21-1446-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

STATE OF CONNECTICUT, BY ITS ATTORNEY GENERAL, WILLIAM M. TONG,

Plaintiff-Appellee

v.

EXXON MOBIL CORPORATION,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT (CIV. NO. 20-1555)
(THE HONORABLE JANET C. HALL, J.)

BRIEF OF THE APPELLEE STATE OF CONNECTICUT, BY ITS ATTORNEY GENERAL, WILLIAM M. TONG

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INTRODUCTION

This is a straightforward enforcement action by a sovereign State invoking its statutory police power, and it belongs in state court. The conduct the State is policing in this action is ExxonMobil's deceptive commercial speech in a disinformation campaign that has persisted for decades. When pressed in legal proceedings, ExxonMobil admits that "[e]very action that we have taken . . . results in the emissions of greenhouse gases that contribute to climate change . . . ." J.A. 187. Yet such candor was and is absent from ExxonMobil's commercial statements, replaced instead with false claims of environmentally friendly practices and misrepresentations about established climate science. Thus, the State of Connecticut filed a Complaint in Connecticut Superior Court alleging that, in conducting an ongoing decades-long campaign to deceive Connecticut consumers, ExxonMobil has engaged in deceptive and unfair business practices that violate the Connecticut Unfair Trade Practices Act (CUTPA).

Deceptive and unfair business practices—in and of themselves—are unlawful in Connecticut; no consequence of a deceptive or unfair act is required to establish liability. Conn. Gen. Stat. §§ 42-110a – 42-110q.

Climate change is only relevant to this case because it is the *topic* of ExxonMobil's unlawful acts and practices. As the district court correctly concluded, the *topic* of an unfair or deceptive business practice does not change the law governing its adjudication. *See* J.A. 224 ("The fact that the alleged lies were *about* the impact of fossil fuels on the Earth's climate does not empower the court to rewrite the Complaint and substitute other claims for [the State's] CUTPA claims.").

As "master of the claim," *Caterpillar v. Williams*, 482 U.S. 386, 392 (1987), the State has the right to decide what action to bring. The district court (*Hall, J.*) followed that rule and properly declined ExxonMobil's invitation to transform the State's complaint into something it is not. *See* J.A. 182 ("I will not transform this complaint the way you want me to."). Its decision should be affirmed.

STATEMENT OF THE ISSUE

Whether the district court properly remanded the State's CUTPA action to Connecticut Superior Court.

STATEMENT OF THE CASE

1. *Connecticut Sued ExxonMobil Under The State's Unfair Trade Practices Act.*

On September 14, 2020, plaintiff-appellee State of Connecticut filed an eight count Complaint against defendant-appellant ExxonMobil Corporation. *See* J.A. 8-52. The State alleged that ExxonMobil has engaged in a decades-long campaign of deception about the relationship between its business practices and climate change, and the Complaint asserted one cause of action: violations of CUTPA. Specifically, the State alleged that ExxonMobil propagated disinformation and published untruthful advertorials that were both deceptive (count one) and unfair (count three), ExxonMobil continues to publish advertisements that are both deceptive (count five) and unfair (count seven), and that the violations in each aforementioned count were done willfully (counts two, four, six, eight). J.A. 43-50.

In its prayer for relief, the State did not request damages. Indeed, CUTPA does not authorize the recovery of damages in enforcement actions brought by the State. *Compare* Conn. Gen. Stat. § 42-110g (permitting "[a]ny person . . . to recover actual damages") *with id.* § 42-110m (damages not included as permissible recovery in suit by Attorney

General). Instead, the State requested only what CUTPA provides the government, including equitable relief, restitution, disgorgement, civil penalties, and—most importantly—an injunction ordering ExxonMobil to cease its deceitful practices. *See* J.A. 51-52. As with any form of relief in any case, the State will have to prove "the causal relationship" between ExxonMobil's CUTPA violations and each particular remedy sought. *See* J.A. 152-53. However, unlike proving liability in a tort action, neither causation nor injury is an essential element for establishing CUTPA liability. *See* Conn. Gen. Stat. § 42-110m; *Caldor, Inc. v. Heslin*, 577 A.2d 1009, 1013 (Conn. 1990); *Ulbrich v. Groth*, 78 A.3d 76, 100 (Conn. 1992).

ExxonMobil timely removed this action to district court. *See* J.A. 53-110. The State moved to remand the case back to state court. *See* J.A. 111-12; D. Ct. Dkt. 36. ExxonMobil filed an opposition to the State's motion to remand, D. Ct. Dkt. 37, and the State replied, D. Ct. Dkt. 38. The district court heard oral argument. *See* J.A. 144-216. Soon thereafter, the district court issued an opinion rejecting ExxonMobil's arguments for removal and remanding the case back to state court. *See* J.A. 217-248.

2. *The District Court Rejected ExxonMobil's Arguments And Remanded The Case To State Court.*

The district court noted that ExxonMobil's primary arguments, which would require transforming the State's claims into something they are not, are "in tension with Supreme Court precedents concerning removal." J.A. 221. Specifically, the district court found ExxonMobil's arguments irreconcilable with the well-pleaded complaint rule because the State is the "master of the claim" and "may avoid federal jurisdiction by exclusive reliance on state law," in this case, CUTPA. *See* J.A. 222-24 (quoting *Caterpillar*, 482 U.S. at 392).

First, the district court rejected ExxonMobil's proposal that federal common law should provide an alternate route to removal, because removal of state law claims "merely on the ground that federal common law has *displaced* such claims" is incompatible with Supreme Court precedent. J.A. 232 (emphasis added). The district court properly noted the "material difference between a state claim that [presents] a federal question defense . . . and a state claim that has been replaced by a federal cause of action with extraordinary preemptive force: only the latter suffices for removal." J.A. 231 (citing *Beneficial National Bank v.*

Anderson, 539 U.S. 1, 9-11 (2003)); *see also City of New York v. Chevron*, 993 F.3d 81, 93-95 (2d Cir. 2021).

Second, the district court determined that "[the State's] claims do not necessarily raise a federal issue," which is a requisite element of *Grable* jurisdiction. J.A. 236; *see Grable & Sons Metal Products v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005).

Third, the district court rejected removal based on the Federal Officer Removal Statute, specifically 28 U.S.C. § 1442 (a) (1), because ExxonMobil has "no explanation as to how the allegedly deceptive statements that form the basis of [the State's] consumer protection claims have any causal connection to the production of fossil fuels for or under the direction of the federal government." J.A. 241; *see Isaacson v. Dow Chemical Co.*, 517 F.3d 129, 135 (2d Cir. 2008).

Fourth, the district court held that the Outer Continental Shelf Lands Act, specifically 43 U.S.C. § 1349 (b), did not provide a basis for removal. The court concluded that the State seeks "redress for deceptive and unfair practices relating to ExxonMobil's interactions with consumers in Connecticut—not for harms that might result from the

manufacture or use of fossil fuels, let alone from ExxonMobil's operations on the Outer Continental Shelf." J.A. 242.

Finally, after disposing of ExxonMobil's final two arguments, which are not raised on appeal, the district court denied the State's request for a sanction of attorney's fees. It did so, however, "with some reservation." J.A. 248.

3. ExxonMobil's Arguments Have Been Uniformly Rejected.

ExxonMobil has proffered the same arguments raised here in similar cases in different jurisdictions. Though some are under appellate review, these arguments for removal have uniformly failed. District courts in California, Maryland, Colorado, Rhode Island, Massachusetts, Hawaii, Minnesota, and New Jersey all rejected these arguments and granted remand. *See County of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934 (N.D. Cal. 2018) ("*San Mateo I*"); *Mayor & City Council of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538 (D. Md. 2019) ("*Baltimore I*"); *Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.) Inc.*, 405 F. Supp. 3d 947 (D. Colo. 2019) ("*Boulder I*"); *Rhode Island v. Chevron Corp.,* 393 F. Supp. 3d 142 (D.R.I. 2019) ("*Rhode Island I*"); *Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31 (D. Mass.

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One district court denied remand based on the federal common law argument asserted here, but the Ninth Circuit reversed, and the Supreme Court denied certiorari. *California v. BP P.L.C.*, Nos. C 17-06011 WHA, C 17-06012 WHA, 2018 U.S. Dist. LEXIS 32990 (N.D. Cal. Feb. 27, 2018) ("*Oakland I*"), *vacated and remanded sub nom., City of Oakland v. BP P.L.C*, 969 F.3d 895 (9th Cir. 2020) ("*Oakland II*"), *amended and superseded on denial of reh'g sub nom.*, 969 F.3d 895 (9th Cir. 2020), *cert denied sub nom., Chevron Corp. v. City of Oakland*, 2021 U.S. LEXIS 3100 (S. Ct. Jun. 14, 2021).

