**UNITED STATES DISTRICT COURT**
**DISTRICT OF MARYLAND**
(Northern Division)

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| CITY OF ANNAPOLIS, MARYLAND,<br><br>Plaintiff,<br><br>vs.<br><br>BP P.L.C.; *et al.*,<br><br>Defendants. | Case Number: 21-cv-00772-SAG |

**PLAINTIFF CITY OF ANNAPOLIS'S SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION TO REMAND TO STATE COURT**

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**Cases**

**Statutes**



**Rules**



**Constitutions**

## I. INTRODUCTION

The City of Annapolis ("City" or "Annapolis") brought this action in Maryland state court, asserting Maryland common law and statutory claims for public and private nuisance, negligent and strict liability failure to warn, trespass, and violations of the Maryland Consumer Protection Act. The City seeks to rectify local injuries caused by Defendants' decades-long campaign to discredit the science of global warming, conceal the dangers posed by their fossil fuel products, and misrepresent their role in responding to the climate crisis. Defendants removed, asserting in their 123-page Notice of Removal ("NOR") a litany of bases for jurisdiction that misrepresent the City's complaint and controlling law. All those arguments have recently been rejected by the Fourth Circuit in a closely analogous case involving many of the same defendants. *See Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178 (4th Cir. 2022). The First, Ninth, and Tenth Circuits have also rejected attempts to remove materially similar cases on identical jurisdictional theories in the last three years—including most recently on July 7, 2022—as have five other district courts.[1] Defendants' positions remain meritless, and this case should be remanded to state court.

Taking Defendants arguments in turn, they all fail. Defendants first say Annapolis's state-law causes of action "arise under federal common law because federal law exclusively governs

[1] *City & Cnty. of Honolulu v. Sunoco LP*, __ F.4th __, No. 21-15313, 2022 WL 2525427 (9th Cir. July 7, 2022); *Rhode Island v. Shell Oil Prods. Co.*, 35 F.4th 44, 50 (1st Cir. 2022); *Cnty. of San Mateo v. Chevron Corp.*, 32 F.4th 733 (9th Cir. 2022); *Bd. of Cty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238, 1249 (10th Cir. 2022), *cert. petition filed* (June 8, 2022) ("*Boulder*"); *City of Oakland v. BP PLC*, 969 F.3d 895 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2776 (U.S. June 14, 2021); *City of Hoboken v. Exxon Mobil Corp.*, 558 F. Supp. 3d 191 (D.N.J. 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.); *Delaware v. BP Am. Inc.*, No. CV 20-1429-LPS, 2022 WL 58484 (D. Del. Jan. 5, 2022), *appeal pending*, No. 22-1096 (3d Cir.); *Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31 (D. Mass. 2020).

claims for interstate and international pollution, as well as claims implicating the foreign affairs and navigable waters of the United States." NOR at 12, ¶ 6. The Fourth Circuit in *Baltimore* "resoundingly . . . reject[ed] Defendants' attempts to invoke federal common law," because the complaint "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," and there was no reason to craft no new federal common law that might apply. 31 F.4th at 199–200. So too here.

Defendants next argue "this action necessarily raises disputed and substantial federal questions" relating to emissions regulation, foreign affairs, and the First Amendment, and jurisdiction is thus supplied by *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005). NOR at 13, ¶ 7. The court in *Baltimore* held "Defendants' invocation of *Grable* jurisdiction and the foreign-affairs doctrine fails to pass legal muster," because none of those issues were "necessarily raised" by Baltimore's state law claims. 31 F.4th at 208. Defendants' arguments here are identical, and fail for the same reasons. Their only new *Grable* argument, that "the First Amendment injects affirmative federal-law elements into the plaintiff's cause of action," NOR at 35, ¶ 51, is frivolous. The First Amendment at most provides Defendants a potential federal constitutional defense to Annapolis's state-law claims, which *per se* cannot form the basis for federal question jurisdiction.

Defendants' arguments under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(b) ("OCSLA"), *see* NOR at 13, ¶ 8, were rejected in *Baltimore* because "invoking jurisdiction under § 1349(b)(1) requires a but-for connection between a claimant's cause of action and operations on the [outer continental shelf, or 'OCS'],"  and Baltimore's allegations bore "a weak relationship to the OCS" that was "too remote and attenuated for a but-for connection under OCSLA." 31 F.4th at 220, 222 (quotation omitted). Defendants' arguments here are the same, and likewise fail.

Most of Defendants' removal notice is spent arguing that Annapolis's Complaint hinges on "the cumulative impact of Defendants' *global* extraction and production activities over the past several decades—which necessarily include Defendants' substantial activities under the direction, supervision and control of federal officers," and therefore the case is removable under the federal officer removal statute, 28 U.S.C. § 1442. NOR at 13, ¶ 9. The court in *Baltimore* considered these arguments at length, *see* 31 F.4th at 228–38, and ruled that none of them supported jurisdiction. Defendants have attempted to avoid *Baltimore*'s holding by alleging a flotilla of additional interactions between themselves and the government over the past century, from leasing mineral rights on federal land to providing aviation fuel during the Korean War. *See generally* NOR at 47–99, ¶¶ 71–170. But each activity Defendants rely on describes either "simply complying with the law [which] does not constitute the type of help or assistance [to a federal superior] necessary to bring a private entity within the scope of the statute," *Baltimore*, 31 F.4th at 229 (cleaned up), or an "arms-length commercial transaction" that does not constitute federal direction or control, *id.* at 232 (quotation omitted). And in any event, none of them has anything to do with what is actually alleged in the City's Complaint; Annapolis has not sued Defendants "for or relating to" anything they did under federal direction, as the statute requires. *See* 28 U.S.C. § 1442(a)(1).

Last, *Baltimore* directly forecloses Defendants' argument that jurisdiction exists pursuant to the Constitution's enclave clause, U.S. CONST. art. I, § 8, cl. 17. "[F]ederal-question jurisdiction tied to federal enclaves generally requires that all pertinent events [in a case] take place on a federal enclave," 31 F.4th at 219 (quotations omitted), and Annapolis does not allege injuries on federal land, seek recovery for injuries to federal land, or allege that actions taken on federal land create liability. *Baltimore*'s "firm rejection of jurisdiction based on this doctrine" binds this Court. *Id.*

This case has sat on the Court's docket for nearly 18 months with no forward movement. Both before and since, in "all the cases involving subject matter similar to that here," Defendants have maintained "[a] batting average of .000" resisting motions to remand. *City & Cnty. of Honolulu v. Sunoco LP*, No. 20-CV-00163-DKW-RT, 2021 WL 839439, at *2 n.3 (D. Haw. Mar. 5, 2021) (denying stay of remand order pending appeal in analogous climate-change related case). The Court should allow the parties to return to state court to begin litigation on the merits.

## II. FACTS

The City sued Defendants in Maryland state court, asserting state-law tort and statutory claims. *See* Complaint, Dkt. 2, Ex. 1 to NOR at 14, 153–171, ¶¶ 13, 243–310 ("Compl."). The City's claims rest on Defendants' decades-long campaign to deceive and mislead consumers and the public about the impacts of climate change and its link to fossil fuels, which led to disastrous impacts caused by profligate, increasing use of Defendants' products. *See id.* at 9–14, ¶¶ 1–12.

For more than half a century, Defendants have known their fossil fuel products create greenhouse gases that change the climate, causing sea levels to rise, storms to worsen, the atmosphere and oceans to warm, and a cascade of other consequences. *Id.* at 9, 11, 57–81, ¶¶ 1, 7, 64–105. As early as the 1950s, Defendants researched the link between fossil fuels and global warming, amassing a comprehensive understanding of the adverse climate impacts caused by their products. *Id.* at 57–58, ¶¶ 64–67. Their own scientists predicted internally that unabated consumption of fossil fuels would cause "dramatic environmental effects," warning that the world had only a narrow window of time to stave off "catastrophic" climate change. *Id.* at 58–59, 63–70, ¶¶ 69, 71, 78, 82–85. Defendants took these warnings seriously: they evaluated impacts of climate change on their own infrastructure, invested to protect assets from rising seas and more extreme storms, and developed technologies to profit off a warmer world. *See id.* at 102–104, ¶¶ 142–47.

