UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

STATE OF VERMONT, Plaintiff, v. EXXON MOBIL CORPORATION, EXXONMOBIL OIL CORPORATION, ROYAL DUTCH SHELL PLC, SHELL OIL COMPANY, SHELL OIL PRODUCTS COMPANY LLC, MOTIVA ENTERPRISES LLC, SUNOCO LP, SUNOCO, LLC, ETC SUNOCO HOLDINGS LLC, ENERGY TRANSFER (R&M), LLC, ENERGY TRANSFER LP, and CITGO PETROLEUM CORPORATION, Defendants.	)	Case No. 2:21-cv-260

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION TO REMAND

STATE OF VERMONT

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INTRODUCTION

Defendants' Notice of Removal ("NOR") is predicated primarily on their manifestly incorrect insistence that Plaintiff, the State of Vermont, brought this action to hold them liable "for harms stemming from climate change," NOR ¶ 15, Doc. 1, and thus the State's claims must be decided under federal law and in federal court. But no matter how many times Defendants say so, the State plainly does not seek to hold Defendants liable for such harms. Because the entire NOR is premised upon this objectively unreasonable mischaracterization of the Complaint, this action was improperly removed from state court. It should, and must, be remanded. The State should also be awarded attorney fees.

The Complaint states unambiguously that this action seeks only to enforce a state statute, the Vermont Consumer Protection Act, 9 V.S.A. § 2453 ("VCPA"), which requires fair and honest dealing by those who market products or services to Vermont consumers. The Complaint alleges that Defendants have violated the VCPA by deceptively marketing their fossil fuel products to Vermont consumers. Protecting consumers from such deception is at the core of a state's regulatory authority and a vital state interest. While Defendants extol their decades of purported involvement in matters involving national security, national defense, or national energy needs, they are still subject to the requirements of the VCPA—just like anyone else that carries on business in the State. Their prior service to the U.S. Government does not give them *carte blanche* to engage in unfair or deceptive acts and practices when marketing their products to consumers in Vermont or elsewhere.

Throughout the NOR, Defendants conflate the difference between harm to the *marketplace* caused by their deceptive promotion of their products, and harm to the *environment* caused by use of their products. While Defendants' deceptive marketing does concern the

untruths they convey to consumers about topics such as "emissions" and "climate change," this action seeks to remedy only the former: harm to the transparency and integrity of the marketplace, which is squarely within a state's traditional police powers. This action does not seek to regulate global greenhouse gas emissions or to hold Defendants liable for harm caused by such emissions, nor will a state court judgment against Defendants have any such effect.

Deception-free marketing to Vermont consumers would not "force a reduction in fossil fuel sales," NOR ¶ 17, nor implicate "Defendants' nationwide and global activities" to produce fossil fuels, the U.S. Government, the U.S. military, foreign governments and their militaries, heavy industries, or basic infrastructure. *Id.* ¶ 19. It *would* affect "individual households", *id.*, because it would enable Vermont consumers to make purchasing decisions about Defendants' products based on truthful and complete information, including whether to buy them and if so, in what quantities. That is how the marketplace is supposed to operate. If, as Defendants contend, complying with state consumer protection laws will have the effect of reducing demand for their products, that would simply reflect the operation of the "invisible hand" of an efficient marketplace and only serves to confirm the materiality of their deceptions.

Because the State does not seek damages for harms caused by greenhouse gas emissions, any reliance upon *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021) collapses. There is no basis for this Court to apply federal common law to the State's consumer protection claims, and no basis for jurisdiction under *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.,* 545 U.S. 308 (2005). In fact, nothing in the Complaint implicates a federal interest sufficient for this Court to exercise jurisdiction. To the contrary, consumer protection actions are routinely heard by state courts applying state law, including statutes like the VCPA.

Defendants' remaining arguments also are not colorable. Defendants make the empty argument that this action is removable under the Federal Officer Removal Statute and the Outer Continental Shelf Lands Act, but neither statute is remotely applicable here. While the NOR offers a far-ranging and irrelevant historical narrative on matters such as World War II, the Korean War, and the Cold War, it identifies no federal decision, policy, or directive concerning Defendants' marketing practices in Vermont or elsewhere. Those practices are not even plausibly related to any activities they supposedly undertook at the direction of the U.S. government or on the Outer Continental Shelf. Nor does this action arise out of "federal enclaves." There also is no basis for diversity jurisdiction since the State is the "real party in interest" on the plaintiff's side. This case belongs in state court, where it was brought.

BACKGROUND

A. The Complaint.

On September 14, 2021, the State filed this action in the Vermont Superior Court, Civil Division seeking to remedy past and ongoing violations of the VCPA. The State alleges that Defendants have violated the VCPA by engaging in deceptive acts and unfair practices in the marketing, distribution, and sale of gasoline and other fossil fuel products to Vermont consumers. Below, the Complaint is summarized as it is actually pleaded, as opposed to Defendants' tactically re-imagined version of it.

Defendants are major marketers, distributors, and sellers of fossil fuel products, including branded gasoline and motor oil products sold to consumers in Vermont. Collectively, their fossil fuel products are marketed, distributed, and sold to Vermont consumers at over 220 branded gas stations in the State, Compl. ¶ 29, and at retail establishments in Vermont such as Advance Auto Parts, AutoZone, Costco, TSC Tractor Supply, O'Reilly Auto Parts, and Jiffy Lube. *Id.* ¶¶ 36-37, 39. Defendants have violated the VCPA by marketing their fossil fuel products to Vermont

consumers in a deceptive and unfair manner, misrepresenting the purported environmental benefits of their products and concealing what Defendants have long known: that their products are a significant source of greenhouse gas emissions and a major cause of ongoing climate change. These deceptive and unfair practices are ongoing.

As the Complaint makes explicit, the State does not seek relief that would impose requirements on Defendants' "extraction or production of fossil fuels," force them to discontinue those activities, or eliminate or restrict the distribution or sale of Defendants' products to Vermont consumers. *Id.* ¶ 6. Nor does it seek to hold Defendants liable for any environmental harm or remediation in Vermont or elsewhere. *Id.* Rather, this action seeks solely to enforce the statutory requirement under the VCPA that Defendants must sell their products to Vermont consumers based on fair and honest disclosures, free of unfair and deceptive acts and practices, so that Vermont consumers can make their own independent and informed choices. *Id.* It alleges that Defendants have violated the VCPA, and continue to do so, in several distinct but related ways.

First, as the Complaint alleges in specific detail, Defendants have known for decades, based on scientific research they conducted or commissioned, that consumer use of their fossil fuel products is a major cause of harmful climate change, but Defendants have actively misrepresented and concealed that information in marketing their products to Vermont consumers. *See*, *e.g.*, *id.* ¶¶ 67-69. This deception has had a material impact on Vermont consumers and the choices they have been able to make as to their purchase and use of fossil fuels, and violates the VCPA, which was enacted to ensure that State consumers are able to make such decisions based on fair and honest disclosures in the marketplace. *Id.* ¶¶ 4-6.

Indeed, an ExxonMobil predecessor had begun measuring the increase in atmospheric CO_2 caused by fossil fuel consumption as early as 1957. *Id.* ¶ 44. By the late 1960s, the American Petroleum Institute ("API"), an industry group whose leadership included Defendants, had commissioned and received scientific studies concluding that due to fossil fuel consumption "'[s]ignificant temperature changes are almost certain to occur by the year 2000, and that there seems to be no doubt that the potential damage to our environment could be severe.'" *Id.* ¶ 48. By 1980, a petroleum industry "Climate and Industry Task Force," in which Defendants participated, had learned that the rise in atmospheric CO_2 was caused mainly from fossil fuel burning and was trending toward a "doubling of preindustrial levels of atmospheric carbon dioxide by 2038," with a likely 2.5°C rise in global temperature and "major economic consequences by 2038, and a 5°C rise with 'globally catastrophic effects' by 2067." *Id.* ¶¶ 52-53 (quoting report by Dr. John Laurmann). ExxonMobil and Shell separately conducted internal scientific research that corroborated the climate change findings reported to API, and they began planning internally to modify their operations—such as taking into account more violent storms and a wetter, warmer climate in their development efforts— based on their knowledge of the climate impacts of consumer use of their products.

But while the Defendants knew that consumer use of their products was a major cause of global warming—and ExxonMobil and Shell even altered their production operations to take it into account—Defendants repeatedly lied to the consuming public in Vermont and elsewhere about their products' role in climate change and took affirmative steps to conceal their knowledge so that these consumers would be kept in the dark about the products' harmful effects. Rather than inform Vermont consumers and others of the dangers known to them regarding the consumption of their products, Defendants, individually and through API and other industry groups, took the

opposite tack, and for decades engaged in concerted disinformation campaigns to have consumers believe that their "products were not harmful or were far less harmful to the environment than other products." *Id.* ¶¶ 67-68.

This included deceptive advertising designed to sow false doubts among consumers about climate change or that it was largely being caused by Defendants' products. The reports, ads, website posts, and other marketing to Vermont consumers—by individual Defendants and collectively through API—directly contradicted the findings of their own research and climate scientists generally that use of Defendants' products was increasingly affecting the Earth's climate. *Id.* ¶¶ 69-71.

The Complaint further alleges that the Defendants' efforts to deceive Vermont consumers have continued in more recent years through their ongoing advertising that holds out their fossil fuel products as climate friendly and supposedly better for the environment than other products, while failing to disclose the substantial adverse impacts Defendants' products continue to have on the climate. In an earlier era, cigarette manufacturers deceptively advertised their products as "low-tar," "light," or "mild," thus misleading consumers into believing that certain cigarettes were safer than others and a healthy alternative to quitting smoking. *Id.* ¶¶ 96-97. The Defendants here have similarly marketed their gasoline and other fossil fuel products using terminology such as "green," "clean," "cleaner," "purer," and "lower emissions" to deceive Vermont consumers into believing that using their products will minimize or reduce the impact on the climate, while not disclosing to consumers that any supposed reduction in emissions is immaterial and that use of their fossil fuel products remains a leading cause of global warming. *Id.* ¶¶ 97-98.

