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APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-2728

CITY OF HOBOKEN

v.

CHEVRON CORPORATION;
CHEVRON U.S.A. INC.;
EXXON MOBIL CORPORATION;
EXXONMOBIL OIL CORPORATION; SHELL PLC;
BP P.L.C.; BP AMERICA, INC.; CONOCOPHIL-
LIPS; CONOCOPHILLIPS CO.; PHILLIPS 66;
PHILLIPS 66 COMPANY; AMERICAN PETRO-
LEUM INSTITUTE;
SHELL USA,

Appellants.

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 2:20-cv-14243)
District Judge: Honorable John M. Vazquez

No. 22-1096

STATE OF DELAWARE, ex rel. Kathleen Jennings,
Attorney General of the State of Delaware

v.

BP AMERICA INC.; BP P.L.C.;
CHEVRON CORPORATION; CHEVRON U.S.A.
INC.; CONOCOPHILLIPS; CONOCOPHILLIPS
COMPANY; PHILLIPS 66; PHILLIPS 66 COM-
PANY; EXXON MOBIL CORPORATION; EXX-
ONMOBIL OIL CORPORATION; XTO ENERGY
INC.; HESS CORPORATION; MARATHON OIL
CORPORATION; MARATHON PETROLEUM COR-
PORATION; MARATHON PETROLEUM COM-
PANY LP; SPEEDWAY LLC; MURPHY OIL COR-
PORATION; MURPHY USA INC.; SHELL PLC;
SHELL USA; CITGO PETROLEUM CORPORA-
TION; TOTALENERGIES SE.; OCCIDENTAL PE-
TROLEUM CORPORATION; DEVON ENERGY
CORPORATION; APACHE CORPORATION; CNX
RESOURCES CORPORATION; CONSOL ENERGY
INC.; OVINTIV, INC.; AMERICAN PETROLEUM
INSTITUTE; TOTALENERGIES MARKETING
USA, INC.,

Appellants.

On Appeal from the United States District Court
for the District of Delaware
(D.C. No. 1:20-cv-01429)
District Judge: Honorable Leonard P. Stark

Argued: June 21, 2022

Before: McKEE, RESTREPO, and BIBAS,
Circuit Judges

(Filed: August 17, 2022)

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OPINION OF THE COURT

BIBAS, *Circuit Judge.*

Our federal system trusts state courts to hear most cases—even big, important ones that raise federal defenses. Plaintiffs choose which claims to file, in which court, and under which law. Defendants may prefer federal court, but they may not remove their cases to federal court unless federal laws let them. Here, they do not.

Oil companies ask us to hear two sweeping climate-change suits. But the plaintiffs filed those suits in state court based only on state tort law. And there is no federal hook that lets defendants remove them to federal court. So we will affirm the District Courts' orders sending them back.

I. CLIMATE CHANGE COMES TO COURT

Coastal residents have a problem. In recent decades, the oceans have risen, harming beaches and marshland. And communities have suffered torrential rains and stronger hurricanes.

Many residents blame fossil fuels for climate change. Burning fossil fuels releases carbon dioxide. And that carbon dioxide, studies suggest, can heat the air and eventually make the oceans rise.

Angered, cities and states across the country have sued oil companies. They say the oil companies knew how dangerous fossil fuels were for the environment yet did not slow production. And they said nothing about its dangers; on the contrary, they labored to convince the public that burning fossil fuels was fine.

Here, we address two of those suits. Delaware and Hoboken, New Jersey each sued the oil companies in state court for state-law torts. By "produc[ing], marketing, and s[e]l[ling] fossil fuels," they said, the oil companies had worsened climate change. Hoboken App. 68. So they sought damages for the environmental harm they had suffered and injunctions to stop future harm.

Though these suits started in state court, they did not stay there. The oil companies promptly removed them to federal district courts. The suits' broad focus on "*global* climate change," the companies argued, "demand[ed] resolution by a federal court under federal law." Hoboken App. 194; Del. App. 94. They listed several reasons why:

- the tort claims arose under federal law, either because:
    - they were inherently federal, not state claims, or
    - they raised substantive federal issues;
- the suits related to producing oil on the Outer Continental Shelf; and
- the oil companies were acting under federal officers.

But both District Courts rejected these theories. And they were in good company: so far, four other circuits have refused to allow the oil companies to remove similar state tort suits to federal court. *See Rhode Island v. Shell Oil Prods. Co.,* 35 F.4th 44, 50–51 (1st Cir. 2022); *Mayor & City Council of Balt. v. BP P.L.C.*, 31 F.4th 178, 238 (4th Cir. 2022); *City & Cnty. of Honolulu v. Sunoco LP,* 2022 WL 2525427, at *2 (9th Cir. July 7, 2022); *Cnty. of San Mateo v. Chevron*

Corp., 32 F.4th 733, 744 (9th Cir. 2022); *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238, 1246 (10th Cir. 2022).

We agree with our sister circuits:

- These two lawsuits neither are inherently federal nor raise substantial federal issues that belong in federal court.
- Oil production on the Outer Continental Shelf is too many steps removed from the burning of fuels that causes climate change.
- Plus, Delaware and Hoboken are not suing over actions that the companies were directed to take by federal officers.

So we will affirm the District Courts' orders remanding these cases to state court.

II. THESE STATE TORT CLAIMS DO NOT "ARISE UNDER" FEDERAL LAW

Not all claims belong in federal court. The Constitution limits us to hearing only cases involving claims "arising under" its provisions, federal laws, or treaties, or those involving admiralty or certain parties. U.S. Const. art. III, § 2, cl. 1. All other claims must go to state courts instead. The oil companies may remove these cases to federal court only if they present federal questions. 28 U.S.C. §§ 1331, 1441.

Most federal-question cases allege violations of the Constitution, federal statutes, or federal common law. But Delaware and Hoboken allege only the torts of nuisance, trespass, negligence (including negligent failure to warn), and misrepresentation, plus consumer-fraud violations, all under state law. So the companies must show either that these state claims are completely preempted by federal law or that some

substantial federal issue must be resolved. *Caterpillar Inc. v. Williams,* 482 U.S. 386, 393 (1987); *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 313–14 (2005). They show neither.

A. These are state, not federal, claims

If plaintiffs say their claims are state-law claims, we almost always credit that. That is because plaintiffs are "the master[s] of the[ir] claim[s]." *Caterpillar*, 482 U.S. at 392. They may "avoid federal jurisdiction by exclusive reliance on state law." *Id.* After all, they choose to sue, so they choose why.

But once in a great while, we "recharacteriz[e] a state law claim as a federal claim removable to [federal] court." *Goepel v. Nat'l Postal Mail Handlers Union*, 36 F.3d 306, 312 (3d Cir. 1994). We can do that only when some federal statute completely preempts state law.

Complete preemption is different from ordinary preemption. Ordinary preemption is a defense that applies when incompatible federal and state laws regulate the same actions. A defendant may raise ordinary preemption to defeat the plaintiff's state-law claim. *Caterpillar*, 482 U.S. at 392–93.

Complete preemption, by contrast, is a potent jurisdictional fiction. It lets courts recast a state-law claim as a federal one. *Id.* at 393. Defendants can thus remove the suit to federal court. Ordinary preemption defenses cannot work this alchemy. *Id.*

But complete preemption is rare. Federal law completely preempts state law only when there is (1) a federal statute that (2) authorizes federal claims "vindicating the same interest as the state claim." *Goepel*, 36 F.3d at 315. Only statutes that check both boxes can transform state-law claims into federal ones. *Id.*

at 311–12. And the Supreme Court has identified only three. *See Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 6–8, 10–11 (2003) (ERISA, the National Bank Act, and the Labor-Management Relations Act). Unsurprisingly, the companies cannot cite an applicable statute that passes this test.

So instead, the oil companies try another tack. They suggest a new form of complete preemption, one that relies not on statutes but federal common law. Rather than limiting ourselves to three federal statutes, they say, we should just ask if our constitutional system "permit[s] the controversy to be resolved under state law." Oil Cos. Br. 29 (Hoboken) (quoting *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981)). Otherwise, states could brush off national interests and upend the federal system. But this theory has a fatal flaw: the lynchpin case that the oil companies cite is about garden-variety preemption, not the complete preemption they need. *See Tex. Indus.*, 451 U.S. at 641.

Undeterred, the oil companies argue that only federal common law can resolve far-reaching climate-change suits. In support, they point to a recent decision holding that a climate-change suit had to be decided under federal, not state, law. *See City of New York v. Chevron Corp.*, 993 F.3d 81, 90–93 (2d Cir. 2021). But that case involved another ordinary-preemption defense to a case first filed in federal court. *Id.* at 94. It did not even try to check the boxes needed for complete preemption. Nor did it suggest another way to get there. *See id.* at 93–94 (acknowledging that its preemption analysis might not satisfy the "heightened standard unique to the removability inquiry").

Next, the companies cite two circuit cases that relabeled state-common-law claims as federal. *See Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 924, 926–29 (5th Cir. 1997); *New SD, Inc. v. Rockwell Intl Corp.*, 79 F.3d 953, 955 (9th Cir. 1996). Neither explains what gives federal courts the authority to refashion state-common-law claims as federal. Besides, most courts recognize that these cases are not good law. *See, e.g.*, *Earth Island Inst. v. Crystal Geyser Water Co.*, 521 F. Supp. 3d 863, 874–76 (N.D. Cal. 2021) (noting *New SD*'s unique facts and doubting its continued viability); Del. App. 37 n.9 (collecting cases declining to follow *Sam L. Majors*). We will not follow those outliers.

Finally, the companies cite a Supreme Court footnote's hint that federal courts have broad power to "determine whether the real nature of [a] claim is federal." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n.2 (1981) (internal quotation marks omitted). But the Court later walked that suggestion back. Recognizing the "considerable confusion" caused by "*Moitie*'s enigmatic footnote," the Court later cabined it to its "case-specific context." *Rivet v. Regions Bank of La.*, 522 U.S. 470, 477–78 (1998) (internal quotation marks omitted). The footnote did not change "the rule" that "a federal defense," like ordinary preemption, does not justify removal. *Id.* at 478.

But the oil companies' biggest problem is that our precedent already forecloses their test. We have said 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." *Goepel*, 36 F.3d at 312 (emphasis added). So because the oil companies have no statute, they have no removal jurisdiction either.

B. Nor do they raise a substantial federal question

The state tort claims may not *be* federal, the oil companies say, but at least they raise "substantial, disputed federal questions." Oil Cos. Br. 31 (Hoboken) (citing *Grable*, 545 U.S. at 313–14); Oil Cos. Br. 30 (Del.) (same). And when state claims require resolving substantial federal issues, federal courts can hear them. *Gunn v. Minton*, 568 U.S. 251, 258 (2013). But neither of the federal issues the oil companies identify justifies federal jurisdiction here.

First, the companies rehash their common-law preemption argument. Because emissions claims "arise in an area governed exclusively by federal law," they argue, every "element[] of these claims [is] necessarily federal." Oil Cos. Br. 31 (Del.) (emphasis omitted); *see also* Oil Cos. Br. 31 (Hoboken) (same).

But this is the same wolf in a different sheep's clothing. The federal issue that the oil companies identify is whether federal common law governs these claims. Yet as we have said, there is no complete preemption here. And ordinary preemption is a *defense.* Defenses are not the kinds of substantial federal questions that support federal jurisdiction. *Metro Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987).

Contrast this argument with the two key cases defining what federal questions are substantial and disputed. In each, to prove some *element* of a state-law claim, the plaintiff had to win on an issue of federal law. In *Grable,* an "essential element of [Grable's state] quiet title claim" required it to prove that the IRS had not "give[n] it adequate notice, as defined by federal law." 545 U.S. at 314–15. And in *Gunn*, to show legal malpractice, Gunn had to prove that if his

lawyers had been competent, "he would have prevailed in his federal patent infringement case." 568 U.S. at 259.

Finally, the oil companies raise First Amendment problems. They stress that these suits charge them with misrepresenting "matters of public concern" about climate change. Oil Cos. Br. 33 (Hoboken); Oil Cos. Br. 33 (Del.). But though the First Amendment limits state laws that touch speech, those limits do not extend federal jurisdiction to every such claim. State courts routinely hear libel, slander, and misrepresentation cases involving matters of public concern. The claims here arise under state law, and their elements do not require resolving substantial, disputed federal questions.

III. THESE CLAIMS ARE TOO FAR REMOVED FROM OIL PRODUCTION ON THE OUTER CONTINENTAL SHELF

The oil companies fall back on statutes that let federal courts hear state-law claims on special subjects. Here, they cite a law that lets federal courts hear cases

> arising out of, or in connection with (A) 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 stress that a sizable chunk of oil comes from the Shelf. *See* Oil Cos. Br. 60 (Hoboken) (one-third of U.S.-produced oil); Oral Arg. 39:04–20 (1–5% of global oil). So, they say, the Shelf Act lets us hear these cases. To weigh this argument, we must

figure out what the Shelf Act means and how it applies.

A. For jurisdiction, the Shelf Act requires a close link to operations on the Shelf

1. Oil production on the Shelf need not cause the suit. Start with the text. The parties (and other circuits) dispute what it takes for a suit to be "in connection with" shelf operations. Hoboken and Delaware argue that this phrase limits jurisdiction to cases where oil production is a but-for cause of the tort or the like. The Fourth, Fifth, and Tenth Circuits agree. *See Mayor & City Council of Balt.*, 31 F.4th at 220; *In re Deepwater Horizon*, 745 F.3d 157,163 (5th Cir. 2014); *Bd. of Cnty. Comm'rs of Boulder Cnty.*, 25 F.4th at 1272–75.

But that reading is too cramped. "Connection" reaches beyond causation. It means a "causal *or logical* relation or sequence." *Connection* (def. 1a), *Webster's Ninth New Collegiate Dictionary* (1988) (emphasis added); *accord Connexion* (def. 3), *Oxford English Dictionary* (2d ed. 1989) ("a bond of interdependence, causality, logical sequence, coherence, or the like"). Legos, puzzle pieces, and train cars connect, though they do not cause one another. And as statisticians stress, a correlation or connection does not imply causation.

The structure of the provision confirms this reading. The jurisdictional phrase covers both suits "arising out of" production on the Shelf and those "in connection with" it. 43 U.S.C. § 1349(b)(1). The most natural reading is that the arising-out-of language "asks about causation; but" the in-connection-with wording "contemplates that some relationships will support jurisdiction without a causal showing." *Ford Motor Co.*

v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1026 (2021) (interpreting similar language from a judicial rule requiring that specific personal jurisdiction "arise out of *or relate to*" the disputed conduct (internal quotation marks omitted)). Reading the second half to require causation would make it redundant with the first half. *See Yates v. United States*, 574 U.S. 528, 543 (2015) (canon against surplusage).

Though we depart from some circuits' approaches, other precedent supports our reasoning. Indeed, at least the Ninth Circuit reads the Shelf Act not to require but-for causation. *San Mateo*, 32 F.4th at 754. Plus, courts have read similar connection language in different statutes or rules to cover more than just but-for causes. *See, e.g.*, *Maracich v. Spears*, 570 U.S. 48, 59 (2013) (Privacy Act); *United States v. Loney*, 219 F.3d 281, 284 (3d Cir. 2000) (Sentencing Guidelines). "[I]n connection with" is "broad." *Mont v. United States*, 139 S. Ct. 1826, 1832 (2019) (interpreting that language in another statute). So we read it broadly.

2. A suit must be linked closely to production or development on the Shelf. But however broad, the statute must stop somewhere. *See id.* (recognizing that "in connection with" must have "outer bounds"). Otherwise, "connections, like relations, stop nowhere." *Maracich*, 570 U.S. at 59 (internal quotation marks omitted). Applied loosely, the statute could sweep in many routine state-law claims. Fender benders might be connected to the Shelf if the cars' gas tanks held gas produced there. An insurance dispute over arson could be connected if the arsonist threw Shelf oil on the fire. Or a products-liability suit over a defective hair dryer might be connected if Shelf petroleum went into the hair dryer's plastic. But our system presumes that most state-law claims belong in

state, not federal, court. 13 Charles A. Wright et al., *Federal Practice & Procedure* § 3522 (4th ed. 2022); *see* U.S. Const. art. III, § 2, cl. 1 (limiting federal jurisdiction). And we must read this statute "consistent with [this] principle[] of federalism inherent in our constitutional structure." *Bond v. United States*, 572 U.S. 844, 856 (2014).

