No. 19-1818

United States Court of Appeals for the First Circuit

STATE OF RHODE ISLAND,

Plaintiff – Appellee,

v.

SHELL OIL PRODUCTS COMPANY, LLC; CHEVRON CORP.; CHEVRON USA, INC.; EXXONMOBIL CORP.; BP, PLC; BP AMERICA, INC.; BP PRODUCTS NORTH AMERICA, INC.; ROYAL DUTCH SHELL PLC; MOTIVA ENTERPRISES, LLC; CITGO PETROLEUM CORP.; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66; MARATHON OIL COMPANY; MARATHON OIL CORPORATION; MARATHON PETROLEUM CORP.; MARATHON PETROLEUM COMPANY, LP; SPEEDWAY, LLC; HESS CORP.; LUKOIL PAN AMERICAS LLC; and DOES 1-100,

Defendants – Appellants,

GETTY PETROLEUM MARKETING, INC.,

Defendant.

Appeal from the United States District Court
for the District of Rhode Island, No. 1:18-cv-00395-WES-LDA
The Honorable William E. Smith

PLAINTIFF–APPELLEE'S SUPPLEMENTAL BRIEF

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INTRODUCTION

The State of Rhode Island ("State" or "Rhode Island"), as sovereign and *parens patriae*, filed this action in Rhode Island state court, alleging exclusively state law claims. The action seeks relief for climate change-related injuries to the State's public health and welfare, natural resources, public property, and infrastructure. Appellants' liability rests on their deliberate misrepresentation of the climate change harms they knew would result from the normal use of their fossil fuel products, and their misleading and deceptive marketing of those products. As the State explained in its Response Brief, its claims do not arise under federal common law, and are not subject to removal under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(b)(1) ("OCSLA"). *See* Plaintiff–Appellee's Response Brief at 19–28 & 42–44 ("Resp."). Since this Court's decision affirming remand, additional courts have rejected the exact arguments Appellants press here, and the additional bases for removal that Appellants decline to mention in their Supplemental Brief ("ASB"). Appellants offer nothing new to support a different result.[1]

[1] In addition to the decisions cited in the State's Response Brief, *see* Resp. 1 n.1, three district courts in three circuits have granted motions to

In the most important recent decision, the Ninth Circuit in *City of Oakland v. BP PLC*, 969 F.3d 895, 902 (9th Cir. 2020), *cert. denied*, __ S.Ct. __, No. 20-1089 (U.S. June 14, 2021), rejected Appellants' theory that the plaintiffs' "public-nuisance claim was governed by federal common law because the claim implicates 'uniquely federal interests'" and thus arose under federal law. That court correctly held that a state law claim only "arises under" federal law for removal jurisdiction purposes when the claim is completely preempted by a federal statute, or satisfies the four-part test articulated in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 30 (2005). The *Oakland* plaintiffs' public nuisance claims did not fit into either of those categories, so the court vacated the district court's order denying remand. The holding in *Oakland* comports with Chief Judge Smith's holdings

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remand in similar cases involving climate change injuries brought by state and local governments, rejecting "arising under" jurisdiction, OCSLA jurisdiction, and federal enclave jurisdiction. *City & Cnty. of Honolulu v. Sunoco LP*, No. 20-cv-00163-DKW, 2021 WL 531237 (D. Haw. Feb. 12, 2021), *appeal filed*, No. 21-15318 (9th Cir. Feb. 23, 2021); *Minnesota v. Am. Petroleum Inst.*, No. CV 20-1636 (JRT/HB), 2021 WL 1215656 (D. Minn. Mar. 31, 2021), *appeal filed*, No. 21-1752 (8th Cir., April 5, 2021); *Connecticut v. Exxon Mobil Corp.*, No. 3:20-CV-1555 (JCH), 2021 WL 2389739 (D. Conn. June 2, 2021), *appeal filed*, No. 21-1446 (2d Cir. June 8, 2021).

below that "there is nothing in the artful-pleading doctrine that sanctions th[e] particular transformation" of state law claims into federal ones that Appellants suggest, and that neither *Grable* nor complete preemption provides a basis for jurisdiction here. JA425; Resp. 28–41. The malleable "artful pleading" approach that Appellants urge on the Court adds confusion and imprecision to removal jurisdiction analysis, ignoring the Supreme Court's repeated admonition that "administrative simplicity is a major virtue in a jurisdictional statute." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S.Ct. 1562, 1574–75 (2016).