Despite their knowledge, Defendants embarked on a campaign of denial and disinformation about the existence, cause, and adverse effects of global warming. *See id.* at 81–102, ¶¶ 106–141. Among other tactics, Defendants (1) bankrolled contrarian climate scientists whose views conflicted not only with the overwhelming scientific consensus, but also with Defendants' internal understanding of global warming; (2) funded think tanks, industry groups, and foundations that peddled climate change denialism; and (3) spent millions of dollars on advertising and public messaging that cast doubt on climate science. *See id.* Defendants continue to mislead the public about their own responses to the climate crisis, through "greenwashing" campaigns that falsely portray their companies, products, and activities as environmentally responsible and engaged in finding "climate solutions." *See id.* at 114–140, ¶¶ 161–221.

Today and in the years to come, the City bears the costs of Defendants' deception and disinformation. *See id.* at 144–152, ¶¶ 236–42. The City has experienced nearly one foot of sea level rise, which will accelerate over the coming decades, and would continue even if all use of fossil fuels were to end today. *Id.* at 145–149, ¶ 238(a). Higher sea levels are submerging lowlands, exacerbating coastal flooding, inundating natural resources, and damaging the City's property and infrastructure. *Id.* The destructive force of hurricanes in Annapolis is growing due to increased rainfall and windspeed, coupled with slower movement of storms over land. *Id.* More frequent and severe flooding threatens City Dock and related infrastructure, necessitating the demolition and costly reconstruction of a major parking structure less than 500 feet from the Maryland State House. *Id.* at 149, ¶ 238(b). Climate change also threatens historic and cultural buildings within the City, including the nearly 50 colonial-era buildings in the Annapolis Historic District. *Id.* at 149–50, ¶ 238(c). Climate change also threatens commercially and recreationally important maritime activities in Annapolis, including boating, fishing, sailing, racing, and the annual

Annapolis Boat Shows, which attract tourists and competitors from around the world. *Id.* at 16, ¶ 19. Blue crab, oyster, and clam fisheries are also likely to suffer due to increased ocean temperatures and acidification, harming the fishing and seafood industries that are also important to the City. *Id*. at 145–149, ¶ 238(a). The most critical burdens fall disproportionately on under-resourced communities and communities of color in Annapolis, who will require additional resources from the City to respond and adapt to the crisis. *Id.* at 150, ¶ 238(d).

## III. LEGAL STANDARDS

Courts must "construe removal jurisdiction strictly" because it implicates "significant federalism concerns." *Lontz v. Tharp*, 413 F.3d 435, 440 (4th Cir. 2005) (citation omitted). Accordingly, "[t]he burden of demonstrating jurisdiction resides with the party seeking removal," and "if federal jurisdiction is doubtful, a remand to state court is necessary." *Dixon v. Coburg Dairy, Inc.*, 369 F.3d 811, 816 (4th Cir. 2004) (*en banc*) (quotations omitted).

The well-pleaded complaint rule governs whether a case "arises under" federal law for purposes of a district court's original and removal jurisdiction under 28 U.S.C. §§ 1331 and 1441. *E.g., Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 830 (2002). The rule "is the basic principle marking the boundaries of the federal question jurisdiction of the federal district courts," *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987), and "makes the plaintiff the master of the claim" such that "he or she may avoid federal jurisdiction by exclusive reliance on state law," *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). "Jurisdiction may not be sustained on a theory that the plaintiff has not advanced," *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 810 n.6 (1986), and cannot arise based on "an actual or anticipated defense," *Vaden v. Discover Bank*, 556 U.S. 49, 60 (2009), "including the defense of pre-emption, even if both

parties admit that the defense is the only question truly at issue in the case," *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 14 (1983).

## IV. ARGUMENT

### A. The Fourth Circuit "Resoundingly" Rejected Defendants' Position That Claims Like Annapolis's Arise Under Federal Common Law.

Defendants' arguments based in federal common law here are identical to those presented in *Baltimore* and are foreclosed by it. The defendants there argued that "even though the Complaint never says anything about federal common law, Baltimore's claims are 'inherently federal and necessarily arise under federal law because they seek to impose liability based on the production and sale of oil and gas abroad,'" meaning the city's claims sought to curb "interstate and/or international pollution." 31 F.4th at 199. Defendants' arguments here are the same. They say Annapolis's causes of action "necessarily arise under federal, not state, law" and that "[t]he issues presented by the Complaint are exclusively federal in nature," NOR at 15, ¶ 14, because "[c]laims for interstate or international pollution implicate 'uniquely federal interests' and must out of necessity be subject to uniform federal law as a matter of fundamental constitutional structure," NOR at 16, ¶ 17. The Fourth Circuit considered that "perplexing argument," 31 F.4th at 204, and held that "[a]t most" it presents "an ordinary preemption argument that does not warrant removal," *id.* at 208. *Baltimore* controls, and this Court must "decline to permit Defendants to rely upon federal common law as a theory of removal." *Id.* The Fourth Circuit's dissection of Defendants' federal common law argument speaks for itself. *See id.* at 199–208. The following discussion nonetheless connects each of Defendants' assertions to the portions of *Baltimore* rejecting them.

First, the federal common law Defendants point to has been overridden by Congress and cannot provide a cause of action or a basis for jurisdiction. Defendants contend that "when, as here, 'we deal with air and water in their ambient or interstate aspects, there is a federal common

law,'" and thus "state law *cannot* apply to such claims." NOR at 16–17, ¶ 18 (quoting *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 421 (2011) ("*AEP*")). That is incorrect and misrepresents decades of Supreme Court precedent. "[F]ederal common law in this area ceases to exist due to statutory displacement" by the Clean Air Act, and Annapolis "has not invoked the federal statute displacing federal common law." *Baltimore*, 31 F.4th at 204.

The Supreme Court in 1972 "recognized public nuisance as a federal common law claim" in the context of "disputes involving [pollution in] interstate and navigable waters." *Id.* (citing *Illinois v. City of Milwaukee*, 406 U.S. 91, 103–04 (1972) ("*Milwaukee I*")). Congress amended the Clean Water Act in 1981, however, "and the Court then held that the [Clean Water Act amendments] displaced the federal common law claim of public nuisance it had previously recognized for water pollution." *Id.* (citing *City of Milwaukee v. Illinois*, 451 U.S. 304, 312–20 (1981) ("*Milwaukee II*")). Three decades later in *AEP*, the Supreme Court considered whether plaintiffs "could invoke the federal common law of nuisance to abate out-of-state pollution and impose liability on five electric companies for global warming." *Id.* at 205 (cleaned up) (citing *AEP*, 564 U.S. at 418, 422). The Court "expressed uncertainty about the existence of federal common law for the plaintiffs," but ultimately held "that any 'federal common-law claim for curtailment of greenhouse gas emissions because of their contribution to global warming' was 'displaced by the federal legislation authorizing [the Environmental Protection Agency] to regulate carbon-dioxide emissions.'" *Id.* (quoting *AEP*, 564 U.S. at 423, 424).[2] "When a federal statute *displaces* federal common law, the federal common law ceases to exist," *id.* at 205 (collecting cases), and thus "[p]ublic nuisance claims involving interstate pollution, including issues about

[2] *See also Boulder*, 25 F.4th at 1259 ("What *Milwaukee II* did to the federal common law of interstate water pollution, *AEP* did to the federal common law of interstate air pollution.").

greenhouse-gas emissions, are nonexistent under federal common law because they are statutorily displaced" by the Clean Air Act, *id.* at 206. "Since those claims are defunct, and invoking them is devoid of merit, a federal court cannot exercise federal-question jurisdiction on that basis" and, as in *Baltimore*, "Defendants cite no authority justifying removal for nonexistent claims that have been displaced by federal statutes." *Id.* (quotation omitted).

Second, Defendants argue that "the question of how to address greenhouse gas emissions (which underlies Plaintiff's claims and its requested relief) involves inherently federal concerns and can be resolved only by application of federal law," even absent Congressional say so. NOR at 23, ¶ 27. But "how to address greenhouse gas emissions" is not the basis of the City's complaint, which rests rather on defendants' tortious failure to warn, "abetted by a sophisticated disinformation campaign." *Baltimore*, 31 F.4th at 233. "Jurisdiction may not be sustained on a theory that the plaintiff has not advanced." *Merrell Dow*, 478 U.S. at 810 n.6.

In any event, *Baltimore* squarely held that there is no basis to create new federal common law that might fit Defendants' theory. "Judicial lawmaking in the form of federal common law plays a necessarily modest role under a Constitution that vests the federal government's 'legislative Powers' in Congress and reserves most other regulatory authority to the States." *Rodriguez v. Fed. Deposit Ins. Corp.*, 140 S. Ct. 713, 717 (2020). As such, "before federal judges may claim a new area for common lawmaking, strict conditions must be satisfied." *Id.* Two indispensable conditions are "(1) there must be 'uniquely federal interests' at play, and (2) a party must show a 'significant conflict' between an identifiable federal policy or interest and the operation of state law or the application of state law would 'frustrate specific objectives' of federal legislation." *Baltimore*, 31 F.4th at 200–01 (cleaned up).

