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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MATTHEW J. PLATKIN, ATTORNEY GENERAL OF THE STATE OF NEW JERSEY; NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION; and CARI FAIS, ACTING DIRECTOR OF THE NEW JERSEY DIVISION OF CONSUMER AFFAIRS,

Plaintiffs,

v.

EXXON MOBIL CORPORATION; EXXONMOBIL OIL CORPORATION; BP P.L.C.; BP AMERICA INC.; CHEVRON CORPORATION; CHEVRON U.S.A. INC.; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66; PHILLIPS 66 COMPANY; SHELL PLC; SHELL OIL COMPANY; and AMERICAN PETROLEUM INSTITUTE,

Defendants.

No. 3:22-cv-06733-ZNQ-RLS

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO REMAND TO STATE COURT

Hon. Zahid N. Quraishi, U.S.D.J.
Hon. Rukhsanah L. Singh, U.S.M.J.

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I. INTRODUCTION

There is no federal subject-matter jurisdiction over this case, and it must be remanded to New Jersey state court under recent, unequivocal, binding circuit precedent. Defendants agree in their Notice of Removal ("NOR") that "the removal grounds asserted here are the same as those that were recently rejected by the Third Circuit in two similar climate change-related cases." Doc. 1 at 4 (Nov. 22, 2022). In that decision, the court noted the century-old axiom that "[p]laintiffs choose which claims to file, in which court, and under which law," and held that because "the plaintiffs filed those suits in state court" based only on state law, there was "no federal hook that lets defendants remove them to federal court." *City of Hoboken v. Chevron Corp.*, 45 F.4th 699, 706 (3d Cir. 2022). The mandate from that decision has issued, and the ruling is final. *See Hoboken*, No. 21-2728, Docs. 146 & 147 (3d Cir. Oct. 12, 2022) (denying stay and issuing mandate). The Complaint here is indistinguishable from the complaints at issue in *Hoboken* in all respects material to jurisdiction. Defendants, all of whom were parties to *Hoboken*, do not contend otherwise. The Court must grant Plaintiffs' motion to remand.

Each of Defendants' jurisdictional arguments has—by Defendants' own admission—already been rejected by every federal court to consider them. Plaintiffs nonetheless address each argument below. In *Hoboken*, the Third Circuit joined four other circuit courts and more than a dozen district courts that have rejected identical or nearly identical removals in analogous climate deception cases,[1] and the unanimous judicial consensus is the correct application of the law.

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

First, Plaintiffs' New Jersey-law claims do not arise under federal common law. *See* NOR ¶¶ 15–30; Part IV.A, *infra*. Federal common law cannot "completely preemp[t] state law," and there is no other mechanism to convert well-pleaded state claims into federal ones. *Hoboken*, 45 F.4th at 707. In any event, "the federal common law of nuisance that formerly governed transboundary pollution suits *no longer exists* due to Congress's displacement of that law" through the Clean Air Act. *Boulder*, 25 F.4th at 1260; 42 U.S.C. §§ 7401 *et seq.*

Second, there is no jurisdiction under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(b) ("OCSLA"), because Plaintiffs' claims do not arise out of or relate to operations on the outer continental shelf ("OCS"). *See* NOR ¶¶ 31–42, Part IV.B, *infra*. Plaintiffs' claims "are all too far away from Shelf oil production" to support removal. *Hoboken*, 45 F.4th at 712. Plaintiffs allege that Defendants misled the public for decades concerning the climatic harms their products cause, and their allegedly wrongful conduct is "several steps further away from exploration and production on the Shelf than" cases that come within OCSLA's jurisdictional grant. *See id.*

Third, Defendants' encyclopedia of relationships with the federal government through the 20th and 21st centuries, which fill nearly 90 pages of the removal notice, do not support jurisdiction under the federal officer removal statute. 28 U.S.C. § 1442; *see* NOR ¶¶ 43–164, Part IV.C, *infra*.

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cert. petition filed (June 8, 2022) (No. 21-1550); *Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31 (D. Mass. 2020); *City & Cty. of Honolulu v. Sunoco LP*, Nos. 20-cv-00163-DKW-RT, 20-cv-00470-DKW-KJM, 2021 WL 531237 (D. Haw. Feb. 12, 2021), *aff'd*, 39 F.4th 1101 (9th Cir. 2022), *cert. petition filed* (Dec. 2, 2022) (No. 22-523); *Minnesota v. Am. Petroleum Inst.*, No. 20-1636 (JRT/HB), 2021 WL 1215656 (D. Minn. Mar. 31, 2021), *appeal filed*, No. 21-1752 (8th Cir. Apr. 5, 2021); *Connecticut v. Exxon Mobil Corp.*, No. 3:20-cv-1555 (JCH), 2021 WL 2389739 (D. Conn. June 2, 2021), *appeal filed*, No. 21-1446 (2d Cir. June 8, 2021); *Delaware v. BP Am. Inc.*, 578 F. Supp. 3d 618 (D. Del. 2022), *aff'd sub nom. City of Hoboken v. Chevron Corp.*, 45 F.4th 699 (3d Cir. 2022), *cert. petition filed* (Feb. 27, 2023) (No. 22-821); *City of Annapolis v. BP P.L.C.*, Nos. SAG-21-00772, SAG-21-01323, 2022 WL 4548226 (D. Md. Sept. 29, 2022), *appeal filed*, No. 22-2082 (4th Cir. Oct. 14, 2022); *District of Columbia v. Exxon Mobil Corp.*, __ F. Supp. 3d __, 2022 WL 16901988 (D.D.C. Nov. 12, 2022), *appeal filed*, No. 22-7163 (D.C. Cir. Nov. 30, 2022).

All the government relations on which Defendants rely were not subject to close federal supervision and control, and/or have nothing to do with Plaintiffs' claims—in part because Plaintiffs have disclaimed recovery for injuries caused by fuel sales to the federal government for national security or military purposes. *See, e.g.*, *Hoboken*, 45 F.4th at 712–13. Defendants have also failed to present a colorable federal defense. *See Honolulu*, 39 F.4th at 1110.

Fourth, Plaintiffs' claims do not necessarily present a disputed and substantial question of federal law that could confer jurisdiction under the exception to the well-pleaded complaint rule established in G*rable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005). *See* NOR ¶¶ 165–194, Part IV.D, *infra*. Defendants' contentions that Plaintiffs' claims will "supplant federal regulation of greenhouse gas emissions," "impede the [United States'] foreign-affairs power," and "impose *de facto* regulations on Defendants' nationwide speech," are all ordinary federal preemption defenses. NOR ¶¶ 166, 182, 193. Under the well-pleaded complaint rule, "'a federal defense,' like ordinary preemption, does not justify removal" on its own, and in turn "[d]efenses are not the kinds of substantial federal questions that support federal jurisdiction" under *Grable*. *Hoboken*, 45 F.4th at 708–09.

Finally, there is no jurisdiction under the federal enclave jurisdiction doctrine. The Third Circuit did not consider Defendants' enclave jurisdiction arguments because Defendants abandoned them on appeal. In the district court below, however, another court of this district rejected enclave jurisdiction because the plaintiff did not allege any injuries on federal land, and the same analysis obtains here. *See Hoboken*, 558 F. Supp. 3d at 209. That holding too is in accord with the unanimous decisions of every court to consider the issue.[2]

[2] *See Boulder*, 25 F.4th at 1271–72; *San Mateo*, 32 F.4th at 748–51; *Baltimore*, 31 F.4th at 217–19; *Rhode Island*, 35 F.4th at 58–59.

