UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF VERMONT

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

REPLY IN SUPPORT OF PLAINTIFF'S MOTION TO REMAND

STATE OF VERMONT

THOMAS J. DONOVAN, JR.
ATTORNEY GENERAL

Justin E. Kolber
Laura B. Murphy
Assistant Attorneys General
Joshua R. Diamond
Deputy Attorney General
Office of the Attorney General
109 State Street
Montpelier, VT 05609
(802) 828-3186
Justin.Kolber@vermont.gov
Laura.Murphy@vermont.gov

LEWIS BAACH KAUFMANN
MIDDLEMISS PLLC

Eric L. Lewis*
Mark J. Leimkuhler*
1101 New York Avenue, Suite 1000
Washington, DC 20005
(202) 833-8900
Eric.Lewis@lbkmlaw.com
Mark.Leimkuhler@lbkmlaw.com
* *Pro hac vice*

March 18, 2022

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

PRELIMINARY STATEMENT

Defendants' opposition, like their notice of removal, relies on patent mischaracterizations of the State's Complaint and self-serving speculation about the purported objectives of this action. Contrary to Defendants' imaginings, and as clear on the face of the Complaint, this action does not seek to restrict the production or sale of fossil fuels or to regulate worldwide greenhouse gas emissions. Rather, this action is brought under a Vermont statute, the Vermont Consumer Protection Act, to fulfill its central purpose to ensure a fair and honest marketplace for Vermont consumers.[1]

The Supreme Court and other federal courts have consistently found consumer protection to be a vital state interest and a core function of states' regulatory power. Defendants cannot frustrate that state interest and authority by concocting allegations that do not exist, or by insisting that the State's claims, as Defendants seek to recast them, are removable based on discredited "preemption" or "artful pleading" theories, or on inapplicable *Grable* jurisdiction.

Defendants' heavy reliance on *City of New York*, a decision that is procedurally and substantively irrelevant, underscores their distortion of the State's claims. That case has no bearing on the removal issue here because *it was originally brought in federal court*—indeed, the Second Circuit expressly disclaimed any pertinence of its ruling to the question of removal. Moreover, the Second Circuit's classification of the City's claims in that case as inherently federal in nature likewise is not controlling here. Unlike the City's nuisance and trespass claims, which sought damages for environmental harm to its infrastructure "caused by global greenhouse

[1] Defendants cite no authority for the apparent premise of their arguments—that states may not do anything to regulate or affect fossil fuel production, sales, or emissions at all. While that is not the objective of this consumer protection action, the State rejects Defendants' faulty premise. *See* Mem. of Law in Supp. of Plf.'s Mot. to Remand, ECF No. 49 ("Br.") 14, 17.

gas emissions," the State of Vermont seeks only to remedy harm to the State's marketplace resulting from Defendants' longstanding deception of consumers. The State is vindicating one of its core interests in doing so.

Defendants' other asserted grounds for removal are also unavailing. As the State's opening memorandum and this reply show, courts have consistently rejected Defendants' removal attempts based on federal officer, OCSLA, federal enclave, and diversity/real party in interest grounds. Defendants present nothing new in their opposition that would warrant a departure by this Court from those well-established precedents. Accordingly, this action should be remanded to the Chittenden Superior Court.

ARGUMENT

I. FEDERAL COMMON LAW DOES NOT GOVERN THE STATE'S CLAIMS.

Defendants' contention that "federal common law governs claims like the ones presented here that functionally seek to regulate transboundary pollution and foreign affairs" (Defs.' Mem. of Law in Opp. to Plf.'s Mot. to Remand, ECF No. 51 ("Opp.") 1), reflects an *Alice in Wonderland* view of the Complaint. As in *Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31, 46 (D. Mass. 2020), Defendants have "seize[d] on a few lines here and there in the complaint," taken "out of context," to argue that the Complaint asserts "*functionally* the same theory of liability that the Second Circuit held 'must be brought under federal common law.'" Opp. 2, 13 (quoting *City of New York*, 993 F.3d 81, 95 (2d Cir. 2021) (emphasis added)). The Complaint does no such thing. Nor does the State's Complaint "functionally" or otherwise (i) "seek to impose strict liability" for "greenhouse gas emissions and purported climate injuries" (*id*. at 15); (ii) suppress the production and sale of fossil fuels (*id.* at 24); or (iii) "invalidate various federal policies supporting the transition to lower-emission energy sources" (*id*. at 28).

When "fairly read," *Massachusetts,* 462 F. Supp. 3d at 43, the Complaint seeks only to protect the Vermont marketplace and Vermont consumers from deception—a function indisputably within the State's traditional regulatory authority. It alleges consumer deception that is "far afield of any 'uniquely federal interests.'" *Id*. The State's Complaint does not seek "to hold multinational oil companies liable for damages caused by global greenhouse gas emissions." *City of New York*, 993 F.3d at 85. Nor will the relief sought by the State preclude Defendants—functionally or otherwise—from continuing to market their products in Vermont in any lawful manner. Other persons market fossil fuels in the State of Vermont without violating the Vermont Consumer Protection Act ("VCPA"). Defendants are not exempt from the VCPA.

In *Massachusetts*, the court saw through and rejected Exxon's reading of the complaint as "a 'sleight-of-hand,' as '[t]he Complaint has nothing to do with efforts to stop or reduce Exxon's production or sale of its fossil fuel products' but, in truth, is only 'a state action aimed at protecting consumers … from Exxon's deceptive representations in the marketplace.'" 462 F. Supp. 3d at 46. Exxon and its co-defendants are engaged in the same sleight-of-hand here. The Complaint does not in any way seek to regulate transboundary pollution or foreign affairs, nor does it implicate any federal issues that warrant, let alone authorize, federal jurisdiction.

A. The State's VCPA Claims Do Not Arise Under Federal Common Law.

This is a straightforward consumer protection case in which the State seeks to enforce a statute, the VCPA, requiring fair and honest dealing by those who market products or services to Vermont consumers. Relying heavily upon *City of New York,* Defendants nevertheless assert not only that the State's VCPA claims "must arise, if they can be asserted at all, under federal common law," but also that the *City of New York* decision is "controlling." Opp. 10, 12. Neither

is true, and, tellingly, Defendants make no attempt to grapple with the crucial distinctions between the two cases (other than by mischaracterizing the State's Complaint).

City of New York was "a nuisance suit seeking to recover damages for the harms caused by global greenhouse gas emissions." 993 F.3d at 91. There, the City sought to hold defendants liable "for the effects of emissions made around the globe over the past several hundred years. In other words, the City request[ed] damages for the cumulative impact of conduct occurring simultaneously across just about every jurisdiction on the planet." *Id.* at 92. Its damages claim would have "effectively impose[d] strict liability for the damages caused by fossil fuel emissions no matter where in the world those emissions were released" because, to avoid liability, the oil companies' "only solution would be to cease global production altogether." *Id.* at 93.

That is manifestly not the case here. "Defendants need not cease global production altogether" (Opp. 15) to avoid future VCPA liability because the conduct that triggers that liability is their false and misleading statements to Vermont consumers. Defendants only need to stop making such false and misleading statements about their products. Their contention that the Second Circuit "rejected this very argument in *City of New York*," Opp. 15, is false. Unlike the damages claim asserted in *City of New York*, the "economic reality" of the State's claims is not "to effectively impose strict liability for the damages caused by fossil fuel emissions no matter where in the world those emissions were released (or who released them)." *Id.* (quoting *City of New York*, 993 F.3d at 92); *City of New York,* 993 F.3d at 93.