The defendants in *Baltimore* "identif[ied] three 'uniquely federal interests' at play: (1) the control of interstate pollution; (2) energy independence; and (3) multilateral treaties." *Id.* at 202. The Fourth Circuit held that those generalized areas of concern were insufficient:

> Assuming these qualify as "uniquely federal interests," Defendants' request for federal common law still fails because they do not satisfy the necessary "precondition" of creating federal common law—the recognition of a significant conflict between a federal interest and state law's application. [citation] Defendants, who bear the removal burden, never establish 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 within either their Notice of Removal or Opening Brief. [citations] . . . As the Supreme Court put it, failing to identify a significant conflict when requesting a court to create federal common law is "fatal" to a party's position. [citation] Given these failures, we see no reason to fashion any federal common law for Defendants.

*Baltimore*, 31 F.4th at 202. The court held that the defendants' failure to "point to any significant conflict" constituted "a complete abdication of their removal burden." *Id.* at 204.

The facts here are the same. Defendants assert Annapolis's claims generally implicate federal emissions regulation, nonspecific national energy concerns, and foreign policy.[3] But as in *Baltimore*, Defendants' removal notice does not discuss any conflict between Maryland tort law and any specific federal statute, regulation, or identifiable policy decision. Defendants instead offer the unintelligible generalization that "the substance of the complaint's allegations and demands for relief reveal that those claims are exclusively federal by virtue of the structure of our

[3] *See, e.g.*, NOR at 21, ¶ 24 ("Plaintiff's claims . . . implicate the federal government's foreign affairs power and the Constitution's Foreign Commerce Clause."); 22, ¶ 25 (asserting that Annapolis's claims implicate "treaty obligations and federal and international regulatory schemes"); 22, ¶ 26 ("fossil fuels are strategically important domestic resources that should be developed to reduce the growing dependence of the United States on politically and economically unstable sources of foreign oil imports") (quotation omitted); 23, ¶ 27 (asserting climate change has "catalyzed myriad federal and international efforts to understand and address [greenhouse gas] emissions," and that "these are complex policy-balancing problems, on a necessarily national scale, and without fixed 'right answers'").

Constitution." NOR 19, ¶ 21. Defendants' "fail[ure] to identify a significant conflict when requesting a court to create federal common law is 'fatal' to [their] position," and there is "no reason to fashion any federal common law for Defendants." 31 F.4th at 202.

Third, again exactly like *Baltimore*, Defendants "present a perplexing argument that [Annapolis'] claims must be resolved by federal common law because it is the source of the underlying claims," which is wrong for multiple reasons. *Id.* at 204. Defendants begin with the demonstrably false contention that *United States v. Standard Oil*, 332 U.S. 301 (1947), created a "two-step analysis . . . for determining whether a claim arises under state or federal law for jurisdictional purposes," whereby a court first asks "whether the source of law is federal or state based on the nature of the issues at stake," and then "decide[s] whether the plaintiff has stated a viable federal claim." NOR at 18, ¶ 20. That is not true. *Standard Oil* was initiated in federal district court, and "did not turn on federal-question jurisdiction." *Baltimore*, 31 F.4th at 204 n.7. The decision does not discuss or analyze subject-matter jurisdiction at all, which existed because "the United States [wa]s the party plaintiff to the suit." *Standard Oil*, 332 U.S. at 316; *see* 28 U.S.C. § 1345 ("[T]he district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States."); *United States v. Moffitt, Zwerling & Kemler, P.C.*, 83 F.3d 660, 667 (4th Cir. 1996) (noting United States' authority "to bring suit at common law" in district court "can be traced to the First Judiciary Act of 1789"). The same is true of *United States v. Swiss American Bank, Ltd.*, 191 F.3d 30 (1st Cir. 1999), on which Defendants also rely. *See* NOR at 18–19, ¶¶ 20 & 22. The United States there sued an Antiguan bank "to recover assets accumulated by a convicted felon and later forfeited to the government as part of a plea bargain." *Id.* at 34. The United States "alleged in its complaint that [Fed. R. Civ. P.] 4(k)(2) supplied the necessary means for obtaining personal jurisdiction" over the Antiguan defendant, *id.* at 40, and

"argue[d] vigorously that its case [wa]s founded on, and should be decided according to, federal common law," *id.* at 43, because only federal causes of action support the exercise of personal jurisdiction under that rule. *See* Fed. R. Civ. P. 4(k)(2).

Neither *Standard Oil* nor *Swiss American Bank* say anything about removal jurisdiction, or about when a complaint alleging only state-law causes of action nonetheless "aris[es] under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. In reality, the method for "determining whether a claim arises under state or federal law for jurisdictional purposes," NOR at 18, ¶ 20, is the well-pleaded complaint rule, aided by the analysis articulated in *Grable*. *See* Part IV.B, *infra*. For that exact reason, the court in *Baltimore* noted that even if the defendants could find a conflict between Maryland law and a uniquely federal interest, "the well-pleaded complaint rule would still forbid the removal of Baltimore's Complaint because it pleads no express invocation of federal common law." *Id.* at 204.

There is no daylight between Defendants' federal common law arguments here and those that the Fourth Circuit "resoundingly" rejected in *Baltimore*. 31 F.4th at 199. There is no relevant extant body of federal common law, there is no basis to create one, and jurisdiction would still be absent even if either of those predicates were true because Annapolis' Complaint pleads no federal common law cause of action. Federal common law does not provide jurisdiction here.

### B. Defendants' *Grable* Arguments Are Either Directly Foreclosed by *Baltimore* or Are Meritless.

Defendants next argue Annapolis's state-law causes of action necessarily raise three categories of substantial, disputed federal issues, and the Complaint thus arises under federal law and is removable under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005). Specifically, Defendants assert that Annapolis's Complaint "seek[s] to upend the careful balance Congress and struck between energy production and

environmental protection," NOR at 24–25, ¶ 32; "impede[s] the foreign-affairs power" of the United States, NOR at 29, ¶ 41; and "necessarily include[s] federal constitutional elements" via the First Amendment, NOR at 35, ¶ 51. The Fourth Circuit rejected identical arguments concerning federal energy policy and the foreign affairs doctrine, and "agree[d] with Baltimore" that "Defendants dramatically overread *Grable*'s scope." 31 F.4th at 208. Defendants' third argument that "the First Amendment injects affirmative federal-law elements into the plaintiff's cause of action" is frivolous. NOR at 35, ¶ 51.

"For statutory purposes, a case can 'aris[e] under' federal law in two ways." *Gunn v. Minton*, 568 U.S. 251, 257 (2013). First, "a case arises under federal law when federal law creates the cause of action asserted"; second, the Supreme Court has "identified a 'special and small category' of cases in which arising under jurisdiction still lies" even though only state law causes of action appear on the face of the complaint. *Id.* at 257–58. That "slim category" of cases encompasses only state law complaints in which "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.* at 258. The Supreme Court intended *Grable* to "bring some order to th[e] unruly doctrine" of arising-under jurisdiction that had confused lower courts for many years. *Gunn*, 568 U.S. at 258.

"Federal courts must be 'cautious' in exercising this form of jurisdiction because it lies at the 'outer reaches of § 1331.'" *Baltimore*, 31 F.4th at 208 (quoting *Burrell v. Bayer Corp.*, 918 F.3d 372, 380 (4th Cir. 2019)). The first element of the *Grable* test is for that reason demanding—"a federal issue is 'necessarily raised' only when a federal question is a 'necessary element' of one of the pleaded state-law claims within a plaintiff's complaint." *Id.* (quoting *Burrell*, 918 F.3d at 381). Here, "[l]ooking at the face of [Annapolis]'s Complaint, *Grable* jurisdiction cannot lie

because a federal issue is not 'necessarily raised,'" and "*Grable* jurisdiction thus fails on the very first prong." *Id.* at 209. Defendants' arguments again "fai[l] to pass legal muster." *Id.* at 208.

**1. No Federal Energy Law or Regulation Is an Element of Annapolis's Claims.**

Defendants first offer a circuitous argument why Annapolis's state-law claims "would necessarily disrupt the federal regulatory structure of an essential, national industry," and therefore necessarily raise federal issues. NOR at 28 ¶ 39. They assert that because the Complaint "seeks relief for an alleged nuisance," Annapolis "would be required to prove that the defendants' conduct is 'unreasonable'" under Maryland law. NOR at 25, ¶ 34. But, they say, "Congress has directed a number of federal agencies to regulate Defendants' conduct, and thus to engage in the same analysis of benefits and costs that [Annapolis] would have the state court undertake," NOR at 25, ¶ 35, and inexorably "the relief sought by [Annapolis] would necessarily alter the regulatory regime Congress designed," NOR at 27, ¶ 37, and so a federal issue is necessarily raised.

