United States Court of Appeals
For the Second Circuit

August Term 2022

Argued: September 23, 2022
Decided: September 27, 2023

No. 21-1446-cv

STATE OF CONNECTICUT, by its
Attorney General, WILLIAM M. TONG,

Plaintiff-Appellee,

v.

EXXON MOBIL CORPORATION,

Defendant-Appellant.

Appeal from the United States District Court
for the District of Connecticut
No. 20-cv-1555, Janet C. Hall, *Judge*.

Before: SULLIVAN, NARDINI, and PÉREZ, *Circuit Judges*.

In 2020, the State of Connecticut sued Exxon Mobil Corporation ("Exxon Mobil") in Connecticut state court, alleging that Exxon Mobil had engaged in a decades-long campaign of deception to knowingly mislead and deceive Connecticut consumers about the negative climatological effects of the fossil fuels that Exxon Mobil was marketing to those consumers. Based on these allegations, Connecticut asserted eight claims against Exxon Mobil, all under the Connecticut Unfair Trade Practices Act ("CUTPA"), Conn. Gen. Stat. § 42-110b(a). Exxon Mobil removed the case to federal district court, invoking subject-matter

jurisdiction under the federal-question statute, 28 U.S.C. § 1331, the federal-officer removal statute, *id.* § 1442(a)(1), and the Outer Continental Shelf Lands Act (the "OCSLA"), 43 U.S.C. § 1349(b)(1)(A), as well as on other bases no longer pressed in this appeal. The district court (Hall, *J.*) rejected each of Exxon Mobil's theories of federal subject-matter jurisdiction, and thus remanded the case to state court.

On appeal, we are tasked with deciding (1) whether the well-pleaded complaint rule is subject to any exceptions other than the three we enumerated in *Fracasse v. People's United Bank*, 747 F.3d 141, 144 (2d Cir. 2014); (2) whether Connecticut's CUTPA claims raise the federal common law of transboundary pollution as a necessary element for establishing Exxon Mobil's liability; (3) whether Exxon Mobil was "acting under" an "officer . . . of the United States" and "under color of such office," 28 U.S.C. § 1442(a)(1), for purposes of the allegedly deceptive acts forming the basis of Connecticut's CUTPA claims; and (4) whether such acts "aris[e] out of, or in connection with," Exxon Mobil's "operation[s]" on the outer continental shelf (the "OCS"), where Exxon Mobil extracts oil and gas on land leased from the federal government, 43 U.S.C. § 1349(b)(1)(A). We answer each of these questions in the negative. As a result, we **AFFIRM** the district court's order remanding this case to the Connecticut Superior Court for the District of Hartford.

AFFIRMED.

BENJAMIN W. CHENEY, Assistant Attorney General (Matthew I. Levine, Deputy Associate Attorney General; Daniel M. Salton, Jonathan E. Harding, Assistant Attorneys General, *on the brief*), *for* William M. Tong, Attorney General of Connecticut, Hartford, CT, *for Plaintiff-Appellee* State of Connecticut.

KANNON K. SHANMUGAM, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Washington, DC (Justin Anderson, Kyle

Smith, William T. Marks, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Washington, DC; Theodore V. Wells, Jr., Daniel J. Toal, Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, NY; Kevin M. Smith, Tadhg Dooley, Wiggin & Dana LLP, New Haven, CT; Robert M. Langer, Wiggin & Dana, LLP, Hartford, CT; Patrick J. Conlon, Exxon Mobil Corporation, Spring, TX, *on the brief*), *for Defendant-Appellant* Exxon Mobil Corporation.

RICHARD J. SULLIVAN, *Circuit Judge*:

In 2020, the State of Connecticut sued Exxon Mobil Corporation ("Exxon Mobil") in Connecticut state court, alleging that Exxon Mobil had engaged in a decades-long "campaign of deception" to knowingly mislead and deceive Connecticut consumers about the negative climatological effects of the fossil fuels that Exxon Mobil was marketing to those consumers. J. App'x at 8. Based on these allegations, Connecticut asserted eight claims against Exxon Mobil, all under the Connecticut Unfair Trade Practices Act ("CUTPA"), Conn. Gen. Stat. § 42-110b(a). Exxon Mobil removed the case to federal district court, invoking subject-matter jurisdiction under the federal-question statute, 28 U.S.C. § 1331, the federal-officer removal statute, *id.* § 1442(a)(1), and the Outer Continental Shelf Lands Act (the "OCSLA"), 43 U.S.C. § 1349(b)(1)(A), as well as on other bases no longer

pressed in this appeal. The district court (Hall, *J.*) rejected each of Exxon Mobil's theories of federal subject-matter jurisdiction, and thus remanded the case to state court.

On appeal, we are tasked with deciding (1) whether the "well-pleaded complaint rule," *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987), is subject to any exceptions other than the three we enumerated in *Fracasse v. People's United Bank*, 747 F.3d 141, 144 (2d Cir. 2014); (2) whether Connecticut's CUTPA claims raise the "federal common law of transboundary pollution," Exxon Mobil Br. at 30–31; *cf. City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021), as a necessary element for establishing Exxon Mobil's liability; (3) whether Exxon Mobil was "acting under" an "officer . . . of the United States" and "under color of such office," 28 U.S.C. § 1442(a)(1), for purposes of the allegedly deceptive acts forming the basis of Connecticut's CUTPA claims; and (4) whether such acts "aris[e] out of, or in connection with," Exxon Mobil's "operation[s]" on the outer continental shelf (the "OCS"), where Exxon Mobil extracts oil and gas on land leased from the federal government, 43 U.S.C. § 1349(b)(1)(A). For the reasons explained below, we answer each of these questions in the negative. As a result, we **AFFIRM** the

district court's order remanding this case to the Connecticut Superior Court for the District of Hartford.

I. Background

A. Facts

Exxon Mobil is a multinational energy and chemicals company and was ranked the eleventh-largest public company in the world in 2019. Exxon Mobil's "principal business is energy, involving exploration for, and production of, crude oil and natural gas, manufactur[ing] of petroleum products[,] and transportation and sale of crude oil, natural gas and petroleum products." J. App'x at 17 (internal quotation marks omitted). The State of Connecticut alleges that Exxon Mobil has engaged "[f]or several decades" in a "campaign of deception" that "has misled and deceived Connecticut consumers about the negative effects of its business practices on the climate." *Id.* at 8. More specifically, Connecticut alleges as follows:

Since the 1950s, Exxon Mobil's corporate leadership has been aware of research indicating that the combustion of fossil fuels – such as those produced and marketed by Exxon Mobil – causes dangerous changes to the Earth's climate. Indeed, much of that research has been *internal* research, commissioned by Exxon Mobil and conducted by its own in-house scientists. Throughout the 1970s and

1980s, as the issues of "climate change and its potentially catastrophic consequences" grew increasingly prevalent in American public discourse, *id.*, Exxon Mobil's leadership grew increasingly concerned that the company would face catastrophic economic consequences if consumer markets for oil and gas were to be softened by widespread public acceptance of what Exxon Mobil's own internal research had long suggested: that fossil fuels play a significant role in causing climate change.

In an effort to protect its profitability and revenues, Exxon Mobil began publishing and commissioning "advertisements, interviews, . . . research papers," and other public "statements casting doubt on th[e] connection" between fossil fuels and global warming in various media outlets consumed by "tens of thousands of Connecticut residents, nearly every week." *Id.* at 26–41, 218. Even after "finally admitting publicly that combustion of fossil fuels contributes to climate change," Exxon Mobil continued to publish advertising "falsely portraying [itself] as a corporation committed to seriously combatting climate change." *Id.* at 9.

The effect of this "campaign of deception" has been that "many consumers still do not believe the scientific facts" of climate change and its causal connection

to fossil fuels. J. App'x at 10. Closer to home, it has resulted in "Connecticut consumers" purchasing "more oil and gasoline than [they] would have purchased had the reality of climate change been disclosed." *Id.* at 9, 43. As a corollary, it has also "resulted in the stifling of an open marketplace for renewable energy, thereby leaving consumers unable to reasonably avoid the detrimental consequences of fossil[-]fuel combustion." *Id.* at 46.

B. Procedural History

On the basis of this alleged "campaign of deception," the State of Connecticut, by and through its Attorney General, commenced this suit against Exxon Mobil on September 14, 2020 in the Connecticut Superior Court for the District of Hartford. Connecticut's complaint asserted eight claims – all under CUTPA, which provides that "[n]o person shall engage in . . . unfair or deceptive acts or practices in the conduct of any trade or commerce." Conn. Gen. Stat. § 42-110b(a). The Connecticut Supreme Court has read two distinct causes of action into CUTPA – one for "decepti[on]," *Caldor, Inc. v. Heslin*, 215 Conn. 590, 597 (1990) (explaining that a deception claim requires a "material" "representation, omission, or practice" that is "misleading" when interpreted "reasonably under the circumstances"), and the other for "unfairness," *Ulbrich v. Groth*, 310 Conn. 375, 409 (2013) (noting that the sole element of an unfairness claim

is "a [trade] practice [that] is unfair"). Here, Connecticut brought four claims for deception and four for unfairness. Based on these claims, Connecticut sought numerous forms of relief, including, among others: (1) an injunction enjoining Exxon Mobil from continuing to engage in deceptive practices under CUTPA; (2) civil penalties of $5,000 per willful violation of CUTPA; (3) disgorgement of revenues attributable to unfair practices under CUTPA; and (4) "[e]quitable relief" for "deceptive acts and practices that will require future climate[-]change mitigation," including in the form of "restitution" for "all expenditures attributable to Exxon[ ]Mobil that [Connecticut] has made and will have to make to combat the effects of climate change." J. App'x at 51 ¶¶ 3, 5 (citing Conn. Gen. Stat. § 42-110m).

Exxon Mobil timely removed Connecticut's action to federal district court. In its notice of removal, Exxon Mobil invoked federal subject-matter jurisdiction under the federal-question statute, the federal-officer removal statute, and the OCSLA, as well as other statutory provisions no longer relevant on appeal. Following removal, Connecticut moved to remand the case to state court. After a full round of briefing and oral argument, the district court issued a lengthy opinion rejecting all of Exxon Mobil's asserted grounds for federal jurisdiction and

granting Connecticut's motion to remand the case to the Connecticut Superior Court for the District of Hartford.

Exxon Mobil timely appealed.

II. Appellate Jurisdiction

As a general matter, "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." 28 U.S.C. § 1447(d). However, such an order *is* "reviewable by appeal" where, as here, the case "was removed pursuant to [28 U.S.C. §] 1442," i.e., the federal-officer removal statute. *Id.*

Until recently, there was "persistent circuit conflict" as to the scope of appellate review authorized by this statutory exception in cases, like this one, where "the removing defendant [had] premised removal [only] *in part* on the federal-officer removal statute." Petition for a Writ of Certiorari at 11, *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532 (2021) (No. 19-1189), 2020 WL 1557798, at *11 (emphasis added). Eight circuits – including our own – had taken the view that appellate review under section 1447(d)'s exception for federal-officer removal cases "is . . . confined to a defendant's removal arguments under the federal[-]officer . . . removal statute[]." *BP P.L.C.*, 141 S. Ct. at 1537; *see State Farm*

Mut. Auto. Ins. Co. v. Baasch, 644 F.2d 94, 96–97 (2d Cir. 1981) (so holding); *Rhode Island v. Shell Oil Prods. Co.*, 979 F.3d 50, 55–56, 58–59 (1st Cir. 2020) (holding same; collecting earlier Second, Third, Fourth, Eighth, Ninth, Tenth, and Eleventh Circuit cases holding likewise), *cert. granted, judgment vacated*, 141 S. Ct. 2666 (2021). Three other circuits, meanwhile, had taken the broader view that "[i]nstead, a court of appeals may review the merits of *all* theories for removal that a district court has rejected," so long as one of those theories was federal-officer jurisdiction. *BP P.L.C.*, 141 S. Ct. at 1537; *cf. Mayor & City Council of Baltimore v. BP P.L.C.*, 952 F.3d 452, 460 & n.4 (4th Cir. 2021) (rejecting this view but collecting Fifth, Sixth, and Seventh Circuit cases that had adopted it), *vacated and remanded,* 141 S. Ct. 1532.

In 2021, however, the Supreme Court resolved that circuit split and held that "[o]nce" a "defendant's notice of removal [has] assert[ed] [that] the case is removable in accordance with" the federal-officer removal statute and "the district court [has] ordered the case remanded to state court, the *whole* of its order be[comes] reviewable on appeal." *BP P.L.C.*, 141 S. Ct. at 1538 (emphasis added; internal quotation marks omitted). Accordingly, our holding in *Baasch*, 644 F.2d at 96–97, has been abrogated, and we have appellate jurisdiction under

section 1447(d) to "consider *all* of [Exxon Mobil's asserted] grounds for removal," *BP P.L.C.*, 141 S. Ct. at 1543 (emphasis added).

III. Standard of Review

"We review an appeal from an order of remand de novo." *Agyin v. Razmzan*, 986 F.3d 168, 173–74 (2d Cir. 2021). Whether on appeal from a grant or a denial of a motion to remand, the "defendant always has the burden of establishing that removal is proper." *United Food & Com. Workers Union, Loc. 919 v. CenterMark Props. Meriden Square, Inc.*, 30 F.3d 298, 301 (2d Cir. 1994) (citation and alteration omitted). We "construe the removal statute narrowly, resolving any doubts against removability," *Platinum-Montaur Life Scis., LLC v. Navidea Biopharmaceuticals, Inc.*, 943 F.3d 613, 617 (2d Cir. 2019) (internal quotation marks omitted), out of "regard for the rightful independence of state governments," *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 32 (2002) (internal quotation marks omitted).

IV. Discussion

"An[] action that was originally filed in state court may be removed by a defendant to federal court only if the case originally could have been filed in federal court." *Marcus v. AT&T Corp.*, 138 F.3d 46, 52 (2d Cir. 1998) (citing 28 U.S.C.

§ 1441(a)). We must therefore decide whether any of the eight claims in Connecticut's complaint – all of which were brought under a single state statute, namely, CUTPA – triggers either federal-question jurisdiction, federal-officer jurisdiction, or special jurisdiction under the OCSLA. If so, then removal was proper, and we must reverse the district court's remand order. *See Broder v. Cablevision Sys. Corp.*, 418 F.3d 187, 194 (2d Cir. 2005) ("A single claim over which federal[] . . . jurisdiction exists is sufficient to allow removal." (citing *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 562–63 (2005); *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 164–66 (1997))). If not, then the district properly remanded this case to state court, and we must affirm.