As we have explained, Delaware and Hoboken bring traditional state-law claims. And their connection to the Shelf is not immediately apparent from their complaints. They never reference the Shelf. The gist of their complaint is not about *producing* oil on the Shelf but selling it to people to burn in their cars, homes, and manufacturing plants.

To avoid "usurp[ing] state judicial power" by hearing this case, we must decide whether it falls beyond the bounds of the statute. 13 Wright et al., *Federal Practice & Procedure* § 3522. Alone, "the phrase 'in connection with' . . . provides little guidance" and is "essentially indeterminat[e]." *Maracich*, 570 U.S. at 59–60 (alteration in original) (internal quotation marks omitted). So it cannot help us decide which cases belong in state court and which should come to federal court. Still, federalism counsels in favor of finding some limit. In similar statutes, we have divined "a limiting principle" by looking to "the structure of the statute[,] its other provisions," and the rest of the disputed provision itself. *Id.* at 60; *see also Chadbourne & Parke LLP v. Troice*, 571 U.S. 377, 387 (2014) (focusing "in connection with" in the PSLRA by looking to other phrases in the provision).

The Shelf Act focuses narrowly on operations on the Outer Continental Shelf, the underwater area outside state boundaries but under federal control. *See* 43 U.S.C. §§ 1331(a), 1301(a) (defining the Shelf).

Consider the surrounding language of the jurisdictional provision. We may hear cases "in connection with (A) 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.*" 43 U.S.C. § 1349(b)(1) (emphases added). This phrasing focuses in on "physical activity" taken "on the [Shelf]." *Tenn. Gas Pipeline v. Houston Cas. Ins. Co.*, 87 F.3d 150, 154 (5th Cir. 1996). Indeed, as the Fifth Circuit has explained, the word "operation" requires courts to decide whether actions occurred "on the [Shelf] or not." *Amoco Prod. Co. v. Sea Robin Pipeline Co.*, 844 F.2d 1202, 1207 (5th Cir. 1988).

The operations covered are tied to "exploration, development, or production," not anything like consumption, combustion, or emission. Those operations must be "conducted on" the Shelf itself. Even more precisely, the location is the Shelf's very "subsoil and seabed." This language all focuses on the oil drilling on the Shelf itself, not oil consumption hundreds or thousands of miles away.

Other parts of the Shelf Act also reinforce this limitation to operations on the Shelf. The next subparagraph creates federal jurisdiction over lease and permit disputes to decide who has the right to produce oil on the Shelf. § 1349(b)(1)(B). The paragraph after that creates federal jurisdiction over production-related injuries. § 1349(b)(2). Both types of covered conduct are tethered to the physical production of Shelf oil, not its later consumption.

Likewise, the venue rules for the Shelf Act focus on activities that are not within states. For instance, the Act locates these suits in "the judicial district of the State *nearest* the place the cause of action arose."

§ 1349(b)(1) (emphasis added). That language is unusual; venue laws typically send lawsuits to the district "in which" or "where" the events happened. *See, e.g.*, 28 U.S.C. §§ 1391(b)(2), (e)(1) & (1)(B), (f)(1), 1400(b); 42 U.S.C. § 2000e-5(f)(3); 49 U.S.C. § 32308(e). But "nearest" makes sense if the Act primarily covers operations out on the Shelf, beyond any state's boundaries.

Indeed, the Act focuses on setting rules for that narrow geographic area. The Act as a whole "define[s] a body of law applicable to the seabed, the subsoil, and the fixed structures . . . on the outer Continental Shelf." *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 355 (1969). Thus, it sets up a program for leasing out Shelf land. 43 U.S.C. § 1334. And it sets which laws apply there. § 1333; *Rodrigue*, 395 U.S. at 356–57. This too is directed at activities on the Shelf itself.

Last, though this textual reasoning may be new, the operational limitation fits the intuition of past precedent. Shelf Act cases fall into four buckets:

- Disputes about who may operate on the Shelf. *See, e.g.*, *W&T Offshore, Inc. v. Bernhardt*, 946 F.3d 227, 231–32 (5th Cir. 2019) (lease dispute); *United Offshore Co. v. S. Deepwater Pipeline Co.*, 899 F.2d 405, 407 (5th Cir. 1990) (contract dispute); *Cutting Underwater Tech. USA, Inc. v. Eni U.S. Operating Co.*, 671 F.3d 512, 513 (5th Cir. 2012) (mem.) (same).

- Cases about transporting oil or gas from the Shelf. *See, e.g.*, *Medco Energi US, LLC v. Sea Robin Pipeline Co.*, 729 F.3d 394, 396 (5th Cir. 2013).

- Disputes over first-order contracts to buy oil or gas produced on the Shelf. *See, e.g.*, *Amoco*

Prod. Co. v. Sea Robin Pipeline Co., 844 F.2d 1202, 1203, 1210 (5th Cir. 1988) (involving contracts that "b[ore] on the production of . . . particular" oil and gas reservoirs on the Shelf).

- And tort suits about accidents on the Shelf. *See, e.g.*, *Petrobras Am., Inc. v. Vicinay Cadenas, S.A.*, 815 F.3d 211, 213 (5th Cir. 2016) (chain broke & oil equipment sank); *In re Deepwater Horizon*, 745 F.3d at 161–62 (Gulf oil spill); *Barker v. Hercules Offshore, Inc.*, 713 F.3d 208, 211–12 (5th Cir. 2013) (oil-rig worker fell to his death).

All those cases target activity on the Shelf or pipelines connected to it. Thus, though they do not expressly adopt our operational limitation, their conclusions fit with our reasoning. *Cf. San Mateo*, 32 F.4th at 753 (analogizing the Shelf Act to jurisdiction over federal enclaves). So we ask: do the lawsuits here target actions on or closely connected to the Shelf? No.

B. These suits are too many steps removed from operations on the Shelf for jurisdiction

Delaware and Hoboken try to cast their suits as just about misrepresentations. But their own complaints belie that suggestion. They charge the oil companies with not just misrepresentations, but also trespasses and nuisances. Those are caused by burning fossil fuels and emitting carbon dioxide.

These claims are all too far away from Shelf oil production. True, Delaware and Hoboken take issue with the oil companies' entire business, from production through sale. But the carbon emissions they deplore come not from extracting oil and gas, but

burning them: driving cars, heating houses, fueling machinery. Indeed, if the oil companies had produced oil, stored it, and never sold it, their carbon emissions would be a fraction of their size. Thus, Delaware and Hoboken are upset, not by Shelf production, but by what oil companies did with their oil after it hit the mainland: sell it for people to burn. That is several steps further away from exploration and production on the Shelf than pipeline disputes and oil-rig injuries. So the Shelf Act does not give us jurisdiction to hear this suit.

IV. THESE SUITS DO NOT TARGET ACTIONS TAKEN FOR THE GOVERNMENT

Finally, the oil companies say that we can hear these suits because of their business connections to the federal government. *Cf.* 28 U.S.C. § 1442(a) (allowing removal of claims "relating to" actions taken "under" federal officers). They press several theories:

- The government has leased them drilling rights on the Shelf.
- The companies have also contributed oil to the government's Strategic Petroleum Reserve.
- Plus, one company operated the national reserve from World War II through the 1970s.
- During World War II, the companies also produced specialty materials for the war effort.
- And they have continued to contribute specialty fuels since.

All these theories fail.

Start with the Shelf leases. Though the federal government grants the leases, oil produced under

them is produced "to sell on the open market," not specifically for the government. Del Br. 50; *see* 43 U.S.C. § 1334; *Bd. of Cnty. Comm'rs of Boulder Cnty.*, 25 F.4th at 1253–54. Nor do the leases impose close federal control. And complying with run-of-the-mill regulations on oil and gas production is not enough for federal jurisdiction. *See Watson v. Philip Morris Cos.*, 551 U.S. 142, 152–53 (2007); *see* 43 U.S.C. § 1334 (lease regulatory program); Del. App. 49–52 (same).

The companies' other theories at least focus on products or services that they provided to the federal government. But these, too, are unavailing. In their complaints, both Hoboken and Delaware insist that they are not suing over emissions caused by fuel provided to the federal government.

Resisting this conclusion, the companies say that these suits cannot separate harm caused by military fuel use from harm caused by civilian fuel use. So they ask us to disregard these disclaimers as "merely artful pleading designed to circumvent federal officer jurisdiction." *St. Charles Surgical Hosp., LLC v. La. Health Serv. & Indem. Co.*, 990 F.3d 447, 451 (5th Cir. 2021) (internal quotation marks omitted).

But the disclaimers are no ruse. Artful pleading disguises federal claims as state ones. *See* 14C Wright et al., *Federal Practice & Procedure* § 3722.1 (artful pleading). Yet here, there are no federal claims to disguise. The causes of action are about state torts. And there is no complete preemption. So this argument just retreads well-worn ground.

Instead, Delaware and Hoboken carve out a small island that would needlessly complicate their cases. One amicus estimates that the Department of Defense is responsible for less than 1/800th of the world's

energy consumption. Robert Taylor Amicus Br. 15–16. Delaware and Hoboken urge us not to hang our jurisdiction on so small a slice of the pie. We will not.

* * * * *

Climate change is an important problem with national and global implications. But federal courts cannot hear cases just because they are important. The Constitution restricts us to resolving claims that are about federal law or that Congress has expressly authorized us to hear. These claims check neither box. So we cannot hear them.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CITY OF HOBOKEN, *Plaintiff*, v. EXXON MOBIL CORP., ET AL., *Defendants.*	Civil Action No. 20-cv-14243 **OPINION** Sept. 8, 2021

John Michael Vazquez, U.S.D.J.

This case is one of many similar cases recently filed throughout the United States seeking to hold oil and gas companies accountable for their role in climate change. In this matter, Plaintiff the City of Hoboken ("Plaintiff" or "Hoboken") alleges that Defendants, who are oil and gas companies and related entities, engaged in a decades-long campaign to downplay the effect of fossil fuel usage on climate change. Plaintiff further alleges that it and its residents have been damaged by this conduct through the dire effects of global warming. Presently before the Court is Plaintiff's motion to remand this case to state court, D.E. 94, and Defendants' motion to strike certain portions of Plaintiff's reply brief, D.E. 106. The Court reviewed all the submissions in support and opposition to the motions[1] and considered the motions without oral

[1] Plaintiff's brief in support of its motion to remand, D.E. 94, is referred to as "Plf. Br."; Defendants' brief in opposition, D.E. 100, is referred to as "Defs. Opp."; and Plaintiff's reply, D.E. 101, is referred to as "Plf. Reply". The parties also filed notices of

argument pursuant to Federal Rule of Civil Procedure 78(b) and Local Civil Rule 78.1(b). For the reasons discussed below, Plaintiff's motion to remand is **GRANTED** and Defendants' motion to strike is **DENIED**.

I. FACTUAL BACKGROUND[2] AND PROCEDURAL HISTORY

Through this matter, Hoboken seeks compensation to offset the costs it has and will continue to incur to protect itself from the effects of global warming. Plaintiff contends that Defendants' production, marketing, and sale of fossil fuels has been a "substantial factor" in skyrocketing carbon dioxide (CO_2) emissions. Compl. ¶ 42. The rising concentration of CO_2 emissions is a driving force in climate change. *Id.* ¶ 41. And global warming, in turn, is causing climate disruption and damage throughout the world, including in Hoboken. Hoboken is a densely populated urban area located across the Hudson River from New York City. *Id.* ¶¶ 8, 10, 46. As a result, it is particularly vulnerable to damage from rising sea levels and extreme rainfall events caused by global warming. *Id.* ¶¶ 45, 225-54. Hoboken has already incurred substantial damage from weather events associated with global warming, including Hurricane Irene and Superstorm Sandy. *See id.* ¶ 11. Hoboken submits that it will continue to experience extreme weather events, damage from rising sea levels, and

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supplemental authority and responses. D.E. 108, 110, 115, 117, 118. Defendants' brief in support of their motion to strike, D.E. 106, is referred to as "Defs. Strike Br."; Plaintiff's brief in opposition, D.E. 107, is referred to as "Plf. Strike Opp."; and Defendants' reply, D.E. 109, is referred to as "Defs. Strike Reply."

[2] The factual background is taken from the Complaint. D.E. 1-2 ("Compl.").

other problems associated with global warming. *See id.* ¶¶ 225-27.

Plaintiff alleges that Defendants have known about and studied the potential harms from fossil fuel usage since the 1950s. *Id.* ¶ 75. Despite this knowledge, Defendants decided to prioritize their profits and actively suppressed evidence of the effects of global warming. *Id.* ¶¶ 75, 107. Beginning in the late 1980s, Exxon's strategy to combat global warming "shifted from trying to understand the impact of fossil fuels on climate change to trying to dispute and conceal their impact. It has continued to employ this strategy through the present day." *Id.* ¶ 116. To do so, Exxon and other Defendants created front groups with neutral names to promote climate science denial and misinformation campaigns. *Id.* ¶¶ 118-61. To that end, from 1998 to 2007, "ExxonMobil gave over $20 million to think tanks and organizations that published research and ran campaigns denying climate science." *Id*. ¶ 159. But while Defendants were engaged in their misinformation campaign, they were actively making business plans that accounted for rising sea levels and warming temperatures due to global warming. *Id*. ¶¶ 162-71.

As the scientific certainty about global warming solidified over the last decade, Defendants switched their tactics from outright deception to a plan to "greenwash" consumers. Greenwashing refers to Defendants' strategy to make consumers think that Defendants are committed to combatting climate change when, in fact, Defendants have not made any changes to their fundamental, core business of extracting and producing fossil fuels. *Id.* ¶¶ 172-92. "Defendants' greenwashing campaigns," which still continue, "are cover for their accelerating extraction, production,

marketing and sale of fossil fuels—the actual cause of climate change." *Id.* ¶ 194. In addition to the pivot to "greenwashing," Defendants also continue to fund organizations that deny global warming. *Id.* ¶ 209.

Plaintiff contends that Defendants' decades long "campaign of deception" about the impact fossil fuels have on climate change is causing lasting harm to Hoboken. *Id.* ¶ 222. This damage includes an increased frequency of flooding in the city, which requires large-scale and long-term remediation efforts; decreased property values; and increased insurance and property costs for Plaintiff and its residents. *Id.* ¶¶ 222-23. Hoboken has already been forced to expend hundreds of millions of dollars in remediation efforts after damage caused by extreme rainfall events, including Hurricane Irene and Superstorm Sandy. *Id.* ¶¶ 269-84. Despite these efforts and further remediation plans, designers acknowledge that a "fully comprehensive solution" is beyond Plaintiff's means. *Id.* ¶ 285. Plaintiff alleges that Defendants' actions are the proximate cause of Plaintiff's need to invest in its substantial, yet incomplete, remediation plans. *Id.* ¶ 287.

Plaintiff filed its Complaint in New Jersey state court, alleging the following claims: public nuisance (Count One); private nuisance (Count Two); trespass (Count Three); negligence (Count Four); and violation of the New Jersey Consumer Fraud Act (Count Five). D.E. 1-2. Plaintiff seeks compensation for costs related to damage from Superstorm Sandy and similar events, as well as for Plaintiff's abatement and remediation efforts. *See, e.g.*, Compl. ¶ 306. Ultimately, the crux of Hoboken's Complaint is that Defendants knew that their products caused substantial harm to the environment. Yet, Defendants misled consumers

for decades about the real risks of continued dependence on fossil fuels and continued to sell their products. Now, Hoboken wants help paying for the effects of climate change it has faced and will continue to face.

On October 9, 2020, Defendants Chevron Corp. and Chevron U.S.A., Inc. removed the matter to this Court.[3] Defendants' 168-page notice of removal ("NOR") states that removal is proper on multiple grounds, including federal question, 28 U.S.C. § 1331; jurisdiction under the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1349(b); federal officer removal, 28 U.S.C. § 1442; and the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d). D.E. 1. On December 11, 2020, Plaintiff filed the instant motion to remand. D.E. 94. After briefing was completed for the motion to remand, Defendants filed their motion to strike as to certain portions of Plaintiff's reply brief. D.E. 106.