Because Vermont's consumer protection claims do not seek to hold Defendants liable "for damages caused by global greenhouse gas emissions," 993 F.3d at 85, they are not "ultimately based on the 'transboundary' emission of greenhouse gases." Opp. 13. Thus, even assuming federal law applies to "disputes involving interstate air or water pollution" (Opp. 12,

quoting *City of New York*, 993 F.3d at 91), this is not such a dispute. Nor does this lawsuit constitute "a broad challenge to the lawful production and sale of fossil fuels" (*id*. at 3); involve "claims for relief that would force large reductions in greenhouse gas emissions" (*id*. at 16 n.8); seek "to force Defendants to reduce—if not eliminate—their fossil fuel production activities" (*id*. at 18); or attempt "to countermand federal energy and environmental policy" (*id*. at 25).

The flaw in Defendants' reliance upon *City of New York* is reflected in their assertion that the State "cannot 'disavow[] any intent to address emissions' while 'identifying such emissions' as the source of its harm." Opp. 14-15, quoting *City of New York*, 993 F.3d at 91. This is a *non sequitur*. Greenhouse gas emissions are the subject of Defendants' deceptions, but they are not the source of harm to the marketplace which the State seeks to remedy. Defendants effectively concede that no federal law or policy authorizes them to engage in deceptive marketing or preempts state regulation of their advertising. Opp. 18. And they do not dispute that States "routinely enforce consumer protection … laws alongside the federal government." Br. 19 (quoting *Massachusetts*, 462 F. Supp. 3d at 43-44).[2]

Nor does the Complaint allege, as Defendants assert, that "the promotion of fossil fuels is inherently misleading." Opp. 1; *see also id*. 5 ("By requesting disgorgement of profits for advertising that it alleges is inherently misleading, the Complaint functionally seeks to impose strict liability for greenhouse gas emissions …."). The Complaint targets specific advertisements

[2] States can enforce their laws against national companies, even when those companies are also regulated by federal law. This is consistent with the findings of Vermont courts in other consumer protection cases brought by the State. *See, e.g.*, *Vermont v. Purdue Pharma*, No. 757-9-18, at 3-4 (Vt. Super. Ct. Mar. 19, 2019) (State's claims targeting advertisements for opioids were not preempted by the Federal Food, Drug, and Cosmetic Act), available at https://ago.vermont.gov/wp-content/uploads/2019/03/2019-3-18-Decision-Denying-Motion-to-Dismiss.pdf; *Vermont v. R.J. Reynolds Tobacco Co.*, 2008 WL 7929224 (Vt. Super. Ct. Aug. 19, 2008) (State's claim targeting cigarette advertisements was not preempted by the Federal Cigarette Labeling and Advertising Act).

and marketing campaigns (*see, e.g.*, Compl. ¶¶ 88-94, 99-117, 122-124, 130-135) "designed to mislead Vermont consumers into believing that the use of Defendants' products will minimize or reduce the impact of their fossil fuel consumption on the environment and the climate," when that is not true. *Id.* ¶ 98; *see also id.* ¶ 179 ("Defendants' misleading statements and conduct were and are deceptive because they were and are likely to create an impression among consumers that Defendants' fossil fuel products are better or safer for the environment.").

Defendants' assertion that the Complaint focuses "on public statements … rather than on the resulting greenhouse gas emissions themselves" to "obscure the centrality of federal law," Opp. 3, assumes that some federal law is central to the State's claims, when that is not the case. In all events, the Complaint focuses on Defendants' marketing campaigns because it asserts consumer protection claims based upon those deceptive statements. And notwithstanding Defendants' contention to the contrary (*id.*), the Complaint *does* allege that Defendants' products performed other than as advertised. *See, e.g.*, Compl. ¶ 118 ("Defendants' ads convey a false impression that the use of their products results in environmental benefits.").

While it is true that consumer choices "would have been different had Vermont consumers been provided with accurate and complete information rather than the lies and deception propagated for decades by Defendants," Compl. ¶ 4, it does not follow that the State's Complaint "seeks to abate fossil fuel use and lower greenhouse gas emissions by shifting consumer demand to alternative forms of energy." Opp. 1. Even if marketing free of deception were to lead Vermont consumers to buy less fossil fuel, that potential outcome would not make the State's consumer protection claims removable. Moreover, while truthful advertising could lead Vermont consumers to make different choices which might have an impact on consumption of Defendants' products, the "other energy-related choices" available to consumers (Opp. 1,

quoting Compl. ¶ 4) include, for example, the purchase of Defendants' competitors' fuels sold free of the deceptions employed by Defendants.

Nor does the State seek to impose liability on Defendants "for failing to shift consumer demand at the point of sale." Opp. 3. They are merely required to refrain from consumer deception in marketing their products. Their further assertion that the State seeks to hold them "liable for the harms stemming from climate change because Defendants' promotional activities allegedly prevented consumers from reducing fossil fuel use" (Opp. 2) is, again, a *non-sequitur*.

As with their baseless contention that the State's VCPA claims implicate transboundary pollution, Defendants' assertion that those claims also implicate foreign affairs is based upon their start-to-finish mischaracterization of the Complaint. *See* Opp. 18 (The State's claims implicate foreign affairs because "at bottom" they "seek to hold Defendants liable for the climate-related harms … caused by fossil fuel consumption."). Because the State's VCPA claims do not seek to hold Defendants liable for climate-related harms, the Complaint does not "'effectively' seek[] to require Defendants to take action 'across every state (and country)' all 'without asking what the laws of those other states (or countries) require.'" *Id.* (quoting *City of New York*, 993 F.3d at 92). The Second Circuit was discussing actions to mitigate liability for the effects of global greenhouse gas emissions, not actions to mitigate liability for deceptive advertising. Nothing in the Complaint even arguably raises an issue involving "our relationships with other members of the international community." Opp. 17 (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964)).

In *Massachusetts,* the court distinguished *City of New York* on the basis that the latter "involved public nuisance claims with a theory of damages tied to the impact of climate change," while the Commonwealth's consumer protection claims "d[id] not prompt th[e] Court or any

other to provide 'answers' to the 'fundamental global issue' of climate change." 462 F. Supp. 3d at 42-43. Just so here. Defendants argue that *Massachusetts* predated *City of New York*, and gave "dispositive force to the *label* the plaintiff applied to its claims rather than their *substance*." Opp. 21. But *Massachusetts* did *not* predate the trial court decision in *City of New York* which, as Defendants observe, the Second Circuit unanimously affirmed. *Id*. at 13. And, as noted, the *Massachusetts* court looked at the complaint's actual substance rather than ExxonMobil's self-serving rhetoric about it. Defendants do not dispute that ExxonMobil, having been called out for its "sleight-of-hand," did not even bother to appeal the *Massachusetts* remand order.

As did the court in *Massachusetts*, this Court should conclude that the State's consumer protection claims are governed by the VCPA, and do not arise under federal common law.

B. Defendants' Reliance on the "Artful Pleading" Doctrine is Misplaced.

Defendants establish no basis for applying the artful pleading doctrine. They argue that the State invokes form over substance by contending "this case is not removable under the well-pleaded complaint rule because the Complaint itself does not explicitly allege a federal claim." Opp. 19. As they mischaracterize the Complaint, Defendants mischaracterize the State's brief.

As set forth therein (Br. 19-20), under the "artful pleading" doctrine (a corollary to the well-pleaded complaint rule), a plaintiff "cannot avoid removal by declining to plead 'necessary federal questions.'" *Romano v. Kazacos*, 609 F.3d 512, 518-19 (2d Cir. 2010). A party invoking the doctrine must establish that Congress has "completely preempted, or entirely substituted, a federal law cause of action for the state [cause of action]," or that Congress "expressly provided for the removal of particular actions asserting state law claims in state court." *Id*.

