No. 22-1096

IN THE

United States Court of Appeals for the Third Circuit

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

Plaintiff-Appellee,

v.

BP AMERICA INC., BP PLC, CHEVRON CORP., CHEVRON USA INC., CONOCOPHILLIPS, CONOCOPHILLIPS CO., PHILLIPS 66, PHILLIPS 66 CO., EXXON MOBIL CORP., EXXONMOBIL OIL CORP., XTO ENERGY INC., HESS CORP., MARATHON OIL CORP., MARATHON PETROLEUM CORP., MARATHON PETROLEUM CO. LP, SPEEDWAY LLC, MURPHY OIL CORP., MURPHY USA INC., SHELL PLC, SHELL USA, INC., CITGO PETROLEUM CORP., 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)

DEFENDANTS-APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(Continued)

Page(s)

TABLE OF AUTHORITIES
(Continued)

Page(s)

TABLE OF AUTHORITIES
(Continued)

Statutes

Treatises

INTRODUCTION

Plaintiff has brought far-reaching claims in Delaware state court seeking to hold Defendants liable for the alleged physical effects of global climate change. Plaintiff seeks damages for injuries that it alleges are caused by the cumulative impact of emissions emanating from every State in the Nation and every country in the world since the Industrial Revolution. The question for this Court is what body of law governs these claims and which court must adjudicate them. Despite Plaintiff's attempt to plead the claims under state law, the Supreme Court's precedents make clear that these are federal interstate-pollution claims that belong in federal court.

The federal nature of Plaintiff's claims is evident from the allegations in the Complaint itself. Plaintiff defines its injuries as the "physical, environmental, and socioeconomic" consequences of "*global* warming," 3-JA-251¶8 (emphasis added), caused by "the normal use of [Defendants'] fossil fuel products," 3-JA-315¶58. Such interstate and international claims are necessarily and exclusively governed by federal law because "state law cannot be used" to address environmental harms in one State emanating from pollution beyond that State's borders. *City of*

Milwaukee v. Illinois & Michigan, 451 U.S. 304, 313 n.7 (1981) ("*Milwaukee II*"). As a matter of federal *constitutional structure*, Plaintiff's claims arise under federal law because they seek redress for harms caused by transboundary emissions. The "basic scheme of the Constitution … demands" that "federal common law" govern claims involving "air and water in their ambient or interstate aspects." *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 421 (2011) ("*AEP*").

Contrary to Plaintiff's contention, this federal-common-law argument is a choice-of-law question, not merely an ordinary preemption defense. As the Second Circuit recently held in assessing whether federal or state law should apply to putative state-law claims based on nearly identical allegations, "[s]uch a sprawling case is simply beyond the limits of state law," and the claims "must be brought under federal common law." *City of New York v. Chevron Corp.*, 993 F.3d 81, 92, 95 (2d Cir. 2021).

In an effort to avoid federal jurisdiction, Plaintiff asks this Court to ignore its alleged injuries and its requested relief, and instead focus *solely* on its allegations of "misrepresentation." While a plaintiff may be master of its complaint, it cannot compel the court to ignore the plain language

of the complaint. Rather, courts must examine the "gravamen" of a complaint, particularly what "actually injured" the plaintiff. *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 35 (2015). Here, the injury and damages for which Plaintiff seeks relief are the "physical, environmental, and socioeconomic" consequences of "global warming," 3-JA-251¶8, which, the Complaint alleges, are "overwhelmingly caused by anthropogenic greenhouse gas emissions," 3-JA-310–11¶48. Plaintiff cannot divest federal courts of jurisdiction by mislabeling inherently and exclusively federal claims and maintaining that such mischaracterizations are immune from judicial inquiry under the well-pleaded complaint rule.

Plaintiff does not dispute that its claims require proof that Defendants *caused* the alleged harms. And the complaint makes Defendants' alleged actions—the extraction, promotion, production, *and* sale of oil and gas—central to its causal theory. Plaintiff's alleged injuries could not, as a factual matter, have been caused solely by Defendants' alleged misrepresentations, as Plaintiff's Complaint readily acknowledges. *See, e.g.*, 3-JA-253–54¶12. In fact, the only purported role of the alleged misrepresentations that the Complaint identifies is to have "unduly inflated

the market for fossil fuel products." 3-JA-316¶58. There is no allegation—nor could there be—that the alleged misrepresentations by themselves caused the physical effects of global climate change for which Plaintiff seeks monetary relief. The production and sale of oil and gas—a substantial portion of which occurred at the direction of federal officers and on the Outer Continental Shelf ("OCS")—and resulting worldwide emissions are thus essential elements of the causal chain for each of Plaintiff's claims.

In sum, Plaintiff's claims all rest on alleged physical injuries that, as the Complaint puts it, are caused by "greenhouse gas emissions from [Defendants'] fossil fuel products." 3-JA-258¶21(c). As a result, there are ample bases for federal jurisdiction under federal common law, the *Grable* doctrine, the federal-officer-removal statute, and the Outer Continental Shelf Lands Act ("OCSLA").