A. Federal-Question Jurisdiction

1. The Well-Pleaded Complaint Rule

The federal-question statute provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the . . . laws . . . of the United States." 28 U.S.C. § 1331. Our analysis of whether a case "aris[es] under the . . . laws . . . of the United States," *id.*, is "governed by the 'well-pleaded complaint rule,'" *Caterpillar*, 482 U.S. at 392. Under that rule, federal-question jurisdiction generally "exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint" and cannot be triggered "on the basis of a

federal defense, . . . even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue." *Id.* at 393.

The principal effect of the well-pleaded complaint rule is to "make[] the plaintiff the master of the claim," meaning that – subject to certain exceptions – plaintiffs "may avoid federal jurisdiction by exclusive reliance on state law." *Id.* at 392. In other words, the "general rule" is that federal courts lack federal-question jurisdiction "if the complaint does not affirmatively allege a federal claim." *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 6 (2003); *see New York ex rel. Jacobson v. Wells Fargo Nat'l Bank, N.A.*, 824 F.3d 308, 315 (2d Cir. 2016) ("[F]ederal-question jurisdiction is invoked by and large [where] plaintiffs plead[] a cause of action created by federal law." (quoting *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005)) (alteration omitted)).

Here, of course, Connecticut's complaint did not "affirmatively" allege any "cause of action created by federal law." *Wells Fargo*, 824 F.3d at 315 (quoting *Grable*, 545 U.S. at 312). Instead, all eight of Connecticut's CUTPA claims "exclusive[ly] rel[y] on state law." *Caterpillar*, 482 U.S. at 392. As a result, Exxon

Mobil can establish federal-question jurisdiction only by demonstrating that Connecticut's suit falls within an exception to the well-pleaded complaint rule.

2. Defining Our Exceptions to the Well-Pleaded Complaint Rule

While there are "certain exceptions to [the well-pleaded complaint] rule," *Beneficial*, 539 U.S. at 6, our precedents make clear that they are tightly circumscribed. We have stated that exactly "*[t]hree* situations exist in which a complaint that does not allege a federal cause of action may nonetheless 'arise under' federal law for purposes of subject[-]matter jurisdiction." *Fracasse*, 747 F.3d at 144 (emphasis added; alteration omitted). They are: (1) "if Congress expressly provides, by statute, for removal of state[-]law claims"; (2) "if the state[-]law claims are completely preempted by federal law"; and (3) "in certain cases if the vindication of a state[-]law right necessarily turns on a question of federal law." *Id.* Here, Exxon Mobil urges that the three exceptions we enumerated in *Fracasse* are non-exhaustive. We disagree.

a. The Artful-Pleading Doctrine

First, Exxon Mobil argues that "the artful-pleading doctrine" provides a broad, flexible exception from the well-pleaded complaint rule that extends beyond the bounds of the "the three situations identified in . . . *Fracasse*." Reply Br. at 12. That argument is squarely foreclosed by our precedents, which make

clear that the artful-pleading doctrine covers a *subset* of the exceptions encompassed by *Fracasse* – and not the other way around. As we explained in *Romano v. Kazacos*, "[t]he artful[-]pleading rule applies when Congress has either (1) so completely preempted, or entirely substituted, a federal law cause of action for a state one that plaintiff cannot avoid removal by declining to plead 'necessary federal questions,' or (2) expressly provided for the removal of particular actions asserting state[-]law claims in state court." 609 F.3d 512, 519 (2d Cir. 2010) (quoting *Rivet v. Regions Bank*, 522 U.S. 470, 475 (1998)). Connecticut, then, is plainly right to observe that under *Romano*, the "two circumstances" that comprise the artful-pleading doctrine are simply, "in opposite order, the first and second exceptions articulated in *Fracasse*." Connecticut Br. at 16–17.

Nevertheless, Exxon Mobil persists in attempting to cast the artful-pleading doctrine in looser, more conceptually capacious terms than those we used in *Romano*. Such efforts are unavailing.

Principally, Exxon Mobil cherry-picks language from our decision in *NASDAQ OMX Group, Inc. v. UBS Secs., LLC*, 770 F.3d 1010 (2d Cir. 2014), to argue that the artful-pleading doctrine's scope is not limited to the "complete-preemption" and "special-removal-statutes" scenarios outlined in

Romano. Instead, Exxon Mobil argues, the gravamen of the doctrine is that "a court must look beyond the plaintiff's characterization of its claims and determine whether 'the real nature' of the complaint is 'federal,' even if the plaintiff is attempting to 'avoid federal jurisdiction by framing its claims in terms of state law.'" Exxon Mobil Br. at 27 (quoting *NASDAQ OMX*, 770 F.3d at 1019) (alterations omitted). But Exxon Mobil's view of the artful-pleading doctrine is foreclosed by binding precedent.

For starters, our decision in *NASDAQ OMX* repeatedly cited both *Fracasse* and *Romano* with approval, *see* 770 F.3d at 1018, 1019, 1020, 1024, 1027, which counsels strongly against reading it as either a repudiation of, or a departure from, the strict rules we laid down in those earlier cases. Indeed, *NASDAQ OMX* affirmatively supports the proposition that the outer boundaries of the artful-pleading doctrine lie *within* – not *beyond* – those of the three *Fracasse* exceptions. *See id.* at 1019 ("*[E]ven in the absence of artful pleading*, federal jurisdiction may properly be exercised over a 'special and small' category of actual state claims that present significant, disputed issues of federal law[, i.e., the third category identified in *Fracasse*]." (quoting *Gunn v. Minton*, 568 U.S. 251, 258 (2013)) (emphasis added). Finally, Exxon Mobil's preferred reading of *NASDAQ OMX*

cannot be squared with the Supreme Court's admonition that "[a]lthough" lower courts "occasionally" invoke the artful-pleading doctrine as authorizing a free-wheeling inquiry into "whether the real nature of the claim is federal, regardless of plaintiff's characterization, most of them *correctly* confine this practice to areas of the law" that are "completely pre[]empted" by "federal substantive law." *Caterpillar*, 482 U.S. at 393, 397 n.11 (emphasis added; citation and alteration omitted).

Unable to find support in *our* precedents for its broad view of the artful-pleading doctrine, Exxon Mobil turns to out-of-Circuit caselaw. Once again, its efforts are unsuccessful. For example, Exxon Mobil invokes the Sixth Circuit's decision in *Ohio ex rel. Skaggs v. Brunner*, 629 F.3d 527 (6th Cir. 2010), for the proposition that the "exceptions to the well-pleaded complaint rule" we recognized in *Romano* are not "the only situations in which the [artful-pleading] doctrine applies." Reply Br. at 12. But there, the Sixth Circuit merely stated that "'the artful[-]pleading doctrine allows removal where federal law completely preempts a plaintiff's state-law claim,' or *perhaps* (it is not clear after *Rivet*) where federal issues necessarily must be resolved to address the state[-]law causes of action." *Brunner*, 629 F.3d at 532 (quoting *Rivet*, 522 U.S. at 475) (emphasis added;

alteration omitted). As a result, *Brunner* does nothing to advance Exxon Mobil's argument that the artful-pleading doctrine extends beyond the boundaries of the three *Fracasse* exceptions.

To the extent that *Brunner* definitively holds that the artful-pleading doctrine encompasses complete-preemption situations, it is fully consistent with *Romano*. *See Romano*, 609 F.3d at 519 ("The artful[-]pleading rule applies when Congress has . . . completely preempted, or entirely substituted, a federal[-]law cause of action for a state one."). Insofar as *Brunner*'s dicta suggests that "perhaps" the artful-pleading doctrine also provides an exception from the well-pleaded complaint rule "where federal issues necessarily must be resolved to address the state[-]law causes of action," 629 F.3d at 532, that exception is one of the three that we recognized in *Fracasse*, *see* 747 F.3d at 144 ("[A] complaint that does not allege a federal cause of action may nonetheless arise under federal law for purposes of [federal-question] jurisdiction . . . if the vindication of a state[-]law right necessarily turns on a question of federal law." (internal quotation marks and alteration omitted)). It is simply one that we have labeled as a *supplement* to the artful-pleading doctrine, *see NASDAQ OMX*, 770 F.3d at 1019, rather than a constituent part of it, *see Romano*, 609 F.3d at 518–19. Thus, any distinction between

what we have said in *Fracasse* and *Romano* and what the Sixth Circuit said in *Brunner* is a distinction without a difference.[1] And "[i]n any event, our [C]ourt is not bound by the holdings – much less the dicta – of other federal courts of appeal." *Rates Tech. Inc. v. Speakeasy, Inc.*, 685 F.3d 163, 173–74 (2d Cir. 2012).

At bottom, we reaffirm what we said in *Romano*: the "artful-pleading doctrine" is simply a label for the first two of the three exceptions to the well-pleaded complaint rule that we would later enumerate in *Fracasse*. *Compare Fracasse*, 747 F.3d at 144 (laying out the three exceptions from the well-pleaded complaint rule), *with Romano*, 609 F.3d at 518–19 (defining the artful-pleading doctrine to comprise the first two exceptions laid out in *Fracasse*). We are unpersuaded by Exxon Mobil's assertions to the contrary.

b. Federal Common Law

Next, Exxon Mobil suggests the existence of a *fourth* exception from the well-pleaded complaint rule, separate from the three we recognized in *Fracasse* (and thus, by extension, from the two we recognized as part of the artful-pleading

---

[1] It should come as no surprise that different circuits – in their "effort[s] to bring . . . order to th[e] unruly doctrine" governing the "special and small category of cases" subject to exceptions from the well-pleaded complaint rule, *Gunn*, 568 U.S. at 258 (internal quotation marks omitted) – have defined and classified those exceptions using slightly different labels and subgroupings. But Exxon Mobil has never suggested that any legal significance attaches to whether we classify the "necessarily raised" exception as a constituent part of, or an external supplement to, the artful-pleading doctrine.

doctrine in *Romano*). Exxon Mobil contends that under that putative exception, "a claim may arise under federal common law for purposes of federal jurisdiction even [though] the complaint does not explicitly invoke federal common law." Reply Br. at 12. We disagree.

Against the backdrop of Exxon Mobil's repeated "insist[ence] that its 'invocation of federal common law is *not* an argument for complete preemption,'" J. App'x at 225 (quoting Dist. Ct. Doc. No. 37 at 17 n.21) (alteration omitted), Exxon Mobil's argument for a "federal-common-law exception" would appear to hinge on the proposition that the well-pleaded complaint rule must yield not only in situations of "complete[] preempt[ion]," *Fracasse*, 747 F.3d at 144; *Romano*, 609 F.3d at 519, but also in certain situations of *ordinary* preemption.[2] That proposition, however, is contrary to "settled law" dating back "since 1887." *Franchise Tax Bd. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 14 (1983). Namely, while "[t]he artful[-]pleading doctrine allows removal where federal law completely preempts a plaintiff's state-law claim," *Sullivan*, 424 F.3d at 272 (quoting *Rivet*, 522 U.S.

[2] "Complete preemption" – sometimes "labeled 'jurisdictional' preemption" – "is distinct from ordinary or 'defensive' preemption, which includes express, field, and conflict preemption." *Whitehurst v. 1199SEIU United Healthcare Workers E.*, 928 F.3d 201, 206 n.2 (2d Cir. 2019) (quoting *Sullivan v. Am. Airlines, Inc.*, 424 F.3d 267, 272 & n.5 (2d Cir. 2005)); *see Sullivan*, 424 F.3d at 272–73 (providing more detailed discussion of the distinction between complete and ordinary preemption).

at 475), the "Supreme Court has left no doubt . . . that . . . . 'a case may *not* be removed to federal court,'" *id.* at 273 (quoting *Caterpillar*, 482 U.S. at 393), "simply because the defendant may raise the defense of ordinary preemption," *id.* (citing *Caterpillar*, 482 U.S. at 393; *Franchise Tax Bd.*, 463 U.S. at 14). Thus, to the extent that Exxon Mobil's argument for a "federal-common-law exception" is really an invitation to find federal-question jurisdiction on the basis of ordinary preemption, we are bound to decline it.

But even if we take Exxon Mobil's argument at face value, it still fails. Principally, Exxon Mobil contends that "[t]his Court's decision in *Republic of Philippines* [*v. Marcos*, 806 F.2d 344 (2d Cir. 1986)] is illustrative" of a freestanding federal-common-law exception from the well-pleaded complaint rule. Exxon Mobil Br. at 24. On the contrary, our holding there was that when "the plaintiff pleads a state cause of action," its "'well-pleaded' complaint can be read in *one of two ways* to implicate federal law." *Republic of Philippines*, 806 F.2d at 354 (emphasis added). Those two exceptions from the well-pleaded complaint rule, respectively, were simply the "second" and "third" of the three exceptions we would later recognize in *Fracasse*. 747 F.3d at 144. Thus, when we discussed "federal common law" in *Republic of Philippines*, we did so exclusively in the context of assessing

whether "the federal common law . . . of foreign affairs" either (1) is "so powerful . . . as to" completely preempt a "state cause of action for conversion" that was "brought by a foreign government against its former head of state," or (2) was "raise[d] as a necessary element" of that state conversion claim, insofar as its adjudication would require deciding "whether to honor the request of a foreign government that the American courts enforce the foreign government's directives to freeze property in the United States." 806 F.2d at 354 (internal quotation marks omitted). We said nothing, however, to suggest the existence of a *freestanding* "federal-common-law exception" from the well-pleaded complaint rule.

Unable to rely on *Republic of Philippines*, Exxon Mobil points to three out-of-Circuit decisions – all decided long before the Supreme Court began its "effort[s] to bring some order to th[e] unruly doctrine" of exceptions to the well-pleaded complaint rule, *Gunn*, 568 U.S. at 258 – as evidence of a putative fourth category of exception. Once again, Exxon Mobil's efforts fall short.

One of those decisions, *Caudill v. Blue Cross & Blue Shield of N.C.*, 999 F.2d 74 (4th Cir. 1993), has been expressly abrogated by the Supreme Court. *See Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 689 (2006).[3] Thus, it is no longer

[3] Exxon Mobil asserts that *Empire Healthchoice* "abrogated" *Caudill* "on other grounds" than those for which Exxon Mobil invokes it. Exxon Mobil Br. at 24 (italics omitted). We disagree. In *Caudill*,

good law in its own circuit – let alone in ours (or in any other circuit) – and we give it no weight.

