No. 22-1096

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., SHELL PLC, SHELL USA INC., CITGO PETROLEUMCORP., TOTALENERGIES SE, 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)

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INTRODUCTION

The State of Delaware brought common-law and statutory claims against Appellants in Delaware state court under Delaware law to redress severe harms unfolding in Delaware because of Appellants' decades-long campaign of deception regarding their fossil fuel products' relationship to climate change. Appellants removed, asserting an encyclopedia of jurisdictional theories, all of which the district court found lacked merit. *See generally* 1-JA-23–57. Appellants' arguments are identical to ones found meritless by ten district courts and four circuit courts in analogous cases involving many of the same defendants.[1] Appellants ignore all those decisions, and do not attempt to distinguish any of them in their Opening Brief ("AOB"), or even cite them. This Court should adopt the same proven approach and return this case to state court, where it belongs.

[1] *See Mayor & City Council of Baltimore v. BP P.L.C.*, No. 19-1644, 2022 WL 1039685 (4th Cir. Apr. 7, 2022) ("*Baltimore IV*"); *Bd. of Cty. Commissioners of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238 (10th Cir. 2022) ("*Boulder III*"); *City of Oakland v. BP PLC*, 969 F.3d 895 (9th Cir. 2020) ("*Oakland*"), *cert. denied*, 141 S. Ct. 2776 (2021); *Cty. of San Mateo v. Chevron Corp.*, 960 F.3d 586 (9th Cir. 2020) ("*San Mateo*"), *cert. granted, judgment vacated*, 141 S. Ct. 2666 (2021); *Rhode Island v. Shell Oil Prod. Co.*, 979 F.3d 50 (1st Cir. 2020), *cert. granted,*

STATEMENT OF ISSUES

1. Did the district court lack federal question jurisdiction under 28 U.S.C. §§ 1331 & 1441, where the Complaint pleads no federal claims, and neither the complete preemption nor *Grable* exceptions to the well-pleaded complaint rule are satisfied? *See* 1-JA-33–44.

2. Did the district court lack subject-matter jurisdiction under the federal officer removal statute, 28 U.S.C. § 1442, because none of Appellants' conduct alleged in the Complaint relates to activities Appellants engaged in under the direction or control of a federal superior? *See* 1-JA-44–52.

3. Did the district court lack subject-matter jurisdiction under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(b)(1), because Appellants "cannot satisfy" the statutory requirement to show that

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judgment vacated, 141 S. Ct. 2666 (2021); *City of Hoboken v. Exxon Mobil Corp.*, No. 20-cv-142343-JMV, 2021 WL 4077541 (D.N.J. Sept. 8, 2021), *appeal pending*, No. 21-2728 (3d Cir.); *Connecticut v. Exxon Mobil Corp.*, No. 3:20-CV-1555 (JCH), 2021 WL 2389739 (D. Conn. June 2, 2021), *appeal pending*, No. 21-1446 (2d Cir.); *Minnesota v. Am. Petroleum Inst.*, No. CV 20-1636 (JRT/HB), 2021 WL 1215656 (D. Minn. Mar. 31, 2021), *appeal pending*, No. 21-1752 (8th Cir.); *City and Cnty. of Honolulu v. Sunoco LP, et al.*, No. 20-CV-00163-DKW, 2021 WL 531237 (D. Haw. Feb. 12, 2021), *appeal pending*, Nos. 21-15313, 21-15318 (9th Cir.); *Massachusetts v. Exxon Mobil Corp.*, 462 F.Supp.3d 31 (D. Mass. 2020).

Delaware "would not have been injured 'but for' [Appellants'] operations" on the outer continental shelf ("OCS")? *See* 1-JA-53–56.

STATEMENT OF RELATED CASES

This case has not come before this Court previously. The appeal pending in this Court in *City of Hoboken v. Exxon Mobil Corp.*, No. 21-2728, presents similar issues.

STATEMENT OF THE CASE

I. Allegations in Delaware's Complaint

For decades, Appellants have known that their oil, gas, and coal products create greenhouse gas pollution that changes Earth's climate, warms the oceans, and causes sea levels to rise. 3-JA-247, 250, 316–50. Starting as early as the 1950s, Appellants researched the link between fossil fuel consumption and global warming, amassing a comprehensive and nuanced understanding of the adverse climate impacts caused by their fossil fuel products. 3-JA-316–18. In internal reports and communications, their own scientists predicted that the unabated consumption of fossil fuels would cause "dramatic environmental effects," and that only a narrow window of time remained to stave off "catastrophic" climate change. 3-JA-324–39. Appellants took these

warnings seriously. They evaluated impacts of climate change on their infrastructure, invested to protect their own assets from rising seas and more extreme storms, and developed technologies to profit in a warmer world. 3-JA-378–81. Beginning in the 1980s, however, Appellants embarked on a campaign of disinformation about the existence, cause, and effects of global warming. 3-JA-350–78. When consumer and public awareness started catching up to Appellants' own knowledge of the serious dangers posed by their fossil fuel products, Appellants pivoted to a new deceptive strategy: "greenwashing." 3-JA-395–422. They advertise, for example, that certain fossil fuel products are "green" or "clean," while failing to warn that the production and use of those products is the leading cause of climate change. 3-JA-395–96.

The State has incurred and will continue to incur significant damages due to Appellants' conduct, including expenses to mitigate climate impacts such as rising average sea levels causing tidal flooding and damage to public infrastructure; saltwater intrusion into farmland and fresh drinking water supplies; ocean acidification causing loss of coastal habitats and natural resources and industries dependent on them; and increased air temperature causing more extreme heat days,

poor air quality, and other public health risks. 3-JA-429–44. Delaware thus seeks damages for the harms that it has already incurred—and for the costs of abating and mitigating the harms it will suffer—because of Appellants' tortious conduct.

II. Procedural Background

The State sued Appellants in Delaware state court, asserting state-law claims for (1) negligent failure to warn, (2) trespass, (3) nuisance, and (4) violations of the Delaware Consumer Fraud Act. 3-JA-444–62. Appellants removed based on seven theories of jurisdiction, but have pared down to four on appeal: federal question jurisdiction based on federal common law, federal question jurisdiction based on *Grable*, federal officer removal jurisdiction under 28 U.S.C. § 1442, and OCSLA removal under 43 U.S.C. § 1349(b)(1). The district court granted the State's motion to remand, 1-JA-23–57, but stayed remand pending appeal, 1-JA-86.

SUMMARY OF THE ARGUMENT

1. First, there is no federal question jurisdiction under the well-pleaded complaint rule or either of its exceptions. Appellants say Delaware's claims "can arise only under federal common law," AOB 15,

because "[o]nly federal common law … can govern these types of claims involving interstate emissions," AOB 2 (citation omitted), and thus they are within the district court's original federal question jurisdiction under 28 U.S.C. § 1331. But "the federal common law of nuisance that formerly governed transboundary pollution suits *no longer exists* due to Congress's displacement of that law" by the Clean Air Act ("CAA"), *Boulder III*, 25 F.4th at 1260, and Appellants "cite no authority justifying removal for nonexistent claims that have been displaced by federal statutes," *Baltimore IV*, 2022 WL 1039685 at *10.

There is no basis to take the rare step of crafting *new* federal common law that might fit here, because Appellants have not identified any uniquely federal interest implicated by Delaware's complaint, and "do not point to any significant conflict existing between [Delaware] law and their purported federal interests, which is a complete abdication of their removal burden." *Id.* at *8. The "artful pleading" doctrine does Appellants no good, because "artful pleading" is another name for the "complete preemption" doctrine. *See id.* at *4; *Boulder III*, 25 F.4th at 1256; *Oakland*, 969 F.3d at 905; *Goepel v. Nat'l Postal Mail Handlers Union, a Div. of LIUNA*, 36 F.3d 306, 310 n.5 & 311–12 (3d Cir. 1994).

"[T]he Supreme Court has only applied complete preemption in the context of federal statutes, not federal common law," *Baltimore IV*, 2022 WL 1039685 at *9 n.8, because "complete preemption requires congressional intent," *Boulder III*, 25 F.4th at 1261, and "[t]herefore, the federal common law for transboundary pollution cannot *completely* preempt" state law at all, *id.* at 1262.

There is also no federal question jurisdiction under *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mftg.*, 545 U.S. 308 (2005), because no substantial issue of federal law is necessarily raised by the State's state-law causes of action. Appellants "never identify what federal question is a 'necessary element' for any of [Delaware's] state-law claims," *Baltimore IV*, 2022 WL 1039685 at *12, and instead "suggest that [Delaware's] state-law claim[s] implicat[e] a variety of 'federal interests,' including energy policy, national security, and foreign policy," *Oakland*, 969 F.3d at 906–07, which is insufficient to confer federal question jurisdiction. "If these federal issues are raised, it will be by the [Appellants] as potential defenses, which cannot create a basis for removal." *Boulder III*, 25 F.4th at 1267. No federal issue here is substantial to the federal system as a whole, moreover, because "[a]

prerequisite to establish a case as having importance 'to the federal system as a whole' is to identify a concrete federal law or regulation that the case definitively implicates, which [Appellants] have neglected to do." *Id.* at 1268.