On appeal of the decisions that granted remand, the First, Fourth, Ninth, and Tenth Circuits determined the scope of their review was limited to federal officer removal, and each affirmed. *Rhode Island v. Chevron Corp.,* 979 F.3d 50 (1st Cir. 2020) ("*Rhode Island II*"); *Mayor &*

City Council of Baltimore v. BP P.L.C., 952 F.3d 452 (4th Cir. 2020) ("*Baltimore II*"); *County of San Mateo v. Chevron Corp.*, 960 F.3d 586 (9th Cir. 2020) ("*San Mateo II*"), *reh'g en banc denied* (Aug. 4, 2020); *Board of County Commissioners of Boulder County v. Suncor Energy (U.S.A.) Inc.*, 965 F.3d 792 (10th Cir. 2020) ("*Boulder II*"). The Supreme Court subsequently held that the Fourth Circuit should have reviewed each asserted ground for removal, not only federal officer removal, and it therefore vacated the portion of those Circuit decisions regarding reviewability of the other grounds for removal and remanded for further proceedings. *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532 (2021) ("*Baltimore III*").

Despite the differences in those cases, the rationales for granting motions to remand in those jurisdictions are persuasive. Moreover, those cases are instructive in understanding why ExxonMobil is before this Court attempting to jam square-peg arguments into round-hole legal doctrines. The arguments asserted here were originally crafted in support of removing state common law claims that require a causal link to environmental degradation to prove liability. *See* D. Ct. Dkt. 36, Memorandum of Law at 28. They have even less merit here, asserted

against state statutory consumer protection claims without a causation or injury requirement for establishing liability.

SUMMARY OF THE ARGUMENT

The district court properly remanded this case to Connecticut Superior Court because there is no federal jurisdiction over the State's CUTPA claims. The well-pleaded complaint rule controls, and its application here demands remand. No corollary rule or exception—complete preemption, *Grable* jurisdiction, the artful pleading doctrine—provides a basis for removal. Neither do any federal statutes that permit removal in specific circumstances. ExxonMobil's arguments to the contrary are merely invitations to ignore binding precedent and disavow the well-pleaded complaint rule, return to the pre-*Grable* wild west of federal question analysis, or drastically and unprecedentedly expand the scope of federal removal statutes.

ExxonMobil's primary argument—that federal common law "governs" the State's claims—is baseless and cannot justify removal. ExxonMobil concocts this argument using the language of complete preemption—a recognized exception to the well-pleaded complaint rule—while grounding its argument with caselaw concerning ordinary

preemption or displacement—a doctrine unrelated to adjudicating removal. *See Sullivan v. American Airlines, Inc.*, 424 F.3d 267, 272-73 (2d Cir. 2005) (distinguishing jurisdictional complete preemption from ordinary, or defensive, preemption). ExxonMobil relies on this Court's decision in *City of New York v. Chevron*, but in that decision this Court went out of its way to distinguish its analysis on a motion to dismiss from the "fleet of cases" rejecting the arguments asserted here as grounds for removal "under the heightened standard unique to the removability inquiry." *See City of New York,* 993 F.3d at 94 (noting that each case was remanded because "defendants' anticipated defenses could [not] singlehandedly create federal-question jurisdiction under 28 U.S.C. § 1331 in light of the well pleaded complaint rule."); *see also Oakland II*, 969 F.3d at 908. The different procedural postures render this Court's decision in *City of New York* inapplicable here. Even if ExxonMobil's preemption argument was based on sound legal theory—which it is not—the argument fails because federal environmental common law cannot and does not preempt the State's statutory enforcement powers under CUTPA.

ExxonMobil next argues that this Court should invoke the so-called *Grable* doctrine to find federal question jurisdiction. But the State's enforcement of its own unfair and deceptive practices statute does not contain an embedded issue of federal law as is necessary under the strict requirements of *Grable*. *See Grable*, 545 U.S. at 314. ExxonMobil's entire argument—as is the case with all its arguments—relies on mischaracterizing the State's complaint as an action to regulate fossil fuel production and influence federal energy policy. It is not. No substantial federal issue is embedded in nor necessarily raised by the State's well-pleaded CUTPA complaint. This case is a far cry from the "special and small category" of cases involving a "nearly pure issue of [federal] law" as "a necessary element" of the claims alleged. *See Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 699-700 (2006).

ExxonMobil also argues for the unprecedented expansion of two statutes that confer federal jurisdiction in narrow and specific circumstances which are not present here. The first—the Federal Officer Removal Statute—does not provide a basis for removal under the circumstances of this case. Not only does ExxonMobil's argument again mischaracterize the State's complaint, but it also fails because (1)

ExxonMobil did not "act under" the direction of a federal officer and (2) even assuming ExxonMobil did "act under" the direction of a federal officer at some times in some matters, those purported actions have no nexus to the State's CUTPA claims concerning ExxonMobil's marketing and branding statements.

The second—the Outer Continental Shelf Lands Act—is irrelevant to this case. The State's claims do not arise out of, nor are they in connection with, ExxonMobil's exploration, development, or mineral production operations on the outer Continental Shelf.

ARGUMENT

Federal courts have limited jurisdiction and must presume that a case lies outside of their jurisdiction unless and until jurisdiction has been shown to be proper. *Gunn v. Minton*, 568 U.S. 251, 256 (2013). Though a defendant can seek removal of a case "brought in a State court of which the district courts of the United States have original jurisdiction," 28 U.S.C § 1441 (a), "federal courts construe the removal statute narrowly, resolving any doubts against removability." *Somlyo v. J. Lu-Rob Enterprises, Inc.*, 932 F.2d 1043, 1045-46 (2d Cir. 1991). The presumption against removal is even higher in actions brought by a State

exercising its sovereign authority to enforce its own laws. *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 21 n.22 (1983) ("considerations of comity make us reluctant to snatch cases which a State has brought from the courts of that State, unless some clear rule demands it."). Acceptance of any of ExxonMobil's asserted bases for removal would dramatically shift the carefully crafted balance between federal question jurisdiction and states' rights to enforce their own laws.

The party seeking removal "bears the burden of demonstrating the propriety of removal." *Grimo v. Blue Cross/Blue Shield*, 34 F.3d 148, 151 (2d Cir. 1994). The district court correctly held that ExxonMobil failed to meet that burden, and this Court should affirm that decision after *de novo* review of the district court's full remand order. *See Romano v. Kazacos*, 609 F.3d 512, 517 (2d Cir. 2010); *Baltimore III*, 141 S.Ct. at 1543.

I. The Well-Pleaded Complaint Rule Controls Federal Question Analysis, And Its Application Demands Remand.

To determine whether a civil action arises under federal law for purposes of 28 U.S.C. § 1331, courts first must look to the "well-pleaded complaint rule," which states that "federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly

pleaded complaint." *Caterpillar*, 482 U.S. at 392. It is "settled law that a case may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption . . . ." *Id.* at 393. This rule enables a plaintiff to be the "master of the claim" and "avoid federal jurisdiction by exclusive reliance on state law." *Id.* at 392.

That is exactly what the State did here by relying exclusively on its state consumer protection statute, CUTPA. Actions brought pursuant to CUTPA do not present a federal question for purposes of removal. *See, e.g., Loussides v. America Online, Inc.*, 175 F. Supp. 2d. 211, 213 n.2 (D. Conn. 2001) (remanding case to state court after concluding that "[t]he standards for determining CUTPA liability do not depend on federal law."). ExxonMobil does not argue otherwise. Instead, it argues that the State's claims arise under federal law through one of the exceptions to the well-pleaded complaint rule.

In *Fracasse v. People's United Bank*, 747 F.3d 141, 144 (2d Cir. 2014), this Court articulated that only "[t]hree situations exist in which a complaint that does not allege a federal cause of action may nonetheless 'aris[e] under' federal law for purposes of subject matter jurisdiction:" (1) "if Congress expressly provides, by statute, for removal of state law

claims . . ."; (2) "if the state law claims are completely preempted by federal law . . ."; and (3) "in certain cases if the vindication of a state law right necessarily turns on a question of federal law . . . ." *Fracasse*, 747 F.3d at 144 (citations omitted). ExxonMobil concedes that the first and second exceptions do not apply in this case. *See* J.A. 225. The third exception is well-recognized by this Court as *Grable* jurisdiction.

