IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

CITY OF CHARLESTON,

Plaintiff,

v.

BRABHAM OIL COMPANY, INC.; COLONIAL GROUP, INC.; ENMARK STATIONS, INC.; COLONIAL PIPELINE COMPANY; PIEDMONT PETROLEUM CORP.; EXXON MOBIL CORPORATION; EXXONMOBIL OIL CORPORATION; ROYAL DUTCH SHELL PLC; SHELL OIL COMPANY; SHELL OIL PRODUCTS COMPANY LLC; CHEVRON CORPORATION; CHEVRON U.S.A. INC.; BP P.L.C.; BP AMERICA INC.; MARATHON PETROLEUM CORPORATION; MARATHON PETROLEUM COMPANY LP; SPEEDWAY LLC; MURPHY OIL CORPORATION; MURPHY OIL USA, INC.; HESS CORPORATION; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66; AND PHILLIPS 66 COMPANY,

Defendants.

C/A No. 2:20-cv-03579-RMG

PLAINTIFF'S SUPPLEMENTAL REPLY IN SUPPORT OF PLAINTIFF'S MOTION TO REMAND TO STATE COURT

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I. INTRODUCTION

When the City of Charleston ("Charleston" or "City") filed its Supplemental Opening Brief in support of its motion to remand, *see* Doc. 139 (Sept. 27, 2022) ("Br."), the Fourth Circuit had already rejected every basis for federal subject-matter jurisdiction Defendants raise here except fraudulent joinder, in the materially similar case *Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178 (4th Cir. 2022). In the intervening eight weeks, three more district courts have granted motions to remand in similar cases, rejecting the same arguments. *See District of Columbia v. Exxon Mobil Corp.*, No. CV 20-1932 (TJK), 2022 WL 16901988 (D.D.C. Nov. 12, 2022); *City of Oakland v. BP P.L.C.*, No. C 17-06011 WHA, 2022 WL 14151421 (N.D. Cal. Oct. 24, 2022); *City of Annapolis, Md. v. BP P.L.C.*, No. CV SAG-21-00772, 2022 WL 4548226 (D. Md. Sept. 29, 2022). Those orders join decisions issued this year by the First, Third, Ninth, and Tenth Circuits affirming orders granting remand on the same grounds, and three earlier district court orders likewise granting remand.[1] Defendants' arguments are the same here and fail for the same reasons.

Defendants abandon all but three arguments in support of removal in their Supplemental Answering Brief. *See* Doc. 141 (Nov. 1, 2022) ("Opp."). None of them has any merit. They say first that "[t]he additional evidence" attached to their Notice of Removal "leave[s] no doubt that removal under the federal officer removal statute is proper." Opp. 10. But all that evidence was

[1] *City of Hoboken v. Chevron Corp.*, 45 F.4th 699 (3d Cir. 2022); *City & Cnty. of Honolulu v. Sunoco LP*, 39 F.4th 1101 (9th Cir. 2022); *Rhode Island v. Shell Oil Prods. Co.*, 35 F.4th 44 (1st Cir. 2022); *Cnty. of San Mateo v. Chevron Corp.*, 32 F.4th 733 (9th Cir. 2022); *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238, 1249 (10th Cir. 2022), *cert. petition filed* (June 8, 2022); *see also City of Oakland v. BP PLC*, 969 F.3d 895 (9th Cir. 2020) (reversing order denying remand), *cert. denied*, 141 S. Ct. 2776 (U.S. June 14, 2021); *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.); *Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31 (D. Mass. 2020).

before the courts in *Hoboken*, *Honolulu*, *Oakland*, and *Annapolis*, and each found it did not support removal.[2] Defendants' arguments fail here for all the same reasons. Next, Defendants argue federal questions are necessarily raised because they may at some point assert First Amendment defenses. *See* Opp. 30–32. The courts in *Hoboken*, *Honolulu*, *Oakland*, and *Annapolis* rejected identical arguments.[3] The position is in any event frivolous. Finally, Defendants argue the two South Carolina-resident defendants are fraudulently joined, and thus there is diversity jurisdiction. *See* Opp. 32–34. But as Charleston has explained three times before, Defendants cannot shoulder their burden to show there is no possibility of recovery against the South Carolina defendants Brabham Oil Company, Inc., ("Brabham") and Piedmont Petroleum Corp. ("Piedmont"). *See* Doc. 103 at 58–63 (motion to remand); Doc. 116 at 37–42 (reply in support of remand); Br. 32–33.