As to OCSLA jurisdiction, Appellants' arguments are meritless and every court that has considered them has rejected them. Their chief new contention is that a recent Supreme Court opinion clarifying the Court's own use of the word "connection" in its personal jurisdiction jurisprudence, *see generally Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S.Ct. 1017 (2021), should be understood as a gloss on the words "in connection with" in the unrelated OCSLA statute's subject-matter jurisdiction provisions. The Court has cautioned, however, that it is "generally undesirable, where holdings of the Court are not at issue, to dissect the sentences of the United States Reports as though they were

the United States Code." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993). Appellants present no reason why the Supreme Court's use of the word "connection" when interpreting constitutional due process limitations on specific personal jurisdiction should inform this Court's interpretation of the statutory phrase "in connection with" in OCSLA. Appellants ultimately "have not shown that [the State's] injuries would not have occurred but for [Appellants'] operations" on the outer continental shelf, JA434, or that the State's claims will impact recovery of resources from the outer continental shelf, and there is no jurisdiction under OCSLA.

Accordingly, the Court should again affirm.

ARGUMENT

I. The Well-Pleaded Complaint Rule Is the Standard for Removability of State Law Claims.

The standards for determining removal jurisdiction under the general removal statute, 28 U.S.C. § 1441, and under OCSLA, are well established. *See* Resp. 19, 42–48.

Removal statutes are "strictly construed," and "defendants have the burden of showing the federal court's jurisdiction." *Danca v. Private Health Care Sys., Inc.*, 185 F.3d 1, 4 (1st Cir. 1999). The well-pleaded

complaint rule governs whether a case "arises under" federal law for purposes of 28 U.S.C. §§ 1331 and 1441. *See, e.g.*, *Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 830 (2002). The rule "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), and jurisdiction exists "only when the plaintiff's statement of his own cause of action shows that it is based upon federal law." *Vaden v. Discover Bank*, 556 U.S. 49, 60 (2009) (cleaned up). Federal question jurisdiction cannot rest on "a federal defense, including the defense of preemption." *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 14 (1983).

II. The State Pleaded Rhode Island Claims That Do Not "Arise Under" Federal Common Law.

The State's claims do not arise under federal common law. The areas of federal concern Appellants identify simply have nothing to do with the State's Complaint, which rests on traditional state-law nuisance, trespass, products liability, and public trust causes of action. Even if the complaint had any relationship to federal common law, that would at best provide Appellants an ordinary preemption defense that *per se* cannot create federal question jurisdiction.

The Second Circuit's decision in *City of New York* lends Appellants no support; subject-matter jurisdiction was not at issue there and the plaintiff's claims and theories of liability were critically different from the State's claims and theories here. *See generally City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021). The State does not concede that *City of New York* was correctly decided. But even assuming it was, that court "consider[ed] the [defendants]' *preemption defense* on its own terms, not under the heightened standard unique to the removability inquiry" at issue on this appeal. *Id.* at 94 (emphasis added).

A. The State's Claims Have Nothing to Do with Any Body of Federal Common Law.

Federal common law does not provide an independent basis for federal question jurisdiction. *See* Parts II.B & C, *infra*; Resp. 20–28. Even if it could, the State's case has nothing to do with any body of federal common law, and the Court should not invent new common law to accommodate Appellants' theory. The Ninth Circuit recently held that the defendants in *Oakland* failed to satisfy the requirements for crafting federal common law, 969 F.3d at 902, and this Court should do the same.

"Judicial lawmaking in the form of federal common law plays a necessarily modest role under a Constitution that vests the federal

government's 'legislative Powers' in Congress and reserves most other regulatory authority to the States." *Rodriguez v. Fed. Deposit Ins. Corp.*, 140 S.Ct. 713, 717 (2020). "The instances where [the Supreme Court] ha[s] created federal common law are few and restricted," *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963), and have "included admiralty disputes and certain controversies between States," *Rodriguez*, 140 S.Ct. at 717. "[S]trict conditions must be satisfied" before a new area of federal common law may be recognized, *id.*, most prominently that there must be a "significant conflict" between state law and a "uniquely federal interest," *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507–08 (1988). The interest and conflict cannot be "abstract" or "speculative." *Miree v. DeKalb Cnty.*, 433 U.S. 25, 32 (1977). The proponent of the purported federal common law must show a "specific, concrete federal policy or interest" with which state law directly conflicts "as a precondition for recognition of a federal rule of decision." *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 87, 88 (1994).

