ORAL ARGUMENT SCHEDULED FOR MAY 8, 2023

22-7163

United States Court of Appeals for the District of Columbia Circuit

DISTRICT OF COLUMBIA,

Plaintiff-Appellee,

v.

EXXON MOBIL CORPORATION; EXXONMOBIL OIL CORPORATION; BP P.L.C.; BP AMERICA, INC.; CHEVRON CORPORATION; CHEVRON U.S.A. INC.; SHELL PLC, f/k/a Royal Dutch Shell plc; SHELL USA, INC., f/k/a Shell Oil Company,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR STATES OF NEW YORK, CALIFORNIA, CONNECTICUT, DELAWARE, HAWAI'I, ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEW JERSEY, NEW MEXICO, OREGON, PENNSYLVANIA, RHODE ISLAND, WASHINGTON, AND WISCONSIN AS AMICI CURIAE IN SUPPORT OF APPELLEE FOR AFFIRMANCE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel of record certifies as follows:

A. Parties and Amici

Except for the States of New York, California, Connecticut, Delaware, Hawai'i, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, Washington, and Wisconsin, all parties, intervenors, and amici appearing before the district court and in this court are listed in the Brief of Appellants, Brief for Appellee, Brief of Law Professors as *Amici Curiae* in Support of Plaintiff-Appellee, Brief of Amici Curiae Robert Brulle et al. in Support of Plaintiff-Appellee and Affirmance, and/or Brief of the National League of Cities et al. as Amici Curiae in Support of Plaintiff-Appellee.

B. Rulings Under Review

References to the rulings at issue appear in the Brief of Appellants and Brief for Appellee.

C. Related Cases

There are no related cases within the meaning of Circuit Rule 28(a)(1)(C).

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GLOSSARY

CPPA	Consumer Protection Procedures Act
OCSLA	Outer Continental Shelf Lands Act
S & P	Standard & Poor's

PERTINENT STATUTORY PROVISIONS

Except for pertinent provisions of the District of Columbia's Consumer Protection Procedures Act, D.C. Code § 28-3901 et seq., all applicable statutes, etc., are contained in the Brief of Appellants. Pertinent provisions of the District's Consumer Protection Procedures Act are set forth in the addendum at the conclusion of this brief.

INTERESTS OF AMICI CURIAE

Amici are the States of New York, California, Connecticut, Delaware, Hawai'i, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, Washington, and Wisconsin.[1] Amici States have an interest in preserving their authority to enforce state consumer-protection laws against corporate entities and to have those laws interpreted in state court. Prevention of unfair and deceptive business practices is "an area traditionally regulated by the States." *See California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989); *see also Altria Grp., Inc. v. Good*, 555 U.S. 70, 79 n.6 (2008). And "considerations of comity" should make federal courts "reluctant to snatch cases which a State has brought from the courts of that State, unless some clear rule demands it." *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 21 n.22 (1983).

No "clear rule" requires this Court to "snatch" this consumer-protection case from the District of Columbia's courts, where the District

[1] As States, amici file this brief as of right under Rule 29(a)(2) of the Federal Rules of Appellate Procedure.

chose to file its case and where the case belongs.[2] All federal courts of appeals that have considered the defendant oil companies' removal arguments (and those of their state amici) have rejected those arguments, and this Court should do the same.

The District sued several major oil companies under its Consumer Protection Procedures Act (CPPA), D.C. Code § 28-3901 et seq. The District's complaint alleges a familiar form of consumer deception: companies made public representations about their products and businesses that they knew to be false and/or misleading. (*See* Joint Appendix (J.A.) 76-158.) The complaint alleges that, for decades, the companies waged a public misinformation campaign about human-caused climate change despite knowing—including from the fuel industry's own research—that burning fossil fuels would have significant negative environmental consequences. Later, according to the complaint, the companies changed tack, deceitfully presenting themselves to the public as leaders in alternative energy sources and misrepresenting their

[2] Principles of comity apply to the District's court system, which Congress created as equivalent to a state court system. *See JMM Corp. v. District of Columbia*, 378 F.3d 1117, 1123-25 (D.C. Cir. 2004).

products' environmental impacts. The District seeks to hold the companies liable not for causing climate change, but for making false or deceptive representations to D.C. consumers about the effect of burning fossil fuels and about the companies' investments in alternative energy sources. Such claims fall well within the States' traditional authority to prevent unfair trade practices.

