Nos. 22-2082, 22-2101

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ANNE ARUNDEL COUNTY, MARYLAND,
PLAINTIFF-APPELLEE,
v.

BP P.L.C., ET AL.
DEFENDANTS-APPELLANTS.

Appeal from the United States District Court
for the District of Maryland, No. 1:21-cv-01323-SAG
(The Honorable Stephanie A. Gallagher)

CITY OF ANNAPOLIS, MARYLAND,
PLAINTIFF-APPELLEE,
v.

BP P.L.C., ET AL.
DEFENDANTS-APPELLANTS.

Appeal from the United States District Court
for the District of Maryland, No. 1:21-cv-00772-SAG
(The Honorable Stephanie A. Gallagher)

PLAINTIFFS-APPELLEES' RESPONSE BRIEF

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INTRODUCTION

Plaintiffs-Appellees Anne Arundel County and the City of Annapolis ("Plaintiffs") filed similar lawsuits 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 Maryland's Consumer Protection Act ("CPA") against Defendants-Appellants ("Defendants"). Plaintiffs seek relief for local injuries caused by Defendants' decades-long campaign to discredit the science of climate change, conceal the dangers of using their fossil-fuel products, and deceive consumers about their role in responding to climate change.

Defendants removed both cases, asserting an encyclopedia of jurisdictional theories, each of which this Court has recently rejected in an analogous climate-deception case. *See Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178 (4th Cir. 2022). The district court granted Plaintiffs' motions for remand in a memorandum opinion applying to both cases. The court held that it lacked subject-matter jurisdiction and rejected Defendants' five asserted bases for removal,

finding that three were foreclosed by *Baltimore*[1] and the remaining two were meritless. *See* J.A.1467–86. Those latter two are now before the Court: (1) federal-officer removal jurisdiction pursuant to 28 U.S.C. § 1442(a)(1); and (2) federal-question jurisdiction under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005), based on Defendants' anticipated First Amendment defenses. Both are variations on theories this Court rejected in *Baltimore*, and should again reject here.

Every court to consider Defendants' removal arguments in similar climate-deception cases—five appellate courts and twelve district courts, including this Court and the court below—has rebuffed them.[2] This Court

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[1] Defendants maintain two of those foreclosed arguments here for preservation purposes only, and do not appear to contest the district court's order as to the third. *See* Defendants-Appellants' Opening Brief ("OB") at 6 n.2, 67.

[2] *See* J.A.1467–1486; *Cnty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934 (N.D. Cal. 2018), *aff'd*, 32 F.4th 733 (9th Cir. 2022), *cert. petition filed* (Nov. 22, 2022) (No. 22-495); *Mayor & City Council of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538 (D. Md. 2019), *aff'd*, 31 F.4th 178 (4th Cir. 2022), *cert. petition filed* (Oct. 14, 2022) (No. 22-361); *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142 (D.R.I. 2019), *aff'd sub nom. Rhode Island v. Shell Oil Prods. Co., L.L.C.*, 35 F.4th 44 (1st Cir. 2022), *cert. petition filed* (Dec. 2, 2022) (No. 22-524); *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 405 F. Supp. 3d 947 (D. Colo. 2019), *aff'd*, 25 F.4th 1238 (10th Cir. 2022), *cert. petition filed* (June 8, 2022)

should follow the broad judicial consensus, affirm remand, and return these cases to state court where they belong.

JURISDICTIONAL STATEMENT

This Court has appellate jurisdiction to review the district court's orders granting Plaintiffs' motions to remand. *See* 28 U.S.C. § 1447(d); *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532 (2021).

ISSUES PRESENTED

1. Did the district court lack subject-matter jurisdiction under the federal-officer removal statute, 28 U.S.C. § 1442, because none of the

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(No. 21-1550); *Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31 (D. Mass. 2020); *City & Cnty. of Honolulu v. Sunoco LP*, Nos. 20-cv-00163-DKW-RT, 20-cv-00470-DKW-KJM, 2021 WL 531237 (D. Haw. Feb. 12, 2021), *aff'd*, 39 F.4th 1101 (9th Cir. 2022), *cert. petition filed* (Dec. 2, 2022) (No. 22-523); *Minnesota v. Am. Petroleum Inst.*, No. 20-1636 (JRT/HB), 2021 WL 1215656 (D. Minn. Mar. 31, 2021), *appeal filed*, No. 21-1752 (8th Cir. Apr. 5, 2021); *Connecticut v. Exxon Mobil Corp.*, No. 3:20-cv-1555 (JCH), 2021 WL 2389739 (D. Conn. June 2, 2021), *appeal filed*, No. 21-1446 (2d Cir. June 8, 2021); *City of Hoboken v. Exxon Mobil Corp.*, 558 F. Supp. 3d 191 (D.N.J. 2021), *aff'd sub nom. City of Hoboken v. Chevron Corp.*, 45 F.4th 699 (3d Cir. 2022); *Delaware v. BP Am. Inc.*, 578 F. Supp. 3d 618 (D. Del. 2022), *aff'd sub nom. City of Hoboken v. Chevron Corp.*, 45 F.4th 699 (3d Cir. 2022); *City of Oakland v. BP P.L.C.*, Nos. C 17-06011 WHA, C 17-06012 WHA, 2022 WL 14151421 (N.D. Cal. Oct. 24, 2022), *appeal filed*, No. 22-16810 (9th Cir. Nov. 25, 2022); *District of Columbia v. Exxon Mobil Corp.*, __ F. Supp. 3d __, 2022 WL 16901988 (D.D.C. Nov. 12, 2022), *appeal filed*, No. 22-7163 (D.C. Cir. Nov. 30, 2022).

conduct challenged in the Complaint relates to activities Defendants engaged in under the direction or control of a federal superior? *See* J.A.1476–1483.

2. Did the district court lack federal-question jurisdiction under 28 U.S.C. §§ 1331 & 1441, where the *Grable* doctrine is not satisfied based on Defendants' First Amendment defenses? *See* J.A.1483–1486.

STATEMENT OF THE CASES

I. The Complaints

Plaintiffs' theory of liability is straightforward. *See* J.A.540–546; J.A.1296–1302. For decades, Defendants have known that their oil, gas, and coal products create greenhouse gas emissions that change the Earth's climate, warm the oceans, and cause sea levels to rise. J.A.540; J.A.542; J.A.588–612; J.A.1296; J.A.1298–1299; J.A.1346–1370. Defendants evaluated impacts of climate change on their infrastructure, invested to protect their own assets from rising seas and more extreme storms, and developed technologies to profit in a warmer world. J.A.588–612; J.A.633–635; J.A.1346–1370; J.A.1391–1393.

Instead of warning consumers or the public, however, Defendants embarked on a sophisticated campaign of disinformation to cast doubt on

the science of global warming, while concealing and misrepresenting the climate change impacts of their fossil-fuel products. J.A.612–633; J.A.1370–1391. That deception inflated global consumption of fossil fuels, which increased greenhouse gas emissions, exacerbated climate change, and created hazardous environmental conditions in Maryland. J.A.543–545; J.A.1299–1302. Defendants' failure to warn and tortious promotion were a substantial factor in bringing about Plaintiffs' climate-related harms, which include damage to property and infrastructure from rising seas, tidal flooding, and more frequent and intense extreme weather events. J.A.675–683; J.A.1433–1445.

To vindicate these localized injuries, Plaintiffs sued Defendants in Maryland state court, pleading state-law claims for public and private nuisance, negligent and strict liability failure to warn, trespass, and violations of Maryland's Consumer Protection Act. J.A.684–702; J.A.1445–1464. The Complaints seek damages for the harms caused by Defendants' deception campaigns; disgorgement of profits generated by those campaigns; and equitable relief to abate the local environmental hazards those campaigns contributed to. J.A.703; J.A.1464.

II. Removal and Federal Court Proceedings

Defendants removed these cases to federal court, asserting five grounds for federal jurisdiction. J.A.16–18; J.A.721–723. Plaintiffs timely filed motions to remand, which the district court granted. J.A.1467–1486; *see also* J.A.1487 (order remanding Anne Arundel County's case to state court); J.A.3135 (order remanding the City of Annapolis's case). The district court explained that this Court in *Baltimore* had rejected each of Defendants' removal theories. J.A.1472. The court nonetheless considered Defendants' arguments not presented in *Baltimore*, i.e. their (1) "expanded evidentiary record in support of federal officer jurisdiction" and (2) "new argument for *Grable* jurisdiction" based on their anticipated First Amendment defenses. J.A.1473 (cleaned up). The expanded evidentiary record included additional information regarding Defendants' extraction of fossil fuels from the Outer Continental Shelf and operations at the Elk Hills Petroleum Reserve, plus evidence that they produced and sold fossil fuels to the federal government during World War II and the Korean War, have sold "specialized" fuels to the U.S. military at various times, and have supplied oil to the Strategic Petroleum Reserve. *See* J.A.1479. As to the second theory, Defendants

argued that Plaintiffs' claims are removable under *Grable* because they necessarily incorporate federal-law elements related to the First Amendment. *See* J.A.1484.

