No. 21-2728

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CITY OF HOBOKEN,

Plaintiff-Appellee,

v.

CHEVRON CORP., CHEVRON U.S.A. INC., EXXON MOBIL CORP., EXXONMOBIL OIL CORP., ROYAL DUTCH SHELL PLC, BP P.L.C., BP AMERICA INC., CONOCOPHILLIPS, CONOCOPHILLIPS COMPANY, PHILLIPS 66, PHILLIPS 66 COMPANY, AMERICAN PETROLEUM INSTITUTE, and SHELL OIL COMPANY

Defendants-Appellants.

On Appeal from the United States District Court for the District of New Jersey, Case No. 20-cv-14243 (Hon. John Michael Vazquez)

BRIEF OF DELAWARE, CONNECTICUT, HAWAI'I, MAINE, MARYLAND, MASSACHUSETTS, MINNESOTA, NEW JERSEY, NEW MEXICO, NEW YORK, OREGON, PENNSYLVANIA, RHODE ISLAND, WASHINGTON, AND THE DISTRICT OF COLUMBIA AS *AMICI CURIAE* IN SUPPORT OF APPELLEE AND AFFIRMANCE

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INTERESTS OF THE *AMICI CURIAE*

The States of Delaware, Connecticut, Hawai'i, Maine, Maryland, Minnesota, New Jersey, New Mexico, New York, Oregon, Rhode Island, and Washington, the Commonwealths of Massachusetts and Pennsylvania, and the District of Columbia ("Amici States") file this brief as *amici curiae* in support of plaintiff-appellee City of Hoboken. *See* Fed. R. App. P. 29(a)(2).

States have a sovereign interest in protecting consumers and the public from deceptive commercial activities. States have long been "vested with the responsibility of protecting the health, safety, and welfare of [their] citizens."[1] That responsibility includes "ensuring the accuracy of commercial information in the marketplace."[2] Indeed, States have long occupied and regulated the fields of consumer protection,[3] advertising,[4] and unfair business practices.[5]

Here, Hoboken's lawsuit seeks to vindicate those core state interests by holding Defendants accountable for their decades-long efforts to

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[1] *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342 (2007).

[2] *Edenfield v. Fane*, 507 U.S. 761, 769 (1993).

[3] *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 150 (1963).

[4] *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541-42 (2001).

[5] *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989).

conceal and misrepresent the climate-change impacts of their fossil-fuel products. As set forth in the complaint, Defendants have known for more than fifty years that fossil-fuel consumption was driving up greenhouse gas emissions and dangerously warming the planet. But, according to the complaint, instead of warning consumers and the public of those dangers, Defendants waged sophisticated disinformation campaigns to cast doubt on the existence, causes, and consequences of global warming. Those campaigns succeeded, hyperinflating fossil-fuel consumption and causing deadly climate-change impacts in Hoboken (and elsewhere).

Protecting their residents (and themselves) by enforcing state laws in state court falls squarely within Amici States' and Hoboken's longstanding interests. Accepting Defendants' arguments would significantly interfere with those interests. This Court should affirm—on all grounds—the District Court's well-reasoned decision.

ARGUMENT

Defendants rehash arguments that have been uniformly rebuffed by appellate and district courts alike.[6] Here, as in other climate-deception cases, Defendants attempt to remove based on the federal common law of interstate pollution. But Hoboken's claims fall far outside any body of federal common law that might once have applied to

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[6] *See City of Oakland v. BP PLC*, 969 F.3d 895, 906-07 (9th Cir. 2020) ("*Oakland*"), *cert. denied*, 141 S. Ct. 2776 (Mem.), 2021 WL 2405350 (June 14, 2021); *Mayor & City Council of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538, 558-61 (D. Md. 2019) ("*Baltimore I*"), *aff'd in part, appeal dismissed in part*, 952 F.3d 452 (4th Cir.) ("*Baltimore II*"), *vacated and remanded on other grounds*, 141 S. Ct. 1532 (2021); *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 405 F. Supp. 3d 947, 964-68 (D. Colo. 2019) ("*Boulder I*"), *aff'd in part, appeal dismissed in part*, 965 F.3d 792 (10th Cir. 2020) ("*Boulder II*"), *vacated and remanded on other grounds*, No. 20-783 (U.S. May 24, 2021); *Cnty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934, 938 (N.D. Cal. 2018) ("*San Mateo I*"), *aff'd in part, appeal dismissed in part*, 960 F.3d 586 (9th Cir. 2020) ("*San Mateo II*"), *reh'g en banc denied* (Aug. 4, 2020), *vacated and remanded on other grounds*, No. 20-884 (U.S. May 24, 2021); *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142, 150-51 (D.R.I. 2019) ("*Rhode Island I*"), *aff'd in part, appeal dismissed in part*, 979 F.3d 50 (1st Cir. 2020) ("*Rhode Island II*"), *vacated and remanded on other grounds*, No. 20-900 (U.S. May 24, 2021); *Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31, 44-45 (D. Mass. 2020) ("*Massachusetts*"); *Minnesota v. Am. Petroleum Inst.*, No. CV 20-1636 (JRT/HB), 2021 WL 1215656, at *6-*8 (D. Minn. Mar. 31, 2021) ("*Minnesota*"), *appeal filed*, No. 21-1752 (8th Cir. Apr. 5, 2021); *Connecticut v. Exxon Mobil Corp.*, No. 3:20-CV-1555 (JCH), 2021 WL 2389739, at *7-*10 (D. Conn. June 2, 2021) ("*Connecticut*"), *appeal filed*, No. 21-1446 (2d Cir. June 8, 2021); *City & Cty. of Honolulu v. Sunoco LP*, No. 20-CV-00163-DKW-RT, 2021 WL 531237, at *2 n.8 (D. Haw. Feb. 12, 2021), *appeals filed*, Nos. 21-15313 & 21-15318 (9th Cir. Feb. 23, 2021) ("*Honolulu*").