2. Second, Delaware's claims are not removable under the federal officer removal statute, 28 U.S.C. § 1442, because Appellants have not shown they engaged in any conduct at the behest of a federal superior that is in any way related to the State's claims. Delaware has disclaimed injuries arising from federal land or direct sales to the government, and the remaining relationships Appellants identify are "arm's-length business arrangement[s] with the federal government," *San Mateo*, 960 F.3d at 600, which do not demonstrate the degree of federal guidance, supervision, and control that constitutes "acting under" a federal officer within the meaning of the statute. Moreover, "the relationship between [Delaware's] claims and any federal authority over a portion of certain [Appellants'] production and sale of fossil-fuel products is too tenuous to support removal under § 1442." *Baltimore IV*, 2022 WL 1039685 at *32. Defendants have also not adequately alleged any colorable federal defense available to them.

3. Third, Delaware's claims are not removable under OCSLA because they do not "aris[e] out of, or in connection with ... any operation conducted on" the OCS. *See* 43 U.S.C. § 1349(b)(1). The activities some Appellants engaged in on the OCS are distantly attenuated from the State's claims, and Appellants have failed to show that Delaware would not have been injured but for those operations. *See Baltimore IV*, 2022 WL 1039685 at *19–*22; *Boulder III*, 25 F.4th at 1272–75.

Standard of Review: Whether a district court has subject-matter jurisdiction over a case, "including a court's decision to remand for a lack of jurisdiction," is reviewed de novo. *Papp v. Fore-Kast Sales Co.*, 842 F.3d 805, 810 (3d Cir. 2016).

ARGUMENT

I. Delaware's State-Law Claims Do Not Arise Under Federal Law Because They Are Not Completely Preempted by Any Statute and Do Not Satisfy *Grable*.

A civil action "arising under the Constitution, laws, or treaties of the United States" within the meaning of 28 U.S.C. § 1331 is removable from state to federal court under the general removal statute, 28 U.S.C. § 1441. The Supreme Court's "caselaw construing § 1331 was for many decades," however, "highly 'unruly,'" and the Supreme Court has

endeavored to clarify and simplify the applicable standard. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S.Ct. 1562, 1571 (2016). Today, courts must assess federal question jurisdiction over removed state-law claims by applying the well-pleaded complaint rule and its two exclusive exceptions: complete preemption and *Grable*.

Appellants badly confuse controlling precedent, and invite the Court to return to the "muddled backdrop" predating "what we now understand as the 'arising under' standard." *See Manning*, 136 S.Ct. at 1571. Appellants' novel assertion that "the constitutional structure itself" provides some alternative method to determine jurisdiction under 28 U.S.C. § 1331 such that Delaware's claims "can arise only under federal common law, not any individual state's law," AOB 15, is meritless. *See* Part 1.a, *infra*. Delaware pleads no federal claims, and the state-law claims it *does* plead are not completely preempted by federal common law, *see* Part 1.b, and do not satisfy *Grable*, *see* Part 1.c.

a. Jurisdiction Under the General Removal Statute Must Be Resolved by Applying the Well-Pleaded Complaint Rule and its Two Narrow Exceptions: *Grable* and Complete Preemption.

For more than a century, the Supreme Court has applied a "jurisdictional framework governing removal of federal questions from

state into federal courts," whereby "a cause of action arises under federal law only when the plaintiff's well-pleaded complaint raises issues of federal law." *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987) (citations omitted). Thus, "a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution." *Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 6 (2003) (quoting *Louisville & Nashville R. Co. v. Mottley,* 211 U.S. 149, 152 (1908)); *Vaden v. Discover Bank*, 556 U.S. 49, 60 (2009) (same).

The well-pleaded complaint rule is a "powerful doctrine" that "severely limits the number of cases in which state law 'creates the cause of action' that may be initiated in or removed to federal district court." *Franchise Tax Bd. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 9–10 (1983). It "makes the plaintiff the master of the claim," such that plaintiffs may "avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). "A federal defense 'ordinarily does not appear on the face of the well-pleaded complaint, and, therefore, usually is insufficient to warrant removal to federal court.'" *Maglioli v. All. HC Holdings LLC*, 16 F.4th 393, 407

(3d Cir. 2021) (quoting *Dukes v. U.S. Healthcare, Inc.*, 57 F.3d 350, 353 (3d Cir. 1995)); *see also, e.g.*, *Caterpillar*, 482 U.S. at 393 (same).

To "bring some order" to lower courts' inconsistent application of the well-pleaded complaint rule, the Supreme Court in 2005 "condensed [its] prior cases" into a straightforward inquiry. *Gunn v. Minton*, 568 U.S. 251, 258 (2013). "[A] case can 'aris[e] under' federal law in two ways," namely if "federal law creates the cause of action asserted," or if it falls within the "'special and small category' of cases" that satisfy *Grable*'s four-part analysis. *Id.*; *see* Part 1.c, *infra*. The only other exception to the well-pleaded complaint rule (sometimes called a corollary) is the "complete preemption" doctrine, which "provides that a federal question *does* appear on the face of [a state-law] complaint when Congress 'so completely pre-empt[s] a particular area that any civil complaint raising [the] select group of claims is necessarily federal in character.'" *Maglioli*, 16 F.4th at 407 (quoting *Metro Life Ins.*, 481 U.S. at 63–64)).

Consistent with this precedent, the Ninth and Tenth Circuits recently held in analogous cases related to climate change that "there are *two* exceptions to the well-pleaded complaint rule" only, and affirmed orders granting remand. *See Boulder III*, 25 F.4th at 1255 (emphasis

added); *see Oakland*, 969 F.3d at 906. Remarkably, Appellants ignore those on-point decisions. They contend instead that Delaware's claims arise under federal law because "only federal law could empower a court to address injuries" related to climate change, no matter what the complaint says. *See* AOB 14. In other words, Appellants would have this Court disregard both the well-pleaded complaint rule and the *Grable* standard entirely.

Appellants' theory must be rejected, and the *Manning* case illustrates why. The state court plaintiff there brought no federal claims, but "couched its description" of its state securities claims "in terms suggesting that [the defendant] violated" an SEC regulation issued under the Securities Exchange Act. 136 S.Ct. at 1566–67. The Exchange Act grants exclusive federal jurisdiction over any case "brought to enforce any liability or duty created by [the statute] or the rules or regulations thereunder." 15 U.S.C. § 78aa(a). The defendant removed, arguing that whenever a complaint "explicitly or implicitly 'assert[s]' that 'the defendant breached an Exchange Act duty,'" it is within exclusive federal jurisdiction. 136 S.Ct. at 1568.

The Supreme Court disagreed, explaining that the *Grable* analysis "well captures [those] classes of suits 'brought to enforce'" an Exchange Act duty. *Id.* at 1569. The Court stressed that it had "time and again declined to construe federal jurisdictional statutes more expansively than their language, most fairly read, requires," based on "the need to give due regard to ... the power of the States to provide for the determination of controversies in their courts." *Id.* at 1573 (cleaned up). The Court acknowledged that state courts could properly consider Exchange Act questions arising as defenses anyway, and held it was "less troubling for a state court to consider such an issue than to lose all ability to adjudicate a suit raising only state-law causes of action." *Id.* at 1574. Those principles apply here. Like *Oakland* and *Boulder III*, however, Appellants ignore *Manning* entirely.

The cases Appellants *do* cite, instead of *Oakland*, *Boulder III*, or *Manning*, all either applied an outdated articulation of the *Grable* test, applied complete preemption, or did not analyze removal jurisdiction at all. *See* AOB 24–26. None of them held that federal common law creates a free-floating basis for jurisdiction, and they provide no guidance here. In *In re Otter Tail Power Co.*, 116 F.3d 1207 (8th Cir. 1997), AOB 25, the

Eighth Circuit applied a test that has since been synthesized into *Grable*. *See* 116 F.3d at 1213 (jurisdiction exists where "the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law"). So did the Second Circuit in *Republic of Philippines v. Marcos*, 806 F.2d 344, 354 (2d Cir. 1986) (federal jurisdiction present where state law claims "rais[ed], as a necessary element, the [federal common law] question whether to honor the request of a foreign government"); *see* AOB 22, 25. Finally, in *Torres v. Southern Peru Copper Corp.*, "foreign policy issues" were directly raised because "the Peruvian government ha[d] participated substantially in the activities for which [the defendant was] being sued," and Peru "vigorous[ly]" "oppos[ed] the action" and "maintain[ed] that the litigation implicate[d] some of its most vital interests and, hence, *will* affect its relations with the United States." 113 F.3d 540, 542–43 (5th Cir. 1997) (emphasis added). Nothing like those facts exist here.[2] In *Otter Tail*, *Torres*, and *Marcos*, the plaintiff's

[2] The Fourth and Tenth Circuits in *Baltimore IV* and *Boulder III* rejected "foreign affairs" as a basis for *Grable* jurisdiction because, like Appellants here, the defendants in those cases neither identified a specific policy or relationship that was implicated, nor explained how it conflicted with the plaintiff's claims. *See Boulder III*, 25 F.4th at 1265–66; *Baltimore IV*, 2022 WL 1039685, at *14–*15.

prima facie case presented a question of federal law. Each case predates *Grable*, moreover, and today would be resolved under that standard.

