military fuels); NOR Ex. 73, tbl. 1, 2–9 (Air Force Wight Aeronautical Lab., Military Jet Fuels, 1944-1987, AFWAL-TR-87-2062 (Dec. 1987)) (same); NREL, Investigations of Byproduct Application to Jet Fuel, NREL/SR-510-30611, at 4–6 (Oct. 2001), https://www.nrel.gov/docs/fy02osti/30611.pdf (same); NOR Ex. 78 (ASTM D1655-20 Jet A specs) (same); NOR Ex. 80 (Dep't of Defense, FSII Specifications, MIL-DTL-85470B (June 1999)) (merely listing specifications of certain types of military fuel products); NOR Ex. 81 (Dep't of

Indeed, Defendants' own exhibits demonstrate that the government left it largely to fossil fuel companies to design, develop, and deliver products that matched the government's specifications. *See, e.g.*, NOR ¶ 152 n.125 ("Shell, and other companies, took on the task of developing these fluids." (quoting Ex. 60) (cleaned up)); *id.* ("[The government] arranged for Shell to develop a special low-volatility, low-vapor-pressure kerosene fuel for the craft." (quoting Ex. 59). For example, Defendants identify government contracts under which the Shell Oil Company apparently constructed "'special fuel facilities' to handle and store PF-1." NOR ¶ 152. But except for a few generic "inspection" provisions, those contracts do not contemplate any government control over *how* to accomplish the contracted tasks, requiring only "suitable" means. NOR Ex. 65 at 2–3 (Contract No. AF33(657)-13272 (SH-516) (June 30, 1964)).[7] The same goes for the various fuel-supply contracts cited in the Notice of Removal.[8] Although these agreements apparently required government contractors to deliver fuels that met certain product specifications, none of their provisions suggest that the government exercised direct control over the production process itself, beyond conducting the type of "quality assurance" that is "incidental to [any] sale" and does not give rise to an acting-under relationship. *Baltimore II*, 952 F.3d at 464.

Defense, Performance Specification, Inhibitor, Corrosion / Lubricity Improver Fuel Soluble, MIL-PRF-25017H) (same); NOR Ex. 92 (DLA, Detail Specifications, Turbine Fuels, Aviation Kerosene Types, NATO F-34(JP-8), NATO F-35, AND JP-8+100, MIL-DTL-83133E (April 1, 1999)) (same); NOR ¶ 93 Ex. 93 (Department of Army Technical Manual, Petroleum Handling Operations for Aviation Fuel, TM 10-1107 at 6 (Feb. 1960)) (describing the properties of jet fuels).

[7] *See also* NOR Ex. 66 at 2–5 (Contract No. AF33(657)-12525 (SH-515) (Sept. 20, 1963)) (same); NOR Ex. 67 at 1 (Concurrence in Contract No. SH-514 with Shell Oil Company, New York, N.Y. (June 28, 1963)) (making contractor responsible for "engineering design and support"); NOR Ex. 68 at 2–4 (Contract No. AF33(657)10449 (SH-513) (Feb. 25, 1963)); NOR Ex. 69 at 2–3 (Contract No. AF33(657)-8582 (SH-512) (Sept. 13, 1962)).

[8] *See* NOR Ex. 62 at 2 (Contract No. AF33(657)-8577 (SH-511) (Aug. 14, 1962)) (requiring contractor to supply PF-1, subject to "Quality Control Inspection"); NOR Ex. 63 at 1 (Amendment No. 2 to Contract No. AF33(657)-5577 (SH-511) (Aug. 26, 1963)) (same); NOR Ex. 91 (fuel specifications for Tesoro contracts).

3. Defendants cannot raise a colorable federal defense.

A defendant fails to raise a colorable federal defense if the proffered defense is "'immaterial and made solely for the purpose of obtaining jurisdiction' or is 'wholly insubstantial and frivolous.'" *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 513 n.10 (2006). Such is the case here. Defendants' notice of removal lists a litany of federal defenses while providing scant explanation as to how any of them apply here. NOR ¶ 179–82. In any event, the federal defenses raised by Defendants are meritless. The government contractor defense has no application here because the City has expressly disclaimed injuries that arose from Defendants' provision of fossil fuel products to the federal government. Compl. ¶ 14. Defendants' constitutional arguments concerning the interstate and foreign commerce clause, the due process clause, and the foreign affair doctrines also fail, as they misconstrue the City's Complaint as attempting to limit fossil fuel production and greenhouse gas emissions. NOR ¶¶ 180–81. In fact, the City's complaint is predicated on Defendants' campaign of deception and failure to warn consumers. Compl. ¶¶ 7–9. Finally, the *Noerr-Pennington* doctrine is inapplicable because the City does not challenge Defendants' lobbying activity, and in any event, the First Amendment does not protect commercial speech that is misleading. *Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563, 566 (1980).

B. Federal common law does not confer this Court subject-matter jurisdiction over the City's claims.

Defendants argue that the City's state-law claims are within this Court's original jurisdiction because they "necessarily arise" under federal common law. *See, e.g.*, NOR ¶¶ 6, 10, 14-27. That is wrong, as this Court and a half dozen others have held, for at least three reasons.