interstate emissions, because Hoboken's claims do not seek to regulate cross-border emissions and do not raise any uniquely federal interest. Instead, these claims seek to vindicate core state and local interests in protecting consumers and the public against deceptive commercial activity. *See infra*, Part I. Even if federal common law did apply here, it would operate as an ordinary preemption defense that, under the well-pleaded complaint rule, cannot support federal-question jurisdiction.

As for Defendants' assertion of jurisdiction under the federal officer removal statute and the Outer Continental Shelf Lands Act ("OCSLA"), those assertions ignore the tortious conduct that triggers liability under Hoboken's complaint: Defendants' decades-long efforts to conceal and mislead the dangers of its fossil-fuel products. *See infra*, Part III. That misconduct is too attenuated from any actions taken at the direction of a federal officer or any operations conducted on the Outer Continental Shelf to support federal-officer or OCSLA jurisdiction. Accordingly, this Court should affirm the District Court's remand order and send Hoboken's state-law claims back to state court, where they were filed and where they belong.

I. Federal Common Law Does Not Apply Because States and Local Governments Have Authority Under State Law to Protect Consumers from Deceptive Commercial Practices and to Address Climate Change Harms Within Their Borders

Defendants repeatedly argue that federal common law preempts Hoboken's claims because those claims implicate a "uniquely federal interest." As explained in Part II, *infra*, that argument is beside the point: it sounds in ordinary preemption, *see Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988), and so cannot provide a basis for removal, *see Maglioli v. All. HC Holdings LLC*, 16 F.4th 393, 407 (3d Cir. 2021); *Rosenberg v. DVI Receivables XVII, LLC*, 835 F.3d 414, 421 n.4 (3d Cir. 2016).

That argument is also wrong on the merits of ordinary preemption. The Supreme Court has made clear that there are only "a few areas, involving 'uniquely federal interests,' [that] are so committed by the Constitution and the laws of the United States to federal control that state law is pre-empted and replaced" by federal common law. *Boyle*, 487 U.S. at 504 (quoting *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981)). "The cases in which federal courts may engage in common lawmaking are few and far between." *Rodriguez v. Fed. Deposit Ins. Corp.*, 140 S. Ct. 713, 716 (2020).

Hoboken's case is not one of them. Far from creating "a significant conflict" between "a uniquely federal interest" and "the operation of state law," *Linan-Faye Const. Co. v. Hous. Auth. of City of Camden*, 49 F.3d 915, 920 (3d Cir. 1995), Hoboken's deception-based claims fall squarely within traditional spheres of state regulation. *See infra*, Part I.A. That conclusion does not change simply because Hoboken claims that Defendants' deception caused climate-related harms. *See infra*, Parts I.B & I.C.

A. Protecting Consumers from Deceptive Commercial Practices is a Traditional State Prerogative

Hoboken seeks redress under New Jersey state law for Defendants' alleged history of false and misleading advertising, disinformation, and deceptive promotion of dangerous products. Protecting consumers from deceptive commercial conduct is plainly an area within which states have traditionally regulated pursuant to their broad sovereign police powers. *See Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 150 (1963) (noting that states have "traditional power to enforce … regulations designed for the protection of consumers"); *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989) (preventing unfair business practices and consumer deception is "an area traditionally regulated by the States"); *Edenfield v. Fane*, 507 U.S. 761, 769 (1993) (a state's "in-

terest in ensuring the accuracy of commercial information in the marketplace is substantial"); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001) (identifying "advertising" as "a field of traditional state regulation" (cleaned up)). Ultimately, whether deceptive commercial conduct violates a state consumer protection statute, and whether such conduct might constitute a tort or give rise to a claim for nuisance, are questions well within the bounds of state law.