In consideration of these exceptions, ExxonMobil urges the Court to rely on the artful pleading doctrine, Br. at 27-29, which is "an independent corollary to the well-pleaded complaint rule . . . that a plaintiff may not defeat removal by omitting to plead necessary federal questions," *Rivet v. Regions Bank*, 522 U.S. 470, 475 (1998) (internal quotation marks omitted). Following Supreme Court guidance, this Court has stated that "[t]he artful pleading rule applies when Congress has either (1) so completely preempted, or entirely substituted, a federal law cause of action for a state one that plaintiff cannot avoid removal by declining to plead 'necessary federal questions,'": or (2) "expressly provided for the removal of particular actions asserting state law claims in state court." *Romano*, 609 F.3d at 519 (citing *Beneficial*, 539 U.S. at 6). These two circumstances are, in opposite order, the first and second

exceptions articulated in *Fracasse* that ExxonMobil concedes do not apply in this case. J.A. 225. Thus, based on recent precedent from this Court, the artful pleading doctrine need not be considered.

As noted by the district court, however, the scope of the artful pleading doctrine has at times been unclear, and it has previously been invoked by this Court in the context of *Grable* jurisdiction. *See* J.A. 238-39 n.10. Indeed, the cases upon which ExxonMobil relies—*Marcus v. AT&T Corporation*, 138 F.3d 46 (2d Cir. 1998) and *Republic of Philippines v. Marcos*, 806 F.2d 344 (2d Cir. 1986)—are *Grable* cases. Though they predate the Supreme Court's analysis in *Grable*, and therefore did not undergo a full *Grable* analysis, they correctly anticipated how the Supreme Court would eventually articulate the "special and small category" of *Grable* cases, and jurisdiction was found on that basis. Post-*Grable* jurisprudence is clear—the artful pleading doctrine does not provide an independent basis for removal; it is coextensive with the established exceptions to the well-pleaded complaint rule. Notwithstanding the limiting language of *Romano,* the district court afforded the artful pleading doctrine the broadest reading permitted by precedent by relying on *Marcus* and *Republic of Philippines*

and considering it as coextensive with *Grable*. Had it not done so, it would not have considered the artful pleading doctrine at all, as ExxonMobil has expressly disclaimed complete preemption arguments, and its belief that the artful pleading doctrine provides a basis for removal outside of the recognized exceptions to the well-pleaded complaint rule is unfounded.

Applying the well-pleaded complaint rule and its exceptions and corollary rules, the district court properly concluded that the State's complaint does not present a removable action. ExxonMobil disagrees, and argues that (A) federal common law and (B) *Grable* jurisdiction provide sufficient grounds for removal. As explained below, those arguments are without merit, and this Court should affirm the district court's decision.

A. Federal Common Law Does Not Provide A Basis For Removal.

ExxonMobil's argument that this case arises under federal common law is not supported by the existing law governing removal. It disavows classification as an assertion of complete preemption, yet it purports to stand independent of *Grable*. It also argues nothing about Congressional intent, and thus it shirks all accepted paths to federal question

jurisdiction. That, of course, is sufficient to establish that the argument fails.

Because the State's CUTPA claims so clearly are not removable under current precedent, ExxonMobil seeks to eliminate the well-pleaded complaint rule and its corollaries and replace it with an alternative proposal of how courts should decide removal actions. The district court characterized ExxonMobil's position as "straightforward: federal courts should have jurisdiction over important issues of federal law." J.A. 227. The district court then noted, however, that "[t]he problem for ExxonMobil is that the well-pleaded complaint rule does in fact exist." *Id.*

ExxonMobil premises its argument that removal is proper in cases "governed by" federal common law on a series of decisions that do not relate to removal. *See* Br. at 13-23. At best, these cases support the existence of federal environmental common law, though passage of the Clean Air Act has displaced—or ordinarily preempted—most federal environmental common law. *See City of New York*, 993 F.3d at 95. Additionally, ExxonMobil uses edited excerpts from dicta in these cases to suggest that federal common law has a much more prominent place in modern jurisprudence than it does, *see* Br. at 14-15, but even an unedited

quotation that ExxonMobil cites undermines that argument: "*If state law can be applied, there is no need for federal common law*; if federal common law exists, it is because state law cannot be used." *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 n.7 (1981) (emphasis added).

ExxonMobil then attempts to support its argument that removal is proper in actions "governed by" federal common law by relying heavily on a case—*Republic of Philippines*, 806 F.2d 344—in which federal common law was not the basis for removal. *See* Br. 24-25. As the district court noted, "discussion of federal common law as a basis for removal in *Republic of Philippines* was . . . dicta" because it based removal on what is now known as *Grable* jurisdiction. *See* J.A. 230 n.6 ("the Second Circuit ultimately rested its decision in that case on its determination that plaintiff's state-law claim 'raises, as a necessary element,' an issue of federal law, *i.e.*, what has come to be known as *Grable* jurisdiction."). ExxonMobil points to no other Second Circuit or Supreme Court precedent to support its argument that federal common law can provide a basis for removal because all relevant precedent is to the contrary. *See, e.g., Beneficial*, 539 U.S. at 8 ("a state claim may be removed to federal court in *only* two circumstances—when Congress expressly so provides .

. . or when a federal statute wholly displaces the state-law cause of action through complete pre-emption.") (citation omitted) (emphasis added).

Further analysis of ExxonMobil's federal common law argument reveals why it is outside of existing removal precedent. As the district court noted, this Court has indicated that "courts should apply complete preemption analysis to arguments for removal relating to federal common law." J.A. 230; *see Fax Telecommunications Inc. v. AT&T*, 138 F.3d 479, 486 (2d Cir. 1998). However, precedent limits "complete preemption removal to 'the very narrow range of cases where 'Congress has clearly manifested an intent' to make specific action within a particular area removable.'" *Fax Telecommunications*, 138 F.3d at 486 (quoting *Marcus*, 138 F.3d at 54); *see also Beneficial*, 539 U.S. at 8-11. Because federal common law only exists *in lieu* of manifested Congressional intent, the fairest reading of precedent compels this Court to definitively declare that federal common law cannot provide an independent basis for removal.

In the face of this daunting legal landscape, ExxonMobil nonetheless persists in arguing that federal question removal is somehow supported by the principle from *City of New York* that federal common

law displaces state law claims that premise liability on international pollution. ExxonMobil's argument that federal environmental common law "governs" the State's sovereign enforcement of its consumer protection statute necessarily fails for at least three reasons: (1) the two bodies of law do not overlap at all, let alone so thoroughly that CUTPA is completely preempted; (2) ordinary preemption is not a basis for removal; and (3) *City of New York* is inapposite.

1. The State's CUTPA Claims Do Not Arise Under Federal Environmental Law.

ExxonMobil's federal common law argument fails because the State's CUTPA claims do not arise under federal environmental common law. The State alleges that ExxonMobil violated CUTPA through both deceptive and unfair acts and practices. To properly allege a deception claim under CUTPA, the State need only allege three things: (1) a representation, omission, or other practice likely to mislead consumers; (2) that consumers interpreted the message reasonably under the circumstances; and (3) that the misleading representation, omission or practice was material. *See Caldor*, 577 A.2d at 1013. To properly allege an unfairness claim under CUTPA, the State may allege that the challenged practice: (1) "offends public policy as it has been established

by statutes, the common law, or otherwise"; (2) "is immoral, unethical, oppressive, or unscrupulous"; or (3) "causes substantial injury to consumers . . . ." *Ulbrich*, 78 A.3d at 100. "A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three." *Id.*

As the district court explained, "[the State] alleges that ExxonMobil lied to Connecticut consumers, and that these lies affected the behavior of those consumers." J.A. at 223. The court continued: "[t]he fact that the alleged lies were *about* the impacts of fossil fuels on the Earth's climate does not empower the court to rewrite the Complaint and substitute other claims for [the State's] CUTPA claims." J.A. at 224. The State's claims concern the lies; the same claims could be brought regardless of the topic of the lies.

ExxonMobil's 'arising under' argument is entirely premised on the statutory relief that the State is seeking as penalty for ExxonMobil's CUTPA violations. That relief, however, is purely equitable in nature. *See* Conn. Gen. Stat. § 42-110m. More importantly, it is only "redress for the allegedly deceptive and unfair manner by which ExxonMobil interacted with Connecticut consumers." J.A. 223. Any redress requested

in the Complaint is for the harms that flow from ExxonMobil's deceptive and unfair acts and practices, and the State will be left to its proof. "Plainly, the court cannot award relief corresponding with conduct that goes beyond the claims in the Complaint." J.A. 224 n.4.