None of Appellants' other cases fare any better. *United States v. Swiss American Bank, Ltd.*, 191 F.3d 30 (1st Cir. 1999), AOB 23, was filed in federal court and subject-matter jurisdiction existed because the United States was the plaintiff. *See* 191 F.3d at 35; 28 U.S.C. § 1345. The *Sam L. Majors Jewelers v. ABX, Inc.* decision, AOB 24, is "necessarily limited" and inapposite here; it held only that a claim for property lost in interstate air shipping arises under federal common law based on "the historical availability of this common law remedy, and the statutory preservation of the remedy." 117 F.3d 922, 929 n.16 (5th Cir. 1997). In *Treiber & Straub, Inc. v. UPS, Inc.* 474 F.3d 379 (7th Cir. 2007), AOB 24, the plaintiff filed its complaint in federal court alleging both federal and state causes of action. *Treiber & Straub, Inc. v. United Parcel Serv., Inc.*, 2005 WL 2108081, at *1, *10–11 (E.D. Wis. 2005).

Similarly, the Fourth Circuit in *North Carolina v. Alcoa Power Generating, Inc.*, AOB 24–25, held that removal was proper because "the right that North Carolina s[ought] to vindicate—[title to a riverbed]—turn[ed] on construction of federal law," based on Supreme Court

precedent that state title to riverbeds "is conferred ... by the Constitution itself." 853 F.3d 140, 146–47 (4th Cir. 2017) (cleaned up). The Fourth Circuit distinguished *Alcoa* in *Baltimore IV*, moreover, because the defendants "d[id] not rely on any constitutional provision suggesting federal law applies to or governs Baltimore's claims" and "certainly [could not] point this Court to over 150 years of precedent recognizing the federal character" of claims like Baltimore's. 2022 WL 1039685, at *10. The same is true here.

None of Appellants' cases support their quest to expand federal jurisdiction. Appellants' arguments would mean, at most, that federal common law preempts Delaware's state law right to relief, which cannot create jurisdiction under the well-pleaded complaint rule. The district court carefully considered and rejected Appellants' reliance on these cases. *See* 1-JA-35–37.

b. Federal Common Law Does Not and Cannot Completely Preempt the State's Claims.

Delaware's claims neither arise under nor invoke federal common law. The various areas of federal concern Appellants identify are irrelevant to the State's Complaint. Even if Delaware's Complaint had any relationship to federal common law, that would at best provide

Appellants an ordinary preemption defense, which cannot support removal jurisdiction. Judicially crafted federal common law *per se* cannot wield complete preemptive force over state law.

The Second Circuit's decision in *New York* lends Appellants no support, both because subject-matter jurisdiction was not at issue there and because New York City's claims and theories of liability differ critically from the State's claims and theories. Even if *New York* is correctly decided, which Delaware does not concede, the Second Circuit viewed its decision as entirely *consistent* with the many decisions ordering remand in climate-related tort and consumer protection cases. The court "consider[ed] the [defendants'] *preemption defense* on its own terms, not under the heightened standard unique to the removability inquiry." *City of New York v. Chevron Corp.*, 993 F.3d 81, 94 (2d Cir. 2021) (emphasis added); *see also Baltimore IV*, 2022 WL 1039685 at *7 ("*City of New York* does not pertain to the issues before us" and was "in a completely different procedural posture."); *Boulder III*, 25 F.4th at 1262.[3]

[3] Appellants may argue a split of authority exists between the Second Circuit on the one hand, and the Fourth, Ninth, and Tenth Circuits on the other, regarding whether federal common law "controls" claims like Delaware's. But all those circuits expressly held there is no conflict

i. The Federal Common Law on Which Appellants Rely No Longer Exists, and There is No License to Craft New Federal Common Law Here.

Federal common law cannot provide a basis for federal question jurisdiction independent of *Grable* and complete preemption. *See* Part 1.a, *supra*. Even if it could, this case still would not be removable because it has nothing to do with any body of federal common law. The body of law on which Appellants expressly rely has been displaced by the Clean Air Act and "no longer exists." *See Boulder III*, 25 F.4th at 1259–60; *Baltimore*, *IV*, 2022 WL 1039685, at *8–*10. The Ninth Circuit in *Oakland* and the Fourth Circuit in *Baltimore IV* both held that the defendants failed to satisfy the requirements for crafting new federal common law, *see Oakland*, 969 F.3d at 906–07; *Baltimore IV*, 2022 WL 1039685 at *6–*8, as should this Court.

"Judicial lawmaking in the form of federal common law plays a necessarily modest role under a Constitution that vests the federal

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between *City of New York* and the "parade of recent opinions holding that state-law claims for public nuisance brought against fossil fuel producers do not arise under federal law." *City of New York*, 993 F.3d at 93. The Second Circuit stated that the "fleet of cases" holding "federal preemption does not give rise to a federal question for purposes of removal … does not conflict with our holding." *Id.* at 94.

government's 'legislative Powers' in Congress and reserves most other regulatory authority to the States." *Rodriguez v. FDIC*, 140 S.Ct. 713, 717 (2020). "The instances where [the Supreme Court] ha[s] created federal common law are few and restricted," *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963), and have "included admiralty disputes and certain controversies between States," *Rodriguez*, 140 S.Ct. at 717.

"[S]trict conditions must be satisfied" before a new area of federal common law may be recognized. *Id.* There must first be a "significant conflict" between state law and a "uniquely federal interest," *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507–08 (1988). The proponent of federal common law must show a "specific, concrete federal policy or interest," "as a precondition for recognition of a federal rule of decision." *O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 87, 88 (1994). "Unless and until that showing is made, there is no cause to displace state law, much less to lodge th[e] case in federal court." *Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 693 (2006). "[F]ailing to identify a significant conflict when requesting a court to create federal common law is 'fatal' to a party's position." *Baltimore IV*, 2022 WL 1039685, at *7 (quoting *O'Melveny*, 512 U.S. at 88).

Appellants chiefly rely on the federal common law of interstate pollution nuisance, which they say "govern[s] claims involving 'air and water in their ambient or interstate aspects.'" AOB 2 (quoting *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 421 (2011) ("*AEP*")). That argument misrepresents the express holding of *AEP*. The Supreme Court did not hold, as Appellants suggest, that federal common law "exclusively governs" claims like Delaware's, *see* AOB 13; it did the opposite. In *AEP*, the plaintiffs sued in federal court, alleging five electric power companies' greenhouse gas emissions violated the federal common law of interstate nuisance. 564 U.S. at 418. The Court concluded that "the Clean Air Act and the EPA actions it authorizes displace any federal common-law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired powerplants" because it was "plain that the Act 'speaks directly' to emissions of carbon dioxide from the defendants' plants." *Id.* at 424. The Court thus declined to entertain the "academic question whether, in the absence of the [CAA] ... , the plaintiffs could state a federal common-law claim for curtailment of greenhouse gas emissions because of their contribution to global warming." *Id.* at 423. Importantly, the Court continued, "the availability *vel non* of a state lawsuit depends, *inter alia,*

on the preemptive effect of the federal Act." *Id.* at 429. The Court reserved that separate question of whether the plaintiffs' state-law nuisance claims remained viable, "leav[ing] the matter open for consideration on remand." *Id.*

The Fourth Circuit in *Baltimore IV* and the Tenth Circuit in *Boulder III* analyzed *AEP* in detail, and both rejected Appellants' interpretation of it. *See* 2022 WL 1039685, at *9–*10; 25 F.4th at 1258–61. The *Baltimore IV* decision held that "[p]ublic nuisance claims involving interstate pollution, including issues about greenhouse-gas emissions, are nonexistent under federal common law because they are statutorily displaced. In other words, a federal statute is the legal source of those claims, and a federal common law remedy is unavailable." 2022 WL 1039685, at *9. The Fourth Circuit found that Appellants' argument "that removal is proper based on federal common law even when the federal common law claim has been deemed displaced, extinguished, and rendered null by the Supreme Court … defies logic." *Id.* at 10.

Similarly, the Tenth Circuit first held that "'[w]hen Congress has acted to occupy the entire field'—as it did through the CAA in regard to domestic greenhouse gas emissions—that action displaces any previously

available federal common law action.'" *Boulder III*, 25 F.4th at 1260 (quoting *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 857 (9th Cir. 2012)). "In other words, the federal common law of nuisance that formerly governed transboundary pollution suits *no longer exists* due to Congress's displacement of that law through the CAA." *Id.* "'Simply put,'" the Court concluded, "this case could 'not have been removed to federal court on the basis of federal common law that no longer exists.'" *Id.* (quoting *Cty. of San Mateo v. Chevron Corp.*, 294 Supp.3d 934, 297 (N.D. Cal. 2018)). Appellants' arguments here are the same, as is the result: there is no applicable federal common law.

Apart from the now-displaced common law, Appellants do not attempt to identify any significant conflict between Delaware law and any specific uniquely federal interest. They generically argue that Delaware may not "'impos[e] its regulatory policies on the entire Nation,'" because the "inherently interstate nature" of Delaware's claims "requires a uniform *national* rule of decision." AOB 15–16 (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585 (1996)). But "[t]he cases are many in which a person acting outside the state may be held responsible according to the law of the state for injurious consequences within it," *Young v. Masci*,

289 U.S. 253, 258–59 (1933), because "[a] state has an especial interest in exercising judicial jurisdiction over those who commit torts within its territory." *Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 776 (1984) (quotation omitted). By the same token, "[t]hat state common law might provide redress for harm caused by certain private actors, and thereby create remedies unavailable to a plaintiff through the federal legislative or regulatory process, is entirely unremarkable." *Boulder III*, 25 F.4th at 1267; *see also Baltimore IV*, 2022 WL 1039685, at *7 n.6 ("uniformity—in and of itself—is not always a federal interest"). There is no unique federal interest here, and no direct conflict between any federal interest and the state duties at issue.