The State also alleges that Defendants continue to reinforce the ongoing deception that their fossil fuel products are unconnected with climate change by inundating Vermont consumers with their "greenwashing" campaigns, *i.e.*, marketing strategies that falsely hold the Defendants out to consumers as responsible stewards of the environment who are actively promoting solutions to climate change, when in fact the Defendants remain major sources of the problem. *Id.* ¶¶ 119-20. Defendants are fully aware that purchasing decisions of environmentally conscious consumers in Vermont and elsewhere can be materially influenced by their perceptions of whether a seller is environmentally responsible. Defendants thus "employ false and misleading" marketing—including "at the point-of-sale at Vermont gas stations"—to deceive Vermont consumers into believing that Defendants are "environmentally responsible companies" "committed to finding solutions to the climate crisis," when in fact Defendants have been and remain a significant cause of it. The campaigns direct consumer attention away from the fact that Defendants' core businesses remain focused upon the sale of fossil fuel products that exacerbate climate change, and that Defendants' alternative energy efforts are miniscule in comparison and irrelevant. *Id.* ¶ 120.

The State seeks: (i) to enjoin the Defendants from further deception of Vermont consumers regarding the climate impacts of their products, and to require them "to take affirmative steps to rectify their prior" "deceptive acts", including signage on pumps at Vermont gas stations selling their products; (ii) disgorgement of amounts the Defendants obtained or "retained as a result of their" deceptive acts and practices directed toward consumers in the State; (iii) civil penalties under the VCPA for the unfair and deceptive acts and practices; and (iv) the State's litigation and investigative costs. *Id.* p. 67-68 (Prayer for Relief).

The relief sought in this action is no different than the relief routinely sought and awarded under consumer protection statutes like the VCPA. *See, e.g. Vermont v. R. J. Reynolds Tobacco Co.*, No. S1087-05 CnC, 2013 WL 3184666, at *1 (Vt. Super. Ct. June 3, 2013) (awarding civil penalties and injunctive relief to enjoin and correct cigarette misrepresentations); Complaint at 95-96, *Vermont v. Purdue Pharma L.P.*, (Vt. Super. Ct. Oct. 31, 2018) (No. 757-9-18) (state complaint seeking civil penalties, disgorgement of profits, and injunctive relief regarding opioids misrepresentations);[1] Complaint at 26-27, *Vermont v. Clearview AI, Inc.*, (Vt. Super. Ct. Mar. 10, 2020) (No. 226-3-20) (state complaint seeking civil penalties, disgorgement of profits, and injunctive relief regarding facial recognition technology misrepresentations).[2]

For purposes of remand, it is equally important for the Court to consider what the State's consumer protection action does ***not*** seek. The Complaint does not seek damages, restitution, or other monetary relief for any environmental harm that may be associated with climate change. Nor does the Complaint seek to regulate in any way the Defendants' production of fossil fuels, or force them to discontinue those activities, or to stop or reduce their distribution and sale of their fossil fuel products in Vermont or elsewhere. It simply asks to hold them accountable for the decades of lying to Vermont consumers, which is ongoing.

B. The Notice of Removal.

On October 22, 2021, Defendants removed this action to this Court. Their NOR sews together snippets of words and phrases from different parts of the Complaint to create a false impression that the "core purpose" of the Complaint is to "force reductions in fossil fuel

[1] *Available at:* https://ago.vermont.gov/wp-content/uploads/2018/11/Purdue-Pharma-Unredacted-Complaint.pdf

[2] *Available at:* https://ago.vermont.gov/wp-content/uploads/2020/03/Complaint-State-v-Clearview.pdf

production, promotion, and sales." NOR ¶ 10. Ascribing a motive and a claim for relief that neither appear nor are implied anywhere in the State's pleading, Defendants contend that "the fundamental issue raised in the Complaint is not the accuracy of representations about the products being sold, but whether Defendants' products should be sold in reduced quantities or even sold at all." *Id.* ¶ 11. This characterization is manifestly false.

Based upon their mischaracterization of the claims in the Complaint, Defendants proceed to assert six grounds for removal, contending that: (i) Vermont's VCPA claims "arise under" federal law because they purportedly are governed by federal common law; (ii) *Grable* jurisdiction exists because the claims purportedly raise substantial federal issues (including that the claims are governed by federal common law); (iii) jurisdiction exists under the federal officer removal statute because the VCPA claims purportedly are "'connected or associated' with fossil fuel production activities that Defendants have undertaken at federal direction for decades"; (iv) jurisdiction exists under the Outer Continental Shelf Lands Act because the case purportedly "arises out of, or in connection with, operations Defendants conducted on the Outer Continental Shelf"; (v) the claims supposedly "arise out of Defendants' substantial fuel production activities on federal enclaves," warranting "federal enclave jurisdiction"; and (vi) there is diversity jurisdiction because Vermont consumers are purportedly the "real parties in interest" to this State enforcement action. NOR ¶¶ 26-31. None of these have merit.

LEGAL STANDARD

Consistent with the need for federal-state comity, federal courts should not "snatch cases … brought from the courts of [a] State, unless some clear rule demands it." *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for S. Cal.,* 463 U.S. 1, 21 n.22 (1983). Accordingly, removal statutes are strictly construed against removal and any doubts "are resolved against removability out of respect for the limited jurisdiction of the federal courts and

the rights of the states." *Hubacz v. Vill. Of Waterbury, Vt*., No. 2:14-cv-134, 2014 WL 4060314, at *3 (D. Vt. Aug. 14, 2014) (citing *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.,* 488 F.3d 112, 124 (2d Cir.2007)) (internal citations omitted).

The removing party "bears the burden of showing that federal jurisdiction exists." *Hand v. Chrysler Corp.,* 997 F. Supp. 553, 555 (D. Vt. 1998); *see also Blockbuster, Inc. v. Galeno,* 472 F.3d 53, 57 (2d Cir. 2006); *Vermont v. MPHJ Tech. Invs., LLC*, No. 2:14-cv-192, 2015 WL 150113, at *4 (D. Vt. Jan. 12, 2015), *aff'd*, 803 F.3d 635 (Fed. Cir. 2015). Here the burden falls upon the Defendants. It is a burden they cannot meet.

ARGUMENT

This action was improperly removed from state court. No statute or common law doctrine authorizes this Court to exercise subject matter jurisdiction over Vermont's consumer protection claims, which arise solely under the VCPA and do not implicate any "uniquely federal interest," *Texas Indus., Inc. v. Radcliff Materials, Inc.,* 451 U.S. 630, 640 (1981), or "substantial" federal question, *Gunn v. Minton,* 568 U.S. 251, 258 (2013). None of the alleged bases for removal jurisdiction is even colorable.

I. Because the State's Claims in This VCPA Enforcement Action Do Not "Arise Under" Federal Law, Removal on That Basis Was Unauthorized.

Defendants allege removal jurisdiction under 28 U.S.C. § 1441(a), which is coextensive with original jurisdiction under 28 U.S.C. § 1331. NOR ¶ 24 & n.8. Section 1331 states that the district courts "shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. A case "arises under" federal law "when federal law creates the cause of action asserted." *Gunn,* 568 U.S. at 257. The "creation" test "accounts for the vast bulk of suits that arise under federal law" and "admits of only extremely rare exceptions." *Id.*

Whether a claim arises under federal law is determined by examining the "well pleaded" allegations of the complaint. *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 6 (2003). Federal jurisdiction exists "only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Rivet v. Regions Bank of La.,* 522 U.S. 470, 475 (1998). As the "master of [its] claim," a plaintiff may "avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar Inc. v. Williams,* 482 U.S. 386, 392 (1987).

This action does not "arise under" federal law since the VCPA causes of action—the only causes of action alleged—are created by state and not federal law. Defendants nevertheless allege that the State's claims "concern transboundary pollution and foreign affairs and raise significant federalism concerns, and therefore 'must be brought under federal common law.'" NOR ¶ 26 (quoting *City of New York*, 993 F.3d at 95). Not so. As discussed below, Defendants' reliance upon *City of New York* is misplaced because, among other things and unlike the plaintiff in that case, Vermont does not seek "to hold multinational oil companies liable for damages caused by global greenhouse gas emissions." 993 F.3d at 85. Nor do the claims in this action otherwise implicate any "uniquely federal interest" that would warrant the substitution of judicially created "federal common law" for the governing rules the Vermont legislature set forth in the VCPA.

Moreover, under the "well pleaded complaint" rule, federal common law would not provide a basis for removal absent complete preemption of state law, which, as shown below, does not exist here. Recognizing that obstacle to removal, Defendants assert in the alternative that jurisdiction exists under *Grable,* either because the VCPA claims are governed by federal common law or because they raise other "substantial federal issues." But the claims are not

governed by federal common law and do not otherwise raise substantial federal issues. Defendants' reliance upon *Grable*, therefore, also is misplaced.

A. Federal Common Law Does Not Displace the State's VCPA Claims.

Federal courts "do not possess a general power to develop and apply their own rules of decision." *Milwaukee v. Illinois & Michigan,* 451 U.S. 304, 312 (1981). While federal courts have "the need and authority in some limited areas to formulate what has come to be known as 'federal common law,'" those instances are "few and restricted." *Texas Indus.,* 451 U.S. at 640. They fall into two categories: (i) when "a federal rule of decision is 'necessary to protect [a] uniquely federal interest"'; and (ii) when "Congress has given the courts the power to develop substantive law." *Id.* As to the first category, "federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases." *Id.* at 641 (footnotes and citations omitted). None of those situations is present here.[3]

Defendants' reliance upon *City of New York* as a basis to apply federal common law to the State's VCPA claims is without basis. In *City of New York*, the City sought to hold oil companies liable, under state common law concerning nuisance and trespass, for the costs of a $20 billion program to mitigate the effects of global warming. 993 F.3d at 86-87. Because the City was seeking nuisance damages for global warming, which was exacerbated by greenhouse

[3] Even where a federal interest is implicated, federal common law will displace state law only to the extent of "a conflict between that federal interest and the operation of state law." *City of New York*, 993 F.3d at 90; *see also O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994). Because the VCPA claims in this action do not implicate any "uniquely federal interest," the further requirement of a conflict between the federal interest and state law also is not met.

gas emissions from defendants' fossil fuel products, the Second Circuit held the suit could not proceed under New York law. *Id*. at 85, 91.