The Court should grant Charleston's motion to remand and allow the case to at last proceed in state court, and should award Charleston its reasonable costs and attorney's fees incurred because of Defendants' objectively baseless removal, pursuant to 28 U.S.C. § 1447(c).

II. ARGUMENT

A. None of Defendants' Federal Officer Arguments Withstand Scrutiny and All Have Been Rejected by District and Circuit Courts Across the Country.

Defendants dedicate almost their entire Opposition to arguing that the Court has jurisdiction pursuant to the federal officer removal statute, 28 U.S.C. § 1442. That argument has been rejected by every court that has considered it, including courts presented with the "materially expanded evidentiary record" on which Defendants rely. *See* Opp. 1. 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

[2] *Hoboken*, 45 F.4th at 712–13; *Honolulu*, 39 F.4th at 1107–10; *Oakland*, 2022 WL 14151421, at *7; *Annapolis*, 2022 WL 4548226, at *7.

[3] *Hoboken*, 45 F.4th at 709; *Honolulu*, 39 F.4th at 1110; *Oakland*, 2022 WL 14151421, at *5–6; *Annapolis*, 2022 WL 4548226, at *9.

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).

1. Charleston's Allegations and Theory of Liability Are Not "For or Relating To" Any of Defendants' Relationships With The Federal Government.

None of Defendants' dealings with the federal government confer jurisdiction because the City has not brought this action "for or relating to" any of them. The statute's "nexus" element requires a removing party to demonstrate "a connection or association" between "the alleged government-directed conduct" and "the conduct charged in the Complaint." *Baltimore*, 31 F.4th at 233–34. That is not true here because the Complaint here, as in *Baltimore*, "clearly seeks to challenge the promotion and sale of fossil fuel products without warning and abetted by a sophisticated disinformation campaign." Br. 17; *see id.* 17–19. Defendants cannot allege their disinformation or promotion was conducted under government auspices.

First, the Complaint "disclaims injuries arising . . . from Defendants' provision of fossil fuel products to the federal government." Compl. 5, ¶ 14; *see* Br. 25–26. That disclaimer covers production of military aviation fuel or "avgas" during World War II and the Korean War, and sales of specialty fuel to the military over time. *See, e.g.*, Br. 26. The court in *Annapolis* found an identical disclaimer effective. The defendants argued the plaintiffs "craft[ed] their complaint to focus on alleged misrepresentations, yet nonetheless s[ought] damages for all injuries suffered as a result of global climate change," thus implicating *all* the defendants' fossil fuel production ever—some of it to the government. 2022 WL 4548226 at *8. The court found the claims "not quite so broad":

> They explicitly disclaim injuries arising on federal property and arising from "special-formula fossil-fuel products that Defendants designed specifically for, and provided exclusively to, the federal government for use by the military." [Complaint] ¶ 14. This disclaimer further distances the alleged misconduct from the purported federal authority. Plaintiffs craft their Complaints in this manner not to disguise federal claims, but rather, to "carve out a small island that would needlessly complicate their cases." *City of Hoboken v. Chevron Corp.*, 45 F.4th 699, 713 (3d Cir. 2022).

Id.; *see also Hoboken*, 45 F.4th at 713 ("[T]he disclaimers are no ruse."). The same applies here.

