UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

STATE OF MINNESOTA, by its Attorney General, Keith Ellison, Plaintiff, v. AMERICAN PETROLEUM INSTITUTE, EXXON MOBIL CORPORATION, EXXONMOBIL OIL CORPORATION, KOCH INDUSTRIES, INC., FLINT HILLS RESOURCES LP, FLINT HILLS PINE BEND, Defendants.	Case No. 20-cv-1636-JRT-HB

PLAINTIFF STATE OF MINNESOTA'S REPLY IN SUPPORT OF MOTION TO REMAND TO STATE COURT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Rules

Regulations

Other Authorities

I. INTRODUCTION

This is a case brought under state law. Defendants' Opposition (Dkt. 44, "Opp.") to the State's Motion to Remand (Dkt. 35, "Motion" or "MPA") rehashes arguments repeatedly rejected nationwide—by district and circuit courts alike—and attempts to invoke federal jurisdiction by recasting the Complaint into something it is not. This suit does not "seek[] to curtail the worldwide production and sale of fossil fuels," Opp. 3. Rather, the State seeks to hold Defendants liable for concealing and misrepresenting the dangers of their products—dangers that were known to them for decades. Despite that knowledge, Defendants promoted the unrestrained consumption and use of their products in violation of the State's product liability and consumer protection laws. Even if the Attorney General did seek to end all fossil-fuel production worldwide (and he does not), there is no basis in the Complaint by which a court could grant such relief. The Court should repudiate Defendants' tired efforts to avoid adverse law and mischaracterize the Complaint, and remand the case.[1] *See, e.g.*, *Mayor & City Council of Baltimore v. BP P.L.C.*, 952 F.3d 452, 467 (4th Cir. 2020) ("*Baltimore II*"), *cert. granted*, No. 19-1189, 2020 WL 5847132 (U.S. Oct. 2, 2020) (rejecting defendants' portrayal of complaint after reading it "as a whole"); *Massachusetts v. Exxon Mobil Corp.*, 462 F. Supp. 3d 31, 44 (D. Mass. 2020) (rejecting "ExxonMobil's caricature of the complaint").

[1] The Attorney General declines to address Defendants' red herring conspiracy theories, Opp. 6-9, other than to state that Defendants' claims are both irrelevant and false. *See*, *e.g.*, *Exxon Mobil Corp. v. Schneiderman*, 316 F. Supp. 3d 679, 709 (S.D.N.Y. 2018) (describing such theories as "pure speculation").

A review of the basic jurisdictional framework is warranted in light of Defendants' scattershot Opposition. "A defendant may remove a state court claim to federal court *only* if the claim originally could have been filed in federal court, and the well-pleaded complaint rule provides that a federal question must be presented on the face of the properly pleaded complaint to invoke federal court jurisdiction." *Gore v. Trans World Airlines*, 210 F.3d 944, 948 (8th Cir. 2000) (emphasis added). Thus, the first task is for the Court to examine the face of the Complaint. If no federal question is presented there, the Court may consider two exceptions to the well-pleaded complaint rule. *See City of Oakland v. BP PLC*, 969 F.3d 895, 904-06 (9th Cir. 2020). The first *narrowly* permits federal-question jurisdiction over state-law claims that "'really and substantially involv[e] a dispute or controversy respecting the validity, construction or effect of [federal] law.'" *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 313 (2005). The second, referred to as "complete preemption" or the "artful pleading" doctrine, permits federal-question removal in the *rare circumstance* where "the pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim.'" *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 (1987) (quoting *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987)). Neither exception applies here. *See* MPA 6-11; Parts II.A-B, *infra*.

Defendants attempt to assert myriad grounds for federal jurisdiction, all of which fail. The Complaint does not assert claims under federal common law, on its face or otherwise; it involves no action by Defendants taken under the direction of a federal officer, in a federal enclave, or on the Outer Continental Shelf; it does not constitute a "class action"

under the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d); and it is clear that the Attorney General is the real party in interest such that diversity jurisdiction is not appropriate. Defendants thus fail to meet their substantial burden of proving that removal is proper on any basis.

This Notice of Removal is materially identical to those unanimously rejected in analogous cases, which Defendants fail to meaningfully distinguish. This Court should likewise remand.[2]

II. THIS CASE SHOULD BE REMANDED BECAUSE THERE IS NO SUBJECT-MATTER JURISDICTION.

Again, under the "well-pleaded complaint" rule, "federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar*, 482 U.S. at 392. The rule "makes the plaintiff the master of the claim," because, in drafting the complaint, the plaintiff may choose to "avoid federal jurisdiction by exclusive reliance on state law." *Id.*

[2] *See Oakland*, 969 F.3d 895; *Cty. of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934 (N.D. Cal. 2018) ("*San Mateo I*"), *aff'd in part, appeal dismissed in part*, 960 F.3d 586 (9th Cir. 2020), *reh'g en banc denied* (Aug. 4, 2020) ("*San Mateo II*"); *Mayor & City Council of Baltimore v. BP P.L.C.*, 388 F. Supp. 3d 538 (D. Md. 2019) ("*Baltimore I*"), *as amended* (June 20, 2019), *aff'd in part, appeal dismissed in part*, 952 F.3d 452; *Bd. of Cty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, 405 F. Supp. 3d 947 (D. Colo. 2019) ("*Boulder I*"), *aff'd in part, appeal dismissed in part*, 965 F.3d 792 (10th Cir. 2020) ("*Boulder II*"), *petition for cert. filed* (U.S. Dec. 8, 2020) (No. 20-783); *Rhode Island v. Chevron Corp.*, 393 F. Supp. 3d 142 (D.R.I. 2019) ("*Rhode Island I*") (granting remand), *aff'd in part, appeal dismissed in part*, 979 F.3d 50 (1st Cir. 2020) ("*Rhode Island II*"); *Massachusetts*, 462 F. Supp. 3d 31.

A. The State does not assert a claim under federal common law.

Here, the Complaint relies exclusively on state law; it does not include any claim involving federal common law. No law supports Defendants' argument that these state-law claims "are governed by and arise under federal common law," Opp. 13, and every court that has considered their arguments has rejected them, with the exception of one district court order that was reversed on appeal. *See Oakland*, 969 F.3d at 906-08; *Massachusetts*, 462 F. Supp. 3d at 40 n.6; *San Mateo I*, 294 F. Supp. 3d at 937; *Baltimore I*, 388 F. Supp. 3d at 555; *Boulder I*, 405 F. Supp. 3d at 963; *Rhode Island I*, 393 F. Supp. 3d at 149. The law is clear: well-pleaded state law claims are not federal claims; they arise under federal law for removal purposes only when they satisfy *Grable* or are completely preempted.[3] *See, e.g.*, *Oakland*, 969 F.3d at 904-06. Neither exception applies here. *See* Part II.B, *infra.* As in their other futile removal efforts, Defendants have again "fail[ed] to cite any Supreme Court or other controlling authority authorizing removal based on state-law claims

[3] Defendants incorrectly argue that the artful pleading doctrine is "separate and distinct" from complete preemption as a basis for removal, Opp. 29 n.21. However, a majority of courts, including the Supreme Court and this Court, have held that they are one and the same. *See, e.g.*, *Rivet v. Regions Bank of La.*, 522 U.S. 470, 475 (1998) ("The artful pleading doctrine allows removal where federal law completely preempts a plaintiff's state-law claim."); *Oakland*, 969 F.3d at 905 (same); *Gore*, 210 F.3d at 950 (finding claims both artfully pleaded and completely preempted); *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 343 F. Supp. 2d 838, 852 (W.D. Mo. 2004) (rejecting argument that artful pleading doctrine provides an independent basis for removal); *Minnesota ex rel. Hatch v. Worldcom, Inc.*, 125 F. Supp. 2d 365, 373 (D. Minn. 2000) ("[C]omplete preemption is a prerequisite for application of the 'artful pleading' doctrine."); *Stephens v. Cowles Media Co.*, 995 F. Supp. 974, 978 (D. Minn. 1998) ("[T]he governing standard is clear that the 'artful pleading' exception . . . would be applicable only if Title VII were to so completely preempt the employment discrimination field. . . .") (Tunheim, J.).

implicating federal common law" in a case such as this, because there simply is none. *See Boulder I*, 405 F. Supp. 3d at 963.