Because Defendants had no objectively reasonable basis to remove in light of binding precedent issues just last year, the Court should not only remand, but also award Plaintiffs their just costs and expenses incurred as a result of the removal, including attorneys' fees, pursuant to 28 U.S.C. § 1447(c). *See* Part IV.E, *infra*. "Typically, courts award attorneys' fees" under that provision "where it is clear that the complaint does not state a claim removable to federal court or where minimal research would have revealed the impropriety of removal." *Vastola v. Sterling, Inc.*, No. 21-cv-14089-ZNQ-LHG, 2022 WL 2714009, at *5 (D.N.J. July 13, 2022) (Quraishi, J.). Here, every legal argument in Defendants' 150-page removal notice, and every factual contention in their 102 supporting exhibits comprising more than 1,000 pages, *see* Docs. 1-2 through 1-104, was before the Third Circuit in *Hoboken* and the two district courts whose remand orders it affirmed. *See Delaware v. BP Am. Inc.*, 578 F. Supp. 3d 618 (D. Del. 2022); *City of Hoboken v. Exxon Mobil Corp.*, 558 F. Supp. 3d 191 (D.N.J. 2021). Defendants nevertheless say their waste of the Court's time is justified because they believe "the Third Circuit's decision was incorrect" and they petitioned for certiorari. NOR at 4. But the law today is crystal clear that this case is not removable. The fee-shifting provision in Section 1446(c) is designed "to deter removals sought for the purpose of prolonging litigation and imposing costs on the opposing party," *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 140 (2005), and Defendants' removal serves no other purpose.

II. BACKGROUND

Plaintiffs summarized the allegations of their Complaint in their opposition to Defendants' motion to stay, *see* Doc. 76 at 2–3 (Feb. 13, 2023), and briefly reiterate them here. Plaintiffs filed the Complaint on October 18, 2022, bringing claims for failure to warn, negligence, impairment of the public trust, trespass, public and private nuisance, and violations of the New Jersey Consumer Fraud Act ("CFA"). *See generally* Complaint, Doc. 1-2 ("Compl."). Plaintiffs assert that Defendants have known for over 50 years that the intended use of their fossil fuel products

creates greenhouse gas emissions that cause climate change, presenting catastrophic risks in New Jersey, as elsewhere. *Id.* ¶¶ 1, 5, 7–17. Defendants privately took steps to protect their own assets from the impacts of climate change, while publicly advancing a decades-long campaign to disseminate false and misleading information about climate change; discredit the scientific consensus on climate change; and sow doubt in the minds of consumers and the public about the consequences of using Defendants' products—while promoting increased use of their products through false and misleading advertising. *Id.* ¶¶ 1, 5–6. Defendants' strategy hyper-inflated demand for fossil fuels, increasing greenhouse gas emissions and exacerbating climate change impacts across New Jersey. *See, e.g.*, *id.* ¶¶ 1, 7–17, 50.

Their campaign of misleading marketing and deceptive promotion continues to this day, including through sophisticated "greenwashing" campaigns. *Id.* ¶¶ 1, 4, 6, 158–232. Those campaigns misleadingly promote Defendants as sustainable energy companies, but fail to disclose that their renewable energy investments represent a negligible share of their overall business while Defendants continue to ramp up fossil fuel production. *Id.* ¶¶ 6, 158–59. Defendants also advertise that certain fossil fuel products are "green" or "clean," while concealing the fact that those very same products are leading causes of climate change. *Id.* ¶¶ 6, 158.

III. LEGAL STANDARDS

The rules governing removal jurisdiction are well-established. Federal courts are "courts of limited jurisdiction" in that "[t]hey possess only that power authorized by Constitution and statute." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552 (2005). Statutes authorizing a defendant to remove an action from state court are therefore "strictly construed, requiring remand if any doubt exists over whether removal was proper." *Carlyle Inv. Mgmt. LLC v. Moonmouth Co.*, 779 F.3d 214, 218 (3d Cir. 2015). The presumption against removal is higher

still in actions brought by a state exercising its sovereign authority to enforce its own laws. *See Franchise Tax Bd. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 21 n.22 (1983).

Under the cardinal "well-pleaded complaint rule," "federal jurisdiction exists 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) (quotations omitted). The rule "makes the plaintiff the master of the claim," and the plaintiff may thus "avoid federal jurisdiction by exclusive reliance on state law." *Id.* The rule is a "powerful doctrine" that "severely limits the number of cases in which state law 'creates the cause of action' that may be initiated in or removed to federal district court." *Franchise Tax Bd.*, 463 U.S. at 9–10. A close corollary to the well-pleaded complaint rule is that "[f]ederal jurisdiction cannot be predicated on an actual or anticipated defense" based in federal law, whether anticipated by the plaintiff in the complaint, or asserted by the defendants in the notice of removal. *Vaden v. Discover Bank*, 556 U.S. 49, 60 (2009).

There are two narrow exceptions to the well-pleaded complaint rule. The first, known as "complete preemption," confers federal subject-matter jurisdiction in the few instances "where Congress 'has expressed its intent to completely pre-empt a particular area of law such that any claim that falls within this area is necessarily federal in character.'" *N.J. Carpenters & the Trustees Thereof v. Tishman Constr. Corp. of N.J.*, 760 F.3d 297, 302 (3d Cir. 2014) (quoting *In re U.S. Healthcare, Inc.*, 193 F.3d 151, 160 (3d Cir. 1999)). "This same principle has been referred to elsewhere as the 'artful pleading' doctrine," because it prohibits plaintiffs from pleading around federal causes of action that Congress intended to be exclusive. *Goepel v. Nat'l Postal Mail Handlers Union*, 36 F.3d 306, 310 n.5 (3d Cir. 1994). The Supreme Court has only recognized three federal statutes that have complete preemptive force, none of which are at issue here. *See id.* The other exception, known as the *Grable* rule, permits federal question jurisdiction over the "slim

category" of state law claims in which a federal issue is "(1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Manning v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 772 F.3d 158, 163 (3d Cir. 2014), *aff'd*, 578 U.S. 374 (2016).

IV. ARGUMENT

A. Plaintiffs' Claims Do Not Arise Under Federal Common Law.

Defendants begin by reasserting the novel removal theory based in federal common law that the Third Circuit already rejected. They say Plaintiffs' claims "necessarily arise under federal law," "as a matter of federal constitutional law and structure," because they implicate "'air and water in their ambient or interstate aspects.'" NOR ¶ 15 (quoting *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 421 (2011) ("*AEP*")). That is wrong.

First, as *Hoboken* held, federal common law can never have complete preemptive force because complete preemption depends on *Congress*' express intent to federalize an area of law. Complete preemption "is a potent jurisdictional fiction" that "lets courts recast a state-law claim as a federal one," but only in the "rare" cases "when there is (1) a federal statute that (2) authorizes federal claims 'vindicating the same interest as the state claim.'" *Hoboken*, 45 F.4th at 707 (citation omitted). "Complete preemption is different from ordinary preemption," because ordinary preemption "is a defense" that "cannot work th[e] alchemy" of converting a state law claim into a federal one. *Id.* The Third Circuit has thus held for nearly three decades that "'the two-part test for complete preemption' is 'the *only* basis for recharacterizing a state law claim as a federal claim removable to [federal] court.'" *Id.* at 708 (quoting *Goepel*, 36 F.3d at 312).

Defendants say "federal law exclusively governs" Plaintiffs' claims because they involve "interstate and international pollution," and thus are actually federal. NOR ¶ 7. But the Third Circuit held in *Hoboken* that "whether federal common law governs these claims . . . is a *defense*,"

and declined to recognize the "new form of complete preemption" Defendants advocate "that relies not on statutes but federal common law." 45 F.4th at 707, 709. Defendants' federal common law arguments are thinly disguised ordinary preemption arguments that cannot support removal.[3]

Second, the body of federal common law on which Defendants rely has been displaced by the Clean Air Act and so "no longer exists." *See Boulder*, 25 F.4th at 1259–60; *Baltimore*, 31 F.4th at 204–07; *Rhode Island*, 35 F.4th at 55–56. Defendants principally assert that "federal law exclusively governs claims for interstate and international pollution," NOR ¶ 7, citing the Supreme Court's opinions in *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) ("*Milwaukee I*"); *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981) ("*Milwaukee II*"); and *AEP*. The Fourth Circuit in *Baltimore* discussed at length why those cases do not support Defendants' position.

