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)

DEFENDANTS-APPELLANTS' REPLY BRIEF

Thomas G. Hungar
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
(202) 955-8500
thungar@gibsondunn.com

Theodore J. Boutrous, Jr.
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, California 90071-3197
(213) 229-7000
tboutrous@gibsondunn.com

Counsel for Defendants-Appellants Chevron Corporation and Chevron U.S.A. Inc.
[*Additional counsel listed on signature page*]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Plaintiffs' far-reaching claims in Maryland state court seek to hold Defendants liable for the alleged physical effects of global climate change. Plaintiffs seek damages for injuries that they allege are caused by the cumulative impact of emissions emanating from every State in the Nation and every country in the world over decades. These allegations are inherently and necessarily federal in nature. In an effort to avoid federal jurisdiction, however, Plaintiffs argue that this Court should ignore their actual claims, ignore their alleged injuries, and ignore their requested relief, focusing instead solely on their allegations of "misrepresentation." This effort must fail.

While a plaintiff may be the master of its complaint, it cannot compel the court to ignore that complaint's plain language, nor can it strip the federal courts of jurisdiction by pretending away essential elements of its claims. Federal officer removal requires courts to consider whether the defendant's federally directed conduct relates to the plaintiff's alleged injury. Here, Plaintiffs allege that their injuries all stem from global climate change, which, they contend, was substantially caused by Defendants' production, promotion, and sale of fossil fuels. And because the

record here demonstrates that a significant portion of Defendants' production and sale activities—including evidence of the production of large amounts of specialized, noncommercial grade fuels for the U.S. military, which must meet detailed specifications to fulfill unique military needs—were undertaken at the direction of federal officers, removal is appropriate.

Even if Plaintiffs' claims were somehow limited to Defendants' alleged "misrepresentations," *Grable* removal also is appropriate because Plaintiffs' claims necessarily incorporate federal elements under the First Amendment. Plaintiffs object that Defendants point to no cases exactly like Plaintiffs' unprecedented litigation, but Defendants have satisfied all four elements for removal under *Grable*.

Because Defendants are entitled to a federal forum, the Court should reverse the district court's decision remanding the cases to state court.

ARGUMENT

I. These Actions Are Removable Under The Federal Officer Removal Statute.

Congress empowered federal courts to hear any claim "for or relating to any act" taken under a federal officer's direction. 28 U.S.C.

§ 1442(a)(1). Here, Plaintiffs seek to impose liability and damages based on the alleged physical effects of Defendants' extraction, production, promotion, and sale of oil and gas, substantial portions of which were performed under the direction, supervision, and control of federal officers. *See* OB.13-60. On the record in these cases—which includes far more evidence of federally directed activities than the record in *Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178 (4th Cir. 2022) ("*Baltimore IV*")—removal is proper.

A. Defendants' extraction, production, and sales activities under federal officers "relat[e] to" Plaintiffs' civil actions.

1. Defendants' oil and gas activities under federal direction were so pervasive that they necessarily relate to Plaintiffs' lawsuits.

Plaintiffs have no meaningful response to Defendants' argument that the new evidence presented in these cases demonstrates pervasive federal control over much of Defendants' production and sales activities. Nor can they, since the expanded records in these cases include evidence of Defendants (i) producing specialized fuels for the military, (ii) acting under the direction of the military during World War II and the Korean

War, and (iii) supplying oil to the Strategic Petroleum Reserve ("SPR"). *See infra* at 17-29; OB.16-19.

The record here also fills what the *Baltimore IV* Court concluded were evidentiary gaps by adding new evidence that Defendants acted under federal officers in performing operations on the Outer Continental Shelf ("OCS") to fulfill basic government duties that the federal government otherwise would have needed to perform itself, J.A.271-278; J.A.856-863; *see* OB.16-17, and new evidence, including declassified documents, that Standard Oil, a predecessor of Defendant Chevron, acted "*in the employ* of the Navy Department and [was] responsible to the Secretary thereof" in operating the Elk Hills Reserve, J.A.76 (emphasis altered); J.A.778; *see also* OB.17-18.

The Court in *Baltimore IV* acknowledged that Defendants' "production and sale" of fossil fuels under the direction of federal officers was "relevant to the nexus analysis," 31 F.4th at 234, but ultimately concluded—based on the more limited evidence then before it—that jurisdiction was lacking because a federal officer did not "control[] [defendants'] total production and sales of fossil fuels," *id.* at 233. But the Court did not have the benefit of the expanded records in these cases, which include

extensive new evidence making clear that federal officers directed Defendants' extraction, production, and sale of significant volumes of oil and gas.

2. Plaintiffs' "civil action[s]" concern injuries allegedly arising from global greenhouse gas emissions.

Plaintiffs contend that federal officer removal is improper because "no federal officer was involved in Defendants' deceptive commercial activities." Resp.11 (capitalization omitted). They argue that the relevant inquiry is "the source of [Defendants' alleged] tort liability," which they insist is "the concealment and misrepresentation of [Defendants' oil-and-gas] products' known dangers." Resp.12 (quoting *Baltimore IV*, 31 F.4th at 233-34). This argument ignores the relevant standard for removal under 28 U.S.C. § 1442(a).

The federal officer removal statute provides for removal of suits brought against any person acting under a federal officer whenever the "*civil action*"—*i.e.*, the plaintiff's lawsuit as a whole—is "for or relating to any act under color of such office." 28 U.S.C. § 1442(a)(1) (emphasis added). As Defendants explained in their Opening Brief, this Court and the Supreme Court have long analyzed this and similar jurisdictional

inquiries by focusing on the acts that allegedly caused the plaintiff's injuries. *See* OB.20-22.

Plaintiffs insist that this Court should look not at their alleged injuries, but rather only at particular alleged acts Plaintiffs have chosen to emphasize now—the alleged "misrepresentations." They cite the Supreme Court's statement that "[p]ast cases have interpreted the 'color of office' test to require a showing of a 'causal connection' between the charged conduct and asserted official authority." *Willingham v. Morgan*, 395 U.S. 402, 409 (1969). But *Willingham* itself equates the "charged offenses" with the conduct that "actually injured" the plaintiff. *Id.* at 408. This makes logical sense because the "charged offense" in a "civil action" is the defendant's conduct that allegedly injured the plaintiff. And for this reason, and as explained in Defendants' Opening Brief, the Supreme Court and the Fourth Circuit have long held that when assessing the basis of a lawsuit for jurisdictional purposes, courts must focus on the injuries alleged. *See* OB.20-22.