Defendants' attempt to distinguish the State's unanimous on-point authority by muddying the water with inapposite case citations is unavailing. For example, in *Sam L. Majors Jewelers v. ABX, Inc.*, the Fifth Circuit affirmed removal on a "narrow," "necessarily limited" holding that a "cause of action against an interstate air carrier for claim for property lost or damaged in shipping arises under federal common law." 117 F.3d 922, 926-29, nn.15&16 (5th Cir. 1997). The court emphasized the "historical availability of [a federal] common law remedy" against air carriers for the specific types of lost-parcel claims at issue, which the Airline Deregulation Act explicitly preserved. *Id.* at 928-29 & n.15. Moreover, *Sam L. Majors* predates *Grable*, which sought to "bring some order to th[e] unruly doctrine" used to determine whether state-law claims arise under federal law for removal purposes, and resolve the "general confusion" reflected in cases like *Sam L. Majors*. *Gunn v. Minton*, 568 U.S. 251, 258 (2013). Today, state-law claims only arise under federal law when they satisfy the four *Grable* requirements or are completely preempted. *See* Part II.B, *infra*; *see also Boulder II*, 405 F. Supp. 3d at 963 (noting *Sam L. Majors* "contradict[s] *Caterpillar* and the tenets of the well-pleaded complaint rule"). Defendants' citation to dicta in another pre-*Grable* case does not overcome the weight of this authority. *See In re Otter Tail Power Co.*, 116 F.3d 1207, 1213 (8th Cir. 1997) (finding the complaint on its face necessarily presented a federal question).

A number of Defendants' cited cases stand for the unremarkable proposition that federal courts have jurisdiction over federal common law claims. *See, e.g.*, *Treiber Straub,*

Inc. v. U.P.S., Inc., 474 F.3d 379, 381 (7th Cir. 2007) (finding federal common law claim lodged against common carrier in federal court cognizable); *Battle v. Seibels Bruce Ins. Co.*, 288 F.3d 596, 607-08 (4th Cir. 2002) (pre-*Grable* case holding that "federal common law *alone* governs the interpretation of insurance policies issued" under the National Flood Insurance Act, a federal law (emphasis in original)); *Newton v. Capital Assur. Co.*, 245 F.3d 1306, 1309 (11th Cir. 2001) (same). And *Caudill v. Blue Cross & Blue Shield of N.C.*, 999 F.2d 74 (4th Cir. 1993), if not *explicitly* overruled by the Supreme Court, has been roundly and rightfully criticized for its reasoning regarding removal. *See, e.g.*, *Empire HealthChoice Assur., Inc. v. McVeigh*, 396 F.3d 136, 142 (2d Cir. 2005), *aff'd*, 547 U.S. 677 (2006) ("The *Caudill* court conflated the preemption and jurisdiction analyses by holding that a significant conflict with uniquely federal interests was sufficient to confer subject matter jurisdiction on the federal court. . . . We agree with the criticism *Caudill* has received for giving short shrift to the well-pleaded complaint rule.").

Moreover, the supposed "two-step analysis" that Defendants extract from *United States v. Standard Oil Co.*, 332 U.S. 301 (1947), Opp. 25, has never been applied in the removal context and has never been recognized as an exception to the well-pleaded complaint rule. None of the cases Defendants cite support their concocted interpretation.

In *Standard Oil*, the federal government brought claims for indemnity and loss of services against Standard Oil in federal court, seeking to recover expenses the government paid after a Standard Oil truck hit and injured a soldier. 332 U.S. at 302. The government argued, and the Court agreed, that under the *Clearfield Trust* doctrine, federal law governs "the scope, nature, legal incidents and consequences of the relation between persons in

service and the Government." *Id.* at 305-06 (citing *Clearfield Tr. Co. v. United States*, 318 U.S. 363 (1943)). Notably, *Clearfield* and both of Defendants' cited cases—*Standard Oil* and *United States v. Swiss Am. Bank, Ltd.*, 191 F.3d 30 (1st Cir. 1999)—were all filed by the United States in federal court in the first instance, expressly asserting federal law claims. The cases say nothing about removal or subject matter jurisdiction, and nothing about whether or when federal common law "governs" a well-pleaded state-law complaint.

The jumble of federal issues Defendants claim "control" the State's claims plainly do not. The State's claims and remedies arise solely out of state law and seek relief for Defendants' failure to warn and false and misleading statements made to Minnesota consumers. Nothing about this consumer protection case requires a court to usurp federal regulatory authority over global energy production, federal waters, or interstate and international commerce.

"Interstate Pollution Claims." Defendants' interstate pollution argument fails for two independent reasons: first, if such federal common law ever existed, it was displaced by the Clean Air Act ("CAA") and therefore cannot provide a basis for removal; and second, it is irrelevant to the state-law claims at issue here.

First, Defendants rely on *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011) ("*AEP*"), and *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012). But they misrepresent those cases (which were both filed in federal court under federal common law theories and involved no questions of removal jurisdiction) and ignore subsequent on-point case law that forecloses their arguments here. *AEP* does not hold that federal common law applies to the exclusion of state law. Indeed, the opposite is

true: the Supreme Court held that the CAA displaced any federal common law claims to abate greenhouse gas emissions. *AEP*, 564 U.S. at 424. Thus, whatever federal common law may have existed predating the CAA has therefore been extinguished. It cannot provide a basis for removal. *See* MPA 16 & n.6; *San Mateo I*, 294 F. Supp. 3d at 937.[4]

Second, Defendants incorrectly posit a straw man: that the case seeks "to use state law to limit the production, sale, and use of fossil fuels not just in Minnesota but in all 50 states (and internationally)." Opp. 14. The State's complaint merely seeks to address Defendants' campaign of deception and misleading promotion, and remedy the injuries Defendants caused in Minnesota as a result. Compl. ¶¶172-83. The *Massachusetts* court correctly rejected similar arguments, emphasizing the state's role in consumer protection and holding that protecting Massachusetts consumers and investors from fraud does not implicate "uniquely federal interests." 462 F. Supp. 3d at 44. The same reasoning applies here.

Navigable Waters and Foreign Affairs. Defendants' arguments that "[f]ederal common law governs claims that arise out of" navigable waters, Opp. 18-19, or foreign affairs, Opp. 20-24, fail for similar reasons. First, Defendants' citations are once again inapposite because almost every cited case originated in federal court, and they therefore

[4] Defendants' citation to *City of New York v. BP p.l.c.*, 325 F. Supp. 3d 466 (S.D.N.Y. 2018), is also inapposite. That case was initially filed in federal district court, and the cited opinion resolved a motion to dismiss for failure to state a claim, not any issue of removal or subject-matter jurisdiction. Moreover, the City brought claims against fossil-fuel company defendants for "(1) public nuisance, (2) private nuisance, and (3) trespass." *Id.* at 470. Even assuming *arguendo* that those causes of action are indeed "governed by" federal common law, the decision has no relevance to whether the state-law product liability and consumer protection claims at issue here arise under federal law.

have no bearing on the removability of well-pled state-law claims. Only *Republic of Philippines v. Marcos* even discusses subject matter jurisdiction, and there, the court properly held that it only had jurisdiction in cases "in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." 806 F.2d 344, 352 (2d Cir. 1986). The court ultimately found it had jurisdiction because whether to honor the request of a foreign government to reach property held by its former head of state in the U.S. was a necessary element of the case, and was "a federal question to be decided with uniformity as a matter of federal law." *Id*. at 354. No such federal question exists here.

Second, Defendants again mischaracterize the Complaint. The State alleges that Defendants failed to warn consumers of the known dangers of their products, and deceptively marketed their products by misrepresenting or failing to disclose their risks. Compl. ¶¶180-82, 207-08. Nothing in the Complaint requires the State to prove any injury "by way of" navigable waters. *See Oakland*, 969 F.3d at 911 n.12 (rejecting fossil-fuel defendants' argument that federal-question jurisdiction was present because of navigable waters). Nor do allusions to topics ranging from President Eisenhower's foreign policy decisions to the Paris Agreement, Opp. 21-23, have anything to do with whether Defendants made misleading statements or omissions to consumers in connection with the sale of goods. They certainly do not "raise[] a claim that necessarily implicates and may substantially impact relations between the United States and a foreign state." *O'Neill v. St. Jude Med., Inc.*, No. CIV. 04-1211, 2004 WL 1765335, at *1 (D. Minn. Aug. 5, 2004) (rejecting "federal common law of foreign relations" argument and remanding products

liability and deceptive trade practices case brought on behalf of plaintiffs in various European nations) (Tunheim, J.); *see also Baltimore I*, 388 F. Supp. 3d at 562 (finding foreign affairs doctrine "inapposite in the complete preemption context"). Federal common law does not, and cannot, provide a basis for jurisdiction here.