Briefly, the Supreme Court in *Milwaukee I* "recognized public nuisance as a federal common law claim" "for disputes involving [pollution to] interstate and navigable waters." *Baltimore*, 31 F.4th at 204. In 1981, Congress amended the Clean Water Act, "and the Court then held [in *Milwaukee II*] that the [amended CWA] displaced the federal common law claim of public nuisance it had previously recognized for water pollution." *Id.* "[W]hen Congress addresses a question previously governed by a decision rested on federal common law," the Court held, "the need for such an unusual exercise of law-making by federal courts disappears." *Milwaukee II*, 451 U.S. at 314. Three decades later, the Court held in *AEP* that the Clean Air Act displaced any federal common law of interstate air pollution.

[3] *See also Baltimore*, 31 F.4th at 208 ("[W]e decline to permit Defendants to rely upon federal common law as a theory for removal" in part because "[a]t most, Defendants present us with an ordinary preemption argument that does not warrant removal."); *Rhode Island*, 35 F.4th at 55–56; *Boulder*, 25 F.4th at 1262.

In *AEP*, the Court declined to answer the "academic question" whether a federal common law nuisance claim for greenhouse gas pollution could ever have been viable, because "[a]ny such claim would be displaced by the federal legislation authorizing EPA to regulate carbon-dioxide emissions," namely the Clean Air Act. *See AEP*, 564 U.S. at 422–24; *Baltimore*, 31 F.4th at 205; *see also Boulder*, 25 F.4th at 1259 ("What *Milwaukee II* did to the federal common law of interstate water pollution, *AEP* did to the federal common law of interstate air pollution."). "In other words, the federal common law of nuisance that formerly governed transboundary pollution suits *no longer exists* due to Congress's displacement of that law." *Boulder*, 25 F.4th at 1260. District courts lack jurisdiction to hear claims that are "so attenuated and unsubstantial as to be absolutely devoid of merit," and "it is 'no longer open to discussion' that federal common law claims even exist to govern" claims like the Plaintiffs' here. *See Baltimore*, 31 F.4th at 206 (quoting *Hagans v. Lavine*, 415 U.S. 528, 537 (1974)).[4] Federal common law that does not appear on the face of a plaintiff's complaint cannot confer jurisdiction in general and does not do so here.

B. There Is No Jurisdiction Under OCSLA.

There is also no jurisdiction under OCSLA, which again the Third Circuit already held in *Hoboken*. "OCSLA defines a body of law uniquely applicable to the seabed, the subsoil, and fixed structures such as artificial island drilling rigs, all of which pertain to the outer continental shelf lands." *Superior Oil Co. v. Andrus*, 656 F.2d 33, 35 (3d Cir. 1981). OCSLA grants district courts original jurisdiction over cases "arising out of, or in connection with . . . any operation conducted on the [OCS] which involves exploration, development, or production of the minerals" beneath it. 43 U.S.C. § 1349(b)(1). The terms "arising out of, or in connection with" are not defined in the

[4] *See also Rhode Island*, 35 F.4th at 55; *District of Columbia*, 2022 WL 16901988 at *3 n.3 ("Under *AEP*, it is unclear how the District's claims could arise under federal common law in this area if those 'federal law claim[s] [have] been deemed displaced, extinguished, and rendered null by the Supreme Court.'" (quoting *Baltimore*, 31 F.4th at 207)).

statute, but the Third Circuit held in *Hoboken* that a case comes within OCSLA jurisdiction if it is "linked closely to production or development on the Shelf," which is true when the suit "target[s] actions on or closely connected to the Shelf" as a basis of liability. 45 F.4th at 710, 712.

In *Hoboken*, the Third Circuit held that materially indistinguishable climate deception "claims [we]re all too far away from Shelf oil production" to satisfy the statute, because they alleged injuries caused "not by Shelf production, but by what oil companies did with their oil after it hit the mainland: sell it for people to burn." *Id.* That conduct was "several steps further away from exploration and production on the Shelf than pipeline disputes and oil-rig injuries" that typically fall within OCSLA jurisdiction. *Id.* The same is true here. Defendants incorrectly assert that Plaintiffs "challeng[e] *all of* Defendants' extraction of oil, coal, and natural gas," and "a substantial quantum of those activities" occur on the OCS. NOR ¶ 40. But as in *Hoboken*, the wrongful conduct Plaintiffs allege is Defendants' misrepresentations in the marketplace, "[s]o the Shelf Act does not give [this Court] jurisdiction to hear this suit." *See Hoboken*, 45 F.4th at 712.[5]

C. There Is No Jurisdiction Under the Federal Officer Removal Statute.

In *Hoboken*, the Third Circuit also rejected Defendants' federal officer removal arguments, as have the First, Fourth, Ninth, and Tenth Circuits in analogous climate deception lawsuits. Every district court that has resolved the issue—including another court in this district—has likewise held that Defendants' various relationships to the federal government do not confer jurisdiction. Defendants nonetheless present the same arguments they litigated and lost in *Hoboken*.

The federal officer removal statute, 28 U.S.C. § 1442(a), permits a private defendant to remove an action from state court if the defendant meets its burden to demonstrate four elements:

[5] The First, Fourth, Ninth, and Tenth Circuits applied slightly different standards to interpret OCSLA's jurisdictional scope, but each of them held claims materially similar to Plaintiffs' were not removable under OCSLA. *See Rhode Island*, 35 F.4th at 59–60; *San Mateo*, 32 F.4th at 751–55; *Boulder*, 25 F.4th at 1272–75; *Baltimore*, 31 F.4th at 219–22.

> (1) the defendant is a "person" within the meaning of the statute; (2) the plaintiff's claims are based upon the defendant's conduct "acting under" the United States, its agencies, or its officers; (3) the plaintiff's claims against the defendant are "for, or relating to" an act under color of federal office; and (4) the defendant raises a colorable federal defense to the plaintiff's claims.

Papp v. Fore-Kast Sales Co., 842 F.3d 805, 812 (3d Cir. 2016) (citation and brackets omitted).

Defendants have failed to meet their burden of proof, and federal officer jurisdiction is absent. First, Plaintiffs have disclaimed relief for injuries arising from Defendants' supplying fossil fuels directly to the federal government for military and national defense purposes. Second, Defendants were not "acting under" the control of federal officers within the meaning of the statute when they carried out the activities they cite as bases for removal. Third, there is no connection between the actions Defendants allegedly took under federal supervision and the misconduct alleged in the Complaint—*i.e.*, Defendants' campaign to deceive the public about the climatic risks of fossil fuels. And finally, Defendants have not sufficiently pleaded a colorable federal defense.

1. Defendants Have Not Acted Under a Federal Superior in Any Way Relevant to This Case.

As the Third Circuit has already held, Defendants' proffered "business connections to the federal government" fail to show an "acting under" relationship that supports removal. *Hoboken*, 45 F.4th at 712–13. "The phrase 'acting under' is broad, and [courts] construe it liberally. But the phrase is not boundless." *Maglioli v. All. HC Holdings LLC*, 16 F.4th 393, 404 (3d Cir. 2021) (citation omitted). "[P]recedent and statutory purpose make clear that [a] private person's 'acting under' must involve an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior." *Watson v. Philip Morris Cos.*, 551 U.S. 142, 152 (2007).

A federal contractor can satisfy that standard "when the relationship between the contractor and the Government is an unusually close one involving detailed regulation, monitoring, or supervision," *id.* at 153, and "[t]hat relationship typically involves 'subjection, guidance, or

control'" over the contractor's operations by the government, *id*. at 151 (citation omitted). "Merely complying with federal laws and regulations is not 'acting under' a federal officer," and "[e]ven a firm subject to detailed regulations and whose 'activities are highly supervised and monitored' is not 'acting under' a federal officer." *Maglioli*, 16 F.4th at 404 (quoting *Watson*, 551 U.S. at 153). Similarly, "a person is not 'acting under' a federal officer when the person enters into an arm's-length business arrangement with the federal government or supplies it with widely available commercial products or services." *San Mateo*, 32 F.4th at 757 (citations omitted).

a. Plaintiffs Disclaimed Relief for Injuries Arising from Fuel Sales to the Government for Military and National Defense Purposes.