Appellants argue that the State's claims "implicat[e]" federal interests in "interstate and international pollution," and "international climate policy and foreign relations," ASB 9, 18, and therefore "arise

under" federal common law. Those incorrect conclusions flow from the false premise that the State's case seeks to regulate air pollution across the nation and globe, and "necessarily seek[s] to impose liability for [Appellants'] nationwide and international emissions-producing conduct." ASB 5. But Appellants do not describe any specific federal policy, regulatory consideration, or federal government action that might be impacted by the State's claims, because there is none.

The theory of the State's case is that Appellants caused climate change-related harms through deliberate misrepresentation of the climatic dangers they knew would result from their misleading and deceptive marketing and promotion of fossil fuels. *See* JA420–22 (district court's summary of State's allegations); Resp. 3. The State's case seeks to vindicate Rhode Island's core state interest in "ensuring the accuracy of commercial information in the marketplace." *See Edenfield v. Fane*, 507 U.S. 761, 769 (1993). It targets misconduct that falls squarely within fields of traditional state regulation, including "protection of consumers," *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 150 (1963); "advertising," *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541–42 (2001); "unfair business practices," *California v. ARC Am. Corp.*, 490 U.S.

93, 101 (1989); and the "power to determine the scope of the public trust" and its protection "within [Rhode Island's] borders," *PPL Montana, LLC v. Montana*, 565 U.S. 576, 604 (2012). It pursues state tort remedies that are rooted in "the state's historic powers to protect the health, safety, and property rights of its citizens." *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 725 F.3d 65, 96 (2d Cir. 2013). And it redresses injuries that fall squarely within the states' purview: "the adverse effects of climate change." *Am. Fuel & Petrochemical Mfrs. v. O'Keeffe*, 903 F.3d 903, 913 (9th Cir. 2018). There is no unique federal interest in the subjects of the State's claims.

Unable to draw a clear connection with any uniquely federal interest, Appellants assert generically that "[a]s a matter of federal constitutional law and structure," any claim involving climate change-related harms necessarily arises under federal common law. ASB 3. The Ninth Circuit rejected that argument in *Oakland*. 969 F.3d at 902. There, as here, the defendants did not "identify a legal issue" with a specific conflict, but instead "suggest[ed] that the Cities' state-law claim implicate[d] a variety of 'federal interests,' including energy policy, national security, and foreign policy." *Id.* at 906–07. The court observed

that whether the defendants could be held liable for public nuisance was "no doubt an important policy question, but it does not raise a substantial question of federal law for the purpose of determining whether there is jurisdiction under § 1331." *Id.* at 907. So too here.

As the State explained in its Response Brief, Resp. 26–28, the federal common law of interstate pollution nuisance that once existed has been displaced by Congress through the Clean Air Act and Clean Water Act, such that "the need for such an unusual exercise of law-making by federal courts [has] disappear[ed]." *See, e.g., Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 423 (2011); *see also Oakland*, 969 F.3d at 906. The State also explained that the foreign affairs doctrine only supplies an ordinary preemption defense, where a state "take[s] a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility." *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420 n.11 (2003); Resp. 34–35. Multiple then-former officials of the United States' foreign policy apparatus, including the current Secretary of State Antony Blinken, appeared in this Court as *amici* to explain that no aspect of this case is likely to interfere with federal foreign policy prerogatives. *See generally* Brief of Former U.S.

Government Officials as *Amici Curiae*, Case No. 19-1818, Doc. 117531144 (Dec. 23, 2019). There is ultimately no body of federal common law that applies to this case, and no basis to craft a new one.[2]

B. Complaints Alleging State Law Claims Are Only Removable if They Satisfy *Grable* or State Law Is Completely Preempted by a Federal Statute.

Appellants' arguments that every state court case arises under federal law and is removable if "dispositive issues stated in the complaint require the application of federal common law," ASB 14, misconstrues jurisdictional boundaries the Supreme Court has recently taken pains to simplify and clarify.

As the Ninth Circuit underscored in *Oakland*, complete preemption and *Grable* are the only two recognized exceptions to the well-pleaded complaint rule. *See Oakland*, 969 F.3d at 904–06, 908. Ordinary preemption is a federal defense, however, that can never supply federal question jurisdiction. *See, e.g.*, *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58,

[2] Unsurprisingly, none of the cases Appellants cite for their foreign relations argument involved removal jurisdiction. Each of them applied a garden-variety preemption analysis to state or federal law claims that were already in federal court. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *United States v. Pink*, 315 U.S. 203 (1942); *City of New York*, 993 F.3d 81.