B. There is no *Grable* jurisdiction because the Complaint does not "necessarily raise" any substantial, disputed federal questions.

Once the Court is satisfied that the Complaint does not assert a cause of action under the federal common law, the inquiry turns to whether a narrow exception to the well-pleaded complaint rule applies. Defendants assert that they have satisfied the four-prong test under *Grable*. They are wrong. This case does not satisfy any of the elements required for removal jurisdiction under the *Grable* exception, which extends federal jurisdiction only to the "special and small category" of state-law complaints where 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 (discussing *Grable*, 545 U.S. 308). Removal jurisdiction is "unavailable unless it appears that some substantial, disputed question of federal law is a *necessary element* of one of the well-pleaded state claims." *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 13 (1983) (emphasis added).

Here, the rights the State seeks to vindicate, and the relief sought, stem entirely from state law. No element of the State's claims "depends on resolution of a substantial question of federal law." *See id.* at 28. Defendants' laundry list of generalized theories, including congressional balancing, foreign affairs, and navigable waters, are all irrelevant. None of

the State's claims requires proof on those topics, as every court to consider the issue has found. *See* n.2, *supra* (collecting cases where remand has consistently been granted after Defendants removed).

Defendants' attempts to distinguish the unanimous decisions rejecting their theories in analogous cases fall flat because there is no material distinction to be made. Defendants assert that the remand orders in the analogous cases are inapposite because they involved nuisance theories, and this case involves consumer protection claims. Opp. 38 n.25. That is not true. The *Massachusetts* case, for example, involved only consumer protection and investor fraud claims, and that court squarely rejected *Grable* jurisdiction. *See Massachusetts*, 462 F. Supp. 3d at 44-45 ("[T]he Commonwealth's allegations do not require any forays into foreign relations or national energy policy.").[5] And *Baltimore* involved failure to warn and Maryland Consumer Protection Act violations in addition to nuisance claims. *See* 952 F.3d at 457.

Defendants' argument that some of these cases may eventually be overturned by the Supreme Court is meaningless speculation, especially because *Rhode Island I*, *Baltimore I*, *Boulder I*, *San Mateo I*, and *Oakland* have all now been resolved in the plaintiffs' favor on

[5] Defendants attempt to distinguish *Massachusetts* on the ground that not every basis for *Grable* jurisdiction asserted here was before the court in that case. Opp. 38 n.25. But Defendants do not challenge the underlying holdings of *Massachusetts*, and those holdings apply equally to any "new" basis for *Grable* jurisdiction asserted here. *See, e.g.*, *Massachusetts*, 462 F.Supp.3d at 43 ("Whether ExxonMobil was honest or deceitful in its marketing campaigns . . . does not necessarily raise any federal issue whatsoever").

appeal, and the question before the Supreme Court in *Baltimore* does not even involve *Grable* jurisdiction.[6] *See* Opp. 28 n.22.

Defendants' final argument, that the cases are distinguishable because some courts granted remand without analyzing all four *Grable* elements, is equally unavailing. *Defendants* must satisfy *all four Grable* elements to withstand remand. *See Oakland*, 969 F.3d at 904-05 ("All four requirements must be met for federal jurisdiction to be proper."); *Cent. Iowa Power Co-op. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 561 F.3d 904, 912 (8th Cir. 2009) ("[T]he party seeking removal has the burden to establish federal subject matter jurisdiction," and "all doubts about federal jurisdiction must be resolved in favor of remand."). The fact that the Ninth Circuit in *Oakland* disposed of Defendants' arguments without the need to analyze every element means only that Defendants failed to

[6] The only issue before the Supreme Court in *Baltimore* involves the scope of appellate jurisdiction over a district court's order remanding a case to state court. As framed by the petitioners, including some of the Defendants here, the question presented is: "Whether 28 U.S.C. 1447(d) permits a court of appeals to review any issue encompassed in a district court's order remanding a removed case to state court where the removing defendant premised removal in part on the federal-officer removal statute, 28 U.S.C. 1442, or the civil rights removal statute, 28 U.S.C. 1443." Petition for a Writ of Certiorari at I, *BP p.l.c., et al., v. Mayor & City Council of Baltimore*, No. 19-1189 (U.S. Mar. 31, 2020). The question presented does not involve *Grable* jurisdiction, nor any other merits issue before the Court here, or even before the district court there. Although Petitioners have improperly invited the Supreme Court to address the merits of their argument that "claims alleging injury based on interstate emissions necessarily arise under federal common law," Petitioners' Brief at 37, *id*., that argument is not properly before the Court. *See* Supreme Court Rule 14.1(a) ("Only the questions set out in the petition . . . will be considered by the Court."). The Supreme Court will doubtless hold to its practice of declining to reach issues not addressed by the courts of appeal below, *see, e.g.*, *Ret. Plans Comm. of IBM v. Jander*, 140 S. Ct. 592, 595 (2020). API's letter to this Court regarding the United States' *amicus* filing in that case, Dkt. 47, is therefore both irrelevant and inappropriate, and should be struck. *See* L.R. 7.1(i) (prohibiting unsolicited memoranda of law).

show at least one element—that any federal issue was "substantial." That key failure is a dispositive deficiency in those cases and here.

1. The Complaint does not necessarily raise any substantial issue of federal law that is actually disputed.

As the Eighth Circuit has emphasized, the *Grable* inquiry "demands precision" and defendants "should be able to point to specific elements of [the plaintiff's] state law claims" that "necessarily depend on the resolution of a disputed and substantial question of federal law." *Cent. Iowa Power Co-op.*, 561 F.3d at 912, 914. Defendants' oblique and utterly unsubstantiated assertions that the State's "state-law claim[s] implicate[] a variety of 'federal interests,' . . . does not raise a substantial question of federal law for the purpose of determining whether there is jurisdiction under § 1331." *Oakland*, 969 F.3d at 907-08.

First, this is a consumer protection case. It does not seek to—and could not—disturb any congressionally mandated environmental protection scheme. The examples Defendants offer, namely CAA and related Environmental Protection Agency regulation, concern air pollution, not the deceptive advertising and failure to warn at issue here. The State's claims in no way depend on overturning the validity of a federal act or regulation. Moreover, the government has made no policy decision holding that companies should be able to produce and sell fossil fuels while concealing and misrepresenting the known dangers of their use. In a thread that weaves through each of Defendants' nebulous bases for *Grable* jurisdiction, their assertions at most amount to a preemption defense, and "a case may not be removed to federal court on the basis of a federal defense." *Markham v. Wertin*, 861 F.3d 748, 754 (8th Cir. 2017).

The few cases Defendants cite are readily distinguished because each depended on federal law to prove an essential element of a state law claim. In the tort action *Board of Commissioners of Southeast Louisiana Flood Protection Authority-East v. Tennessee Gas Pipeline Co.*, 850 F.3d 714 (5th Cir. 2017), removal was proper because the extent of the defendant oil companies' duty to restore land under state law was determined solely by references to federal statutes that "create a duty of care that *does not otherwise exist* under state law." *Id.* at 723 (emphasis added). Similarly, in *Bryan v. BellSouth Communications, Inc.*, 377 F.3d 424, 431-32 (4th Cir. 2004), and *Hill v. BellSouth Telecommunications, Inc.*, 364 F.3d 1308, 1317 (11th Cir. 2004), removal was proper because the question of whether certain telecommunications charges were proper under state unfair trade practices law required determining the propriety of certain tariffs under federal law. Here, in contrast, Plaintiff's claims do not implicate any federal regulatory programs or statutory mandates. State law provides the sole authority for the State's claims.

Second, contrary to Defendants' contentions, Opp. 35, the State's allegation that Defendants engaged in a conspiracy "to mislead the public and decision makers about the consequences of using their products," Compl. ¶35, does not justify removal here. On this point, Defendants rely on *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341, 347 (2001), and its progeny, which concern whether claims based on fraudulent representations to the federal Food and Drug Administration for medical device approval are impliedly preempted by the federal Food, Drug, and Cosmetic Act. Opp. 35. But "*Buckman* did not address any jurisdictional issues of removal," and thus has no application in this context. *Littel v. Bridgestone/Firestone, Inc.*, 259 F. Supp. 2d 1016, 1027 (C.D. Cal. 2003) (granting

remand and finding that the implied preemption defense set forth in *Buckman* "does not confer subject matter jurisdiction on this Court where it otherwise is lacking").

