UNITED STATES DISTRICT COURT
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-wks

Date: February 18, 2022

ORAL ARGUMENT REQUESTED

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION TO REMAND

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Defendants Exxon Mobil Corporation ("ExxonMobil"), 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 (collectively, "Defendants") respectfully submit this memorandum of law in opposition to Plaintiff's motion to remand.[1] Under Local Rule 7(a)(6), Defendants respectfully request oral argument on Plaintiff's motion to remand.

PRELIMINARY STATEMENT

Federal court is the appropriate forum to resolve the federal legal issues that the Attorney General raises. Federal common law governs claims like the ones presented here that functionally seek to regulate transboundary pollution and foreign affairs. The Attorney General challenges Defendants' promotion of fossil fuel products because their use allegedly "will cause catastrophic effects on the environment *if unabated*." Compl. ¶ 118 (emphasis added). The Complaint asserts that the promotion of fossil fuels is inherently misleading because their continued use "is and remains a leading cause of global warming and, *unless abated*, will bring about grave consequences" including "sea level rise, disruptions to the hydrologic cycle, increased extreme precipitation, heatwaves, drought, and other consequences of the climate crisis." *Id.* ¶¶ 98, 179 (emphasis added). And according to the Complaint, consumers would have made "other energy-related choices" if Defendants had disclosed the link between fossil fuel combustion and "the continuing, significant contributions their products actually make to greenhouse gas emissions and climate change." *Id.* ¶¶ 4-5. The Attorney General seeks to abate fossil fuel use and lower greenhouse gas emissions by shifting consumer demand to alternative forms of energy. The

[1] By filing this memorandum of law in opposition to Plaintiff's motion to remand, Defendants do not waive any right, defense, affirmative defense, or objection, including any challenges to personal jurisdiction over Defendants.

Attorney General's claims represent a blatant effort to impermissibly regulate Defendants' fossil fuel promotion and sales and implicate a host of federal issues that warrant federal jurisdiction.

This lawsuit belongs in federal court because federal law governs the claims asserted. In a related case, the Second Circuit recently held that federal common law governs claims seeking redress for global climate change, regardless of the plaintiff's purported causes of action, because climate change is a "uniquely international problem" that is "not well suited to the application of state law." *City of New York* v. *Chevron Corp.*, 993 F.3d 81, 85–86 (2d Cir. 2021). Although the City of New York argued that its case concerned only the "production, promotion, and sale of fossil fuels," not the direct regulation of emissions, the Second Circuit explained that "[a]rtful pleading" could not "transform" the complaint into "anything other than a suit over global greenhouse gas emissions" governed by federal law. *Id.* at 91.

The same reasoning supports federal jurisdiction here. The Complaint reasserts functionally the same theory of liability that the Second Circuit held "must be brought under federal common law." *City of New York*, 993 F.3d at 95. For example, in *City of New York*, the City claimed that defendants had "known for decades that their fossil fuel products pose a severe risk to the planet's climate," and yet "downplayed the risks and continued to sell massive quantities of fossil fuels, which has caused and will continue to cause significant changes to the City's climate." *Id.* at 86–87. The Attorney General likewise claims that Defendants have "known for decades that the Earth's climate has been changing because of emissions of CO_2 . . . [from] the fossil fuels they sell," and yet "downplay[ed] the key role of fossil fuels in climate change." Compl. ¶¶ 2, 90. The Attorney General seeks to hold Defendants liable for the harms stemming from climate change because Defendants' promotional activities allegedly prevented consumers from reducing fossil fuel use. *See, e.g.*, *id.* ¶¶ 2, 67, 118, 175, 183, 192. The goal of the Attorney

General's action is to suppress fossil fuel sales—and thereby abate greenhouse gas emissions—by imposing liability on Defendants for failing to shift consumer demand at the point of sale.

The Complaint nonetheless attempts to disavow "relief that would force Defendants to discontinue, reduce, or eliminate their extraction or production of fossil fuels, or eliminate the sale of Defendants' fossil fuel products to Vermont consumers or impose limits on the quantities sold here." Compl. ¶ 6. In the Attorney General's telling, this case is simply about harms to the "marketplace," not to the "environment." Br. 2–3, 13. But the Complaint never alleges that the fossil fuel products performed other than as advertised, that they did not conform to applicable standards, or that they injured consumers in any tangible way. What Plaintiff means by "harm to the marketplace" is that consumers purchased *too much* gasoline, which allegedly increased global greenhouse gas emissions and caused environmental impacts from climate change. Indeed, the Complaint repeatedly alleges that Vermont consumers would—by which Plaintiff means *should*—choose "to buy and consume lower quantities of [Defendants'] fossil fuel products, or perhaps stop buying them altogether," absent Defendants' allegedly misleading statements. Compl. ¶ 2. The Complaint even seeks an injunction requiring the "disclosure of the role of fossil fuels in climate change at every point of sale in the State of Vermont," precisely because it would, as alleged, lead to consumers purchasing less fossil fuels. *Id.* at 68. Accordingly, this is not a typical consumer protection case that must be litigated in state court, as the Attorney General argues, but rather a broad challenge to the lawful production and sale of fossil fuels *because* the normal use of those products results in greenhouse gas emissions. This case thus implicates federal interests.

The Attorney General's characterization of his Complaint does not bind this Court. The Attorney General has crafted his Complaint to obscure the centrality of federal law (and thereby try to evade federal jurisdiction) by focusing on public statements that allegedly induce fossil fuel consumption, rather than on the resulting greenhouse gas emissions themselves. However, as the Second Circuit explained, targeting an "earlier moment in the global warming lifecycle" (including the "promotion," marketing, and "sale" of fossil fuels) "is merely artful pleading and does not change the substance of its claims." *City of New York*, 993 F.3d at 97 (internal quotation marks omitted). The inherently federal nature of the asserted claims and requested relief in the Complaint, and not the Attorney General's artful pleading, demonstrates that this case belongs in federal court. Six separate grounds provide independent bases for federal subject matter jurisdiction.

First, the Attorney General's claims necessarily arise under federal common law because they implicate the regulation of transboundary pollution and foreign affairs. They also necessarily require the resolution of substantial, disputed questions of federal law about regulating greenhouse gas emissions. The Attorney General cannot disavow any intent to curb emissions when his requested relief is predicated on shifting consumer demand away from fossil fuels in order to mitigate the alleged physical effects of climate change.

Second, even considering the Attorney General's nominal state-law claims under the VCPA, this action is removable under *Grable* because the Complaint necessarily raises several substantial and disputed federal questions about compliance with fuel economy and environmental standards and policies supporting the development of lower-emission energy sources.

Third, this action satisfies the requirements of the federal officer removal statute, 28 U.S.C. § 1442, because the Attorney General's claims are "connected or associated" with fossil fuel production activities that Defendants have undertaken at federal direction for decades.

Fourth, this action is removable under the Outer Continental Shelf Lands Act ("OCSLA") because the Attorney General's claims necessarily arise out of, or in connection with, Defendants' operations on the Outer Continental Shelf ("OCS").

Fifth, this action arises out of Defendants' fossil fuel production and promotional activities on federal enclaves, warranting the exercise of federal jurisdiction.

Sixth, the Attorney General brings this suit on behalf of a discrete group of Vermont consumers, who are the real parties in interest, permitting removal on the basis of diversity of citizenship under 28 U.S.C. § 1332(a).

Litigation about the appropriate level of fossil fuel production and consumption, and the national and global issues posed by climate change, belongs in a federal forum. Because of the federal nature of this lawsuit, removal is proper and the motion to remand should be denied.

BACKGROUND

Under the guise of state consumer protection law, the Attorney General brings suit as part of a longstanding effort by certain state and municipal officials to limit Defendants' production, promotion, and sale of fossil fuels. In early 2016, a coalition of state attorneys general, including the Vermont Attorney General, joined a "Climate Change Coalition Common Interest Agreement" to advance their shared interests in "*limiting* climate change" and pursuing investigations and litigation to accelerate "the implementation and deployment of renewable energy technology." ECF No. 1, Ex. 1 at 1 (emphasis added). Those state and local government officials called themselves the "Green 20" to reflect their commitment to a progressive climate change agenda.[2]

[2] The parties to the Climate Change Coalition Common Interest Agreement included the attorneys general of California, Connecticut, Delaware, the District of Columbia, Iowa, Illinois, Maryland, Massachusetts, Maine, Minnesota, New Hampshire, New Mexico, New York, Oregon, Rhode Island, Virginia, Vermont, Washington, and the U.S. Virgin Islands. *See* ECF No. 1, Ex. 1 at 3–19; Ex. 2 at 1.

On March 29, 2016, the Green 20 held a press conference titled, "AGs United for Clean Power," which was co-organized by then-Vermont Attorney General William Sorrell. ECF No. 1, Ex. 2 at 1. Seizing on the perceived "gridlock in Washington," the New York Attorney General promoted "collective efforts to deal with the problem of climate change" and urged his colleagues to "step into this [legislative] breach" through the "creative" and "aggressive" use of their respective offices to target the fossil fuel industry. *Id.* at 1–3.[3] The Vermont Attorney General embraced New York's invitation, explaining that climate change "is the environmental issue of our time" and "Vermont is stepping up and doing its part." *Id.* at 5.

The "AGs United for Clean Power" was the product of a strategy that climate activists developed years earlier.[4] The strategy first emerged at a "Workshop on Climate Accountability, Public Opinion, and Legal Strategies" held in La Jolla, California in June 2012. ECF No. 1, Ex. 4 at 1. At the workshop, the participants discussed using civil litigation and state law enforcement authority to "maintain[] pressure on the [fossil fuel] industry that could eventually lead to its support for legislative and regulatory responses to global warming." *Id.* at 27. For example, the participants discussed using "a single sympathetic state attorney general [who] might have substantial success in bringing key internal documents to light." *Id.* at 11. They hoped the

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3 This press conference drew criticism from 13 other state attorneys general, who viewed the Green 20's efforts as a backdoor attempt to use "law enforcement authority to resolve a public policy debate." ECF No. 1, Ex. 3 at 3.

4 The state attorneys general attended closed-door presentations given by environmental activists, which were intentionally kept from reporters and the public. *See* ECF No. 1, Ex. 5 at 1 ("My ask is if you speak to the reporter, to not confirm that you attended or otherwise discuss the event."). Similarly, the Vermont Attorney General "admitted at a court hearing that when it receives a public records request to share information concerning the [Green 20] coalition's activities, it researches the party who requested the records, and upon learning of the requester's affiliation with 'coal or Exxon or whatever,' the office 'give[s] this some thought . . . before [it] share[s] information with this entity.'" *In re Exxon Mobil Corp.*, No. 096-297222-18, 2018 Tex. Dist. LEXIS 1, at *9 (Tex. Dist. Ct., Tarrant Cty. Apr. 24, 2018).

"pressure" caused by investigations would coerce "the energy industry's cooperation *in converting to renewable energy*," forcing the companies to change their positions on climate change and energy policy. *Id.* at 27–28 (emphasis added). They also conceived of civil litigation as a vehicle for regulating emissions and ultimately shutting down the fossil fuel industry. As one commentator observed: "Even if your ultimate goal might be to shut down a company, you still might be wise to start out by asking for compensation for injured parties." *Id.* at 13.

Over the ensuing years, approximately a third of the Green 20 members have filed lawsuits against one or more of the Defendants in this action, all with the purpose of limiting—if not ceasing—Defendants' production and sale of fossil fuels.[5] The first of these lawsuits, a securities fraud action brought by the New York Attorney General, was tried in October 2019, and concluded with a complete defense verdict for ExxonMobil. Justice Ostrager, who presided, found the State's allegations about ExxonMobil deceiving investors to be "without merit," "hyperbolic," and the "result of an ill-conceived initiative of the Office of the Attorney General." *People* v. *Exxon Mobil Corp.*, 2019 WL 6795771, at *1–2, *26 (N.Y. Sup. Ct. Dec. 10, 2019).