63 (1987). Appellants' insistence that federal common law "governs," "exclusively govern[s]," "necessarily governs," "control[s]," or provides "the rule of decision" here is all euphemism for the proposition that federal common law preempts the State's claims, which could not create jurisdiction even if it were accurate. *See* ASB at 3, 4, 7, 11, 12, 13, 16, 17.

The Supreme Court's "caselaw construing § 1331 was for many decades" before *Grable* "highly 'unruly.'" *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S.Ct. 1562, 1571 (2016). To "bring some order" to the doctrine, the Court in *Grable* "condensed [its] prior cases" into a straightforward inquiry: "a case can 'aris[e] under' federal law in two ways," namely if "federal law creates the cause of action asserted," or if it falls within the "'special and small category' of cases" that satisfy *Grable*'s four-part test. *See Gunn v. Minton*, 568 U.S. 251, 258 (2013). The only other recognized exception to the well-pleaded complaint rule is the complete preemption doctrine. *See Oakland*, 969 F.3d at 906; Resp. 20–24.

Manning itself illustrates why Appellants' approach must be rejected. The state court plaintiff there alleged the defendant bank violated state common law and securities laws. 136 S.Ct. at 1566. The

plaintiff brought no federal claims, but the complaint "couched its description" of the defendant's conduct "in terms suggesting that [the defendant] violated" an SEC regulation issued under the Securities Exchange Act. *Id.* at 1566–67. The Exchange Act grants exclusive federal jurisdiction over any case "brought to enforce any liability or duty created by [the Exchange Act] or the rules or regulations thereunder." 15 U.S.C. § 78aa(a). The defendant removed, arguing that whenever "a plaintiff's complaint either explicitly or implicitly 'assert[s]' that 'the defendant breached an Exchange Act duty,' then the suit is 'brought to enforce' that duty and a federal court has exclusive jurisdiction." 136 S.Ct. at 1568.

The Supreme Court disagreed. It explained that it had previously interpreted the statutory phrase "brought to enforce" as "coextensive with [its] construction of 'arising under'" for the purposes of 28 U.S.C. § 1331, and thus the *Grable* analysis already "well captures [those] classes of suits 'brought to enforce'" an Exchange Act duty. *Id.* at 1570. The Court stressed it had "time and again declined to construe federal jurisdictional statutes more expansively than their language, most fairly read, requires," based on "the need to give due regard to . . . to the power of the States to provide for the determination of controversies in their

courts." *Id.* at 1573 (citation omitted). The Court acknowledged that there is "nothing to prevent state courts from resolving Exchange Act questions that result from defenses or counterclaims," and thus "s[aw] little difference, in terms of the uniformity-based policies [the defendant] invoke[d], if those issues instead appear in a complaint." *Id.* at 1574. The Court held it was "less troubling for a state court to consider such an issue than to lose all ability to adjudicate a suit raising only state-law causes of action." *Id.*

Appellants' arguments here suffer the same pitfalls as the defendant's arguments in *Manning*. They claim federal jurisdiction is essential where "there is an overriding federal interest in the need for a uniform rule of decision" because of certain federal interests. ASB 6 (quoting *Illinois v. City of Milwaukee*, 406 U.S. 91, 105 n.6 (1972)). But the Court in *Manning* repeated its "confidence that state courts would look to federal court interpretations of the relevant [federal] statutes," which presented "no 'incompatibility with federal interests.'" 136 S.Ct. at 1574. Appellants argue that "the structure of the Constitution dictates that only federal law can apply" to the State's state-law claims and thus federal jurisdiction must also exist. ASB 3. But the Court in *Manning*

repeated its "deeply felt and traditional reluctance to expand the jurisdiction of federal courts through a broad reading of jurisdictional statutes," and adopted an approach that "serves, among other things, to keep state-law actions like [the plaintiff's] in state court, and thus to help maintain the constitutional balance between state and federal judiciaries." 136 S.Ct. at 1573. Ultimately, the Court stated it would "not lightly read the statute to alter the usual constitutional balance, as it would by sending actions with all state-law claims to federal court just because a complaint references a federal duty." *Id.* at 1574. Those same principles hold here.