In jurisdictional contexts, courts must "zero[] in on the core of the[] suit," especially the "acts that actually injured" the plaintiff. *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 35 (2015). This Court's precedents

reflect the same approach: The key jurisdictional question is which acts allegedly caused the "injuries" and the "harm" that allegedly gave rise to the "damages" that the plaintiff seeks to recover. *Cnty. Bd. of Arlington Cnty. v. Express Scripts Pharmacy, Inc.*, 996 F.3d 243, 251-52 (4th Cir. 2021); *see also France.com, Inc. v. French Republic*, 992 F.3d 248, 253 (4th Cir. 2021) (focusing the jurisdictional analysis on where the "asserted injuries alleged in the complaint flow from"). Indeed, "any other approach would allow plaintiffs to evade" jurisdictional requirements "through artful pleading." *Sachs*, 577 U.S. at 36.

Plaintiffs disregard *Sachs* and *France.com* because those cases interpret the words "based upon" in the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1605(a)(2), rather than the words "relating to" in the Federal Officer Removal Statute, *id.* § 1442(a)(1). Resp.16-17. But the term "relating to" is *broader* than "based upon." *See Saudi Arabia v. Nelson*, 507 U.S. 349, 358 (1993) (the term "based upon" in the FSIA "calls for something more than a mere … relation to"). The reasoning in the FSIA cases thus applies *a fortiori* here. Moreover, Plaintiffs ignore the key lesson from these cases. In *Sachs*, the Court wanted to prevent plaintiffs from manipulating their complaints to bypass the rules governing

federal jurisdiction. 577 U.S. at 36. Here, too, Plaintiffs are attempting to evade federal officer jurisdiction by asking the Court to ignore wide swaths of their Complaints and look only at particular alleged conduct. But as this Court recognized in *France.com*, focusing on the "asserted injuries alleged in the complaint" allows the Court to avoid falling for this artful pleading. 992 F.3d at 253.

Plaintiffs also accuse Defendants of "misleadingly portray[ing]" *Express Scripts*, which they contend focused only on "charged conduct" when analyzing the "relating to" prong. Resp.15-16. But *Express Scripts* confirms that Defendants' approach is correct. In that case, Arlington County sued pharmacies for causing the opioid epidemic, and the defendants removed on the grounds that some of the opioids they produced were distributed to veterans. 996 F.3d at 249. The County protested that its complaint "did not even mention the distribution of opioids to veterans." *Id.* at 256. This Court rejected the County's attempt to "elevate form over substance." *Id.* Instead, the Court focused on the fact that the County's "claims seek monetary *damages* due to *harm* arising from 'every opioid prescription' filled by" the defendants. *Id.* at 256-57 (emphases added). Thus, the County's "claim … necessarily include[d]" the activity that the

defendants performed for veterans and the federal government. *Id.* at 257. That broad "connection or association" was sufficient for the plaintiff's "claims [to] 'relate to'" the "Defendants' governmentally-directed conduct." *Id.* at 256-57.

Plaintiffs are thus wrong to argue that *Express Scripts* involved a "direct connection between the acts taken under federal direction and the conduct challenged in the complaint." Resp.20. To the contrary, the plaintiff in that case insisted that it never mentioned anything involving federal acts in its complaint. 996 F.3d at 256. Nevertheless, the Court found it dispositive that the logic of the plaintiff's theory of injury necessarily swept in all opioid sales; and because at least *some* opioid sales were undertaken under the direction of federal officers, the federal officer removal statute—which "must be 'liberally construed,'" *id.* at 250-51—was satisfied.

The same is true here. Plaintiffs "seek monetary damages due to harm arising from" global climate change, *Express Scripts*, 996 F.3d at 256-57, which they allege was caused by the "extraction, production, marketing, and sale of [Defendants'] oil and gas," J.A.543; J.A.1299. A substantial amount of that activity occurred under the direction of the

federal government, and thus Plaintiffs' claims "necessarily include[]" that federally directed activity. *Express Scripts*, 996 F.3d at 257. In fact, under Plaintiffs' own theory, Defendants' actions at the direction of federal officers are encompassed within Plaintiffs' claims. Plaintiffs allege that "it is not possible to determine the source of any individual molecule of CO_2 in the atmosphere … because such greenhouse gas molecules do not bear markers that permit tracing them to their source, and because greenhouse gasses quickly diffuse and comingle in the atmosphere." J.A.692, J.A.1423. This means that all emissions arising from Defendants' actions at the direction of federal officers are necessarily part of Plaintiffs' causal chain. Indeed, the Court in *Baltimore IV* recognized that the defendants' fossil-fuel production "is necessary to establish the avenue of Baltimore's climate-change-related injuries." 31 F.4th at 233. It is thus Plaintiffs' own theory of injury that encompasses Defendants' actions at the direction of federal officers.

Plaintiffs contend that Defendants are "[r]ewriting" their Complaints by noting the centrality of the allegations concerning the production, sale, and use of oil and gas. Resp.18-19. But the Complaints on their face allege that Plaintiffs' purported injuries flow from the

increased production of Defendants' oil and gas products that created emissions when combusted, drove climate change, and caused them physical injury. J.A.545; J.A.1302. Plaintiffs allege that "Defendants' fossil fuel products are the primary driver of global warming" and "the resultant dangers to the environment," including Plaintiffs' alleged injuries. J.A.648; J.A.1406; J.A.672; J.A.1431; *see also* J.A.541; J.A.1297. And Plaintiffs concede, as they must, that "extraction and production of fossil fuels is a link in the causal chain connecting [Defendants'] challenged conduct … to Plaintiffs' alleged injuries." Resp.13. Because alleged misrepresentations matter to Plaintiffs' claims only insofar as they purportedly *increased* production and sale of fossil fuels—and thus greenhouse gas emissions and resulting injuries—Plaintiffs' claims necessarily relate to Defendants' production and sale.

