

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DISTRICT OF COLUMBIA,

Plaintiff,

v.

EXXON MOBIL CORP., *et al.*,

Defendants.

Civil Action No. 1:20-cv-01932-TJK

**DEFENDANTS' RESPONSE TO PLAINTIFF'S
NOTICE OF SUPPLEMENTAL AUTHORITY**

Defendants write in response to the Attorney General’s notice (Dkt. 89) regarding the district court’s decision on plaintiff’s motion to remand in *City of Hoboken v. Exxon Mobil Corp.* See Opinion (“*Hoboken Order*”), Case No. 20-cv-14243 (D.N.J. Sept. 8, 2021) (attached as Exhibit A to the notice, Dkt. 89-1). Defendants submit that the *Hoboken Order* is incorrect, and they have appealed it to the Third Circuit. Neither this Court nor the D.C. Circuit has yet addressed the issues relevant to the pending motion to remand in this case, and the *Hoboken Order* is not persuasive for many reasons including, but not limited to, the following.¹

First, the *Hoboken* court misunderstood the defendants’ argument that the plaintiff’s claims necessarily “arise under” federal common law and therefore present a removable “federal question.” Instead, the *Hoboken* court analyzed the issue under “ordinary preemption” principles, and concluded that, on that basis, removal was improper. *Hoboken Order* at 9. This was error. As Defendants have explained in this case, “Courts determine at the outset whether plaintiffs’ claims arise under federal or state law,” and “[t]his analysis does not implicate preemption principles or standards.” Dkt. 51, at 11. Because the *Hoboken* court incorrectly considered this issue as a preemption defense, it did not address whether the claims were actually governed by federal common law. If it had, the court would have concluded that they are, just as the Second Circuit recently held that such claims “must be brought under federal common law”—and, thus,

¹ The *Hoboken* court stayed its remand order so that the defendants could file a formal motion to stay pending their appeal to the Third Circuit. See Order, Case No. 20-cv-14243 (D.N.J. Sept. 9, 2021) (attached as Exhibit 1). As the *Hoboken* court explained, “Defendants removed [*Hoboken*], in part, under the federal officer removal statute and the Class Action Fairness Act,” and “both of these statutes provide a statutory right to appeal a remand order that addresses these bases for removal.” *Id.* at 1 (citations omitted). And because the Third Circuit (like the D.C. Circuit) has not yet “addressed Defendants’ arguments,” staying the case pending appeal “is prudent to preserve resources and in light of considerations of judicial economy. Specifically, the Third Circuit will be presented with matters of first impression that could potentially impact the [*Hoboken*] Court’s remand Order.” *Id.* at 2.

the nominally state-law claims are “federal claims.” *City of New York v. Chevron Corp.*, 993 F.3d 81, 95 (2d Cir. 2021).

Instead, the *Hoboken* court concluded that the claims would not be removable even if they were governed by federal common law. It did so based on a misunderstanding of *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, 471 U.S. 845 (1985), attributing incorrect significance to the fact that, in that case, the plaintiffs “filed their complaint in federal court.” *Hoboken* Order at 10-11. But the Supreme Court expressly held that there is “federal question” jurisdiction over “claims founded upon federal common law as well as those of statutory origin.” *National Farmers Union*, 471 U.S. at 850, 852. And the *Hoboken* court ignored the decisions from multiple courts of appeals that have held that federal common law provides a “permissible basis for jurisdiction based on a federal question.” *Treiber & Straub, Inc. v. U.P.S., Inc.*, 474 F.3d 379, 383 (7th Cir. 2007); *see also Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 924, 931 (5th Cir. 1997) (concluding “removal is proper” because plaintiff’s pleaded state-law claims “arose under federal common law”).

Second, the *Hoboken* court concluded that the plaintiff’s claims were not “focused on” the defendants’ actions under federal officers, and therefore were not removable under the Federal Officer Removal statute. *Hoboken* Order at 20. But it was improper to focus exclusively on plaintiff’s theory of “deception” because, as the Supreme Court and the D.C. Circuit have held when both parties have reasonable theories of the case, the Defendants’ theory must be credited for purposes of federal officer removal. *See, e.g., Jefferson Cnty., Ala. v. Acker*, 527 U.S. 423, 432–33 (1999) (“[W]e credit the [defendants]’ theory of the case for purposes of . . . our jurisdictional inquiry”; defendants need not have “an airtight case on the merits” to show the requisite nexus); *K&D LLC v. Trump Old Post Office LLC*, 951 F.3d 503, 506 (D.C. Cir. 2020)

(“[W]e credit the [defendants’] theory of the case for purposes of both elements of the removal inquiry.”).

Moreover, since Congress amended the statute in 2011, multiple courts of appeals, including the Third Circuit, have consistently held that the statute broadly applies to actions that are “*connected or associated, with acts under color of federal office.*” *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286, 292 (5th Cir. 2020) (en banc); *see also Baker v. Atl. Richfield Co.*, 962 F.3d 937, 944 (7th Cir. 2020) (“Simply stated, the Companies did not need to allege ‘that the complained-of conduct *itself* was at the behest of a federal agency.’”); *In re Commonwealth’s Motion to Appoint Counsel Against or Directed to Def. Ass’n of Phila.*, 790 F.3d 457, 466 (3d Cir. 2015) (“[I]t is sufficient for there to be a ‘connection’ or ‘association’ between the act in question and the federal office.”). And while the D.C. Circuit has not yet determined the precise scope of the statute, it has recognized that “[o]ur sister circuits read this language as relaxing the nexus requirement, such that ‘a connection or association between the act in question and the federal office’ now suffices.” *K&D*, 951 F.3d at 507 n.1. The claims in this case are connected to and associated with Defendants’ substantial fossil fuel production at the direction of the federal government. *See* Dkt. 51 at 46-47. This is more than enough to support federal jurisdiction under the Federal Officer Removal statute, which the Court “must construe . . . liberally in favor of removal.” *K&D*, 951 F.3d at 506.

Third, the *Hoboken* court incorrectly held that the claims were not removable under the Outer Continental Shelf Lands Act because the defendants’ alleged conduct was not a “but-for” cause of plaintiff’s alleged injuries. *Hoboken* Order at 17-18. But the Court failed to address clear precedent holding that there is federal jurisdiction, without requiring but-for causation, when “any dispute that alters the progress of production activities on the [Outer Continental Shelf (“OCS”)]

threatens to impair the total recovery of the federally-owned minerals from the reservoir or reservoirs underlying the OCS.” *Amoco Prod. Co. v. Sea Robin Pipeline Co.*, 844 F.2d 1202, 1210 (5th Cir. 1988). And the Supreme Court’s recent decision in *Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017 (2021), confirmed that the “requirement of a ‘connection’ between a plaintiff’s suit and a defendant’s activities” does not necessarily require but-for causation. *Id.* at 1026 (declining to require “a strict causal relationship between the defendant’s in-state activity and the litigation” for specific jurisdiction).²

DATE: September 17, 2021

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² By filing this response, Defendants do not waive any right, defense, affirmative defense, or objection, including any challenges to personal jurisdiction over Defendants.

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CERTIFICATE OF SERVICE

I hereby certify that, on September 17, 2021, I caused the foregoing Notice of Supplemental Authority to be electronically filed using the Court's CM/ECF system, and service was effected electronically pursuant to Local Rule 5.3 to all counsel of record.

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