Third, Defendants' foreign policy concerns in no way satisfy *Grable*. The Opposition describes decades of foreign policy decisions: Eisenhower-era trade deals; the Kyoto Protocol; the Paris Agreement; and more. Opp. 21-23, 36. But what the Opposition fails to explain is how any of these issues relate to the State's allegations that Defendants failed to warn consumers about the hazards of their fossil-fuel products and made misleading marketing statements—let alone which element of the State's claims necessarily requires proof on any foreign policy issue. As the *Massachusetts* court correctly held:

> [T]he Commonwealth's allegations do not require any forays into foreign relations or national energy policy. It alleges only corporate fraud. Whether ExxonMobil was honest or deceitful in its marketing campaigns . . . does not necessarily raise any federal issue whatsoever.

462 F. Supp. 3d at 44. The same is true here. No element of the State's claims implicates any foreign policy question. And "[j]ust as raising the specter of political issues cannot sustain dismissal under the political question doctrine, neither does a general invocation of international law or foreign relations mean that an act of state is an essential element of a claim" sufficient to satisfy *Grable*. *Provincial Gov't of Marinduque v. Placer Dome, Inc.*, 582 F.3d 1083, 1091 (9th Cir. 2009) (reversing denial of remand to state court); *see also Oakland*, 969 F.3d at 906-07 (no substantial question of federal law where defendants suggest that a state-law claim "implicates" federal interests in energy policy, national security, and foreign policy); *San Mateo I*, 294 F. Supp. 3d at 938 ("The mere potential for

foreign policy implications . . . does not raise the kind of actually disputed, substantial federal issue necessary for *Grable* jurisdiction.").[7]

Defendants' citations do not advance their position. In *Pet Quarters, Inc. v. Depository Trust & Clearing Corp.*, 559 F.3d 772 (8th Cir. 2009), the claims required the court to determine the validity of the federal government's conduct—a program approved by the SEC—not just the defendant's conduct. *Id.* at 779. The claim there was properly removed because it "directly implicate[d] actions taken by the [SEC] in approving the creation of the [program] and the rules governing it." *Id.* Here, there is no federal program dictating Defendants' false claims.

Likewise, the court in *In re National Security Agency ("NSA") Telecommunications Records Litigation*, 483 F. Supp. 2d 934, 942-43 (N.D. Cal. 2007), held that *Grable* was satisfied because the state secrets privilege "require[d] dismissal if national security concerns prevent plaintiffs from proving [their] *prima facie* elements" and observed that the federal government had already stated its intention to assert the privilege. Here, however, the federal government has claimed no such privilege.

Fourth, like Defendants' other ill-defined federal regulatory considerations purportedly at stake, their invocation of navigable waters has nothing to do with the State's

[7] In any event, Defendants' foreign affairs argument is, like their federal common law argument, a veiled ordinary preemption defense that cannot survive the well-pleaded complaint rule and cannot provide a basis for *Grable* jurisdiction in this case or any other. *See Patrickson v. Dole Food Co.*, 251 F.3d 795, 804 (9th Cir. 2001), *aff'd in part, cert. dismissed in part*, 538 U.S. 468 (2003) ("If federal courts are so much better suited than state courts for handling cases that might raise foreign policy concerns, Congress will surely pass a statute giving us that jurisdiction.").

consumer protection claims and is, at most, a preemption defense incapable of generating federal jurisdiction. *See Oakland*, 969 F.3d at 911 n.12; *Rhode Island I*, 393 F. Supp. 3d at 591. Defendants' focus on U.S. Army Corps of Engineers guidance for incorporating sea level rise projections into feasibility studies, Opp. 37 & n.24, is puzzling. Minnesota is a landlocked state, and the flooding-related damages Defendants cite are related instead to climate change-induced extreme precipitation. Compl. ¶142-49.

Fifth, for the reasons described in Part II.A, *supra*, federal common law—in either its transboundary pollution, navigable waters, or foreign relations forms—cannot provide a basis for original-jurisdiction removal here, and Defendants' re-asserting it separately as a basis for *Grable* removal does not make it so.

Sixth, though Defendants assert this action "raises important constitutional questions," nowhere do they identify what such a question might be, other than to broadly assert "federalism." *See* Opp. 38. In casting such a wide net, Defendants catch nothing. Defendants fail to identify any specific "substantial, disputed question of federal law [that] is a necessary element" of the State's claims, and therefore *Grable*'s requirements are not met. *Franchise Tax Bd.*, 463 U.S. at 13. Moreover, as described below, federalism concerns weigh in favor of returning this case to state court.

2. The federal-state balance favors adjudication of these Minnesota-law claims in Minnesota's own courts.

Even if Defendants had met their burden to show that the state-law claims asserted in the Complaint necessarily raise a disputed and substantial federal question, this Court must still consider the appropriate balance of state versus federal jurisdiction. The right to

remove is always construed narrowly against removal, *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941), and "the 'claim of sovereign protection from removal arises in its most powerful form'" where the removed action is one brought by a state in state court to enforce state law, as in this state-law action brought by Minnesota. *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 676 (9th Cir. 2012) (quoting *W. Va. ex rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d 169, 178 (4th Cir. 2011)). "The presumption against federal jurisdiction is especially strong in cases of this sort, involving States seeking to vindicate quasi-sovereign interests in enforcing state laws and protecting their own citizens from deceptive trade practices . . . ." *In re Standard & Poor's Rating Agency Litig.*, 23 F. Supp. 3d 378, 385 (S.D.N.Y. 2014).

Defendants' federalism argument collapses under any fair reading of the Complaint, which seeks solely state-law remedies to stop and penalize Defendants' deceptive trade practices and for related injuries to the State. *See* Compl. ¶¶184-242 (Counts I-V), 243-51 (Request for Relief). "No one doubts that this task falls within the core of a state's responsibility." *Massachusetts*, 462 F. Supp. 3d at 44 (citing *Edenfield v. Fane*, 507 U.S. 761, 769 (1993) ("[T]here is no question that [a state's] interest in ensuring the accuracy of commercial information in the marketplace is substantial."); *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982) ("[A] State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general.")).

C. There is no federal officer removal jurisdiction.

Defendants' federal officer removal arguments under 28 U.S.C. § 1442 are

meritless. The First, Fourth, Ninth, and Tenth Circuits already squarely rejected them,[8] and nothing in Defendants' removal notice avoids the same outcome here. *See* MPA 21-25. To invoke § 1442(a)(1), Defendants must establish, among other things, that (1) they acted under the direction of a federal officer, and (2) there was a causal connection between the defendants' actions and the federal authority. *Jacks v. Meridian Res. Co.*, 701 F.3d 1224, 1230 (8th Cir. 2012). Defendants fail on both points.

1. There is no causal connection between the State's claims and the acts Defendants purportedly performed under a federal officer.

As every court to consider the issue has held, federal officer jurisdiction fails in this context.[9] Although Defendants' proffer "may have the flavor of federal officer involvement in the [their] business, . . . that mirage only lasts until one remembers what [the State] is alleging in its lawsuit." *Rhode Island II*, 979 F.3d at 59-60. Defendants failed to warn of the known risks of fossil-fuel combustion on a massive scale, misled the public regarding those risks, promoted their products' unlimited use, and engaged in a multi-decade disinformation campaign to support the ever-increasing production, sale, and combustion of fossil-fuel products. There is no causal connection between this conduct and the acts Defendants purportedly performed at the direction of a federal officer, and Defendants'

[8] *Rhode Island II*, 979 F.3d at 59-60; *Baltimore II*, 952 F.3d at 463-71; *San Mateo II*, 960 F.3d at 598-603; *Boulder II*, 965 F.3d at 819-27.

[9] *See* MPA 32-36; *Baltimore II*, 952 F.3d at 466-67; *Boulder I*, 405 F. Supp. 3d at 976-77; *Rhode Island I*, 393 F. Supp. 3d at 152; *San Mateo I*, 294 F. Supp. 3d at 939; *see also State v. Monsanto Co.*, 274 F. Supp. 3d 1125, 1131 (W.D. Wash. 2017), *aff'd*, 738 F. App'x 554 (9th Cir. 2018); *In re MTBE Prods. Liab. Litig.*, 488 F.3d 112, 131 (2d Cir. 2007) (federal officer removal improper in case involving heavily regulated fuel additive where federal regulations "say nothing" about deceptive marketing and other tortious conduct).

arguments to the contrary fail for at least three reasons.