The Second Circuit recognized this point in *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021). Addressing a substantially similar climate-change suit that also sought to recover for energy companies' "production, promotion, and sale of fossil fuels," the Second Circuit held that the City of New York could not "focus on" one particular "'moment' in the global warming lifecycle" to "artful[ly] plead[]" its case. *Id.*

at 88, 91, 97. The Second Circuit emphasized that the City's complaint identified greenhouse gas emissions as "the singular source of [its] harm," and, under the City's causal theory, "[i]t is precisely *because* fossil fuels emit greenhouse gases—which collectively 'exacerbate global warming'—that the City is seeking damages." *Id.* at 91. The Third Circuit, too, in examining climate claims of this kind, recognized that, although the plaintiffs "try to cast their suits as just about misrepresentations[,] … their own complaints belie that suggestion. They charge the oil companies with not just misrepresentations, but also trespasses and nuisances. Those are caused by burning fossil fuels and emitting carbon dioxide." *City of Hoboken v. Chevron Corp.*, 45 F.4th 699, 712 (3d Cir. 2022). Just so here.

Plaintiffs attempt to distinguish *City of New York* as arising from a different jurisdictional posture. Resp.19-20. But Plaintiffs fail to explain how this distinction pertains to the Second Circuit's refusal to accept the plaintiff's artful pleading. The Second Circuit—like this Court in *Express Scripts* and *France.com* and the Supreme Court in *Sachs*—refused to allow plaintiffs to manipulate the courts in an effort to subvert federal jurisdictional rules. *See City of New York*, 993 F.3d at 91 ("Artful pleading

cannot transform the City's complaint into anything other than a suit over global greenhouse gas emissions."). This Court should do the same.

Plaintiffs also contend that their claims are fundamentally different from those in *City of New York*. Resp.20. But the claims in *City of New York* are substantively identical to those here. The City of New York's case concerned not just the "production and sale of fossil fuels," but also their "promotion." 993 F.3d at 88, 91, 97 & n.8. The City alleged, like Plaintiffs do here, that the defendants "kn[ew] for decades that their fossil fuel products pose risks of severe impacts on the global climate through the warnings of their own scientists," yet "extensively promoted fossil fuels for pervasive use, while denying or downplaying these threats." *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466, 468-69 (S.D.N.Y. 2018), *aff'd*, 993 F.3d 81. The City argued that the defendants were liable for "nuisance and trespass" because "for decades, [the defendants] promoted their fossil-fuel products by concealing and downplaying the harms of climate change [and] profited from the misconceptions they promoted." Br. for Appellant at 27, *City of New York v. BP P.L.C.*, No. 18-2188, 2018 WL 5905772 (2d Cir. Nov. 8, 2018). This is the same theory of liability that Plaintiffs purport to pursue here.

Plaintiffs also insist that *Baltimore IV* already foreclosed removal in these cases. Resp.18-19. But the Court in *Baltimore IV* never confronted the legal argument Defendants make here that Plaintiffs' "civil action[s]" necessarily "relat[e] to" Defendants' alleged extraction and production of fossil fuels, 28 U.S.C. § 1442(a)(1), because Plaintiffs' claimed injuries were allegedly caused in part by Defendants' production and sale of oil and gas. *Baltimore IV* held that federal officer removal was improper because the defendants' production and sale of fossil-fuel products was too attenuated from the acts that the plaintiff emphasized, that is, the alleged "disinformation campaign." 31 F.4th at 233-34. The Court did not consider Defendants' antecedent argument articulated here: that in applying the federal officer removal statute's relatedness inquiry, courts must consider whether the defendant's federally directed acts relate to the plaintiff's alleged *injury*. The Court is thus not bound on this question by any holding in *Baltimore IV*. *See* OB.19-20.

3. Plaintiffs' artful disclaimers fail.

Plaintiffs contend that they disclaimed "injuries arising from special-formula fossil-fuel products" that Defendants designed and provided to the military. Resp.22 (quoting J.A.545; J.A.1302). But these

purported disclaimers are squarely inconsistent with the rest of Plaintiffs' Complaints, wherein Plaintiffs allege that they have been injured "as a direct result of" the worldwide phenomenon of climate change as a whole. J.A.692, J.A.1423. The Court should not credit Plaintiffs' attempts to ignore whole swaths of their Complaints in order to gerrymander their claims.

Disclaimers of this sort fail when, as here, they are "merely artful pleading designed to circumvent federal officer jurisdiction." *St. Charles Surgical Hosp., L.L.C. v. La. Health Serv. & Indem. Co.,* 990 F.3d 447, 451 (5th Cir. 2021). As the Seventh Circuit explained in rejecting a similar disclaimer, when plaintiffs allege that a certain product "harmed them," they cannot "have it both ways" by "purport[ing] to disclaim" that their lawsuit includes the defendant's "manufacture of [that product] for the government." *Baker v. Atl. Richfield Co.*, 962 F.3d 937, 945 n.3 (7th Cir. 2020). Rather, "[t]his is just another example of a difficult causation question that a federal court should be the one to resolve." *Id.*; *see also* OB.29-31 (collecting cases). The same is true here. Plaintiffs have not disclaimed any claim or amount of damages against any Defendant—they are seeking all damages that they have purportedly suffered from

the adverse effects of global climate change, including "damage to property and infrastructure from rising seas, tidal flooding, and more frequent and intense extreme weather events." Resp.5.

Moreover, Plaintiffs' allegations necessarily arise from the total accumulation of all greenhouse-gas emissions, and, according to Plaintiffs, "it is not possible to determine the source of any particular individual molecule of CO_2 in the atmosphere attributable to anthropogenic sources." J.A.698; J.A.1453. But Plaintiffs do not offer any method to isolate the alleged climate-related injuries they suffered as a result of Defendants' non-federally directed conduct, nor is there a "realistic possibility" of doing so. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 880 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012).

Finally, Plaintiffs' disclaimers do not even purport to touch on all of Defendants' federal conduct. They focus instead on just a subset—the manufacture of special-formula products for the military. As the record shows, however, Defendants' production and sales activities under federal direction go well beyond that, including development of the federal government's oil and gas resources on the OCS. Thus, even if disclaimers

could in theory be effective to avoid federal jurisdiction, Plaintiffs' disclaimers here are inadequate on their face.

B. Defendants acted under federal officers.

Plaintiffs next contend that Defendants were not "acting under" federal officers when they extracted and produced vast quantities of fossil fuels over the decades, arguing that Defendants were merely engaging in arm's-length consumer contracts or, at most, regulator-regulated relationships. Resp.29-52. In each instance, however, Plaintiffs gloss over—or outright ignore—key allegations in the removal notice and record evidence showing that Defendants' operations were under federal officers' "guidance," "direction," and "supervision" and that Defendants assisted the government in producing "item[s] that it needs"—tasks that, without Defendants, "the Government itself would have had to perform." *Watson v. Philip Morris Cos.*, 551 U.S. 142, 151-54 (2007). The U.S. government has long treated fossil fuels (including highly specialized, government fuels) as essential to military needs, national security, and economic prosperity. J.A.59-60; J.A.760-761. Correspondingly, it has treated Defendants as "in the employ" of the federal government as they extract, produce, and supply oil and gas from specific sources, at specific volumes,

and to exacting specifications—all under the direction of federal officers. J.A.76; J.A.778 (emphasis omitted).