The next, *In re Otter Tail Power Co.*, 116 F.3d 1207 (8th Cir. 1997), does not support Exxon Mobil's position at all. There, the Eighth Circuit explained that a "federal question is raised in those cases in which a well-pleaded complaint establishes either [1] that federal law creates the cause of action or [2] that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Id.* at 1213 (citation omitted). Full stop. That court went on to hold that because the plaintiff's state-law claims turned on the "enforce[ability]" of "a prior order of the [federal] district court" – which itself had turned on "the effects of a United States treaty, various federal statutes, *and* the federal common law of inherent tribal sovereignty" – they "necessarily present[ed] a federal question" sufficient to make removal proper. *Id.* at 1214 & n.6 (emphasis added). In sum, the presence of federal common law bore on the Eighth Circuit's

---

the Fourth Circuit held that "state[-]law claims under federal health insurance contracts" raise "federal[-]question jurisdiction" because they are "governed by 'federal common law' that displaces state law." 999 F.2d at 77. In *Empire Healthchoice*, the Supreme Court held that such claims do *not* raise federal-question jurisdiction, *see* 547 U.S. at 683, specifically identified *Caudill* among the lower-court decisions that had erroneously "uph[eld] federal jurisdiction" over such claims, *id.* at 689, and expressly rejected "the dissent's view" that "federal common law" "provides a basis for federal jurisdiction" over such claims – i.e., the very same "view" that the Fourth Circuit had endorsed in *Caudill* and Exxon Mobil now urges us to adopt, *id.* at 690 (internal quotation marks omitted).

jurisdictional analysis *only* to the extent that it was relevant to the question of whether "the vindication of a state[-]law right necessarily turns on a question of federal law" – a question already accounted for in the *Fracasse* framework that Exxon Mobil tries so desperately to resist. 747 F.3d at 144.

That leaves only *Sam L. Majors Jewelers* v. *ABX, Inc.*, 117 F.3d 922 (5th Cir. 1997). There, the Fifth Circuit found federal-question jurisdiction over a state-law "action seeking to recover damages against an airline for lost or damaged shipments," reasoning that "the federal common law . . . controls" such actions. *Id.* at 923. Notably, that court held that such an action may be said to "arise[] under federal common[-]law principles," allowing "jurisdiction [to] be asserted," *even though* the relevant "area of law" (airline regulation) was not "completely preempted by" federal common law (and/or federal statute). *Id.* at 924–25 (emphasis added). If taken at face value, that holding would seem to provide support for Exxon Mobil's view that in addition to *Fracasse*'s three enumerated exceptions from the well-pleaded complaint rule, there exists a distinct exception for actions that are, in some vague sense, "governed by federal common law." Exxon Mobil Br. at 11, 16, 20, 23, 26; Reply Br. at 8, 11.

But not even the Fifth Circuit panel that decided *Sam L. Majors Jewelers* took its own holding at face value. Instead, it took pains to "emphasize" that its "holding [was] necessarily limited" to the highly specific context of "cause[s] of action against an interstate air carrier for claim[s] for property lost or damaged in shipping." *Sam L. Majors Jewelers*, 117 F.3d at 929 n.16. And with good reason. The Fifth Circuit recognized that if its holding were *not* limited to that specific context – in which it could be explained by the unique "historical availability of [a federal] common[-]law remedy [for tort claims against airlines and other interstate carriers], and the statutory preservation of th[at] remedy" – it would have opened a "circuit split[]" on a rule of "national uniformity" and "vital importance." *Id.* Even setting aside the sui generis nature of *Sam L. Majors*, we are bound by our Circuit law and that of the Supreme Court, which has made clear that "a federal cause of action" must "completely preempt[] a state cause of action" in order to trigger the potent legal fiction that "any [state-law] complaint that comes within the scope of th[at] federal cause of action necessarily 'arises under' federal law." *Franchise Tax Bd.*, 463 U.S. at 24 (emphasis added); *see Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987) (cautioning that courts should "be reluctant to find that extraordinary pre[]emptive power," later referred to as complete

preemption, "that converts an ordinary state common[-]law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule"). We decline to disturb that rule today.

* * *

Finding ourselves wholly unpersuaded by Exxon Mobil's efforts to push the boundaries of the exceptions we recognized in *Fracasse* and *Romano*, we reaffirm what we said in those cases. There are three – and only three – exceptions to the "general rule" that "absent diversity jurisdiction, a case will not be removable if the complaint does not affirmatively allege a federal claim." *Beneficial*, 539 U.S. at 6. They apply (1) "if Congress expressly provides, by statute, for removal of state[-]law claims as it did," for example, in the federal-officer removal statute and OCSLA; (2) "if the state[-]law claims are completely preempted by federal law"; and (3) in "certain" circumstances, as outlined in *Gunn v. Minton, see* 568 U.S. at 258, "if the vindication of a state[-]law right necessarily turns on a question of federal law." *Fracasse*, 747 F.3d at 144. Under the law of this Circuit, the "artful-pleading doctrine" refers to nothing more and nothing less than the first and second of these exceptions. *See Romano*, 609 F.3d at 519.

3. Applying Our Exceptions to the Well-Pleaded Complaint Rule

Having clarified the scope of the "three situations . . . in which a complaint that does not allege a federal cause of action may nonetheless 'arise under' federal law for purposes of subject[-]matter jurisdiction," we now turn to the question of whether any of those situations is present here. *Fracasse*, 747 F.3d at 144 (alteration omitted).

a. The Artful-Pleading Exceptions: Special Removal Statutes and Complete Preemption

Connecticut asserts that "Exxon[ ]Mobil [has] concede[d]" that "the first and second exceptions articulated in *Fracasse*," i.e., the two exceptions encompassed by the artful-pleading doctrine, "do not apply in this case." Connecticut Br. at 16–17. That is half right.

On the one hand, Exxon has indeed "concede[d]" the inapplicability of the "second exception[] articulated in *Fracasse*." *Id*. That exception applies only "if [the removed complaint's] state[-]law claims are *completely* preempted by federal law," *Fracasse*, 747 F.3d at 144 (emphasis added), and in the proceedings below, Exxon Mobil "insist[ed] that its 'invocation of federal common law is *not* an argument for complete preemption,'" J. App'x at 225 (quoting Dist. Ct. Doc. No. 37 at 17 n.21 (Exxon Mobil's brief in opposition to Connecticut's motion to remand))

(alteration omitted). It is well-settled law that "litigants are bound by the concessions of freely retained counsel." *Jackson v. Fed. Exp.*, 766 F.3d 189, 198 (2d Cir. 2014) (internal quotation marks omitted).[4]

On the other hand, we disagree with Connecticut's assertion that "Exxon[ ]Mobil [has] concede[d]" that "the *first* . . . exception[] articulated in

---

[4] In turn, "the cardinal principle of judicial restraint – if it is not necessary to decide more, it is necessary not to decide more – counsels us" to refrain, *Miller v. Metro. Life Ins. Co.*, 979 F.3d 118, 124 (2d Cir. 2020) (citation omitted), from reaching out to address the now-purely-hypothetical "issue of whether federal common law can" *ever* "give rise to complete preemption" or otherwise "convert state claims into federal claims in the same manner as complete preemption under federal statutes," J. App'x at 225. To be sure, that question is an important one that calls out for resolution in this Circuit. For a time, our precedents had suggested that federal common law *can* have complete preemptive effect. *See, e.g.*, *Nordlicht v. N.Y. Tel. Co.*, 799 F.2d 859, 862 (2d Cir. 1986). Later, we issued two opinions seemingly suggesting that it cannot. *See Marcus v. AT&T Corp.*, 138 F.3d 46, 53–54 (2d Cir. 1998); *Fax Telecommunicaciones Inc. v. AT&T*, 138 F.3d 479, 486 (2d Cir. 1998). A little over two years ago, in *City of New York v. Chevron Corp.*, 993 F.3d 81 (2d Cir. 2021), we acknowledged that the question remains open to at least some extent in our Circuit. There, we held that actions bringing state-law tort claims "to recover damages for the harms caused by global greenhouse gas emissions" were "governed by federal common law" – but only for purposes of raising "an affirmative federal preemption defense" on a theory of *ordinary* preemption. *Id.* at 91, 94, 99 (citation and alteration omitted). In so holding, we took care to distinguish a "fleet of [recent, out-of-Circuit] cases" holding that federal common law "does not give rise to" *complete* preemption, for purposes of satisfying "the heightened standard unique to the removability inquiry." *Id.* at 94. We explained that, due to the distinction between complete (jurisdictional) preemption and ordinary (defensive) preemption, *see Sullivan*, 424 F.3d at 272–73, our holding would "not conflict with" these out-of-Circuit cases, "even if [they were] correct," *City of New York*, 993 F.3d at 94. But we reserved the question of whether they *were*, in fact, "correct" to hold that federal common law cannot give rise to complete, jurisdictional preemption. *Id.* If Exxon Mobil had not explicitly conceded that its "invocation of federal common law . . . is not an argument for complete preemption," Dist. Ct. Doc. No. 37 at 17 n.21, this case would squarely present the question we reserved in *City of New York*. But since Exxon Mobil *did* so concede, our resolution of that question – as important as it may be – will have to wait for another day.

Fracasse" is inapplicable here. Connecticut Br. at 16–17 (emphasis added). That exception applies "if Congress expressly provides, by statute, for removal of state law claims," *Fracasse*, 747 F.3d at 144 – or, to use the slightly more precise language of *Romano*, "when Congress has . . . expressly provided for the removal of *particular [types of] actions* asserting state[-]law claims in state court," 609 F.3d at 519 (emphasis added). The Supreme Court, for example, has held that the Price-Anderson Act, 42 U.S.C. § 2014(hh), presents an exception to the well-pleaded complaint rule because it "expressly provides for removal of [tort actions arising out of nuclear accidents] brought in state court even when they assert only state-law claims." *Beneficial*, 539 U.S. at 6. Throughout the course of this litigation, Exxon Mobil has argued that analogous provisions in the federal-officer removal statute and OCSLA are applicable to Connecticut's complaint here and thus provide independent bases for federal subject-matter jurisdiction and removal. These arguments were therefore preserved below and pressed on appeal, and are not waived, abandoned, or otherwise conceded. *See Bookings v. Gen. Star Mgmt. Co.*, 254 F.3d 414, 418–19 & n.4 (2d Cir. 2001).[5]

---

[5] Exxon Mobil invokes the federal-officer removal statute and OCSLA as "independent grounds for removal," Exxon Mobil Br. at 2 – that is, independent of ordinary federal-question jurisdiction under 28 U.S.C. § 1331. Accordingly, we address these ostensibly "independent grounds," *id.*, only after considering whether the federal-question jurisdiction lies under *Fracasse*'s third

b. The *Grable*/*Gunn* Exception: "Necessarily Raised"

And so, whether Exxon Mobil properly removed this case under the federal-question statute boils down to whether Connecticut's pleading implicates the third exception identified in *Fracasse* as "a complaint that does not allege a federal cause of action [but] may nonetheless 'arise under' federal law for purposes of subject[-]matter jurisdiction" because the "vindication of [the] state[-]law right [asserted] necessarily turns on a question of federal law." 747 F.3d at 144 (alteration omitted). To determine whether Connecticut's pleading is among those "certain cases," *id.*, we apply the framework set forth by the Supreme Court in *Grable* and later streamlined in *Gunn*. Under that framework, "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." *Gunn*, 568 U.S. at 258.

As to whether Connecticut's "state-law claim[s] necessarily raise a . . . federal issue," *Grable*, 545 U.S. at 314, Exxon Mobil argues that "the first *Grable* prong is satisfied" because Connecticut's CUTPA claims "implicate[] the federal

---

exception from the well-pleaded complaint rule. *See infra* Sections IV.B, IV.C.

common law of transboundary pollution," Exxon Mobil Br. at 30–31.[6] But that misstates the inquiry. For a "federal issue" to be "necessarily raised," *Gunn*, 568 U.S. at 258, the "mere *presence* of a federal issue in a state cause of action" is insufficient; the pertinent "question of federal law" must be "a *necessary element* of one of the well-pleaded state claims." *City of Rome v. Verizon Commc'ns, Inc.*, 362 F.3d 168, 176 (2d Cir. 2004) (quoting *Merrell Dow*, 478 U.S. at 813) (emphasis added). A "state-law claim 'necessarily' raises federal questions where the claim is affirmatively 'premised' on a violation of federal law." *New York ex rel. Jacobson v. Wells Fargo Nat'l Bank, N.A.*, 824 F.3d 308, 315 (2d Cir. 2016) (quoting *Grable*, 545 U.S. at 314). Conversely, if a "court could . . . resolve[] the case without reaching the federal issues," then "the claims do not necessarily raise a federal issue." *New York v. Shinnecock Indian Nation*, 686 F.3d 133, 140–41 (2d Cir. 2012).

In light of that authority, Exxon Mobil cannot establish *Grable* jurisdiction simply by gesturing toward ways in which "this case" loosely "implicates" the

---

[6] Exxon Mobil also contends that "[t]he first *Grable* prong is satisfied because" Connecticut's claims "threaten the 'careful balance' struck by the federal government 'between the prevention of global warming, a project that necessarily requires national standards and global participation, on the one hand, and energy production, economic growth, foreign policy, and national security, on the other.'" Exxon Mobil Br. at 30–31 (quoting *City of New York*, 993 F.3d at 93). That contention is entirely irrelevant to our *Grable* analysis, since it "may [or may not] give rise to an affirmative federal preemption defense," but it certainly "is not grounds for federal jurisdiction." *City of New York*, 993 F.3d at 94.

same subject matter as "the federal common law of transboundary pollution." Exxon Mobil Br. at 31. Rather, Exxon Mobil must point to a "necessary element" of proving liability under Connecticut's CUTPA claims, *City of Rome*, 362 F.3d at 176, that is "affirmatively premised on [Exxon Mobil's] violation of," *Wells Fargo*, 824 F.3d at 315 (internal quotation marks omitted) – and "could [not be] resolved . . . without" applying, *Shinnecock Indian Nation*, 686 F.3d at 140 – the federal common law of transboundary pollution.

Properly framed, then, our analysis of the first *Grable* prong must start by determining what exactly the "necessary element[s]" of Connecticut's "well-pleaded state claims" *are*. *City of Rome*, 362 F.3d at 176 (quoting *Merrell Dow*, 478 U.S. at 813). As noted above, the Connecticut Supreme Court has read two distinct causes of action into CUTPA – one for "decept[ion]," *Caldor*, 215 Conn. at 597, the other for "unfairness," *Ulbrich*, 310 Conn. at 409.

A CUTPA deception claim has three elements, all of which must be proven to establish liability: (1) "there must be a representation, omission, or other practice likely to mislead consumers"; (2) "the consumers must interpret the message reasonably under the circumstances"; and (3) "the misleading representation, omission, or practice must be material – that is, likely to affect

consumer decisions or conduct." *Caldor*, 215 Conn. at 597 (internal quotation marks omitted).