The district court correctly concluded that the companies are not entitled to remove the District's consumer-protection claims from the District's courts merely because the companies' false or deceptive commercial statements related to an issue—such as climate change—that has national or international dimensions as well as local dimensions. Removability depends upon the causes of action that a plaintiff asserts, not the topics a defendant's false or deceptive statements concern.

The District's claims do not permit removal under any of the companies' theories on appeal. Because the Clean Air Act has displaced any federal common law relating to transboundary air pollution, the companies are wrong to say that claims regulating transboundary air pollution arise under federal common law. In any event, the District's claims do not seek to regulate transboundary emissions and thus would

not present a federal question even if the companies were correct that any such regulation would arise under federal common law. Nor would a court adjudicating the District's claims necessarily determine any substantial issue of federal law or policy; a court need only determine whether the companies engaged in unfair or deceptive trade practices. And the companies fail to demonstrate that they engaged in any consumer deception at the direction of a federal officer or in connection with their operations on the outer continental shelf.

Accepting the companies' arguments here would significantly harm Amici States' sovereign interests in enforcing and interpreting their own laws and would expand removal jurisdiction well beyond what the Supreme Court has allowed. When a State brings a state-law action in its own courts to protect its own residents, "sovereign protection from removal arises in its most powerful form." *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 676 (9th Cir. 2012) (quotation marks omitted). Federal courts have consistently remanded state-law actions that were removed on the theory that they touch upon issues with national dimensions—including in many cases where substantially the same defendants raised

substantially the same arguments as they do here. This Court should affirm the district court's remand order.

ARGUMENT

Consumer protection lies in the heartland of the States' traditional police powers. Likewise, "Congress long ago delegated to the District the police power to regulate businesses." *Edwards v. District of Columbia*, 755 F.3d 996, 1002 (D.C. Cir. 2014). In this case, the District's consumer-protection claims belong in the District's courts.

"Federal courts are courts of limited jurisdiction, possessing only that power authorized by Constitution and statute." *Gunn v. Minton*, 568 U.S. 251, 256 (2013) (quotation marks omitted). Absent diversity jurisdiction, removal to federal court is generally proper "only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). Under this "well-pleaded complaint rule," the plaintiff is "the master of the claim," and "may avoid federal jurisdiction by exclusive reliance on state law." *Id.* (quotation marks omitted).

The District brought this case under a single statute of its own law—the CPPA—and the companies fail to show either that the District's

complaint presents a federal question or that any exception to the well-pleaded complaint rule applies. The District's sole legal theory is that the companies engaged in deceptive acts and business practices. (J.A. 146-156.) Yet the companies attempt to rewrite the claims that the District actually pleaded to obtain a forum the companies prefer. All six federal courts of appeals that have considered similar cases have rejected the companies' arguments, and this Court should do the same.[3]

[3] *Rhode Island v. Shell Oil Prods. Co.*, 35 F.4th 44 (1st Cir.), *cert. docketed*, No. 22-524 (U.S. Dec. 6, 2022); *City of Hoboken v. Chevron Corp.*, 45 F.4th 699 (3d Cir. 2022), *cert. docketed*, No. 22-821 (U.S. Mar. 1, 2023); *Mayor & City Council of Baltimore v. BP p.l.c.*, 31 F.4th 178 (4th Cir.), *cert. docketed*, No. 22-361 (U.S. Oct. 18, 2022); *Minnesota ex rel. Ellison v. American Petroleum Inst.*, Nos. 21-1752, 21-8005, 2023 WL 2607545 (8th Cir. Mar. 23, 2023); *City of Oakland v. BP plc*, 969 F.3d 895 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2776 (2021); *County of San Mateo v. Chevron Corp.*, 32 F.4th 733 (9th Cir.), *cert. docketed*, No. 22-495 (U.S. Nov. 28, 2022); *City & County of Honolulu v. Sunoco LP*, 39 F.4th 1101 (9th Cir.), *cert. docketed*, No. 22-523 (U.S. Dec. 6, 2022); *Board of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238 (10th Cir.), *cert. docketed*, No. 21-1550 (U.S. June 10, 2022).