II. STANDARD OF REVIEW

Pursuant to the federal removal statute, "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed . . . to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a). "[T]he party asserting federal jurisdiction in a removal case bears the burden of showing, at all stages of the litigation, that the case is properly before the federal court." *Frederico v. Home Depot*, 507 F.3d 188, 193 (3d Cir. 2007). A district court "must resolve all contested issues of substantive fact in favor of the

[3] All Defendants subsequently consented to the Chevron Defendants' removal. D.E. 9, 10, 13, 14, 17.

plaintiff and must resolve any uncertainties about the current state of controlling substantive law in favor of the plaintiff." *Boyer v. Snap-On Tools Corp.*, 913 F.2d 108, 111 (3d Cir. 1990). Removal statutes "are to be strictly construed against removal and all doubts should be resolved in favor of remand." *Batoff v. State Farm Ins. Co.*, 977 F.2d 848, 851 (3d Cir. 1992) (quoting *Steel Valle Auth. v. Union Switch & Signal Div.*, 809 F.2d 1006, 1010 (3d Cir. 1987)); *see also Samuel-Bassett v. Kia Motors Am., Inc.*, 357 F.3d 392, 396 (3d Cir. 2004).

III. ANALYSIS

At the outset, Defendants asked this Court to reserve decision on the motion for remand until the Supreme Court resolved the question of whether there is federal question jurisdiction in a number of factual and procedurally similar cases. Defs. Opp. at 7. Although the Supreme Court has decided the other matters such that a stay is no longer appropriate, the Court briefly addresses this issue because it provides helpful context.

As noted, this case is one of many similar suits brought by cities and states throughout the country to address Defendants' alleged disinformation campaign regarding the effects of fossil fuels on global warming. Eleven of these cases were recently pending before the Supreme Court.[4] In each, the respective plaintiff filed

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[4] The cases are *BP P.L.C. v. Mayor & City Council of Balt.*, 141 S. Ct. 1532 (2021); *Chevron v. County of San Mateo*, --- S. Ct. ---, 2021 WL 2044534 (U.S. May 24, 2021) (consolidating six cases); *Shell Oil Prods. Co. v. Rhode Island*, --- S. Ct. ---, 2021 WL 2044535 (U.S. May 24, 2021); and *Suncor Energy (U.S.A.) Inc. v. Bd. of Cty. Comm'rs of Boulder Cty.*, --- S. Ct. ---, 2021 WL 2044533 (U.S. May 24, 2021). In citing to the underlying

suit in state court and the defendants removed the matter on numerous grounds, including each of the arguments advanced by Defendants here. In all but two cases, the district court granted the plaintiff's ensuing motion to remand. On initial appeal, the circuit courts addressed their scope of review, determined that they could only review whether there was federal-officer jurisdiction pursuant to 28 U.S.C. § 1442, and concluded that removal was not proper under Section 1442. *See, e.g.*, *Rhode Island v. Shell Oil Prods. Co., L.L.C.* (*Rhode Island II*), 979 F.3d 50, 55 (1st Cir. 2020) (concluding that on appeal, the circuit's "review is cabined to the question of whether the district court has jurisdiction over this case pursuant to federal officer removal"). Defendants subsequently petitioned for writs of certiorari in each case, which were granted by the Supreme Court.[5]

On May 17, 2021, the Supreme Court issued its opinion in *BP P.L.C. v. Mayor & City Council of Baltimore* (*Baltimore III*), 141 S. Ct. 1532 (2021). The Supreme Court, however, did not consider the underlying merits of the removal or remand. Instead, it focused solely on the narrow issue of a court's scope of review when removal is premised on the federal officer removal statute or the civil rights removal statute, 28 U.S.C. § 1443. *Id.* at 1536. The Supreme Court determined that when a matter is removed pursuant to Sections 1442 or 1443, an appellate court

decisions in each of these cases in this Opinion, this Court does not reference the appellate history for each matter.

[5] The Supreme Court denied the writ of certiorari in *Chevron Corp. v. City of Oakland* (consolidating two cases), No. 1089, on June 14, 2021. This matter sought review of the Ninth Circuit's decision reversing two district court decisions denying motions to remand in similar cases.

may review the entire remand order on appeal even if the remand order addresses grounds for removal outside of Sections 1442 and 1443. *Id.* at 1537-38. Accordingly, the Supreme Court remanded each case and directed the circuit courts to consider all of the defendants' grounds for removal, not just federal officer removal. *See id.* at 1543.

Because the Supreme Court only addressed this limited procedural issue, *Baltimore III* does not guide the Court's analysis here. But since the Supreme Court's decision in *Baltimore III*, Defendants now insinuate that this Court should wait until the circuit courts decide multiple issues of first impression upon remand, as they might impact Defendants' numerous bases for federal jurisdiction in this matter. D.E. 115 at 2. Given the fact that Plaintiff filed its motion for remand more than six months ago and this Court has no indication of when any circuit may address these issues on remand, the Court finds that it would not be prudent to await a decision from the appellate courts. Critically, no such matter is pending before the Third Circuit.

Turning to the merits of the parties' arguments, "[f]ederal courts are not courts of general jurisdiction." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541-42 (1986). Rather, to adjudicate a case, a federal district court must have subject matter jurisdiction through "power authorized by Constitution and statute." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552 (2005). Therefore, a district court must presume that it lacks jurisdiction over a matter unless jurisdiction is shown to be proper. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). As discussed, Defendants seek to remove this matter on multiple grounds. The Court addresses

each basis for removal below. Ultimately, none of Defendants' grounds for removal are sufficient for this Court to exercise subject-matter jurisdiction.

A. Federal Question

A court has federal question jurisdiction, pursuant to 28 U.S.C. § 1331, if the complaint "establishes that federal law create[s] the cause of action or that the plaintiff's right to relief necessarily depends on the resolution of a substantial question of federal law." *ACR Energy Partners, LLC v. Polo N. Country Club, Inc.*, 143 F. Supp. 3d 198, 202 (D.N.J. 2015). In determining whether a complaint alleges a federal question, courts are guided by the well-pleaded complaint rule. According to the rule, "a plaintiff is ordinarily entitled to remain in state court so long as its complaint does not, on its face, affirmatively allege a federal claim." *Concepcion v. CFG Health Sys. LLC*, No. 13-2081, 2013 WL 5952042, at *2 (D.N.J. Nov. 6, 2013). A defense based on federal law is insufficient to convey jurisdiction under the well-pleaded complaint rule. *N.J. Carpenters & Trs. Thereof v. Tishman Constr. Corp. of N.J.*, 760 F.3d 297, 302 (3d Cir. 2014). Plaintiff does not assert any federal claims here; Hoboken only asserts state law claims. Thus, on its face, the well-pleaded complaint rule is not satisfied.

There are, however, a few exceptions to the well-pleaded complaint rule.

1. Complete Preemption

In the NOR, Defendants contend that Plaintiff's claims are completely preempted by the Clean Air Act,

42 U.S.C. § 7401 *et seq.* NOR ¶ 168-71.[6] There is a "'narrow exception' to the well pleaded complaint rule . . . 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.'" *Tishman Constr. Corp. of N.J.*, 760 F.3d at 302 (quoting *In re U.S. Healthcare, Inc.*, 193 F.3d 151, 160 (3d Cir. 1999)). The complete preemption exception is narrow. *Pascack Valley Hosp. v. Local 464A UFCW Welfare Reimbursement Plan*, 388 F.3d 393, 399 (3d Cir. 2004). In fact, the Supreme Court has only recognized the complete preemption doctrine in three instances, none of which are applicable here. *Tishman Constr. Corp. of N.J.*, 760 F.3d at 302. Moreover, "[i]f Congress intends a preemption instruction completely to displace ordinarily applicable state law, and confer federal jurisdiction thereby, it may be expected to make that atypical intention clear." *Empire HealthChoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 698 (2006).

Defendants do not identify any provision of the Clean Air Act or other related document that evidences a congressional intent to displace state law remedies that fall within the ambit of the Clean Air Act. Defendants also fail to identify any means for a litigant to assert a federal cause of action under the Act. In addition, in the similar cases pending throughout the country, no court has determined that the claims are completely preempted by the Clean Air

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[6] Defendants rely on this basis for removal in the NOR but do not address it in their opposition brief. Thus, it appears that Defendants abandoned this argument. However, because it informs the Court's decision with respect to Defendants' arguments regarding the federal common law, as addressed next, the Court briefly discusses the issue.

Act. *See, e.g.*, *City of Oakland v. BP PLC*, 969 F.3d 895, 907 (9th Cir. 2020) (explaining that the Clean Air Act does not meet the requirements for complete preemption); *Rhode Island v. Chevron Corp. (Rhode Island I)*, 393 F. Supp. 3d 142, 149-50 (D.R.I. 2019) (concluding that the plaintiff's claims were not completely preempted by the Clean Air Act). Accordingly, complete preemption based on the Clean Air Act does not confer subject-matter jurisdiction here.

2. Federal Common Law and Ordinary Preemption

Defendants also contend that Plaintiff's claims necessarily arise under federal law "because they seek to regulate transboundary and international emission and pollution." Defs. Opp. at 12; *see also* NOR at 5-6. Defendants maintain that there are certain specialized areas, including interstate pollution, where there is an overriding interest in having a uniform federal rule. Defs. Opp. at 12-13. In short, Defendants argue that their claims arise under the federal common law. "The problem for Defendants is that there is nothing in the artful-pleading doctrine that sanctions this particular transformation." *Rhode Island I*, 393 F. Supp. 3d at 148.

In *Illinois v. City of Milwaukee* (*Milwaukee I*), 406 U.S. 91 (1972), the Supreme Court explained that "where there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism, we have fashioned federal common law" *Id.* at 105 n.6. The Court continued that addressing pollution in Lake Michigan, as it is bounded by four states, is an area that demands an application of federal law. *Id.* But even assuming that this matter is ultimately governed by the federal common law, *Milwaukee I* does

not provide Defendants with a basis for removal. *Milwaukee I* was filed in federal court pursuant to 28 U.S.C. § 1251(a)(1), which gives a district court original jurisdiction over controversies between two or more states. *Milwaukee I*, 406 U.S. at 1388. Accordingly, *Milwaukee I* did not implicate the well-pleaded complaint rule, nor did the Supreme Court address any principals of preemption or jurisdiction.

In relying on the federal common law as a basis for removal, Defendants are in essence raising the affirmative defense that the federal common law preempts Plaintiff's claims. This amounts to an argument for ordinary preemption. And ordinary preemption does not convert Plaintiff's state law claims to a federal case. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 392-93 (1987) ("Ordinarily federal pre-emption is raised as a defense to the allegations in a plaintiff's complaint" and "it is now well settled law that a case may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption"); *see also Briones v. Bon Secours Health Sys.*, 69 F. App'x 530, 534 (3d Cir. 2003) ("Because of the general rule that the plaintiff is master of his claim, where a well-pleaded state complaint contains only claims based on state law that are not 'completely preempted,' a federal court to which the case has been removed must remand to the state court for a determination of the issues presented.").

Defendants argue that *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, 471 U.S. 845 (1985), demonstrates that if a plaintiff's claims necessarily arise under the federal common law, there is federal jurisdiction. Defs. Opp. at 15. In *National Farmers Union*, however, the petitioners filed their complaint in federal court, arguing that

their claims arose under the federal common law. *Nat'l Farmers Union Ins. Cos.*, 471 U.S. at 848. Thus, the case involved affirmative claims that appeared on the face of the complaint. This is materially different than the defense that Defendants assert here. *National Farmers Union*, therefore, does not support Defendants' argument based on the federal common law.

In addition, Defendants' argument regarding the federal common law has been rejected by other courts. For example, in *Baltimore I*, the court recognized that the defendants' argument that Baltimore's claims were governed by the federal common law because they touched on climate change "is a cleverly veiled preemption argument." *Mayor & City Council of Balt. v. BP P.L.C.* (*Baltimore I*), 388 F. Supp. 3d 538, 555 (D. Md. 2019). The court continued that "[u]nfortunately for defendants, ordinary preemption does not allow the Court to treat the City's public nuisance claims as if it had been pleaded under federal law." *Id*. Similarly, in *Rhode Island I*, the court explained that "complete preemption is different from ordinary preemption, which is a defense and therefore does not provide a basis for removal." *Rhode Island I*, 393 F. Supp. 3d at 148. The *Rhode Island I* court then determined that "environmental federal common law does not—absent congressional say-so—completely preempt the State's public-nuisance claim, and therefore provides no basis for removal." *Id*. at 149. In this instance, outside of Defendants' suggestion that this Court take a wait-and-see approach with the cases that were recently remanded by the Supreme Court, Defendants do not attempt to explain why these other courts were incorrect or why this case is different. And this Court finds *Rhode Island I*, *Baltimore I*, and the other similar cases persuasive.

Defendants also argue that Plaintiff's claims arise under federal law because "they seek to regulate the production and sale of oil and gas abroad and therefore, implicate the federal government's foreign affairs power and the Constitution's Foreign Commerce Clause." Defs. Opp. at 18. The Court disagrees. Plaintiff seeks compensation to help it pay for damage that has already occurred and for remediation efforts to prevent further damage. Defendants have not made any persuasive arguments to the contrary.

Finally, Defendants contend that this case should be removed because Plaintiff is artfully pleading around a federal claim. The Supreme Court has explained that at times, a federal court must "determine whether the real nature of the claim is federal, regardless of plaintiff's characterization." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n.2 (1981). Under the "artful pleading" doctrine, "a plaintiff may not defeat removal by omitting to plead necessary federal questions." *Goepel v. Nat'l Postal Mail Handlers Union, a Div. of Liuna*, 36 F.3d 306, 310 (3d Cir. 1994).[7] At the same time, as "master of its complaint," Hoboken is at liberty to raise or not raise federal claims. *Caterpillar*, 482 U.S. at 398-99. Here, Hoboken chose to plead only state law claims against non-diverse parties. None of Hoboken's claims are premised on federal law and Defendants do not contend

[7] The Court notes that in *Goepel*, which is cited by Defendants, the Third Circuit addressed the difference between complete and ordinary preemption, explaining that only complete preemption can convert a state law-based complaint into a federal case. As discussed, the Circuit recognized that a federal defense amounts to ordinary preemption and does not establish that the case is removable to federal court. *Goepel*, 36 F.3d at 310. Thus, the Circuit rejected the very argument Defendants make here.

that Plaintiff omitted any facts to avoid federal jurisdiction. Although federal law may ultimately block Plaintiff's claims through ordinary preemption, this is an affirmative defense rather than a necessary element of Plaintiff's claims. Accordingly, as pled, Plaintiff's Complaint is premised solely on state law.

City of New York v. Chevron Corporation (*New York*), 993 F.3d 81 (2d Cir. 2021), does not change the Court's analysis.[8] The plaintiff in *New York* filed its complaint in federal court. As a result, the Second Circuit was "free to consider the [Defendants'] preemption defense on its own terms, not under the heightened standard unique to the removability inquiry." *Id.* at 94. In fact, the Second Circuit expressly noted that because of this procedural difference, its conclusion did not conflict with "the parade of recent opinions holding that 'state-law claims for public nuisance brought against fossil fuel producers do not arise under federal law.'" *Id.* (quoting *City of Oakland*, 960 F.3d at 575) (internal brackets omitted). *New York* merely suggests that Defendants may ultimately prevail with their federal preemption defense argument, but this defense does not provide this Court with subject-matter jurisdiction.

3. *Grable* Jurisdiction[9]

A claim is also deemed to arise under federal law for purposes of the well-pleaded complaint rule when, although it finds its origins in state law, "the

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[8] After the motion to remand briefing was completed, Defendants filed a notice of supplemental authority informing the Court of the Second Circuit's decision in *New York*. D.E. 108.

[9] *Grable* jurisdiction is sometimes referred to as *Smith* jurisdiction in light of *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921).

plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Empire Healthchoice Assurance Inc.*, 547 U.S. at 690. This exception to the well-pleaded complaint rule only applies to a "slim category" of cases that satisfy four requirements: within a state law claim, 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) (quoting *Gunn v. Minton*, 568 U.S. 251, 258 (2013)).

A federal issue is necessarily raised if "vindication of a right under state law must necessarily turn on some construction of federal law." *Id.* (quoting *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 9 (1983)). In *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, for example, the IRS seized real property to satisfy a federal tax delinquency and subsequently sold the property. 545 U.S. 308, 310 (2005). Grable brought a quiet title action in state court five years later, claiming that the purchaser's record title was invalid because the IRS failed to notify Grable of the seizure in the specific manner required by 26 U.S.C. § 6335. *Id.* at 311. The Supreme Court determined that federal jurisdiction was appropriate because "[w]hether Grable was given notice within the meaning of the federal statute is thus an essential element of its quiet title claim, and the meaning of the federal statute is actually in dispute." *Id*. at 315.