As an initial matter, Plaintiffs have expressly "disclaim[ed] injuries . . . arising from Defendants' provision of non-commercial, specialized fossil fuel products to the federal government for military and national defense purposes." Compl. ¶ 19. That alone is sufficient to defeat removal. The court in *Hoboken* affirmed orders granting remand in part because both plaintiffs "insist[ed] that they [we]re not suing over emissions caused by fuel provided to the federal government." 45 F.4th at 713. The disclaimer here "is not a 'jurisdictional disclaimer' that categorically disclaims jurisdiction conferred by the federal officer removal statute, but is instead a 'claim disclaimer' that 'expressly disclaim[s] the claims upon which federal officer removal [is] based.'" *Delaware*, 578 F. Supp. 3d at 635 (quoting *Dougherty v. A O Smith Corp*., No. 13-cv-1972, 2014 WL 3542243, at *5 (D. Del. July 16, 2014)). And "federal courts have consistently granted motions to remand based on claim disclaimers." *Id.* (cleaned up).

Defendants say Plaintiffs' disclaimer is an "attempt to artfully plead around removal," NOR ¶ 155, but once again the Third Circuit rejected that exact argument in *Hoboken*:. The court explained "the disclaimers are no ruse," because "[a]rtful pleading disguises federal claims as state ones" and "here, there are no federal claims to disguise," since the plaintiffs' claims were not

completely preempted. 45 F.4th at 713; *see* Part IV.A., *supra*. Plaintiffs' claims are likewise not completely preempted and "artful pleading" is irrelevant to federal officer removal.

Defendants' cited cases do not support their position. No disclaimer was at issue in *Nessel v. Chemguard, Inc.*; the plaintiffs there "surgically divide[d] their complaints" to have some claims for injuries arising from a hazardous chemical's commercial formulations adjudicated in state court, and other claims for the same injuries arising from the chemical's *military* formulations resolved in a multidistrict litigation proceeding. No. 1:20-cv-1080, 2021 WL 744683, at *1, *3 (W.D. Mich. Jan. 6, 2021). Here, Plaintiffs have not sought to sever claims related to Defendants' relationships with the government, but have instead disclaimed them entirely. In *Ballenger v. Agco Corp.*, the disclaimer was held ineffective on its own terms because it waived federal claims but not "claims arising out of work done on U.S. Navy vessels," which could be subject to federal officer removal even if pleaded under state law. No. 06-cv-2271, 2007 WL 1813821, at *1 & n.2, *2 (N.D. Cal. June 22, 2007). Finally, *Rhodes v. MCIC, Inc.*, involved a *jurisdictional* disclaimer that attempted to waive "any cause of action or claim for recovery that could give rise to federal subject matter jurisdiction" under the federal officer or federal question statutes. 210 F. Supp. 3d 778, 785–86 (D. Md. 2016). Here, the Plaintiffs make a true claim disclaimer, disclaiming recovery for a category of harms whether or not those claims might be subject to federal jurisdiction.

The Court may disregard Defendants' "supplying large quantities of highly specialized, noncommercial-grade fuels for U.S. military use," NOR ¶ 47, because they are disclaimed.

b. Defendants' Leasing Federal Mineral Rights, and Purportedly Conducting Business "In Furtherance of Important Federal Interests," Do Not Establish an "Acting Under" Relationship.

Defendants offer the same menu of "business connections to the federal government" here that the Third Circuit rejected in *Hoboken*. *See* 45 F.4th at 712–13. None constitute the type of "unusually close" relationship that can satisfy the statute. *See Watson*, 551 U.S. at 153.

Federal Mineral Leases. Defendants' contention that they act under federal officers by drilling for oil and gas on the OCS and other federal lands is wrong. NOR ¶¶ 68–102. Every court that has considered the question has so held. Defendants lease mineral rights on federal property, and "[t]hough the federal government grants the leases, oil produced under them is produced to sell on the open market, not specifically for the government." *Hoboken*, 45 F.4th at 713 (cleaned up). The leases do not "impose close federal control," and require only "compl[iance] with run-of-the-mill regulations on oil and gas production," which is "not enough for federal jurisdiction." *Id.* (citing *Watson*, 551 U.S. at 152–53).[6] "By winning bids for leases to extract fossil fuels from federal land in exchange for royalty payments, [Defendants are] not assisting the government with essential duties or tasks." *Boulder*, 25 F.4th at 1253; *see also San Mateo*, 32 F.4th at 760 ("[T]he willingness to lease federal property or mineral rights to a private entity for that entity's commercial purposes does not, without more, constitute . . . 'acting under' a federal officer."); *Delaware*, 578 F. Supp. 3d at 638 ("Defendants fall short of demonstrating that OCS lessees are performing a task that the federal government would otherwise be required to undertake itself.").

Defendants assert that even if the lease terms are insufficient, they are acting under federal authority because their OCS drilling advances broad policy objectives the government might otherwise have assigned to a hypothetical government-owned oil company, "as many other countries seeking to exploit their domestic petroleum resources have done." NOR ¶ 78. Defendants argue that two "never-enacted bills" show Congress once intended to start a federally owned company to explore and drill for oil on the OCS. *See Delaware*, 578 F. Supp. 3d at 639. They

[6] *See also Baltimore*, 31 F.4th at 232 ("[M]any of the lease terms are mere iterations of the OCSLA's regulatory requirements."); *San Mateo*, 32 F.4th at 760 ("the lease requirements largely track statutory requirements"); *Delaware*, 578 F. Supp. 3d at 637 ("What Defendants identify as 'substantial control and oversight' over their operations is no more than a set of requirements that Defendants, like all other OCS lessees, must comply with . . . .").

assert that they are by extension "acting as agents" of the government when they lease drilling rights on the shelf and sell OCS oil and gas for profit on the open market. *See* NOR ¶ 77 (emphasis removed). But the bills Defendants cite "provide no basis to find a congressional intent to create, directly or indirectly, a 'national oil company.'" *Delaware*, 578 F. Supp. 3d at 639.

The principal proposal Defendants highlight would have created an agency to "*measure* promptly the extent of the publicly owned oil and gas resources on the OCS" to "be sure that bids for production rights on federally explored tracts are truly representative of the value of the resources." Declaration of Joshua D. Dick ("Dick Decl."), Ex. 15 at 3, 4 (emphasis added) (floor statement introducing Outer Continental Shelf Lands Act Amendments of 1975). That proposal would not have established a company to produce fossil fuels, either for government use or for the marketplace. The "contention that [Defendants] are 'acting as agents' to achieve the same 'federal objective' . . . as would a speculative, non-existent 'national oil company' lacks merit." *Delaware*, 578 F. Supp. 3d at 639; *see also Boulder*, 25 F.4th at 1254.

***Operation of the Elk Hills Reserve*.** Defendants' reliance on Standard Oil of California's status as operator of the Elk Hills petroleum reserve is misleading and does not satisfy the "acting under" element. The record confirms Standard's activities under the Operating Agreement at Elk Hills were *not* closely controlled, and amounted to the minimum work necessary to maintain the reserve in usable condition. This was another "arm's-length business arrangement with the Navy" that does not show subjection, guidance, or control. *See San Mateo*, 32 F.4th at 759.