States have long engaged in consumer protection actions in areas that also have national and international dimensions—and courts regularly reject attempts to remove such actions to federal court. For example, federal courts remanded state enforcement actions relating to the subprime mortgage lending crisis;[7] the ongoing opioid epidemic;[8] the use by vehicle manufacturers of "defeat devices" to evade EPA emissions tests;[9] deceptive marketing of tobacco products;[10] and unfair prac-

[7] *See Massachusetts v. Fremont Inv. & Loan*, No. 07-cv-11965, 2007 WL 4571162 (D. Mass. Dec. 26, 2007).

[8] *See, e.g.*, *Delaware ex rel. Denn v. Purdue Pharma L.P.*, C.A. No. 1:18-383-RGA, 2018 WL 1942363, at *4-*5 (D. Del. Apr. 25, 2018).

[9] *See In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, MDL No. 2672, 2017 WL 2258757 (N.D. Cal. May 23, 2017).

[10] *See North Carolina ex rel. Stein v. Tinted Brew Liquid Co.*, No. 19-cv-886, 2019 WL 5839184 (M.D.N.C. Nov. 7, 2019).

tices by Internet service providers.[11] In each of these areas, states took enforcement actions that related to national interests, or even implicated specific federal statutes, but the district courts found no impediment to state-court jurisdiction.

Here, invoking the New Jersey Consumer Fraud Act and the state common law of nuisance, trespass, and negligence, Hoboken seeks to hold Defendants accountable for making false representations about the nature of the fuels they sell—representations that caused consumers, including Hoboken itself, and the public to underestimate the harms of fossil fuel consumption. Hoboken's claims are comparable to the States' suit to hold Volkswagen accountable for "deceptive representations about the environmental characteristics of its cars," *In re Volkswagen*, 2017 WL 2258757, at *11, and New York's suit to hold a cable provider accountable for promising service it could not provide, *New York*, 2017 WL 1755958, at *8-*9. The existence of federal laws relating to climate change does not alter the state-law nature of Hoboken's claims, any more than federal laws regulating tobacco companies, mortgage lenders, motor vehicle manufacturers, pharmaceutical dis-

[11] *See New York v. Charter Commc'ns, Inc.*, No. 17-cv-1428, 2017 WL 1755958 (S.D.N.Y. Apr. 27, 2017).

tributors, or communications providers federalize state-law claims involving those actors.

B. The Federal Common Law of Interstate Emissions Does Not Apply Because Hoboken's Claims Do Not Seek to Regulate Defendants' Emissions

Although Hoboken's deception-based claims are firmly rooted in time-honored fields of state regulation, Defendants insist that these claims are governed by the federal common law of interstate emissions. That body of judge-made law no longer exists, having been displaced by the Clean Air Act. *See Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 423 (2011) ("*AEP*") ("When Congress addresses a question previously governed by a decision rested on federal common law, ... the need for such an unusual exercise of law-making by federal courts disappears." (cleaned up)). It therefore cannot preempt Hoboken's state-law claims, much less convert them into federal claims for jurisdictional purposes. *See Nw. Airlines, Inc. v. Transp. Workers Union of Am., AFL-CIO*, 451 U.S. 77, 95 n.34 (1981) ("[After congressional displacement], the task of the federal courts is to interpret and apply statutory law, not create common law.").

In any event, even when the federal common law of interstate emissions existed, it extended only to lawsuits that have the purpose

and effect of regulating out-of-state emissions.[12] Here, Hoboken's complaint does not seek to limit or otherwise regulate Defendants' emissions or their production of fossil fuels. To the contrary, Hoboken has expressly disclaimed seeking an injunction against Defendants' production of oil and gas (JA 747 at n.1), and seeks only traditional state-law damages and the reimbursement of costs associated with abating the harm Defendants have caused Hoboken by their deceptive and tortious conduct.

Nor does Hoboken's lawsuit even arguably regulate emissions indirectly, whether domestic or international. Indeed, Hoboken does not

[12] *See, e.g.*, *AEP*, 564 U.S. at 419 (seeking "injunctive relief" that would "require[e] each defendant to cap its carbon dioxide emissions and then reduce them by a specified percentage each year for at least a decade" (cleaned up)); *City of Milwaukee v. Illinois*, 451 U.S. 304, 311 (1981) ("*Milwaukee II*") (seeking an order requiring "petitioners to eliminate all overflows and to achieve specified effluent limitations on treated sewage"); *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972) ("*Milwaukee I*") (same); *New Jersey v. City of New York*, 283 U.S. 473, 476-77 (1931) (seeking "an injunction" that would "restrain[] the city from dumping garbage into the ocean or waters of the United States off the coast of New Jersey and from otherwise polluting its waters and beaches"); *New York v. New Jersey*, 256 U.S. 296, 298 (1921) (seeking to "permanently enjoin[]" defendant from "discharging ... sewage" into the New York harbor); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 236 (1907) (seeking "to enjoin the defendant copper companies from discharging noxious gas"); *Missouri v. Illinois*, 200 U.S. 496, 517 (1906) (seeking "to restrain the discharge of ... sewage"); *see also North Dakota v. Minnesota*, 263 U.S. 365, 371-72 (1923) (seeking "an order enjoining the continued use of [certain] ditches" that were causing floods in neighboring state).