The court explained that the City was seeking to hold the oil companies liable "for the effects of emissions made around the globe over the past hundred years," and that such a "sprawling case is simply beyond the limits of state law" because, if the oil companies wanted to avoid "substantial damages award like the one requested by the City," their "only solution would be to cease global production altogether." 993 F.3d at 92-93. As such, the court concluded the City's lawsuit would "regulate cross-border emissions," which "implicat[es] the conflicting rights of [s]tates [and] our relations with foreign nations." *Id*. The court also observed that the risk the oil companies' global operations could be subject to "a welter of different states' laws" could "undermine important federal policy choices." *Id*. at 93.

None of the concerns that led the Second Circuit to hold that the claims in *City of New York* were displaced by federal common law are present in this case. Unlike the City, Vermont does not seek to recover costs to mitigate the effects of global warming, or other relief for harms sustained by greenhouse gas emissions or their effect on the climate. The impact of Defendants' products on climate change may be the subject of Defendants' deceptive marketing, but here the State seeks only to address Defendants' marketplace deceptions, not their global production activities or the emissions resulting from use of their products. Defendants have created the straw person of a different case raising different claims and seeking different relief.

Stated another way, Defendants' reliance upon *City of New York* deliberately conflates the harm to the marketplace caused by their advertising deceptions with harm to the environment from use of their products. Invoking that decision, Defendants assert the Complaint "alleges that Defendants are liable for their continued promotion, marketing, and sale of fossil fuels 'precisely

because [these] fossil fuels emit greenhouse gases,' and are alleged to 'collectively *exacerbate global warming*.'" NOR ¶ 45 (quoting *City of New York*). But what the court actually said—and what was critical to its ruling—was that the City was "*seeking damages*" for the "*effects of emission*s made around the globe" because "fossil fuels emit greenhouse gases" and "exacerbate global warming." 993 F.3d at 91, 93 (emphases added). Vermont seeks no such damages. It seeks relief that allows Vermont consumers to make individual purchasing decisions with accurate, non-misleading information.

Nevertheless, Defendants attempt to shoehorn the State's VCPA claims into the narrow holding of *City of New York* by grossly mischaracterizing the Complaint. *See, e.g.*, NOR ¶¶ 9, 15 (the State seeks "to hold Defendants liable for the harms stemming from climate change"); *id.* ¶ 10 ("the core purpose" of the lawsuit is to "force [a] reduction in fossil fuel production, promotion, and sales"). The explicit language of the Complaint as well as any fair reading belie those and similar assertions in the NOR. Indeed, while it is certainly true that "the use of [Defendants'] products … is and remains a leading cause of global warming and, unless abated, will bring about grave consequences", Compl. ¶ 98, the Complaint expressly disclaims relief to address climate change harms, to regulate the production of Defendants' fossil fuels, or to restrict their distribution or sale in the State. *Id.* ¶ 6. Seeking to stop deception of consumers is a wholly different proposition than seeking to stop production or seeking costs of remediation. Defendants' rewriting of the Complaint based upon their inaccurate reading of the Attorney General's mind completely disregards the causes of action asserted and relief sought by the State.

Defendants' further assertion that the "fundamental issue raised in the Complaint is not the accuracy of representations about the products being sold, but whether Defendants' products

should be sold in reduced quantities or even sold at all," NOR ¶ 11, misreads the Complaint. For example, contrary to Defendants' characterizations in the NOR, the Complaint does not assert that Defendants' misrepresentations and omissions "*caused harm* because 'the use of Defendants' fossil fuel products will contribute to global warming ….'" NOR ¶ 17, citing Compl. ¶ 179 (emphasis added). Rather, paragraph 179 alleges that Defendants' statements were and are deceptive "*because they were and are likely to create an impression among consumers that* Defendants' fossil fuel products are better or safer for the environment when, in fact, the use of Defendants' fossil fuels will contribute to global warming.…" (emphasis added). Once again, Defendants seek to erase the clear distinction between harm *to the marketplace* caused by deceptive representations to consumers, and harm *to the environment*.

Defendants also insist the Complaint "attempts to apply state law to interstate and, indeed, international activity to which federal law and only federal law applies." NOR ¶ 21. Apart from Defendants' failure to identify any such federal law, they wish away the "presumption against finding pre-emption of state law in areas traditionally regulated by the States." *California v. ARC Am. Corp.,* 490 U.S. 93, 101 (1989). The "long history of state common-law and statutory remedies against … unfair business practices" makes "plain" that the regulation of such practices is an area "traditionally regulated by the States," *id.*, as is the regulation of deceptive "advertising," *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 541 (2001) (citing *Packer Corp. v. Utah,* 285 U.S. 105, 108 (1932)), and "consumer protection," *Grocery Mfrs. Ass'n v. Sorrell*, 102 F. Supp. 3d 583, 604 (D. Vt. 2015). *See also Edenfield v. Fane*, 507 U.S. 761, 768 (1993) ("[O]ur cases make clear that the state may ban commercial expression that is fraudulent or deceptive without further justification."). Moreover, when Congress passed federal legislation to protect the marketplace from unfair and deceptive activities, it expressly did

so alongside the states: the Federal Trade Commission Act provides that its remedies "are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law." 15 U.S.C. § 57b(e).

Because Vermont's VCPA claims do not seek to hold "Defendants liable for the alleged harms caused by fossil fuel consumption," there also is no basis for Defendants to conclude that the Complaint "necessarily also seeks to hold Defendants liable for longstanding decisions by the federal government" regarding national security, national energy policy, environmental protection, the strategic petroleum reserve program, the Outer Continental Shelf, mineral extraction on federal lands, or international agreements concerning climate change." NOR ¶ 20. Defendants do not identify any "decision" of the federal government concerning how Defendants advertise their products in Vermont or elsewhere, or any attempt to preempt such regulation of deceptive advertising to consumers by the States.

Neither the Clean Air Act, Environmental Protection Agency (EPA) regulations, the Foreign Commerce Clause, nor the foreign affairs powers of the federal government are even relevant to the State's VCPA claims, let alone "govern[ing]." NOR ¶ 22. Similarly, whether federal law "exclusively governs claims for interstate and international pollution, as well as claims implicating the foreign affairs of the United States," *id.* ¶ 32, is irrelevant because those are not the claims asserted here. In no way do the VCPA claims here implicate any "uniquely federal interest." Defendants assert that "[e]nvironmental protection is undoubtedly an area 'within national legislative power' for which federal courts may 'fashion' federal common law." *Id.* ¶ 36, quoting *American Elec. Power Co. v. Conn.,* 564 U.S. 420, 421 (2011) ("*AEP*"). Apart from the fact this is not an "environmental protection" action, the Supreme Court actually stated in *AEP* that federal courts may fashion federal common law in that area only "where Congress

has so directed." 564 U.S. at 421. Defendants cite no such federal direction as to how they advertise their fossil fuel products to Vermont consumers, because none exists.

Nor does the fact that the Complaint seeks disgorgement of amounts Defendants obtained through their deceptive marketing mean that it "functionally seeks to impose strict liability for greenhouse gas emissions and purported climate injuries." NOR ¶ 46. The damages claim asserted in *City of New York* would have "effectively impose[d] strict liability for the damages caused by fossil fuel emissions no matter where in the world those emissions were released" because, to avoid liability, the oil companies' "only solution would be to cease global production altogether." 993 F.3d at 93. Here, in stark contrast, Defendants can avoid further liability under the VCPA by simply putting an end to their deceptive marketing in Vermont.

Defendants further contend that "by requesting disclaimers on every fuel pump or product label, the Attorney General makes clear that its goal for this litigation is to regulate the sale of fossil fuel and thereby curb greenhouse gas emissions." NOR ¶ 46. The notion that the State has no authority to curb greenhouse gas emissions within the State is faulty; nevertheless, that is not what this case is about. Further, states regularly impose requirements on the sale of gasoline and, like here, those requirements do not attempt to hold fossil fuel companies liable for harms caused by cross-border greenhouse gas emissions.

For instance, states routinely tax the retail sale of gasoline. *See, e.g.*, 23 V.S.A § 3106(a). States also have traditionally regulated disclosures at the point of sale of gasoline within their borders, including regulations on, for example, the posting of prices, *see, e.g.*, 9 V.S.A. § 4110; Mass. Gen. Laws Ann. Ch. 94, §§ 295C, 295D, 295E, octane content, *see, e.g.*, 9 V.S.A. § 2697(a), and ethanol content, *see, e.g.*, 202 Mass. Code Regs. 2.06. States also require gasoline pumps to be licensed to protect consumers from inaccurate dispensing of fuel, *see*, *e.g.*,

9 V.S.A. § 2730, and they impose standards upon the quality of gasoline sold within their borders. *See, e.g.,* 10 V.S.A. § 577 (prohibition on addition of gasoline ethers to fuel products); Mass. Gen. Laws Ch. 94, § 295G (prohibiting the sale of gasoline "which has an end point higher than four hundred and thirty-seven degrees Fahrenheit"). Unless preempted by an Act of Congress, regulating disclosures at the point of sale are fully within states' traditional police powers.

Massachusetts v. Exxon Mobil Corp., 462 F. Supp. 3d 31 (D. Mass. 2020), is instructive. There, the Commonwealth sued ExxonMobil in state court for violations of Massachusetts' consumer protection laws, seeking an injunction against ExxonMobil's deceptive marketing practices and penalties for prior violations (as Vermont seeks in this case). ExxonMobil removed the case to federal court, arguing (as it does here) that Massachusetts sought to regulate global greenhouse gas emissions and that its claims were therefore governed by federal common law. The court rejected ExxonMobil's characterization of the claims and its contention that federal common law governed those claims:

> The complaint, *fairly read*, alleges that ExxonMobil hid or obscured the scientific evidence of climate change and thus duped its investors about the long-term health of its corporation and defrauded consumers of its fossil fuel products. … In short, there is no federal common law here because "[n]othing about the allegations in these lawsuits implicates interests that are 'uniquely federal.'"