The Fourth Circuit found that exact argument meritless for two reasons, both of which apply here. First and most fundamentally, "Defendants never identify what federal question is a 'necessary element' for any of [Annapolis]'s state-law claims." *Baltimore*, 31 F.4th at 210. That itself is enough to resolve that *Grable* jurisdiction is absent, as the Fourth Circuit explained:

> All of Baltimore's claims are brought under Maryland law, and none of them invoke federal law as a necessary requirement for imposing liability upon Defendants. Thus, Defendants' liability does not turn or "hinge" upon interpreting federal law. Failing to carry their removal burden, Defendants provide us with no federal question Baltimore has alleged that is "essential to resolving" its claims under Maryland law.

*Id.* (citations omitted). The same is true here. Annapolis has alleged only claims under Maryland law, and does not implicitly or explicitly allege that Defendants violated a federal duty or impinged on a federal right Annapolis holds. *See* Compl. at 153–171, ¶¶ 243–310. Defendants have not identified a federal question embedded as an element of Annapolis's claims, because there is none.

Second, the Fourth Circuit rejected the defendants' attempts to approximate a federal question of law by implicating federal interests, a tactic Defendants repeat again here. "Read most generously," the *Baltimore* defendants' arguments asserted that "federal agencies typically weigh the costs and benefits of fossil-fuel extraction, so Baltimore's nuisance claims invite a state court factfinder to adjudicate the reasonableness of federal agencies' balancing of harms and benefits." 31 F.4th at 210. "But this argument first rest[ed] on a misunderstanding of Baltimore's Complaint," which was "not solely about the initial act of fossil-fuel extraction, nor [was] it concerned with setting and regulating greenhouse-gas emissions." *Id.* Instead, as the court reiterated throughout the opinion, the defendants were "being sued for 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." *Id.* at 221.

The facts here are the same, as is the result. Defendants contend Annapolis's Complaint presents "an attempt to substitute state law for existing federal standards," NOR at 24, ¶ 31, and that "[w]hether the federal agencies charged by Congress to support both energy and environmental needs for the entire nation have struck an appropriate balance is a question that is inherently federal in character," NOR at 27, ¶ 37. But as in *Baltimore*, the tortious conduct alleged here is Defendants' decades-long campaigns to conceal and misrepresent the dangers of their fossil fuel products. *See, e.g.*, Compl. at 9–12, ¶¶ 1–2, 8–9. That Complaint does not allege federal regulators have erred, does not ask for regulations to be modified or created, and does not even allege Defendants have violated any federal law. It does not question any "balance" between "energy and environmental needs" determined by a federal agency or anyone else. *See* NOR at 27, ¶ 37. Defendants' collateral attack argument fails for the same reasons it did in *Baltimore*. Here, like there, "[i]t is a far cry from what the Court has deemed sufficient to satisfy the 'necessarily

raised' prong," and "federal-question jurisdiction does not lie since Baltimore's Complaint is not one of those 'slim category' of cases warranting *Grable* jurisdiction." 31 F.4th at 212.

**2. The Foreign Affairs Doctrine Is An Ordinary Preemption Defense That Does Not Apply Here And Would Not Provide Jurisdiction If It Did.**

Defendants next argue, as they did in *Baltimore*, that Annapolis's Complaint necessarily raises issues of federal law because its "claims impede the foreign-affairs power by seeking to regulate global climate change, which has been and continues to be the subject of major international treaties." NOR at 29, ¶ 41. That does not accurately describe the Complaint or the foreign affairs doctrine. The foreign affairs doctrine is a preemption defense, under which "'state laws that intrude on this exclusively federal power are [constitutionally] preempted'" either through conflict or field preemption, because "the power to conduct international affairs is solely vested with the federal government, not the States." *Baltimore*, 31 F.4th at 213 (cleaned up) (quoting *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1071 (9th Cir. 2012)).

The *Baltimore* court rejected the defendants' reliance on foreign affairs because, first, "there [wa]s nothing in Baltimore's Complaint indicating that foreign affairs are 'necessarily raised' by its state-law claims." 31 F.4th at 212. The complaint contained "historical references to international treaties in a brief section," but "there [wa]s no indication that Baltimore's state-law claims either rise or fall based on any foreign policies, international treaties, or relationships with foreign nations." *Id.* at 213. "'The most one can say is that a question of [foreign affairs] is lurking in the background,'" which is insufficient to confer subject-matter jurisdiction. *Id.* (quoting *Gully v. First Nat'l Bank*, 299 U.S. 109, 117 (1936)). Defendants do not argue Annapolis's prima facie case here turns on a question of foreign policy, because it does not.

Even on its own terms, Defendants' foreign affairs argument fails. "Defendants do not identify any express foreign policy from the federal government that conflicts with [Annapolis's]

state-law claims," and instead allude to a variety of non-binding statements and general policy positions that "do not establish that Maryland common law, or even the common law of States generally, is an obstacle to the federal government's dealings with foreign nations." *See Baltimore*, 31 F.4th at 213. And as in *Baltimore*, "Defendants have not provided [the court] with even one decision from Maryland courts showing how any of Baltimore's state-law claims entail foreign relations," and "have not at all explained how common law claims under state law meaningfully 'disturb foreign relations,' nor have they delineated how [Annapolis's] claims are an attempt to 'establish its own foreign policy.'" *Id* at 214. (quoting *Zschernig v. Miller*, 389 U.S. 429, 441 (1968)). As instructed by *Baltimore*, the Court must "decline to apply the foreign-affairs doctrine as . . . a valid means for removal under *Grable* jurisdiction." *Id.*[4]

**3. Defendants' *Grable* Arguments Based in the First Amendment Are Frivolous.**

Defendants make one *Grable* argument that is not addressed directly by *Baltimore*. They say Annapolis's Complaint "target[s] speech on matters of public concern like climate change," so "the First Amendment injects affirmative federal-law elements into the plaintiff's cause of action." NOR at 35, ¶ 51. Notwithstanding Defendants' position that "[t]hese First Amendment issues are not 'defenses,'" however, NOR at 35, ¶ 52, the First Amendment at most arms Defendants with an affirmative federal defense that does not supply jurisdiction.

[4] The Second Circuit's decision in *City of New York v. Chevron Corp.*, 993 F.3d 81, 92 (2d Cir. 2021), which Defendants will likely rely on to show this case supposedly conflicts with foreign policy, does not affect the outcome here. That court affirmed an order granting a motion to dismiss under Fed. R. Civ. P. 12(b)(6), and thus "*City of New York* was in a completely different procedural posture" from both *Baltimore* and this case. *See Baltimore*, 31 F.4th at 203. The Second Circuit "confined itself to Rule 12(b)(6) and never addressed its own subject-matter jurisdiction." *Id.* In any event, *Baltimore* held that "*City of New York* suffers from the same legal flaw as Defendants' arguments: It fails to explain a significant conflict between the state-law claims before it and the federal interests at stake *before* arriving at its conclusions." *Id.*

Defendants generally rely on *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964), which first imposed the "actual malice" standard for defamation claims brought by public figures, and cases following it. *See* NOR at 35, ¶¶ 51–52. They say those cases impose prima facie elements on Annapolis's causes of action, "including factual falsity, actual malice, and proof of causation of actual damages"—although they do not specify which of those elements apply here, or to which causes of action—which in turn means a federal question is necessarily raised on the face of the Complaint. NOR at 35, ¶ 51. But if that were enough to satisfy *Grable*, *every* defamation suit brought by a public figure in *every* state court would be removable 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 Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 773 (1986) (quoting *Sullivan*, 376 U.S. at 279–80). Defendants' own cases show that cannot be correct. *See* NOR at 35–37.

Four Supreme Court cases Defendants cite were never in federal district court at any point—they were litigated entirely in a state court system and came before the U.S. Supreme Court on direct appeal or by writ of certiorari.[5] A fifth and sixth were litigated in the federal system on *diversity* grounds, and the opinions do not discuss subject-matter jurisdiction.[6] In the only case Defendants cite that was actually removed from state court, federal jurisdiction was proper pursuant to the bankruptcy removal statutes, 28 U.S.C. §§ 1334(b) & 1452, not because of a federal question. *In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, 511 F. Supp. 2d 742, 761–64 (S.D.