Defendants do not identify any "necessary federal questions" embedded in the State's Complaint; there are none. Nor do they show that Congress has "completely preempted, or

entirely substituted, a federal law cause of action for the state [cause of action]," or "expressly provided for the removal of particular actions asserting state law claims in state court." *Id*. In fact, they disclaim any intention of doing so. *See* Opp. 11 ("Defendants are not asserting a preemption defense as a basis for federal jurisdiction."). Having asserted their "federal common law analysis 'does not implicate preemption principles,'" they "have expressly abandoned the preemption ground." *Delaware v. BP Am. Inc.*, 2022 WL 58484, *4 (D. Del. Jan. 5, 2002).

Instead, Defendants reiterate their erroneous contention (mistakenly in reliance upon *City of New York*) that federal common law governs the State's VCPA claims because those claims somehow seek to regulate transboundary pollution and foreign affairs. Opp. 19. As discussed above, the Complaint does no such thing. Moreover, because "federal common law is created by the judiciary—not Congress," there can be no showing of the requisite Congressional intent, and thus "the federal common law for transboundary pollution cannot completely preempt the Municipalities' state-law claims." *Bd. of Cnty. Comm'r of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238, 1262 (10th Cir. 2022) ("*Boulder III*"). Accordingly, Defendants' reliance upon federal common law as a basis to invoke the artful pleading doctrine is misplaced.

In any case, the Complaint does not "challenge" the development, production, refining, or use of Defendants' products, or seek "to hold Defendants liable because their 'core businesses' … 'remain focused upon expanding the production, distribution, and sale of fossil fuel products,'" or to "suppress fossil fuel sales and thus reduce transboundary emissions." Opp. 20. The Complaint challenges Defendants' deceptive marketing of their products. Full stop.

Thus, it is clear "from the face of the Complaint" (Opp. 20), as opposed to Defendants' distortion of it, that Vermont's claims "do not prompt th[e] Court or any other to provide 'answers' to the 'fundamental global issue' of climate change." *Massachusetts*, 462 F. Supp. 3d

at 42-43. It is also clear that, as discussed above, Defendants' reliance on *City of New York* is misplaced, if not disingenuous, and the State's claims are not governed by federal common law.

Hence, even if federal common law provided a basis for removal absent complete preemption, there is no basis to invoke the artful pleading doctrine here. *See Massachusetts*, 462 F. Supp. 3d at 43 (even if federal common law preempts state causes of action, court still lacks jurisdiction because consumer protection claims did not implicate federal common law). And, as discussed above, Defendants' attempt to distinguish *Massachusetts* (*see* Opp. 21), is unavailing.[3]

Because the State's claims do not implicate federal common law, Defendants' contention (Opp. at 20) that two cases they cite—*Nordlicht v. N.Y. Tel. Co.*, 799 F.2d 859 (2d Cir. 1986), and *Republic of Philippines v. Marcos*, 806 F.2d 344 (2d Cir. 1986)—were initially filed in state court is irrelevant. Nevertheless, the cases remain inapposite. *Nordlicht* involved claims arising out of charges for telephone calls originating outside the United States, an area where "federal law preempts state law." 799 F.2d at 862. *Nordlicht* was removable based on complete preemption. *See Marcus v. AT&T Corp.*, 138 F.3d 46, 53 (2d. Cir. 1998). Since then, the Supreme Court "sharply circumscribed the availability of removal based on complete preemption," limiting it to situations "where Congress has clearly manifested an intent to disallow state law claims in a particular field," *id*. at 54 (citing *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 65-66 (1987)), which is not the case here.

[3] As previously discussed (Br. 21), the Second Circuit acknowledged that the federal common law recognized in *City of New York* might not provide a basis for removal, 993 F.3d at 93-94, but this Court need not reach that issue because the State's VCPA claims are not governed by federal common law. The procedural issue is currently under review in *Connecticut v. Exxon Mobil Corp.*, 21-1446-CV (2d Cir.). Should the Second Circuit determine that federal common law does not provide a basis for removal, that would be an additional reason for remand here. On the other hand, a ruling that *Connecticut* may be removed would not control here because, unlike Connecticut, the State of Vermont *does not* seek monetary relief for environmental harm relating to the production, marketing, or sale of fossil fuels. *See* Case No. 2:21-cv-00260, ECF No. 30.

In *Marcos*, a foreign government brought claims against its former head of state to recover looted property. 806 F.2d at 354. The claims "necessarily require[d] determinations that will directly and significantly affect American foreign relations," *id.* at 353, including "as a necessary element, the question whether to honor the request of a foreign government that the American courts enforce the foreign government's directives to freeze property in the United States subject to future proceedings in the foreign state," *id*. at 354. Jurisdiction "was proper under what is now-called the *Grable* doctrine." *Qatar v. First Abu Dhabi Bank PJSC*, 432 F. Supp. 3d 401, 417 (S.D.N.Y. 2020). *Grable* jurisdiction is unavailable here.[4]

In sum, the State has not failed to plead necessary federal questions and Defendants cannot establish that Congress has completely preempted, or entirely substituted, a federal cause of action for the State's VCPA claims.

C. There Is No Basis For Jurisdiction Under The *Grable* Doctrine.

Defendants' contention that the State's claims "arise under" federal law pursuant to the *Grable* doctrine fares no better. Every court to consider Defendants' *Grable* arguments has rejected them. *See, e.g.*, *Boulder III.*, 25 F.4th at 1266 ("federal issues asserted [by defendants] are neither necessary to the [] claims nor substantial to the federal system"); *City of Oakland v. BP PLC*, 969 F.3d 895, 906-07 (9th Cir. 2020) (defendants do not satisfy *Grable* by alleging that "state-law claim implicates a variety of 'federal interests,' including energy policy, national security, and foreign policy"); *City of Hoboken v. Exxon Mobil Corp.*, 2021 WL 4077541, *7 (D. N.J. Sept. 8, 2021) ("general concern that federal law might be implicated" on matters such as

[4] Defendants also cite *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n.2 (1981), in which the Court agreed that "at least some of the claims had a sufficient federal character to support removal." *Id*. Subsequently, in *Rivet v. Regions Bank of La.*, 522 U.S. 470 (1998), the Court "clarif[ied] and confine[d] to its specific context the Court's second footnote in *Moitie*." Regardless, the "real nature" of the State's VCPA claims is not federal.

whether "Defendants' conduct is unreasonable" in light of "analysis Congress already performed when enacting a variety of federal environmental statutes" is "materially different than a claim, like in *Grable*, that is dependent on the interpretation of federal law"); *Minnesota v. Am. Petroleum Inst.*, 2021 WL 1215656, *7 (D. Minn. Mar. 31, 2021) (*Minnesota I*) (complaint only required court to consider whether defendants "engaged in a misinformation campaign that ran afoul of Minnesota's consumer protection statutes and common law."); *see also Connecticut v. Exxon Mobil Corp.*, 2021 WL 2389739, *12; *Delaware*, 2022 WL 58484, *9; *Massachusetts*, 462 F. Supp. 3d at 45 (collecting cases).

The State's claims here do not fit within the "special and small category" of cases, *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 699 (2006), over which *Grable* jurisdiction lies. They are not governed by federal common law and do not otherwise raise "substantial questions of federal environmental policy and regulations." Opp. 24.

Federal common law. To the extent Defendants argue the Complaint "necessarily raises federal issues" because it "implicates the federal common law of transboundary pollution … and foreign affairs," Opp. 23, they have merely repackaged their mischaracterization of the Complaint. *Newton v. Cap. Assur. Co.*, 245 F.3d 1306, 1309 (11th Cir. 2001) and *Battle v. Seibels Brice Ins.*, 288 F.3d 596 (4th Cir. 2002), remain inapposite. *See* Br. 22-23. Federal common law does not govern the State's VCPA claims. *See also supra*, Section A.

Fossil Fuel Production. Defendants argue the State seeks relief "that would suppress fossil fuel production and sales precisely because consumers would purchase less fuel, reducing emissions and mitigating environmental harm." Opp. 24. Even if reduced production or sales would result, the contention is irrelevant; the federal government does not promote deceptive

advertising, nor is there any federal law, regulation, or policy requiring consumers to purchase fossil fuel products, let alone Defendants' products.