ARGUMENT

I. Plaintiff's Claims Are Necessarily And Exclusively Governed By Federal Law And Are Therefore Removable.

Claims that are based on interstate and international emissions are necessarily and exclusively governed by federal law as a matter of constitutional structure. *See* Defendants' Opening Brief ("OB") at 15–16.

"[T]he basic scheme of the Constitution … demands" that "federal common law" govern disputes involving "air and water in their ambient or interstate aspects." *AEP*, 564 U.S. at 421; *see also Illinois v. City of Milwaukee*, 406 U.S. 91, 105 n.6 (1972) ("*Milwaukee I*") (the "basic interests of federalism … demand[]" this result). Thus, "our federal system does not permit [a] controversy [of this sort] to be resolved under state law," *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981); indeed, "state law cannot be used" at all. *Milwaukee II*, 451 U.S. at 313 n.7. Rather, the "rule of decision [must] be[] federal," and the claims thus necessarily "arise[] under federal law." *Milwaukee I*, 406 U.S. at 100, 108 n.10 (quotation marks omitted).

Because claims seeking damages for injuries caused by interstate emissions are necessarily governed by and arise under federal law, they are also removable to federal court. Claims are removable if a plaintiff could have "filed its operative complaint in federal court," *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1748 (2019), and it is "well settled" that 28 U.S.C. § 1331's "grant of jurisdiction will support claims founded upon federal common law," *Nat'l Farmers Union Ins. Cos. v.*

Crow Tribe of Indians, 471 U.S. 845, 850 (1985) (quotation marks omitted). Accordingly, Plaintiff's claims here, based on the alleged harms to Delaware arising from global climate change, are governed by federal law and removable. Plaintiff's arguments to the contrary are unavailing.

A. Federal Law Necessarily And Exclusively Governs Plaintiff's Claims.

This case concerns transboundary greenhouse gas emissions—which Plaintiff has pleaded is the "mechanism" causing its alleged physical-property injuries. 3-JA-310¶48. Plaintiff seeks damages for alleged harms caused by the cumulative impact of emissions emanating from every State in the Nation based on conduct occurring primarily "*outside* of Delaware." 3-JA-447¶243 (emphasis added). Despite their state-law labels, the Complaint's claims are—and can only be—federal. This is because the structure of the federal Constitution dictates that claims seeking redress for harms caused by transboundary emissions must arise under federal law.

As the Second Circuit explained, claims seeking redress for injuries caused by transboundary emissions "demand the existence of federal common law" because they span state and even national boundaries, and

"a federal rule of decision is necessary to protect uniquely federal interests." *New York*, 993 F.3d at 90. In that case, the Second Circuit held that New York City's "sprawling" claims, which—like Plaintiff's—sought "damages for the cumulative impact of conduct occurring simultaneously across just about every jurisdiction on the planet," were "simply beyond the limits of state law" and thus necessarily were "federal claims" that "must be brought under federal common law." *Id.* at 92, 95. The Second Circuit's choice-of-law holding directly applies here.

Plaintiff faults Defendants (and the Second Circuit) for failing to establish that "a new area of federal common law [should] be recognized." Resp.20, 26–27. But Defendants are not asking this Court to recognize a "new area" of federal common law. The Supreme Court long ago recognized this area as one in which federal law alone necessarily governs. Indeed, "[f]or over a century, a mostly unbroken string of cases has applied federal law to disputes involving interstate air … pollution." *New York*, 993 F.3d at 91. Defendants seek no expansion of federal common law; they simply ask the Court to apply the holdings of numerous Supreme Court cases stretching back decades.

Plaintiff misreads *AEP*, asserting that it left open the possibility that state-law claims like Plaintiff's may be viable. Resp.21–22. In fact, *AEP* reserved only the narrow question whether state-law claims under "the law of each State *where the defendants operate power plants*"—that is, each State where the source of the pollution was located—were viable. 564 U.S. at 429 (emphasis added). Here, however, the source of the pollution causing Plaintiff's alleged injuries is every State in the country and every country in the world, and Plaintiff is not suing under the law of any of them, but rather under its own state law. Plaintiff's claims are federal because the scheme of the Constitution categorically bars a State affected by interstate pollution from using its own law to "regulate the conduct of out-of-state sources." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 495 (1987).

Plaintiff also contends that federal common law cannot govern because it has been displaced by the Clean Air Act. Resp.19. But that argument confuses the jurisdictional choice-of-law question (which law governs?) with the separate merits question (is the claim viable?). Under this "two-part approach," courts must first determine the "source question"—whether, for jurisdictional purposes, "the source of the controlling

law [is] federal or state"; only then should the court answer the "substance question"—whether the plaintiff has stated a viable claim. *United States v. Swiss Am. Bank, Ltd.*, 191 F.3d 30, 42–45 (1st Cir. 1999). Whether a claim "arises under" federal law "turns on the resolution of the source question," not the "substance question." *Id*. at 44. And that "choice-of-law task is a federal task for federal courts." *Milwaukee II*, 451 U.S. at 349.