First, where a party disclaims injuries arising from federal activities, as the State has done here, Compl. ¶9 n.4, "remand clearly is appropriate, because [the defendant] cannot prove a causal nexus between its government contracts and [plaintiff's] claims." *Fisher v. Asbestos Corp.*, No. 2:14-CV-02338, 2014 WL 3752020, at *3 (C.D. Cal. July 30, 2014) (collecting cases). Indeed, to "deny remand [in such a] case would affirm [defendant's] right to assert a defense against a claim that does not exist, an absurd result." *Id*. Defendants cite no contrary authority, and instead rely on an out-of-context quotation from *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009), Opp. 56. That quote is about standing, not jurisdiction.

Defendants' argument that the State's disclaimer is ineffective because of the purportedly "undifferentiated nature of the climate-change based harm alleged in the Complaint" also fails. While the State disagrees with the substance of that claim, it is of no moment. Defendants have offered no evidence that the harms attributable to federal activities cannot be isolated, or that the State's claims will necessarily require proof of harm caused by conduct under federal direction. *See Fisher*, 2014 WL 3752020, at *5 (rejecting argument that waiver was ineffective "because it is obvious that the only claims [the plaintiff] could have against [the defendant] relate to its government work," where asbestos complaint "comprise[d] allegations covering a wide range of exposure incidents and broadly directed at many defendants"). Nonetheless, by quantifying greenhouse gas pollution attributable to Defendants' products and conduct, climatic and environmental responses to those emissions are calculable, and can be attributed to Defendants on an

individual and aggregate basis.[10] Nothing about the State's claims requires the State to prove injuries from actions taken under a federal officer, and the State's disclaimer is effective.

Second, contrary to Defendants' arguments, Opp. 56, the Complaint does not seek relief to stop or reduce Defendants' production or sale of fossil-fuel products, including to the federal government. As set forth in the Motion, multiple courts have rejected defendants' attempts to mischaracterize substantially similar claims and allegations. MPA 22-23. Defendants' assertion that these cases are distinguishable because they did not consider defendants' operation of infrastructure for the Strategic Petroleum Reserve ("SPR") is simply not true. *See*, *e.g.*, *Baltimore II*, 952 F.3d at 471 (defendants' production of oil from SPR at Elk Hills was not "not sufficiently 'related' to Baltimore's claims"); *Rhode Island II*, 979 F.3d at 60 ("the Elk Hills Reserve contract . . . address[es] extraction, not distribution or marketing"). And Defendants' new arguments concerning the sale of specialty fuel products to the federal government, like their rejected arguments concerning their operations on federal lands and unit price contracts with the federal government, have no relation to the misconduct alleged, which arises out of Defendants' campaign of deception. Compl. ¶¶1-9. *Rhode Island II* rejected a similar effort to recast allegations directed to false and misleading statements as an attempt to end all fossil fuel production:

> Rhode Island is alleging the oil companies produced and sold oil and gas products in Rhode Island that were damaging the environment and engaged in a misinformation campaign about the harmful effects of their products on

[10] *See e.g.* Richard Heede, *Carbon Majors: Updating activity data, adding entities, & calculating emissions: A Training Manual*, Climate Accountability Institute (2019), https://climateaccountability.org/pdf/TrainingManual%20CAI%2030Sep19hires.pdf.

> the earth's climate. The contracts the oil companies invoke as the hook for federal-officer jurisdiction mandate none of those activities.

979 F.3d at 60. That conclusion applies equally here.

Third, Defendants' nexus showing falls short even under the relaxed causal connection standard. *See, e.g.*, *Baltimore II*, 952 F.3d at 466-67 (discussing "relaxed reading" of nexus prong); *Graves v. 3M Co.*, 447 F. Supp. 3d 908, 913 (D. Minn. 2020) (discussing "lower" hurdle). Under Defendants' theory, any claims against a fossil-fuel company would be "related to" federal governmental actions and should therefore be heard in federal court. That is not the standard. In *Baltimore II*, the court recognized that a similar complaint "clearly [sought] to challenge the promotion and sale of fossil fuel products without warning and abetted by a sophisticated disinformation campaign." *Id.* at 467. Thus, "the relationship between Baltimore's claims and any federal authority over a portion of certain Defendants' production and sale of fossil fuel products [wa]s too tenuous to support removal under § 1442." *Id*. at 468; *see also Massachusetts*, 462 F. Supp. 3d at 47 ("ExxonMobil's marketing and sale tactics were not plausibly 'relat[ed] to' the drilling and production activities supposedly done under the direction of the federal government.").

"There is simply no nexus between anything for which [the State] seeks damages and anything the oil companies allegedly did at the behest of a federal officer." *Rhode Island II*, 979 F.3d at 60. Accordingly, the court lacks subject matter jurisdiction.

2. Defendants were not "acting under" a federal officer.

Defendants also fail to meet their separate burden to establish that when they committed the tortious conduct alleged in the Complaint, they were "acting under" the

federal government in "an effort to assist, or to help carry out, the duties or tasks of [a] federal superior." *Watson v. Philip Morris Cos.*, 551 U.S. 142, 151-52 (2007); *see also Baltimore II*, 952 F.3d at 463-66; *San Mateo II*, 960 F.3d at 601-03; *Boulder II*, 965 F.3d at 819-27; *Rhode Island II*, 979 F.3d at 59-60. Defendants simply fail to show that the federal government directed them to lie to consumers. The facts alleged in the Notice and Opposition show, at most, that certain Defendants entered "arm's-length business arrangement[s] with the federal government" that do not satisfy § 1442. *See San Mateo II*, 960 F.3d at 600-02. Their new arguments and facts are untimely and impermissible. *See LeNeave v. N. Am. Life Assur. Co.*, 632 F. Supp. 1453, 1454 (D. Minn. 1986) (defendant must seek leave of the court to amend jurisdictional allegations). To the extent the Court considers them, they do not merit removal.

i. Defendants' assertions regarding dealings with the military do not establish that they engaged in their deception campaign at the direction of federal officers.

As determined by federal courts around the country, Defendants' assertions regarding their interactions with the military do not establish federal jurisdiction.[11] To the extent Defendants present the military-industrial relationship from an angle different than those already rejected in previous cases, they still fail to show that Defendants acted under federal officers in any way relevant to this case.

World War II and the Korean War. Setting aside that the State does not allege misconduct during the Second World War ("WWII") or the Korean War, Defendants offer

[11] *See San Mateo II*, 960 F.3d at 600-602; *Baltimore II*, 952 F.3d at 463-64; *Rhode Island II*, 979 F.3d at 59-60.

no evidence that they were "under the 'subjection, guidance, or control'" of a federal officer in providing fuel to the military during this period. *San Mateo II*, 960 F.3d at 599 (citation omitted). Defendants instead rely on CERCLA cases and a historical report that merely speak to a cooperative, mutually beneficial relationship between the military and the industry. *See* Opp. 48 (citing John Frey et al., *A History of the Petroleum Administration for War*, *1941-1945* (1946)). For instance, the Frey report frames the Petroleum Administration for War's ("PAW") relationship with the industry as a "partnership" that was "dedicated to the proposition that cooperation, rather than coercion, was the formula by which the forces of Government and industry could best be joined." Frey at 1.[12] A cooperative partnership is not the type of guidance or control that supports federal officer jurisdiction.

"Specialty Fuels" Sold to the Military. Defendants argue that they continue to supply fossil-fuel products to the military to "exacting specifications," but they offer no evidentiary support of this, other than a report which shows that certain Defendants were top fuel suppliers to the Department of Defense ("DOD"). *See* Opp. 49 (citing Anthony Andrews, Cong. Rsch. Serv., R40459, *Department of Defense Fuel Spending, Supply, Acquisition, and Policy* 10 (2009)). The report does not show that the DOD exercised any control over the industry, much less its marketing practices. To the contrary, it evidences

[12] Defendants' arguments concerning the Defense Production Act of 1950 similarly fall short of demonstrating federal control. *See* Opp. 49. The report cited by Defendants refers to "refiners" generally, not to any specific defendant. *Id*. n.46 (citing *Fourth Annual Report of the Activities of the Joint Committee on Defense Production*, H.R. Rep. No. 84-1 (Jan. 5, 1955)).

exactly the type of arms-length commercial relationship held not to support federal officer jurisdiction in *Boulder II*, 965 F.3d at 827; *Baltimore II*, 952 F.3d at 465; and *San Mateo II*, 960 F.3d at 600. *See* Andrews at 1 (DOD "typically awards fuel contracts based on the lowest cost to the point of delivery") & 15 (DOD "uses fixed-price contracts with an economic price adjustment that provides for upward and downward revision of the stated contract price upon the occurrence of specified contingencies"). Regardless, Defendants' purported fuel sales to the government have nothing to do with the State's claims here.

ii. Defendants' mineral leases provide no basis for federal officer removal.