First, and most fundamentally, federal common law does not provide an independent exception to the well-pleaded complaint rule. Just as in *Baltimore*, Defendants' theory that the City's claims are "in fact 'governed by federal common law' is a cleverly veiled preemption

argument" that cannot supply subject-matter jurisdiction. *Baltimore I*, 388 F. Supp. 3d at 555. Second, the various areas of federal concern Defendants identify simply have nothing to do with the City's Complaint, which arises entirely under Maryland law. Third, Defendants misconstrue controlling precedent in asserting that the federal common law of interstate nuisance "governs" or preempts every state-law cause of action involving climate change. The opposite is true: to the extent federal common law ever existed with respect to greenhouse gas emissions, it has been displaced by the Clean Air Act ("CAA"), and "the availability *vel non* of a state lawsuit depends, *inter alia*, on the preemptive effect of the federal Act." *Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 429 (2011) ("*AEP*").

Defendants' federal common law theory would "hijack[]" the well-pleaded complaint rule and "enhance[] federal judicial power at the expense of plaintiffs and state Courts." *Baltimore I*, 388 F. Supp. 3d at 558. The Court should again reject it, like every court to date has done.

1. Federal common law cannot provide an independent basis for removal.

The City's claims do not arise under federal common law because *Grable* and complete preemption do not apply, *see* Part IV.C, *infra*, and there is no third avenue for removal jurisdiction based on supposedly "governing" federal common law. *See Baltimore I*, 388 F. Supp. 3d at 555–58; *accord Oakland*, 969 F.3d at 907–08. Defendants and the cases they provide "fail to cite any Supreme Court or other controlling authority authorizing removal based on state-law claims implicating federal common law," because there is none. *Boulder I*, 405 F. Supp. 3d at 963.

Defendants' vague assertion that "the substance of the complaint's allegations and demands for relief reveal that those claims are exclusively federal by virtue of the structure of our Constitution," NOR ¶ 21, confuses issues that the Supreme Court has taken pains to simplify. The Supreme Court has recognized only two "carefully delineated exceptions to the well-pleaded

complaint rule," for state law claims that "[a]re completely preempted by federal law or necessarily rais[e] substantial, disputed issues of federal law" under *Grable*. *Baltimore*, 388 F. Supp. 3d at 556. The express purpose in clarifying those exceptions was "to bring some order to th[e] unruly doctrine" that had developed among the lower courts to determine when a state-law claim arises under federal law for removal purposes. *See Gunn v. Minton*, 568 U.S. 251, 258 (2013); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1571 (2016) (describing the "muddled backdrop" that preceded *Grable*). The question of whether federal common law provides a basis for jurisdiction must be analyzed by applying *Grable* and the complete preemption doctrine. *See, e.g.*, *Oakland*, 969 F.3d at 902.[9]

Viewed under the proper framework, Defendants' federal common law theory is fundamentally "a veiled complete preemption argument" that must fail. *Baltimore*, 388 F. Supp. 3d at 557. The complete preemption doctrine "provides that if the subject matter of a putative state law claim has been totally subsumed by federal law—such that state law cannot even treat on the subject matter—then removal is appropriate." *Lontz*, 413 F.3d at 439–40. "[T]o remove an action on the

[9] Defendants pack several footnotes with decisions that applied pre-*Grable* formulations of the well-pleaded complaint rule and its exceptions. To the extent those cases remain good law, they only illustrate the previously imprecise nature of the inquiry that *Grable* sought to remedy. In *Club Comanche, Inc. v. Gov't of Virgin Islands*, 278 F.3d 250, 260 (3d Cir. 2002), the court held that there was *no* subject-matter jurisdiction because "the federal common law of submerged lands, did not need to be raised in Club Comanche's well-pleaded quiet title complaint"; that is, in *Grable* terms, no substantial federal issue was necessarily raised. Likewise in *N. Am. Phillips Corp. v. Emery Air Freight Corp.*, 579 F.2d 229, 233 (2d Cir. 1978), the court stated that state law claims are removable where "federal law is a pivotal issue in the case, one that is basic in the determination of the conflict between the parties." That too is an obsolete restatement of *Grable*'s first element, that a federal issue must be necessarily raised. The Fifth Circuit's decision in *Sam L. Majors Jewelers v. ABX, Inc.*, is inapposite because that case was "a difficult one" in which the court "only h[e]ld that a cause of action against an interstate air carrier for claim for property lost or damaged in shipping arises under federal common law," based on "the historical availability of this common law remedy, and the statutory preservation of the remedy," rendering the decision "necessarily limited." 117 F.3d 922, 929 n.16 (5th Cir. 1997). Finally, *City of Camden v. Beretta U.S.A. Corp.* is, in its own words, a "complete preemption" case. 81 F. Supp. 2d 541, 546–47 (D.N.J. 2000).

basis of complete preemption," however, "a defendant must show that Congress intended for federal law to provide the 'exclusive cause of action'" under a specific "federal statute [that] wholly displaces the state-law cause of action." *Baltimore*, 388 F. Supp. 3d at 553 (quoting *Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 8, 9 (2003)). Defendants do not directly argue that either federal common law or any statute completely preempts the City's claims, or that Congress has provided an exclusive cause of action. In fact, they go so far as to argue that the availability of a federal cause of action is irrelevant: "whether a claim arises under state or federal law for jurisdictional purposes . . . does *not* depend on the answer to the distinct substantive question of whether the plaintiff has stated a viable claim under federal law." NOR ¶ 20. Defendants ask the Court to find that the City's claims are *de facto* completely preempted, even though the requirements for complete preemption are clearly not satisfied. The Court should again "decline to endorse such an extension of removal jurisdiction." *Baltimore*, 388 F. Supp. 3d at 558.