Numerous municipalities have filed similar climate-related litigation against energy companies for their promotion of fossil fuels. A trial court in Texas found that these lawsuits were part of a broader strategy "aimed to chill and suppress ExxonMobil's speech through legal actions & related campaigns." *City of San Francisco* v. *Exxon Mobil Corp.*, 2020 WL 3969558, at *3, *8

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[5] *See State of Delaware* v. *BP America Inc.*, No. N20C-09-097 AML (Del. Super. Ct. Sept. 10, 2020); *State of Connecticut* v. *Exxon Mobil Corp.*, No. 20-6132568-S (Conn. Super. Ct. Sept. 14, 2020); *State of Minnesota* v. *Am. Petroleum Inst.*, No. 62-CV-20-3837 (Minn. Dist. Ct. June 24, 2020); *District of Columbia* v. *Exxon Mobil Corp.*, No. 20-2892 (D.C. Super. Ct. June 25, 2020); *Commonwealth* v. *Exxon Mobil Corp.*, No. 19-3333 (Mass. Super. Ct. Oct. 24, 2019); *People* v. *Exxon Mobil Corp.*, No. 18-452044 (N.Y. Sup. Ct. Oct. 24, 2018); *State* v. *Chevron Corp. et al.*, No. 18-4716 (R.I. Super. Ct. July 2, 2018).

(Tex. Ct. App. June 18, 2020) (internal quotation marks omitted). A Texas appellate court likewise expressed concern about such "[l]awfare," considering it "an ugly tool by which to seek the environmental policy changes the [municipalities] desire, enlisting the judiciary to do the work that the other two branches of government cannot or will not do." *Id.* at *20.

Against this backdrop, the Attorney General brings the instant action alleging that Defendants violated the VCPA by misleading Vermont consumers about the link between fossil fuel combustion and climate change. Compl. ¶¶ 5, 69. But the true purpose of the Attorney General's lawsuit, despite the remand motion's attempts to mask it, is to shift consumer demand away from fossil fuels, and in turn reduce fossil fuel production, promotion, and sales, precisely because these activities, as alleged, contribute to climate change. For example, the Complaint alleges from the outset that fossil fuels are the primary driver of climate change:

- "Human influence has warmed the climate at a rate that is unprecedented in at least the last 2000 years." Compl. ¶ 1(b).
- "The main human influence" on climate change "is via ***combustion of fossil fuels*** and land use-change-related CO_2 emissions." *Id.* ¶ 1(d).
- "[C]arbon dioxide concentrations have increased by 40% since pre-industrial times, ***primarily from fossil fuel emissions***." *Id.*
- Of the "CO_2 emitted from human activities during the decade of 2010-2019 . . . ***the combustion of fossil fuels was responsible for 81-91%***." *Id.*
- "Significant further global warming will occur in this century ***unless*** deep reductions in CO_2 and other greenhouse emissions occur in the coming decades." *Id.* (emphasis added) (internal quotation marks omitted).

According to the Complaint, the promotion, sale, and use of Defendants' fossil fuel products have exacerbated climate change because consumers have been prevented from making energy choices that could have resulted in lower emissions and less harm to the environment. *See id.* ¶¶ 2, 4, 67, 175, 192. Indeed, the Attorney General challenges this promotional activity precisely because it is alleged to "*increase[]* greenhouse gas emissions and is a leading cause of global warming;" and it is alleged "that the continued use of these products *will cause catastrophic effects on the environment if unabated*." *Id.* ¶ 118 (emphasis added). The Complaint goes on to describe the harms to the environment—allegedly caused by Defendants—by cataloging the potential impacts of climate change, "including rising sea levels, disruptions to the hydrologic cycle, increases in extreme precipitation, heatwaves, and droughts." *Id.* ¶ 168; *see also id.* ¶ 43.

These allegations make clear 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 used at all. *See* Compl. ¶ 180 (noting that "continued increase in fossil fuel product consumption creates severe environmental threats and significant economic costs for communities, including the state of Vermont"); *id.* ¶ 120 (complaining that "Defendants' core businesses remain focused upon expanding the production, distribution, and sale of fossil fuel products that exacerbate climate change"). In short, the Complaint—and this entire case—is about climate change, fossil fuel's role in contributing to climate change, and the use of state law to curtail promotion and sales of fossil fuels as a means to address climate change.

LEGAL STANDARD

"The removal process was created by Congress to protect defendants." *Legg* v. *Wyeth*, 428 F.3d 1317, 1325 (11th Cir. 2005). A defendant may remove "any civil action brought in a State court of which the district courts of the United States have original jurisdiction." 28 U.S.C.

§ 1441(a). Although the party opposing remand bears the burden of establishing that jurisdiction exists in federal court, *see Hand* v. *Chrysler Corp.*, 997 F. Supp. 553, 555 (D. Vt. 1998), removal is proper so long as jurisdiction exists over any single claim, *see* 28 U.S.C. § 1367; *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 563 (2005). The plaintiff's characterization of its claims or the lack of any reference to federal law in the complaint is not controlling. *See Calhoon* v. *Bonnabel*, 560 F. Supp. 101, 104–05 (S.D.N.Y. 1982); *see also* 14C Charles Alan Wright et al., Federal Practice and Procedure § 3722.1 (4th ed. 2020).

ARGUMENT

I. Federal Common Law Governs The Attorney General's Claims.

A. The Attorney General's Claims Arise Under Federal Common Law.

Under the Second Circuit's decision in *City of New York*, the Attorney General's claims here must arise, if they can be asserted at all, under federal common law. *See* 993 F.3d at 95. 28 U.S.C. Section 1331 thus vests this Court with federal question jurisdiction over this suit. *See Nat'l Farmers Union Ins. Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845, 850 (1985). Federal common law governs "uniquely federal interests," *City of New York*, 993 F.3d at 90, such as where the issue is, by nature, within the "national legislative power" and there is a "demonstrated need for a federal rule of decision," *American Electric Power Co.* v. *Connecticut ("AEP")*, 564 U.S. 410, 421–22 (2011). This includes issues "so vitally affecting interests, powers and relations of the Federal Government as to require uniform national disposition," *United States* v. *Standard Oil Co.*, 332 U.S. 301, 307 (1947), as when "the interstate or international nature of the controversy makes it inappropriate for state law to control," *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981).

The Second Circuit has long recognized that claims may arise under federal common law even where a plaintiff artfully pleads a state law cause of action and avoids affixing a federal law label. *See Marcus* v. *AT&T Corp.*, 138 F.3d 46, 55–56 (2d Cir. 1998); *City of New York*, 993 F.3d at 92–93. Although the Attorney General purports to bring claims "created by state and not federal law," Br. 11, the artful pleading doctrine requires the Court to assess the "substance" of the Attorney General's claims and determine whether they in fact arise under federal law, *City of New York*, 993 F.3d at 97.

This analysis does not implicate ordinary preemption principles because a claim that "arise[s] under federal common law" presents "a permissible basis for jurisdiction based on a federal question under 28 U.S.C. § 1331." *Treiber & Straub, Inc.* v. *U.P.S., Inc.*, 474 F.3d 379, 383 (7th Cir. 2007); *see Empire HealthChoice Assurance Inc.* v. *McVeigh*, 396 F.3d 136, 140 (2d Cir. 2005) ("It is beyond dispute that if federal common law governs a case, that case presents a federal question within the subject matter jurisdiction of the federal courts, just as if the case were governed by a federal statute.") (internal quotation marks and citation omitted);[6] *First Pa. Bank N.A.* v. *E. Airlines, Inc.*, 731 F.2d 1113, 1115–16 (3d Cir. 1984). The Attorney General's focus on preemption, *see* Br. 15–20, is thus misplaced because Defendants are not asserting a preemption defense as the basis for federal jurisdiction.

Here, as in *City of New York*, the Attorney General's claims necessarily arise under federal common law because they encroach upon two "uniquely federal interests": transboundary pollution and foreign affairs. 993 F.3d at 90; *see also Native Vill. of Kivalina* v. *ExxonMobil Corp.*,

[6] In *Empire*, neither party argued that any existing body of federal law governed the claims at issue, and the question for the court was whether it could "create federal common law," which the court declined to do. 396 F.3d at 140–41. Here, by contrast, the question for this Court is whether the State's claims implicate the already-recognized federal common law of transboundary pollution and foreign affairs, which, as explained below, they do.

696 F.3d 849, 855 (9th Cir. 2012) (transboundary pollution); *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 425 (1964) (foreign affairs).

1. The Attorney General's Claims Implicate Transboundary Pollution.

"For over a century, a mostly unbroken string of cases has applied federal law to disputes involving interstate air or water pollution." *City of New York*, 993 F.3d at 91; *see also AEP*, 564 U.S. at 421 ("Environmental protection is undoubtedly an area within national legislative power" for which federal courts may "fashion" federal common law). Because the Attorney General's claims encroach upon the federal common law of transboundary pollution, they are "governed by federal common law." *City of New York*, 993 F.3d at 99.

The Second Circuit's *City of New York* decision is controlling. In that case, the City of New York sued several energy companies—including two of the Defendants here[7]—asserting claims for public nuisance, private nuisance, and trespass under New York law stemming from the defendants' "production, *promotion*, and sale of fossil fuels." 993 F.3d at 88 (emphasis added). As here, the City argued that in producing, promoting, and selling fossil fuels Defendants "downplay the threat posed by climate change," which "will cause increasingly severe injuries to New York City." *City of New York* v. *BP p.l.c.*, 325 F. Supp. 3d 466, 470 (S.D.N.Y. 2018), *aff'd*, 993 F.3d 81 (2d Cir. 2021). The Southern District of New York dismissed the City's complaint "with prejudice in its entirety," holding that the city's climate change-based claims were necessarily governed by federal common law, not state law, because "a federal rule of decision is 'necessary to protect uniquely federal interests.'" *Id.* at 471, 476 (quoting *Tex. Indus.*, 451 U.S. at 640). The City argued that its state law claims did not seek to regulate emissions, but the district court disagreed, observing that the complaint "makes clear that the City is seeking damages for

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7 The defendants in *City of New York* were Chevron Corporation, ConocoPhillips, Exxon Mobil Corporation, Royal Dutch Shell plc, and BP p.l.c.

global-warming related injuries resulting from greenhouse gas emissions, and not only the production of Defendants' fossil fuels." *Id.* at 471–72. Because the City's claims were "ultimately based on the 'transboundary' emission of greenhouse gases," the court concluded they "arise under federal common law and require a uniform standard of decision." *Id.* at 472.

The Second Circuit affirmed in a unanimous panel decision, holding that federal common law, not state law, governs claims seeking redress for global climate change, a "uniquely international problem of national concern" that is "not well-suited to the application of state law." *City of New York*, 993 F.3d at 85–86. In doing so, the court rejected the City's effort to characterize its action as challenging only the "production, promotion, and sale of fossil fuels," not the "regulation of emissions":

> Artful pleading cannot transform the City's complaint into anything other than a suit over global greenhouse gas emissions. It is precisely *because* fossil fuels emit greenhouse gases—which collectively "exacerbate global warming"—that the City is seeking damages. Put differently, the City's complaint whipsaws between disavowing any intent to address emissions and identifying such emissions as the singular source of the City's harm. But the City cannot have it both ways.

Id. at 91. Application of federal common law was necessary, the court explained, in light of the "real risk that subjecting the Producers' global operations to a welter of different states' laws could undermine important federal policy choices." *Id.* at 93.