462 F. Supp. 3d at 43 (emphasis added).

In so doing, the court read the complaint as filed rather than as the specter ExxonMobil tried to create. It distinguished the Commonwealth's claims from those asserted in *City of New York*.[4] The Commonwealth was not asserting "public nuisance claims with a theory of damages

[4] More precisely, *Massachusetts* distinguished the claims asserted in *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466 (S.D.N.Y. 2018), which is the ruling that the Second Circuit subsequently affirmed in *City of New York*. The distinction between the claims at issue in *City of*

tied to the impact of climate change," and its consumer protection claims "d[id] not prompt th[e] Court or any other to provide 'answers' to the 'fundamental global issue' of climate change." 462 F. Supp. 3d at 42-43. "Much more modestly, the Commonwealth wants 'to hold ExxonMobil accountable for misleading the state's investors and consumers. No one doubts that this task falls within the core of a state's responsibility.'" *Id.* at 43-44. To the contrary, states "routinely enforce consumer protection … laws alongside the federal government." *Id.* at 44. ExxonMobil did not even bother to appeal the remand order in *Massachusetts*.[5] Like Massachusetts, the State of Vermont here seeks only to hold Defendants accountable for misleading Vermont consumers, in an action to "enforce consumer protection" that "falls within the core of [the S]tate's responsibility." *Id.*

Because the State's VCPA claims are squarely within its regulatory authority, would not regulate cross-border emissions, and do not implicate either the conflicting rights of states or relations with foreign nations, or otherwise threaten to subject the oil companies' global operations to "a welter of different states' laws" that could undermine important federal policy choices, *City of New York*, 993 F.3d at 93, there is no basis to apply federal common law here.

B. The Artful Pleading Doctrine is Inapplicable.

Recognizing that the Complaint only asserts claims arising under state law, Defendants seek to invoke the "artful pleading" doctrine. NOR ¶¶ 72-76. Under that doctrine, a corollary to the well-pleaded complaint rule, a plaintiff "cannot avoid removal by declining to plead

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New York and those asserted by *Massachusetts* applies even though *Massachusetts* predated the Second Circuit decision in *City of New York*.

[5] *See also In re Tobacco/Governmental Health Care Costs Litig.*, 100 F. Supp. 2d 31, 34 (D.D.C. 2000) (foreign nations' claims that tobacco industry fraudulently concealed dangers of smoking did not implicate federal common law of foreign relations; whether defendants engaged in negligence, fraud, misrepresentation, concealment, or deceit "is not governed by a federal common law at all, but by state common law").

'necessary federal questions.'" *Romano v. Kazacos*, 609 F.3d 512, 518-19 (2d Cir. 2010). A party invoking the doctrine must establish that Congress has "completely preempted, or entirely substituted, a federal law cause of action for the state [cause of action]", or that Congress "expressly provided for the removal of particular actions asserting state law claims in state court." *Id*. Just as in *Massachusetts*, Defendants cannot begin to meet that burden here.

Complete preemption applies "only in the very narrow range of cases where 'Congress has clearly manifested an intent' to make a specific action within a particular area removable." *Ben & Jerry's Homemade, Inc. v. KLLM, Inc.*, 58 F. Supp. 2d 315, 317-18 (D. Vt. 1999) (quoting *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 66 (1987); *Marcus v. AT&T Corp.,* 138 F.3d 46, 53-55 (2d Cir.1998)). *See also Beneficial Nat'l Bank,* 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.").

Defendants have not alleged any recognized basis for invoking the artful pleading doctrine. They have not pointed to any "necessary federal questions" here, because there are none. There is no federal statute wholly displacing VCPA claims and no express provision by Congress that VCPA claims are to be removed. Defendants instead contend that state law claims may be removed on the basis of federal common law and that such claims may arise under federal common law "regardless of the label a plaintiff affixes to its claims." NOR ¶ 72. However, the cases they rely upon—*Standard Oil Co.*, 332 U.S. at 307; *City of New York*, 993 F.3d at 91; *Marcos*, 806 F.2d at 352; and *Nordlicht v. New York Tel. Co.*, 799 F.2d 859, 862 (2d Cir. 1986)—were each filed in federal court in the first instance. None concerned reliance upon the artful pleading doctrine as a basis for removing state law claims to federal court, let alone an

assertion that the claims are governed by federal common law as opposed to being completely preempted by federal statute. The artful pleading doctrine is a red herring.

In fact, in *City of New York*, the Second Circuit acknowledged that the federal common law recognized in that proceeding might not provide a basis for removal:

> Here, the City filed suit in federal court in the first instance. We are thus free to consider the Producers' preemption defense on its own terms, not under the heightened standard unique to the removability inquiry.

993 F.3d at 93-94. In all events, this Court need not reach the procedural issue left open in *City of New York* because, even if federal common law could provide a basis for invoking the artful pleading doctrine, the State's VCPA claims are not governed by federal common law, as discussed above. *See Massachusetts*, 462 F. Supp. 3d at 43 (even if federal common law may completely preempt state causes of action, court would still lack jurisdiction because Commonwealth's claims did not implicate federal common law).[6]

C. Because the VCPA Claims Do Not Raise a Substantial Federal Question, There Also Is No Basis for *Grable* Jurisdiction.

Defendants further allege that *Grable* provides an independent basis for federal jurisdiction because the Complaint purportedly "raises substantial and disputed federal questions concerning the federal common law of transboundary pollution and foreign affairs," NOR ¶ 26, as well as other "substantial and disputed federal questions concerning federal environmental standards, regulations, and international treaties striking a balance between the use of fossil fuels and the reduction of greenhouse gas emissions," *id*. ¶ 27. This argument too is unavailing.

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[6] Even if the federal common law that Defendants purport to invoke applied to this case (which it does not), the case still could not be removed because such common law would be displaced by the Clean Air Act. *See City of New York,* 993 F.3d at 95 (federal common law displaced by Clean Air Act); *Cnty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 937 (N.D. Cal. 2018) ("*Mateo I*") (case "should not have been removed to federal court on the basis of federal common law that no longer exists.").

Under *Grable*, "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 "is not enough that the federal issue be significant to the particular parties in the immediate suit.… The substantiality inquiry under *Grable* looks instead to the importance of the issue to the federal system as a whole." *Id.* at 260. Accordingly, *Grable* jurisdiction lies only in a "special and small category" of cases. *Empire Healthchoice Assurance, Inc. v. McVeigh,* 547 U.S. 677, 699 (2006).[7]

1. The "Federal Common Law" Prong of Defendants' *Grable* Argument Fails.

The "federal common law" prong of Defendants' *Grable* argument fails because, as discussed above, the VCPA claims in this Action do not "implicate transboundary greenhouse-gas pollution and issues of foreign policy." NOR ¶ 80 (citing *City of New York*, 993 F.3d at 91). Defendants' reliance upon *Newton v. Cap. Assur. Co., Inc.*, 245 F.3d 1306 (11th Cir. 2001), and *Battle v. Seibels Bruce Ins. Co.*, 288 F.3d 596 (4th Cir. 2002), is misplaced because those cases involved disputes over insurance policies issued pursuant to the National Flood Insurance Program (NFIP), and it is "well settled that federal common law *alone* governs the interpretation of" such policies. *Battle*, 288 F.3d at 607 (emphasis in original). Thus, a complaint alleging

[7] In *Gunn*, for example, the Supreme Court considered whether a state law claim alleging legal malpractice in the handling of a patent infringement case must be brought in federal court. The client argued that, because his legal malpractice claim was based upon an alleged error in a patent case, it "arises under" federal patent law. A unanimous Court acknowledged that, while resolution of a federal patent question may have been "necessary" to the malpractice claim and "actually disputed," the federal issue "is not substantial in the relevant sense." 568 U.S. at 259. Legal malpractice claims based on underlying patent matters are "unlikely to have the sort of significance for the federal system necessary to establish jurisdiction." *Id.* at 258.

breach of an NFIP policy "rais[es] a substantial federal question on its face." *Newton*, 245 F.3d at 1309. That is not the situation here.

Nor do Vermont's claims constitute a "'collateral attack' on the '[federal] regulatory scheme"' or on the "federal system as a whole." NOR ¶ 83. To assert otherwise, Defendants cite *Bd. of Comm'rs of Se. La. Flood Prot. Auth.-E. v. Tenn Gas Pipeline Co.*, 850 F.3d 714, 724 (5th Cir. 2017), in which the plaintiff sought an injunction and compensatory damages arising from offshore oil exploration activities that damaged coastal lands. The complaint "dre[w] on federal law as the exclusive basis for holding [d]efendants liable for some of their actions," including the Rivers and Harbors Act of 1899, the Clean Water Act of 1972, and the Coastal Zone Management Act of 1972. *Id.* at 721, 722-23.

The VCPA claims asserted here do no such thing. And Defendants' further contention that those claims are "based on assertions that contradict established federal policies endorsed by the President and numerous federal agencies, and by various federal laws", NOR ¶ 83, is empty. Vermont's claims seeking honest disclosures do not contradict any federal policy or law and Defendants fail to articulate any coherent argument to the contrary.

2. The VCPA Claims Do Not "Necessarily Raise" Any Other Federal Issues.

The alternate prong of Defendants' *Grable* argument also fails. Defendants allege that the VCPA claims raise federal questions because they purportedly invoke "federal regulations including regulations enacted by the Environmental Protection Agency." NOR ¶ 88, citing Compl. ¶¶ 108, 115, 117. According to Defendants, in evaluating whether their marketing is deceptive, a court will need to "assess" whether "the products in question comply with, and surpass, existing standards set forth by the EPA." NOR ¶ 89. But there is no need to assess

compliance with federal law, and even if there were, any such federal issue would not be "substantial" within the meaning of *Grable*.

Resolving the State's claims here requires no evaluation of compliance with EPA's fuel standards. *Cf. N.Y. ex rel. Jacobson v. Wells Fargo Nat'l Bank, N.A.*, 824 F.3d 308, 315-16 (2d Cir. 2016) (a state law claim raises federal questions when it "is affirmatively 'premised' on a violation of federal law"). Contrary to Defendants' characterization, paragraphs 108, 115, and 117 of the Complaint do ***not*** allege a "violation of the 'minimum requirements for gasoline detergent additives set by the [EPA],'" or that the products do not meet "TOP TIER standards" or "exceed EPA standards for vehicle emissions and engine durability." NOR ¶ 91. They only allege that Defendants fail to make honest disclosures.