[5] *See Milkovich v. Lorain J. Co.*, 497 U.S. 1, 10 (1990) (Ohio); *Hepps*, 475 U.S. at 771 (Pennsylvania); *Sullivan*, 376 U.S. at 263–64 (Alabama); *Nat'l Rev., Inc. v. Mann*, 140 S. Ct. 344, 345 (2019) (Alito, J., dissenting from denial of certiorari) (District of Columbia).

[6] *See Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 48 (1988); *Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 772 (1984).

Tex. 2005). The court's discussion of the First Amendment came in resolving a motion to dismiss. *See id.* at 809–15. None of Defendants' authorities bear on the removal questions before this Court.

Despite their concession that "most state-law misrepresentation claims are not removable," Defendants say the First Amendment provides jurisdiction because Annapolis "is a public entity seeking to use the machinery of its own state courts to impose de facto regulations on Defendants' nationwide speech on issues of national public concern." NOR at 35–36, ¶ 53. The opinion in *California v. Sky Tag, Inc.*, No. CV118638ABCPLAX, 2011 WL 13223655 (C.D. Cal. Nov. 29, 2011), explains in a similar context why that is not a basis for jurisdiction. The Los Angeles City Attorney there brought state law claims to "compel removal of illegal supergraphic signs" erected in the city. *Id.* at *1. The defendants argued the case was removable because the City's action would impose a prior restraint on their speech, and "this alleged First Amendment violation is not an affirmative defense but an element of the City's claim." *See id* at *3. The court disagreed:

> Assuming the City's requested injunction is in fact a prior restraint, Defendants are correct that prior restraints are presumed invalid, and that the City bears the burden to justify the speech restriction. That does not, however, transform Defendants' defense of a First Amendment violation into an element of the City's claims. As the master of its complaint, the City has not alleged any First Amendment claim, and, if it must eventually demonstrate that an injunction in this case would comport with the First Amendment, it need only do so in response to Defendants' objection. This is no different than other First Amendment defenses that courts have repeatedly found did not support removal jurisdiction. [collecting cases]

*Id.* (citations omitted). That analysis applies here, and three other district courts have rejected the same argument in decisions remanding analogous climate-change-related cases to state court. *See Delaware*, 2022 WL 58484, at *8–9; *Hoboken*, 558 F. Supp. 3d at 204–05; Connecticut, 2021 WL 2389739, at *10. There is simply no legal authority supporting Defendants' argument that their own potential First Amendment defenses create jurisdiction. The position is frivolous.

Ultimately, just as in *Baltimore*, there is no federal issue necessarily raised on the face of Annapolis's Complaint. Defendants' *Grable* argument thus fails at the outset and the Court does not need to consider the other *Grable* factors.

**C. *Baltimore* Forecloses Removal Under the Outer Continental Shelf Lands Act.**

Next, Defendants assert removal is proper under OCSLA. The *Baltimore* decision again controls, and again holds that Defendants' arguments are meritless. OCSLA's jurisdictional provision grants district courts original jurisdiction

> of cases and controversies *arising out of, or in connection with* any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals . . .

43 U.S.C. § 1349(b)(1) (emphasis added). Interpreting the statute on first impression in *Baltimore*, the Fourth Circuit "join[ed] [its] sister circuits and f[ou]nd that invoking jurisdiction under § 1349(b)(1) requires a but-for connection between a claimant's cause of action and operations on the OCS." 31 F.4th at 220. "Under their plain meanings," the court held, the phrases "'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.*; *accord Boulder*, 25 F.4th at 1272; *In re Deepwater Horizon*, 745 F.3d 157, 163 (5th Cir. 2014); *cf. San Mateo*, 32 F.4th at 754 (holding OCSLA jurisdiction "does not necessarily require but-for causation" but that "the connection between [defendants'] conduct [on the OCS] and the injuries alleged by the plaintiffs here is too attenuated to give rise to jurisdiction"). The statute thus asks whether a plaintiff's "injuries 'would not have occurred' but for Defendants' conduct on the OCS." *Baltimore*, 31 F.4th at 220. "[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.'" *Id.* at 221 (quoting *Deepwater Horizon*, 745 F.3d at 163).

Applying the but-for connection test, the court in *Baltimore* noted that the city's "allegations and injuries are not confined to Defendants' fossil-fuel activities on the OCS," and that their allegedly tortious "marketing practices, which led to increased consumption of their fossil-fuel products and then climate change, are far removed from their OCS activities and their tort liability." *Id.* at 221. "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 facts and allegations here are the same. Defendants argue there is OCSLA jurisdiction because Annapolis's Complaint supposedly "challenges *all of* Defendants' 'extraction' of 'oil, coal, and natural gas,'" and "a substantial quantum of those activities arises from OCS operations," therefore Annapolis's claims arise in connection with OCS operations. NOR at 42, ¶ 64. But that is exactly the line of reasoning rejected in *Baltimore*: "Because Baltimore's injuries [arising from Defendants' misleading and deceptive marketing] remain even after we disregard whatever slice of Defendants' fossil-fuel production occurred on the OCS, we cannot find a but-for connection satisfying the OCSLA's jurisdictional grant." 31 F.4th at 221 (quotation omitted). There is no but-for connection.

Defendants argue there is also OCSLA jurisdiction because "the *relief* sought" by Annapolis "would affect Defendants' OCS extraction and development operations," since it might disincentivize OCS oil production. NOR at 43, ¶ 66. *Baltimore* rejected this argument, too. "Ignoring the OCSLA's text and judicial decisions applying it," the court said, "Defendants argue that the OCSLA's policy aims will be frustrated and a parade of horrible outcomes will ensue if we decline federal jurisdiction." 31 F.4th at 222. "Even if such speculative and policy-laden arguments were permitted," however, the cases the defendants relied on were "markedly different from Baltimore's suit because they involve[d] the intersection of commercial disputes satisfying the 'operation' element of the OCSLA, not injurious torts impacting a municipality's citizenry and

internal infrastructure." *Id.* (collecting cases); *accord Boulder*, 25 F.4th at 1275 ("[I]t is difficult to see how such a prospective theory of negative economic incentives—flowing from a lawsuit that does not directly attack OCS exploration, resource development, or leases—is anything other than contingent and speculative."). Defendants' arguments here are the same, and likewise fail.

### D. Defendants' Federal Officer Removal Arguments Are Foreclosed by *Baltimore*, and The New Factual Details in Their Notice of Removal Do Not Confer Jurisdiction.

The bulk of Defendants' removal notice and their supporting documents take a kitchen-sink approach to federal officer removal. *See* NOR at 44–104, ¶¶ 67–182. They assert that this case implicates virtually every interaction any Defendant has had with the government since at least the start of the twentieth century, covering everything from fossil fuel sales during World War II, to mineral leases on the OCS, operation of an oil reserve co-owned with the Navy, and fuel sales to the military. Several of those arguments are directly foreclosed by *Baltimore*, and Defendants' maintenance of them is frivolous. The remainder are facially meritless and have been rejected by every court that has considered them. Defendants have not shown they acted under federal officers within the meaning of 28 U.S.C. § 1442, and the few instances they cite that could constitute acting under a federal officer have nothing to do with Annapolis's claims.

To remove a case under the federal officer removal statute, "a private defendant must show: (1) that it acted under a federal officer, (2) that it has a colorable federal defense, and (3) that the charged conduct was carried out for [or] in relation to the asserted official authority." *Baltimore*, 31 F.4th at 228 (cleaned up). Defendants have failed to make any of these showings.

#### 1. Annapolis Has Not Brought Suit Against Defendants "For or Relating To" Any Act Defendants Committed Under Federal Direction.

Defendants are not entitled to federal officer removal because the activities they assert they conducted under color of federal office "are insufficiently related to [Annapolis's] claims for purposes of the [statute's] nexus prong." *Baltimore*, 31 F.4th at 230. Section 1442's third element,

the "nexus prong," requires a removing party to demonstrate "a connection or association" between "the alleged government-directed conduct" and "the conduct charged in the Complaint." *Id.* at 233–34 (quoting *Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 258 (4th Cir. 2017)). Defendants make no attempt to connect their alleged wrongful conduct to any government control.

The Fourth Circuit considered two of Defendants' relationships with the government in *Baltimore*—certain Defendants' OCS leases and Chevron's operations at Elk Hills Petroleum Reserve—and deemed them insufficiently related to claims like Annapolis's. The court explained:

> 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. Of course, there are many references to fossil fuel production in the Complaint, which spans 132 pages. But, by and large, these references only serve to tell a broader story about how the unrestrained production and use of Defendants' fossil fuel products contribute to greenhouse gas pollution. Although this story is necessary to establish the avenue of Baltimore's climate change-related injuries, it is not the source of tort liability. 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 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.