The extent to which the State is ultimately successful in proving the catastrophic harm that has flowed from ExxonMobil's decades of deception, and what form of equitable relief should be provided for that harm, are determinations are for another day. Such determinations do not change the law under which the State's claims arise. The State's CUTPA claims do not arise under federal common law, and the district court's order remanding this case to state court should therefore be affirmed.

2. Ordinary Preemption Is Not A Basis For Removal.

Relying on *City of New York*, ExxonMobil asserts that "claims seeking redress for interstate pollution are *governed* exclusively by federal common law . . . ." Br. at 13 (emphasis added). Arguing that state law claims are "governed" by federal law is just another way of arguing that they are preempted. *See, e.g., Beneficial*, 539 U.S. at 8 (complete preemption found when "federal statutes at issue provided the exclusive

cause of action for the claim asserted and also set forth procedures and remedies *governing* that cause of action.") (emphasis added). Indeed, courts have concluded that ExxonMobil's argument that certain claims are "'governed by federal common law' is a cleverly veiled preemption argument." *Baltimore I*, 388 F. Supp. 3d at 555 (citing *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504 (1988); *International Paper Co. v. Ouellette*, 479 U.S. 481, 488 (1987)); *see also Rhode Island I*, 393 F. Supp. 3d at 148; *Hoboken*, 2021 U.S. Dist. LEXIS 169925, at *15-16.

The legal flaw with ExxonMobil's argument is that it conflates ordinary preemption and complete preemption. This difference is not mere semantics. *See Whitehurst v. 1199SEIU United Healthcare Workers East*, 928 F.3d 201, 206 n.2 (2d Cir. 2019) ("Complete preemption is distinct from ordinary or 'defensive' preemption, which includes express, field, and conflict preemption."). "Under the complete-preemption doctrine, certain federal statutes are construed to have such 'extraordinary' preemptive force that state-law claims coming within the scope of the federal statute are transformed, for jurisdictional purposes, into federal claims—i.e., completely preempted." *Sullivan*, 424 F.3d at 272. Ordinary preemption, "also known as defensive preemption," is

much broader, and the existence of ordinary preemption over a claim does not indicate that complete preemption exists. *See id.* at 272-73. Complete preemption is jurisdictional, and ordinary is not. *Id.* at 272 n.5. "The Supreme Court has left no doubt . . . that a plaintiff's suit does not arise under federal law simply because the defendant can raise the defense of ordinary preemption." *Id.* at 273.

Even though ExxonMobil's federal common law argument "parallels the complete preemption doctrine," ExxonMobil has consistently "insist[ed] that its 'invocation of federal common law . . .is *not* an argument for complete preemption.'" J.A. 225 (quoting ExxonMobil's opposition brief). This makes sense, as federal common law cannot provide a basis for complete preemption. *See Beneficial*, 539 U.S. at 8. Thus, the preemption argument ExxonMobil asserts sounds in ordinary, or defensive, preemption, which cannot establish federal jurisdiction.

In the context of the State's CUTPA claims, any "redress for interstate pollution," to the extent it is considered at all, could only be considered after determining liability because there is no causation requirement for the State to prevail on its CUTPA claims. *See supra* at

22-23 (listing CUTPA elements). Under CUTPA, the injury is the unfair or deceptive act itself. Conn. Gen. Stat. § 42-110m ("Proof of . . . public injury shall not be required in any action brought pursuant to . . . this section). In other words, the State can prevail in its case without a court ever assessing the environmental impact—or for that matter any impact—of ExxonMobil's CUTPA violations. *See id.* § 42-110o (b) (permitting civil penalties as remedy for violations). ExxonMobil's argument about federal environmental common law therefore cannot be that it "governs" CUTPA *liability*, but rather that it provides a defense to certain discretionary remedies sought by the State for harms flowing from the unfair or deceptive acts. This is evident by ExxonMobil's reliance on *City of New York.*

As ExxonMobil admits in its brief, this Court in *City of New York* "treated federal common law as a matter of ordinary preemption . . . ." Br. at 26. More than that, however, this Court in *City of New York* explained the difference between the displacement—or ordinary preemption—at issue in that case and the arguments for removal that ExxonMobil raises here. The distinction is in the procedural posture: because *City of New York* was originally filed in district court, this Court

analyzed the argument as an ordinary preemption defense on a motion to dismiss, not under the "heightened standard" of complete preemption "unique to the removability inquiry." *City of New York*, 993 F.3d at 94. ExxonMobil's argument here and the defendants' argument in *City of New York* both present "federal preemption defenses," *id.*, but given the different procedural postures, the same argument has drastically different impacts. In *City of New York*, it mandated dismissal, but when considering removal, it is of no consequence. *Caterpillar, Inc.*, 482 U.S. at 393 ("a case may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption . . . ."). That is why this Court indicated agreement that ExxonMobil's federal common law argument is properly addressed by state courts after remand. *City of New York*, 993 F.3d at 94-95.

ExxonMobil has conflated jurisdictional complete preemption with an ordinary preemption defense. There is no legal authority from any Circuit or the Supreme Court to support the notion that federal environmental common law completely preempts a sovereign State's enforcement of its consumer protection statute. So instead, ExxonMobil attempts to use ordinary preemption as the basis of its claim that the

State must surrender its statutory police powers to the jurisdiction of federal courts simply because the topic of ExxonMobil's deceptive advertising concerns an important national issue. Not only does this offend traditional notions of federalism, but it also fails because ordinary preemption cannot confer federal question jurisdiction.[1]

3. *City of New York* Is Inapposite.

For the reasons stated above, *City of New York* provides no precedential value in adjudicating removal pursuant to federal question jurisdiction. Notwithstanding the procedural and analytical differences that render it distinct from the removal issue here, the State is compelled to distinguish it fully because ExxonMobil has argued that those fundamental legal distinctions should not prevent this Court from using *City of New York* as a basis for removal. *See* Br. at 26. The differences are significant.

First, the legal authority for bringing the actions is different. Connecticut has brought an enforcement action in its sovereign capacity.

[1] The merits of ExxonMobil's ordinary preemption defense also fail. As this Court noted, however, that argument is for "the state court[] to decide upon remand." *City of New York*, 993 F.3d at 94 (quoting *San Mateo I*, 294 F. Supp. 3d at 938).

It has done so pursuant to state statutory authority. *See* Conn. Gen. Stat. § 42-110m. "[The State] has a statutory interest under CUTPA to protect the public from unfair practices in the conduct of any trade or commerce." *Connecticut v. Moody's Corp.*, No. 3:10-cv-546, 2011 U.S. Dist. LEXIS 780, at *10 (D. Conn. Jan. 5, 2011) (internal quotation marks omitted). That interest is different than that of the City of New York, which alleged three common law tort claims not grounded in sovereignty. *City of New York*, 93 F.3d at 88.

Second, the causes of action are different. The State alleges one cause of action: CUTPA. The City of New York alleged public nuisance, private nuisance, and trespass. *City of New York*, 93 F.3d at 88. "CUTPA's standard for liability is flexible unlike the more rigid tort standard." *Sportsmen's Boating Corp. v. Hensley*, 474 A.2d 780, 787 (Conn. 1984). For example, CUTPA liability does not require proof of injury or have causation as an essential element. *See supra* at 26-27. On the other hand, liability for the torts alleged by the City of New York is premised on proving causation and injury. *See, e.g., NAACP v. AcuSport, Inc.*, 271 F. Supp. 2d 435, 492 (E.D.N.Y. 2003) ("[i]t is necessary in a suit seeking the injunction of a public nuisance, just as in other tort actions,

for a plaintiff to show causation."). The legal distinction is significant—the City of New York had to prove that global emissions caused harm to New York, whereas the State need only prove that ExxonMobil's misleading statements violated Connecticut's consumer protection statute.

Third, the relief sought is different. The State seeks injunctive relief, civil penalties, and equitable remedies—including restitution and disgorgement—prescribed by CUTPA. *See* J.A. 51-52. Contrary to ExxonMobil's mischaracterization of the State's requested relief as "statutory damages," *see* Br. at 3, 6, 13, the State does not seek damages. The distinction is not mere labeling—there is a "conceptual distinction" between damages and equitable relief. *Town of New Hartford v. Connecticut Resources Recovery Authority*, 970 A.2d 592, 614 (Conn. 2009) ("[t]he money recovery called damages is based upon the plaintiff's loss, and in that respect stands in bold contrast to the money recovery called restitution, which is based upon the defendant's gain.") (internal quotation marks omitted). In bold contrast to the State's requested equitable relief, the City of New York sought "compensatory damages for

the past and future costs of climate-proofing its infrastructure and property." *City of New York*, 93 F.3d at 88.

