No. 22-1096

IN THE

United States Court of Appeals for the Third Circuit

STATE OF DELAWARE, *ex rel.* KATHLEEN JENNINGS,
ATTORNEY GENERAL OF THE STATE OF DELAWARE

Plaintiff-Appellee,

v.

BP AMERICA INC., BP PLC, CHEVRON CORP., CHEVRON USA INC., CONOCOPHILLIPS, CONOCOPHILLIPS CO., PHILLIPS 66, PHILLIPS 66 CO., EXXON MOBIL CORP., EXXONMOBIL OIL CORP., XTO ENERGY INC., HESS CORP., MARATHON OIL CORP., MARATHON PETROLEUM CORP., MARATHON PETROLEUM CO. LP, SPEEDWAY LLC, MURPHY OIL CORP., MURPHY USA INC., ROYAL DUTCH SHELL PLC, SHELL OIL COMPANY, CITGO PETROLEUM CORP., TOTAL SA, TOTALENERGIES MARKETING USA INC., OCCIDENTAL PETROLEUM CORP., DEVON ENERGY CORP., APACHE CORP., CNX RESOURCES CORP., CONSOL ENERGY INC., OVINTIV INC., AMERICAN PETROLEUM INSTITUTE,

Defendants-Appellants.

On Appeal from an Order
of the United States District Court
for the District of Delaware (20-cv-1429)

DEFENDANTS-APPELLANTS' OPENING BRIEF

THOMAS G. HUNGAR
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
(202) 955-8500
thungar@gibsondunn.com

THEODORE J. BOUTROUS, JR.
WILLIAM E. THOMSON
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197
(213) 229-7000
tboutrous@gibsondunn.com
wthomson@gibsondunn.com

Counsel for Defendants-Appellants Chevron Corporation and Chevron U.S.A. Inc.
[*Additional counsel listed on signature page*]

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Defendants submit the following statement:

BP America Inc. is a wholly owned indirect subsidiary of BP plc.

BP plc is a publicly traded corporation organized under the laws of England and Wales. No publicly traded corporation owns 10% or more of its stock.

Chevron Corporation is a publicly traded company (NYSE: CVX). It does not have a parent corporation, and no publicly held company owns 10% or more of its stock.

Chevron U.S.A. Inc. is a wholly owned indirect subsidiary of Chevron Corporation. No publicly traded corporation owns 10% or more of Chevron U.S.A.'s stock.

ConocoPhillips is a publicly traded corporation incorporated under the laws of Delaware with its principal place of business in Texas. It does not have a parent corporation and no publicly held company owns 10% or more of its stock.

ConocoPhillips Company is wholly owned by ConocoPhillips.

Phillips 66 is a publicly traded company. It does not have a parent corporation, and no publicly held company owns 10% or more of its stock.

Phillips 66 Company is wholly owned by Phillips 66.

Exxon Mobil Corporation is a publicly traded corporation and has no corporate parent. No publicly held corporation owns 10% or more of Exxon Mobil Corporation's stock.

ExxonMobil Oil Corporation's corporate parent is Mobil Corporation, which owns 100% of ExxonMobil Oil Corporation's stock. Mobil Corporation, in turn, is wholly owned by Exxon Mobil Corporation.

XTO Energy Inc.'s corporate parent is Exxon Mobil Corporation, which owns 95.5% of XTO Energy Inc.'s stock.

Hess Corporation is a publicly traded corporation, and it has no corporate parent. There is no publicly held corporation that owns 10% or more of Hess Corporation's stock.

Marathon Oil Corporation has no parent corporation, and there is no publicly held corporation that owns 10% or more of Marathon Oil Corporation's stock.

Marathon Petroleum Corporation is a publicly held corporation and does not have a parent corporation. BlackRock, Inc. is the only publicly

held company that owns 10% or more of Marathon Petroleum Corporation's stock.

Marathon Petroleum Company LP is a wholly owned subsidiary of Marathon Petroleum Corporation. No other publicly held company owns 10% or more of Marathon Petroleum Company LP's stock.

Murphy Oil Corporation has no parent corporation, and there is no publicly held corporation that owns 10% or more of Murphy Oil Corporation's stock.

Murphy USA Inc. is a publicly held corporation, and it has no corporate parent. Murphy USA Inc. further discloses that BlackRock, Inc. owns more than 10% of Murphy USA Inc.'s outstanding stock.

Speedway LLC ("Speedway"), a Delaware LLC, is wholly owned by SEI Speedway Holdings, LLC, a Delaware LLC. SEI Speedway Holdings, LLC is wholly owned by 7-Eleven, Inc. 7-Eleven, Inc., a Texas corporation, is wholly-owned by SEJ Asset Management & Investment Company, Inc. ("SAM"), a Delaware corporation. SAM is owned in part by Seven-Eleven Japan Co., Ltd. ("SEJ"), a Japanese corporation. SEJ is wholly-owned by Seven & i Holdings, Co., Ltd., a Japanese corporation, whose stock is publicly traded on the Tokyo Stock Exchange. SAM is also

owned in part by Seven & i Holdings, Co., Ltd. No other publicly held corporation owns 10% or more of Speedway's stock.

Royal Dutch Shell plc changed its name to Shell plc, effective January 21, 2022. Shell plc does not have any parent corporations, and no publicly traded company owns 10% or more of Shell plc's stock.

Shell Oil Company changed its name to Shell USA, Inc., effective March 1, 2022. Shell USA, Inc. is a wholly owned subsidiary of Shell Petroleum Inc., whose ultimate corporate parent is Shell plc. No other publicly held company owns 10% or more of the stock of Shell USA, Inc.

CITGO Petroleum Corporation's ("CITGO") parent corporation is CITGO Holding, Inc., which is a wholly owned subsidiary of PDV Holding, Inc., which is a wholly owned subsidiary of Petróleos de Venezuela S.A. No publicly held corporation owns 10% or more of CITGO's stock.

Total SA is a publicly held French company.

TotalEnergies Marketing USA, Inc. is a wholly owned subsidiary of TotalEnergies Marketing Services. TotalEnergies Marketing Services is a wholly owned subsidiary of TotalEnergies S.E., a publicly held French company.

Occidental Petroleum Corporation, a publicly traded company, has no parent company, and no publicly held company owns 10% or more of its stock. Occidental Chemical Corporation is wholly owned by Occidental Chemical Holding Corporation.

Devon Energy Corporation has no parent corporation, and there is no publicly held corporation that owns 10% or more of Devon Energy Corporation's stock.

Apache Corporation does not have a parent corporation, and there is no publicly held corporation that owns 10% or more of Apache Corporation's stock.

CNX Resources Corporation is a publicly held corporation and does not have a parent corporation. BlackRock Fund Advisors owns 10% or more of CNX Resources Corporation's stock.

CONSOL Energy Inc. is a publicly held corporation and does not have a parent corporation. BlackRock Fund Advisors, which is a subsidiary of publicly held BlackRock, Inc., owns 10% or more of CONSOL Energy Inc.'s stock.

Ovintiv Inc. is a publicly held corporation and does not have a parent corporation. No publicly held corporation owns 10% or more of Ovintiv Inc.'s stock.

American Petroleum Institute is a non-profit, tax-exempt organization incorporated in the District of Columbia. It is a non-stock corporation and thus has no parent organization, and no publicly held corporation holds 10% or more of its stock.

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INTRODUCTION

Plaintiff, the State of Delaware, filed this case in Delaware state court, seeking to use Delaware state tort law to impose liability on selected energy companies for physical harms allegedly attributable to the effects of global climate change stemming from the cumulative impact of the worldwide production, promotion, sale, and use of oil and gas going all the way back to the Industrial Revolution. These claims belong in federal court.

Federal law governs Plaintiff's claims because they seek to recover damages for alleged physical effects of interstate and international greenhouse gas emissions. Plaintiff does not seek damages related to its own purchases or use of Defendants' products (as in a misrepresentation or consumer-fraud case); rather, Plaintiff seeks damages for injuries that it alleges are caused by the cumulative impact of emissions emanating from every state in the Nation and every country in the world. As the Second Circuit recently held in a case with nearly identical allegations: "Such a sprawling case is simply beyond the limits of state law," and these claims "must be brought under federal common law." *City of New York v. Chevron Corp.*, 993 F.3d 81, 92, 95 (2d Cir. 2021). The Supreme

Court has held that the "*basic scheme of the Constitution* … demands" that "federal common law" govern claims involving "air and water in their ambient or interstate aspects." *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 421 (2011) ("*AEP*") (emphasis added). By contrast, "state law cannot be used" to address alleged environmental harms in one State emanating from pollution beyond that State's borders. *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 313 n.7 (1981) ("*Milwaukee II*"). Only "[f]ederal common law and not the varying common law of the individual States" can govern these types of claims involving interstate emissions. *Illinois v. City of Milwaukee*, 406 U.S. 91, 107 n.9 (1972) ("*Milwaukee I*").

The district court nonetheless remanded to state court, concluding that "Plaintiff only asserts state-law claims." 1-JA-38. The district court was incorrect. Plaintiff's own Complaint describes interstate and international emissions as "the main driver of the gravely dangerous changes occurring to the global climate" and as the source of Plaintiff's alleged physical injuries. 3-JA-249¶4, 3-JA-252–53¶11. Plaintiff's attempts to frame these claims as solely concerned with alleged "misrepresentations" cannot change the fundamental fact that all of its alleged harms and all

of the relief it seeks are based on the physical effects of worldwide greenhouse gas emissions. And as the Supreme Court has long held: "When we deal with air and water in their ambient or interstate aspects, there is a federal common law." *AEP*, 564 U.S. at 421. Because Plaintiff's claims arise in an area of exclusively federal law, removal was proper.

Similarly, Plaintiff's claims are removable under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005), because the claims necessarily involve substantial and disputed issues of federal law—indeed, they are governed exclusively by federal law.

The district court also erred in denying federal-officer removal and removal under the Outer Continental Shelf Lands Act ("OCSLA"). The court focused *solely* on Plaintiff's misrepresentation allegations, but in doing so the court failed to consider Plaintiff's overall theory of injury causation. Plaintiff's alleged injuries cannot arise solely from Defendants' purported misrepresentations. Instead, Plaintiff alleges injuries to physical property from "sea level rise, flooding, erosion, loss of wetlands and beaches, [and] ocean acidification," 3-JA-310¶46, which—by Plaintiff's own account—are caused by worldwide fossil fuel production, use,

and emissions. The only purported role of the alleged misrepresentations that the Complaint identifies is to have "unduly inflated the market for fossil fuels." 3-JA-316¶58. In contrast, the production and sale of those fuels—a substantial portion of which occurred at the direction of federal officers and on the Outer Continental Shelf ("OCS")—are essential elements of the causal chain for each of Plaintiff's claims.

The record is replete with evidence that Defendants produced substantial oil and gas at the direction of federal officers and on the OCS. For example, Defendants have produced and supplied large quantities of specialized, non-commercial-grade fuel for and at the direction of the U.S. military, and in recent years as much as 30% of annual domestic oil production has come from federally owned lands on the OCS. Defendants submitted unrebutted expert declarations from historians of military-industrial relations and energy policy that draw on over a half-century of evidence to show the deep connections between Defendants' oil operations and the federal government's mandate to ensure an abundant and reliable supply of oil and gas for the national defense. Because Plaintiff's claims are based on *global* climate change, they are not limited to pur-

ported misrepresentations or Defendants' operations in Delaware; rather, they necessarily encompass the worldwide production, sale, and use of oil and gas, including the significant portion that occurred under the direction, supervision, and control of federal officers and on the OCS.

In sum, Defendants' production activities and the emissions claimed to result therefrom are the *sine qua non* of Plaintiff's alleged harm and requested damages. As a result, Plaintiff's claims arise under federal law, raise substantial and disputed issues of federal law, and are connected to actions taken under federal officers and on the OCS. Removal was therefore proper.

JURISDICTIONAL STATEMENT

Defendants timely removed this action to the district court on October 23, 2020. 28 U.S.C. § 1446(b)(2)(A); 2-JA-89. The district court had jurisdiction under 28 U.S.C. §§ 1331, 1367(a), 1441(a), and 1442, and 43 U.S.C. § 1349(b).