Defendants maintain that for its nuisance claims, Hoboken is required to prove that Defendants' conduct is unreasonable. This depends, according to Defendants, on an assessment of whether "the gravity of

the harm outweighs the utility of the actor's conduct' or that 'the harm caused by the conduct is serious.'" NOR ¶ 140 (quoting *Seven Plus One, LLC v. Sellers*, No. A-4688-14T2, 2016 WL 6994346, at *6 (N.J. Super. Ct. App. Div. Nov. 29, 2016)). Defendants go on to explain that this analysis is akin to the analysis Congress already performed when enacting a variety of federal environmental statutes. *Id.* Thus, Defendants conclude, Plaintiff's claims are "inherently federal in character." *Id.* ¶ 141.

This general concern that federal law might be implicated or may guide the Court's analysis is materially different than a claim, like that in *Grable,* that is dependent on the interpretation of federal law. Critically, Defendants do not identify any provision of federal law that would provide them a remedy or upon which Plaintiff's nuisance claims are predicated. "The fact that federal law may be informative . . . or 'shape or even limit the remedy that Plaintiff may obtain' does not mean that federal law is a necessary component of the cause of action." *MHA LLC v. HealthFirst, Inc.*, 629 F. App'x 409, 413 (3d Cir. 2015) (internal quotation omitted). As the district court explained in *San Mateo*:

> [E]ven if deciding that nuisance claims were to involve a weighing of costs and benefits, and even if the weighing were to implicate the defendants' dual obligations under federal and state law, that would not be enough to invoke *Grable* jurisdiction. On the defendants' theory, many (if not all) state tort claims that involve the balancing of interests and are brought against federally regulated entities would be removable. *Grable* does not sweep so broadly.

County of San Mateo v. Chevron Corp., 294 F. Supp. 3d 934, 989 (N.D. Cal. 2018).

In their opposition brief, Defendants argue that Hoboken's claims implicate affirmative federal constitutional elements imposed by the First Amendment, which are not considered affirmative defenses. Defendants further contend that federal jurisdiction is proper under *Grable* because the Court will be required to construe the First Amendment when considering Plaintiff's claims. Defs. Opp. at 24-25. Defendants rely on cases that address the constitutional limits of common law defamation claims. *See Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 774 (1986). Each of the cases involve a federal constitutional defense to a state tort law. Critically, the federal court's jurisdiction in each of these cases did not appear to turn on the existence of the constitutional defense. *See, e.g.*, *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 48 (1988) (explaining that the respondent originally filed a diversity action in district court); *Hepps*, 475 U.S. at 774 (reviewing state court claims that were considered by the Pennsylvania Supreme Court). The Court finds Defendants' authority to be inapposite.

Finally, Defendants cite *Ortiz v. University of Medicine & Dentistry of New Jersey*, No. 08-2669, 2009 WL 737046 (D.N.J. Mar. 18, 2009), for the proposition that when a court is required to construe the United States Constitution, the claim necessarily raises a federal issue under *Grable.* Defs. Opp. at 25. The Court disagrees; the implications of *Ortiz* are not nearly as broad as Defendants represent. In *Ortiz,* Judge Linares adopted Magistrate Judge Falk's conclusion that *Grable* jurisdiction existed because the plaintiff's state law wrongful termination and

employment discrimination claims were dependent on federal law. But in *Ortiz*, the plaintiff alleged that she was terminated in retaliation for exercising her right to free speech, in violation of the First and Fourteenth Amendments. 2009 WL 737046, at *5. Thus, the plaintiff's "state cause of action require[d] proof of violation of federal law as an essential element to recovery." *Id.* at *7. Nothing in *Ortiz* stands for the broad proposition that any constitutional issue, no matter how it is raised, is sufficient to invoke federal jurisdiction. And as explained above, Hoboken's claims do not turn on federal law.

Every court that has considered Defendants' Grable argument thus far has rejected Defendants' position. *See Massachusetts v. Exxon Mobil Corp*., 462 F. Supp. 3d 31, 45 (D. Mass. 2020) (collecting cases). Defendants do not challenge any of these decisions, and this Court finds these decisions persuasive. Seeing no clear reason to deviate from the clear weight of authority, this Court also concludes that *Grable* jurisdiction does not exist. As a result, Defendants fails to establish that there is federal question jurisdiction in this matter as authorized by 28 U.S.C. § 1331.

B. Outer Continental Shelf Lands Act Removal

Defendants also contend that this Court has original jurisdiction pursuant to the OCSLA, 43 U.S.C. § 1349(b). NOR ¶¶ 31-41. Specifically, Defendants maintain that Plaintiff's claims encompass Defendants' activities on the Outer Continental Shelf ("OCS"), and therefore, fall into the "broad jurisdictional grant of Section 1349."[10] *Id.* ¶ 31. The OCSLA

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[10] The Continental Shelf "is a vast underwater expanse that begins a few miles from the U.S. coast, where states' jurisdiction

"extends federal law to the subsoil and seabed of the Outer Continental Shelf and all attachments thereon." *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881, 1886 (2019). Thus, pursuant to the OCSLA, the federal government has exclusive jurisdiction over the OCS. *Id.* at 1887.

When considering jurisdiction under the OCSLA, courts analyze (1) whether the conduct "that caused the injury constituted an operation conducted on the outer Continental Shelf that involved the exploration and production of minerals," and (2) if the case "arises out of, or in connection with the operation." *In re Deepwater Horizon*, 745 F.3d 157, 163 (5th Cir. 2014); *see also Various Pls. v. Various Defs.* (*Oil Field Cases*), 673 F. Supp. 2d 358, 370 (E.D. Pa. 2009) (looking to the Fifth Circuit for guidance on OCSLA jurisdiction because there is no Third Circuit precedent on the issue). In addition, Section 1349 requires a "but-for" connection between the claims and the OCS operation. *Id.*

Defendants argue that the "but-for" requirement is too narrow. Specifically, Defendants maintain that such causation is sufficient but not necessary under the OCSLA. Instead, Defendants point to the statutory text of Section 1349(b), which only requires a "connection." Defs. Opp. at 29-30. In support, Defendants rely on *EP Operating Ltd. Partnership v. Placid Oil Co.*, 26 F.3d 563 (5th Cir. 1994), which concluded that a suit that "would affect the efficient exploitation of resources from the OCS" was within the

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ends, and extends roughly two hundred miles into the ocean to the seaward limit of the international-law jurisdiction of the United States." *Baltimore II*, 952 F.3d at 465 n.8 (internal quotations omitted).

jurisdictional grant of Section 1349. *Id.* at 570. Defendants maintain that *EP Operating* establishes that jurisdiction exists "where the plaintiff's claims are connected to OSCLA operations in the sense that they threaten to 'impair' the 'recovery' of minerals from the OCS." Defs. Opp. at 30. In *EP Operating*, however, the Fifth Circuit did not consider the parameters of a causal connection under the Act. Instead, the Circuit was addressing the definition of "operation." *EP Operating Ltd.*, 26 F.3d at 570. Accordingly, *EP Operating* does not support Defendants' argument. Because Defendants provide no other authority to deviate from the but-for requirement, the Court applies the but-for test.

Turning to the merits of Defendants' OCLSA jurisdictional argument, Defendants contend that OCSLA jurisdiction exists because certain Defendants participated in the OCS leasing program. NOR ¶¶ 36-37. Because of Defendants' allegedly deceptive promotion of oil and gas, Defendants were able to increase production and some of this increased production originated from the OCS. Defendants continue that Hoboken's claims and damages, therefore, arise from these OCS operations. This chain of causation is too attenuated. Although it is more than plausible that fossil fuels originating from the OCS led to the effects of global warming that Hoboken is now facing, this does not amount to but-for causation. As explained by the Court in *San Mateo,* "even if some of the activities that caused the alleged injuries stemmed from operations on the [OCS], the defendants have not shown that the plaintiffs' causes of action would not have accrued *but for* the defendants' activities on the shelf." *San Mateo*, 294 F. Supp. 3d at 939; *see also Baltimore I*, 388 F. Supp. 3d at 566 (concluding that OCSLA jurisdiction does not exist

because the City's claims are based on a broad array of conduct and the defendants failed to establish that the claims "would not have occurred but for defendants' extraction activities on the OCS"). Consequently, the OCSLA does not confer subject-matter jurisdiction.

C. Federal Officer Removal

Defendants also removed this matter on the basis of the federal officer removal statute, 28 U.S.C. § 1442(a). "The 'central aim' of the federal officer removal statute 'is to protect officers of the federal government from interference by litigation in state court while those officers are trying to carry out their duties." *Golden v. N.J. Inst. of Tech.*, 934 F.3d 302, 309 (3d Cir. 2019) (quoting *Papp v. Fore-Kast Sales Co., Inc.*, 842 F.3d 805, 811 (3d Cir. 2016)) (internal punctuation omitted). For a court to exercise its jurisdiction under Section 1442(a)(1), it must be satisfied that each of the following four requirements are met:

> (1) the defendant is a person within the meaning of the statute; (2) the plaintiff's claims are based upon the defendant's conduct arising 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 claim.

Id. (quoting *Papp*, 842 F .3d at 812) (internal quotation marks omitted).[11]

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[11] Section 1442 provides as follows:

> (a) A civil action or criminal prosecution that is commenced in a State court and that is against or directed to

Defendants' argument turns on the second and third requirements. The second requirement "is liberally construed to cover actions that involve an effort to assist, or to help carry out, the federal supervisor's duties or tasks." *Id.* In this instance, Defendants maintain that at a minimum, the Chevron parties "performed critical and necessary functions for the U.S. military in furtherance of national defense policy and have acted pursuant to government mandates, leases, and contracts under which they assisted the federal government in achieving federal policy goals, all under federal direction, oversight, and control." NOR ¶ 42. Specifically, Defendants maintain that they acted under a federal officer because the government exerted extensive guidance and control over their fossil fuel production. *Id.* ¶ 44. To meet the third requirement, "it is sufficient for there be a 'connection' or 'association' between the act in question and the federal officer." *Golden*, 934 F.3d at 310 (quoting *In re Commonwealth's Motion to Appoint Counsel Against or Directed to Def. Ass'n of Phila.,* 790 F.3d 457, 468 (3d Cir. 2015)). To support their argument, Defendants provide a historical treatise about the United States' need for fossil fuels for national

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> any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> > (1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

28 U.S.C. § 1442(a)(1).

security purposes during the twentieth century and explain that Defendants' oil and gas production was in part connected to these national security concerns. *Id.* ¶¶ 48-133. While informative, the historical narrative is not relevant. Hoboken's Complaint is focused on Defendants' decades long misinformation campaign that was utilized to boost Defendants' sales to consumers. Defendants do not claim that any federal officer directed them to engage in the alleged misinformation campaign.

Turning to the specifics of Defendants' federal officer removal argument. Defendants rely on their involvement with the OCS leasing program; a petroleum reserve at Elk Hills, California; and specialized government contracts and work related to national defense. OCS leases are administered by the Department of Interior, and Defendants maintain that in 2009, "oil produced from the OCS accounted for 30% of all domestic production." NOR ¶¶ 65-67. With respect to Elk Hills, Defendants' argument stems from Chevron's predecessor's involvement with a petroleum reserve in California that is owned by the federal government, from 1976 to 1998. *Id.* ¶ 83-103. Each circuit that has considered whether Defendants' involvement with the OCS leases and the Elk Hills reserve is sufficient to satisfy the federal officer removal statute has found that it is not. The Fourth Circuit explained that "[a]ny connection between the fossil fuel production of the OCS and the conduct alleged in the Complaint is simply too remote" to satisfy the third prong. *Mayor & City Counsel of Balt. v. BP P.L.C.* (*Baltimore II*), 952 F.3d 452, 466 (4th Cir. 2020). The Fourth Circuit further explained that although Baltimore's complaint references the defendants' production, these allegations "only serve to tell a broader story" about how Defendants' fossil fuels

contributed to greenhouse gas pollution. *Id.* at 467. But "it is the concealment and misrepresentation of the products' known dangers—and simultaneous promotion of their unrestrained use—that allegedly drove consumption, and thus greenhouse gas pollution, and thus climate change." *Id.* The Fourth Circuit reached the same conclusion with respect to Elk Hills. *Id.* at 468-69. The First Circuit similarly explained that:

> [a]t 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. The contracts the oil companies invoke as the hook for federal-officer jurisdiction mandate none of those activities.

Rhode Island II, 979 F.3d at 59-60. The Court sees no reason to depart from the persuasive reasoning of the First and Fourth Circuits. As discussed, Plaintiff is not focused on the specialized and limited production efforts on the OCS and at Elk Hills, or, for that matter, Defendants' overall production efforts. Instead, Plaintiffs point to Defendants' misinformation campaign. Accordingly, the Court concludes that Defendants' conduct relating to OCS and Elk Hills does not serve as a jurisdictional hook.

The same is true for Defendants' contention that their role in providing the United States' military with specialized fuel, and for the storage and transport of

fuel for national emergencies, are sufficient bases to convey federal jurisdiction. NOR ¶¶ 104, 107-30. As recognized by Defendants themselves, fuel produced through these military contracts at the present day is "highly specialized" so that it can be used on planes, ships and other vehicles and satisfy other national defense requirements. *Id.* ¶¶ 120. This specialized fuel does not appear to be the same as fuel that consumers purchased because of Defendants' alleged marketing and disinformation campaigns. Finally, Hoboken's Complaint does not touch on the storage or transport of fossil fuels. Consequently, this conduct does not relate to Plaintiff's claims.

With respect to the federal officer removal statute, Defendants' basis for removal and arguments in their opposition brief are largely the same as those presented to each circuit court that has considered federal officer removal in the related cases. Four circuits have concluded that Defendants could not remove based on the federal officer removal statute. Defendants, however, provide new information in this matter that they contend should change the analysis. For example, with respect to Elk Hills, Defendants provide new factual support demonstrating that the Navy hired Standard Oil, Chevron's predecessor, to operate the field on its behalf for thirty-one years. NOR ¶ 95. Defendants also provide new information about the government's control of the oil and gas industry during World War II. *Id.* ¶¶ 48-60. But again, Plaintiff's claims focus on Defendants' alleged misinformation campaign, not their production of oil and gas. Moreover, Defendants' new information addresses conduct that predates Plaintiff's allegations. Thus, this new information likely would not change any of the prior circuit analyses. In fact, the District of Hawai'i recently determined that Defendants' new

information did not alter the analysis and concluded that there was not federal officer removal. *See City & Cnty. of Honolulu v. Sunoco LP*, No. 20-163, 2021 WL 531237, at *4-5 (D. Haw. Feb. 12, 2021) ("The Court is unconvinced that any of the supposedly additional or new arguments presented here alter the Ninth Circuit's holding that the leases do not give rise to an unusually close relationship with the federal government for purposes of Section 1442(a)(1)."). And critically, this information does not alter this Court's conclusion in this matter. Defendants, therefore, cannot remove this matter pursuant to the federal officer removal statute.

D. Federal Enclave Removal

Next, Defendants seek to remove this matter on the basis of federal enclave jurisdiction. NOR ¶¶ 178-82. "A federal enclave is an area over which the federal government has assumed exclusive legislative jurisdiction through the application of Art. I, Section 8 of the U.S. Constitution." *Jones v. John Crane-Houdaille, Inc.*, No. 11-2374, 2012 WL 1197391, at *1 (D. Md. Apr. 6, 2012). "A suit based on events occurring in a federal enclave, where state law has been federalized, therefore must necessarily arise under federal law and implicates federal question jurisdiction under § 1331." *Id.* The "key factor" in deciding whether federal enclave jurisdiction exists is the location of the injury. *Sparling v. Doyle*, No. 13-323, 2014 WL 2448926, at *3 (W.D. Tex. May 30, 2014); *see also Board of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 405 F. Supp. 3d 947, 974 (D. Colo. 2019) (quoting *Ramos v. C. Ortiz Corp.*, No. 15-980, 2016 WL 10571684, at *3 (D.N.M. May 20, 2016)) ("The location where Plaintiff was injured determines whether the right to removal exists" under federal

enclave jurisdiction."); *Baltimore I*, 388 F. Supp. 3d at 565 (explaining that "courts have only found that claims arise on federal enclaves, and thus fall within federal question jurisdiction, when all or most of the pertinent events occurred there"); *Bordetsky v. Akima Logistics Servs., LLC*, No. 14-1786, 2016 WL 614408, at *2 (D.N.J. Feb. 16, 2016) ("When dealing with a federal enclave, the focus is on where the tort occurred.").