Thus, sometimes—as here—federal common law supplies the rule of decision for jurisdictional purposes, even when the party has no *remedy* under federal common law on the merits. "[I]t has long been understood that a claim can arise under federal law even if a court ultimately concludes that federal law does not provide a cause of action." *Al-Qarqani v. Chevron Corp*., 8 F.4th 1018, 1025 (9th Cir. 2021), *cert. pet. docketed*, No. 21-1153 (U.S. Feb. 22, 2022). A claim governed by federal common law arises under federal law for "jurisdictional purposes," even if that claim "may fail at a later stage." *Oneida Indian Nation v. Cnty. of Oneida*, 414 U.S. 661, 675 (1974). Courts should not "conflate[]" these distinct "jurisdiction" and "merits-related determination[s]." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006).

Nor does the displacement of any federal-common-law remedies here mean that Plaintiff can bring its claims under state law. The Second Circuit explained that such a "position is difficult to square with the fact that federal common law governed this issue in the first place" because, "where federal common law exists, it is because state law cannot be used." *New York*, 993 F.3d at 98 (quotation marks omitted). "[S]tate law does not suddenly become presumptively competent to address issues that demand a unified federal standard simply because Congress saw fit to displace a federal court-made standard with a legislative one." *Id.* Although the Clean Air Act may displace any remedy under federal common law, it does not displace the entire source of law altogether. *See id.* at 95 n.7. Statutory displacement cannot "give birth to new state-law claims," *id.* at 98, because our constitutional structure "does not permit the controversy to be resolved under state law," *Tex. Indus.*, 451 U.S. at 641. Indeed, the Second Circuit concluded that such an outcome is "too strange to seriously contemplate." *New York*, 993 F.3d at 98–99. Regardless of displacement, our constitutional structure requires "a federal rule of decision" for such claims. *Id.* at 90.

Plaintiff insists that its claims are based solely on alleged "misrepresentation," not greenhouse-gas emissions. Resp.24–25. But the Complaint's entire theory of harm and requested relief depend on interstate and international emissions. In fact, Plaintiff concedes that it seeks redress for injuries caused by the "adverse effects of climate change." Resp.25. Plaintiff seeks to impose liability for harms resulting from global climate change, which Plaintiff alleges are "overwhelmingly caused by anthropogenic greenhouse gas emissions," 3-JA-310–11¶48, arising from every State in our Nation and every country in the world. Plaintiff's effort to cast its claims solely in terms of marketing is merely "artful pleading" designed to focus on an "earlier" moment in the causal chain that ostensibly led to its injuries. *New York*, 993 F.3d at 97. But Plaintiff cannot "disavow[] any intent to address emissions" while "identifying such emissions as the singular source" of the alleged harm. *Id*. at 91.

B. Claims Governed By Federal Law Are Removable.

1. Because only federal law may be used to resolve Plaintiff's claims, the Complaint could have been filed in federal court and is removable. *Home Depot*, 139 S. Ct. at 1748.

Plaintiff resists this straightforward conclusion by asserting that a nominally state-law claim can arise under federal law only if *Grable* is satisfied or complete preemption applies. Resp.12. But numerous courts have held that federal common law provides a basis for federal jurisdiction and removal is proper whenever nominally state-law claims in fact arise under federal common law. OB.24–25 (citing *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922 (5th Cir. 1997); *North Carolina ex rel. N.C. Dep't of Admin. v. Alcoa Power Generating, Inc.*, 853 F.3d 140 (4th Cir. 2017); *In re Otter Tail Power Co.*, 116 F.3d 1207 (8th Cir. 1997); *Republic of Philippines v. Marcos*, 806 F.2d 344 (2d Cir. 1986)).

Plaintiff's attempts to distinguish these cases are unpersuasive. Plaintiff tries to characterize *Sam L. Majors* as applying only to "property lost in interstate air shipping." Resp.16. But the court explained that there was federal question jurisdiction "to support removal" because the claim "ar[ose] under federal common law." *Sam L. Majors*, 117 F.3d at 924, 928. As here, "national uniformity of a single rule is of vital importance." *Id.* at 929 n.16. Accordingly, *Sam L. Majors* confirms that if, as here, a cause of action nominally pleaded under state law necessarily

"arises under federal common law principles," then "removal is proper." *Id.* at 924.

Plaintiff characterizes *Otter Tail* and *Republic of Philippines* as applying a jurisdictional test for evaluating the removability of putative state-law claims that has been synthesized into *Grable*. Resp.14–16. Even accepting this characterization, both cases support the fact that Plaintiff's inherently federal claims are also removable under *Grable*. *See infra* at 20–21. In any event, the courts in both cases found that claims necessarily arising under federal law could have been filed in federal court initially, and thus are removable.