Here, the Attorney General's Complaint asserts functionally the same theory of liability that the Second Circuit held "must be brought under federal common law." *City of New York*, 993 F.3d at 95. For example, in *City of New York*, the City claimed that defendants had "known for decades that their fossil fuel products pose a severe risk to the planet's climate," and yet "downplayed the risks and continued to sell massive quantities of fossil fuels, which has caused and will continue to cause significant changes to the City's climate." *Id.* at 86–87. Here, the Attorney General likewise claims that Defendants have "known for decades that the Earth's climate has been changing because of emissions of CO_2 . . . [from] the fossil fuels they sell," and yet "downplay[ed] the key role of fossil fuels in climate change." Compl. ¶¶ 2, 90. The Attorney General seeks to hold Defendants liable for the harms stemming from climate change because Defendants' promotional activities allegedly prevented consumers from reducing fossil fuel consumption. *See, e.g.*, *id.* ¶¶ 2, 67, 118, 175, 183, 192. Specifically, the Complaint employs the following logic: **(a)** Defendants' advertising influences consumers' "decisions regarding the purchase of Defendants' fossil fuel products," *id.* ¶ 95; **(b)** consumers' continued use of those fossil fuel products, along with the continued production of those products, "*increases* greenhouse gas emissions and is a leading cause of global warming," *id.* ¶ 118; and **(c)** global warming, in turn, leads to the adverse consequences the Attorney General seeks to abate, including "rising sea levels, disruptions to the hydrologic cycle, increases in extreme precipitation, heatwaves, and droughts," *id.* ¶ 168. The Attorney General's theory of liability is thus predicated on Defendants' promotion and sale of fossil fuels and their purported impact on the environment.

The Attorney General argues that, unlike *City of New York*, it "seeks only to address Defendants' marketplace deceptions, not their global production activities or the emissions resulting from use of their products." Br. 13. But this argument is belied by the very allegations in the Complaint. According to the Complaint, Defendants' "development, production, refining, and use of their fossil fuel products . . . *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." Compl. ¶ 118. Under Plaintiff's theory, Defendants' promotion of their fossil fuel products, in turn, exacerbates global warming because it has prevented consumers from making "other energy-related choices" that could have resulted in lower emissions and less harm to the environment. *Id.* ¶ 4; *see also id.* ¶¶ 118, 170, 175. The Attorney General cannot "disavow[] any intent to address emissions" while "identifying such emissions" as the source of its harm. *City of New York*, 993 F.3d at 91.

The Attorney General purports to disclaim "relief that would force Defendants to discontinue, reduce, or eliminate their extraction or production of fossil fuels, or eliminate the sale of Defendants' fossil fuel products to Vermont consumers or impose limits on the quantities sold here." Compl. ¶ 6. But that disclaimer contradicts what the prayer for relief actually requests.

The Complaint seeks to force Defendants "to disgorge all funds acquired and/or retained" as a result of the alleged deception, and to compel Defendants to disclose "the role of fossil fuels in climate change at every point of sale in the State of Vermont." *Id.* at 68. By requesting disgorgement of profits for advertising that it alleges is inherently misleading, the Complaint functionally seeks to impose strict liability for greenhouse gas emissions and purported climate injuries. The Attorney General argues that the Complaint does not seek to impose strict liability in this way because, to avoid future liability, Defendants need not cease global production altogether, but can "simply put[] an end to their deceptive marketing in Vermont." Br. 17. The Second Circuit rejected this very argument in *City of New York*. There, the City argued that because it sought damages rather than abatement or the imposition of pollution standards, its claims did not "threaten to regulate emissions at all, let alone beyond New York's borders." 993 F.3d at 92. The Second Circuit explained that this argument "ignores economic reality" because "'regulation can be effectively exerted through an award of damages,' and 'the obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.'" *Id.* (citation omitted). The Attorney General also seeks disclaimers on every fuel pump and product label precisely because they would, as alleged, force a reduction in fossil fuel sales and thereby curb greenhouse gas emissions.[8] There is no way to square those elements of the prayer for relief with Plaintiff's self-serving suggestion that Defendants' global extraction, production, or sales of fossil fuel products is not addressed by the Complaint.

The Attorney General's focus on curtailing fossil fuel sales is further demonstrated by the origins of this litigation in the "Green 20" coalition's purpose of "limiting climate change" and compelling energy companies to transition to renewable energy. ECF No. 1, Ex. 1 at 1. Through this and similar state court litigation, state attorneys general are trying to scale down, if not eliminate, fossil-fuel production as a means of regulating global greenhouse gas emissions—a role solely within the province of the federal government. On cue, the Attorney General alleges that Defendants have somehow impeded "the transition to a stable energy system" by choosing "to hide important information about their products from consumers in Vermont and elsewhere." Compl. ¶ 58. The "failure to reduce usage" of Defendants' fossil fuel products, according to the Attorney General, will "lead to potentially catastrophic effects to the climate, the environment, and the global economy, including significant changes in sea level, weather and ocean currents, extreme precipitation and drought, and resulting impacts on and loss of ecosystems, communities, and people." *Id.* ¶ 43. Allegations like these reflect the true transboundary nature of the claims.

The Attorney General contends that this case is all about alleged harm to the "marketplace," but that alleged harm exists only insofar as consumers purchased more gasoline than the Attorney

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[8] The Attorney General further argues that its requested disclaimers are not about regulating "the sale of fossil fuel," but are akin to other requirements the state imposes on the sale of gasoline, such as laws requiring disclosure of prices or levels of ethanol, and laws prohibiting the sale of certain types of gasoline. Br. 17–18. But administrative regulations concerning the composition and price of fossil fuels are not relevant and not at issue here. Rather, this lawsuit involves claims for relief that would force large reductions in greenhouse gas emissions. Such regulation, and this backdoor attempt to regulate the sale of fossil fuel to reduce emissions through the courts, implicate questions of federal import that must be litigated in federal court.

General thinks they should have purchased given the "ultimate impact" of those purchases "on the climate." Compl. ¶ 52. In other words, the Attorney General alleges that Defendants' marketing is actionable not because of any harm Defendants' products had on *consumers*, but because of the marketing's alleged harms to the *environment*. As the Second Circuit explained, targeting an "earlier moment in the global warming lifecycle" (including the promotion and marketing of fossil fuels) "is merely artful pleading" and "does not change the substance" of the claims. *City of New York*, 993 F.3d at 97 (internal quotation marks omitted). Because the Attorney General's claims seek to hold Defendants liable "precisely *because* fossil fuels emit greenhouse gases—which collectively exacerbate global warming," the claims arise under federal common law. *Id.* at 91.

2. The Attorney General's Claims Implicate Foreign Affairs.

The international nature and impacts of the Attorney General's claims are another reason why this suit arises only under federal common law. Issues involving "our relationships with other members of the international community must be treated exclusively as an aspect of federal law" and heard in federal court. *Sabbatino*, 376 U.S. at 425. Indeed, the Supreme Court has made clear that claims that significantly implicate the "exercise of state power that touches on foreign relations must yield to the National Government's policy." *Am. Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 413 (2003). This includes matters of state law. *See Zschernig* v. *Miller*, 389 U.S. 429, 432 (1968) (holding that a state probate statute constituted "an intrusion by the State into the field of foreign affairs" and was governed by federal common law).

In their Notice of Removal, *see* Notice ¶¶ 58–66,[9] Defendants recounted the network of international treaties, from 1959 to the Paris Agreement, that have struck a "balance . . . between the prevention of global warming . . . on the one hand, and energy production, economic growth,

[9] "Notice" refers to Defendants' Notice of Removal, *see Vermont* v. *Exxon Mobil Corp.*, No. 2:21-cv-00260-wks (D. Vt. Oct. 22, 2021), ECF No. 1.

foreign policy, and national security, on the other." *City of New York*, 993 F.3d at 93. As the Second Circuit acknowledged, addressing global warming is "a project that necessarily requires national standards and global participation," and "subjecting" energy companies' "global operations" to inconsistent state laws "could undermine important federal policy choices." *Id.*

This action, like the one in *City of New York*, seeks to upset that "careful balance." *Id.* The lawsuit attempts to force Defendants to reduce—if not eliminate—their fossil fuel production activities to achieve the Attorney General's preferred greenhouse gas emissions levels and transition to other forms of energy. *See* § I.A.1 *supra*. The Complaint thus "effectively" seeks to require Defendants to take action "across every state (and country)" all "without asking what the laws of those other states (or countries) require." *City of New York,* 993 F.3d at 92. The Attorney General's claims therefore necessarily will interfere with the carefully calibrated network of "international treaties" that strike the "balance" between "the prevention of global warming . . . on the one hand," and "energy production, economic growth, foreign policy, and national security, on the other." *Id*. at 93.

The Attorney General argues that his VCPA claims do not implicate the federal common law of foreign affairs because "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." Br. 16. But this argument ignores the *substance* of the Attorney General's allegations, which at bottom seek to hold Defendants liable for the climate-related harms allegedly caused by fossil fuel consumption. Defendants identified numerous decisions by the federal government concerning fossil fuel consumption. *See* Notice ¶¶ 58–66. Because the Attorney General's claims implicate these federal decisions attempting to balance "the prevention of global warming" with "energy production, economic growth, foreign policy, and national security," the claims necessarily arise under the federal common law of foreign affairs. *City of New York*, 993 F.3d at 93.

B. The Well-Pleaded Complaint Rule Is No Obstacle To Removal Because the Attorney General Artfully Pleaded His Claims To Try To Evade Federal Jurisdiction.

The Attorney General contends that this case is not removable under the well-pleaded complaint rule because the Complaint itself does not explicitly allege a federal claim. Br. 19. That attempt to invoke form over substance fails because the "[t]he artful-pleading doctrine, [a] corollary to the well-pleaded complaint rule, prevents a plaintiff from avoiding removal by framing in terms of state law a complaint the real nature of [which] is federal, regardless of plaintiff's characterization." *Marcus*, 138 F.3d at 55–56 (internal quotation marks and citation omitted). As the Supreme Court explained in *Federated Department Stores, Inc.* v. *Moitie*, courts must "determine whether the real nature of the claim is federal, regardless of plaintiff's characterization." 452 U.S. 394, 397 n.2 (1981).

Although the Attorney General has framed his Complaint with reference to state law, this Court is not bound by that characterization. Under the artful pleading doctrine, this Court must evaluate the claims asserted and determine which body of law provides the rule of decision. Through the claims here, the Attorney General seeks to regulate **(i)** transboundary pollution, *see* § I.A.1 *supra*, and **(ii)** foreign affairs, *see* § I.A.2 *supra*, so must invoke a source of law under the Constitution that empowers such regulation. Here, that source of law is necessarily federal common law.

The Complaint challenges the "development, production, refining, and use of [Defendants'] fossil fuel products," because the "continued use of these products" will allegedly cause "catastrophic effects on the environment if unabated." Compl. ¶ 118. The Complaint seeks to hold Defendants liable because their "core businesses" allegedly "remain focused upon expanding the production, distribution, and sale of fossil fuel products that exacerbate climate change." *Id.* ¶ 120. By seeking to suppress fossil fuel sales and thus reduce transboundary emissions, the Complaint implicates the federal common law of transboundary pollution and foreign affairs. Contrary to the Attorney General's assertions, the Complaint therefore raises "necessary federal questions." Br. 20; *see Empire*, 396 F.3d at 140 ("It is beyond dispute that if federal common law governs a case, that case presents a federal question within the subject matter jurisdiction of the federal courts." (internal quotation marks and citation omitted)). Because it is clear from the face of the Complaint that the Attorney General's claims are governed by federal common law, the well-pleaded complaint rule poses no bar to federal jurisdiction.

The Attorney General incorrectly claims that the cases Defendants cite "were each filed in federal court in the first instance." Br. 20. In fact, in two of the cases the Attorney General references—*Marcos* and *Nordlicht*—the plaintiffs first brought their purported state-law claims in state court. *See Nordlicht* v. *New York Tel. Co.*, 799 F.2d 859, 861, 867 (2d Cir. 1986) (recounting that "Nordlicht brought a putative class action in New York Supreme Court" asserting claims for fraud, "NYTel removed the case . . . on federal question grounds," "[t]he District Court denied the motion" to remand and dismissed Nordlicht's claims, and the Second Circuit "affirmed"); *Republic of the Philippines* v. *Marcos*, 806 F.2d 344, 347 (2d Cir. 1986) (recounting that the complaint "was filed in the Supreme Court of the State of New York" before removal).