Defendants' 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), is misplaced for two reasons. First, Defendants' approach would recreate the very confusion *Grable* sought to resolve. The first step of the "two-step analysis" Defendants glean from *Standard Oil*, whereby a court must first determine "whether the source of law is federal or state based on the nature of the issues at stake," NOR ¶ 22, makes no sense in the context of removed state-law claims. A state-law claim only arises under federal law based on "the nature of the issues at stake," *id.*, when those "issues" satisfy the specific tests for *Grable* or complete preemption. *See Oakland*, 969 F.3d at 904–06. There is no third way. Second, *Standard Oil* and *Swiss American Bank* say nothing about the removability of well-pleaded state-law claims because both were brought *in federal court by the United States* in the first instance. Neither case involved removal jurisdiction—or subject-matter jurisdiction at all,

which unquestionably existed because the United States was the plaintiff—and neither involved claims pleaded under state law. Each instead resolved a choice of law issue: whether the federal government's tort claims against private defendants were cognizable under state or federal law. Those cases are irrelevant.

2. This case has nothing to do with any body of federal common law.

The Complaint also cannot be removed based on federal common law because, despite Defendants' repeated mischaracterizations, this case is about Defendants' campaign of deception and disinformation. *See Baltimore II*, 952 F.3d at 467. This case does not "seek to regulate the production and sale of oil and gas abroad," NOR ¶ 24; usurp "federal government['s] exclusive authority over the nation's international policy on climate change and relations with foreign nations," *id.*; meddle in governance of "the navigable waters of the United States," *id.* ¶ 6; or even implicate any other purported uniquely federal interest. The Ninth Circuit in *Oakland* flatly rejected these theories for removal on the merits. *See* 969 F.3d at 906–07. As here, the defendants in *Oakland* argued that the complaint "implicate[d] a variety of 'federal interests,' including energy policy, national security, and foreign policy." *Id.* These arguments did not justify removal because they "d[id] not raise a substantial question of federal law for the purpose of determining whether there is jurisdiction under § 1331." *Id.* at 907. *Accord Baltimore I*, 388 F. Supp. 3d at 559 ("defendants do not actually identify any foreign policy that is implicated by the City's claims, much less one that is necessarily raised"); *Massachusetts*, 462 F. Supp. 3d at 43–44; *San Mateo I*, 294 F. Supp. 3d at 937; *Rhode Island I*, 393 F. Supp. 3d at 148–50; *Boulder I*, 405 F. Supp. 3d at 957–64.

The same analysis and result apply here. The City "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 Annapolis, rather than the City, taxpayers, residents, or broader segments of the public." Compl.

¶ 15. "Whether latent federal power should be exercised to displace state law is primarily a decision for Congress," and here "'[a]part from the highly abstract nature of (the federal) interest, there has been no showing that state law is not adequate to achieve it.'" *See Miree v. DeKalb Cty., Ga.*, 433 U.S. 25, 32 (1977) (quoting *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 71 (1966)). There is no basis to presume that Congress intended to subsume state-law claims for failure to warn, trespass, nuisance, and deceptive trade practices into bodies of judge-made federal law concerning interstate pollution, federal waterways, or foreign policy.

3. The federal common law of interstate greenhouse gas emissions, if it ever existed, has been displaced by the Clean Air Act.

Finally, Defendants' theory fails because the CAA displaced whatever federal common law might once have related to greenhouse gas emissions. The Supreme Court and Ninth Circuit have rejected Defendants' assertion that federal common law governs every state-law claim that touches on global warming. *See AEP*, 564 U.S. at 429; *Oakland*, 969 F.3d at 906; *see also Baltimore I*, 388 F. Supp. 3d at 557 ("[C]ase law suggests that any such federal common law claim has been displaced by the Clean Air Act.").

Defendants misread *AEP* and *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012). In *AEP*, the plaintiffs sued five electric power companies in federal court, alleging the companies' greenhouse gas emissions violated the federal common law of interstate nuisance or, in the alternative, state tort law. 564 U.S. at 418. The Supreme Court concluded 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" because it was "plain that the Act 'speaks directly' to emissions of carbon dioxide from the defendants' plants." *Id.* at 424. The Court thus declined to entertain 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"; if ever such a cause of action existed, it did not survive the CAA. *Id.* at 423. The Court expressly reserved the separate question of whether the plaintiffs' *state* nuisance claims remained viable, "leav[ing] the matter open for consideration on remand." *Id.* at 429; *see also San Mateo I*, 294 F. Supp. 3d at 937.

The *Kivalina* plaintiff also pleaded claims under federal common law in federal court in the first instance, and the Ninth Circuit simply applied the "direct Supreme Court guidance" from *AEP* that "Congress has directly addressed the issue of domestic greenhouse gas emissions from stationary sources and has therefore displaced federal common law." 696 F.3d at 856. The plaintiff had originally pleaded alternative state-law claims but did not appeal the district court's decision not to exercise supplemental jurisdiction over them after dismissing the federal common law claims. *Id.* at 854–55. The Ninth Circuit thus never considered the state-law claims.

To the extent a federal common law of interstate greenhouse gas emissions ever existed, the CAA displaced it. "Simply put, th[is] case[ ] should not have been removed to federal court on the basis of federal common law that no longer exists." *San Mateo I*, 294 F. Supp. 3d at 937.