Exhibits to Defendants' notice of removal, on which their purported experts' declarations rely, show that in 1976 the Navy was in the "[f]inal steps to de-mothball more than 160 oil wells" at Elk Hills, Dick Decl. Ex. 34, at 3, and that "[e]xcept for a period during World War II," the field "ha[d] been virtually untouched" since 1927, *id*. at 5. Defendants emphasize that a bit earlier, "in

November 1974, the Navy directed Standard Oil to increase production to 400,000 barrels per day [at Elk Hills] to meet the unfolding energy crisis." NOR ¶ 115 (citing Dick Decl. Ex. 20, at 3). Their own exhibits show, however, that instead of complying with what Defendants characterize as an order from the Navy, Standard Oil in January 1975 simply declined. Dick Decl. Ex. 32 (January 7, 1975 letter "advis[ing] Navy that Standard wishes to terminate its position as Operator of the Elk Hills Reserve"). When production restarted in 1976, it was done by Standard's successor to the contract. Dick Decl. Ex. 35 at 14, 16.[7] None of these facts can reasonably be characterized as subjection, guidance, or control imposed on Standard by the government. *See also Honolulu*, 39 F.4th at 1109 (affirming remand and rejecting reliance on Elk Hills Operating Agreement because it "gave Standard Oil general direction—not 'unusually close' supervision").

Strategic Petroleum Reserve. Defendants' argument that they acted under federal officers by "supplying fuel for and managing the Strategic Petroleum Reserve" ("SPR"), NOR ¶ 47, again misrepresents the record and the law. Some Defendants have supplied oil to the SPR, but they have done so either by selling oil to the government or making in-kind royalty payments on OCS leases. Defendants provide a letter from the Department of the Interior to OCS operators, for example, describing a "program to use royalties in kind (RIK) to replenish the [SPR]," which states that "[d]elivery of the accurate volume of Royalty Oil . . . in accordance with the terms of this letter will satisfy in full the Lessee's royalty obligation" under their respective OCS leases. *See* Dick

[7] Tellingly, the exhibit Defendants cite from a history of Elk Hills comes out of a chapter that *begins* in 1976, *after* Standard's role as operator ended. *See generally* Dick Decl. Ex. 35. They do not include any of the book's preceding 188 pages, even though the table of contents in their exhibit lists sections titled "Navy-Standard Negotiations," "Navy-Standard Relations Under the Unit Plan Contract," "Standard Becomes Operator of Non-Unit Lands," "Standard Steps Down as Operator and Williams Brothers Takes Over," and two sections titled "Navy-Standard Relations," stretching between 1927 and 1976. *Id.* at 7–10. In the period between 1976 and 1980 described in the excerpt, Chevron's primary relationship to the government seems to have been in litigation over the parties' respective ownership and extraction rights in the reserve. *See id.* at 20–24.

Decl. Ex. 38, at 2–3. But as discussed above, "winning bids for leases to extract fossil fuels from federal land in exchange for royalty payments" does not create an "acting under" relationship. *Boulder*, 25 F.4th at 1253 (citation omitted). That some Defendants have at times paid royalties in kind, and the United States has in turn used those "Royalty Oil" payments to replenish the SPR, does not lead to a different result.

Defendants imply that they act under the government when "the President[] call[s] for an emergency drawdown" from the SPR. NOR ¶ 127. But that is simply an obligation imposed on lessees by statute. The Secretary of Energy may "drawdown and sell petroleum products in the Reserve" if the President makes certain findings, *see* 42 U.S.C. § 6241(a), (d), and some Defendants' leases apparently provide that certain facilities must operate "as a sales and distribution point in the event of an SPR drawdown," NOR ¶ 126 (emphasis removed). The Ninth Circuit in *San Mateo* rejected similar reliance on OCS lease terms giving the President a right of first refusal on OCS production in wartime, because those "lease requirements largely track statutory requirements" that are not specific to Defendants. *See San Mateo*, 32 F.4th at 760. The SPR drawdown provisions are no different.[8]

WWII/Korean War. Defendants contend that they acted under federal officers when they produced aviation fuel or "avgas" and operated petroleum infrastructure, particularly during World War II and the Korean War. *See* NOR ¶¶ 129–48. Those activities are within the Plaintiffs' disclaimers, and none of Defendants' wartime activities constitute an "acting under" relationship.

[8] Relatedly, Defendants argue that they acted under federal officers pursuant to the Emergency Petroleum Allocation Act ("EPAA"). Defendants' activities under the EPAA are "irrelevant here because the EPAA only controlled the allocation and distribution of *available* gasoline supplies" and it "did not require fossil fuel companies to increase production levels." *Delaware*, 578 F. Supp 3d at 636 n.22 (emphasis in original) (cleaned up).

First, Defendants' compliance with directives from the Petroleum Administration for War ("PAW") and under the Defense Production Act ("DPA") do not demonstrate federal control, because "'simply *complying* with the law' . . . no matter how detailed the government regulation or how intensely the entity's activities are supervised and monitored," does not show an acting-under relationship. *Baltimore*, 31 F.4th at 229 (quoting *Watson*, 551 U.S. at 153). Contrary to Defendants' assertions, avgas production during World War II was a largely cooperative endeavor, under which Defendants "designed and built their facilities, maintained private ownership of the facilities, and managed their own refinery operations." *United States v. Shell Oil Co.*, 294 F.3d 1045, 1050 (9th Cir. 2002). The PAW "relied almost exclusively on contractual agreements to ensure avgas production," and companies like Defendants "affirmatively sought contracts to sell avgas to the government," which "were profitable throughout the war." *Id.* at 1049–50. Avgas production was "more like an arm's-length business deal" that does not support federal-officer jurisdiction. *See Honolulu*, 39 F.4th at 1108. Likewise, "Defendants' compliance with the DPA was only lawful obedience" because "DPA directives are basically regulations." *Id.*[9] None of this constitutes acting under federal officers.

Second, Defendants' purported involvement in construction and operation of the Inch pipelines fares no better. *See* NOR ¶¶ 144–48. Defendants offered no facts showing the

[9] District courts have granted remand and rejected essentially identical arguments from some of the same defendants in cases alleging pollution along the coast of Louisiana: "The oil industry was indeed highly regulated, supervised, and monitored during WWII, and the regulation was both highly detailed and often quite specific. In this case, the facts demonstrate compliance with regulation. They do not demonstrate direction. The PAW was given power to direct. It threatened to direct. But threats are not themselves direction." *Par. of Plaquemines v. Riverwood Prod. Co.*, No. CV 18-5217, 2022 WL 101401, at *9 (E.D. La. Jan. 11, 2022), *aff'd sub nom. Plaquemines Par. v. Chevron USA, Inc.*, No. 22-30055, 2022 WL 9914869 (5th Cir. Oct. 17, 2022), *cert. denied*, No. 22-715, 2023 WL 2227757 (U.S. Feb. 27, 2023).

government closely controlled those projects. Defendants' declarant opines that oil companies "provided the government" with "know-how in the areas of pipeline construction and operation." Dick Decl. Ex. 101 ¶ 13. That is insufficient. A contractor is not "under federal supervision or control" when "the government [is] relying on the expertise of [the contractor] and not vice versa." *Cabalce v. Thomas E. Blanchard & Assocs., Inc.*, 797 F.3d 720, 728 (9th Cir. 2015).

Third, Defendants' operation of government-owned petroleum infrastructure during World War II also fails to satisfy the "acting under" standard. *See* NOR ¶¶ 139–40. Defendants' own declarant opines that this infrastructure was managed under the same "government-owned, contractor-operated" relationship as Standard Oil's operation of the Elk Hills Reserve. Dick Decl. Ex. 101 ¶ 14. As noted above, the Elk Hills Operating Agreement was an "arm's-length business arrangement with the Navy" that did not demonstrate subjection, guidance, or control. *San Mateo*, 32 F.4th at 759. Defendants offer no evidence that their operation of wartime petroleum infrastructure involved any more federal control or subjection than the operation of Elk Hills.