The Attorney General also fails to acknowledge that Defendants cited other cases that were filed in state court in the first instance, such as *Moitie*. And the decisions in *Standard Oil Co.* and *City of New York*—which addressed claims filed in federal court—are apt because the courts there, like here, needed to determine whether federal common law governed the plaintiffs' purportedly state-law claims. 332 U.S. at 307; 993 F.3d at 91. These cases establish that federal common law governs claims like those asserted here regardless of how they are framed through artful pleading, and the Attorney General cannot avoid this conclusion simply by filing his Complaint in state court.

Finally, the Attorney General argues that a federal district court rejected similar arguments made by ExxonMobil in *Massachusetts* v. *Exxon Mobil Corp.*, 462 F. Supp. 3d 31 (D. Mass. 2020). *See* Br. 21. But that opinion predated *City of New York*, and the court's decision to give dispositive force to the *label* the plaintiff applied to its claims rather than their *substance* is inconsistent with the well-pleaded complaint rule and artful pleading doctrine under controlling Second Circuit precedent (which was not binding on the District of Massachusetts). Although the Attorney General labels his claims as based on state consumer protection law, the federal nature of those claims flows from the allegations in the Complaint, and federal common law applies.

C. The Attorney General's Acknowledgment That His Claims May Be Displaced Under The Clean Air Act Confirms That There Is Federal Jurisdiction.

The Attorney General argues that, even assuming federal common law governs his claims, "the case still could not be removed because such common law would be displaced by the Clean Air Act." Br. 21 n.6. This acknowledgement that a *federal* statute may displace the *federal* common law claims Plaintiff asserts confirms that the action has a uniquely *federal* character and thus can properly be litigated in *federal* court. That Congress, through the Clean Air Act, would have so comprehensively addressed the question at issue as to leave no room for *federal* common law remedies cannot mean that *state* law remedies suddenly become viable. *See City of New York*, 993 F.3d at 98 ("[S]tate law does not suddenly become presumptively competent to address issues that demand a unified federal standard simply because Congress saw fit to displace a federal court-made standard with a legislative one"). Indeed, the Attorney General's suggestion that Congress's decision to displace federal common law remedies somehow allows the application of state law would turn the *Erie* doctrine on its head. Federal common law exists in the area of transboundary pollution precisely *because* it would be "inappropriate for state law to control" such disputes. *Texas Indus., Inc.*, 451 U.S. at 641; *see also AEP*, 564 U.S. at 422 (finding that "borrowing the law of a particular State would be inappropriate" where plaintiffs sued to limit defendants' carbon dioxide emissions).

The Attorney General's approach confuses the *jurisdictional* inquiry with the *merits* inquiry. Whether a party can obtain a remedy under federal common law is a distinct question from whether federal common law supplies the rule of decision in the first instance. The Supreme Court made this very point in *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661 (1974), reasoning that a claim governed by federal common law arises under federal law for "jurisdictional purposes" even if that claim "may fail at a later stage for a variety of reasons." *Id.* at 675. Thus, whether federal common law has been displaced is not relevant to the jurisdictional inquiry. The jurisdictional inquiry, which asks whether federal common law governs the claims, turns on the importance of the federal interests at stake and whether state law is appropriate to govern the dispute. *See AEP*, 564 U.S. at 420–23. If a claim arises under federal common law, a federal court proceeds to the merits inquiry to determine if the plaintiff has stated a claim for relief, including whether its claim has been displaced by a federal statute. *See, e.g.*, *Standard Oil Co.*, 332 U.S. at 310, 316–17 (1947) (first holding that federal common law applied to the claim; and then declining to fashion a new substantive legal liability under federal common law); *City of New York*, 993 F.3d at 91, 95 (first finding that federal common law governed the City's claims, and then dismissing claims because the Clean Air Act displaced any federal common law remedies the court could otherwise award). Whether a federal statute precludes a claim from being asserted here is a merits issue properly adjudicated by the federal court on a motion to dismiss.

D. Jurisdiction Over Claims Governed By Federal Common Law Is Independently Authorized Under The *Grable* Doctrine.

Federal jurisdiction also is proper because the Attorney General's claims "arise under" federal law pursuant to the *Grable* doctrine. This doctrine provides federal jurisdiction over a putative state-law claim if a federal issue is (1) necessarily raised by that claim, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress. *See Grable & Sons Metal Prods., Inc.* v. *Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005). Jurisdiction is proper in such circumstances because of the "serious federal interest in claiming the advantages thought to be inherent in a federal forum." *Id.*

The Complaint necessarily raises federal issues that are actually disputed. Because this action implicates the federal common law of transboundary pollution (§ I.A.1 *supra*) and foreign affairs (§ I.A.2 *supra*), it necessarily raises federal issues. The Attorney General does not dispute that federal jurisdiction under *Grable* is warranted where an action "necessarily raise[s]" federal issues requiring application of "principles of federal common law." *Newton* v. *Cap. Assur. Co.*, 245 F.3d 1306, 1309 (11th Cir. 2001) (citing *Nat'l Farmers Union Ins. Cos.*, 471 U.S. 845 at 850); *see also Battle* v. *Seibels Bruce Ins.*, 288 F.3d 596, 607–08 (4th Cir. 2002). The Attorney General mistakenly suggests these cases are inapposite because they involved insurance contracts issued pursuant to a federal program. Br. 22–23. To the contrary, they demonstrate that where a court must resolve issues of federal common law—such as the substance of federal common law and the availability of certain remedies in light of congressional action—*Grable* jurisdiction is proper.

The federal issues raised here are substantial. By implicating the federal common law of transboundary pollution and foreign affairs, there is no question that the Attorney General's claims raise substantial questions of federal law. *See Battle*, 288 F.3d at 607 (a claim in an area where "federal common *law* alone governs" "necessarily depends on resolution of a substantial question of federal law" (citation omitted)); *Newton*, 245 F.3d at 1309 (a claim that requires applying "principles of federal common law . . . satisfies § 1331 by raising a substantial federal question").

The federal-state balance supports the federal forum. The exercise of federal jurisdiction over a claim governed by federal common law is fully consistent with the principles of federalism. Federal courts are the traditional and appropriate fora for litigation involving greenhouse gas emissions. *See Massachusetts* v. *EPA*, 549 U.S. 497, 519 (2007). If anything, allowing the Attorney General's claims to be governed by state law would *threaten* the balance of federal-state relations, particularly in the context of foreign affairs.

II. Federal Jurisdiction Is Authorized By *Grable* Because The Attorney General Raises Substantial Questions Of Federal Environmental Policy And Regulation.

This Court also has jurisdiction under *Grable* because the Complaint necessarily raises substantial federal issues regarding federal environmental policy and regulation. An action "necessarily raise[s]" federal issues warranting the exercise of *Grable* jurisdiction where the court must determine whether an entity has complied with federally-prescribed duties, *see NASDAQ QMX Grp., Inc.* v. *UBS Securities,* 770 F.3d 1010, 1029 (2d Cir. 2014), or where the "interpretation of federal law [is] required," *District of Columbia* v. *Grp. Hosp. & Med. Servs., Inc.*, 576 F. Supp. 2d 51, 55 (D.D.C. 2008). Although the Complaint purports to assert violations of the VCPA, in an attempt to plead such state-law claims, the Complaint necessarily raises federal questions about **(i)** fossil fuel production, **(ii)** federal fuel economy and environmental standards, and **(iii)** alternative energy sources.

Fossil Fuel Production. The Attorney General seeks relief that would suppress fossil fuel production and sales precisely because consumers would purchase less fuel, reducing emissions and mitigating environmental harm. *See, e.g.*, Compl. ¶¶ 98, 118, 170. By seeking to functionally suppress the production and sale of fossil fuels, the Complaint contravenes federal law that "affirmatively promotes fossil fuel use in a host of ways, including beneficial tax provisions, permits for imports and exports, subsidies for domestic and overseas projects, and leases for fuel extraction on federal land." *Juliana* v. *United States*, 947 F.3d 1159, 1167 (9th Cir. 2020); *see, e.g.*, 42 U.S.C. § 15927(b). And by seeking to "effectively regulate" greenhouse gas emissions, *City of New York*, 993 F.3d at 92, the Attorney General attempts to countermand federal energy and environmental policy. Congress has already struck a careful balance between energy production and environmental protection by passing federal statutes such as the Clean Air Act. *See* 42 U.S.C. § 7401, *et seq.* And the EPA already regulates both stationary and mobile sources of greenhouse gases across the country. *See* 40 C.F.R. § 60.1, *et seq.*; *id.* § 85.501, *et seq*. By alleging that Defendants' promotions functionally increase greenhouse gas emissions, the Attorney General seeks to have a state court adjudicate the same competing interests that Congress and the EPA have already carefully balanced, and potentially reach different results.

By seeking to disgorge Defendants' profits for their alleged failure to shift consumer demand away from fossil fuels, and by requesting disclaimers on every fuel pump, the Attorney General seeks to regulate the sale of fossil fuel in order to curb greenhouse gas emissions. These penalties raise substantial federal issues because, if successful, they will undermine federal policies endorsed by numerous federal agencies. *See* Notice ¶¶ 58–71. Subjecting this regulatory scheme to the Attorney General's VCPA claims constitutes a "collateral attack" on the "[federal] regulatory system," making the disputed issues substantial. *Bd. of Comm'rs of Se. La. Flood Prot. Auth.-E.* v. *Tenn. Gas Pipeline Co.*, 850 F.3d 714, 724 (5th Cir. 2017) ("*Levee Board*").[10]

[10] The Attorney General attempts to distinguish *Levee Board*, arguing that it directly implicated federal statutes as the "exclusive basis" for liability stemming from coastal damage allegedly caused by oil exploration and production activities. 850 F.3d at 722. But the issues of whether the defendants improperly dredged lands and altered "federal levee systems" turned on a

Fuel Economy and Environmental Standards. The Attorney General's theory of deception seeks to impose liability for allegedly misleading representations about Defendants' compliance with—and surpassing of—federal fuel economy and environmental standards, while omitting that their products still produce emissions and contribute to climate change. *See* Notice ¶ 88. For example, the Attorney General alleges that "Shell[']s claims" about its V-Power Nitro+ Premium fuel are deceptive for stating that "the fuel 'is more efficient,' has 'lower emissions,' and contains seven times the clean agents required to meet federal standards." Compl. ¶ 108. Similarly, the Attorney General claims that Defendants Sunoco and CITGO made deceptive advertisements in stating that their products met "stringent TOP TIER" standards and surpassed other EPA standards. *Id.* ¶¶ 115, 117. To assess whether the alleged statements and omissions are misleading, a court will need to assess what the federal standards are, and whether the products in question comply with, and surpass, existing standards set forth by the EPA, as well as whether compliance with those federal standards, as evidence of comparative efficiency and reduced emissions, can constitute misleading conduct. Thus, the Attorney General raises a disputed question of compliance with federal standards. *See NASDAQ*, 770 F.3d at 1029.

The Attorney General claims that "there is no need to determine whether Defendants' products meet or exceed federal EPA standards because . . . their advertising is deceptive either way, and there is no allegation that the standards are not met." Br. 25. But the Attorney General expressly invokes those federal standards as an element of his "unfairness" claim under the

construction of federal law. *Id.* Similarly, here, the Attorney General functionally seeks to regulate transboundary pollution, which would have "broad significance" for the federal government and could "undermine the development of a uniform body of federal law." *Id.* at 724 (citations and internal quotation marks omitted).