Appellants' cases all either applied an outdated articulation of the *Grable* test or did not analyze removal jurisdiction at all. ASB 10–11. The plaintiff in *Treiber & Straub, Inc. v. UPS, Inc.*, 474 F.3d 379 (7th Cir. 2007), filed its complaint in federal court and affirmatively alleged federal *and* state law causes of action; no question of subject-matter jurisdiction was before the court. *See Treiber & Straub, Inc. v. UPS, Inc.*, 2005 WL 2108081, at *1, *10–11 (E.D. Wis. Aug. 31, 2005); 28 U.S.C. § 1367. The Eighth Circuit's decision in *In re Otter Tail Power Co.* applied the substantial federal issue test that has since been synthesized in

Grable. *See* 116 F.3d 1207, 1213 (8th Cir. 1997) (jurisdiction exists where "the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law" (citation omitted)). It is unclear what test the Ninth Circuit applied in *New SD, Inc. v. Rockwell Int'l Corp.*, 79 F.3d 953, 955 (9th Cir. 1996), to hold that "on government contract matters having to do with national security, state law is totally displaced by [the] federal common law"; the court did not apply or discuss complete preemption, "artful pleading," or the pre-*Grable* substantial federal issue test. That court clarified in *Oakland*, however, that the "two exceptions to the well-pleaded-complaint rule" are *Grable* and complete preemption.[3]

The Fifth Circuit's decision in *Sam L. Majors Jewelers v. ABX, Inc.*, is inapposite because that case was "a difficult one" and held only that a claim against an interstate air carrier for property lost in shipping arises under federal common law based on "the historical availability of this

[3] Even before *Oakland*, circuits and district courts had criticized *New SD* both for its jurisdictional reasoning and its holding that the plaintiff's contract claims arose under federal common law. *See Babcock Servs., Inc. v. CH2M Hill Plateau Remediation Co.*, 2013 WL 5724465, at *4 (E.D. Wash. 2013) (*New SD*'s "premise is no longer sound" after *Grable*); *Raytheon Co. v. Alliant Techsys., Inc.*, 2014 WL 29106, at *4 (D. Ariz. 2014) (same); *see also Woodward Governor Co. v. Curtiss Wright Flight Sys., Inc.*, 164 F.3d 123, 128 (2d Cir. 1999) ("[T]he reasoning behind *New SD* is, in our opinion, flawed.").

common law remedy, and the statutory preservation of the remedy" in the Airline Deregulation Act of 1978. 117 F.3d 922, 929 n.16 (5th Cir. 1997). By its own terms, the decision was "necessarily limited." *Id.* Next, *Caudill v. Blue Cross & Blue Shield of N.C.*, 999 F.2d 74 (4th Cir. 1993), was expressly abrogated by *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677 (2006), which applied a *Grable* analysis and held that federal common law did not provide "a basis for federal jurisdiction" over reimbursement claims related to certain health insurance plans. *Id.* at 690–93. In short, the cases do not speak to a different jurisdictional test. *See also* Resp. 22 & nn.19–21.

Finally, Appellants' discussion of *United States v. Swiss Am. Bank, Ltd.*, 191 F.3d 30 (1st Cir. 1999), and *United States v. Standard Oil Co. of Cal.*, 332 U.S. 301 (1947), is misleading. *See* ASB 16–18. Neither of those cases involved any question of subject-matter jurisdiction; both were filed in federal court in the first instance, and subject-matter jurisdiction existed because the United States was the plaintiff. *Standard Oil*, 332 U.S. at 302; *Swiss Am. Bank*, 191 F.3d at 35; 28 U.S.C. § 1345. The "two-part approach" applied in both cases was a choice-of-law analysis to determine whether the United States' subrogation claim in

Standard Oil and conversion claim in *Swiss American Bank* were cognizable under state or federal law. In both cases the government strenuously argued that its claims were federal and the courts agreed, holding that because the United States sought to vindicate its own monetary interests, its claims had to be considered under federal law. *See Standard Oil*, 332 U.S. at 305–06; *Swiss Am. Bank*, 191 F.3d at 42–45. The cases say nothing about removal jurisdiction or the well-pleaded complaint rule, or even subject-matter jurisdiction at all.

C. This Court Has Repeatedly Held That There Is No Independent "Artful Pleading" Exception to the Well-Pleaded Complaint Rule.

Appellants' contention that the "artful pleading doctrine" creates a free-standing basis for jurisdiction—separate and apart from *Grable* and complete preemption—misstates the law of this circuit and adds confusion where the Supreme Court has strived for clarity. *See* ASB 12–16. The State explained in its Response Brief that the doctrine does not create a separate basis for jurisdiction, *see* Resp. 24–25, and adds detail here in response to Appellants' supplemental arguments.