Fourth, the activity at issue is different. Here, the unlawful activity at issue is ExxonMobil's deceptive acts and unfair business practices related to marketing and branding. Connecticut does not claim that emissions are unlawful. In fact, the State's statutory enforcement action does not seek to reduce the production, exploration, or distribution of ExxonMobil's products, nor the emissions that result therefrom. The City of New York alleged the opposite. It claimed that the marketing and branding was lawful, and the emissions were unlawful.

Fifth, the venue is different. The State filed its CUTPA action in state court. The City of New York filed its tort action in federal court. As the district court noted, this distinction matters. *See* J.A. 183 ("If [the State] had gone up to the counter, paid [its] filing fee and the case landed on my desk, it might have been a different case.").

Despite different legal authority, causes of action, remedies sought, activities alleged unlawful, and venues, ExxonMobil boldly proclaims that there is "only [one] possible distinction" between this case and *City of New York*. Br. at 22. In fact, the distinctions far outweigh any

similarities. *City of New York* is a completely different case, and if anything, its analysis supports remand here. *City of New York*, 93 F.3d at 94 ("[t]here may be important questions of ordinary preemption, but those are for the state courts to decide upon remand") (quoting *San Mateo I*, 294 F. Supp. 3d at 938).

B. The State's Claims Do Not Trigger *Grable* Jurisdiction.

ExxonMobil argues that federal question jurisdiction is also proper because the State's claims necessarily raise disputed and substantial federal issues. This exception to the well-pleaded complaint rule is known as *Grable* jurisdiction after the case that set forth the test to properly identify the "slim category" of qualifying cases and bring order to this previously "unruly doctrine." *Gunn*, 568 U.S. at 258 (citing *Grable*, 545 U.S. 308 (2005)).

The *Grable* test provides that "federal jurisdiction over a state law claim will lie 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. It presents a high bar, as it is intended only to apply when "federal issues [are] embedded in state-law claims." *Grable*,

545 U.S. at 314. In other words, *Grable* jurisdiction applies only when the plaintiff's "right to relief depends on the resolution of a substantial question of federal law." *Franchise Tax Board*, 463 U.S. at 28; *accord New York v. Shinnecock Indian Nation*, 686 F.3d 133, 139 (2d Cir. 2012).

The Supreme Court has made clear that "it takes more than a federal element 'to open the 'arising under' door [of 28 U.S.C. § 1331].'" *Empire Healthchoice*, 547 U.S. at 701. Indeed, since its recognition, *Grable* jurisdiction has only been found by the Supreme Court in (1) "a series of quiet-title actions from the early 1900s that involved disputes as to the interpretation and application of federal law"; (2) "a shareholder action seeking to enjoin a Missouri corporation from investing in federal bonds on the ground that the federal act pursuant to which the bonds were issued was unconstitutional"; and (3) "a state quiet-title action claiming that property had been unlawfully seized by the Internal Revenue Service (IRS) because the notice of the seizure did not comply with Internal Revenue Code." *Oakland II*, 969 F.3d at 904.

ExxonMobil seeks to avail itself of this narrow exception to the well-pleaded complaint rule by arguing that the State's claims (a) are governed by federal common law, and (b) constitute "collateral attacks on

federal legislative and regulatory determinations." Br. at 30-34. But, as application of the four-prong *Grable* test to the State's Complaint demonstrates, there is no federal issue "embedded" in the State's CUTPA claims; the State's right to relief under CUTPA does not necessarily raise a substantial question of federal law. Moreover, ExxonMobil's expansion of this narrow exception would upend the federal-state balance and unnecessarily usurp states' rights to bring enforcement actions in state court when the underlying conduct is even tangentially related to a federally regulated industry. The district court properly rejected this argument, and this Court should affirm its holding.

1. No Federal Issue Is "Necessarily Raised."

A federal issue is "necessarily raised" for purposes of determining subject matter jurisdiction only if it is "a necessary element of one of the well-pleaded state claims." *City of Rome v. Verizon Communications, Inc.*, 362 F.3d 168, 176 (2d Cir. 2004); *accord Shinnecock Indian Nation*, 686 F.3d at 140-41 (federal issue not necessarily raised because "the court could have resolved the case without reaching the federal issues."). "A state-law claim 'necessarily' raises federal questions where the claim is affirmatively 'premised' on a violation of federal law." *New York ex rel.*

Jacobson v. Wells Fargo National Bank N.A., 824 F.3d 308, 315-16 (2d Cir. 2016). The district court correctly determined that ExxonMobil failed to meet this prong of the *Grable* test because "a court reviewing a CUTPA claim is not required to apply federal law." J.A. 236.[2]

For the same reasons the State's CUTPA claims do not 'arise under' federal common law, *see supra* at 22-24, they do not 'necessarily raise' an issue of federal common law. To fit that argument into a *Grable* analysis, the question before this Court becomes whether the "federal common law of transboundary pollution", *see* Br. at 30-31, is a necessary element of the State's CUTPA claims. It is not. Or, in other words, can the State's CUTPA claims be adjudicated without applying the "federal common law of transboundary pollution"? They can.

The elements of a deception or an unfairness claim under CUTPA—*see supra* at 22-23—contain no element of federal law and require no determination about "transboundary pollution." Moreover, since CUTPA liability does not require proving causation or injury, any issue even

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[2] Much of the district court's *Grable* analysis focused on two arguments that ExxonMobil abandons on appeal. *See* J.A. 235-38 (rejecting arguments based on purported First Amendment defense and Connecticut courts' ability to consider portions of the Federal Trade Commission Act).

peripherally concerning pollution will not be relevant until after a liability determination is made. Put simply, the State's ability to obtain relief under CUTPA has nothing to do with pollution. *See* Conn. Gen. Stat. § 42-110m.

ExxonMobil's second claimed basis for *Grable* jurisdiction also fails to show how a federal issue is necessarily raised. ExxonMobil argues that the State's claims require "deciding the appropriate balance between fossil-fuel production and use, on the one hand, and alleged environmental harms, on the other." Br. 32-33. Specifically, ExxonMobil is critical of certain words within a state environmental statute cited in the State's Complaint to support the claim that ExxonMobil's unfair business practices ran afoul of public policy. But this argument fails for the same reasons that federal common law is not 'necessarily raised'—the State's right to relief does not rely on any determination of federal environmental law.

A CUTPA unfairness claim can be successful by showing one of three things: that the practice (1) "offends public policy as it has been established by statutes, the common law, or otherwise"; (2) "is immoral, unethical, oppressive, or unscrupulous"; *or* (3) "causes substantial injury

to consumers." *Ulbrich*, 78 A.3d at 100. Here, the State pleads all three, including the first factor—that ExxonMobil's advertising and branding statements offend public policy. *See* J.A. 43-50 (counts three and seven). One element of support for the State's assertion of offense to public policy is a state statute. J.A. 46. Another is that ExxonMobil's misleading advertising and branding statements contravened Connecticut's public policy of "truth in advertising." J.A. 46. Undoubtedly, other support for this factor will arise as the case proceeds through discovery. Thus, to establish whether ExxonMobil's conduct met the first unfairness factor, the State may present a variety of different bases and will need not 'necessarily raise' the purported "complex and value-laden policy judgments" that ExxonMobil reads into the State's Complaint. *See* Br. at 32. Moreover, "[a]ll three criteria do not need to be satisfied to support a finding of unfairness" because satisfaction of any one criterion can establish a CUTPA violation. *Ulbrich*, 78 A.3d at 100.

Neither unrelated federal environmental common law nor declarations of state public policy constitute a "necessary element" upon which the State's "right to relief depends." *City of Rome*, 362 F.3d at 176; *Shinnecock Indian Nation*, 686 F.3d at 139. The purported federal issues

to which ExxonMobil points are therefore not necessarily raised. Consequently, *Grable* jurisdiction does not exist in this case.

2. There Is No "Substantial" Federal Issue.

Even if the State's CUTPA claims necessarily raised a federal issue—which they do not—ExxonMobil cannot demonstrate that the raised issue is sufficiently "substantial" as required for *Grable* jurisdiction. A federal issue is substantial if it is "nearly a pure issue of law" that is "both dispositive of the case and would be controlling in numerous other cases." *Empire Healthchoice,* 547 U.S. at 700 (internal quotation marks omitted). An issue that is "fact-bound and situation-specific" does not create a substantial issue. *Oakland II*, 969 F.3d at 905 (quoting *Empire Healthchoice*, 547 U.S. at 701).