The State does not allege misconduct in the extraction of fossil fuels. Even if Defendants' leases with the federal government to do so were relevant, the First, Fourth, Ninth, and Tenth Circuits already determined that fossil-fuel companies do not act under federal officers when they extract oil and gas from the outer continental shelf ("OCS") pursuant to federal mineral leases. *See Rhode Island II*, 979 F.3d at 59-60; *Baltimore II*, 952 F.3d at 465-66; *San Mateo II*, 960 F.3d at 602-03; *Boulder II*, 965 F.3d at 826. Defendants do not even attempt to distinguish this authority, and their arguments regarding their agreements to explore for and produce fossil fuels are otherwise unavailing.

As set forth in *San Mateo II*, "'[t]he willingness to lease federal property or mineral rights to a private entity for the entity's own commercial purposes, without more' cannot be 'characterized as the type of assistance that is required' to show that the private entity is 'acting under' a federal officer." 960 F.3d at 603 (quoting *Baltimore II*, 952 F.3d at 465). While Defendants assert that their OCS activities "fulfilled a government need" and

furthered "energy security," Opp. 52, the Ninth Circuit held in *San Mateo II* that "[t]he leases do not require that lessees act on behalf of the federal government, under its close direction, or *to fulfill basic governmental duties*." 960 F.3d at 602-03 (emphasis added). The fact that a private company's business might advance a generalized economic policy interest in "energy security" or "energy independence" does not turn that conduct into "an effort to *assist*, or to help *carry out*, the duties or tasks of [a] federal superior" that would satisfy § 1442. *See Watson*, 551 U.S. at 151-52.

Defendants also cite to a statute giving the federal government the right to set maximum rates of production for OCS leases, as well as federal regulations requiring OCS lessees to conduct well tests, control the flaring and venting of gas, and allowing the federal government to set "a cap on the production rate" from OCS wells. Opp. 51-52. At most, those laws suggest that "OCS resource development is highly regulated." *Baltimore II*, 952 F.3d at 465. And as the Fourth Circuit explained in rejecting nearly identical arguments, "'differences in the degree of regulatory detail or supervision cannot by themselves transform . . . regulatory *compliance* into the kind of assistance' that triggers the 'acting under' relationship." *Baltimore II*, 952 F.3d at 465 (citation omitted); *Watson*, 551 U.S. at 153 ("[A] highly regulated firm cannot find a statutory basis for removal in the fact of federal regulation alone.").

iii. Defendants' contributions into the Strategic Petroleum Reserve were not made at government direction.

Defendants' in-kind royalty payments in the form of oil, which the government directed into the SPR, also cannot satisfy § 1442. Defendants' contributions to the SPR

between 1999 and 2009 were made through a program under which lessees of mineral rights on federal land, including especially leases on the OCS, paid royalties on those leases in kind, i.e., by giving the government a portion of their production. *See* Opp. 52. *San Mateo II* rejected OCS leases as a basis for removal because "'the willingness to lease federal property or mineral rights to a private entity for the entity's own commercial purposes, without more' cannot be 'characterized as the type of assistance that is required' to show that the private entity is 'acting under' a federal officer." 960 F.3d at 603 (quoting *Baltimore II*, 952 F.3d at 465). Defendants do not and cannot explain why making in-kind royalty payments pursuant to those leases would constitute "acting under" a federal superior, when making cash royalty payments does not. Indeed, under Defendants' reasoning, cash royalties would yield the same result if the government spent the funds to buy SPR oil somewhere else.

Moreover, the regulations governing the purchase and sale of SPR oil make clear that the government views its role as that of a market participant, not one of subjection, guidance, or control over entities like Defendants. *See*, *e.g.*, 10 C.F.R. § 626.4(a) ("To reduce the potential for negative impacts from *market participation*," the Department of Energy must review certain factors "prior to commencing acquisition of petroleum for the SPR." (emphasis added)). Selling commodity oil to the government through a competitive bidding process, which the government then directs to the SPR, is simply not "an effort to *assist*, or to help *carry out*" the duties of a federal superior as required by § 1442. *See Watson*, 551 U.S. at 152.

Finally, lease provisions enabling an ExxonMobil affiliate to operate SPR infrastructure for commercial purposes subject to emergency drawdowns, Opp. 53, are also insufficient. The Secretary of Energy may "drawdown and sell petroleum products in the Reserve" if the President makes certain findings, 42 U.S.C. § 6241(a), (d)(1), and certain Defendants' leases contain provisions describing their role as lessees in the event a drawdown is ordered. Opp. 53. Those provisions are strikingly similar to Outer Continental Shelf Land Act ("OCSLA") lease terms that the Ninth Circuit rejected as a basis for removal in *San Mateo II* because they merely "track[ed] legal requirements" imposed by statute. 960 F.3d at 603 (citing 43 U.S.C. § 1341(b)). The lease terms direct compliance with the drawdown statute, and "[m]ere compliance with the law, even if the laws are highly detailed, and thus leave an entity highly regulated, does not show that the entity is acting under a federal officer." *Id.* (citations omitted). None of Defendants' involvements with the SPR constitute "acting under" a federal officer.

For these reasons, the Court lacks subject matter jurisdiction under 28 U.S.C. § 1442.

D. There is no OCSLA jurisdiction because the State's claims do not arise out of injuries on the Outer Continental Shelf and are not connected with Defendants' offshore activities.

There is no OCSLA jurisdiction because the tortious activity here does not involve "operations" or physical injuries on the OCS, and the State's claims do not "arise out of" and are not "connected with" Defendants' offshore activities within the meaning of

OCSLA's removal provision.[13] *See* MPA 20; *Boulder I*, 405 F. Supp. 3d at 978 (collecting cases). Every court to consider Defendants' argument in an analogous case has rejected it. *See Boulder I*, 405 F. Supp. 3d at 978-79; *Rhode Island I*, 393 F. Supp. 3d at 151-52; *Baltimore I*, 388 F. Supp. 3d at 566-67; *San Mateo I*, 294 F. Supp. 3d at 938-39. This Court should do the same.

Defendants cannot show that the "activities that caused the [State's alleged] injuries . . . constituted an 'operation' 'conducted on the OCS.'" *See In re Deepwater Horizon*, 745 F.3d 157, 163 (5th Cir. 2014); *Plains Gas Sols., LLC v. Tennessee Gas Pipeline Co., LLC*, 46 F. Supp. 3d 701, 704-05 (S.D. Tex. 2014). The relevant activity here "is the concealment and misrepresentation of the products' known dangers—and simultaneous promotion of their unrestrained use—that allegedly drove consumption, and thus greenhouse gas pollution, and thus climate change." *Baltimore II*, 952 F.3d at 467; *see also Rhode Island II*, 979 F.3d at 60; *see, e.g.*, Compl. ¶¶3-6. This conduct is not an "operation" conducted on the OCS. *See Boulder I*, 405 F. Supp. 3d at 978-79; *Baltimore I*, 388 F. Supp. 3d at 566-67; *EP Operating*, 26 F.3d at 567 ("[T]he term 'operation' contemplate[s] the doing of some physical act on the [OCS]."). "[F]or jurisdiction to lie, a

[13] Defendants' cited cases, Opp. 59, merely demonstrate that OCSLA jurisdiction applies to claims arising directly from facilities *on* the OCS. *See Barker v. Hercules Offshore, Inc.*, 713 F.3d 208, 213 (5th Cir. 2013) (tort claim arising out of accident that occurred on jack-up rig attached to OCS); *EP Operating Ltd. P'ship v. Placid Oil Co.*, 26 F.3d 563, 569 (5th Cir. 1994) (action to determine ownership rights in offshore equipment attached to OCS); *Laredo Offshore Constructors, Inc. v. Hunt Oil Co.*, 754 F.2d 1223, 1225 (5th Cir. 1985) (contract dispute involving construction of offshore platform on OCS); *Ronquille v. Aminoil Inc.*, No. CIV.A. 14-164, 2014 WL 4387337, at *2 (E.D. La. Sept. 4, 2014) (asbestos case arising from plaintiff's "work on and in support of the OCS structures and materials").

case must arise directly out of OCS operations," and "[t]he fact that some of [Defendants'] oil was apparently sourced from the OCS does not create the required direct connection" between the State's claims and an operation on the OCS. *Boulder I*, 405 F. Supp. 3d at 978.