On January 5, 2022, the district court granted Plaintiff's motion to remand. 1-JA-59. On January 13, 2022, Defendants timely filed a notice of appeal. 1-JA-1–2.

This Court has jurisdiction under 28 U.S.C. §§ 1291 and 1447(d).

STATEMENT OF ISSUES

1. Whether the district court had subject-matter jurisdiction given that Plaintiff's claims for injuries stemming from global climate change arise under federal law. *See* 2-JA-113–23; 6-JA-1173–78; 1-JA-33–38.

2. Whether the district court had removal jurisdiction under *Grable* for claims raising substantial and disputed federal questions, given that Plaintiff's claims are governed exclusively by federal law and include federal constitutional elements. *See* 2-JA-178–97; 6-JA-1179–85; 1-JA-39–44.

3. Whether the district court had jurisdiction under 28 U.S.C. § 1442(a)(1) since, under that statute's liberal construction in favor of removal, Plaintiff's claims are "for or relating to" injuries allegedly caused by emissions from oil and gas, a substantial amount of which Defendants produced at the direction of federal officers. *See* 2-JA-129–77; 6-JA-1190–1218; 1-JA-44–53.

4. Whether Plaintiff's claims "aris[e] out of, or in connection with" Defendants' operations on the OCS, 43 U.S.C. § 1349(b)(1), because Plaintiff alleges that its injuries were caused by emissions from oil and

gas, a substantial amount of which Defendants extracted from the OCS, and given that Plaintiff's requested relief would impair OCS activities. *See* 2-JA-123–29; 6-JA-1185–89; 1-JA-53–56.

[An addendum of key statutory provisions is included at the end of the brief.]

STATEMENT OF RELATED CASES

Plaintiff's underlying state-court case is *State of Delaware, ex rel. Jennings v. BP America Inc.*, No. N20C-09-097-AML CCLD (Del. Super. Ct.). One related case, *City of Hoboken v. Exxon Mobil Corp.*, No. 21-2728, is pending before this Court. Similar cases pending in other jurisdictions are listed in Attachment B to the Civil Appeal Information Statement. Dkt. No. 84-3.

STATEMENT OF THE CASE

A. Background

As an issue of national and international significance, climate change has long been the subject of federal laws and regulations, political negotiations, and diplomatic engagement with other countries. *See* 2-JA-194–95. Dissatisfied with the federal government's approach to this issue, plaintiffs for years have sought to effect their preferred policies

through litigation. This lawsuit is another in a long series of such climate-change-related actions that "seek[] to impose liability and damages on a scale unlike any prior environmental pollution case." *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 876 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012). Courts have consistently dismissed such claims. *See, e.g.*, *id.*; *AEP*, 564 U.S. at 424–29.

Most recently, a number of state and local governments across the country launched a coordinated series of lawsuits in state courts seeking to hold certain energy companies liable for global climate change under various states' laws. This case is part of that campaign. *See* 3-JA-254¶13. Plaintiff sued a select group of energy companies and a trade association, alleging that "fossil fuels are the driving force behind anthropogenic climate change." 3-JA-417¶200. According to the Complaint, Defendants' production and marketing of oil and gas have increased greenhouse gas emissions and contributed to global climate change, leading to Plaintiff's alleged physical injuries from rising sea levels, more frequent extreme heat, and increased extreme precipitation. 3-JA-429¶226.

Plaintiff asserts claims for nuisance, trespass, negligent failure to warn, and violations of Delaware's Consumer Fraud Act. 3-JA-444–

62¶¶234–80. Rather than seeking relief limited to injuries caused by alleged misrepresentations, Plaintiff demands damages for all injuries allegedly suffered as a result of global climate change, disgorgement of profits from Defendants' production and sale of oil and gas, and an order compelling Defendants to abate the alleged nuisance of global climate change. 3-JA-463; 3-JA-454¶263.

B. Proceedings Below

Defendants removed this action to federal court, asserting multiple bases for removal, including that Plaintiff's claims (1) arise under federal law, given that Plaintiff alleges that its injuries result from interstate and international emissions 2-JA-113–23; (2) are removable under *Grable*, 2-JA-178–97; (3) relate to acts performed under the direction of federal officers, 2-JA-129–77; and (4) are removable under OCSLA, 2-JA-123–29.

The district court remanded to state court. 1-JA-59. The court acknowledged that Plaintiff's "broader theory" depends on "'the unrestrained production and use of Defendants' fossil fuel products.'" 1-JA-49. Indeed, the Complaint's public-nuisance claim, in particular, makes

clear that Plaintiff's claims cover much more than just alleged "misrepresentations," by alleging that Defendants created the nuisance by, among other things, "[c]ontrolling every step of the fossil fuel product supply chain, including the extraction of raw fossil fuel products, including crude oil, coal, and natural gas from the Earth; the refining and marketing of those fossil fuel products, and the placement of those fossil fuel products into the stream of commerce." 3-JA-451¶257.

Nevertheless, the court allowed Plaintiff to manipulate its Complaint to artfully plead around each basis for removal. The court rejected Defendants' federal-common-law argument by incorrectly concluding that defendants can remove nominally state-law claims only when those claims are completely preempted by a federal statute. 1-JA-37–38. The court also ignored substantial evidence demonstrating that Defendants' activities at issue were undertaken at the direction of federal officers based on Plaintiff's purported disclaimer. 1-JA-45–47.

SUMMARY OF ARGUMENT

I. As a matter of federal constitutional structure, Plaintiff's claims necessarily arise under federal law, and thus there is federal-question jurisdiction. Plaintiff seeks to hold Defendants liable for the

consequences of emissions-producing activities by billions of actors in all other states and around the world stretching back decades. A single state's law cannot govern such transboundary claims. Claims involving interstate pollution are inherently and exclusively federal in nature, and therefore are removable.

II. Similarly, Plaintiff's claims raise substantial, disputed issues of federal law—given that federal law provides the exclusive rule of decision for those claims—thereby making removal appropriate under *Grable*.

III. Plaintiff's claims are also removable under the federal-officer-removal statute. Defendants acted under the federal government's direction and control in multiple ways, including with regard to the production and supply of highly specialized fuels to the military, the exploration and extraction of oil from federal lands, and management of vital oil resources for the federal government. Defendants undertook these activities for the federal government to accomplish critical national-security and economic objectives. Because Plaintiff's purported causes of action, theory of injury, and requested remedies implicate the cumulative and global

use of fossil fuels, Plaintiff's claims are connected to acts that Defendants undertook at the direction of federal officers.

IV. Finally, removal is appropriate under OCSLA. Defendants have long engaged in extensive exploration, development, and production of oil and gas on the OCS, which has accounted for as much as 30% of annual domestic oil production. Plaintiff alleges that its injuries arise from the cumulative impact of worldwide extraction, production, and sale of oil and gas products over the past several decades—activities that necessarily include Defendants' substantial OCS production. Additionally, Plaintiff's requested relief would discourage Defendants' OCS operations.

ARGUMENT

A defendant may remove a civil case from state court if the plaintiff "could have filed its operative complaint in federal court." *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1748 (2019); *see also* 28 U.S.C. § 1441(a) (allowing removal of "any civil action" within district court's "original jurisdiction"). The removing party need only demonstrate federal jurisdiction over a single claim to authorize removal. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 559, 563 (2005). Here,

removal was proper because the district court had jurisdiction over this suit under the federal-question-jurisdiction statute, 28 U.S.C. § 1331, the federal-officer-removal statute, *id.* § 1442, and OCSLA, 43 U.S.C. § 1349(b)(1).

Standard of Review. This Court reviews subject-matter jurisdiction de novo. *Papp v. Fore-Kast Sales Co.*, 842 F.3d 805, 810 (3d Cir. 2016).

I. Removal Was Proper Because Plaintiff's Claims Arise Under Federal Law.

Plaintiff seeks to hold Defendants liable for the consequences of emissions-producing activities occurring in other states and around the world. Under long-established Supreme Court precedent, claims based on interstate and international sources of pollution are necessarily and exclusively governed by federal law. And, as numerous courts of appeals have recognized, where nominally state-law claims are governed by federal common law, the claims are removable.

A. Federal Law Necessarily And Exclusively Governs Plaintiff's Claims Because They Are Based On Interstate And International Emissions.

As a matter of federal constitutional structure, Plaintiff's claims arise under federal law because they seek redress for harms allegedly

caused by transboundary emissions. Although labeled state-law claims, the Complaint's claims can only be federal. This is because Plaintiff seeks damages for alleged harms caused by the cumulative impact of emissions emanating from *every state* in the Nation based on conduct occurring "in *and outside of Delaware*." 3-JA-447¶243 (emphasis added). Under our Constitution, only federal law could empower a court to address injuries from the worldwide greenhouse gas emissions about which Plaintiff complains.

1. Where, as here, "there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism," only federal law can apply. *Milwaukee I*, 406 U.S. at 105 n.6. In such circumstances, "state law cannot be used." *Milwaukee II*, 451 U.S. at 313 n.7.

Specifically, where a case implicates "uniquely federal interests," the Constitution gives federal courts "the need and authority … to formulate" a national body of law, rather than allowing for piecemeal—and potentially contradictory—rules of decision to develop among the states. *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640–41 (1981). In these areas, "our federal system does not permit the controversy to be

resolved under state law." *Id.* at 641. Instead, federal law necessarily supplies the exclusive rules of decision and any causes of action.

Interstate pollution—including the effects of interstate greenhouse gas emissions—is one such area where federal law alone necessarily governs. Claims based on cross-border pollution can arise only under federal common law, not any individual state's law: "When we deal with air and water in their ambient or interstate aspects, there is a federal common law." *AEP*, 564 U.S. at 421. "Federal common law and not the varying common law of the individual States is … necessary to be recognized as a basis for dealing in uniform standard with the environmental rights of a State against improper impairment by sources outside its domain." *Milwaukee I*, 406 U.S. at 107 n.9. Accordingly, "[f]or over a century, a mostly unbroken string of cases has applied federal law to disputes involving interstate air or water pollution." *New York*, 993 F.3d at 91.

This principle flows from the constitutional structure itself. In our federal system, each state may make laws within its own borders, but no state may "impos[e] its regulatory policies on the entire Nation." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585 (1996). The Constitution's allocation of sovereignty between the states and the federal government, and

among the states themselves, precludes application of state law when a claim's inherently interstate nature requires a uniform *national* rule of decision. Allowing state law to govern such claims would permit one state to "impose its own legislation on … the others," violating the "cardinal" principle that "[e]ach state stands on the same level with all the rest." *Kansas v. Colorado*, 206 U.S. 46, 97 (1907).

Accordingly, "the basic scheme of the Constitution … demands" that federal law exclusively govern interstate air pollution claims, such as claims that energy companies bear responsibility for the worldwide greenhouse gas emissions that allegedly caused harms from global climate change. *AEP*, 564 U.S. at 421. This basic constitutional principle is "*imperative* in the present era of growing concern on the part of a State about its ecological conditions and impairments of them" from "outside sources." *Milwaukee I*, 406 U.S. at 107 n.9 (emphasis added).

2. These precedents dictate that Plaintiff's common-law claims necessarily arise under federal law. This case hinges on transboundary greenhouse gas emissions, which Plaintiff alleges are the "primary cause of the climate crisis" causing its purported injuries. 3-JA-249¶5. Plain-

tiff's Complaint describes "Defendants' fossil fuel products [as] the primary driver of global warming." 3-JA-400¶169. And Plaintiff demands damages for all injuries it allegedly has suffered and will suffer as a result of *global* climate change, including more frequent and severe flooding, harsher storm events, and extreme heat. 3-JA-429¶226. As the district court acknowledged, Plaintiff's "broader theory" is that "'the unrestrained production and use of Defendants' fossil fuel products contribute[d] to greenhouse gas pollution'" and "Plaintiff's alleged injuries." 1-JA-49.

Accordingly, any judgment about transboundary emissions or their alleged causal contribution to climate change requires evaluation at an interstate and, indeed, international level. Plaintiff does not—and could not—allege injury arising solely from in-state emissions. Rather, Plaintiff alleges that Defendants created a nuisance by "[c]ontrolling every step of the fossil fuel product supply chain, including the extraction of raw fossil fuel products … ; the refining and marketing of those fossil fuel products; and the placement of those fossil fuel products into the stream of commerce," 3-JA-451¶257(a), with no geographical limitation whatsoever. Because of the very nature of global climate change and Plaintiff's

tort theories, the claims here necessarily seek to hold Defendants liable "for the effects of emissions made around the globe over the past several hundred years." *New York*, 993 F.3d at 92.