challenge Defendants' mere production and sale of fossil fuels but rather Defendants' use of deception and false advertising to promote the production and sale of fossil fuel products. As the Fourth Circuit recognized in a similar case, such a complaint does "not merely allege that Defendants contributed to climate change and its attendant harms by producing and selling fossil fuel products; it is the concealment and misrepresentation of the products' known dangers—and simultaneous promotion of their unrestrained use—that allegedly drove consumption, and thus greenhouse gas pollution, and thus climate change." *Baltimore II*, 952 F.3d at 467. Success for Hoboken will not compel Defendants to reduce emissions, alter the balance of federal-state cooperative federalism in the regulation of climate change, or implicate foreign affairs. Instead, it will allow Hoboken to obtain relief for Defendants' deceptive commercial conduct, force Defendants to bear the costs of such conduct, and incentivize them to avoid such deception in the future.

This case is analogous to the litigation against tobacco companies for unlawful deceptive practices, which resulted in a Master Settlement Agreement between the tobacco companies and forty-six States. The Master Settlement Agreement prohibits "material misrepresentations of facts regarding the health consequences of using any Tobacco Prod-

uct," prohibits several deceptive advertising practices, and requires the tobacco companies to compensate the States for health-care costs related to smoking—but it does not prohibit or regulate the production or consumption of tobacco products. *See* Master Settlement Agreement Between States & Tobacco Manufacturers at 10-19 (1998), https://tinyurl.com/3wheh42w. Here, a settlement between Hoboken and Defendants awarding damages and prohibiting future misrepresentations to consumers about the dangers of fossil fuel emissions (or a post-trial order from the state court granting equivalent relief) would not prohibit or restrain Defendants from producing and selling their products in a lawful, non-deceptive manner.

C. States and Local Governments Have an Interest in Addressing Climate Change Harms Within Their Borders

Contrary to Defendants' insistence, Hoboken's lawsuit does not raise a uniquely federal interest capable of supporting federal common law simply because greenhouse gas emissions are a link in the causal chain connecting Defendants' tortious conduct (their climate-disinformation campaigns) and Hoboken's climate-related injuries. Quite the opposite: it is "well settled that the states have a legitimate interest in combatting the adverse effects of climate change on their

residents." *American Fuel & Petrochem. Mfrs. v. O'Keeffe*, 903 F.3d 903, 913 (9th Cir. 2018).

Indeed, many Amici States have enacted measures to address the impacts of climate change. Delaware, for example, recently issued its Climate Action Plan, setting forth actions to maximize the State's resilience to the effects of climate change. *See* Del. Dep't of Natural Res. & Envtl. Control, *Delaware's Climate Action Plan* (2021), https://tinyurl.com/f7bdus32. Hawaii's Act 117 of 2015 recognized that the State's beaches "are disappearing at an alarming rate" and thus authorized the use of transient accommodation tax revenues for beach conservation and restoration. *See* 2015 Haw. Sess. Laws Act 117. And Rhode Island produced a detailed study on the impacts of climate change on it, which contains numerous, detailed recommendations for increasing the state's resiliency. *See* Rhode Island, *Resilient Rhody: An Actionable Vision for Addressing the Impacts of Climate Change in Rhode Island* (2018), https://tinyurl.com/2p97hk6h.[13] Such climate-adaptation

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[13] These adaptation and mitigation efforts are by no means limited to states. Hoboken itself has developed a strategy for adapting and mitigating rainfall and seawater flooding exacerbated by climate change, and has begun building flood protection infrastructure and purchasing land to build parks to protect against flooding. *See* OMA, *Resist-Delay-Store-Discharge: A Comprehensive Urban Water Strategy* (2014), https://tinyurl.com/3rzvpx4a.

measures put the lie to Defendants' expansive theory that state law is displaced by federal law whenever it touches upon global warming.

II. Under the Well-Pleaded Complaint Rule, Hoboken's State-Law Claims Do Not Arise Under Federal Law for Jurisdictional Purposes

Even if federal common law did somehow preempt Hoboken's state-law claims, that would not give rise to federal-question jurisdiction. Defendants' federal common law arguments raise—at most—an ordinary preemption defense that cannot support removal under the well-pleaded complaint rule. *See infra*, Part II.A. Nor can Defendants shoehorn Hoboken's lawsuit into *Grable* jurisdiction. *See infra*, Part II.B. State courts are, moreover, perfectly capable of handling federal preemption defenses, including those sounding in federal common law. *See infra*, Part II.C. The District Court therefore correctly rejected federal-question jurisdiction, and this Court should affirm.