VCPA.[11] The Complaint alleges that Defendants' acts and practices are unfair because, in part, they "are contrary to other statutory, regulatory, and/or common law policies and prohibitions," including misrepresentations related to "environmental benefits and/or environmental products or services." Compl. ¶ 190. When a claim like the Attorney General's requires the court to interpret "compliance" with a "federally prescribed duty," the Complaint "necessarily raises a disputed question of federal law." *NASDAQ*, 770 F.3d at 1021. The Attorney General suggests that, under Defendants' theory of removal, any state-law claim that merely refers to federal law would trigger federal jurisdiction. Br. 27–28. Not so. The relevant point here is that the Attorney General cannot avoid the construction of federal law. A court would need to answer the question of whether Defendants' fuels met or exceeded federal environmental standards before determining whether Defendants' statements about the cleanliness of those fuels were false or deceptive.

Alternative Energy Sources. The Complaint also alleges that Defendants engage in "greenwashing" by highlighting their investments to reduce emissions, while increasing fossil fuel production globally. For example, the Complaint accuses ExxonMobil of deceiving consumers whenever ExxonMobil describes its efforts "to decrease [its] overall carbon footprint" without mentioning that it "has continued to ramp up fossil fuel production, and to plan for *unabated* oil and gas exploitation indefinitely into the future." Compl. ¶¶ 122, 126 (alteration in original) (emphasis added). Adjudicating such a claim requires resolving a fundamental question of federal policy: whether the only way to reduce emissions is to categorically reduce fossil fuel usage, which still provides the majority of energy in the United States today. Any such judicial evaluation "could undermine important federal policy choices." *City of New York*, 993 F.3d at 93.

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[11] To determine whether an act or practice is "unfair," a state court would have to decide whether the challenged conduct "*offends public policy*; or is immoral, unethical, oppressive, or unscrupulous; or causes substantial injury to consumers." Compl. ¶ 188 (emphasis added).

The Complaint functionally seeks to invalidate various federal policies supporting the transition to lower-emission energy sources. For example, the Complaint alleges that, whenever ExxonMobil promotes "natural gas" as a "less carbon-intensive" energy source, it is inherently misleading because natural gas still "produces significant amounts of greenhouse gas emissions." Compl. ¶ 123. But the requested determination that such statements are misleading would conflict with official federal policy, which has, for many years, supported investment in and development of natural gas as a means to reduce greenhouse gas emissions and to encourage "greater energy independence."[12] The Complaint similarly challenges ExxonMobil's public promotion of biofuels because those statements overstate how "sustainable" and "environmentally friendly" those fuels are. Compl. ¶ 122. But federal policy has endorsed the research and development of biofuels as an alternative energy source. For example, in 2019, ExxonMobil signed a $100 million agreement with Department of Energy laboratories to "explore ways to bring biofuels and carbon capture and storage to commercial scale across the power generation, transportation, and manufacturing sectors."[13] These allegations would require a court to substitute its judgment under state law for that of the federal government on the efficacy of various energy sources such as natural gas and biofuels to determine whether Defendants' statements promoting these activities were misleading.

The Attorney General contends that, even if these federal issues were necessarily raised and disputed, they are not substantial enough to warrant *Grable* jurisdiction because they are "fact-

[12] *See* Notice ¶ 62. Recently, the EPA recognized that the switch from coal to natural gas for power generation played an important role in reducing greenhouse gas emissions. *See* EPA, Inventory of U.S. Greenhouse Gas Emissions and Sinks at 104 (2021). Defendants' public statements that natural gas is a *relatively* cleaner-burning fuel thus align with the energy policy endorsed by various levels of the federal government.

[13] Press Release, U.S. Dep't of Energy, *DOE National Labs Partner with ExxonMobil for $100 Million in Joint Research* (May 8, 2019), https://www.energy.gov/articles/doe-national-labs-partner-exxonmobil-100-million-joint-research.

bound and situation-specific" as opposed to "a nearly pure issue of law." Br. 26.[14] That is not the right legal standard. Under *Grable*, a court assessing whether a federal issue is substantial "looks to the importance of the issue to the federal system as a whole." *NASDAQ*, 770 F.3d at 1024. The Complaint raises issues of compliance with fuel economy standards and development of alternative energy sources, which sit at the intersection of federal energy policy and environmental regulation. In turn, these policy decisions have implications for the economy, national security, and foreign affairs—all of which are of "great importance to the federal system." *See In re NSA Telecomms. Recs. Litig.*, 483 F. Supp. 2d 934, 943 (N.D. Cal. 2007); *see also Grynberg Prod. Corp.* v. *British Gas, p.l.c.*, 817 F. Supp. 1338, 1356 (E.D. Tex. 1993). Federal jurisdiction is therefore warranted under *Grable*.

III. This Action Satisfies The Requirements Of The Federal Officer Removal Statute.

Defendants properly removed this action because the Attorney General's claims are necessarily related to Defendants' production and supply of oil and gas under the supervision and control of the federal government. *See* 28 U.S.C. § 1442(a)(1). Under the federal officer removal statute, suits may be removed "despite the nonfederal cast of the complaint," *Jefferson County* v. *Acker*, 527 U.S. 423, 431 (1999), reflecting the congressional policy that persons acting under federal officers "require the protection of a federal forum." *Willingham* v. *Morgan*, 395 U.S 402, 407 (1969). "To invoke the statute, a defendant who is not himself a federal officer must demonstrate that (1) the defendant is a 'person' under the statute, (2) the defendant acted 'under

[14] The cases cited by the Attorney General demonstrate the distinction in kind between narrow federal issues and the broad ones implicated here, including climate change. *See, e.g.*, *Congregation Machna Shalva Zichron Zvi Dovid* v. *U.S. Dep't of Agric.*, 557 F. App'x 87, 90 (2d Cir. 2014) (application of USDA food service regulations to religious organization running a summer camp); *Mihok* v. *Medtronic, Inc.*, 119 F. Supp. 3d 22, 31 (D. Conn. 2015) (application of FDA's current good manufacturing practice regulations to medical device company); *Vermont* v. *MPHJ Tech. Invs., LLC*, No. 2:13-CV-170, 2014 WL 1494009, at *6 (D. Vt. Apr. 15, 2014) (letters threatening patent infringement litigation).

color of federal office,' and (3) the defendant has a colorable federal defense.'" *Agyin* v. *Razmzan*, 986 F.3d 168, 174 (2d Cir. 2021) (internal quotation marks and citation omitted). There is no dispute that Defendants qualify as "persons" under the statute, and the other elements are satisfied as well. Defendants have acted "under color of federal office," and the Attorney General's claims are "connected or associated" with fossil fuel production activities that Defendants have undertaken at federal direction for decades. *Latiolais* v. *Huntington Ingalls, Inc.*, 951 F.3d 286, 292 (5th Cir. 2020) (en banc); *see* Notice ¶ 101. And Defendants raise several colorable federal defenses, such as the government contractor defense, the foreign affairs doctrine, and the First Amendment, as discussed below.

A. The Attorney General Misstates The Legal Standard For Federal Officer Removal.

The Attorney General's suit arises from Defendants' production and sale of fossil fuels, including activities conducted under federal direction. The Attorney General seeks to avoid that reality by arguing that he has not characterized his own lawsuit that way, but the plaintiff's characterization of the lawsuit is not controlling for purposes of the federal officer removal statute. The federal officer removal statute is to be "liberally construed" in favor of a federal forum. *Watson* v. *Philip Morris Cos.*, 551 U.S. 142, 147 (2007) (internal quotation marks and citation omitted). The Court must credit Defendants' "theory of the case when evaluating the relationship between the defendants' actions and the federal officer." *Agyin*, 986 F.3d at 175 (internal quotation marks and citation omitted). Defendants' allegations in support of removal need only be "facially plausible," and must be given the "benefit of all reasonable inferences." *Baker* v. *Atl. Richfield Co.*, 962 F.3d 937, 941, 945 (7th Cir. 2020). A party seeking removal under the federal officer statute is not required to "win his case before he can have it removed." *Willingham*, 395 U.S. at 407.

The Attorney General nonetheless claims that Defendants' "theory" of federal officer jurisdiction "is based upon the same mischaracterization of the Complaint that underlies their other alleged bases for removal." Br. 29–30. When assessing the theory of federal officer removal, however, courts look to the "crux" or "gravamen" of the plaintiff's complaint. *Fry* v. *Napoleon Cmty. Schs.*, 137 S. Ct. 743, 755 (2017). In doing so, courts must "set[] aside any attempts at artful pleading" including the "use (or non-use) of particular labels and terms." *Id.* Here, the gravamen of the Complaint, as explained above, is that the Attorney General targets allegedly deceptive advertising in order to curtail the "continued use of [Defendants'] products" which will "cause catastrophic effects on the environment if unabated." Compl. ¶ 118. The Attorney General thus functionally targets Defendants' production and sale of fossil fuels, which Defendants have produced under federal direction and supervision for decades. While the Attorney General might contest the *degree* to which his claims are predicated on Defendants' production of oil and gas under the direction and control of federal officers, that is a *merits* question for a federal court to decide. *See Willingham*, 395 U.S. at 409; *Acker*, 527 U.S. at 432; *Baker*, 962 F.3d at 944.

B. Defendants "Acted Under" Color Of Federal Office.

Defendants "acted under" color of federal office because the federal government directed, supervised, and controlled their actions associated with the Attorney General's claims.

Although the entirety of the federal officer removal statute is meant to be interpreted broadly, the "acting under" provision must be read "especially" broadly. *Agyin*, 986 F.3d at 175. To satisfy this element, Defendants must show that their relationship with the government "involves 'an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior.'" *Id.* at 175 (quoting *Watson*, 551 U.S. at 152). The Supreme Court has approved removal in cases involving defendants "working hand-in-hand with the federal government" to further the government's ends and where a defendant "helped the Government to produce an item that it needed." *Agyin*, 986 F.3d at 175 (quoting *Papp* v. *Fore-Kast Sales Co*., 842 F.3d 805, 812 (3d Cir. 2016)). The "acting under" element also "covers situations . . . where the federal government uses a private corporation to achieve an end it would have otherwise used its own agents to complete." *Id.* (quoting *Ruppel* v. *CBS Corp*., 701 F.3d 1176, 1181 (7th Cir. 2012)). Indeed, "matters involving private contractors working on behalf of the federal government" are "the archetype case" for "acting under" removal jurisdiction. *W. Va. State Univ. Bd. of Governors* v. *Dow Chem. Co.*, 23 F.4th 288, 299 (4th Cir. 2022).

In their Notice of Removal, Defendants detailed a decades-long history of efforts to "assist" or "carry out" the duties of the federal government under the government's supervision and control, including as federal contractors.[15] *Agyin*, 986 F.3d at 175. Defendants' contributions include producing specialized fuel, including during wartime (Notice ¶¶ 112–64, 123), constructing and operating oil pipelines required for military efforts (*id.* ¶¶ 125–28), operating government-owned petroleum production facilities to produce war products (*id.* ¶¶ 129–30), and maintaining the Strategic Petroleum Reserve ("SPR") (*id.* ¶¶ 134–38). Defendants also helped the federal government "achieve an end it would have otherwise used its own agents to complete," under significant government direction, through their activities on the OCS. *Agyin*, 986 F.3d at 175; Notice ¶¶ 146, 151–53.

Sidestepping this historical record, the Attorney General suggests that Defendants did not produce fuel under federal direction because their dealings with the federal government represented "an arm's-length business arrangement" that produced "widely available commercial

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15 Defendants dispute the Attorney General's improper attempt to attribute to them the actions of their separately organized predecessors, subsidiaries, or affiliates, but accept the allegations as true solely for purposes of determining whether the pleading supports removal jurisdiction.

products or services." Br. 33.[16] The Attorney General's attempt to diminish Defendants' relationship with the government misconstrues the applicable standard for removal. That an entity may have earned a profit in its dealings with the federal government does not preclude a finding that the entity "acted under" a federal officer. *See Isaacson* v. *Dow Chem. Co.*, 517 F.3d 129, 138 (2d Cir. 2008) (holding defendants need not show their relationship with the government was "coerced" for removal). Nor does removal always require a showing that the product in question was unique to the government. For instance, courts have held federal officer removal applicable where defendants produced materials used for both military and civilian goods. *See, e.g.*, *Baker*, 962 F.3d at 940; *Cty. Bd. of Arlington Cty., Va.* v. *Express Scripts Pharmacy, Inc.*, 996 F.3d 243, 251–52 (4th Cir. 2021).