Defendants contend that the Complaint relies upon conduct that occurred in the District of Columbia and that some of the fossil fuel produced by Defendants came from federal enclaves. NOR ¶¶ 178-82. In a footnote, Defendants add that because Plaintiff's injuries arise from all global warming, Plaintiff is necessarily complaining about emissions from jet fuel on United States military bases. Defs. Opp. at 53 n.10. Again, the Court disagrees. The focus of Hoboken's claims is on harm that occurred in Hoboken rather than in a federal enclave. This argument, therefore, is rejected.

E. Class Action Fairness Act Jurisdiction

Finally, Defendants maintain that this matter is removable under the CAFA. NOR ¶¶ 183-95. The CAFA provides federal courts with diversity jurisdiction over class actions when (1) the amount in controversy exceeds $5 million; (2) there are minimally diverse parties; and (3) the class consists of 100 or more members. *Gallagher v. Johnson & Johnson Consumer Cos.*, 169 F. Supp. 3d 598, 601-02 (D.N.J. Mar. 14, 2016) (citing *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 592 (2013)). A class action is defined as "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action."

28 U.S.C. § 1332(d)(1)(B). This argument can be dealt with in short order because Plaintiff is not bringing this matter under Rule 23 or any similar state law. Defendants provide no information suggesting otherwise. Consequently, the Court concludes that CAFA jurisdiction does not exist.

In sum, none of Defendants' bases for federal jurisdiction are sound. Accordingly, this matter will be remanded to state court.

IV. MOTION TO STRIKE

Defendants seek to strike portions of Plaintiff's reply brief, specifically, Plaintiff's new argument for costs pursuant to 28 U.S.C. § 1447(c) and collateral estoppel, because they were raised for the first time in Plaintiff's reply brief. Defs. Strike Br. at 2-4. Defendants do not set forth the legal basis for their requested relief. While Federal Rule of Civil Procedure 12(f) allows a court to "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter," Fed R. Civ. P. 12(f), Defendants seek to strike arguments in a brief. "[M]otions, affidavits, briefs, and other documents outside of the pleadings are not subject to Rule 12(f)." 5C Charles Alan Wright & Arthur Miller, Federal Practice & Procedure § 1380 (3d ed. 2016). Defendants' motion, therefore, is denied as procedurally improper.

Defendants, however, correctly argue that this Court typically does not consider new arguments in a reply brief. *See Cobra Enters., LLC v. All Phase Servs., Inc.*, No. 20-4750, 2020 WL 2849892, at *1 (D.N.J. June 1, 2020) ("As a matter of procedure, this Court will not accept arguments offered for the first time in the reply brief, as they were not properly

asserted in the opening brief and Plaintiffs have not had the opportunity to respond to them."). Here, Plaintiff concedes that it had a basis to seek statutory costs under 28 U.S.C. § 1447(c) when filing its motion to remand but "refrained . . . from seeking that relief in its opening brief." Plf. Strike Opp. at 1. The same is true for Hoboken's collateral estoppel argument, which is based on the fact that numerous courts already rejected Defendants' arguments regarding federal jurisdiction before Defendants filed their opposition brief. Thus, while the Court will not strike these arguments from Hoboken's reply brief, the Court did not consider them in deciding the motion for remand.

V. CONCLUSION

For the reasons stated above, Plaintiff's motion to remand, D.E. 94, is **GRANTED**. This action is remanded to the New Jersey Superior Court, Law Division, Hudson County. In addition, Defendants' motion to strike, D.E. 106, is **DENIED**. An appropriate Order accompanies this Opinion.

Dated: September 8, 2021

/s/ John Michael Vazquez
John Michael Vazquez, U.S.D.J.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

STATE OF DELAWARE, *ex rel.* KATHLEEN JENNINGS Attorney General of the State of Delaware, Plaintiff, v. BP AMERICA INC., BP P .L.C., CHEVRON CORPORATION, CHEVRON U.S.A. INC., CONOCOPHILLIPS, CONOCOPHILLIPS COMPANY, PHILLIPS 66, PHILLIPS 66 COMPANY, EXXON MOBIL CORPORATION, XTO ENERGY INC., HESS CORPORATION, MARATHON OIL CORPORATION, MARATHON OIL COMPANY, MARATHON PETROLEUM COMPANY LP, SPEEDWAY LLC, MURPHY OIL CORPORATION, MURPHY USA INC., ROYAL DUTCH SHELL	C.A. No 20-1429-LPS Jan. 5, 2022

PLC, SHELL OIL COMPANY, CITGO PETROLEUM CORPORATION, TOTAL S.A., TOTALENERGIES MARKETING USA, INC., OCCIDENTAL PETROLEUM CORPORATION, DEVON ENERGY CORPORATION, APACHE CORPORATION, CNX RESOURCES CORPORATION, CONSOL ENERGY INC., OVINTIV, INC., and AMERICAN PETROLEUM INSTITUTE,

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MEMORANDUM OPINION

STARK, U.S. District Judge:

Pending before the Court is the State of Delaware's ("Delaware" or "Plaintiff') motion to remand, filed pursuant to 28 U.S.C. § 1447(c). (D.I. 86) The Court has reviewed the complaint (D.I. 1-1), the notice of removal (D.I. 1), and the parties' briefs, exhibits, declarations, and notices of supplemental authority (*see, e.g.,* D.I. 89, 96-99, 101, 104, 107, 108, 113, 119). The Court also heard argument via teleconference on May 19, 2021. (D.I. 111) ("Tr.") For the reasons set forth below, the Court will grant Plaintiff's motion.[1]

I. BACKGROUND

On September 10, 2020, Plaintiff filed suit in the Delaware Superior Court against numerous major

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[1] In their initial briefing, Defendants suggested that cases then pending before the U.S. Supreme Court might address issues relating to federal jurisdiction and the same type of claims asserted here. (*See* D.I. 96 at 6-7) Defendants did not formally request a stay, although they observed that "awaiting guidance from the Supreme Court on the issues raised in Plaintiffs Motion may further the interests of judicial economy and efficiency." (D.I. 96 at 7) Thereafter, on May 17, 2021, the Supreme Court issued its ruling in *BP P.L.C. v. Mayor of Baltimore*, 141 S. Ct. 1532 (2021) ("*Baltimore III*"). The *Baltimore III* decision, however, only addresses the scope of appellate review and does not reach the merits of any dispute over federal jurisdiction. During oral argument in the instant case, Defendants suggested that the Court delay its decision until after the Supreme Court rendered its ruling on the petition for a writ of certiorari in the appeal from the Ninth Circuit's decision in *City of Oakland v. BP P.L.C.*, 960 F.3d 570 (9th Cir. 2020), *modified* by 969 F.3d 895. (*See* Tr. at 88-89) The Supreme Court subsequently denied that petition on June 14, 2021. *See Chevron Corp. v. City of Oakland*, 141 S. Ct. 2776 (2021). No party has suggested there is any reason for further delay in resolving Plaintiffs motion.

corporations having operations in the fossil fuel industry (collectively, "Defendants"). Plaintiff's complaint asserts solely state-law claims, specifically for: (1) negligent failure to warn, (2) trespass, (3) nuisance, and (4) violations of the Delaware Consumer Fraud Act.[2] (D.I. 1-1 ¶¶ 234-80) Plaintiff's claims are based on an alleged disinformation campaign undertaken by Defendants, purportedly to mislead the public and consumers by misrepresenting the devastating impacts of climate change and its link to fossil fuels—ultimately leading to disastrous climate impacts on the State of Delaware, as the result of increased

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[2] The negligent failure to warn, trespass, and nuisance claims are brought against the "Fossil Fuel Defendants," which includes the BP entities (BP P.L.C. and BP America Inc.), the Chevron entities (Chevron Corporation and Chevron USA, Inc.), the ConocoPhillips entities (ConocoPhillips, ConocoPhillips Company, Phillips 66, and Phillips 66 Company), the Exxon entities (Exxon Mobil Corporation, ExxonMobil Oil Corporation, XTO Energy Inc.), Hess Corporation, the Marathon entities (Marathon Oil Corporation, Marathon Oil Company, Marathon Petroleum Corporation, Marathon Petroleum Company LP, and Speedway LLC), the Murphy Oil entities (Murphy Oil Corporation and Murphy USA, Inc.), the Shell entities (Royal Dutch Shell PLC and Shell Oil Company), Citgo Petroleum Corporation, the Total entities (Total S.A. and TotalEnergies Marketing USA, Inc.), Occidental Petroleum Corporation, Devon Energy Corporation, Apache Corporation, the CONSOL entities (CNX Resources Corporation and CONSOL Energy Inc.), and Ovintiv, Inc. (*See* D.I. 1-1 ¶ 36) The claim for violation of the Delaware Consumer Fraud Act ("CFA") is brought against Defendant American Petroleum Institute and some, but not all, of the Fossil Fuel Defendants (including the BP entities, the Chevron entities, the Exxon entities, Hess Corporation, the Shell entities, Citgo Petroleum Corporation, CNX Resources Corporation, and the Marathon entities) (this subgroup of Defendants hereinafter referred to as the "CFA Defendants"). (*See id.* ¶ 265)

extraction, production, and consumption of fossil fuels. (*See id.* ¶¶ 1-12)[3]

According to Plaintiff, Defendants have known for more than 50 years that their fossil fuel products create greenhouse gas pollution having significant adverse impacts on the climate and sea levels. (*See id.* ¶¶ 1, 7, 62-103) Instead of disclosing the known harms associated with their products, Defendants embarked on a campaign of denial and disinformation about the existence, cause, and adverse effects of global warming, which was designed to protect and expand the consumption of their fossil fuel products. (*See id.* ¶¶ 104-60) As the scientific consensus about the causes and consequences of climate change has strengthened, Defendants continued to mislead the public by advertising that certain fossil fuel products are "green" or "clean," and falsely portraying themselves as environmentally conscious companies that invest heavily in renewable energy sources. (*See id.* ¶¶ 161-210)

Plaintiff alleges it has suffered, and will foreseeably continue to suffer, damages from the climate impacts purportedly caused by Defendants' disinformation campaign, including accelerating sea level rise, increased extreme weather events, ocean acidification, and elevated average air temperature. (*See id.* ¶¶ 226-30) Plaintiff further contends it has incurred,

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[3] The Court understands Plaintiff's theory to be, in part, that Defendants' misrepresentations and deception caused increased consumption of fossil fuels all around the world, leading to injurious environmental impacts in Delaware, impacts for which Plaintiff seeks to recover damages (among other potential relief). (*See* D.I. 1-1 ¶¶ 7-11; *see also* Tr. at 93 ("[T]he only source of liability is the misrepresentation . . . and the damages are restricted to the impact in Delaware."))

and will continue to incur, expenses to preemptively mitigate the injuries caused by Defendants' misconduct. (*See id.* ¶ 231) Plaintiff seeks compensatory damages, penalties under the Delaware Consumer Fraud Act, punitive damages, and attorneys' fees and costs.[4] (*See id.* at 217) (Prayer for Relief)

On October 23, 2020, Defendants removed this action from the Delaware Superior Court to this Court, citing seven grounds for federal jurisdiction: (1) federal common law, (2) *Grable* jurisdiction, (3) complete preemption by the Clean Air Act ("CAA"), (4) federal enclave jurisdiction, (5) the federal officer removal statute, 28 U.S.C. § 1442, (6) jurisdiction under the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1331, *et seq.,* and (7) the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1453. (*See* D.I. 1)

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[4] The Prayer for Relief in Plaintiff's complaint does not seek an injunction against Defendants' oil production, marketing, and sales activities. However, in stating the common-law nuisance claim, the complaint does indicate that Plaintiff "seeks an order that . . . enjoins Fossil Fuel Defendants from creating future common-law nuisance." (D.I. 1-1 ¶ 263) During oral argument, Plaintiff insisted it is "in no way directly asking a court to limit, modify, alter, cease, [or] in any way hinder the actual exploration, production, sale, [and] consumption of fossil fuels," adding that "any injunctive relief' would instead "focus on the veracity of marketing and other public communications." (Tr. at 27-29) Plaintiff then further clarified it would not "be looking for prospective injunctive relief against speech of any kind," adding that Defendants "can continue to market, but they may be subject to liability in Delaware for continued false and deceptive conduct." (*Id.* at 93-94, 103) The Court, thus, understands that Plaintiff seeks no injunctive relief "directed at [D]efendants' forward-looking activities in any way." (*Id.* at 29)

Plaintiff filed the pending motion on November 20, 2020, seeking remand of the instant action back to the Delaware Superior Court. (D.I. 86)

II. LEGAL STANDARDS

Federal courts are "courts of limited jurisdiction" and "possess only that power authorized by Constitution and statute." *Exxon Mobil Corp. v. Allapattah Servs., Inc.,* 545 U.S. 546, 552 (2005). A defendant may remove a civil action from a state court to a federal district court if the federal district court would have original jurisdiction of the action. *See* 28 U.S.C. § 1441(a). However, "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded" to state court. 28 U.S.C. § 1447(c).

"The removing party carries a heavy burden of showing that at all stages of the litigation the case is properly before the federal court. Removal statutes are to be strictly construed, with all doubts to be resolved in favor of remand."[5] *Manning v. Merrill Lynch Pierce Fenner & Smith, Inc.,* 772 F.3d 158, 162 (3d Cir. 2014) (internal citation omitted).

III. DISCUSSION

In the notice of removal, Defendants asserted seven grounds for removal. (D.I. 1) After Plaintiff challenged each of these grounds (*see generally* D.I. 89), Defendants effectively abandoned their contentions with respect to complete preemption by the CAA,

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[5] Defendants assert that the principle of "all doubts to be resolved in favor of remand" is no longer viable after the Supreme Court's *Baltimore III* ruling. (Tr. at 71-72) The Court disagrees. *Baltimore III* neither expressly addresses nor implicitly undermines this principle.

federal enclave jurisdiction, and CAFA.[6] Hence, the Court needs to address only the four remaining grounds: (1) federal common law, (2) *Grable* jurisdiction, (3) the federal officer removal statute, and (4) jurisdiction under the OCSLA. Defendants have failed to meet their burden to show that this Court may exercise jurisdiction over this case on any of these four grounds. Thus, the Court will grant Plaintiff's motion and remand this case to the Delaware Superior Court.

A. Federal Common Law

Defendants contend that Plaintiff's state-law claims "necessarily arise under federal common law" because the issues presented in these claims "are exclusively federal in nature." (D.I. 1 at 23; D.I. 96 at 16) According to Defendants, since Plaintiff's claims "seek to regulate transboundary and international emissions and pollution," they fall under one of the specialized areas of overriding federal interest. (D.I. 96 at 16) Additionally, since Plaintiff's claims "seek to regulate the production and sale of oil and gas

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[6] In their briefing, Defendants only mention CAFA once in passing, and address complete preemption and federal enclave jurisdiction only in one footnote each. (*See* D.I. 96 at 6, 19 n.7, 51 n.12) These grounds for removal are, as a result, waived. *See John Wyeth & Bro. Ltd v. CIGNA Intl Corp.*, 119 F.3d 1070, 1076 n.6 (3d Cir. 1997) ("[A]rguments raised in passing (such as, in a footnote), but not squarely argued, are considered waived."); *Peters v. Ryan*, 2017 WL 1393692, at *2 (D. Del. Apr. 13, 2017) ("When a party files an opposition brief and fails to contest an issue raised in the opening brief, the issue is considered waived or abandoned by the non-movant."). During oral argument, Defendants confirmed that they have "narrowed things down" to the four grounds that the Court addresses, adding that federal enclave jurisdiction is "subsumed within" other bases for removal. (*See* Tr. at 65)

abroad," they implicate the "federal government's foreign affairs power." (*Id.* at 18)

Plaintiff counters that federal common law cannot provide an independent basis for removal because Plaintiff's complaint asserts exclusively state-law claims; any exceptions to the well-pleaded complaint rule are not satisfied in this case. (D.I. 89 at 8; D.I. 101 at 3) Plaintiff also insists that its claims do not implicate federal common law, as they seek neither to address cross-border pollution nor to regulate international fossil fuel production and sales. (D.I. 89 at 10; D.I. 101 at 7)

The Court agrees with Plaintiff that federal common law cannot create federal jurisdiction to support removal here, irrespective of whether Plaintiff's claims are "federal in nature."[7]

Federal district courts have "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. The "presence or absence of federal question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Rivet v. Regions Bank of La.,* 522 U.S. 470, 475 (1998) (internal citation omitted). "[A] case may not be removed to federal court on the basis of a federal

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[7] Having found that federal common law cannot create a basis for removal, the Court need not reach the question of whether federal common law has been displaced by the Clean Air Act, as Plaintiff contends. (*See* D.I. 89 at 11; D.I. 96 at 21-22) If Plaintiff is correct, this would provide yet another basis to reject Defendants' assertion of federal common law as a ground to deny remand.

defense, including the defense of preemption, . . . even if the defense is the only question truly at issue in the case." *Franchise Tax Bd. v. Constr. Laborers Vacation Tr. for S. Cal.,* 463 U.S. 1, 14 (1983). Hence, a plaintiff may "avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar Inc. v. Williams,* 482 U.S. 386, 392 (1987). Nevertheless, a court may uphold removal "where federal law ***completely*** preempts an asserted state-law claim." *Rivet,* 522 U.S. at 471 (emphasis added). Federal law completely preempts state law "[o]nly if Congress intended [for the federal law] to provide the exclusive cause of action" asserted in the claim. *Beneficial Nat'l Bank v. Anderson,* 539 U.S. 1, 9 (2003).