The Ninth Circuit rejected the same arguments ExxonMobil asserts here, holding that "state-law claims implicat[ing] a variety of 'federal interests,' including energy policy, national security, and foreign policy . . . do[] not raise a substantial question of federal law for the purpose of determining whether there is jurisdiction under § 1331." *Oakland II*, 969 F.3d at 906-907. It did so for three reasons: (1) defendants there did not assert a distinct "legal issue" (*i.e.,* a nearly pure issue of law), (2) even an

"overwhelming interest" on an "important policy question" does not make an issue substantial, and (3) evaluation of the claim was "fact-bound and situation-specific." *Id.* (citing *Empire Healthchoice*, 547 U.S. at 701). District courts across the country have rejected the same *Grable* arguments made by ExxonMobil here for those same reasons. *See Massachusetts*, 462 F. Supp. 3d at 45; *Boulder I*, 405 F. Supp. 3d at 965-68; *Rhode Island I*, 393 F. Supp. 3d at 150-51; *Baltimore I*, 388 F. Supp. 3d at 558-61; *San Mateo I*, 294 F. Supp. 3d at 938; *Minnesota*, 2021 U.S. Dist. LEXIS 62653, at *19-25; *Hoboken*, 2021 U.S. Dist. LEXIS 169925, at *18-23.

The Ninth Circuit's rationale also applies here. Just as in the Ninth Circuit, ExxonMobil's arguments do not "require[]an interpretation of a federal statute," "challenge[] a federal statute's constitutionality," or "identify a legal issue necessarily raised by the claims that, if decided, will be controlling in numerous other cases." *Oakland II*, 969 F.3d at 906 (internal quotation marks omitted). This is especially true here because—unlike the common law nuisance claims in *Oakland*—the State need not raise any environmental issue to succeed on its CUTPA claims. Although the Ninth Circuit questioned whether state common law tort

claims "require[d] an interpretation or application of federal law at all" because of the Clean Air Act's displacement of federal environmental common law, *id.* at 906, here the analysis is even clearer where the State's CUTPA claims regarding ExxonMobil's marketing and branding—which do not require showing causation or injury—plainly do not implicate any federal law.

Though the concerns ExxonMobil raises are important—indeed, energy policy and the others certainly are—an important issue is not the same as a 'substantial' issue under *Grable*. ExxonMobil has not identified a nearly pure issue of law raised by the State's CUTPA claims that is not fact-specific and would be controlling in numerous other cases. The lack of a 'substantial' issue of federal law is sufficient to determine that this case does not meet the high threshold for *Grable* jurisdiction.

3. The Two Other *Grable* Prongs Are Not Met.

Grable jurisdiction also requires a determination that the issue is "actually disputed" and that it is "capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn*, 568 U.S. at 258. ExxonMobil fails to satisfy either of these prongs.

The issues raised by ExxonMobil are not actually disputed. They are based on a mischaracterization of the State's complaint. Adjudication of the State's CUTPA claims will not implicate issues of transboundary pollution nor mostly preempted federal environmental common law. *See supra* at 36-37. Moreover, the State has not launched a collateral attack on a federal regulatory scheme, and resolution of the State's CUTPA claims will not require consideration of the balance between fossil-fuel production and environmental harm. Those allegations are remnants of ExxonMobil's removal arguments in other jurisdictions in cases alleging state common law nuisance claims that required as part of their adjudication proving causation for damages from greenhouse gases. Concerns about transboundary pollution and federal environmental regulations are immaterial to the State's right to obtain relief from ExxonMobil for its unlawful marketing and branding statements, and they are at best peripheral to a small fraction of remedies sought pursuant to CUTPA.

As to the final prong, requiring resolution of the State's CUTPA claims in federal court pursuant to *Grable* would disrupt the federal-state balance approved of by Congress. When assuming jurisdiction over a

state-law claim, a federal court must ensure "federal jurisdiction is consistent with congressional judgment about the sound division of labor between state and federal courts governing the application of § 1331." *Grable*, 545 U.S. at 313. The Second Circuit has looked to "express congressional preference[s]" in making this determination. *Jacobson*, 824 F.3d at 316. When Congress promulgated the Federal Trade Commission Act, 15 U.S.C. §§ 41-58, it included a savings clause. *See* 15 U.S.C. § 57b (e) ("Remedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law."). In so doing, Congress explicitly gave states the ability to enact and enforce their own consumer protection statutes. To hold otherwise in the face of Congress' express congressional preference would constitute an undue usurpation of our federalist system.

II. No Statutory Grant Of Federal Jurisdiction Exists.

ExxonMobil argues that two federal statutes—the Federal Officer Removal Statute, 28 U.S.C. § 1442, and the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356b—confer federal jurisdiction over the State's CUTPA claims. Legally, these arguments fail because ExxonMobil cannot meet the statutes' criteria. Practically, they fail

because the expansion of the statutes' scope ExxonMobil seeks would cause these narrowly tailored exceptions to swallow the Constitutional rule limiting federal court jurisdiction. *See* U.S. Const. art. III, sec. 2.

A. The Federal Officer Removal Statute Is Inapplicable To The State's Claims.

The Federal Officer Removal Statute authorizes removal of cases alleging claims against "any officer (or person acting under that officer) of the United States or of any agency thereof . . . for or relating to any act under color of such office . . . ." 28 U.S.C. § 1442 (a) (1). To qualify for removal, ExxonMobil must: (1) "show that they are 'person[s]' within the meaning of the statute who 'act[ed] under [a federal] officer'"; (2) "show that they performed the actions for which they are being sued 'under color of [federal] office'"; and (3) "raise a colorable federal defense." *Isaacson*, 517 F.3d at 135. Though these are distinct criteria, all of which must be shown, "they tend to collapse into a single requirement: that the acts that form the basis for the state civil or criminal suit were performed pursuant to an officer's direct orders or to comprehensive and detailed regulations." *In re Methyl Tertiary Butyl Ether Products Liability Litigation*, 488 F.3d 112, 124 (2d Cir. 2007) ("*In re MTBE*") (internal quotation marks omitted).

The "removal statute's basic purpose is to protect the Federal Government from the interference with its operations that would ensue were a State able, for example, to arrest and bring to trial in State court . . . officers and agents of the Federal Government acting . . . within the scope of their authority." *Watson v. Phillip Morris Co.*, 551 U.S. 142, 150 (2007) (internal quotation marks omitted). In other words, "the removal provision was an attempt to protect federal officers from interference by hostile state courts." *Willingham v. Morgan*, 395 U.S. 402, 405 (1969). The statute has served this same basic purpose since 1815, despite several Congressional amendments, including the Removal Clarification Act of 2011. *See San Mateo II*, 960 F.3d at 598; *Willingham*, 395 U.S. at 405 (federal officer removal first existed as provision in 1815 customs statute then as part of other laws before Congress extended to all federal officers in 1948).

Despite two centuries of contrary precedent, ExxonMobil argues for an expansive and unprecedented reading of this statute that would, in essence, permit any entity that ever contracted with the federal government to avoid litigating in a state court, regardless of the claims raised. Four Circuit courts have rejected this argument. *See Baltimore II,*

952 F.3d at 471; *San Mateo II*, 960 F.3d at 603; *Boulder II*, 965 F.3d at 827; *Rhode Island II*, 979 F.3d at 59-60. This Court should as well.

1. ExxonMobil Was Not 'Acting Under' A Federal Officer.

As the First, Fourth, Ninth, and Tenth Circuits have held when presented with nearly identical arguments, ExxonMobil cannot meet the 'acting under' prong required for federal officer removal. 'Acting under' requires a "special relationship" in which the entity "*assists* or . . . helps *carry out* the duties or tasks of the federal superior." *Isaacson*, 517 F.3d at 137 (quoting *Watson*, 551 U.S. at 152, 157). This special relationship goes beyond "simply *complying* with the law" regardless of how intensely the entity's activities are supervised or monitored. *Watson*, 551 U.S. at 152-53. Rather, this relationship requires a private actor "acting on behalf of the officer in a manner akin to an agency relationship" or being "subject to the officer's close direction, such as acting under the 'subjection, guidance, or control of the officer.'" *San Mateo II*, 960 F.3d at 599-600 (quoting *Watson*, 551 U.S. at 151).