Here, Connecticut's deception claims center around the allegation that Exxon Mobil has engaged "[f]or several decades" in a "campaign of deception" that "has misled and deceived Connecticut consumers about the negative effects of its business practices on the climate." J. App'x at 8. Thus, Connecticut pleads the elements of its CUTPA deception claims by alleging that Exxon Mobil's "campaign" entailed (1) "false" "representations" and "deceptive omissions" that were "likely to mislead consumers," and that "Connecticut consumers" (2) "reasonably" and (3) "material[ly]" relied on such representations in purchasing "more oil and gasoline than [they] would have purchased had the reality of climate change been disclosed." *Id.* at 8–9, 43–44. Since all three of these allegations must be proven to establish Exxon Mobil's liability for deception under CUTPA, *see Caldor*, 215 Conn. at 597, each constitutes a "necessary element" for purposes of our *Grable* analysis, *City of Rome*, 362 F.3d at 176.

Meanwhile, the sole "element" of a CUTPA unfairness claim is that "a [trade] practice is unfair." *Ulbrich*, 310 Conn. at 409 (citation omitted). That element may be pleaded by alleging any combination of "three criteria," which

need not "[a]ll . . . be satisfied to support a finding of unfairness." *Id.* (citation omitted). Those criteria are "(1) [w]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise – in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; [and] (3) whether it causes substantial injury to consumers, competitors[,] or other businesspersons." *Id.* (citation and alterations omitted). "A practice may be unfair" *either* "because of the degree to which it meets one of the criteria *or* because[,] to a lesser extent[,] it meets all three." *Id.* (emphasis added; citation omitted).

Here, Connecticut's unfairness claims center around the same alleged "campaign of deception" as its deception claims. J. App'x at 8. Thus, Connecticut alleges that Exxon Mobil's allegedly "false and/or misleading statements about its business practices and their environmental impact," *id.* at 47, were "unfair" insofar as they *either* (1) were "in contravention of Connecticut's public polic[ies]" of "promoting truth in advertising" and "protect[ing] its natural resources and environment and . . . control[ling] . . . pollution in order to enhance the health,

safety[,] and welfare of the people of the [S]tate," J. App'x at 46 ¶¶ 189–90 (quoting Conn. Gen. Stat. § 22a-1); (2) were inherently "immoral, unethical, oppressive[,] and/or unscrupulous," *id.* at 46 ¶ 191; *and/or* (3) "caused substantial injury to consumers within the State of Connecticut" by "stifling . . . an open marketplace for renewable energy," *id.* at 46 ¶ 193.

Since these three subsidiary allegations need not "[a]ll . . . be [proven] to support a finding of unfairness," *Ulbrich*, 310 Conn. at 409, Connecticut's unfairness claims "*could* [be] resolved . . . without" adjudicating any given one of them, *Shinnecock Indian Nation*, 686 F.3d at 140 (emphasis added). Thus, none may be counted as a "necessary element" for purposes of our *Grable* analysis. *City of Rome*, 362 F.3d at 176. And as a result, if we determine that any one of these allegations could potentially support a showing of unfairness without raising a federal issue, the rest will drop out from our *Grable* analysis.

With that established, the remainder of our federal-question analysis proceeds straightforwardly. Each of the three necessary elements of Connecticut's deception claim is one that a "court could . . . resolve[] . . . without reaching" the federal common law of transboundary pollution. *Shinnecock Indian Nation*, 686 F.3d at 140. We entirely agree with the district court's analysis of this point:

"Connecticut alleges that ExxonMobil lied to Connecticut consumers, and that these lies affected the behavior of those consumers. The fact that the alleged lies were *about* the impacts of fossil fuels on the Earth's climate" is immaterial. J. App'x at 223–24.

Analyzing the unfairness claim is not much harder. In their briefing, the parties vigorously dispute whether federal pollution law is necessarily raised by Connecticut's allegation that Exxon Mobil's relevant public statements and omissions

> [w]ere in contravention of Connecticut's public policy . . . that "human activity must be guided by and in harmony with the system of relationships among the elements of nature[;] [and that] the policy of the [S]tate of Connecticut is to conserve, improve[,] and protect its natural resources and environment and to control air, land, and water pollution in order to enhance the health, safety[,] and welfare of the people of the [S]tate."

Id. at 46 ¶ 189 (quoting Conn. Gen. Stat. § 22a-1).

But we easily conclude that *other* allegations that Connecticut made in support of a showing of unfairness – most obviously, its allegation that Exxon Mobil's statements and omissions "were in contravention of Connecticut's public policy" of "promoting truth in advertising," *id.* at 46 ¶ 190 – have absolutely nothing to do with "the federal common law of transboundary pollution," Exxon

Mobil Br. at 31. Thus, Connecticut's unfairness claims, like its deception claims, "could [be] resolved . . . without reaching [any] federal issue[]." *Shinnecock Indian Nation*, 686 F.3d at 140.

Because no "federal issue is . . . necessarily raised" by any of Connecticut's CUTPA claims, the *Grable*/*Gunn* exception from the well-pleaded complaint rule is inapplicable here. *Gunn*, 568 U.S. at 258; *see also Grable*, 545 U.S. at 313–14. We therefore affirm the district court's conclusion that it lacked federal-question jurisdiction over this action.

B. Federal-Officer Removal Jurisdiction

Unable to establish federal-question jurisdiction, Exxon Mobil turns to the federal-officer removal statute, which provides for removal jurisdiction over civil actions commenced against "any officer (or person acting under that officer) of the United States or of any agency thereof . . . for or relating to any act under color of such office." 28 U.S.C. § 1442(a)(1). Because Exxon Mobil is not itself a federal officer, it "must satisfy a three-pronged test to determine whether [it] may effect removal" on those grounds. *Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 135 (2d Cir. 2008). Exxon Mobil must (1) show that it is a "'person' within the meaning of the statute who 'acted under a federal officer,'" (2) show that it "performed the actions for which [it is] being sued 'under color of federal office,'" and (3) "raise a

colorable federal defense." *Id.* (quoting 28 U.S.C. § 1442(a)(1); citing *Jefferson County v. Acker*, 527 U.S. 423, 431 (1999)) (alterations omitted). The first two of these prongs "tend to collapse into a single requirement: that *the acts that form the basis for the state civil . . . suit* were performed pursuant to an officer's direct orders or to comprehensive and detailed regulations." *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 488 F.3d 112, 124 (2d Cir. 2007) (emphasis added; internal quotation marks omitted).

Here, Exxon Mobil argues that it is entitled to invoke federal-officer removal jurisdiction based on two categories of its current and historical business dealings with the federal government. Neither argument is convincing.

First, Exxon Mobil notes that it leases oil drilling sites from the federal government on the outer continental shelf, and that "pursuant to" these leases, it "has been subject to myriad federal government requirements" and, pursuant to its role as an "operator and lessee of the Strategic Petroleum Reserve Infrastructure," it has been "required to pay royalties in kind to the federal government." Exxon Mobil Br. at 39–40. Exxon Mobil has made this very argument to five of our sister circuits, all of which have squarely rejected it. *See Rhode Island v. Shell Oil Prod. Co. ("Rhode Island I")*, 979 F.3d 50, 59–60 (1st Cir. 2020),

vacated on other grounds, 141 S. Ct. 2666 (2021); *Rhode Island v. Shell Oil Prod. Co. ("Rhode Island II"),* 35 F.4th 44, 53 n.6 (1st Cir. 2022) (reinstating *Rhode Island I*'s analysis in relevant part); *City of Hoboken v. Chevron Corp.*, 45 F.4th 699, 712–13 (3d Cir. 2022); *Mayor & City Council of Baltimore v. BP P.L.C.*, 31 F.4th 178, 231–34 (4th Cir. 2022); *County of San Mateo v. Chevron Corp.*, 32 F.4th 733, 759–60 (9th Cir. 2022); *Bd. of Cnty. Comm'rs of Boulder Cnty. v. Suncor Energy (U.S.A.) Inc.*, 25 F.4th 1238, 1250–54 (10th Cir. 2022). We find their reasoning persuasive, and we now join them.

"At most, the leases appear to represent arms-length commercial transactions whereby Exxon[ ]Mobil agreed to certain terms . . . in exchange for the right to use government-owned land for their own commercial purposes." *Mayor & City Council of Baltimore*, 31 F.4th at 232 (citation omitted). But as one of our sister circuits has explained, "a person is not" – and cannot be – "'acting under' a federal officer when the person [merely] enters into an arm's-length business arrangement with the federal government." *County of San Mateo*, 32 F.4th at 757. We agree. A "private person's 'acting under' [a federal officer] must involve an effort to *assist,* or to help *carry out*, the duties or tasks of the federal superior," and such a "relationship typically involves subjection, guidance, or control." *Watson*

v. Philip Morris Cos., 551 U.S. 142, 151–52 (2007) (internal quotation marks omitted). "[W]e are skeptical that the willingness to lease federal property or mineral rights to a private entity for the entity's own commercial purposes, without more, could ever be characterized as the type of assistance that is required to trigger the government-contractor analogy." *Mayor & City Council of Baltimore*, 31 F.4th at 232. And in cases where courts *have* found private contractors to be "acting under" federal direction, the key distinguishing factor has been that "the private contractor in such cases is helping the [g]overnment to produce an item that it needs." *Watson*, 551 U.S. at 153. Here, "[t]hough the federal government grants the [outer continental shelf] leases, oil produced under them is produced to sell on the open market, not specifically for the government." *City of Hoboken*, 45 F.4th at 713 (internal quotation marks omitted). Thus, Exxon Mobil's argument based on its leases of government land fails at the first *Isaacson* prong.

Next, Exxon Mobil argues that it "has contributed significantly to the United States military by providing fossil fuels that support the national defense." Exxon Mobil Br. at 38. But the mere fact that Exxon Mobil "help[s] the [g]overnment to produce an item that it needs" is not enough; it must also show that in providing fossil fuels to the military it acts under the "close supervision," "subjection,

guidance, or control" of federal officers. *Watson*, 551 U.S. at 151, 153 (internal quotation marks omitted). In attempting to establish such "close supervision," *id.* at 153, Exxon Mobil focuses extensively (indeed, almost exclusively) on examples of the "significant control over the means of [oil and gas] production," including over Exxon Mobil's predecessor companies, that "the United States government exercised" during World War II, J. App'x at 87 (citation omitted). But World War II ended in 1945, and here, the conduct alleged in Connecticut's complaint dates back no earlier than the 1950s. We are aware of no authority for the proposition that once a private company has acted under the close supervision of the federal government for some discrete period in its history, it may claim "acting-under" status for the rest of time. On the contrary, when Exxon Mobil recently made similar arguments regarding "the federal government's relationship with the oil industry during World War II," the Fifth Circuit flatly rejected them. *Plaquemines Par. v. Chevron USA, Inc.*, No. 22-30055, 2022 WL 9914869, at *1 (5th Cir. Oct. 17, 2022).

That leaves only Exxon Mobil's bald and passing assertion that "to this day, [it] supplies fossil-fuel products to the military under exacting specifications established by the federal government." Exxon Mobil Br. at 39 (citing J. App'x at

89). But while Exxon Mobil has put forth record evidence of the significant *volume* of fossil fuels that it still provides to the military each year, the record contains no indication of the degree of "supervision" or "control" that the federal government exerts over Exxon Mobil's production of such fuels, *Watson*, 551 U.S. at 151, 153. That is fatal for Exxon Mobil, which bears the "burden of providing 'candid, specific and positive' allegations that [it was] acting under federal officers when" its alleged campaign of deception was underway. *In re MTBE*, 488 F.3d at 130 (quoting *Willingham v. Morgan*, 395 U.S. 402, 408 (1969)).

But even if we took Exxon Mobil at its word and assumed, arguendo, that it could satisfy the first *Isaacson* prong by virtue of its contracts to supply fuel to the military, it would clearly fail the second prong. Exxon Mobil cites the Seventh Circuit's decision in *Betzner* v. *Boeing Co.* for the proposition that the "level of federal control" exerted over military suppliers "suffices to constitute direction." Exxon Mobil Br. at 39 (citing 910 F.3d 1010, 1015 (7th Cir. 2018)). But in *Betzner*, the court explained that "the 'acting under the color of federal authority' requirement . . . is distinct from the 'acting under' requirement in the same way a bona fide federal officer could not remove a trespass suit that occurred while he was taking out the garbage – there must be a 'causal connection between the

charged conduct and asserted official authority.'" 910 F.3d at 1015 (quoting *Jefferson County v. Acker*, 527 U.S. 423, 431 (1999)) (other internal quotation marks omitted). The court went on to find that the defendant – a manufacturer and supplier of military aircraft, seeking to remove a former employee's mesothelioma-related tort claims – "ha[d] sufficiently stated a causal connection between the [plaintiff's] negligence claims and its official actions controlled by the military," *because* Boeing's factory "was under the sole direction of the United States Air Force when it manufactured the B-1 and B-1B Lancer aircraft that allegedly caused [the plaintiff's] asbestos-related illnesses." *Id.*

Here, by contrast, there is no such causal nexus between Exxon Mobil's claimed role as a military supplier and the alleged "campaign of deception" that forms the basis of Connecticut's CUTPA claims. For starters, Exxon Mobil can hardly claim that it "was under the sole direction of" the military at any point between 1957 and the present. *Id.*; *see City of Hoboken*, 45 F.4th at 713 (crediting amicus scientist's "estimate[] that the Department of Defense is responsible for less than 1/800th of the world's energy consumption" and rejecting invitation of defendants, including Exxon Mobil, "to hang our jurisdiction on so small a slice of the pie"). Even more fundamentally, this case presents a total mismatch between

the business practices that Exxon Mobil asserts were subject to federal control and supervision (its actual production of fossil fuels) and the business practices of which Connecticut complains (its marketing and public-relations campaigns to assuage consumers' fears about the environmental impacts of those fossil fuels). Thus, Exxon Mobil cannot establish that it "performed the actions for which [it is] being sued 'under color of federal office,'" *Isaacson*, 517 F.3d at 135 (quoting 28 U.S.C. § 1442(a)(1)) (alteration omitted) – i.e., that "the acts that form the basis for [Connecticut's] suit were performed pursuant to an officer's direct orders or to comprehensive and detailed regulations," *In re MTBE*, 488 F.3d at 124 (internal quotation marks omitted).[7] And so at bottom, Exxon Mobil cannot invoke federal-officer removal jurisdiction over Connecticut's CUTPA claims in this action, regardless of whether it attempts to do so by focusing on its status as a

---

[7] We reject Exxon Mobil's efforts to resist this conclusion by asserting that the causal-nexus requirement recognized in pre-2011 cases like *Isaacson* and *In re MTBE* was abrogated by the Removal Clarification Act of 2011. *See* Pub. L. No. 112-51, § 2(b)(1)(A), 125 Stat. 545 (amending the federal-officer removal statute to refer to defendants sued "for *or relating to* any act under color of [federal] office," *id.* (emphasis added), where it had previously referred only to defendants sued "*for* any act under color of such office," 28 U.S.C. § 1442(a) (2006) (emphasis added)). In fact, we have continued to apply the casual-nexus requirement in our binding and precedential opinions long after 2011 – and indeed, as recently as just last year. *See, e.g.*, *Agyin*, 986 F.3d at 179 (finding sufficient nexus where defendant's "*challenged conduct* was directed by federal regulation and he was acting under a federal officer" (emphasis added)).

lessee and tenant of the Department of Interior or as a supplier to the Department of Defense.