Defendants' reliance upon *Juliana v. United States* is misplaced because, there, plaintiffs sought an order requiring the government to develop a plan to "phase out fossil fuel emissions and draw down excess atmospheric CO2." 947 F.3d 1159, 1164-65 (9th Cir. 2020). The fact that the government "promotes fossil fuels use in a host of ways" (Opp. 25, quoting *Juliana* 947 F.3d at 1167), is irrelevant to the *Grable* analysis because the Complaint raises no issue concerning "beneficial tax provisions, permits for import and exports, subsidies for domestic and overseas projects, and leases for fuel extraction on federal land." *Id*. Nor does the State seek to have a state court "adjudicate the same competing interests that Congress and the EPA have already carefully balanced." *Id*.

Thus, Defendants' contention that the relief requested "raises substantial federal issues because, if successful, they will undermine federal policies endorsed by numerous federal agencies" (Opp. 25) is baseless. Nothing in the claims is a "collateral attack," or any attack at all, on the Clean Air Act, EPA regulation of greenhouse gas emissions, or any other "regulatory scheme." *Id*. It "is difficult to comprehend how the suit's resolution could have controlling effect across the federal system . . . when the Energy Companies fail to adequately tether their 'national interest' argument to any specific federal law or laws." *Boulder III*, at 1268.

Fuel Economy and Environmental Standards. Defendants seek to create federal questions by invoking EPA regulations concerning fuel economy and environmental standards. Opp. 26, citing NOR ¶ 88, Compl. ¶¶ 108, 115, 117. Again, this is a red herring. There is no need to assess compliance with federal law, and, moreover, any such federal issue would not be "substantial" within the meaning of *Grable*.

Defendants maintain that the Complaint "raises a disputed question of compliance with federal standards" because, to assess whether the alleged statements and omissions are misleading, a court will need to (i) assess whether the products in question comply with EPA standards, and (ii) "whether compliance with those standards, as evidence of comparative efficiency and reduced emissions, can constitute misleading conduct." Opp. 26. This is a further mischaracterization of the Complaint. It is true, for example, that Shell's ads "are deceptive for stating" that "the fuel 'is more efficient,' has 'lower emissions,' and contains seven times the clean[ing] agents required to meet federal standards," Opp. 24, but the "deception" does not depend on whether or not the specific claims in those ads are true; they are deceptive because they do not disclose "that the difference in CO_2 emissions is very small" and the products "still contribute significantly to climate change," Compl. ¶ 108; *see also* Br. 24 (discussing Defendants' mischaracterization of paragraphs 115 & 117 of the Complaint). The Complaint does not allege a violation of EPA standards, nor does it allege that the products do not surpass those standards.

Defendants nevertheless argue that the State invokes those federal standards as an element of its "unfairness" claim under the VCPA. Opp. 26-27 (citing Compl. ¶ 190). But once again, Defendants cite snippets of the Complaint out of context. Paragraph 190 of the Complaint alleges that Defendants' acts or practices are unfair because they: (i) offend the public policy reflected in § 2453(a) of the VCPA, which protects consumers from deceptive marketing to ensure an honest marketplace; and (ii) are contrary to other statutory, regulatory, and/or common law policies and prohibitions *against material misrepresentations and nondisclosures* including with respect to environmental benefits and/or environmental products or services, that influence economic decision-making and interfere with a fair and honest marketplace" (emphasis added).

Defendants ignore the "material misrepresentations and nondisclosures" aspect of paragraph 190 in a misguided attempt to suggest the State's claim "requires the court to interpret 'compliance' with a 'federally prescribed duty.'" Opp. 27 (quoting *NASDAQ QMX Grp., Inc. v. UBS Securities*, 770 F.3d 1010, 1021 (2d Cir. 2014)). *NASDAQ* arose out of technical difficulties encountered during the Facebook IPO. UBS charged NASDAQ with violating its "primary obligation … 'to operate a fair and orderly market.'" *Id*. at 1017. "[W]hether a registered securities exchange such as NASDAQ has violated its federally prescribed duty to operate a fair and orderly exchange necessarily raises a disputed question of federal law." *Id.* at 1021. No "federally prescribed duty" is implicated by the State's VCPA claims. And even if paragraph 190 referenced federal policy, such references, "pled as public policy considerations attendant to [state] law claims, do not provide a basis for federal subject matter jurisdiction." *Fracasse v. People's United Bank,* 747 F.3d 141, 144 (2d Cir. 2014).

Defendants also fail to address that, even if there were a need to assess whether their products meet or exceed EPA standards, such a limited "federal issue" would not satisfy *Grable*'s "substantiality" requirement. *See* Br. 26-27. The state court in which this action was brought "is competent to apply federal law, to the extent it is relevant." *Empire Healthchoice*, 547 U.S. at 681. *See also Merrell Dow Pharmaceuticals Inc. v. Thompson,* 478 U.S. 804, 822-23 (1986) (no jurisdiction over state law tort claims predicated upon alleged "misbranding" of a drug in violation of federal law); *Bennett v. Southwest Airlines Co.*, 484 F.3d 907, 908, 910 (7th Cir. 2007) (even if federal aviation standards "play a major role in a claim that [defendants] acted negligently," no *Grable* jurisdiction because "[w]e have a fact-specific application of rules that come from both federal and state law rather than a context-free inquiry into the meaning of a federal law"); *Vermont v. MPHJ Tech. Invs., LLC*, 2014 WL 1494009, at *6 (D. Vt. Apr. 15,

2014) (State's VCPA claims "d[id] not challenge the validity or scope of [defendant's] patents nor d[id] they require any determination of whether infringement has actually occurred.").

Alternative Energy Sources. Defendants contend the Complaint's "greenwashing" allegations "require[ ] resolving a fundamental question of federal policy: whether the only way to reduce emissions is to categorically reduce fossil fuel usage." Opp. 27. The Complaint alleges that Defendants' "greenwashing campaigns continue to mislead Vermont consumers about the degree to which their products contribute to climate change, and that they have not in fact significantly invested in alternative energy sources or otherwise taken steps to minimize their environmental impacts." Compl. ¶ 169.

Determining whether the greenwashing campaigns are deceptive under the VCPA does not require a court to resolve any question of federal policy, let alone a judicial evaluation that "could undermine important federal policy choices." Opp. 27 (quoting *City of New York*, 993 F.3d at 93). It just requires Defendants not to deceive. For example, Defendants contend the Complaint "seeks to invalidate various federal policies supporting the transition to lower-emission energy sources," or would require "a court to substitute its judgment under state law for that of the federal government on the efficacy of various energy sources" or "conflict with official federal policy" supporting development of natural gas or biofuels. Opp. 28. However, there is no federal policy supporting Defendants' greenwashing. *See Boulder III*, 25 F.4th at 1267 ("To be sure, there is a federal interest in promoting energy development. The Energy Companies, however, have failed to establish that a federal issue is a necessary element of the Municipalities' state-law claims."); *Delaware*, 2022 WL 58484, at *7 (assertions that state's claims sought to "strike a new regulatory balance that would supplant decades of national

energy, economic, and environmental policies on these issues" were "not consistent with a fair reading of Plaintiff's claims").

D. The State Has Not "Confirmed" There Is Federal Jurisdiction Over Its VCPA Claims.

Defendants' contention (Opp. 21) that the State has somehow "confirmed" there is federal jurisdiction over its VCPA claims is wrong. Footnote 6 of the State's opening memorandum plainly asserts, as is also made clear in the remainder of the memorandum, that the State's claims are *not* governed by federal common law. Br. 21 n. 6 ("Even if the federal common law that Defendants purport to invoke applied to this case (*which it does not*) ….") (emphasis added). Accordingly, nothing in footnote 6 "confirms that the action has a uniquely *federal* character and thus can be litigated in *federal* court." Opp. 21. And because the State's claims do not arise under federal law, Defendants' dissertation on the differences between a jurisdiction inquiry and a merits inquiry, Opp. 22, is irrelevant.