The district court rejected Defendants' federal-officer removal theory, because "[n]one of [their] new examples of federal authority relates to the alleged concealment of the harms of fossil fuel products." J.A.1479–1483. The court also rejected Defendants' "expansive assertion of *Grable* jurisdiction" based on their First Amendment defenses, noting that "Defendants fail[ed] to point to a single case that has relied on *Grable* to support federal jurisdiction in this way." J.A.1483–1486. The court granted remand, joining the unanimous "district and circuit courts around the country to conclude that these state law claims for private misconduct belong in state court." J.A.1486–1487; *see also* J.A.3135.

The district court granted in part Defendants' motion to stay pending appeal. No. 21-cv-01323, ECF No. 161; No. 21-cv-00772, ECF No. 184.

SUMMARY OF ARGUMENT

Defendants' removal theories have been rejected by courts nationwide in similar climate-deception cases, including this Court. They

have supplemented the evidence in support of federal-officer removal and tinkered with their arguments, but their jurisdictional theories remain meritless. The Ninth Circuit and Third Circuit have so held. *See Honolulu*, 39 F.4th 1101; *Hoboken*, 45 F.4th 699. This Court should likewise affirm.

Federal-Officer Jurisdiction. Defendants still fall well short of satisfying the requirements of the federal-officer removal statute, 28 U.S.C. § 1442(a)(1).

First, Defendants do not show that any of their purported federally directed acts are related to "the conduct charged in the Complaint[s]." *See Baltimore*, 31 F.4th at 233–34 (quoting *Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 257– 58 (4th Cir. 2017)). Defendants make no attempt to show that anything they did purportedly at the behest of federal superiors was related to the "sophisticated disinformation campaign" and "concealment and misrepresentation of the[ir] products' known dangers" Plaintiffs allege as the basis for liability. *See id.* at 233. As in *Baltimore*, "the relationship between [Plaintiffs'] 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." *Id.* at 234.

Second, Defendants have not shown that they acted under federal officers in the first place. Plaintiffs have disclaimed injuries arising from sales of specialized fuels to the government, and none of the relationships Defendants identify demonstrate the degree of federal "subjection, guidance, or control" that constitutes "acting under" a federal officer within the meaning of the statute. *Baltimore*, 31 F.4th at 228–29 (quoting *Watson v. Philip Morris Co.*, 551 U.S. 142, 147 , 151 (2007)).

Third, although the Court need not reach the statute's third element, Defendants raise no colorable federal defense, as the Ninth Circuit found in *Honolulu*, 39 F.4th at 1110.

Grable. There is no federal-question jurisdiction under *Grable*, 545 U.S. 308. Defendants' First Amendment rights may at most provide them federal defenses to Plaintiffs' state-law claims, which cannot confer federal-question jurisdiction. The First Amendment does not insert additional affirmative elements into Plaintiffs' state-law claims and does not supply grounds for jurisdiction.

ARGUMENT

I. The District Court Correctly Found No Basis for Federal-Officer Removal.

Defendants have litigated and lost the same theory of federal-officer jurisdiction in seventeen courts, including this one. *See supra* note 1. Nonetheless, Defendants dress up old arguments in purportedly "new" evidence, and insist they acted under federal officers throughout much of the last century, pointing to everything from fossil-fuel sales during World War II to mineral leases on the Outer Continental Shelf ("OCS"). But as the district court correctly held, "Defendants' expanded factual record does not correct the relational legal deficiency identified [by this Court] in *Baltimore* []." J.A.1483. The Third and Ninth Circuits have likewise found Defendants' expanded record did not cure the deficiencies in Defendants' arguments, and this Court should join them. *See Honolulu*, 39 F.4th at 1106–10; *Hoboken*, 45 F.4th at 712–13.

To remove a case under the federal-officer removal statute, 28 U.S.C. § 1442, "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.

A. No Nexus Exists Between Defendants' Challenged Conduct and the Directions of Any Federal Officer.

Defendants are not entitled to federal-officer removal because the activities they allege they conducted under color of federal office "are insufficiently related to [Plaintiffs'] claims" to meet their statutory burden. *See Baltimore*, 31 F.4th at 230. "To satisfy the third prong" of Section 1442, also known as the "nexus" prong, the removing party must demonstrate "a connection or association" between "the alleged government-directed conduct" and "the conduct charged in the Complaint." *Id.* at 233–34 (quoting *Sawyer*, 860 F.3d at 257–58).

None of the ways in which Defendants say they acted under federal officers "correct the relational legal deficiency identified in *Baltimore* []." J.A.1483.

1. No Federal Officer Was Involved in Defendants' Deceptive Commercial Activities.

In *Baltimore*, the Court explained why neither certain Defendants' OCS leases nor a Chevron predecessor's operations at the Elk Hills

Petroleum Reserve in California were sufficiently related to "the conduct alleged in the Complaint" to satisfy the nexus prong:

> 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 (footnote omitted). The same is true here. Plaintiffs' Complaints challenge Defendants' failure to warn consumers and the public about their fossil-fuel products' known dangers, and Defendants' decades-long campaigns of deception and disinformation about those dangers. *See, e.g.*, J.A.540–546; J.A.1296–1302.

The district court correctly held that Defendants fail to satisfy the nexus prong because they "present no evidence that the alleged

concealment of the harms of fossil fuel products was for or related to their purported federally authorized actions," and "there is no suggestion that the government influenced Defendants' alleged decision to misrepresent the safety of their products." J.A.1481. Defendants do not, for example, "claim that any federal officer directed their respective marketing or sales activities, consumer-facing outreach, or even their climate-related data collection." *Minnesota*, 2021 WL 1215656, at *9; *see also Hoboken*, 558 F. Supp. 3d at 207. Nor do they contend that their "sophisticated misinformation campaign" was "justified" in any way "by [a] federal duty." *Rhode Island*, 393 F. Supp. 3d at 152 (cleaned up). The Court's holding in *Baltimore* applies directly and with equal force here.

2. Defendants Cannot Satisfy the Nexus Prong by Framing Fossil-Fuel Production as a Link in the Causal Chain.

Unable to show that the federal government was involved in their deceptive marketing activities, Defendants insist that the nexus prong is satisfied because the extraction and production of fossil fuels is a link in the causal chain connecting their challenged conduct (Defendants' failure to warn and misrepresentations) to Plaintiffs' alleged injuries (the local impacts of climate change in Maryland). *See* OB 19–28. But just as in

Baltimore, "the relationship between [Plaintiffs'] 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 234.

Defendants submit that the district court applied too demanding a standard to the nexus prong, and indeed that this Court erred by doing so in *Baltimore*. *See* OB 19–28. According to Defendants, "courts must consider whether the defendant's federally directed acts relate to the plaintiff's alleged *injury*," even if those acts have nothing to do with the conduct that forms the basis of liability. OB 19. The statutory language does not support that reading. A case is removable if, in relevant part, it "is against or directed to . . . any officer (or any person acting under that officer) of the United States . . . for or relating to any act under color of such office." 28 U.S.C. § 1442(a)(1). Determining whether a case is "against" the defendant "for or relating to" an act under color of office requires determining whether the official conduct is a necessary element of liability. That is why the Supreme Court held more than two decades ago that a removing defendant "must show a nexus, . . . [']between *the charged conduct* and asserted official authority,'" not between the

plaintiff's injury and official authority. *Jefferson Cnty., Ala. v. Acker*, 527 U.S. 423, 431 (1999) (emphasis added) (quoting *Willingham v. Morgan*, 395 U.S. 402, 409 (1969)). That remains the law in the Fourth Circuit, as elsewhere—which Defendants' cited cases illustrate. *See, e.g.*, *Baltimore*, 31 F.4th at 233; *Sawyer*, 860 F.3d at 257–58 (requiring nexus between "the charged conduct and asserted official authority").[3]

Defendants misleadingly portray this Court's opinion in *County Board of Arlington County v. Express Scripts Pharmacy, Inc.*, 996 F.3d 243 (4th Cir. 2021), as focusing the nexus inquiry on "the acts that