A. Removal Cannot Rest on Defendants' Federal Common Law Preemption Defense

The well-pleaded complaint rule governs whether federal-question jurisdiction can support removal. Under the rule, "federal jurisdiction exists only when a federal question is presented on the face of the properly pleaded complaint. Ordinarily, a case may not be removed on the basis of a federal defense, including the defense of

preemption, even if the defense is anticipated in the complaint." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 386 (1987). Because federal preemption arises in this case only as a defense, "it does not appear on the face of a well-pleaded complaint, and, therefore, does not authorize removal to federal court." *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987).

There is a "narrow exception to the well pleaded complaint rule ... where Congress has expressed its intent to completely preempt a particular area of law such that any claim that falls within this area is necessarily federal in character." *New Jersey Carpenters & the Trustees Thereof v. Tishman Const. Corp. of New Jersey*, 760 F.3d 297, 302 (3d Cir. 2014) (quotations omitted). As this Court has explained, "the only state claims that are 'really' federal claims and thus removable to federal court are those that are preempted completely by federal law." *Goepel v. Natl. Postal Mail Handlers Union, a Div. of LIUNA*, 36 F.3d 306, 311-12 (3d Cir. 1994) (citation omitted).

No recognized area of complete preemption applies to this case and, tellingly, Defendants have declined to invoke complete preemption on appeal. Instead, Defendants assert Hoboken's claims arise under federal law "because they seek redress for harms allegedly caused by transboundary emissions." But as the District Court rightly explained:

> In relying on the federal common law as a basis for removal, Defendants are in essence raising the affirmative defense that the federal common law preempts [Hoboken's] claims. This amounts to an argument for ordinary preemption. And ordinary preemption does not convert [Hoboken's] state law claims into a federal case.

(JA 25.) If Defendants wish to raise preemption as an affirmative defense against Hoboken's state-law claims, they must do so in state court after remand.

Defendants point (AOB 16, 22-23) to cases involving interstate pollution, climate change, or foreign affairs in an effort to bolster their argument that Hoboken's claims are removable, but nearly all of these cases were initiated in federal court in the first instance or did not address the propriety of removal. *See, e.g.*, *AEP*, 564 U.S. 410 (initiated in federal court); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481 (1987) (did not address propriety of removal); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981) (initiated in federal court); *Milwaukee II*, 451 U.S. 304 (same); *Milwaukee I*, 406 U.S. 91 (same); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964) (same); *United States v. Pink*, 315 U.S. 203, 233 (1942) (same); *City of New York v. Chevron Corp.*, 993 F.3d 91 (2d Cir. 2021) (same). *See also Connecticut*, 2021 WL 2389739, at *7 n.7 (discussing the distinction between the case brought in *City of New*

York from that brought by Connecticut). These cases are therefore unhelpful to determining whether Hoboken's state-law claims may be removed to federal court.

Defendants also cite to this Court's decision in *United Jersey Banks v. Parell*, 783 F.2d 360 (3d Cir. 1986), for the proposition that Hoboken cannot "artfully plead" federal claims as state-law claims in order to deny Defendants a federal forum. (AOB 25-26.) But Defendants fail to mention that this Court held in that same case that "[t]he fact that [a plaintiff's] claim under state law may be defeated because of the preemptive effect of [federal law] does not mean that such federal laws provide the basis of the cause of action," and reiterated "the general rule [is] that federal jurisdiction will not be found when the complaint states a prima facie claim under state law." 783 F.2.d at 367-68. As there, Hoboken has asserted claims under state law, and ordinary preemption cannot create federal jurisdiction.

B. There Is No *Grable* Jurisdiction Because Hoboken's Claims Do Not "Necessarily Raise" Any Substantial, Disputed Federal Questions

Defendants' assertion that this matter is removable under *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005), fails. For *Grable* jurisdiction to apply, the complaint must include a fed-

eral question that 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." *Goldman v. Citigroup Glob. Markets Inc.*, 834 F.3d 242, 249 (3d Cir. 2016) (quotation marks omitted). *Grable* only encompasses a "slim category of removable cases," and courts have universally rejected *Grable* jurisdiction in analogous climate-deception cases.[14] This Court should do the same.

To carry their burden under *Grable*, Defendants must point to the "specific elements of [plaintiff's] state law claims that require proof that [federal law] was violated and explain why that proof is necessary." *Central Iowa Power Coop. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 561 F.3d 904, 914 (8th Cir. 2009). They must show that there is an issue of federal law that must be resolved to prove Hoboken's state-law claims.