The artful pleading doctrine is best understood as another name for the complete preemption doctrine and not as an independent basis for

jurisdiction. The Supreme Court has explained that "[t]he artful pleading doctrine allows removal where federal law completely preempts a plaintiff's state-law claim." *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 475 (1998), This Court has thus repeatedly voiced its "skepti[ism] of the applicability of the artful pleading doctrine outside of complete federal preemption of a state cause of action," and has limited it to that context. *Rosselló-González v. Calderón-Serra*, 398 F.3d 1, 12 (1st Cir. 2004). The Ninth Circuit in *Oakland* was correct: "Under the well-pleaded-complaint rule, the district court lacked federal-question jurisdiction unless one of the *two* exceptions to the well-pleaded-complaint rule applies," namely *Grable*, and complete preemption. *Oakland*, 969 F.3d at 906 (emphasis added). There is no *third* avenue to remove state law claims against non-diverse defendants from state court. This Court should heed the Supreme Court's instruction not to return to the "muddled backdrop" predating "what we now understand as the 'arising under' standard." *Manning*, 136 S.Ct. at 1571.[4]

[4] Nothing in *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588 (2013), alters that understanding. The Court there held only that parties could not evade federal jurisdiction under the Class Action Fairness Act through a *nonbinding stipulation* that the case does not satisfy CAFA's

Appellants' cases only prove that this Court has treated the complete preemption and artful pleading doctrines as equivalent. They cite *López-Muñoz v. Triple-S Salud, Inc.* for its statement that "the artful pleading doctrine allows a federal court to peer beneath the local-law veneer of a plaintiff's complaint in order to glean the true nature of the claims presented." ASB 13 (quoting 754 F.3d 1, 5 (1st Cir. 2014)). But the first sentence of the next paragraph reads: "This jurisdiction-granting exception, *known as complete preemption*, comprises a narrow exception to the well-pleaded complaint rule." 754 F.3d at 5 (emphasis added). The only question before the Court there was whether the Federal Employees Health Benefits Act of 1959, completely preempted the plaintiff's Puerto Rican law claims, and the Court held that it did not. *Id.* at 6.

This Court's earlier opinion in *BIW Deceived v. Loc. S6, Indus. Union of Marine & Shipbuilding Workers of Am.*, 132 F.3d 824 (1st Cir. 1997), also cited by Appellants, is the same. *See* ASB 12–13. The Court

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jurisdictional amount. The Court held that "treat[ing] a nonbinding stipulation as if it were binding" would "exalt form over substance, and run directly counter to CAFA's primary objective" of moving nationally significant class actions into federal court. *Id.* at 595. The opinion says nothing generalizable about "artful pleading", federal common law, or jurisdiction under § 1331.

there wrote: "Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character." 132 F.3d at 831 (quoting *Metro. Life Ins. Co.*, 481 U.S. at 63–64). Again, the very next paragraph begins: "This powerful preemption principle propels a significant exception to the well-pleaded complaint rule—*the artful pleading doctrine*." *Id.* (emphasis added). The Court then considered "how certain a court must be that an artfully pleaded complaint contains a federal question before denying a motion to remand" and held that the doctrine only applies "when a review of the complaint, taken in context, reveals a colorable federal question *within a field in which state law is completely preempted*." *Id.* at 832 (emphasis added). Multiple other decisions say the same thing: "complete preemption" and "artful pleading" are the same.[5]

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[5] *See, e.g.*, *Lawless v. Steward Health Care Sys., LLC*, 894 F.3d 9, 17 (1st Cir. 2018); *Negrón-Fuentes v. UPS Supply Chain Sols.*, 532 F.3d 1, 6 (1st Cir. 2008).