Second, and more broadly, none of the relationships dissected in Defendants' removal notice and briefing have anything to do with the City's allegations. The crux of the City's Complaint is that Defendants failed to warn consumers and the public about known dangers associated with fossil fuel products, and deceived the public regarding those dangers. *See, e.g.*, Compl. 1, 3–5, ¶¶ 1, 7–12. As the court found in *Annapolis*, "Defendants present no evidence that the alleged concealment of the harms of fossil fuel products was for or related to their purported federally authorized actions." 2022 WL 4548226, at *8. The Court is not required to "credit" Defendants' theory of the case to bridge that. *See* Br. 18. The *Honolulu* district court explained:

> Put simply, if Defendants had it their way, they could assert *any* theory of the case, however untethered to the claims of Plaintiffs, because this Court must "credit" that theory. To do so, though, would completely ignore the requirement that there must be a causal connection *with the plaintiff's claims.*

City & Cnty. of Honolulu v. Sunoco LP, No. 20-CV-00163-DKW-RT, 2021 WL 531237, at *7 (D. Haw. Feb. 12, 2021), *aff'd*, 39 F.4th 1101 (9th Cir. 2022). The same obtains here.[4]

Defendants attempt to satisfy the nexus element by urging a different legal standard entirely. They say that in evaluating the nexus requirement, "'[w]hat matters is the crux—or, in legal-speak, the gravamen—of the plaintiff's complaint, setting aside any attempts at artful pleading.'" Opp. 25–26 (quoting *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 755 (2017); *Personenverkehr AG v. Sachs*, 577 U.S. 27, 35 (2015)). But *Fry* and *Sachs* are not federal-officer removal cases, or cases about federal subject-matter jurisdiction at all, and both interpreted statutes with entirely different language. *Fry* construed the administrative exhaustion requirements of the Individuals with Disabilities Education Act ("IDEA"), which require claimants to follow certain dispute resolution

[4] *See District of Columbia*, 2022 WL 16901988, at *8 (nexus element not satisfied because "[t]he 'charged conduct' here is Defendants' false advertising—not fossil fuel production en masse").

procedures "before the filing of a civil action under [any other disability laws] seeking relief that is also available under" IDEA. 20 U.S.C. § 1415(l); *see Fry*, 137 S. Ct. at 754–55. *Sachs* construed an exception in the Foreign Sovereign Immunities Act, "which provides in part that a foreign state does not enjoy immunity when 'the action is based upon a commercial activity carried on in the United States by the foreign state.'" *Sachs*, 577 U.S. at 31 (quoting 28 U.S.C. § 1605(a)(2)). Neither decision sheds any light on the federal-officer removal statute, or anything about the facts of this case. In any event, "[w]hen 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." *Annapolis*, 2022 WL 4548226, at *6 (quoting *Baltimore*, 31 F.4th at 233); *see* Br. 17.

The Defendants lodged a surfeit of new materials with their Notice of Removal that was not part of the record in *Baltimore*, but none of it implicates the nexus element. As the court found reviewing the same evidence in *Annapolis*, all of it "pertains exclusively to the first element" of the federal officer inquiry, "that Defendants 'acted under' a federal officer." 2022 WL 4548226, at *7. For the same reasons discussed in *Annapolis*, "[t]his expanded factual record does nothing to address the legal deficiency" identified in *Baltimore* because "[n]one of Defendants' new examples of federal authority relates to the alleged *concealment of the harms* of fossil fuel products." *Id.* (emphasis added). There is simply no connection between any of the conduct Defendants say they did under federal direction and the City's causes of action.

2. None of Defendants' Purported Relationships With the Government Satisfy the Statute's "Acting Under" Element.

Defendants' relationships with the government also do not support removal because Defendants have not shown they were "acting under" a federal superior. "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 Cos., Inc.*, 551 U.S. 142, 151 (2007)). A contractor acts under the government "where the relationship [i]s 'an unusually close one involving detailed regulation, monitoring, or supervision,'" and the contractor assists with "the fulfillment of a government need." *Id.* (quoting *Watson*, 551 U.S. at 153). "'[P]recedent and statutory purpose' make clear," moreover, "that 'acting under" must involve an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior,'" and "'simply *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 152–53) (other citations omitted).

a. Defendants' Activities During World War II and the Korean War Were Simple Compliance with the Law That Do Not Show an "Acting Under" Relationship.