ExxonMobil asserts that several actions it has taken over the past century meet the 'acting under' standard: (1) providing fossil fuels for the war effort during World War II; (2) entering into lease agreements with

the federal government under the Outer Continental Shelf Lands Act; and (3) contributing to the strategic energy stockpile as an operator and lessee of the Strategic Petroleum Reserve. Br. at 38-40. Despite the 'acting under' requirement being liberally construed, ExxonMobil cannot demonstrate that it was sufficiently acting under federal officer direction for purposes of triggering federal jurisdiction.

First, ExxonMobil cites a Ninth Circuit case for the proposition that the government exercised significant control of fossil fuels during World War II. Br. at 38 (citing *United States v. Shell Oil Co.*, 294 F.3d 1045 (9th Cir. 2002)). Whether an entity is 'acting under' federal supervision is a fact-specific inquiry. *In re MTBE*, 488 F.3d at 130 (defendants' burden to provide "candid, specific, and positive allegations . . . that they were acting under federal officers") (citation and internal quotation marks omitted). ExxonMobil points to nothing in the record—including any contractual relationship with the federal government—to support this 'acting under' assertion. Indeed, ExxonMobil was not even party in *United States v. Shell Oil Co.* Absent specific allegations about ExxonMobil's contractual relationship with the federal government, this Court has not been provided a sufficient record to make a determination

about the subjection, guidance, or control by the federal government. *In re MTBE*, 488 F.3d at 131 ("in most instances, a contract, principal-agent relationship, or near-employee relationship with the government will be necessary to show the degree of direction by a federal officer necessary to invoke removal under 28 U.S.C. § 1442 (a) (1).").

Even if the Ninth Circuit's description of the federal government's relationship to Shell Oil and other companies during World War II could be imputed to ExxonMobil, however, the degree of supervision and control described in the cited caselaw fails to meet the requisite standard. The Ninth Circuit explained that petroleum refiners in the 1930s "developed new technologies for producing high-octane gas fuel," and the "primary consumer of this fuel was the Unites States military." *Shell Oil Co.*, 294 F.3d at 1049. In other words, the companies developed a product and sold it. The Court summarized the nature of the relationship: "[t]hroughout the war, the Oil Companies designed and built their facilities, maintained private ownership of the facilities, and managed their own refinery operations. The Oil Companies affirmatively sought contracts to sell [fossil fuel] to the government, and the contracts were profitable throughout the war." *Id.* at 1050.

The 'control' element that is crucial to ExxonMobil's argument came from "the War Production Board ("WPB") and the Petroleum Administration for War ("PAW")." *Id.* at 1049. These "agencies to oversee war-time production" were, in essence, merely strict federal regulators. For example, "[t]he WPB established a nationwide priority ranking system to identify scarce goods, prioritize their use, and facilitate their production; it also limited the production of nonessential goods." *Id.* The regulated entities, of which ExxonMobil claims one of its predecessor corporations was, simply had to comply with the new legal requirements about which products could be made and which could not. That sort of regulation does not constitute the requisite intense oversight or special agency relationship required for federal officer removal. *See Watson*, 551 U.S. 157 ("differences in the degree of regulatory detail or supervision cannot by themselves transform . . . regulatory *compliance* into ['acting under'] assistance"). If it did, every company that adjusted its production practices to contribute to the federal government's World War II efforts could claim to meet the first prong for federal officer removal.

Second, ExxonMobil asserts that it was 'acting under' federal direction because of its leases with the federal government to conduct

operations on the outer Continental Shelf. Unlike the other asserted bases, ExxonMobil has provided the Court with evidence, in the form of copies of the leases, to support this claim. These same lease agreements, however, have been found insufficient to meet the 'acting under' criterion by four other Circuits. *See Baltimore II*, 952 F.3d at 465 (noting that lease provisions mirror regulatory requirements of the Outer Continental Shelf Lands Act (OCSLA), constitute mere arms-length commercial transactions, and do not sufficiently control lessee's activities); *San Mateo II*, 960 F.3d at 602-603 ("[t]he leases do not require that lessees act on behalf on the federal government, under its close direction, or to fulfill basic governmental duties. Nor are lessees engaged in an activity so closely related to the government's function that the lessee faces a significant state-court prejudice. In fact, the lease requirements largely track legal requirements . . . .") (citation and internal quotation marks omitted); *Boulder II*, 965 F.3d at 823-826 (agreeing with Fourth and Ninth Circuits that lease agreements fail to demonstrate 'acting under' federal officer because agreements amount to mere regulation and do not give government control of production of oil and gas or require it conform to government use); *Rhode Island II*, 979 F.3d at 59 ("[i]n the OCSLA

leases . . . there appears to be no 'close supervision' of this extraction or production of oil 'specifically conformed to government use.'"). As the same lease agreements are provided here, this Court should follow the reasoning of the First, Fourth, Ninth and Tenth Circuits to hold that the lease agreements are insufficient to meet the 'acting under' requirement for federal officer jurisdiction.

Third, ExxonMobil states that it was 'acting under' the federal government through its involvement in the Strategic Petroleum Reserve and other actions "promoting energy security and reducing reliance on oil imported from hostile powers." Br. at 39-40. This bald assertion, however, suffers from the same lack of candid, specific, and positive allegations as its assertions about assisting with fossil fuel production in World War II. For that reason alone, it is insufficient. Moreover, even giving full credit to the unsupported assertions contained in ExxonMobil's Notice of Removal, J.A. 90-98, this argument suffers from the same flaws as ExxonMobil's reliance on the OCSLA lease agreements: the relationship created is mere government regulation, and any purported agreements—such as those requiring paying "in kind" royalties, Br. at 40—are simply arm's-length transactions with conditions exchanged for the profitable

privilege of conducting oil exploration and production on valuable government-owned land.

None of ExxonMobil's purported activities were done 'acting under' a federal officer such that they would confer federal jurisdiction. As such, the Court need not conduct any further analysis to reject jurisdiction under 28 U.S.C. § 1442.

2. There Is No Nexus Between ExxonMobil's Purported Actions Under A Federal Officer And The State's Claims.

Under the second prong of the Federal Officer Removal Statute, ExxonMobil must demonstrate that it "performed *the actions for which [it] is being sued* 'under color of [federal] office.'" *Isaacson*, 517 F.3d at 135 (emphasis added). In other words, ExxonMobil must demonstrate that its *marketing and branding statements* were directed by a federal officer. It cannot, and therefore it is not entitled to remove this case pursuant to 28 U.S.C. § 1442. J.A. 239-40. Because ExxonMobil cannot plausibly allege that its World War II fossil fuel production, its drilling operations under OCSLA leases, or its involvement with the Strategic Petroleum Reserve are the actions for which the State has alleged CUTPA violations, it instead urges this Court to abandon precedent and,

in essence, eliminate the need for there to be *any* nexus between an act taken at direction of a federal officer and the conduct for which the party is being sued. This argument is wholly unsupported, and the district court properly rejected it.

Despite federal officer removal having the same basic premise for two centuries, *see supra* at 45-46, ExxonMobil argues that the Removal Clarification Act of 2011 drastically changed its scope by adding the words "or relating to" in several places. *See* Pub L. No. 112-51, 125 Stat. 545. The clause at issue now states that federal officer removal applies to actions against entities acting under federal officers "for or relating to any act under color of such office." 28 U.S.C. § 1442 (a) (1). Even a cursory examination of the Public Act upon which ExxonMobil bases its argument, however, reveals that the purpose of the Act was to clarify what *type* of proceeding qualifies for federal officer removal. *See* Pub L. No. 112-51, Sec. 2 (a) (titled "Clarification of Inclusion of Certain *Types* of Proceedings") (emphasis added). The substantive amendment defines "civil action" and "criminal prosecution" to include "any proceeding (whether or not ancillary to another proceeding) to the extent that in such proceeding a judicial order, including a subpoena for testimony or

documents, is sought or issued." *Id.* at Sec. 2 (a) (2). It further clarifies that only *that* proceeding, and not the entire litigation, may be removed to district court. *Id.* The "relating to" language on which ExxonMobil premises this entire argument is merely part of the conforming amendment to make sure that the substantive amendment is reflected throughout the statute. *See id.* at Sec. 2 (b). That this is the intent of the Removal Clarification Act of 2011 is also reflected in the bill's summary. *See* https://www.congress.gov/bill/112th-congress/house-bill/368 (last visited November 1, 2021). ExxonMobil points to nothing to suggest otherwise.