Most appellate courts that have explored the limits of the doctrine have held, like this circuit, that it is another way of describing complete preemption. *See, e.g.*, *Oakland*, 969 F.3d at 905; *Bernhard v. Whitney Nat. Bank*, 523 F.3d 546, 551 (5th Cir. 2008) ("[T]he artful pleading doctrine applies *only* where state law is subject to complete preemption."); *Blackburn v. Sundstrand Corp.*, 115 F.3d 493, 495 (7th Cir. 1997) ("A separate doctrine, misleadingly called 'complete

Importantly, the Supreme Court in *Manning* expressly rejected the same "artful pleading" arguments Appellants make here, untethered from complete preemption. The defendant in *Manning* urged that even where *Grable* is not satisfied, "a judge should go behind the face of a complaint to determine whether it is the product of 'artful pleading.'" 136 S.Ct. at 1575. The Court did not mince words: "We have no idea how a court would make that judgment," and holding plaintiffs to such an amorphous but exacting standard would be "excruciating for courts to police." *Id.* Courts should instead apply the "familiar" arising under standard elucidated in *Grable*, to "promot[e] administrative simplicity,

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preemption,' does permit removal when the plaintiff's own claim . . . reflects artful pleading."); *Davis v. Bell Atl.-W. Virginia, Inc.*, 110 F.3d 245, 247 (4th Cir. 1997) ("[T]he Supreme Court has refused to allow artful pleading to circumvent [the LMRA's] preemptive force . . . [u]nder th[e] 'complete pre-emption corollary to the well-pleaded complaint rule.'" (citation omitted)); *Goepel v. Nat'l Postal Mail Handlers Union, a Division of LIUNA*, 36 F.3d 306, 311–12 & n.5 (3d Cir. 1994) (complete preemption "has been referred to elsewhere as the 'artful pleading' doctrine"); *but see Ohio ex rel. Skaggs v. Brunner*, 629 F.3d 527, 532 (6th Cir. 2010) ("it is not clear after *Rivet*" whether artful pleading doctrine operates apart from complete preemption); *Sullivan v. Am. Airlines, Inc.*, 424 F.3d 267, 272 n.4 (2d Cir. 2005) ("The precise scope of the artful-pleading doctrine is not entirely clear.").

which is a major virtue in a jurisdictional statute." *Id.* at 1574 (cleaned up).[6]

D. The Second Circuit's Decision in *City of New York* Supports Remand.

Appellants discuss the Second Circuit's opinion in *City of New York* throughout their Supplemental Brief, but that case is distinguishable on its face. It does not speak to the issues before the Court and is factually inapposite. To the extent the decision is relevant at all, it supports remand.

First, the *City of New York* court reviewed an order granting a motion to dismiss, and explicitly distinguished its reasoning and holding from the numerous recent decisions granting motions to remand in cases involving climate change, including the district court's decision below. *See* 993 F.3d at 93–94. Because the City "filed suit in federal court in the first instance," the court considered "the [defendant companies']

[6] The Second Circuit's reference to the City's "artful pleading" in *City of New York* only highlights the imprecision surrounding the phrase. *See* 993 F.3d at 91, 97. That court considered a preemption defense on the merits, and did not cite to any authority invoking the artful pleading doctrine; it was instead describing in evocative terms the fact that the City's complaint did not "concern itself with aspects of fossil fuel production and sale that are unrelated to emissions." *Id.* at 97.

preemption defense on its own terms, not under the heightened standard unique to the removability inquiry." *Id.* at 94. The court emphasized, moreover, that its ordinary preemption analysis "d[id] not conflict" with the Ninth Circuit's decision in *Oakland*, as well as with "the fleet of [other] cases" holding that "anticipated defense[s]"—including those based on federal common law—could not "single-handedly create federal-question jurisdiction under 28 U.S.C. § 1331 and the well-pleaded complaint rule." *Id.* The district court here reached exactly that holding.

Second, *City of New York*'s facts were different from this case, and even if the Second Circuit's preemption analysis were correct, it would not apply here. The City defined the conduct giving rise to liability as "lawful commercial activity," namely their lawful "production, promotion, and sale of fossil fuels." *Id.* at 87,88 (cleaned up). Unlike here, the City's complaint did "not concern itself with aspects of fossil fuel production and sale that are unrelated to emissions." *Id.* at 97. The City reaffirmed that point in its opening brief to the Second Circuit, declaring that its "particular theory of the claims . . . assumes that Defendants' business activities have substantial social utility and does not hinge on a finding that those activities themselves were unreasonable or violated any

obligation other than the obligation to pay compensation." Brief for Appellant at 19, *City of New York v. Chevron Corp.*, No. 18-2188, Dkt. 89, 2018 WL 5905772 (2d Cir. Nov. 8. 2018). Those allegations, the court held, would "effectively impose strict liability for the damages caused by fossil fuel emissions no matter where in the world those emissions were released (or who released them)," and the defendants would need to "cease global production [of fossil fuels] altogether" if they "want[ed] to avoid all liability." 993 F.3d at 92. The City's lawsuit, "if successful, would operate as a *de facto* regulation on [transborder] emissions," and the court held it was preempted. *Id*. at 96.