Appellants' reasoning flows from the incorrect premise that Delaware seeks to regulate air pollution across the nation and globe. The State's actual theory is that Appellants caused climate change-related harms in Delaware through their deliberate misrepresentation of the climatic dangers of fossil fuels and their misleading marketing of those products. The State's case seeks to vindicate its core "interest in ensuring the accuracy of commercial information in the marketplace." *Edenfield v. Fane*, 507 U.S. 761, 769 (1993). It targets misconduct that falls within

fields of traditional state regulation, including "protection of consumers," *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 150 (1963); and "unfair business practices," *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989). And it redresses injuries within the State's purview: "the adverse effects of climate change." *Am. Fuel & Petrochem. Mfrs. v. O'Keeffe*, 903 F.3d 903, 913 (9th Cir. 2018). There is no uniquely federal interest here. The Court must honor the well-pleaded complaint rule and "take [Delaware] at its word when it claims that it 'does not seek to impose liability on Defendants for their direct emissions of greenhouse gases and does not seek to restrain Defendants from engaging in their business operations.'" *Baltimore IV*, 2022 WL 1039685, at *18 (citation omitted).

Appellants also rely on the rhetorical assertion that "[f]ederal law governs" "because [Delaware] seek[s] to recover damages for alleged physical effects of interstate and international greenhouse gas emissions." AOB 1. The Ninth Circuit rejected that exact argument in *Oakland*. There, as here, the defendants "suggest[ed] that the [plaintiffs]' state-law claim implicates a variety of 'federal interests,' including energy policy, national security, and foreign policy" but did not identify a

specific conflict. *Id.* at 906–07. The court observed that whether the defendants could be liable for public nuisance for harms related to climate change was "no doubt an important policy question, but it does not raise a substantial question of federal law for the purpose of determining whether there is jurisdiction under § 1331." *Id.* at 907.

The Fourth Circuit also rejected identical arguments in *Baltimore IV*, holding that failure to identify a specific conflict with any federal interest was "fatal." 2022 WL 1039685, at *7. The defendants there relied on the same purported "uniquely federal interests" that Appellants assert here: "(1) the control of interstate pollution; (2) energy independence; and (3) multilateral treaties." *See id.* at *7; *compare* AOB 14–16 (interstate pollution); AOB 16–21 (international emissions); AOB 21–22 (foreign affairs). But Baltimore "d[id] not propose a new federal cause of action, never allege[d] an existing federal common law claim, and only br[ought] claims originating under Maryland law." *Id.* at *5. Removal was therefore impermissible because the defendants "never establish[ed] a significant conflict between Baltimore's state-law claims—which purport to impose liability on Defendants for their marketing and use of their fossil-fuel products—and any federal interests." *Baltimore IV*, 2022 WL 1039685,

at *7. The defendants' failure to "point to any significant conflict existing between Maryland law and their purported federal interests," the court held, was a "complete abdication of their removal burden." 2022 WL 1039685, at *8.

The same is true here. Appellants' Opening Brief discusses their purported "uniquely federal interests" at some length, AOB 14–22, but the word "conflict" does not appear in the brief. Appellants' "failure to argue a 'significant conflict' between [Delaware's] causes of action and its identified federal interests constitutes a waiver," and also "substantively precludes the creation of federal common law." *Baltimore IV*, 2022 WL 1039685, at *7. This Court should join the Fourth, Ninth, and Tenth Circuits in denying Appellants "the unprecedented opportunity to obtain removal based on a nonexistent theory of federal common law when its viability is no longer open to discussion as a means of federal relief." *Id.* at *10 (citation omitted).

ii. Even if It Still Existed, the Federal Common Law of Interstate Air Pollution Nuisance Could Not Have Complete Preemptive Force.

The complete preemption doctrine provides a "narrow exception to the well-pleaded complaint rule for instances where Congress has

expressed its intent to 'completely pre-empt' a particular area of law such that any claim that falls within this area is 'necessarily federal in character.'" *In re U.S. Healthcare, Inc.*, 193 F.3d 151, 160 (3d Cir. 1999). "Removal is proper," however, "only if [a] federal statute 'wholly displaces the state-law cause of action,'" and both "'provide[s] the exclusive cause of action for the claim asserted and also set[s] forth procedures and remedies governing that cause of action.'" *Magliolo*, 16 F.4th at 407 (quoting *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003)).

Because of the high threshold to establish Congress's intent to entirely displace state law, "[c]omplete preemption is rare. The Supreme Court has recognized only three completely preemptive statutes: the Employee Retirement Income Security Act ('ERISA'), the Labor Management Relations Act ('LMRA'), and the National Bank Act." *Id.* at 408. And "the Supreme Court has only applied complete preemption in the context of federal statutes, not federal common law." *Baltimore IV*, 2022 WL 1039685, at *9 n.8. Appellants do not argue that any statute completely preempts the State's claims. They say instead that Delaware's claims "are inherently and exclusively federal in nature, and therefore are removable" because they "involve[e] interstate pollution." AOB 11.

Both the Fourth Circuit in *Baltimore IV* and the Tenth Circuit in *Boulder III* rejected that exact argument. *See Baltimore IV*, 2022 WL 1039685, at *9 n.8; *Boulder III*, 25 F.4th at 1261–62.

The Tenth Circuit's analysis is illustrative: the defendants argued that "despite stating only state-law claims, it is nonetheless clear from the face of the [plaintiffs'] complaint that 'federal common law supplies the rule of decision for th[e]se claims'" because they related to climate change and purportedly to interstate pollution. *Boulder III*, 25 F.4th at 1261. But "federal common law is created by the judiciary—not Congress," and thus "Congress has not 'clearly manifested an intent' that the federal common law for transboundary pollution will completely preempt state law." *Id.* at 1262. "Therefore, the federal common law for transboundary pollution [could] not *completely* preempt" the plaintiffs' claims. *Id.* Appellants' arguments here are identical, and similarly fail.

This Court rejected arguments analogous to Appellants' just last year, moreover, in *Maglioli*. The plaintiffs there brought claims in state court under Pennsylvania law, alleging that nursing homes "acted negligently in handling the COVID-19 pandemic, causing the residents' deaths." *Maglioli*, 16 F.4th at 407. The nursing homes removed, arguing

in part that the plaintiffs' claims were completely preempted by the Public Readiness and Emergency Preparedness Act, 42 U.S.C. §§ 247d-6d, 247d-6e ("PREP Act"), which immunizes "certain covered individuals—such as pharmacies and drug manufacturers—from lawsuits during a public-health emergency." 16 F.4th at 400. The PREP Act provides one exception, for "'an exclusive Federal cause of action'" for serious injuries or death caused by "'willful misconduct.'" *Id.* at 401 (quoting 42 U.S.C. § 247d-6d(d)(1)). The defendants "argue[d] that the PREP Act is so pervasive that the estates' state-law negligence claims are *really* federal claims … and are thus removable to federal court." *Id.* at 406.

The Court disagreed and affirmed remand. The Court held that the PREP Act "unambiguously creates an *exclusive* federal cause of action." *Id.* at 409. The court reasoned, however, that the plaintiffs' complaint "allege[d] negligence" under Pennsylvania law, "not willful misconduct" as defined in the PREP Act, *id.* at 410, and "complete preemption does not apply when federal law creates an entirely *different* cause of action from the state claims in the complaint," *id.* at 411. Summarizing, the Court stated:

> Where federal law displaces state law, courts must apply federal law. … What matters in this case is that the nursing homes raise federal preemption as a *defense* to state law. They argue that the PREP Act displaces the estates' state-law claims, and thus courts must apply the PREP Act rather than New Jersey law. Perhaps, but it is not for us to decide. … The fact that a defendant might ultimately prove that a plaintiff's claims are pre-empted does not establish that they are removable to federal court.

Id. at 406–07 (cleaned up).

Appellants' arguments here are indistinguishable from those rejected in *Boulder III*, *Baltimore IV*, and *Maglioli*. Appellants insist that the State's claims "are governed exclusively by federal law," AOB 6, and "federal law necessarily supplies the exclusive rules of decision and any causes of action," because "[i]nterstate pollution … is one such area where federal law alone necessarily governs," *id.* at 15. This is all euphemism describing an ordinary preemption defense. The district court correctly held that Appellants' "repeated refrains that federal common law 'governs' or 'exclusively governs' the issues underlying Plaintiff's state-law claims are simply veiled—and nonmeritorious, for purposes of removal—preemption arguments." 1-JA-35.