Plaintiff also argues that *Alcoa* is distinguishable because it relied on "constitutional provision[s]" and "over 150 years of precedent recognizing the federal character" of the claims. Resp.17. But this is Defendants' very argument: For over a century, the Supreme Court has held that federal constitutional principles dictate that federal law alone can govern claims asserting injury from interstate pollution. *See supra* at 4–5; OB.13–16.

2. Plaintiff next argues that, under the well-pleaded complaint rule, this Court must accept the state-law labels Plaintiff has affixed to

its Complaint. Resp.25. But an "independent corollary" of that rule is that "a plaintiff may not defeat removal by omitting to plead necessary federal questions." *Franchise Tax Bd. of the State of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 22 (1983). And here, federal common law necessarily supplies the rule of decision for Plaintiff's claims.

It therefore makes no difference that Plaintiff did not explicitly label its claims as federal. *Contra* Resp.9–10. What matters is "the substance of the plaintiff's claims," not "how the plaintiff pled the action." *Est. of Campbell by Campbell v. S. Jersey Med. Ctr.*, 732 F. App'x 113, 116 (3d Cir. 2018). "[C]ourts will not permit plaintiff to use artful pleading to close off defendant's right to a federal forum and occasionally the removal court will seek to determine whether the real nature of the claim is federal, regardless of plaintiff's characterization." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n.2 (1981) (cleaned up).[1]

[1] As Defendants explained, OB.26–27, *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 478 (1998), preserved this part of *Moitie*, *contra* Resp.37 n.4.

Plaintiff contends that courts should not undertake a rigorous inquiry into the federal nature of Plaintiff's nominally state-law claims. Resp.33. But both this Court and the Supreme Court have advised that such an inquiry is exactly what is required. Federal courts have an "independent duty" to ascertain their own jurisdiction. *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 426 F.3d 694, 702 (3d Cir. 2005). Accepting Plaintiff's passive approach, by contrast, would allow plaintiffs to illegitimately avoid—or in other cases illegitimately *enter*—federal court, simply by affixing labels. *See Sachs*, 577 U.S. at 35 (courts must examine the "gravamen" of a complaint by "zero[ing] in on the core of [the] suit," in particular what "actually injured" the plaintiff); *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 755 (2017) ("What matters is the crux—or, in legalspeak, the gravamen—of the plaintiff's complaint, setting aside any attempts at artful pleading.").

Plaintiff writes off *Sachs* and *Fry* as "irrelevant" because they did not involve removal jurisdiction. Resp.37–38. But that ignores the key lesson of the "gravamen" approach. In both cases, the Court wanted to prevent plaintiffs from manipulating their complaints to bypass the rules governing federal jurisdiction. *Fry*, 137 S. Ct. at 755. Here, too, Plaintiff

is attempting to assert claims that can arise only under federal law but avoid federal court through the simple ruse of labelling them as state-law claims. To allow Plaintiff to evade federal court in this manner "would elevate form over substance and would put a premium on artful labeling." *Jarbough v. Att'y Gen. of U.S.*, 483 F.3d 184, 189 (3d Cir. 2007).

Plaintiff also relies on *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562 (2016), Resp.36, but there the plaintiffs *could have* proceeded solely under state law; the question was whether plaintiffs *were* proceeding under state law. Here, by contrast, "state law cannot be used" at all given the inherently federal nature of interstate-pollution disputes. *Milwaukee II*, 451 U.S. at 313 n.7.

This same distinction demonstrates why Plaintiff is incorrect to characterize Defendants' argument as an "ordinary preemption" defense. Resp.17–18. An ordinary preemption defense, like the one asserted in *Maglioli v. All. HC Holdings LLC*, 16 F.4th 393, 406–07 (3d Cir. 2021); *see* Resp.30–31, would assert that a federal statute prevents the plaintiff from recovering under an otherwise viable state-law claim. Defendants do not invoke that argument as a basis for jurisdiction. Instead, Defend-

ants' position is that because Plaintiff's nominally state-law claims necessarily and exclusively arise under federal law, there is no state law to preempt. *See* OB.22–30. Rather than raising an ordinary preemption defense, Defendants' removal argument concerns the question of *which law* must govern Plaintiff's claims. While plaintiffs ordinarily can "avoid federal jurisdiction by exclusive reliance on state law," Resp.11, this case presents an unusual situation in which the claims asserted can only be governed by federal law. Thus, Plaintiff *cannot* rely on state law.

Finally, Plaintiff argues that "artful pleading" refers solely to complete preemption. Resp.33. But neither this Court nor the Supreme Court has ever held that "artful pleading" and "complete preemption" are synonymous. *See* 14C Wright & Miller, Fed. Prac. & Proc. Juris. § 3722.1 (Rev. 4th ed.) ("This view of the coextensiveness of the complete preemption and artful pleading doctrines has not been expressly embraced by most federal courts."). In fact, complete preemption is simply one application of the artful-pleading corollary, which arises *whenever* a plaintiff artfully pleads either to avoid or manufacture a federal claim.