As the Second Circuit held when considering nearly identical claims, because "emissions [are] the *singular source* of the City's harm," the claims "*must be brought under federal common law*." *New York*, 993 F.3d at 91, 95 (emphases added). These claims "demand the existence of federal common law," and "a federal rule of decision is necessary to protect uniquely federal interests." *Id.* at 90. The City of New York had alleged that the defendant energy companies—all of whom are Defendants here—"have known for decades that their fossil fuel products pose a severe risk to the planet's climate" but "downplayed the risks and continued to sell massive quantities of fossil fuels." *Id.* at 86–87. The City argued that "state tort law," not federal common law, applied because emissions were "only a link in 'the causal chain' of the City's damages." *Id.* at 85, 91. The Second Circuit soundly rejected this argument, noting that the City could not use "[a]rtful pleading" to transform its complaint into "anything other than a suit over global greenhouse gas emissions." *Id.* at 91. It was "precisely *because* fossil fuels emit greenhouse gases"

that the City brought suit. *Id.* The City was not allowed to "disavow[] any intent to address emissions" while at the same time "identifying such emissions as the singular source of [its alleged injuries]." *Id.*

Although jurisdiction in the Second Circuit case was premised on diversity, the court still had to decide whether federal or state law governed the plaintiff's claims. The defendants had argued that the only possible source of the City of New York's causes of action—federal common law—had been "displaced" by the Clean Air Act, as the Supreme Court had held in *AEP*. To determine whether *AEP*'s holding applied to the City's lawsuit, the Second Circuit first had to decide whether the City's claims were properly brought under state law (as the City claimed) or instead arose under federal common law, no matter how artfully pleaded. The Second Circuit held: "Such a sprawling case is simply beyond the limits of state law," and was "the quintessential example of when federal common law is most needed." *New York*, 993 F.3d at 92–93.

Plaintiff's claims here are no different from those asserted in *New York*, where plaintiff alleged that defendants "have 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." 993 F.3d at 86–87. Here, Plaintiff likewise alleged that Defendants knew "the climate effects inherently caused by the normal use and operation of their fossil fuel products" but "embarked on a decades-long campaign designed to … undermine national and international efforts to rein in greenhouse gas emissions" and to "accelerate their business practice of exploiting fossil fuel reserves." 3-JA-354–55¶¶108–09, 3-JA-444–45¶237.

In any event, whether Plaintiff's claims are characterized as focusing on production or deceptive marketing (or a combination of the two) is irrelevant because Plaintiff's alleged injuries all stem from interstate and international emissions, and thus must be governed by federal law. Nearly five decades ago, the Supreme Court held that the "demands for applying federal law [were] present in the pollution of a body of water such as Lake Michigan bounded, as it is, by four States." *Milwaukee I*, 406 U.S. at 105 n.6. These "demands" are even greater here, where Plaintiff seeks damages from an alleged nuisance caused by the pollution of the *global atmosphere*—an atmosphere shared by every state in the Nation and every country in the world. As the United States explained

in *AEP*: "The medium that transmits injury to potential plaintiffs is literally the Earth's entire atmosphere." Tenn. Valley Auth. Br. 17, *AEP*, 2011 WL 317143 (U.S. Jan. 31, 2011).

Finally, Plaintiff's claims are also inherently federal and arise under federal common law because they seek to impose liability based on the production and sale of oil and gas abroad. The federal government has exclusive authority over the Nation's international policy on climate change and relations with foreign nations. As the White House's response to the Ukraine crisis makes clear, the Nation's energy security—including its ability to deter war through economic means—is an essential aspect of national-security policy that depends in part on Defendants' ability to develop domestic oil and gas resources. Indeed, the Biden Administration recently took the extraordinary step of banning the import of Russian oil and emphasized the "need [for] oil and gas production to rise to meet current demand."[1]

[1] Ben Lefebvre, *"We are on war footing": Granholm calls on oil companies to ramp up production*, Politico (Mar. 9, 2022), https://www.politico.com/news/2022/03/09/granholm-calls-oil-companies-increase-production-00015802.

"[S]tate courts [are] not left free to develop their own doctrines" of foreign relations or dictate our "relationships with other members of the international community." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425–26 (1964). Accordingly, "there is federal question jurisdiction over actions having important foreign policy implications," and nominally state-law claims "arise[] under federal law" when they "necessarily require determinations that will directly and significantly affect American foreign relations." *Republic of Philippines v. Marcos*, 806 F.2d 344, 352–54 (2d Cir. 1986). So is the case here.

B. Because Plaintiff's Claims Are Governed Exclusively By Federal Common Law, They Arise Under Federal Law And Therefore Are Removable.

Given that Plaintiff's claims are necessarily governed by federal common law, they arise under federal law and are removable under federal-question jurisdiction.

1. When a plaintiff files an action in state court that *could have* been filed in federal court, its claims are removable. *Home Depot*, 139 S. Ct. at 1748; *see also Maglioli v. All. HC Holdings LLC*, 16 F.4th 393, 406 (3d Cir. 2021) (removal appropriate when "plaintiff could have originally filed the action in federal court").

"[B]ecause federal common law is federal law, disputes governed by it 'arise under the laws of the United States,'" and therefore provide a basis for a district court's original and removal jurisdiction. *E.O.H.C. v. Sec'y, U.S. Dep't of Homeland Sec.*, 950 F.3d 177, 192 (3d Cir. 2020) (alterations omitted). It is "well settled" that 28 U.S.C. § 1331's "grant of 'jurisdiction will support claims founded upon federal common law.'" *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 850 (1985). A cause of action "'arises under' federal law," for purposes of federal-question jurisdiction, "if the dispositive issues stated in the complaint *require* the application of federal common law," as is the case with Plaintiff's claims of injury based on the global production and sale of oil and gas. *Milwaukee I*, 406 U.S. at 100 (emphasis added); *see also United States v. Swiss Am. Bank, Ltd.*, 191 F.3d 30, 42 (1st Cir. 1999) ("[A] case in which the rule of decision must be drawn from federal common law presents a uniquely federal question, and, thus, comes within the original subject matter jurisdiction of the federal courts.").

The district court resisted this straightforward conclusion by noting that some of the cases Defendants relied on did not involve removal. 1-JA-36–37. But the posture of the cases does not matter because "[t]he

scope of removal jurisdiction based on the existence of a federal question is identical to the scope of federal question jurisdiction under 28 U.S.C. § 1331." *Warthman v. Genoa Twp. Bd. of Trs.*, 549 F.3d 1055, 1061 (6th Cir. 2008) (brackets omitted). Thus, regardless of their procedural posture, these cases stand for the proposition that claims "aris[ing] under federal common law … fall[] within the district court's federal question jurisdiction," even when plaintiffs use state-law labels to try to obscure their claims' federal nature. *Treiber & Straub, Inc. v. UPS, Inc.*, 474 F.3d 379, 383–84, 387 (7th Cir. 2007).

2. The district court concluded that the well-pleaded complaint rule prohibits removal where Plaintiff asserts only state-law causes of action, even if those claims are governed exclusively by federal law. 1-JA-34. But, as the district court acknowledged, 1-JA-37 n.9, its conclusion conflicts with cases from other courts. The Fifth Circuit has squarely held that "removal is proper" when claims are nominally pleaded under state law but in fact "ar[i]se under federal common law," *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 924, 928 (5th Cir. 1997). The Fourth Circuit, too, has held that removal is proper when "the constitutional nature" of purported state-law claims means that they were "governed by"

federal common law. *North Carolina ex rel. N.C. Dep't of Admin. v. Alcoa Power Generating, Inc.*, 853 F.3d 140, 147, 149 (4th Cir. 2017). The Eighth Circuit recognizes federal jurisdiction over removed complaints raising putative state-law claims because a "plaintiff's characterization of a claim as based solely on state law is not dispositive" when "federal common law" governs. *In re Otter Tail Power Co.*, 116 F.3d 1207, 1213–14 (8th Cir. 1997). And the Second Circuit has held that an "action arises under federal law"—and therefore is removable—when "federal common law" "displace[s] entirely any state cause of action." *Republic of Philippines*, 806 F.2d at 354.

These cases were removable because an "independent corollary" of the well-pleaded complaint rule is that "a plaintiff may not defeat removal by omitting to plead necessary federal questions." *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 22 (1983). According to this principle, "a plaintiff cannot frustrate a defendant's right to remove by pleading a case without reference to any federal law when the plaintiff's claim is *necessarily federal*" or by disguising an "inherently federal cause of action." 14C Wright & Miller, Fed. Prac. & Proc. Juris. § 3722.1 (4th ed.) (emphasis added).

There is "ample precedent" demonstrating that federal jurisdiction lies where "the state claim pleaded is 'really one' of federal law," and a plaintiff cannot "deny a defendant a federal forum" by artfully pleading "a federal claim … as a state law claim." *United Jersey Banks v. Parell*, 783 F.2d 360, 367 (3d Cir. 1986). As the Supreme Court has stated, "courts 'will not permit plaintiff to use artful pleading to close off defendant's right to a federal forum and occasionally the removal court will seek to determine whether the real nature of the claim is federal, regardless of plaintiff's characterization.'" *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n.2 (1981) (alterations omitted).

The district court incorrectly suggested that this statement from *Moitie* was abrogated by *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 478 (1998). 1-JA-38 & n.11. But *Rivet* narrowed only the separate point made in *Moitie*, which concerned whether removal could rest on the preclusive effect of a prior federal judgment. *See* 522 U.S. at 478. Indeed, *Rivet* expressly confirmed the broader principle of removal jurisprudence articulated in *Moitie*, stating: "If a court concludes that a plaintiff has 'artfully pleaded' claims in this fashion, it may uphold removal even

though no federal question appears on the face of the plaintiff's complaint." *Id.* at 475. And, as this Court has since explained, "the 'artful pleading' doctrine … requires a court to peer through what are ostensibly wholly state claims to discern the federal question lurking in the verbiage." *U.S. Express Lines Ltd. v. Higgins*, 281 F.3d 383, 389 (3d Cir. 2002).

Jurisdiction turns on "the substance of the plaintiff's claims," not "how the plaintiff pled the action." *Est. of Campbell ex rel. Campbell v. S. Jersey Med. Ctr.*, 732 F. App'x 113, 116 (3d Cir. 2018). Courts must often examine claims to determine the "gravamen" of a complaint for jurisdictional purposes. *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 35 (2015). To do so, courts are to "zero[] in on the core of [the] suit," and, in particular, what "actually injured" the plaintiff. *Id.* "What matters is the crux—or, in legal-speak, the gravamen—of the plaintiff's complaint, setting aside any attempts at artful pleading." *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 755 (2017). In both *Sachs* and *Fry*, the Supreme Court "worr[ied]" that any other approach would make it "too easy" for plaintiffs to manipulate their complaint to "bypass" the rules governing federal jurisdiction by using the right "magic words." *Id.* (citing *Sachs*, 577 U.S. at 32–36).

Yet here, Plaintiff seeks to do just that, asserting claims that can arise only under federal law, while attempting to keep them out of federal court by labeling them as state-law claims. This is exactly what the artful-pleading doctrine is meant to prevent. To allow Plaintiff to evade federal jurisdiction in this manner "would elevate form over substance and would put a premium on artful labeling." *Jarbough v. Att'y Gen. of U.S.*, 483 F.3d 184, 189 (3d Cir. 2007).

Plaintiff's theory is that courts should blindly accept the labels that a plaintiff affixes to its claims, and ignore the substance of those claims. That approach is contrary to the precedent of this Court and the Supreme Court, and would fly in the face of this Court's "independent duty" to ascertain its own jurisdiction. *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 426 F.3d 694, 702 (3d Cir. 2005). If the Court were to accept Plaintiff's theory, plaintiffs in other cases could even illegitimately lay claim to federal jurisdiction by strategically attaching labels to truly state-law claims. This Court, however, is "not bound by the label attached by a party to characterize a claim and will look beyond the label to analyze the substance of a claim." *Jarbough*, 483 F.3d at 189.