First, Defendants have manufactured and supplied extensive amounts of specialized fuels for the military. OB.33-37. Plaintiffs argue this was nothing more than "commercial" activity, but the record shows Defendants "*manufactured for the government*" non-commercial, military-grade fuels. *Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 255 (4th Cir. 2017). Plaintiffs also contend that this activity does not involve the requisite level of government control and supervision. Resp.35-39. They are mistaken. Federal officer removal is appropriate whenever—as here—the government "require[s]" a defendant to manufacture contracted products "according to detailed [federal] specifications." *Baker*, 962 F.3d at 947. A federal officer need not physically supervise the production; setting detailed, bespoke specifications as part of a government-contractor relationship is more than sufficient. *See id.* at 946 ("The government contractor defense … applies" where "the federal government approved reasonably precise specifications.").[1]

[1] Plaintiffs object that, unlike with the production of Agent Orange, Defendants here have not been subject to the threat of criminal sanctions for not complying with governmental orders. *See* Resp.38-39. But this

That is exactly what happened here. For decades, Defendants produced and supplied large quantities of highly specialized, non-commercial-grade fuels to satisfy the unique and precise operational requirements of U.S. military planes, ships, and other vehicles. J.A.92-99; J.A.748-755. Defendants created custom products to satisfy the military's demand for "specific freezing points, flash points, viscosity, and tolerance of high temperatures." J.A.180; J.A.1200. Some specifications span dozens of pages. *See, e.g.*, J.A.492-533; J.A.1123-1164; J.A.442-470; J.A.1072-1100; J.A.472-490; J.A.1102-1121. Indeed, the government's control over Defendants' work was even greater than the "[p]ricing, eligibility verification, shipping, [and] payment" dictates that *Express Scripts* found sufficient to give rise to federal officer jurisdiction. 996 F.3d at 252.

Court in *Baltimore IV* simply noted that the Fifth Circuit had allowed federal officer removal where "the Department of Defense required Dow Chemical to provide Agent Orange under threat of criminal sanctions." 31 F.4th at 231 (citing *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 398-99 (5th Cir. 1998)). The *Baltimore IV* Court in no way suggested that the threat of criminal prosecution—or any penalty for that matter—is *required* to satisfy the "acting under" test. *See Express Scripts*, 996 F.3d at 247-57 (sustaining removal without any threat of criminal prosecution).

Absent Defendants' production of these specialized fuels, "the Government itself would have had to" produce them, thus confirming that removal was proper. *Watson*, 551 U.S. at 154; *see also* OB.36-37. As two former Chairmen of the Joint Chiefs of Staff explained, "to achieve its paramount goal of protecting our national security, the military demands highly specialized fuels … . The [U.S.] military has not, and does not, have the knowledge or experience to produce these specialized products on its own. It relies on the private companies, many of which are Defendants in these lawsuits, to manufacture these fuels. Given the vital importance of these fuels, the military has, and continues to, closely direct and supervise these private parties and demands that the fuels meet the exact specifications required for military operations." Amici Br. of General R. Myers & Admiral M. Mullen, at 21-22, *City & Cnty. of Honolulu v. Sunoco LP*, No. 21-15313 (9th Cir. July 26, 2021).

Second, during World War II, the predecessors or affiliates of Defendants Chevron, Shell Oil Company, and ExxonMobil acted under the direction of federal officers to assist the war effort. Plaintiffs contend that none of these efforts "demonstrate sufficiently close federal control

or supervision" to satisfy the "acting under" requirement. Resp.30. But the record evidence belies this assertion.

For example, as part of the war effort, the federal government entered into contracts with Defendants' affiliates or predecessors to obtain "vast quantities of avgas," which "was essential to the United States' war effort." *Shell Oil Co. v. United States*, 751 F.3d 1282, 1285-86 (Fed. Cir. 2014). These contracts provided federal officers with the power to direct Defendants' operations. The contract with Shell Oil Company's predecessor or affiliate, for instance, specified that it work "day and night" to expand facilities producing avgas "as soon as possible and not later than August 1, 1943." J.A.91; J.A.793 (emphasis omitted). The federal government controlled "how and when" ExxonMobil and its affiliates "use[d] raw materials and labor." J.A.92; *accord* J.A.793-794. Plaintiffs argue that these arrangements were "cooperative endeavor[s]" and that Defendants actively sought to join the war efforts because they were profitable. Resp.31-32. But Section 1442(a) contains no requirement that the relationship with the federal officer be contentious, or that contractors operate out of charity or under duress, rather than for profit. Defendants' wartime provision of avgas is a "classic case" of "when [a] private

contractor acted under a federal officer or agency because [Defendants] helped the Government to produce an item that it needed." *Papp v. Fore-Kast Sales Co.*, 842 F.3d 805, 812 (3d Cir. 2016) (cleaned up).

Plaintiffs also argue that Defendants' work building and operating two vital pipelines between Texas and Illinois, respectively, and the Eastern Seaboard, J.A.99-102; J.A.794-796, does not constitute actions under the guidance of federal officers because "the government [was] relying on the expertise of [the energy companies] and not vice versa." Resp.34 (quoting *Cabalce v. Thomas E. Blanchard & Assocs., Inc.*, 797 F.3d 720, 728 (9th Cir. 2015)). But the government can rely on contractors' expertise or specialized experience if the contractors' work is "connected to the federal government's 'subjection, guidance, or control.'" *Cabalce*, 797 F.3d at 728 (quoting *Watson*, 551 U.S. at 151). And "delegation" and "principal/agent arrangement[s]" are quintessential relationships permitting federal officer removal. *Watson*, 551 U.S. at 156. Here, the government "delegat[ed] operating function" to Defendants, which operated as the government's "agent[s] to manage, operate and maintain the pipe lines." *Schmitt v. War Emergency Pipelines, Inc.*, 72 F. Supp. 156, 158 (E.D. Ark. 1947), *aff'd*, 175 F.2d 335 (8th Cir. 1949). While the

government paid for and owned both pipelines, industry served as an agent and contractor to fulfill government purposes in supplying oil. J.A.159-161; J.A.1179-1181.