For example, in *Campbell*, this Court affirmed removal where a plaintiff should have pleaded its claims under the Federal Tort Claims

Act, but instead asserted "a purely state law claim in state court." 732 F. App'x at 116. Without the power to remove such cases, "a defendant's ability to avail himself of a federal forum would be partly dependent on how the plaintiff pled the action, rather than the substance of the plaintiff's claims." *Id.* Plaintiff attempts to distinguish *Estate of Campell* because it does not use the words "well-pleaded complaint." Resp.34–35. But Plaintiff ignores this Court's admonition that courts must look beyond mere labels to the gravamen of the suit "to determine the appropriate forum"; plaintiffs cannot manipulate "federal question jurisdiction through 'artful pleading.'" 732 F. App'x at 116–17.

Plaintiff relies on cases that address whether Congress intended federal *statutes* to govern the claims at issue. *See* Resp.34–35 (citing *Goepel v. Nat'l Postal Mail Handlers Union*, 36 F.3d 306 (3d Cir. 1994)). But *Goepel* did not hold that claims arising under *federal common law* cannot provide subject-matter jurisdiction. Nor did *Goepel* consider a situation where the plaintiff's nominally state-law claims were actually governed exclusively by federal common law by virtue of the Constitution's structure. *See* 36 F.3d at 309 n.3 (the Court did "not reach the question of whether the Goepels could have stated a cause of action under federal

common law"). Instead, the Court considered a situation where the defendant "relied upon" a "statute." *Id.* at 311. In this case, federal law applies because our constitutional structure "does not permit the controversy to be resolved under state law." *Tex. Indus.*, 451 U.S. at 641.

Moreover, the rationale behind applying the artful-pleading doctrine in the complete-preemption and federal-common-law contexts is the same. The artful-pleading doctrine exists to prevent plaintiffs from avoiding a federal forum by disguising with state-law labels a claim that is "purely a creature of federal law." *Franchise Tax Bd.*, 463 U.S. at 23. That principle applies all the more here, given that federal common law alone governs Plaintiff's claims.

Plaintiff's narrow theory of federal jurisdiction would result in absurd consequences that are inconsistent with our federal system and common sense. Illinois could sue the City of Milwaukee in Illinois state court under Illinois law for interstate water pollution, and Milwaukee would be denied a federal forum to address the interstate dispute. *Contra Milwaukee II*, 451 U.S. 304. Or Connecticut could bring suit in its own state courts under Connecticut law against an out-of-state defendant

seeking to abate interstate air pollution, and the defendant could not remove to federal court. *Contra AEP*, 564 U.S. 410. Plaintiff's proposed rule is irreconcilable with the Supreme Court's rulings that these claims arise under federal law alone and thus are properly heard in federal court.

II. Plaintiff's Claims Raise Disputed And Substantial Federal Issues And Are Therefore Removable Under *Grable*.

Plaintiff's claims are also removable under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 313–14 (2005), because their resolution requires answering substantial, disputed federal questions under federal common law and the First Amendment.

Federal Common Law. As explained above, by virtue of our constitutional structure, federal law alone must provide the rules of decision for Plaintiff's claims, and therefore they are also independently removable under *Grable*. In fact, Plaintiff acknowledges (Resp.14, 16) the holdings of the Second, Fifth, and Eighth Circuits that when claims pleaded under state law are actually governed by federal common law, they are removable under a *Grable*-type analysis. This concession is dispositive. Although Plaintiff asserts that Defendants' argument on this point is

"unintelligible," Resp.38, Defendants' position is simple: Because federal law alone can govern Plaintiff's claims, those claims necessarily raise substantial federal questions under *Grable*. OB.24–26. Indeed, Plaintiff never explains how a claim that could only be federal in nature would *not* qualify as raising a substantial federal issue.

Plaintiff's only response is to repeat its erroneous assertion that Defendants have raised an ordinary-preemption defense. Resp.39–40. But federal common law does not merely *preempt* state law in cases such as this one; rather, under the structure of the Constitution, such matters are federal by their very nature. Beyond mischaracterizing Defendants' *Grable* argument as a disguised preemption defense, Plaintiff does not challenge the logic that, if its claims are governed by federal common law, then removal under *Grable* is proper. Nor could it. As Defendants previously explained, numerous courts have upheld removal over nominally state-law claims when "federal common law *alone* governs" those claims. *Battle v. Seibels Bruce Ins. Co.*, 288 F.3d 596, 607 (4th Cir. 2002); *see also* OB.31 (collecting cases).