31 F.4th at 233–34. The same is true here. The crux of Annapolis's Complaint is that Defendants failed to warn consumers and the public about known dangers associated with fossil fuel products and actively worked to deceive the public regarding those dangers. *See, e.g.*, Compl. at 9, 11–14, ¶¶ 1,7–12. Defendants' Notice of Removal does not attempt to connect those allegations to anything they claim they did at federal behest, because there is no such connection.

They assert that this Court must "credit the defendant's theory of the case," NOR at 45, 101, ¶¶ 68, 174–75, under which liability necessarily depends on oil and gas production Defendants may have done under federal direction. Multiple district courts in analogous cases have rejected that position, because § 1442 does not "authorize Defendants to freely rewrite the

complaint and manufacture a cause of action explicitly disclaimed by Plaintiff and then ask the Court to accept their 'theory of the case' for purposes of removal." *Delaware*, 2022 WL 58484, at *10 n.21.[7] As in *Baltimore*, Annapolis's claims premise liability on Defendants' "concealment and misrepresentation of [fossil fuel] products' known dangers," so "the relationship between [the City's] claims and any federal authority over a portion of certain Defendants' production and sale of fossil fuel products is too tenuous to support removal under § 1442." 31 F.4th at 233–34.

Defendants' cited cases only underscore the differences between this lawsuit and those that satisfy the nexus standard. *In re Commonwealth's Motion to Appoint Counsel Against or Directed to Defender Ass'n of Philadelphia* involved efforts to bar attorneys at the Federal Community Defender Organization from representing clients in state post-conviction proceedings based on their alleged misuse of federal grant funds. 790 F.3d 457, 461 (3d Cir. 2015). The Third Circuit held "the acts complained of undoubtedly 'relate to' acts taken under color of federal office," because the case was predicated on the issue of whether "the Federal Community Defender is violating the federal authority granted to it." *Id.* at 472. The case thus involved a direct connection between acts taken under federal direction and the alleged tort. The same is true for *Baker v. Atlantic Richfield Co.*, where the plaintiffs alleged the defendants' manufacturing operations "tortiously contaminated" a housing complex, but the defendants claimed the government controlled and directed their operations at a facility they previously operated "*on the same site*" as

[7] *See also Minnesota*, 2021 WL 1215656, at *5 ("To adopt Defendants' theory, the Court would have to weave a new claim for interstate pollution out of the threads of the Complaint's statement of injuries. This is a bridge too far."); *City & Cnty. of Honolulu v. Sunoco LP*, No. 20-CV-00163-DKW-RT, 2021 WL 531237, at *7 (D. Haw. Feb. 12, 2021) (granting motion to remand), *aff'd*, No. 21-15313, 2022 WL 2525427 (9th Cir. July 7, 2022) ("[I]f Defendants had it their way, they could assert *any* theory of the case, however untethered to the claims of [the complaint]," and "completely ignore the requirement that there must be a causal connection *with the plaintiff's claims*."); *accord Connecticut*, 2021 WL 2389739, at *11.

the plaintiffs' homes. 962 F.3d 937, 940–41 (7th Cir. 2020) (emphasis added). Lastly, in *Nessel v. Chemguard, Inc.*, the plaintiffs alleged injuries from a chemical fire retardant that the defendants manufactured for both consumer and military use. No. 1:20-cv-1080, 2021 WL 744683, at *1 (W.D. Mich. Jan. 6, 2021). The plaintiff alleged it was injured by both military *and* civilian formulations of the chemical, and attempted to "surgically divide" its injuries between two complaints against the same defendants, one for the military version and one for the civilian version. *Id.* at *3. The plaintiff conceded, however, that the two formulations "contain some of the same [toxic] compounds" and offered no explanation how injuries could be divvied between the two cases. *Id.* On those facts, the court found there was clearly a nexus between the plaintiff's claims and the defendants' actions under federal direction, i.e. manufacturing the flame retardant pursuant to military specifications. *Id.* In each of those cases, government-directed conduct overlapped in part or in whole with the culpable behavior alleged in the complaint. Here, Defendants do not contend the federal government had any involvement in the alleged deceptive marketing and disinformation that underpin the City's claims. *See* NOR at 99–103, ¶¶ 171–78.

Tellingly, Defendants dedicate more than fifty pages of their removal notice to discussing in grueling detail all manner of federal programs they have participated in. *See* NOR at 47–99, ¶¶ 71–170. But the *four* pages they use to explain why any of that relates to Annapolis's Complaint fail to do so. *See* NOR at 99–103, ¶¶ 171–78. Any connection between this case and federal activity is highly attenuated and cannot satisfy federal officer removal.

**2. Defendants Have Not "Acted Under" Federal Officers in Any Relevant Way.**

Even if any of Defendants' federal officer allegations had anything to do with this case, removal would still have been improper because Defendants have failed to show that they "acted under" a federal officer within the meaning of the statute. "In cases involving a private entity, the 'acting under' relationship requires that there at least be some exertion of 'subjection, guidance,

or control' on the part of the federal government." *Baltimore*, 31 F.4th at 229 (quoting *Watson v. Philip Morris Co.*, 551 U.S. 142, 151 (2007)). "Additionally, 'precedent and statutory purpose' make clear that 'acting under' must involve an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior." *Id.* (quoting *Watson*, 551 U.S. at 152). "'[S]imply *complying* with the law' does not constitute the type of 'help or assistance necessary to bring a private [entity] within the scope of the statute,' no matter how detailed the government regulation or how intensely the entity's activities are supervised and monitored." *Id.* (quoting *Watson*, 551 U.S. at 153). By the same token, "a person is not 'acting under' a federal officer when the person enters into an arm's-length business arrangement with the federal government or supplies it with widely available commercial products or services." *San Mateo*, 32 F.4th at 757. While the federal officer removal statute is forgiving to removing defendants, courts "may not interpret § 1442(a) so as to 'expand the scope of the statute considerably, potentially bringing within its scope state-court actions filed against private firms in many highly regulated industries.'" *Id.* (quoting *Watson*, 551 U.S. at 153).

Most broadly, "Congress endorsed oil operations and considered making a national oil company, but that does not show that oil production was a basic governmental task." *Honolulu*, 2022 WL 2525427, at *4. Each of the relationships with the government Defendants recite either describe compliance with generally applicable regulation or unremarkable commercial contracts.

***OCS Leases***: Defendants argue that they acted and continue to act under federal subjection and control because they extract oil and gas from OCS lands leased form the government under OCSLA. *See* NOR at 50–65, ¶¶ 76–102. The court in *Baltimore* was "not convinced that the supervision and control to which OCSLA lessees are subject connote the sort of 'unusually close' relationship that courts have previously recognized as supporting federal officer removal." 31 F.4th at 232. "Though OCS resource development is highly regulated, 'differences in the degree

of regulatory detail or supervision cannot by themselves transform . . . regulatory *compliance* into the kind of assistance' that triggers the 'acting under' relationship." *Id.*[8]

Defendants' exhaustive discussion of OCSLA's statutory history, policy objectives, and proposed alternatives that never became law, *see* NOR at 50–65, ¶¶ 76–102, do not overcome *Baltimore*'s holding do not alter what the statute or Defendants' leases actually say. Defendants note OCS leases require an environmental impact statement under the National Environmental Policy Act, NOR at 62–63, ¶¶ 98–99; and that lessees must submit "detailed plans" to federal agencies, *id.* at 59–60, ¶ 92; pay substantial royalties either in cash or in kind, *id.* at 62–63, ¶¶ 96, 99, 101; and comply with a range of regulations, *see id.* at 59–63, ¶¶ 92–96, 100. Those are all "mere iterations of the OCSLA's regulatory requirements" that cannot confer jurisdiction. *See Baltimore*, 31 F.4th at 232. The smattering of never-enacted bills Defendants cite, which supposedly would have amended OCSLA to create a "national oil company," NOR at 54–55, ¶¶ 84–85, have no bearing on whether Defendants "acted under" federal officers when they extracted oil on the OCS for their own commercial purposes under the private leasing program that was actually enacted. An unenacted law establishes no federal control and evinces no congressional intent. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994).[9] Defendants argue their performance under OCSLA leases is "not merely a

[8] *See also Boulder*, 25 F.4th at 1253 (OCS leases "do not obligate Exxon to make a product specially for the government's use," and "do not require Exxon to tailor fuel production to detailed government specifications aimed at satisfying pressing federal needs"); *San Mateo*, 32 F.4th at 759–60 (OCS leases "do not require that lessees act on behalf of the federal government, under its close direction, or to fulfill basic governmental duties," and "the lease requirements largely track statutory requirements.").