For example, paragraph 108 refers to Shell ads touting the benefits of its gasoline products (*e.g.*, "more efficient," "lower emissions," "seven times the cleaning agents required" by federal standards). But that does not allege that the products violate EPA standards. Rather, as the Complaint makes clear, the ads are deceptive because they do not disclose "that the difference in CO_2 emissions is very small" and that the products "still contribute significantly to climate change." Compl. ¶ 108; *see also id.* ¶¶ 115-16 (Sunoco's ads make "no mention of the enormous amounts of greenhouse gas emissions associated with its products and the very limited impact of any 'lower emissions' benefit."); *id*. ¶ 117 (CITGO touts the supposed benefits of its products while making "no mention of the massive greenhouse gas emissions associated with CITGO's fossil fuel products and the very limited impact of any 'minimizing' benefit.").

Paragraph 118 further makes explicit the nature of the deception:

> As illustrated in the foregoing paragraphs, Exxon's, Shell's, Sunoco's, and CITGO's marketing is deceptive in emphasizing their products' purported environmentally beneficial qualities – such as "cleanliness," "better mileage," and "lower emissions." Even if it were true that these products improve engine

> performance and/or efficiency relative to prior or other products, Defendants' ads convey a false impression that the use of their products results in environmental benefits. Defendants fail to disclose what they have long known to the contrary: that the development, production, refining, and use of their fossil fuel products (including products that may yield somewhat more efficient engine performance than other fossil fuels) *increases* greenhouse gas emissions and is a leading cause of global warming; and that the continued use of these products will cause catastrophic effects on the environment if unabated.

In *Vermont v. MPHJ Tech. Invs., LLC*, No. 2:13-CV-170, 2014 WL 1494009, at *6 (D. Vt. Apr. 15, 2014), the State brought VCPA claims arising out of the defendant's practice of sending letters to small businesses and non-profit entities threatening patent infringement litigation. This Court determined that the VCPA claims did not raise federal issues because they "do not depend on any determination of federal patent law"; although the consumer protection claims concerned threats of patent litigation, they "d[id] not challenge the validity or scope of [defendant's] patents nor d[id] they require any determination of whether infringement has actually occurred." *Id.* The State was instead "targeting bad faith conduct irrespective of whether the letter recipients were patent infringers or not, on the basis that [defendant's] bad faith conduct would be unlawful even [its] patents were valid and the conduct was directed toward actual patent infringers." *Id.*

Similarly, there is no need to determine whether Defendants' products meet or exceed federal EPA standards because, as alleged in the Complaint, their advertising is deceptive either way, and there is no allegation that the standards are not met. Because that question is irrelevant to the State's claims, the "necessarily raise[d]" element of *Grable* cannot be satisfied. *See also New York v. Shinnecock Indian Nation*, 686 F.3d 133, 140-41 (2d Cir. 2012) (where a claim can be resolved without reaching a federal question, "the claims do not necessarily raise a federal issue"); *Highland Cap. Mgmt. LP. v. Schneider*, 198 F. App'x 41, 44 (2d Cir. 2006) (tortious interference claim "does not necessarily require [plaintiff] to prove a violation of federal law

because the defendants' 'wrongful' conduct, at least as pleaded, may presumably be demonstrated without showing that the defendants violated federal securities laws"); *Massachusetts*, 462 F. Supp. 3d at 44 ("Whether ExxonMobil was honest or deceitful in its marketing campaigns and financial disclosures does not necessarily raise any federal issue whatsoever.").

Even if there were a need to assess whether Defendants' products meet or exceed EPA standards, such a limited "federal issue" would not satisfy *Grable*'s "substantiality" requirement. *Grable* "presented a nearly pure issue of law, the resolution of which would establish a rule applicable to numerous tax sale cases." *Empire Healthchoice*, 547 U.S. at 681. As the Second Circuit recently stated, "[a]n issue tends to be substantial if it is 'a nearly pure issue of law, one that could be settled once and for all and thereafter would govern numerous [similar] cases.'" *Tantaros v. Fox News Network, LLC*, 12 F.4th 135, 145 (2d Cir. 2021) (quoting *Empire Healthcare*, 547 U.S. at 700). The VCPA claims here raise no such issue.

Thus, even if there were an issue concerning Defendants' compliance with EPA standards, which there is not, it would be "fact-bound and situation-specific," which is insufficient under *Grable*. *Empire Healthchoice*, 547 U.S. at 681. *See also Congregation Machna Shalva Zichron Zvi Dovid v. U.S. Dep't of Agric.,* 557 F. App'x 87, 90 (2d Cir. 2014) (substantiality requirement not met by "a fact-specific application of the regulations" that "does not implicate the validity of the regulations themselves, or have any other broader effect on federal interests"); *MPHJ Tech.*, 2014 WL 1494009, at *9 (substantiality not met where federal issue "involve[d] the application of existing [federal] law to the facts of this case").

Even where a state court may be required to "grapple with federal law," that is an insufficient basis for federal jurisdiction. *Mihok v. Medtronic, Inc.*, 119 F. Supp. 3d 22, 31 (D.

Conn. 2015)) (quoting *In re Standard & Poor Rating Agency Litig.*, 23 F. Supp. 3d 378, 398 (S.D.N.Y. 2014)). State courts do that all the time. The Vermont state court in which this action was brought "is competent to apply federal law, to the extent it is relevant." *Empire Healthchoice*, 547 U.S. at 681.[8]

Defendants' contention, NOR ¶ 90, citing Compl. ¶ 190, that Vermont also invokes federal standards as an element of its unfair practices claim under the VCPA fares no better. The Complaint alleges that business conduct is considered "unfair" if, among other things, "it offends public policy." Compl. ¶ 188. Paragraph 190 does not identify any federal policy, but even if it did, such references, "pled as public policy considerations attendant to [state] law claims, do not provide a basis for federal subject matter jurisdiction." *Fracasse v. People's United Bank,* 747 F.3d 141, 144 (2d Cir.2014) (employees cited Fair Labor Standards Act as reflecting public policy considerations underlying their state law claims). Were it otherwise, "then every state law claim that adverts in any part to a proposition of federal law would satisfy the 'substantiality' requirement. Such an interpretation would render inquiry as to whether the claims 'arise under'

[8] *See also Merrell Dow Pharmaceuticals Inc. v. Thompson,* 478 U.S. 804, 822-23 (1986) (no subject matter jurisdiction over state law tort claims predicated upon alleged "misbranding" of a drug in violation of federal law); *Bennett v. Southwest Airlines Co.*, 484 F.3d 907, 908, 910 (7th Cir. 2007) (even if federal aviation standards "play a major role in a claim that [defendants] acted negligently," no *Grable* jurisdiction because "[w]e have a fact-specific application of rules that come from both federal and state law rather than a context-free inquiry into the meaning of a federal law"); *Klein v. Aicher*, No. 19-CV-9172 (RA), 2020 WL 4194823, at *4–5 (S.D.N.Y. July 21, 2020) ("[T]he application of a federal legal standard to private litigants' state law claims does not have broad consequences to the federal system or the nation as a whole, which is necessary to confer federal question jurisdiction.") (citations and internal quotation marks omitted); *Dovid*, 2013 WL 775408, at *12 ("A state law cause of action that requires the interpretation of a federal regulation, by itself, is not sufficiently 'substantial' to create federal jurisdiction.").

federal law meaningless and clearly fly in the face of the Supreme Court's test in *Gunn.*" *Fracasse,* 747 F.3d at 145.[9]

The fourth *Grable* factor also points against removal. Here as in *Hubacz*, "the federal-state balance weighs heavily in favor of the State of Vermont, as it is the State's statutes … that are at issue." *Hubacz*, 2014 WL 4060314, at *5 (remanding where all claims arise under state law). Moreover, with respect to consumer protection, Congress enacted the Federal Trade Commission Act but has never "indicated that state courts are inappropriate forums to resolve such issues by completely preempting them." *New York by James*, 2021 WL 3140051, at *7-8 (discussing state labor and workplace safety laws that coexist with federal standards); *see also New York State Rest. Ass'n v. New York City Bd. of Health*, 556 F.3d 114, 123 (2d Cir. 2009) (finding no preemption of city food labeling laws and noting that "courts assume 'that state and local regulation related to [state consumer protection] matters . . . can normally coexist with federal regulations.'"). To the contrary, as indicated above, the Federal Trade Commission Act expressly preserves state law remedies.

In sum, where "even the presence of a true federal issue is questionable," to "argue that the issue is significant such that it carries federal import beyond these litigants' interests … is untenable." *Hubacz,* 2014 WL 4060314, at *5. This case is "poles apart from *Grable*" and "cannot be squeezed into the slim category *Grable* exemplifies." *Empire Healthchoice*, 547 U.S. at 681.

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[9] *See also New York by James v. Amazon.com, Inc.,* No. 21-cv-1417 (JSR), 2021 WL 3140051, at *7-8 (S.D.N.Y. July 26, 2021) ("The Complaint refers to federal standards as part of a passing articulation of what reasonable safety measures entail. This Court is not required to interpret OSHA, the NLRA, or the interaction between the CDC guidance and the APA in order to resolve the state labor law claims.").

II. This Action is Not Removable Under the Federal Office Removal Statute.

Four Circuit Courts of Appeals and at least nine District Courts have already rejected Defendants' attempts to remove under the federal officer jurisdiction, including in cases where (unlike here) the plaintiff is seeking damages for climate-related injuries.[10] It should be rejected here as well.

The federal officer removal statute permits the removal of cases against "any officer (or any person acting under that officer) of the United States or any agency thereof, [sued] in an official or individual capacity, for or relating to any act under color of such office…." 28 U.S.C. § 1442(a) (1). To remove under this statute, a defendant who is not a federal officer must establish that it: (1) acted under a federal officer, (2) is being sued for an act under color of such office, and (3) has a colorable federal defense. *Isaacson v. Dow Chem. Co.,* 517 F.3d 129, 135-38 (2d Cir. 2008).