***Specialized Military Fuels*.** New Jersey has disclaimed relief arising from Defendants' sales of "specialized" fuels to the military, *see* NOR ¶¶ 53–67, and regardless, these too are arm's-length sales that do not involve close government control and supervision. It is not sufficient under the statute to show that the government "set forth detailed [product] specifications" for an item being purchased. *Baltimore*, 31 F.4th at 231. The government must have "close[ly] supervis[ed]" production, by for example "exercis[ing] intense direction and control over all written documentation" accompanying the product, or "maintain[ing] strict control over the [product's] development." *Id*. (quoting *Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 253 (4th Cir. 2017), and *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 398–99 (5th Cir. 1998)) (cleaned up).

Defendants' own documents show that the design, development, and production of fuels for military have principally been in Defendants' hands, not the government's. An account of the Blackbird spy plane project, for example, states that the government adopted a "management philosophy" of giving maximal "free[dom]" to its private contractors; officials refrained from "substituting their judgment for that of the contractors," and the "[r]equirements for Government approval as a prerequisite to action were minimal." Dick Decl. Ex. 60, at 27–28. Similarly, Shell Oil's contracts relating to the OXCART program gave the government generic rights to inspect the final deliverables, as would any commercial contract. *See, e.g.*, Dick Decl. Ex. 65 at 13–14. Nothing in the contracts suggests the government oversaw or controlled the manufacturing process itself. *See, e.g.*, Dick Decl. Ex. 66, at 3–4 (tasking Shell with providing "technical supervision" and "[e]ngineering," "general administration," and "laboratory support necessary to make the facility operational"). Shell's contracts for JP-5 and JP-8 jet fuel are also unremarkable commercial agreements, secured by Shell's winning bid and negotiated at arm's length. *See, e.g.*, Dick Decl. Ex. 84 at 2–3. None of Defendants' sales to the military satisfy the federal officer removal statute's "acting under" requirement, because "[a]rm's length business agreements with the federal government for highly specialized products remain arm's length business agreements." *City of Oakland v. BP P.L.C.*, No. C 17-06011, 2022 WL 14151421, at *8 (N.D. Cal. Oct. 24, 2022) (rejecting identical arguments and granting remand).

Economic and National Security Policy. Finally, Defendants argue that their businesses are important in general to amorphous federal policy objectives like "securing domestic energy independence and meeting the requirements of the U.S. military and the national economy." NOR ¶ 51. Even if Defendants accurately describe the policy interests at stake, the fact that the

government thinks an industry's activities are beneficial to the public does not mean every business activity of every member of the industry constitutes "acting under" a federal officer.

The Eighth Circuit rejected similar arguments in *Buljic v. Tyson Foods, Inc.*, 22 F.4th 730 (8th Cir. 2021), *cert. denied*, No. 22-70, 2023 WL 2123737 (Feb. 21, 2023). The court in *Buljic* affirmed a district court order remanding wrongful death claims on behalf of workers who died after allegedly contracting the COVID-19 virus at a Tyson pork processing facility. 22 F.4th at 734. Tyson argued it was acting under federal authority by keeping its factories open during the pandemic, based in part on federal policy statements and guidelines reflecting the national importance of the food supply chain. *Id.* at 734–36, 739–40. The Eighth Circuit rejected that position: "the fact that an industry is considered critical does not necessarily mean that every entity within it fulfills a basic governmental task or that workers within that industry are acting under the direction of federal officers." *Id.* at 740. "It cannot be that the federal government's mere designation of an industry as important—or even critical—is sufficient to federalize an entity's operations and confer federal jurisdiction." *Id*. (citation omitted). Defendants' broad policy arguments are unavailing here for the same reasons.

c. Defendants' Various Relationships with the Federal Government Over Time Have Nothing to Do with New Jersey's Allegations.

Even if Defendants' activities were conducted under color of federal office, they "are insufficiently related to [Plaintiffs'] claims" to satisfy the statute. *See Baltimore*, 31 F.4th at 230. Section 1442 requires that the claims being removed are "for or relating to" the removing defendant's actions under federal authority. That standard is broad, but not limitless—there must at least "be a 'connection' or 'association' between the act in question and the federal office." *In re Commonwealth's Motion to Appoint Couns. Against or Directed to Def. Ass'n of Phila.*, 790 F.3d 457, 471 (3d Cir. 2015). A "connection is too tenuous" it will not support removal. *Cty. of*

Montgomery v. Atl. Richfield Co., 795 F. App'x 111, 113 (3d Cir. 2020). In analogous contexts, the Court has found the standard satisfied where a defendant "demonstrate[s] a direct connection or association between the federal government and the failure to warn" alleged in a plaintiff's complaint. *Papp*, 842 F.3d at 813 (emphasis added).

As numerous federal courts have held in materially indistinguishable suits, Defendants' activities allegedly conducted under federal officers do not relate to Plaintiffs' claims. First, the Complaint targets Defendants' failure to warn and disinformation campaign regarding the known dangers of fossil fuels—conduct Defendants do not allege was directed or even influenced by federal officers. Second, as discussed above, Plaintiffs disclaim relief for injuries arising on federal property and from the provision of fossil fuels for national defense purposes. And third, Defendants' activities during World War II and the Korean War predate the misrepresentations and failures to warn that central to Plaintiffs' claims, by decades.

As numerous courts have held, Defendants' activities allegedly conducted under federal officers do not relate to claims like Plaintiffs'. In *Baltimore*, the Fourth Circuit explained that the relationship between Defendants' operations and the plaintiff's claims were "too tenuous":

> When read as a whole, the Complaint clearly seeks to challenge the promotion and sale of fossil-fuel products without warning and abetted by a sophisticated disinformation campaign. . . . Put differently, Baltimore does not merely allege that Defendants contributed to climate change and its attendant harms by producing and selling fossil-fuel products; it is the concealment and misrepresentation of the products' known dangers—and the simultaneous promotion of their unrestrained use—that allegedly drove consumption, and thus greenhouse gas pollution, and thus climate change.

31 F.4th at 233–34. The First Circuit reached the same conclusion in *Rhode Island*:

> At first glance, these agreements may have the flavor of federal officer involvement in the oil companies' business, but that mirage only lasts until one remembers what Rhode Island is alleging in its lawsuit. Rhode Island is alleging the oil companies produced and sold oil and gas products in Rhode Island that were damaging the environment and engaged in a misinformation campaign about the harmful effects of their products on the earth's climate.

> . . . There is simply no nexus between anything for which Rhode Island seeks damages and anything the oil companies allegedly did at the behest of a federal officer.

979 F.3d at 59–60. And in the *Hoboken* case itself, another court of this District could "se[e] no reason to depart from the persuasive reasoning of the First and Fourth Circuits" because the complaint there was "not focused on . . . Defendants' overall production efforts" but rather on "Defendants' misinformation campaign." *See* 558 F. Supp. 3d at 208.

The result is the same here. Plaintiffs' Complaint hinges liability on Defendants' failure to warn, and their "massive disinformation campaign" to "concea[l] and misrepresent[t] the dangers of fossil fuels." Compl. ¶ 6; *see id.* ¶¶ 97–142, 235–333. Defendants "do not claim that any federal officer directed them to engage in the alleged misinformation campaign," or to do anything even loosely related. *Hoboken*, 558 F. Supp. 3d at 207. Defendants do not, for example, "claim that any federal officer directed their respective marketing or sales activities, consumer-facing outreach, or even their climate-related data collection." *Minnesota*, 2021 WL 1215656, at *9. Nor do they contend that their "sophisticated misinformation campaign" was "justified" in any way "by their federal duty." *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142, 152 (D.R.I. 2019) (cleaned up), *aff'd sub nom. Rhode Island v. Shell Oil Prod. Co.*, 35 F.4th 44 (1st Cir. 2022), *cert. petition filed*, No. 22-524 (Dec. 2, 2022); *see also City of Annapolis v. BP P.L.C.*, No. 21-cv-00772, 2022 WL 4548226, at *8 (D. Md. Sept. 29, 2022) ("[T]here is no suggestion that the government influenced Defendants' alleged decision to misrepresent the safety of their products."). Plaintiffs' claims are not "'directed at the relationship' between [Defendants] and the federal government," and the case is not removable. *See Baker v. Atl. Richfield Co.*, 962 F.3d 937, 944–45 (7th Cir. 2020) (quoting *Def. Ass'n of Phil.*, 790 F.3d at 470).