Instead, ExxonMobil's argument that the "relating to" language should change the scope of the Second Circuit's review relies primarily on the assessment of the Fifth Circuit, which sat *en banc* to address its own "extraordinarily confused" precedent about the extent to which a causal nexus is required. *See Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286, 289 (5th Cir. 2020). However, in *Latiolais*, the Fifth Circuit merely rejected its prior "*direct* causal nexus test," *id.* at 292 (emphasis in original), which was much stricter than the causation test used by the Second Circuit, so that its jurisprudence would "align with sister

circuits," *id.* at 289. Indeed, the other Circuits, to which ExxonMobil points, that have considered the 2011 Removal Clarification Act, now simply conform with the interpretation the Second Circuit has had all along. *See Baker v. Atlantic Richfield Co.*, 962 F.3d 937, 944-45 (7th Cir. 2020) (quoting *Isaacson* for proposition that "[t]o show causation, Defendants must only establish that the act that is the subject of Plaintiffs' attack . . . occurred *while* Defendants were performing their official duties."); *Sawyer v. Foster Wheeler LLC,* 860 F.3d 249, 258 (4th Cir. 2017) (rejecting "*strict causal connection*" test to determine that federal officer removal proper when boiler builder died from asbestos exposure when building boilers for the Navy) (emphasis in original); *In re Commonwealth's Motion to Appoint Counsel*, 790 F.3d 457, 471 (3d Cir. 2015) (federal officer removal proper where disqualification proceedings initiated against Federal Defenders for failing to conform professional activities to those statutorily granted).

The causal nexus test in the Second Circuit has never required showing that the claim be "for the very acts" directed by federal authority. *Isaacson*, 517 F.3d at 137 (quoting *Maryland v. Soper*, 270 U.S. 9, 33 (1926)). Rather, when applied to "non-governmental corporate

defendants, such entities must demonstrate that the acts for which they are being sued . . . occurred *because of what they were asked to do by the Government*." *Isaacson*, 517 F.3d at 137 (emphasis added). "The hurdle erected by this requirement is quite low," *id.*, but it is a requisite hurdle that this Court has consistently reiterated even after the 2011 Removal Clarification Act. *See Veneruso v. Mount Vernon Health Center*, 586 Fed. Appx. 607, 608 (2d Cir. 2014) (noting "requisite 'causal connection' between the acts for which [defendant] is being sued and the asserted federal authority"); *Agyin v. Razmzan*, 986 F.3d 168, 179 (2d Cir. 2021) (sufficient nexus when "*challenged conduct* was directed by federal regulation and he was acting under a federal officer.") (emphasis added); *Badilla v. Midwest Air Traffic Control Service, Inc.*, 8 F.4th 105, 120-21 (2d Cir. 2021) (citing *Isaacson*'s nexus requirement as being met when air traffic controller "being sued for allegedly negligent acts that occurred *while performing* its official air traffic control duties.") (emphasis added).

ExxonMobil cannot demonstrate its advertising decisions and branding statements "occurred because of what [it was] asked to do by the Government." *Isaacson*, 517 F.3d at 137. Indeed, finding a sufficient nexus for the acts purportedly performed at the direction of federal

officers and ExxonMobil's marketing and branding statements would require eliminating the nexus prong of the federal officer removal test altogether. *See* J.A. 188 (district court questioning ExxonMobil about whether hypothetical automobile accident with ExxonMobil tanker truck delivering gas could satisfy 'related to' standard). Elimination of the nexus prong for federal officer removal, as ExxonMobil advocates, would offend notions of federalism by permitting removal of any State enforcement action to federal court simply because a private actor, at some point in time in an unrelated matter, acted under a federal officer's control.

ExxonMobil has failed to present any credible connection between its relationship to the federal government and its unfair and deceptive marketing practices. As the First Circuit held, with regard to similar examples of purported federal control, including OCSLA leases, "these agreements may have the flavor of federal officer involvement in the oil companies' business, but that mirage only lasts until one remembers what [the State] is alleging in its lawsuit." *Rhode Island II*, 979 F.3d at 59-60. "There is simply no nexus between anything for which [the State] seeks damages and anything the oil companies allegedly did at the behest

of a federal officer." *Id.* at 60. The same is true here, and this Court should therefore affirm the district court's denial of removal pursuant to 28 U.S.C. § 1442 (a) (1).

B. The Outer Continental Shelf Lands Act (OCSLA) Is Inapplicable To The State's Claims.

Federal jurisdiction under OCSLA simply does not exist in this case. *See* 43 U.S.C. § 1349 (b) ("the district courts of the United States shall have jurisdiction of cases and controversies arising out of, or in connection with (A) any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals . . . ."). "Courts typically assess jurisdiction under this provision in terms of whether (1) the activities that caused the injury constituted an 'operation' 'conducted on the outer Continental Shelf' that involved the exploration and production of minerals, and (2) the case 'arises out of, or in connection with' the operation." *In re Deepwater Horizon*, 745 F.3d 157, 163 (5th Cir. 2014). The second prong has been interpreted as a but-for causation requirement. *Id.* ExxonMobil cannot meet either criterion.

ExxonMobil cannot meet the first criterion because "the term 'operation' contemplate[s] the doing of some physical act on the [outer Continental Shelf]." *EP Operating Limited Partnership v. Placid Oil Co.,* 26 F.3d 563, 567 (5th Cir. 2014). Moreover, that activity must relate to exploration, development, or production. *Id.* at 567-68 (reading 'operation' broadly "to encompass the full range of oil and gas activity from locating mineral resources through the construction, operation, servicing and maintenance of facilities to produce those resources."). Here, however, even considering a broad reading of 'operation,' the marketing of fossil fuel products is not an "operation . . . involv[ing] exploration, development, or production" of oil and gas on the outer Continental Shelf. Indeed, the State's complaint does not allege anything about any of ExxonMobil's purported activities on the outer Continental Shelf. *See* J.A. at 243 ("although the Complaint details the harms caused by combustion of fossil fuels in order to explain why ExxonMobil's statements violate CUTPA, these are not the harms that underlie [the State's] claims in this case."). There is no "operation" at issue.

Likewise, ExxonMobil cannot meet the "arising out of" but-for causation requirement of the second criterion required for OCSLA

jurisdiction. ExxonMobil's marketing and branding statements did not occur *but for* its purported operations on the outer Continental Shelf. *See* J.A. 242 ("ExxonMobil's argument on this issue fails because the claims [the State] has chosen to bring in this case seek redress for deceptive and unfair practices relating to ExxonMobil's interactions with consumers in Connecticut"). Any relationship to outer Continental Shelf operations—if one exits at all—is far too attenuated for OCSLA jurisdiction. Even courts that decided cases in which causation and injury were required for establishing liability rejected removal based on OCSLA. *See, e.g., Boulder I*, 405 F. Supp. 3d at 978 (holding no jurisdiction under OCSLA because "[t]he fact that some of ExxonMobil's oil was apparently sourced from the [outer Continental Shelf] does not create the required direct connection."); *Rhode Island I*, 393 F. Supp. 3d at 151-52 (holding no jurisdiction under OCSLA because "Defendants' operations on the Outer Continental Shelf may have contributed to the State's injuries; however, Defendants have not shown that these injuries would not have occurred but for those operations."); *Baltimore I*, 388 F. Supp. 3d at 566-67 (holding no jurisdiction under OCSLA because "defendants offer no basis to enable this Court to conclude that the City's claims for injuries

stemming from climate change would not have occurred but for defendants' extraction activities on the [outer Continental Shelf]."); *San Mateo I*, 294 F. Supp. 3d at 938-39 (holding no jurisdiction under OCSLA because "defendants have not shown that the plaintiffs' causes of action would not have accrued *but for* the defendants' activities on the shelf.").

In short, the State's claims do not arise out of, nor are they in connection with, ExxonMobil's exploration, development, or mineral production operations on the outer Continental Shelf.

CONCLUSION

The remand order and judgment of the district court should be affirmed, and this case should be remanded to the Superior Court of Connecticut, Docket No. HHD-CV-20-6132568-S.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I, Benjamin W. Cheney, Assistant Attorney General of the State of Connecticut and a member of the Bar of this Court, certify pursuant to Federal Rule of Appellate Procedure 32 (g) and Local Rule 32.1 (a) (4), that the foregoing Brief of Appellee State of Connecticut is proportionately spaced, has a typeface of 14 points or greater, and contains 12,082 words.

NOVEMBER 4, 2021

/s/ Benjamin W. Cheney
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CERTIFICATE OF SERVICE

I, Benjamin W. Cheney, Assistant Attorney General of the State of Connecticut and a member of the Bar of this Court, certify that, on November 4, 2021, the attached Brief of Appellee State of Connecticut was filed through the Court's electronic filing system. I certify that all participants in the case are registered users with the electronic filing system and that service will be accomplished by that system.

/s/ Benjamin W. Cheney
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