[3] *Ruppel v. CBS Corp.*, 701 F.3d 1176, 1181 (7th Cir. 2012) ("[T]here must be a 'causal connection between the charged conduct and asserted official authority.'" (quoting *Acker*, 527 U.S. at 431)); *Baker v. Atl. Richfield Co.*, 962 F.3d 937, 943 (7th Cir. 2020) ("The question, then, is whether the polluting conduct [plaintiffs] complain of relates to the federal directives [defendants] acted under."); *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286, 296 (5th Cir. 2020) (en banc) (requiring nexus between "charged conduct" and "an act pursuant to a federal officer's directions"); *In re Commonwealth's Motion to Appoint Couns. Against or Directed to Def. Ass'n of Philadelphia*, 790 F.3d 457, 471–72 (3d Cir. 2015) (same); *see also, e.g.*, *Goncalves ex rel. Goncalves v. Rady Children's Hosp. San Diego*, 865 F.3d 1237, 1245 (9th Cir. 2017) (defendants must show "the challenged acts [in the complaint] 'occurred *because of* what they were asked to do by the Government'" (quoting *Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 137 (2d Cir. 2008))); *Caver v. Cent. Ala. Elec. Coop.*, 845 F.3d 1135, 1145 (11th Cir. 2017) (finding causal nexus where "the acts for which [defendant] is being sued . . . occurred because of" conduct at direction of federal officer).

allegedly caused the 'injuries' and on the 'harm' that allegedly gave rise to the 'damages' that the plaintiff seeks to recover." OB 21 (quoting *Express Scripts*, 996 F.3d at 251–52). But Defendants' argument cherry-picks the word "injuries" from the Court's discussion of the "acting-under" prong, not the nexus prong. *See* 996 F.3d at 251–52. As to the nexus prong, the Court explained that "the conduct charged in the Complaint" must "relate to the asserted official authority." *Id.* at 256 (cleaned up).

None of Defendants' remaining cases support their novel reading of the nexus requirement. *France.com*, *Sachs*, and *Devengoechea* do not concern Section 1442—or even the phrase "for or relating to." *France.com, Inc. v. French Republic*, 992 F.3d 248, 250, 253 (4th Cir. 2021), *cert. denied*, 142 S. Ct. 712 (2021); *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 29 (2015); *Devengoechea v. Bolivarian Republic of Venezuela*, 889 F.3d 1213, 1220 (11th Cir. 2018). Instead, each interprets Congress's use of the words "based upon" in the Foreign Sovereign Immunities Act, which withdraws sovereign immunity in any case where "the action is based upon a commercial activity carried on in the United States by [a] foreign state." 28 U.S.C. § 1605(a)(2). None of them bears on this Court's construction of Section 1442. And in any event, they too illustrate a focus

on the elements of the defendant's liability, not the factual cause of the plaintiff's injuries. *See Sachs*, 577 U.S. at 32 ("In the court's view, Sachs would satisfy the 'based upon' requirement for a particular claim if *an element* of that claim consists in conduct" within statutory exception. (cleaned up)).

Fry is another inapposite case that interprets different words in a different statute, namely the phrase "seeking relief" in the Individuals with Disabilities Education Act. *Fry v. Napoleon Cnty. Sch.*, 580 U.S. 154, 161, 169 (2017). In that case too, the Supreme Court's analysis does not support Defendants' preferred construction. *Fry* explained that "the gravamen of a complaint" was defined by the "conduct [that] violate[d]" the law, not by the "nature" of a plaintiff's injuries. *Id.* at 169–71, 174. Under that logic, the gravamen of Plaintiffs' Complaints is Defendants' concealment and misrepresentation of the dangers of fossil fuels. *See Baltimore*, 31 F.4th at 233. It is not—as Defendants protest—Plaintiffs' climate-related injuries. There must be a nexus between asserted federal authority and "the conduct charged in the Complaint[s]," and Defendants can cite no case holding otherwise. *See Baltimore*, 31 F.4th at 233.

3. Defendants Cannot Satisfy the Nexus Prong by Rewriting the Complaints.

Defendants next try to reframe the Complaints to create a nexus where none exists. They insist that "Defendants' production activities . . . form an essential part of Plaintiffs' claims" because according to Defendants the Complaints put those activities "front and center by seeking to hold Defendants at least partially responsible for climate change and for Plaintiffs' alleged physical injuries purportedly resulting therefrom," and those "production activities" necessarily incorporate the subset of production Defendants have sold to the federal government. OB 22, 24. Defendants contend that this is particularly true for Plaintiffs' trespass and nuisance claims, because "[m]isrepresentation is not traditionally an element of these claims" and "each claim rests on allegations that Plaintiffs suffered physical injuries from Defendants' extracting, refining, and selling of fossil fuel." OB 24; *see also* OB 23–24.

This Court considered precisely the same types of claims in *Baltimore* and determined that the "source of tort liability" was, indeed, Defendants' "concealment and misrepresentation of the products' known dangers—and the simultaneous promotion of their unrestrained use" rather than any production-related activities. 31 F.4th at 195, 233–34;

see also Part I.A.1, *supra*. The same applies to Plaintiffs' failure to warn and CPA claims. Defendants' unremarkable assertion that Plaintiffs must prove injury as an element of these claims, OB 24, does nothing to support their attempt to reframe the Complaints to satisfy Section 1442's nexus prong. Multiple courts in analogous cases have rejected Defendants' attempts "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*, 578 F. Supp. 3d at 636 n.21 (citations omitted).[4] The district court correctly determined, by applying the proper nexus standard, that "[n]one of Defendants' new examples of federal authority relates to the alleged concealment of the harms of fossil fuel products." J.A.1479–1480.

The Second Circuit's decision in *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021), does not support Defendants for two reasons. First, "*City of New York* was in a completely different procedural posture"

[4] *See also Minnesota*, 2021 WL 1215656, at *5 ("To adopt Defendants' theory . . . is a bridge too far."); *Honolulu*, 2021 WL 531237, at *7 ("[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*." (citation omitted)); *accord Connecticut*, 2021 WL 2389739, at *11.

because it was filed in federal court, and the Second Circuit "never addressed its own subject-matter jurisdiction." *Baltimore*, 31 F.4th at 203. The Second Circuit did not consider federal-officer removal, or removal jurisdiction at all. Second, the complaint there sought to hold certain fossil-fuel companies liable for "lawful commercial activity," namely the defendants' lawful "production, promotion, and sale of fossil fuels." 993 F.3d at 87–88 (cleaned up). For that reason, the Second Circuit viewed the complaint as "effectively impos[ing] strict liability for the damages caused by fossil fuel emissions." *Id.* at 93. Plaintiffs' claims here, again, seek to hold Defendants liable for damages caused by their unlawful deception. Even if New York City's claims might have a relevant nexus with Defendants' production for the government, Plaintiffs' do not.

The remaining cases Defendants cite found the nexus standard satisfied because they involved a direct connection between the acts taken under federal direction and the conduct challenged in the complaint, which is lacking here. *See* OB 26–28. In *Baker*, the plaintiffs alleged the defendants' manufacturing operations contaminated a housing complex, and the defendants claimed the government controlled and directed their operations at a prior facility "on the same site" as the

plaintiffs' homes. 962 F.3d at 940–41. Because the "wartime production" of hazardous products at the government's behest during World War II "was a small, yet *significant*, portion of their relevant conduct," on the same premises as the alleged contamination, the defendants met the nexus standard. *Id.* at 945. In *Express Scripts*, the plaintiff alleged the defendants created a public nuisance by "filling certain opioid prescriptions," and the defendants satisfied the nexus prong because "[they] were required to fill those prescriptions to comply with their duties under [a federal government] contract" that the government had a statutory mandate to execute. 996 F.3d at 257.[5] Here, "there is no suggestion that the government influenced Defendants' alleged decision to misrepresent the safety of their products." J.A.1481.

[5] Defendants' assertion that these cases are like *Express Scripts* because "Plaintiffs seek damages due to harm allegedly arising from emissions released by all of Defendants' oil and gas products that were combusted" is also inaccurate. OB 27. There, the plaintiff expressly sought relief for harm "arising from 'every opioid prescription' filled by" pharmacies like the defendants. 996 F.3d at 257. Here, "[Plaintiffs'] claims are . . . premised on the incremental impacts caused by Defendants' purported disinformation and the resulting increased production and consumption of petroleum products," not all undifferentiated injuries from climate change. *Delaware*, 578 F. Supp. 3d at 635–36 (cleaned up).

4. Defendants Cannot Satisfy the Nexus Prong Based on Conduct Expressly Disclaimed by the Complaints.

Plaintiffs' Complaints both expressly "disclaim 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." J.A.545; J.A.1302. That disclaimer covers production of aviation fuel or "avgas" during World War II and the Korean War, as well as sales of specialized non-commercial fuels to the military over time. As the district court correctly determined, these "disclaimer[s] further distance[] the alleged misconduct from the purported federal authority." J.A.1482.