Defendants' "theory" for federal officer jurisdiction over this VCPA action is based upon the same mischaracterization of the Complaint that underlies their other alleged bases for

[10] *See Mayor & City Council of Baltimore v. BP P.L.C.,* 952 F.3d 452 (4th Cir. 2020) ("*Baltimore II*"); *Bd. of Cnty. Comm'r of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.,* 965 F.3d 792 (10th Cir. 2020) ("*Boulder II*"); *Rhode Island v. Shell Oil Prod. Co.,* 979 F.3d 50, 59 (1st Cir. 2020) *("Rhode Island II"), cert. granted, judgment vacated*, 141 S. Ct. 2666 (2021); *Cnty. of San Mateo, v. Chevron Corp.*, 960 F.3d 586 (9th Cir. 2020) ("*San Mateo II")*, *cert. granted, judgment vacated sub nom. Chevron Corp. v. San Mateo Cnty., Cal.*, 141 S. Ct. 2666 (2021); *Massachusetts,* 462 F. Supp. 3d 31; *Connecticut v. Exxon Mobil Corp.,* No. 3:20-cv-1555 (JCH), 2021 WL 2389739 (D. Conn. June 2, 2021); *City of Hoboken v. Exxon Mobil Corp*., No. 20-cv-14243*,* 2021 WL 4077541 (D. N.J. Sept. 8, 2021); *Minnesota v. Am. Petroleum Inst.,* No. 20-1636 (JRT/HB), 2021 WL 1215656 (D. Minn. Mar. 31, 2021) ("*Minnesota I*"); *City & Cnty. of Honolulu v. Sunoco LP,* No. 20-cv-00163-DKW-RT, 20-cv-00470-DKW-KJM, 2021 WL 531237 (D. Haw, Feb. 12, 2021) ("*Honolulu I*"); *Rhode Island, v. Chevron Corp* 393 F. Supp. 3d 142 (D. R.I.2019) ("*Rhode Island I*"); *Bd. of Cnty. Comm'r of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.,* 405 F. Supp. 3d 947 (D.Colo. 2019) ("*Boulder* I"); *Mayor & City Council of Baltimore v. BP P.L.C.,* 388 F. Supp. 3d 538 (D. Md. 2019) ("*Baltimore I*"); *San Mateo I,* 294 F. Supp. 3d 934.

removal (such as federal common law): that the suit, though "sounding in state consumer protection law," "arises from Defendants' production, promotion, and sale of fossil fuels—including such activities conducted under the direction of federal officers for decades …." NOR ¶ 101. Because there is no plausible connection between Defendants' deceptive marketing practices in Vermont and any "federal" activities described in the NOR, there is no basis for federal officer jurisdiction. Nor do Defendants satisfy the "arising under" and "colorable defense" elements for removal.

A. Defendants are Not Being Sued "Because Of" Any Activities They May Have Engaged in "Under Color Of" Federal Office.

To establish that a suit "is '*for* a[n] act under color of office,' the defendant must show a nexus, a 'causal connection' between the charged conduct and asserted official authority." *Jefferson Cnty., Ala. v. Acker*, 527 U.S. 423, 431 (1999) (internal quotations omitted); *see also Isaacson*, 517 F.3d at 137 ("non-governmental corporate defendants … must demonstrate that the acts for which they are being sued … occurred *because of* what they were asked to do by the Government") (emphasis in original).

There is no such nexus here. Defendants cite their alleged sales of highly specialized non-commercial grade fuel to the military, their activities during World War II and the Korean War, their involvement with the Strategic Petroleum Reserve ("SPR"), and their activities on the Outer Continental Shelf ("OCS"). *See* NOR ¶¶ 111-159. But as the First Circuit observed in *Rhode Island II*, defendants' asserted basis for federal officer removal is a "mirage" that "only lasts until one remembers what Rhode Island is alleging in this lawsuit"—namely, that defendants "sold oil and gas products in Rhode Island that were damaging the environment and engaged in a misinformation campaign about the harmful effects of their products on the earth's climate." 979 F.3d at 59-60. *See also Connecticut,* 2021 WL 2389739, at *11 ("ExxonMobil

provides no explanation as to how the allegedly deceptive statements that form the basis of Connecticut's consumer protection claims have any causal connection to the production of fossil fuels for or under the direction of the federal government."); *Massachusetts*, 462 F. Supp. 3d at 47 (D. Mass. 2020) ("ExxonMobil's marketing and sale tactics were not plausibly 'relat[ed] to' the drilling and production activities supposedly done under the direction of the federal government.").

Thus, while Defendants' "historical treatise about the United States' need for fossil fuels for national security purposes during the twentieth century" may be "informative," it is "not relevant" to claims that are "focused on Defendants' decades long misinformation campaign." *City of Hoboken*, 2021 WL 4077541, at *9 (D.N.J. Sept. 8, 2021). *See also County of Montgomery v. Atlantic Richfield Co*., No. 18-5128, 2019 WL 2371808, at *6-8 (E.D. Pa. June 5, 2019), *aff'd*, 195 F. App'x 111 (3d Cir. 2020) ("no connection" between defendants' role in the proliferation of lead-based paint in privately owned homes, and their having supplied lead-based paint to the government for military purposes during World War II).

The same is true with respect to Defendants' activities on the OCS, and their involvement with the SPR. *See, e.g.*, *Rhode Island II*, 979 F.3d at 59-60 ("no nexus" between Rhode Island's claims and Defendants' OCS activities because the OCS leases "address extraction, not distribution or marketing"); *Minnesota I,* 2021 WL 1215656, at *9 (no connection between Defendants' OCS lease operations and Minnesota's deceptive marketing claims); *Honolulu I*, 2021 WL 531237, at *6 (defendants' SPR activities provide no basis for federal officer jurisdiction). Contrary to Defendants' assertions, neither the oil extracted from the OCS nor the oil that may have flowed through the SPR "are necessarily part of the causal chain that forms the

basis of the Attorney General's claims," NOR ¶ 137, since those claims are based upon deceptive marketing practices that have nothing to do with the origin of the oil.

Nor is there any nexus between the activities for which Defendants are being sued in this action and their sales to the government of specialized fuels which are used "to power planes, ships and other vehicles and to satisfy other national defense requirements." NOR ¶ 114. It is not even the same fuel that Defendants deceptively market to Vermont consumers. *See City of Hoboken,* 2021 WL 4077541, at *10 ("This specialized fuel does not appear to be the same as fuel that consumers purchased because of Defendants' alleged marketing and disinformation campaigns.").

In sum, the deceptive practices for which Defendants are being sued in this action did not occur "because of" anything Defendants were asked to do by the Government, whether in connection with World War II, Korean War, the SPR, the OCS, or otherwise. Defendants' fossil fuel production activities are "not the source of … liability" underlying the VCPA claims in this action. *Baltimore II*, 952 F.3d at 467. Defendants' federal officer removal theory fails on this factor alone.

B. Defendants Were Not "Acting Under" a Federal Officer.

Nevertheless, even if this Court were to look beyond the causal nexus requirement, Defendants also fail to establish that they were "acting under" a federal officer when they sold fuel to the government during World War II, the Korean War, and in connection with the SPR, or when they produce oil and gas on the OCS.

The "acting under" requirement denotes a "special relationship" by which the person seeking removal "assist[s] or …help[s] *carry out* the duties or tasks of the federal superior." *Isaacson*, 517 F.3d at 137 (quoting *Watson v. Philip Morris Companies, Inc.,* 551 U.S. 142, 152 (2007)) (italics in original). The person must have been "acting on behalf of the officer in a

manner akin to an agency relationship" or "subject to the [federal] officer's close direction," such that the person was under the "subjection, guidance, or control" of that officer with respect to the conduct at issue in the complaint. *San Mateo II,* 960 F.3d at 599-600; *Watson*, 551 U.S. at 151 (quoting Webster's New International Dictionary 2765 (2d ed. 1953)).

Defendants argue that their "decades-long contractual relationship with the federal government to produce critical fuels" for military needs is a "'special relationship' with federal officers sufficient to satisfy the 'acting under' prong." NOR ¶ 124. But a "person is not 'acting under' a federal officer when the person enters into an arm's-length business arrangement with the federal government or supplies it with widely available commercial products or services." *San Mateo II*, 960 F.3d at 600-02 (rejecting federal officer jurisdiction predicated upon fuel supply contracts and agreements regarding the Elk Hills petroleum reserve); *Rhode Island II*, 979 F.3d at 59-60 (same). Defendants were not "acting under" a federal officer in connection with any of their alleged fuel sales to the government. *See also Baltimore II,* 952 F.3d at 463 (fuel supply agreements).

Nor were Defendants "acting under" a federal officer in connection with their activities on the OCS. *See, e.g., Baltimore II*, 952 F.3d at 464–68; *Boulder II*, 965 F.3d at 820-27; *San Mateo II*, 960 F.3d at 602-03; *Rhode Island II*, 979 F.3d at 59.

C. Defendants Also Fail to Raise a Colorable Federal Defense.

Even if Defendants had satisfied the first two prongs for federal officer jurisdiction, removal would still be improper because they fail to raise a colorable federal defense to the claims asserted them. *Jamison v. Wiley,* 14 F.3d 222, 238 (4th Cir. 1994); *Minnesota I,* 2021 WL 1215656, at *9. A defendant fails to raise a colorable federal defense if the proffered defense is "'immaterial and made solely for the purpose of obtaining jurisdiction' or is 'wholly insubstantial and frivolous.'" *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 513 n.10 (2006). Such is

the case here, where Defendants' litany of federal defenses is premised on a reimagined Complaint, and none has colorable application to the State's actual allegations. *See Honolulu I*, 2021 WL 531237, at *7; *Minnesota I*, 2021 WL 1215656, at *9.