Plaintiff's claims are not completely preempted by federal common law. Defendants do not dispute, nor can they, that Plaintiff's complaint, on its face, only asserts state-law causes of action. The complaint makes no attempt to state any claims arising under federal common law. Nor is there any indication that Congress has intended for federal common law to provide the exclusive cause of action for the claims asserted in the complaint. *See Beneficial Nat'l Bank,* 539 U.S. at 9. In apparent recognition of the futility of this theory, Defendants have expressly abandoned the preemption ground, noting that their federal common law analysis "does not implicate preemption principles or standards." (D.I. 1 ¶ 14)

Unable to establish complete preemption, Defendants turn to argue that Plaintiff s claims have an "inherently federal nature." (D.I. 96 at 18) This contention, too, is unpersuasive. In the Court's view, Defendants' repeated refrains that federal common law "governs" or "exclusively governs" the issues underlying Plaintiff's state-law claims are simply veiled—and

non-meritorious, for purposes of removal—preemption arguments. (*See, e.g., id.* at 16) (referring to "specialized areas 'where there is an overriding federal interest in the need for a uniform rule of decision") (quoting *Illinois v. City of Milwaukee,* 406 U.S. 91, 105 n.6 (1972) (*"Milwaukee I"*)) Ordinary preemption, however, does not provide a basis for establishing federal jurisdiction. *See Metro. Edison Co. v. Pa. Pub. Util. Comm'n,* 767 F.3d 335, 362 (3d Cir. 2014) (finding that "preemption arguments, other than complete preemption, relate to the merits of the case" and "do not ordinarily raise issues of subject matter jurisdiction").

Neither the Supreme Court nor the Third Circuit has held that a complaint expressly asserting state-law claims that happen to implicate federal common law can create an additional exception to the well-pleaded complaint rule and confer removal jurisdiction on federal courts. *See Oakland,* 969 F.3d at 908 (reversing district court's finding that plaintiff's nuisance claims are removable on ground that such claims are governed by federal common law). The cases cited by Defendants for this supposed proposition are inapposite, as they either involve plaintiff's expressly pleading federal common law causes of action, *see Am. Elec. Power Co. v. Connecticut,* 564 U.S. 410, 418, 421 (2011); *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians,* 471 U.S. 845, 848-50 (1985); *City of Milwaukee v. Illinois* (*"Milwaukee II"*), 451 U.S. 304, 310 (1981); *Treiber & Straub, Inc. v. United Parcel Serv., Inc.,* 474 F.3d 379, 383 (7th Cir. 2007), or involve federal courts exercising subject matter jurisdiction on grounds independent of federal questions, *see Milwaukee I,* 406 U.S. at 93 (proceeding by state plaintiff under Supreme Court's original jurisdiction pursuant to U.S. Const. art. III, § 2, cl. 2); *Banco Nacional de Cuba v.*

Sabbatino, 376 U.S. 398, 406 (1964) (common law conversion claim brought by foreign government in federal district court); *United States v. Standard Oil Co.,* 332 U.S. 301, 302 (1947) (claims brought by United States in federal district court).[8] None of these cases supports the proposition that, in the context of removal, purportedly controlling federal common law issues—that are ***not*** pleaded on the face of a complaint—create the grounds for federal jurisdiction.[9] Hence, existing law

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[8] This category of cases also includes the New York case cited by Defendants as supplemental authority (D.I. 104), as that case was filed in federal district court in the first instance based on diversity jurisdiction. *See City of New York v. BP PLC*, 325 F. Supp. 3d 466 (S.D.N.Y. 2018), *aff'd*, 993 F.3d 81, 94 (2d Cir. 2021) ("Here, the City filed suit in federal court in the first instance. We are thus free to consider the Producers' preemption defense on its own terms, not under the heightened standard unique to the removability inquiry.").

Defendants also cite *United States v. Swiss Am. Bank Ltd,* 191 F.3d 30, 45 (1st Cir. 1999), for the proposition that a case is one "arising under" federal law "Ns long as the source of the rule to be applied is federal." (*See* D.I. 96 at 21-22) *Swiss Am. Bank*, however, concerns a "claim that arises under federal law" for purposes of establishing personal jurisdiction over a foreign defendant under Federal Rule of Civil Procedure 4(k)(2), and does not hold that a claim to which federal law applies as the source of the rule also confers original subject matter jurisdiction under 28 U.S.C. § 1331.

[9] In their notice of removal (although not in their briefs), Defendants cite a single case in which federal common law was relied on as an independent basis for conferring federal jurisdiction: *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 928-29 (5th Cir. 1997). In *Sam L. Majors*, the Fifth Circuit held that a state-law negligence claim arose under federal common law and, thus, gave rise to federal jurisdiction. In reaching that conclusion, the Fifth Circuit relied primarily on *Milwaukee I* and *Nat'l Farmers Union*. Neither of these two cases, however, involved removal on the basis of federal common law. Further, the

governing federal question jurisdiction does not support Defendants' reliance on federal common law to establish removal jurisdiction in this case.[10]

Defendants' reliance on the "artful pleading" doctrine fares no better. The Court rejects Defendants' contention that this doctrine "is not necessarily linked to [the] complete preemption doctrine." (Tr. at *75; see also* D.I. 96 at 20) Under Third Circuit law, the "artful pleading" doctrine is synonymous with the "complete preemption" doctrine for purposes of establishing federal jurisdiction, supporting removal only where there is "a clear indication of a Congressional intention to permit removal despite the plaintiff's exclusive reliance on state law." *Goepel v. Nat'l Postal Mail Handlers Union,* 36 F.3d 306, 310 n.5, 311 (3d Cir. 1994) (holding that "complete preemption" doctrine "has been referred to elsewhere as the 'artful pleading' doctrine"); *see also Inselberg v. New York Football Giants, Inc.,* 661 F. App'x 776, 779 (3d Cir. 2016) (same). Thus, absent a finding of complete preemption of Plaintiff's state-law claims—and Defendants

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reasoning of *Sam L. Majors* on this issue has been criticized by a number of courts. *See, e.g., Connecticut v. Exxon Mobil Corp.,* 2021 WL 2389739, at *4 (D. Conn. June 2, 2021); *Sekata v. FedEx*, 2020 WL 6546211, at *4-5 (N.D. Ohio Nov. 6, 2020); *Bd. of Cty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.* ("*Boulder I*"), 405 F. Supp. 3d 947, 963 (D. Colo. 2019); *Signer v. DHL Worldwide Exp., Inc.,* 2007 WL 1521497, at *5-6 (S.D. Fla. May 22, 2007). This Court, too, finds the reasoning of *Sam L. Majors* unpersuasive.

[10] Defendants' argument that "Section 1331's 'grant of jurisdiction will support claims founded upon federal common law as well as those of a statutory origin,' while correct, is not dispositive, because Plaintiff has not asserted on the face of its complaint any "claims founded upon federal common law." (D.I. 96 at 19) (quoting *Nat'l Farmers Union*, 471 U.S. at 850)

disclaim any intent to show such complete preemption (*see* D.I. 1 ¶ 14)—the "artful pleading" doctrine does not provide an independent basis for removal, regardless of whether federal common law provides the rule of decision on the merits of Plaintiff's state-law claims. None of Defendants' cited cases holds otherwise.[11]

In sum, Plaintiff only asserts state-law claims in its complaint, and Defendants fail to show complete preemption. Therefore, Plaintiff's claims do not arise under federal law for jurisdiction purposes. Federal common law, even if (as Defendants insist) implicated in Plaintiff's state-law claims, does not provide a proper basis for removing this case. *See Oakland,* 969 F.3d at 908; *City of Hoboken v. Exxon Mobil Corp.,* 2021 WL 4077541, at *5-6 (D.N.J. Sept. 8, 2021); *Connecticut,* 2021 WL 2389739, at *7; *Minnesota v. Am. Petroleum Inst.,* 2021 WL 1215656, at *6 (D. Minn.

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[11] *Jarbough v. Att'y Gen. of the United States*, 483 F.3d 184 (3d Cir. 2007), *Interfaith Cmty. Org. v. Honeywell Intl, Inc*., 426 F.3d 694 (3d Cir. 2005), and *First Pa. Bank, N.A. v. E. Airlines, Inc.,* 731 F.2d 1113 (3d Cir. 1984), are all inapposite, as they were filed and adjudicated in federal court and say nothing about the removability of state-law claims or subject matter jurisdiction. In *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n.2 (1981), the Supreme Court stated in a footnote: "[t]he Court of Appeals also affirmed the District Court's conclusion that *Brown II* was properly removed to federal court, reasoning that the claims presented were 'federal in nature.' We agree that at least some of the claims had a sufficient federal character to support removal." In a subsequent case, the Supreme Court clarified that *Moitie*'s "enigmatic footnote" does not create removal jurisdiction on the basis of a federal defense. *Rivet*, 522 U.S. at 477-78 ("We therefore clarify today that *Moitie* did not create a preclusion exception to the rule, fundamental under currently governing legislation, that a defendant cannot remove on the basis of a federal defense.").

Mar. 31, 2021); *Boulder I,* 405 F. Supp. 3d at 964; *Rhode Island v. Chevron Corp.* ("*Rhode Island I*"), 393 F. Supp. 3d 142, 150 (D.R.I. 2019); *Mayor of Baltimore v. BP P.L.C.* ("*Baltimore 1*"), 388 F. Supp. 3d 538, 558 (D. Md. 2019); *Cty. of San Mateo v. Chevron Corp.* ("*San Mateo 1*"), 294 F. Supp. 3d 934, 938 (N.D. Cal. 2018). Therefore, the Court will turn to consideration of the other grounds asserted by Defendants as the basis for federal removal jurisdiction.

B. *Grable* Jurisdiction

Federal jurisdiction exists in a "special and small category" of cases even when a party's claim "finds its origins in state rather than federal law." *Gunn v. Minton,* 568 U.S. 251, 258 (2013). Pursuant to what is commonly referred to as "*Grable* jurisdiction," "federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Id.* at 258; *see also Grable & Sons Metal Prods. v. Darue Eng'g & Mfg.,* 545 U.S. 308, 314-15 (2005). Defendants proffer numerous theories for why removal is proper here on the basis of *Grable* jurisdiction, all of which rely on Defendants' contention that Plaintiff's claims "necessarily involve inherently federal issues." (D.I. 96 at 22) In the Court's view, however, no federal issue is "necessarily raised" by this litigation. Accordingly, each of Defendants' efforts to invoke *Grable* jurisdiction fails.

Most broadly, Defendants contend that Plaintiff's claims attempt to "supplant federal energy policy, exercise the federal foreign affairs power, and regulate Defendants' speech over matters of public concern." (*Id.*) The Court disagrees with Defendants' characterization of Plaintiff's claims. Instead, Plaintiff's claims

do not "necessarily raise" any question of federal law. (*See* D.I. 89 at 13; D.I. 101 at 14) The federal interest issues cited by Defendants do not provide "an essential element" for any of Plaintiff's claims; nor does the vindication of rights asserted in Plaintiff's claims "'necessarily turn[] on some construction of federal law.'" *Manning,* 772 F.3d at 163 (quoting *Franchise Tax Bd.,* 463 U.S. at 9).

More specifically, Defendants first argue that *Grable* jurisdiction exists because Plaintiff's claims seek to "strike a new regulatory balance that would supplant decades of national energy, economic, and environmental policies on these issues," and, thus, "cannot be reconciled with the decision-making scheme Congress enacted." (D.I. 96 at 23) These statements are not consistent with a fair reading of Plaintiff's claims. Instead, the claims asserted by Plaintiff are based on Defendants' alleged disinformation campaign—which purportedly led to increased extraction, production, and consumption of petroleum products, without warning to consumers and the public of the risks known to Defendants (*see* D.I. 1-1 ¶¶ 1-12)—and Plaintiff's claims seek only relief directed at recovering damages resulting from that alleged disinformation campaign.[12] In other words, rather than (as Defendants, incorrectly, contend) "inviting a Delaware state court to assert control over an entire industry and its interstate (indeed, international) commercial activities" (D.I. 96 at 23), Plaintiff's claims in reality "do[] not challenge or seek to overturn any federal law, rule, or program," "do[]

[12] Plaintiff clarified during oral argument that the injuries alleged in the complaint are limited to the "incremental impact" resulting from Defendants' "wrongful and tortious promotion and marketing." (Tr. at 24-26)

not claim that Defendants are liable for violating any federal law," and "neither directly nor indirectly seek[] any relief from any federal agency." (D.I. 89 at 15) Whether the indirect, non-judicially-imposed consequences of remediating the disinformation campaign (if, and only if, proven) would lead to changes in "energy, economic, and environmental policies" is not a matter with which the Court can be concerned. *See generally Hollingsworth v. Perry,* 570 U.S. 693, 700 (2013) (holding that federal courts have authority to answer questions "only if necessary to do so in the course of deciding an actual 'case' or 'controversy"). Federal jurisdiction is not created by predictions about extra judicial realities that may (or may not) result from a state court resolving a claim that raises solely matters of state law.

Defendants' next effort to invoke *Grable* jurisdiction rests on the theory that Plaintiff's claims seek to "regulate global climate change, which is an inherently federal matter that is the subject of major international treaties." (D.I. 96 at 24) Contrary to Defendants' assertion, however, nothing in Plaintiff's complaint shows that Plaintiff "seeks to replace these international negotiations and decisions from the representative branches of government with a state-law solution." (*Id.* at 25) Defendants cite generally to international agreements on climate change, including the Kyoto Protocol of 1997 and the Paris Agreement of 2015, but fail to identify any "essential element" in Plaintiff's claims that would require a court to affirmatively answer any foreign affairs question. *See*

Manning, 772 F.3d at 163. Hence, no federal question concerning foreign affairs is "necessarily raised."[13]

Nor does Defendants' assertion that they may be subject to both state and federal regulatory and enforcement regimes (*see* D.I. 96 at 23-24) bring this case within the "slim category" of *Grable* jurisdiction. As the Northern District of California stated in rejecting this same position, "[o]n the defendants' theory, many (if not all) state tort claims that involve the balancing of interests and are brought against federally regulated entities would be removable. *Grable* does not sweep so broadly." *San Mateo I,* 294 F. Supp. 3d at 938.