Defendants argue federal officer removal is warranted because through World War II and the Korean War "the federal government exerted extraordinary control over Defendants during wartime to guarantee the supply of oil and gas for wartime efforts, such as high-octane aviation gasoline ('avgas')." Opp. 11. The same arguments were before the district and circuit courts in *Honolulu*, *Hoboken*, *Oakland*, and *Annapolis*, based on the same evidence, and were rejected. *See Annapolis*, 2022 WL 4548226, at *8 ("Defendants' misrepresentation of the harms of fossil fuel products was not for or related to the government's control of oil production during World War II and the Korean War."); *Oakland*, 2022 WL 14151421, at *7 (same). The same result obtains here.

Defendants allege that "[w]ith the advent of the Korean War in 1950, President Truman established the Petroleum Administration for Defense ('PAD') under authority of the Defense Production Act ('DPA')," which "issued production mandates" Defendants were obliged to follow. Opp. 13. The Ninth Circuit in *Honolulu* held that did not satisfy the statute:

> Defendants did not act under federal officers when they produced oil and gas during the Korean War and in the 1970s under the Defense Production Act (DPA). DPA directives are basically regulations. When complying, Defendants did not serve as government agents and were not subject to close direction or supervision. The government sometimes invoked the DPA in wartime, but . . . Defendants' compliance with the DPA was only lawful obedience. That is not enough.

Honolulu, 39 F.4th at 1107–08. The removal allegations here are the same, and so is the result.

Defendants' legal authorities do not support their contention that the oil industry was effectively nationalized during the Second World War. Defendants cite *United States v. Shell Oil Co.*, 294 F.3d 1045, 1049 (9th Cir. 2002), for the proposition that "the United States government exercised significant control" over avgas production and other "high-priority war programs." Opp. 11–12. What *Shell Oil Co.* actually says, however, is that while "PAW, and other government agencies had the authority to require production of goods at refineries owned by the Oil Companies, and even to seize refineries if necessary, in fact they relied almost exclusively on contractual agreements to ensure avgas production." 294 F.3d at 1049–50; *see Oakland*, 2022 WL 14151421, at *7 (discussing *Shell Oil*). *Shell Oil* makes clear that aviation fuel production during World War II was a cooperative endeavor under which companies like Defendants "affirmatively sought contracts to sell avgas to the government," which "were profitable throughout the war." 294 F.3d at 1050; *see also Oakland*, 2022 WL 14151421, at *7. Avgas production was "more like an arm's-length business deal" that "involve[d] a typical commercial relationship" and thus does not establish federal-officer jurisdiction. *See Honolulu*, 39 F.4th at 1108.[5]

[5] Defendants' other citation, *Exxon Mobil Corp. v. United States*, No. CV H-10-2386, 2020 WL 5573048 (S.D. Tex. Sept. 16, 2020) is not to the contrary. *See* Opp. 31. That case considered the equitable allocation of response costs in a cost-recovery action under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601, *et seq.* ("CERCLA"). The decision has nothing to do with federal officer removal and in any event states, consistent with *Shell Oil*, that the government's primary method of obtaining aviation fuel was

Even if the City had not disclaimed injuries relating to products sold or provided to the government, *and* Defendants could satisfy the acting under element, the Complaint still does not seek relief "for or relating to" Defendants' actions during World War II and the Korean War, as the misrepresentations central to the City's allegations all took place years after those wars ended. The Complaint's earliest allegations concerning Defendants' *knowledge* of the climatic effects of their fossil fuel products begin in 1954, *see* Compl. 57, ¶ 54, and the bulk of them allege knowledge in the 1960s through the 1980s, *see id.* at 58–79, ¶¶ 58–87. The Complaint's allegations concerning Defendants' *public misrepresentations* focus primarily on conduct beginning in or about 1988. *See id.* at 83–101, ¶¶ 95–126. Defendants' wartime production ended in 1952 and mostly occurred during the 1940s. *See* Notice of Removal ("NOR") 76–79, ¶¶ 110–16; Opp. 10–14.[6]

b. Defendants' Sales of Specialized Fuel to the Military Are Commercial Transactions That Could Not Support Removal.