C. The City's Complaint does not satisfy *Grable*'s four-part test.

A state-law claim arises under federal law for *Grable* purposes "if 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." *Gunn*, 568 U.S. at 258. Only a "slim category" of cases satisfies *Grable*. *Id.* This case is not one of them, as this Court and every court has held in similar cases. *See Oakland*, 969 F.3d at 907; *Baltimore I*, 388 F. Supp. 3d at 561 (rejecting "defendants' attempt to inject a federal issue into the City's state law public nuisance claim where one simply does not exist"); *see also supra* n.1.

No element of *Grable*'s four-part test is satisfied here. The City's state-law claims do not "necessarily raise" any question of federal law, "disputed" or otherwise. Defendants' NOR lists an

encyclopedia of federal topics that will allegedly come up in the course of litigation, from regulation of greenhouse gases under the Clean Air Act, NOR ¶ 36, to petroleum import quotas imposed under President Eisenhower, *id.* ¶ 49. Each of these issues, if they come into play at all, might at most supply a federal defense. As with all removals premised on a federal question, "[i]t is not enough that 'federal law becomes relevant only by way of a defense to an obligation created entirely by state law.'" *Baltimore I*, 388 F. Supp. 3d at 558 (quoting *Franchise Tax Bd.*, 463 U.S. at 13). Moreover, none of the various federal matters Defendants rely on are "substantial" under *Grable*, because they are not "importan[t] . . . to the federal system as a whole." *Gunn*, 568 U.S. at 260. Finally, the "federal-state balance approved by Congress," *id.* at 258, favors the City's ability to litigate claims under Maryland law in Maryland courts.

1. The City's Complaint does not "necessarily raise" any "actually disputed" issues of federal law.

Defendants' jumble of theories for *Grable* jurisdiction all fail the test's first prong because the City's claims do not necessarily raise any federal issue. "A federal question is 'necessarily raised' for purposes of § 1331 only if it is a 'necessary element of one of the well-pleaded state claims.'" *Burrell v. Bayer Corp.*, 918 F.3d 372, 381 (4th Cir. 2019) (quoting *Franchise Tax Bd.*, 463 U.S. at 13). Thus, "[i]f a plaintiff can establish, without the resolution of an issue of federal law, all of the essential elements of his state law claim, then the claim does not necessarily depend on a question of federal law." *Pinney v. Nokia*, 402 F.3d 430, 442 (4th Cir. 2005). "In other words, if the plaintiff can support his claim with *even one* theory that does not call for an interpretation of federal law, his claim does not 'arise under' federal law for purposes of § 1331," and "[a] plaintiff's right to relief for a given claim necessarily depends on a question of federal law only when *every* legal theory supporting the claim requires the resolution of a federal issue." *Dixon*, 369 F.3d at 816–17 (emphasis added); *Flying Pigs, LLC v. RRAJ Franchising, LLC*, 757 F.3d 177, 182 (4th Cir.

2014) (same). No *prima facie* element of any of the City's claims turns on federal law, and Defendants' arguments forecast, at most, federal defenses that must be adjudicated in state court.

Defendants studiously avoid labeling the issues they identify as federal defenses. They first argue that "Congress has struck a careful balance between energy production and environmental protection by enacting federal statutes such as the [CAA] and by directing the EPA to regulate Defendants' conduct and perform its own cost-benefit analyses," and assert that the City's claims "seek to upend" that balance. NOR ¶ 32. When Defendants complain that "emissions have been extensively regulated nationwide by the federal government under the [CAA]," *id.* ¶ 36 (quotation omitted), what they mean—but cannot say—is that they think the CAA preempts the City's claims. This Court clearly explained why that theory fails in *Baltimore I*:

> The City does not rely on any federal statutes or regulations in asserting its nuisance claims; in fact, it nowhere even alleges that defendants violated any federal statutes or regulations. Rather, it relies exclusively on state nuisance law . . . . Although federal laws and regulations governing energy production and air pollution may supply potential defenses, federal law is plainly not an element of the City's state law nuisance claims.

388 F. Supp. 3d at 559 (emphasis added). The same is true here.

Defendants' citations are inapposite and only illustrate why *Grable* jurisdiction is not appropriate in this case. In *Board of Commissioners v. Tenn. Gas Pipeline Co.*, the Fifth Circuit held that federal questions were necessarily raised because the plaintiff's negligence and nuisance claims "dr[ew] on federal law as the exclusive basis" for liability, and could not be resolved "without a determination whether multiple federal statutes create a duty of care that does not otherwise exist under state law." 850 F.3d 714, 722–23 (5th Cir. 2017). Here, all the duties and standards the City seeks to enforce are created by Maryland law. *See* Compl. ¶¶ 243–310 (setting forth state-law causes of action only), Prayer for Relief. In *Pet Quarters, Inc. v. Depository Trust & Clearing Corp.*, federal questions were necessarily raised because the plaintiff expressly alleged

that a stock borrowing program approved and regulated by the Securities and Exchange Commission, "*by its mere existence*, hinder[ed] competition," and the complaint thus "directly implicate[d] actions taken" by the SEC in approving and regulating the program. 559 F.3d 772, 779 (8th Cir. 2009). There is no similar allegation here. And in *Bennett v. Southwest Airlines Co.*, the Seventh Circuit held that federal questions were *not* necessarily raised in a set of negligence claims arising out of a plane crash, despite "the dominant role that federal law plays in air transport." 484 F.3d 907, 909 (7th Cir. 2007). Because the actual negligence duties allegedly owed by the defendants derived entirely from state law, the court declined to hold "that the national regulation of many aspects of air travel means that a tort claim in the wake of a crash 'arises under' federal law." *Id.* at 912. Defendants' arguments here are the same as those rejected in *Bennett*: that because various matters concerning air quality, navigation, and fossil fuels are federally regulated, all state causes of action touching on those subjects necessarily raise federal questions. It remains meritless.