Defendants devote 41 pages of the NOR and more than 1,266 pages of exhibits to federal-officer jurisdiction, yet only two and one-half pages address their alleged federal defenses, and then only in the most cursory manner. NOR ¶¶ 168-173. Defendants have no colorable "government contractor" defense because, among other things, the claims in this action have nothing to do with Defendants' alleged production of "oil and gas at the direction of the federal government." *Id.* ¶ 169. And because (among other reasons) the relief sought in this action would not have "the practical effect of control[ling] conduct beyond the boundaries of [Vermont]," Defendants assert no colorable defenses under the Commerce Clause, the Due Process Clause, or the "foreign affairs doctrine." *Id.* ¶¶ 170, 172. Defendants also lack a colorable First Amendment defense because the First Amendment does not protect misleading commercial speech. *Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563 (1980). Defendants' reliance upon the *Noerr-Pennington* doctrine, NOR ¶ 171, also is unavailing because the State is not challenging Defendants' lobbying activity.

In sum, this Court should reject federal-officer jurisdiction, just as every other court has done when ruling upon Defendants' arguments.

III. This Action Is Not Removable Under the Outer Continental Shelf Lands Act.

The OCSLA authorizes federal courts to exercise jurisdiction over "cases and controversies arising out of, or in connection with … 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."

43 U.S.C. § 1349(b)(1). Defendants offer no plausible basis to allege that the State's deceptive marketing claims are subject to jurisdiction under this provision. Indeed, their assertion of OCSLA jurisdiction in "climate" cases has been rejected at least eight times by courts nationwide, including where (unlike here) the plaintiff seeks monetary relief for climate-related injuries.[11] It is meritless and should be rejected here.

Courts typically assess jurisdiction under the OCSLA "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).[12] As used in the OCSLA, "the term 'operation' contemplate[s] the doing of some physical act on the [Outer Continental Shelf]" such as "locating mineral resources" through surveying and drilling, "the construction, operation, servicing and maintenance of facilities to produce those resources," or removing the minerals. *EP Operating Ltd. P'ship v. Placid Oil Co.*, 26 F.3d 563, 567-68 (5th Cir. 2014). A case "arises out of, or in connection with" the operation if, "but-for" the operation, the case would not have arisen. *Plaquemines Par. v. Palm Energy*

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[11] *See City of Hoboken*, 2021 WL 4077541, appeal filed No. 21-2728 (3d Cir. Sept. 14, 2021); *Connecticut*, 2021 WL 2389739, appeal filed No. 21-1446 (2d Cir. Sept. 22,2021); *Minnesota I,* 2021 WL 1215656, appeal filed No. 21-1752 (8th Cir. Apr. 5, 2021); *Honolulu I,* 2021 WL 531237, appeal filed No. 21-15318 (9th Cir. Feb. 23, 2021); *Rhode Island I*, 393 F. Supp. 3d 142 *cert. granted and vacated and remanded on other grounds*, 141 S.Ct. 2666 (2021); *Boulder I*, 405 F. Supp. 3d 947 *cert. granted and vacated and remanded on other grounds*, 141 S.Ct 2667 (Mem) (2021); *Baltimore I* , 388 F. Supp. 3d 538, *amended* (June 20, 2019) *cert. granted and vacated and remanded on other grounds*, 141 S.Ct. 1532 (Mem) (2021); *San Mateo I*, 294 F. Supp. 3d 934 *cert. granted and vacated and remanded on other grounds*, 141 S.Ct. 2666 (Mem) (2021).

[12] The Fifth Circuit "appears to have more familiarity" with this provision than other courts of appeals. *Connecticut,* 2021 WL 2389739, at *12 (finding no Second Circuit or Supreme Court decisions discussing "the limits of this jurisdictional grant").

Offshore, LLC, No. CIV.A. 13-6709, 2015 WL 3404032, at *4 (E.D. La. May 26, 2015); *see also Deepwater Horizon*, 745 F.3d at 163.

The "injury" to the marketplace at the heart of Vermont's consumer protection claims does not arise from any "physical act" or "operation" conducted on the OCS. *See, e.g., Connecticut*, 2021 WL 2389739, at *12 (rejecting OCSLA jurisdiction over claims that "seek 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 [OCS]"); *Minnesota I,* 2021 WL 1215656, at *10 (rejecting OCSLA jurisdiction because "the State's claims are rooted not in the Defendants' fossil fuel production, but in its alleged misinformation campaign"). [13]

Defendants make the bootstrap argument that Vermont's VCPA claims "arise out of Defendants' OCS operations because fossil fuel production on the OCS is part of the production about which Defendants allegedly misled Vermont consumers." NOR ¶ 181; *see also id.* ¶ 182 ("The Complaint also challenges Defendants' statements relating to their fossil fuel products regardless of where they were extracted or produced."). Even if Defendants' deceptive marketing concerned their activities on the OCS, the relationship between those activities and the injury resulting from the deception would still be "too remote and attenuated" to support OCSLA jurisdiction. *Par. of Plaquemines v. Total Petrochemical & Ref. USA, Inc.*, 64 F. Supp. 3d 872, 898 (E.D. La. 2014).

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[13] OCSLA jurisdiction exists in narrow circumstances that involve a direct connection between the claims asserted and physical operation on the OCS, such as, where a person is injured on an oil rig located on the OCS, *Various Plaintiffs v. Various Defendants (Oil Field Cases)*, 673 F. Supp. 2d 358, 370 (E.D. Pa. 2009); where oil was spilled from such a rig, *Deepwater Horizon*, 745 F.3d at 162; and in contract disputes directly relating to OCS operations. *Laredo Offshore Constructors, Inc. v. Hunt Oil Co.*, 754 F.2d 1223, 1225 (5th Cir. 1985).

OSCLA removal requires "but for" causation, and Defendants' production activities on the OCS are not a "but for" cause of the State's deceptive marketing claims. Defendants allege that a "substantial quantum" of the fossil fuels they sell "are extracted and produced from OCS operations." NOR ¶ 182. But that fails to establish "but for" causation even in cases seeking redress for injuries caused by climate change.[14] It necessarily fails here as well; where or how Defendants sourced the fossil fuels is irrelevant to Vermont's claims that Defendants deceived consumers about their products.

Defendants baselessly contend that this Court has OCSLA jurisdiction because "resolution of this dispute foreseeably could affect the efficient exploitation of minerals from the OCS." NOR ¶ 184. It is difficult to see how a judgment requiring honest disclosures and remedying past deceptions could "discourage OCS production, jeopardize[e] the federal government's leasing program, [or] impair[ ] national energy security." *Id*. Even if such outcomes are conceivable, they are too speculative to support OSCLA jurisdiction. *See Par. of Plaquemines,* 64 F. Supp. 3d at 898 ("[t]he problem with Defendants' argument … is that they seek to hinge federal jurisdiction on uncertain, speculative, and completely hypothetical future events"); *see also Boulder I*, 405 F. Supp. 3d at 979 ("A case cannot be removed under OCSLA based on speculative impacts; immediate and physical impact is needed."); *Minnesota I*, 2021

[14] *See e.g., City of Hoboken*, 2021 WL 4077541, at *9) ("Although it is more than plausible that fossil fuels originating from the OCS led to the effects of global warming that Hoboken is now facing, this does not amount to but-for causation."); *Rhode Island I*, 393 F.Supp.3d at 151-52 ("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 ("[D]efendants offer no basis to ... conclude that the City's claims for injuries stemming from climate change would not have occurred but for defendants' extraction activities on the OCS"); *San Mateo I*, 294 F. Supp. 3d at 939 ("[E]ven if some of the activities that caused the alleged injuries stemmed from operations on the [OCS], the defendants have not shown that the plaintiffs' causes of action would not have accrued *but for* the defendants' activities on the shelf.").

WL 1215656, at *10 ("This type of speculation . . . does not establish a stable ground for supporting removal.").

Defendants' reliance upon *Amoco Production Co. v. Sea Robin Pipeline Co.,* 844 F.2d 1202 (5th Cir. 1988), is misplaced. *Amoco* involved a dispute regarding take-or-pay rights for natural gas produced from OCS wells, which "necessarily and physically has an immediate bearing on the production of the particular well," and was thus "a controversy 'arising out of, or in connection with (A) any operation ... which involves exploration, development, or production of the minerals ...'" *Id.* at 1210 (quoting § 1349(b)(1)). *See also Par. of Plaquemines,* 64 F. Supp. 3d at 898 (in *Amoco*, the court "was persuaded that the parties' adherence to or abandonment of the contracts at issue would have a direct effect on offshore production.").

"No case holds removal is appropriate if some fuels from the OCS *contribute* to the harm." *Boulder I,* 405 F. Supp. 3d at 979 (italics in original). Defendants' "argument that there is federal jurisdiction if any oil *sourced* from the OCS is some *part* of the conduct that creates the injury" would "dramatically expand the statute's scope." *Id.* (italics in original). Here, Defendants would stretch OCSLA jurisdiction even further because the harm to the marketplace that Vermont seeks to remedy does not arise from Defendants' fossil fuel products; it arises from Defendants' deceptive marketing of those products. There is no OCSLA jurisdiction over the claims in this action.

IV. No Aspect of This Action Arises Out of or Concerns Federal Enclaves.

Known as the "federal enclaves" doctrine, "[t]he United States has power and exclusive authority 'in all Cases whatsoever ... over all places purchased' by the government 'or the erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings.'" *Akin v. Ashland Chem. Co*., 156 F.3d 1030, 1034 (10th Cir. 1998) (quoting U.S. Const. art. I, § 8, cl. 17).

Accordingly, causes of action arising from incidents occurring on such "federal enclaves" may be removed as a part of federal question jurisdiction. *Id*. The right to removal depends upon "[t]he location where Plaintiff was injured." *Boulder I*, 405 F. Supp. 3d at 974; *see also Minnesota I,* 2021 WL 1215656 at *10-11; *Baltimore I*, 388 F. Supp. 3d at 565; *San Mateo I,* 294 F. Supp. 3d at 939. However, the "federal enclave doctrine only applies when the locus in which the claim arose is the federal enclave itself." *In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d 1103, 1125 (N.D. Cal. 2012).

No aspect of the consumer protection claims in this action arises from any activity on or relating to federal enclaves. While the State, under its statutory law, seeks to halt Defendants' ongoing unfair and deceptive marketing practices in Vermont as a general matter, and to impose penalties for Defendants' prior unlawful marketing activities to Vermont consumers (Compl. ¶¶ 4-6, 96-98, 118-120, 170, 177-194 and at p. 67-68 (Request for Relief)), the State expressly disclaims seeking to hold Defendants liable "in connection with any marketing or sales of their fossil fuel products that may have occurred on federal lands." *Id*. ¶ 6. Thus, Defendants again mischaracterize the Complaint in wrongly asserting that it "necessarily sweeps in" their "allegedly misleading marketing directed at and viewed on" various federal enclaves within Vermont's borders. NOR ¶ 190.