Next, Defendants argue they "continue to produce and supply large quantities of highly specialized fuels that are required to conform to exact DOD specifications to meet the unique operational needs of the U.S. military." Opp. 14. But Defendants' manufacture and sale of "non-commercial grade fuels" for and to the miliary, *see* Opp. 10, is an ordinary commercial relationship, and "a person is not 'acting under' a federal officer when the person enters into an arm's-length business arrangement with the federal government." *San Mateo*, 32 F.4th at 757. "Arm's length business agreements with the federal government for highly specialized products," including selling military fuels, "remain arm's length business agreements." *Oakland*, 2022 WL 14151421, at *8.

"providing economic pressure and incentives for the refinery," and that "the government was not an operator of the refineries" under CERCLA. *Id.* at *47.

[6] *See City of Hoboken v. Exxon Mobil Corp.*, 558 F. Supp. 3d 191, 208 (D.N.J. 2021) ("Defendants' new information addresses conduct that predates Plaintiff's allegations."); *Delaware v. BP Am. Inc.*, 78 F. Supp. 3d 618, 635 (D. Del.) (same); *Oakland*, 2022 WL 14151421, at *8 (same).

Defendants' own documents show that the design, development, and production of specialty fuels has been principally in Defendants' hands and not under the government's subjection, guidance, or control. According to a historical report of the OXCART and U-2 programs, for example, excerpts of which Defendants rely on, private contractors took the lead in designing, developing, and manufacturing the planes. The government told its contractors what planes and performance specifications it wanted, leaving day-to-day operations to the contractors. "[T]he lack of detailed and restricting [government] specifications" is a primary reason the "creative designers" in charge of the OXCART and U-2 programs "produced state-of-the-art aircraft in record time."[7]

The Defense Logistics Agency ("DLA") contracts Defendants cite are no different. *See* Opp. 15–16. Like any commercial agreement, those contracts informed the fuel manufacturer what kind of product the government wanted—*e.g.*, a fuel with certain additives. *See* Decl. of Joshua Dick in Support of Notice of Removal, Exs. 32, 48, 50, 60 (Oct. 9, 2020) ("Dick Decl. I"); Decl. of Joshua Dick in Support of Defendants' Opposition to Plaintiff's Motion to Remand, Ex. 41 (Apr. 7, 2021). The contracts gave the government the unremarkable right to inspect and ensure that the fuels delivered were, in fact, the fuels requested. *See, e.g.*, Dick Decl. Ex. 41, at 7–8. Those "quality assurance" provisions are "typical of any commercial contract." *Baltimore*, 31 F.4th at 231.

Nothing in *County Board of Arlington County v. Express Scripts Pharmacy, Inc.* alters the result. *See* 996 F.3d 243 (4th Cir. 2021); Opp. 17–18. The defendants there contracted with the Department of Defense to administer the "TRICARE Mail-Order Pharmacy" or "TMOP," a prescription drug service under TRICARE, a "federal health insurance program administered by

[7] Exhibit 38 to the Dick Declaration in support of Defendants' Notice of Removal provides a three-page excerpt from Gregory W. Pedlow & Donald E. Welzenbach, *The Central Intelligence Agency and Overhead Reconnaissance: The U-2 and OXCART Programs, 1954–1974* (1992). The Notice of Removal provides a url hyperlink to the complete 400-page report. *See* NOR 81, ¶ 120 n.181. The quotation here can be found at page 320 of the report.