Finally, Defendants contend that Plaintiff's claims would "necessarily incorporate affirmative federal constitutional elements imposed by the First Amendment." (D.I. 96 at 26) The Court is not persuaded. While the cases cited by Defendants

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[13] *See Oakland*, 969 F.3d at 906-07 (rejecting *Grable* jurisdiction, which had been argued to be based on theory "that the Cities' state-law claim implicates a variety of 'federal interests,' including . . . foreign policy"); *Minnesota*, 2021 WL 1215656, at *5 ("The Court declines Defendants' invitation to interpret this well-pleaded consumer protection action as a wholesale attack on all features of global fossil fuel extraction, production, and policy."); *Boulder I*, 405 F. Supp. 3d at 966 ("Certainly Defendants have not shown that any interpretation of foreign policy is an essential element of Plaintiffs' claims."); *Rhode Island I*, 393 F. Supp. 3d at 151 ("By mentioning foreign affairs, . . . Defendants seek to raise issues . . . that are not perforce presented by the State's claims."); *Baltimore I*, 388 F. Supp. 3d at 559 ("[D]efendants' generalized references to foreign policy wholly fail to demonstrate that a federal question is 'essential to resolving' the City's state law claims."); *San Mateo I*, 294 F. Supp. 3d at 938 ("The mere potential for foreign policy implications . . . does not raise the kind of actually disputed, substantial federal issue necessary for *Grable* jurisdiction.").

address the constitutional boundaries for the remedies available under state-law defamation and libel claims, they do not hold that the Constitution supplies a necessary element for these state-law claims. *See Milkovich v. Lorain J. Co.,* 497 U.S. 1, 20 (1990) (holding that statement of "opinion" reasonably implying false and defamatory facts is subject to same culpability requirements as statement of facts); *Hustler Magazine, Inc. v. Falwell,* 485 U.S. 46, 52 (1988) (holding that public figures may not recover for intentional infliction of emotional distress by reason of publication without showing both falsity and actual malice); *Phila. Newspapers, Inc. v. Hepps,* 475 U.S. 767, 774-75 (1986) (holding that private figure plaintiff alleging defamation must prove falsity in cases involving media defendant's speech on matters of public concern); *New York Times Co. v. Sullivan,* 376 U.S. 254, 279-80 (1964) (holding that public figures may recover for defamation only when they can prove both falsity of statement and that statement was made with actual malice). Defendants cite no authority for the proposition that the First Amendment—through *Grable* jurisdiction—converts state law causes of action involving speech into federal causes of action for purposes of assessing jurisdiction.[14] To the contrary, the Third Circuit has repeatedly found that defamation claims, despite having "profound First Amendment implications," are still "fundamentally a state cause of action." *Tucker v. Fischbein,* 237 F.3d 275, 281 (3d

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[14] The only case Defendants cite that was found removable based on *Grable* jurisdiction involves a complaint that "expressly states that [the defendant] violated the United States Constitution in describing [the plaintiffs state-law wrongful termination] claims." *Ortiz v. Univ. of Med. & Dentistry of New Jersey*, 2009 WL 737046, at *1 (D.N.J. Mar. 18, 2009).

Cir. 2001) (internal citation omitted); *see also Manning,* 772 F.3d at 164 ("[E]ven if Plaintiffs' claims were ***partially*** predicated on federal law, federal law would still not be necessarily raised.").[15]

Many of the decisions Defendants cite in support of their attempts to invoke *Grable* jurisdiction were litigated to judgment in state courts, and then subsequently reviewed by the Supreme Court.[16] (*See* D.I. 101 at 20) State and local governments routinely litigate nuisance and similar claims that purportedly "target speech on matters of public concern"—and do so in state court.[17] (*See id.* at 19) It follows that, while

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[15] Defendants contended during oral argument that Plaintiff was "seeking to get a prior restraint or to regulate speech." (Tr. at 47) In response, Plaintiff clarified that "a global prior restraint order injunction . . . is just not part of this case." (*Id.* at 93) Plaintiff confirmed that it would not "be looking for prospective injunctive relief against speech of any kind," and that Defendants "can continue to market, but they may be subject to liability in Delaware for continued false and deceptive conduct." (*Id*. at 93-94, 103)

[16] *See Milkovich*, 497 U.S. at 6-7 (Ohio); *Hepps*, 475 U.S. at 770 (Pennsylvania); *New York Times*, 376 U.S. at 256 (Alabama).

[17] *See, e.g., Delaware ex rel. Denn v. Purdue Pharma L.P.,* 2018 WL 1942363, at *1 (D. Del. Apr. 25, 2018) (remanding Delaware's case to state court where Delaware alleged, in part, that defendants "misrepresented material facts or suppressed, concealed, or omitted material facts" concerning their products and compliance with federal drug laws); *State v. Purdue Pharma LP*, 2019 WL 4019929, at *12 (Okla. Dist. Ct. Aug. 26, 2019) (awarding $572 million judgment in nuisance trial where "challenged conduct" was "misleading marketing and promotion of opioids," contributing to statewide opioid crisis); *Cty. of Santa Clara v. Atl. Richfield Co.*, 40 Cal. Rptr. 3d 313, 330 (Cal. Ct. App. 2006) (reversing dismissal of public nuisance claim alleging that defendants misled consumers and public about dangers of indoor lead paint).

Plaintiff's claims may implicate First Amendment considerations, they do not "necessarily raise" a federal issue. *See generally MHA LLC v. HealthFirst, Inc.,* 629 F. App'x 409, 413 (3d Cir. 2015) ("The fact that federal law may be informative . . . does not mean that federal law is a necessary component of the cause of action."); *see also Hoboken,* 2021 WL 4077541, at *7-8 (rejecting argument that First Amendment created *Grable* jurisdiction for state-law claims); *Connecticut,* 2021 WL 2389739, at *10 (same).

As Defendants have failed to demonstrate that a federal issue is "necessarily raised" by Plaintiff's claims, Defendants have likewise failed to show that the Court may exercise *Grable* jurisdiction. The Court need not additionally evaluate whether Defendants can meet any of the other three requirements for invoking *Grable* jurisdiction.

C. Federal Officer Removal Statute

The federal officer removal statute, 28 U.S.C. § 1442(a), is "an exception to the 'well-pleaded complaint' rule." *Kircher v. Putnam Funds Tr.,* 547 U.S. 633, 644 n.12 (2006). The statute permits removal when four elements are met: "(1) the defendant is a 'person' within the meaning of the statute; (2) the plaintiffs' 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) (internal citation omitted). "Unlike the general removal statute, the federal officer removal statute is to be broadly construed in favor of a federal forum." *In re Commonwealth's Motion to Appoint Couns. Against or*

Directed to Defender Ass'n of Phila., 790 F.3d 457, 466-67 (3d Cir. 2015) (internal quotation marks omitted).

Defendants identify a number of activities they contend satisfy the four elements of the federal officer removal statute. They are: (1) securing and expanding fuel supplies during the two World Wars and the Korean War (D.I. 1 ¶¶ 52-57); (2) developing mineral resources on the outer continental shelf ("OCS") (*id.* ¶¶ 59-62, 68-89); (3) operating the Elk Hills Reserve (*id.* ¶¶ 90-107); (4) supplying and managing the Strategic Petroleum Reserve (*id.* ¶¶ 108-13); and (5) producing specialized fuels for the military (*id.* ¶¶ 114-37). Plaintiff does not challenge that Defendants are "person[s]" within the meaning of the statute and only addresses Defendants' colorable federal defenses in passing. (D.I. 89 at 26 n.10) Plaintiff, however, contends that (1) its claims do not rest on activities "for, or relating to" an act under color of federal office, and that (2) Defendants are not "acting under" federal officers. The Court addresses each of these two issues, both of which Defendants must prevail on to establish federal officer removal jurisdiction.

1. Whether Plaintiff's Claims Concern Acts "For, Or Relating To" An Act Under Color Of Federal Office

In the Third Circuit, in order to meet the "for, or relating to" requirement, "it is sufficient for there to be a 'connection' or 'association' between the act in question and the federal office." [18] *Defender Ass'n,* 790 F.3d at 471.

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[18] The removal statute was amended in 2011 to include the phrase "or relating to." The Third Circuit has found this new

Plaintiff points out that several activities Defendants rely on in their effort to show a connection or association between activities and federal office—including the operation of petroleum reserves and the sales of "specialized petroleum products" to the U.S. military—are irrelevant to the analysis because Plaintiff has, in its complaint, expressly disclaimed any "injuries arising on federal property and those that arose from Defendants' provision of fossil fuel products to the federal government." (D.I. 89 at 26; *see also* D.I. 1-1 ¶ 14) Defendants respond that Plaintiff's disclaimer is ineffective because "such 'attempts at artful pleading to circumvent federal officer removal by the use of jurisdictional disclaimers have generally failed.'" (D.I. 96 at 56-59) (quoting *Dougherty v. A O Smith Corp.,* 2014 WL 3542243, at *5 (D. Del. July 16, 2014)) Defendants' reliance on this Court's decision in *Dougherty* is misplaced. Plaintiff's 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 was based."[19] *Id.* at *10. *Dougherty*

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language "broaden[ed] the universe of acts that enable Federal officers to remove to Federal court." *Defender Ass'n*, 790 F.3d at 467. A defendant is no longer required to "show a nexus, a causal connection between the charged conduct and asserted official authority," *Jefferson County v. Acker*, 527 U.S. 423, 431 (1999) (internal citation and quotation marks omitted), as had previously been understood to be required, *see Defender Ass'n*, 790 F.3d at 471-72.

[19] In *Dougherty*, the Court emphasized the distinction between a "jurisdictional claimer" and a "claim disclaimer." The "jurisdictional disclaimer" the Court found ineffective to avoid removal under the federal officer removal statute stated:

recognizes that "federal courts have consistently granted motions to remand" based on "claim disclaimers." *Id.* Defendants have provided no persuasive basis for the Court to depart from that general principle here.[20]

Plaintiff rightly explains that other activities cited by Defendants—including Defendants' activities during the Korean War, the two World Wars, and events occurring still earlier than these—are irrelevant for purposes of removal because Defendants'

> Plaintiffs hereby disclaim any cause of action or claim for recovery that could give rise to federal subject matter jurisdiction under either 28 U.S.C. § 1331 (federal question) or 28 U.S.C. § 1442, subdivision (a)(1) (federal officer).

Dougherty, 2014 WL 3542243, at *3. The "claim disclaimers," on which the Court granted a motion to remand, stated

> Plaintiffs have disclaimed and hereby waive as the basis for any relief in this case exposures that may have occurred during Mr. Dougherty's service in the United States Navy from 1945-1947
>
> To the extent necessary, Plaintiffs also hereby waive all claims against Crane stemming from Mr. Dougherty's asbestos exposure from any federal government job site, and aboard Navy ships or any other military vessel

Id. at *9. The disclaimer asserted by Plaintiff in this case is not a "jurisdictional disclaimer," but a "claim disclaimer."

[20] Defendants also argue that Plaintiff cannot "factually distinguish between its alleged injuries resulting from the combustion of fuels produced at the government's behest, and those resulting from the combustion of fuels sold to any other consumer." (D.I. 96 at 58) However, Plaintiff alleges that the "climatic and environmental responses to those emissions are calculable, and can be attributed to Fossil Fuel Defendants on an individual and aggregate basis" by "quantifying greenhouse gas pollution attributable to Fossil Fuel Defendants' products and conduct." (D.I. 1-1 ¶ 59)

alleged disinformation campaign, which is what the instant case is actually about, started "decades later." (D.I. 89 at 29-30) Defendants are simply wrong in their insistence that all of their production activities, including those pre-dating the misconduct alleged by Plaintiff, are relevant to satisfying the "for, or relating to" requirement. (D.I. 96 at 56 n.13) Defendants' contention relies on their characterization of Plaintiff's claims, which the Court has found to be incorrect. Plaintiff's claims are not based on the "impacts caused by the ***cumulative production*** of petroleum products," as contended by Defendants (*see id.* at 55), but are, instead, premised on the "incremental impacts" caused by Defendants' purported disinformation and the resulting increased production and consumption of petroleum products (*see* Tr. at 24). As Plaintiff has conceded, it will not be entitled to recover any damages if it turns out that Defendants' alleged campaign of deception had "zero effect on extraction, production, [and] consumption of fossil fuel." (*Id.* at 26-27)[21]

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[21] Defendants rely on *Acker*, 527 U.S. at 432, and *Defender Association*, 790 F.3d at 474, for the proposition that the Court must credit their "theory of the case" for purposes of the federal officer removal statute. (*See* D.I. 96 at 55-56) Defendants have misunderstood these cited cases. In *Acker*, whether there was a connection between the claims in the lawsuit and the defendants' official acts rested on disputed readings of an Ordinance imposing occupational taxes, and the Supreme Court credited the defendants' reading because "[t]o choose between those readings of the Ordinance is to decide the merits of this case." *Acker*, 527 U.S. at 433. In *Defender Association*, whether a colorable federal defense existed turned on conflicting interpretations of a federal statute, and the Third Circuit accepted the defendants' counsel's position because "[it] is the question squarely presented by the merits of this case." *Defender Ass'n*, 790 F.3d at 474. While an officer needs not "win his case before he can have it removed," *Willingham v. Morgan*, 395 U.S. 402, 407 (1969), neither *Acker*

Excluding Defendants' activities covered by Plaintiff's disclaimer and those predating the accused misconduct, the only remaining activity relevant to the "for, or relating to" analysis is Defendants' operations under the OCS lease program.[22] The Court finds that, under the Third Circuit's "more permissive view" of the "for, or relating to" test, *Papp,* 842 F.3d at 813, the issue of whether there is a sufficient "connection or association" between Plaintiff's claims and Defendant's participation in the OCS lease program poses a close call.

On one hand, Plaintiff's claims, read as a whole, are focused on "the disinformation and over-promotion campaign," and the recoverable injuries are limited to those stemming from the "incremental impacts" caused by Defendants' alleged deception and misrepresentation. (*See* D.I. 89 at 28; *see also* Tr. at 24) Thus, the connection between the tortious misconduct alleged in the complaint and any of Defendants'

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nor *Defender Association* authorize Defendants to freely rewrite the complaint and manufacture a cause of action explicitly disclaimed by Plaintiff and then ask the Court to accept their "theory of the case" for purposes of removal. See *Minnesota*, 2021 WL 1215656, at *5 ("To adopt Defendants' theory, the Court would have to weave a new claim for interstate pollution out of the threads of the Complaint's statement of injuries. This is a bridge too far."); *City and Cty. of Honolulu v. Sunoco LP*, 2021 WL 531237, at *7 (D. Haw. Feb. 12, 2021) (declining to credit Defendants' theory of case because "Defendants' theory of the case is not a theory for ***this*** case").

[22] Plaintiff also contends, and the Court agrees, that Defendants' activities in connection with the Emergency Petroleum Allocation Act ("EPAA") (*see* D.I. 1 ¶ 63 n.50; see also D.I. 96 at 43-44) are irrelevant here because the EPAA only controlled the allocation and "distribut[ion] [of] ***available*** gasoline supplies." (D.I. 101 at 24-25) The EPAA did not require fossil fuel companies to increase production levels.

individual fossil fuel production activities, including the operations under the OCS lease program, may be "too remote." *Hoboken,* 2021 WL 4077541, at *10; *see also Mayor of Baltimore v. BP P.L.C.* ("*Baltimore II*"), 952 F.3d 452, 466 (4th Cir. 2020).[23] On the other hand, although Defendants' participation in the OCS lease program does not form the source of tort liability asserted by Plaintiff (*see* Tr. at 93) ("[T]he only source of liability is the misrepresentation . . . and the damages are restricted to the impact in Delaware."), the activity nonetheless contributes to the broader theory about "how the unrestrained production and use of Defendants' fossil fuel products contribute to greenhouse gas pollution," *Baltimore II,* 952 F.3d at 467, a theory associated with Plaintiff's alleged injuries.

The Court need not resolve this close question here because, even assuming Defendants' operations under the OCS lease program satisfy the "for, or relating to" test, the relationship between Defendants and the federal government under the OCS leases—for the reasons to be explained in the next section—does not meet the "acting under" requirement. Thus,

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[23] The Fourth and Fifth Circuits have adopted the same, more lenient "connection or association" test as the Third Circuit. See *Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 257-58 (4th Cir. 2017); *Williams v. Lockheed Martin Corp*., 990 F.3d 852, 859-60 (5th Cir. 2021). Several other courts, applying the apparently more stringent "causal nexus" standard, have found that the connection between Defendants' fossil fuel production and a similarly-situated plaintiff's claims is insufficient to satisfy the "for, or relating to" requirement of the federal officer removal statute. *See, e.g., Rhode Island v. Shell Oil Prods. Co.* ("*Rhode Island II*"), 979 F.3d 50, 59-60 (1st Cir. 2020); *Minnesota*, 2021 WL 1215656, at *9; *Honolulu*, 2021 WL 531237, at *6-7; *Boulder I*, 405 F. Supp. 3d at 976-78; *Rhode Island I*, 393 F. Supp. 3d at 152; *San Mateo I*, 294 F. Supp. 3d at 939.