C. OCSLA Jurisdiction

In a final effort to establish the removability of Connecticut's action, Exxon Mobil invokes OCSLA, which provides for federal jurisdiction over actions "arising out of, or in connection with . . . any operation conducted on the outer [c]ontinental [s]helf [that] involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer [c]ontinental [s]helf, or [that] involves rights to such minerals." 43 U.S.C. § 1349(b)(1)(A). Exxon Mobil states that it "indisputably engages in significant 'operation[s]' on the outer continental shelf," where its drilling sites "were collectively responsible for producing 690 million barrels of oil and 1.034 trillion cubic feet of natural gas in 2019 alone." Exxon Mobil Br. at 45 (alteration in original). Exxon Mobil argues that Connecticut's "claims arise in part from" these "operations," insofar as its complaint included a background factual allegation that Exxon Mobil "has contributed to climate change by causing the sale of fossil[-]fuel and petroleum products[] in Connecticut and elsewhere," and a prayer for discretionary relief in the form of restitution for "all expenditures attributable to [Exxon Mobil] that the

State has made and will have to make to combat the effects of climate change." *Id.* (quoting J. App'x at 11, 51).

This argument brings us back to ground well-trodden by our sister circuits. Exxon Mobil has made virtually the same argument to five other courts of appeals, all of which have rejected it. *See Rhode Island II*, 35 F.4th at 59–60; *City of Hoboken*, 45 F.4th at 709–12; *Mayor & City Council of Baltimore*, 31 F.4th at 219–22; *County of San Mateo*, 32 F.4th at 751–55; *Bd. of Cnty. Comm'rs of Boulder Cnty.*, 25 F.4th at 1272–75. In that respect, too, we now join them.

The critical question here is whether Connecticut's CUTPA claims "aris[e] . . . in connection with" Exxon Mobil's "operations" extracting oil and gas on the OCS. 43 U.S.C. § 1349(b)(1)(A). To be sure, our sister circuits are not in perfect agreement regarding how to interpret the statutory phrase, "in connection with." The Fourth and Tenth Circuits have construed that phrase to require a but-for causal link between a plaintiff's claims and a defendant's operations on the OCS. *See Mayor & City Council of Baltimore*, 31 F.4th at 220; *Bd. of Cnty. Comm'rs of Boulder Cnty.*, 25 F.4th at 1272–75; *see also In re Deepwater Horizon*, 745 F.3d 157, 163 (5th Cir. 2014) (holding same, albeit in a different context). Those circuits therefore held that since Exxon Mobil and its co-defendants had "concede[d] that some of

their fossil-fuel production occurred outside of the OCS," and the respective plaintiffs' "injuries remain even after we disregard 'whatever slice' of Defendants' fossil-fuel production occurred on the OCS," there could be no "but-for connection satisfying . . . OCSLA's jurisdictional grant." *Mayor & City Council of Baltimore*, 31 F.4th at 221 (4th Cir. 2022) (citing *Cnty. Comm'rs of Boulder Cnty.*, 25 F.4th at 1272–75).

The Third and Ninth Circuits, meanwhile, have held "that the language of [section] 1349(b), 'aris[e] out of, or in connection with,' does not necessarily require but-for causation," *County of San Mateo*, 32 F.4th at 754 (second alteration in original), and instead asked, "do the lawsuits here target actions on or closely connected to the Shelf?" *City of Hoboken*, 45 F.4th at 712. These circuits nonetheless answered that question in the negative, reasoning that plaintiffs' common-law trespass, nuisance, and misrepresentation claims were "all too far away from Shelf oil production" because "the carbon emissions they deplore come not from extracting oil and gas, but burning them: driving cars, heating houses, fueling machinery." *Id.*

We, meanwhile, join the First Circuit in concluding that "we need not wrestle the but-for-causation issue to the ground today," because "despite the[ir]

different approaches to construing [section] 1349(b), our sister circuits' [unified] *application* of [section] 1349(b) leads to a materially similar result" in the case before us. *Rhode Island II*, 35 F.4th at 59–60 (emphasis added; citation and alterations omitted). Even under the Third Circuit's looser construction of the phrase "in connection with," Exxon Mobil still could not establish OCSLA jurisdiction here, because Connecticut's claims still would be "too many steps removed from [Exxon Mobil's] operations on the Shelf." *City of Hoboken*, 45 F.4th at 712.

In fact, Connecticut's CUTPA claims are an additional step *further* removed from those "operations" than was the case in *City of Hoboken*. There, the court explained that the plaintiffs' attempts "to cast their suits as just about misrepresentations" were "belie[d]" by "their own complaints," which "charge[d] the oil companies with not just misrepresentations, but also trespasses and nuisances" allegedly "caused by burning fossil fuels and emitting carbon dioxide." *Id.* But here, as we have explained, *see supra* Section IV.A.3.b, Connecticut *can* accurately "cast [its] suit[] as just about misrepresentations," *City of Hoboken*, 45 F.4th at 712. Connecticut's claims, then, ultimately concern neither "extracting oil and gas" *nor* "burning them," *id.*, but *talking about what happens to the environment when they are burned*. Thus, under any standard we might apply, it is plain that

Connecticut's suit does not "aris[e] . . . in connection with," 43 U.S.C. § 1349(b)(1)(A), Exxon Mobil's "operations" extracting oil and gas on the outer continental shelf and cannot trigger federal jurisdiction under OCSLA.

V. Conclusion

For the foregoing reasons, we **AFFIRM** the district court's order remanding this case to the Connecticut Superior Court for the District of Hartford.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

STATE OF CONNECTICUT, Plaintiff, v. EXXON MOBIL CORPORATION, Defendant.	: : : : : : : : :	CIVIL CASE NO. 3:20-cv-1555 (JCH) JUNE 2, 2021

RULING ON MOTION TO REMAND (DOC. NO. 36)

I. INTRODUCTION

Plaintiff, the State of Connecticut, has moved for an order remanding the case to the Superior Court of Connecticut and awarding costs and attorneys' fees. See Pl.'s. Mot. to Remand to Superior Court and for Costs and Fees ("Pl.'s Mot.") (Doc. No. 36). Defendant, Exxon Mobil Corporation ("ExxonMobil") opposes this Motion. See Br. of Def. in Opp'n to Pl.'s Mot. to Remand ("Def.'s Opp'n") (Doc. No. 37). The court heard argument in connection with the Motion on May 21, 2021. See Min. Entry (Doc. No. 51).

For the reasons stated below, the court grants the Motion to Remand and denies Connecticut's request for costs and fees.

II. BACKGROUND

A. Allegations in the Complaint

ExxonMobil is a "multinational energy and chemicals company" incorporated in New Jersey, with its principal place of business in Texas. Ex. 12, Notice of Removal

("Compl.") (Doc. 1-2 at 34-78) ¶ 47.[1] ExxonMobil manufactures, transports, and sells a variety of fossil fuels, such as crude oil, natural gas, and petroleum products. Id. ¶¶ 53-54. ExxonMobil has sold substantial quantities of fossil fuels in Connecticut, including through gas stations. Id. ¶¶ 59-60.

At least as early as 1957, ExxonMobil has been aware of research indicating that the combustion of fossil fuels causes dangerous changes to the Earth's climate. Id. ¶¶ 63-95. This research includes materials created by Exxon's own employees warning that emissions attributable to fossil fuels "would cause climate variations including a mean temperature increase." Id. ¶¶ 64, 68-70.

In an effort to resist potential decreases in its revenue that might result from widespread acceptance of the conclusion ExxonMobil itself understood--the causal connection between the combustion of fossil fuels and climate change--ExxonMobil published statements casting doubt on this connection. Id. ¶¶ 96-167. These statements took various forms, including advertisements, interviews, and research papers. Id. ¶¶ 100-03. For example, between 1972 and 2001, ExxonMobil published advertisements in the New York Times, a newspaper circulated to tens of thousands of Connecticut residents, nearly every week. Id. ¶¶ 137-39. One such advertisement, published in 1984, disparaged a scientific theory linking fossils fuels to melting polar ice caps and rising sea levels as "[l]ies they tell our children" and a "myth of the 1960s and 1970s." Id. ¶ 144(a). Another, published in 1997, warned readers that efforts to

---

[1] The Complaint uses the label "ExxonMobil" to refer to both Exxon Mobil Corporation and its predecessor entities. Compl. ¶¶ 50-51.

respond to the threat of climate change were based on "speculation" and not on "science." Id. ¶ 144(h).

B. Procedural Background

Connecticut, through its Office of the Attorney General, filed its Complaint in the Superior Court of Connecticut on September 24, 2020. See Compl. The Complaint asserts eight claims under the Connecticut Unfair Trade Practices Act ("CUTPA"). Id. at 38-43.[2]

Count One alleges that ExxonMobil made false and/or misleading statements likely to deceive Connecticut consumers, in order to increase its profits, in violation of section 42-110b of the Connecticut General Statutes. Id. at 36-38. Count Three alleges that ExxonMobil's statements, by "stifling [ ] an open marketplace for renewable energy, [and] thereby leaving consumers unable to reasonably avoid the detrimental consequences of fossil fuel combustion", contravened Connecticut's public policy and constituted an unfair trade practice, also in violation of section 42-110b. Id. at 38-40. Counts Five and Seven assert that a subset of the statements that ExxonMobil made, which Connecticut labels as "greenwashing", i.e., "deceptive [ ] campaigns to portray the company as environmentally conscious", constituted deceptive (Count Five) and unfair (Count Seven) practices, again in violation of section 42-110b. Id. at 40-43. Counts Two, Four, Six, and Eight allege that ExxonMobil's conduct was willful, triggering penalties under section 42-110o. Id. at 38, 40-43. Connecticut seeks damages,

---

[2] The Complaint repeats certain paragraph numbers. The court cites to page numbers in the Complaint when necessary to avoid confusion.

disgorgement of revenues and profits, and multiple forms of injunctive relief, including an order requiring ExxonMobil to "fund a corrective education campaign to remedy the harm inflicted by decades of disinformation." Id. at 44-45.

On October 14, 2020, ExxonMobil filed its Notice of Removal. See Notice of Removal. In addition to listing several grounds for removal, the Notice of Removal asserts that, "[w]hile purportedly brought under state law and in the name of consumer protection, this lawsuit . . . is the latest product of a multi-year plan . . . to change federal climate and energy policy." Id. at 1-2.

Connecticut filed its Motion to Remand on December 2, 2020.[3] See Pl.'s Mot. ExxonMobil filed its Opposition on January 18, 2021. See Def.'s Opp'n. Connecticut filed a Reply on February 8, 2021. See Pl.'s Reply in Supp. of Mot. to Remand ("Pl.'s Reply") (Doc. No. 38). In addition, the parties have filed Notices of Additional Authority, in which they bring to the court's attention decisions by other district courts granting motions to remand in cases involving overlapping issues, as well as a recent decision by the Second Circuit concerning preemption of state nuisance claims pertaining to climate change. See Notices (Docs. Nos. 39, 41, 42, 46, 47).

III. STANDARD OF REVIEW

The federal removal statute permits removal of any "civil action [that] includes . . . a claim arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1441(c). Defendants bear the burden of proving that removal is proper. O'Donnell v.

[3] ExxonMobil filed a Motion to Dismiss for Lack of Personal Jurisdiction on November 13, 2020. See Mot. to Dismiss (Doc. No. 35). This Ruling does not address that Motion.

AXA Equitable Life Ins. Co., 887 F.3d 124, 128 (2d Cir. 2018) (citation omitted); see Syngenta Crop Prot., Inc. v. Henson, 537 U.S. 28, 32 (2002) ("The right of removal is entirely a creature of statute and a suit commenced in state court must remain there until cause is shown for its transfer under some act of Congress." (citation and internal quotation marks omitted)).

IV. DISCUSSION

A. The Well-Pleaded Complaint Rule

ExxonMobil argues that removal of this case is proper, because "federal common law necessarily and exclusively governs claims for interstate and international pollution." Def.'s Opp'n at 16-17. Underlying ExxonMobil's primary arguments for removal is an insistence that Connecticut's claims in this case, though labeled as claims for deceptive and unfair practices under CUTPA, are not all that they seem. In effect, ExxonMobil asks the court to view Connecticut's claims as more akin to nuisance claims that seek to regulate emissions of pollutants through common-law tort liability rules.

This request for the court to look past Connecticut's characterization of its own Complaint is in tension with Supreme Court precedents concerning removal. Section 1441(a) of title 28 authorizes removal of a "civil action brought in a State court of which the district courts of the United States have original jurisdiction." 28 U.S.C. § 1441(a). The Supreme Court has described this provision as limiting removal to "state-court actions that originally could have been filed in federal court." Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987). Thus, according to the Court, in the" [a]bsen[ce] [of] diversity [jurisdiction] . . . federal jurisdiction exists only when a federal question is presented on

the face of the plaintiff's properly pleaded complaint." Id. This rule is known as the "well-pleaded complaint rule." Id.

Two aspects of the well-pleaded complaint rule have significant implications for this case. First, it is beyond dispute that the well-pleaded complaint rule can prevent removal of cases that involve dispositive questions of federal law. As the Supreme Court has explained, "it is [ ] 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, even if the defense is anticipated by the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue." Id. at 393 (citation omitted). Thus, unless a defendant can show that a recognized exception to the well-pleaded complaint rule applies, a defendant's argument that a case involves an issue of federal law--even a dispositive issue of federal law--is not sufficient to remove a case under section 1441(a).