DOD to provide medical care to current and retired service members and their families." *Arlington Cnty.*, 996 F.3d at 248–49 (cleaned up). Critically, "DOD is required by law to enter into contracts for the provision of healthcare services to TRICARE members" (servicemembers, veterans, and their families), and so its pharmacy contractors "were essentially acting as the statutorily authorized *alter ego* of the federal government, as the TRICARE statute requires the Secretary of Defense to contract out the administration of the TMOP program." *Id.* at 253–54. The pharmacy companies were administering a government program the Department of Defense is required by statute to execute, related to the quintessential government function of providing healthcare to servicemembers. Nothing here is like the relationships in *Arlington*.

c. Defendants' Oil and Gas Leases on the Outer Continental Shelf Do Not Create an "Acting Under" Relationship.

Defendants next ask to relitigate an issue they lost in *Baltimore* (and in every other circuit to consider the issue): that they "acted under" federal officers by leasing oil and gas recovery rights from the federal government on the outer Continental Shelf ("OCS"). *See* Opp. 18–21. Defendants acknowledge the Fourth Circuit 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, but say they "provide[d] substantial evidence that the OCS leasing program subjects them to exactly that sort of control," Opp. 18–19. The City already explained why Defendants' "new" material does not change the outcome in *Baltimore*. *See* Br. 20–21. The City supplements that discussion to respond to arguments highlighted in Defendants' Supplemental Opposition.

Defendants first cite their declarant, Professor Tyler Priest, for the proposition that Outer Continental Shelf Lands Act leases are "*not merely commercial transactions*," because "it was the *federal government*, not the oil companies, that 'dictated the terms, locations, methods, and rates of

hydrocarbon production on the OCS'" pursuant to detailed orders. *See* Opp. 19 (emphasis in original). The Ninth Circuit found the same argument meritless in *Honolulu*:

> Defendants rely on a history professor who specializes in oil exploration. The professor chronicles offshore oil leases and government control over such operations, which Defendants contend show a high degree of supervision. But the government orders show only a general regulation applicable to all offshore oil leases. Indeed, Defendants' expert portrays the "OCS orders" as "directions and clarifications to all operators on how to meet the requirements in the C.F.R." General government orders telling Defendants how to comply are not specific direction and supervision, which the removal statute requires.

39 F.4th at 1109. That holding is consistent with *Baltimore,* and with the rulings of the First, Third, and Tenth Circuits considering and rejecting the same leases for the same reasons.[8]

Next, Defendants make the jaw-dropping claim that "[w]ithout Defendants, the federal government would have needed to create a national oil company," and specifically "would have been forced to supply, operate, and manage federal oil reserves on its own," a task "state-owned companies perform in several other countries." Opp. 23–24; *see id.* at 21–22. That position is frivolous. First, Defendants' Notice of Removal cites bills to amend the Outer Continental Shelf Lands Act, one of which they contend would have created a national oil company. *See* NOR ¶¶ 63–66. But none of those bills became law, and they do not stand for the proposition Defendants ascribe to them. Defendants highlight a 1975 bill from Charleston native, Senator Fritz Hollings. *See id.* ¶ 64. But in Senator Hollings' words the bill would have created an agency to "*measure* promptly the extent of the publicly owned oil and gas resources on the OCS" to ensure "bids for production rights on federally explored tracts are truly representative of the value of the resources," Dick

[8] *See Hoboken,* 45 F.4th at 713; *Boulder*, 25 F.4th at 1253; *San Mateo,* 32 F.4th at 759–60; *Rhode Island v. Shell Oil Prod. Co.*, 979 F.3d 50, 59 (1st Cir. 2020), *cert. granted, judgment vacated on other grounds*, 141 S. Ct. 2666 (2021).

Decl. I, Ex. 9 at S903–04 (emphasis added).[9] In any event, selling OCS oil and gas to consumers does not "help[] officers fulfill [a] basic governmental task[]." *See Baltimore*, 31 F.4th at 229.[10]

d. Defendants' Operations at the Elk Hills Reserve in California Do Not Provide Federal Officer Jurisdiction and Every Court Has So Held.