Courts have found nearly identical disclaimers effective in analogous cases. The district court in *Delaware* held a similar disclaimer was "not a 'jurisdictional disclaimer' that categorically disclaims jurisdiction conferred by the federal officer removal statute," but rather "a 'claim disclaimer' that 'expressly disclaim[s] the claims upon which federal officer removal was based'"; and "'federal courts have consistently granted motions to remand' based on 'claim disclaimers.'" *Delaware*, 578 F. Supp. 3d at 635 (quoting *Dougherty v. A O Smith Corp.*, 2014 WL

3542243, at *10 (D. Del. July 16, 2014)). The Third Circuit affirmed on the same basis:

> In their complaints, both Hoboken and Delaware insist that they are not suing over emissions caused by fuel provided to the federal government. . . . Resisting this conclusion, the companies say that these suits cannot separate harm caused by military fuel use from harm caused by civilian fuel use. So they ask us to disregard these disclaimers as 'merely artful pleading designed to circumvent federal officer jurisdiction.' [citation] But the disclaimers are no ruse. . . . Instead, Delaware and Hoboken carve out a small island that would needlessly complicate their cases.

Hoboken, 45 F.4th at 713 (cleaned up). The same analysis applies here. *See* J.A.1482 (citing *Hoboken*, 45 F.4th at 713).

The cases Defendants cite do not support their objections to Plaintiffs' disclaimers. *Express Scripts* did not involve a disclaimer at all; instead, the Court rejected the plaintiff's argument that federal-officer jurisdiction could not rest on conduct that its "[c]omplaint did not even mention." 996 F.3d at 256–57. There is a critical distinction between simply failing to mention certain conduct and *affirmatively disclaiming* injuries from that category of conduct. There was similarly no disclaimer at issue in *Nessel v. Chemguard, Inc.* The plaintiffs there brought two cases alleging environmental injuries from the same chemical product—

one for injuries from the product's commercial formulations and one for military formulations—and both cases were conditionally transferred to a multidistrict litigation proceeding involving the military formulation. No. 1:20-cv-1080, 2021 WL 744683, at *1 (W.D. Mich. Jan. 6, 2021). The plaintiff moved to remand its commercial case while proceeding in the MDL on its military-related claims, but the court held the plaintiffs could not "surgically divide their complaints" to have some claims adjudicated in the MDL and some in state court, where the injury could not be differentiated. *Id.* at *3. Here, by contrast, Plaintiffs have not sought to sever claims related to Defendants' relationships with the government, Plaintiffs have disclaimed them entirely. And in *Ballenger v. Agco Corp.*, the disclaimer was held ineffective on its own terms because it waived federal claims but not "claims arising out of work done on U.S. Navy vessels." No. C 06–2271 CW, 2007 WL 1813821 at *1 & n.2, *2 (N.D. Cal. June 22, 2007).

The two other cases Defendants cite arose in factually distinguishable circumstances. As described above, the defendants in *Baker* alleged that the federal government directed and controlled a "small, yet *significant*" portion of their challenged conduct of "tortiously

contaminat[ing]" the site in question. *See* 962 F.3d at 940–41, 945. The plaintiffs attempted to disclaim injuries from one defendant's production of Freon-12 for the government, but defendant showed that the government "directed it to build a facility for the government and then lease it from the government to produce Freon-12," which "resulted in waste streams containing lead and arsenic," "the two main toxins the [plaintiffs] claim harmed them." *Id.* at 941–42, 945 n.3. Although the parties disputed the degree of contamination caused by government-ordered production at the site, it was undisputed that one defendant "operated under government commands [there] for 20% of the relevant time span," and another defendant "for 5-to-15% of the period," releasing the very contaminants at issue, on the very properties at issue. *Id.* at 945.

Under those circumstances, the court held the plaintiffs could not "have it both ways" and disclaim conduct at the heart of their case. *Id.* at 945 n.3. These cases are entirely different, because any connection between Plaintiffs' claims and Defendants' sales to the government is at best extremely attenuated, both legally and causally. As the district court held, the disclaimers "carve out a small island that would needlessly

complicate [Plaintiffs'] cases." J.A.1482 (citing *Hoboken*, 45 F.4th at 713). Plaintiffs do not seek to "have it both ways."

The decision in *O'Connell v. Foster Wheeler Energy Corp.* is not to the contrary, because the plaintiff there attempted a jurisdictional disclaimer. *See* 544 F. Supp. 2d 51, 54 n.6 (D. Mass. 2008). The plaintiff overbroadly disclaimed "any cause of action or recovery for any injuries resulting from exposure to asbestos dust caused by any acts or omissions of a party committed at the direction of an officer of the United States Government," and expressly argued that the disclaimer "eliminate[d] federal subject matter jurisdiction, including any that would attach under" the federal officer removal statute. *See id.* That language is substantially similar to, for example, the jurisdictional disclaimer the court rejected in *Dougherty v. A O Smith*, which sought to disclaim "any cause of action or claim for recovery that could give rise to federal subject matter jurisdiction under either 28 U.S.C. § 1331 (federal question) or 28 U.S.C. § 1442, subdivision (a)(1) (federal officer)." 2014 WL 3542243 at *3. That type of circular, failsafe disclaimer—if a claim confers federal jurisdiction it is disclaimed, and if it does not it is not—cannot be permitted because it makes exercise of federal jurisdiction impossible.

Showing that a cause of action confers removal jurisdiction *ipso facto* eliminates it from the case, revoking the removal jurisdiction just conferred. Here, the Plaintiffs make a true claim disclaimer, disclaiming a category of potentially recoverable harms whether or not those claims might be subject to federal jurisdiction. That disclaimer is effective.

These lawsuits seek to hold Defendants liable for their misrepresentations and failure to warn, not for all greenhouse gas emissions ever released, and Plaintiffs' burden is to show that *that* conduct was a substantial cause of their injuries. Satisfying that burden does not depend on avgas or other specialty fuels Defendants sold to the U.S. military. Moreover, the Complaints allege that there are methods for attributing climate-related impacts to "Defendants' products and conduct" on "an individual and aggregate basis." J.A.587; J.A.1345.[6] As that uncontested allegation makes clear, Plaintiffs can disaggregate the harms caused by Defendants' tortious conduct from those caused by specific products sold to the government, and corresponding damages can

[6] *See also, e.g.*, Richard Heede, *Carbon Majors: Updating activity data, adding entities, & calculating emissions: A Training Manual*, CLIMATE ACCOUNTABILITY INSTITUTE (2019), https://climateaccountability.org/pdf/TrainingManual%20CAI%2030Sep19hires.pdf.

thus be calculated in accordance with Plaintiffs' disclaimers. This Court should join the numerous courts that have found disclaimers like Plaintiffs' effective in analogous cases.

5. Defendants' Purported Federal Acts That Predate The Challenged Conduct Cannot Satisfy the Nexus Prong.

Plaintiffs' claims are not "for or relating to" Defendants' actions during World War II and the Korean War. The misrepresentations central to Plaintiffs' claims took place years after those wars ended. *See* J.A.613–614 (alleging Defendants' deception campaigns accelerated in the late 1980s); *accord* J.A.1371–1372. Defendants' wartime activities are simply irrelevant to the case. *See Oakland*, 2022 WL 14151421, at *8 ("The alleged deceptive promotion, moreover, started well *after* the Second World War and therefore the wartime activities cannot be a plausible basis to hold any defendant liable."); *Delaware*, 578 F. Supp. 3d at 635 (wartime activities "are irrelevant for purposes of removal because Defendants' alleged disinformation campaign, which is what the instant case is actually about, started decades later" (cleaned up)); *accord Hoboken*, 558 F. Supp. 3d at 206–08 .

B. Defendants Have Not Shown They "Acted Under" Federal Officers in Any Way Relevant to These Cases.

None of Defendants' proffered interactions with the federal government show an acting-under relationship that would support removal. "Although the words 'acting under' are 'broad,' the Supreme Court has emphasized that they are not 'limitless.'" *Baltimore*, 31 F.4th at 228–29 (quoting *Watson*, 551 U.S. at 147). "'[P]recedent 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," 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).

"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." *Id.* at 229 (quoting *Watson*, 551 U.S. at 151). A contractor thus acts under the government where (1) "the relationship [i]s 'an unusually close one involving detailed regulation, monitoring, or supervision,'" and (2) the contractor assists

"the fulfillment of a government need." *Id.* (quoting *Watson*, 551 U.S. at 153–54). "[A] person is not 'acting under' a federal officer when the person enters into an arm's-length business arrangement with the federal government," however, "or supplies it with widely available commercial products or services." *San Mateo*, 32 F.4th at 757 (citations omitted).

1. Defendants Did Not Act Under a Federal Officer When They Produced and Sold Fossil Fuels or Built Pipelines During World War II or the Korean War.

Defendants contend that they acted under federal officers when they produced avgas and built pipelines during World War II and the Korean War. OB 38–42. Those activities are within the Plaintiffs' disclaimers, and regardless none of Defendants' wartime evidence shows an "acting-under" relationship because it does not demonstrate sufficiently close federal control or supervision. Instead, it largely evidences mere compliance with legal requirements.