Appellants' last assertion, that this case arises under federal common law because it implicates "international policy on climate change

and relations with foreign nations," AOB 21, is also at best an ordinary preemption defense that multiple courts have rejected. "Under the foreign[-]affairs doctrine, state laws that intrude on this exclusively federal power are [constitutionally] preempted" through field or conflict preemption, "because the power to conduct international affairs is solely vested with the federal government, not the States." *Baltimore IV*, 2022 WL 1039685, at *14 (citation omitted); *see generally*, *e.g.*, *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000). But Appellants "do not identify any express foreign policy from the federal government that conflicts with [Delaware's] state-law claims," and "have not provided [the court] with even one decision … showing how any of [Delaware's] state-law claims entail foreign relations." *Baltimore IV*, 2022 WL 1039685, at *15. The most Appellants say is that "the Nation's energy security … is an essential aspect of national-security policy," citing no particular policy, treaty, or anything else. AOB 21 & n.1. In any event, "[b]ecause such political judgments are not within the competence of either state or federal courts," there is "no support for the proposition that federal courts are better equipped than state courts to deal with cases raising such concerns." *Patrickson v. Dole Food Co.*, 251 F.3d 795, 804 (9th Cir. 2001)

(reversing denial of remand to state court).

c. The "Artful Pleading Doctrine" is Coextensive with Complete Preemption and Does Not Provide an Independent Exception to the Well-Pleaded Complaint Rule.

Resisting the on-point authority discussed above, Appellants contend that they are not really making either an ordinary preemption or complete preemption argument. Instead, they say, they rely on "an 'independent corollary' of the well-pleaded complaint rule," described in *Franchise Tax Board*, called the artful pleading doctrine. AOB 25 (quoting *Franchise Tax Bd.*, 463 U.S. at 22). But the overwhelming weight of authority holds the artful pleading doctrine is just a different name for the complete preemption doctrine. It is not a free-floating method by which federal judges squint at a plaintiff's state-law claims until they become federal. Delaware's claims are not completely preempted, and thus not "artfully pleaded."

i. This Court Has Already Held That "Artful Pleading" is Not an Independent Ground for Jurisdiction.

This Court has repeatedly held that complete preemption and artful pleading are synonymous. The "independent corollary of the well-pleaded complaint rule" that is "referred to in *Franchise Tax Board,* i.e.

where the state claim pleaded is 'really one' of federal law," "has been referred to elsewhere as the 'artful pleading' doctrine." *United Jersey Banks v. Parell*, 783 F.2d 360, 367 (3d Cir. 1986). Therefore, "the only state claims that are 'really' federal claims and thus removable to federal court, are those that are preempted completely by federal law." *Goepel v. Nat'l Postal Mail Handlers Union, a Div. of LIUNA*, 36 F.3d 306, 311–12 (3d Cir. 1994) (citation omitted); *see also id.* at 310 n.5 ("This same principle has been referred to elsewhere as the 'artful pleading' doctrine." (quoting *United Jersey Banks v. Parell*, 783 F.2d at 367)). Appellants have no convincing response.

The cases Appellants cite for the proposition that the Court must "examine claims to determine the 'gravamen' of a complaint," AOB 27, are all inapposite. The phrase "well-pleaded complaint" does not appear in any of them, and they do not stand for an exception to that rule. In *Estate of Campbell v. South Jersey Medical Center*, 732 F. App'x 113, 116 (3d Cir. 2018), the defendant removed pursuant to 42 U.S.C. § 233(l)(2). That statute allows a narrow class of federally funded medical facilities to remove certain claims against them "for a hearing and determination 'as to the appropriate forum or procedure for the assertion of the claim

for damages.'" *Id.* (quoting 42 U.S.C. § 233(l)(2)). The Court there did not address any other basis for jurisdiction, and *affirmed remand to state court*, which the district court determined was the appropriate forum for the dispute. *See id.* at 117–18. *Estate of Campbell* does not discuss or cite 28 U.S.C. § 1441 or 1331, or consider federal question jurisdiction.

Appellants' answer is that this Court's decision in *Goepel* is not binding, because it "involved an allegedly preemptive federal *statute*" rather than federal common law. AOB 29. And anyway, they say, "the rationale behind applying the artful-pleading doctrine in the complete-preemption and federal-common-law contexts is the same," so presumably all the cases holding otherwise are wrong. *Id.* at 30. That is obviously incorrect; the complete preemption doctrine exists to vindicate "*Congress's* clear intent 'to completely pre-empt a particular area of law'" and move disputes in that area into federal court. *See Metro. Edison Co. v. Pennsylvania Pub. Util. Comm'n*, 767 F.3d 335, 363 (3d Cir. 2014) (emphasis added) (quoting *In re U.S. Healthcare, Inc.*, 193 F.3d at 160). Appellants' theory ignores congressional intent entirely, and invites federal judges to engage in a freewheeling inquiry into what a plaintiff's

claims "really" are. Respect for federalism and the separation of powers will not tolerate that result.

ii. Supreme Court and Other Circuits' Decisions Likewise Hold That "Artful Pleading" is Another Name for Complete Preemption.

The Supreme Court in *Manning* rejected the same appeal to "artful pleading" untethered from complete preemption that Appellants raise here. The defendant in *Manning* urged that even where *Grable* does not apply, "a judge should go behind the face of a complaint to determine whether it is the product of 'artful pleading.'" 136 S.Ct. at 1575. The Court did not mince words, stating that it "ha[d] no idea how a court would make that judgment," and that such an amorphous but exacting standard would be "excruciating for courts to police." *Id.* Courts should instead apply the "familiar" arising under standard clarified in *Grable*. *Id.* at 1574–75.

The Tenth Circuit reached the same conclusion in *Boulder III*: "Complete preemption is a term of art for an exception (or an independent corollary) to the well-pleaded complaint rule. Sometimes complete preemption is also known as artful pleading, [and] [t]he Supreme Court treats the 'artful pleading' and 'complete preemption' doctrines as

indistinct." *Boulder III*, 25 F.4th at 1256 (citations omitted).[4] *See also Oakland*, 969 F.3d at 905 ("A second exception to the well-pleaded-complaint rule is referred to as the artful-pleading doctrine. This doctrine allows removal where federal law completely preempts a plaintiff's state-law claim." (cleaned up)); *Baltimore IV*, 2022 WL 1039685, at *16. The majority of circuits are in accord, and none have held that the two doctrines operate independently.[5]

Appellants' discussion of *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27 (2015), and *Fry v. Napoleon Cmty. Sch.*, 137 S.Ct. 743, 755

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[4] Appellants' reliance on the second footnote in *Federated Dep't Stores, Inc. v. Moitie*, is misplaced. *See* 452 U.S. 394, 397 n.2 (1981); AOB 26–27. The Supreme Court noted in *Rivet v. Regions Bank of Louisiana*, that "*Moitie*'s enigmatic footnote, … has caused considerable confusion in the circuit courts," and explained that the case did not create any exception "to the rule, fundamental under currently governing legislation, that a defendant cannot remove on the basis of a federal defense." 522 U.S. 470, 478 (1998). The courts in *Oakland*, *Boulder III*, and *Baltimore IV* all cited *Rivet* for the proposition that complete preemption and artful pleading are the same. *See Oakland*, 969 F.3d at 905; *Boulder III*, 25 F.4th at 1256; *Baltimore IV*, 2022 WL 1039685, at *4.

[5] *See, e.g.*, *Lawless v. Steward Health Care Sys., LLC*, 894 F.3d 9, 17 (1st Cir. 2018); *Bernhard v. Whitney Nat'l Bank*, 523 F.3d 546, 551 (5th Cir. 2008) ("[W]e have said that the artful pleading doctrine applies *only* where state law is subject to complete preemption."); *Blackburn v. Sundstrand Corp.*, 115 F.3d 493, 495 (7th Cir. 1997). Two circuits have suggested that the scope of the doctrine is not settled after *Rivet*. *See Ohio ex rel. Skaggs v. Brunner*, 629 F.3d 527, 532 (6th Cir. 2010); *Sullivan v. Am. Airlines, Inc.*, 424 F.3d 267, 272 n.4 (2d Cir. 2005).

(2017), is irrelevant. *Sachs* was filed in district court, and examined how courts should determine whether a plaintiff's case is "based upon a commercial activity carried on in the United States by [a] foreign state," and thus exempt from the sovereign immunity provisions of the Foreign Sovereign Immunity Act. 577 U.S. at 29 (quoting 28 U.S.C. § 1605(a)(2)). And *Fry*—also filed in federal district court—examined whether the plaintiff "s[ought] relief that is also available under" the Individuals with Disabilities Education Act, and was therefore first required to exhaust administrative remedies under that statute. 137 S.Ct. at 748, 751–52 (quoting 20 U.S.C. § 1415 (l)). Neither case involved removal jurisdiction, or the well-pleaded complaint rule, or federal question jurisdiction. Appellants' cases say nothing about federal question removal of state law claims. The "artful pleading" and "complete preemption" doctrines are the same, and are not satisfied here.

d. This Case Does Not Satisfy *Grable* Because No Substantial Issue of Federal Law is Necessarily Raised by Any of the State's Claims.

Appellants' arguments under *Grable* are largely unintelligible. As the district court held, the State's claims "do not 'necessarily raise' any question of federal law," and "[t]he federal interest issues cited by

Defendants do not provide 'an essential element' for any of [Delaware's] claims; nor does the vindication of rights asserted in [Delaware's] claims 'necessarily turn[] on some construction of federal law.'" 1-JA-39 (quoting *Manning v. Merrill Lynch Pierce Fenner & Smith*, Inc., 772 F.3d 158, 163 (3d Cir. 2014)). Even if any federal issues were necessary elements of the State's claims, they are not "substantial" to the federal system as a whole.