Pressing ever forward, Defendants contend that Standard Oil of California, a Chevron predecessor, acted under federal officers through its management of the Elk Hills Petroleum Reserve in California. Opp. 21–22. *Baltimore* held that a 1944 unit production contract ("UPC") between Standard Oil and the Navy governing their co-ownership of the reserve did not support removal. 31 F.4th at 234–38; *accord San Mateo*, 32 F.4th at 758–59. Defendants "do not argue that removal is proper based on the UPC" here, and instead say Standard Oil "acted under federal officers pursuant to a separate agreement," namely the Operating Agreement through which the government hired Standard Oil to complete some tasks. Opp. 21. The Ninth Circuit in *Honolulu* held the same agreement did not support removal:

> [Defendants] offer a different contract between the parties ("Operating Agreement"), which is separate from the "Unit Production Contract" in *San Mateo* [and *Baltimore*]. Defendants argue that the Navy had "exclusive control" over the time and rate of exploration, and over the quantity and rate of production at Elk Hills. And Defendants uncovered evidence showing that the Navy employed Standard Oil.
>
> We reject Defendants' arguments. While one could read the language about the Navy's "exclusive control" as detailed supervision, what instead happened was the Navy could set an overall production level or define an exploration window, and Standard Oil could act at its discretion. The agreement gave Standard Oil general direction—not "unusually close" supervision.

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[9] Senator Hollings underscored the bill's purpose: "It would not be wise to auction off a much-loved irreplaceable antique without first getting an objective appraisal of its value. Our oil and gas resources, like the antique, are valuable and irreplaceable. We cannot continue to auction them off at prices based on the buyers' own appraisals . . . ." Dick Decl. I, Ex. 9 at S904.

[10] Defendants' contention that the government chose to "hire third parties" to "extract and sell" OCS resources, Opp. 20, is a patent misrepresentation. *Defendants pay the government* royalties to lease drilling rights on OCS lands, not vice-versa, and "oil produced under [the leases] is produced to sell on the open market, not specifically for the government." *See Hoboken*, 45 F.4th at 713.

39 F.4th at 1109; *see also* Br. 22–24.

e. Defendants' Contributions to the Strategic Petroleum Reserve Through Royalty Payments Are Simple Compliance With The Law.

Finally, Defendants say they "'acted under' federal officers by supplying federally owned oil for and managing the Strategic Petroleum Reserve for the government." Opp. 22–23. The Ninth Circuit's opinion in *Honolulu* succinctly disposes of the position:

> Defendants argue that they acted under federal officers when they repaid offshore oil leases in kind and contracted with the government to operate the Strategic Petroleum Reserve (SPR). . . . The SPR is a federally owned oil reserve created after the 1973 Arab oil embargo. [citation] Many Defendants pay for offshore leases in oil and deliver it to the SPR. Another Defendant leases and operates the SPR and by contract must support the government if there is a drawdown on the reserve.
>
> But Defendants cannot show "acting under" jurisdiction for SPR activities. 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.

39 F.4th at 1108. The facts and arguments here are the same, as is the result.

3. Defendants Have Not Shown a Colorable Federal Defense.

Finally, Defendants have not satisfied their burden to show a colorable federal defense. Defendants say "they have several colorable federal defenses to raise," namely the government contractor defense, federal preemption, federal immunity, and various constitutional doctrines. *See* Opp. 29–30. Again, the Ninth Circuit's decision in *Honolulu* explains the insufficiency:

> Defendants cite the government-contractor defense, preemption, federal immunity, the Interstate and Foreign Commerce Clauses, the Due Process Clause, the First Amendment, and the foreign affairs doctrine. For some of these, as the district court put it, Defendants have "simply assert[ed] a defense and the word 'colorable' in the same sentence." . . . . Overall, the defenses fail to stem from official duties or are not colorable.

39 F.4th at 1110. Here, as there, "Defendants' conclusory statements and general propositions of law do not make their defenses colorable." *Id.*

B. Defendants' *Grable* Argument Based on Their Own First Amendment Defenses Is Not Supported by Any Judicial Authority and Remains Frivolous.