Defendants do not even try to make that showing. Instead, they rely on vague and general statements about how Hoboken's allegations "deal with air and water in their ambient or interstate aspects," assert-

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[14] *See Oakland*, 969 F.3d at 906-07; *Baltimore I*, 388 F. Supp. 3d at 558-61; *Boulder I*, 405 F. Supp. 3d at 964-68; *San Mateo I*, 294 F. Supp. 3d at 938; *Rhode Island I*, 393 F. Supp. 3d at 150-51; *Massachusetts*, 462 F. Supp. 3d at 44-45; *Minnesota*, 2021 WL 1215656, at *6-*8; *Connecticut*, 2021 WL 2389739, at *7-*10; *Honolulu*, 2021 WL 531237, at *2 n.8.

ing this is sufficient to remove Hoboken's entirely-state-law claims to federal court. (AOB 32-33.) They further argue that the issues raised by this case are substantial simply because they "directly implicate actions taken by the federal government [...] to regulate the interstate and international phenomenon of global climate change" (AOB 33), without any specificity as to how Hoboken's state-law claims do so. The reason for that lack of specificity is simple: federal issues, such as interstate and international emissions regulation, are not necessarily raised by Hoboken on the face of its well-pleaded complaint. Defendants cannot transform this case into a federal matter by inserting federal issues into Hoboken's allegations. *Caterpillar*, 482 U.S. at 392 ("The [well-pleaded complaint] rule makes the plaintiff the master of the claim."). And as explained above, Hoboken's state-law claims do not seek to—and cannot—regulate emissions in any way. *See supra,* Part I.B.

Even if Hoboken's claims somehow implicated national or international federal climate policy, that alone would not suffice for removal. Climate change is a complex phenomenon, and under Defendants' reasoning any state law case that implicates climate change, no matter how carefully pleaded, could be removed into federal court. Such a policy would "disturb[] the congressionally approved balance of federal

and state judicial responsibilities." *Goldman*, 834 F.3d at 257 (3d Cir. 2016) (cleaned up).

Defendants also argue removal is appropriate because Hoboken's claims raise First Amendment questions. (AOB 33-36.) However, Defendants do not even discuss the specific elements of Hoboken's state-law claims, as is required for *Grable* jurisdiction. *Central Iowa Power Co-op.*, 561 F.3d at 914 ("[*Grable*] inquiry demands precision; if the appellees' argument is correct, they should be able to point to the specific elements of CIPCO's state law claims that require proof that the O&T Agreement was violated and explain why that proof is necessary"). Instead, Defendants gesture vaguely at "a variety of federal interests" purportedly implicated by Hoboken's claims. *See Oakland*, 969 F.3d at 906-07. *See also, e.g.*, *San Mateo I*, 294 F. Supp. 3d at 938 ("[D]efendants mostly gesture to federal law and federal concerns in a generalized way.").

Defendants recite a list of landmark First Amendment cases (AOB 34), but omit that those cases all involve freedom of the press. *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (magazine's right to publish satire); *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986) (newspaper's right to publish allegations of ties to organized crime);

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (newspaper's right to publish an editorial in support of civil rights). Defendants' speech at issue here, which consists of advertisements and publications with the purpose of increasing the sale of fossil fuels (*see* Compl. ¶¶ 133-140 (JA101-104)), is undeniably *commercial speech*, which Hoboken alleges is deceptive; but the First Amendment does not protect such speech at all, as the Supreme Court has repeatedly ruled. *Friedman v. Rogers*, 440 U.S. 1, 10 (1979). Hoboken's allegations of deceptive conduct raise no significant question of federal law because state laws' ability to restrict dishonest commercial speech is not seriously disputed.

C. State Courts Are Perfectly Capable of Resolving Defendants' Affirmative Federal Defenses

Some of Defendants' amici insist that "[s]tate courts have no business deciding how global climate change should be addressed." (Amicus Br. of Indiana, *et al.*, ECF 70 at 8.) They also claim that federal court jurisdiction is needed because state courts cannot be trusted to decide these cases on the merits, and will instead act merely "at the behest of a handful of state and local governments." (*Id.* at 9-10.) These amici are wrong.

Speculation that "at least some courts" will not apply the law correctly, or that there will "inevitably" be a "patchwork of conflicting

rules" if state courts are permitted to hear these cases (*id.* at 9), merits no credence. The law, after all, presumes judicial impartiality and imposes a heavy burden on those attempting to show otherwise. *See United States v. Oaks*, 606 F.3d 530, 537 (8th Cir. 2010); 45 Am. Jur. 2d Judges § 125. And the possibility that different courts in different states applying different consumer protection and tort laws might come to different conclusions on the merits is not a crisis; it simply reflects states as sovereigns acting within their respective spheres. *Cf. Alden v. Maine*, 527 U.S. 706, 714, 751 (1999) (noting states retain "the dignity and essential attributes" of sovereignty, including the ability "to govern in accordance with the will of their citizens"); *In re "Agent Orange" Prod. Liab. Litig*, 635 F.2d 987, 994 (2d Cir. 1980) ("[T]hat application of state law may produce a variety of results is of no moment. It is in the nature of a federal system that different states will apply different rules of law, based on their individual perceptions of what is in the best interests of their citizens. That alone is not grounds in private litigation for judicially creating an overriding federal law.").