II. THIS ACTION IS NOT REMOVABLE UNDER THE "FEDERAL OFFICER" STATUTE.

Defendants already have lost the same federal officer removal arguments fifteen times including in cases where (unlike here) the plaintiff seeks monetary relief for climate-related injuries. Their arguments have been rejected five times by the Courts of Appeals—in the First, Fourth, and Ninth, and twice in the Tenth Circuit—and ten times by district courts.[5] Defendants

[5] *See Boulder III,* 25 F.4th 1238 (10th Cir. 2022); *Bd. of Cnty. Comm'r of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.,* 965 F.3d 792 (10th Cir. 2020) ("*Boulder II*"); *Mayor & City Council of Baltimore v. BP P.L.C.,* 952 F.3d 452 (4th Cir. 2020) ("*Baltimore II*"); *Rhode Island v. Shell Oil Prod. Co.,* 979 F.3d 50, 59 (1st Cir. 2020) ("*Rhode Island II*"), *cert. granted, judgment vacated*, 141 S. Ct. 2666 (2021); *Cnty. of San Mateo v. Chevron Corp.*, 960 F.3d 586 (9th Cir. 2020) ("*San Mateo II*"), *cert. granted, judgment vacated sub nom. Chevron Corp. v. San Mateo Cnty., Cal.*, 141 S. Ct. 2666 (2021); *Delaware*, 2022 WL 58484, at *5; *Massachusetts*, 462 F. Supp. 3d 31; *Connecticut*, 2021 WL 2389739; *Hoboken,* 2021 WL 4077541; *Minnesota I*, 2021 WL 1215656; *City and Cnty of Honolulu v. Sunoco LP*, 2021 WL 531237 (D. Haw. Feb. 12, 2021) ("*Honolulu I*"); *Rhode Island, v. Chevron Corp*, 393 F. Supp.

provide no basis for this Court to reach a different result. The grounds they assert for federal officer jurisdiction do not have the required connection to Vermont's claims or the subjection, guidance, or control of federal officers needed for federal officer removal. Yet, as with their other arguments, they persist in asserting arguments that have been rejected time and time again.

The law requires Defendants to show that the acts they are sued upon "occurred *because of* what they were asked to do by the government." *Isaacson v. Dow Chemical Co.*, 517 F.3d 129, 137 (2d Cir. 2008); *see also Massachusetts,* 462 F. Supp. at 46-47 (holding that ExxonMobil's false and deceptive marketing and sales tactics "were not plausibly 'relat[ed] to' the activities supposedly done under the direction of the federal government"); *Connecticut,* 2021 WL 2389739, *11 (finding no federal officer jurisdiction because ExxonMobil "does not assert, or even suggest, that the government directed [it] to make the[] allegedly deceptive statements" that formed the basis of the State's consumer protection claims); *Honolulu I*, 2021 WL 531237, *7 ("if Defendants had it their way, they could assert *any* theory of the case, however untethered to the claims of Plaintiffs, because this Court must 'credit' that theory. To do so, though, would completely ignore the requirement that there must be a causal connection *with the plaintiff's claims*.") (emphasis in original).

Here, Defendants do not claim that any federal officer directed them to engage in the deceptive marketing alleged in the Complaint, nor do they establish that their deceptive marketing to Vermont consumers was otherwise caused by any of the conduct they assert as a basis for federal officer jurisdiction. And they fail to show that contracts, regulations, or

---

3d 142 (D. R.I. 2019) ("*Rhode Island I*"); *Bd. of Cnty. Comm'r of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.,* 405 F. Supp. 3d 947 (D.Colo. 2019) ("*Boulder* I"); *Mayor & City Council of Baltimore v. BP P.L.C.,* 388 F. Supp. 3d 538 (D. Md. 2019) ("*Baltimore I*"); *Cnty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934 (N.D. Cal. 2018) ("*San Mateo I*").

"directives" to increase or ensure the supply of oil, build pipelines, maintain reserves, operate their facilities, or otherwise, would establish the "unusually close" relationship required under the statute. *See Honolulu I*, 2021 WL 531237, *5; *San Mateo II*, 960 F.3d at 599, 601-602; *Baltimore II*, 952 F. Supp. 3d at 465-66; *Boulder II*, 965 F.3d at 823-24.[6]

World War II and the Korean War Activities. Defendants strain to invoke long-ago activities in the early 1900's, and during World War II and the Korean War, which are irrelevant as they predate the Complaint allegations by decades. *See* Compl. at ¶¶ 67-162; *Delaware,* 2022 WL 58484, at *10; *Hoboken*, 2021 WL 4077541, at *10; *Connecticut*, 2021 WL 2389739, at *2. The events of decades, and even more than a century ago, have no relevance here and are indicative of Defendants' desperation. "Critical under the statute is to what extent defendants acted under federal direction at the time they were engaged in conduct now being sued upon." *In re Methyl Tertiary Butyl Ether ("MTBE") Prod. Liab. Litig.,* 488 F.3d 112, 124–25 (2d Cir. 2007). Vermont's claims are not based on conduct during or before the Korean War.

Highly Specialized Non-Commercial Grade Fuels for Military Use. Defendants admit that fuel produced through their military contracts is "non-commercial" and "highly specialized" so that it can be used on "planes, ships and other vehicles and satisfy other national defense requirements." NOR ¶¶ 103, 114. Defendants' specialized fuel is not "the same as fuel that consumers purchased because of Defendants' alleged marketing and disinformation campaigns."

[6] Defendants' reliance on *Cnty Bd. Of Arlington City*, *Va, v. Express Scripts Pharmacy Inc.,* 996 F.3d 243 (4th Cir. 2021) and *Baker v. Atl. Richfield Co.*, 962 F.3d 937 (7th Cir. 2020) is misplaced. *See W. Va. State Univ. Bd. of Governors v. Dow Chem. Co.*, 23 F.4th 288, 300 (4th Cir. 2022) (rejecting federal officer jurisdiction and explaining the difference between *Arlington City* and *Baltimore II*); *Delaware*, 2022 WL 58484 at *12-13. Defendants' invocation of *Fry v. Napoleon Cmty., Schs*., 137 S. Ct. 743 (2017) is similarly misplaced, as it was not a removal case and did not discuss federal officer jurisdiction. Rather, it addressed whether a lawsuit under the Americans with Disabilities Act and Rehabilitation Act triggered the Individuals with Disabilities in Education Act's exhaustion requirement.

Hoboken, 2021 WL 4077541, at *10. That Defendants provided highly specialized fuel to the military has absolutely no connection to the State's claims, and hence, is an insufficient basis for federal officer jurisdiction. *Id.; see Minnesota I*, 2021 WL 1215656, at *9. Even if specialized military fuel sales were somehow relevant to Vermont's claims, which they are not, "[t]he arrangement between the Oil Companies and the Government was a cooperative endeavor" and a far cry from the "ongoing supervision the government exercised over the formulation, packaging, and delivery of Agent Orange" in *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 400 (5th Cir. 1998).[7] Defendants' conclusory statement that they had a "special relationship with" and acted under the "subjection, guidance, and control" of federal officers cannot withstand scrutiny. *See Baltimore II,* 952 F.3d at 464.

Outer Continental Shelf ("OCS"). No court has accepted Defendants' contention that there is federal officer jurisdiction because of their OCS activities; all have rejected it, yet nevertheless Defendants persist with theories they know have been discredited. *See Boulder III*, 25 F.4th at 1258 ("by winning bids for leases to extract fossil fuels from federal land in exchange for royalty payments, Exxon is not assisting the government with essential duties or tasks"); *Baltimore II*, 952 F.3d at 465 (court skeptical "that the willingness to lease federal property or mineral rights to a private entity for the entity's own commercial purposes, without more, could ever be characterized as the type of assistance that is required to trigger the government-contractor analogy").[8] Defendants add nothing new to their serially rejected arguments.