Defendants first claim that they were subject to federal control through recommendations and directives issued by the Petroleum Administration for War ("PAW") during World War II. OB 38–39. At the outset, the mere fact that PAW directives were "mandatory and enforceable by law," OB 39, moreover, does not demonstrate federal

control, as "'simply *complying* with the law' . . . no matter how detailed the government regulation or how intensely the entity's activities are supervised and monitored," does not show an acting-under relationship. *Baltimore*, 31 F.4th at 229 (quoting *Watson*, 551 U.S. at 153).

Defendants' own citations explain, moreover, that the PAW "had the authority to require production of goods at refineries owned by the Oil Companies, and even to seize refineries if necessary," but "relied almost exclusively on contractual agreements to ensure avgas production." *United States v. Shell Oil Co.*, 294 F.3d 1045, 1049–50 (9th Cir. 2002);[7] *see also id.* at 1050 ("Throughout the war, the Oil Companies designed and built their facilities, maintained private ownership of the facilities, and managed their own refinery operations."). *Shell Oil* makes clear that aviation fuel production during World War II was a cooperative

[7] As the Tenth Circuit explained in *Boulder* in the context of OCS lease provisions, the federal government's ability to intervene, without actual intervention, does not "support[] the[] invocation of federal-officer removal." 25 F.4th at 1254 (quoting *Mays v. City of Flint*, 871 F.3d 437, 447 (6th Cir. 2017)). *See also Par. of Plaquemines v. Riverwood Prod. Co.*, No. CV 18-5217, 2022 WL 101401, at *9 (E.D. La. Jan. 11, 2022) (granting remand) ("The oil industry was indeed highly regulated, supervised, and monitored during WWII, and the regulation was both highly detailed and often quite specific. . . . The PAW was given power to direct. It threatened to direct. But threats are not themselves direction.").

endeavor, and companies like Defendants "affirmatively sought contracts to sell avgas to the government," which "were profitable throughout the war." 294 F.3d at 1050.

Defendants still insist the PAW retained the ability to use other measures if cooperative efforts failed, *see* OB 39, but several of their own exhibits in support of removal indicate that the cooperative approach proved sufficient.[8] Avgas production was "more like an arm's-length business deal" that "involve[d] a typical commercial relationship" and does not support federal-officer jurisdiction. *See Honolulu*, 39 F.4th at 1108; *Express Scripts*, 996 F.3d at 251 ("Even when a contract specifies the details of the sales and authorizes the government to supervise the sale and delivery, the simple sale of contracted goods and services is insufficient to satisfy the federal officer removal statute."). The facts here are entirely unlike *Papp v. Fore-Kast Sales Co.*, where the defendant

[8] According to one historical account cited by Defendants, the PAW was "dedicated to the proposition that cooperation, rather than coercion, was the formula by which the forces of Government and industry could best be joined." J.A.979. During a 1941 conference held by the Office of Petroleum Coordination for National Defense, Secretary of the Interior Ickes stressed that "[t]he cooperation so far . . . has been very good." J.A.1631. *See also* J.A.396 ("No Government agency had to compel [oil companies] to do the job" of producing fossil fuels during World War II.).

produced aircraft "under the specific supervision" of the military, whose "oversight extended to labels and warnings for all parts of the aircraft." 842 F.3d 805, 810 (3d Cir. 2016).

Defendants cite one provision from an avgas contract that purportedly directed an oil company to "use its best efforts and work day and night to expand facilities producing avgas." J.A.91 (cleaned up); *accord* J.A.793. That sort of generic direction cannot give rise to an acting-under relationship. *See Cabalce v. Thomas E. Blanchard & Assocs., Inc.* 797 F.3d 720, 728 (9th Cir. 2015) ("contractual generalities" do not suffice). Defendants claim "the federal government controlled 'how and when' ExxonMobil and its affiliates 'use[d] raw materials and labor,'" OB 40 (citing J.A.92), but for that proposition their notices of removal rely solely on factual findings from *Exxon Mobil Corp. v. United States*, No. CV H-10-2386, 2020 WL 5573048 (S.D. Tex. Sept. 16, 2020). That decision states, consistent with *Shell Oil*, that the government's primary method of obtaining aviation fuel was "providing economic pressure and incentives for the refinery," and that "the government was not an operator of the refineries" at issue. *Id.* at *47.

For similar reasons, Defendants cannot rest federal-officer removal on their purported involvement in constructing and operating "two vital pipelines." OB 41. The record lacks any evidence that the federal government controlled how those pipelines were built, and Defendants' own declarant opines that the oil companies "provided the government" with the "know-how in the areas of pipeline construction and operation." J.A.160; J.A.1180. That is insufficient to support removal, because government contractors do not operate "under federal supervision or control" when "the government [is] relying on the expertise of [the contractor] and not vice versa." *Cabalce*, 797 F.3d at 728 (cleaned up).

Finally, Defendants explain that during the Korean War, "President Truman established the Petroleum Administration for Defense ('PAD') under authority of the Defense Production Act," which "issued orders to Defendants to produce avgas" and expand production. OB 41–42. The Ninth Circuit 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 (citations omitted). The same result obtains here.

2. Defendants Did Not Act Under Federal Officers When Selling "Specialized" Fuels to the Military.

Defendants' sales of "specialized" fuels to the military cannot satisfy the acting-under standard because they did not involve the requisite government control and supervision. 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 (emphasis added). A defendant must do more than show the government "set forth detailed [product] specifications" for the item being purchased. *Id.* at 231 (quotations omitted). It must show the government "close[ly] supervis[ed]" production, such as by "exercis[ing] intense direction and control over all written documentation" accompanying the 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, 398–99 (5th Cir. 1998)) (cleaned up).

Defendants' own documents show that the design, development, and production of specialty fuels has been principally in Defendants' hands and not the government's. According to one historical account of the Blackbird spy plane project, for example, the government adopted a "management philosophy" of giving maximal "free[dom]" to its private contractors; officials refrained from "substituting their judgment for that of the contractors," and the "[r]equirements for Government approval as a prerequisite to action were minimal." J.A.2766–2767. The same is true of Blackbird's predecessor projects. According to a historical report of the OXCART and U-2 programs, excerpts of which Defendants rely on, private contractors took the lead in designing, developing, and manufacturing the new spy planes. The government told its contractors what planes and performance specifications it wanted, leaving day-to-day operations and management to the contractors. Indeed, "the 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."[9] Defendants'

[9] The exhibits attached to Defendants' removal notices include a two-page excerpt from Gregory W. Pedlow & Donald E. Welzenbach, *The Central*

submissions again indicate that "the government was relying on the expertise of [private contractors]" to manufacture the planes—"and not vice versa." *See Cabalce*, 797 F.3d at 728 (quotation omitted).

This conclusion is only reinforced by Shell Oil's contracts for manufacturing fuels and fuel facilities for the OXCART program. *See* J.A.1696–1705; J.A.2768–2777. Those commercial agreements gave the government generic rights to inspect the final deliverables, as any commercial contract would. *See, e.g.*, J.A.1737 (agreeing that work will "conform to high professional standards"); *accord* J.A.2806. Nothing in the contracts suggests the government oversaw or controlled the manufacturing process itself, as Section 1442 demands. *See*, *e.g.*, J.A.1747–1748 (tasking Shell with providing "technical supervision" and "[e]ngineering," "general administration," and "laboratory support necessary to make the facility operational").

The government's contracts with Tesoro are no different. Like any commercial agreement, those contracts told Tesoro what kind of product

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Intelligence Agency and Overhead Reconnaissance: The U-2 and OXCART Programs, 1954–1974 (1992). *See* J.A.1642–1645; J.A.2736–2739. The removal notices provide a url hyperlink to the complete report. *See* J.A.94 n.125; J.A.750 n.26. The quotation here appears at page 320.

the government wanted—*e.g.*, a fuel with certain additives. *See* J.A.2345–2565 (Tesoro contracts); J.A.2880–3100 (same). The contracts gave the government the right to inspect and ensure that the fuels delivered were the fuels requested, *see, e.g.*, J.A.2574–2575; J.A.3109–3110, but those "quality assurance" provisions are "typical of any commercial contract," *Baltimore*, 31 F.4th at 178.[10] Nothing in the Tesoro agreements shows the federal government oversaw or controlled the day-to-day development or manufacturing of those fuels.