The Attorney General also overlooks Defendants' production activities performed under the supervision of the federal government, including their responses to federal directives following the 1973 Oil Embargo (Notice ¶ 118), compliance with the federal government's oil production and quantity requirements during World War II (*id.* ¶¶ 121–22), operation of government-owned petroleum facilities at federal direction (*id.* ¶ 129), and management and production of oil for the Strategic Petroleum Reserve, including drawing down the reserve at government direction in various times of emergency (*id.* ¶¶ 134, 137). Defendants cite numerous instances in which the

[16] The Attorney General attempts to rely on out-of-circuit cases to suggest that Defendants' actions do not satisfy the "acted under" requirement. *See* Br. 33 (citing *County of San Mateo* v. *Chevron Corp.*, 960 F.3d 586, 600–02 (9th Cir. 2020); *Rhode Island* v. *Shell Oil Prod. Co.*, 979 F.3d 50, 59–60 (1st Cir. 2020); *Mayor & City Council of Baltimore* v. *BP P.L.C.*, 952 F.3d 452, 463 (4th Cir. 2020), *vacated and remanded*, 141 S. Ct. 1532 (2021)). Specifically, the Attorney General's citations address only particular fuel supply agreements—such as the Elk Hills Petroleum Reserve and a separate agreement undertaken by CITGO—despite the more comprehensive record that Defendants provide here. These citations neither address all of Defendants' federally directed activities, nor do they control here, as the Second Circuit has not yet considered Defendants' federal officer removal arguments.

federal government subjected Defendants to exacting standards and scrutiny, directing not just *what* Defendants would do for the government, but *how* they were required to do it. This included, among other things, detailed military specifications for specialized jet fuels that were not "widely available" and were "materials that [the federal government] needed to stay in the fight at home and abroad" during times of war. *Baker*, 962 F.3d at 942; *see* Notice ¶¶ 112–14. Defendants' activities under government direction therefore satisfy the "acting under" element of the statute.

C. The Attorney General's Claims Are Related To Defendants' Activities Performed Under Color Of Federal Office.

Defendants' activities taken at federal direction meet the "low" burden of "relating to" the Complaint's allegations. 28 U.S.C. § 1442(a)(1); *Isaacson*, 517 F.3d at 137. To satisfy this nexus requirement, a defendant need only demonstrate that plaintiff's claims are "connected or associated" with the relevant conduct taken at federal direction. *Latiolais*, 951 F.3d at 292. Defendants do not "need to allege that the complained-of conduct *itself* was at the behest of a federal agency." *Baker*, 962 F.3d at 944 (internal quotation marks and citation omitted). Rather, "[i]t is sufficient for the 'acting under' inquiry that the allegations are directed at the relationship between [Defendants] and the federal government." *Id.* at 944–45.

The Attorney General incorrectly claims that Defendants do not satisfy the "relating to" requirement. Relying on outdated case law, the Attorney General contends that this element is only satisfied when the defendant shows a "causal connection" to the charged conduct and demonstrates that "the acts for which they are being sued . . . occurred *because of* what they were asked to do by the Government." Br. 30.[17] As every circuit court to consider the issue has

[17] The Attorney General's reliance on *Connecticut* v. *Exxon Mobil Corporation* is misplaced. In that case, which is currently on appeal in the Second Circuit, the court failed to apply the amended language in the federal officer removal statute, instead relying on case law that predated the amendment. No. 3:20-cv-1555 (JCH), 2021 WL 2389739, at *11 (D. Conn. June

recognized, when Congress inserted the words "or relating to" in § 1442(a)(1) through the Removal Clarification Act of 2011, it "broadened federal officer removal" to actions "alternatively *connected* or *associated*, with acts under color of federal office." *Latiolais*, 951 F.3d at 292; *accord Baker*, 962 F.3d at 943–44; *Sawyer* v. *Foster Wheeler LLC*, 860 F.3d 249, 258 (4th Cir. 2017); *In re Commonwealth's Motion to Appoint Counsel*, 790 F.3d 457, 471 (3d Cir. 2015). Although the Second Circuit has not yet directly addressed the issue, it has long construed broadly the connection required for federal officer removal. *See, e.g.*, *Agyin*, 986 F.3d at 174 n.2, 175.

Defendants meet this broad construction of "relating to" here, especially when construed to give Defendants the "benefit of all reasonable inferences from the facts alleged," *Baker*, 962 F.3d at 945. The Attorney General's Complaint, at its core, targets Defendants' production of oil and gas—which includes oil and gas that Defendants extracted and produced under federal direction (*see* Notice ¶¶ 106–110), as well as Defendants' subsequent promotion and sale of that oil and gas. The Attorney General takes issue with Defendants' advertisements *because* they allegedly enabled Defendants to continue to produce and sell fossil fuels, exacerbating global warming and climate change. This activity necessarily encompasses production of fossil fuels that Defendants carried out under the direction and control of the federal government. By challenging Defendants' production, promotion, and sale of oil and gas products, along with the purported cumulative impact of those products, the Attorney General's allegations are necessarily "directed at the relationship between the [Defendants] and the federal government." *Baker*, 962 F.3d at 945 (internal quotation marks and citation omitted). A clear "connection" or "association" exists

2, 2021) (holding that Defendants must show that their alleged wrongful conduct "occurred because of" activities they were "asked to do by the government."). The Attorney General cites several other out-of-circuit, climate-related cases which are not controlling here and in any event failed to properly credit the defendant's theory of removal. *See* Br. 30–31.

between Defendants' production activities undertaken at the direction of federal officers to help carry out the federal government's military and economic objectives, and the Attorney General's claims attacking Defendants for the impact of those activities. *See Latiolais*, 951 F.3d at 292.

Contrary to the Attorney General's assertions, Defendants need not show that the federal government directed the allegedly misleading statements and omissions. Indeed, courts have held the opposite in failure-to-warn cases, *see id.* at 296, and it is not necessary "that the complained-of conduct *itself* was at the behest of a federal agency"—just that the "allegations are directed at the relationship between [Defendants] and the federal government" for at least part of the time frame relevant to plaintiff's claims, *Baker*, 962 F.3d at 944–45 (internal quotation marks and citation omitted). For example, in *Baker*, the Seventh Circuit found a sufficient connection where "at least some of the pollution" at issue "arose from the federal acts." *Id.* at 940–41, 945. And, in *Arlington County*, the Fourth Circuit found a sufficient connection where an oversupply of prescription opioids was linked to the defendants' duty to provide medical care to veterans as part of a health insurance program administrated by the Department of Defense ("DOD")—even though the complaint "did not even mention the distribution of opioids to veterans, [or] the DOD contract." 996 F.3d at 249, 256.

Similarly, here, the Attorney General alleges that Defendants' alleged deception is actionable because it has enabled the "continued use of [fossil fuel] products," which will "cause catastrophic effects on the environment if unabated." Compl. ¶ 118. At least some of these products were produced under federal direction and control. The Attorney General's claims thus relate to Defendants' production activities performed at the behest of the federal government.

D. Defendants Have "Colorable" Federal Defenses.

Defendants have raised several "colorable" federal defenses that should be litigated in federal court. "Courts have imposed few limitations on what qualifies as a colorable federal defense." *Isaacson*, 517 F3d. at 138. The "evidentiary standard" for these defenses is not high given that the purpose of federal officer removal is "to encourage the trial of such complex evidentiary questions in federal court." *Gordon* v. *Air & Liquid Sys. Corp.*, 990 F. Supp. 2d 311, 319 (E.D.N.Y. 2014).

To the extent that the Attorney General takes issue with the defenses raised, the Attorney General's conflict is not with the defenses themselves, but with the Defendants' theory of the case. Br. 34. Although the parties disagree about the strength and applicability of Defendants' asserted federal defenses—including the government contractor defense, the foreign affairs doctrine, federal preemption, and the First Amendment, *see* Notice ¶¶ 169–72—those defenses are at least "colorable" and aligned with Defendants' theory of the case. The merits of those arguments should be heard before a federal court. *Baker*, 962 F.3d at 944, 947.

The Attorney General argues that Defendants have no colorable "government contractor" defense because "the claims in this action have nothing to do with Defendants' alleged production of 'oil and gas at the direction of federal government.'" Br. 34 (quoting Notice ¶ 169). But the claims target Defendants' advertisements only insofar as they enabled Defendants to continue selling fossil fuels—including oil and gas that Defendants extracted, produced, and sold under federal direction—which, as alleged, contribute to climate change. It does not matter that federal officers did not direct the precise conduct at issue to present a "colorable" government contractor defense. *See Cuomo* v. *Crane Co.*, 771 F.3d 113, 117 (2d Cir. 2014) (holding that manufacturer provided a "colorable" factual basis in a failure-to-warn case, even though government specifications "made no mention of asbestos warnings").

The Attorney General also mistakenly asserts that the First Amendment and the *Noerr-Pennington* doctrine are inapplicable. Br. 34. The First Amendment contains broad protections for speech, particularly on issues of public concern like climate change. *See Janus* v. *AFSCME, Council 31*, 138 S. Ct. 2448, 2476 (2018) (observing that "climate change" is one of several "controversial" and "sensitive political topics" which are "undoubtedly matters of profound value and concern to the public" (internal quotation marks and citation omitted)). And under the *Noerr-Pennington* doctrine, the First Amendment protects even deceptive "publicity campaign[s] to influence governmental action." *E.R.R. Presidents Conf.* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 140–41 (1961). Even assuming Defendants' speech was misleading, and it was not, Defendants have a colorable federal defense that the claims target protected speech to, for instance, influence the government—one of the largest consumers of Defendants' products in the world. *See* Notice ¶ 124. Whether the First Amendment shields Defendants' speech here is exactly the sort of "merits question" that a federal court should decide. *Baker*, 962 F.3d at 944.

IV. This Action Is Removable Under The Outer Continental Shelf Lands Act.

Removal of this action is warranted under OCSLA, which vests federal courts with original jurisdiction over all actions "arising out of, or in connection with . . . any operation conducted on the [OCS] which involves exploration, development, or production of the minerals, of the subsoil and seabed of the [OCS], or which involves rights to such minerals." 43 U.S.C. § 1349(b)(1). The jurisdictional sweep of Section 1349(b) is "broad" and "cover[s] a wide range of activity occurring beyond the territorial waters of the states." *Barker* v. *Hercules Offshore, Inc.*, 713 F.3d 208, 213 (5th Cir. 2013) (internal quotation marks and citation omitted). This is because "Congress intended for the judicial power of the United States to be extended to the entire range of legal disputes" that Congress "knew would arise relating to resource development" on the OCS. *Laredo Offshore Constructors, Inc.* v. *Hunt Oil Co.*, 754 F.2d 1223, 1228 (5th Cir. 1985). Jurisdiction under OCSLA is thus present where "at least part of the work" allegedly causing injuries "arose out of or in connection with" the defendant's OCS operations. *Ronquille* v. *Aminoil Inc.*, No. 14–

164, 2014 WL 4387337, at *2 (E.D. La. Sept. 4, 2014).