Similarly, Plaintiffs dismiss Defendants' work during the Korean War when President Truman established the Petroleum Administration for Defense ("PAD") under authority of the Defense Production Act of 1950 ("DPA"), Pub. L. No. 81-774, 64 Stat. 798. *See* Resp.34-35. PAD issued orders to Defendants to produce avgas on a monumental scale, "calling on the industry to drill 80,000 wells inside the United States, and more than 10,000 more wells abroad, in 1952." J.A.102; *accord* J.A.796-797. In undertaking these actions, Defendants stood in for federal officers to perform vital governmental functions under strict instructions and close governmental control. *See Watson*, 551 U.S. at 152 ("the private person's 'acting under' must involve an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior").

Third, Defendant Chevron's predecessor Standard Oil operated the Navy's portion of Elk Hills Reserve. Plaintiffs contend that the contract under which Standard Oil was hired by the government to operate the Navy's portion of the Reserve reflects only an arm's-length business

arrangement and does not include the precise specifications needed for federal-officer removal. Resp.41-45. But the context here is vital. It was "mandatory" that the Navy be able to produce oil from Elk Hills "in time of national emergency" because it was one of the "great sources of petroleum in the United States." J.A.348; J.A.933. The Navy thus had to decide whether it wanted to produce oil itself or hire a contractor for the job, OB.46-47, and it chose to hire Standard Oil for more than 30 years, during which time the Navy viewed Standard Oil as not only an agent—which alone would be sufficient for federal-officer jurisdiction—but as acting "*in the employ of the Navy Department*." J.A.76; J.A.778. In fact, in a communication demanding that Standard Oil increase production to 400,000 barrels per day to meet the unfolding energy crisis, the Navy unequivocally told Standard Oil: "*you are in the employ of the Navy* and have been tasked with performing a function which is within the *exclusive control* of the Secretary of the Navy." J.A.77; J.A.778 (emphases added; brackets omitted); *accord* J.A.296; J.A.881 (Navy had "exclusive control over the exploration, prospecting, development, and operation of" Elk Hills, which it could do "directly with its own personnel" or with contractors).

The Navy had "full and absolute power to determine … the rate of prospecting and development on, and the quantity and rate of production from [Elk Hills]," and reserved the right, "from time to time," to "shut in wells on the Reserve if it so desire[d]." J.A.74-75 (emphasis omitted). This arrangement allowed the Navy to manage Elk Hills as it saw fit—but "rather than [do so] with its own personnel," "[t]he Navy chose to operate the reserve through a contractor." J.A.75 (emphasis omitted).

Thus, Standard Oil's activities at Elk Hills taken under the Navy's direction "assist[ed]" and "help[ed] carry out[] the duties [and] tasks of the federal superior." *Watson*, 551 U.S. at 152 (emphasis omitted). For decades, Chevron's predecessor was in the employ and under the "subjection, guidance, or control" of the Navy, exactly the "unusually close [relationship] involving detailed regulation, monitoring, or supervision" that permits federal-officer removal. *Id*. at 151, 153.

The same argument applies to Defendants' production of oil and gas under the DPA. Plaintiffs describe this conduct as mere "lawful obedience" to regulatory requirements, Resp.34-35, but the DPA production orders did not simply set mandatory standards for Defendants' normal operations. Rather, the DPA "gave the U.S. government broad powers to

direct industry for national security purposes," and the federal government "directed oil companies to expand production during the Korean War, for example, by calling on the industry to drill 80,000 wells inside the United States, and more than 10,000 more wells abroad, in 1952" alone. J.A.102. Such demands on private actors are qualitatively different from the facts of Plaintiffs' cited authority, *Washington v. Monsanto Co.*, 738 F. App'x 554 (9th Cir. 2018), where the defendant was ordered only "to accept a third party's purchase orders," *id.* at 556.

Fourth, Defendants produced oil and gas subject to federal officers' supervision and direction pursuant to detailed OCS leases. In *Baltimore IV*, the Court was "not convinced that the supervision and control to which" OCS Lands Act ("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 the expanded evidentiary record here shows that the federal government "procured the services of oil and gas firms to develop urgently needed energy resources on federal offshore lands that the federal government was unable to do on its own" because it lacked the experience, expertise, and technological capabilities. J.A.62; J.A.764. And the *federal government*, not the oil

companies, "dictated the terms, locations, methods and rates of hydrocarbon production on the OCS" and, accordingly, "[t]he policies and plans of the federal OCS program did not always align with those of the oil firms interested in drilling." J.A.62; J.A.764. Moreover, Defendants here have introduced the declaration of Professor Richard Tyler Priest, who cites various primary sources in detailing that for "more than six decades, the U.S. federal [OCS] program filled a national government need," J.A.193; J.A.1213 (footnote omitted), and that federal officials "supervised, directed, and controlled the rate of oil and gas production," J.A.237-238; J.A.1258.

Plaintiffs argue that Defendants' OCSLA leases set forth only "an ordinary regulator-regulated relationship," albeit in a highly regulated environment. Resp.47-48. But the record evidence contradicts that claim. The federal officials who oversee and manage the OCS program "did not engage in perfunctory, run-of-the-mill permitting and inspection." J.A.54-55. Rather, they "provided direction to lessees regarding when and where [Defendants] drilled, and at what price, in order to protect the correlative rights of the federal government as the resource owner and trustee" of federal lands. J.A.55.

Plaintiffs also contend that Defendants' extraction, production, and sale of oil and gas from the OCS do not constitute "basic governmental functions." Resp.49-50. But Defendants have submitted significant new evidence not before the Court in *Baltimore IV* showing the federal government's long-term commitment to developing and extracting government-owned oil and gas from the OCS. OB.49-54. Despite turning to private industry for this project, the federal government "dictated the *terms, locations, methods and rates* of hydrocarbon production on the OCS," J.A.62; J.A.764 (emphasis added)—and it did so to achieve governmental purposes, using Defendants to exploit its own proprietary resources and further its national-security interest of ensuring sufficient energy reserves, 43 U.S.C. §§ 1332(3), 1344(a)-(e), 1802(1)-(2).