Defendants contend that the lengthy specifications applicable to some of the fuels they produced renders their activities similar to "the production of Agent Orange . . . that [this Court] considered the hallmark of 'close supervision.'" OB 35 (quoting *Baltimore*, 31 F.4th at 231). Defendants omit half the story. The Court described the supervision at issue in that case as involving "the Department of Defense *requir[ing]*

[10] Even the quality assurance provisions are unremarkable: the contracts direct Tesoro to test the properties of their fuels using widely applicable protocols developed by the American Society for Testing and Materials ("ASTM"). *See, e.g.*, J.A.2568–2570; J.A.2574–2575; J.A.3103–3105; J.A.3109–3110. This Court "ha[d] little trouble concluding that [another set of] fuel supply agreements," which were similarly subject to ASTM standards, did not satisfy the acting-under prong. *Baltimore*, 31 F.4th at 230–31.

Dow Chemical to provide Agent Orange *under threat of criminal sanctions*" and "maintain[ing] strict control over the chemical's development." *Baltimore*, 31 F.4th at 231 (citation omitted) (emphases added). Defendants provide no indication that the government comparably controlled their development of military aviation fuels,[11] much less that they were *required* to produce such fuels or face criminal penalties. As the district court in *Oakland* explained in finding Defendants' specialized fuel contracts insufficient to confer jurisdiction, while "Dow Chemical risked criminal prosecution" unless it produced Agent Orange, "Defendants here faced nothing." 2022 WL 14151421, at *8. At bottom, "[a]rm's length business agreements with the federal government for highly specialized products remain arm's length business agreements." *Id.* (citing *San Mateo*, 32 F.4th 733).

[11] *West Virginia State University Board of Governors v. Dow Chemical Co.*, another case Defendants cite, confirms that the private actor's conduct in helping or assisting federal officers must be performed "under the government's control or subjection." 23 F.4th 288, 301–02 (4th Cir. 2022) (citations omitted). Defendants provide no such evidence as to any of their specialized fuel production activities.

3. Defendants Did Not Act Under Federal Officers Through Their Contributions to the Strategic Petroleum Reserve.

Defendants next contend that they "'acted under' federal officers by supplying oil for and managing the [Strategic Petroleum Reserve ("SPR")] on behalf of the government." OB 43. That argument, like the rest, has been rejected by every court that has considered it. 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. [cite] 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.

Honolulu, 39 F.4th at 1108. The Ninth Circuit's conclusion is consistent with this Court's reasoning in *Baltimore*. For example, lease provisions requiring certain lessees to participate "as a sales and distribution point

in the event of a drawdown," J.A.2687, simply require compliance with federal statutes.[12] Those provisions are strikingly similar to the OCS lease terms that this Court rejected in *Baltimore* because they were "mere iterations of the OCSLA's regulatory requirements." 31 F.4th at 232. "[C]ompliance with such requirements, no matter their level of complexity, cannot by itself trigger the 'acting under' relationship." *Boulder*, 25 F.4th at 1253–54.

4. Defendants Did Not Act Under a Federal Officer Through Their Operations at the Elk Hills Reserve.

Defendants next argue that Standard Oil of California, a Chevron predecessor, acted under federal officers through its management of the Elk Hills Reserve. OB 45–48. This Court rejected that argument in *Baltimore* because it "simply ha[d] no idea whether production authorized by Congress [at Elk Hills] was carried out by Standard" and was "left wanting for pertinent details about Standard's role in operating the Elk Hills Reserve and producing oil therefrom on behalf of the Navy." 31 F.4th at 237. Defendants' "new" evidence fails to remedy that

[12] 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).

deficiency and confirms that activities at Elk Hills *do not* support removal.

To begin, Defendants cite some of the very same provisions of a 1944 unit production contract ("UPC") between Standard and the Navy governing their co-ownership of the reserve that this Court found insufficient in *Baltimore*. *Compare* OB 46 ("The UPC afforded the Navy 'exclusive control over the exploration, prospecting, and operation' of Elk Hills." (quoting J.A.296; J.A.881)), *with Baltimore*, 31 F.4th at 236 ("Defendants stress that the UPC gave the Navy '*exclusive control* over the exploration, prospecting, development, and operation of the [Elk Hills] Reserve.'" (citation omitted)). And as the Ninth Circuit held in *San Mateo*, the UPC represents an "arm's-length business arrangement" that allowed Standard 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." 32 F.4th at 759. "Standard's activities under the [UPC] did not" amount to an acting-under relationship. *Id.*

Defendants pivot, contending that the UPC provides "background" for their more intense involvement at Elk Hills later. OB 46–47.

Specifically, Defendants contend that Standard Oil acted under the Navy pursuant to an Operating Agreement through which the government hired Standard to complete some tasks. OB 45–48. However, the Ninth Circuit again held in *Honolulu* that the Operating 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.

Honolulu, 39 F.4th at 1109 (citation omitted).

Ignoring this precedent, Defendants claim the Operating Agreement cures the evidentiary gap this Court identified in *Baltimore* because that agreement says Standard was "in the employ of the Navy Department and [was] responsible to the Secretary thereof." OB 45–47 (quoting J.A.76; J.A.778). Hard proof, they say, is that "in [November]

1974, after [Standard] questioned whether it was possible to produce 400,000 barrels per day, the Navy directed [Standard] to develop a plan to do so and rejected the Company's objections." OB 46. But rather than preparing that plan, "Standard Oil chose to withdraw from operating Elk Hills" less than two months later. J.A.78 & n.89; *accord* J.A.778–779 & n.110; *see also* J.A.1620–1621 (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"). When "large-scale production efforts . . . restarted in 1976," Standard's successor to the contract was the operator of the reserve. *See* J.A.185; J.A.1205. In response to what Defendants characterize as an order from the Navy compelling Standard to act, the company declined to do so and took its business elsewhere. That cannot reasonably be characterized as subjection, guidance, or control.

The Operating Agreement identifies various tasks that Standard voluntarily agreed to perform, such as "drilling," "[e]xploration and prospecting[,]" and the "maintenance" of facilities. J.A.367–368 (§ 4(e) of Agreement); *accord* J.A.952–953. It also establishes general duties of care for Standard to follow. *See* J.A.374 (§ 10(a) of Agreement); *accord*

J.A.959. But none of that comes close to the "detailed regulation, monitoring, or supervision" required by federal-officer removal. *Baltimore*, 31 F.4th at 229 (quoting *Watson*, 551 U.S. at 149). To the contrary, the Operating Agreement expressly directs *Standard Oil*—not the Navy—to "furnish . . . a set of field operating procedures that are commensurate with the State of California laws and good oil field practice." J.A.368 (§ 4(f) of Agreement); *accord* J.A.953. In other words, the Navy was "relying on the expertise of [Standard]" to operate the Reserve "and not vice versa." *Cabalce*, 797 F.3d at 728 (quotation omitted). And although Defendants point to other provisions that supposedly show "the Navy exercised close supervision and control over" Standard, OB 47–48,[13] the Ninth Circuit correctly found that the Operating Agreement did not subject Standard to the "unusually close" supervision Section 1442 demands, *see Honolulu*, 39 F.4th at 1109.

Ultimately, the Operating Agreement was another "arm's-length business arrangement with the Navy" that does not demonstrate government subjection, guidance, or control. *San Mateo*, 32 F.4th at 759.

[13] Notably, Defendants provide no evidence that the Navy actually exercised the supposedly "extensive powers" they identify. *See* OB 47.

5. Defendants Did Not Act Under a Federal Officer By Producing Fossil Fuels on the Outer Continental Shelf.

Finally, Defendants claim they acted under federal officers when they produced oil and gas on the OCS through leases pursuant to the Outer Continental Shelf Lands Act ("LA"). OB 49–54. This Court considered and squarely rejected Defendants' removal arguments based on OCS leases in *Baltimore*. 31 F.4th at 231–32. Defendants' "new" evidence demonstrates neither (a) that they are subject to sufficient supervision and control to demonstrate the "'unusually close' relationship" the Court found lacking in *Baltimore*, nor (b) that they assist with "the fulfillment of a government need." *Id.* at 229, 232 (quoting *Watson*, 551 U.S. at 153–54). As the Ninth Circuit concluded in *Honolulu*, despite this additional evidence, "Defendants break no new ground." 39 F.4th at 1108.

a. The OCS Leases Create a Regulator-Regulated Relationship.

In *Baltimore*, the Court 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 (citations omitted). None of Defendants' purportedly new evidence fills this gap.