"Only a 'slim category' of cases satisfy the *Grable* test." *Manning*, 772 F.3d at 163 (quoting *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 701 (2006)). A state law claim arises under federal law for *Grable* purposes "if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Id.*

Appellants begin by misstating the first step in the *Grable* analysis and trying to disguise a preemption defense in *Grable* cloth. They offer that "[t]he Court must determine whether Plaintiff 's claims are *governed by* federal law," namely federal common law, "because, if so, they are removable under *Grable*." AOB 32 (emphasis added). Appellants provide no citation for that proposition because that is not what *Grable* says. The

rule is that "[f]or a federal issue to be necessarily raised" under *Grable*, "'vindication of a right under state law [must] necessarily turn[ ] on some construction of federal law.'" *Manning*, 772 F.3d at 163 (quoting *Franchise Tax Bd.*, 463 U.S. at 9). Appellants do not argue Delaware has asserted state law claims with necessary prima facie federal law elements—they say Delaware *cannot assert* state law claims because "federal law provides the exclusive rule of decision for those claims." AOB 11. That is the line of reasoning this Court rejected in *Maglioli*. The nursing home defendants there "argue[d] that the PREP Act displaces the estates' state-law claims, and thus courts must apply the PREP Act rather than New Jersey law," which could not satisfy *Grable* because it only "raise[d] federal preemption as a *defense* to state law." *Maglioli*, 16 F.4th at 407. Appellants' assertion that federal common law "governs" is the same, and fails for the same reason.

Appellants' secondary argument, that Delaware's claims necessarily raise a federal issue under *Grable* because "the First Amendment injects affirmative federal-law elements into the plaintiff's cause of action," is bizarre. AOB 33. Appellants note that "common-law speech torts" are burdened by the First Amendment, such that in some

circumstances it is the plaintiff's burden to prove "factual falsity, actual malice, and proof of causation of actual damages." AOB 33 (citing *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 774–76 (1986)). But if that were enough to satisfy *Grable*, *every* defamation suit filed by a public figure in *every* state court would be removable under § 1441 because "the Constitution 'prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice."'" *See Hepps*, 475 U.S. at 773 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964)). Worse yet, because "[t]he well-pleaded complaint rule applies to the original jurisdiction of the district courts as well as to their removal jurisdiction," *Franchise Tax Bd.*, 463 U.S. at 10 n.9 (citations omitted), Appellants' theory would mean any plaintiff could lodge state-law defamation claims in federal district court against non-diverse defendants, asserting federal question jurisdiction. That cannot be correct, and Appellants' cases show it is not.[6] In any event, Delaware has

[6] *Hepps* was litigated in the state court system and reviewed by the Supreme Court on appeal from the Pennsylvania Supreme Court. *See id.* at 770–71. In *Ortiz v. Univ. of Med. & Dentistry of N.J.*, 2009 WL 737046 (D.N.J. Mar. 18, 2009), removal was proper because the plaintiff's state-

not pleaded any "common-law speech torts" like defamation, and Appellants cite no authority holding that any of Delaware's causes of action incorporate affirmative First Amendment elements. Whatever First Amendment rights Appellants might assert, they are federal defenses. *See* 1-JA-42.

Appellants have not shown any federal issue necessarily raised by the State's complaint, and the Court's inquiry can end there. Nevertheless, Appellants also cannot satisfy *Grable* because none of the federal issues they identify are "substantial." The substantiality inquiry looks to the importance of a federal issue "to the federal system as a whole." *Gunn*, 568 U.S. at 260. "An issue has such importance when it raises substantial questions as to the interpretation or validity of a federal statute, or when it challenges the functioning of a federal agency or program." *Oakland*, 969 F.3d at 905 (citation omitted). A question may also be "substantial" when it presents "a 'pure issue of law,' that directly draws into question 'the constitutional validity of an act of Congress,' or challenges the actions of a federal agency, and a ruling on the issue is

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law civil rights complaint alleged that the *defendant* violated the *plaintiff's* free speech rights, not because the complaint somehow implicated the First Amendment rights of the defendant. *Id.* at *3, *5.

'both dispositive of the case and would be controlling in numerous other cases.'" *Id.* (citations omitted). "By contrast, a federal issue is not substantial if it is 'fact-bound and situation-specific,'" "or raises only a hypothetical question unlikely to affect interpretations of federal law in the future." *Id.* (citations omitted).

None of the relevant indicia of substantiality are present here. Appellants vaguely aver that "among other things," Delaware's complaint "'directly implicates actions taken by the' federal government ... to address climate change," AOB 32, and that "First Amendment interests are at their apex" in a suit brought by a government entity, AOB 34. The district court rejected those arguments because they are "not consistent with a fair reading of [Delaware's] claims." 1-JA-40. Delaware's claims "do not challenge or seek to overturn any federal law, rule, or program, do not claim that Defendants are liable for violating any federal law, and neither directly nor indirectly seek any relief from any federal agency." *Id.* (cleaned up). Likewise, Delaware's complaint does not "seek to regulate global climate change," and "nothing in [Delaware's] complaint shows that Plaintiff seeks to replace [any] international negotiations and decisions from the representative branches of

government with a state-law solution." 1-JA-41. For these reasons too, the district court did not have subject-matter jurisdiction under *Grable*.

II. The District Court Correctly Held That Appellants Are Not Entitled to Removal Under the Federal Officer Removal Statute.

The First, Fourth, Ninth, and Tenth Circuits, plus ten district courts, have held in analogous cases that Appellants' federal officer arguments do not supply jurisdiction. Each of those courts held that Appellants' various proffered relationships to the government, including their leasing land on the OCS, their activities at the Elk Hills Petroleum Reserve, and their sales of fossil fuels to the government do not satisfy the statute's requirements. Appellants purport to introduce new "evidence," but as the District of Hawaii held when reviewing the same materials and granting remand, "they have merely rearranged the deckchairs." *Honolulu*, 2021 WL 531237, at *5.

The federal officer removal statute, 28 U.S.C. § 1442, permits removal if four requirements are met:

> (1) the defendant is a 'person' within the meaning of the statute; (2) the plaintiff's claims are based upon the defendant's conduct 'acting under' the United States, its agencies, or its officers; (3) the plaintiff's claims against the defendant are 'for, or relating to' an act under color of

> federal office; and (4) the defendant raises a colorable federal defense to the plaintiff's claims.

Papp v. Fore-Kast Sales Co., Inc., 842 F.3d 805, 812 (3d Cir. 2016) (brackets omitted).

Federal officer jurisdiction is absent here for at least reasons. First, Delaware has disclaimed relief for any injuries arising from Appellants' supplying fossil fuels directly to the federal government. Second, Appellants have not established that they were "acting under" the control of federal officers when they carried out any of the activities they rely on. Third, Appellants have not shown any connection between the activities they allegedly engaged in under federal supervision and the misconduct actually alleged in the complaint—a sophisticated campaign to deceive consumers and the public about the risks of fossil fuels. And fourth, Appellants have not sufficiently pleaded a colorable federal defense.

a. Appellants Have Not Acted Under a Federal Superior in Any Way Relevant to This Case.

None of Appellants' various proffered interactions with the federal government show an "acting under" relationship that would support removal. "The phrase 'acting under' is broad, and [this Court] construe[s] it liberally. But the phrase is not boundless." *Maglioli*, 16 F.4th at 404

(citation omitted). "[P]recedent and statutory purpose make clear that the private person's 'acting under' must involve an effort to *assist,* or to help *carry out,* the duties or tasks of the federal superior." *Watson v. Philip Morris Companies, Inc.*, 551 U.S. 142, 152 (2007). "That relationship typically involves 'subjection, guidance, or control,'" exerted by the government. *Id.* at 151. "Merely complying with federal laws and regulations is not 'acting under' a federal officer for purposes of federal-officer removal," and "[e]ven a firm subject to detailed regulations and whose 'activities are highly supervised and monitored' is not 'acting under' a federal officer." *Maglioli*, 16 F.4th at 404 (quoting *Watson*, 551 U.S. at 153).

i. Delaware Disclaimed Recovery for Injuries Arising from Federal Property and Sales to the Federal Government.

As an initial matter, the State has "expressly disclaimed any 'injuries arising on federal property and those that arose from Defendants' provision of fossil fuel products to the federal government.'" 1-JA-45 (quoting complaint). The district court correctly found that the disclaimer constitutes "a 'claim disclaimer' that 'expressly disclaim[s] the claims upon which federal officer removal was based,'" and that "'federal

courts have consistently granted motions to remand' based on 'claim disclaimers.'" 1-JA-46 & n. 19 (quoting *Dougherty v. A O Smith Corp.*, 2014 WL 3542243, at *10 (D. Del. July 16, 2014)); *see also Dougherty*, 2014 WL 3542243, at *14 (collecting cases). The Court may disregard Appellants' reliance on operations at federal reserves like Elk Hills, and "supplying large quantities of specialized jet fuel for the U.S. military." AOB 39. Nonetheless, those arguments do not support jurisdiction.

ii. Appellants' Oil and Gas Production on Federal Land and Purportedly "In Furtherance of Important Federal Interests" Does Not Establish an Acting Under Relationship.

Appellants primarily argue that their business activities over the years were important to vague, "long-term," federal policy objectives, like "reduc[ing] ... dependence of the United States on politically and economically unstable sources of foreign oil," AOB 48 (quoting 42 U.S.C. § 15927(b)(1)), and generally improving "domestic energy security and economic prosperity," AOB 51. Even if Appellants accurately describe the policy interests at stake, the fact that the government thinks an industry's activities are beneficial to the public does not mean every normal business activity of every member of the industry is "acting under" a federal officer.