Nor does this case "arise[] out of, or in connection with" an OCS operation, which occurs when (1) the plaintiff "would not have been injured 'but for'" the operation, *Recar v. CNG Producing Co.*, 853 F.2d 367, 369 (5th Cir. 1988), and (2) granting relief "threatens to impair the total recovery of the federally-owned minerals" from the OCS, *EP Operating*, 26 F.3d at 570. Although some courts have treated the OCSLA jurisdictional grant as broad, "the 'but-for' test . . . is not limitless" and must be applied in light of the OCSLA's overall goals. *Plains Gas Sols.*, 46 F. Supp. 3d at 704-05. "[A] 'mere connection' between the cause of action and the OCS operation" that is "too remote" will not "establish federal jurisdiction." *Deepwater Horizon*, 745 F.3d at 163.

Defendants have not met their burden to show that the State would not have suffered its injuries "but for" Defendants' operations on the OCS—even assuming some quantum of fossil fuels originating from the OCS contributed to them. Every court to have considered the issue has rejected their argument that the sheer volume of production on the OCS means Defendants' OCS operations are a but-for cause of the State's injuries. *See Boulder I*, 405 F. Supp. 3d at 979; *Rhode Island I*, 393 F. Supp. 3d at 151-52; *Baltimore I*, 388 F. Supp. 3d at 566-67; *San Mateo I*, 294 F. Supp. 3d at 938-39. Defendants have a multitude of other sources of production, and nothing about production of these input materials relates to fraud in marketing the refined end products.

If adopted, Defendants' theory would confer OCSLA jurisdiction on *any* claim that

imposes damages on fossil-fuel companies that operate on the OCS, no matter how remote the connection to the injury. *See Boulder I*, 405 F. Supp. 3d at 979. The remedies the State seeks here would not regulate production activities on the OCS. *See, e.g.*, *Pharm. Research & Mfrs. of Am. v. Concannon*, 249 F.3d 66, 82 (1st Cir. 2001), *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 220 (2d Cir. 2004). Nor would they pose an obstacle to the achievement of OCSLA's objectives, because the statute is not intended to maximize the profits of companies that violate state laws.[14] Defendants' arguments must be rejected, as they have been in *Boulder I*, *Rhode Island I*, *Baltimore I*, and *San Mateo I*.

E. There is no enclave jurisdiction because the Complaint expressly disclaims injuries arising on federal property and is not directed at operations occurring on federal enclaves.

Defendants' enclave arguments misread the Complaint rather than rebut the persuasive authority in the Motion. Enclave jurisdiction still does not exist here. This action does not "sweep[] in" operations occurring on enclaves, Opp. 62, nor does it "[n]ecessarily impact[]" them, Opp. 63. The Complaint disclaims injuries arising on federal property. Compl. ¶9 n.4. Such disclaimers are effective and require remand.[15] *See* MPA 17-18 (collecting cases). Nothing in the Complaint contradicts or obviates this disclaimer.

[14] Defendants' arguments concerning the effect of damages awards, though couched in relation to OCSLA jurisdiction, raise federal defenses that cannot provide grounds for removal—namely, claims of extraterritorial regulation in violation of the dormant Commerce Clause and conflict preemption. *See Vaden v. Discover Bank*, 556 U.S. 49, 60 (2009) ("Federal jurisdiction cannot be predicated on an actual or anticipated defense" based in federal law).

[15] Defendants' cited cases, Opp. 64, are irrelevant. Neither dealt with a disclaimer, and in both cases, the vast majority of the relevant events occurred on enclaves—unlike here. *See Richards v. Lockheed Martin Corp.*, No. 11-CV-1033, 2012 WL 13081667, at *1 (D.N.M. Feb. 24, 2012); *see also Fung v. Abex Corp.*, 816 F. Supp. 569 (N.D. Cal. 1992).

Moreover, Defendants' unsupported assertion that the State cannot "isolate [federal] injuries" or differentiate the harms at issue here, Opp. 63, is an irrelevant attempt to stray into the merits. In any event, the State *can* isolate such harms. *See supra* n.10.

Moreover, where tortious activities "allegedly occur partially inside and partially outside the boundaries of an enclave," defendants bear a "higher burden" of proof regarding federal jurisdiction because "the state's interest increases proportionally, while the federal interest decreases." *Ballard v. Ameron Int'l Corp.*, No. 16-CV-06074-JSC, 2016 WL 6216194, at *3 (N.D. Cal. Oct. 25, 2016). Here, Defendants have offered no evidence of enclave jurisdiction—only an assumption that some sales must have occurred on enclaves. *See* Opp. 64. This is insufficient, and Defendants' argument would have the perverse effect of federalizing any state-law claim against a company that sells products on military bases within the state. Such an absurd result finds no authority in the jurisprudence, and cannot be countenanced here. *See Boulder I*, 405 F. Supp. 3d at 974.

Even assuming some portion of Defendants' misleading advertising *did* occur on federal enclaves, jurisdiction does not attach where most of the tortious conduct occurred outside the enclave. "[C]ourts have only found that claims arise on federal enclaves, and thus fall within federal question jurisdiction, when all or most of the pertinent events occurred there." *Baltimore I*, 388 F. Supp. 3d at 565 (collecting cases); *Coleman v. Trans Bay Cable, LLC*, No. 19-CV-02825-YGR, 2019 WL 3817822, at *3 (N.D. Cal. Aug. 14, 2019). Here, the pertinent events—the misrepresentations and omissions Defendants made in connection with the sale of fossil-fuel goods—overwhelmingly occurred outside of any discrete federal enclaves. *See New Mexico ex rel. Balderas v. Monsanto Co.*, 454 F. Supp.

3d 1132, 1146 (D.N.M. 2020) (holding "partial occurrence on a federal enclave is insufficient to invoke federal jurisdiction" where waterways identified as enclaves "ma[de] up only a small fraction" of contaminated waterbodies at issue); *Ballard v. Ameron Int'l Corp.*, 2016 WL 6216194, at *3 (remanding state law asbestos-related claims where plaintiff worked for defendant on military base, but asbestos exposure there was "just a small portion of the total exposure: one of 17 locations and during six months of the years-long exposure period"); *San Mateo I*, 294 F. Supp. 3d at 939 ("Nor was federal enclave jurisdiction appropriate, since federal land was not the 'locus in which the claim arose.'") (citation omitted).

Defendants' cited cases, Opp. 64-65, largely support the State's argument that in order for enclave jurisdiction to apply, either the injury must have arisen on the enclave or the vast majority of relevant conduct must have occurred there. *See, e.g.*, *Corley v. Long-Lewis, Inc.*, 688 F. Supp. 2d 1315, 1328-29 (N.D. Ala. 2010) (rejecting plaintiff's argument that he was exposed to more asbestos outside the enclaves than in them, because "[t]he fact that the injury occurred [on a federal enclave] is sufficient" and plaintiff "performed a substantial amount of work" on naval bases over his 17 years in the Navy); *Jones v. John Crane-Houdaille, Inc.*, No. CCB-11-2374, 2012 WL 1197391, at *3 (D. Md. Apr. 6, 2012) (noting remand may be appropriate depending on the "specific location" of plaintiff's workplace); *Klausner v. Lucas Film Ent. Co.*, No. 09-03502, 2010 WL 1038228, at *4 (N.D. Cal. Mar. 19, 2010) ("vast majority" of events took place on enclave); *Rosseter v. Indus. Light & Magic*, No. C-08-04545, 2009 WL 210452, at *2 (N.D. Cal. Jan. 27, 2009)

(courts look "to see where *all the* 'pertinent events' took place" (emphasis added)).[16] None of these cases hold that enclave jurisdiction arises where some modicum of events occur on the enclave. This is not the law, *see Baltimore I*, 388 F. Supp. 3d at 565 (collecting cases). Enclave jurisdiction is not proper.[17]

F. The Class Action Fairness Act does not apply because this is not a class action.

This case is not a class action under Federal Rule of Civil Procedure 23, and is not subject to CAFA. Defendants make several unsupportable arguments that do not overcome the State's on-point authority, MPA 25-28. Defendants cannot cite a single case supporting their position that an action brought in part under a state's *parens patriae* authority is a class action under CAFA. That is because Defendants' position is wrong, and every court to consider the issue has so concluded. *See, e.g.*, *Nessel ex rel. Michigan v. AmeriGas Partners, L.P*, 954 F.3d 831, 838 (6th Cir. 2020). Defendants give this Court no reason to depart from the uniform caselaw rejecting their position.