POINT I

STATES PROTECT CONSUMERS FROM CORPORATE MISREPRESENTATIONS ON ISSUES OF NATIONAL IMPORTANCE BY ENFORCING STATE LAW IN STATE COURT

States are responsible for protecting their citizens' welfare, *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342 (2007), including by preventing unfair business practices, *see ARC Am. Corp.*, 490 U.S. at 101. Accordingly, measures designed to prevent consumer deception are well within a State's police powers. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146 (1963). Indeed, a State has a "substantial" interest in ensuring the accuracy of commercial information in its marketplace. *Edenfield v. Fane*, 507 U.S. 761, 769 (1993).

States routinely bring state-law consumer-protection actions in state court involving issues that have national dimensions—and federal courts have regularly rejected attempts to remove such cases. For example:

a. Sixteen States—including several of the amici supporting the companies in this case—sued the credit-rating agency Standard & Poor's ("S & P") in their respective state courts for allegedly misrepresenting

the objectivity and independence of S & P's bond ratings.[4] As in this case, the States asserted exclusively state-law claims, including violations of state consumer-protection statutes. The cases were removed to federal court, with S & P arguing that the States' claims presented a federal question. The federal district court presiding over the resulting multi-district litigation disagreed. While acknowledging that the Credit Rating Agency Reform Act of 2006 reflected a strong federal interest in regulating national credit-rating agencies, the court correctly determined that resolving the States' claims would not require the court to resolve any federal question.[5] *See In re Standard & Poor's Rating Agency Litig.*, 23 F. Supp. 3d 378, 389-91, 393-400 (S.D.N.Y. 2014).

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[4] The companies' amici Arkansas, Indiana, Mississippi, and South Carolina were among the States that successfully moved to remand to state court.

[5] The court also held that, having remanded the State-filed actions, it was required to abstain from hearing related declaratory judgment claims that S & P had brought directly in federal court. *In re Standard & Poor's Rating Agency Litig.*, 23 F. Supp. 3d 378, 408-09 (S.D.N.Y. 2014) (citing *Younger v. Harris*, 401 U.S. 37 (1971)). In abstaining, the court rejected S & P's contention that the States were attempting to regulate the market for credit-rating services. *Id.* at 411. Instead, the court recognized, the States sought to hold S & P accountable for past misrepresentations and to enjoin future misrepresentations. *Id.*

b. Sixteen States—again including some of those supporting the companies in this case—sued Volkswagen in their respective state courts for using "defeat devices" to evade applicable emissions requirements.[6] Like this case, the Volkswagen litigation related to emissions; some States' complaints described nationwide estimates of excess emissions traceable to Volkswagen's conduct and/or the health and environmental consequences of such emissions.[7] Volkswagen removed, arguing that the district court had federal-question jurisdiction over the resulting multi-district litigation because at least some of the state statutes referenced federal regulations; the States' allegations relied on Volkswagen's use of a "defeat device," a term defined only in federal regulations; and many of the States' claims conflicted with the Clean Air Act's division of enforcement authority between the federal government and the States. The federal district court rejected each of these arguments. Of particular

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[6] The companies' amici Alabama and Montana were among the twelve States that successfully moved to remand to state court. (Four States resolved their claims via settlement before the motions to remand were decided.)

[7] *See In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig.*, No. 15-md-2672 (N.D. Cal.), ECF No. 2834-2, at 69-70 (Tennessee), 104-105 (Missouri), 138-139 (Ohio), 150-151 (Illinois), 162-163 (Minnesota); *id.*, ECF No. 3116-3, at 67-68 (New Mexico).

relevance here, the court correctly concluded that States pursuing consumer-protection claims need not prove a federal emissions violation in order to establish that Volkswagen made unfair or deceptive representations. *See In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig.*, No. 15-md-2672, 2017 WL 2258757, at *1-2, *5-11 (N.D. Cal. May 23, 2017).[8]

c. Many States have pursued state-law claims in state court against manufacturers, distributors, and retailers of prescription opioids. In one such case, the companies' amicus Montana sued Purdue Pharma and others in Montana state court. Montana brought exclusively state-law claims and sought a preliminary injunction governing Purdue's promotional and educational activity that could reach Montana consumers or prescribers. Purdue removed to federal court, arguing that Montana's suit attempted to supplant federal regulatory determinations with Montana's own assessment of how Purdue's opioids should be regulated, labeled, and marketed. The court rejected Purdue's arguments and granted

[8] *See also Arizona ex rel. Brnovich v. Volkswagen AG*, 193 F. Supp. 3d 1025, 1029 (D. Ariz. 2016) (remanding because a court would "not *necessarily*" have to construe any federal law to assess whether Volkswagen's statements were misleading (quotation marks omitted)).