First Amendment. Plaintiff's allegations of "disinformation campaign[s]," 3-JA-445–46¶239, necessarily include affirmative federal-law

elements required by the First Amendment, OB.33–34. Plaintiff protests that removing based upon such federal-law elements would result in "*every* defamation suit filed by a public figure in *every* state" being removable. Resp.41. But the speech in question must be "of public concern." *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986). Not every defamation suit merits removal, but climate change is uniquely "at the very center of this Nation's public discourse." *Nat'l Review, Inc. v. Mann*, 140 S. Ct. 344, 347–48 (2019) (Alito, J., dissenting from denial of certiorari).

III. Plaintiff's Claims Seek To Impose Liability And Damages For Acts Taken Under The Direction Of Federal Officers.

Congress empowered federal courts to hear any claim "for or relating to any act" taken under a federal officer's direction. 28 U.S.C. § 1442(a)(1). Here, Plaintiff seeks to impose liability and damages based on the alleged physical effects of Defendants' extraction, production, promotion, and sale of oil and gas, substantial portions of which were performed under the direction, supervision, and control of federal officers. *See* OB.35–61. On the record before this Court—which is far more robust than was the record in related cases previously decided by other courts of appeals—removal is proper.

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

Plaintiff contends that none of Defendants' activities on behalf of the federal government constitutes an "acting under" relationship sufficient for removal. Resp.45. Each of Plaintiff's objections falls short.

Plaintiff's Attempted Disclaimer. First, Plaintiff attempts to avoid federal court by disclaiming several of these activities, including Defendants' sale of specialized military fuels and their operation of federal reserves, like Elk Hills. Resp.46–47. But despite Plaintiff's attempt to artfully plead around federal jurisdiction, Plaintiff's alleged injuries necessarily arise from the total accumulation of all greenhouse-gas emissions, including those that flow from Defendants' activities on behalf of the federal government. Plaintiff offers no method to isolate its alleged climate-related injuries from federally directed conduct, and indeed, courts have found that there is no "realistic possibility" of doing so. *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 880 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012).

This Court should not credit Plaintiff's attempts to ignore whole swaths of its Complaint in order to gerrymander its claims. *See, e.g.*, *St. Charles Surgical Hosp., L.L.C. v. La. Health Serv. & Indem. Co.,* 990 F.3d

447, 451 (5th Cir. 2021) (disclaimers fail when they are "merely artful pleading designed to circumvent federal officer jurisdiction" (quotation marks omitted)).

As the Seventh Circuit explained in rejecting a similar disclaimer, when plaintiffs allege that a certain product "harmed them," they cannot "have it both ways" by "purport[ing] to disclaim" that their lawsuit includes the defendant's "manufacture of [that product] for the government." *Baker v. Atl. Richfield Co.*, 962 F.3d 937, 945 n.3 (7th Cir. 2020). Rather, "[t]his is just another example of a difficult causation question that a federal court should be the one to resolve." *Id.*; *see also* OB.46–47 (collecting cases). The same is true here. Plaintiff has not disclaimed any claim or amount of damages against any Defendant—it is seeking all damages it has purportedly suffered from the "adverse effects of climate change." Resp.25. And whether or not Defendants' activities undertaken at the direction of federal officers caused Plaintiff's alleged harm is a merits question that should be resolved in federal court. Whether the plaintiffs' "injuries flowed from the Companies' specific wartime produc-

tion for the federal government or from their more general manufacturing operations" are "merits questions that a federal court should decide." *Baker*, 962 F.3d at 944.

Specialized Fuels. Beyond its attempted disclaimer, Plaintiff does not even try to contest that Defendants' decades-long production and supply of specialized fuels for the military—items that the government needed and otherwise would have had to produce for itself—satisfies the "act[ing] under" prong. *See* OB.43–47. That is because Defendants produce and supply large quantities of highly specialized, non-commercial-grade fuels that must conform to precise governmental specifications to satisfy the unique and ever-changing requirements of the U.S. military's planes, ships, and other vehicles. *See* 9-JA-2092–03. The record is clear: "A substantial portion of the oil and gas used by the U.S. military are non-commercial grade fuels developed and produced by private parties, including Defendants here, under the oversight and direction of military officials," Amicus Br. of Gen. (Ret.) Richard B. Myers & Adm. (Ret.) Michael G. Mullen at 6, *City of Hoboken v. Chevron Corp.*, No. 21-2728, ECF No. 67 (3d Cir. Nov. 22, 2021); and by producing and supplying special-

ized fuels, Defendants filled a critical national need that the *Federal Government would have otherwise had to undertake itself*. Such an arrangement is the "archetypal case" of acting under federal-officer direction. *Papp v. Fore-Kast Sales Co.*, 842 F.3d 805, 813 (3d Cir. 2016). No court of appeals has yet addressed this basis for federal-officer jurisdiction.

OCS Leases. Plaintiff argues that Defendants' OCS leases are "garden[-]variety mineral rights leases" that require only regulatory compliance. Resp.49. But this contention is contradicted by the record: The federal officials who oversee and manage the OCS "provided direction to lessees regarding when and where they drilled, and at what price, in order to protect the correlative rights of the federal government as the resource owner and trustee" of federal lands. 9-JA-1997.