The State's causes of action, its theories of liability, and the relief it seeks are all categorically different here. The State has brought claims under its statutory and *parens patriae* authority for injuries caused by Appellants' use of *unlawful deception* to inflate the market for their fossil-fuel products. JA90–114 (Compl. ¶¶147–224, describing deception and injuries). Nothing in this case would directly or indirectly require Appellants to cease production and sale of fossil fuels, either to satisfy a judgment in this case or to avoid future liability, and Appellants do not argue that it would. Whether the Second Circuit's preemption analysis

was correct is not before this Court. But even if it were, *this* case is different.

III. There Is No OCSLA Jurisdiction Because the State's Claims Arise Out of Appellants' Misinformation Campaigns, Not Offshore Fossil Fuel Production.

As the State argued in its Response Brief, the district court correctly held there is no federal jurisdiction in this case pursuant to OCSLA because Appellants "have not shown that [the State's] injuries would not have occurred but for those operations." Resp. 42. JA434. For OCSLA jurisdiction to attach, there must be a "but-for connection" between the cause of action and Defendants' operations on the OCS. *In re Deepwater Horizon*, 745 F.3d 157, 163 (5th Cir. 2014). "[T]he term 'operation' contemplate[s] the doing of some physical act on the [OCS]," *EP Operating Ltd. P'ship v. Placid Oil Co.*, 26 F.3d 563, 567 (5th Cir. 1994), and "a 'mere connection' between the cause of action and the OCS operation" that is "too remote" will not "establish federal jurisdiction," *In re Deepwater Horizon*, 745 F.3d at 163.

The relevant activity here is Appellants' misrepresentation campaigns that promoted the unrestrained use of fossil fuels, not any kind of "operation" conducted on the OCS, *see EP Operating*, 26 F.3d at

567. The fact that some Appellants produce oil and gas on the OCS does not mean the State's claims "aris[e] out of or in connection with" that activity. Under Appellants' theory, any case against any fossil fuel company involving any adverse impact associated with any of their products would be subject to federal jurisdiction under OCSLA because a significant portion of the nation's oil is drawn from the OCS. That is absurd, and the district court's holding is in accord with every other court that has considered, and rejected, Defendants' arguments in substantially similar cases. *See , e.g.*, *Honolulu*, 2021 WL 531237 at *3; *Minnesota*, 2021 WL1215656 at *10. Nothing about offshore production relates to the misleading marketing of Appellants' finished products.

Appellants' reliance on *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S.Ct. 1017 (2021), is misplaced. The Supreme Court there explained the contours of its own specific personal jurisdiction precedent, *see id.* at 1026–30, and what it meant when it said that constitutional due process limitations require "a connection between the forum and the specific claims at issue" before a state may exercise specific personal jurisdiction over a defendant, *see Bristol-Myers Squibb Co. v. Superior Court of Cal.,* ., 137 S.Ct. 1773, 1781 (2017). The opinion did not purport

to interpret the *statutory* phrase "in connection with," as used by Congress in OCSLA or anywhere else.

Appellants also do not explain why adjudicating the State's claims would pose an obstacle to "the efficient exploitation of the minerals" on the OCS. 43 U.S.C. § 1332; *see also Amoco Production Co. v. Sea Robin Pipeline Co.*, 844 F.2d 1202, 1210 (5th Cir. 1988). The remedies the State seeks would not regulate OCS production activities for the same reasons they would not regulate emissions. *See* Part II.A, *supra*. The most Appellants argue is that a large monetary award against them "would inevitably deter" production on the OCS. ASB 30. That is speculation. Even if it were well-founded, Appellants' reasoning would mean *any* case that *might*, based on the pleadings, lead to a large monetary judgement against a company with operations on the OCS would fall within OCSLA's jurisdictional grant because it *might* eventually impact their operations. No court has adopted such a limitless standard, and this Court should not either.

CONCLUSION

The Court should again affirm.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the undersigned certifies that this brief complies with the applicable typeface, type-style, and type-volume limitations. This brief was prepared using a proportionally spaced type (Century Schoolbook, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 6,000 words. This certificate was prepared in reliance on the word-count function of the word-processing system used to prepare this brief.

Dated: August 27, 2021

/s/ *Victor M. Sher*
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CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system.

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