Montana's motion to remand, correctly determining that granting the requested relief would not implicate federal regulatory decisions. *In re National Prescription Opiate Litig.*, No. 17-md-2804, 2018 WL 4019413 (N.D. Ohio Aug. 23, 2018). Montana's case is one of many opioid-related cases involving purely state-law claims that have been remanded to state court. *See Dunaway v. Purdue Pharma L.P.*, 391 F. Supp. 3d 802, 813 (M.D. Tenn. 2019) (collecting cases). As the federal courts in those cases have recognized, removal is not proper merely because state-law claims involve an issue of national importance that is addressed (to some extent) by federal law. *See id.*

In each of these areas, States brought enforcement actions that related to national interests and even related to specific federal statutes and/or regulatory regimes. But the federal district courts correctly determined that they lacked jurisdiction over the state-law claims the plaintiff States had chosen to plead. *See Caterpillar Inc.*, 482 U.S. at 392.

The district court was right to reach the same result here. The CPPA makes it unlawful to engage in unfair or deceptive trade practices. D.C. Code § 28-3904. Invoking the CPPA, the District seeks to hold the companies liable for making misrepresentations about the nature of their

products and about their investments in alternative energy sources. The District's claims are comparable to state suits to hold S & P accountable for having "misled the States' citizens in representing that bond ratings were objective and independent," *In re Standard & Poor's*, 23 F. Supp. 3d at 384; to hold Volkswagen accountable for "deceptive representations about the environmental characteristics of its cars," *In re Volkswagen*, 2017 WL 2258757, at *11; and to shape Purdue Pharma's promotional and educational activity affecting state consumers and prescribers, *In re National Prescription Opiate Litig.*, 2018 WL 4019413, at *1. The existence of federal laws, regulations, and interests relating to climate change does not alter the nature of the District's deception-focused claims or provide any other basis for removal. And, as the Volkswagen litigation shows, States are not powerless to enforce state laws in state courts merely because a defendant's deceptive representations involved emissions.

POINT II

THE DEFENDANT COMPANIES' REMOVAL THEORIES IGNORE THE CLAIMS THE DISTRICT OF COLUMBIA ACTUALLY PLEADED AND WOULD UNDERMINE THE ROLE OF STATE COURTS IN INTERPRETING AND ENFORCING STATE LAW

The companies reprise four of the seven removal theories the district court rejected below. These theories have been roundly rejected by the federal courts of appeals, and none provides a valid basis for preventing state courts from hearing state-law claims and interpreting their own state's laws—including consumer-protection laws, which occupy a field that States traditionally regulate.

The prerogative of state courts to "define and elaborate their own laws" should be spared "undue interference from the Federal Judiciary." *See Arkansas v. Farm Credit Servs. of Cent. Ark.*, 520 U.S. 821, 826 (1997). It is "a tenet of dual sovereignty" that state courts are competent to decide whether relief sought under state law is barred under some federal principle, and accepting the companies' argument for removal here "would lead to a major diminution in the power of state courts to enforce their own laws." *See Board of Cnty. Comm'rs of Boulder Cnty.*, 25 F.4th at 1267; *see also Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*,

457 U.S. 423, 431 (1982) (comity bars any presumption that "state courts will not safeguard federal constitutional rights").

A. The District's Complaint Seeks Relief for Corporate Deception.

Each of the companies' removal arguments rests on a fundamental mischaracterization of the District's claims. Even though the complaint pleads that the companies' violations of the CPPA consisted of misrepresentations and omissions (*e.g.*, J.A. 80), the companies attempt to rewrite the District's deception-focused claims as a generalized attack on greenhouse-gas emissions. In support of their characterization, the companies point to the complaint's description of certain consequences of climate change. (Br. of Appellants (Br.) at 13-14, 22-23, 51; *see also* J.A. 122-123.) But, as the District explained below, its complaint "refers to various harms that will result from the climate crisis not because they are the target of the District's relief, but to illustrate one reason why Defendants' misrepresentations and omissions were and are material to consumers." (Mem. of Law in Supp. of Pl.'s Mot. to Remand at 15 (Aug. 31, 2020), Dist. Ct. ECF No. 46.) The District seeks to hold the companies accountable for alleged deception—the broader issue of climate change is

not the source of liability in this case. *See Mayor & City Council of Baltimore*, 31 F.4th at 233.