Trying to demonstrate otherwise, Defendants point to:

(1) Various OCS-related requirements in the Code of Federal Regulations ("CFR"), *see, e.g.*, J.A.207–208 (quoting regulatory requirements); *accord* J.A.1227–1229;

(2) "OCS Orders" that contain "directions and clarifications . . . on how to meet the requirements in the C.F.R.," J.A.212 (testimony of Dr. Priest); *accord* J.A.1232;

(3) The declaration of one of their experts, who opined that government officials "supervised, directed, and controlled the rate of oil and gas production," including through OCS Orders and use of supervisors with "substantial discretion" in implementing OCS regulations. J.A.211; J.A.237–238; *accord* J.A.1231, 1258; *see also* J.A.207–208 (describing supervisory role and lessee obligations "according to the regulations"); *accord* J.A.1227–1229; and

(4) An OCS lease term describing the government's authority to compute royalties by determining "the reasonable value of the production," J.A.281 (§ 6(b) of cited lease); *accord* J.A.866, authority which their expert explains was delegated by regulation, *see* J.A.208; *accord* J.A.1228–1229.[14]

At bottom, though, these assertions simply describe an ordinary regulator-regulated relationship: a statute delegates rulemaking

[14] This authority, then, is another example of a "lease term[]" that is a "mere iteration[] of the OCSLA's regulatory requirements." *See Baltimore*, 31 F.4th at 232.

authority to an agency, the agency promulgates and enforces rules, and the regulated entities comply with the law. But even "[t]hough OCS resource development is highly regulated," *Baltimore*, 31 F.4th at 232, "simple compliance with the law" does not create an acting-under relationship, *id.* at 229 (quoting *Watson*, 551 U.S. at 153).

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.
>
> Defendants also argue that government "regional supervisor[s] still had to make adaptive and discretionary decisions" pertaining to individual operations. But these were decisions like approving certain actions on a well or giving specific waivers to excuse compliance with regulations, not directing or supervising operations generally. The government also set overall production levels for wells. Yet the orders were general regulations that applied to everyone rather than "unusually close" direction or supervision.

Honolulu, 39 F.4th at 1109 (citations omitted). 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. *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).

b. Defendants Do Not Assist with "Basic Government Functions" by Producing Fossil Fuels on the OCS.

The last time Defendants presented their OCS leases to this Court, the Court was "skeptical that the willingness to lease federal property or mineral rights to a private entity for the entity's own commercial purposes, without more, could ever be characterized as the type of assistance that is required to trigger the government-contractor analogy." *Baltimore*, 31 F.4th at 232.[15] None of the additional evidence

[15] *See also 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." (citation omitted)).

Defendants present here shows that they "assist the government in carrying out basic governmental functions." *See id.* at 230.

To begin, the OCS leases do not "obligate [Defendants] to make a product specially for the government's use." *Boulder*, 25 F.4th at 1253. Rather, "oil produced under them is produced to sell on the open market, not specifically for the government." *Hoboken*, 45 F.4th at 713 (cleaned up). Relatedly, Defendants' contention that the federal government "decided to hire . . . private companies like Defendants . . . to develop the OCS," OB 50, is a patent misstatement. The government does not "hire" Defendants to produce fossil fuels under the OCS leases. *Defendants pay the government* royalties under the terms of their respective leases for the right to extract fossil fuels, which they sell for profit. *See, e.g.*, J.A.280 (2017 form OCS lease granting lessees "the exclusive right and privilege to drill for, develop, and produce oil and gas resources"); *accord* J.A.865. And Defendants' selling OCS oil and gas to consumers plainly does not "help[] officers fulfill [a] basic governmental task[]." *See Baltimore*, 31 F.4th at 229 (quoting *Watson*, 551 U.S. at 153). The reason the federal government "had no prior experience or expertise" in oil and gas development, as Defendants' expert states, J.A.206; J.A.1226, is that

fossil-fuel production for commercial sale has *never* been a task of the federal government.

Defendants also claim that several never-enacted bills to amend OCSLA would have created "a national oil company" and that, without Defendants, "the federal government would have been required, as a matter of energy security, to develop mineral reserves on the OCS directly, on its own." OB 51–52. That position is frivolous for multiple reasons. As Defendants concede, "Congress . . . rejected" the 1970s "proposals to create a national oil company to develop the OCS," and none became law. OB 51. Unenacted bills do not evince congressional intent. *See Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994). And even if they did, the bills cited by Defendants do not evince any congressional intent to nationalize oil production on the OCS. Defendants highlight a 1975 bill from Senator Hollings, but in the Senator's own 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 "be sure that bids for production rights on federally explored tracts are truly representative of the value of the resources." J.A.1600–1601 (emphasis added); *accord* J.A.2601–2602. And

as Defendants acknowledge, the 1974 "Fogco" bill purportedly would have given a government-owned company "the right to develop up to 20% of the mineral resources on the OCS," OB 52 (citing J.A.242–243; J.A.1262–1263), leaving 80 percent to private companies. These bills 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.

In *Honolulu*, Defendants similarly pointed to these bills and argued "that offshore oil resources are a national security asset" to show they acted under federal officers through their OCS activities. 39 F.4th at 1108. The Ninth Circuit correctly explained that Defendants' evidence did not "show that oil production was a basic governmental task." *Id.*[16] Defendants' contention that they have acted under federal officers by leasing OCS mineral rights has been universally rejected and is frivolous.

[16] And as the district court in *Delaware* explained, "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." 578 F. Supp. 3d at 639.

C. Defendants Have Not Raised a Colorable Federal Defense.

The Court need not reach the "colorable federal defense" prong of the federal-officer inquiry because Defendants fail to satisfy the nexus or acting-under prongs. *See Boulder*, 25 F.4th at 1254 ("Because Exxon has not established that it acted under a federal officer . . . we do not need to reach the remaining elements for federal officer removal."); *San Mateo*, 32 F.4th at 760 (same).[17] In any event, most of the defenses Defendants raise were properly rejected by the Ninth Circuit in *Honolulu* because they either "fail to stem from official duties or are not colorable." 39 F.4th at 1110. The same applies here to each of the purported defenses Defendants assert.

II. The District Court Correctly Found that Defendants' First Amendment Defenses Do Not Satisfy *Grable*.

Defendants next contend that Plaintiffs' claims are removable under *Grable*, 545 U.S. 308, "because they necessarily incorporate federal

[17] Defendants note that neither the district court nor Plaintiffs addressed the "colorable federal defense" prong below. OB 55. But as with the other prongs of federal-officer removal, Defendants bear the burden of establishing a colorable federal defense. *See Sawyer*, 860 F.3d at 254 (a private defendant seeking to remove a case under Section 1442 "must show . . . that it has 'a colorable federal defense,'" among other elements) (citation omitted)).

elements imposed by the First Amendment." OB 60. The district court correctly rejected this baseless theory, in line with every other court that has considered it. *See* J.A.1483–1486.

The *Grable* doctrine defines the "slim category of cases in which state law supplies the cause of action but federal courts have jurisdiction under [28 U.S.C.] § 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) (quoting *Burrell v. Bayer Corp.*, 918 F.3d 372, 380 (4th Cir. 2019)). 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)). "Federal courts must be 'cautious' in exercising this form of jurisdiction because it lies at the 'outer reaches of § 1331.'" *Id.* at 208 (quoting *Burrell*, 918 F.3d at 380). 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.* at 209 (quoting *Burrell*, 918 F.3d at 381).

Defendants contend that "where nominally state-law tort claims target speech on matters of public concern like climate change, the First Amendment injects affirmative federal-law elements into the plaintiff's cause of action." OB 61–62. That is entirely wrong, and none of the cases they cite stands for the proposition that state-law claims like Plaintiffs', filed in state court, are removable under *Grable* because of "inject[ed]" First Amendment elements. The Third Circuit explained in rejecting the same argument in *Hoboken*:

> [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.

45 F.4th at 709. Every other court that has considered Defendants' First Amendment theory for *Grable* jurisdiction has likewise dismissed it out of hand. *See* J.A.1483–1486; *Oakland*, 2022 WL 14151421, at *5–6; *Delaware*, 578 F. Supp. 3d at 632–34; *Hoboken*, 558 F. Supp. 3d at 204–05; *Connecticut*, 2021 WL 2389739, at *10.

Defendants do not cite a single case finding grounds to remove state-law claims to federal court on the basis of a defendant's First Amendment rights. Four cases Defendants cite were never in federal district court at any point—they were litigated in a state court system and came before the U.S. Supreme Court on direct appeal or by writ of certiorari. *See Milkovich v. Lorain J. Co.*, 497 U.S. 1, 10 (1990) (Ohio); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 771 (1986) (Pennsylvania); *New York Times Co. v. Sullivan*, 376 U.S. 254, 263–64 (1964) (Alabama); *Nat'l Rev., Inc. v. Mann*, 140 S. Ct. 344, 345 (2019) (Alito, J., dissenting from denial of certiorari) (District of Columbia). Two others were filed in federal court on *diversity* grounds, and the opinions do not discuss subject-matter jurisdiction. *See Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 48 (1988); *Snyder v. Phelps*, 580 F.3d 206, 210 (4th Cir. 2009) (similar), *aff 'd*, 562 U.S. 443 (2011). The decisions simply do not bear on the removal questions before this Court.