The Eighth Circuit rejected similar arguments in *Buljic v. Tyson Foods, Inc.*, 22 F.4th 730 (8th Cir. 2021). The court in *Buljic* affirmed an order remanding wrongful death claims on behalf of workers who died from the COVID-19 virus, allegedly contracted at a Tyson meat processing facility. *Id.* at 734. Tyson argued that it was acting under a federal officer when it kept its factories open during the pandemic, based in part on federal policy statements and guidelines reflecting the critical national importance of the food supply chain. *Id.* at 734–36, 739–40. The Eighth Circuit rejected that position because "the fact that an industry is considered critical does not necessarily mean that every entity within it fulfills a basic governmental task or that workers within that industry are acting under the direction of federal officers." *Id.* at 740. "It cannot be," the court held, "that the federal government's mere designation of an industry as important—or even critical—is sufficient to federalize an entity's operations and confer federal jurisdiction." *Id.* Appellants' proffered relationships with the government fail for similar reasons.

OCS Leases. Appellants' contention that they have acted under federal officers by "fulfill[ing] a government function in exploring, extracting, and producing government-owned oil and gas from the

government-controlled OCS," AOB 49, is wrong, and every court that has considered the question has rejected Appellants' position. The OCS leases "do not obligate [Appellants] to make a product specially for the government's use," and "do not require [Appellants] to tailor fuel production to detailed government specifications aimed at satisfying pressing federal needs." *Boulder III*, 25 F.4th at 1253. Instead, "many of lease terms [sic] are mere iterations of the OCSLA's regulatory requirements," and compliance with federal law cannot create an acting under relationship. *Baltimore IV*, 2022 WL 1039685, at *29; *see also San Mateo,* 960 F.3d at 603 ("the lease requirements largely track legal requirements").

The leases are garden variety mineral rights leases, and "the willingness to lease federal property or mineral rights to a private entity for the entity's own commercial purposes, without more cannot be characterized as the type of assistance that is required to show that the private entity is 'acting under' a federal officer." *San Mateo*, 960 F.3d at 603 (quotation omitted). "By winning bids for leases to extract fossil fuels from federal land in exchange for royalty payments, [Appellants are] not

assisting the government with essential duties or tasks." *Boulder III*, 25 F.4th at 1253.

Appellants' related explanation that the OCS leases show the United States "elected to exploit those natural resources to produce fossil fuels" and "hire[d] third parties to perform that task on its behalf" is a flat misstatement. AOB 51–52. The government does not "hire" Appellants to produce fossil fuels under the OCS leases. *Appellants pay the government* rent and royalty fees under the terms of their respective leases for the right to extract fossil fuels, which they sell for profit. *See, e.g.*, 3-JA-481 (2017 form OCS lease granting lessees "the exclusive right and privilege to drill for, develop, and produce oil and gas resources"). Producing oil and gas to sell on the open market is not even "arguably ... 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 154.

Finally, Appellants' suggestion that "exploration and exploitation of the OCS was nearly nationalized" in the 1970s is false, and would be irrelevant if true. AOB 53. None of the bills on which Appellants rely would have "nationalized" OCS oil production. The principal proposal they highlight would have created an agency to "*measure* promptly the

extent of the publicly owned oil and gas resources on the OCS" to "be sure that bids for production rights on federally explored tracts are truly representative of the value of the resources." 3-JA-515, 516 (floor statement introducing Outer Continental Shelf Lands Act Amendment of 1975) (emphasis added). As the district court held, "[t]hese never-enacted bills provide no basis to find a congressional intent to create, directly or indirectly, a 'national oil company.'" 1-JA-52. Appellants' "contention that they are 'acting as agents' to achieve the same 'federal objective' ... as would a speculative, non-existent 'national oil company' lacks merit." *Id.*

Operation of the Elk Hills Reserve. Appellants' reliance on Standard Oil of California's status as operator of the Elk Hills reserve is misleading, and does not satisfy the "acting under" element. The Elk Hills Operating Agreement was another "arm's-length business arrangement with the Navy" that does not demonstrate subjection, guidance, or control. *See San Mateo*, 960 F.3d at 602.

Appellants emphasize that "in November 1974, the Navy directed Standard Oil to determine whether it was possible to produce 400,000 barrels per day [at Elk Hills] to meet the unfolding energy crisis." AOB

54 (citing 6-JA-1346). They neglect to mention their own exhibits showing that instead of complying with that request, Standard Oil less than two months later gave notice of its intent to terminate the agreement. 4-JA-550–51 (Jan. 7, 1975 letter "advis[ing] Navy that Standard wishes to terminate its position as Operator of the Elk Hills Reserve"). When "large-scale production efforts ... restarted in 1976," Standard's successor to the contract was the operator of the reserve. *See* 9-JA-2090. In response to what Appellants characterize as an order from the Navy compelling Standard Oil to act, Standard declined to do so and took its business elsewhere. That cannot reasonably be characterized as subjection, guidance, or control.

The record confirms that Standard's activities during the life of the Operating Agreement at Elk Hills were in fact *not* closely controlled, and that Standard's efforts amounted to the minimum work necessary to maintain the reserve in usable condition. Exhibits to Appellants' notice of removal, on which their purported experts' declarations rely, show that in 1976 Navy was in the "[f]inal steps to de-mothball more than 160 oil wells" at Elk Hills, 3-JA-471, and that the field "ha[d] been virtually untouched" since 1927, 3-JA-473. That "de-mothballing" work was not

accomplished by Standard, and Appellants' exhibits include a production manager's statement in 1977 that "[i]t took us several months just to get the equipment going again," and "[t]he gas processing plant was built in the early 1950's and had [ne]ver been used." 3-JA-468. Appellants have not met their burden to show Standard Oil "act[ed] under" the Navy at Elk Hills.

Strategic Petroleum Reserve. Lastly, Appellants' argument that they acted under federal officers "by supplying federally owned oil and managing the Strategic Petroleum Reserve" ("SPR"), AOB 55–56, again misrepresents the record. First, the government has never compelled Appellants to fill the Strategic Petroleum Reserve. Some Appellants have indeed "suppl[ied] federally owned oil" to the SPR; they have done so, however, either by selling oil to the government or making in-kind royalty payments on OCS leases. *See* 4-JA-553–54 (letter from Department of Interior to OCS operators, describing "program to use royalties in kind (RIK) to replenish the Strategic Petroleum Reserve (SPR)," stating "Delivery of the accurate volume of Royalty Oil ... in accordance with the terms of this letter will satisfy in full the Lessee's royalty obligation to the [government]"). The fact that lessees have at

times paid royalties in the form of crude oil that the United States then directs into the SPR does not change the result.

Second, Appellants imply that they act under the government when "the President calls for an emergency drawdown" from the SPR. AOB 55. But that authority is conferred by statute; the Secretary of Energy may "drawdown and sell petroleum products in the Reserve" if the President makes certain findings, 42 U.S.C. § 6241(a), (d)(1), and some Appellants' leases with the government state that certain facilities must operate "as a sales and distribution point in the event of [an SPR] drawdown," 2-JA-161–62. The Ninth Circuit in *San Mateo* rejected similar reliance on OCS lease terms giving the President a right of first refusal of OCS production in time of war, because those "lease requirements largely track legal requirements" that exist independent of any individual lease. *See San Mateo*, 960 F.3d at 603. "Mere compliance with the law," the Ninth Circuit held, "even if the laws are highly detailed, … does not show that the entity is 'acting under' a federal officer." *Id.* (cleaned up). The SPR drawdown provisions are no different.

b. Appellants' Various Relationships with the Federal Government Over Time Have Nothing to Do with Delaware's Allegations.

The conduct Appellants purportedly engaged in under federal officers also does not give rise to federal officer jurisdiction because it has nothing to do with the allegations in the complaint. Section 1442 requires that a plaintiff's claims arise from a defendant's conduct "for or relating to" acts performed under a federal officer. That standard is broad, and "it is sufficient for there to be a 'connection' or 'association' between the act in question and the federal office." *In re Commonwealth's Motion to Appoint Couns. Against or Directed to Def. Ass'n of Philadelphia*, 790 F.3d 457, 471 (3d Cir. 2015). The statute is not limitless, however, and a "connection [that] is too tenuous" will not support removal. *Cty. of Montgomery v. Atl. Richfield Co.*, 795 F. App'x 111, 113 (3d Cir. 2020). In analogous contexts, the Court has found the standard satisfied where a defendant "demonstrate[s] a *direct* connection or association between the federal government and the failure to warn" alleged in the plaintiff's complaint. *Papp*, 842 F.3d at 813 (emphasis added).

Appellants attempt to draw a connection between their conduct allegedly done under federal supervision by misconstruing Delaware's

complaint. They say Delaware's complaint is "unlike any other tort case throughout history," because the "alleged injuries necessarily arise from the total accumulation of *all* greenhouse gas emissions," and presumably therefore everything they have ever done "relates" to Delaware's claims. AOB 40; *see also id*. at 57. The district court's analysis rejected that mischaracterization:

> Plaintiff rightly explains that other activities cited by Defendants—including Defendants' activities during the Korean War, the two World Wars, and events occurring still earlier than these—are irrelevant for purposes of removal because Defendants' alleged disinformation campaign, which is what the instant case is actually about, started 'decades later.' … Defendants' contention relies on their characterization of Plaintiffs claims, which the Court has found to be incorrect. Plaintiffs' claims are … premised on the 'incremental impacts' caused by Defendants' purported disinformation and the resulting increased production and consumption of petroleum products.