3. The district court also erred in concluding that complete preemption is the only application of the artful-pleading doctrine. 1-JA-37. Neither this Court nor the Supreme Court has ever so held. Instead, complete preemption is simply one application of the artful-pleading corollary, which applies *whenever* a plaintiff artfully pleads either to avoid or manufacture a federal claim. Thus, in *Estate of Campbell*, this Court affirmed removal where a plaintiff should have brought its claims under the Federal Tort Claims Act, but instead relied on "a purely state law claim in state court." 732 F. App'x at 116. Without the power to remove such cases, "a defendant's ability to avail himself of a federal forum would be partly dependent on how the plaintiff pled the action, rather than the substance of the plaintiff's claims," thereby allowing the plaintiff to "avoid federal question jurisdiction through 'artful pleading.'" *Id.*

This Court's decision in *Goepel v. National Postal Mail Handlers Union*, 36 F.3d 306 (3d Cir. 1994), does not hold otherwise. *Cf.* 1-JA-37. *Goepel* involved an allegedly preemptive federal *statute*, and thus this Court looked to the complete-preemption doctrine applicable to such statutes. Here, by contrast, federal law applies because our constitutional structure itself "does not permit the controversy to be resolved under

state law." *Tex. Indus.*, 451 U.S. at 641. *Goepel* did not and could not address that issue.

Moreover, the rationale behind applying the artful-pleading doctrine in the complete-preemption and federal-common-law contexts is the same. The doctrine exists to prevent plaintiffs from camouflaging a claim that is "purely a creature of federal law" beneath state-law labels in an effort to deprive defendants of their right to a federal forum. *Franchise Tax Bd.*, 463 U.S. at 23. That principle squarely applies here, because Plaintiff's claims necessarily arise under federal common law, given that state law simply cannot exist in this area. Indeed, there is "[n]o plausible reason" why "the appropriateness of and need for a federal forum should turn on whether the claim arose under a federal statute or under federal common law." Richard H. Fallon Jr., et al., *Hart & Wechsler's Federal Court and the Federal System* 819 (7th ed. 2015).

II. Plaintiff's Claims Are Removable Because They Necessarily Raise Disputed And Substantial Federal Issues.

Plaintiff's claims are also removable under *Grable*, 545 U.S. at 313–14, because their resolution would require the Court to address substantial, disputed federal questions.

A. Plaintiff's Claims Raise Contested Issues Of Federal Law, Given That They Necessarily Implicate Federal Common Law.

As explained above, Plaintiff's claims arise in an area governed exclusively by federal law. This fact independently justifies removal under *Grable*.

Numerous courts have upheld removal over nominally state-law claims when "federal common law *alone* governs" those claims. *Battle v. Seibels Bruce Ins. Co.*, 288 F.3d 596, 607 (4th Cir. 2002); *see also Newton v. Capital Assurance Co.*, 245 F.3d 1306, 1309 (11th Cir. 2001) (similar). And the Fifth Circuit affirmed removal of "state-law tort claims"—despite the plaintiffs' invocation of "the well-pleaded complaint rule"—because the case "raise[d] substantial questions of federal common law by implicating important foreign policy concerns." *Torres v. S. Peru Copper Corp.*, 113 F.3d 540, 542–43 (5th Cir. 1997).

Here, the district court concluded that Defendants have not identified an element of Plaintiff's claims that requires resolution of federal law. 1-JA-41–44. But because federal law *exclusively* governs Plaintiff's claims, the elements of these claims are *necessarily* federal. Plaintiff's

theory of harm stems from "global warming and its physical, environmental, social, and economic consequences," 3-JA-254¶15, which was allegedly caused by "the normal use of [Defendants'] fossil fuel[s]," 3-JA-315¶58. The Court must determine whether Plaintiff's claims are governed by federal law (something the district court did not do) because, if so, they are removable under *Grable*. And the answer to this question is yes because when, as here, claims "deal with air and water in their ambient or interstate aspects, there is a federal common law." *AEP*, 564 U.S. at 421.

The federal interests at issue are "substantial" because, among other things, this case "directly implicates actions taken by the" federal government, *Manning v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 772 F.3d 158, 165 n.4 (3d Cir. 2014), to address global climate change. These federal actions are disputed because Plaintiff and Defendants disagree over whether federal law allows Plaintiff to recover at all on its claims. And the claims are properly adjudicated in federal court because this "sprawling case is simply beyond the limits of state law." *New York*, 993 F.3d at 92.

Thus, Plaintiff's claims raise substantial issues of federal law and are removable under *Grable*. Indeed, it is difficult to imagine a situation in which a cause of action that could be governed only by federal law would *not* raise a substantial federal question.

B. Plaintiff's Complaint Raises Contested Issues Under The First Amendment.

Plaintiff's claims are also removable under *Grable* because its allegations of "disinformation campaign[s]," 3-JA-445–46¶239, necessarily include affirmative federal-law elements required by the First Amendment.

Where nominally state-law tort claims target speech on matters of public concern like climate change, the First Amendment injects affirmative federal-law elements into the plaintiff's cause of action, such as factual falsity, actual malice, and proof of causation of actual damages. *See Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 774–76 (1986). Notably, the First Amendment grafts affirmative federal-law elements—not merely defenses—onto common-law speech torts, imposing "a constitutional requirement" onto these torts under which plaintiffs must "bear the burden of showing falsity, as well as fault, before recovering damages." *Id.* at 776.

The district court noted that many of Defendants' precedents were litigated in state courts. 1-JA-43. But that misses the point. Regardless of their posture, these cases articulate the federal requirements under the First Amendment to establish these speech claims. Accordingly, "a court will have to construe the United States Constitution" to decide Plaintiff's claims. *Ortiz v. Univ. of Med. & Dentistry of N.J.*, 2009 WL 737046, at *3 (D.N.J. Mar. 18, 2009).

Likewise, the district court erred in concluding that Third Circuit precedent foreclosed removal here. *Cf.* 1-JA-42–43. Although this Court in *Tucker v. Fischbein* observed that defamation is "fundamentally a state cause of action," it also acknowledged that the First Amendment adds requirements to the state's basic elements for defamation. 237 F.3d 275, 281, 283–84 (3d Cir. 2001).

To be sure, most state-law misrepresentation claims are not removable because they typically do not implicate the broader federal interests at issue in this case. But First Amendment interests are at their apex where, as here, a governmental entity seeks to use purported state-law claims to regulate speech on issues of "public concern," *Hepps*, 475 U.S. at 774, thus warranting federal jurisdiction.

III. Plaintiff's Claims Are Removable Under The Federal-Officer-Removal Statute.

Plaintiff's claims are independently removable under the federal-officer-removal statute because Plaintiff seeks to impose liability and damages for activity carried out under the direction, supervision, or control of federal officers.

Congress entrusted federal courts to hear any claim "for or relating to any act" taken under a federal officer's direction. 28 U.S.C. § 1442(a)(1). The statute applies when "(1) the defendant is a 'person'"; (2) the plaintiff's claims relate to "the defendant's conduct 'acting under'" federal officers; (3) the plaintiff's claims relate to "an act under color of federal office"; and "(4) the defendant raises a colorable federal defense to the plaintiff's claims." *Papp*, 842 F.3d at 812 (alterations omitted).[2] "The classic case" for federal-officer removal "is when the private contractor acted under a federal officer or agency because the contractors helped the Government to produce an item that it needed." *Id.* (citations and alterations omitted).

[2] Plaintiff does not contest that Defendants are "person[s]" under § 1442(a)(1). *See* 1-JA-45.

The federal-officer-removal statute requires "liberal construction." *Watson v. Philip Morris Cos.*, 551 U.S. 142, 147 (2007). And it must be "'broadly construed' in favor of a federal forum." *In re Commonwealth's Mot. to Appoint Counsel Against or Directed to Def. Ass'n of Phila.*, 790 F.3d 457, 466–67 (3d Cir. 2015). Courts also must "construe the facts in the removal notice in the light most favorable to the" existence of federal jurisdiction, *id.* at 466; give Defendants the "benefit of all reasonable inferences from the facts alleged," *Baker v. Atl. Richfield Co.*, 962 F.3d 937, 941, 945 (7th Cir. 2020); and "credit" the defendant's—not plaintiff's—"theory of the case" when considering federal-officer removal, *Jefferson Cnty. v. Acker*, 527 U.S. 423, 432 (1999).

Yet the district court instead construed the allegations in a light most favorable to *Plaintiff*, and then refused to consider substantial evidence establishing that federal-officer removal was proper on the face of the Complaint. The record establishes each element necessary for federal-officer removal.

A. Defendants "Act[ed] Under" Federal Officers.

Private persons "act[] under [a federal] officer," 28 U.S.C. § 1442(a)(1), when they, subject to a federal officer's "subjection, guidance, or control," help the government "perform[] a job that, in the absence of a contract with a private firm, the Government itself would have had to perform." *Watson*, 551 U.S. at 151, 154.

Defendants have established through substantial evidence, including unrebutted expert declarations,[3] that a significant portion of their oil and gas production and sales over the last century was conducted under the direction, guidance, supervision, and control of the federal government. As Senator O'Mahoney, Chairman of the Special Committee Investigating Petroleum Resources, emphasized in 1945: "No one who knows even the slightest bit about what the petroleum industry contributed to the war can fail to understand that it was, without the slightest doubt, one of the most effective *arms* of this Government … in bringing about a victory." 6-JA-1332 (emphasis added). Professor Wilson further

[3] Professor Tyler Priest is an Associate Professor of History and Geographical and Sustainability Sciences at the University of Iowa. 9-JA-1971. Professor Mark Wilson is a Professor of History at the University of North Carolina-Charlotte. 9-JA-2052.

explains: "[T]he U.S. government has controlled and directed oil companies in order to secure and expand fuel supplies for its military forces and those of its allies, both in wartime and in peacetime." 9-JA-2053.

This Court has recognized that "[g]overnment contractors are a classic example" where federal-officer removal is proper. *Maglioli*, 16 F.4th at 405. And federal contractors "act under" federal officers whenever, as here, "the contractors help[] the Government to produce an item that it needed," or "the federal government uses a private corporation to achieve an end it would have otherwise used its own agents to complete." *Papp*, 842 F.3d at 812 (alteration omitted). Thus, "[c]ourts have consistently held that the 'acting under' requirement is easily satisfied where a federal contractor removes a case involving injuries arising from a product manufactured for the government." *Moore v. Elec. Boat Corp.*, 25 F.4th 30, 34 n.3 (1st Cir. 2022).

Here, Defendants did not simply comply with federal regulations in producing and marketing products, like the cigarette manufacturer in *Watson*. Rather, the government enlisted Defendants to supply it with critical and essential products, including specialized fuels required by the military. Defendants' relationships with the government did not consist

of mere supply arrangements to provide the government with a fungible consumer good; rather, these relationships were deep, complex, and long-lasting arrangements that were formed as part of the U.S. government's mobilization of the entire energy industry to win wars and to achieve energy security at home—objectives that benefitted the Nation as a whole and remain relevant today. In each of the examples below, Defendants "acted under" federal officers to produce and supply oil and gas for the federal government, in furtherance of federal policies.

1. Defendants Produced And Supplied Specialized Fuels For The Military.

The U.S. Department of Defense ("DOD") is the single largest consumer of energy in the United States and one of the world's largest consumers of petroleum fuels. *See* 7-JA-1510. Many Defendants have acted under federal officers for decades by producing and supplying large quantities of specialized jet fuel for the U.S. military, producing and supplying oil and gas during World War II at the direction of the Petroleum Administration for War ("PAW"), and supplying petroleum to the federal government under directives issued pursuant to the Defense Production Act of 1950, Pub. L. No. 81-774, 64 Stat. 798 ("DPA"). *See* 2-JA-133–75.