---

[7] *See Shell Oil Co. v. United States*, 751 F.3d 1282, 1287 (Fed. Cir. 2014); *United States v. Shell Oil Co*., 294 F.3d 1045, 1050 (9th Cir. 2002).

[8] *See also Boulder II*, 965 F.3d 792; *Rhode Island II.,* 979 F.3d 50, 59; *San Mateo II,* 960 F.3d 586; *Delaware*, 2022 WL 58484, at *5; *Massachusetts,* 462 F. Supp. 3d 31; *Connecticut*, 2021 WL 2389739; *Hoboken,* 2021 WL 4077541; *Minnesota I,* 2021 WL 1215656; *Honolulu I*, 2021 WL 531237; *Rhode Island I,* 393 F. Supp. 3d 142; *Boulder I,* 405 F. Supp. 3d 947; *Baltimore I,* 388 F. Supp. 3d 538; *San Mateo I,* 294 F. Supp. 3d 934.

Strategic Petroleum Reserve ("SPR") and Emergency Petroleum Allocation Act of 1973 ("EPAA"). Defendants argue that federal officer jurisdiction exists because they supply oil to and manage the SPR and comply with the "EPAA," but this argument directly contradicts a parade of cases holding otherwise. *See Hoboken*, 2021 WL 4077541 (rejecting federal officer jurisdiction based on activities related to the SPR); *see also Honolulu I*, 2021 WL 531237, at *6 (same); *Minnesota I*, 2021 WL 1215656, at *9 (same). Complying with federal statutes and regulations cannot establish that Defendants "acted under" a federal officer. *Watson v. Philip Morris Cos.*, 551 U.S. at 151-52 (2007). Defendants' roles in storing and transporting for national emergencies and complying with the EPAA are no exception—they are insufficient bases to convey federal officer jurisdiction. *See Hoboken,* 2021 WL 4077541, *10.

Further, any purported agreements with the government cited by Defendants are simply arms-length transactions with conditions exchanged for the profitable privilege of conducting oil exploration and production on government-owned land. Any royalties paid were pursuant to their OCS leases. *See Boulder II*, 965 F.3d at 821 ("government [] mandates . . . crude or natural gas produced pursuant to OCS leases be offered" pursuant to "the Emergency Petroleum Allocation Act of 1973."). Since those OCS leases and any other purported agreements do not create an "acting under" relationship, neither does the requirement of paying royalties. Finally, there can be no federal officer jurisdiction where, as here, Defendants do not claim that a federal officer directed them to engage in the *deceptive marketing* to Vermont consumers; Defendants cannot provide any theory of control or connection to the State's claims.

III. THERE IS NO OCSLA JURISDICTION.

There is no OCSLA jurisdiction because Defendants cannot meet the two-part test. *See In re Deepwater Horizon*, 745 F.3d 157, 163 (5th Cir. 2014). First, they do not contend any part

of the alleged deceptive marketing took place on the OCS, much less qualified as an "operation" under the OCSLA. Br. 34-36; Opp. 39. This alone negates OCSLA jurisdiction. *Connecticut I*, 2021 WL 2389739, *12 (rejecting OCSLA jurisdiction and finding "this case seek[s] redress for deceptive and unfair practices relating to ExxonMobil's interactions with consumers in Connecticut–not … from ExxonMobil's operations on the Outer Continental Shelf").

Second, Defendants cannot show that this case "arises out of, or in connection with [an] operation" on the OCS. *Deepwater Horizon*, 745 F.3d at 163; Br. 37-38. Defendants argue that the second part of the test does not require "but for" causation, but as with virtually all of their arguments, every court to consider this argument has rejected it. *Boulder III*, 25 F.4th at 1272-273 (OCSLA jurisdiction requires "but for" connection); *Delaware*, 2022 WL 58484, at *5; *Hoboken*, 2021 WL 4077541; *Connecticut*, 2021 WL 2389739; *Baltimore I*, 388 F. Supp. 3d at 566-67; *Rhode Island I*, 393 F. Supp. 3d at 151-52; *San Mateo I*, 294 F. Supp. 3d at 938-39. They provide no reason for this Court to address the identical argument differently.

Defendants ignore these decisions and instead cite to *Ford Motor Co. v. Montana Eight Jud. Dist. Ct.*, 141 S. Ct. 1017, 1026 (2021), a *personal jurisdiction* case which did not involve removal. Opp. 40. In *Ford,* the Court explained that because personal jurisdiction only requires that a defendant have minimum contacts with the forum state, a "strict causal relationship" between the defendant's in-state activity and the litigation is not needed to establish specific jurisdiction. *Id.* *Ford* is irrelevant to OCSLA subject matter jurisdiction.

Next, Defendants say they meet the "but for" requirement, because they make the unsupported assertion that Vermont's claims are a direct response to increased fossil fuel production on the OCS. Opp. 40. Ten courts have rejected this argument, most recently the

Tenth Circuit.[9] Defendants cite no case finding OCSLA jurisdiction in circumstances even remotely similar to this case. Vermont's claims are rooted in Defendants' decades of deceptive marketing, not their fossil fuel exploration or production on the OCS.

Defendants' policy argument that the Complaint threatens the very purpose of the OCSLA and the federal leasing program also fails because it is too speculative to support jurisdiction. *See Boulder III*, 25 F.4th at 1274 ("The chain of contingencies that connects the initiation of this case in state court to an eventual impair[ment of] the total recovery of the federally [] owned materials from the OCS is too uncertain, speculative, and hypothetical to serve as a[n] [OCSLA] jurisdictional hook.") (internal citations omitted); *Minnesota*, 2021 WL 1215656, at *10 ("This type of speculation . . . does not establish a stable ground for supporting removal."); *Boulder I*, 405 F. Supp. 3d at 979 (D. Colo. 2019) (same).

Finally, Defendants' reliance on *City of New York* is a non-starter. OCSLA jurisdiction was not at issue or addressed by the Second Circuit in that case; indeed, the OCS was not mentioned at all. *See City of New York*, 993 F.3d 81.

IV. FEDERAL ENCLAVE JURISDICTION DOES NOT EXIST.

Defendants' federal enclave arguments rest on misstatements of law and imagined allegations that do not exist in the Complaint. Opp. 41-42. They have raised these theories many

[9] *See Boulder III*, 25 F.4th at 1273-274 ("[Defendants'] OCS activities are not the "but-for" cause of the Municipalities' injuries" which largely include Defendants "sale and deceptive promotion of fossil fuels"); *Delaware*, 2022 WL 58484, at *5; *Hoboken,* 2021 WL 4077541; *Connecticut*, 2021 WL 2389739; *Minnesota I*, 2021 WL 1215656; *Honolulu I*, 2021 WL 531237; *Rhode Island I*, 393 F. Supp. 3d 142; *Boulder I*, 405 F. Supp. 3d 947; *Baltimore I*, 388 F. Supp. 3d 538; *San Mateo I*, 294 F. Supp. 3d 934. The decision in *Boulder III*, *supra*, demolishes Defendants' attempt to distinguish *Parish of Plaquemines v. Total Petrochemical & Refining USA, Inc.*, 64 F. Supp. 3d 872, 898 (E.D. La. 2014).

times before, and the nine courts to address them previously have all rejected them, including in cases where (unlike here), the plaintiff is seeking monetary relief for climate-related harm.[10]

First, the conduct alleged here did not "arise on" federal enclaves because the Complaint expressly disclaims relief for any conduct or harm "that may have occurred on federal lands." Compl. ¶ 6; Br. at 39-40. Such disclaimers routinely support remand.[11] Thus, Defendants' statement that the Complaint "necessarily sweeps in Defendants' promotional activities directed at and viewed on [] federal enclaves" (Opp. 43) is unavailing.