Defendants' other assertions about foreign affairs and the First Amendment, *see, e.g.*, NOR ¶¶ 41, 51, all fail for the same reason: they are, at most, federal defenses. With regard to foreign affairs, courts in related cases have all rejected substantively identical arguments.[10] Most saliently, *Baltimore I* applied Fourth Circuit precedent and held that the defendants "d[id] not actually identify any foreign policy that is implicated by the City's claims, much less one that is necessarily raised," and that their "generalized references to foreign policy wholly fail to demonstrate that a

[10] *See Oakland*, 969 F.3d at 906–07 & n.6 (rejecting reliance on federal issues "including energy policy, national security, and 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. Nor does the mere existence of a federal regulatory regime mean that these cases fall under *Grable*."); *Boulder I*, 405 F. Supp. 3d at 965–67 (foreign affairs, regulatory balancing); *Rhode Island I*, 393 F. Supp.3d at 151 (foreign affairs, federal regulations); *see also Massachusetts*, 462 F. Supp. 3d at 44 (foreign relations, energy policy).

federal question is essential to resolving the City's state law claims." 388 F. Supp. 3d at 559 (quotations omitted). Defendants' arguments here are identical, as is the result.

Defendants' First Amendment argument is likewise at most a federal defense, not a necessary element of any of the City's state law claims. It plainly cannot support federal jurisdiction. *See, e.g.*, *Nevada v. Culverwell*, 890 F. Supp. 933, 937 (D. Nev. 1995) (no removal based on First Amendment defense). Unsurprisingly, no case Defendants cite involved removal based on this novel First Amendment theory. Defendants' logic would transform every state-law defamation case, every state-law deceptive trade practices case, and any other case involving advertising into a federal claim, creating grave federalism and comity problems and vastly expanding the "special and small category" of cases that fall under *Grable*. *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 699 (2006).

2. Defendants have not shown that the complaint raises questions of federal law that are "substantial."

Even if Defendants could show a federal question is necessarily raised, none would be "substantial" under *Grable*. The substantiality inquiry looks to the importance of a federal issue "to the federal system as a whole." *Gunn*, 568 U.S. at 260. "An issue has such importance when it raises substantial questions as to the interpretation or validity of a federal statute, or when it challenges the functioning of a federal agency or program." *Oakland*, 969 F.3d at 905 (citations omitted). A question may also be "substantial" when it presents "a 'pure issue of law,' that directly draws into question 'the constitutional validity of an act of Congress,' or challenges the actions of a federal agency, and a ruling on the issue is 'both dispositive of the case and would be controlling in numerous other cases.'" *Id.* (citations omitted). "By contrast, a federal issue is not substantial if it is 'fact-bound and situation-specific,'" "or raises only a hypothetical question unlikely to affect interpretations of federal law in the future." *Id.* (citations omitted).

The City's claims do not challenge a federal statute, rule, or program, and do not turn on a "dispositive," "pure" issue of federal law that "would be controlling" in other cases. Instead, they raise only state-law issues that are highly "fact-bound and situation-specific," and any connection to future questions of federal law is "hypothetical." *See Oakland*, 969 F.3d at 905. Contrary to Defendants' contentions, the City's claims premised on public deception and wrongful promotion have nothing to do with energy regulations, foreign policy, or national security.

Finally, the "federal-state balance approved by Congress" also supports remand. Where, as here, a state subdivision seeks to enforce state laws and protect public rights within its traditional police authority, federalism concerns weigh strongly in favor of adjudication in state court. *Cf. Franchise Tax Bd.*, 463 U.S. at 21 n.22 ("[C]onsiderations of comity make [courts] reluctant to snatch cases which a State has brought from the courts of that State, unless some clear rule demands it."). In sum, none of *Grable*'s four elements are satisfied here.

D. There is no OCSLA jurisdiction because the City's claims do not arise out of, and are not connected with, the Outer Continental Shelf.

Defendants' assertion of OCSLA jurisdiction has no reasonable basis in law or fact. Defendants have uniformly lost this argument, including in this Court. Although the Fourth Circuit has not ruled on the outer limits of OCSLA jurisdiction, this Court held that "[e]ven under a 'broad' reading of the OCSLA jurisdictional grant endorsed by the Fifth Circuit, defendants fail to demonstrate that OCSLA jurisdiction exists." *Baltimore I*, 388 F. Supp. 3d at 566; *see also Minnesota*, 2021 WL 1215656, at *10; *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; *Honolulu*, 2021 WL 531237, at *3.

The standard adopted by the Fifth Circuit represents a maximally broad interpretation of OCSLA's jurisdictional subsection, 43 U.S.C. § 1349(b)(1). The City does not concede that it is the correct test, or that the Fourth Circuit would adopt the same approach—but Defendants still cannot

satisfy it. Under the Fifth Circuit framework, the removing party must establish: "(1) the activities that caused the [plaintiff's] injury constituted an 'operation' 'conducted on the [OCS]' that involved the exploration and production of minerals, and (2) the case 'arises out of, or in connection with' the operation." *See In re Deepwater Horizon*, 745 F.3d 157, 163 (5th Cir. 2014).