The district court passed over these examples, reasoning that they were either disclaimed by the Plaintiff or preceded Defendants' allegedly tortious conduct. But, unlike any other tort case throughout history, that gambit is not plausible here because Plaintiff's alleged injuries necessarily arise from the total accumulation of *all* greenhouse gas emissions, and, contrary to the district court's belief, 1-JA-46–47 n.20, Plaintiff offers no plausible method to isolate its claimed climate-related injuries allegedly caused by Defendants' "disinformation campaign" from their federally directed conduct in producing and selling oil and gas. Indeed, courts have held that there is no "realistic possibility" of doing so. *Kivalina*, 663 F. Supp. 2d at 880. Plaintiff's conclusory statement that emissions "can be attributed to Fossil Fuel Defendants on an individual and aggregate basis," 3-JA-316¶59, is a bald legal conclusion, not an explanation, of how such calculations are possible. And it is belied by Plaintiff's concession that "it is not possible to determine the source of any particular individual molecule of CO_2 in the atmosphere attributable to anthropogenic sources, because such greenhouse gas molecules do not bear markers that permit tracing them to their source, and because

greenhouse gasses quickly diffuse and comingle in the atmosphere." 3-JA-447–48¶245.

Defendants Acted Under Federal Officers During World War II and the Korean War. During World War II, the United States pursued full production of its oil reserves and created agencies to control the petroleum industry, including Defendants' predecessors and affiliates. "[T]he petroleum industry" operated as "one of the most effective arms of this Government … in bringing about a [military] victory." 6-JA-1332. Under agencies like PAW, the government dictated where and how to drill, rationed essential materials, and set statewide minimum levels for production. 6-JA-1523–27. "PAW instructed the oil industry about exactly which products to produce, how to produce them, and where to deliver them." 9-JA-2063. PAW also maintained "disciplinary measures" for noncompliance, including "restricting transportation, reducing crude oil supplies, and withholding priority assistance." 4-JA-797.

Defendants also acted under the federal government by operating and managing government-owned and government-funded petroleum-production facilities. During World War II, the government built "dozens

of large government-owned industrial plants" that were "managed by private companies under government direction." 9-JA-2066. "The U.S. government enlisted oil companies to operate government-owned industrial equipment." 9-JA-2067. Among the largest facilities was a refinery site in Richmond, California, operated by Socal (a Chevron predecessor), which was "the second-largest of all the facilities focused on aviation gasoline [('avgas')] production, providing 10 percent of total global output of" avgas by 1945. 9-JA-2073.

When the Korean War began in 1950, President Truman established the Petroleum Administration for Defense ("PAD") under authority of the DPA. PAD issued production orders to Defendants and other oil and gas companies to ensure adequate quantities of avgas for military use. *See* 2-JA-169. The DPA "gave the U.S. government broad powers to direct industry for national security purposes," and "PAD directed oil companies to expand production during the Korean War, for example, by calling on the industry to drill 80,000 wells inside the United States, and more than 10,000 more wells abroad, in 1952." 9-JA-2081–82; 2-JA-169–70.

Defendants Have Continued to Produce and Supply Large Quantities of Specialized Fuel Under Military Direction. To this day, Defendants continue to produce and supply large quantities of highly specialized fuels to the federal government. These products are required to conform to exacting DOD specifications to meet the unique operational needs of the U.S. military. "By 2010, the U.S. military remained the world's biggest single purchaser and consumer of petroleum products" and, "[a]s it had for decades, the military continued to rely on oil companies to supply it under contract with specialty fuels, such as JP-5 jet aviation fuel and other jet fuels, F-76 marine diesel, and Navy Special Fuel." 9-JA-2092–03. "[I]n the absence of [these] contract[s] with [Defendants], the Government itself would have had to perform" these essential tasks to meet DOD's fuel demands. *Baker*, 962 F.3d at 942.

For example, during the Cold War, Shell Oil Company developed and produced specialized jet fuel to meet the unique performance requirements of the U-2 spy plane and later the OXCART and SR-71 Blackbird programs. 2-JA-170–71. For the U-2, Shell Oil Company produced JP-7 fuel, which required a high boiling point to ensure the fuel could perform at high altitudes and speeds. And "[t]he Government stated that the

need for the 'Blackbird' was so great that the program had to be conducted despite the risks and the technological challenge. … A new fuel and a chemical lubricant had to be developed to meet the temperature requirements." 2-JA-170 n.159. For OXCART, Shell Oil Company produced millions of gallons of specialized fuel under contracts with specific testing and inspection requirements. *See generally* 4-JA-577–791.

Similarly, BP entities contracted with the Defense Logistics Agency to provide approximately 1.5 billion gallons of specialized military fuels for the DOD's use between 2016 and 2020 alone. 8-JA-1529–34. Since 2016, BP entities entered into approximately 25 contracts to supply various military-specific fuels, together with fuels containing specialized additives. *Id.* Such additives are essential to support the high performance of the military engines they fuel. *See* 5-JA-1035–36, 1044–53; 3-JA-526; 2-JA-173–74. DOD specifications also required BP entities to conform the fuels to other specific chemical and physical requirements, such as enumerated ranges for conductivity, heat of combustion, and thermal stability, all of which are essential and unique to performance of the military function. 8-JA-1766–1818; 9-JA-1819–1969. Similarly, between 1983 and 2011, Marathon subsidiary Tesoro Corporation entered into at least

15 contracts with the DOD Defense Logistics Agency to supply highly specialized military jet fuels, such as JP-4, JP-5, and JP-8. *See* 5-JA-813–16.

Thus, Defendants have produced and supplied large quantities of highly specialized, non-commercial-grade fuels that must conform to precise governmental needs to satisfy the unique operational and ever-changing requirements of the U.S. military's planes, ships, and other vehicles. *See, e.g.*, 6-JA-1340–41; 9-JA-2092–93. The record here is clear: "[T]he military" has "rel[ied] on oil companies to supply it under contract with specialty fuels." 9-JA-2092. This arrangement is "an archetypal case" of acting under federal-officer direction because Plaintiff's allegations are "directed at actions [Defendants] took while working under a federal contract to produce an item the government needed, to wit, [specialized military fuels], and that the government otherwise would have been forced to produce on its own." *Papp*, 842 F.3d at 813. Under this Court's precedents, Defendants "easily satisf[y] the 'acting under' requirement of the § 1442(a)(1) inquiry." *Id.*

The amicus brief filed by former Chairmen of the Joint Chiefs of Staff in the related case *City of Hoboken v. Exxon Mobil Corp.*, No. 21-

2728 (3d Cir.), confirms this point: "For more than a century, petroleum products have been essential for fueling the U.S. military around the world." Amicus Br. of Gen. (Ret.) Richard B. Myers & Adm. (Ret.) Michael G. Mullen at 3, *Hoboken*, ECF No. 67 (Nov. 22, 2021). To ensure a steady supply, "the Federal Government has directed, incentivized, and contracted with Defendants to obtain oil and gas products," and "[a] substantial portion of the oil and gas used by the U.S. military are non-commercial grade fuels developed and produced by private parties, including Defendants here, under the oversight and direction of military officials." *Id.* at 6. The contracts to produce these specialized fuels "were not typical commercial agreements"—they required Defendants "to supply fuels with unique additives to achieve important objectives." *Id.* at 20–21.

While Plaintiff tries to disclaim these clear bases for federal-officer removal, accepting Plaintiff's approach would improperly sanction its attempts to strategically ignore whole swaths of its Complaint (and uncontested history) through selective disclaimers. *See, e.g.*, *O'Connell v. Foster Wheeler Energy Corp.*, 544 F. Supp. 2d 51, 54 n.6 (D. Mass. 2008) (rejecting attempt to disclaim "recovery for any injuries resulting from" acts

"committed at the direction of an officer of the United States Government"); *Ballenger v. Agco Corp.*, 2007 WL 1813821, at *2 (N.D. Cal. June 22, 2007) ("[T]he fact that Plaintiffs' complaint expressly disavows any federal claims is not determinative."). Ultimately, the question whether "Plaintiff['s] injuries occurred … under color of federal office" is "for federal—not state—courts to answer." *Nessel v. Chemguard, Inc.*, 2021 WL 744683, at *3 (W.D. Mich. Jan. 6, 2021).

Likewise, this Court should not write off Defendants' activities during the World Wars or the Korean War because they predated the alleged disinformation campaigns. *Cf.* 1-JA-47. Plaintiff itself cites the rapid rise in fossil fuel emissions "since the mid-twentieth century" as causing "a correspondingly sharp spike in atmospheric concentration of CO_2." 3-JA-311–12¶¶50–52. "[G]reenhouse gas molecules do not bear markers," 3-JA-448¶245, and the emissions from this period are thus indistinguishable from and cumulative with all later emissions.

2. Defendants Produced Oil And Gas At Federal Direction In Furtherance Of Important Federal Interests.

For decades, the federal government has also directed Defendants and their predecessors,[4] under contracts with detailed specifications, to take specific actions to fulfill the government's long-term objective of producing significant amounts of government-owned oil and gas from federal lands. This objective is vital to the Nation's energy security. The policy of the United States has long been that fossil "fuels are strategically important domestic resources that should be developed to reduce the growing dependence of the United States on politically and economically unstable sources of foreign oil imports." 42 U.S.C. § 15927(b)(1). Defendants performed these critical tasks in several ways, including by developing resources on the OCS, operating the Elk Hills reserve, and managing the Strategic Petroleum Reserve.

[4] The Complaint improperly conflates the activities of Defendants with the activities of their separately organized predecessors, subsidiaries, and affiliates. Defendants reject Plaintiff's erroneous attribution attempts, but for purposes of the jurisdictional analysis, those allegations show that Plaintiff's Complaint as pleaded was properly removed.

OCS Leases. Defendants fulfilled a government function in exploring, extracting, and producing government-owned oil and gas from the government-controlled OCS. As Professor Wilson explained, OCS leases are "*not merely commercial transactions* between the federal government and the oil companies. They reflect the creation of a valuable national security asset for the United States over time." 9-JA-1975 (emphasis added). The federal OCS program "procured the services of oil and gas firms to develop urgently needed resources on federal offshore lands that the federal government was unable to do on its own." 9-JA-1973–74. The federal government "had no prior experience or expertise," and "[t]herefore … had little choice but to enlist the service of the oil firms who did." 9-JA-1986. The *federal government*, not the oil companies, "dictated the terms, locations, methods and rates of hydrocarbon production on the OCS" to advance federal interests. 9-JA-1977.

Federal supervisors exerted substantial control and oversight over Defendants' operations. The federal supervisors had complete authority to control and dictate the "rate of production from OCS wells," 9-JA-1994, and to suspend operations in certain situations, 9-JA-1988. They also "had the final say over methods of measuring production and computing

royalties," which was based on "the estimated reasonable value of the product as determined by the supervisor." 9-JA-1988–89. These federal officials "did not engage in perfunctory, run-of-the-mill permitting and inspection." 9-JA-1991. Rather, the federal supervisors "provided direction to lessees regarding when and where they drilled, and at what price, in order to protect the correlative rights of the federal government as the resource owner and trustee" of federal lands. 9-JA-1997.

In addition, the federal government exerted substantial control by issuing highly specific and technical orders, known as "OCS Orders," which, among other things: "specified how wells, platforms, and other fixed structures should be marked"; "dictated the minimum depth and methods for cementing well conduct casing in place"; "prescribed the minimum plugging and abandonment procedures for all wells"; and "required the installation of subsurface safety devices … on all OCS wells." 9-JA-1992–93. Through these OCS Orders, federal officials "exercised active control on the federal OCS over the drilling of wells, the production of hydrocarbons, and the provision of safety." 9-JA-1994.

OCSLA's congressional history confirms that the federal government uses OCS lessees to perform an essential governmental task. Multiple legislative proposals in the 1970s sought to exploit these government-owned oil and gas reserves by creating a national oil company. *See* 2-JA-142–43; 3-JA-515–23; 9-JA-2021–23; 121 Cong. Rec. 4490 (daily ed. Feb. 26, 1975). One bill, for example, "would have formally established a 'Federal Oil and Gas Corporation.'" 9-JA-2022. These proposals were ultimately rejected in favor of enlisting private energy companies, including Defendants, to perform these critical and necessary tasks on the government's behalf and under close federal supervision and control. *See* 9-JA-2022–26.

The national importance of the OCS to domestic energy security and economic prosperity has continued to the present, across every administration. *See* 9-JA-2049–50. For example, in 2010, President Obama announced "the expansion of offshore oil and gas exploration" because "our dependence on foreign oil threatens our economy." 9-JA-2048–49.