Defendants' position that the City's Complaint necessarily raises substantial and disputed federal issues sounding in the First Amendment is frivolous, and their Supplemental Opposition doubles down on facially erroneous legal positions. In reality, "it would dramatically expand *Grable* to conclude that any state tort claim involving speech on matters of public concern could invoke federal court jurisdiction," and "Defendants fail to point to a single case that has relied on *Grable* to support federal jurisdiction in this way." *Annapolis*, 2022 WL 4548226, at *9.

The *Grable* doctrine defines the "slim category of cases in which state law supplies the cause of action but federal courts have jurisdiction under § 1331 because the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Baltimore*, 31 F.4th at 208 (cleaned up)). In that category, "[f]ederal-question jurisdiction exists over a state-law claim if a federal issue is: '(1) necessarily raised, (2) actually disputed, (3) substantial, *and* (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress.'" *Id.* at 209 (quoting *Gunn v. Minton*, 568 U.S. 251, 258 (2013)).

Defendants' removal notice asserted a laundry list of eight theories of *Grable* jurisdiction, which their briefing abandons. *See* NOR ¶ 138. Instead, the Supplemental Opposition presses a theory that the City's claims "arise under federal law for purposes of *Grable* jurisdiction because they necessarily incorporate affirmative federal constitutional elements imposed by the First Amendment." Opp. 30–31. That theory was mentioned only in passing in the Notice of Removal, *see* NOR ¶ 146, and correctly characterized there as a federal *defense* the Defendants might assert on the merits, *see* NOR ¶ 132. It cannot provide jurisdiction under *Grable* even if it is properly before the Court in any event. The Third Circuit dismissed the same argument out of hand:

> [T]hough the First Amendment limits state laws that touch speech, those limits do not extend federal jurisdiction to every such claim. State courts routinely

> hear libel, slander, and misrepresentation cases involving matters of public concern. The claims here arise under state law, and their elements do not require resolving substantial, disputed federal questions.

Hoboken, 45 F.4th at 709. "Defendants [still] fail to point to a single case that has relied on *Grable* to support federal jurisdiction in this way." *Annapolis*, 2022 WL 4548226, at *9.

C. The South Carolina Defendants Are Not Fraudulently Joined.

Finally, Defendants maintain that the Brabham and Piedmont defendants were fraudulently joined and complete diversity is therefore satisfied, incorporating prior briefing by reference. As the City has explained in two opening briefs and an earlier reply brief, Defendants cannot bear the heavy burden to show the City has no possibility of recovery. *See* Doc. 103 at 58–63; Doc. 116 at 37–42; Br. 32–33. The standard for fraudulent joinder is "even more favorable to the plaintiff than the standard for ruling on a motion to dismiss under Fed. R. Civ. P. 12(b)(6)," and requires the moving defendant to "show that the plaintiff cannot establish a claim even after resolving all issues of law and fact in the plaintiff's favor." *Hartley v. CSX Transp., Inc.*, 187 F.3d 422, 424 (4th Cir. 1999) (citing *Marshall v. Manville Sales Corp.*, 6 F.3d 229, 232–33 (4th Cir.1993)). Brabham and Piedmont say they "played no role in any marketing campaign relating to greenhouse gases, global warming, or the science of climate change." Opp. 33. As the City has explained, those assertions are a challenge to the City's claims on the merits that cannot be resolved in a jurisdictional motion, and anyway do not rebut the City's claims for failure to warn and violation of the South Carolina Unfair Trade Practices Act. *See* Reply in Support of Motion to Remand at 38–40, Doc. 116.

III. CONCLUSION

Defendants' arguments in opposition to remand are all meritless, and multiple of them are frivolous. Defendants had no objectively reasonable basis to remove, and the Court should grant Charleston's Motion to Remand to State Court, and award the City costs and attorney's fees pursuant to 28 U.S.C.§ 1447(c).

Respectfully submitted,

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