Instead, Defendants repeat the same unsupported arguments that numerous courts have rejected. *See, e.g.*, *LG Display Co., Ltd. v. Madigan*, 665 F.3d 768, 772 (7th Cir. 2011) (rejecting argument that a case brought by an Attorney General is brought by a "representative of a class"); *CVS Pharmacy*, 646 F.3d at 174-77 (rejecting argument that case brought by state in its own court to enforce its own laws is an "interstate case of

[16] Defendants' two remaining cited cases are inapposite because in both, almost all relevant acts took place on the enclave.

[17] Defendants' argument that enclave jurisdiction arises because the Complaint references conduct in D.C., Opp. 65-66, merely restates the NOR, ¶65. *See* MPA 19 for the State's unrebutted refutation.

national importance"); *see also Purdue Pharma, L.P. v. Kentucky*, 704 F.3d 208, 212-20 (2d Cir. 2013); *Washington v. Chimei Innolux Corp.*, 659 F.3d 842, 848-49 (9th Cir. 2011); *Mississippi ex rel. Hood v. AU Optronics Corp.*, 701 F.3d 796, 798-99, 802-03 (5th Cir. 2012).

Three of Defendants' arguments merit a direct response. First, Defendants falsely assert that this action will allow a "state court judge[] to dictate national policy from the local courthouse steps." Opp. 69. Not so. The State brought this action to enforce Minnesota law within the State of Minnesota. What Defendants do outside Minnesota is beyond the scope of the Attorney General's power to control. The Court should ignore Defendants' straw man. Second, Defendants' reliance on *Song v. Charter Communications, Inc.*, No. 17cv325, 2017 WL 1149286 (S.D. Cal. Mar. 28, 2017), is misplaced. The *Song* court compelled arbitration under the Federal Arbitration Act ("FAA"); the parties there did not brief CAFA jurisdiction, the court did not offer any analysis of the basis for its jurisdiction, and the entirety of the court's order relates to the application of the FAA.[18] Third, Defendants' reliance on *Koster v. Portfolio Recovery Assocs., Inc*., 686 F. Supp. 2d 942, 944 (E.D. Mo. 2010), Opp. 71, is misplaced because that case rejects the very arguments Defendants raise here. Specifically, the court dismissed the argument that a *parens patriae* action brought by the Missouri Attorney General under a Missouri consumer protection statute was removable under CAFA. *Id.* at 247.

[18] As explained in the Motion, *Williams v. Employers Mutual Casualty Co.*, 845 F.3d 891 (8th Cir. 2017), does not aid Defendants because that case involved a certified class action. *See* MPA 26 n.12.

Contrary to Defendants' arguments, Opp. 68, seeking restitution does not transform the Attorney General's lawsuit from a *parens patriae* action into a class action because "a claim for restitution, when tacked onto other claims being properly pursued by the state, alters neither the State's quasi-sovereign interest in enforcing its own laws, *nor the nature and effect of the proceedings*." *AU Optronics Corp. v. South Carolina*, 699 F.3d 385, 394 (4th Cir. 2012) (finding lawsuit brought by state was not a "mass action" under CAFA) (emphasis added); *see also, e.g.*, *CVS Pharmacy*, 646 F.3d at 177-78 (finding attorney general action was not a "class action" under CAFA even where relief included restitution and repayment of excess charges); *LG Display Co.*, 665 F.3d at 772-73 (finding that state attorney general case was not a "mass action" under CAFA even though state sought damages on behalf of state consumers). Here, the "nature and effect" of the litigation is a consumer protection lawsuit authorized by Minnesota Statute section 8.31 and the Attorney General's *parens patriae* authority; it is not a "class action" under Rule 23 or any other statute.

G. Diversity is lacking because the State is the real party in interest.

Defendants correctly recognize that a state is the real party in interest where it seeks to redress an injury to a sufficiently substantial segment of its population in pursuit of a "'quasi-sovereign interest.'" Opp. 72 (quoting *Alfred L. Snapp*, 458 U.S. at 607). Here, the State, acting through the Attorney General, is the real party in interest because: (a) it is the party entitled to enforce the right asserted; (b) only the Attorney General may recover civil penalties here; and (c) the State brings its claims under its *parens patriae* authority, seeking

to protect its citizens and ensure a fair marketplace and truth in advertising within its borders. *See* MPA 28-29.

Defendants' attempt to rebut these well-settled propositions is unavailing. Their reliance on the 119-year-old case *Missouri, K. & T. Ry. Co. of Kansas v. Hickman*, 183 U.S. 53 (1901), is misplaced. *See Washington v. CLA Estate Servs., Inc.*, No. C18-480, 2018 WL 2057903, at *2 (W.D. Wash. May 3, 2018) (finding *Hickman* "inapposite" in this context). The court in *In re Facebook* examined *Hickman* in depth, and held that the test is whether the "lawsuit would primarily vindicate state interests and primarily obtain relief for the state, rather than serving primarily parochial interests and obtaining parochial relief." *In re Facebook, Inc., Consumer Privacy User Profile Litig.*, 354 F. Supp. 3d 1122, 1129 (N.D. Cal. 2019). The court correctly determined that Illinois was the real party in interest because the case was brought on behalf of the people of the state as a matter of statewide concern and sought civil penalties, which individuals could not obtain, to punish wrongdoers and deter future wrongdoing. *Id*. at 1129, 1135-36. Just so here.

It is well settled that states are the real party in interest in the consumer protection context when the state sues to protect deceived or defrauded consumers; the attorney general has statutory authority to bring the claim; the state has a specific, concrete interest in eliminating deceptive practices; and/or the relief is sought is available to the state alone.[19] *See* MPA 28-29. Here, the State seeks to protect Minnesotans impacted by

[19] *See, e.g.*, *Nevada*, 672 F.3d at 67-72; *Pennsylvania v. Mid-Atl. Toyota Distributors, Inc.*, 704 F.2d 125, 130-32 (4th Cir. 1983); *Texas v. Scott & Fetzer Co.*, 709 F.2d 1024, 1027 (5th Cir. 1983); *People by Underwood v. LaRose Indus. LLC*, 386 F. Supp. 3d 214, 217-18

Defendants' campaign of deception, the Attorney General has statutory authority to bring claims under the Prevention of Consumer Fraud Act, the State has a concrete interest in remedying the harms caused by Defendants' misrepresentations, and only the State may bring the claims asserted. The State is the real party in interest, and diversity jurisdiction does not provide grounds for removal. Defendants' frivolous argument should be denied.

III. CONCLUSION

This Court lacks jurisdiction and should grant the State's Motion to Remand.

(N.D.N.Y. 2019); *CLA Estate Servs.*, 2018 WL 2057903, at *2-3 & *3 n.3 (collecting cases); *In re Standard & Poor's Rating Agency Litig.*, 23 F. Supp. 3d at 404; *W. Va. ex rel. McGraw v. Bristol Myers Squibb Co.*, No. CIV-A-13-1603, 2014 WL 793569, at *5 (D.N.J. Feb. 26, 2014); *W. Va. ex rel. McGraw v. Fast Auto Loans, Inc.*, 918 F. Supp. 2d 551, 564-65 (N.D.W. Va. 2013); *Illinois v. AU Optronics Corp.*, 794 F. Supp. 2d 845, 854-56 (N.D. Ill. 2011); *Arizona ex rel. Horne v. Countrywide Fin. Corp.*, No. CV-11-131, 2011 WL 995963, at *3 (D. Ariz. Mar. 21, 2011); *Virginia v. SupportKids Servs., Inc.*, No. 3:10-CV-73, 2010 WL 1381420, at *3-4 (E.D. Va. Mar. 30, 2010).

Respectfully Submitted,

Dated: December 18, 2020

KEITH ELLISON
Attorney General
State of Minnesota

By: */s/ Leigh Currie*

LIZ KRAMER
Solicitor General
Atty. Reg. No. 0325089

OLIVER LARSON
Assistant Attorney General
Atty. Reg. No. 0392946

LEIGH CURRIE
Special Assistant Attorney General
Atty. Reg. No. 0353218

445 Minnesota Street, Suite 1400
St. Paul, Minnesota 55101-2131
(651) 757-1010
(651) 297-4139 (Fax)
liz.kramer@ag.state.mn.us
oliver.larson@ag.state.mn.us
leigh.currie@ag.state.mn.us

SHER EDLING LLP

/s/ Victor M. Sher
VICTOR M. SHER (*pro hac vice* pending)
MATTHEW K. EDLING (*pro hac vice* pending)

100 Montgomery St., Ste. 1410
San Francisco, CA 94104
(628) 231-2500
vic@sheredling.com
matt@sheredling.com

ATTORNEYS FOR STATE OF MINNESOTA