At bottom, the federal government controls vast quantities of oil and gas reserves in the OCS. The government long ago elected to exploit

those natural resources to produce fossil fuels and could have chosen either to extract and sell (or use) the oil and gas itself or hire third parties to perform that task on its behalf. Since the federal government had "no prior experience or expertise," it chose the second option. 9-JA-1986. This is the classic definition of "acting under": "[I]n the absence of … contract[s] with … private firm[s], the Government itself would have had to" extract and produce its oil and gas from the OCS to achieve its national-security and economic goals. *Watson*, 551 U.S. at 147, 154.

The district court concluded that Defendants' OCS operations did not constitute "acting under" because Defendants were complying with regulations. 1-JA-50. But Defendants' obligations went beyond simple compliance with the law. The federal government specified the place and methods of Defendants' drilling operations. 9-JA-1991–93. The district court also found that OCS operations are not the type of task "that the federal government would otherwise be required to undertake itself." 1-JA-51. But the court did not explain how the government could have achieved its national-security and economic goals—which required production of the government-owned OCS reserves—without either under-

taking that production itself or contracting with private parties to perform that necessary task. And that conclusion is further belied by the congressional record, showing that, far from being an entirely commercial enterprise, the exploration and exploitation of the OCS was nearly nationalized in order to ensure a consistent, largescale supply of oil and gas for the Nation. *See* 2-JA-142–43; 3-JA-515–23; 9-JA-2021–23; 9-JA-2022–26. After having been called upon by the government to fill an essential role in developing oil and gas reserves on the OCS, Defendants followed exacting instructions and operated under the supervision of federal authorities to develop federal resources.

Operation of the Elk Hills Reserve. Chevron predecessor Standard Oil of California operated the federal government's National Petroleum Reserve No. 1 in Elk Hills "in the employ" of the Navy for 31 years. 6-JA-1241–46. Congress's policy objective was to maintain and preserve these fields exclusively for federal strategic purposes, and the government used Standard Oil to accomplish these objectives. 2-JA-157–58. This relationship between Standard Oil and the Navy was far more than a standard commercial interaction. The Navy had "[d]etermine[d] absolutely … the rate of prospecting and development on, and the quantity

and rate of production from [Elk Hills]." 6-JA-1241. And the Navy reserved the right to "shut[] in and/or abandon wells" on the Reserve. 6-JA-1244.

Standard Oil's operation and production of Elk Hills for the Navy were subject to substantial supervision by Navy officers. 2-JA-152–58. The Operating Agreement between the Navy and Standard Oil provided that Standard Oil "is *in the employ of the Navy Department* and is *responsible to the Secretary thereof*." *See* 4-JA-531 (emphases added). Naval officers thus directed Standard Oil to conduct operations to further national policy. For example, in November 1974, the Navy directed Standard Oil to determine whether it was possible to produce 400,000 barrels per day to meet the unfolding energy crisis, advising Standard Oil that "*you are in the employ of the Navy* and *have been tasked with performing a function which is within the exclusive control of the Secretary of the Navy*." 6-JA-1346 (emphases added). This arrangement allowed the Navy to manage Elk Hills as it saw fit, but "rather than [do so] with its own personnel," "[t]he Navy chose to operate the reserve through a contractor" that acted in the employ of the Navy. 2-JA-156.

Standard Oil's operation of Elk Hills at the Navy's direction is quintessential "acting under" activity. It was "an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior." *Watson*, 551 U.S. at 152. Standard Oil operated Elk Hills for decades "in the employ of," and under the "subjection, guidance, or control" of the Navy, a paradigmatic example of an "unusually close [relationship] involving detailed regulation, monitoring, or supervision." *Id.* at 151, 153.

Strategic Petroleum Reserve. In further response to the 1970s oil embargoes, Congress created the Strategic Petroleum Reserve to reduce the impact of disruptions on the Nation's oil supply. 2-JA-159–60. Defendants "acted under" federal officers by supplying federally owned oil and managing the Strategic Petroleum Reserve for the government. The Strategic Petroleum Reserve subjects producers to the federal government's supervision and control, including in the event that the President calls for an emergency drawdown, under which the reserve oil can be used to address national crises. 2-JA-162–63; *see also* 6-JA-1282. The United States exercised this emergency control to draw down the reserve in response to Hurricane Katrina in 2005 and disruptions to oil supply in Libya in 2011, 2-JA-162–63 & n.127; 6-JA-1282, and, most recently, in

response to the war in Ukraine. Thus, Defendants engaged in "an effort to *assist*, or to help *carry out*," the federal government's mission to ensure energy security. *Watson*, 551 U.S. at 152.

B. Defendants' Extraction, Production, And Sales Activities, Including Those Under Federal Officers, Were "For Or Relating To" Plaintiff's Claims.

Congress has required federal courts to hear any claim "for or relating to any act" taken under a federal officer's direction. 28 U.S.C. § 1442(a)(1). When Congress inserted the words "or relating to" into the Removal Clarification Act of 2011, it "broadened federal officer removal to actions, not just *causally* connected, but alternatively *connected* or *associated*, with acts under color of federal office." *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286, 292 (5th Cir. 2020) (en banc); *accord Def. Ass'n*, 790 F.3d at 471–72 ("[I]t is sufficient for there to be a 'connection' or 'association' between the act in question and the federal office."). In assessing whether the facts of the case meet this standard, courts must "credit [the defendant's] theory of the case" and liberally construe matters in favor of the federal forum. *Acker*, 527 U.S. at 432.

Defendants more than meet that standard. "The federal statute permits removal" here because Defendants were acting under federal officers when "carrying out the 'act[s]' that are the *subject* of [Plaintiff's] complaint." *Watson*, 551 U.S. at 147 (emphasis added). Here, as discussed above, the subject of Plaintiff's Complaint is the "unrestricted production and use of fossil fuel[s]," which Plaintiff alleges led to global climate change and thereby caused its injuries. 3-JA-247¶1. Plaintiff's Complaint expressly alleges that Plaintiff's injuries were caused by Defendants' "extraction, production, and sale" of oil and gas, necessarily including the extensive activities that Defendants have undertaken at federal direction. In particular, Plaintiff's theory of harm stems from "global warming and its physical, environmental, and socioeconomic consequences," 3-JA-251¶8, which were allegedly caused by "the normal use of [Defendants'] fossil fuel products." 3-JA-315¶58. Plaintiff's allegations, on their face, demonstrate that an essential element of their claimed injuries is the emission of greenhouse gases resulting from the production and combustion of Defendants' petroleum products, including those produced under close federal supervision. *See* 3-JA-451¶257(a) (asserting nuisance claim premised on Defendants allegedly "[c]ontrolling every

step of the fossil fuel product supply chain, including the extraction of raw fossil fuel products, including crude oil, coal, and natural gas from the Earth"). Viewing it any other way is inconsistent with the lenient standard for removal of claims associated with activities taken at the direction of federal officers.

Further, the relief that Plaintiff seeks is inconsistent with a claim based merely on misrepresentation or deception. Plaintiff is not claiming as its damages the purchase price for fossil fuels it consumed due to a misrepresentation, as in a consumer-fraud claim. And Plaintiff's trespass and nuisance claims are not based on a theory that misrepresentations, or even Defendants' products, "intruded on" or "invaded" its property. Rather, the Complaint seeks relief for harms allegedly caused by cumulative, worldwide production and sales activities, including compensatory damages for all of Plaintiff's injuries resulting from global climate change, an order compelling Defendants to abate the alleged nuisance of global climate change, and an order enjoining Defendants from "creating future common-law nuisance." 3-JA-463; 3-JA-454¶263. This relief does not align with misrepresentation claims.

The fact that "Plaintiff clarified during oral argument that the injuries alleged in the complaint are limited to the 'incremental impact' resulting from Defendants' 'wrongful and tortious promotion and marketing,'" 1-JA-40 n.12, is a red herring. This supposed "clarification" does not change the fact that Plaintiff seeks damages for injuries it alleges are caused by the cumulative impact of emissions from every person's activities in every state in the Nation and every country in the world. Tellingly, Plaintiff has assiduously avoided saying that it seeks damages *only* for any incremental increase in emissions caused by Defendants' alleged misrepresentations—rather than for all harms it has allegedly suffered as a result of climate change, irrespective of the source or cause of the emissions.

In any event, none of Plaintiff's claims would be complete upon a showing of any misrepresentation. Nor does Plaintiff assert that global climate change, and the alleged injuries resulting therefrom, are solely the result of Defendants' supposed misrepresentations. To prevail on its claims, Plaintiff must show that the alleged tortious conduct *caused* Plaintiff's asserted property-based injuries. To make that showing,

Plaintiff also must rely at least in part on Defendants' production and sales activities.

When assessing the nature of a plaintiff's claims, courts focus on the "gravamen" of the complaint, *Fry*, 137 S. Ct. at 755, meaning what "actually injured" the plaintiff, *Sachs*, 577 U.S. at 35; *see also Watson*, 551 U.S. at 147 ("the subject" of the complaints). Here, the gravamen of the Complaint is Plaintiff's purported physical injuries from the "unrestricted production and use of fossil fuel products [that] create greenhouse gas pollution that warms the planet and changes our climate." 3-JA-247¶1. Plaintiff's attempts to evade a federal forum—by focusing on alleged misrepresentations to the exclusion of the rest of its Complaint—is precisely the sort of "artful pleading" the Supreme Court rejected in *Sachs* and *Fry*. Defendants' production of oil and gas, including under the direction of the federal government, is the source of Plaintiff's injuries and the gravamen of the Complaint. Plaintiff's claims depend on allegations about the "climate effects that inevitably flow from the intended or foreseeable use of [Defendants'] fossil fuel products." 3-JA-444¶236. The production and sale of those products under the direction

of the federal government therefore "relat[es] to" Plaintiff's claims. 28 U.S.C. § 1442(a)(1).

The district court acknowledged that "Defendants' participation in the OCS lease program … contributes to the broader theory about 'how the unrestrained production and use of Defendants' fossil fuel products contribute to greenhouse gas pollution.'" 1-JA-48–49. Indeed, the court concluded that Defendants' satisfaction of the "for, or relating to" prong was a "close question," and it ruled solely on the incorrect conclusion that Defendants did not "act[] under" federal officers in that activity. 1-JA-49. Once this Court considers the entire, uncontested record in this case, the question ceases to be "close": Defendants conducted activities at the behest and under the direction of federal officers, and Plaintiff bases its claims on worldwide emissions that necessarily encompass those activities.

C. Defendants Raised Colorable Defenses To Plaintiff's Claims.

Finally, Defendants have asserted numerous, plausible colorable defenses, such as the government-contractor defense, preemption, and that Plaintiff's claims are barred by the foreign-affairs doctrine. *See* 2-

JA-175–77. The district court did not address this prong, noting that Plaintiff challenged it only "in passing." 1-JA-45.

IV. Plaintiff's Claims Are Removable Because They Have A Connection With Defendants' Activities On The Outer Continental Shelf.

Plaintiff's claims are also removable because they are connected with Defendants' extraction and production of oil and gas from the OCS, and Plaintiff's requested relief could impair those OCS operations. The district court concluded that OCSLA jurisdiction did not apply because Defendants failed to establish but-for causation between their OCS operations and Plaintiff's claims. 1-JA-54–56. But the district court misstated the standard for OCSLA removal and misapplied it to the facts of this case.

A. OCSLA Grants Federal Courts Jurisdiction Over Any Claim Arising Out Of, Or In Connection With, OCS Operations.

OCSLA establishes federal jurisdiction over actions "arising out of, or *in connection with* … any operation conducted on the [OCS]" involving the "exploration, development, or production of the [OCS] minerals" or "subsoil and seabed." 43 U.S.C. § 1349(b)(1) (emphasis added). Congress

passed OCSLA "to establish federal ownership and control over the mineral wealth of the OCS and to provide for the development of those natural resources." *EP Operating Ltd. P'ship v. Placid Oil Co.*, 26 F.3d 563, 566 (5th Cir. 1994). The breadth of this provision reflects OCSLA's "expansive substantive reach." *Id.* at 569.