Plaintiff also contends that the government's oversight of the OCS constitutes nothing more than a standard set of "legal requirements." Resp.49. But the fact that contracts and regulations may govern a defendant's relationship with the federal government does not bar removal. If contracts precluded an acting-under relationship, federal contractors could *never* qualify for federal-officer removal. Moreover, the federal government routinely communicates its instructions in the form of official

regulations, but that does not negate federal-officer removal. *See, e.g.*, *In re Commonwealth's Mot. to Appoint Counsel Against or Directed to Def. Ass'n of Phila.*, 790 F.3d 457, 461, 469 (3d Cir. 2015).

This Court has held only that "regulation or compliance" alone is not *sufficient*; the defendant must also "show that their actions involve an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior." *Maglioli*, 16 F.4th at 404–05 (quotation marks omitted). And that is exactly what happened here. Because the federal government had "no prior experience or expertise" in extracting oil and gas, it chose to rely on private entities. 9-JA-1986. This is the definition of "acting under": "[I]n the absence of … contract[s] with … private firm[s], the Government itself would have had to" extract and produce Government-owned oil and gas. *Watson v. Philip Morris Cos.*, 551 U.S. 142, 154 (2007).

Elk Hills Reserve. Plaintiff argues that the federal government exerted little control over Standard Oil's operations at the Elk Hills Reserve. Resp.51–53. But the relationship between the Navy and Standard Oil went well beyond a federal-contractor relationship. The Navy "chose to operate the reserve through a contractor rather than with its own personnel." 2-JA-156. Standard Oil operated the Reserve for the Navy for

more than 30 years, and during this period, the Navy viewed Standard Oil as "in the employ of the Navy Department." 4-JA-531. Standard Oil's activities at Elk Hills taken under the Navy's direction "assist[ed]" and "help[ed] carry out[] the duties [and] tasks of the federal superior." *Watson*, 551 U.S. at 152 (emphasis omitted).

Strategic Petroleum Reserve. Plaintiff also downplays Defendants' operation of the Strategic Petroleum Reserve ("SPR"), arguing that it entailed only "selling oil to the government or making in-kind royalty payments on OCS leases." Resp.53. But Plaintiff misrepresents the structured relationship between the federal government and Defendants. The SPR subjects Defendants to the federal government's supervision and control, including in the event that the President calls for an emergency drawdown. 2-JA-162–63. Under that arrangement, Defendants had to fill the reserve and to draw down the supply whenever called upon by the government, OB.55–56, thereby helping "the [g]overnment to produce an item that it needs," *Baker*, 962 F.3d at 942.

B. Plaintiff's Claims Are "For Or Relating To" Defendants' Oil-And-Gas Activities Under Federal Officers.

Plaintiff argues that Defendants' conduct under federal officers has "*nothing to do* with the allegations in the complaint." Resp.55 (emphasis added). But the Complaint clearly and unequivocally alleges that "Defendants specifically created, contributed to, and/or assisted, and/or were a substantial contributing factor in … caus[ing] or exacerbat[ing] global warming and related consequences." 3-JA-451¶257. Plaintiff's position that Defendants' production and sales activities under the direction and control of federal officers has "nothing to do" with its claims is untenable.

Plaintiff resorts to arguing that there is no "*direct* connection or association between the federal government and the failure to warn." Resp.55 (quoting *Papp*, 842 F.3d at 813). But Congress has required federal courts to hear any claim "for or relating to any act" taken under a federal officer's direction. 28 U.S.C. § 1442(a)(1). Federal-officer removal is satisfied where, as here, there is a connection between "the plaintiff's *claims* against the defendant" and the defendant's actions "under color of federal office." *Golden v. N.J. Inst. of Tech.*, 934 F.3d 302, 309 (3d Cir. 2019) (emphasis added). A "claim" is not simply one component of the

alleged cause of action that the plaintiff has strategically chosen to highlight; a "claim" is a demand for "a legal remedy to which one asserts a right," *Vazquez v. TriAd Media Sols., Inc.*, 797 F. App'x 723, 726 (3d Cir. 2019) (quoting Black's Law Dictionary (10th ed. 2014)), "esp[ecially] the part of a complaint in a civil action specifying what relief the plaintiff asks for," Black's Law Dictionary (11th ed. 2019).

Here, Plaintiff's "claims" are pleas for compensatory damages and orders of abatement for alleged physical injuries stemming from the effects of global climate change allegedly caused by the production and combustion of fossil fuels. Production and combustion thus are necessary, central links in the causal chain leading to Plaintiff's asserted injuries—that is why Plaintiff included them in the Complaint. *See* OB.3–5, 57–60.