The companies' state amici concede that suits seeking to remedy local harms caused by local conduct pose no federalism concerns. Br. of Indiana et al. as *Amici Curiae* (Indiana et al. Br.) at 9. The District's complaint pleads such a suit: it explains in detail how the companies' deceptions have targeted and reached D.C. consumers and continue to do so. (*See, e.g.*, J.A. 80, 82-83, 113, 120, 126, 128, 131, 141-145.) The District's CPPA claims seek to hold the companies liable for alleged misrepresentations—including those that misled the District's consumers about the consensus view among scientists regarding climate change, and about the "starring role" that the companies' products have played in causing climate change, *see Rhode Island*, 35 F.4th at 55 n.8; the claims do not seek to regulate emissions.[9]

Having chosen to limit its claims to the CPPA, the District can receive only the relief available under that statute. *See* D.C. Code § 28-

[9] The District's claims closely resemble Minnesota's deception-based claims, which the Eighth Circuit recently held were not removable under the theories the companies press here. *See Minnesota*, 2023 WL 2607545.

3909(a)-(b). Because the complaint pleads only CPPA claims, the companies' state amici miss the mark in arguing that the District "has not disavowed" damages on theories other than those contemplated by CPPA. *See* Indiana et al. Br. at 9. Rather than awarding relief based on unpleaded claims, a court will construe the scope of requested relief to align with the claims actually pleaded. *See Connecticut v. Exxon Mobil Corp.*, No. 20-cv-1555, 2021 WL 2389739, at *3 n.4 (D. Conn. June 2, 2021) (construing request for relief under Connecticut's Unfair Trade Practices Act), *argued*, No. 21-1446 (2d Cir. Sept. 23, 2022). And to the extent the companies suggest (*e.g.*, Br. at 22-24) that the District seeks relief incompatible with federal law, they raise only a federal defense, which cannot support removal, *see Caterpillar Inc.*, 482 U.S. at 393; *In re Volkswagen*, 2017 WL 2258757, at *11-12. State courts "are presumed competent to resolve federal issues," including preemption arguments. *See Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 150 (1988).

B. The District's Claims—Which Address the Companies' Alleged Misrepresentations and Not Their Emissions—Do Not Arise Under Federal Common Law.

The companies argue that federal courts have jurisdiction over any claim relating to the companies' role in climate change—regardless of the causes of action the District actually pleaded in its complaint—because such claims inherently regulate an area reserved to the federal government. *See* Br. at 13-34. The companies are wrong, for at least two reasons.

First, even if the companies were correct that the District's claims target "transboundary pollution" (*e.g.*, *id.* at 22), any relevant federal common law regulating transboundary emissions has been displaced by the Clean Air Act, and displaced common law provides no basis for federal jurisdiction, *see* Br. for the United States as Amicus Curiae at 6-16, *Suncor Energy (U.S.A.) Inc. v. Board of Cnty. Comm'rs of Boulder Cnty.*, No. 21-1550 (U.S. Mar. 16, 2023).[10] In *American Electric Power Co. v. Connecticut*, the Supreme Court held that the Clean Air Act and the

[10] The companies invoke a contrary position taken by the United States in a previous case. *See* Br. at 17. But the United States has since reexamined and disavowed that prior position, which had been rejected by all of the federal courts of appeals to consider it. Br. for the United States as Amicus Curiae at 6-7, *Suncor Energy*, No. 21-1550.

Environmental Protection Agency actions it authorizes have displaced any federal common law right of public nuisance to require the abatement of greenhouse-gas emissions. 564 U.S. 410, 415, 422-24 (2011). Following that decision, several federal courts of appeals have correctly rejected arguments similar to the companies' arguments here, holding that because any federal common law that previously governed limiting interstate pollution has been displaced by federal statute, state-law claims against fossil fuel companies cannot arise under federal common law. *See Rhode Island*, 35 F.4th at 53-56; *Mayor & City Council of Baltimore*, 31 F.4th at 204-07; *Board of Cnty. Comm'rs of Boulder Cnty.*, 25 F.4th at 1257-61.