[9] *See also* "These never-enacted bills provide no basis to find a congressional intent to create, directly or indirectly, a 'national oil company.' Thus, Defendants' contention that they are 'acting as agents' to achieve the same 'federal objective' . . . as would a speculative, non-existent 'national oil company' lacks merit." *Delaware*, 2022 WL 58484 at *13.

commercial transaction," but they support that contention with statements about their *commercial* output: the creation of $44 billion in annual GDP and "relatively high-paying jobs." NOR at 58–59, ¶ 91; Declaration of Prof. Tyler Priest at 4–6, ¶ 7(1). General economic productivity does not show an unusually close relationship with a federal superior.

***Other Federal Mineral Leases***: Defendants' arguments as to onshore mineral development on federal lands rely on the same flawed reasoning as their arguments as to OCS mineral development. *See* NOR at 65–67, ¶¶ 103–09. The "willingness to lease federal property or mineral rights to a private entity for the entity's own commercial purposes, without more" does not show a private entity is acting under a federal officer. *Baltimore*, 31 F.4th at 232. Defendants mischaracterize features of a Bureau of Land Management lease—including royalty payments, endangered species and natural resource protections, and termination provisions—none of which connotes unusually close federal supervision and control. *See* NOR at 66, ¶ 107 n.64. For example, 30 U.S.C. § 266(i) provides that leases will not be terminated for cessation or suspension of production; it does not, as Defendants claim, provide government authority to suspend operations. Similarly, 34 U.S.C. § 3103.4-4 provides that either party may suspend operations "in the interest of conservation of natural resources." These statutorily imposed terms apply to any lessee.

***Elk Hills Petroleum Reserve***: Next, Defendants seek to remove based on various activities by Standard Oil of California (Chevron's predecessor) at the Elk Hills Reserve in California. *See* NOR at 67–75, ¶¶ 110–28. That argument was rejected in *Baltimore*, because the court "simply ha[d] no idea whether production authorized by Congress [at Elk Hills] was carried out by Standard," and were "left wanting for pertinent details about Standard's role in operating the Elk Hills Reserve and producing oil therefrom on behalf of the Navy, which might bear directly upon

the 'acting under' analysis." 31 F.4th at 237. Defendants' "new" evidence fails to remedy that deficiency and instead confirms that no defendant's activities there support removal.

Boiled down, Defendants say Chevron operated the Elk Hills reserve under federal direction in two ways. First, Chevron's predecessor Standard Oil "entered into a Unit Plan Contract ('UPC')" with the Navy in 1944 that, according to Defendants, vested near total control in the Navy and used Standard Oil as a "third-party contractor to maximize production as quickly as possible." *See* NOR at 69, ¶ 114; 72, ¶ 121. But as the Ninth Circuit held in *San Mateo*, that is not an accurate description of the UPC. That agreement instead represents an "arm's-length business arrangement" that allowed Standard Oil and the Navy "to coordinate their use of the oil reserve in a way that would benefit both parties: the government maintained oil reserves for emergencies, and Standard ensured its ability to produce oil for sale." *San Mateo*, 32 F.4th at 759. Standard and the Navy both owned portions of the oil field, and "[a]s is common in the oil exploration and production industry, the two landowners entered into a unit agreement to coordinate operations" there. *Id.* at 758. "Standard's activities under the unit agreement did not give rise to a relationship where Standard was 'acting under' a federal officer for purposes of § 1442." *Id* at 759.

Second, Defendants argue that if the UPC is not sufficient, the 1971 Operating Agreement between Standard and the Navy surely is, because it says "OPERATOR *[Standard Oil] is in the employ of the Navy Department* and is responsible to the Secretary thereof." NOR at 73, ¶ 123; Kelly Decl. Ex. 29, Doc. 3 at 144–64 (Mar. 25, 2021). Hard proof, they say, is that "[i]n November 1974, when a dispute arose concerning whether it was possible to produce 400,000 barrels per day to meet the unfolding energy crisis, the Navy directed the Unit Operator (Standard Oil) to prepare a plan, rejecting objections and advising Standard Oil" that it must comply with the Navy's demands. NOR at 73, ¶ 123. But rather than preparing that plan, "Standard Oil chose to withdraw

from operating Elk Hills" less than two months later, in January 1975. *See* NOR at 74, ¶ 125 & n.89; Kelly Decl. Ex. 32 (letter dated Jan. 7, 1975 from President of Standard Oil "advis[ing] Navy that Standard wishes to terminate its position as Operator of the Elk Hills Reserve"). Defendants characterize the termination as Standard's decision to "concentrate on other federal objectives," but that just means when the Navy tried to compel Standard Oil to act, Standard simply declined, and instead turned its resources to expand "discovery and production of new oil reserves" to sell *on the commercial market*. *See* NOR at 74, ¶ 125.

Defendants' own submissions make crystal clear that any obligation to expand production at Elk Hills in the 1970s was not Chevron's. Defendants concede that "other prime contractors operated Elk Hills for the Navy following 1975," so when the Naval Petroleum Reserves Production Act of 1976 "reopened the Elk Hills Reserve," Chevron was involved at most "as subcontractors." NOR at 74–75, ¶¶ 126, 128. Defendants say Chevron was still deeply involved, citing a subcontract whereby Chevron would process natural gas offsite for the new Operator of the reserve. NOR at 75, ¶ 128 & n.93. But the document they cite explains gas could not be processed at Elk Hills because Chevron "balked at sharing the cost for so much new plant construction," "the Government failed to convince Chevron that it should have its gas processed on the Reserve," and ultimately "the Government and Chevron reached a compromise" that allowed some new construction and some offsite processing. Kelly Decl. Ex. 35, Doc. 4 at 40. There is no colorable interpretation of the record by which Navy's relationship to Standard and Chevron at Elk Hills demonstrates subjection, guidance, or control.

***Strategic Petroleum Reserve***: Defendants next argue their involvement with the Strategic Petroleum Reserve ("SPR") shows they have acted under federal officers. The SPR represents the United States' supply of emergency crude oil, and it has been stocked, from time to time, through

in-kind royalty payments by certain Defendants under the terms of their OCS leases. NOR at 75–79, ¶¶ 129–34. Defendants' arguments fail for the same reasons as their positions concerning the OCS and Elk Hills Reserve. "First, payment under a commercial contract—in kind or otherwise—does not involve close supervision or control and does not equal 'acting under' a federal officer. Second, operating the SPR involves a typical commercial relationship and Defendants are not subject to close direction." *Honolulu*, 2022 WL 2525427, at *4; *accord Baltimore*, 31 F.th at 232; *Boulder*, 25 F.4th at 1253 ("By winning bids for leases to extract fossil fuels from federal land in exchange for royalty payments, Exxon is not assisting the government with essential duties or tasks."). Lease provisions requiring lessees to participate "as a sales and distribution point in the event of an SPR drawdown," NOR at 78, ¶ 133, are also insufficient. The Secretary of Energy may "drawdown and sell petroleum products in the [SPR]" if the President makes certain findings. 42 U.S.C. § 6241(a), (d)(1). Apparently, some Defendants' leases contain provisions prescribing their role in the event of a drawdown. NOR at 77–78, ¶¶ 133–34. Those provisions too "are mere iterations of the OCSLA's regulatory requirements" that do not support removal. *Baltimore*, 31 F.4th at 232; *see also Honolulu*, 2022 WL 2525427 at *3–4.

***Emergency Petroleum Allocation Act***: Defendants also cannot use the Emergency Petroleum Allocation Act ("EPAA") to satisfy the acting-under prong because they have done nothing more than comply with the statute's regulatory scheme. When Congress passed EPAA, it authorized the President to promulgate regulations that controlled the allocation and distribution of petroleum products across the country. *See* EPAA, Pub. L. No. 93-159, § 4, 87 Stat. 627 (Nov. 27, 1973). Defendants argue their participation gives rise to an acting-under relationship. NOR at 79-80, ¶ 135. But the law could not be clearer on this point: "A private firm's compliance (or

noncompliance) with federal laws, rules, and regulations does not by itself fall within the scope of the statutory phrase 'acting under' a federal 'official.'" *Watson*, 551 U.S. at 153.

***Military Fuel Sales and Wartime Operations***: Defendants' sales of fuel to the military at various times also fails for at least three reasons. First, Defendants' sales to the military have nothing to do with this case. Most of the conduct they cite "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.'" *Delaware*, 2022 WL 58484, at *10.