It is undisputed that the federal government controls substantial amounts of oil and gas in the OCS. The government could either extract and sell (or use) the oil and gas itself or hire third parties to perform that task on its behalf. Since the federal government had "no prior experience or expertise," it chose the second option. J.A.206. This is the definition of "acting under": "[I]n the absence of … contract[s] with … private

firm[s], the Government itself would have had to" extract and produce oil and gas. *Watson*, 551 U.S. at 154.

Fifth, Plaintiffs describe Defendants' operation of the SPR as a mere commercial arrangement in a heavily regulated industry. Resp.40-41. But certain Defendants, as lessees of federal offshore OCSLA leases, were required by the federal government to pay royalties "in kind," which the government used for its strategic stockpile. J.A.81; J.A.782-783. Defendants also were subject to significant federal supervision and control, including needing to respond immediately to the President's call for emergency drawdowns. J.A.82; J.A.784; *see also* 42 U.S.C. § 6241(d)(1). Under this arrangement, Defendants functioned as private contractors helping "the [g]overnment to produce an item that it need[ed]." *Baker*, 962 F.3d at 942.

C. Defendants asserted colorable federal defenses.

Finally, Defendants have raised colorable federal defenses. Plaintiffs' claims are barred by the government-contractor defense, preemption, federal immunity, the foreign-affairs doctrine, and various constitutional provisions. *See* OB.55-59. Plaintiffs cursorily argue that these defenses "either fail to stem from official duties or are not colorable."

Resp.53 (quoting *City & Cnty. of Honolulu v. Sunoco LP*, 39 F.4th 1101, 1110 (9th Cir. 2022), *cert. pet. filed*, No. 22-523 (U.S.)). This argument, too, fails.

First, Plaintiffs have forfeited this argument, acknowledging to the district court that the colorable federal defense prong was not "at issue" in these cases. No. 21-cv-01323, ECF No. 143, at 3; *see also In re Under Seal*, 749 F.3d 276, 287 (4th Cir. 2014) ("to preserve an argument for appeal, the party must press" it "before the district court" (cleaned up)).

Second, the argument that colorable federal defenses must arise from a federal duty is wrong. As the Third Circuit has explained, "duty-based defenses" are not "the only permissible ones." *In re Commonwealth's Mot.*, 790 F.3d 457, 473 (3d Cir. 2015). "What matters is that a defense raises a federal question, not that a federal duty forms the defense." *In re Commonwealth's Mot.*, 790 F.3d at 473; *see also* 16 *Moore's Federal Practice* § 107.259 (3d ed. 2022) ("The federal defense need not coincide with an asserted federal duty. It is enough that the defense raises a federal question."). The only "nexus" requirement is "that the suit is for [or relating to] an act under color of office"; that requirement

has no application to the "colorable federal defense" prong. *Jefferson Cnty. v. Acker*, 527 U.S. 423, 431 (1999) (cleaned up).

Finally, Defendants need not "win [their] case before [they] can have it removed." *Acker*, 527 U.S. at 431. Instead, Defendants must simply assert the federal defense and plead "facts" which, if proven, would "establish[] a *prima facie* defense." *Papp*, 842 F.3d at 814-15. Defendants have done that here. *See* OB.55-59.

II. Plaintiffs' Claims Necessarily Raise Disputed And Substantial Issues Under The First Amendment And, Accordingly, Are Removable Under *Grable*.

Even if Plaintiffs' claims were somehow limited to Defendants' alleged "misrepresentations" about the effects of oil-and-gas use, J.A.1374, removal would still be proper under *Grable*. Plaintiffs' speech-related claims necessarily include affirmative federal-law elements required by the First Amendment because those constitutional requirements are "essential" elements of Plaintiffs' case. *Gully v. First Nat'l Bank*, 299 U.S. 109, 112 (1936); *see also* OB.60-67.

Plaintiffs object that the cases Defendants cite did not involve removal, Resp.56, but that misses the point. The posture of those cases is irrelevant. What is relevant is that Plaintiffs' claims provide a basis for

Grable removal because "a court will have to construe the United States Constitution" to decide Plaintiffs' claims, which implicate broader federal interests involving matters of national and international concern. *Ortiz v. Univ. of Med. & Dentistry of N.J.*, 2009 WL 737046, at *3 (D.N.J. Mar. 18, 2009).

Plaintiffs also argue that none of the cases Defendants cite is entirely analogous to the present case, Resp.56-58, but the question is not whether a case on all fours with this one exists, but whether the elements for removal under *Grable* have been established. On this question, Plaintiffs do not challenge two of *Grable*'s four prongs—that the issues raised are "actually disputed" and "substantial." Rather, they dispute only whether a federal issue is "necessarily raised" and "capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *See generally* Resp.54-63.

With respect to whether a federal issue is "necessarily raised," *Gunn v. Minton*, 568 U.S. 251, 258 (2013), Plaintiffs suggest that the relevant First Amendment issues are "federal constitutional defenses" rather than aspects of their claims. Resp.58-59. But the First Amendment grafts affirmative federal-law *elements—not* defenses—onto common-law

speech-related torts. The First Amendment imposes "a constitutional requirement" onto these torts under which Plaintiffs must "bear the burden of showing falsity, as well as fault, before recovering damages." *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986).

Plaintiffs also protest that removal based upon such federal-law elements would dramatically expand *Grable* to encompass "any state tort claim involving speech on matters of public concern." Resp.60. But unlike the vast majority of state tort cases involving speech, these cases involve attempts by governmental entities to punish speech on matters of public concern, which implicates the very core of the First Amendment's protections. Indeed, "climate change" is among the "controversial subjects" and "sensitive political topics" where freedom of speech "merits 'special protection.'" *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2476 (2018). First Amendment interests are at their apex where, as here, a governmental entity seeks to use state law to punish speech on issues of "public concern." *Hepps*, 475 U.S. at 774-75.

Plaintiffs also suggest that the federal interests at stake pale in comparison to Maryland's interest in "fields of traditional state regulation." Resp.61-62. But "[f]or over a century, a mostly unbroken string of

cases has applied federal law to disputes involving interstate air … pollution." *City of New York*, 993 F.3d at 91. The federal interests here are paramount.

III. Defendants Preserve Additional Arguments That Plaintiffs' Claims Arise Under Federal Law.

Defendants continue to preserve their arguments that Plaintiffs' claims arise under federal law because federal law necessarily and exclusively governs claims seeking relief for harms allegedly stemming from interstate and international pollution. *See* OB.67. Likewise, Defendants maintain that Plaintiffs' claims are removable under *Grable* because they raise and depend on the resolution of disputed, substantial federal questions, and that Plaintiffs' claims are removable under OCSLA because they "aris[e] out of, or in connection with" operations on the OCS, 43 U.S.C. § 1349(b)(1). *See* OB.67.