Disclaimers such as those in paragraph 6 of the Complaint are effective to preclude federal enclave jurisdiction. *See, e.g., Washington v. Monsanto Co*., 274 F. Supp. 3d 1125, 1132 (W.D. Wash. 2017) (assertion that plaintiff does not seek damages for contamination within federal territory is sufficient to find that "none of its claims arise on federal enclaves"); *Boulder I*, 405 F. Supp. 3d at 974 (no federal enclave jurisdiction where plaintiff expressly alleges that it does not "seek damages or abatement relief for injuries to or occurring on federal lands."); *Rhode*

Island I, 393 F. Supp. 3d at 152 (claims do not arise on federal enclaves where complaint "avoids seeking relief for damages to any federal lands"); *Baltimore I*, 388 F.Supp.3d at 565 (no federal enclave jurisdiction where complaint excludes federal territory from scope of injury).

Defendants' remaining arguments deserve short shrift. They contend that the Complaint's disclaimer at paragraph 6 should be ignored because the "gravamen of the purported consumer harms is Defendants' extraction, production, and sale of fossil fuels, and the alleged effects of climate change from the combustion of fossil fuels", NOR ¶ 191; the "true aim" of the Complaint is "to halt Defendants' oil and gas operations," which "necessarily sweeps in those activities that occur on federal enclaves", NOR ¶ 189; and the Complaint "alleges that climate change injuries will be suffered in federal enclaves within Vermont," such as "the Green Mountain National Forest, where the federal government administers 410,690 acres of land", NOR ¶ 192.

But the Complaint makes no mention of the Green Mountain National Forest or any other federal enclave and, even if it did, Defendants' arguments once again confuse harm to the marketplace created by Defendants' deceptive marketing with harm to the environment caused by their products. *See, e.g.*, *Honolulu I*, 2021 WL 531237 at *8 ("[C]ontrary to Defendants' assertions, the relevant conduct here, let alone 'all' of it, is not the production or refining of oil and gas. … It is, instead, the warning and disseminating of information about the hazards of fossil fuels."); *Connecticut I,* 2021 WL 2389739, at *13 ("Connecticut's claims seek redress for the manner by which ExxonMobil has interacted with consumers in Connecticut, not the impacts of climate change.").

Moreover, federal enclave jurisdiction has been rejected even in those cases where the plaintiff seeks relief for environmental injuries caused by Defendants' products. In *Boulder I*,

for example, the complaint referenced the Rocky Mountain National Park as "an example of the regional trends that have resulted from Defendants' climate alteration," but the "actual injury for which [p]laintiffs seek compensation is injury to 'their property' and 'their residents,' occurring 'within their respective jurisdictions.'" 405 F. Supp. 3d at 974. That the impact of Defendants' products on the climate "may have caused similar injuries to federal property does not speak to the nature of [p]laintiffs' alleged injuries for which they seek compensation and does not provide a basis for removal." *Id*. *See also Baltimore I,* 388 F. Supp. 3d at 565 ("The Complaint does not contain any allegations concerning defendants' conduct on federal enclaves and in fact, it expressly defines the scope of injury to exclude any federal territory."); *Rhode Island I*, 393 F. Supp. 3d at 151-52 ("Although [federal enclaves] exist[ ] in Rhode Island … the State's claims did not arise there, especially since its complaint avoids seeking relief for damages to any federal lands.").[15]

In sum, this Court should find, like every other court to address the issue, that Defendants have not met their burden to show that jurisdiction exists under the federal enclave doctrine.

V. This Action Is Not Within the Court's Diversity Subject Matter Jurisdiction.

Defendants concede that a State is not "a citizen" for purposes of establishing diversity jurisdiction. NOR ¶ 197; *see also Moor v. County of Alameda,* 411 U.S. 693, 717 (1973) ("There is no question that a State is not a "citizen" for purposes of the diversity jurisdiction."). Their contention that the State's action nevertheless falls within the Court's diversity jurisdiction under 28 U.S.C. § 1332(a) is based upon the erroneous proposition that Vermont is not the real party in interest here. *See* NOR ¶ 197 (Vermont "is a nominal plaintiff …[t]he real parties in

[15] ExxonMobil's appeal of the remand order in *Connecticut* is pending in the Second Circuit. ExxonMobil's appellate brief does not argue for federal enclave jurisdiction and thus appears to have abandoned the claim in that case.

interest are consumers in Vermont."). But Vermont ***is*** the real party in interest, and diversity jurisdiction does not exist.

The "party in interest" is determined by looking at the "essential nature and effect of the proceeding." *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 464 (1945), *overruled on other grounds by Lapides v. Bd. of Regents of Univ. Sys. of Ga*., 535 U.S. 613 (2002); *Purdue Pharma L.P. v. Kentucky,* 704 F.3d 208, 218 (2d Cir. 2013). Where, as here, the State of Vermont brings an enforcement action seeking statewide injunctive relief and statutory penalties under the VCPA, the State is the real party in interest and diversity jurisdiction is therefore lacking. *See, e.g.*, *MPHJ Tech. Invs.,* 2014 WL 1494009, at *9; *MyInfoGuard, LLC v. Sorrell*, No. 2:12-CV-074, 2012 WL 5469913, at *5 (D. Vt. Nov. 9, 2012).

In *MyInfoGuard*, this Court explained: "The fact that the State seeks civil penalties and a statewide injunction…remedies unavailable to consumers — leaves no doubt that the State has concrete interests in the litigation; put simply, the benefits of those remedies flow to the State as a whole." 2012 WL 5469913, at *5. The requested remedies "demonstrate that the State brought the case on behalf of itself and not individual businesses," and "[b]ecause the State is the true party in interest, there is no diversity and subject matter jurisdiction cannot be established under § 1332(a)." *MPHJ Tech. Invs.,* 2014 WL 1494009, at *9.

The disgorgement remedy that the State seeks also "is a distinctly public-regarding remedy, available only to government entities seeking to enforce explicit statutory provisions." *F.T.C. v. Bronson Partners, LLC*, 654 F.3d 359, 372 (2d Cir. 2011). *See also Minnesota I,* 2021 WL 1215656, at **2, 13 (Minnesota is the real party in interest in suit seeking injunctive relief, civil penalties, and disgorgement); *New York by James,* 2021 WL 3140051, at *4 (the state

is real party in interest in suit seeking disgorgement); *In re Standard & Poor's Rating Agency Litig.* 23 F. Supp. 3d at 406 (same).

Finally, even if this Court were to determine that the State was a nominal party, Defendants still have not met their burden of showing complete diversity. Defendants argue "the real parties in interest are consumers in Vermont", NOR ¶ 197, but in doing so they conflate "Vermont consumers" with "Vermont citizens." While a large portion of Vermont consumers will be Vermont citizens, all consumers in Vermont are protected *regardless* of residency requirements, and thus can include citizens of other states who drive to Vermont and purchase Defendants' fossil fuel products here, including, for example, citizens of New York and New Jersey, where the ExxonMobil defendants are incorporated. *See, e.g.*, *New York v. Feldman*, 210 F. Supp. 2d 294, 303 (S.D.N.Y. 2002) (the Attorney General is authorized to protect all consumers including "non-residents injured by wrongdoing that occurred" instate); *In re DeFelice,* 77 B.R. 376, 380 (Bankr. D. Conn. 1987) (the State's interest in consumer protection "is served whenever the perpetrators of consumer fraud within its borders are brought to justice regardless of whether their victims happen to be citizens"); *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 947 (6th Cir. 2011) ("the place of the injury controls in a consumer-protection lawsuit," not the citizenship). Thus, even if Vermont consumers could somehow be deemed to the real parties in interest, Defendants would still fail to establish complete diversity.

VI. The Court Should Award Attorney Fees to the State.

A remand order "may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). As a general rule, fees and costs may be awarded "where the removing party lacked an objectively reasonable basis for seeking removal." *Martin v. Franklin Cap. Corp.*, 546 U.S. 132, 140 (2005). The court may

depart from that rule if its reasons for doing so are "faithful to the purposes of awarding fees under § 1447(c)." *CMGRP, Inc. v. Agency for the Performing Arts, Inc.*, 689 F. App'x 40, 41 (2d Cir. 2017) (quoting *Martin*, 546 U.S. at 141). Those purposes "include disincentivizing actions that 'delay resolution of the case, impose additional costs on both parties, and waste judicial resources.'" *Id.*

Applying those principles, the Second Circuit has affirmed the award of fees and costs where a party removed an action in violation of the well-pleaded complaint rule, concluding that removal under those circumstances was not objectively reasonable. *See, e.g.*, *Calabro v. Aniqa Halal Live Poultry Corp.*, 650 F.3d 163, 166 (2d Cir. 2011); *Savino v. Savino*, 590 F. App'x 80, 81 (2d Cir. 2015). This Court, too, has awarded fees where a case was removed based on federal question jurisdiction, but the complaint alleged no cause of action arising under federal law. *See Barnhart-Graham Auto, Inc. v. Green Mountain Bank*, 786 F. Supp. 394, 395 (D. Vt. 1992).

Defendants' removal of this action was not objectively reasonable. As discussed above, Defendants removed this case based upon a distorted characterization of the State's VCPA claims, designed to make it appear as if the State's claims were comparable to those asserted in *City of New York*. Moreover, such removal was in violation of the well-pleaded complaint rule. Defendants' reliance upon the Federal Officer Removal Statute, OCSLA, the federal enclaves doctrine, and diversity jurisdiction also was objectively unreasonable. Accordingly, the Court should exercise its discretion and award the State its costs and attorney fees.

CONCLUSION

For the foregoing reasons, the Court should remand this action to the Superior Court of the State of Vermont, Chittenden Unit, where it was originally brought.

DATED: December 17, 2021

Respectfully submitted,

STATE OF VERMONT

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