Second, the Complaint "disclaims injuries arising from special-formula fossil-fuel products that Defendants designed specifically for, and provided exclusively to, the federal government for use by the military." Compl. at 14, ¶ 14; *see Fisher v. Asbestos Corp.*, No. 2:14-CV-02338-WGY, 2014 WL 3752020, at *3 (C.D. Cal. July 30, 2014) (collecting cases). Defendants cannot "manufacture a cause of action explicitly disclaimed by Plaintiff and then ask the Court to accept their 'theory of the case' for purposes of removal." *Delaware*, 2022 WL 58484, at *10 & n.21; *accord Minnesota*, 2021 WL 1215656, at *11. The cases Defendants cite do not support finding Annapolis's disclaimer ineffective. *See Rhodes v. MCIC, Inc.*, 210 F. Supp. 3d 778, 786 (D. Md. 2016) (disclaimer ineffective because it was qualified to "keep[] in play a claim against Defendants who could legitimately assert the federal officer defense"); *Ballenger v. Agco Corp.*, No. C 06–2271 CW, 2007 WL 1813821 at *1 & n.2, *2 (N.D. Cal. June 22, 2007) (disclaimer ineffective when it waived federal claims but not "claims arising out of work done on U.S. Navy vessels").

Third, even taking their arguments on their own terms, "Defendants did not act under federal officers when they produced oil and gas during the Korean War and in the 1970s pursuant to the Defense Production Act," or in any of their fuel sales to the Department of Defense.

*Honolulu*, 2022 WL 2525427, at *3. Whether a government-contractor relationship satisfies the acting-under prong depends on both "the nature of the 'item' provided *and* the level of supervision and control that is contemplated by the contract." *Baltimore*, 31 F.4th at 230. A defendant must do more than show the government "set forth detailed [product] specifications" that define the nature of the item being purchased. *Id.* at 231 (quotations omitted). It must show that the government "close[ly] supervised" production, such as by "exercis[ing] intense direction and control over all written documentation to be delivered with [that product]" or "maintain[ing] strict control over the [product's] development." *Id.* (quoting *Sawyer*, 860 F.3d at 253, and *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 399 (5th Cir. 1998)) (cleaned up).

Here, Defendants describe a grab-bag of different fuel formulations they provided to the government across several decades. NOR at 88–95, ¶¶ 149–163. But these fuel specifications show only that the government wanted Defendants to sell them particular products, not that the government exercised control or close supervision over their design, development, or production. Defendants' own exhibits demonstrate that the government left it largely to fossil fuel companies to design and deliver products that met the government's specifications. *See, e.g.*, NOR at 90, ¶ 152 n.125 ("Shell, and other companies, took on the task of developing these fluids." (quoting Ex. 60) (cleaned up)); *id.* ("[The government] arranged for Shell to develop a special low-volatility, low-vapor-pressure kerosene fuel for the craft." (quoting Ex. 59)). Defendants identify government contracts under which the Shell Oil Company apparently constructed "'special fuel facilities' to handle and store PF-1." NOR at 90, ¶ 152. But except for a few generic "inspection" provisions, those contracts do not contemplate any government control over *how* to accomplish the contracted tasks, requiring only "suitable" means. NOR Ex. 65 at 24–25 (Contract No. AF33(657)-13272 (SH-516) (June 30, 1964)). The same goes for the various fuel-supply contracts

cited in the Notice of Removal. These agreements apparently required government contractors to deliver fuels that met certain product specifications, but none of their provisions suggest the government exercised control over production beyond conducting the type of "quality assurance" that is "typical of any commercial contract." *Baltimore*, 31 F.4th at 231.

**E. Defendants' Federal Enclave Arguments Are Foreclosed by *Baltimore*.**

Finally, Defendants' argument that jurisdiction is proper because "Defendants have produced and sold oil and gas on federal enclaves, including military bases in Maryland and elsewhere" is meritless in light of *Baltimore*. *See* NOR at 105, ¶ 183. The court "decline[d] to endorse Defendants' overreaching approach to federal-question jurisdiction premised on federal enclaves," and the allegations in the Notice of Removal here are identical. *Baltimore*, 31 F.4th at 218. The Constitution provides Congress "the power to 'exercise exclusive Legislation in all Cases whatsoever, . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings[.]'" *Id.* at 218 (quoting U.S. CONST. art. I, § 8, cl. 17). "The federal government thus possesses sole jurisdiction over its enclaves, and federal courts have federal question jurisdiction over tort claims that arise on federal enclaves." *Id.* (cleaned up). But "federal-question jurisdiction tied to federal enclaves generally requires that *all* pertinent events take place on a federal enclave," *id.* at 219, and the Fourth Circuit has in particular "considered whether the injury itself was sustained within the federal enclave" as a critical ingredient, *id.* at 218.

The court in *Baltimore* held there was no enclave jurisdiction because Baltimore's complaint "specifically states that '"Baltimore" refers to Baltimore City's geographic area, and specifically to non-federal lands within its boundaries, unless otherwise stated,'" and "[a]ll of Baltimore's harms are pleaded within the confines and boundaries of Baltimore City." 31 F.4th at 218–19. "So given Baltimore's alleged injuries have not occurred on a federal enclave," the court

continued, "it seeks relief for harms sustained on non-federal land, which precludes the exercise of federal-question jurisdiction." *Id.* at 219. Annapolis's Complaint here is the same. The word "Annapolis" as used in the Complaint "refers to the area falling within Plaintiff's geographic boundaries, excluding federal land, unless otherwise stated." Compl. at 10, ¶ 3, n.2. As in *Baltimore*, Annapolis's claims "arise in [Annapolis], where the City allegedly suffered and will suffer harm." 31 F.4th at 219. There is no enclave jurisdiction.

## V. CONCLUSION

Every one of Defendants' bases for removal jurisdiction here has been held meritless in a binding opinion from the Fourth Circuit. Ultimately "[t]his case is about whether oil and gas companies misled the public about dangers from fossil fuels. It is not about companies that acted under federal officers, conducted activities on federal enclaves, or operated on the OCS," or Defendants' other mischaracterizations. *See Honolulu*, 2022 WL 2525427, at *8. Each "new" fact and argument has been rejected by every court that has considered them. This Court lacks subject-matter jurisdiction and this case must be remanded.[10]

[10] Defendants dedicate the final ten pages of their removal notice to attacking Annapolis's claims on the merits, arguing that "[t]he world has known for many decades that the combustion of fossil fuels releases greenhouse gases into the atmosphere," NOR at 112, ¶ 196, and anyway "the United States, and the world, has continued to rely on and use oil and gas at ever-increasing rates," NOR at 120, ¶ 211, so no one could have been deceived. Defendants do not explain why their premature merits arguments are relevant to this Court's subject-matter jurisdiction, and they are not. The Fourth Circuit has cautioned courts against "extensive litigation of the merits of a case while determining [removal] jurisdiction," because doing so "thwarts the purpose of jurisdictional rules." *Hartley v. CSX Transp., Inc.*, 187 F.3d 422, 425 (4th Cir. 1999). The Court would "er[r] by delving too far into the merits in deciding a jurisdictional question," and must leave Defendants' arguments for consideration by the state court on remand. *See id.*

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Respectfully submitted,

**CITY OF ANNAPOLIS**
**OFFICE OF LAW**

*/s/ D. Michael Lyles*

D. Michael Lyles
City Attorney, #13120
160 Duke of Gloucester Street
Annapolis, Maryland 21401
T: 410-263-7954
F: 410-268-3916
dmlyles@annapolis.gov

Joel A. Braithwaite
Assistant City Attorney, #28081
160 Duke of Gloucester Street
Annapolis, Maryland 21401
T: 410-263-7954
F: 410-268-3916
jabraithwaite@annapolis.gov

**SHER EDLING LLP**
Victor M. Sher (*pro hac vice*)
Matthew K. Edling (*pro hac vice*)
Martin D. Quiñones (*pro hac vice*)
100 Montgomery St., Ste. 1410
San Francisco, CA 94104
Tel: (628) 231-2500
Fax: (628) 231-2929
Email: vic@sheredling.com
matt@sheredling.com
marty@sheredling.com

*Attorneys for Plaintiff City of Annapolis*

**CERTIFICATE OF SERVICE**

I hereby certify that, on the 15th day of July, 2022, the foregoing document was filed through the ECF system and will be sent electronically to the registered participants identified on the Notice of Electronic Filing.

*/s/ Martin D. Quiñones*
Martin D. Quiñones