CONCLUSION

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

March 1, 2023

Respectfully submitted,

/s/ Sarah E. Meyer
Sarah E. Meyer
Hillary V. Colonna
WOMBLE BOND DICKINSON (US) LLP
100 Light Street, 26th Floor
Baltimore, MD 21202
Telephone: (410) 545-5800
Facsimile: (410) 545-5801
E-mail: sarah.meyer@wbd-us.com
E-mail: hillary.colonna@wbd-us.com

Matthew J. Peters
LATHAM & WATKINS LLP
555 Eleventh Street NW, Suite 1000
Washington, DC 20004-1304
Telephone: (202) 637-2200
Facsimile: (202) 637-2201
E-mail: matthew.peters@lw.com

Steven M. Bauer
Margaret A. Tough
Katherine A. Rouse
LATHAM & WATKINS LLP
505 Montgomery Street, Suite 2000
San Francisco, CA 94111-6538
Telephone: (415) 391-0600
Facsimile: (415) 395-8095
E-mail: steven.bauer@lw.com
E-mail: margaret.tough@lw.com
E-mail: katherine.rouse@lw.com

Jameson R. Jones
Daniel R. Brody
BARTLIT BECK LLP
1801 Wewatta Street, Suite 1200
Denver, CO 80202
Telephone: (303) 592-3100
Facsimile: (303) 592-3140
E-mail: jameson.jones@bartlit-beck.com
E-mail: dan.brody@bartlit-beck.com

Attorneys for Defendants-Appellants ConocoPhillips and ConocoPhillips Company

/s/ Ty Kelly Cronin
Ty Kelly Cronin
Alison C. Schurick
BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ P.C.
100 Light Street, 19th Floor
Baltimore, MD 21202
Telephone: (410) 862-1049
Facsimile: (410) 547-0699
E-mail: tykelly@bakerdonelson.com
E-mail: aschurick@bakerdonelson.com

/s/ Theodore J. Boutrous, Jr.
Theodore J. Boutrous, Jr.
William E. Thomson
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
Telephone: (213) 229-7000
Facsimile: (213) 229-7520
E-mail: tboutrous@gibsondunn.com
E-mail: wthomson@gibsondunn.com

Andrea E. Neuman
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166
Telephone: (212) 351-4000
Facsimile: (212) 351-4035
E-mail: aneuman@gibsondunn.com

Thomas G. Hungar
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
Telephone: (202) 955-8500
Facsimile: (202) 467-0539
E-mail: thungar@gibsondunn.com

Joshua D. Dick
GIBSON, DUNN & CRUTCHER LLP
555 Mission Street
San Francisco, CA 94105-0921
Telephone: (415) 393-8200
Facsimile: (415) 393-8306

Attorneys for Defendants-Appellants Chevron Corporation and Chevron U.S.A. Inc.

/s/ Steven M. Bauer
Steven M. Bauer
Margaret A. Tough
Katherine A. Rouse
LATHAM & WATKINS LLP
505 Montgomery Street, Suite 2000
San Francisco, CA 94111-6538
Telephone: (415) 391-0600
Facsimile: (415) 395-8095
E-mail: steven.bauer@lw.com
E-mail: margaret.tough@lw.com
E-mail: katherine.rouse@lw.com

Matthew J. Peters
LATHAM & WATKINS LLP
555 Eleventh Street NW, Suite 1000
Washington, DC 20004-1304
Telephone: (202) 637-2200
Facsimile: (202) 637-2201
E-mail: matthew.peters@lw.com

Attorneys for Defendants-Appellants Phillips 66 and Phillips 66 Company

/s/ Martha Thomsen
Martha Thomsen
Megan H. Berge
BAKER BOTTS LLP
700 K Street, N.W.
Washington, DC 20001-5692
Telephone: (202) 639-7863
Facsimile: (202) 508-9329
E-mail: martha.thomsen@bakerbotts.com
E-mail: megan.berge@bakerbotts.com

J. Scott Janoe
BAKER BOTTS LLP
910 Louisiana Street
Houston, TX 77002
Telephone: (713) 229-1553
Facsimile: (713) 229-7953
E-mail: scott.janoe@bakerbotts.com

Attorneys for Defendant-Appellant Hess Corp.

/s/ *Brian D. Schmalzbach*
Brian D. Schmalzbach
MCGUIREWOODS LLP
800 East Canal Street
Richmond, VA 23219
Telephone: (804) 775-4746
Facsimile: (804) 698-2304
E-mail: bschmalzbach@mcguirewoods.com

Ava E. Lias-Booker
MCGUIREWOODS LLP
500 E. Pratt Street, Suite 1000
Baltimore, MD 21202-3169
Telephone: (410) 659-4400
Facsimile: (410) 659-4599
E-mail: alias-booker@mcguirewoods.com

Melissa O. Martinez
MCGUIREWOODS LLP
500 E. Pratt Street, Suite 1000
Baltimore, MD 21202-3169
Telephone: (410) 659-4400
Facsimile: (410) 659-4599
E-mail: mmartinez@mcguirewoods.com

Attorneys for Defendant-Appellant American Petroleum Institute

/s/ *David C. Frederick*
David C. Frederick
Daniel S. Severson
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, DC 20036
Telephone: (202) 326-7900
Facsimile: (202) 326-7999
E-mail: dfrederick@kelloghansen.com
E-mail: dseverson@kelloghansen.com

Attorneys for Defendants-Appellants Shell plc (f/k/a Royal Dutch Shell plc) and Shell USA, Inc. (f/k/a Shell Oil Company)

/s/ *Tracy A. Roman*
Tracy A. Roman
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004
Telephone: (202) 624-2500
Facsimile: (202) 628-5116
E-mail: troman@crowell.com

Honor R. Costello
CROWELL & MORING LLP
590 Madison Avenue, 20th Fl.
New York, NY 10022
Telephone: (212) 223-4000
Facsimile: (212) 223-4134
E-mail: hcostello@crowell.com

Attorneys for Defendants-Appellants CONSOL Energy Inc. and CONSOL Marine Terminals LLC

/s/ *Noel J. Francisco*
Noel J. Francisco
David M. Morrell
J. Benjamin Aguiñaga
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
Telephone: (202) 879-3939
Facsimile: (202) 626-1700
E-mail: njfrancisco@jonesday.com
E-mail: dmorrell@jonesday.com
E-mail: jbaguinaga@jonesday.com

David C. Kiernan
JONES DAY
555 California Street, 26th Floor
San Francisco, CA 94104
Telephone: (415) 626-3939
Facsimile: (415) 875-5700
E-mail: dkiernan@jonesday.com

Attorneys for Defendant-Appellant CNX Resources Corp.