As to the first prong, the City's claims are not premised on an "operation" conducted on the OCS. The relevant activity here "is the concealment and misrepresentation of the products' known dangers—and simultaneous promotion of their unrestrained use—that allegedly drove consumption, and thus greenhouse gas pollution, and thus climate change." *See Baltimore II*, 952 F.3d at 467; *see also*, *e.g.*, Compl. ¶¶ 1,7–12. Defendants' deception is not an "operation" conducted on the OCS. *See Boulder I*, 405 F. Supp. 3d at 978–79; *Baltimore I*, 388 F. Supp. 3d at 566–67. Courts routinely refuse to exercise jurisdiction over cases like this one, moreover, where the claims are only tangentially related to OCS mineral exploration and production, and where granting relief would have no effect on those operations.[11] "The fact that some of [Defendants'] oil was apparently sourced from the OCS does not create the required direct connection" between the City's claims and an OCS operation. *See Boulder I*, 405 F. Supp. 3d at 978.

As to the second prong of the Fifth Circuit's test, a case "arises out of, or in connection with," an OCS operation when both (1) the plaintiff "would not have been injured 'but for'" the operation, *Recar v. CNG Producing Co.*, 853 F.2d 367, 369 (5th Cir. 1988), and (2) granting relief

[11] *See, e.g.*, *LLOG Expl. Co. v. Certain Underwriters at Lloyd's of London*, No. CIVA 06-11248, 2007 WL 854307, at *3, *5 (E.D. La. Mar. 16, 2007) (no OCSLA jurisdiction over insurance dispute "regarding damages to production facilities that have already occurred" because suit "does not affect or alter the progress of production activities on the OCS, nor does it threaten to impair the total recovery of federally owned minerals from the OCS"); *Parish of Plaquemines v. Total Petrochem. & Refining USA, Inc.*, 64 F. Supp. 3d 872, 894–95 (E.D. La. 2014) (no OCSLA jurisdiction where injurious conduct occurred in state waters, even though it "involved pipelines that ultimately stretch to the OCS").

"threatens to impair the total recovery of the federally-owned minerals" from the OCS, *EP Operating Ltd. P'ship v. Placid Oil Co.*, 26 F.3d 563, 569, 570 (5th Cir. 1994). Neither is true here. "[T]he 'but-for' test . . . is not limitless" and must be applied in light of the OCSLA's overall goals. *Plains Gas Sols., LLC v. Tenn. Gas Pipeline Co.*, 46 F. Supp. 3d 701, 704–05 (S.D. Tex. 2014). "[A] 'mere connection' between the cause of action and the OCS operation" that is "too remote" will not "establish federal jurisdiction." *Deepwater Horizon*, 745 F.3d at 163. Here, the City's claims are based on Defendants' failure to warn consumers and the public of known dangers associated with fossil fuel products and Defendants' campaign to deceive the public regarding those dangers. *See, e.g.*, Compl. ¶¶ 1,7–12. Defendants' assertion that OCSLA jurisdiction attaches because "a substantial quantum" of oil and natural gas production arise from OCS operations, NOR ¶ 64, amounts to an "argument that there is federal jurisdiction if any oil *sourced* from the OCS is some *part* of the conduct that creates the injury," which would "dramatically expand the statute's scope," *see Boulder I*, 405 F. Supp. 3d at 979.

Nor will granting relief here threaten to impair recovery from the OCS. *See* NOR ¶ 66. The Complaint's single reference to an abatement remedy states that the City seeks a judgment that provides for "abatement of the nuisances complained of," Compl., Prayer for Relief ¶ 2, which refers to impacts on the City from changed climatic conditions, *see e.g., id*. ¶ 248–49. The City seeks only to abate the nuisance conditions in the City, to prevent future injury in the City. The abatement of local nuisance conditions would not "threaten[] to impair the total recovery of the federally-owned minerals" from the OCS. NOR ¶ 66. Defendants' arguments must be rejected, as they were in *Baltimore I*, *Minnesota*, *Honolulu*, *Boulder I*, *Rhode Island I*, and *San Mateo I*.[12]

[12] The other cases cited by Defendants do not support their position. OSCLA jurisdiction under 43 U.S.C. § 1349 was not even at issue in *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct.

E. There is no enclave jurisdiction because the City's claims do not "arise" within any federal enclave.

Defendants' continued assertion of enclave jurisdiction is frivolous. Federal enclave jurisdiction extends only to tort claims that *arise on* federal enclave lands. *See, e.g.*, *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1250 (9th Cir. 2006); *Stokes v. Adair*, 265 F.2d 662, 666 (4th Cir. 1959). Every other court to consider this issue in an analogous case has rejected it. *See Baltimore I*, 388 F. Supp. 3d at 565 ("[I]t cannot be said that federal enclaves were the 'locus' in which the City's claims arose."); *Honolulu*, 2021 WL 531237 at *8; *Rhode Island I*, 393 F. Supp. 3d at 152; *Minnesota*, 2021 WL 1215656, at *10–11; *San Mateo I*, 294 F. Supp. 3d at 939. Federal enclave jurisdiction does not exist because the City's "claims and injuries are alleged to have arisen exclusively on non-federal lands." *See Boulder I*, 405 F. Supp. 3d at 974.