Second, Defendants' "theor[ies] sweep[] far too broadly." *Boulder III*, 25 F.4th at 1271. Federal enclave jurisdiction requires that *all or most of the* pertinent events occur on a federal enclave. *Id.*; *Baltimore I* (collecting cases). Here again, the cases Defendants offer to rebut these well-established principles are all inapposite. *See Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1249 (9th Cir. 2006) (plaintiff allegedly exposed to and injured by asbestos while working on U.S. Air Force bases); *Corley v. Long-Lewis, Inc.*, 688 F. Supp. 2d 1315, 1321-29 (N.D. Ala. 2010) (plaintiff alleged harm from asbestos exposure that occurred mostly on federal enclaves). *Humble* was not even a removal case. *Humble Pipe Line Co. v. Waggonner,* 376 U.S. 369, 370, 374 (1964) (state was "without jurisdiction to levy ad valorem tax on privately owned

---

[10] *See e.g. Boulder III*, 25 F.4th at1272; *Connecticut*, 2021 WL 2389739 at *13 (finding of no federal enclave jurisdiction not appealed); *Hoboken*, 2021 WL 4077541, at *11; *Honolulu I*, 2021 WL 531237, at *8; *Minnesota I*, 2021 WL 1215656, at *11 (finding of no federal enclave jurisdiction not appealed); *Baltimore I*, 388 F. Supp. 3d at 565; *San Mateo I*, 294 F. Supp. 3d at 939; *Rhode Island I*, 393 F. Supp. 3d at 152; *Boulder I*, 405 F. Supp. 3d at 974.

[11] Br. 39-40; *See also Delaware*, 2022 WL 58484, at *10. The cases that Defendants cite to argue otherwise are inapposite. *See Holdren v. Buffalo Pumps, Inc.*, 614 F. Supp. 2d 129, 150 (D. Mass. 2009) (court expressly declined to address whether a disclaimer defeats federal officer removal under 28 U.S.C. § 1442); *O'Connell v. Foster Wheeler Energy Corp.*, 544 F. Supp. 2d 51, 54 n.6 (D. Mass. 2008) (court did not address disclaimers in the context of federal enclave jurisdiction but rather addressed whether a plaintiff could disclaim a colorable federal defense); *Machnik v. Buffalo Pumps, Inc.*, 506 F. Supp. 2d 99, 103 n.1 (D. Conn. 2007) (same).

property" situated on land ceded to government for Air Force base). Defendants also contend the State is targeting their production and sale of oil and gas and this "necessarily sweeps in those activities that occur on federal enclaves." This argument fails for all the reasons discussed above. It too has been rejected by each court to consider it. *See supra* n.10.

Finally, Defendants again distort snippets from the Complaint to argue that the State targets pollution and climate change injuries, and alleges injury to federal enclaves in Vermont—the Marsh-Billings-Rockefeller National Park, Green Mountain National Forest, and ports along the border with Canada. Opp. 42. This misrepresents the Complaint. First, those locations are not mentioned anywhere in the Complaint. More importantly, the text of the paragraphs mis-cited by Defendants, and the Complaint generally, state that while the climate impacts of their products is the subject of Defendants' deceit, the State's claims seek to remedy the resulting harm to the Vermont marketplace, not to remedy impacts on the environment.[12] None of the cases cited by Defendants address allegations like those in this case or support Defendants' federal enclave removal theory.[13]

---

[12] Paragraph 179 of the Complaint states: "Defendants' *misleading statements and conduct were and are deceptive* because they were and *are likely to create an impression among consumers* that Defendants' fossil fuel products are better or safer for the environment when, in fact, the use of Defendants' fossil fuel products will contribute to global warming, sea level rise, disruptions to the hydrologic cycle, increased extreme precipitation, heatwaves, drought, and other consequences of the climate crisis." (Emphases added.) Paragraphs 118 and 180 of the Complaint contain analogous language.

[13] *Akin v. Ashland Chem. Co.*, 156 F.3d 1030 (10th Cir. 1998) was a toxic tort case arising solely out of an alleged chemical exposure at an Air Force base—facts much different from those at issue here—as the Tenth Circuit recognized in *Boulder III* in rejecting the same argument advanced by Defendants. The reliance Defendant's place on *Quadrini v. Sikorsky Aircraft Div.*, 425 F. Supp. 81, 86 (D. Conn. 1977) is equally misguided because (1) it was not a removal case; (2) the issue at summary judgment was what substantive law applies to a wrongful death claim when a helicopter crashes on a federal enclave; and (3) the Second Circuit "decline[d] to make [*Quandrini*] the law of this circuit," *Vasina v. Grumman Corp.*, 644 F.2d 112, 117 (2d Cir. 1981). *United States v. Lewisburg Area Sch. Dist.*, 539 F.2d 301 (3d Cir. 1976) is inapplicable as it too did not deal with removal. Rather, it addressed, at the motion to dismiss stage, whether

V. THERE IS NO DIVERSITY JURISDICTION BECAUSE THE STATE OF VERMONT IS THE REAL PARTY IN INTEREST.

Both the U.S. Supreme Court and the Second Circuit have recognized that removal statutes are to be strictly construed against removal and that all doubts must be resolved in favor of remand. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941); *Lupo v. Hum. Affs. Int'l, Inc.*, 28 F.3d 269, 274 (2d Cir. 1994); *see also Whitaker v. Am. Telecasting, Inc.*, 261 F.3d 196, 201 (2d Cir. 2001). "The presumption against federal jurisdiction is especially strong in cases of this sort, involving States seeking to vindicate quasi-sovereign interests in enforcing state laws and protecting their own citizens from deceptive trade practices and the like." *In re Standard & Poor's Rating Agency Litig.*, 23 F. Supp. 3d 378, 385 (S.D.N.Y. 2014).

Defendants' argument that the State has not established a "quasi-sovereign interest" in this action fails. Opp. 45. The State's allegations of harm to the marketplace from the unfair and deceptive trade practices are more than sufficient to implicate quasi-sovereign interests. Compl. ¶¶ 4-6, 170-175; *Connecticut*, 2021 WL 2389739, at *14 (holding State is "suing to protect a quasi-sovereign interest and is therefore a real party in interest … [it] seeks redress not simply for the deception allegedly caused by each of ExxonMobil's statements but rather for a decades-long campaign of alleged disinformation that resulted in 'the stifling of an open marketplace for renewable energy'"); *Massachusetts*, 462 F. Supp. 3d at 43-44 (State "wants to hold ExxonMobil accountable for misleading the state's … consumers. No one doubts that this task falls within the core of a state's responsibility."); *accord Minnesota I*, 2021 WL 1215656, at *13.

Defendants contend that Vermont's interest in protecting its consumers from unfair and deceptive marketing is not an injury to a sufficiently substantial segment of its population, but

---

a county and school district could impose and collect occupation and per capita taxes on federal employees residing on a federal enclave.

this contradicts decisions by the U.S. Supreme Court, this Court, and other federal courts. The Supreme Court has recognized that "private consumers" in each State constitute a "substantial segment" of the State's population, *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 607 (1982),[14] and that there "is no question that [a state's] interest in ensuring the accuracy of commercial information in the marketplace is substantial," *Edenfield v. Fane*, 507 U.S. 761, 769, (1993). This Court has explicitly held that the State is the real party in interest when the relief sought by the State in a VCPA case is a statewide injunction and civil penalties unavailable to private litigants. *MPHJ Tech.*, 2014 WL 1494009, at *10 (Vermont has concrete interest when it seeks civil penalties and statewide injunction under the VCPA as "the benefits of those remedies flow to the State as a whole."); *accord MyInfoGuard LLC v. Sorrell*, 2012 WL 5469913, at *5 (D. Vt. Nov. 9, 2012).