Defendants indisputably engage in "operation[s] conducted on the [OCS]" that entail the "exploration" and "production" of "minerals." 43 U.S.C. § 1349(b)(1). The OCS reserves comprise a massive portion of the nation's oil and gas, and have accounted for as much as 30 percent of annual U.S. oil production.[18] Defendants (or their affiliates) are among the principal lessees of the more than 5,000 active oil and gas leases on OCS acres administered under OCSLA. Notice ¶¶ 178–79. And this case "aris[es] out of, or in connection with" those operations. 43 U.S.C. § 1349(b)(1). The Complaint's theory of liability is premised on the allegation that "the development, production, refining, and use of their fossil fuel products . . . increases greenhouse gas emissions and is a leading cause of global warming." Compl. ¶ 118. Defendants' global production of fossil fuels is the predicate for the Attorney General's claims, and "at least part of the work"—indeed, millions of barrels of it—occurred on the OCS. *See Ronquille*, 2014 WL 4387337, at *2.

The Attorney General's efforts to resist this conclusion are unavailing. *First*, the Attorney General argues that this case does not arise out of, or in connection with, Defendants' OCS operations because "OCSLA jurisdiction exists in narrow circumstances that involve a direct connection between the claims asserted and physical operation on the OCS." Br. 36 n.13. But the Fifth Circuit has made clear that OCSLA jurisdiction is not narrow, but "very broad," *Tennessee Gas Pipeline* v. *Houston Casualty Insurance Co.*, 87 F.3d 150, 154 (5th Cir. 1996), extending to "the entire range of legal disputes that [Congress] knew would arise relating to resource development" on the OCS, *Laredo*, 754 F.2d at 1228. *Accord Barker*, 713 F.3d at 213. The cases

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[18] *See* Cong. Research Serv., *U.S. Crude Oil and Natural Gas Production in Federal and Nonfederal Areas* at 3, 5 (Oct. 23, 2018), available at https://bit.ly/3eMqdyA.

cited by the Attorney General involving contract disputes, oil spills, and personal injuries only serve to illustrate the variety of contexts in which OCSLA jurisdiction may exist. Br. 36 n.13.

Second, the Attorney General cites *Parish of Plaquemines* v. *Total Petrochemical & Refining USA, Inc.*, 64 F. Supp. 3d 872, 898 (E.D. La. 2014), for the proposition that the connection between Defendants' OCS operations and the claims at issue are "too remote and attenuated to support OCSLA jurisdiction." Br. 36 (internal quotation marks omitted). But in *In re Deepwater Horizon*, the Fifth Circuit explicitly declined to consider whether a "mere connection" between the claims at issue and the OCS operations were "too remote to establish federal jurisdiction." 745 F.3d 157, 163 (5th Cir. 2014). And in *Plaquemines* itself, the district court remanded the case because the defendants could not point to any operations that took place on the OCS. 64 F. Supp. 3d at 894. As discussed above, however, Defendants' production of fossil fuels—including that on the OCS—forms the basis for this action and makes *Plaquemines* inapposite.

Third, the Attorney General argues that Defendants' OCS operations must be the "but-for" cause of the Attorney General's claims. Br. 35, 37. That is incorrect. Congress's use of the phrase "in connection with"—separate and apart from the grant of jurisdiction over claims "arising out of" OCS operations—reflects that there is no such causal requirement. As the Supreme Court recently concluded in analyzing similar language in the personal-jurisdiction context, the "requirement of a 'connection' between a plaintiff's suit and a defendant's activities" does not require but-for "causation." *Ford Motor Co.* v. *Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1026 (2021). In any event, a "'but for' connection" between the Attorney General's "cause[s] of action" and the Defendants' substantial "OCS operation[s]" exists here. *Deepwater Horizon*, 745 F.3d at 163. Those causes of action are a direct response to the purportedly increased production of fossil fuels that the Attorney General contends resulted from Defendants' allegedly misleading statements. *See, e.g.*, Compl. ¶ 4. Because that purportedly increased production occurred in part on the OCS, Defendants' OCS operations have a "but for connection" with the claims here.

Finally, the Attorney General suggests that this lawsuit does not qualify as a "dispute that alters the progress of production activities on the OCS," or "threatens to impair the total recovery of the federally-owned minerals" from the OCS, *Amoco Prod. Co.* v. *Sea Robin Pipeline Co.*, 844 F.2d 1202, 1210 (5th Cir. 1988), because it merely seeks "a judgment requiring honest disclosures and remedying past deceptions." Br. 37. But the Attorney General minimizes the sweeping nature of his Complaint. By seeking profit disgorgement, civil penalties, and climate-change disclaimers at every point of sale precisely because they would, as alleged, reduce fossil fuel sales, the Attorney General's claims threaten the very purpose of OCSLA and the continued viability of the federal leasing program. *See Laredo Offshore*, 754 F.2d at 1228.[19] By functionally seeking to regulate fossil fuel sales and abate emissions, the Attorney General's claims are tantamount to regulation of Defendants' OCS activities. As the Second Circuit explained, such "regulation can be effectively exerted through an award of damages, and the obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *City of New York*, 993 F.3d at 92 (internal quotation marks and citation omitted).

V. This Action Arises Out Of Federal Enclaves.

Removal is appropriate based on federal enclaves because it seeks relief for harm to federal

[19] For this reason, *Amoco* supports Defendants' theory of the case, as the contracts at issue covered only a portion of one producer's OCS operations, *see* 844 F.2d at 1207–08, while the Attorney General's claims could impact all of the Defendants' operations—a significant portion occurring on the OCS, *see* Notice ¶ 178. Even a foreseeable impact on OCS operations can provide a jurisdictional basis under OCSLA. *See, e.g.*, *EP Operating Ltd.* v. *Placid Oil Co.*, 26 F.3d 563, 570 (5th Cir. 1994) (noting that the "resolution of these ownership rights will facilitate the reuse, sale or salvage of these offshore facilities," which "would affect the efficient exploitation of resources from the OCS"); *United Offshore Co.* v. *S. Deepwater Pipeline Co.*, 899 F.2d 405, 407 (5th Cir. 1990) (finding jurisdiction even though dispute was "one step removed from the actual transfer of minerals to shore").

enclaves located within Vermont and because the claims implicate conduct that occurred in other federal enclaves. The Constitution's "Enclave Clause," which authorizes Congress to "exercise exclusive Legislation in all Cases whatsoever" over all places purchased with the consent of a state "for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings," U.S. Const. art. I, § 8, cl. 17, has been construed to "establish federal subject matter jurisdiction over tort claims occurring on federal enclaves." *Jograj* v. *Enter. Servs., LLC*, 270 F. Supp. 3d 10, 16 (D.D.C. 2017). The "key factor" in evaluating federal enclave jurisdiction "is the location of the plaintiff's injury or where the specific cause of action arose." *Sparling* v. *Doyle*, No. EP-13-CV-00323-DCG, 2014 WL 2448926, at *3 (W.D. Tex. May 30, 2014). Federal jurisdiction is available even if only some of the events or damages alleged in the complaint occurred on a federal enclave. *See Durham* v. *Lockheed Martin Corp.*, 445 F.3d 1247, 1250 (9th Cir. 2006) (finding defendant was permitted "to remove to federal court" because "some of [plaintiff's] claims arose on federal enclaves"). This action arises out of federal enclaves in two ways sufficient to justify federal enclave jurisdiction.

First, the Complaint alleges that climate change "creates severe environmental threats and significant economic costs for communities, including in the state of Vermont." Compl. ¶ 180. Specifically, the Complaint alleges that "the continued use" of Defendants' fossil fuel products "will cause catastrophic effects on the environment if unabated" and "contribute to global warming, sea level rise, disruptions to the hydrologic cycle, increased extreme precipitation, heatwaves, drought, and other consequences of the climate crisis." *Id.* ¶¶ 118, 179. Necessarily impacted are multiple federal enclaves within Vermont, including the Marsh-Billings-Rockefeller National Park, the Green Mountain National Forest, and ports of entry along the border with Canada. *Cf. Akin* v. *Ashland Chem. Co.*, 156 F.3d 1030, 1034 (10th Cir. 1998); *United States* v.

Lewisburg Area Sch. Dist., 539 F.2d 301, 304 (3d Cir. 1976); *Quadrini* v. *Sikorsky Aircraft Div.*, 425 F. Supp. 81, 86 (D. Conn. 1977).

The Attorney General does not dispute that these locations are federal enclaves, or that his Complaint necessarily alleges harms suffered thereto. Instead, he argues that federal enclave jurisdiction cannot be exercised because he has disclaimed relief for any injuries suffered on federal enclaves. *See* Br. 39–40; Compl. ¶ 6. Contrary to the Attorney General's assertions, courts have consistently refused to allow plaintiffs to evade federal jurisdiction through similar express disclaimers. *See Corley* v. *Long-Lewis, Inc.*, 688 F. Supp. 2d 1315, 1329 (N.D. Ala. 2010) (holding that plaintiff cannot "artfully plead" around federal enclave jurisdiction by disclaiming relief for "those times he was exposed while working in a federal enclave"); *see also Holdren* v. *Buffalo Pumps, Inc.*, 614 F. Supp. 2d 129, 150–51 (D. Mass. 2009); *O'Connell* v. *Foster Wheeler Energy Corp.*, 544 F. Supp. 2d 51, 54 n.6 (D. Mass. 2008); *Machnik* v. *Buffalo Pumps Inc.*, 506 F. Supp. 2d 99, 103 n.1 (D. Conn. 2007).

Second, even if the Attorney General does not seek relief for harms to federal enclaves, his claims alternatively arise out of Defendants' conduct on federal enclaves. Despite the Attorney General's artful pleading, the gravamen of the Complaint is environmental harm to Vermont that can only be abated by reducing fossil fuel purchases at the point of sale. By targeting Defendants' production and sale of oil and gas, and their alleged climate impacts, the Complaint necessarily sweeps in those activities that occur on federal enclaves. *See, e.g.*, *Humble Pipe Line Co.* v. *Waggoner*, 376 U.S. 369, 372–74 (1964). And in alleging that Defendants engaged in deceptive acts through the "promotion and selling of their fossil fuel products to Vermont consumers," Compl. ¶ 178, the Complaint necessarily sweeps in Defendants' promotional activities directed at and viewed on those federal enclaves. Because Vermont's claims arise partially on federal enclaves, this Court has subject matter jurisdiction over this action.

VI. This Court Has Diversity Jurisdiction Because The Real Parties In Interest Are Completely Diverse From Defendants.

Federal courts are vested with diversity jurisdiction over civil actions for which (1) the amount in controversy exceeds $75,000, and (2) there is "complete diversity," meaning that no plaintiff is a citizen of the same State as any defendant. 28 U.S.C.§ 1332(a); *Lincoln Prop. Co.* v. *Roche*, 546 U.S. 81, 89 (2005). Both requirements are satisfied here.

First, it is undisputed that the amount in controversy satisfies the jurisdictional threshold. Because the Complaint asks for Defendants to pay $10,000 for each of the many alleged violations of the VCPA, the amount in controversy far "exceeds the sum or value of $75,000." 28 U.S.C. § 1332(a)(1). The amount in controversy also incorporates the cost of complying with injunctive relief. *See DiTolla* v. *Doral Dental IPA of New York*, 469 F.3d 271, 276 (2d Cir. 2006). The Attorney General seeks injunctive relief that would require "disclosure of the role of fossil fuels in climate change *at every point of sale in the State of Vermont*." Compl. at 68 (emphasis added). Based on this relief alone, it is quite possible that a disclosure regime to correct the alleged misrepresentations would cost millions of dollars and independently satisfy the threshold.

Second, the parties are "completely diverse." All Defendants are citizens of states other than Vermont because they are incorporated, headquartered, and maintain their principal places of business in states other than Vermont, or outside the United States. *See* Compl. ¶¶ 9, 11, 13, 15–17, 19–23, 25; 28 U.S.C. § 1332(c)(1). The Attorney General brings this action on behalf of "Vermont consumers [who] have suffered substantial injury by reason of the financial cost of making purchases based on materially inaccurate and incomplete information about the products in question." Compl. ¶ 192. Those consumers are the real parties in interest in this action and all are citizens of Vermont.