Moreover, state courts can and do rule on matters involving climate change.[15] A possible preemption defense does not change this; state courts are fully "competent to apply federal law, to the extent it is relevant." *Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 701 (2006); *see also McKesson v. Doe*, 141 S. Ct. 48, 51 (2020) ("Our system of 'cooperative judicial federalism' presumes federal and state courts alike are competent to apply federal and state law."). Deciding whether federal law preempts state law "is a serious obligation, and not something that federal courts may easily take for themselves." *Lontz v. Tharp*, 413 F.3d 435, 442 (4th Cir. 2005). Concluding otherwise would "denigrate the respect accorded coequal sovereigns." *Tafflin v. Levitt*, 493 U.S. 455, 466 (1990).

[15] *See, e.g.*, *New England Power Generators Ass'n, Inc. v. Dep't of Env't Prot.*, 105 N.E.3d 1156, 1167 (Mass. 2018) (upholding state regulations limiting GHG emissions by electricity producers); *Cal. Chamber of Com. v. State Air Res. Bd.*, 10 Cal. App. 5th 604, 614 (2017) (upholding state board's creation of a cap-and-trade emissions reduction system); *Stevenson v. DNREC*, C.A. No. S13C-12-025-RFS, 2018 WL 3134849 (Del. Super. Ct. June 26, 2018) (rejecting challenge to Delaware's participation in the Regional Greenhouse Gas Initiative); *Cascade Bicycle Club v. Puget Sound Reg'l Council*, 306 P.3d 1031, 1041 (Wash. Ct. App. 2013) (addressing climate change issues in challenge to environmental impact statements pursuant to state laws).

III. Defendants' Alleged Ties to Federal Officers or the Outer Continental Shelf Do Not Support Removal Because They Are Unrelated to the Conduct Challenged by Hoboken

Defendants also claim their government procurement contracts for military fuels justify removal under 28 U.S.C. § 1442(a)(1) (the federal officer removal statute), and that leases with the federal government under 43 U.S.C. §§ 1331-1356b (OCSLA) are somehow implicated by Hoboken's claims. (AOB 47-52, 60-69.) Courts have unanimously rejected these flawed jurisdictional assertions in similar climate-deception lawsuits.[16] This Court should do the same because Hoboken's claims target Defendants' deceptive marketing of fossil fuel products, not their fossil fuel extraction processes.

Federal Officers. Section 1442(a)(1) allows removal of an action brought against "[t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office." A private entity seeking removal under

[16] *See, e.g.*, *Rhode Island II*, 979 F.3d at 59-60 (rejecting federal-officer jurisdiction); *Baltimore II*, 952 F.3d at 467 (same); *San Mateo II*, 960 F.3d at 602 (same); *Baltimore I*, 388 F. Supp. 3d at 567 (rejecting OCSLA jurisdiction and federal-officer jurisdiction); *Honolulu*, 2021 WL 531237, at *3 (same); *Boulder I*, 405 F. Supp. 3d at 979 (same); *Rhode Island I*, 393 F. Supp. 3d at 151-52 (same); *San Mateo I*, 294 F. Supp. 3d at 938-39 (same).

§ 1442(a)(1) must establish each of the following elements: (1) it is a "person" under the statute; (2) the plaintiff's claims are based on the defendant's conduct acting under a federal officer; (3) the plaintiff's claims are for, or relating to, an act under color of federal office; and (4) the defendant raises a colorable federal defense. *Papp v. Fore-Kast Sales Co.*, 842 F.3d 805 (3d Cir. 2016). This requires Defendants here to show they deceived consumers and lied about climate risk pursuant to a government procurement contract or an offshore lease, or at the direction of a federal officer. They cannot do so, and thus fail as to elements (2) and (3) above.

Federal officer removal exists to afford a defendant acting under close federal supervision the ability to be heard in federal court. For example, and in sharp contrast with this case, this Court granted removal to attorneys representing clients under a federal contract, which involved a direct connection between the federal government and the allegedly culpable behavior: the misuse of federal funds by attorneys who worked for "a non-profit entity created through the [federal] Criminal Justice Act." *In re Commonwealth's Motion to Appoint Counsel Against or Directed to Def. Ass'n of Phila.*, 790 F.3d 457, 464, 469, 472 (3d Cir. 2015). As this Court noted in *Defender Association*, contractors "act under" fed-

eral officers only where they have an "unusually close" relationship. 790 F.3d at 468 (quoting *Watson v. Philip Morris Cos.*, 551 U.S. 142, 153 (2007)). And in *Papp*, this Court reversed the district court's remand order, based on the claim of asbestos exposure during work on a military aircraft pursuant to a government contract, finding that the "central aim" of removal was to protect contractors working under a federal officer from "interference" by litigation in state courts. 842 F.3d at 811. The Seventh Circuit reached a similar conclusion in *Baker v. Atlantic Richfield Company*, where plaintiffs alleged that defendants' manufacturing operations "tortiously contaminated" their properties, but defendants claimed that the federal government controlled and directed those same operations. 962 F.3d 937, 940-41 (7th Cir. 2020). In all these cases, the government-directed conduct overlapped with the culpable behavior described in the complaint. Here, Defendants do not contend the federal government had any involvement whatsoever in the deception campaign that underpins Hoboken's claims.