The companies argue that whether a statute has entirely displaced federal common law has no bearing on whether that federal common law "applies in the first instance." Br. at 29. The companies are wrong. It "defies logic" to suggest "that removal is proper based on federal common law even when the federal common law claim has been deemed displaced, extinguished, and rendered null by the Supreme Court." *Mayor & City Council of Baltimore*, 31 F.4th at 206. "Simply put, this case could not have been removed to federal court on the basis of federal common law

that no longer exists." *Board of Cnty. Comm'rs of Boulder Cnty.*, 25 F.4th at 1260 (quotation marks omitted).

Second, even if the companies were correct that displaced federal common law remains jurisdictionally relevant (Br. at 29-30), the District's claims do not implicate that federal common law.[11] Again, the District's lawsuit does not target emissions. The companies and their state amici insist that the District seeks to impose its regulatory preferences on other States. *See id.* at 29; Indiana et al. Br. at 2, 7-8. But they never explain how regulating corporate deception would regulate "transboundary pollution" or "transboundary emissions." In fact, nothing in the District's complaint seeks to limit emissions within the District, let alone in other States. Instead, the District challenges the companies' use of deception to promote their brands and products and to avoid revenue losses. The District seeks to recover for past misrepresentations and to enjoin future misrepresentations. (*See* J.A. 156-157.) The companies and their state

[11] The same result obtains "[e]ven if federal common law still exists in this space and provides a cause of action to govern transboundary pollution cases" because "that remedy doesn't occupy the same substantive realm as state-law . . . consumer protection claims." *See Minnesota*, 2023 WL 2607545, at *3.

amici do not explain how requiring the companies to be honest in the District's marketplace would trench on any other sovereign's prerogative.[12]

At bottom, this case lacks the features that justify applying federal common law. Because the District's suit does not target the companies' continuing ability to produce and sell fossil fuels (only their ability to mislead consumers), it does not necessarily implicate any federal interest in energy or environmental policy. Moreover, there is no "overriding federal interest in the need for a uniform rule of decision" in matters of corporate deception, as compared to transboundary pollution. *See Illinois v. City of Milwaukee*, 406 U.S. 91, 105 n.6 (1972). Nor would it be "inappropriate" to apply local law in this consumer-protection case.

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[12] The Master Settlement Agreement between tobacco companies and forty-six States illustrates that States can regulate corporate misrepresentations on issues of national importance without usurping the prerogatives of coequal sovereigns. *See* Master Settlement Agreement Between States and Tobacco Manufacturers at 36 (Jan. 2019 printing) (1998) (forbidding "any material misrepresentation of fact regarding the health consequences of using any Tobacco Product"). The agreement was signed by each of the companies' state amici save Mississippi and Texas, who had already reached individual tobacco settlements. *See* Nat'l Ass'n of Att'ys Gen., *The Master Settlement Agreement*. (For sources available online, full URLs appear in the Table of Authorities. URLs were last visited on April 7, 2023.)

Contra Indiana et al. Br. at 6 (quotation marks omitted). As explained, prevention of unfair and deceptive business practices is "an area traditionally regulated by the States." *ARC Am. Corp.*, 490 U.S. at 101; *see also Altria Grp., Inc.*, 555 U.S. at 79 n.6.

C. A State Court Need Not Decide Any Substantial Federal Issue to Assess Whether the Companies Lied About Fossil Fuels, Climate Change, and Their Investments in Alternative Energy Sources.

The companies also argue (Br. at 34-39) that removal was proper under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005). *Grable* jurisdiction requires that the federal question be: "(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." *Gunn*, 568 U.S. at 258. These factors are present only in a "special and small category of cases." *Id.* (quotation marks omitted). This case is not one of them.

Showing that a federal question is necessarily raised is an inquiry that "demands precision": defendants invoking *Grable* jurisdiction should be able to point to the specific elements of a plaintiff's state-law claim that requires deciding a federal issue. *See Minnesota*, 2023 WL 2607545,

at *4 (quotation marks omitted). In this case, the companies cannot identify those specific elements because they are not present. A court need not resolve any issue of federal law or policy to determine whether the companies misled consumers about the environmental impact of their products and their investment in alternative energy sources.