/s/ *Thomas K. Prevas*
Thomas K. Prevas
SAUL EWING ARNSTEIN & LEHR LLP
1001 Fleet Street, 9th Floor
Baltimore, MD 21202-4359
Telephone: (410) 332-8683
Facsimile: (410) 332-8123
E-mail: thomas.prevas@saul.com

Attorneys for Defendants-Appellants Crown Central LLC, Crown Central New Holdings LLC, and Rosemore, Inc.

/s/ Warren N. Weaver
Warren N. Weaver
WHITEFORD TAYLOR & PRESTON LLP
7 Saint Paul Street., Suite 1400
Baltimore, MD 21202
Telephone: (410) 347-8757
Facsimile: (410) 223-4177
E-mail: wweaver@wtplaw.com

EIMER STAHL LLP
Nathan P. Eimer
Pamela R. Hanebutt
Lisa S. Meyer
224 South Michigan Avenue, Suite 1100
Chicago, IL 60604
Telephone: (312) 660-7600
E-mail: neimer@eimerstahl.com
E-mail: phanebutt@eimerstahl.com
E-mail: lmeyer@eimerstahl.com

Robert E. Dunn
99 S. Almaden Blvd. Suite 642
San Jose, CA 95113
Telephone: (408) 889-1690
E-mail: rdunn@eimerstahl.com

Attorneys for Defendant-Appellant CITGO Petroleum Corporation

/s/ *Craig A. Thompson*
Craig A. Thompson
VENABLE LLP
750 East Pratt Street, Suite 900
Baltimore, MD 21202
Telephone: (410) 244-7605
Facsimile: (410) 244-7742
E-mail: cathompson@venable.com

Theodore V. Wells, Jr.
Daniel J. Toal
Yahonnes Cleary
Caitlin E. Grusauskas
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
Telephone: (212) 373-3089
Facsimile: (212) 492-0089
E-mail: twells@paulweiss.com
E-mail: dtoal@paulweiss.com
E-mail: ycleary@paulweiss.com
E-mail: cgrusauskas@paulweiss.com

Attorneys for Defendants-Appellants Exxon Mobil Corporation and ExxonMobil Oil Corporation

/s/ *John B. Isbister*
John B. Isbister
Jaime W. Luse
TYDINGS & ROSENBERG LLP
One East Pratt Street, Suite 901
Baltimore, MD 21202
Telephone: (410) 752-9700
Facsimile: (410) 727-5460
E-mail: jisbister@Tydings.com
E-mail: jluse@Tydings.com

ARNOLD & PORTER KAYE
SCHOLER LLP
Nancy Milburn
Diana Reiter
250 West 55th Street
New York, NY 10019-9710
Telephone: (212) 836-8000
Facsimile: (212) 836-8689
E-mail: nancy.milburn@arnoldporter.com
E-mail: diana.reiter@arnoldporter.com

John D. Lombardo
777 South Figueroa Street, 44th Floor
Los Angeles, CA 90017-5844 Telephone: (213) 243-4000
Facsimile: (213) 243-4199
E-mail: matthew.heartney@arnoldporter.com

Jonathan W. Hughes
Three Embarcadero Center, 10th Floor
San Francisco, CA 94111-4024
Telephone: (415) 471-3156
Facsimile: (415) 471-3400
E-mail: jonathan.hughes@arnoldporter.com

Attorneys for Defendants-Appellants BP plc, BP America Inc., and BP Products North America Inc.

/s/ *Mark S. Saudek*
Mark S. Saudek
GALLAGHER EVELIUS & JONES LLP
218 North Charles Street, Suite 400
Baltimore, MD 21201
Telephone: (410) 347-1365
Facsimile: (410) 468-2786
E-mail: msaudek@gejlaw.com

Robert Reznick
ORRICK, HERRINGTON
& SUTCLIFFE, LLP
1152 15th Street NW
Washington, DC 20005
Telephone: (202) 339-8600
Facsimile: (202) 339-8500
E-mail: rreznick@orrick.com

James Stengel
ORRICK, HERRINGTON
& SUTCLIFFE, LLP
51 West 52nd Street
New York, New York 10019-6142
Telephone: (212) 506-5000
Facsimile: (212) 506-5151
E-mail: jstengel@orrick.com

Catherine Y. Lui
ORRICK, HERRINGTON
& SUTCLIFFE, LLP
405 Howard Street
San Francisco, CA 94105-2669
Telephone: (415) 773-5571
Facsimile: (415) 773-5759
E-mail: clui@orrick.com

Attorneys for Defendants-Appellants Marathon Oil Corporation and Marathon Oil Company

/s/ *Shannon S. Broome*
Shannon S. Broome
Ann Marie Mortimer
HUNTON ANDREWS KURTH LLP
50 California Street, Suite 1700
San Francisco, CA 94111
Telephone: (415) 975-3700
Facsimile: (415) 975-3701
E-mail: SBroome@HuntonAK.com
E-mail: AMortimer@HuntonAK.com

Shawn Patrick Regan
HUNTON ANDREWS KURTH LLP
200 Park Avenue, 52nd Floor
New York, NY 10166
Telephone: (212) 309-1000
Facsimile: (212) 309-1100
E-mail: SRegan@HuntonAK.com

Attorneys for Defendants-Appellants Marathon Petroleum Corporation and Speedway LLC

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 (New Century Schoolbook, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 6,499 words. This certificate was prepared in reliance on the word-count function of the word-processing system used to prepare this brief.

/s/ *Theodore J. Boutrous Jr.*
Theodore J. Boutrous, Jr.

GIBSON, DUNN & CRUTCHER LLP

Attorney for Defendants-Appellants Chevron Corp. and Chevron U.S.A. Inc.

CERTIFICATE OF SERVICE

I hereby certify that on March 1, 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.

/s/ Theodore J. Boutrous Jr.
Theodore J. Boutrous, Jr.

GIBSON, DUNN & CRUTCHER LLP

Attorney for Defendants-Appellants Chevron Corp. and Chevron U.S.A. Inc.