Congress established original federal jurisdiction over "the entire range of legal disputes that it knew would arise relating to resource development on the Outer Continental Shelf." *Laredo Offshore Constructors, Inc. v. Hunt Oil Co.*, 754 F.2d 1223, 1228 (5th Cir. 1985). The jurisdictional grant is "straightforward and broad." *Petrobras Am., Inc. v. Vicinay Cadenas, S.A.*, 815 F.3d 211, 215 (5th Cir. 2016), and represents "a sweeping assertion of federal supremacy over the submerged lands," *Ten Taxpayer Citizens Grp. v. Cape Wind Assocs., LLC*, 373 F.3d 183, 188 (1st Cir. 2004). Accordingly, OCSLA's "arising out of, or in connection with" jurisdictional standard is "undeniably broad in scope." *EP Operating*, 26 F.3d at 569.

Consistent with OCSLA's plain language, courts have repeatedly found OCSLA jurisdiction even where an OCS operation is only indirectly related to a plaintiff's alleged harms that occur downstream from the

OCS operation. For example, in *United Offshore Co. v. Southern Deepwater Pipeline Co.*, the court found that OCSLA conferred jurisdiction over a contractual dispute involving the control of a gas-pipeline operator, even though that "dispute is one step removed" from OCS operations. 899 F.2d 405, 407 (5th Cir. 1990). And the court in *Superior Oil Co. v. Transco Energy Co.* found OCSLA jurisdiction over a claim involving the breach of contracts for the sale of natural gas that was simply *produced* on the OCS. 616 F. Supp. 98, 100–01 (W.D. La. 1985).

Similarly, and importantly here, courts have found OCSLA jurisdiction even when an OCS operation accounted for only a *portion* of the plaintiff's alleged injury. *See Lopez v. McDermott, Inc.*, 2018 WL 525851, at *3 (E.D. La. Jan. 24, 2018) (finding OCSLA jurisdiction where "it *appear*[*ed*] that *at least part of the work* that [p]laintiff alleges caused his exposure to asbestos arose out of or in connection with the OCS operations" (emphases added)); *Ronquille v. Aminoil Inc.*, 2014 WL 4387337, at *2 (E.D. La. Sept. 4, 2014) (similar).

Despite these precedents, the district court concluded that but-for causation was the proper standard, relying on the statement in *In re Deepwater Horizon* that § 1349 "require[s] only a 'but-for' connection,"

745 F.3d 157, 163 (5th Cir. 2014). 1-JA-54–55. But this interpretation both overreads *Deepwater Horizon* and ignores the plain language of OCSLA, which requires only a "connection with" OCS operations. 28 U.S.C. § 1349(b)(1). But-for causation is not required to satisfy the "in connection with" prong, and the question in *Deepwater Horizon* was only whether a "but-for" connection is *sufficient*, not whether it is *necessary*. 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. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1026 (2021).

B. Plaintiff's Alleged Injuries Are Connected To Defendants' OCS Operations.

Both elements of OCSLA jurisdiction are satisfied here: (1) Defendants have engaged in "operation[s] conducted on the [OCS]" that entail the "exploration" and "production" of "minerals," and (2) Plaintiff's claims "aris[e] out of, or *in connection with*" those operations. 43 U.S.C. § 1349(b)(1) (emphasis added).

1. Defendants Have Long Engaged In Extensive OCS Operations.

The OCS reserves comprise a massive proportion of the Nation's oil-and-gas resources and have accounted for as much as 30% of annual domestic oil production.[5] Under OCSLA, the U.S. Department of the Interior oversees an extensive federal leasing program to develop the oil-and-gas reserves of the OCS. 43 U.S.C. § 1334 *et seq.* In 2019, OCS leases supplied more than 690 million barrels of oil.[6]

Defendants (or their predecessors, subsidiaries, or affiliates) operate a large share of the OCS oil and gas leases. Between 1947 and 1995, 16 of the 20 largest—including the five largest—OCS operators in the Gulf of Mexico, measured by oil volume, were a Defendant (or predecessor

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[5] *See* Cong. Research Serv., R42432, *U.S. Crude Oil and Natural Gas Production in Federal and Nonfederal Areas* 3, 5 (Oct. 23, 2018), https://bit.ly/3eMqdyA.

[6] Bureau of Safety and Environmental Enforcement, *Outer Continental Shelf Oil and Gas Production*, https://on.doi.gov/2S9xfFO.

(Cont'd on next page)

of a Defendant) or one of their subsidiaries.[7] Defendants (and their subsidiaries or affiliates) presently hold, in whole or part, approximately 22.1% of all OCS leases.[8]

Accordingly, the first prong of OCSLA jurisdiction is easily satisfied.

2. A Substantial Portion Of Plaintiff's Harms Arose From, Or In Connection With, Defendants' OCS Activities.

Plaintiff's claims "aris[e] out of" or have a "connection with" Defendants' operations on the OCS—phrases that courts have interpreted as "undeniably broad in scope." *EP Operating*, 26 F.3d at 569. Plaintiff's claims challenge all of Defendants' "extraction," "production," and "promot[ion]" of "oil, coal, and natural gas" around the world. 3-JA-247¶2; *see also* 3-JA-379–80¶¶143–46 (discussing arctic offshore drilling equipment and patents). Plaintiff's causal theory is that Defendants' increased production and sale of oil and gas led to increases in greenhouse

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[7] U.S. Dep't of Interior, *Bureau of Ocean Energy Mgmt., Ranking Operator by Oil* (Dec. 22, 2000), https://bit.ly/3CjpFtC.

[8] *See* Bureau of Ocean Energy Mgmt., *Lease Owner Information*, https://bit.ly/3vBvkbp.

gas emissions, which caused changes to the climate and thereby caused Plaintiff's alleged injuries. *See* 3-JA-247–49¶¶2–5; 3-JA-447–48¶¶243–45; 3-JA-449–50¶249–51; 3-JA-451–53¶¶257–58; 3-JA-458–59¶273. All of Plaintiff's alleged damage—and, correspondingly, all the requested relief—necessarily ties back to all global production, including Defendants' substantial activities on the OCS. Indeed, Plaintiff acknowledges that "greenhouse gas molecules do not bear markers that permit tracing them to their source." 3-JA-447–48¶245. Misrepresentations alone could not have caused these physical injuries; rather, Defendants' OCS operations are necessarily connected to Plaintiff's claims and alleged injuries.

Moreover, Defendants' substantial OCS operations satisfy even a "but-for" test—which courts describe as a "sweeping standard." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1739 (2020). Plaintiff's theory of harm is that "Defendants are extractors, producers, refiners, manufacturers, distributors, promoters, marketers, and/or sellers of fossil fuel products, each of which contributed to deceiving the public and consumers … about the role of *their products* in causing the global climate crisis." 3-JA-248¶4 (emphasis added). "[T]he normal use of [Defendants'] fossil fuel prod-

ucts," 3-JA-315¶58, was the source of "[g]lobal warming … with [its] attendant physical and environmental consequences," 3-JA-434¶228(c). Plaintiff's claims thus implicate all of Defendants' "extraction, refining, development, marketing, and sale of fossil fuel products"—including on the OCS. 3-JA-452¶258.

C. The District Court Also Had OCSLA Jurisdiction Because The Relief Plaintiff Seeks Threatens To Impair OCS Production Activities.

OCSLA jurisdiction is also proper for the independent reason that Plaintiff's requested relief would significantly affect the continued scope and viability of Defendants' OCS operations and the federal OCS leasing program as a whole.

Courts find OCSLA jurisdiction satisfied if the resolution of the dispute simply *could affect* the efficient exploitation of minerals from the OCS. "[*A*]*ny dispute* that alters the progress of production activities on the OCS and thus *threatens* to impair the total recovery of the federally-owned minerals was intended by Congress to come within the jurisdictional grant of section 1349." *EP Operating*, 26 F.3d at 570 (emphases added). This federal "interest is implicated whether a given controversy threatens that total recovery either immediately *or in the long-term*." *Id.*

at 570 n.15 (emphasis added); *see also United Offshore*, 899 F.2d at 407 (finding OCSLA jurisdiction where "resolution of the dispute would affect the exploitation of minerals on the [OCS]").

As in the numerous similar climate-change cases around the country, Plaintiff seeks substantial damages and disgorged profits, as well as an order of "abatement" and an injunction against the creation of future nuisances. Such relief would inevitably deter Defendants and others from production on the OCS.

CONCLUSION

This Court should reverse the district court's remand order.

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Respectfully Submitted,

K&L GATES LLP
/s/ Steven L. Caponi
Steven L. Caponi
600 N. King Street, Suite 901
Wilmington, DE 19801
Telephone: (302) 416-7000
E-mail: steven.caponi@klgates.com

KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK, P.L.L.C.
David C. Frederick
Grace W. Knofczynski
Daniel S. Severson
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
Telephone: (202) 326-7900
E-mail: dfrederick@kellogghansen.com
E-mail: gknofczynski@kellogghan-
sen.com
E-mail: dseverson@kellogghansen.com

Counsel for Defendants Shell plc (f/k/a Royal Dutch Shell plc) and Shell USA, Inc. (f/k/a Shell Oil Company)

By: /s/ Theodore J. Boutrous, Jr.
GIBSON, DUNN & CRUTCHER LLP
Theodore J. Boutrous, Jr.
William E. Thomson
333 South Grand Avenue
Los Angeles, CA 90071
Telephone: (213) 229-7000
Facsimile: (213) 229-7520
E-mail: tboutrous@gibsondunn.com
E-mail: wthomson@gibsondunn.com

Andrea E. Neuman
200 Park Avenue
New York, NY 10166
Telephone: (212) 351-4000
Facsimile: (212) 351-4035
E-mail: aneuman@gibsondunn.com

Thomas G. Hungar
1050 Connecticut Avenue, N.W.
Washington, DC 20036
Telephone: (202) 955-8500
Facsimile: (202) 467-0539
E-mail: thungar@gibsondunn.com

Attorneys for Defendants Chevron Corp. and Chevron U.S.A. Inc.

ARNOLD & PORTER KAYE SCHOLER LLP
/s/ Nancy G. Milburn
Nancy G. Milburn
Diana E. Reiter
250 West 55th Street
New York, NY 10019-9710
Telephone: (212) 836-8383
Facsimile: (212) 836-8689
E-mail: nancy.milburn@arnoldporter.com
E-mail: diana.reiter@arnoldporter.com

Jonathan W. Hughes
3 Embarcadero Center, 10th Floor
San Francisco, CA 94111-4024
Telephone: (415) 471-3156
Facsimile: (415) 471-3400
E-mail: jonathan.hughes@arnoldporter.com

Matthew T. Heartney
John D. Lombardo
777 South Figueroa Street, 44th Floor
Los Angeles, CA 90017-5844
Telephone: (213) 243-4000
Facsimile: (213) 243-4199
E-mail: matthew.heartney@arnoldporter.com
E-mail: john.lombardo@arnoldporter.com

Paul J. Fishman
One Gateway Center, Suite 1025
Newark, NJ 07102
Telephone: (973) 776-1900
Facsimile: (973) 776-1919
E-mail: paul.fishman@arnoldporter.com

Attorneys for Defendants BP America Inc. and BP p.l.c.

EIMER STAHL LLP
/s/ Nathan P. Eimer
Nathan P. Eimer
Pamela R. Hanebutt
Lisa S. Meyer
224 South Michigan Avenue, Suite 1100
Chicago, IL 60604
Telephone: (312) 660-7600
E-mail: neimer@eimerstahl.com
E-mail: phanebutt@eimerstahl.com
E-mail: lmeyer@eimerstahl.com

Robert E. Dunn
99 S. Almaden Blvd. Suite 662
San Jose, CA 95113
Telephone: (669) 231-8755
E-mail: rdunn@eimerstahl.com

Attorneys for Defendant CITGO Petroleum Corporation.

SHOOK, HARDY & BACON L.L.P.
/s/ Tristan L. Duncan
Tristan L. Duncan
Daniel B. Rogers
2555 Grand Blvd.
Kansas City, MO 64108
Telephone: (816) 474-6550
E-mail: tlduncan@shb.com
E-mail: drogers@shb.com

Attorneys for Defendant Murphy USA Inc.