Defendants' attempts to manufacture a connection between their conduct purportedly at federal direction and Plaintiffs' Complaint are unavailing. Defendants say there is a federal nexus

with Plaintiffs' alleged *injuries*, rather than the misconduct this lawsuit targets. *See* NOR ¶ 154 ("Plaintiffs' claims, as pleaded, depend on the premise that Defendants' *production* of fossil fuels caused Plaintiffs' alleged injuries.") (emphasis in original). That is not what the law requires. A removing defendant "must show a nexus, . . . [']between *the charged conduct* and asserted official authority,'" not between the plaintiff's injury and official authority. *Jefferson Cty. v. Acker*, 527 U.S. 423, 431 (1999) (emphasis added) (quoting *Willingham v. Morgan*, 395 U.S. 402, 409 (1969)). That blackletter principle remains the law in the Third Circuit, and Defendants cannot satisfy it. *See Def. Ass'n of Phila.*, 790 F.3d at 472 (affirming denial of remand where the "acts complained of undoubtedly 'relate to' acts taken under color of federal office").[10]

None of Defendants' cited cases support finding the relatedness prong satisfied here. In *Baker*, the plaintiffs alleged that their residences were contaminated by lead and other chemicals released from a chemical plant previously operated "on the same site" between 1907 and 1970. *Baker*, 962 F.3d at 940. Because "wartime production" and disposal of hazardous products at the government's behest during World War II "was a small, yet *significant*, portion of their relevant conduct" that directly caused the plaintiffs' injuries in the same location where that conduct occurred, the defendants had sufficiently demonstrated a connection. *Id.* at 945. Likewise, *Defender Association of Philadelphia* found a direct, causal connection between the complained-of conduct and the defendants' acts under color of federal office that is absent here. 790 F.3d at

[10] Defendants wrongly insist that the Court must "credit [their] theory of the case," NOR ¶ 44, and must assume that Plaintiffs' claims "implicate all of Defendants' oil and gas production, including for the federal government," NOR ¶ 45. But the Complaint identifies Defendants' wrongful conduct as their "successful climate deception campaign" to "discredit the scientific consensus on climate change" and "create doubt . . . about the climate change impacts of burning fossil fuels." Compl. ¶ 1. Defendants cannot "freely rewrite the complaint and manufacture a cause of action explicitly disclaimed by Plaintiff[s] and then ask the Court to accept their 'theory of the case' for purposes of removal." *Delaware*, 578 F. Supp. 3d at 636 n.21.

472 ("[T]he Federal Community Defender attorneys' employment with the Federal Community Defender is the very basis of the Commonwealth's decision to wage these disqualification proceedings against them."). In *Papp*, the military's "control" over "the content of written materials and warnings associated with" Boeing's C-47 aircraft coincided with the allegation at "heart of [plaintiff's] claim" that Boeing "fail[ed] to provide sufficient warning about the dangers of asbestos in the landing gear." 842 F. 3d at 813. Here, in contrast, Defendants' conduct allegedly at federal direction is not the source of liability—liability flows from their failure to warn and their misrepresentations. Defendants' production activities are a link in the causal chain making up "the avenue of [Plaintiffs'] climate-related injuries," but not the source of liability. *Baltimore*, 31 F.4th at 233. Finally, the relatedness standard was met in *Arlington* because the plaintiff "fault[ed] the [defendants] for filling certain opioid prescriptions and causing a public nuisance, but the [defendants] were required to fill those prescriptions to comply with their duties" under a contract with the Department of Defense, and the defendants "had no ability to modify the contract." *Cnty. Bd. of Arlington Cnty., Virginia v. Express Scripts Pharmacy, Inc.*, 996 F.3d 243, 257 (4th Cir. 2021). Here, "there is no suggestion that the government influenced Defendants' alleged decision to misrepresent the safety of their products." *City of Annapolis*, 2022 WL 4548226, at *8.

Plaintiffs' claims are not "for or relating to" Defendants' actions during World War II and the Korean War for the additional reason that the misrepresentations central to Plaintiffs' claims took place years after those wars ended. *See* Compl. ¶¶ 97–104 (alleging Defendants' deception campaigns accelerated in the late 1980s). Defendants' wartime activities are simply irrelevant to the case, and multiple courts have granted remand in similar cases for the same reason.[11]

[11] *See Oakland*, 2022 WL 14151421, at *8 ("The alleged deceptive promotion, moreover, started well *after* the Second World War and therefore the wartime activities cannot be a plausible basis" for liability.); *accord Delaware*, 578 F. Supp. 3d at 635; *Hoboken I*, 558 F. Supp. 3d at 206–08.

d. Defendants Have Not Alleged a Colorable Federal Defense.

The Court need not reach the "colorable federal defense" prong of the federal-officer inquiry because Defendants fail to satisfy the nexus or acting-under prongs. *See Boulder*, 25 F.4th at 1254; *San Mateo*, 32 F.4th at 760. Nonetheless, most of the defenses Defendants raise were properly rejected by the Ninth Circuit in a closely analogous case because they either "fail to stem from official duties or are not colorable." *Honolulu*, 39 F.4th at 1110. The same applies here.

Defendants' claimed preemption defenses based on the Foreign Commerce Clause, the Due Process Clause, the First Amendment, and the foreign affairs doctrine, *see* NOR ¶¶ 159–63, have nothing to do with the actions Defendants claim they took at federal direction, like operations at the Elk Hills reserve, fuel sales to the military, and leasing OCS mineral rights. *See Honolulu*, 39 F.4th at 1110. Their federal contractor defense, on the other hand, *see* NOR ¶¶ 157–58, has nothing to do with Plaintiffs' Complaint. They say "liability related to alleged defects in military equipment cannot be imposed" here because they satisfy the elements of the defense. NOR ¶ 157 (citing *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504–14 (1988)). But Plaintiffs have not brought product defect causes of action, do not premise liability on any "defects in military equipment," and as repeatedly stated, the Complaint expressly disclaims recovery for injuries national security and military sales to the government for. Defendants' federal contractor defense is baseless here.

D. There Is No Jurisdiction Under the *Grable* Doctrine.

Lastly, there is no jurisdiction under the *Grable* doctrine. A state law claim arises under federal law for *Grable* purposes "if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Manning*, 772 F.3d at 163 (quoting *Gunn v. Minton*, 568 U.S. 251, 258 (2013)). "Only a 'slim category' of cases satisfy the *Grable* test," *id.* (quoting *Empire*

Healthchoice Assurance, Inc. v. McVeigh, 547 U.S. 677, 701 (2006)), and this suit is not among them. None of the issues Defendants rely on are necessarily raised in Plaintiffs' Complaint.[12]

"For a federal issue to be necessarily raised" under *Grable*, "'vindication of a right under state law [must] necessarily turn[ ] on some construction of federal law.'" *Manning*, 772 F.3d at 163 (quoting *Franchise Tax Bd.*, 463 U.S. at 9). *Grable* is still subordinate to the well-pleaded complaint rule, however, which "excludes cases in which a federal question is inherent in a potential *defense* rather than in the plaintiff's *cause of action*." *Parlin v. DynCorp Int'l, Inc.*, 579 F. Supp. 2d 629, 633 (D. Del. 2008) (emphasis added). "[T]he focus of the *Grable* analysis, like that of the 'well-pleaded complaint' rule, remains on the plaintiff's cause of action." *Id.* Stated differently, a federal question is necessarily raised only "when the determination of federal law is an essential element of the plaintiff's state law claim." *Delaware v. Purdue Pharma L.P.*, No. CV 1:18-383-RGA, 2018 WL 1942363, at *2 (D. Del. Apr. 25, 2018); *Oakland*, 969 F.3d at 904.