The Attorney General's only argument in opposition to diversity jurisdiction is that the State of Vermont, rather than the consumers on whose behalf it sues, is the real party in interest. Br. 41–42. But because the Attorney General alleges that Defendants harmed *individual consumers* through their alleged misstatements, and seeks relief that would accrue to the benefit of those consumers, the State of Vermont is not the real party in interest.

"Ordinarily, [i]n an action where a state is a party, there can be no federal jurisdiction on the basis of diversity of citizenship because a state is not a citizen for purposes of diversity jurisdiction." *Louisiana* v. *Union Oil Co. of Cal.*, 458 F.3d 364, 366 (5th Cir. 2006) (alteration in original) (internal quotation marks and citation omitted). "However, if the State is a nominal party with no real interest in the dispute, its citizenship may be disregarded." *Id.* To establish more than a nominal interest in the litigation, the Attorney General must demonstrate a "quasi-sovereign interest" distinct "from the interests of particular private parties" such as an "interest in the health and well-being—both physical and economic—of its residents in general." *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982). A general interest in protecting Vermont consumers from deceptive consumer practices is not enough. *See Mo., K. & T. Ry. Co.* v. *Mo. R.R. & Warehouse Comm'rs*, 183 U.S. 53, 60 (1901); *Dep't of Fair Empl. & Hous.* v. *Lucent Techs., Inc.*, 642 F.3d 728, 738–39 (9th Cir. 2011). The Attorney General must instead allege an "injury to a sufficiently substantial segment of its population" rather than an injury to a "group of individual residents." *Snapp*, 458 U.S. at 607.

The Attorney General has failed to do so here. The Complaint merely alleges an unspecified injury to an unspecified number of Vermont residents due to Defendants' alleged violations of the VCPA.[20] The Complaint makes the conclusory allegation that "Vermont consumers have suffered substantial injury by reason of the financial cost of making purchases on materially inaccurate and incomplete information about the products in question." Compl. ¶ 192. The Attorney General further claims throughout his brief that this action is about harm to the "marketplace," not the "environment." Br. 1–2, 13. But nowhere does the Complaint allege that Defendants' deceptive conduct had a widespread impact on Vermont's consumer marketplace sufficient to implicate the "quasi-sovereign interest in the economic well-being of its citizens." *In re Standard & Poor's Rating Agency Litig.*, 23 F. Supp. 3d 378, 405 (S.D.N.Y. 2014) (internal quotation marks and citation omitted).[21] There is no allegation that Defendants' gasoline performed other than advertised or that it injured a substantial segment of the population. Absent plausible allegations that Defendants caused widespread harm to Vermont's consumer marketplace as a whole, the Attorney General is merely a nominal party, suing on behalf of a discrete group of Vermont consumers.

The Attorney General also does not disclaim seeking relief that would accrue directly to these individual consumers under the VCPA. Br. 42–43; *see also* 9 V.S.A. § 2458(b)(2) (authorizing "restitution of cash or goods on behalf of a consumer or a class of consumers similarly situated"). Rather, the Attorney General cites several cases involving different statutes in different jurisdictions suggesting that disgorgement of ill-gotten gains is "available only to government

[20] The Attorney General suggests that "Vermont consumers" can include citizens of other states passing through Vermont and purchasing Defendants' products. Br. 43. But the Complaint never once mentions out-of-state residents purchasing Defendants' products in Vermont. To the contrary, it specifically alleges that "Defendants' unlawful acts and practices . . . were targeted at and affected Vermont *residents*." Compl. ¶ 185 (emphasis added).

[21] To the extent that the Attorney General alleges harm to Vermont as a whole, he alleges *environmental* harm. As explained above, claims seeking relief for harms stemming from climate change arise under federal law.

entities." Br. 42 (quoting *F.T.C.* v. *Bronson Partners, LLC*, 654 F.3d 359, 372 (2d Cir. 2011)). The Attorney General fails to mention, however, that the disgorgement remedy it seeks is already available to Vermont consumers under a private right of action. *See Vastano* v. *Killington Valley Real Estate*, No. 751-12-01 Rdcv, 2008 WL 2937171 (Vt. Super. Ct. Jan. 10, 2008) (ordering disgorgement in private action under the same consumer protection statute invoked here), *aff'd on other grounds*, 996 A.2d 170 (Vt. 2010). For this claim, the Attorney General is not seeking relief for Vermont consumers in general, but to restore the discrete interests of certain individuals who allegedly would have refrained from purchasing gasoline at the fuel pump had they known about the connection between fossil fuels and climate change. *See* Compl. ¶¶ 183, 192; *see also In re Baldwin-United Corp.*, 770 F.2d 328, 341 (2d Cir. 1985).

This Court's decision in *MyInfoGuard, LLC* v. *Sorrell* is not to the contrary. There, the Attorney General alleged that defendants had engaged in "cramming"—charging over $625,000 to the telephone bills of more than 8,000 Vermont consumers without their consent. *See MyInfoGuard, LLC* v. *Sorrell*, No. 2:12-cv-102, ECF No. 9, Compl. ¶ 1 (D. Vt. May 16, 2012). Given the widespread scope and magnitude of the harm, this Court found that the State had "concrete interests in the litigation" and that the requested relief would "flow to the State as a whole." *MyInfoGuard, LLC* v. *Sorrell*, Nos. 2:12-cv-074, 2:12-cv-102, 2012 WL 5469913, at *5 (D. Vt. Nov. 9, 2012). Here, by contrast, the Attorney General merely suggests that Defendants' conduct may have the capacity to influence some unknown number of consumers' subjective preferences in energy and transportation. *See, e.g.*, Compl. ¶¶ 169, 175, 183, 192. That is different in kind from the objective, substantial harm to consumers alleged in *MyInfoGuard*.[22]

[22] Similarly, in *MPHJ Technology Investments*, cited by the Attorney General, the State alleged objective, substantial harm to consumers where the defendant allegedly sent fraudulent patent

Because the parties are completely diverse, and the amount in controversy exceeds $75,000, this Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332.

VII. The Attorney General Is Not Entitled to Costs and Fees.

Removal of this action was objectively reasonable, and no unusual circumstances warrant an award of costs and fees. "Absent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal." *Martin* v. *Franklin Cap. Corp.*, 546 U.S. 132, 141 (2005). Removal is not "objectively unreasonable" unless foreclosed by "clearly established law." *Williams* v. *Int'l Gun-A-Rama*, 416 F. App'x 97, 99 (2d Cir. 2011). The law is not "clearly established" where there is even "a small measure of disagreement." *Bedminster Fin. Grp., Ltd.* v. *Umami Sustainable Seafood, Inc.*, No. 12 Civ. 5557(JPO), 2013 WL 1234958, at *11–12 (S.D.N.Y. Mar. 26, 2013). The Attorney General does not and cannot suggest that Defendants acted in bad faith or that "their motion rises to the level of abuse or harassment." *Qatar* v. *First Abu Dhabi Bank PJSC,* 432 F. Supp. 3d 401, 421 (S.D.N.Y. 2020). To the contrary, Defendants' legal arguments are well-reasoned and supported by precedent, including the Second Circuit's recent decision in *City of New York*.

Ample authority in the Second Circuit demonstrates more than "a small measure of disagreement" regarding the issues at bar. *City of New York* demonstrates that suits seeking redress for global climate change are subject to federal common law. 993 F.3d at 92. And recently the Second Circuit stayed a remand order pending an appeal addressing nearly identical issues. *See Connecticut* v. *Exxon Mobil Corp.*, No. 21-1466 (2d Cir. Oct. 5, 2021), ECF No. 81. Similarly,

enforcement letters to small businesses and non-profit organizations requesting up to $1200 in licensing fees and threatening suit if it received no response. 2014 WL 1494009, at *10. Here, in contrast, any alleged harm to consumers is speculative and based on the Attorney General's value judgment about the environmental decisions Vermonters *should* make. Thus, *MPHJ* does not support a finding that the State has a concrete interest in this litigation.

the federal district court in *City of New York* v. *Exxon Mobil Corp.* stayed that action entirely pending the Second Circuit's resolution of the issues presented by the *Connecticut* appeal. *See* No. 21-cv-04807 (S.D.N.Y. Nov. 12, 2021), ECF No. 58.

The Attorney General repeatedly cites the holdings of other district courts in climate change cases which have ruled against federal jurisdiction, *see* Br. 29 n.10, 35 n.11, 37 n.14, but as the Attorney General acknowledges, those decisions are not binding.[23] In arguing for fees and costs, the Attorney General conspicuously refrained from citing the express holdings in those cases uniformly refusing to award costs and fees. *See, e.g.*, *Connecticut*, 2021 WL 2389739, at *15 (holding that Defendants "did not lack an objectively reasonable basis for removal" because "several of the issues raised . . . are novel within the Second Circuit"); *Minnesota* v. *Am. Petroleum Inst.*, No. 20-1636 (JRT/HB), 2021 WL 3711072, at *5 (D. Minn. Aug. 20, 2021) ("[T]he issues presented in this case intersect with rapidly evolving areas of law and it is not unreasonable for Defendants to assert novel arguments or preserve arguments as issues for appeal."); *see also Delaware* v. *BP Am. Inc.*, No. 20-1429-LPS, 2022 WL 58484, at *15 (D. Del. Jan. 5, 2022) ("It was not objectively unreasonable for Defendants to wish to litigate these removal grounds again, in this Circuit. . . . Plaintiff's lengthy complaint is fairly susceptible to different interpretations[.]"). Given the issues currently pending in the Second Circuit, and in other courts across the country,

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[23] The same is true of the Tenth Circuit's decision affirming remand in *Board of County Commissioner of Boulder County* v. *Suncor Energy (U.S.A.) Inc.*, — F.4th —, 2022 WL 363986 (Feb. 8, 2022). Nor is *Boulder County* persuasive here. For instance, unlike the Tenth Circuit, this Court is bound by the Second Circuit's conclusion that federal common law necessarily governs claims seeking redress for global climate change. And unlike in *Boulder County*, here, the record reflects that certain defendants have acted under a federal officer by making a product "specially for the government's use." *Id.* at *7; *see also* § III.B *supra*.

Defendants had an objectively reasonable basis to remove this case to federal court.[24]

CONCLUSION

This Court has subject matter jurisdiction, and the motion to remand should be denied. Although this action is purportedly brought under a state consumer protection law, the Attorney General seeks relief that would suppress fossil fuel production and sales precisely because those sales, as alleged, contribute to greenhouse gas emissions and climate change. The Attorney General repeatedly insists that this case is only about harms to the marketplace, not the environment. But the Complaint does not allege that Defendants' fossil fuel products performed other than advertised, that they did not conform to applicable standards, or that they injured any consumers. The purported harm to the *marketplace* exists only insofar as consumers purchased more gasoline than the Attorney General thinks they should have *because of* the impact on the *environment*. Focusing on an antecedent step in the value chain of emissions—the promotion of fossil fuels—is merely artful pleading and does not the change the fact that, at bottom, the Attorney General seeks to hold Defendants liable for harms stemming from the global phenomenon of climate change. A lawsuit of this nature belongs in federal court.

[24] The authority the Attorney General cites is inapposite. Br. 43–44. In those cases, the defendants attempted to remove a lawsuit based on federal claims in a third-party complaint, *see Calabro* v. *Aniqa Halal Live Poultry Corp.*, 650 F.3d 163, 166 (2d Cir. 2011), federal defenses, *see Savino* v. *Savino*, 590 F. App'x 80, 81 (2d Cir. 2015), or federal claims asserted in a counterclaim, *see Barnhart-Graham Auto, Inc.* v. *Green Mountain Bank*, 786 F. Supp. 394 (D. Vt. 1992). Here, by contrast, the allegations in the Attorney General's Complaint alone provide multiple grounds for removal under federal law. For this same reason, the alternative holding of Judge Billings in *Barnhart-Graham Auto* is inapplicable. The Complaint implicates far more than a single "meager reference to federal law." 786 F. Supp. at 396.

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