RICHARDS, LAYTON & FINGER, P.A.
/s/ Jeffrey L. Moyer
Jeffrey L. Moyer
One Rodney Square
920 North King Street
Wilmington, DE 19801
Telephone: (302) 651-7700
E-mail: moyer@rlf.com

CRAVATH, SWAINE & MOORE LLP
Kevin Orsini
Vanessa A. Lavely
825 Eighth Avenue
New York, NY 10019
Telephone: (212) 474-1718
Facsimile: (212) 474-3700
E-mail: korsini@cravath.com
E-mail: vlavely@cravath.com

Attorneys for Defendant Occidental Petroleum Corporation

WOMBLE BOND DICKINSON (US) LLP
/s/ Kevin J. Mangan
Kevin J. Mangan
1313 North Market Street, Suite 1200
Wilmington, Delaware 19801
Telephone: (302) 252-4320
Facsimile: (302) 252-4330
E-mail: kevin.mangan@wbd-us.com

MCGUIREWOODS LLP
Andrew G. McBride
2001 K Street N.W.
Washington, D.C. 20006
Telephone: (202) 857-1700
E-mail: amcbride@mcguirewoods.com

Kathryn M. Barber
800 East Canal Street
Richmond, VA 23219
Telephone: (804) 775-1000
E-mail: kbarber@mcguirewoods.com

Attorneys for American Petroleum Institute

MARON MARVEL BRADLEY
ANDERSON & TARDY LLC
/s/ Antoinette D. Hubbard
Antoinette D. Hubbard
1201 N. Market Street, Suite 900
P.O. Box 288
Wilmington, DE 19801
mailto:DDesouza@HuntonAK.com
Telephone: (302) 425-5177
E-mail: Adh@maronmarvel.com

HUNTON ANDREWS KURTH LLP
Shannon S. Broome
50 California Street
San Francisco, CA 94111
Telephone: (415) 975-3718
E-mail: SBroome@HuntonAK.com

Shawn Patrick Regan
200 Park Avenue
New York, NY 10166
Telephone: (212) 309-1046
E-mail: SRegan@HuntonAK.com

Attorneys for Defendants Marathon Petroleum Corporation, Marathon Petroleum Company LP, and Speedway LLC

DUANE MORRIS LLP
/s/ Mackenzie M. Wrobel
Mackenzie M. Wrobel
1201 N. Market Street, Suite 501
Wilmington, DE 19801-1160
Telephone: (302) 657-4900
E-mail: MMWrobel@duanemorris.com

SHOOK HARDY & BACON LLP
Michael F. Healy
555 Mission Street, Suite 2300
San Francisco, CA 94105.
Telephone: (415) 544-1942
E-mail: mfhealy@shb.com
DUANE MORRIS LLP
Michael L. Fox
Spear Tower
One Market Plaza, Suite 2200
San Francisco, CA 94105-1127
Telephone: (415) 957-3092
E-mail: MLFox@duanemorris.com

Attorneys for Defendant Ovintiv INC.

WHITE AND WILLIAMS LLP
/s/ Christian J. Singewald
CHRISTIAN J. SINGEWALD
600 N. King Street
Suite 800
Wilmington, DE 19801
Telephone: (302) 654-0424
E-mail: singewaldc@white-andwilliams.com

MCGUIREWOODS LLP
Joy C. Fuhr
Brian D. Schmalzbach
800 East Canal Street
Richmond, VA 23219
Telephone: (804) 775-1000
E-mail: jfuhr@mcguirewoods.com
E-mail: bschmalzbach@mcguire-woods.com

Attorney for Defendant Devon Energy Corporation

CROWELL & MORING LLP
/s/ Kathleen Taylor Sooy
Kathleen Taylor Sooy
Tracy A. Roman
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 624-2500
E-mail: ksooy@crowell.com
E-mail: troman@crowell.com

Honor R. Costello
590 Madison Avenue, 20th Fl.
New York, NY 10022
Telephone: (212) 223-4000
E-mail: hcostello@crowell.com

Attorneys for Defendant CONSOL Energy Inc.

LATHAM & WATKINS LLP
/s/ Steven M. Bauer
Steven M. Bauer
Margaret A. Tough
505 Montgomery Street, Suite 2000
San Francisco, California 94111-6538
Telephone: (415) 391-0600
E-mail: steven.bauer@lw.com
E-mail: margaret.tough@lw.com

BARTLIT BECK LLP
Jameson R. Jones
Daniel R. Brody
1801 Wewatta Street, Suite 1200
Denver, CO 80202
Telephone: (303) 592-3123
E-mail: jameson.jones@bartlit-beck.com
E-mail: dan.brody@bartlit-beck.com

MCCARTER & ENGLISH LLP
Daniel J. Brown
Alexandra M. Joyce
Renaissance Centre
405 N. King St., 8th Floor
Wilmington, DE 19801
Telephone: (302) 984-6331
E-mail: djbrown@mccarter.com
E-mail: ajoyce@mccarter.com

Attorneys for Defendants ConocoPhillips and ConocoPhillips Company

JONES DAY
/s/ Noel J. Francisco
Noel J. Francisco
David M. Morrell
J. Benjamin Aguiñaga
51 Louisiana Avenue, N.W.
Washington, DC 20001
Telephone: (202) 879-3939
Facsimile: (202) 626-1700
E-mail: njfrancisco@jonesday.com
E-mail: dmorrell@jonesday.com
E-mail: jbaguinaga@jonesday.com

David C. Kiernan
555 California Street, 26th Floor
San Francisco, CA 94104
Telephone: (415) 626-3939
Facsimile: (415) 875-5700
E-mail: dkiernan@jonesday.com

Attorneys for Defendant CNX Resources Corp.

LATHAM & WATKINS LLP
/s/ Steven M. Bauer
Steven M. Bauer
Margaret A. Tough
505 Montgomery Street, Suite 2000
San Francisco, California 94111-6538
Telephone: (415) 391-0600
E-mail: steven.bauer@lw.com
E-mail: margaret.tough@lw.com

MCCARTER & ENGLISH LLP
Daniel J. Brown
Alexandra M. Joyce
Renaissance Centre
405 N. King St., 8th Floor
Wilmington, DE 19801
Telephone: (302) 984-6331
E-mail: djbrown@mccarter.com
E-mail: ajoyce@mccarter.com

Attorneys for Defendants Phillips 66 and Phillips 66 Company

ABRAMS & BAYLISS LLP
/s/ Michael A. Barlow
Michael A. Barlow
20 Montchanin Road, Suite 200
Wilmington, Delaware 19807
Telephone: (302) 778-1000
E-mail: barlow@abramsbayliss.com

ORRICK, HERRINGTON & SUTCLIFFE LLP
Robert P. Reznick
1152 15th Street NW
Washington, DC 20005
Telephone: (202) 339-8600
E-mail: rreznick@orrick.com

Attorneys for Marathon Oil Corporation

PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
/s/ Kannon K. Shanmugam
Kannon K. Shanmugam
William T. Marks
2001 K Street, N.W.
Washington, DC 20006
Telephone: (202) 223-7325
Facsimile: (202) 204-7397
E-mail: kshanmugam@paulweiss.com
E-mail: wmarks@paulweiss.com

Theodore V. Wells, Jr.
Daniel J. Toal
1285 Avenue of the Americas
New York, NY 10019-6064
Telephone: (212) 373-3000
Facsimile: (212) 757-3990
E-mail: twells@paulweiss.com
E-mail: dtoal@paulweiss.com

Attorneys for Defendants Exxon Mobil Corporation, ExxonMobil Oil Corporation, and XTO Energy Inc.

RICHARDS LAYTON & FINGER, P.A.
/s/ Robert W. Whetzel
Robert W. Whetzel
Alexandra M. Ewing
One Rodney Square
902 North King Street
Wilmington, DE 19801
Telephone: (302) 651-7634
Facsimile: (302) 651-7701
E-mail: whetzel@rlf.com
E-mail: ewing@rlf.com

Attorneys for Apache Corporation

RICHARDS, LAYTON & FINGER, P.A.
/s/ Robert W. Whetzel
Robert W. Whetzel
Blake Rohrbacher
Alexandra Ewing
One Rodney Square
920 N. King Street
Wilmington, DE 19801
Telephone: 302-651-7700
E-mail: whetzel@rlf.com
E-mail: rohrbacher@rlf.com
E-mail: ewing@rlf.com

Attorneys for Defendants Total S.A. and TotalEnergies Marketing USA, Inc.

WHITE AND WILLIAMS LLP
/s/ Joseph J. Bellew
Joseph J. Bellew
600 N. King Street, Suite 800
Wilmington, DE 19801-3722
Telephone: (302) 467-4532
Facsimile: (302) 467-4540
E-mail: bellewj@whiteandwilliams.com

BAKER BOTTS L.L.P.
J. Scott Janoe
910 Louisiana Street, Suite 3200
Houston, Texas 77002-4995
Telephone: (713) 229-1553
Facsimile: (713) 229-7953
E-mail: scott.janoe@bakerbotts.com

Megan Berge
700 K Street, N.W.
Washington, D.C. 20001-5692
Telephone: (202) 639-1308
Facsimile: (202) 639-1171
E-mail: megan.berge@bakerbotts.com

Attorneys for Defendant Murphy Oil Corporation

WHITE AND WILLIAMS LLP
/s/ Joseph J. Bellew
Joseph J. Bellew
600 N. King Street, Suite 800
Wilmington, DE 19801-3722
Telephone: (302) 467-4532
Facsimile: (302) 467-4540
Email: bellewj@whiteandwilliams.com

BAKER BOTTS L.L.P.
J. Scott Janoe
910 Louisiana Street, Suite 3200
Houston, Texas 77002-4995
Telephone: (713) 229-1553
Facsimile: (713) 229-7953
E-mail: scott.janoe@bakerbotts.com

Megan Berge
700 K Street, N.W.
Washington, D.C. 20001-5692
Telephone: (202) 639-1308
Facsimile: (202) 639-1171
E-mail: megan.berge@bakerbotts.com

Attorneys for Defendant Hess Corporation

CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2022, an electronic copy of the foregoing Brief for Defendants-Appellants was filed with the Clerk of Court for the United States Court of Appeals for the Third Circuit using the appellate CM/ECF system, and that service on the following Filing Users will be accomplished by the appellate CM/ECF system.

/s/ Theodore J. Boutrous, Jr.
Theodore J. Boutrous, Jr.
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains 12,992 words, as determined by the word-count function of Microsoft Word 2010, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point New Century Schoolbook font.

3. This brief complies with this Court's Rule 28.3(d) because at least one of the attorneys whose names appear on the brief, including Theodore J. Boutrous, Jr., is a member of the bar of this Court.

4. This brief complies with this Court's Rule 31.1(c) because: (1) the text of the electronic brief is identical to the text in the paper document, and (2) the document has been scanned with version 12.1.6 of Symantec Endpoint Protection and is free of viruses.

/s/ Theodore J. Boutrous, Jr.
Theodore J. Boutrous, Jr.
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071

ADDENDUM

Pursuant to Third Circuit Local Appellate Rule 28.1(a) and Federal Rule of Appellate Procedure 28(f), this addendum includes pertinent statutes, reproduced verbatim:

28 U.S.C. § 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1442. Federal officers or agencies sued or prosecuted

(a) A civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

(2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.

(3) Any officer of the courts of the United States, for or relating to any act under color of office or in the performance of his duties;

(4) Any officer of either House of Congress, for or relating to any act in the discharge of his official duty under an order of such House.

… .

28 U.S.C. § 1447. Procedure after removal generally

… .

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise.

43 U.S.C. § 1349. Citizen suits, jurisdiction and judicial review

… .

(b) Jurisdiction and venue of actions

(1) Except as provided in subsection (c) of this section, the district courts of the United States shall have jurisdiction of cases and controversies arising out of, or in connection with (A) any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals, or (B) the cancellation, suspension, or termination of a lease or permit under this subchapter. Proceedings with respect to any such case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the State nearest the place the cause of action arose.

(2) Any resident of the United States who is injured in any manner through the failure of any operator to comply with any rule, regulation, order, or permit issued pursuant to this subchapter may bring an action for damages (including reasonable attorney and expert witness fees) only in the judicial district having jurisdiction under paragraph (1) of this subsection.

… .