For this reason, other circuits have had little difficulty rejecting similar arguments when fossil fuel companies have sought federal officer removal. *See, e.g.*, *Rhode Island II*, 979 F.3d at 59-60; *Baltimore II*, 952 F.3d at 467. As the First Circuit observed, the arguments "have the

flavor of federal officer involvement in the oil companies' business, but that mirage only lasts until one remembers what [the plaintiff] is alleging in its lawsuit." *Rhode Island II*, 979 F.3d at 59-60. As the Fourth Circuit explained, there is no relationship between a "sophisticated disinformation campaign" targeting consumers in the retail market and an oil company's procurement contracts with the federal government. *Baltimore II*, 952 F.3d at 467-68. The Ninth and Tenth Circuits have similarly rejected Defendants' arguments. *See San Mateo II*, 960 F.3d at 600-603; *Boulder II*, 965 F.3d at 821-27.

The fact that the federal government purchases products from a company does not, without more, make it the regulator of the company's product in the retail market or the author of its messages to the consuming public. Government procurement is readily distinguished from consumer fuel purchases, and Hoboken's lawsuit deals with the latter, not the former. For example, Washington and Oregon filed complaints in their respective state courts alleging that Monsanto Company produced products containing polychlorinated biphenyls (PCBs) that contaminated water, land, and wildlife—and that Monsanto intentionally concealed the toxicity of PCBs. Monsanto unsuccessfully attempted to remove the lawsuits to federal court on the grounds that the federal

government bought and directed the production of some PCBs. The district courts remanded the cases because the federal government had merely purchased a product from Monsanto and had not directed Monsanto to conceal the toxicity of PCBs. *See Washington v. Monsanto Co.*, 274 F. Supp. 3d 1125 (W.D. Wash. 2017), *aff'd*, 738 F. App'x 554 (9th Cir. 2018); *Oregon v. Monsanto Co.*, No. 18-cv-238, Tr. at 56-62 (D. Ore. July 19, 2018), ECF No. 57. Here, Defendants have similarly failed to show that the federal government, through procurement contracts or leases for exploration, directed them to deceive consumers.

Outer Continental Shelf. Defendants' activities on the outer continental shelf similarly lack any relationship with Hoboken's actual claims, and OCSLA thus provides no basis for removal. OCSLA creates federal jurisdiction over cases "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). For OCSLA to apply, the "activities that caused the injury" alleged must have been an "operation" that was "conducted on the outer Continental Shelf" and the case must

"arise[] out of, or in connection with" that operation. *In re Deepwater Horizon*, 745 F.3d 157, 163 (5th Cir. 2014).

"Even under a broad reading of the OCSLA jurisdictional grant," Defendants' arguments fail because any connection between Hoboken's consumer deception claims and Defendants' operations on the outer Continental Shelf is simply too attenuated. *See Baltimore I*, 388 F. Supp. 3d at 566. As in other climate-deception cases, the alleged unlawful conduct here is Defendants' "alleged *failure to warn* about the hazards of using their fossil fuel products" and their "*disseminat[ion]* [of] misleading information about the same." *Honolulu*, 2021 WL 531237, at *3. Hoboken does not seek to hold Defendants liable merely for "the manufacture or use of fossil fuels, let alone [Defendants'] operations on the Outer Continental Shelf." *Connecticut*, 2021 WL 2389739, at *12. And so, Defendants cannot show that Hoboken's lawsuit "arise[s] directly out of OCS operations," *Boulder I*, 405 F. Supp. 3d at 978, or that its "causes of action would not have accrued *but for* the defendants' activities on the shelf," *San Mateo I*, 294 F. Supp. 3d at 938-39.

Moreover "Defendants cite no case authority holding that injuries associated with downstream uses of OCS-derived oil and gas products creates OCSLA jurisdiction." *Boulder I*, 405 F. Supp. 3d at 979. Indeed,

to adopt that jurisdictional theory would "dramatically expand [OCSLA's] scope" beyond all recognition, implying that "[a]ny spillage of oil or gasoline involving some fraction of OCS-sourced oil—or any commercial claim over such a commodity—could be removed to federal court." *Id.* Under this view, for example, personal injury claims involving a collision with a gasoline tanker truck, a products liability case involving any petroleum-based product, and a breach-of-contract claim involving the sale of gasoline would all be removable under OCSLA. "Congress" cannot have "intended such an absurd result." *Id.*

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CONCLUSION

This Court should affirm the District Court's order remanding this action to state court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND BAR MEMBERSHIP

I hereby certify that:

1. I am a member of the Bar of this Court.

2. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a) and Fed. R. App. P. 29(a)(5), because this brief contains 6,350 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

3. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word for Microsoft 365 with 14-point, Iowan Old Style typeface.

4. This brief complies with the requirements of L.A.R. 31.1(c) because:

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December 22, 2021

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system on December 22, 2021, and that parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system.

December 22, 2021

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