Tellingly, the companies' brief does not discuss the elements of the District's CPPA claims in any detail, let alone identify an overlap between those elements and a necessarily presented federal question. (The companies cite the CPPA in one single paragraph of their opening brief. *See* Br. at 6 (statement of the case).) Instead, the companies invoke federal law and interests in a generalized way. But the District's claims "cannot be squeezed into the slim category *Grable* exemplifies." *See Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 701 (2006).

The companies argue that the District's suit asks the court to evaluate the costs and benefits of the companies' actions as they relate to greenhouse-gas emissions and climate change—a policy judgment the companies say is reserved for federal regulators. Br. at 36-38. But the companies are mistaken. A court need not make any policy judgment about how to regulate climate change to determine whether the companies

deceived consumers about the nature of their businesses and products. Nor has the District asked a court to determine whether the companies perpetrated fraud on the federal government, as the companies suggest. *See id.* at 37.

The District claims, instead, that the companies made false and/or misleading representations to consumers about their products and conduct relating to climate change. The companies identify no federal interest—much less one that is substantial and disputed—in permitting fossil fuel companies to mislead consumers. And even if the District's claims did require a court to weigh the benefits of fossil fuels against their costs (and the claims do not), that would not transform the District's claims into a federal cause of action. On the companies' view, any state-law claim that involves balancing interests brought against a federally regulated entity would be removable. *Grable* is not so capacious. And expanding *Grable* in the manner the companies suggest would upset the balance between the state and federal judicial systems. *See Peters v. Alaska Tr., LLC*, 305 F. Supp. 3d 1019, 1028 (D. Alaska 2018) (declining to exercise *Grable* jurisdiction and recognizing that consumer protection is traditionally a matter of state law for state courts).

D. The Companies' Alleged Misrepresentations Were Not Undertaken at the Direction of Any Federal Officer.

The companies next argue that removal was proper under the federal-officer removal statute. Br. at 39-53. That law permits removal of an action brought against "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." 28 U.S.C. § 1442(a)(1). To invoke section 1442(a)(1), a private entity must establish that: (1) "it is a person within the meaning of the statute"; (2) "there is a causal nexus between its actions, taken pursuant to a federal officer's directions, and [the] plaintiff's claims"; and (3) "it can assert a colorable federal defense." *County of San Mateo*, 32 F.4th at 755 (quotation marks omitted).

Even if the companies acted under the direction of federal officers in some respects (*see* Br. at 41-48), they acknowledge that their alleged misrepresentations were not undertaken at the direction of federal officers (*id.* at 51). The companies urge this Court to focus on the acts that injured the District. *Id.* at 50-51. But because the District brings suit under the CPPA alone, the injuries at issue in this case flow only from deceptive trade practices.

The companies argue that federal-officer removal is appropriate even though no federal officer caused the companies to deceive consumers. *Id.* at 49-52. But as other courts have observed, even if section 1442(a)(1)'s "relating to" requirement presents a low bar, the companies fail to clear it because their production of fuel, operation of leases, and other activities arguably conducted at federal direction have no relationship to the consumer-facing representations at issue.[13] *See Minnesota*, 2023 WL 2607545, at *7; *Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31, 47 (D. Mass. 2020).

[13] That conclusion is consistent with remand orders in other contexts. For example, Washington and New Mexico filed complaints in their respective state courts alleging that Monsanto Company and others produced products containing polychlorinated biphenyls (PCBs) that contaminated the States' natural resources and that Monsanto intentionally concealed the toxicity of PCBs. Monsanto unsuccessfully attempted to remove the lawsuits to federal court, including under the federal-officer removal statute. The district courts found no federal-officer removal jurisdiction because the federal government had merely purchased PCBs or PCB-containing products and had not directed Monsanto to conceal PCBs' toxicity. *See Washington v. Monsanto Co.*, 274 F. Supp. 3d 1125, 1127-31 (W.D. Wash. 2017), *aff'd*, 738 F. App'x 554 (9th Cir. 2018); *New Mexico ex rel. Balderas v. Monsanto Co.*, 454 F. Supp. 3d 1132, 1137-46 (D.N.M. 2020).