Defendants quickly introduce two other cases they claim support jurisdiction based on their anticipated First Amendment defenses; they badly misrepresent both. The Supreme Court's decision *Gully v. First National Bank* had nothing to do with the First Amendment, and in any

event held that the plaintiff's claim did not arise under federal law and *should be remanded to state court*. 299 U.S. 109, 114–118 (1936). The Court explained that for federal-question jurisdiction to exist, "a right or immunity created by the Constitution or laws of the United States *must be an element, and an essential one, of the plaintiff's cause of action*." *Id.* at 112 (emphasis added). Stated differently, it was already true in 1936 that "[b]y unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby." *Id.* at 116. Defendants nonetheless cite *Gully* for their contention that Plaintiffs' claims arise under federal law because a court will "have to address *whether the First Amendment protects Defendants' speech* on matters of public concern." OB 63 (emphasis added). That is a gossamer-thin euphemism describing a federal defense, which more than a century of jurisprudence—*Gully* included—does not permit as a basis for jurisdiction under the well-pleaded complaint rule. *See Nevada v. Culverwell*, 890 F. Supp. 933, 937 (D. Nev. 1995) (relying on *Gully* to find no grounds for removal based on First Amendment defense).

The decision in *Ortiz v. University of Medicine & Dentistry of New Jersey* only proves the point. Federal jurisdiction was proper there because the plaintiff's state-law civil rights complaint alleged that the *defendant* violated the *plaintiff's* free speech rights, not because the complaint somehow implicated the defendant's First Amendment protections. *See* No. 08-2669JLL208-CV-026, 2009 WL 737046, at *3, *5 (D.N.J. Mar. 18, 2009). The plaintiff's complaint "expressly state[d]" that the defendant "violated the United States Constitution in describing her [state-law employment discrimination] claims" such that her "stated cause of action require[d] proof of violation of federal law as an essential element to recovery." *Id.* at *1, *7 (citing *Grable* 545 U.S. at 319). The case said nothing about the *defendant's* First Amendment rights, and "[n]othing in *Ortiz* stands for the broad proposition that any constitutional issue, no matter how it is raised, is sufficient to invoke federal jurisdiction." *Hoboken*, 558 F. Supp. 3d at 205.

Defendants nonetheless insist that the First Amendment issues in the cases they cite are not defenses but rather "constitutionally required *elements* of the plaintiff's cause of action, for which the *plaintiff* bears the burden of proof . . . as a matter of federal law." OB 62 (cleaned up). But

as the district court in *Hoboken* held and the Third Circuit affirmed, that is simply wrong: "Each of the cases [defendants cite] involve a federal constitutional defense to a state tort law. Critically, the federal court's jurisdiction in each of these cases did not appear to turn on the existence of the constitutional defense." *Hoboken*, 558 F. Supp. 3d at 204; *accord Delaware*, 578 F. Supp. 3d at 632 ("While the cases cited by Defendants address the constitutional boundaries for the remedies available under state-law defamation and libel claims, they do not hold that the Constitution supplies a necessary element for these state-law claims."); *see also Connecticut*, 2021 WL 2389739, at *10 ("ExxonMobil fails to cite any authority . . . for the proposition that these limits would apply to such claims in a manner that would embed any First Amendment issues within state law claims—as opposed to providing ExxonMobil with a federal defense."). The same applies to *Snyder*, which involved state-law tort claims filed in federal court on diversity grounds and thus did not consider whether the First Amendment provided necessary elements of the claims, instead describing it as "the First Amendment *defense*." *See* 580 F.3d at 210, 218 & n.11 (emphasis added).

Defendants are also wrong that the district court's rejection of their First Amendment theory for *Grable* jurisdiction is "irreconcilable with the court's rejection of federal officer removal" by describing the challenged conduct as Defendants' misrepresentations. OB 64. The fact that these cases largely challenge Defendants' misrepresentations and that Defendants may assert First Amendment defenses to Plaintiffs' claims does not transform those defenses into elements of Plaintiffs' claims to support *Grable* removal. Defendants cite no examples of any court holding otherwise. The district courts in *Hoboken* and *Connecticut* rejected both Defendants' First Amendment theory and their federal-officer removal theory, while describing the challenged conduct as Defendants' misinformation and deception. *See Hoboken*, 558 F. Supp. 3d at 204–05, 207–09; *Connecticut*, 2021 WL 2389739, at *10–12.

Further, the district court correctly reasoned that "it would dramatically expand *Grable* to conclude that any state tort claim involving speech on matters of public concern could invoke federal court jurisdiction," which "would raise federalism concerns and counter the mandate for federal courts to 'strictly construe' removal statutes." J.A.1484–1485 (citation omitted). Defendants agree that "most state-law

misrepresentation claims are not subject to removal," but say that is because most of the time "allegations regarding misrepresentations will not impact the federal system." OB 65. Defendants say vaguely that this case will impact the federal system, however, because climate change is "hotly debated," and because Plaintiffs' are local governments. OB 66 (quoting *Nat'l Review, Inc. v. Mann*, 140 S. Ct. 344, 347-48 (2019) (Alito, J., dissenting from denial of certiorari)). They still offer no explanation how any of this that interjects federal element into Plaintiffs' prima facie case, and still cite no case upholding removal on this basis.

Defendants also assert in a conclusory fashion that federal courts may hear this case without disturbing the congressionally-approved balance "[g]iven the compelling federal interests at stake," without considering the important state interests raised by Plaintiffs' claims. *See* OB 66–67. Plaintiffs' claims target misconduct that fall within fields of traditional state regulation, including "protection of consumers," *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 150 (1963), and "unfair business practices," *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989) (citation omitted). "A state has an especial interest in exercising judicial jurisdiction over those who commit torts within its

territory," *Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 776 (1984) (quotation omitted), and a core "interest in ensuring the accuracy of commercial information in the marketplace," *Edenfield v. Fane*, 507 U.S. 761, 769 (1993) (citations omitted). In light of these important state interests, the district court correctly concluded that wresting these cases from Maryland state courts simply because Defendants may assert First Amendment defenses "would impermissibly upset the Congressionally approved federal-state balance." *See* J.A.1485.

Finally, Defendants insist the First Amendment provides jurisdiction because "Plaintiffs are public entities seeking to use the machinery of their state courts to impose *de facto* regulations on Defendants' nationwide speech on issues of national concern." OB 66. The opinion in *California v. Sky Tag, Inc.*, No. CV-11-8638-ABC-PLA, 2011 WL 13223655 (C.D. Cal. Nov. 29, 2011), explains in a similar context why that is not a basis for jurisdiction. There, the Los Angeles City Attorney 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 under *Grable* because the City's action would impose a prior restraint on their speech, but the court rejected this theory as "no

different than other First Amendment defenses that courts have repeatedly found did not support removal jurisdiction." *Id.* at *3 (collecting cases). Moreover, the Third Circuit in *Hoboken*, as well as the district courts in *Oakland*, *Delaware*, *Hoboken*, and *Connecticut*, rejected Defendants' First Amendment theory notwithstanding the fact that those cases also involve suits filed by public entities in state courts challenging Defendants' same misrepresentations.

Ultimately, Defendants provide no support for their "expansive assertion of *Grable* jurisdiction." J.A.1486. Courts have resoundingly rejected their theory, and this Court should do the same. Whatever First Amendment rights Defendants might assert, they are federal defenses that do not supply a basis for jurisdiction.

CONCLUSION

The Court should affirm the district court's orders granting remand.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the undersigned certifies that this brief complies with the applicable typeface, type-style, and type-volume limitations. This brief was prepared using a proportionally spaced type (Century Schoolbook, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 12,806 words. This certificate was prepared in reliance on the word-count function of the word-processing system used to prepare this brief.

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CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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STATUTORY ADDENDUM

Pursuant to Fourth Circuit Local Rule 28(b) and Federal Rule of Appellate Procedure 28(f), this addendum includes pertinent statutes, reproduced verbatim:

Statutes **Page**

28 U.S.C. § 1331. Federal Question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1441(a). Removal of Civil Actions

(a) Generally.--Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

. . .

28 U.S.C. § 1442. Federal officers or agencies sued or prosecuted

(a) A civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

(2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.

(3) Any officer of the courts of the United States, for or relating to any act under color of office or in the performance of his duties;

(4) Any officer of either House of Congress, for or relating to any act in the discharge of his official duty under an order of such House.

. . .

28 U.S.C. § 1447. Procedure after removal generally

. . .

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise.

. . .

28 U.S.C. § 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

. . .

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

. . .

42 U.S.C. § 6241. Drawdown and sale of petroleum products

(a) Power of Secretary The Secretary may drawdown and sell petroleum products in the Reserve only in accordance with the provisions of this section.

. . .

(d) Presidential finding prerequisite to drawdown and sale

(1) Drawdown and sale of petroleum products from the Strategic Petroleum Reserve may not be made unless the President has found drawdown and sale are required by a severe energy supply interruption or by obligations of the United States under the international energy program.

. . .