Second, it also well settled that "[t]he well-pleaded complaint] rule makes the plaintiff the master of the claim." Id. at 392. This principle is no mere abstraction: the Supreme Court has expressly observed that a plaintiff "may avoid federal jurisdiction by exclusive reliance on state law." Id. In other words, section 1441(a) afford plaintiffs a degree of strategic control over whether a case will be litigated in state or federal court. Such strategic considerations do not amount to nefarious gamesmanship; they are a direct and recognized result of the text of section 1441(a), as interpreted by the Supreme Court.

With these principles in mind, the court briefly comments on the nature of Connecticut's claims, before discussing the recognized exceptions to the well-pleaded

complaint rule, which are also referred to as corollaries to the rule. Connecticut's Complaint asserts claims for deceptive and unfair practices under CUTPA. See Compl. at 36-43. The claims are asserted pursuant to section 42-110b of the Connecticut General Statutes, and they comprise distinct elements. A deceptive practice claim requires a plaintiff to allege (1) "a representation, omission, or other practice likely to mislead consumers"; (2) that is interpreted "reasonably under the circumstances" by a consumer"; (3) and that is material, i.e., "likely to affect consumer decisions or conduct." Langan v. Johnson & Johnson Consumer Cos., Inc., 95 F. Supp. 3d 284, 288 (D. Conn. 2015) (quoting Smithfield Assocs., LLC v. Tolland Bank, 86 Conn. App. 14, 28 (2004)). With regard to unfair practice claims, Connecticut courts have adopted the "cigarette rule" articulated by the Federal Trade Commission ("FTC"). Ulbrich v. Groth, 310 Conn. 375, 409 (2013) (citation omitted). Under this approach, a plaintiff must allege that a practice (1) "offends public policy as it has been established by statutes, the common law, or otherwise"; (2)" is immoral, unethical, oppressive, or unscrupulous: (3) or "causes substantial injury to consumers." Id. As the Connecticut Supreme Court has explained, "[a] practice may be unfair because of the degree to which it meets one of the[se] criteria or because to a lesser extent it meets all three." Id. (citation omitted).

These causes of action regulate the manner by which business interact with consumers. Consistent with the nature of these claims, Connecticut's claims seek redress for the allegedly deceptive and unfair manner by which ExxonMobil interacted with Connecticut consumers. See supra at 2-3. In short, Connecticut alleges that ExxonMobil lied to Connecticut consumers, and that these lies affected the behavior of those consumers.

The fact that the alleged lies were about the impacts of fossil fuels on the Earth's climate does not empower the court to rewrite the Complaint and substitute other claims for Connecticut's CUTPA claims.[4] Nor does the possibility that Connecticut might have considered including other claims, but declined to do so, permit the court to rewrite the Complaint to add such claims. The court is aware that other states have asserted common-law nuisance and trespass claims against ExxonMobil and other producers of fossil fuels. See, e.g., City of New York v. Chevron, 993 F.3d 81, 88 (2d Cir. 2021). But Connecticut has not asserted such claims in this case. Unless one of the recognized exceptions discussed below applies, 'the plaintiff [is] the master of the claim." See Caterpillar Inc., 482 U.S. at 392.

1. Federal Common Law and Complete Preemption

Under the "'complete pre-emption' doctrine," the "pre-emptive force of a [federal] statute" can be "so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'" Caterpillar Inc., 482 U.S. at 393 (quoting Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 65 (1987)). In other words, "[o]nce an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law." Id. (citing

---

[4] During oral argument, the parties raised the broad language of Connecticut's fifth request for of relief: "An order pursuant to Conn. Gen. Stat. § 42-110m directing ExxonMobil to pay restitution to the State for all expenditures attributable to ExxonMobil that the State has made and will have to make to combat the effects of climate change." See Compl. at 44. The court construes this request for relief as seeking restitution only for expenditures attributable to ExxonMobil's allegedly deceptive and unfair practices in marketing its products, as alleged in the Complaint. Plainly, the court cannot award relief corresponding with conduct that goes beyond the claims in the Complaint.

Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Tr. for S. Cal., 463 U.S. 1, 24 (1983)).

ExxonMobil's argument "that federal common law necessarily and exclusively governs claims for interstate and international pollution", Def.'s Opp'n at 17, parallels the complete preemption doctrine. See Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 11 (2003) ("Because [sections] 85 and 86 provide the exclusive cause of action for such claims, there is, in short, no such thing as a state-law claim of usury against a national bank."). However, perhaps recognizing that the Supreme Court has only applied complete preemption to claims arising under federal statutes, and that the Second Circuit has indicated that the only case in which it ever determined that federal common law can give rise to complete preemption is no longer good law, ExxonMobil insists that its "invocation of federal common law . . . is not an argument for complete preemption." See Def.'s Opp'n at 17 n.21 (emphasis added). Thus, ExxonMobil's argument raises the issue of whether federal common law can convert state claims into federal claims in the same manner as complete preemption under federal statutes.

ExxonMobil's Opposition to the Motion to Remand cites scant authority in support of this proposition.[5] See Def.'s Opp'n at 16-18. In Sam L. Majors Jewelers v. ABX, Inc., 117 F.3d 922 (5th Cir. 1997), the Fifth Circuit stated that, notwithstanding the well-pleaded complaint rule, removal is proper if a "cause of action arises under federal

[5] The two Supreme Court decisions cited by ExxonMobil are inapposite. In City of Milwaukee v. Illinois, 451 U.S. 304 (1981), the Complaint had been filed in federal court, id. at 310, and removal was therefore not an issue. In Standard Fire Insurance Co. v. Knowles, 568 U.S. 588 (2013), the Court addressed whether a plaintiff can evade the scope of the Class Action Fairness Act of 2005 by stipulating that the plaintiff "will not seek damages that exceed $5 million in total." Id. at 590.

common law principles." Id. at 924. However, the Fifth Circuit failed to identify any authority for that proposition. See id. Instead, the Fifth Circuit relied on decisions recognizing that federal question jurisdiction exists when a complaint filed in federal court asserts causes of action under federal common law. See id. at 926 (citing Illinois v. City of Milwaukee, 406 U.S. 91, 100 (1972)) (other citations omitted).

Left undiscussed in Sam. L Majors Jewelers was the proposition, critical to ExxonMobil's argument in the current case, that a court may look past a complaint's labeling of a claim as arising under state law, despite the Supreme Court's declaration that the well-pleaded complaint rule "makes the plaintiff the master of the claim." See Caterpillar Inc., 482 U.S. at 392. This power of federal courts to "convert" a claim pleaded under state law into a federal claim is the essence of the complete preemption exception to the well-pleaded complaint rule. See Metro. Life Ins. Co., 481 U.S. at 65 (observing that "extraordinary preemptive power" is required to "convert [ ] an ordinary state common law complaint into one stating a federal claim for the purposes of the well-pleaded complaint rule"). In other words, the complete preemption doctrine permits courts to look past a plaintiff's labeling of a claim only in limited circumstances; it is a narrow exception to the general rule that the plaintiff--and not the defendant or the court--is "the master of the claim." See Caterpillar Inc., 482 U.S. at 392.

The second case relied on by ExxonMobil, Associated X-Ray Corp. v. Federal Express Corp., No. 3:93-CV-2209 (AVC), 1994 WL 897156 (D. Conn. July 22, 1994), observed that, "[w]hen federal law preempts state law, the court may allow removal . . . even though the complaint appears to allege state law claims," and that district courts have "original jurisdiction over civil actions arising under federal common law." Id. at *3.

However, as in Sam L. Majors Jewelers, the court did not cite any decisions holding that federal courts may disregard plaintiffs' characterizations of their claims in cases involving federal common law. See id.

In a world without the well-pleaded complaint rule, ExxonMobil's position would be straightforward: federal courts should have jurisdiction over important issues of federal law. The problem for ExxonMobil is that the well-pleaded complaint rule does in fact exist. Through this rule, the Supreme Court has given substantial weight to the principle that "the plaintiff [is] the master of the claim." Caterpillar Inc., 482 U.S. at 392. Again, it is beyond dispute that the well-pleaded complaint rule can prevent removal in cases that involve dispositive issues of federal law. Id. at 393. In such cases, given the availability of a petition for a writ of certiorari from a state court of last resort, a defendant's ability to have a federal defense reviewed by a federal court is narrowed, but it is not extinguished. 28 U.S.C. § 1257(a). The complete preemption doctrine bypasses this arrangement, but only when the "pre-emptive force of a [federal] statute . . . [is] 'extraordinary.'" Caterpillar Inc., 482 U.S. at 393. A different system would be constitutionally permissible, but this court must respect and enforce "the federal-state balance approved by Congress." See Gunn v. Minton, 568 U.S. 251, 258 (2013).

Although the Supreme Court has not expressly addressed whether a defendant may remove a case on the ground that purported state claims actually arise under federal common law, the Supreme Court's articulation of the complete preemption standard suggests that the Court views congressional intent, in relation to the text of a specific federal statute, as an essential prerequisite for overcoming the principle that a plaintiff is the master of a complaint. In Metropolitan Life Insurance Co. and Caterpillar

Inc., the Supreme Court justified permitting courts to look past plaintiffs' characterizations of claims on the ground that specific federal statutes evidenced clear congressional intent to impose "extraordinary preemptive power." Metro. Life Ins. Co., 481 U.S. at 65; Caterpillar Inc., 482 U.S. at 393. More recently, in Beneficial National Bank v. Anderson, 539 U.S. 1 (2003), the Supreme Court provided the following formulation:

> [A] state claim may be removed to federal court in only two circumstances--when Congress expressly so provides, such as in the Price-Anderson Act, or when a federal statute wholly displaces the state-law cause of action through complete pre-emption. When the federal statute completely pre-empts the state-law cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law.

Id. at 8 (emphasis added) (internal citation omitted).

The Supreme Court's analysis of the particular claims at issue in Beneficial National Bank is also instructive for the current dispute. In that case, the defendant sought removal of state usury claims. Id. at 9. The Supreme Court examined whether either of two sections of the National Bank Act justified removal of the state usury claims. Id. The first provision at issue, section 85 of the National Bank Act, caps the rates of interest that banks with national operations may charge. See 12 U.S.C. § 85. The Supreme Court observed that this provision "unquestionably pre-empts any common-law or [state] statutory rule that would treat [ ] rates [below the statutory limit] as usurious." Beneficial Nat'l Bank, 539 U.S. at 9. However, because section 85 would merely "provide the petitioners with a complete federal defense," section 85 alone "would not justify removal." Id. (citations omitted).

Section 86 of the National Bank Act goes beyond capping interest rates. This provision establishes a private cause of action on the part of any person who pays "a rate of interest greater than is allowed by section 85." 12 U.S.C. § 86. The Supreme Court held that sections 85 and 86 together permit removal because they evidenced congressional intent to "supersede both the substantive and remedial provisions of state usury laws." Beneficial Nat'l Bank, 539 U.S. at 9-11. As a result, "there is, in short, no such thing a state-law claim of usury against a national bank." Id. at 11.

The Second Circuit, for its part, once recognized federal common law as a basis for removal under the complete preemption doctrine, but the Second Circuit later reconsidered this principle after the Supreme Court's decision in Metropolitan Life Insurance Co. In Nordlicht v. New York Telephone Co., 799 F.2d 859 (2d Cir. 1986), the Second Circuit held that removal of state-law fraud claims challenging a pricing scheme for phone calls was appropriate, because such claims "necessarily ar[o]se under federal common law." Id. at 862.

However, twelve years later, in Marcus v. AT&T Corp., 138 F.3d 46 (2d Cir. 1998), the Second Circuit rejected an argument that federal common law permitted removal of state-law claims relating to telecommunications, noting that the Supreme Court's decision in Metropolitan Life Insurance Co. "sharply circumscribed the availability of removal based on complete preemption." Id. at 54. The Second Circuit concluded:

> Thus, after Metropolitan Life, it is clear that the complete preemption doctrine applies only where Congress has clearly manifested an intent to disallow state law claims in a particular field.

> Given the narrow scope of the complete preemption doctrine after Metropolitan Life, absent some express statement or other clear manifestation from Congress that it intends the complete preemption doctrine to apply, we believe that federal common law does not completely preempt state law claims in the area of interstate telecommunications.

Id.

Shortly thereafter, in Fax Telecommunications Inc. v. AT&T, 138 F.3d 479 (2d Cir. 1998), the Second Circuit again rejected an argument that federal common law enabled removal of state claims. Id. at 486-87. Moreover, the Second Circuit provided the following description of its holding in Marcus:

> In Marcus, we reconsidered Nordlicht in light of the Supreme Court's opinion in Metropolitan Life, which limited the availability of complete preemption removal to "the very narrow range of cases where 'Congress has clearly manifested an intent' to make specific action within a particular area removable."

Id. at 486 (quoting Marcus, 138 F.3d at 54). In this way, the Second Circuit made clear that its only decision squarely recognizing federal common law as a basis for removal no longer is good law.[6] Further, the Second Circuit gave a clear indication that courts should apply complete preemption analysis to arguments for removal relating to federal common law.

---

[6] In Republic of Philippines v. Marcos, 806 F.3d 344 (2d Cir. 1986), the Second Circuit stated that it was "probably" possible for "federal common law in the area of foreign affairs [to be] so 'powerful', or important as to displace a purely state cause of action of constructive trust." Id. at 354. However, acknowledging that it might be "wrong on this point", the Second Circuit ultimately rested its decision in that case on its determination that plaintiff's state-law claim "raises, as a necessary element," an issue of federal law. i.e., what has come to be known as Grable jurisdiction. See id. The Second Circuit's discussion of federal common law as a basis for removal in Republic of Philippines was thus dicta. See Baraket v. Holder, 632 F.3d 56, 59 (2d Cir. 2011) ("[I]t is not substantive discussion of a question or lack thereof that distinguishes holding from dictum, but rather whether resolution of the question is necessary for the decision of the case."). Given the Second Circuit's reconsideration of Nordlicht, this court finds the dicta in Republic of Philippines concerning federal common law to be unpersuasive.

The parties have not identified, and the court has also been unable to find, any decision by the Second Circuit after Nordlicht holding that federal common law can provide a basis for removal.