Nothing in the NOR provides a reason to deviate from these prior holdings and the weight of case law. As Defendants concede, "[t]he key factor in determining whether federal enclave jurisdiction exists is the location of the plaintiff's injury or where the specific cause of action arose." *Sparling v. Doyle*, No. EP-13-CV-00323-DCG, 2014 WL 2448926, at *3 (W.D. Tex. May 30, 2014); NOR ¶ 185. In turn, a cause of action "arises" where "the substance and consummation of events giving rise to claims occur." *Coleman v. Trans Bay Cable, LLC*, No. 19-CV-02825-YGR, 2019 WL 3817822, at *3 (N.D. Cal. Aug. 14, 2019) (citation omitted)

1881 (2019), or *Ten Taxpayer Citizens Grp. v. Cape Wind Assocs., LLC*, 373 F.3d 183 (1st Cir. 2004). Both of those case involved OCSLA's separate choice of law provisions, which provide that the laws "of each adjacent State . . . are declared to be the law of the United States for that portion of the subsoil and seabed" on the OCS, "[t]o the extent that they are applicable and not inconsistent" with federal law. *See* 43 U.S.C. § 1333(2)(A). That section and those cases discuss how a court with jurisdiction should determine the content of federal law that applies on the OCS and say nothing about when and how federal subject-matter jurisdiction may be established in the first instance. And far from opining on the statute's expansiveness, *see* NOR ¶ 58, the court in *Laredo Offshore Constructors, Inc. v. Hunt Oil Co.* found OCSLA jurisdiction over a breach of contract claim because "the contracts at issue were, most significantly, *intimately connected with* an operation on the [OCS]." *See* 754 F.2d 1223, 1225 (5th Cir. 1985) (emphasis added).

Here, the City does not premise its claims on activities occurring on a federal enclave, and the Complaint expressly disclaims injuries to and on federal property, including federal property located within Annapolis. Compl. ¶¶ 14, 240 n.263. Where a plaintiff makes such a disclaimer, courts routinely grant motions to remand for that reason. *See, e.g.*, *Baltimore I*, 388 F. Supp. 3d at 565 (rejecting enclave jurisdiction where the complaint "expressly define[d] the scope of injury to exclude any federal territory"); *Rhode Island I*, 393 F. Supp. 3d at 152; *Boulder I*, 405 F. Supp. 3d at 974; *Honolulu*, 2021 WL 531237, at *8; *Washington v. Monsanto Co.*, 274 F. Supp. 3d 1125, 1132 (W.D. Wash. 2017) ("[B]ecause [the State of] Washington avowedly does not seek relief for contamination of federal territories, none of its claims arise on federal enclaves.")

Moreover, even assuming *arguendo* that some tortious conduct relevant to the City's claims *did* occur on federal enclaves, subject-matter jurisdiction is still lacking for two reasons: first, because most of the tortious conduct at issue here did not occur in federal enclaves, and second, because Defendants have not met their burden of proof. As to the first, "courts have only found that claims arise on federal enclaves, . . . when all or most of the pertinent events occurred there." *Baltimore I*, 388 F. Supp. 3d at 565 (collecting cases); *see also Coleman*, 2019 WL 3817822, at *3. Here, the pertinent events—the misrepresentations and omissions Defendants made in connection with the sale of fossil fuel goods—overwhelmingly occurred outside of any discrete federal enclaves. *See Baltimore I*, 388 F. Supp. 3d at 565; *Monsanto*, 454 F. Supp. 3d at 1146 ("partial occurrence on a federal enclave is insufficient to invoke federal jurisdiction" where enclaves "ma[de] up only a small fraction" of contaminated waterbodies at issue). Defendants' attempt to recast the City's claims as arising out of their extraction and production activities on federal lands is atmospheric. Defendants also provide no evidence of enclave jurisdiction—only vague assertions that the Complaint "necessarily sweeps in" oil and gas activities on federal enclaves, NOR ¶ 186,

and "relies upon conduct occurring in the District of Columbia," NOR ¶ 187. That is insufficient.[13] It cannot be said that the City's claims "arose" on federal enclaves merely because a few Defendants allegedly conducted some operations there.

F. Defendants' merits attacks on the City's claims are premature and misguided.

In a last-ditch effort to avoid remand, Defendants attack the merits of the City's claims, asserting that they could not have misled the public about the dangers of their fossil-fuel products because everyone already knew about global warming. NOR ¶¶ 194–212. The Court should reject this untimely and misguided attack out of hand.

To begin, Defendants' challenges are premature. The Fourth Circuit has cautioned courts against "extensive litigation of the merits of a case while determining [removal] jurisdiction," because doing so "thwarts the purpose of jurisdictional rules." *Hartley v. CSX Transp., Inc.*, 187 F.3d 422, 425 (4th Cir. 1999). Other circuits agree, holding that a district court should not resolve factual issues on a motion to remand that are "intertwined with an element of the merits of the [plaintiff's] claim," *Leite v. Crane Co.*, 749 F.3d 1117, 1122 n.3 (9th Cir. 2014); that "bleed[] into the merits of the case," *Papp v. Fore-Kast Sales Co.*, 842 F.3d 805, 811 n.4 (3d Cir. 2016); or that otherwise risk "pretrying a case to determine removal jurisdiction," *Carriere v. Sears, Roebuck & Co.*, 893 F.2d 98, 100 (5th Cir. 1990). This Court must decline Defendants' invitation to decide