1-JA-47 (citations omitted). The court noted that whether Appellants' OCS operations relate to Delaware's claims was a closer question, but held that they "d[o] not meet the 'acting under' requirement" and thus

could not support federal officer removal. 1-JA-49.[7] The district court was correct.

Numerous courts have rejected attempts to warp indistinguishable complaints. In *Baltimore IV*, the Fourth Circuit explained why Appellants' position is "too tenuous" to support removal:

> When read as a whole, the Complaint clearly seeks to challenge the promotion and sale of fossil-fuel products without warning and abetted by a sophisticated disinformation campaign. … Put differently, Baltimore does not merely allege that Defendants contributed to climate change and its attendant harms by producing and selling fossil-fuel products; it is the concealment and

[7] Appellants' reliance on *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286 (5th Cir. 2020) (en banc), and *Baker v. Atl. Richfield Co.*, 962 F.3d 937, 941 (7th Cir. 2020), is misplaced. In both cases, the plaintiff's injuries were closely, directly connected to the defendants' federally directed conduct. In *Latiolais*, the plaintiff alleged he was exposed to asbestos aboard a navy ship while it was being refurbished by a defendant, and the defendant failed to warn about asbestos' dangers. 951 F.3d at 289–90. Because the alleged negligence occurred as part of the very refurbishment activities under naval direction that allegedly caused the plaintiff's exposure, the plaintiff's complaint "relate[d] to an act under color of federal office." *Id.* at 296. In *Baker*, the plaintiffs alleged that their properties were contaminated by lead and other chemicals released from a nearby chemical plant, based on operations between 1910 and 1965. *Baker*, 962 F.3d at 940. Because "wartime production" of hazardous products at the government's behest during World War II "was a small, yet *significant*, portion of their relevant conduct" that directly caused the plaintiffs' injuries, the defendants had sufficiently demonstrated a connection. *Id.* at 945. Any relationship between the Complaint here and Appellants' conduct at federal direction is far more attenuated.

> misrepresentation of the products' known dangers—and simultaneous promotion of their unrestrained use—that allegedly drove consumption, and thus greenhouse gas pollution, and thus climate change.

2022 WL 1039685 at *31–32. Faced with similar arguments, the First Circuit reached the same result in *Rhode Island*:

> At first glance, these agreements may have the flavor of federal officer involvement in the oil companies' business, but that mirage only lasts until one remembers what Rhode Island is alleging in its lawsuit. Rhode Island is alleging the oil companies produced and sold oil and gas products in Rhode Island that were damaging the environment and engaged in a misinformation campaign about the harmful effects of their products on the earth's climate. …. There is simply no nexus between anything for which Rhode Island seeks damages and anything the oil companies allegedly did at the behest of a federal officer.

979 F.3d at 59–60. The result is the same here.

Finally, Appellants have not sufficiently alleged any colorable federal defense, since they "never take the time to set forth the elements of any of the cited defenses, let alone attempt to explain why the defenses are colorable." *Honolulu*, 2021 WL 531237, at *7. Appellants must do "something more than simply asserting a defense and the word 'colorable' in the same sentence," and they have not done so. *Id.*; *see also Minnesota*, 2021 WL 1215656, at *9.

III. The State's Claims Are Not Removable Under the Outer Continental Shelf Lands Act.

Appellants' OCSLA arguments are baseless. The Tenth Circuit in *Boulder III* and the Fourth Circuit in *Baltimore IV* rejected identical arguments on indistinguishable facts, and this Court should do the same. *See Baltimore IV*, 2022 WL 1039685, at *19–22; *Boulder III*, 25 F.4th at 1272–75.

a. OCSLA Removal Requires at Least a "But-For" Causal Relationship Between Appellants' Operations on the OCS and the State's Causes of Action.

"OCSLA defines a body of law uniquely applicable to the seabed, the subsoil, and fixed structures such as artificial island drilling rigs, all of which pertain to the outer continental shelf lands." *Superior Oil Co. v. Andrus*, 656 F.2d 33, 35 (3d Cir. 1981). OCSLA grants federal courts jurisdiction over cases "arising out of, or in connection with ... any operation conducted on the [OCS] which involves exploration, development, or production of the minerals" on the OCS. 43 U.S.C. § 1349(b)(1).

The phrase "arising out of, or in connection with" is not defined in the statute. This Circuit has not had occasion before to construe the reach of § 1349(b)(1), but the circuits are in accord that it requires a "but-for"

causal relationship between the defendants' operations and the plaintiff's claims. The *Baltimore IV* court considered the question on first impression and reached that conclusion. 2022 WL 1039685 at *20. Looking first to the statute's plain language, the court observed that "'arising out of' and 'in connection with' both require a causal relationship to determine if a given controversy actually 'result[s] (from)' or possesses a 'relationship in fact [with]' activities conducted on the OCS." *Id.* (citing dictionary definitions). The court noted that "[f]ederal courts interpreting 'arise out of, or in connection with' under the OCSLA have consistently determined that it imposes a but-for relationship," and the Fourth Circuit "decline[d] to disrupt this settled and sensible trend." *Id.* (collecting cases); *see also Boulder III*, 25 F.4th at 1272; *In re Deepwater Horizon*, 745 F.3d 157, 163 (5th Cir. 2014) ("[T]his court deems § 1349 to require only a 'but-for' connection.").

Appellants argue all these decisions are wrong and the statute must be read more capaciously, but do not offer an alternative definition of "arising out of" or "in connection with." AOB 62–65. "[A]s the Supreme Court has observed," however, "'[t]he phrase "in connection with" provides little guidance without a limiting principle.'" 1-JA-54 (quoting

Maracich v. Spears, 570 U.S. 48, 49 (2013)). The district court thus held that "the 'but for' requirement as construed by the Fifth Circuit," and now the Fourth and Tenth Circuits, "is a reasonable principle that limits the scope of the phrase." *See* 1-JA-54–55 (citing *In re Deepwater Horizon*, 745 F.3d at 163). This Court should "join [its] sister circuits and find that invoking jurisdiction under § 1349(b)(1) requires a but-for connection between a claimant's cause of action and operations on the OCS." *Baltimore IV*, 2022 WL 1039685, at *21.

b. Delaware's Claims Have Nothing to Do with Appellants' OCS Operations.

Applying the appropriate test, the Court "must ask if [Delaware's] injuries 'would not have occurred' but for [Appellants'] conduct on the OCS." *Baltimore IV*, 2022 WL 1039685 at *21. "[W]hile use of the but-for test implies a broad jurisdictional grant under § 1349, its use is not limitless because a blind application of this test would result in federal court jurisdiction over all state law claims even tangentially related to offshore oil production on the OCS." *Boulder III*, 25 F.4th at 1272–73 (cleaned up). "[A] 'mere connection' between a claimant's case and operations on the OCS is insufficient to show federal jurisdiction if the

relationship is 'too remote.'" *Baltimore IV*, 2022 WL 1039685 at *21 (quoting *In re Deepwater Horizon*, 745 F.3d at 163).

Boulder III and *Baltimore IV* held that indistinguishable allegations do not satisfy even OCSLA's but-for standard. The Fourth Circuit held that Baltimore's complaint focused on the defendants' alleged actions of "unlawfully marketing, promoting, and ultimately selling their fossil-fuel products, which includes their collective failure to warn the public of the known dangers associated with their fossil-fuel products," all of which "are far removed from their OCS activities." *Id.* at *21. "In other words, irrespective of Defendants' activities on the OCS, Baltimore's injuries still exist as a result of that distinct marketing conduct." *Id.* The Tenth Circuit held that while "[t]he Fifth Circuit has sanctioned OCSLA jurisdiction over disputes 'one step removed from the actual transfer of minerals to shore,' ... the relationship between Exxon's OCS operations and the Municipalities' claims is removed several steps beyond that." *Boulder III*, 25 F. 4th at 1274. The same is true here.

Nor will granting relief here threaten to impair recovery from the OCS. Far from enjoining Appellants' global production of fossil fuels, the State seeks to abate the nuisance Appellants have created in Delaware.

Such relief would not "threate[n] to impair the total recovery of the federally-owned minerals" from the OCS. *EP Operating Ltd. P'ship v. Placid Oil Co.*, 26 F.3d 563, 570 (5th Cir. 1994). As the Fourth Circuit held in *Baltimore IV*, moreover, "speculative and policy-laden arguments" resting on "a parade of horrible outcomes [that] will ensue if [the Court] decline[s] federal jurisdiction" cannot support OCSLA jurisdiction because "'a defendant cannot establish removal jurisdiction by mere speculation and conjecture, with unreasonable assumptions.'" *Baltimore IV*, 2022 WL 1039685 at *22 (quoting *Ibarra v. Manheim Invs., Inc.*, 775 F.3d 1193, 1197 (9th Cir. 2015)). Neither the facts nor the law support Appellants' "impaired recovery" argument.

CONCLUSION

The Court should affirm.

Respectfully submitted,

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Dated: April 14, 2022 /s/ *Victor M. Sher*

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CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system.

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