Here, by arguing that "federal common law necessarily and exclusively governs" Connecticut's claims, Def.'s Opp'n at 17, ExxonMobil asks the court to conclude that there is no such thing as a CUTPA deceptive or unfair practice claim targeting the marketing interactions between a seller of fossil fuels and Connecticut consumers. ExxonMobil argues that "interstate and international pollution" is an area of law that is so saturated with federal interests and regulation that Connecticut's claims are therefore also "federal in nature." See Def.'s Opp'n at 17. However, for the purposes of removal, there is a material difference between a state claim that a federal preemption defense "unquestionably" defeats and a state claim that has been replaced by a federal cause of action with extraordinary preemptive force: only the latter suffices for removal.[7] See Beneficial Nat'l Bank, 539 U.S. at 9-11. The Supreme Court has directed courts to scrutinize congressional intent and statutory text to distinguish between these two situations. See id. at 9 ("Only if Congress intended [section] 86 to provide the exclusive cause of action for usury claims against national banks would the statute be comparable

---

[7] Indeed, the Second Circuit recently commented on the consequences of this distinction for other lawsuits that have been filed by states against producers of fossil fuels. See City of New York, 993 F.3d at 94. In that case, the Second Circuit, which possessed diversity jurisdiction, held that certain state nuisance and trespass claims are preempted by federal common law. Id. at 90-94. After articulating this decision, the Second Circuit "pause[d] [ ] to reconcile [its] conclusion 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. at 93 (brackets, citations, and quotation marks omitted).

The Second Circuit observed that, "[t]he single issue before each of those federal courts was thus whether the defendants' anticipated defense could singlehandedly create federal-question jurisdiction under [section] 1331 in light of the well-pleaded complaint rule." Id. at 94 (citing Caterpillar Inc., 482 U.S. at 398). While the Second Circuit only mentioned these cases in passing, its description of these cases as concerning the effect of an "anticipated federal defense" suggests that the Second Circuit would not view the complete preemption doctrine as applicable in a similar case. As explained above in this Ruling, the Supreme Court has held that a mere "complete federal defense", as contrasted with complete preemption, does "not justify removal." Beneficial Nat'l Bank, 539 U.S. at 9 (citations omitted). The court also notes that the Second Circuit's decision did not address state consumer protection claims.

to the provisions we construed in the Avco and Metropolitan Life cases."). Federal common law provides no criteria by which a court can discern whether a federal cause of action carries the "extraordinary", Caterpillar, 482 U.S. at 393, degree of preemption needed for removal.

The strongest argument for altering this framework in the context of federal common law is the principle that defendants should be able to receive prompt review of dispositive issues of federal law, but the Supreme Court has made quite clear that the well-pleaded complaint rule can frustrate this principle. Caterpillar Inc., 482 U.S. at 393 ("[I]t is [ ] 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, even if the defense is anticipated by the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue."). Thus, although the Supreme Court's decisions pertaining to the well-pleaded complaint rule have not squarely addressed federal common law, the approach it has crafted in cases involving federal statutes is inconsistent with removal of purported state claims merely on the ground that federal common law has displaced such claims. Therefore, the court concludes that ExxonMobil has not shown that federal common law justifies removal of this case.

2. Grable Jurisdiction

ExxonMobil also argues that the doctrine recognized by the Supreme Court in Grable & Sons Metals Products, Inc. v. Darue Engineering & Manufacturing, 545 U.S.

308 (2005), justifies removal of this case. Under the so-called Grable doctrine,[8] removal is proper if a federal issue is "embedded" within a state law claim. See id. at 314. The embedded federal issue must be "(1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." Gunn, 568 U.S. at 258 (citing Grable, 545 U.S. at 313-14). All four of these elements must be met in order to establish federal jurisdiction. Id.

ExxonMobil's primary arguments for Grable jurisdiction concern the potential impact of Connecticut's claims on federal policymaking. See Def.'s Opp'n at 18-20. According to ExxonMobil, Connecticut's claims amount to an "attempt to countermand federal energy and environmental policy." Id. at 18. ExxonMobil argues that the relief sought by Connecticut would disrupt the "careful balance between energy production and environmental protection" that "Congress has already struck." Id. at 19. In addition, ExxonMobil contends that the Complaint's allegations necessarily imply that the federal government was among the victims of ExxonMobil's alleged deception. Id. at 19.

Whether a state claim relates to issues of national concern may demonstrate that an embedded federal issue is "substantial", i.e., the third element for Grable jurisdiction, but such an argument does not address the first Grable element, that is, whether a state claim "necessarily raise[s]" an issue of federal law. See Grable, 545 U.S. at 314. In Grable, the respondent purchased real property that the IRS had seized from the

---

[8] The Second Circuit has also referred to this doctrine as "the substantial federal question exception to the well-pleaded complaint rule." New York v. Shinnecock Indian Nation, 686 F.3d 133, 141 (2d Cir. 2012).

petitioner in satisfaction of a federal tax delinquency. Id. at 310. Five years after the purchase, the petitioner contested ownership of the property through a state quiet title action. Id. The basis for the petitioner's state quiet title claim was an allegation that "the IRS had failed to notify [the petitioner] of its seizure of the property in the exact manner required by [section] 6335(a)" of title 26 of the U.S. Code. Id. at 311. Under the applicable state law, the petitioner was required to "specify the facts establishing the superiority of [its] claim." Id. at 314 (citation and internal quotation marks omitted).

The Supreme Court held that the petitioner's state quiet title claim necessarily raised a federal issue, because "[w]hether [the petitioner] was given notice within the meaning of the federal statute is thus an essential element of its quiet title claim." Id. at 315. The Supreme Court also justified its holding on the ground that "[t]he meaning of the federal tax provision is an important issue of federal law that sensibly belongs in a federal court." Id. at 315. However, it only progressed to this second segment of its analysis after concluding that the federal issue was necessarily raised by the petitioner's state claim. See id. at 314-15. As explained above, federal jurisdiction only exists under the Grable doctrine if "all four . . . requirements are met." Gunn, 568 U.S. at 258.

The requirement that a state claim "necessarily raise" an issue of federal law is underscored by the Second Circuit's decision in New York v. Shinnecock Indian Nation, 686 F.3d 133 (2d Cir. 2012). That case involved a dispute between the State of New York and the Shinnecock Indian Nation over the development of a casino. 686 F.3d at 135-36. The district court conducted a bench trial and issued a permanent injunction prohibiting construction of the casino, unless the Shinnecock Indian Nation complied with state and local laws. Id. at 135. As the Second Circuit observed, whether "federal

Indian law [ ] preclude[d] the application of state and local law to the Tribe's activities . . . was essentially the only issue in dispute at trial." Id. at 139.

Nevertheless, the Second Circuit concluded that New York's claim did not necessarily raise a federal issue, and that the district court therefore lacked jurisdiction over the claim. Id. at 140-41. As the court explained, "if the Shinnecock were to have established that their construction of the casino complied with state and local law, the court could have resolved the case without reaching the federal issues." Id. at 140.

Here, Connecticut's Complaint asserts claims for defective and unfair acts and practices under CUTPA. Compl. at 38-43. The only argument ExxonMobil makes that pertains to the first element of Grable jurisdiction, i.e., the requirement that a state claim "necessarily raise" an issue of federal law, is that CUTPA looks to the Federal Trade Commission's definition of unfair or deceptive acts for guidance. See Def.'s Opp'n at 20. Section 42-110b(b) codifies "the intent of the [Connecticut] legislature that in construing" CUTPA, "the commissioner and the courts of this state shall be guided by interpretations given by the Federal Trade Commission and the federal courts to Section 5(a)(1) of the Federal Trade Commission Act." Conn. Gen. Stat. § 42-110b(b). Section 42-110b(c) authorizes the Commissioner of Connecticut's Department of Consumer Protection to issue regulations implementing CUTPA but requires that "[s]uch regulations shall not be inconsistent with the rules, regulations and decisions of the Federal Trade Commission and the federal courts in interpreting the provisions of the Federal Trade Commission Act." Conn. Gen. Stat. § 42-110b(c).

With respect to section 42-110b(b), to "be guided by interpretations" is not the same as being bound by them. See Conn. Gen. Stat. § 42-110b(b). As the Connecticut

Appellate Court has explained, "[a]lthough the guidance provided by federal law will often be enlightening, federal law is not a straightjacket. . . . In other words, federal law sets a floor for Connecticut law, but not a ceiling." Johnson Elec. Co., Inc. v. Salce Contracting Assocs., Inc., 72 Conn. App. 342, 352 (2002). Further, although Connecticut courts have adopted the framework of analysis embodied by the federal "cigarette rule", this rule requires courts to look to public policy, as announced in Connecticut statutes and common law. See Ulbrich, 310 Conn. at 409; see also Artie's Auto Body, Inc. v. Hartford Fire Ins. Co., 317 Conn. 602, 623-27 (2015) (referring to a Connecticut statute and regulatory scheme to determine whether plaintiffs could prevail on their unfair practice claim). Thus, CUTPA claims do not necessarily raise federal issues by operation of this provision, because a court reviewing a CUTPA claim is not required to apply federal law. Rather, a court refers to federal law for guidance in applying Connecticut law. As for section 42-110b(c), it is not helpful for ExxonMobil because the Complaint does not allege that ExxonMobil violated a regulation issued by the Commissioner of the Department of Consumer Protection. See Compl. at 36-42. Therefore, Connecticut's claims do not necessarily raise a federal issue.

Further, even assuming for the sake of argument that, on account of either of these provisions, Connecticut's CUTPA claims necessarily raise a federal issue, it is not the federal issue on which ExxonMobil focuses. ExxonMobil makes absolutely no argument that "interpretations given by the Federal Trade Commission and the federal courts to Section 5(a)(1) of the Federal Trade Commission Act," Conn. Gen. Stat. § 42-110b(b), are actually disputed or substantial. See Def.'s Opp'n at 20. In other words, with respect to any federal issue involving the FTCA, ExxonMobil has not satisfied the

remaining elements of Grable jurisdiction, i.e., that an issue is substantial, actually disputed, and capable of resolution without disrupting the federal-state balance approved by Congress. Therefore, ExxonMobil has failed to show that this issue can support federal jurisdiction under the Grable doctrine.

The majority of the remainder of ExxonMobil's arguments in support of Grable jurisdiction are different forms of its argument that Connecticut's claims relate to issues of national concern. See Def.'s Opp'n at 20-23. For example, ExxonMobil argues that Connecticut "seeks to impose one state's energy policy on the rest of the country." Id. at 21. ExxonMobil also contends that, because the U.S. Army Corps of Engineers has exercised its delegated authority to regulate . . . issues of sea level rise", Connecticut's claims "ask this court to second-guess the efficacy of the Corps' programs." Id. Although ExxonMobil seeks to fit these arguments into the first element of Grable jurisdiction, see Def.'s Opp'n at 18-22, arguments of this nature address whether an issue is substantial but not whether an issue is necessarily raised. See Grable, 545 U.S. at 314.[9]

Finally, ExxonMobil briefly contends that Connecticut's claims necessarily raise federal issues because they implicate ExxonMobil's free speech rights under the First Amendment. See Def.'s Opp'n at 22. However, the cases on which ExxonMobil relies address the constitutional limits on defamation and libel claims. See Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52 (1988); Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767,

[9] ExxonMobil also repeats its argument concerning federal common law and the well-pleaded complaint rule. See Def.'s Opp'n at 21-22. The court has already addressed why this argument does not justify removal. See supra at 8-16

774-75 (1986); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964). ExxonMobil fails to cite any authority for the proposition that these limits apply to consumer protection claims, nor for the proposition that these limits would apply to such claims in a manner that would embed any First Amendment issues within state law claims--as opposed to providing ExxonMobil with a federal defense. Further, ExxonMobil does not address the "subordinate position in the scale of First Amendment values" that the Supreme Court and the Second Circuit have assigned to commercial speech. See Vugo, Inc. v. City of New York, 931 F.3d 42, 49 (2d Cir. 2019) (quoting Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 477 (1989)). Therefore, the court concludes that ExxonMobil has not shown that Connecticut's claims necessarily raise First Amendment issues for the purposes of the Grable doctrine.

Accordingly, for all of the above reasons, the court concludes that ExxonMobil has failed to show that the Grable doctrine justifies removal.[10]

---

[10] During oral argument, counsel for ExxonMobil repeatedly emphasized the "artful pleading doctrine." The court notes that the phrase "artful pleading doctrine" is absent from both ExxonMobil's 58-page Notice of Removal and 56-page Opposition to the Motion to Remand. See Notice of Removal; Def.'s Opp'n. The phrases "artful pleading" and "artfully pleaded" each appear once on the first page of the Opposition to the Motion to Remand, but without any citation to a specific court decision. See Def.'s Opp'n at 1.

The Supreme Court once appeared to use the term "artful pleading doctrine" as a synonym for complete preemption. See Rivet v. Regions Bank of Louisiana, 522 U.S. 470, 475 (1998) ("The artful pleading doctrine allows removal where federal law completely preempts a plaintiff's state-law claim."). However, the Supreme Court also appeared to describe this doctrine as the "principle that 'a plaintiff may not defeat removal by omitting to plead necessary federal questions.'" Id. (emphasis added).

In Marcus v. AT&T Corp., the Second Circuit analyzed complete preemption and the artful pleading doctrine separately. See 138 F.3d at 53-56. With respect to artful pleading, the Second Circuit concluded that a breach of contract claim was removable, because it was based on a "tariff [ ] filed with the FCC pursuant to the FCA", and, therefore, "the breach of warranty claim necessarily raise[d] a substantial federal question." Id. at 56. The Marcus decision predated the Supreme Court's decision in Grable, which, as discussed above, clarified when a state law claim is removable on account of an embedded issue of federal law. See Grable, 545 U.S. at 314. Subsequently, in Sullivan v. American

B. Federal Officer Removal Statute

ExxonMobil next argues for removal on the basis of the federal officer removal statute. Section 1442(a)(1) authorizes removal of cases involving claims against "any officer (or any person acting under that officer) of the United States or of any agency thereof." 28 U.S.C. § 1442(a)(1). In contrast to "the general removal statute[, which] must be strictly construed, both [section] 1442 and especially its 'acting under' provision must be read broadly." Agyin v. Razman, 986 F.3d 168, 175 (2d Cir. 2021) (citations omitted). Private parties that seek removal on the basis of section 1442 must show that (1) "they are person[s] within the meaning of statute who act[ed] under [a federal] officer", (2) "they performed the actions for which they are being sued under color of [federal] office", and (3) "they [ ] raise a colorable federal defense." Isaacson v. Dow Chem. Co., 517 F.3d 129, 135 (2d Cir. 2008) (citation and quotation marks omitted).