[13] The cases cited by Defendants do not support federal enclave jurisdiction here. In *Fung v. Abex Corp.*, 816 F. Supp. 569, 571 (N.D. Cal. 1992), the court found enclave jurisdiction existed because the plaintiffs *alleged* that their "injuries were a consequence of their working on naval vessels," despite not specifying federal enclave status or the exact location of exposure. Similarly, in *Reed v. Fina Oil & Chem. Co.*, 995 F. Supp. 705, 713 (E.D. Tex. 1998), the could found enclave jurisdiction applied to claims of toxic exposure at a rubber factory, at least a third of which occurred during federal ownership. In *Durham*, the court only stated that the defendant could have attempted removal based on federal enclave jurisdiction, it did not find that such jurisdiction existed in that case. 445 F.3d at 1250. Finally, in *Corley v. Long-Lewis, Inc.*, 688 F. Supp. 2d 1315, 1336 (N.D. Ala. 2010), the court analyzed whether there was a distinction between a claim arising directly on a federal enclave versus a naval vessel docked at a military base.

thorny questions of fact that go to the City's theory of liability. *Cf. Hartley*, 187 F.3d at 425 ("The district court erred by delving too far into the merits in deciding a jurisdictional question.").

Even if the Court were to consider Defendants' attacks on the merits of this lawsuit, it should find them misguided and unavailing. As purported proof that the City's claims are "absurd," NOR ¶ 206, Defendants point to a handful of publications that accurately reported on the climate risks of Defendants' fossil-fuel products, *see, e.g., id.* ¶¶ 199.[14] But where companies have engaged in analogous campaigns of concealment and deception, they have been found liable for resulting harms, notwithstanding evidence suggesting that those harms were known to some segments of the population, including government officials. *See, e.g.*, *People v. ConAgra Grocery Prods. Co.*, 17 Cal. App. 5th at 65, 93, 119 (lead-paint companies liable for knowingly promoting a hazardous product, notwithstanding evidence suggesting that "[s]ince the 19th century, the medical profession has recognized that lead paint is toxic and a poison"); *State v. Purdue Pharma L.P.*, No. CJ-2017-816, 2019 WL 9241510, at *8–9, 12, 14 (Okla. Dist. Ct. Nov. 15, 2019) (pharmaceutical companies liable for their "misleading marketing and promotion of opioids," notwithstanding evidence that government agencies were aware of the addiction risks of opioids); *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 26, 35–36 (D.D.C. 2006) (tobacco companies liable for "unlawful conspiracy to deceive the American public about the health effects of smoking," even though scientists and the media had been reporting on these harms since the 1950s).

[14] Defendants also purportedly identified thousands of articles in newspaper archives that contained the phrases "greenhouse effect," "global warming," or "climate change." NOR ¶ 200. They do not bother to explain what any of those publications said about those topics, let alone whether they support or refute the City's allegations. As the City documents in the Complaint, Defendants substantially contributed to the volume of materials discussing climate change—by flooding consumers, regulators, and the public with false and misleading representations about the existence, causes, and adverse consequences of climate change. *See* Compl. ¶¶ 106–41, 161–235.

This case is no different. As the Complaint documents, public awareness of climate change was growing at the end of the 1980s—and with it, calls for fossil fuel regulation. *See* Compl. ¶¶ 108–09. But when Defendants heard those calls, they acted swiftly to protect their bottom line, orchestrating a sophisticated and widespread disinformation campaign to undermine public confidence in the science of climate change. *See id.* ¶¶ 110–41. Defendants spent millions of dollars trying to convince the public that the existence, causes, and adverse effects of global warming were "open question[s]"—even though, internally, Defendants harbored no such doubts. *Cf. Philip Morris*, 449 F. Supp. 2d at 208 (finding the tobacco industry "mounted a coordinated, well-financed, sophisticated public relations campaign to attack and distort the scientific evidence demonstrating the relationship between smoking and disease"). And even as Defendants publicly insisted that the science was unsettled, they internally took steps to protect their own assets from climate impacts and take advantage of profit opportunities that would come with a warmer world. *See* Compl. ¶¶ 142–47. Defendants' purposeful disinformation campaign, that continues to this day, muddled public understanding of the very risks that Defendants understood and hedged against.

CONCLUSION

For the foregoing reasons, the City requests that this Court remand the Complaint to state court and grant the City its just costs of litigating this objectively unreasonable Notice of Removal.

Dated: May 13, 2021

Respectfully submitted,

CITY OF ANNAPOLIS
OFFICE OF LAW

/s/ D. Michael Lyles
D. Michael Lyles
City Attorney, #13120
160 Duke of Gloucester Street
Annapolis, Maryland 21401
T: 410-263-7954

F: 410-268-3916
dmlyles@annapolis.gov

Joel A. Braithwaite
Assistant City Attorney, #28081
160 Duke of Gloucester Street
Annapolis, Maryland 21401
T: 410-263-7954
F: 410-268-3916
jabraithwaite@annapolis.gov

SHER EDLING LLP
Victor M. Sher (*pro hac vice*)
Matthew K. Edling (*pro hac vice*)
Martin D. Quiñones (*pro hac vice*)
Margaret V. Tides (*pro hac vice* forthcoming)
Quentin C. Karpilow (*pro hac vice* forthcoming)
100 Montgomery St., Ste. 1410
San Francisco, CA 94104
Tel: (628) 231-2500
Fax: (628) 231-2929
Email: vic@sheredling.com
matt@sheredling.com
marty@sheredling.com
maggie@sheredling.com
quentin@sheredling.com

Attorneys for Plaintiff City of Annapolis

CERTIFICATE OF SERVICE

I hereby certify that, on the 13th day of May, 2021, the foregoing document was filed through the ECF system and will be sent electronically to the registered participants identified on the Notice of Electronic Filing.

/s/ Victor M. Sher
Victor M. Sher