Plaintiff's own allegations thus demonstrate that the *sine qua non* in its claimed injuries is the greenhouse-gas emissions resulting from the production and combustion of petroleum products. *See* 3-JA-247–48¶2. Indeed, the district court below concluded that Defendants' satisfaction of the "for, or relating to" prong was a "close question," and it ruled solely

on the incorrect basis that Defendants did not "act[] under" federal officers in that activity. 1-JA-49. Once the Court considers the entire record here—unhindered by Plaintiff's attempted disclaimer—the propriety of federal officer removal becomes abundantly clear.

C. Defendants Satisfy The Colorable-Defense Prong.

Defendants have also raised several meritorious federal defenses: Plaintiff's claims are barred by the government-contractor defense, preemption, federal immunity, the foreign-affairs doctrine, and various constitutional provisions. *See* 2-JA-175–76.

Plaintiff objects that Defendants did not adequately *prove* their federal defenses. Resp.58. But a defendant "need not win his case before he can have it removed." *Willingham v. Morgan*, 395 U.S. 402, 407 (1969). In fact, "[o]ne of the primary purposes of the" federal-officer-removal statute is "to have [federal] defenses litigated in the federal courts." *Id.* Thus, a defense need only be "colorable," *Papp*, 842 F.3d at 812, and that standard is readily met here, OB.61–62.

IV. Plaintiff's Claims Are Connected To Defendants' Activities On The Outer Continental Shelf.

Plaintiff's claims are removable because they are connected with Defendants' extraction and production of oil and gas from the OCS, and

Plaintiff's requested relief could impair those OCS operations. Plaintiff insists that OCSLA "require[s] a causal relationship" and therefore Defendants must demonstrate a "but-for connection." Resp.60–61. Plaintiff misstates the standard for OCSLA removal and misapprehends how it applies here.

OCSLA establishes federal jurisdiction over actions "arising out of, or *in connection with* … any operation conducted on the [OCS]" involving the "exploration, development, or production of the [OCS] minerals" or "subsoil and seabed." 43 U.S.C. § 1349(b)(1) (emphasis added). Plaintiff's position is inconsistent with the plain language of the statute and renders the "in connection with" part of the standard completely meaningless and superfluous. But-for causation is not required to satisfy OCSLA's "in connection with" standard, which is "undeniably broad in scope." *EP Operating Ltd. P'ship v. Placid Oil Co.*, 26 F.3d 563, 569 (5th Cir. 1994).

Courts have regularly concluded that OCSLA jurisdiction exists even where an OCS operation is only indirectly or partially related to a plaintiff's alleged harms. *See* OB.63–64 (citing cases). Although Plaintiff attempts to misdirect the Court into focusing on misrepresentation,

Resp.62, its causal theory and requested relief implicate *all* of Defendants' oil and gas production, including on the OCS. *See* OB.66–68.

Plaintiff also overlooks the Supreme Court's holding in the personal-jurisdiction context that the "requirement of a 'connection' between a plaintiff's suit and a defendant's activities" does *not* require a "causal showing," let alone but-for causation. *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1026 (2021). Here, where the statutory language is "arising out of, or *in connection with*," 43 U.S.C. § 1349(b)(1) (emphasis added), Plaintiff's contrary view would render the "connection" prong superfluous.

In any event, Defendants' substantial OCS operations satisfy even a "but-for" standard. Plaintiff's theory is that Defendants' production and sale of oil and gas increased greenhouse gas emissions, which caused changes to the climate and thereby caused Plaintiff's alleged injuries. *See* OB.68–69. All of Plaintiff's requested relief ties back to global production, including Defendants' substantial activities on the OCS. Plaintiff alleges that "the normal use of Defendants' fossil fuel products … caus[ed] global warming." 3-JA-350¶104. Thus, Defendants' OCS operations are necessarily a but-for cause of the alleged injuries.

Plaintiff argues that permitting OCSLA jurisdiction here would grant federal jurisdiction "over all state law claims even tangentially related to offshore oil production on the OCS." Resp.61. But federal jurisdiction exists here because of the unbounded nature of Plaintiff's claims, which necessarily encompass OCS production. *See* 3-JA-252¶11. As the source of up to one-third of annual domestic oil production, *see* OB.66, the OCS is squarely within the scope of Plaintiff's sprawling claims.

Finally, Plaintiff contends that granting its requested relief will not "threaten to impair recovery from the OCS" because Plaintiff seeks only "to abate the nuisance Appellants have created in Delaware." Resp.62. But Plaintiff cannot abate the alleged nuisance merely by addressing production and emissions in Delaware. Plaintiff's claims instead necessarily target Defendants' activities around the world, including on the OCS. 3-JA-454¶263; 3-JA-463. Such relief would inevitably deter Defendants and others from production on the OCS. *See* OB.69–70.

CONCLUSION

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

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CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2022, an electronic copy of the foregoing Brief for Defendants-Appellants was filed with the Clerk of Court for the United States Court of Appeals for the Third Circuit using the appellate CM/ECF system, and that service on the following Filing Users will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains 6,498 words, as determined by the word-count function of Microsoft Word 2010, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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

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

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

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