E. The Companies' Alleged Misrepresentations Do Not Arise Out of Any Operation on the Outer Continental Shelf.

Finally, the companies argue that removal was proper under the Outer Continental Shelf Lands Act (OCSLA). Br. at 53-58. OCSLA establishes federal jurisdiction over "cases and controversies arising out of, or in connection with . . . any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals." 43 U.S.C. § 1349(b)(1). The companies argue that the District's claims arise out of the companies' operations on the outer continental shelf. Br. at 53. But the companies' operations on the outer continental shelf lack the requisite relationship with the District's actual claims, so OCSLA, too, provides no basis for removal.

The companies rely heavily on the Fifth Circuit's interpretation of OCSLA's scope. *E.g.*, *id.* at 53-54. As the district court recognized (J.A. 468), the Fifth Circuit requires "a 'but-for' connection" between a plaintiff's claims and the outer continental shelf operation, *In re Deepwater Horizon*, 745 F.3d 157, 163 (5th Cir. 2014); *see also Board of Cnty. Comm'rs of Boulder Cnty.*, 25 F.4th at 1272-75 (requiring but-for causa-

tion); *Mayor & City Council of Baltimore*, 31 F.4th at 219-20 (same). The companies are wrong to suggest that their extraction of fossil fuels on the outer continental shelf is a but-for cause of the District's claims. *See* Br. at 57. Because the companies' fossil fuel extraction is hardly limited to the outer continental shelf, the companies could have perpetrated the deception alleged here without conducting a single operation there. *See Minnesota*, 2023 WL 2607545, at *5. And even if but-for causation is not required, there is no OCSLA jurisdiction because the companies' challenged actions—their alleged misrepresentations—are too far removed from their operations on the outer continental shelf. *See id.*; *see also County of San Mateo*, 32 F.4th at 754-55; *City of Hoboken*, 45 F.4th at 709-12.

CONCLUSION

The district court's remand order should be affirmed.

Dated: New York, New York
April 7, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Matthew W. Grieco, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 5,359 words and complies with the typeface requirements and length limits of Rules 29 and 32(a)(5)-(7) and the corresponding local rules.

/s/ Matthew W. Grieco

Addendum

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ADDENDUM OF RELEVANT STATUTORY PROVISIONS

D.C. Code § 28-3904. Unfair or deceptive trade practices.

It shall be a violation of this chapter for any person to engage in an unfair or deceptive trade practice, whether or not any consumer is in fact misled, deceived, or damaged thereby, including to:

> (a) represent that goods or services have a source, sponsorship, approval, certification, accessories, characteristics, ingredients, uses, benefits, or quantities that they do not have; . . .
>
> (e) misrepresent as to a material fact which has a tendency to mislead; . . . [and]
>
> (f) fail to state a material fact if such failure tends to mislead . . . .

D.C. Code § 28-3909. Restraining prohibited acts.

(a) Notwithstanding any provision of law to the contrary, if the Attorney General for the District of Columbia has reason to believe that any person is using or intends to use any method, act, or practice in violation of section . . . 28-3904, and if it is in the public interest, the Attorney General, in the name of the District of Columbia, may bring an action in the Superior Court of the District of Columbia to obtain a temporary or permanent injunction prohibiting the use of the method, act, or practice and requiring the violator to take affirmative action, including the restitution of money or property. In any action under this section, the Attorney General shall not be required to prove damages and the injunction shall be issued without bond.

(b) In addition, in an action under this section, the Attorney General for the District of Columbia may recover:

> (1) From a merchant who engaged in a first violation of section . . . 28-3904, a civil penalty of not more than $5,000 for each violation;

(2) From a merchant who engaged in a first violation of section . . . 28-3904 and who subsequently repeats the same violation, a civil penalty of not more than $10,000 for each subsequent violation;

(3) Economic damages; and

(4) The costs of the action and reasonable attorneys' fees.

. . . .

CERTIFICATE OF SERVICE

I hereby certify that, on April 7, 2023, I electronically filed the foregoing Brief for States of New York, California, Connecticut, Delaware, Hawai'i, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, Washington, and Wisconsin as Amici Curiae in Support of Appellee for Affirmance using the Court's CM/ECF system and that, therefore, service was accomplished upon counsel of record by the Court's CM/ECF system.

Dated: New York, NY
April 7, 2023

/s/ Matthew W. Grieco