Defendants have failed to show that removal is proper under the federal officer removal statute, even assuming they could meet the "for, or relating to" test.

2. Whether Defendants "Acted Under" Federal Officers

The "acting under" requirement is "to be liberally construed to cover actions that involve an effort to ***assist,*** or to help ***carry out,*** the federal supervisor's duties or tasks." *Papp,* 842 F.3d at 812 (internal citation and quotation marks omitted). The "classic case" of such a relationship is when a private contractor "help[s] the Government to produce an item that it need[s]." *Id.* (internal citation omitted). This relationship "typically involves subjection, guidance, or control." *Watson v. Philip Morris Cos.,* 551 U.S. 142, 151 (2007). The relationship required to support federal jurisdiction under the federal officer removal statute, however, "does ***not*** include simply ***complying*** with the law." *Id.* at 152.

Relying on the declaration of Dr. Richard Tyler Priest (D.I. 98), Defendants contend that the OCS leases "are not merely commercial transactions;" instead, the federal government exerts "substantial control and oversight" over Defendants' operations under the OCS leases (D.I. 96 at 36-38). Defendants further contend that the OCS lease program reflects "the creation of a valuable national security asset for the United States over time," and that the OCS leases entered into with Defendants are intended to achieve the same "federal objective" as would the creation of a "national oil company." (*Id.* at 36-40) The Court does not agree that Defendants' operations under the OCS leases constitute acts under federal officers.

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; specifically, federal statutes and regulations concerning operation, safety, and environmental impacts. *See* 43 U.S.C. § 1337(a)(1) (authorizing OCS leases to be granted "under regulations promulgated in advance"); *see also Ctr. for Sustainable Econ. v. Jewell,* 779 F.3d 588, 594 (D.C. Cir. 2015) (describing OCSLA as statute with "a structure for every conceivable step to be taken on the path to development of an OCS leasing site"). Dr. Priest generally opines that the regulations governing operations under the OCS leases "went well beyond those that governed the average federally regulated entity at that time." (D.I. 98 ¶ 19) Dr. Priest also points to, as additional evidence that Defendants are "acting under" federal officers, the detailed authorities provided by the statutes and regulations to federal officers to enforce compliance. (*See, e.g.,* D.I. 98 ¶¶ 20-29) However, even if a private company is "subjected to intense regulation," compliance with law and regulations is not enough for "acting under" removal. *See Watson,* 551 U.S. at 153; *see also Cty. of San Mateo v. Chevron Corp.* ("*San Mateo II*"), 960 F.3d 586, 603 (9th Cir. 2020) ("Mere compliance with the law, even if the laws are highly detailed, and thus leave an entity highly regulated, does not show that the entity is acting under a federal officer."). Defendants fail to adduce any evidence that the federal government has exercised "subjection, guidance, or control" over Defendants' production activities beyond requiring Defendants to comply with statutes and regulations governing OCS leases.

Fossil fuel production under the OCS leases by private companies does not amount to an effort to assist federal officers to "fulfill basic government needs, accomplish key government tasks, or produce essential government products." *Bd. of Cty. Comm'rs of Boulder Cty. v. Suncor Energy* (*USA*) *Inc.* ("*Boulder II*"), 965 F.3d 792, 823 (10th Cir. 2020). The type of relationship contemplated by the federal officer removal statute requires that Defendants "stand in for critical efforts the federal superior would be required to undertake itself in the absence of a private contract." *Id.; see also Cty. Bd. Of Arlington Cty. v. Express Scripts Pharm., Inc.,* 996 F.3d 243, 253-54 (4th Cir. 2021) (finding that defendants "were essentially acting as the statutorily authorized ***alter ego*** of the federal government" by providing "healthcare services that [Department of Defense] must, by law, provide"); *Papp,* 842 F.3d at 813 (finding defendant "work[ed] under a federal contract to produce an item the government needed, to wit, a military aircraft, and that the government otherwise would have been forced to produce on its own"); *Isaacson v. Dow Chem. Co.,* 517 F.3d 129, 137 (2d Cir. 2008) (finding defendants "provide[d] a product that the Government was using during war," which it otherwise "would have had to produce itself'). Here, by contrast, Defendants fall short of demonstrating that OCS lessees are performing a task that the federal government would otherwise be required to undertake itself.

Additionally, Defendants are not "tailoring [their] output to detailed federal formulations customized to meet pressing federal needs;" rather, they are "leasing federal land to facilitate commercial production of a standardized, undifferentiated consumer product." *Boulder II,* 965 F.3d at 825; *see also Baltimore II,* 952 F.3d at 464 ("[T]he cited provisions seem typical of any

commercial contract. They are incidental to sale and sound in quality assurance."); *San Mateo II,* 960 F.3d at 601 ("The contracts evince an arm's-length business relationship to supply . . . generally available commercial products."). The situation here is unlike those found in cases in which the "acting under" relationship was present. *See, e.g., Baker v. Atl. Richfield Co.,* 962 F.3d 937, 943 (7th Cir. 2020) (finding "acting under" relationship because of, in part, "the compulsion to provide the product to the government's specifications"); *Sawyer,* 860 F.3d at 251-52 (finding that defendant satisfies "acting under" requirement by manufacturing boilers for use aboard U.S. Navy vessels "under the Navy's strict specifications").

Defendants' reference to certain congressional proposals to create a "national oil company" does not help them. (D.I. 96 at 39) These never-enacted bills provide no basis to find a congressional intent to create, directly or indirectly, a "national oil company." Thus, Defendants' contention that they are "acting as agents" to achieve the same "federal objective" (i.e., facilitating oil and gas production on the OCS) as would a speculative, non-existent "national oil company" lacks merit.

In sum, the relationship between Defendants and the federal government under the OCS leases does not satisfy the "acting under" requirement.[24] Hence,

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[24] The First, Fourth, Ninth, and Tenth Circuits have examined the same OCS leases at issue here, and all have rejected Defendants' argument that Defendants acted under federal officers by developing mineral resources pursuant to OCS leases. *See Rhode Island II*, 979 F.3d at 59; *Baltimore II*, 952 F.3d at 465-68; *San Mateo II,* 960 F.3d at 602; *Boulder II*, 965 F.3d at 820-27.

Defendants have not shown that removal is proper under the federal officer removal statute.

D. Jurisdiction Under The OCSLA

The OCSLA provides federal district courts with subject matter 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 . . . ." 43 U.S.C. § 1349(b)(1). To determine whether OCSLA jurisdiction is present, the Court assesses (1) whether there is an "operation," and (2) whether the case "arise[s] out of, or in connection with" such "operation."

The parties disagree as to the proper legal standard to be applied with respect to the first prong of the test. Relying on the text of the statute, Defendants contend the inquiry is "did the defendant engage in an 'operation conducted on the [OCS]' that entails the 'exploration' and `production' of 'minerals.'" (D.I. 96 at 29) Under that interpretation, Defendants argue they satisfy the "operation" requirement. *See Honolulu,* 2021 WL 531237, at *3 ("Here, the parties do not dispute that Defendants, at least to some extent, engage in operations of exploration, development, or production on the outer Continental Shelf."). Plaintiff, citing Fifth Circuit precedent, counters that the inquiry is whether "the activities that caused the injury constituted an 'operation' conducted on the OCS' that involved the exploration and production of minerals." (D.I. 89 at 50) (citing *In re Deepwater Horizon,* 745 F.3d 157, 163 (5th Cir. 2014)) On this view, Plaintiff continues, Defendants' "activities that caused the injury" are not an "operation" because Plaintiff's claims are rooted in Defendants' alleged disinformation

campaign, not in Defendants' fossil fuel production. *See Baltimore I,* 388 F. Supp. 3d at 566-67 ("[T]he City's claims are based on a broad array of conduct, including defendants' failure to warn consumers and the public of the known dangers associated with fossil fuel products, all of which occurred globally."); *Boulder I,* 405 F. Supp. 3d at 978-79 ("Defendants were not sued merely for producing fossil fuel products, let alone for merely producing them on the OCS."). The Court need not resolve this dispute because Defendants fail the second prong of the test; thus, they cannot invoke federal jurisdiction under the OCSLA even if they have demonstrated an "operation."

Under the second prong, the Fifth Circuit—which has substantial familiarity with OCSLA cases—has held that Defendants must show a "but for" connection between "the cause of action and the OCS operation." *Deepwater Horizon,* 745 F.3d at 163. Here, Defendants cannot satisfy this requirement. Defendants contend only that their purportedly "significant" OCS production has contributed in some way to Plaintiff's injuries (D.I. 96 at 30), but they do not argue that Plaintiff would not have been injured "but for" Defendants' operations on the OCS.[25] *See generally Recar v. CNG Producing Co.,* 853 F.2d 367, 369 (5th Cir. 1988) (finding plaintiff's activities fall within scope of OCSLA because plaintiff "would not have been injured `but for' the maintenance work he was performing and supervising on the platform").

[25] It appears that Defendants have conceded this point, as they stated during oral argument that "no one could prove but-for causation as to any particular one [i.e., an OCS operation] because it is so global in nature." (Tr. at 84)

Having failed to satisfy the "but for" requirement, Defendants instead argue that the requirement should not apply here. Defendants first contend that the "but for" requirement is "contrary to the text of the statute, which requires only a 'connection.'" (D.I. 96 at 31) However, as the Supreme Court has observed, "[t]he phrase 'in connection with' provides little guidance without a limiting principle." *Maracich v. Spears,* 570 U.S. 48, 49 (2013). In the Court's view, the "but for" requirement as construed by the Fifth Circuit is a reasonable principle that limits the scope of the phrase. *See Deepwater Horizon,* 745 F.3d at 163 ("Even though one can hypothesize a 'mere connection' between the cause of action and the OCS operation too remote to establish federal jurisdiction, this court deems § 1349 to require only a 'but-for' connection.").

Defendants also contend that while a "but for" connection would be sufficient to meet the requirement for OCSLA jurisdiction, it is not necessary. (D.I. 96 at 31) The Court agrees, however, with the decisions that have interpreted the "but for" connection as a necessary requirement; decisions that have also, therefore, declined to find jurisdiction based on a more tangential relationship. *See, e.g., Robin v. Creighton-Smith,* 488 F. Supp. 3d 459, 465 (E.D. La. 2020) ("Plaintiffs' contractual claims . . . are at best only tangentially related to such an operation and do not come close to meeting the but-for test required to give rise to jurisdiction."); *Bd. of Comm'rs of the Se. La. Flood Prot. Auth.-E. v. Tenn. Gas Pipeline Co.,* 29 F. Supp. 3d 808, 837 (E.D. La. 2014) (finding no OCSLA jurisdiction because "Plaintiff's injury would have occurred regardless of operations on the OCS,

and the but-for test is not satisfied.").[26] Several district courts that have considered the identical issue raised by similarly-situated defendants have uniformly held that a but-for connection is necessary for finding OCSLA jurisdiction. The Court sees no persuasive reason to depart from these holdings.[27]

Since Defendants fail to demonstrate a "but for" connection between their "operations" on the OCS and Plaintiff's claims, they cannot rely on the OCSLA for

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[26] The Court is not persuaded by Defendants' contention to the contrary that "[c]ourts have routinely held that OCSLA jurisdiction is proper in the absence of a but-for causation." (D.I. 96 at 31-32) In the two cases cited by Defendants (both predating *Deepwater Horizon*), the dispute would not have existed absent an OCS operation. *See EP Operating Ltd. P'ship v. Placid Oil Co.,* 26 F.3d 563, 565 (5th Cir. 1994) ("The current dispute arose out of EP's attempt to recover some value from these unused and depreciating assets on the OCS."); *United Offshore Co. v. S. Deepwater Pipeline Co.,* 899 F.2d 405, 407 (5th Cir. 1990) ("The present dispute . . . involves a contractual dispute over the control of an entity which operates a gas pipeline [from the OCS to the coast of Louisiana].").

[27] *See Hoboken*, 2021 WL 4077541, at *9 ("Although it is more than plausible that fossil fuels originating from the OCS led to the effects of global warming that Hoboken is now facing, this does not amount to but-for causation."); *Minnesota*, 2021 WL 1215656, at *10 ("Defendants offer no basis for the Court to conclude that Minnesota's alleged injuries would not have occurred but-for the Defendants' extraction activities on the OCS."); *Rhode Island I*, 393 F. Supp. 3d at 151-52 ("Defendants have not shown that these injuries would not have occurred but for those operations."); *Baltimore I*, 388 F. Supp. 3d at 566-67 ("[D]efendants offer no basis to enable this Court to conclude that the City's claims for injuries stemming from climate change would not have occurred but for defendants' extraction activities on the OCS."); *San Mateo I*, 294 F. Supp. 3d at 938-39 ("[D]efendants have not shown that the plaintiffs' causes of action would not have accrued ***but for*** the defendants' activities on the shelf").

federal jurisdiction. Removal, therefore, cannot be justified on the basis of OCSLA jurisdiction.

E. Attorneys' Fees And Costs

Plaintiff seeks an award of attorneys' fees and costs pursuant to 28 U.S.C. § 1447(c), which provides that "[a]n order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." (*See also* D.I. 101 at 38-40) Plaintiff waived its opportunity to request attorneys' fees and costs by raising this issue for the first time in its reply brief. *See, e.g., Cottillion v. United Refining Co.,* 781 F.3d 47, 61 (3d Cir. 2015) (finding argument made for first time in reply brief waived). In any event, Plaintiff's request lacks merit. "Absent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal." *Martin v. Franklin Capital Corp.,* 546 U.S. 132, 141 (2005). "[D]istrict courts retain discretion to consider whether unusual circumstances warrant a departure from the rule in a given case." *Id.* Although the overwhelming weight of authority in other similar cases against fossil fuel companies supports Plaintiff, the Third Circuit has not decided these issues. Defendants have also supplied new record evidence, including Dr. Priest's declaration, concerning their operations under the OCS leases. (*See* Tr. at 54-55) It was not objectively unreasonable for Defendants to wish to litigate these removal grounds again, in this Circuit. Finally, the Court perceives no bad faith in Defendants' narrowing of their bases for removal, and agrees with Defendants that Plaintiff's lengthy complaint is fairly susceptible to different interpretations (although the Court

believes the best reading is the one Plaintiff has clarified intended).

For all of these reasons, the Court will deny Plaintiff's request for attorneys' fees costs.

IV. CONCLUSION

For the foregoing reasons, Plaintiff's motion to remand (D.I. 86) will be granted, Plaintiff's request for attorneys' fees and costs will be denied. An appropriate order follows.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-2728

CITY OF HOBOKEN

v.

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

Appellants.

(D.N.J. No. 2:20-cv-14243)

No. 22-1096

STATE OF DELAWARE, ex rel. Kathleen Jennings, Attorney General of the State of Delaware

v.

BP AMERICA INC.; BP P.L.C.; CHEVRON CORPORATION; CHEVRON U.S.A. INC.; CONOCOPHILLIPS; CONOCOPHILLIPS COMPANY; PHILLIPS 66; PHILLIPS 66 COMPANY; EXXON MOBIL CORPORATION; EXXONMOBIL OIL CORPORATION; XTO ENERGY INC.; HESS CORPORATION; MARATHON OIL CORPORATION; MARATHON PETROLEUM CORPORATION; MARATHON PETROLEUM COMPANY LP; SPEEDWAY LLC; MURPHY OIL CORPORATION; MURPHY USA INC.; SHELL PLC; SHELL USA; CITGO PETROLEUM CORPORATION; TOTALENERGIES SE.; OCCIDENTAL PETROLEUM CORPORATION; DEVON ENERGY CORPORATION; APACHE CORPORATION; CNX RESOURCES CORPORATION; CONSOL ENERGY INC.; OVINTIV, INC.; AMERICAN PETROLEUM INSTITUTE; TOTALENERGIES MARKETING USA, INC.,

Appellants.

(D. Del. No. 1:20-cv-01429)

SUR PETITION FOR REHEARING

Present: McKEE, JORDAN, SHWARTZ, RESTREPO, BIBAS, PORTER, and MATEY, Circuit Judges

The petition for rehearing filed by Appellants in the above-captioned case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc is **DENIED**.

By the Court,

s/ Stephanos Bibas
Circuit Judge

Dated: September 30, 2022

Sb/cc: All Counsel of Record