Defendants next argue that the State cannot be the real party in interest because it seeks disgorgement, and in one case a Vermont court awarded a disgorgement remedy to a consumer.[15] Opp. 46-47. Presumably unable to find any contemporary authority, Defendants rely on a 120-year-old case, *Missouri, K. & T. Ry. Co. of Kansas v. Hickman*, 183 U.S. 53, 57 (1901). But this Court has construed *Hickman* and its progeny to support the State being the real party in interest when it seeks an injunction and civil penalties under the VCPA even if the State also seeks an additional remedy for or available to consumers. *See MyInfoguard*, 2012 WL 5469913, at *5

[14] *See also Commonwealth of Pennsylvania v. W. Va.*, 262 U.S. 553, 592, *aff'd,* 263 U.S. 350, (1923) ("The private consumers in each state … constitute a substantial portion of the state's population."); *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 671 (9th Cir. 2012) (collecting cases); *Commonwealth of Mass. v. Bull HN Info. Sys., Inc.*, 16 F. Supp. 2d 90, 100 (D. Mass. 1998); *People v. Peter & John's Pump House, Inc.*, 914 F. Supp. 809, 812 (N.D.N.Y. 1996).

[15] *Vastano v. Killington Valley Real Estate* is the only case awarding consumer disgorgement under the VCPA. 2008 WL 2937171 (Vt. Super. Ct. Jan. 10. 2008). Although the court permitted the remedy, it recognized that the VCPA does not contain a remedy for consumer disgorgement but allows for "equitable relief." *Id*.

(citing *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cavicchia*, 311 F. Supp. 149, 155 (S.D.N.Y.1970)); *MPHJ Tech*, 2014 WL 1494009, at **10; see also In re Standard & Poor's Rating Agency Litig.,* 23 F. Supp. 3d at 385; *AU Optronics Corp. v. S.C.*, 699 F.3d 385, 394 (4th Cir. 2012) (rejecting diversity jurisdiction, adopting whole-case approach, and concluding that "a claim for restitution, when tacked onto other claims being properly pursued by the State, [does not] alter[]the State's quasi-sovereign interest in enforcing its own laws … [and] seeking to protect its citizens"); *Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 219 (2d Cir. 2013) (noting "the claim-by-claim approach has been roundly criticized, and the whole complaint approach has emerged as the majority rule").[16] Since overlapping remedies do not create diversity jurisdiction or undermine the State's broader interest in its case, it does not matter whether the VCPA permits a consumer to seek disgorgement.

Finally, contrary to Defendants' assertion, the State's request for disgorgement does not seek to "impose strict liability for greenhouse gas emissions and purported climate injuries" or "restore the discrete interests of certain individuals." Opp. 15, 47. Its purpose is to ensure Defendants do not benefit from deceptive marketing toward Vermont consumers and reinforce that such misconduct does not pay. *See* 9 V.S.A. § 2451 (purpose of VCPA is "to complement the enforcement of federal statutes and decisions governing unfair methods of competition, unfair or deceptive acts or practices, and anti-competitive practices in order to protect the public and to encourage fair and honest competition"); *United States v. Reader's Dig. Ass'n, Inc.*, 662 F.2d 955, 966 (3d Cir. 1981) (legislative purpose underlying penalty provision of statute is to … "avoid[] a situation in which the statutory penalty would be regarded by potential violators … as

[16] Vermont is not seeking restitution in this action.

nothing more than an acceptable cost of violation, rather than as a deterrence to violation"); *Vermont v. R. J. Reynolds Tobacco Co*., 2013 WL 2458547, at *11 (Vt. Super. June 03, 2013).

VI. THE STATE IS ENTITLED TO ATTORNEY FEES AND COSTS.

Citing an unpublished Second Circuit decision, *Williams v. Int'l Gun-A-Rama*, 416 F. App'x 97, 99 (2d Cir. 2011), Defendants argue that removal "is not 'objectively unreasonable' unless foreclosed by 'clearly established law.'" Opp. 48. But they fail to reckon with *Calabro v. Aniqa Halal Live Poultry Corp.*, 650 F.3d 163, 166 (2d Cir. 2011), in which the Second Circuit affirmed an award of fees and costs where a party removed an action in violation of the well-pleaded complaint rule, concluding that the removal was *not* objectively reasonable. *See also Barnhart-Graham Auto, Inc. v. Green Mountain Bank*, 786 F. Supp. 394, 395 (D. Vt. 1992) (awarding fees where complaint alleged no cause of action arising under federal law).

At a minimum, that is the case here because the State's claims arise solely under the VCPA. Defendants' contention that their arguments are "well-reasoned and supported by precedent, including the Second Circuit's recent decision in *City of New York*," Opp. 48, is meritless. Defendants removed this case based on a distorted characterization of both the State's claims and the *City of New York* case, designed to make it appear as if the State's claims were comparable to those asserted in *City of New York*. As discussed above, Exxon did not even appeal the remand order in *Massachusetts*.

Adding insult to injury, Defendants assert that the Second Circuit recently stayed a remand order pending an appeal "addressing nearly identical issues." Opp. 48 (citing *Connecticut v. Exxon Mobil Corp.*, No. 21-1466 (2d Cir. Oct. 5, 2021), ECF No. 81). As Defendants know, Connecticut seeks an order directing Exxon to pay for expenditures Connecticut "has made and will have to make to combat the effects of climate change."

Connecticut Compl. at 44, ¶¶ 3, 5 (*See* Ex. 12 to ECF No. 1, Notice of Removal, in *Connecticut v. Exxon Mobil Corp*., No 3:20-cv-01555-JCH (D. Conn. Oct. 20, 2020)). *See also* Brief of Appellant Exxon Mobil Corporation at 10, *Connecticut v. Exxon Mobil*, No. 21-1446 (2d Cir. Sept. 21, 2021) (ECF No. 66) (arguing that Connecticut suit belongs in federal court "primarily because, as this Court has previously held [in *City of New York*], federal law governs lawsuits alleging injury from and seeking redress for climate change").

Defendants' citation to climate-related cases where fees and costs were denied, Opp. 49 (citing *Connecticut*, 2021 WL 2389739, at *15; *Minnesota*, 2021 WL 3711072, at *5; *Delaware*, 2022 WL 58484, at *15), is misplaced. Whether or not "suits seeking redress for global climate change" belong in federal court, Opp. 48, Defendants know that this suit does not seek such redress. The State is entitled to fees and costs because removal was "objectively unreasonable," and due to the "unusual circumstances" presented by Defendants' mischaracterization of the State's claims, *Martin v. Franklin Cap. Corp.*, 546 U.S. 132, 141 (2005), as well as their advancement of numerous theories of federal jurisdiction that courts have already rejected many times.

CONCLUSION

For the foregoing reasons, and those set forth in the State's initial memorandum of law, the Court should remand this action to the Chittenden Superior Court.

DATED: March 18, 2022

Respectfully submitted,

STATE OF VERMONT

THOMAS J. DONOVAN, JR.
ATTORNEY GENERAL

By: _____

Justin E. Kolber
Laura B. Murphy
Assistant Attorneys General
Joshua R. Diamond
Deputy Attorney General
Office of the Attorney General
109 State Street
Montpelier, VT 05602
(802) 828-3186
Justin.Kolber@vermont.gov
Laura.Murphy@vermont.gov

LEWIS BAACH KAUFMANN
MIDDLEMISS PLLC

Eric L. Lewis*
Mark J. Leimkuhler*
1101 New York Avenue, Suite 1000
Washington, DC 20005
(202) 833-8900
Eric.Lewis@lbkmlaw.com
Mark.Leimkuhler@lbkmlaw.com
* *Pro hac vice*