Defendants assert that four categories of federal issues are raised in Plaintiffs' Complaint, but each describes a federal preemption defense that cannot supply jurisdiction. First, Defendants say again that Plaintiffs' claims "arise in an area governed exclusively be federal law," and thus "raise substantial issues of federal law and are removable under *Grable*." NOR ¶¶ 168, 172. In *Hoboken*, the defendants also "rehash[ed] their common-law preemption argument" under *Grable*, asserting that "[b]ecause emissions claims arise in an area governed exclusively by federal law,

[12] Even if any federal issue were necessarily raised, adjudicating this case in federal court would still disrupt the federal-state balance of authority. Where, as here, a State Attorney General brings an action "in state court to enforce its own state consumer protection laws," and "alleges only state law causes of action, brought to protect [the State's] residents," the "claim of sovereign protection from removal arises in its most powerful form," and "[c]onsiderations of comity make federal courts reluctant to snatch cases which a State has brought from the courts of that State, unless some clear rule demands it." *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 676 (9th Cir. 2012) (cleaned up) (citations omitted).

. . . every element of these claims is necessarily federal." 45 F.4th at 708–09. The court held Defendants' argument was "the same wolf in a different sheep's clothing," because "[t]he federal issue that the oil companies identify is whether federal common law governs these claims," which "is a *defense*," and "[d]efenses are not the kinds of substantial federal questions that support federal jurisdiction," under *Grable* or otherwise. *Id.* at 709; *accord San Mateo*, at 32 F.4th 748.

Second and third, Defendants say the Complaint "seek[s] to upend the careful balance Congress has struck between energy production and environmental protection," NOR ¶ 173, and "implicate[s] issues of foreign relations that are committed to the federal government," *id.* ¶ 188. These too are at most federal defenses sounding in federal conflict or field preemption. The Fourth, Ninth, and Tenth Circuits rejected the foreign affairs argument because no element of the claims before them turned on questions of foreign policy.[13] If the foreign affairs doctrine limits Plaintiffs' claims, it would do so only as a defense. Defendants' assertion that Plaintiffs' claims "would necessarily alter the regulatory regime Congress designed" concerning greenhouse gas emissions, NOR ¶ 178, is also a thinly veiled preemption defense that multiple courts have likewise rejected.[14]

Fourth, Defendants say "the First Amendment injects affirmative federal-law elements into the Plaintiffs' cause[s] of action." NOR ¶ 191. But "[s]tate courts routinely hear libel, slander, and misrepresentation cases involving matters of public concern," because "while the First Amendment limits state laws that touch speech, those limits do not extend federal jurisdiction to every such claim" and do not embed federal elements into state law claims. *Hoboken*, 45 F.4th at

[13] *Boulder*, 25 F.4th at 1266 ("[T]he Energy Companies have not shown how the alleged foreign policy forms a necessary element of the Municipalities' claims."); *Baltimore*, 31 F.4th at 212 ("[N]othing in Baltimore's Complaint indicat[es] that foreign affairs are 'necessarily raised' by its state-law claims."); *Oakland*, 969 F.3d at 906–07.

[14] *See Boulder*, 25 F.4th at 1266 ("any implied conflict between the Municipalities' state-law claims and federal cost-benefit determinations speaks to a potential defense on the merits"); *Baltimore*, 31 F.4th at 211; *Oakland*, 969 F.3d at 906–07; *Rhode Island*, 35 F.4th at 56–57.

709. They come into play only if the defendant raises them—as a defense. *See also Delaware*, 578 F. Supp. 3d at 633 (rejecting First Amendment *Grable* argument because "the Third Circuit has repeatedly found that defamation claims, despite having 'profound First Amendment implications,' are still 'fundamentally a state cause of action'" (citation omitted)).

E. Defendants Lacked Any Objectively Reasonable Basis to Remove, and the Court Should Award Plaintiffs' Costs Including Attorneys' Fees.

Defendants' removal was frivolous, and the Court should award Plaintiffs "just costs and any actual expenses, including attorneys' fees," incurred litigating remand. 28 U.S.C. § 1447(c). Defendants acknowledge their same jurisdictional arguments were *all* rejected by the Third Circuit in a "similar" case to which *all* Defendants were parties. *See* NOR at 9; *Hoboken*, 45 F.4th 699, 705–713. They nonetheless presented a 150-page removal notice with 102 exhibits and two expert declarations, "to preserve their rights to removal in the event that the Supreme Court reverses the Third Circuit." NOR at ¶ 14. Defendants had no basis to think removal was meritorious.

An award is appropriate under Section 1447(c) where "the removing party lacked an objectively reasonable basis for seeking removal," to "reduc[e] the attractiveness of removal as a method for delaying litigation and imposing costs on the plaintiff." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 140, 141 (2005). "Typically, courts award attorneys' fees where it is clear that the complaint does not state a claim removable to federal court or where minimal research would have revealed the impropriety of removal." *Vastola*, 2022 WL 2714009, at *5. Because the standard is objective, "the district court may require the payment of fees and costs . . . even though the party removing the case did not act in bad faith," *Mints v. Educ. Testing Serv.*, 99 F.3d 1253, 1260 (3d Cir. 1996). District courts retain "broad discretion" to award fees under the statute. *Id.*

Removal was objectively unreasonable here because the law is "clearly established" by both "a controlling authority in the jurisdiction [and] a robust consensus of persuasive authority"

rejecting identical theories of removal in similar cases. *See MacMillan v. Pa. Air Nat'l Guard*, No. 18-cv-576, 2018 WL 2730883, at *2 (W.D. Pa. June 7, 2018) (cleaned up). Every federal court that has considered Defendants' arguments has rejected them, including the Third Circuit in *Hoboken*. *See* Intro. n.1, *supra*. The Court clearly has discretion to award costs and attorneys' fees.

The circumstances of removal here also fully justify an award of fees. Defendants acknowledge they have no basis to resist remand, because "the removal grounds asserted here are the same as those that were recently rejected by the Third Circuit in two similar climate change-related cases" in *Hoboken*. NOR at 4. They nonetheless "submit that the Third Circuit's decision was incorrect," and note that they have petitioned for certiorari. *Id.* But the Third Circuit itself denied a stay of its mandate pending Defendants' certiorari petition, *see Hoboken*, No. 21-2728, Docs. 146 & 147 (3d Cir. Oct. 12, 2022), and the two cases subject to that appeal have both returned to state court.[15] Defendants cite no authority for their apparent position that this Court may ignore circuit precedent because a petition for certiorari is pending. To the contrary, "the law in the Third Circuit is settled, unless and until the Supreme Court finds otherwise," and the Supreme Court has not accepted review of *Hoboken* or any other analogous cases. *See Hupperich v. Comm'r of Soc. Sec.*, No. 19-cv-14210-NLH, 2020 WL 7351213, at *2 (D.N.J. Dec. 15, 2020) (denying stay despite Supreme Court grant of certiorari in cases in direct conflict with Third Circuit authority). Defendants lacked any objectively reasonable basis to believe this case was removable and should be assessed just costs and attorneys' fees Plaintiffs incurred litigating remand.

V. CONCLUSION

The Court should remand this case to state court and award Plaintiffs reasonable costs incurred due to Defendants' objectively baseless removal.

[15] *See Hoboken*, No. 20-cv-14243, Doc. 142 (D.N.J. Oct. 19, 2022) (transmitting remand order to state court); *Delaware*, No. 1:20-cv-01429, Doc. 145 (D. Del. Oct. 19, 2022) (same).

Dated: March 13, 2023

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I certify that on March 13, 2023, I caused a true and correct copy of the foregoing Plaintiffs' Memorandum of Law in Support of Motion to Remand to State Court and to be served on the following counsel of record by electronic transmission at the email address listed below:

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