The paradigmatic example of a private party that may avail itself of the federal officer removal statute is "a private company acting pursuant to a contract with the federal government." See Agyin, 986 F.3d at 175. ExxonMobil argues that it fits this description perfectly, given that it has supplied the federal government with fossil fuels for decades. See Def.'s Opp'n at 24-30. As ExxonMobil details in its Opposition,

---

Airlines, Inc., 424 F.3d 267 (2d Cir. 2005), which was decided three months after Grable, the Second Circuit noted that "[t]he precise scope of the artful-pleading doctrine is not entirely clear" and acknowledged only that the doctrine "has been relied upon to support federal-court jurisdiction . . . where a plaintiff's state-law contract claims were construed as asserting rights arising only under federal tariffs." Id. at 272 n.4 (citing Marcus, 138 F.3d at 55-56).

This court understands the artful pleading doctrine as coextensive with Grable, i.e., the artful pleading doctrine prevents a plaintiff from avoiding Grable jurisdiction by omitting, from the plaintiff's statement of a state-law claim, an essential element of the claim that necessarily raises a federal issue that is substantial, actually disputed, and capable of resolution without disrupting the federal-state balance approved by Congress. Compare Marcus, 138 F.3d at 55-56, and Grable, 545 U.S. at 314.

through various arrangements for the production of fossil fuels, the federal government has at times exercised a significant degree of control and direction over ExxonMobil's operations. See id.

However, ExxonMobil must show not merely that it has acted under a federal agency or officer but also that it "performed the actions for which [it] is being sued 'under color of [federal] office." Isaacson, 517 F.3d at 135 (emphasis added) (citation omitted). The Second Circuit has observed "[t]he hurdle erected by this requirement is quite low": a defendant need not show that a plaintiff's claims are "for the very acts" the defendant performed under color of federal office. See id. at 137. Further, a court must "credit [a defendant's] theory of the case" when analyzing this prong of the federal officer removal test. See id.

Nevertheless, under this "causation requirement . . . non-governmental corporate defendants . . . must demonstrate that the acts for which they are being sued . . . occurred because of what they were asked to do by the Government." Id. Thus, although the strength of the connection between acts performed by a defendant under color of federal office and the acts for which the defendant is sued may be "quite low", the nature of this connection must be causal. See id.; see also Cnty. Bd. of Arlington Cnty., Va. V. Express Scripts Pharmacy, No. 20-1031, 2021 WL 1726106, *9 (4th Cir. May 3, 2021) (holding that causal connection was sufficient for removal, where pharmacy defendants "were legally bound to follow [the Department of Defense]'s formulary when administering" a mail-order pharmacy program "and had no discretion to deviate from the DOD contract's requirements").

Here, ExxonMobil provides no explanation as to how the allegedly deceptive statements that form the basis of Connecticut's consumer protection claims have any causal connection to the production of fossil fuels for or under the direction of the federal government. See Def.'s Opp'n at 30-31. Thus, although Connecticut's allegations that ExxonMobil misrepresented the dangers of fossil fuels for the Earth's climate relate to ExxonMobil's production of fossil fuels, ExxonMobil has not shown why the alleged misrepresentations "occurred because of what [it] was asked to do by the Government." See Isaacson, 517 F.3d at 137. Nowhere does ExxonMobil allege that its contracts with the government required it to publish the advertisements and other misrepresentations alleged by Connecticut. ExxonMobil does not assert, or even suggest, that the federal government directed ExxonMobil to make these allegedly deceptive statements. See Notice of Removal ¶¶ 71-108. As a result, the court's obligation to credit ExxonMobil's theory of the case, see Isaacson, 517 F.3d at 137, does not benefit ExxonMobil with respect to this requirement.

Therefore, even assuming that ExxonMobil can satisfy the first and third prongs of the federal officer removal test, ExxonMobil has failed to satisfy the causation requirement. The court concludes that ExxonMobil has not shown that the federal officer removal statute applies to Connecticut's claims.

C. Outer Continental Shelf Lands Act

Next, ExxonMobil argues that the court possesses jurisdiction on account of the Outer Continental Shelf Lands Act ("OCSLA"). See Def.'s Opp'n at 23-25. Section 1349(b)(1) of title 43 of the U.S. Code provides that

> the district courts of the United States shall have jurisdiction of cases and controversies 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, or (B) the cancellation, suspension, or termination of a lease or permit under this subchapter.

43 U.S.C. § 1349(b)(1). The parties have not brought to the court's attention any decisions by the Second Circuit or the Supreme Court discussing the limits of this jurisdictional grant, and the court has not identified any such authority. Instead the parties both cite to decisions of the Fifth Circuit, which appears to have more familiarity with the OCSLA than other Courts of Appeals. In construing the meaning of section 1349(b), the Fifth Circuit has concluded that "the term 'operation' contemplate[s] the doing of some physical act on the [Outer Continental Shelf]." EP Operating Ltd. P'ship v. Placid Oil Co., 26 F.3d 563, 567 (5th Cir. 1994). For example, in Barker v. Hercules Offshore, Inc., 713 F.3d 208 (5th Cir. 2013), the Fifth Circuit concluded that OCSLA jurisdiction existed because a workplace accident occurred on a "jack-up rig attached to the Outer Continental Shelf." Id. at 213.

ExxonMobil's argument on this issue fails because the claims Connecticut has chosen to bring in this case seek redress for deceptive and unfair practices relating to ExxonMobil's interactions with consumers in Connecticut--not for harms that might result from the manufacture or use of fossil fuels, let alone from ExxonMobil's operations on the Outer Continental Shelf.[11] See Compl. at 36-43. As explained above,

---

[11] ExxonMobil submitted voluminous exhibits that suggest Connecticut may have been motivated to bring the current suit as part of a broader strategy among multiple states' attorneys general to seek redress for harms directly caused by climate change. See Exs. 1-8, Notice of Removal (Doc. No. 1-1 at 1-95; Doc. No. 1-2 at 1-3); Exs. 1-5, Def.'s Opp'n (Docs. Nos. 37-2, 37-3, 37-4, 37-5, 37-6). Even assuming that ExxonMobil is correct about Connecticut's motivations, this does not change the fact that

see supra at 6-8, although the Complaint details the harms caused by combustion of fossil fuels in order to explain why ExxonMobil's statements violate CUTPA, these are not the harms that underlie Connecticut's claims in this case.

Therefore, the court concludes that ExxonMobil has failed to show that OCSLA justifies removal of this case.[12]

D. Federal Enclave Jurisdiction

ExxonMobil also contends that the court possesses jurisdiction on the ground that some of the injuries alleged by Connecticut must have occurred on federal enclaves. See Def.'s Opp'n at 34-36. Section 8 of Article I of the U.S. Constitution authorizes Congress "[t]o exercise exclusive Legislation in all Cases whatsoever . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-yards, and other needful Buildings." U.S. Const. art. I, § 8. Although "the issue is not entirely settled," some courts have construed this provision as "establish[ing] federal subject matter jurisdiction over tort claims occurring on federal enclaves, and have allowed such claims to proceed even when applying state law." Jograj v. Enter. Servs., LLC, 270 F. Supp. 3d 10, 16 (D.D.C. 2017) (citing Akin v. Ashland Chem. Co. 156 F.3d 1030, 1034 (10th

Connecticut has chosen, in this case, to bring claims seeking redress for deceptive and unfair practices relating to the manner by which ExxonMobil has interacted with consumers in Connecticut.

[12] Although OCSLA jurisdiction is not a familiar issue within the Second Circuit, the court notes that other district courts have rejected similar arguments to those raised by ExxonMobil in this case. See, e.g., Minnesota v. Am. Petroleum Inst., No. 20-CV-1636 (JRT/HB), 2021 WL 1215656, at *10-11 (D. Minn. Mar. 31, 2021) (concluding that OCSLA jurisdiction was not present, because "the State's claims are rooted not in the Defendants' fossil fuel production, but in its alleged misinformation campaign").

Cir. 1998), and Federico v. Lincoln Military Hous., 901 F. Supp. 2d 654, 656 (E.D. Va. 2012)).

ExxonMobil argues that federal jurisdiction is present in the current case because "climate change harms . . . [n]ecessarily impact [ ] . . . multiple federal enclaves within Connecticut, including military installations . . . national parks . . . and federal prisons." See Def.'s Opp'n at 35. ExxonMobil also argues that, "by targeting ExxonMobil's oil and gas operations and their alleged impacts, this action necessarily sweeps in those operations that occur on military bases and other federal enclaves." See id. at 36.

ExxonMobil's argument is premised on its characterization of Connecticut's claims as targeting pollution. However, as the court has already explained, Connecticut's claims seek redress for the manner by which ExxonMobil has interacted with consumers in Connecticut, not the impacts of climate change. See supra at 6-8. Further, given that national parks, federal prisons, and military installations are located throughout the country, ExxonMobil's interpretation of federal enclave jurisdiction would appear to give rise to federal jurisdiction in any case involving injuries that occur throughout a state, no matter how minor the injuries occurring on federal enclaves are in relation to the claims at issue. ExxonMobil cites no authority in support of what would amount to a sweeping change to the balance between the jurisdiction of state and federal courts.

Therefore, the court concludes that ExxonMobil has failed to show that removal is proper on account of federal enclave jurisdiction.[13]

E. Diversity Jurisdiction

Finally, ExxonMobil argues that the court possesses diversity jurisdiction because Connecticut is not the real party in interest. See Def.'s Opp'n at 37-39. Section 1332(a)(1) of title 28 vests district courts with "original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . citizens of different States." 28 U.S.C. § 1332(a)(1). "There is no question that a State is not a 'citizen' for purposes of [ ] diversity jurisdiction." Moor v. Alameda Cty., 411 U.S. 693, 717 (1973). However, "courts must disregard nominal or formal parties and rest jurisdiction only upon the citizenship of real parties to the controversy." Purdue Pharma L.P. v. Kentucky, 704 F.3d 208, 218 (2d Cir. 2013) (citation and internal quotation marks omitted).

Courts have developed two competing approaches for determining whether a state is a real party in interest: the "claim-by-claim approach" and the "whole-complaint" approach. Id. at 218-19. Courts applying the former approach analyze whether a state is the real party in interest "with respect to each type of relief sought," while courts applying the latter approach "look[ ] at the lawsuit as a whole." See id. Although the Second Circuit has not definitively adopted the whole-complaint approach, it has

---

[13] As with ExxonMobil's arguments in connection with the OCSLA, although authority on the applicability of federal enclaves jurisdiction is sparse, the court notes that other district courts have rejected similar arguments to those raised by ExxonMobil in this case. See, e.g., Minnesota, 2021 WL 1215656, at *11 ("While the various injuries alleged in the complaint may be felt on federal enclaves as much as they are felt anywhere, the Court requires a more substantive and explicit relationship between the actual claims alleged and a specific federal enclave to exercise jurisdiction.").

strongly suggested that it prefers this approach. See id. at 219 ("[W]e note that the 'claim-by claim' approach has been roundly criticized, and the 'whole-complaint' approach has emerged as the majority rule."). Accordingly, the court will apply the whole-complaint rule in this case. See In re Standard & Poor's Rating Agency Litig., 23 F. Supp. 3d 378, 402 (S.D.N.Y. 2014) ("[A]lthough the Second Circuit did not formally reach the question in Purdue Pharma, it is difficult to view that decision as anything but a thumb firmly on the whole-complaint side of the scale.").

In Connecticut v. Moody's Corp., No. 3:10-CV-546 (JBA), 2011 WL 63905 (D. Conn. Jan. 2011), the court held that Connecticut was the real party in interest in a suit alleging widespread violations of CUTPA by credit ratings agencies, because it "has a statutory interest under CUTPA 'to protect the public from unfair practices in the conduct of any trade or commerce.'" Id. at *3 (quoting Eder Bros., Inc. v. Wine Merchants of Conn., Inc., 275 Conn. 363, 380 (2005)). The court also noted that Connecticut did not seek "restitution [ ] on behalf of specific individuals", but instead sought a restitution order, pursuant to section 42-110m of the Connecticut General Statutes, "without specifying beneficiaries of that restitution, which the State argues may be ordered paid to the Connecticut Department of Consumer Protection[ ] . . . to fund positions and other related expenses for the enforcement of Department of Consumer Protection licensing and registration laws." Id.

Reviewing the Complaint as a whole, the court concludes that Connecticut is suing to protect a quasi-sovereign interest and is therefore a real party in interest. Connecticut seeks redress not simply for the deception allegedly caused by each of ExxonMobil's statements but rather for a decades-long campaign of alleged

disinformation that resulted in “the stifling of an open marketplace for renewable energy.” See Compl. at 39, ¶ 193. Further, as in Moody’s Corp., Connecticut seeks a restitution order under CUTPA that would fund efforts to respond to ExxonMobil’s allegedly deceptive and unfair practices generally, rather than providing compensation to specific individuals. See id. at 78 (seeking “[a]n order that ExxonMobil fund a corrective education campaign to remedy the harm inflicted by decades of disinformation, to be administered and controlled by the State or such other independent third party as the Court may deem appropriate”); Moody’s Corp., 2011 WL 63905, at *3.

Therefore, the court concludes that Connecticut is a real party in interest, and that the court does not possess diversity jurisdiction.

F. Fees and Costs

The plaintiffs seek costs and attorneys’ fees pursuant to section 1447(c) of title 28 the U.S. Code, which provides that “[a]n order remanding the case may require payment of just costs and any actual expenses, incurred as a result of the removal.” 28 U.S.C. § 1447(c). “Absent unusual circumstances, courts may award attorney's fees under [section] 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). The Supreme Court has instructed that, “[i]n applying this rule, district courts retain discretion to consider whether unusual circumstances warrant a departure from the rule in a given case.” Id. Here, Connecticut argues that an award of costs and fees is warranted because ExxonMobil’s arguments for removal have been “roundly rejected by district and circuit courts across the country.” See Pl.’s Mem. at 28.

As the court has noted throughout this Ruling, however, several of the issues raised by ExxonMobil are novel within the Second Circuit. Further, although it is true that multiple district courts have rejected similar arguments for removal, those courts are located in different circuits, and many relevant portions of their rulings were not subject to appellate review until very recently. See BP P.L.C. v. Mayor & City Council of Baltimore, No. 19-1189, slip. op. at 6 (U.S. May 17, 2021) (holding that section 1447(d) of title 28 of the U.S. Code "permits appellate review of [a] district court's remand order--without any further qualification"). Given these circumstances, the court concludes, albeit with some reservation, that ExxonMobil did not lack an objectively reasonable basis for removal. Connecticut's request for costs and fees is denied.

V. CONCLUSION

For the reasons discussed above, the court grants Connecticut's Motion to Remand (Doc. No. 36) and denies Connecticut's request for costs and fees. The Clerk is directed to remand the case to the Superior Court of Connecticut.

SO ORDERED.

Dated this 2nd day of June 2021, at New Haven, Connecticut.

/s/ Janet C. Hall
Janet C. Hall
United States District Judge